February 15, 2009

MORALS LEGISLATION SINCE LAWRENCE V. TEXAS: THE ARGUMENT FOR BONOS MORES

Carman A Leone, Villanova University School of Law

Available at: https://works.bepress.com/carman_leone/1/
MORALS LEGISLATION SINCE LAWRENCE V. TEXAS: THE ARGUMENT FOR BONOS MORES

By: Carman A. Leone
ABSTRACT

In 2003, the Supreme Court of the United States held in *Lawrence v. Texas* that any law that criminalized the act of homosexual sodomy was in violation of the Due Process Clause of the Fourteenth Amendment. The result was not as shocking as the analysis the Court used to come to its decision. Justice Kennedy, writing for the majority, used an unprecedented, ambiguous and unclearly defined balancing test that worked outside the fundamental/non-fundamental framework within which the prevalent substantive due process test operated.

In order to reach its decision, the Court overturned its 1986 case, *Bowers v. Hardwick*, which upheld an Alabama law that criminalized homosexual sodomy under a rational basis review. In *Bowers*, the Court held that the perception of morality is a legitimate state interest that satisfies a rational basis challenge. The *Lawrence* Court, however, not only overturned the holding of *Bowers*, but it also explicitly rejected the state from using morality as a legitimate state interest for supporting its legislation. In his dissenting opinion, Justice Scalia warned of the demise of morals legislation that would inevitably come in the wake of *Lawrence*.

Several United States Circuit Courts of Appeals are now divided as to whether morality alone may serve as state interest in supporting legislation. This paper will argue that morality should satisfy a rational-basis review in light of a century’s wealth of history and tradition in case law that precedes *Lawrence*. Furthermore, I will argue that the Court’s increasing willingness to deviate from traditional interpretive methods of adjudication serves as an impermissible expansion of the judiciary’s role under the Constitution. I will also outline the social dangers as well as negative public policy repercussions that accompany such expansion.

To frame the issue, I will first provide background analysis to the disagreement over the exact holding in *Lawrence* in Part I of this paper. In Part II, I will anchor the disagreement over
the role of morality as an acceptable criterion of state interest by analyzing the current split in the United States Circuit Courts of Appeals over the legality of obscenity laws stemming from the conflicting interpretations of *Lawrence*. In Part III, I will give an overview of the traditional role of rational-basis review, analyze criteria that have historically satisfied rational-basis challenges and show how traditional morality has served as a legitimate state interest for centuries. In Part IV, I will address the arguments for and against continuing this tradition and will attempt to identify who in our system has the authority to balance the “liberty of all” and public morality.
TABLE OF CONTENTS

PART I: BACKGROUND TO THE AMBIGUITY OF LAWRENCE..............................7

PART II: CIRCUIT COURT SPLIT: THE ROLE OF MORALITY IN SUPPORTING
OBSCENITY LAWS..............................................................10

   A. Eleventh Circuit..........................................................10
   
   B. Fifth Circuit............................................................13
   
   C. Consequences...........................................................15

PART III: TRADITIONAL RATIONAL-BASIS REVIEW AND MORALITY............15

PART IV: SUBSTANTIVE DUE PROCESS AND THE ROLE OF MORALITY AS A
      LEGITIMATE STATE INTEREST..............................................22

   A. Primary Arguments Concerning Morals Legislation...........................22

      1. Subjectivity v. Intersubjective Agreement.................................22
      
      2. Libertarian Harm Principle v. Restraintist Burkean Approach...........24
      
      3. Authority to Balance the “liberty of all” and Public Morality: Federal Judiciary v. State Legislature.....................................................27
      
      4. The Historic Role of the Court in Championing Minority Rights:
         Consequentialism v. Formalism...........................................33
         
   B. Final Argument: the Natural Law, Morals, and the Responsibility of the
      Judiciary.................................................................36

PART V: CONCLUSION...................................................................40
In 2003, the Supreme Court of the United States held in Lawrence v. Texas\(^1\) that a Texas statute prohibiting an individual from “engaging in sexual deviate intercourse with another individual of the same sex”\(^2\) violated the United States Constitution. The Lawrence decision had further-reaching effects than simply the elimination of a law forbidding homosexual “deviate intercourse.” Despite the language in the majority opinion that implicitly encouraged a narrow interpretation of the holding’s limited reach,\(^3\) the Lawrence decision has nevertheless deviated from the prevailing substantive-due-process analysis for identifying unenumerated fundamental rights\(^4\) and set a new, less-deferential precedent in adhering to stare decisis,\(^5\) while eliminating morality as a “legitimate state interest.”\(^6\)

Concerning Lawrence’s elimination of morality as a legitimate state interest, Justice Kennedy adopted the language of Justice Stevens’s dissent in Bowers v. Hardwick,\(^7\) holding that the morality of the majority may no longer serve as a legitimate state interest in supporting some state statutes.\(^8\) In his dissenting opinion in Lawrence, Justice Scalia admonished the majority opinion, explaining that “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only

---

2. Vernon’s Texas Statutes and Codes Annotated, title 5 § 21.06.
3. Id. at 578 (“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).
4. Id.at 572 (explaining that there 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. ‘[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.’”) Citation omitted; See also generally, Randy Barnett, Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas, 2003 Cato Sup. Ct. Rev. 21 (2002-2003).
5. See id. at 566-78, 586-87 (Scalia, J. dissenting).
6. See id. at 589 (discussing how morality has traditionally served as a valid and rational basis for legislative enactments until this decision) (Scalia, J., dissenting).
8. See id. at 216 (“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 . . .”).
in light of Bowers’ validation of laws based on moral choices. Every one of these laws is [now] called into question. ... Justice Scalia further explained that it is precisely because of the “impossibility of distinguishing homosexuality from other traditional ‘moral’ offenses” that “Bowers rejected the rational-basis challenge.” In the five years since Lawrence was decided, commentators have speculated as to whether Justice Scalia’s dissent was simply an overreaction to the majority opinion or a valid prediction of the end of traditional morality serving as a legitimate state interest in satisfying rational-basis review.

Interpretations differ over the exact holding of Lawrence, however, and many commentators and courts disagree over which level of judicial scrutiny was applied in reviewing the constitutionality of the Texas statute. Some have interpreted Lawrence as recognizing a fundamental right to private and intimate conduct, which suggests that the Texas statute was deemed unconstitutional under a strict scrutiny judicial review. Others like Justice Scalia, however, have rejected this interpretation in arguing that no fundamental right was explicitly identified in the opinion, and therefore, Justice Kennedy must have applied rational-basis review. If Justice Kennedy did apply rational-basis review in deeming the Texas statute unconstitutional, then under this interpretation of Lawrence, morality may no longer serve as a valid source of state power in satisfying a rational-basis challenge.

Given the ambiguity of the decision, and in light of Justice Scalia’s unanswered dissent, several United States Circuit Courts of Appeals are now divided as to whether morality alone may serve as state interest in supporting legislation. This paper will argue that morality should

---

9 Lawrence, 539 U.S. at 590 (Scalia, J., dissenting).

10 Id.

satisfy a rational-basis review in light of a century’s wealth of history and tradition in case law that precedes Lawrence. Furthermore, I will argue that the Court’s increasing willingness to deviate from traditional interpretive methods of adjudication serves as an impermissible expansion of the judiciary’s role under the Constitution. I will also outline the dangers and negative repercussions that accompany such expansion.

To frame the issue, I will first provide background analysis to the disagreement over the exact holding in Lawrence in Part I of this paper. In Part II, I will anchor the disagreement over the role of morality as an acceptable criterion of state interest by analyzing the current split in the Circuit Courts of Appeals over the legality of obscenity laws stemming from the conflicting interpretations of Lawrence. In Part III, I will give an overview of the traditional role of rational-basis review, analyze criteria that have historically satisfied rational-basis challenges and show how traditional morality has served as a legitimate state interest for centuries. In Part IV, I will address the arguments for and against continuing this tradition and will attempt to identify who in our system has the authority to balance the “liberty of all”12 and public morality. Finally, Part V will provide a conclusion.

I. BACKGROUND TO THE AMBIGUITY OF LAWRENCE

One criticism of the Lawrence decision is that Justice Kennedy did not precisely identify which level of judicial scrutiny he applied in analyzing the validity of the Texas statute at issue. Several lower courts and commentators have interpreted the majority opinion as recognizing a

---

fundamental “right to liberty under the Due Process Clause, [giving homosexuals] the full right to engage in their conduct without intervention of the government.”

Furthermore, this first group argues that the Lawrence Court’s discussion of and reliance on Griswold v. Connecticut, Roe v. Wade, and Planned Parenthood of Southeastern Pa. v. Casey, implicitly suggests that Lawrence itself also identified a constitutionally protected unenumerated right. Just as the Courts in Griswold and its progeny applied expansive and novel substantive-due-process tests in identifying unenumerated rights, Lawrence similarly deviated from the prevailing substantive-due-process test that was established in Glucksberg v. Washington when it identified a constitutionally-protected liberty interest to consensual sexual conduct. State laws that infringe on fundamental rights are subject to heightened scrutiny; if Lawrence did, in fact, identify an unenumerated fundamental liberty right, then only narrowly tailored laws supported by compelling state interest can survive the strict scrutiny challenge, and morality alone would arguably not meet the constitutional muster to satisfy this heightened scrutiny requirement.

A second group of lower courts and commentators argue that Lawrence was revolutionary in the way that it applied a heightened level of scrutiny without engaging in the prevailing fundamental/non-fundamental dichotomy of the Glucksberg test. This group argues that neither strict scrutiny nor rational basis-review was applied to the Texas statute, but rather,

---

13 Lawrence, 539 U.S. at 578. Other parts of the majority opinion suggest a recognition of a new fundamental right: “The liberty protected by the Constitution allows homosexual persons the right to make this choice” Id. at 567; “These matters . . .are central to the liberty protected by the Fourteenth Amendment . . .” Id. at 578.

14 521 U.S. 702 (1997). The Glucksberg test requires the Court to first narrowly identify the unenumerated right, and then analyze whether there is rooted recognition of this right in the history and traditions of the nation.

15 See, i.e., Barnett, supra note 4, at 21; Cook v. Gates, 528 F.3d 42, 52 (1st Cir. 2008) (“This court found . . .that Lawrence recognized a protected liberty interest for adults . . .that defies either the strict scrutiny or rational basis level.”); United States v. Marcum, 60 M.J. 198 (U.S. Armed Forces 2004); Nancy C. Marcus, Beyond Romer and Lawrence: The Right to Privacy Comes out of the Closet, 15 Colum. J. Gender & L. 355 (2006); Jerald A. Sharum, Comment, Controlling Conduct: The Emerging Protection of Sodomy in the Military, 69 Alb. L.Rev. 1195, 1202 (2006); Donald L. Beschle, Lawrence Beyond Gay Rights: Taking the Rationality Requirement for Justifying Criminal Statutes Seriously, 53 Drake L.Rev. 231, 276 (2005).
the Court shifted the burden of proving constitutionality from the petitioner to the state. Under this theory, the liberty right of the petitioner is presumed to preexist, and therefore, it is the task of the state to show a legitimate interest for infringing upon that right. Because the Court found that the interest advanced by Texas in *Lawrence*- supporting public morality- was not justified in light of the governmental intrusiveness into the privacy of the plaintiffs, the Texas statute was deemed unconstitutional.

A third group of lower courts and commentators argue that *Lawrence* did not find a fundamental right, and that, contrary to the first and second group’s interpretations, Justice Kennedy applied a rational-basis review in analyzing the validity of the Texas statute. Justice Scalia adopts this view and argues in his dissent that, “nowhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a ‘fundamental right.”

---

16 Barnett, *supra* note 4, at 21 (“Instead of categorizing the right as ‘fundamental,’ the Court took the simpler track of requiring the state to justify its statute, whatever the status of the right at issue (presuming unconstitutionality).”).

17 *Lawrence*, 539 U.S. at 578 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).


19 *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).
in its analysis of Lawrence, which it never did. Therefore, Justice Scalia argued that the
majority misapplied an “un-heard of form of rational-basis review.”

If the Lawrence Court did apply rational-basis review to the Texas statute, then any
legitimate state interest Texas had in support of the law should have passed constitutional
muster. The Lawrence Court, however, found that Texas failed to advance “any legitimate
state interest” in support of its law. Since the sole justification that Texas advanced in support
of the statute was its interest in promoting morality, the Court implicitly held that morality may
no longer serve as a valid state interest in satisfying a rational-basis review. To underscore this
point, the Court quoted Justice Stevens’s dissent in Bowers, reasoning 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. . ..” Justice Kennedy explained
that Justice Stevens’s analysis “should have been controlling in Bowers and should control
here.”

II. CIRCUIT COURT SPLIT: THE ROLE OF MORALITY IN SUPPORTING OBSCENITY
LAWS

A. Eleventh Circuit

In 2001, the United States Court of Appeals for the Eleventh Circuit decided Williams v.
Pryor, upholding the constitutionality of the Alabama obscenity law that prohibited the sale

---

20 The Glucksberg test requires the Court to (1) narrowly identify the asserted fundamental right, and (2) it must be
“deeply rooted in this Nation’s history and tradition” Id. at 721.
21 Lawrence, 539 U.S. at 586 (Scalia, J., dissenting).
22 See id. at 579 (“Under our rational basis standard of review, ‘legislation is presumed to be valid and will be
sustained if the classification drawn by the statute is rationally related to a legitimate state interest.’(quoting
23 Id. at 578.
24 Bowers, 478 U.S. at 216.
25 Lawrence, 539 U.S. at 578.
26 240 F.3d 944 (11th Cir. 2001).
and commercial distribution of any device used to stimulate human genitals. The court reasoned that Alabama’s interest in promoting morality is a valid source of state law which withstands the plaintiff’s constitutional challenge to the statute. The court further explained that not only does public morality serve as a sufficient state interest in meeting a rational-basis challenge, but it can also “satisfy the government’s burden under the more rigorous intermediate level of constitutional scrutiny. . .in some cases.”

One year after Lawrence was decided, the Eleventh Circuit decided Williams v. Attorney General of Alabama. Even though some lower federal and state courts have interpreted the Court’s holding in Lawrence to have eliminated morality as a valid state interest, the Eleventh Circuit nevertheless upheld the Alabama obscenity law that was at issue in the 2001 Williams case.

Although the dissent in Williams v. Attorney General of Alabama relied on Lawrence as binding precedent in protecting the plaintiff’s right to be free from governmental intrusion when participating in private sexual activity within his home, the majority argued that Lawrence did not, in fact, explicitly identify a fundamental right to such behavior. Further, the Eleventh Circuit reasoned that the recognition of a fundamental right to use sexual devices when engaging in lawful private sexual activity in this case would “endanger[. . .our republican democracy”

27 Id. at 956.
28 See id. at 949 (“The crafting and safeguarding of public morality has long been established as part of the state’s plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny.”).
29 Id. at FN4.
30 378 F.3d 1232 (11th Cir. 2004).
31 See id. at 1250.
32 See id. at 1250-51.
33 See id. at 1238 (“In short, we decline to extrapolate from Lawrence and its dicta a right to sexual privacy triggering strict scrutiny.”). The dissent criticized the majority’s rejection of Lawrence as binding precedent. Specifically, it reasoned that since Bowers was overturned, morality and public morals may no longer serve as a sufficient basis to satisfy a rational-basis challenge. Id. at 1251.
because “once elevated to constitutional status, a right is effectively removed from the hands of the people and placed into guardianship of unelected judges.”

The court further explained that Lawrence’s undiscovered substantive due process analysis, in which the Court freely recognized an unenumerated liberty right in the Constitution without application of a coherent or systematic framework, is particularly problematic in light of morals legislation. The court explained that “one of the virtues of the democratic process is that, unlike the judicial process, it need not take matters to their logical conclusion.” The people of Alabama may choose to support a law that prohibits stimulating devices today; if several years from now the majority deems it to be a silly and an unnecessarily restrictive law, then they may repeal the law through their elected representative in the legislature.

On the other hand, if the court were to identify a fundamental right in this case, there can be no justification against laws that prohibit other illegal private sexual behavior like adult incest, prostitution, obscenity, etc.

In 2007, the Eleventh Circuit decided Williams v. Morgan, again upholding the Alabama obscenity law in line with the prior Williams decisions. In Morgan, the court found that “the State’s interest in preserving and promoting public morality serves as a rational basis for the challenged statute.” Moreover, the court held that it does not read the Lawrence

---

34 Id. at 1252. The Eleventh Circuit majority opinion also highlights that the fundamental right asserted in this case fails the Glucksberg analysis because use of sexual devices for genital stimulation is not deeply rooted in the Nation’s history and tradition and because the concept of ordered liberty is not compromised if the right is not recognized. Id. at 1242.
35 Id.
36 Id.
37 Id. The court also quotes Dennis v. U.S., explaining “[h]istory teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political economic and social pressures.” 341 U.S. 494, 525 (1951).
38 478 F.3d 1316 (11th Cir. 2007).
39 Id. at 1320. Specifically, the court relied on Romer v. Evans, affirming that “if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the [law] so long as it bears a rational relation to some legitimate end.” 517 U.S. 620, 631 (1996).
decision as entirely eliminating morality as a state interest in satisfying rational-basis review because to do so would implicitly invalidate several Supreme Court cases not mentioned in \textit{Lawrence} that consider the regulation of public morality as a valid source of state authority.\footnote{See \textit{id.} at 1323. For a detailed discussion of such cases and their legal effect, see Part III, \textit{infra}.}

\textbf{B. Fifth Circuit}

The Fifth Circuit Court of Appeals recently decided \textit{Reliable Consultants v. Earle}, invalidating a Texas obscenity statute that was nearly identical to the statute at issue in the \textit{Williams} cases.\footnote{\textit{Reliable Consultants}, 517 F.3d at 744.} The Fifth Circuit found that “[b]ecause \textit{Lawrence}, the issue before us is whether the Texas statute impermissibly burdens the individual’s substantive due process right to engage in private intimate conduct of his or her choosing.”\footnote{\textit{Id.}} The court applied an expansive substantive-due-process analysis that “follow[ed] the precise instructions from \textit{Lawrence},”\footnote{\textit{Id. at 745}, n 32.} ultimately finding that “the Texas law burdens [the] constitutional right [to engage in private intimate conduct].”\footnote{\textit{Id. at 744.}}

Moreover, the court reasoned that “‘public morality’ cannot constitutionally sustain the statute after \textit{Lawrence}.”\footnote{\textit{Id. at 745}.} Because \textit{Lawrence} overturned \textit{Bowers}, the Fifth Circuit interpreted the Court to explicitly reject the notion that public morality may continue to serve as a sufficient justification for a law that restricts adult consensual intimacy in the home, starkly contrasting the Eleventh Circuit’s holding.\footnote{\textit{Id.} at 745} The Fifth Circuit analogized the statute that prohibited sodomy between members of the same sex in \textit{Lawrence} to the obscenity law in \textit{Reliable Consultants}. In doing so, it reasoned that morality may not serve as a legitimate state interest to support the

\begin{thebibliography}{99}
\bibitem{41} See \textit{id.} at 1323. For a detailed discussion of such cases and their legal effect, see Part III, \textit{infra}.
\bibitem{42} \textit{Reliable Consultants}, 517 F.3d at 744.
\bibitem{43} \textit{Id.}
\bibitem{44} \textit{Id. at 745}, n 32.
\bibitem{45} \textit{Id. at 744}.
\bibitem{46} \textit{Id. at 744}.
\bibitem{47} \textit{Id. at 745}
\bibitem{48} See \textit{id.}
\end{thebibliography}
obscenity law because the statute restricts the right of individuals to participate in private
intimate conduct within their home without governmental intrusion.48

The dissent in Reliable Consultants, however, took issue with the majority’s substantive-
due-process analysis.49 It explained that the majority avoided clearly identifying which level of
scrutiny it applied to the substantive-due-process claim, and that it simply adopted the wording
of Justice Kennedy’s majority opinion in Lawrence when it held that morality alone may not
support the obscenity law at issue.50 According to the Reliable Consultants dissenting opinion,
Lawrence did not apply a strict scrutiny test because it never identified a fundamental right;
therefore, it applied a rational-basis review.51

The dissent further explained that if Lawrence did apply a rational-basis review, then
public morality should have served as a valid state interest in satisfying the challenge.
Moreover, the dissent distinguished Lawrence as inapplicable to its analysis because the Texas
obscenity law at issue in Reliable Consultants is partly public and partly commercial in nature,
while Lawrence only addressed activity that was both private and non-commercial.52

---

48 See id. at 744
49 See id. at 749
50 See id.
51 See id.
52 See id. at 747. Although the Fifth and the Eleventh Circuit decisions provide the starkest contrast in their
respective approaches to obscenity laws, the United States Court of Appeals for the Third Circuit also considered the
role of morality in obscenity laws in United States v. Extreme Associates, Inc. 431 F.3d 150 (3rd Cir. 2005). In
Extreme Associates, the Third Circuit overturned the lower court’s finding that the Pennsylvania’s obscenity statute
was unconstitutional, and based its decision on prior Supreme Court cases that are directly on point. Id. at 161.
Further, the court held that Lawrence posed no obstacle in the court’s ability to reach its decision. Id. However, the
circuit court implicitly rejected the lower court’s interpretation of Lawrence as eliminating the use of morality as a
valid state interest to satisfy a rational basis challenge:

the District Court stated that after the Supreme Court’s decision in Lawrence v. Texas, “the
government can no longer rely on the advancement of a moral code, i.e., preventing consenting
adults from entering lewd or lascivious thoughts, as legitimate, let alone a compelling, state
interest.” As such, the District Court indicated that the Lawrence decision seriously undermines
the validity of the statutes themselves, as well as earlier Supreme Court decisions upholding those
statutes on public morality grounds. Applying the above analysis to Extreme Associates’ motion
to dismiss, the Court concluded that because ‘upholding the public sense of morality is not even a
legitimate state interest that can justify infringing one’s liberty interest to engage in consensual
C. Consequences

The result of invalidating laws that prohibit private sexual conduct, like the statutes at issue in Lawrence and Reliable Consultants, is not merely an elimination of an obscure, rarely-enforced law. Rather, the reasoning upon which such laws are invalidated has rippling effects. One consequence is the confusion that the lower federal and state courts will have in light of the untraditional methodology employed in Lawrence, as illustrated above. When Lawrence deviated from the Glucksberg test, which provided a comprehensive and manageable framework that identified whether an asserted unenumerated right was to be analyzed under a strict scrutiny or rational-basis review, it did so without explicitly overturning Glucksberg. This essentially leaves the lower courts in flux, not knowing when to apply Lawrence or when to apply Glucksberg in substantive-due-process cases.

Moreover, if the lower courts adopt a “group three” interpretation of Lawrence- that Justice Kennedy applied a rational-basis review to the liberty interest identified in the case- then it follows that public morality may no longer serve as a legitimate state interest in meeting a rational-basis challenge. This proposition, however, contradicts traditional notions of rational-basis review and redefines criteria that have historically satisfied such challenges.

III. TRADITIONAL RATIONAL-BASIS REVIEW AND MORALITY

The United States Constitution vests specific enumerated powers to the three co-equal branches of government; the federal government holds only those powers that are specifically granted by the Constitution. Under the Tenth Amendment, the states have “the [police]
powers”\textsuperscript{56} to make laws that regulate all other aspects of life that fall outside of scope of federal authority and that which is “reserved… to the people” in the Bill of Rights.\textsuperscript{57} Although there is no one specific definition of a state’s police powers, the Supreme Court of the United States has consistently interpreted state police powers to be the constitutionally-vested authority to regulate the safety, health, morals, and general welfare of the people.\textsuperscript{58}

A state may enact legislation that concerns one of the elements of control that are within the ambit of its police powers as long as it does not attempt to regulate something that falls outside the scope of this power, such as Congress’s vested authority over interstate commerce\textsuperscript{59} or the people’s fundamental rights. When a state law is challenged for infringing on an individual’s fundamental right, this usually means that the state allegedly does not have the authority to regulate the type of activity that the law targets.

The plaintiff challenging the state law must identify the right upon which the law is infringing. There are two sources for identifying this right: explicit rights listed in the Bill of Rights or other constitutional Amendments, or unenumerated rights protected by the Ninth Amendment\textsuperscript{60} that are interpreted to derive from the Due Process Clause of the Fifth and Fourteenth Amendments. When a court hears a case in which an individual asserts that an

\begin{footnotes}
\footnote{56 U.S. Const. amend. X.}
\footnote{57 Id.}
\footnote{58 See, i.e., \textit{Jacobson v. Massachusetts}, 197 U.S. 11.26 (1905) (holding, “The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restrains to which every present is necessarily subject for common good.”); \textit{Meyer v. State of Nebraska}, 262 U.S. 390, 401 (1923) (holding “[t]hat the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear. . .”); \textit{Louis K. Liggett Co. v. Baldridge}, 278 U.S. 105, 111-12 (1928) (“The police power may be exerted in the form of state legislation . . . only when such legislation bears a real and substantial relation to public health, safety, morals or some other phase of general welfare.”); \textit{Berman v. Parker}, 348 U.S. 26, 32 (1954) (identifying “public safety, public health, morality, peace and quiet [and] other law and order” as appropriate “application[s] of the police power to municipal affairs.”).}
\footnote{59 U.S. Const. art. I sec. 8.}
\footnote{60 U.S. Const. amend. IX. (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).}
\end{footnotes}
unenumerated right has been violated by a particular state law, the court must engage in a substantive-due-process analysis to assess the merits of the claim and determine whether the individual has protection of their asserted right under the Constitution.

The Court’s traditional test to evaluate the merits of an asserted right determined whether the right was rooted in the history and tradition of the nation. If a court determined that the people have historically retained this right, then the right is considered “fundamental”; the court would then apply a strict scrutiny test to the state legislation to determine if the state’s statute was narrowly tailored to target a compelling interest, and to determine if the law was the least discriminatory means to achieve this objective. This is an almost insurmountable hurdle to overcome by the state. If, however, the court found no historically-rooted origin for the asserted right, then the right would not be fundamental, and therefore, the court would apply a lower level of scrutiny- rational-basis review- to determine the validity of the law.

Traditionally, a state may provide any conceivable legitimate interest in support of a law as long as it shows that the statute has a rational means of accomplishing that interest to satisfy a rational-basis review. The Supreme Court held in Romer v. Evans that a justification asserted by the state may pass a rational-basis review “even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” Historically, the Supreme Court has been quite deferential to states in presuming the rationality of their statutes; because state statutes are presumed to be rational, they are, therefore, presumed to be

---

61 Although this test is now known as the Glucksberg test, Griswold, Roe, and Bowers all engaged in a substantive due process inquiry that looked to the history and tradition of the asserted right prior to finding a constitutionally-protected right.


63 Romer, 517 U.S. at 632.
The Court has noted that individual judges should not question the “wisdom, fairness, or logic of legislative choices” but exercise “judicial restraint” when reviewing a rational-basis challenge. The Court in *Bowers v. Hardwick* adhered to such traditional notions of rational-basis review when it considered the state interest asserted by Georgia in support of its statute that criminalized sodomy. After the *Bowers* Court refused to recognize the fundamental right asserted by the petitioners because sodomy has historically been condemned by society, it reasoned that the state interest in supporting the law must only satisfy a rational-basis test.

Although the respondent asserted that the majority’s morality should not satisfy the challenge, the Court nevertheless held that “[t]he law . . . 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.” Further, Justice Burger concurred in a separate opinion, poignantly explaining that the question of whether an individual has the right to engage in sodomy “is not a question of personal ‘preferences’ but rather of the legislative authority of the State,” because nothing in the Constitution deprives the states of the power to enact the type of statute challenged in *Bowers*.

---

64 See generally, *Vacco v. Quill*, 521 U.S. 793 (1997); *Romer*, 517 U.S. 620.; *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206 (1st Cir. 1994); *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235 (3d Cir. 1996); *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997); *Johnson v. Rodriguez*, 110 F.3d 299 (5th Cir. 1997); *Hager v. City of West Peoria*, 84 F.3d 865 (7th Cir. 1996); *Independent Charities of America, Inc. v. State of Minn.*, 82 F.3d 791 (8th Cir. 1996); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997); *Bah v. City of Atlanta*, 103 F.3d 964 (11th Cir. 1997); *Lofoton v. Secretary of the Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004) (“we must credit any conceivable rational reason that the legislature might have for choosing not to alter its statutory scheme in response to this recent social science research [that has proven that homosexuals are at least as capable as heterosexuals at parenting].”).

65 *Beach Communications*, 508 U.S. at 313-14.

66 *Bowers*, 478 U.S. at 196.

67 *Id.*

68 *Id.* at 197 (Burger, J., concurring).
The concept that morality may serve as a legitimate state interest was not a novel issue first recognized in *Bowers*. Rather, the Court has recognized the role of morality as a legitimate state interest for centuries. For example, in 1884, the Court held in *Barbier v. Connolly*\(^{69}\) that the Equal Protection Clause was not intended to “interfere with the power of the state . . . [in prescribing] regulations to promote health, peace, morals, and good order of the people.”\(^{70}\) In 1905, even the Court in *Lochner v. Massachusetts*,\(^{71}\) which was later overturned as an arbitrary substantive-due-process case, recognized that within the sovereignty of each state exist police powers which primarily relate to “the safety, health, morals, and general welfare of the people.”\(^{72}\) Several other cases underscore the similar point: the state has the power, vested by the Constitution, to regulate the morality of the people.\(^{73}\)

The Court continued to recognize morality as a legitimate source of state police power throughout the twentieth century, until *Lawrence* was decided. In 1973, the Court held in *Paris Adult Theatre I v. Slaton*\(^{74}\) that Georgia’s statute prohibiting the screening of obscene films in an adult theater is not unconstitutional so long as the law satisfied the First Amendment standards, which the Court found that it did.\(^{75}\) The court explained that:

> Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation, is a step that we are unable to take.\(^{76}\)

\(^{69}\) 113 U.S. 21 (1884).

\(^{70}\) *Id.* at 31.

\(^{71}\) 198 U.S. 45 (1905).

\(^{72}\) *Id.* at 53.

\(^{73}\) For a list of such cases, see *supra* note 63.

\(^{74}\) 413 U.S. 49 (1973).

\(^{75}\) *Id.* at 69-70.

\(^{76}\) *Id.* at 68.
Furthermore, the Court in *Paris Adult Theatre I* reasoned that a state’s authority to regulate obscene conduct is more than simply its desire to prohibit conduct that it deems “wrong” or “sinful,” but rather, states have “the right. . .to maintain a decent society.”

Approximately twenty years later, the Court upheld the constitutionality of an Indiana public indecency statute in *Barnes v. Glen Theatre, Inc.*, recognizing that it has consistently allowed states to regulate the health, safety, and morals of society. In *Barnes*, the Court accepted the state’s sole asserted interest as a permissible justification for the public indecency law: the protection of “order and morality.” In his concurrence, Justice Scalia added that all human societies outlaw some activities because they are immoral. Further, he explained that laws against sadomasochism, cockfighting, bestiality, suicide, etc., are not prohibited as unconstitutional simply because they regulate morality.

Morality has not only served as a legitimate state interest for centuries, but it also has served as a legitimate federal interest, too. In *Heart of Atlanta Motel, Inc. v. United States*, the Court recognized that even though Congress was “legislating against moral wrongs” when it passed the Civil Rights Act of 1964, the effect of the law was “no less valid.” In *Heart of Atlanta*, a motel operator brought an action for declaratory judgment, challenging the constitutionality of the Civil Rights Act of 1964, which prohibited owners of hotels and

77 *Id. at 69* (quoting Jacobellis, 378 U.S. at 199.)
79 *Id. at 569* (“This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the states is defined as the authority to provide for the public, safety, and morals, and we have upheld such a basis for legislation.”).
80 *Id.*
81 *Id. at 575* (Scalia, J. concurring). *See also, City of Erie v. Pap’s A.M.,* 529 U.S. 277 (2000) (holding that a Pennsylvania statute that regulated public nude exotic dancing was not unconstitutional). Although the Court in *Pap’s A.M.* analyzed the constitutionality of the statute in light of First Amendment challenges, Justice Scalia addressed the issue of allowing the legislature to draft laws based on traditional morals and values of society in his concurrence. He explained that the traditional power of government to foster good morals and to eliminate immoral behavior has not been repealed by any interpretation of the Constitution.
82 *Id.*
84 *Id. at 257.*
restaurants from choosing to serve people according to their race.\textsuperscript{85} The Court held that it was appropriate for Congress to enact legislation to correct societal behavior that was “deemed a moral and social wrong.”\textsuperscript{86}

Despite the wealth of case law that preceded \textit{Lawrence}, Justice Kennedy nevertheless found that public morality may no longer serve as a legitimate state interest to support a law that proscribes homosexual sodomy.\textsuperscript{87} As part of his reasoning, Justice Kennedy cited \textit{Dudgeon v. United Kingdom}\textsuperscript{88} in highlighting the growing global recognition that homosexual conduct should not be regulated.\textsuperscript{89} However, although Justice Kennedy cited one isolated international opinion to support his decision, he failed to cite countervailing international opinions that undermine his ultimate decision to ban morality as a legitimate state interest.

In \textit{Handyside v. United Kingdom},\textsuperscript{90} for example, the European Court of Human Rights recognized the powerful role morality plays as a legitimate interest of a sovereign state.\textsuperscript{91} At issue in \textit{Handyside} was whether a British law\textsuperscript{92} that prohibited the publication of obscene material in the United Kingdom was in violation of the United Nations Human Rights Convention’s right to free speech.\textsuperscript{93} The applicant in \textit{Handyside} was a publisher who wanted to

\begin{itemize}
\item \textsuperscript{85} Id. at 241.
\item \textsuperscript{86} Id. at 257.
\item \textsuperscript{87} \textit{Lawrence}, 539 U.S. at 578.
\item \textsuperscript{89} \textit{Id.} at 573 (“The [\textit{Dudgeon}] court held that the laws proscribing [consensual homosexual conduct] were invalid under the European Convention on Human Rights.”).
\item \textsuperscript{91} See generally id.
\item \textsuperscript{92} Obscene Publications Act 1959/1964:
\begin{itemize}
\item Section 1
\begin{itemize}
\item (1) For the purpose of this act an article shall be deemed to be obscene if its effect . . . is . . . to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter. . .
\end{itemize}
\end{itemize}
\item \textsuperscript{93} Id. at ¶ 46. Article 10 of the Convention provides:
\begin{itemize}
\item 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
\item 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of the
\end{itemize}
\end{itemize}
disseminate “The Little Red Schoolbook,” a 208-page book designed for school-aged children twelve years old and upwards, that discussed topics including “Masturbation, Orgasm, Intercourse and petting, Contraceptives, Wet dreams, Menstruation, Child-molesters or ‘dirty old men,’ Pornography, Impotence, Homosexuality, Venereal diseases, Abortion, Legal and illegal abortion,” etc.\(^9^4\) The book also taught children how to consume drugs and encouraged other rebellious behavior.\(^9^5\)

Although the European Court of Human Rights recognized the need for unfettered speech and the value of a free press, it held that England’s countervailing interest in banning the publication of the book in order to protect public morality and decency must prevail in this case.\(^9^6\) Therefore, while Lawrence cited Dudgeon as being on point concerning the evolving views of homosexuality in the international community, it ignored the fact that each country’s interest in protecting its own societal values and morals will often provide the strongest interest in supporting its own laws.

IV. SUBSTANTIVE DUE PROCESS AND THE ROLE OF MORALITY AS A LEGITIMATE STATE INTEREST

A. Primary Arguments Concerning Morals Legislation

1. Subjectivity v. Intersubjective Agreement

   reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

\(^9^4\) Id. at ¶ 20.

\(^9^5\) Id. at ¶ 32. The following is a passage from The Little Red Schoolbook cited in Handyside:

   A. Be yourself
   Maybe you smoke pot or go to bed with your boyfriend or girlfriend- and don’t tell your parents or teachers, either because you don’t dare to or just because you want to keep it secret.
   Don’t feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are ‘approved of.’

   C. Pornography
   Porn is a harmless pleasure if it isn’t taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed. But it’s quite possible that you may get some good ideas from it and you may find something which looks interesting that you haven’t tried before.

\(^9^6\) Id. at ¶ 59.
One initial argument made against morals legislation is that there should be no laws solely based on morality because such laws are subjective; if everyone freely lives by different concepts of morality, then no law can enforce one moral norm. One commentator explains, however, that this argument is flawed because “[e]very legal issue, however superficially technical, is a moral issue, for its resolution inevitably has morally important consequences for someone.”

Furthermore, people can agree on the colors of a tablecloth or curtains or even on the wetness of the street, but we may all disagree in our views on abortion, segregation and the value of punishment. However, disagreement over values should not be used to prove that an opposing view is personal, subjective, and incapable of rational demonstration. Subjectivity of moral issues, or relativism, is “no more than a plea for tolerance or pluralism among cultures” in that the goal is not elimination of contrasting perspectives, but recognition of different values.

Understood as such, relativism is entirely consistent with moral realism. An individual may be tolerant and pluralistic while believing that someone else with contrary views and values is simply wrong in his or her beliefs. Therefore, relativism presupposes realism: tolerance and pluralism are objective truths applicable to any culture. People can disagree about many different issues, but the simple fact of disagreement does not, in itself, show that there is no fact of the matter in dispute; “[t]o think otherwise is to confuse intersubjective agreement with subjectivity.”

---

99 See id.
100 Id. at 1089.
101 See id.
102 See id.
103 Id. at 1090.
2. Libertarian Harm Principle v. Restraintist Burkean Approach

Another argument that is often raised in opposition to morals legislation is that the government should not interfere with or inhibit an individual’s ability to engage in private, intimate conduct so long as that conduct does not harm anyone else. John Stuart Mill’s “harm principle” holds that the government may only legitimately exercise control over a civilized community in order to prevent harm to others.104 Several commentators have adopted this theory, and argue that laws that restrict private conduct are unnecessarily intrusive on an individual’s “absolute”105 right to be free from state control.106

For example, in his article “Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas,” Professor Randy Barnett draws the distinction between a state’s legitimate capacity to regulate “wrongful” behavior and the illegitimate regulation of “immoral behavior.”107 According to Barnett’s “libertarian” theory, wrongful behavior is justifiably regulated by the state because such behavior harms others; immoral behavior, on the other hand, is not always wrongful, and thus, must not be always regulated.108 Barnett and other opponents of morals legislation acclaim the Lawrence decision for its recognition of individuals’ rights that protect

104 John Stuart Mill, On Liberty, Gateway: 1955, (original copyright 1859), p. 23 (“That the 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.”).
105 Id.
106 See, i.e., Barnett, supra note 4, at 37-38; Jami Weinstein and Tobyn DeMarco, Challenging Dissent: The Ontology and Logic of Lawrence v. Texas, 10 Cardozo Women’s L.J. 423, 423 (2004) (“It is incumbent on any free society to allow its citizens to autonomously construct their own concept of existence and personhood, provided that their doing so does not obstruct the freedom and self-determination of others.”); Marcus, supra note 18, at 370 (“Lawrence’s powerfully articulated recognition of liberty of the person both in its spatial and more transcendent dimensions, as necessarily limited by the harm principle, was lacking in the Lochnerian cases which limited workplace protections against harms to workers.”)
107 Barnett, supra note 4, at 37-38. (“Wrongful behavior that violates the rights of others may justly be prohibited without violating liberty rights- although ‘wrongful’ is not the same as ‘immoral’...because it is usually immoral to wrongfully violate the rights of others, the entirely justified prohibition on wrongful behavior also necessarily prohibits much immoral behavior as well.”)
108 See id.
the “liberty of the person both in its spatial and in its more transcendent dimensions” from “government intrusions into…private places.”

A counter argument to Mill’s harm principle and Barnett’s approach to morals legislation, however, is that theories that champion individual autonomy to the extent that Mill and Barnett propose inevitably lead down a slippery slope. For example, if a law that bans private conduct among homosexuals is invalidated simply because the activity does not “harm” anyone, then there can be no argument against laws that proscribe adultery, fornication, bestiality, suicide, private drug use, or any other illicit behavior. Laws that require helmet use while riding a motorcycle or bike would be considered an imposition on an individual’s “spatial” and “transcendent” dimensions under such theory. The argument against prohibiting prostitution disappears in light of Mill’s harm principle, if legalization could control any related health issues. Laws against viewing child pornography in private have no legitimacy under such libertarian principles.

Furthermore, Mill’s harm principle is flawed in that it does not provide a definition of “harm,” which is impossible to define without making some kind of moral judgment. If harm is restricted to the physical sense of the word, then any law that does not prevent the infliction of physical pain from one individual onto another loses its justification- an absurd notion in light of myriad of laws that exist outside of this definitional scope. If, however, harm includes emotional, intellectual, or some other transcendent injury, then some notion of morality must be considered in drawing lines of distinction between acceptable and unacceptable behavior.

---

109 Lawrence, 539 U.S. at 562.
110 See id. at 590 (Scalia, J., dissenting).
111 Id. at 562.
112 See Grostic, supra note 11, at 175.
One commentator noted that the “conservative Burkean” approach is an alternative theory to the Millian harm principle. While Mill’s theory would forbid the state from enacting legislation that interferes with seemingly harmless conduct, the Burkean approach considers the nation’s history and tradition before recognizing an unenumerated and unrestrained right to such behavior. This closely resembles the Glucksberg test for identifying unenumerated fundamental rights protected by the Constitution, which also relies on the rooted traditions and historical considerations, as opposed to contemporary, novel and unprecedented approaches like the analysis applied in Lawrence.

The contrast of the two approaches is sharp; the conservative Burkean approach gives states more leverage in regulating public morality at the expense of personal liberty, while Mill’s harm principle gives the Court more leverage in identifying fundamental rights thereby restricting state control over public morality. This contrast precisely highlights the issue that the current Court wrestles with: which substantive-due-process analysis should be applied to identify unenumerated rights after Lawrence?

Should the Court now abide by Justice Kennedy’s approach in Lawrence, or may it still use Justice Rehnquist’s test in Glucksberg? Because the identification of an implicit fundamental right in the Constitution determines the extent to which a state may regulate that right, the choice of analysis to be applied in substantive-due-process cases essentially determines who in our system has the power and authority to regulate moral behavior.

The restraintist Glucksberg approach will leave the power primarily in the hands of the legislator because only few unenumerated rights will be recognized when applying Glucksberg’s history-and-tradition test. If a right is not considered to be “fundamental” under the Glucksberg

114 See id.
test, the state will have a much greater chance in justifying the constitutionality of its law because it will be held to a lower level of judicial scrutiny. Under Lawrence, however, because “history and tradition are the starting point but not the ending point of the substantive due process inquiry,” the Court is free to use a borderless concept of substantive due process, which gives it the primary role in protecting all the sweet “myster[i es] of human life” from the state morals laws.

3. Authority to Balance the “liberty of all” and Public Morality: Federal Judiciary v. State Legislature

The question remains- who in our system has the right to regulate morality? Some, like Barnett, consider the judiciary to be the authority in our system to determine the extent of liberty of the people; if state legislatures are permitted to construct laws solely based on morality, the state would be equipped with too much power. In the Lawrence v. Texas oral arguments, Justice Breyer asked the representative of Texas, “telling very serious lies to your parents at the dinner table is immoral; can the state of Texas, or any other state, criminalize that?” Justice Breyer was suggesting that if state legislatures had the power to regulate anything and everything desired, they would be an unbridled super legislature.

---

115 Lawrence, 539 U.S. at 572.
116 The sweet “mystery of human life” passage has come to epitomize the expansive and undisciplined substantive due process approach that the Court first adopts in Casey, and further develops in Lawrence. The Court in Casey held, “[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” Casey, 505 U.S., at 851.
117 Lawrence, 539 U.S. at 574.
118 Casey, 505 U.S. at 850. (explaining that the Court’s duty is “to define the liberty of all, not to mandate [their] own moral code.”).
119 See Barnett, supra note 4, at 36-37. (“In practice, therefore, a doctrine allowing legislation to be justified solely on the basis of morality would recognize an unlimited police power in state legislatures. Unlimited power is the very definition of tyranny. Although the police power of states may be broad, it was never thought to be unlimited.”).
120 Lawrence v. Texas oral argument, recording at 42:03.
On the other hand, some proponents of fierce federalism, like Justice Scalia, believe that the power to regulate morality must remain with the “democratic majority.” This theory is grounded on several arguments. First, state legislatures have an additional check on its power that the federal judiciary lacks: an elected official who is accountable to his or her constituency and who must face the consequences of unpopular decisions come reelection year.

Secondly, the federal judiciary, along with some state judicial seats, requires no accountability to the people. Third, the appointment process is an internal procedure, and some appointments, like the Supreme Court of the United States, are for life-long terms. Although the appointment process and the life-terms of justices are beneficial in that they promote the virtues of neutrality and candid decision making, the danger is that tenured judges may rule according to personally-held beliefs without fear of losing their jobs.

While there are dangers in construing this balancing power to be in the hands of either the judiciary or the legislature, in my view, both the judiciary and the state legislature must share the responsibility in balancing the liberty of all with the regulation of morality. While I find federalism principles compelling, I disagree with Justice Scalia to the extent that I do believe the Ninth Amendment gives constitutional protection to certain unenumerated rights, and that substantive due process is the mechanism by which the court may exercise this right on behalf of

---

121 Lawrence, 539 U.S. 603 (Scalia, J., dissenting).
122 See Lino A. Graglia, Lawrence v. Texas: Our Philosopher Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law, 65 Ohio St. L.J. 1139, 1149 (2004) (“Legislators do not have to engage in pretenses to make policy choices, and unlike Supreme Court Justices, they can lose their jobs.”).
123 See J. Budziszewski, Civilizing Authority: Society, State, and Church, (Ed. Patrick McKinley Brennan), Lexington Books: New York, pp. 156-58. One illustration of this danger is the decision of the California Supreme Court’s In re Marriage Cases, in which the court legitimized marriage between members of the same sex, despite a ballot referendum in 2000 that reflected the opposing sentiments of the Californian public on the moral issue. 183 P.3d 384 (Cal. 2008). Although sixty-one percent of the voters in California made clear that they wished to amend the constitution to include a provision that limits the definition of marriage to heterosexual couples, the California Supreme Court overrode the public’s decision by permitting same-sex couples to legally marry. Id. at 453. It did so even though the United States Supreme Court has never interpreted the U.S. Constitution as recognizing a fundamental right to homosexual marriage.
the people.124 Where I differ in opinion from libertarians like Barnett, however, is that I believe the Court must be more disciplined when engaging in a substantive-due-process analysis; I find Lawrence’s unprecedented and structureless analysis to be undisciplined and an unacceptable model for use in future substantive-due-process cases.

Currently, both Lawrence and Glucksberg are two completely different methods of applying substantive due process that can achieve opposite results if applied to the same claim, but each are still technically valid tests. Though Lawrence came after Glucksberg, Glucksberg is still good law because it was never explicitly overturned by any subsequent case. As illustrated in Part II, this has created problems for lower federal and state courts in determining when to apply one substantive-due-process test over another. To solve this problem, I believe the Court should adopt one reasonable, systematic, structured and disciplined substantive due process that is grounded in the Constitution.

In deciding between the two types of substantive-due-process tests, the Court should adopt Glucksberg, or a similar test, as its one and only framework that may be applied in all cases; a Lawrence-type analysis should be avoided. There are several reasons for this. First, application of an analysis like that conducted in Lawrence lacks a structured framework to help judges decide the constitutional protection of an asserted right. Without a clear and consistent test to guide them, justices may be tempted to identify unenumerated rights according to those they believe ought to exist, as opposed to those that are grounded in the Constitution.125

Once a right is identified as being protected by the Constitution, the decision is not easily reversed; therefore, if the Supreme Court erroneously identifies an unenumerated fundamental

124 See Troxell v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (explaining that in his view, “[the] Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”).
125 See McDonnell, supra note 120, at 341. See also Graglia, supra note 129, at 1146-47.
right using an undisciplined test, it is nearly impossible do anything about the decision. While a robust theory of natural human rights would possibly favor such firm support through Constitutional law, this is only beneficial if the Court is making well-reasoned and methodical decisions through application of a sensible substantive-due-process test.

Glucksberg, on the other hand, looks to the history and tradition of the nation before recognizing an unenumerated right. This test ensures that if an implicit right is held to be protected by the Constitution, it will be one that historically has been retained by the people and envisioned by the framers of the Constitution at the time the document was drafted. The originalist approach that the Glucksberg test employs, however, need not be the only way to identify unenumerated rights. There could be developments in society that give rise to rights worthy of constitutional protection that are not specifically enumerated and not necessarily rooted in the history and tradition of the nation.

This recognition of emerging rights, however, should not give the Court the license to arbitrarily identify unenumerated rights. Even if the Court does adopt one substantive-due process-test, but chooses not to use the Glucksberg history-and-tradition test, it should still nevertheless structure its test with clear methodical steps that can be applied time and time again. If the Court wanted to employ a test that gives more recognition to developing constitutionally-protected rights that fall outside the scope of what the framers envisioned, it should consider the competing interests that often weigh for and against the recognition of an emerging right, and

---

126 See Nelson Lund and John O. McGinnis, Lawrence v. Texas: Judicial Hubris, 102 Mich. L. Rev. 1555, 1602 (2004) (explaining how federalism reduces the risk of error because it does not require judges to determine the right line between liberty and license through armchair analysis, but provides feedback information on a range of possible balances as states experiment with different social policies. It also reduces the risk of the cost of correcting errors by making it much easier to change direction when appealing new norms prove to have unforeseen drawbacks).

carefully apply balancing tests that take into account current societal interests, tradition, evolving standards, etc.\textsuperscript{128}

Futhermore, having a clear, consistent, framework that is grounded in the Constitution also helps increase the accountability of the justices to one another. Currently, the justices are arguably accountable to the deliberative demand of the other members of the Court, but that accountability only achieves so much. The justices are free to agree or disagree with one another without consequence. Adopting a disciplined substantive-due-process test would only increase accountability to one another; opinions like \textit{Lawrence} would not be as “vulnerable to ridicule of . . . dissent.”\textsuperscript{129}

Most importantly, the Court should adopt a test that is predictable. As part of this predictability requirement, the Court should retain the fundamental/non-fundamental dichotomy that the Court employs in the \textit{Glucksberg} test- and rejects in \textit{Lawrence}- that determines the level of judicial scrutiny that will be applied to the challenged state statute. If the Court were to adopt a \textit{Lawrence}-type analysis as its sole substantive-due-process test, state legislators could not draft laws without knowing if their statute will be later deemed unconstitutional for infringing on some fundamental right yet to be identified.

\textsuperscript{128} See Graglia, \textit{supra} note 129, at 1146-47. Graglia illustrates the difficulty of the judiciary in balancing competing interests on policy-based decisions, explaining:

A question can arise, for example, as to whether leafleting or loudspeakers should be allowed in a public park. Because interests recognized as legitimate--providing an additional opportunity for communication and providing an additional place for rest and recreation--are in conflict, a policy judgment must be made. The essence of self-government is that it is to be made by the people who will be affected, not made for them by some supposedly superior person or persons. Leaving the decision to a judge will not produce the “correct” decision, but only one likely to be more in accordance with views of the cultural elite, more protective of the speech interest, because speaking is what the cultural elite do, and less concerned with avoiding the harms, from which the elite are usually best able to protect themselves. You may not need a public park, for example, if you have a private country club.

\textit{Id.} at 1147.

\textsuperscript{129} Barnett, \textit{supra} note 4, at 41.
In Barnett’s interpretation of the substantive due process technique that Justice Kennedy used in *Lawrence*, the state is required to “justify its restriction.”\(^{130}\) If the state cannot provide a good enough justification for its law, then it is deemed unconstitutional. This type of analysis essentially shifts the presumption of a state’s law from constitutional to unconstitutional, which undermines the deference that the Court has historically afforded states regarding the constitutionality of their statutes.

Furthermore, under a *Lawrence*-type analysis, states will not know what a valid justification for a law may be before it is reviewed by the court. The Court’s invalidation of morality as a “legitimate state interest,” without identifying which level of judicial scrutiny was applied in *Lawrence*, underscores this point. This confused process adds strain on the resources of both the state and federal government by promoting litigation and challenges to the uncertain scope of state power. Further, the Court’s use of an undisciplined test will often result in the encroachment of the state’s vested police powers guaranteed in the Tenth Amendment of the Constitution, while simultaneously aggrandizing the scope the federal judiciary’s power.

On the other hand, using a predictable test like *Glucksberg* can help states predict the validity of their laws at the drafting stage, before they come across the federal bench. With the application of a predictable test, states can ensure that the laws they enact will not infringe on any existing fundamental right, or run afoul of the criteria the Court uses in determining the constitutional protection of an uneumerated right.

Once a fundamental right is identified through application of a clear, disciplined and predictable substantive-due-process test that is rooted in the Constitution, then the state must be able to regulate morality as long as it does not result in an infringement of that identified fundamental right. Thus, by virtue of this approach, the Court and the states would each

\(^{130}\) Barnett, *supra* note 4, at 40.
separately and responsibly exercise their power in regulating the liberty and morality of the people while each remaining within the scope of their constitutionally-vested authority.

4. The Historic Role of the Court in Championing Minority Rights: Consequentialism v. Formalism

Another argument asserts that courts should solely retain the power to regulate morality because the judiciary was designed to protect the “insular and discrete minorities” from the dangers of a majoritarian democracy, and have done so for centuries.\(^\text{131}\) Essentially, the judiciary serves as a check on a flawed democracy. Furthermore, some Supreme Court decisions like *Brown v. Board of Education*,\(^\text{132}\) which championed minority rights, are overwhelmingly considered today as being heroically decided. Therefore, why should courts have a less influential role when (1) they have been creating common law in the way they see fit for centuries without relying on one conclusive substantive-due-process test, and (2) some of those decisions have afforded many minorities rights they arguably may not have secured had the Court not stepped in?

The response to this argument is several-fold. First, while the Court may have created common law for centuries, it was never the original intention of the framers of the Constitution that the Court would have such unfettered power and capacity.\(^\text{133}\) The Federalist No. 78 explains how the judiciary was envisioned to be the “least dangerous” branch of government because, among other reasons, it had no vested right to “take [] active resolution.”\(^\text{134}\)

---


\(^{133}\) See generally Budziszewski, *supra* note 130. But see generally Powell, *supra* note 135.

\(^{134}\) *Id.* at 148.
Anti-federalist Brutus voiced concern that if one branch has the sole power to interpret the constitution, the co-equal system of checks and balances would be undermined.\textsuperscript{135} Federalist Hamilton decried such fears, explaining that the “natural feebleness” of the Court’s design and the principle of \textit{stare decisis} were sure to keep the judiciary from abusing its power.\textsuperscript{136} Other anti-federalists were opposed to the ratification of the Constitution, in part, because of the power that the Supreme Court would have over the people despite not being elected or truly representative of the people.\textsuperscript{137}

Secondly, while the Court has developed the common law since its inception, the nation undeniably has become more heterogeneous with the passage of time. Consequently, as the melting pot of America becomes more diverse, the desires of various groups will increasingly grow in demand and in many different directions. Heterogeneity, however, does not entail relativism. Therefore, it is impossible for a single justice, or five for that matter, to unilaterally determine what is good for America, or for one sector of population over another; a beneficial decision for one group will often result in a detriment for another. The cultural battle is no longer white America v. black America as it was in the early to mid-1900s; rather, today, there are many other struggles that are colored with various shades of grey.

In light of this country’s increasing diversity and the associated competing interests, it is important for our lawmakers and our judiciary to understand that “[t]o change the law is inevitably to change the position of some people in morally important ways.”\textsuperscript{138} Therefore, judgments in the area of morals legislation must be responsibly shared between the democratic process of competitive federalism, which is checked with the virtue of public accountability, and

\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{See} Graglia, \textit{supra} note 129, at 1139.
\textsuperscript{137} \textit{See} Powell, \textit{supra} note 135, at 906.
\textsuperscript{138} Gardner, \textit{supra} note 102, at 11.
a responsible judiciary that applies a consistent, disciplined, and predictable substantive due process test that is rooted in the Constitution when analyzing a claim to an unenumerated fundamental right.\textsuperscript{139}

As far as the Court’s function as a check to a flawed democracy, the lack of any limiting principle endowed to the courts makes it difficult to determine whether they can, alone, make better decisions than those produced in conjunction with American democracy.\textsuperscript{140} Moreover, courts are ill-equipped to be the sole policy decision makers because of their detachment from the people: debates are conducted in private, judges have no way to receive input from the public, and the court has no capacity to compromise or develop a consensus.

With respect to the argument concerning \textit{Brown v. Board of Education}, while one may support the result of \textit{Brown}, one can still disagree with the way in which the Court applied an undisciplined substantive-due-process analysis in order to reach a consequentialist decision. In fact, it is precisely because of the success and praise of \textit{Brown} that could very well have led to Justice Kennedy’s attempt to recreate the same type of sweeping change in \textit{Lawrence}.

The difference between the two cases, however, is that \textit{Lawrence} did not legalize homosexual sodomy, “but instead ratified a sweeping change in social attitudes that had occurred a generation before [the] case was decided.”\textsuperscript{141} \textit{Brown}, on the other hand, was revolutionary in that it eliminated segregation laws while spurring a newfound respect for minority rights. One

\textsuperscript{139} For example, looking at the marriage issue in note 130, various populations differed drastically over support for Proposition 8, the most recent Californian ballot initiative that asked the population to decide whether an amendment should be made to the California Constitution that defines marriage between a man and a woman. The amendment passed 52 percent in favor compared to 48 percent; however, “[w]hites and Asians opposed the measure by 51 to 49 percent; it was supported by blacks (70 to 30 percent) and Latinos (53 to 47 percent). Most voters over 30 supported the measure; voters under 29 opposed it by 61 to 39 percent.” Michael Barone, \textit{Another Same Sex Marriage Ballot Initiative in California?}, USNews.com, November 10, 2008. Available at: http://www.usnews.com/blogs/barone/2008/11/10/another-same-sex-marriage-ballot-initiative-in-california.html?s_cid=rss:barone:another-same-sex-marriage-ballot-initiative-in-california

\textsuperscript{140} Lund and McGinnis, \textit{supra} note 134, at 1604.

could argue that the Court in Brown was simply lucky that the means were justified by its end result. The problem with Brown is that the case has led to similar attempts to create sweeping change that resulted in ridiculed decisions like Roe v. Wade\textsuperscript{142} and Lawrence.

Further, it can be argued that it was only a matter of time before the sentiment against racial profiling and segregation became legitimately memorialized in law by the legislature, with no need for the undisciplined consequentialist analysis in Brown. For example, Roe and the Civil Rights Act of 1964 both became law within less than ten years of one another. Both were unpopular at the time. Today, however, the Civil Rights Act is universally respected and accepted, while Roe is still vigorously protested with massive rallies like the national March for Life parade. The difference: one was decided by the appropriate political branch of government after consensus and compromise, while the other employed an undisciplined substantive due process analysis that was geared toward reaching a certain result.

B. Final Argument: the Natural Law, Morals, and the Responsibility of the Judiciary

Courts violate the natural law when they overstep their constitutionally-vested duty of interpretation, by making legislative decisions based on personally-held beliefs. One common criticism of natural law arguments is that because there is no clear embodiment of a natural code of law, anyone can use the natural law to support their argument, no matter the argument\textsuperscript{143}. However, this criticism exposes the misunderstanding that many people have of the natural law and the orthodox teaching of the Church on the matter.

\textsuperscript{142} 410 U.S. 113 (1973).
\textsuperscript{143} See Ely, supra note 166, at 50 (“The advantage, one gathers, is that you can invoke natural law to support anything you want. The disadvantage is that everybody understands that. Thus, natural law has been summoned in support of all manner of causes in this country- some worthy, some nefarious- and often on both sides of the same issue.”).
According to the teachings of St. Thomas Aquinas, the natural law is violated by public officials when they overreach their vested authority.\footnote{144 See Russell Hittinger, The First Grace: Rediscovering the Natural Law in a Post-Christian World, ISI Books: Delaware, 2003, p. 103.} Specifically concerning the role of the judiciary, “when the judge ignores the legislator on account of what he believes is best of the community, he inflicts injury upon the common wealth.”\footnote{145 Id.} On the other hand, when the properly constituted political authority makes law - the legislature - it exercises the right to use the natural law to promulgate positive law.\footnote{146 See id. at 111-12.} In essence, human law is derived from the natural law. Furthermore, “the precepts of justice that forbid usurpation are themselves precepts of natural justice[;] [j]udicial preference for natural law over positive law is a contradiction in terms.”\footnote{147 Id. at 112.}

Critics of Lawrence, many of whom are judges, consider the decision to be a prime example of such judicial usurpation.\footnote{148 See generally, i.e., Lund and McGinnis, supra note 134.} Despite the fact that undisciplined substantive due process has proliferated within the past half century or so, there are many justices and judges who have voiced criticism over the expansion of the judicial role in the way the Supreme Court has used unstructured and undisciplined substantive-due-process analyses in order to reach predetermined outcomes. This criticism is particularly poignant in the Court’s treatment of unenumerated privacy rights.

As early as 1885 the Court has rejected certain challenges to the constitutionality of state legislation that allegedly infringed upon the privacy rights of adults. In Murphy v. Ramsey,\footnote{149 114 U.S. 15 (1885).} the Court praised legislation that proscribed polygamous unions, explaining that no law could be more “wholesome” and “necessary” than one that maintains the “sure foundation of all that is
stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.”\textsuperscript{150} Two years later, the Court recognized in \textit{Mulger v. Kansas}\textsuperscript{151} that the legislatures must have the power to restrict individual liberty for the benefit of the common good “[or] else society will be at the mercy of the few” who would endanger the peace and security of the many to appease “their own appetites and passions” and “do as they please.”\textsuperscript{152}

Several years later in \textit{Lochner}, Justice Harlan’s dissent criticized the majority decision, explaining that it was not the role of the Court to decide whether the legislation was wise or foolish, but only to determine whether it violated the Constitution; in his view no violation had taken place, and the Court was impermissibly engaging in a policy dispute fueled by individual justices’ notions of what the law ought to be.\textsuperscript{153} Justice Holmes dissented separately in \textit{Lochner}, adding that he did not believe that his agreement or disagreement should impact “the right of the majority to embody their opinions and laws.”\textsuperscript{154}

More recently, the current conservative composition of the Supreme Court seems to have adopted a pro-judicial restraint approach to substantive due process. Justice Kennedy, Chief Justice Roberts, and Justice Alito “all appear to believe that \textit{Glucksberg} was right when it called for judicial restraint in substantive due process case law” by virtue of the recent \textit{Gonzales v. Carhart}\textsuperscript{155} decision, which entirely ignored \textit{Lawrence} in the opinion.\textsuperscript{156}

\textsuperscript{150} \textit{Id.} at 45.
\textsuperscript{151} 123 U.S. 623 (1887).
\textsuperscript{152} \textit{Id.} at 660.
\textsuperscript{153} \textit{Lochner}, 198 U.S. at 69 (Harlan, J., dissenting).
\textsuperscript{154} \textit{Id.} at 75 (Holmes further explained that “[i]t is settled by various decisions of this court that state constitutions and state laws may regulate life in many different ways which we as legislators might think of injudicious, or if you like as tyrannical, as this, which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples.”) (Holmes, J., dissenting).
\textsuperscript{155} 127 S. Ct. 1610 (2007).
\textsuperscript{156} See Calabresi, \textit{supra} note 177, at 1526.
Moreover, Justice Scalia has been one of the more outspoken proponents of federalism and tradition that has endured the shifting composition of the court over the past several decades. In *Romer*, he made clear that while he does not condone hate or discrimination against any individual or group of people, he does believe in upholding morality in the law.\(^{157}\) Even Justice Thomas expressed his disapproval with the majority decision of the court in *Lawrence* in his dissenting opinion. He explained that even though he personally believes the Texas sodomy law to be “uncommonly silly” and that if he were on the Texas legislature he would repeal it, he nevertheless believes it is the role of the legislature, and not the Court, to make such “sweeping decisions.”\(^{158}\)

The point is that the decision to stay within the constitutionally-vested authority of the judiciary must come from the judiciary itself; it, alone, holds this responsibility. Consider Justice Kennedy’s approach to substantive due process as an illustration. Justice Kennedy unapologetically signed on to Justice Rehnquist’s restrained opinion in *Glucksberg*, then joined the expansive plurality opinion in *Casey*. He then authored the expansive opinion in *Lawrence*, and later wrote the restrained opinion *Carhart*. The lack of uniformity in applying one consistent substantive-due-process analysis by the same swing-vote justice illustrates the lack of accountability and the heightened self-responsibility that the justices truly have in the decision-making process.

Although the current majority of the Court seems pro-judicial restraint after *Carhart*, there is no telling what Justice Kennedy will do with his swing vote in future cases, and there

---

\(^{157}\) *Romer*, 517 U.S. at 644 (Scalia, J., dissenting) (“Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals— and could exhibit even ‘animus’ toward such conduct. Surely that is the only sort of ‘animus’ at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.”).

\(^{158}\) *Lawrence*, 539 U.S. at 605. (Thomas, J., dissenting).
may even be a shift of the composition of the court now that president-elect Obama has secured
the Executive office. This much, though, is sure: the decision to make consequentialist decisions
by employing whichever substantive-due-process test will best meet the justices’ ends, or,
alternatively, to employ a restraintist and structured substantive-due-process test that will be
applied consistently in each case, must be a decision that comes from within the judiciary.

V. CONCLUSION

As discussed in part I, Lawrence can be reasonably read to have one of two meanings:
either it stands for the proposition that (1) morality may no longer serve as a legitimate state
interest in satisfying a rational-basis review, or (2) whatever unprecedented substantive-due-
process analysis the Court did apply, the restriction on using morality will be determined on a
case-by-case basis. Of the two interpretations, neither is acceptable.

Justice Kennedy’s invalidation of morality as a legitimate source of state police power in
Lawrence set a dangerous precedent that aggrandized the scope of the judiciary’s role and
encroached on the states’ authority to regulate the safety, health, morals and general welfare of
the people. Further, although Bowers was overturned, several other cases that have also relied on
morality as a legitimate state interest were not mentioned in Lawrence. Because of Lawrence,
the authority of all these cases is now cast into doubt.

Furthermore, the Court cannot reasonably determine the legitimacy of the role of
morality as a support of state legislation without first recognizing that the authority to balance
the liberty of all with the regulation of public morality is a shared responsibility between the state
legislatures and the federal judiciary. In order to remain within the scope of its constitutional
authority, the Court should employ one clear, disciplined and predictable substantive due process
test that is rooted in the Constitution. The test should indicate the criteria the Court will use
when analyzing a claim to an unenumerated liberty right, and the test should also retain the fundamental/non-fundamental dichotomy so that a predictable level of judicial scrutiny may be applied to challenged state statutes. This will help state legislatures draft laws that coincide with the Constitution by considering the Court’s substantive-due-process analysis.

Finally, the decision to abide by one disciplined substantive-due-process analysis must come from the judiciary itself. As long as the analysis that Justice Kennedy uses in *Lawrence* remains good law, however, the threat of judicial aggrandizement on states’ rights to regulate morality remains.