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# Defining One's Own Concept of Existence and the Meaning of the Universe: The Presumption of Liberty in *Lawrence v. Texas*

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Defining One's Own Concept of  
Existence and the Meaning of the Universe:  
The Presumption of Liberty in *Lawrence v. Texas*

*The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest. . . .*

*Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.<sup>2</sup>*

I. INTRODUCTION

The U.S. Supreme Court's decision in *Lawrence v. Texas*,<sup>3</sup> the landmark 2003 ruling overturning a Texas statute criminalizing homosexual sodomy, strikes at the very heart of a debate that has been raging in academic and political circles ever since the Court's revival of substantive due process in *Griswold v. Connecticut*.<sup>4</sup> The crux of the debate focuses on a question primal to political theory: if an expansive understanding is to be given to the right of the individual "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"<sup>5</sup> what legitimate role is left for the state to declare moral limitations upon the definitions individuals choose?

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1. John Stuart Mill, *On Liberty*, in PHILOSOPHY OF LAW 267, 268 (Joel Feinberg & Jules Coleman eds., 7th ed. 2004).

2. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

3. *Id.*

4. 381 U.S. 479 (1965).

5. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

This note argues that *Lawrence* stands for a presumption of liberty protecting the private acts of individuals under the Due Process Clause. Simply put, this means that if the government fails to show that its restrictions on individual exercises of liberty are not necessary and proper regulations of behavior harmful to others, the mere claim that the government is upholding morality grounded in “history” or “traditions” should not justify such restrictions on liberty. This reading of *Lawrence* recognizes the Court’s decision both as a victory for a more sound adjudication of substantive due process claims and as an accurate understanding of the libertarian underpinnings of American constitutionalism. Far from the fears of the dissent, *Lawrence* does not signal the end of morality in the law, but rather it recasts morality in terms that are palatable both to contemporary intuitions of what liberty means and to a classical understanding of the role of the individual in liberal democracy. In the final analysis, *Lawrence* is best seen as a substantial victory for the right of all Americans to define their own concepts of meaning and value in matters fundamental to how individuals constitute their very existence.

Part II of this note gives an overview of the Court’s substantive due process jurisprudence in order to give context to *Lawrence*’s potential reach beyond sexual autonomy cases. Part III analyzes the Court’s opinion in *Lawrence*, focusing on Justice Anthony Kennedy’s majority opinion and Justice Antonin Scalia’s dissenting opinion. Part IV offers a particular interpretation of the majority opinion, arguing that *Lawrence* is nothing less than a watershed moment both for a renewed soundness in constitutional jurisprudence, and for the revival of libertarian values that have far too long been ignored by the Court. This part argues that *Lawrence* can and should be read as ushering in a presumption of liberty in subsequent cases brought before the Court. This part also offers a rejoinder to the principal arguments of Justice Scalia’s dissent, relying on the writings of Joel Feinberg to argue that Scalia’s most sweeping claims are misplaced or incorrect because they fail to grasp the proper limits of legal moralism. Part V offers a short conclusion.

II. THE PRESUMPTION OF CONSTITUTIONALITY:  
SUBSTANTIVE DUE PROCESS FROM *SLAUGHTER-  
HOUSE* TO “FOOTNOTE FOUR PLUS”

As an overview of the Supreme Court’s substantive due process jurisprudence, this section analyzes the Court’s watershed moments in substantive rights analysis under the Fourteenth Amendment to set the context for the Court’s decision in *Lawrence*, and to show why *Lawrence* has the potential to correct some of the Court’s more egregious errors in this field. The robust conception of liberty advanced by *Lawrence* embraces a view of autonomy that is central to the Fourteenth Amendment’s protection of substantive liberty as well as to broader conceptions of human autonomy central to the purposes of liberal society. As the following analysis will show, a crucial error in much of the Court’s earlier substantive rights jurisprudence was its failure to grasp the primacy of a presumption in favor of such conceptions of liberty and autonomy over the competing presumption in favor of the government’s regulatory authority.

As has been noted by numerous commentators, *Lawrence*, even apart from its socially significant holding, is a potential watershed because of the way in which the Court reviewed the statute before it. “*Lawrence* is one of several recent cases indicating that the certainty of the dichotomy between strict scrutiny and low-level scrutiny is breaking down.”<sup>6</sup> Justice Kennedy’s opinion striking down the Texas statute specifically did not declare a fundamental right to engage in homosexual sodomy. For Supreme Court scholars, this point is significant because, “[u]ntil recently, careful review, indeed any meaningful review, of the substantive legitimacy of criminal statutes

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6. Donald L. Beschle, *Lawrence Beyond Gay Rights: Taking the Rationality Requirement for Justifying Criminal Statutes Seriously*, 53 *DRAKE L. REV.* 231, 233 (2005). See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the affirmative action program at the University of Michigan Law School under a balancing test while applying strict scrutiny); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (holding state law disadvantaging homosexuals violated the Equal Protection Clause under a rational basis test); *Casey*, 505 U.S. at 869 (upholding a woman’s constitutional liberty to terminate her pregnancy, but holding that such a liberty is not absolute and should be balanced against the competing interests of the state); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 286–87 (1990) (recognizing a constitutionally protected liberty interest in individual refusal of medical treatment, but holding that states may require such a refusal to be established by clear and convincing evidence); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985) (using rational basis to strike down a zoning ordinance disadvantaging the mentally disabled under the Equal Protection Clause).

was essentially nonexistent unless a narrow category of ‘fundamental rights’ were implicated.”<sup>7</sup> *Lawrence*, in the clearest of terms, indicates that this may no longer be the case; in other words, “[t]he mere enactment of a criminal statute will be insufficient to establish that it is not an arbitrary act, and is therefore a violation of [substantive] due process.”<sup>8</sup> In coming years, the Court may well see *Lawrence* as ushering in the expanded use of “rational basis with a bite” review that places the burden on the government to establish the necessity of its regulation, rather than on the individual to establish the fundamentality of her liberty interest. Seen in this way, *Lawrence* has the potential to reorient the Court’s jurisprudence in a number of areas related to substantive due process claims beyond the limited area of human sexual autonomy.

*A. The Original Meaning (and Early “Slaughter”)  
of the Fourteenth Amendment*

Congress drafted the Fourteenth Amendment to the Constitution “to ensure the constitutionality of the Civil Rights Bill of 1866 and to prevent future Congresses from renegeing on its guarantees.”<sup>9</sup> One of the most significant functions of the Fourteenth Amendment was its protection of certain fundamental rights stemming from federal citizenship against encroachment by all branches of state governments.<sup>10</sup> The Amendment provides, in part, that

[n]o State shall make or enforce any law which shall abridge the

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7. Beschle, *supra* note 6, at 233.

8. *Id.*

9. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 60 (2003).

10. See Randy E. Barnett, *Foreword: What’s so Wicked About Lochner?*, 1 N.Y.U. J. LAW & LIBERTY 7 (forthcoming).

At the risk of oversimplification, another way to characterize the distinct functions of each of the three clauses is this: The Privileges or Immunities Clause is aimed mainly at the *legislative branch* of state governments and enjoins them from making certain *laws* (but it also enjoins the enforcement of improper laws too). The Due Process Clause is aimed mainly at the *judicial branch* of state governments and enjoins them from sanctioning the violation of otherwise proper laws without following *procedures* that ensure accurate outcomes (but it would apply to “administrative” procedures as well). And the Equal Protection Clause is aimed mainly at the *executive branch* of state governments and mandates that *protection* of proper laws be provided equally to all persons.

*Id.*

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>11</sup>

Explaining the history and purpose of each of the three preceding clauses is well beyond the modest purview of this paper; nevertheless, it is helpful to illustrate a few principles that underlie the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment.

Despite the robust debate in contemporary constitutional theory over the existence and validity of unenumerated constitutional rights, ample evidence exists that the framers of the original Bill of Rights and of the Fourteenth Amendment intended for constitutional protection of individual natural rights not specifically listed in the text of the Constitution.<sup>12</sup> The framers of the Fourteenth Amendment intended for the Privileges or Immunities Clause to serve as a bulwark against infringement of enumerated and unenumerated rights by state legislatures. In 1833, the Supreme Court ruled that the Due Process Clause of the Fifth Amendment applied only to the federal government, and not to the states.<sup>13</sup> This precedent, among others, called into question the validity of early Reconstruction era legislation such as the Civil Rights Act of 1866.<sup>14</sup> Representative John Bingham, author of the Fourteenth Amendment, argued that the absence of Congressional power to protect the rights of American citizens from state governments “makes plain the necessity of adopting this amendment.”<sup>15</sup> Moreover, he saw slavery as the issue preventing the original framers from protecting the natural rights of all citizens against unwarranted

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11. U.S. CONST. amend. XIV, § 1.

12. See generally BARNETT, *supra* note 9, at 259, arguing that theories of both original intent and original meaning reveal a desire on the part of the respective framers of the Ninth and Fourteenth Amendments to protect unenumerated natural rights.

The Ninth Amendment and Privileges or Immunities Clause referred to natural rights because it was impossible to specify them all in advance. Any approach that overlooks this in favor of particular historically situated liberties runs afoul of original meaning. . . . [These provisions were] added to the Constitution precisely because it was impossible to enumerate all the liberties we have and undesirable even to try.

*Id.* at 258–59.

13. *Barron v. City of Baltimore*, 32 U.S. 243 (1833).

14. BARNETT, *supra* note 9, at 193.

15. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866)).

state interference; had such a provision been placed in the original Constitution, its existence would have negated the institution of slavery—a bargain that would have likely doomed ratification.<sup>16</sup>

In drafting the Fourteenth Amendment, Representative “Bingham used the words *privileges* and *immunities* as a shorthand description of fundamental or constitutional rights” that state legislatures could not abridge.<sup>17</sup> The phrase “privileges and immunities” of course can be found in the original 1789 Constitution,<sup>18</sup> and had a long and distinguished history by the time the Fourteenth Amendment was drafted. “Blackstone’s *Commentaries on the Laws of England* . . . divided the rights and liberties of Englishmen into those ‘immunities’ that were the residuum of natural liberties and those ‘privileges’ that society had provided in lieu of natural rights.”<sup>19</sup> This view was fleshed out in early American jurisprudence by Justice Bushrod Washington’s celebrated opinion in *Corfield v. Coryell*,<sup>20</sup> a decision he authored while sitting as a circuit court trial judge. Justice Washington famously wrote in that case:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate . . . . These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate

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16. *Id.* at 193–94.

17. *Id.* at 61 (citation omitted).

18. *See* U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

19. BARNETT, *supra* note 9, at 61 (emphasis omitted) (quoting MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 64 (1986)).

20. 6 F. Cas. 546 (E.D. Pa. 1823).

mutual friendship and intercourse among the people of the different states of the Union.”<sup>21</sup>

Justice Washington’s *Corfield* opinion represents an articulation by the first generation of American jurists that recognizes the validity of unenumerated natural rights protected as privileges and immunities by the Constitution. When explaining the meaning of the Privileges or Immunities Clause, Senator Jacob Howard read from Justice Washington’s *Corfield* opinion, stating that “[s]uch is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution.”<sup>22</sup> Speaking of the application of the Bill of Rights to the states through the Fourteenth Amendment, he further noted: “To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be *added* the personal rights guaranteed and secured by the first eight amendments of the Constitution.”<sup>23</sup>

A simple reading of the plain language of the Fourteenth Amendment as understood by those at the time of its adoption may well have recognized that it serves as a limiting function preventing state legislatures from enacting measures that unnecessarily abridged the natural rights, both enumerated and unenumerated, shared by all American citizens; unfortunately, the Supreme Court eviscerated the

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21. *Id.* at 551–52. Justice Washington does list several examples of recognized privileges and immunities here:

Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

*Id.*

22. BARNETT, *supra* note 9, at 194 (citation omitted).

23. *Id.* (citation omitted).

Privileges or Immunities Clause in its infamous 1873 decision in the *Slaughter-House Cases*,<sup>24</sup> rendering it a dead letter.

*Slaughter-House* is a problematic decision for several reasons. Chief among these is that it completely distorted the meaning of the Fourteenth Amendment.<sup>25</sup> Because of the Court's decision in *Slaughter-House*, the Fourteenth Amendment was effectively stripped of one of its primary purposes: to restrict state legislatures from enacting measures that violated the substantive rights—enumerated and not—presumed to be enjoyed by all citizens of the nation because of their status as such. The effect of *Slaughter-House* was to limit judicial recourse of citizens denied substantive liberties as a result of state legislation. With this in mind, it is not an overstatement to argue that the case effectively nullified one of the major purposes of the Fourteenth Amendment. Judicial protection of substantive rights under the Fourteenth Amendment was not completely destroyed by *Slaughter-House* however. Within a few decades, the Court would begin the slow process of applying the Due Process Clause to do the work intended for the Privileges or

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24. 83 U.S. 36 (1873). The Court upheld a state law granting a monopoly to a certain slaughterhouse in the city of New Orleans. In rejecting an argument based on the Privileges or Immunities Clause of the Fourteenth Amendment, the Court, against clear evidence to the contrary, held that the clause did not incorporate the Bill of Rights against the states, but rather protected only rights that flow from the relationship between a United States citizen and the federal government. Justices Field and Bradley each authored vigorous dissents defending judicial application of the clause against state legislation and arguing in favor of the validity of unenumerated natural rights against encroachment from state legislation. Justice Field's dissent argued that the clause does not attempt to confer new privileges or immunities upon U.S. citizens; it rather assumes that there are such privileges and immunities that belong of right to citizens as such and ordains that they shall not be abridged by state legislation. Justice Bradley's dissent suggests monopolies are banned under a theory of natural rights observed in the Declaration of Independence and assumed in the Constitutional structure.

25. See *supra* note 10; see also Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 686 (1994).

[T]here was a clear consensus that the Privileges or Immunities Clause of the Fourteenth Amendment was to have a substantive role. That role was to enforce national privileges and immunities or rights. . . . These views were before the public in the debates of Congress and undoubtedly specifically known to the Justices.

When one examines the opinion articulated by Justice Miller to defend the majority decision, one finds the errors so immense and the gap between the intent of the amendment and Miller's ruling so great, that many are willing, on that basis alone, to believe the [sic] Miller deliberately attempted to defeat the force of the amendment.

Aynes, *supra*.

Immunities Clause: to limit arbitrary suppressions of liberty by state legislatures.<sup>26</sup>

*B. The Rise and Fall of Early Substantive Due Process*

As the Progressive Era dawned at the end of the 19th century, state legislatures began passing laws limiting a variety of economic activities as well as passing a substantial amount of morals legislation aimed at promoting “public health.”<sup>27</sup> Even as this type of legislation grew in popularity, the Supreme Court began infrequently striking down a number of state statutes on due process grounds.<sup>28</sup> Most famously, in *Lochner v. New York*,<sup>29</sup> the Court struck down maximum-hour regulations for workers in a bakeshop on the grounds that such provisions violated the so-called “liberty of contract” implicit in the 14th Amendment’s Due Process protection of liberty. The Court also struck down non-economic legislation on Due Process grounds, holding for instance that liberty embraced by the Due Process Clause grants the right to provide one’s children with religious education,<sup>30</sup> and the right to educate one’s children in

26. This move is controversial of course, both for opponents and even many proponents of unenumerated constitutional rights. There is a valid argument that can be made to demonstrate that there is a “substantive” component of liberty understood by the Due Process Clause—namely that it is within the province of “judicial review to ensure that a law being applied to a particular person was within the proper constitutional power of the legislature to enact,” making the scrutiny of “the substance of statutes . . . a part of the procedures that must be followed before a law may be enforced by death, imprisonment, or fine.” Barnett, *supra* note 10, at 7 (forthcoming). Nevertheless, the move to the Due Process Clause to review state legislation distorts the Fourteenth Amendment in many key ways:

(1) It shifts the substantive scrutiny of laws from the Privileges or Immunities Clause to the Due Process Clause; (2) because the Due Process Clause protects all persons, using it to scrutinize laws obscures the fact that a proper law may make distinctions between citizens and non-citizens; (3) it distorts the original meaning of “liberty” in the Due Process Clause by stretching its meaning beyond the matter of deprivation of liberty by imprisonment; (4) when “liberty” is expanded in this way, it is not clear how it fits with “property”; and (5) it limits the scope of the Fourteenth Amendment to life, liberty, and property and not other positive rights or privileges of citizenship that may properly be denied to non-citizens but not to citizens. The most serious consequence of stretching the Due Process Clause beyond its original meaning to substantively scrutinize laws is how it undermines the legitimacy of this type of scrutiny.

*Id.*

27. Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 22.

28. *Id.*

29. 198 U.S. 45 (1905).

30. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

one's native language.<sup>31</sup> These cases are significant in that they do not find deprivations of life, liberty, or property because of unconstitutional or unfair defects in the procedural aspects of state action. Rather, the Court rejected the laws because they infringed on the substantive liberty rights that all Americans were guaranteed by virtue of their status as citizens. In short, so-called "substantive due process" was used by the Court to protect the type of rights that the framers of the Fourteenth Amendment originally envisioned to be embraced by the Privileges or Immunities Clauses.

Today, *Lochner* and its progeny<sup>32</sup> stand among the most criticized and universally rejected decisions in the history of the Supreme Court. Progressives both then and now saw *Lochner* as undue judicial interference with the rational legislative judgment that contract rights and wealth distribution are not beyond the reach of appropriate state intervention.<sup>33</sup> Similarly, many modern conservatives, likely upset with the Court's revival of a form of substantive due process in post-*Griswold* sexual autonomy cases, also reject the reasoning of *Lochner* and view the case as an egregious form of judicial activism.<sup>34</sup>

The *Lochner* era was indeed flawed, but not in the way that its critics from both the left and the right most commonly complain. The problem with *Lochner* is not that it protected economic rights under the Fourteenth Amendment or that it required state governments to justify economic regulations without granting such legislative judgments a presumption of rationality, and thus,

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31. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

32. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating a law treating the manufacture of ice like a public utility on Due Process grounds); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (rejecting price regulations on Due Process grounds); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (holding minimum wage law for women workers violated the Due Process Clause); *Coppage v. Kansas*, 236 U.S. 1 (1915) (holding that laws protecting the right to organize unions violated the Due Process Clause).

33. *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

34. *See, e.g.*, ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 49 (1990):

In his 1905 *Lochner* opinion, Justice Peckham, defending liberty from what he conceived to be "a mere meddlesome interference," asked rhetorically, "[A]re we all . . . at the mercy of legislative majorities?" The correct answer, where the Constitution is silent, must be "yes." Being "at the mercy of legislative majorities" is merely another way of describing the basic American plan: representative democracy. We may all deplore its results from time to time, but that does not empower judges to set them aside; the Constitution allows only voters to do that.

*Id.* (citations omitted).

constitutionality. The Fourteenth Amendment, as originally drafted and understood, did not contemplate the protection of individual privileges and immunities only from legislation that is discriminatory; rather the amendment contemplated a robust view of individual liberties, both enumerated and unenumerated in the text of the constitution that were intended to be amiable to judicial enforcement. As Professor Barnett points out, “The content of the Civil Rights Act is significant because it identifies some of the privileges or immunities protected from abridgement by the Fourteenth Amendment. And these included the ‘right . . . to make and enforce contracts’—the very right protected by the Court in *Lochner v. New York*.”<sup>35</sup>

The real problem with *Lochner* is that the Court tacitly accepted the premises of *Slaughter-House* when it used the Due Process Clause as the mechanism to enforce economic liberties. Because the Court used the Due Process Clause—and even then used it inconsistently and almost haphazardly<sup>36</sup>—to invalidate economic legislation during the *Lochner* era, it opened itself up to charges of activism because it stretched the clause beyond its original applications regarding the purely procedural aspects of due process.<sup>37</sup> Thus, although the *Lochner* court was rightly attempting to discern the proper limits of economic liberties protected by the Fourteenth Amendment, its project was doomed from the start because it was unable to use the broader contours of the Privileges or Immunities Clause to establish such limits. Left only to use the Due Process Clause, the *Lochner* Court developed a theory of economic liberty that was ill-suited for interpretation under the Due Process Clause as it should properly be understood: as a protection against unfair or arbitrary deprivations of life, liberty, or property in the judicial administration of the law.<sup>38</sup>

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35. Barnett, *supra* note 10, at 8–9.

36. *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908) (sustaining a state law limiting employment hours for female employees notwithstanding a Due Process Clause claim).

37. *See* Barnett, *supra* note 10.

*Lochner* and the other Due Process Clause cases of the Progressive Era—and substantive due process cases today—are all problematic because they continue to respect the precedent of the *Slaughter-House Cases* and refuse to restore the original meaning of the Privileges or Immunities Clause.

*Id.* at 9.

38. *Id.*

As the Great Depression dawned and President Franklin D. Roosevelt instituted New Deal economic policies that expanded elements of the progressive agenda to the national level, the Supreme Court became increasingly resilient to efforts to regulate the national economy through Congressional power under the Commerce Clause.<sup>39</sup> Roosevelt responded to the Court's rejection of New Deal legislation with his infamous "court-packing plan." The plan ultimately failed, but whether from the pressure placed on the Court from Roosevelt and public opinion, or from the influx of more progressive appointees on the Court, the Supreme Court abandoned its controversial *Lochner*-era jurisprudence in 1937.<sup>40</sup> The Court, in one of its most monumental reversals, began upholding economic regulations against individual claims of right and refusing to read substantive due process claims based on the Fourteenth Amendment against the presumed constitutionality of regulatory legislation.<sup>41</sup>

What remained of the "substantive" due process of the *Lochner* era was effectively swept away the next year by the Court's decision in *United States v. Carolene Products Co.*<sup>42</sup> The decision itself, which upheld a federal law that prohibited the shipment of "filled milk" (an oil added milk product) in interstate commerce, swept far beyond the regulatory apparatus implicated by the facts of the case. The *Carolene Products* Court ushered in a "presumption of constitutionality" to the rational regulatory acts of legislative bodies, declaring that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."<sup>43</sup>

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39. *See, e.g.*, *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

40. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state maximum hours law for female employees and effectively overturning *Lochner*).

41. *See id.*; *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Nebbia v. New York*, 291 U.S. 502 (1934).

42. 304 U.S. at 144.

43. *Id.* at 152.

The case is most noted for its fourth footnote,<sup>44</sup> which appended to the presumption of constitutionality for the rationally-based regulatory acts of government a reservation of judicial scrutiny for the non-economic rights protected by the Bill of Rights, and for the protection of “discrete and insular minorities” who are not protected within the political process. It is hard to overstate the impact of Footnote Four in the Court’s substantive due process analysis.<sup>45</sup> The footnote established the basis for modern strict scrutiny review conducted by the Supreme Court. Legislative acts are given a presumption of constitutionality by reviewing courts based on a theory that such laws are the result of a rational and democratic process. Only where a law targets a discrete or insular minority that does not have access to the political process, or where the law violates the enumerated rights in the Bill of Rights are the courts allowed to use more exacting “strict scrutiny” to evaluate the justification of legislative acts.

As the tide of Roosevelt appointees took their seats on the Court, it appeared substantive due process was dead. The regime

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44. *Id.* at 152 n.4 (Holding that “[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

45. *See* Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088–89 (1982). Justice Powell described the legacy of Footnote Four on subsequent constitutional law as such:

This footnote now is recognized as a primary source of “strict scrutiny” judicial review. Indeed, many scholars think it actually commenced a new era in constitutional law. The footnote also is thought to have provided its own theoretical justification. The theory properly extracted from Footnote 4, as expressed by more than a few prominent scholars, is roughly as follows: The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us. Consistent with these premises, the theory continues, the Supreme Court has two special missions in our scheme of government: First, to clear away impediments to participation, and ensure that all groups can engage equally in the political process; and Second, to review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.

*Id.*

enacted by Footnote Four served as a standard by which the Court continually deferred to the rationality of the legislature in reviewing due process claims.<sup>46</sup> In 1955, Justice William O. Douglas declared the complete death of economic substantive due process, noting, “The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”<sup>47</sup>

*C. Substantive Due Process After Griswold: Footnote Four Plus*

As it would turn out, reports of the death of substantive due process were greatly exaggerated.<sup>48</sup> Within a decade of Justice Douglas’s eulogy for substantive review of due process claims, the Court revived the doctrine to examine cases concerning personal autonomy and sexual privacy. The roots of this jurisprudence can be found in Justice John Harlan’s dissenting opinion in *Poe v. Ullman*.<sup>49</sup> Foreshadowing something of the approach that the Court would adopt five years later in *Griswold v. Connecticut*,<sup>50</sup> Justice Harlan argued for a judicial role in defining and establishing the limits of personal autonomy embedded within the “substantive” component of the Due Process Clauses of the Fifth and Fourteenth Amendments. Recognizing that personal autonomy—implicated in the case before him in the form of a married couple’s sexual relations—is a form of “liberty” protected by the Constitution, Justice Harlan set out to establish the limits of permissible activity protected by that liberty. Thus, for Justice Harlan, the Constitution’s protection of liberty is broad and calls for a judicial role in defining such liberty:

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46. *See e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963). After noting that the Court had declined “the use of the ‘vague contours’ of the Due Process Clause to nullify laws which the majority of the Court believed to be economically unwise,” Justice Black commented, “We refuse to sit as a ‘super legislature to weigh the wisdom of legislation.’ . . . [Whether] the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours.” *Id.* (citations omitted).

47. *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955).

48. Following the erroneous publication of a premature obituary in the *New York Journal*, Mark Twain famously responded: “The reports of my death are greatly exaggerated.” *See* Wikipedia, Mark Twain, [http://en.wikipedia.org/wiki/Mark\\_Twain](http://en.wikipedia.org/wiki/Mark_Twain) (last visited Aug. 3, 2006).

49. 367 U.S. 497 (1961).

50. 381 U.S. 479 (1965).

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .<sup>51</sup>

Justice Harlan’s “rational continuum” of liberty embraced the notion that in a constitutional system, the conscientious judge has a duty to reject impositions on liberty that are arbitrary or purposeless. Although this view is not a sweeping libertarian rejection of plenary legislative powers, it is the contemporary articulation of the principle that judges have a defined constitutional role in establishing the content and limits of the broad guarantees of liberty established in the Constitution.<sup>52</sup> Thus, in the context of personal sexual autonomy—and its expression in the right of the marital couple to have access to contraceptives—Justice Harlan would hold that it is a liberty interest entitled to heightened scrutiny by the courts. As Justice Harlan wrote,

This, then, is the precise character of the enactment whose Constitutional measure we must take. The statute must pass a more rigorous Constitutional test than that going merely to the plausibility of its underlying rationale. This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of “liberty” . . . and it is this which requires that the statute be subjected to “strict scrutiny.”<sup>53</sup>

In 1965 the Court decided the case of *Griswold v. Connecticut*<sup>54</sup> and ushered in the contemporary era of substantive due process that has been described as “Footnote Four Plus.”<sup>55</sup> In this watershed case, the Court revived a strain of its substantive due process jurisprudence, which had been dormant since the end of the *Lochner*

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51. *Poe*, 367 U.S. at 542–43 (Harlan, J., dissenting).

52. See *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring) (analyzing favorably Justice Harlan’s dissent regarding the limited judicial review role).

53. *Poe*, 367 U.S. at 548 (Harlan, J., dissenting) (citations omitted).

54. 381 U.S. 479 (1965).

55. BARNETT, *supra* note 9, at 254.

era in 1937, by striking down a Connecticut law interfering with the right of married couples to gain information about, and to use, contraceptives. Justice Douglas's opinion for the majority found that a right to privacy, protecting the right of married couples to make contraceptive choices, can be construed from "penumbras and emanations" of the First, Third, Fourth, Ninth, and Fourteenth Amendments to the Constitution.<sup>56</sup> Justice Harlan concurred, advocating a substantive due process theory of liberty similar to the one sketched in his *Poe* opinion,<sup>57</sup> and Justice Goldberg concurred arguing that the law violated unenumerated rights protected by the Ninth Amendment.<sup>58</sup>

Thus, with *Griswold*, the Court reentered the substantive due process thicket by moving beyond the technical limits of Footnote Four and embracing judicial interpretation and enforcement of unenumerated rights. However, just like the *Lochner* decision before it, *Griswold* would prove controversial for its advocacy of unenumerated rights and for its seemingly Byzantine approach in deciding which unenumerated rights are entitled to judicial scrutiny and protection. The general approach that would emerge in substantive due process cases following *Griswold* involved a focus on the "fundamentality" of the liberty interest being asserted against a particular law or regulation. A right attains fundamental status if it is "deeply rooted in [the] history and traditions" of Anglo-American jurisprudence<sup>59</sup> or if it is "implicit in the concept of ordered liberty."<sup>60</sup> Substantive due process in the Footnote Four-Plus regime enacted by *Griswold* thus serves to "elevate[] some unenumerated rights to the exalted status of 'fundamental' while disparaging the other liberties of the people as mere 'liberty interests.'"<sup>61</sup> In short, if a plaintiff challenging a regulation cannot demonstrate that the right being asserted is fundamental, their substantive due process claim will likely fall to the presumption of constitutionality given to legislation under "rational basis review." In this sense, the majority opinion's approach in *Griswold* is markedly different from the view articulated by Justice Harlan, both in his *Poe* dissent and in his

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56. *Griswold*, 381 U.S. at 484.

57. *Id.* at 501-02 (Harlan, J., concurring).

58. *Id.* at 486 (Goldberg, J., concurring).

59. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

60. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

61. BARNETT, *supra* note 9, at 254.

*Griswold* concurrence.<sup>62</sup> Under Justice Harlan's view, the substantive rights protected by liberty need not be fleshed out according to the specific enumerations of the Bill of Rights. Rather there is a clear judicial role—albeit one informed by clear standards of review—that prescribes protecting liberty interests that are not explicitly listed in the Constitution, but nevertheless are inherent to the very idea of ordered liberty.<sup>63</sup> An important question remains unanswered that will emerge again later: if the Court were to view liberty as a “rational continuum” in the manner suggested by Justice Harlan, to what extent does the influence of traditional and historical values govern the limits of judicially recognized and protected liberty interests?<sup>64</sup>

In the years following *Griswold*, the Court has issued a number of holdings<sup>65</sup> that together have come to recognize “that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person,” particularly in regards to issues of sexual and reproductive

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62. See *Griswold*, 381 U.S. at 500 (Harlan, J. concurring) (“In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values ‘implicit in the concept of ordered liberty.’ For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.” (citations omitted)).

63. *Id.* at 501.

64. But see *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting). Justice Harlan, in a departure from his disciples on the *Lawrence* court, makes a strong case for traditional moral values as a strong limitation against judicial expansion of protected liberty interests in certain types of sexual conduct:

Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

*Id.*

65. See generally *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (invalidating a New York law forbidding sale or distribution of contraceptive devices to persons under sixteen years of age); *Roe v. Wade*, 410 U.S. 113 (1973) (finding that a woman's right to elect an abortion has real and substantial protection as an exercise of her liberty under the Due Process Clause); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending contraceptive rights to non-married persons).

freedom.<sup>66</sup> However, none of these cases started with the presumption that an individual's liberty interests are protected by the Fourteenth Amendment against arbitrary government regulations. Rather, the Court's focus remained on the fundamentality of the privacy interest being asserted and the burden remained with the plaintiffs to demonstrate that their substantive rights claim overcame the presumption of constitutionality in favor of the government. Moreover, although the Due Process Clause was used by the Court as the doctrinal basis of several of its decisions during the last four decades of the 20th century, its analysis remained with *Griswold's* emphasis on privacy, however nebulously constructed, rather than with the protection of "liberty" associated with the writings of Justice Harlan and more closely related to the type of unenumerated rights envisioned in the pre-*Slaughter-House* Fourteenth Amendment.

#### D. *Bowers v. Hardwick*

One post-*Griswold* case, in particular, is highly relevant to any discussion of *Lawrence*. In its 1986 decision in *Bowers v. Hardwick*, the Court upheld a Georgia law criminalizing sodomy<sup>67</sup> between consenting adults<sup>68</sup> against the challenge of a homosexual man who was arrested for engaging in an act of homosexual intimacy in a fact pattern nearly identical to the one that would come before the court seventeen years later in *Lawrence*. Respondent Hardwick challenged the Georgia statute on various Fourteenth Amendment grounds. A deeply divided Burger Court ruled 5-4 that Georgia's sodomy law was constitutional, refusing, in the words of Justice Byron White's majority opinion, to declare "a fundamental right to engage in homosexual sodomy."<sup>69</sup> In repudiating much of the Court's sexual autonomy jurisprudence since *Griswold v. Connecticut*, Justice White

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

67. 478 U.S. 186, 196 (1986). *See also* GA. CODE ANN. § 16-6-2 (1984) (providing, in pertinent part: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . .").

68. Significantly, at least in terms of Justice O'Connor's concurring opinion in *Lawrence* which focuses on the Equal Protection Clause in striking down the Texas law, the Georgia law applied to heterosexual as well as homosexual acts of sodomy. *See* GA. CODE ANN. § 16-6-2 (1984).

69. *Bowers*, 478 U.S. at 191.

declared that “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”<sup>70</sup> Declining to offer strict scrutiny to Hardwick’s Fourteenth Amendment claims,<sup>71</sup> the *Bowers* majority similarly rejected Hardwick’s argument that the law lacked a rational basis<sup>72</sup> because it served merely to express a majoritarian moral preference against the legitimate privacy rights of individuals wishing to express their sexual intimacy through acts made criminal under Georgia’s law.

Four justices, led by Justice Harry Blackmun, dissented in the boldest of terms. Blackmun, foreshadowing *Lawrence*,<sup>73</sup> argued that the majority’s claim that Hardwick was requesting a declaration of a “fundamental right to engage in homosexual sodomy” was entirely incorrect in light of the Court’s earlier sexual autonomy jurisprudence.<sup>74</sup> The dissent strongly suggested the majority unjustifiably focused on the act of homosexual sodomy and the social taboos surrounding it, rather than the broader, and obviously protected, “right to be left alone” in making personal decisions

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70. *Id.* at 194–95.

71. *Id.* at 194 (“[T]o 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.”).

72. *Id.* at 196. Justice White’s opinion defended the rationality of Georgia’s moral justifications for its law in the staunchest of terms:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

*Id.*

73. *Id.* at 214. Blackmun noted,

I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do.

*Id.*

74. *Id.* at 199.

about whether to engage in particular forms of private, consensual sexual intimacy.<sup>75</sup> Such forms of conduct, the dissent observed, strike to the very core of defining “human existence,” and are treated far too lightly and dismissively by the majority.<sup>76</sup>

*E. Substantive Due Process in the Rehnquist Court:  
Casey and Glucksberg*

Substantive due process jurisprudence has been significantly developed by key decisions during the 1990s. These decisions set the tone for Justice Kennedy’s opinion in *Lawrence* and helped establish the ongoing debate among members of the Court as to the proper standards of review to be used in substantive due process cases.

In an important precursor to *Lawrence*, the Court shifted its substantive due process emphasis from “privacy” to “liberty” in 1992. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court relied on the Due Process Clause of the Fourteenth Amendment in reaffirming the right to abortion established in *Roe v. Wade*.<sup>77</sup> The Court’s majority held that the decision to abort a pregnancy, protected by the Due Process Clause, deserved heightened scrutiny because of its essential relationship to a person’s sense of ultimate identity and values, indeed the person’s very conscience, explaining that

[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could

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75. *Id.*

76. *Id.* at 205 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)). Blackmun argues,

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

*Id.* (citations omitted).

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

not define the attributes of personhood were they formed under compulsion of the State.<sup>78</sup>

This language signaled a burgeoning paradigm shift in the Court's substantive due process jurisprudence. In *Casey*, liberty, not privacy, did the work under the Due Process Clause. Justice Kennedy would return this same reasoning eleven years later in *Lawrence*.

The Rehnquist Court issued another landmark substantive due process decision in the 1997 case *Washington v. Glucksberg*.<sup>79</sup> In *Glucksberg*, the Court unanimously upheld a Washington law that criminalized physician-assisted suicide.<sup>80</sup> The plaintiffs, who included both doctors and terminally ill patients, asserted a liberty interest protected by the Due Process Clause in allowing a mentally competent, terminally ill adult to commit physician-assisted suicide.<sup>81</sup> Relying heavily on history and the Anglo-American common law,<sup>82</sup> the Court concluded that there exists no fundamental liberty interest in physician-assisted suicide. Chief Justice Rehnquist, writing for the majority, argued that in addition to the Court's traditional criteria for evaluating a substantive due process claim—"found in the history and traditions" and "implicit in the concept of ordered liberty"—the asserted fundamental liberty interest must be capable of "careful description."<sup>83</sup> The Court thus refused to characterize a broader liberty interest in physician-assisted suicide such as "the right to die" and thus concluded that no such fundamental liberty interest exists. After denying strict scrutiny of the liberty interest asserted, the Court found Washington's asserted interests of preserving human life and avoiding a slide towards euthanasia as easily meeting a rational basis test.<sup>84</sup>

Although the Chief Justice wrote for a unanimous Court, the method of analysis used in the majority opinion to evaluate the substantive due process claim was anything but unanimous. Five of the Justices concurred with the Court's decision, but differed from the Court's analysis on various points, many going as far as to argue that patients have a right to palliative care, even if such care would

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78. *Id.* at 851.

79. 521 U.S. 702 (1997).

80. *Id.* at 709.

81. *Id.* at 708.

82. *Id.* at 710–12.

83. *Id.* at 721.

84. *Id.* at 728.

kill a patient.<sup>85</sup> Indeed, at no point is it clear that a majority of the Court accepted Chief Justice Rehnquist's version of substantive due process analysis.

Justice Souter's concurrence focused on the importance of Justice Harlan's *Poe* dissent and argued that each deprivation of liberty should be balanced against the relative strength of the state's interest involved. Justice Souter begins his concurrence by noting the legacy of *Slaughter-House* on the Court's substantive rights jurisprudence.<sup>86</sup> He then praises Justice Harlan's *Poe* dissent as a model for the proper judicial role in adjudicating substantive rights claims under the Fourteenth Amendment. Justice Souter argues that the *Poe* dissent stands for no less than three key propositions: that there is an important and recognized judicial role in conducting substantive due process, "that the business of such review is not the identification of extra-textual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people," and a recognition of "the basic need to account for the two sides in the controversy and to respect legislation within the zone of reasonableness."<sup>87</sup> With this in mind, it is the duty of Courts reviewing substantive rights claims to recognize "a continuum of rights to be free from 'arbitrary impositions and purposeless restraints.'"<sup>88</sup> For Justice Souter, although history and traditions are the starting place for this type of analysis, emerging standards of liberty in a developing system of ordered liberty surely must come into play for the judge conscientiously conducting substantive due process review. Also, it is interesting to note that in the above framework, the reviewing judge is concerned with the rationality of the legislation rather than the fundamentality of certain

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85. See *id.* at 736–38 (O'Connor, J., concurring). Justice O'Connor's opinion on this point was largely echoed by Justices Stevens, Souter, Ginsburg, and Breyer.

86. *Id.* at 760 n.6 (Souter, J., concurring). Justice Souter notes:

The *Slaughter-House Cases* are important, of course, for their holding that the Privileges or Immunities Clause was no source of any but a specific handful of substantive rights. . . . To a degree, then, that decision may have led the Court to look to the Due Process Clause as a source of substantive rights. . . . But the courts' use of due process clauses for that purpose antedated the 1873 decision, as we have seen, and would in time be supported in the *Poe* dissent, as we shall see.

*Id.* (citations omitted).

87. *Id.* at 762–65 (Souter, J., concurring).

88. *Id.* at 765 (Souter, J., concurring).

extra-textual rights. The presumption in such analysis begins to shift from regulatory constitutionality to individual liberty.

Taken with his joint opinion in *Casey*, Justice Souter's articulation of Justice Harlan's *Poe* opinion reflected an emerging awareness among some members of the Rehnquist Court that substantive rights analysis is neither tied down to strict articulations of the fundamentality of the right being asserted, nor exclusively to history and tradition. Rather, for the first time, a substantial portion of the Court's membership recognized that the Fourteenth Amendment protects a rational continuum of liberty rather than "isolated pinpricks" of fundamental rights. The *Casey* plurality and Justice Souter's *Glucksberg* concurrence demonstrate that, by the 1990s, at least some members of the Court were becoming increasingly uncomfortable with the substantive due process methodology embodied in the Footnote Four Plus regime. The evolution of the Court's understanding of the substantive rights protected by the Fourteenth Amendment and its own role in establishing standards to review claims of such rights was beginning to follow a path more in line with the original meaning of the Amendment. The stage was thus set for the type of substantive rights analysis that the Court would deploy shortly thereafter in *Lawrence*.

### III. LAWRENCE V. TEXAS

#### A. *The Facts and the Procedural Posture of Lawrence*

Responding to a reported weapons disturbance, two officers of the Harris County Police Department entered the residence of petitioner John Geddes Lawrence in 1998.<sup>89</sup> The officers observed Lawrence and another man, petitioner Tyron Garner, engaging in a consensual sexual act.<sup>90</sup> The officers arrested the two men, who were then held overnight before being charged and convicted before a Justice of the Peace.<sup>91</sup> The men were convicted of violating a state law prohibiting homosexual sodomy<sup>92</sup> through their act of "deviate

89. *Lawrence v. Texas*, 539 U.S. 558, 562–63 (2003).

90. *Id.* at 563.

91. *Id.*

92. *Id.* The applicable state law broken by the petitioners was TEX. PENAL CODE ANN. § 21.06(a) (2003) providing that "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex," defined as, "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01(1).

sexual intercourse, namely anal sex, with a member of the same sex (man).”<sup>93</sup>

The petitioners challenged their conviction in Harris County Criminal Court as a violation of the Equal Protection Clause of the Fourteenth Amendment and an analogous provision of the Texas Constitution. The court rejected those claims and fined the petitioners \$200 each and assessed court costs of \$141.25.<sup>94</sup> The Court of Appeals for the Texas Fourteenth District rejected the petitioners’ federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and upheld the convictions, finding the U.S. Supreme Court’s decision in *Bowers v. Hardwick*<sup>95</sup> to be controlling.<sup>96</sup>

The U.S. Supreme Court granted certiorari from the Texas Fourteenth District’s decision to consider three questions: whether the Texas law violated the Equal Protection Clause, whether the Texas law violated the Due Process Clause, and whether *Bowers* should be overruled.<sup>97</sup>

### *B. The Majority Opinion*

It is through the lens of *Bowers* that Justice Anthony Kennedy approaches the facts of *Lawrence* in the Court’s majority opinion.<sup>98</sup> Kennedy begins his constitutional analysis of Lawrence’s claim by noting that the case must “be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”<sup>99</sup> To this extent, Kennedy sets aside the Equal Protection Clause issue<sup>100</sup> and deems it

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93. *Lawrence*, 539 U.S. at 563.

94. *Id.*

95. 478 U.S. 186 (1986).

96. *Lawrence*, 539 U.S. at 563.

97. *Id.* at 564.

98. Justice Kennedy’s opinion was joined by Justices John Paul Stevens (who had vigorously dissented in *Bowers*), David Souter, Ruth Bader Ginsburg, and Stephen Breyer. Justice Sandra Day O’Connor concurred in the Court’s judgment, finding the Texas statute unconstitutional on equal protection grounds. *Id.* at 579.

99. *Id.* at 564.

100. *See id.* at 574–75.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were

necessary to revisit *Bowers*.<sup>101</sup> Using *Griswold* as a “beginning point,” Kennedy cites the various holdings<sup>102</sup> of the Court since the 1960s that have come to recognize “that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person,” particularly in regards to issues of sexual and reproductive freedom.<sup>103</sup>

With this background, Kennedy proceeds to a discussion of *Bowers*, holding that decision as anomalous to the Court’s other substantive due process cases.<sup>104</sup> Kennedy refers to the *Bowers* majority’s characterization of the issue before it as a determination of whether or not there is a “fundamental constitutional right to engage in homosexual sodomy” as a disclosure of its “failure to appreciate the extent of the liberty at stake.”<sup>105</sup> In a sweeping philosophical difference of opinion from *Bowers*, Kennedy observes that the law before the Court in *Lawrence*, as well as the law that was before the Court in *Bowers*, does far more than prohibit a particular type of sexual conduct. For the majority, such laws intrude upon a presumption of liberty that is granted to acts of private, and presumably consensual, sexual conduct:

Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.<sup>106</sup>

Taking this analysis a step further, the majority observes that such liberty interests preclude the state from intruding upon personal

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we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

*Id.*

101. *Id.*

102. *Id.* at 564. See generally *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (invalidating a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age); *Roe v. Wade*, 410 U.S. 113 (1973) (finding that a woman’s right to elect an abortion has real and substantial protection as an exercise of her liberty under the Due Process Clause); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending contraceptive rights to non-married persons).

103. *Lawrence*, 539 U.S. at 565.

104. *Id.* at 567.

105. *Id.*

106. *Id.*

choices protected by the Constitution, including choices related to sexual autonomy:

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>107</sup>

The Court's analysis of Lawrence's claim is interesting because it adjudicates the claim without clearly articulating the standard of review that it is using. The Court does not declare that the Texas sodomy law violates a "fundamental right," thus failing a strict scrutiny analysis; nor does the Court specifically declare that the law lacks a rational basis. Rather, the Court simply states that the petitioners have a constitutionally-protected liberty to decide the nature of their intimate sexual conduct that the Texas law violates. Thus, without announcing a particular standard of review or scrutiny offered to liberty interests embedded in the intimate conduct of homosexual individuals, the majority holds that the *Bowers* court greatly misinterpreted the claim before it.<sup>108</sup> Finding that the historical grounds for sodomy prohibitions that the *Bowers* court heavily relied on in its decision were "overstated" and "more complex" than indicated,<sup>109</sup> Kennedy next moves to discuss the moral considerations that underlie *Bowers*.

Kennedy notes that much of the historical support for sodomy laws stems from the invocation of traditional values or "Judeo-Christian moral and ethical standards,"<sup>110</sup>—the "religious beliefs," "conceptions of right and acceptable behavior and respect for the traditional family" that are often used as justifications for prohibiting homosexual behavior.<sup>111</sup> Although these beliefs are far from trivial

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107. *Id.*

108. *Id.*

109. *Id.* at 571.

110. *Bowers v. Hardwick*, 478 U.S. 186, 196 (Burger, C.J., concurring).

111. *Lawrence*, 539 U.S. at 571.

and can be “profound and deep,” for the *Lawrence* majority, they fail to answer the question before the Court.<sup>112</sup> The Court declines to enforce these views on the operation of all society through the criminal law, as it finds that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”<sup>113</sup>

The Court, in an effort to expand its due process inquiry beyond an examination of only history and tradition,<sup>114</sup> observes that against the historical state interest in preserving a traditional sense of morality<sup>115</sup> is “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>116</sup> The majority cites evidence buttressing this “emerging awareness,” ranging from the elimination of sodomy as a crime from the American Law Institute’s Model Penal Code, to the broad consensus against sodomy laws that has developed in Europe since at least before the time *Bowers* was decided, to the fact that the number of states with sodomy laws on their books had dwindled from twenty-five as of the time of *Bowers* to thirteen (of which only four applied exclusively to homosexual conduct) when *Lawrence* was heard by the Court in 2003.<sup>117</sup>

Additionally, substantive due process cases since *Bowers* were seen by the majority as greatly questioning its rationale. Justice Kennedy cites approvingly the Court’s decision in *Casey* as reaffirming the substantive force of liberty, and significantly not privacy, protected by the Due Process Clause, particularly as to choices one makes regarding sexuality.<sup>118</sup> Similarly, the Court’s

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112. *Id.*

113. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

114. *Id.* at 572 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”)).

115. *See id.* at 571–72. The majority goes to great lengths to establish that the historical moral consensus regarding homosexuality found by the *Bowers* court is far from apparent and that the evidence offered by Justice White and Chief Justice Burger in their respective opinions was clearly overstated.

116. *Id.* at 572.

117. *See id.* at 572–74. It should be noted that *Lawrence* is very much a part of an ongoing debate on and off of the Court regarding the use of foreign legal opinions in U.S. Constitutional cases.

118. *Id.* at 573–74 (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of

holding in *Romer v. Evans*<sup>119</sup> is seen by the majority as explicitly denying the moral disapproval of homosexuals—“like a bare desire to harm the group”—as a sufficient basis to satisfy rational basis review.<sup>120</sup> Thus, although the Court does not specifically say that it is using rational basis review, it does hold in essence that the mere moral disapproval of homosexuality by a legislative majority does not constitute a rational basis supporting the constitutionality of resulting legislation. *Romer* thus becomes a guidepost for the Court in treating homosexuality with a higher level of judicial scrutiny than it originally did in *Bowers*.

In a brief note on *stare decisis*, the majority observes that because the “holding in *Bowers* . . . has not induced detrimental reliance comparable to some instances where recognized individual rights are involved,” the Court should not feel restrained to let *Bowers* stand on *stare decisis* grounds when there is ample evidence that its rationale does not withstand careful analysis.<sup>121</sup> Thus, in light of the substantive due process analysis it has just conducted, the Court declares “*Bowers* was not correct when it was decided, and it is not correct today,” and, as it should not remain binding precedent, “it should be and now is overruled.”<sup>122</sup>

Kennedy’s majority opinion ends where it began, with a clear focus on liberty. Observing that the sexual conduct of the petitioners did not involve minors, coerced consent, persons who might be injured, public conduct, or prostitution, the Court declares that “[t]he petitioners are entitled to respect for their private lives.”<sup>123</sup> The Court notes that its decision is not designed to give formal recognition of any relationship that homosexual persons may choose to enter into; rather, the Court’s decision is simply that “[t]he State cannot demean their existence or control their destiny by making

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human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” (citing *Casey*, 505 U.S. at 851)).

119. 517 U.S. 620 (1996) (holding that an amendment to Colorado’s constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by “orientation, conduct, practices or relationships,” and deprived them of protection under state antidiscrimination laws was “born of animosity toward the class of persons affected” and failed rational basis scrutiny under the Equal Protection Clause because the measure had no rational relation to a legitimate governmental purpose).

120. *Lawrence*, 539 U.S. at 574, 582–83.

121. *Id.* at 577.

122. *Id.* at 578.

123. *Id.*

their private sexual conduct a crime.”<sup>124</sup> Thus, the right of the petitioners and other homosexual persons to “liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’”<sup>125</sup> Because the Texas statute furthers no legitimate state interest for its broad intrusions into the personal and private lives of individuals, it cannot withstand scrutiny under the Due Process Clause.<sup>126</sup>

The majority opinion concludes with the observation that its interpretation of the Due Process Clause is wrought from the understanding that the drafters of the Fifth and Fourteenth Amendments did not presume to know liberty in its manifold possibilities.<sup>127</sup> This is significant because the Court appears to be recognizing that the substantive content of the Fourteenth Amendment, rooted as the majority sees it in the Due Process Clause, is not bound purely by history and tradition in its present day form. It may well be the case that laws once seen as necessary and proper serve only to oppress. Thus, “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>128</sup>

### *C. Justice Scalia’s Dissenting Opinion*

Justice Antonin Scalia issued a particularly scathing dissent in *Lawrence*, which was joined by Chief Justice William Rehnquist and Justice Clarence Thomas. Many of Scalia’s sharpest barbs were directed at what he perceived as the majority’s abuses of discretion. Scalia argues that the Court was wrong in citing foreign sources of authority to interpret the extent of liberty offered to homosexuals under the Due Process Clause,<sup>129</sup> and in its use of *Casey* (where the Court declined to overturn *Roe v. Wade* on *stare decisis* grounds) to argue that *stare decisis* should not apply to *Bowers*.<sup>130</sup> Although many of Justice Scalia’s arguments raise nuanced issues of constitutional

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124. *Id.*

125. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

126. *Id.* at 578–79.

127. *Id.* at 579.

128. *Id.*

129. *See id.* at 598.

130. *See id.* at 586–91.

law that exceed the scope of this note, his chief objection strikes to the heart of the debate over the role of morality in law in the wake of *Lawrence*: what standard of review ought the Court give to liberty interests advanced by *Lawrence* and those similarly situated? Justice Scalia, observing that the majority's standard of review is unclear, notes at the beginning:

Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: “[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.” Instead the Court simply describes petitioners’ conduct as “an exercise of their liberty”—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.<sup>131</sup>

Here Scalia rightly observes that the majority has declined to give “strict scrutiny” or a similar standard of review to some fundamental right claimed by the petitioners, and notes that the Court has not observed a fundamental right to engage in homosexual sodomy. From the premise that there is no fundamental right to homosexual sodomy under the Due Process Clause, Justice Scalia concludes that the Court ignores earlier doctrine establishing that “*only* fundamental rights qualify for this so-called ‘heightened scrutiny’ protection—that is, rights which are “deeply rooted in this Nation’s history and tradition”—in invalidating Texas’s law.<sup>132</sup>

Justice Scalia questions the Court for invalidating Texas’s law because it imposes constraints on personal liberty, noting that while the sodomy law undoubtedly constrains liberty, “[s]o do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery.”<sup>133</sup> Scalia observes that by definition the “emerging awareness” in favor of increased liberty rights cited by the Court cannot be “deeply rooted in *this Nation’s* history and tradition[s].”<sup>134</sup> As the Court did not, and could not in Scalia’s estimation, reverse *Bowers* in finding a “fundamental right” to engage in sodomy, Scalia argues that its subsequent use of rational basis review is deeply flawed.<sup>135</sup> Scalia

131. *Id.* at 586 (alteration in original) (citation omitted).

132. *Id.* at 593 (citing *Reno v. Flores*, 507 U.S. 292, 303 (1993)).

133. *Id.* at 592.

134. *Id.* at 598 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (emphasis added)).

135. *Id.* at 599.

questions the Court's blanket dismissal of Texas's claimed interest in its law, noting that,

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable,"—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest.<sup>136</sup>

For Scalia, the majority "effectively decrees the end of all morals legislation" in declaring that the state's intrusion into the personal life of the petitioners constitutes a violation of the Due Process Clause.<sup>137</sup> Justice Scalia believes that if the majority is correct, a slippery slope emerges, depriving the state of its power to legislate morality: "If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review."<sup>138</sup>

Justice Scalia concludes his dissent with an extraordinary passage criticizing the Court's decision as a "product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."<sup>139</sup> Scalia argues that the Court has chosen to "take[] sides in the culture war" and in so doing, ignores the fact that its views are not those of mainstream America.<sup>140</sup> Scalia claims that what the Court calls "discrimination," the majority of Americans view simply as measures "protecting themselves and their families from a lifestyle that they believe to be immoral and destructive."<sup>141</sup> In a final argument against the Court, Scalia claims that homosexuals have the right to persuade their fellow citizens to repeal sodomy laws, but should have no recourse in the courts to overturn democratically-approved and rationally-based morals legislation. Scalia, expressing his moral positivism, concludes,

[P]ersuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I

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136. *Id.* (citation omitted).

137. *Id.*

138. *Id.*

139. *Id.* at 602.

140. *Id.*

141. *Id.*

would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change.<sup>142</sup>

Justice Scalia’s opinion offers an important critique of the substantive rights analysis developed by the majority and praised in this note. This note will address some of Justice’s Scalia’s more pointed concerns in the following section.

#### *D. What Lawrence Did and Did Not Do*

At the end of the day, it is important to consider what *Lawrence* accomplished and what it did not accomplish. Most obviously, the decision invalidated the Texas sodomy law because it violated a liberty interest recognized by the Court to be protected under the Due Process Clause of the Fourteenth Amendment. Thus, although *Lawrence* still remains committed to the post-*Slaughter-House* focus on the Due Process Clause rather than the Privileges or Immunities Clause in adjudicating substantive rights, it implicitly follows the path developed in the *Casey* plurality opinion and recognized in Justice Souter’s *Glucksberg* concurrence in viewing the limits of constitutionally protected rights as existing on a rational continuum open to “emerging standards of decency.” For the majority, although history and traditions play a beginning role in substantive rights analysis, they play *only* a beginning role. The Court holds that for matters going to the ultimate questions of “existence” and “meaning,” the individual’s right to liberty is both protected by the Constitution and entitled to continuing recognition as new patterns of such liberty emerge in a developing society.

It is also clear that *Lawrence* expands the notion of sexual autonomy protected under the Constitution. It recognized that *Bowers* was an anomaly in the Court’s adjudication of sexual autonomy cases under the Fourteenth Amendment and accordingly set that decision aside as an incorrect precedent. In doing so, the Court clearly indicates that the expressions of intimate sexual

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142. *Id.* at 603.

conduct between consenting adults are protected by the Constitution.

Finally, in an extension of *Romer*, the Court recognized that the moral disapproval of a particular form of private sexual conduct on the part of a legislative majority does not constitute a rational basis justifying laws punishing or discriminating against such conduct. Thus, *Lawrence* uses a form of rational basis review that actually demands that the government show a justification for its restriction on liberty beyond an appeal to tradition, history, or morals. Such a move implicitly recognizes a judicial role in reviewing state legislation for violations of minority rights protected by the constitution, not as a usurpation of legislative power, but as a structural counterweight to the majoritarian passions that from time to time strip the individual of the rights guaranteed her by the Constitution.

On the other hand, *Lawrence* does not create a fundamental right to engage in homosexual conduct. Nor does it proscribe a new standard of review to be used for all substantive due process cases. Nor does it return us to a libertarian utopia overseen by omniscient jurists that can protect citizens from all arbitrary and capricious uses of state power.

But within *Lawrence* there is a potential reworking of many of the problems that have plagued Fourteenth Amendment substantive rights jurisprudence since *Slaughter-House*. As the next section will argue, if the Court expands *Lawrence* beyond sexual autonomy cases, there is tremendous potential for the decision to revolutionize, for the better, the manner in which federal courts review state legislation that infringes on the enumerated and unenumerated rights guaranteed to all citizens by the Constitution because of their essential place within the concept of ordered liberty. If the Court does not expand *Lawrence* beyond its subject matter, it is possible that *Lawrence*, like *Bowers* before it, will soon come to be seen as an anomaly in the Court's jurisprudence—a "one-hit wonder" in constitutional law deployed when the Court only finds it expedient to do so.

#### IV. LAWRENCE AS A POTENTIAL LIBERTARIAN REVOLUTION

Having offered analysis of *Lawrence* in the preceding section, this note will now discuss *Lawrence*'s potential impact on constitutional jurisprudence and the moral limits of criminal legislation. *Lawrence*,

if read correctly and consistently by future courts, has the potential to restore an accurate understanding of the substantive rights protected by the Fourteenth Amendment and the role of the judiciary in protecting those rights. The robust conception of liberty advanced by *Lawrence* embraces a view of autonomy that is central to the Fourteenth Amendment's protection of substantive liberties and to broader conceptions of human autonomy central to the purposes of liberal society. *Lawrence* thus has the potential to be nothing less than a watershed moment for a renewed soundness in constitutional jurisprudence.

*A. Lawrence as a Libertarian Revolution*

In *Lawrence*, the focus on liberty leads the Court to shift burdens of proof from the plaintiff asserting a substantive rights claim to the government defending its regulation; the claimant in *Lawrence* was not required to demonstrate that his liberty interest was fundamental. Rather, the government, under a form of "rational basis with a bite," was required to show that its regulation did not arbitrarily interfere with an important liberty interest. This development has the potential to improve the Court's analysis of future cases involving substantive rights claims by restoring the Court's focus to the fundamental nature of the government's reason for its restriction on liberty rather than on the individual's expression of liberty. Such a move would capture the original purpose of the Fourteenth Amendment—expressed in the Privileges or Immunities Clause—to protect the fundamental rights enjoyed by all American citizens. Put differently, *Lawrence* may hopefully soon come to be seen as a libertarian revolution<sup>143</sup> ushering in an era of heightened deference to a presumption of liberty protecting the private actions of individuals under the Fourteenth Amendment against unjustified state action.<sup>144</sup>

Randy Barnett, a scholar at Boston University Law School and the Cato Institute, a Washington-based libertarian think tank, argues

143. See Barnett, *supra* note 27, at 21.

144. *Id.* But see Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004) (arguing that a libertarian reading of *Lawrence* is mistaken because it fails to see the Court *is* upholding a "fundamental right" within its silences); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (2003) (arguing that *Lawrence* stands for the proposition that the criminal prohibition on sodomy is unconstitutional because it intrudes on private sexual conduct without having significant moral grounding in existing public commitments).

that by choosing to protect a broad claim of “liberty” in *Lawrence*, the Court soundly returns itself to a broad constitutional vision of individual liberties that avoids many of the more egregious mistakes of twentieth century substantive due process jurisprudence.<sup>145</sup> Because the *Lawrence* Court eschewed the substantive due process framework created by Footnote Four of *United States v. Carolene Products Co.*,<sup>146</sup> it is possible that future cases pitting the liberty interests of the individual against the legislative judgment of the state will, like *Lawrence*, neither presume constitutionality for the state’s regulation, nor require a showing that the liberty interest being asserted is “fundamental.” Barnett notes that, although it is never explicitly stated,

Justice Kennedy is employing . . . a “presumption of liberty” that requires the government to justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow “fundamental.” In this way, once an action is deemed to be a proper exercise of liberty (as opposed to license), the burden shifts to the government. All that was offered by the government to justify [the statute in *Lawrence*] is the judgment of the legislature that the prohibited conduct is “immoral,” which for the majority (including, on this issue, Justice O’Connor) is simply not enough to justify the restriction of liberty.<sup>147</sup>

If Barnett is correct, *Lawrence* represents a constitutional revolution for two reasons. First, *Lawrence* successfully overcomes

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145. Barnett, *supra* note 27, at 21. Barnett observes,

[c]ontrary to how their decision was widely reported, the *Lawrence* majority did not protect a “right of privacy.” Instead, quite simply, they protected “liberty.” Breaking free at last of the post-New Deal constitutional tension between the “presumption of constitutionality,” on one hand, and “fundamental rights,” on the other, Justice Anthony Kennedy and the four justices who joined his opinion did not begin by assuming the statute was constitutional. But neither did they call the liberty at issue “fundamental,” which the modern Court would have been expected to do before withholding the presumption of constitutionality from the statute. Instead, the Court took the much simpler tack of requiring the state to justify its statute, whatever the status of the right at issue.

*Id.*

146. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

147. Barnett, *supra* note 27, at 36. It is probably also worth recalling that Justice Thomas called Texas’s law “uncommonly silly” and noted that he would have voted to repeal it were he a legislator. Although Justice Thomas declined to join the majority because he does not believe that the Supreme Court should enforce substantive due process claims against the states, one could presume that Justice Thomas is a seventh “vote” recognizing that the purported moral basis of Texas’s law is a relatively flimsy justification for its existence.

the major shortcoming of much of the post-*Griswold* jurisprudence. Second, the decision places the onus on governments to demonstrate the fundamentality of its legislation and refuses to accept legislative appeals to tradition and morality alone as sufficient for meeting a rationality requirement.

The first component of the potential *Lawrence* revolution comes from the Court's use of rational basis review. As was discussed earlier, the Footnote Four Plus regime requires judges to find extra-constitutional "fundamental rights" in order to justify striking down some of the most obvious examples of undue state interference with personal autonomy. By placing its emphasis on whether or not the petitioners are free to engage in private conduct as an exercise of their "liberty" under the Due Process Clause,<sup>148</sup> the Court returns itself to legitimacy<sup>149</sup> and avoids a "jurisprudence of doubt" by placing the obligation on the state to justify its regulation, rather than on the individual to justify her exercise of liberty. Although *Lawrence* does not take the simplest and most appropriate tack by simply invalidating the Texas sodomy law under the Privileges or Immunities clause, its version of rational basis review under the Due Process Clause is such that it preserves many of the intuitions about substantive rights that underlie the original meaning of the Fourteenth Amendment.

This doctrinal move is significant because it, along with other recent developments, signals a potential return of the Court's Fourteenth Amendment jurisprudence to its proper foundations.<sup>150</sup> Although the Court gutted the Privileges or Immunities Clause in *Slaughter-House*, it may not yet be a dead letter.<sup>151</sup> Although the Court since *Slaughter-House* has used the Due Process Clause to protect citizens against state laws that violate their unenumerated natural rights, such protection has not been at the level warranted by the original meaning of the Privileges or Immunities Clause.<sup>152</sup> Under a proper construction of the Fourteenth Amendment, abridgments of personal liberties guaranteed to all American citizens

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148. *Lawrence*, 539 U.S. at 563. It is significant that "liberty," unlike "privacy," is explicitly mentioned in the text of both the Fifth and Fourteenth Amendments.

149. See Barnett, *supra* note 27, at 29–31 (discussing the shortcomings of *Griswold*).

150. See *supra* Part II.A.

151. See Saenz v. Roe, 526 U.S. 489 (1999) (basing the unenumerated right to travel in the Privileges or Immunities Clause).

152. See BARNETT, *supra* note 9, at 320–21.

by state legislation should be litigated in federal court. “When state legislatures restrict liberties of the people, they are no more entitled to be the judge in their own case than is Congress. The exercise of liberty by the citizen should not be restricted unless the state can show, to the satisfaction of an independent tribunal of justice, that such a restriction is both necessary and proper.”<sup>153</sup>

Of course *Lawrence* does not sweep this far and it does not resurrect the Privileges or Immunities Clause. But *Lawrence*’s burden-shifting more closely approximates the original meaning of the Fourteenth Amendment’s protection of the unenumerated rights of citizens than *Griswold* and its progeny. Thus, *Lawrence* makes sound doctrinal sense by protecting liberty rather than privacy, “without any discussion of whether or not the liberty involved is ‘fundamental.’”<sup>154</sup> The *Lawrence* court protects the rights of the petitioners to engage in sexual activity that is protected under the contours of the Fourteenth Amendment and does so without having to fashion any judicially-created rights or offering any activist remedies; the Court simply asks the state of Texas to justify its heavy restriction on liberty imposed by its sodomy laws and, finding no necessary or proper justifications for the laws, protects the liberty interest of the petitioners as American citizens under the Fourteenth Amendment. If the court seizes upon this type of reasoning and pursues it in future cases, much of the confusion and political controversy surrounding substantive rights jurisprudence could be cleared away. Judges would not be declaring “fundamentality” to one set of favored rights of either the left or the right in a manner that would smack of activism. Rather, all liberty interests that amount to more than mere license could be given a presumption of constitutionality rebuttable by a showing on the part of the government that its restrictions on such interests are necessary and proper according to some enumerated power or another.

Second, *Lawrence* is a triumph because it may stand for the proposition that the mere invocation of morality is no longer a rational justification for legislation interfering with the liberty interests of individuals presumed under the Fourteenth Amendment. As Barnett argues, a legislative judgment of “immorality” simply means that a majority of a legislature disapproves of the conduct

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153. *Id.* at 321.

154. *Id.* at 334.

being legislated against.<sup>155</sup> Although this view may treat too glibly the strongly held moral beliefs of many Americans against homosexuality, the fact remains that, for all intents and purposes, the rational basis standard of review that the Supreme Court offered to “mere” liberty interests (as opposed to “fundamental” rights) prior to *Lawrence* upholds essentially *any* legislative judgment of morality.<sup>156</sup> Thus, if a court declines to find a liberty interest to be “fundamental,” as it did in *Bowers*, there is virtually zero chance that the liberty interest will be sustained by the Court under the Due Process Clause if the legislature proffers a “moral” justification for its law. This is problematic, as Barnett observes, because “a doctrine allowing legislation to be justified solely on the basis of morality would recognize an unlimited police power in state legislatures.”<sup>157</sup> And, of course, an “[u]nlimited police power is the very definition of tyranny.”<sup>158</sup>

Moreover, by refusing to recognize “morals” legislation as a justifiable exercise of the state power, the *Lawrence* court recognizes an important judicial limit on the power of the states to restrict individual liberties. Although the Constitution surely recognizes a residual police power in the states, it is far from clear that this power was ever recognized to extend to wholly private conduct. *Lawrence* is crucial in restoring the integrity of the Court’s interpretation of the Fourteenth Amendment in this context as well because it limits the exercise of arbitrary state restrictions of private liberty, one of the essential purposes of the Amendment. This does not mean that Courts are designed to sit as super-legislatures that serve to override majoritarian and democratic rule that judges find displeasing. Rather, it means that when a particular democratic impulse serves to undermine the substantive rights guaranteed to all American citizens by the Ninth and Fourteenth Amendments, the Courts have a role in limiting legislative power. And the courts have a particularly important role to play when popular legislation serves to arbitrarily deprive individuals of their substantive rights under the Fourteenth Amendment under vague appeals to “morals.” As Barnett explains:

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155. Barnett, *supra* note 27, at 36.

156. At least for claims under the Due Process Clause; see *supra* note 6 for a discussion of *Romer* and other Equal Protection cases where the court did use a form of rational basis review to strike down “morals” legislation.

157. Barnett, *supra* note 27, at 36–37.

158. *Id.* at 37.

The protection of “morals” is the most dubious aspect of the traditional construction of the police power . . . . Only very rarely was the power to protect “morals” used to reach wholly private conduct. In other words, the traditional police power would more accurately be defined as giving states power to protect the “health, safety, and *public* morals” of the populace. A police power to reach purely private “immoral” acts could always be asserted by a legislature whenever it decides to prohibit any form of conduct. By providing no judicially enforceable limit whatsoever on the police power of states, such a construction would violate the original meaning of the Fourteenth Amendment. Because it would permit legislatures to abridge the privileges or immunities of citizens, and because it appears nowhere in the text of the Constitution, such a claim of power is illegitimate.<sup>159</sup>

Thus, at the end of the day, *Lawrence*, can be seen as a “very simple, and indeed, elegant ruling.”<sup>160</sup> Where earlier cases demanded that specific liberty interests be litigated and approved of by the Court before being recognized under the Due Process Clause, *Lawrence* establishes that an area of personal autonomy exists as an irreducible minimum preventing the state from arbitrarily depriving persons of their right to define and constitute their own preferred mode of existence. *Lawrence* is likely to endure because it “highlights the futility of describing liberty in so one-dimensional a manner” as *Bowers* did.<sup>161</sup> Indeed, “[t]he whole of substantive due process, *Lawrence* teaches us, is larger than, and conceptually different from, the sum of its parts.”<sup>162</sup>

Despite the fact that *Lawrence* is praiseworthy as a significant victory for liberty, few on the Court or elsewhere would be inclined to support it as a good precedent, much less as a revolution in substantive due process, if, as Justice Scalia claims, it truly “decrees the end of all morals legislation.”<sup>163</sup> For while, as has been noted above, it is untenable for the Supreme Court of the United States to accept a general legislative desire to prohibit “immorality” as a rational basis for *any* criminal law, few among us would feel comfortable living in a society where morality ceases to serve at all as

159. BARNETT, *supra* note 9, at 334.

160. Barnett, *supra* note 27, at 40.

161. Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1935 (2004).

162. *Id.* at 1937.

163. *Lawrence*, 539 U.S. at 599.

a justification for criminal prohibitions. The next section of this note addresses the moral limits of the criminal law in the wake of *Lawrence*'s expansion of constitutionally protected personal liberty interests in expressions of human sexuality.

*B. The Limits of Legal Moralism: A Rejoinder to Justice Scalia*

One of the primary arguments made by Justice Scalia's dissent in *Lawrence* focuses on what he perceives as the chief threat of the Court's opinion: an emptying of moral content from the law, the result of acquiescence by the Court to the "so-called homosexual rights agenda" in the ongoing culture war.<sup>164</sup> Although the majority states, in clear terms, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,"<sup>165</sup> nowhere in its opinion does the majority signal a willingness to dispense with morals-based legislation altogether. Rather, the majority simply holds that a general desire to invoke a particular system of moral beliefs, through the operation of the criminal law, is an invalid application of morality in the face of an "emerging awareness" of a contrary liberty interest.<sup>166</sup>

Thus, by invalidating the Texas sodomy law, the Court does not also invalidate the role of morality in the law. It merely establishes that there are limitations to the role of morality in the law, limitations clearly exceeded by the statute before it. Because the law lacked a purpose beyond an apparent legislative judgment regarding homosexuality as immoral, the law lacked a rational basis justifying its heavy burden on the exercise of liberty. In doing this, the Court neither acts extraordinarily nor recklessly. If anything, the Court follows a longstanding practice of not relying exclusively on a morals-based rationale for upholding lawmaking.<sup>167</sup>

To understand why Justice Scalia misstates the case, it is helpful to consider some of the fundamental intuitions that underlie our liberal society. Central to the notion of a liberal democracy is a high regard for the autonomy of the individual. Assuring that all citizens

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164. *See id.* at 598–99, 602.

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

166. *See id.* at 571–72.

167. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1234–36 (2004).

are afforded a high measure of autonomy in their personal life choices is one of the highest ethical precepts to which a liberal society can ascribe. Thus, one of the fundamental moral principles of a free society is that the individual, not the state, ought to be responsible for making the choices that govern morality in the personal sphere. The classic articulation of this notion is John Stuart Mill's essay *On Liberty*. Mill argues that individuals in civil society ought to be granted the highest level of liberty compatible with respect to the equal liberties of others. This is because moral virtue is best established in a free society where the autonomy of individuals is respected by the state.<sup>168</sup>

Practically speaking, Mill's position should be appealing to contemporary Americans. Mill's understanding of virtue fits well into a pluralistic system such as the United States. In a free society composed of individuals with divergent philosophical, moral, and religious persuasions, notions of freedom and morality are defeated

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168. For a contemporary explanation of Mill's view, see JOHN RAWLS, A THEORY OF JUSTICE 209–10 (1971). Rawls, a contemporary liberal, summarizes the moral intuition captured by Mill's thought explaining the fundamental value of human autonomy:

Mill defines the concept of value by reference to the interests of man as a progressive being. By this idea he means the interests men would have and the activities they would rather pursue under conditions encouraging freedom of choice. He adopts, in effect, a choice criterion of value: one activity is better than another if it is preferred by those who are capable of both and who have experienced each of them under circumstances of liberty.

Using this principle, Mill adduces essentially three grounds for free institutions. For one thing, they are required to develop men's capacities and powers, to arouse strong and vigorous natures. Unless their abilities are intensely cultivated and their natures enlivened, men will not be able to engage in and to experience the valuable activities of which they are capable. Secondly, the institutions of liberty and the opportunity for experience which they allow are necessary, at least to some degree, if men's preferences among different activities are to be rational and informed. Human beings have no other way of knowing what things they can do and which of them are most rewarding. Thus if the pursuit of value, estimated in terms of the progressive interests of mankind, is to be rational, that is, guided by a knowledge of human capacities and well-formed preferences, certain freedoms are indispensable. Otherwise society's attempt to follow the principle of utility proceeds blindly. The suppression of liberty is always likely to be irrational. Even if the general capacities of mankind were known (as they are not), each person has still to find himself, and for this freedom is a prerequisite. Finally, Mill believes that human beings prefer to live under institutions of liberty. Historical experience shows that men desire to be free whenever they have not resigned themselves to apathy and despair; whereas those who are free never want to abdicate their liberty. Although men may complain of the burdens of freedom and culture, they have an overriding desire to determine how they shall live and to settle their own affairs. Thus by Mill's choice criterion, free institutions have value in themselves as basic aspects of rationally preferred forms of life.

*Id.*

when the state circumvents individual autonomy by compelling a particular view of morality. This does not mean that the state must respect *any* choice that an individual makes or that it cannot develop criminal law. It simply means that when an individual's moral choice does not harm the right of other individuals to make compatible moral choices of their own, the state has no business in compelling its own particular view of morality by making certain choices subject to criminal sanction.

A contemporary exposition of Mill's position is made by Joel Feinberg<sup>169</sup> in *Harmless Wrongdoing*, the fourth volume of his work, *The Moral Limits of the Criminal Law*. Feinberg's work begins with an analysis of John Stuart Mill's harm principle, which maintains that the only justifiable restraint on liberty is the restraint that prevents harm to others.<sup>170</sup> Feinberg defends and fleshes out Mill's harm principle, examining four different "categories of justification for criminal sanction" that have been traditionally advanced by various communities: harm to others, offense to others, harm to the actor herself, and so-called "harmless wrongdoing."<sup>171</sup>

In the first volume of his work, Feinberg argues that the prevention of harm to others is a clearly acceptable use of the criminal law.<sup>172</sup> Feinberg asserts that "moral harm" to others does

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169. See Beschle, *supra* note 6, for an excellent discussion of Joel Feinberg's writings in the context of *Lawrence*.

170. Mill, *supra* note 1, at 267. Mill argues:

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so; because it will make him happier; because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him . . . but not for compelling him . . .

*Id.*

171. See generally JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984) [hereinafter FEINBERG, *HARM TO OTHERS*]; JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* (1986) [hereinafter FEINBERG, *HARM TO SELF*]; JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988) [hereinafter FEINBERG, *HARMLESS WRONGDOING*]; JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* (1985) [hereinafter FEINBERG, *OFFENSE TO OTHERS*].

172. See FEINBERG, *HARM TO OTHERS*, *supra* note 171, at 11 (arguing that "it is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices"); see also FEINBERG, *HARMLESS WRONGDOING*, *supra* note 171, at xix (defining and justifying the harm principle as "[i]t is always a good reason in support of penal legislation that it would be

not justify the application of the criminal law;<sup>173</sup> rather, harm requires an actual showing that the other person be harmed in some way, not merely made “worse off.”<sup>174</sup> Feinberg argues that some laws criminalizing offenses to others are justified under the harm principle in his second volume.<sup>175</sup> “However, it will be insufficient to invoke this justification by merely alleging that someone (or the community at large) is offended by the knowledge that otherwise harmless, though perhaps repulsive, activity is going on somewhere in private.”<sup>176</sup> Feinberg takes up the issue of “legal paternalism” in his third volume, defined by Mill as the use of the criminal law to “prevent harm (physical, psychological, or economic) to the actor himself.”<sup>177</sup> Feinberg, like Mill, rejects this position as a valid justification for criminal statutes because it too substantially interferes with personal autonomy.<sup>178</sup> Feinberg does, however, allow that certain types of “soft paternalism” are “reasonable . . . ‘when but only when that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.’”<sup>179</sup>

With these considerations in the foreground, Feinberg turns to the topic of present interest, criminal prohibitions on the so-called “harmless wrongdoing” of the individual. Feinberg begins his fourth volume by summarizing his earlier definition of the types of harm that may properly be criminalized, arguing that only “harm to one’s body, psyche, or purse” is justifiably criminal under the harm principle.<sup>180</sup> Feinberg accordingly argues that “where the individual is merely acting in a way that, although not presenting any threat to

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effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is no other means that is equally effective at no greater cost to other values”).

173. FEINBERG, HARM TO OTHERS, *supra* note 171, at 66.

174. *See id.* at 105 (defining harm as a “setting back, thwarting, impairing, defeating, and so on”).

175. FEINBERG, OFFENSE TO OTHERS, *supra* note 171, at 1–3. Application of the offense principle is limited to “serious” offenses, which must be the result of wrongful conduct. Although such offenses may justify criminal punishment, it generally is of a lesser magnitude than actual harm to others. *Id.* at 3.

176. *Id.*

177. FEINBERG, HARM TO SELF, *supra* note 171, at 4.

178. *Id.*

179. *See* Beschle, *supra* note 6, at 260 (citing FEINBERG, HARM TO SELF, *supra* note 171, at 12).

180. FEINBERG, HARMLESS WRONGDOING, *supra* note 171, at xx.

others or the community, merely indicates that the actor's character falls short of community norms, criminal punishment will not be justified."<sup>181</sup>

Feinberg sets out to reject the various rationales offered for prohibiting harmless wrongdoing. Feinberg dismisses arguments for moral conservatism (the use of legal coercion in order to prevent drastic change to a particular group's way of life)<sup>182</sup> and strict moralism (the use of legal coercion against non-grievance evils simply on the basis that they are deemed by some value system as "inherently immoral"),<sup>183</sup> claiming that both rationales fail to square soundly with the harm principle.<sup>184</sup> He similarly rejects "legal perfectionism," the doctrine that "it is a proper aim of the criminal law to perfect the character and elevate the taste of the citizens who are subject to it," because it violates the basic principle of liberty that she is defending.<sup>185</sup> Feinberg rejects legal perfectionism because, "[i]t would be manifestly absurd to threaten people with punishment in order to give them wisdom, style, integrity, or a better sense of humor . . . . Genuine generosity, concern, magnanimity, and courage are not readily produced by a policeman's billy club or threats of imprisonment."<sup>186</sup> In the final analysis, the only "virtue" instilled through means of coercion is obedience to authority. For Feinberg, and most in the Western ethical tradition from Aristotle

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181. Beschle, *supra* note 6, at 267–68, (citing FEINBERG, HARMLESS WRONGDOING, *supra* note 171, at 118–20).

182. See FEINBERG, HARMLESS WRONGDOING, *supra* note 171, at 39–80.

183. See *id.* at 124–73.

184. See *id.* at 79–80 (“[M]uch of what we call morality consists of rules designed to prevent evils of a kind whose existence would not be the basis of any assignable person’s grievance. No one can complain on his own behalf, or vicariously for another, if someone has evil thoughts (short of the intention to act on them) or false beliefs, or violates his own religious duties. If these things are evils, they are evils that ‘float free’ and are incapable of grounding personal grievances. The free-floating evils do not hurt anybody; they cause no injury, offense, or distress; they are not in any way unfair. At most, they are matters for regret by a sensitive observer. To prevent them with the iron fist of legal coercion would be to impose suffering and injury for the sake of no one else’s good at all. For that reason the enforcement of most non-grievance morality strikes many of us as morally perverse.”).

185. *Id.* at 277. This does not mean that the state may not choose to instill virtue in its citizens. Feinberg claims that it “seems undeniable that the state may properly attempt to promote public virtue and raise the level of excellence throughout society by such methods as moral and cultural education in the public schools, subsidies to the arts and sciences, and awards and prizes to virtuous exemplars.” *Id.* at 278.

186. *Id.* at 281.

on, genuine virtue can only be developed and practiced by the free choice of the autonomous individual.<sup>187</sup>

If one accepts the premise that in a free society personal ethics can result only from individual choice and not state compulsion, Feinberg's analysis offers a good explanation of why it is wrong for acts of harmless wrongdoing to be punished by the criminal law. After all, if morality is the result of free choice, it is self-defeating to compel individual moral action through threat of criminal punishment. Seen in this light, much of the alarmism of Justice Scalia's *Lawrence* dissent can be disarmed. The Court, like Feinberg, is not attempting to eliminate the role of morality in the law by declining to accept Texas's asserted "moral" basis for its prohibition on sodomy. Although the Court's opinion holds "a state's argument that in forbidding homosexual sodomy it is merely giving effect through law to the moral and ethical principles of a majority of its citizens, without more, cannot justify and constitutionalize a deprivation of the liberty to engage in such conduct,"<sup>188</sup> "[it] does not disable government from promoting traditional or majoritarian views of morality, it merely removes the criminal law weapon of coercion."<sup>189</sup>

One of the most cited passages from Justice Scalia's dissent argues that by striking down the Texas sodomy statute, the Court opens the door for widespread invalidations of other criminal laws with a "moral" basis, such as laws "against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."<sup>190</sup> Although there may be logical problems with this slippery slope argument,<sup>191</sup> its biggest problem is that it likely ignores what is truly at stake in the liberty interest upheld by the Court. One could argue that Justice Scalia, by

187. *See id.* at 281–82.

188. Ronald Turner, *Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from Bowers to Lawrence*, 53 U. KAN. L. REV. 1, 78 (2004).

189. Beschle, *supra* note 6, at 269.

190. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003).

191. *See* Bradley Dowden, *Fallacies*, The Internet Encyclopedia of Philosophy, <http://www.iep.utm.edu/f/fallacies.htm#Slippery%20Slope> (last visited Apr. 4, 2006).

Suppose someone claims that a first step (in a chain of causes and effects, or a chain of reasoning) will probably lead to a second step that in turn will probably lead to another step and so on until a final step ends in trouble. If the likelihood of the trouble occurring is exaggerated, the slippery slope fallacy is committed.

*Id.*; *see also* Dahlia Lithwick, *Slippery Slope: The Maddening "Slippery Slope" Argument Against Gay Marriage*, SLATE, May 19, 2004, <http://slate.msn.com/id/2100824>.

focusing on the physical act of homosexual sodomy in his analysis, misses the broader point of the Court, namely that it is the liberty interest of the individual to define his own concept of existence, not his right to engage in physical acts of sodomy, that is truly at stake in *Lawrence*. Another line of reasoning would argue that Justice Scalia fails both to see the significance of homosexuality in contemporary American life, and to recognize the fact that homosexuality is no longer seen by many as a sexual “deviance.”<sup>192</sup>

While these arguments have their merits, they make too much of what ought to be a simple rejoinder to Justice Scalia: the sodomy law struck down in *Lawrence*, unlike many of the contestants in his “parade of horrors,” simply eludes adequate justification under the harm principle. Justice Scalia is right that some acts, such as fornication and masturbation, can probably no longer be criminalized in the wake of *Lawrence*; but these acts would fall under an interpretation of the harm principle in the same analysis that proceeded above.<sup>193</sup> Because no one is harmed by these acts (assuming that they are done privately and, in the case of fornication, consensually), they should not be criminalized based solely on the grounds of a generalized moral grievance of the legislature.<sup>194</sup>

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192. See Tribe, *supra* note 161, at 1915.

Critics of the *Lawrence* approach often advance hypotheticals about the decriminalization of adult incest or bigamy to suggest the supposedly illimitable effects of decriminalizing sodomy. When confronted with such hypotheticals, we need only ask whether it is at all plausible to imagine the dynamic sketched above—a dynamic constituted by violent intolerance toward those open about their intimate relations and by equally devastating self-erasure by those closeted about their sexual orientations—at work in these other, very different, contexts. Incest laws draw circles around individuals, defining the finite set of family members so closely tied by blood or adoption that sexual intimacy becomes too dangerous or volatile for society to sanction. These restrictions no doubt inflict a heavy burden on particular hapless individuals whose misfortune it is to lust after or to fall in love with a family member, but such tightly drawn circles bear no real resemblance to the broad lines cutting oppressively across society to rule half the adult population off limits as sexual or marital partners for a distinct and despised minority. So, too, the circles that our adultery and bigamy laws have drawn around married couples have established partitions that fall with an undeniably cruel weight upon individuals who fall in love or lust with someone else’s spouse. But these laws—special instances, in a sense, of the customary bans on interference with beneficial contractual relations—likewise cut no wide swath through the population to limit the options open to any particular oppressed minority.

*Id.* at 1944.

193. See Beschle, *supra* note 6, at 271–72.

194. *Id.*

As for laws against bigamy, bestiality, incest, and prostitution, it should be noted that, unlike prohibitions against sodomy, these laws are in most cases designed to prohibit actual harms, as opposed to mere “moral” harm. Many (but admittedly not all) instances of bigamy and incest are based on fraud and coercion.<sup>195</sup> Moreover, it is important to remember that the *Lawrence* court did not rule in favor of homosexual marriage; it simply held that criminal sanctions against private consensual conduct are inappropriate, saying nothing about what a state can or cannot do in crafting its marriage statutes. There is a substantial public health concern that pervades the taboo against bestiality,<sup>196</sup> and likewise, concerns for public health and against the exploitation of women underlie the criminalization of prostitution.<sup>197</sup> It is worth noting here that the *Lawrence* majority requires of the state justifying a regulation of liberty that it show that its regulation is not an *arbitrary* suppression of liberty.<sup>198</sup> Where it is obvious that Texas’s prohibition on sodomy was nothing more than an arbitrary exercise of state authority to express a discriminatory moral disapproval of homosexuality, it is possible, and indeed likely, that challenges to bigamy, bestiality, and incest laws would be seen as having rational justifications by the Court, even in a post-*Lawrence* world.

Moreover, it is crucial to recognize the point made by Professor Tribe that it is somewhat disingenuous to compare the insular and miniscule part of the population that wishes to voluntarily engage in acts of bigamy, bestiality, or incest with the significant population of homosexual Americans who define their very identity as gay or lesbian persons, and who were genuinely harmed and branded as criminals—a stigma that had hampered homosexual Americans in areas ranging from employment to adoption rights—by sodomy laws.<sup>199</sup> Indeed, the majority itself makes this argument by asserting

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195. *Id.* at 271, 274.

196. *Id.* at 274.

197. *Id.* at 272.

198. *See* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). “Arbitrariness” may well be the ultimate standard of review the Court intends to use in the form of rational basis review that it creates in *Lawrence*. Such a view is certainly not at loggerheads with the view of the standard of review articulated above.

199. *See* Tribe, *supra* note 161, at 1944.

[The] [c]riminalization of same-sex sodomy visited a wide range of harms upon gay and lesbian Americans. These injuries are inflicted upon gay men and lesbians regardless of whether a given sodomy law is gender-neutral or gender-specific.

that an emerging awareness recognizes that liberty includes the right to define one's own concept of meaning, of life, and of the universe. This claim carries with it important philosophical assumptions about the very nature of autonomy in liberal society.<sup>200</sup> At a minimum, *Lawrence* recognizes that homosexuality is an expression of human sexuality that is at the very heart of personhood—one that the Court cannot ignore without debasing some of our most valued social notions of human autonomy and freedom as a liberal, constitutional society. To equate homosexuality with criminalized activity devalues the sense of autonomy that defines personhood in liberal society. Indeed *Lawrence* goes to matters of ultimate conscience and personhood; it concerns the facts of life fundamental to the way that the individual understands her place in the universe, as well as in civil society. The Court exercises an important function by passing judgment in this arena: it protects the autonomy rights of a significant minority of American citizens against the arbitrary

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The approach taken by the *Lawrence* majority eliminates the harms associated with sodomy laws altogether. For example, employers—both governmental and private—can no longer rely on sodomy statutes to justify firing or not hiring gay employees. Courts cannot invoke a state's sodomy law to deny custody of a child to a gay parent. Most significantly, the privacy approach banished the taint of criminality from gay identity. Gay men and lesbians need no longer think of themselves as criminals.

Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509, 541–42 (2005).

200. See RAWLS, *supra* note 168, at 543. Rawls argues that the intuitions of rational individuals adduced from behind a veil of ignorance that blinds them of their own personal prejudices and characteristics, would favor protecting human freedom and autonomy as a first principle of justice. All free and rational persons in a liberal society would thus want the same “primary goods”—liberties and benefits—to be distributed in such a way as to maximize the potential that a person could fulfill their own life plan according to their personal conception of the good, whatever that conception may turn out to be. Thus, there is a heavy liberal intuition in favor of allowing self-respecting and autonomous persons to sketch out their own nature in a free society:

[U]nder favorable circumstances the fundamental interest in determining our plan of life eventually assumes a prior place. One reason for this I have discussed in connection with liberty of conscience and freedom of thought. And a second reason is the central place of the primary good of self-respect and the desire of human beings to express their nature in a free social union with others. Thus the desire for liberty is the chief regulative interest that the parties must suppose they all will have in common in due course.

*Id.*; see also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 50 (1974). Nozick, Rawls' libertarian colleague, similarly sees a paramount value in human autonomy and personhood in civil society: “A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for meaningful life.” *Id.*

discrimination of a majoritarian legislative preference that, in failing to grasp the true liberty interest at stake in human sexual relations, reduces homosexual conduct to a criminal activity.

Justice Scalia's remaining "horribles" are easy to distinguish. Laws against adultery clearly fall under the purview of the harm principle because the philandering spouse obviously harms his or her counterpart.<sup>201</sup> Additionally, adultery violates the contractual nature of marriage which society has a cognizable interest in enforcing. As for the issue of same-sex marriage, by invoking it, Justice Scalia ignores clear statements by the Court that its ruling does not validate gay marriage efforts, and "conflates failure of a state to provide equal access to benefits with criminal punishment."<sup>202</sup>

In short, Justice Scalia's slippery slope argument ignores the central proposition of the harm principle echoed in *Lawrence*: that the state may not criminalize harmless personal behavior that is protected because of the autonomy and liberty enjoyed by all individuals. Traditional morality, at the end of the day, is no justification for coercion on the part of the state. Although the state may properly regulate, or make regular, the exercise of individual liberty to assure that it does not serve to harm or wrong others by becoming mere license,<sup>203</sup> it simply cannot justify criminal restrictions on personal autonomy solely by invocations of "traditional morality."

## V. CONCLUSION

Few inside or out of the Court have any idea what the future impact of *Lawrence* will truly be. This note has established that *Lawrence* is indeed a landmark decision, and a significant victory for a richer Constitutional vision of individual liberty. If *Lawrence* can be developed from its controversial subject matter, perhaps it can expand its unique methodology to future cases, thus preserving other valuable liberty interests against undue restraints on the part of the state.

The brief example of a timely issue may be illustrative. Last year the Supreme Court upheld Congressional regulation of marijuana under the Controlled Substances Act pursuant to Commerce Clause

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201. See Beschle, *supra* note 6, at 270.

202. *Id.* at 272-73.

203. See Barnett, *supra* note 27, at 37.

powers notwithstanding a California law allowing individual possession of marijuana for medical purposes.<sup>204</sup> Although the Court's decision in *Gonzales v. Raich* focused on the Commerce Clause, the Respondents in that case raised substantive due process arguments claiming that the medicinal use of marijuana is a liberty interest protected within the meaning of the Due Process Clause.<sup>205</sup> The Supreme Court did not address the substantive due process claim on its merits, but did remand it as a question for the Ninth Circuit to reconsider.<sup>206</sup>

On Monday, March 27, 2006 the Ninth Circuit heard oral arguments in *Raich* on remand.<sup>207</sup> The appellants in *Raich* argue extensively in their briefs that *Lawrence's* substantive due process analysis requires judicial recognition of an emerging liberty interest protecting the rights of certain terminally ill patients to seek palliative medical care in the form of cannabis use.<sup>208</sup> The appellants in *Raich* cite the Supreme Court's respect of "decisional autonomy" in *Lawrence*—"the individual's interest in making basic decisions about the course of her life without government interference"—as standing for the proposition that medicinal use of marijuana is a constitutionally-protected decision that shapes the life of the individual.<sup>209</sup>

The disposition of *Raich* by the Ninth Circuit (as well as any future Supreme Court review following the Ninth Circuit's anticipated ruling) will offer a window into the future of *Lawrence*. If the Court's substantive rights analysis in *Lawrence* stands for what this note has presented, the federal courts would be wise to use the present opportunity to expand that case's methodology beyond cases concerning sexual autonomy. The medical marijuana issue presents another opportunity for the courts to articulate a vision of liberty embracing the right of the individual to determine questions of fundamental existence free of arbitrary legislative constraints. The Ninth Circuit should follow *Lawrence* in demanding that the federal

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204. See *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

205. *Id.* at 2215.

206. *Id.*

207. See Ninth Circuit oral argument schedule, available at <http://www.angeljustice.org/downloads/RemandNinthCircuitCourtofAppealsCalendar.pdf> (last visited Apr. 9, 2006).

208. See Brief for the Petitioners, *Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454), available at <http://www.angeljustice.org/downloads/RemandRaichvGonzalesOpeningBrief.pdf> (last visited Apr. 9, 2006).

209. *Id.* at 27.

837]

*The Presumption of Liberty in Lawrence v. Texas*

government justify its restriction on the exercise of liberty central to the life decisions made by American citizens. Absent a compelling justification on the part of the federal government that prohibitions on medicinal marijuana are necessary and proper components of a justifiable regulatory system, the federal courts should protect the substantive rights of California citizens to use cannabis as a part of a regulated palliative care regime. Such a ruling would reinforce the doctrinal power of *Lawrence* and move it beyond the contentious realm of sexual autonomy cases.

In any case, *Lawrence* should be seen as a valuable piece of jurisprudence and should continue to be vigorously defended against misinterpretation and abuse by forces on either side of the political spectrum. The Court's decision should not be seen as a rejection of the moral beliefs of some Americans or the vindication of the moral beliefs of other Americans. It should simply be read for what it is: a ringing endorsement of the principle that in the United States of America, decisions of fundamental morality are not the province of the legislature. Rather, the Constitution protects the right of all citizens to decide for themselves questions fundamental to their view of life, meaning, and existence. The answers to those questions are certainly open to robust debate in a free society. But, unless such answers result in a demonstrated harm to others, it is fundamentally impermissible for the state to criminalize them.

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