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***Lawrence v. Texas* and Judicial Hubris**

Nelson Lund[†] and John O. McGinnis^{††}

*‘Alas, My Lord,
Your Wisdom is Consumed in Confidence!’¹*

The republic will no doubt survive the Supreme Court’s decision, in *Lawrence v. Texas*,² to invalidate laws against private, consensual sodomy, including those limited to homosexual behavior. Such laws are almost never enforced, and the rare prosecutions for such acts are necessarily capricious. So the direct effect of the Court’s decision is likely to be extremely limited, and largely salutary: a few individuals will be spared the bad luck of getting a criminal conviction for violating laws that are manifestly out of step with prevailing sexual mores.

Nor are we likely to see anything like the intense political opposition

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¹ Shakespeare, *Julius Caesar*, Act II, Scene 2.

² 123 S. Ct. 2472 (2003).

generated by this decision's most important doctrinal ancestor, *Roe v. Wade*. Millions of Americans regard *Roe* as a judicial authorization for mass murder, and understandably continue to oppose the Court's approach to abortion.³ One can hardly foresee a similar passion for overturning a judicial decision that merely eliminates a few haphazard prosecutions for private conduct that has no immediate effect on any third parties. Judging at least by what we see in the general press and popular entertainment media, most of the public can be counted on to respond to the immediate consequences of *Lawrence* with a yawn. If the Court was looking for a case in which to flex its political muscles with impunity, it could hardly have found a better candidate.

This does not mean that *Lawrence* is unimportant. Among the journalists and academics who will largely determine the historical reputations of individual Justices, this case will be enthusiastically celebrated, and not principally for its small direct effects. Rather, we expect to see powerful efforts to ensure that *Lawrence* paves the way for a broader attack on traditional marriage laws and perhaps many other legal expressions of traditional morality.

We cannot join the celebration. *Lawrence* is a paragon of the most anticonstitutional branch of constitutional law: substantive due process. The decision also reflects a breakdown of the Court's most recent attempt to put doctrinal restraints on that intoxicating doctrine. It is a commonplace observation—often repeated by members of the Court itself—that substantive due process makes judges into unelected and unremovable superlegislators. History has recorded several efforts to tame the doctrine in ways designed to give it a more law-like nature, and thereby to protect the properly judicial function of the Court from its all-too-human members. In *Lawrence*, the latest effort fell apart.

The *Lawrence* opinion is a tissue of sophistries embroidered with a bit of sophomoric philosophizing. It is a serious matter when the Supreme Court descends to the level of analysis displayed in this opinion, especially in a high-visibility case that all but promises future adventurism unconstrained by anything

³ The Court has tolerated some forms of opposition to abortion. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297 (1980) (upholding statute that withheld federal funding for abortions). Recently, however, the Court has exhibited a certain impatience toward abortion opponents. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding statute restricting peaceful efforts by anti-abortion activists to persuade pregnant women not to have abortions); *id.* at 765 (Kennedy, J., dissenting) (“The Court’s holding contradicts more than a half century of well-established First Amendment principles.”).

but the will of the judicial majority. This performance deserves to be condemned, rather than celebrated, even by those—like us—who have no sympathy for the statute that the Court struck down. Nor does *Lawrence*, which displays a dismissive contempt for both the Constitution and the work of prior Courts, deserve to be preserved by the doctrine of stare decisis.

Finally, we do not believe that the undisciplined approach to law exemplified by *Lawrence* can be redeemed by its practical effects. The *Lawrence* approach to substantive due process has relatively small and ephemeral benefits and very large and enduring costs, particularly to the judiciary as an institution. This is no accident. The Constitution creates alternative mechanisms for achieving desirable legal changes that are far superior to this kind of judicial improvisation. The ordinary political processes of democracy, and especially the operation of competitive federalism, do not operate flawlessly or instantaneously, but they have numerous advantages over the impatient and self-satisfied imposition of constitutionally unjustified judicial edicts.

I. A BRIEF HISTORY OF SUBSTANTIVE DUE PROCESS

Judges hate to enforce laws they think unjust, for the same reason that almost everyone hates injustice that brings no personal benefits. And just as many citizens sometimes disobey laws that they think wrong or oppressive, judges sometimes refuse to enforce laws that offend their moral sense. This judicial disobedience takes a variety of covert forms, but sometimes it is fairly open. And, as with the general population, some judges are more inclined to disobey the law than others.

A. *The Impertinent Origins of Substantive Due Process*

In American law, the classic debate about the propriety of substituting judges' sense of justice for that of legislators can be found in an exchange of dicta in *Calder v. Bull*.⁴ Justice Chase contended that the very nature of the social compact implies that no legislature may “authorize manifest injustice by positive law; or [] take away that security for personal liberty, or private property, for the

⁴ 3 U.S. (3 Dall.) 386 (1798).

protection whereof the government was established.”⁵ Justice Iredell responded that such an approach misconceives the judicial function:

The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say . . . would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.⁶

Foreshadowing later debates, Iredell contended that American constitutions specified the limits on legislative power, and thereby specified the grounds on which courts might nullify statutes,⁷ while Chase maintained that a roving judicial commission to correct injustice was implicit in the nature and purpose of these constitutions, whose spirit implied additional, unstated prohibitions on the “apparent and flagrant abuse of legislative power.”⁸

Chase himself may have had a very modest view of the scope of his roving commission, but that would not answer Iredell’s objection. Chase might have responded by pointing to a specific constitutional provision that forbids injustice, or at least forbids some general category of intolerable injustice. But there is no such provision. The fateful step of *pretending* that such a provision exists was taken six decades later in Chief Justice Taney’s opinion in *Dred Scott*.⁹

Taney contended in *Dred Scott* that the Missouri Compromise, which had purported to outlaw slavery in the northern territories, violated the Fifth Amendment’s Due Process Clause. His entire analysis was comprehended in the

⁵ *Id.* at 387.

⁶ *Id.* at 399.

⁷ *Id.* at 398-99.

⁸ *Id.* at 388.

⁹ *Scott v. Sandford*, 60 U.S. 393 (1857). In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), a majority of the Court expressed strong sympathy for Chase’s position in *Calder*, and perhaps even assumed a judicial power to refuse enforcement to certain egregiously unjust statutes. The Court, however, did not clearly so hold.

following exclamation:

[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.¹⁰

In dissent, Justice Curtis explained in considerable detail why Taney had to be wrong. The essence of Curtis's argument was that the right to hold human beings as property is founded entirely on positive law, and that this property right must be lost when the owner voluntarily brings such men within a jurisdiction that does not recognize the right.¹¹ Taney himself acknowledged that Congress had the authority to legislate for the territories,¹² and the slave states themselves recognized their own right to forbid the importation of slaves, notwithstanding the due process clauses in their own state constitutions.¹³ The Due Process Clause, whose lineage traced to Magna Charta and which had an analogue in the law of every American state, had never been thought to have any bearing on the right of legislatures to regulate or abolish slavery. Taney gave no reason for suddenly imputing any such substantive effect to the Clause, which would among other things imply that the Fifth Amendment silently withdrew from Congress its unquestioned power to regulate or ban the slave trade.¹⁴

Dred Scott proved to be a pretty good paradigm for the future development of what we call substantive due process. Offering no reason at all to explain how the due process provision of the Constitution could suddenly operate

¹⁰ 60 U.S. at 450.

¹¹ *Id.* at 624-26.

¹² *Id.* at 446-49.

¹³ *Id.* at 627.

¹⁴ Curtis's refutation of the particular substantive effect that Taney imputed to the Due Process Clause did not, of course, eliminate the possibility that the Clause might have some other substantive implications. What Curtis did was all that was needed in the case before him.

to invalidate a type of law that was well-established at the time the provision was enacted, Taney must simply have believed that his political and moral judgments were superior to that of the benighted legislature. Neither he nor anyone since has produced any evidence that the Due Process Clause contained some kind of secret message telling judges that no person shall be deprived of life, liberty, or property except when judges find the deprivation sufficiently inoffensive to their moral and political sensibilities. In response to Curtis's well-reasoned legal arguments, Taney responded with dead silence. And what else should one expect, if he neither had nor needed arguments or evidence? Self-evident truths about the justice of the slaveholders' position apparently struck Taney as quite an adequate substitute.

Even if one assumes that lawless judges will always be with us, one might think that the upshot of Taney's judicial adventurism should have been to make substantive due process an anathema forever. That did not happen, perhaps because every age offers an opportunity for adventurism that seems, at least for the moment, more respectable than Taney's. Whatever the cause, due process has continued to provide a textual thunderbolt that Olympian judges can be hurl at any law that offends them. Neither the Court nor any of its members has even once so much as attempted to explain how any of this can be derived from or even reconciled with the text of the Due Process Clauses. Over and over again, objections to the factitious nature of substantive due process have been answered with the same stony silence that Taney displayed toward Curtis.¹⁵

After the war, the Court revived substantive due process, and then promptly and emphatically reinterred it. In *Hepburn v. Griswold*,¹⁶ the Court invalidated a federal statute making paper money legal tender. Although the opinion focused largely on the Necessary and Proper Clause, the Court also invoked the Due Process Clause and Chase's "manifest injustice is unconstitutional" theory. The Court's analysis of the Fifth Amendment was Taneyesque in its simplicity and emptiness: "It is quite clear, that whatever may be the operation of [a statute that directly diminished the value of existing contracts],

¹⁵ For a comprehensive discussion of the impossibility of reconciling substantive due process with the text of the Constitution, see John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va. L. Rev. 493 (1997).

¹⁶ 75 U.S. (8 Wall.) 603 (1870).

due process of law makes no part of it.”¹⁷ Justice Miller’s dissent echoed Iredell’s objections to Chase in *Calder*, and quite understandably responded to the Court’s statement about due process by saying that “[t]he argument is too vague for my perception.”¹⁸

The very next year, *Hepburn* was overruled in *Knox v. Lee*.¹⁹ Rather like Miller in *Hepburn* and Curtis in *Dred Scott*, the *Knox* Court found the due process position adopted in *Hepburn* hard to take seriously. After noting that the currency had often been debased without anyone suspecting that due process was somehow involved, the Court said of the challenged statute: “Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.”²⁰

B. *Substantive Due Process Returns to Respectability*

That should have been the end of substantive due process. In a subsequent series of cases, however, it gradually came back to life. The crucial step was probably the 5-4 decision in the *Slaughter-House Cases*.²¹ Writing for the Court, Justice Miller casually dismissed a due process objection to a local butchers’ monopoly,²² which two of the dissenters would have sustained on the basis of what by that time was the usual unexplained invocation of due process. What is most important about the case, however, is that the Court gave the principal substantive provision of the Fourteenth Amendment—the Privileges or Immunities

¹⁷ *Id.* at 624.

¹⁸ *Id.* at 637.

¹⁹ 79 U.S. (12 Wall.) 457 (1871).

²⁰ *Id.* at 552.

²¹ 83 U.S. (16 Wall.) 36 (1873).

²² “[I]t is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of [the Due Process Clause].” *Id.* at 80-81.

Clause—such a narrow interpretation that it was effectively drained of significant effect. The main purpose of the Privileges or Immunities Clause, we believe, was to forbid the states from adopting *discriminatory* legislation, for which the notorious Black Codes were the paradigm, that created favored and disfavored classes of state citizens with respect to the basic civil rights the states all recognized in one form or another.²³ In other words, the same *equality* of rights that the Privileges and Immunities Clause of Article IV had always demanded between a state’s citizens and citizens of other states was now supposed to hold among different classes of a state’s own citizens as well. The majority’s decision to confine the reach of the Privileges or Immunities Clause to rights specifically derived from national citizenship, such as the right to travel to the national capital in order to assert a claim against the national government, was a huge and intolerable blunder.²⁴

Eventually, the Court settled on the Equal Protection Clause as the primary textual hook for restoring what *Slaughter-House* had improperly subtracted from the Privileges or Immunities Clause.²⁵ In the early years after *Slaughter-House*, however, a minority of the Court also made efforts to bend the Due Process Clause into a general tool for banning statutes found to be oppressive, or

²³ For more detailed expositions of this interpretation of the Privileges or Immunities Clause, see *Slaughter-House*, 83 U.S. at 96-101 (Field, J., dissenting); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years* 342-51 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992).

²⁴ See 83 U.S. at 79. As Justice Field pointed out in dissent, the majority rendered the Privileges or Immunities Clause a “vain and idle enactment, which accomplished nothing” because the states never had the power to abridge such rights. *Id.* at 96. It should therefore be no surprise that the majority’s conclusion rested on a flawed reading of the text, according to which the phrase “privileges or immunities of *citizens* of the United States” was recast to mean “privileges or immunities of *citizenship* of the United States.” See Harrison, *supra* note x, 101 Yale L.J. at 1414-15.

²⁵ The Equal Protection Clause, as its wording implies, was probably only meant to require governments to protect all groups equally from having their rights violated by other private persons. A prominent illustration of the need for this provision was the tolerance of some governments for the activities of the Ku Klux Klan. The Court’s decision to expand equal protection doctrine to reach additional forms of discrimination would not have been necessary if *Slaughter-House* had not misinterpreted the Privileges or Immunities Clause.

unjustified by the public good.²⁶ After several cases in which the Court rejected due process challenges to various state regulations,²⁷ Justice Miller's majority opinion in *Davidson v. New Orleans* announced with exasperation that the Due Process Clause was not a roving commission for courts to correct what they believed were policy errors by legislatures:

There is here abundant evidence that there exists some strange misconception of the scope of this [due process] provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us . . . that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.²⁸

While declining to provide a comprehensive explication of the clause (along the lines of the unfortunately comprehensive explication of privileges or immunities in his majority opinion in *Slaughter-House*), Miller focused on *procedural* nature of due process:

[I]t is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court

²⁶ See, e.g., *Munn v. Illinois*, 94 U.S. 113, 140-42 (1877) (Field, J., dissenting) (due process provision secures to every individual the essential conditions for the pursuit of happiness and should never be narrowly construed). Field freely acknowledged that the police power of the states permitted legislatures to regulate the use of property and liberty so as to prevent injuries to others, *id.* at 145-46, and the majority confined itself to concluding that the challenged statute was justified by the public interest, *id.* at 126.

²⁷ E.g., *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1874) (upholding liquor prohibition); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875) (upholding prohibition of voting by women); *Munn* (upholding state regulation of rates charged by grain-storage elevators).

²⁸ 96 U.S. 97, 104 (1878).

of justice, according to the modes of proceeding applicable to such a case.²⁹

Thus, *Davidson* at a minimum expressed a clear desire to put sharp limits on the use of the Due Process Clause. Unfortunately, the Court soon adopted a much broader conception of the limits placed on state legislation, according to which the Fourteenth Amendment forbids the regulation of private liberty and property beyond whatever a majority of Justices might consider within the traditional or proper scope of the “police power.”³⁰ The ensuing “*Lochner* era” was marked by disagreements over the appropriate scope of the police power, over the degree of deference owed to legislative judgments, and over the application of the police-power test to particular cases.³¹ But all Justices agreed

²⁹ *Id.* at 105. Earlier in the Court’s opinion, however, Miller also said: “It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.” *Id.* at 102. This example, eerily echoing an example from Chase’s opinion in *Calder*, occurred in a discussion meant to explain why the Due Process Clause of the Fourteenth Amendment (which was assumed to restrict the discretion of state legislatures) must sweep more broadly than the law of the land provision in Magna Charta (which did not restrict the discretion of Parliament). Responding to his own rhetorical question— “[C]an a State make any thing due process of law which, by its own legislation, it chooses to declare such?”—Miller’s point seemed to be that just as the English constitution forbade the Crown from acting by fiat, so our due process provisions must forbid legislatures from acting through “laws” that are really just a kind of fiat because they lack any semblance of generality. Unfortunately, the absence of explanation for the cryptic comment about transferring title from A to B makes guesswork of any effort to say just what limits Miller thought that due process puts on legislative discretion. For a more detailed analysis of Miller’s A-to-B hypothetical, see John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va. L. Rev. 493, 516-24 (1997).

³⁰ *Mugler v. Kansas*, 123 U.S. 623 (1887), for example, upheld a statute forbidding the manufacture of beer for one’s own consumption, but warned that it would invalidate a statute that had “no real or substantial relation” to the protection of “the public health, the public morals, or the public safety.” *Id.* at 661.

³¹ For a helpful discussion of the distinction that had emerged in the *Lochner*-era case law between discriminatory legislation, to which equal protection analysis was applied, and legislation challenged because it violated a fundamental personal right, to which due process analysis was applied, see David E. Bernstein, *Lochner Era Revisionism, Revised:*

in principle—despite the absence of any textual argument for doing so—that the Due Process Clause puts real substantive restraints on legislative power.

Lochner itself illustrates the unanimity among the Justices on this point. While Justices Peckham and Harlan disagreed over the narrow question of whether the statute limiting the hours that bakers could work was a *bona fide* health regulation, and thus within the traditional scope of the police power, Justice Holmes advocated a much more deferential form of review. But even Holmes expressly acknowledged that he would find a violation of the Due Process Clause if “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”³²

How different is Holmes’s position from that of Peckham and Harlan? Contrary to the conventional view, we think the difference is relatively small. Tradition alone cannot provide a workable standard, as Holmes himself clearly recognized by emphasizing that due process protected only “fundamental principles.” Without that qualification, reliance on tradition could become “conservative” in the worst sense of the term, for it would invalidate legislation on no other ground than its novelty, thereby preventing legislatures from responding appropriately to new circumstances. *Lochner* itself exemplifies this problem. All the Justices appeared to agree that the legislature was perfectly free to regulate the hours of bakers in order to protect their health, but the majority assumed it would be unconstitutional to regulate their hours in order to protect their unions, or otherwise to enhance their bargaining power vis à vis their employers. Protection of the bakers’ health is every bit as paternalistic as the other purposes, and the effect on the bakers’ liberty of contract is identical. The relative novelty of what the legislature was trying to accomplish appears to have been its fatal flaw,³³ and no legal doctrine that made mere novelty the test of a statute’s unconstitutionality could survive. As Holmes pointedly noted, in terms reminiscent of Iredell, Curtis, and Miller: “[T]he accident of our finding certain opinions natural and familiar, or

Lochner and the Origins of Fundamental Rights Constitutionalism, Georgetown L.J. (forthcoming).

³² 198 U.S. at 76 (Holmes, J., dissenting).

³³ *Cf. id.* at 63 (“This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase.”).

novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”³⁴

Holmes attempted to take account of this by insisting on protecting only the “fundamental” principles of our tradition. But how does one distinguish fundamental traditions from nonfundamental traditions? Holmes never explained how he could tell the difference between a statute that he merely found “shocking” and a case in which “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.” Thus, Holmes did no better than the majority in fashioning a test that would make substantive due process a coherent rule of law.

The *Lochner* era has come to symbolize the practice of judges illegitimately legislating from the bench. That view did not arise because there is something particularly weird or implausible about regarding traditional property rights or the right to contract as fundamental elements of our legal tradition. They almost certainly were regarded as such by a consensus of the Thirty-Ninth Congress, which framed the Fourteenth Amendment.³⁵ And that position obviously has even deeper roots in our legal tradition, as one can easily see in Justice Washington’s opinion in *Corfield v. Coryell*.³⁶ But legislatures have always been adjusting the substantive contours of these rights, and must continue to do so.³⁷ The real difficulty, which the *Lochner*-era Court never faced up to, was the need to articulate some principled basis, having some connection to the Constitution, for distinguishing constitutionally tolerable legislative adjustments from those which are beyond the pale. Well into the *Lochner* era, for example, the Supreme Court upheld novel regulations that were not much easier than the statute in *Lochner* to justify as measures reasonably designed to protect the public health, morals, or

³⁴ *Id.* at 76 (Holmes, J., dissenting).

³⁵ Section 1 of the Civil Rights Act of 1866, for example, was largely aimed at ensuring that the former slaves would be allowed to enjoy these economic rights.

³⁶ 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

³⁷ Correctly interpreted, the Fourteenth Amendment’s Privileges or Immunities Clause would have required state governments to avoid certain kinds of class discrimination when making these adjustments. See *supra* notes and text accompanying footnotes xx.

general welfare.³⁸ The occasional decision to invalidate a statute looked more like a random strike of lightning than like any kind of principled jurisprudence.³⁹

C. *Prometheus Bound?*

Eventually, the Court took two steps that had radical consequences. First, it began, without much explanation, to expand the list of “fundamental” rights to include a potpourri of privileges traditionally thought important to a life of bourgeois happiness, including the right to raise a family, to worship God, and to better oneself through work and education.⁴⁰ Next, after some important personnel changes, it began to lose its enthusiasm for protecting the core economic rights summed up by liberty of contract and the protection of property rights. Eventually, this process of expanding the periphery and abandoning the core of substantive due process culminated in *Carolene Products*.⁴¹ We think this opinion is best understood as an effort by the Court to tame the doctrine of substantive due process by confining it within narrow boundaries.

The *Carolene Products* reformulation had two steps. First, the Court began by imposing a virtually conclusive presumption of constitutionality under due process on “regulatory legislation affecting ordinary commercial transactions.”⁴² Unlike Holmes’s largely rhetorical expression of deference to legislatures in *Lochner*, *Carolene Products* adopted a formulation with real bite, for it placed on the challenger of such a regulation the burden of proving the *nonexistence* of

³⁸ See, e.g., *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914) (upholding regulation of insurance rates); *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding an overtime-pay regulation for flour millers); *Block v. Hirsh*, 256 U.S. 135 (1921) (upholding rent control law).

³⁹ From 1910 to 1921, “nearly two hundred substantive due process claims were rejected [], while only about a dozen—mostly involving individual rate orders—were sustained.” Currie, *supra* note x, at 103 n.79.

⁴⁰ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). This development occurred before the Court began treating the various provisions of the First Amendment as “incorporated” into the Fourteenth Amendment.

⁴¹ *United States v. Carolene Prod.*, 304 U.S. 144 (1938).

⁴² *Id.* at 152.

“any state of facts either known or which could reasonably be assumed affords support for [the regulation].”⁴³ Not surprisingly, given that the Court has continued to take this test seriously in the realm of commercial regulation, every such regulation has survived the Court’s review, and substantive due process has effectively been abolished in this area.

The second step was Footnote 4’s outline of circumstances in which this ferociously strong presumption might be relaxed, or even reversed. Three somewhat overlapping and now well-known categories were identified: (1) challenges to laws that on their face fall within a specific constitutional prohibition, including the Bill of Rights guarantees “incorporated” into the Fourteenth Amendment by substantive due process; (2) challenges to laws that distort the political process by creating obstacles to the repeal of undesirable legislation; and (3) challenges to laws disadvantaging “discrete and insular minorities.”

The Court’s explanation of the meaning of this framework consisted largely of citations offered as illustrative precedents, and those citations are extremely interesting and significant. With two exceptions, all of the citations were to decisions enforcing Bill of Rights protections against the states, or to equal protection decisions. The exceptions were *Meyer v. Nebraska*⁴⁴ and *Pierce v. Society of Sisters*,⁴⁵ two substantive due process decisions involving parental decisions about their children’s education. These two decisions do not fit into any of the three categories set out in Footnote 4. The Court obscured this fact by *mischaracterizing* both cases as category (3) “discrete and insular minority” cases, which in effect transformed them into equal protection decisions. Thus, the effect of Footnote 4 was to suggest that substantive due process should effectively be limited to “incorporating” specific provisions of the Bill of Rights, an exercise in which the text of the Constitution actually provides significant guidance and judicial discretion is not inherently unbounded.

Perhaps even more important, limiting substantive due process in this way tended to align the combination of substantive due process and equal protection pretty closely with a plausible understanding of what the Privileges or Immunities Clause was meant to accomplish. Whatever uncertainty there is about the exact

⁴³ *Id.* at 154.

⁴⁴ 262 U.S. 390 (1923).

⁴⁵ 268 U.S. 510 (1925).

meaning of Section 1 of the Fourteenth Amendment, nobody has ever seriously denied that it was meant at the very least to provide constitutional authorization for the abolition of the Black Codes and analogous forms of caste legislation. That is essentially what category (3)—the core of modern equal protection doctrine—accomplishes. All of the due process cases cited to illustrate categories (1) and (2) are, or can easily be understood as, “incorporation” decisions tied to specific provisions of the Bill of Rights. Although there is less reason for certainty here than with respect to caste legislation, there is at least some evidence that the Privileges or Immunities Clause was also meant to render much of the Bill of Rights applicable to the states.⁴⁶

We think that Footnote 4, by stressing due process “incorporation” and otherwise focusing Fourteenth Amendment review on equal protection, was as close as the Court had ever come to creating a disciplined framework for the development of substantive due process. Substantive due process would consist almost entirely of applying Bill of Rights provisions to the states, an exercise in which the constitutional text imposes at least some minimal constraints on interpretive willfulness. Outside that area, equal protection doctrine, which has a real connection to the original purpose of the Fourteenth Amendment, would tend to displace substantive due process.⁴⁷

For about a quarter of a century, the Court followed Footnote 4 pretty faithfully, and with significant results. The selective incorporation of Bill of Rights

⁴⁶ See, e.g., Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986); Akhil Reed Amar, *The Bill of Rights* 181-214 (1998). The Court’s incorporation decisions, of course, have never purported to rest on historical evidence about the original meaning of the Fourteenth Amendment.

⁴⁷ It is true, of course, that once “the equal protection of the laws” was rewritten to mean “the protection of equal laws,” *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), equal protection doctrine enabled determined judges to do almost anything they really wanted to do. For instance, the protection of such fundamental rights as the right to vote, which appears naturally to belong to substantive due process, has been brought under the Equal Protection Clause. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964). Nevertheless, we think that equal protection doctrine is somewhat less prone to severe and continuing abuses than substantive due process. Equality of rights was the central purpose of the Privileges or Immunities Clause, and equal protection therefore has a discernable core that is actually connected to the Constitution. Substantive due process, at least since the repudiation of *Lochner*, has no such core at all. Space constraints preclude our providing a detailed discussion of what changes we think are needed in current equal protection doctrine.

provisions, and the concomitant explosion of opportunities to address new interpretive questions about the meaning of those provisions, generated a great deal of interesting legal doctrine with real effects on the life of the nation. And equal protection, of course, generated a tremendous amount of significant new doctrine concerning racial discrimination and other matters. By the end of that fairly short period of time, however, the Court decided that all of this was still not enough.

D. *Prometheus Unbound*

By the mid-1960s, something exciting was happening in the world. The Pill! The Sexual Revolution! The Beatles! This was really big, and the Justices were quick to get into the game. Fittingly enough, the Court's most exuberant member⁴⁸ wrote the initial opinion, in *Griswold v. Connecticut*.⁴⁹ In a series of flourishes that were free-spirited even by the standards set in previous substantive due process opinions, Justice Douglas concocted a general "right of privacy" that was held to protect the right of married couples to use contraceptives.

The best argument for invalidating the prohibition against contraceptive use by married couples would have relied on the *Meyer*⁵⁰ and *Pierce*⁵¹ cases from the *Lochner* era. In *Meyer*, the Court struck down a statute forbidding schoolteachers to instruct their students in any modern language other than English until after the eighth grade. The *Meyer* opinion was short and conclusory, but it clearly rested on a general right "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," including the asserted rights "to acquire useful knowledge, to marry, establish a home and bring up children."⁵² *Pierce* invoked *Meyer* for the proposition that the Constitution forbids a regulation that "unreasonably interferes with the liberty of parents and guardians

⁴⁸ See generally Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (2003).

⁴⁹ 381 U.S. 479 (1965).

⁵⁰ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵¹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁵² 262 U.S. at 399 (lengthy string citation omitted).

to direct the upbringing and education of children under their control.”⁵³ One might have read these cases to stand for the general proposition that heightened scrutiny or a presumption of unconstitutionality attaches to any statute that intrudes into traditional family life, and then argued that the public purpose rationales advanced in defense of the education laws in *Pierce* and *Meyer* were more obviously plausible than Connecticut’s claim that it was seeking to prevent extramarital sexual relationships.

One obstacle to this approach was that *Carolene Products*’ Footnote 4 had already interpreted *Meyer* and *Pierce* very differently, namely as equal protection cases involving the oppression of national and religious minorities, respectively. This had no basis in either opinion, and it was dicta, so the *Griswold* Court might simply have corrected it. A faithful reading of *Meyer* and *Pierce*, however, might have implied a wholesale revival of economic rights—anathema to Douglas and other New Dealers—because these cases relied upon and reaffirmed that core doctrine, even while extrapolating from it to include a broader range of privileges.⁵⁴ Unwilling to replace *Carolene Products*’ misinterpretation of *Meyer* and *Pierce* with a plausible interpretation, the Court invented a new misinterpretation, claiming that *Meyer* and *Pierce* were First Amendment cases.⁵⁵ This claim had no more support in either opinion than Footnote 4’s misrepresentation of *Meyer* and *Pierce* as “discrete and insular minority” cases. *Griswold* moved these cases from Footnote 4’s category (3) to category (1), but to what end? Nobody could plausibly have argued that the right to contraceptives is guaranteed by the First Amendment.⁵⁶

⁵³ 268 U.S. at 534-35. *Pierce* struck down a statute requiring parents to send their children to public rather than private schools.

⁵⁴ *Meyer*’s leading examples of protected freedoms, for example, were “the right of the individual to contract, [and] to engage in any of the common occupations of life,” and these examples were actually supported by abundant precedents, unlike the asserted rights involving marriage and child rearing. 262 U.S. at 626-27. The *Griswold* Court seems to have implicitly recognized this problem, for it expressly rejected any suggestion that *Lochner* “should be our guide.” 381 U.S. 481-82.

⁵⁵ 381 U.S. at 482.

⁵⁶ We do not think the notion is any more plausible today than it was in 1965, but it is no longer possible to assume that everyone would agree. See, e.g., Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv. L.

This odd move turned out to be only the precursor to one of the most famously outlandish arguments in all of constitutional law. After discussing several other specific protections for specific forms of privacy in the Bill of Rights, the Court asserted that “emanations” from these specific provisions of the Constitution created “penumbras” and ultimately a penumbral “zone of privacy” in which the right of married couples to use contraceptives was simply declared to exist. But this is plain sophistry, since the use of contraceptives has nothing at all to do with any of the specific protections in the Bill of Rights. Apart from the obvious *expressio unius* problem, one could as logically have said that since the Bill of Rights protects some acts, it therefore protects all acts, and every governmental regulation of any act is presumptively unconstitutional.

The *Griswold* opinion concludes with a rhapsody to the sacred and noble institution of marriage. This was apparently meant no more seriously than the phony interpretations of *Meyer* and *Pierce*, or the sophistical emanations theory, for the Court soon jettisoned this traditionalist baggage, announcing a right of unmarried persons to contraceptives.⁵⁷ In *Roe v. Wade*, the Court then used the newly minted right of privacy to invalidate statutes restricting abortion. The right of privacy at the core of all these cases is better described as a right of sexual autonomy because that is the only context in which the Court applied the privacy theory.⁵⁸ With the expansion of this right in *Roe* (and subsequent decisions giving

Rev. 1893, 1939-40, 1948 n.212 (2004).

⁵⁷ *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (given *Griswold*, a ban on distributing contraceptives to unmarried persons appears to violate substantive due process, but certainly violates equal protection).

⁵⁸ The *Griswold-Roe* line cannot accurately be described as protecting a right to medical treatment or access to medical devices. *Griswold*’s only reference to medicine came in its statement of the issue presented, where it noted that the case involved “the intimate relation of a husband and wife and their physician’s role in one aspect of that relation.” 381 U.S. at 482. Intervening decisions also relied on a privacy right without mentioning rights connected to medicine. *See, e.g., Eisenstadt*. *Roe* itself expressly relied on the right to privacy created in *Griswold*. *Roe* did observe that abortions may be necessary to avoid medical harms, but it did not impose any requirement that medical harm be imminent, and it expressly held that a woman may abort a pregnancy to avoid a “distressing life.” 410 U.S. at 153.

children a right to contraception and abortion *without their parents' consent*⁵⁹), the Court completely severed substantive due process from all of its remaining ties to anything like a set of fundamental rights that could be found in the American legal tradition.

Substantive due process had ceased to serve as a brake on innovative legislatures (as it once had done in the area of economic liberties) or as a tool for preventing deviations from consensus judgments that could plausibly be thought to be reflected in specific provisions of the Constitution (as in most of the due process cases falling under the rubric of Footnote 4). Substantive due process now put the Court in the vanguard of social change. This was liberation jurisprudence.

E. *Prometheus Rebound?*

Since protection of sexual autonomy is the principle uniting the *Griswold-Roe* line, it came as a discordant note when the Court refused to apply this principle to homosexuals in *Bowers v. Hardwick*. If sexual freedom is a right so fundamental that it justifies a practice that millions of people regard at least as a serious evil, and millions of others regard as murder,⁶⁰ how could the Constitution possibly fail to protect mere sexual contact between consenting adults?

In *Bowers*, the Court declined to answer this obvious question. Instead, it simply revived without explanation the pre-*Roe* idea that substantive due process protects only those liberties “deeply rooted in this Nation’s history and tradition.”⁶¹ As a matter of legal reasoning, this was wholly unsatisfactory, for that standard had already cracked when the Court repudiated the *Lochner*-era cases protecting

⁵⁹ *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Carey v. Population Services Int’l*, 431 U.S. 678 (1977).

⁶⁰ It is true that opponents of abortion are generally willing to make an exception to save the life of the mother. This no more undermines their claim that elective abortion is murder than the exception for homicides in self defense undermines the claim that assassination is murder.

⁶¹ 478 U.S. at 192 (citing Justice Powell’s plurality opinion in *Moore v. City of East Cleveland*, 413 U.S. 494 (1976)). The *Bowers* Court purported to distinguish *Roe* and the contraception cases on the ground that they dealt with a right to decide whether to have a child, *id.* at 190, but made no effort to explain how the “deeply rooted tradition” test could be reconciled with *Roe*.

economic liberties that in fact had deep roots in our history and tradition. And the deeply rooted tradition standard had been entirely obliterated by *Roe*. The *Bowers* decision can only be explained by hostility to substantive due process itself,⁶² by disapproval of homosexuals or their practices,⁶³ and/or by a concern that it would be imprudent to add fuel to the ongoing political fire that *Roe* had notoriously ignited.⁶⁴

Whatever the immediate motivation, *Bowers* might have signaled a new policy of leaving existing due process precedents in place, while refusing to extend the logic of those precedents into new areas of application. Justice White's majority opinion itself suggested just such an approach,⁶⁵ and that policy seemed to be at work in *Casey* in 1992, where the Court purported to preserve the factitious right to abortion primarily for reasons of stare decisis, even while it shaved a little from the edges of the right created by *Roe v. Wade* and its progeny.⁶⁶

In *Washington v. Glucksberg*,⁶⁷ this inclination to go and sin no more seemed to harden into a firm resolution. After the *Bowers* decision, *Cruzan v. Director, Mo. Dept. of Health* had acknowledged a *Lochner*-era precedent recognizing Fourteenth Amendment protection of the common law right to refuse

⁶² See *Bowers* at 191 ("It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription.")

⁶³ See, e.g., *id.* at 197 (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.").

⁶⁴ See, e.g., *id.* at 194-95 (majority opinion) ("The 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.").

⁶⁵ *Id.* at 195 ("There should be, therefore, great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.").

⁶⁶ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

⁶⁷ 521 U.S. 702 (1997).

unwanted medical treatment.⁶⁸ Rejecting the argument that this right plus the right to abortion implied an additional right to assisted suicide, the Court read its precedents to require the identification of a fundamental right “*objectively*, ‘deeply rooted in this Nation’s history and tradition,’”⁶⁹ as well as a “‘careful description’ of the asserted fundamental liberty interest.”⁷⁰ By that strict standard, laws against assisted suicide easily passed muster because they have long existed, are still very widespread, and have in many cases been recently reaffirmed by express legislative action.

Glucksberg seemed to promise an end to the outright judicial improvisation reflected in the *Griswold-Roe* approach to substantive due process. Whatever we have done in the past, the Court seemed to say, we will now treat proposed extensions of the privacy doctrine in much the same way that we have treated claims on behalf of economic liberties since the end of the *Lochner* era: without categorically rejecting such extensions, we will apply a test that effectively incorporates a near conclusive presumption of constitutionality.

The promise of *Glucksberg* might have been kept. But “freezing” substantive due process as it then stood, or more precisely radically slowing its expansion, would have been quite a challenge. The differences between *Glucksberg* and *Carolene Products* help to illustrate the problem. First, in 1938, the Court openly repudiated the bulk of prior substantive due process doctrine, leaving little past precedent with the generative force to compete with the new paradigm. Yet it simultaneously provided a role for the Court to develop new areas of jurisprudence that could make a real difference in American life. Finally, Footnote 4 had aligned the doctrine more closely with the written Constitution than it previously had been. This was a potentially stabilizing program with which Justices having a wide array of jurisprudential inclinations might feel comfortable. But these features were missing from *Glucksberg*. The opinion repudiated no prior decision, and it did not point to any area in which substantive due process could open significant new opportunities for judicial creativity. Nor did it explain how its

⁶⁸ 497 U.S. 261, 278 (1990) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905)).

⁶⁹ 521 U.S. at 720-21 (quoting plurality opinion in *Moore v. City of East Cleveland*) (additional citations omitted) (emphasis added).

⁷⁰ *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

approach, which left the *Griswold-Roe* line intact, would move the law back toward the written Constitution.

We think that “freezing” substantive due process would be a more tenable strategy if it meant returning to something like the Footnote 4 approach. In our view, the *Griswold-Roe* line of decisions was and is an insuperable obstacle to any lasting restraint on substantive due process. As long as that line of cases stands, it will be difficult for anyone to pretend, and impossible for anyone to believe, that this doctrine represents something other than judicial policymaking. Neither the holding in *Bowers* nor the analytical approach of *Glucksberg* can be reconciled in any truly principled fashion with *Griswold* and its progeny. The Court may choose to continue on the path marked by the *Griswold* line, and adopt any number of new national policies liberating individuals from legal restraints on their private behavior. But the Court also has the choice of repudiating this line of decisions outright. The better alternative—one that remains open even after *Lawrence*—would be to return the law roughly to where it had once been guided by *Carolene Products*.

II. THE *LAWRENCE* OPINION

It would have been easy to write a plausible-sounding legal opinion invalidating the Texas sodomy statute. Justice O'Connor sketched one obvious way to do that in her *Lawrence* concurrence. She would have used equal protection rather than due process, and her approach would have applied only to statutes treating homosexual sodomy differently than heterosexual sodomy. The essence of her analysis consisted in extending the reach of two earlier equal protection decisions. In *Department of Agriculture v. Moreno*, the Court invalidated a law that sought to withhold food stamps from households that included unrelated individuals, apparently on the ground that the law was motivated by moral disapproval of “hippie communes.”⁷¹ More recently, in *Romer v. Evans*, the Court used equal protection to invalidate a state constitutional

⁷¹ 413 U.S. 528, 534-35 (1973). The *Moreno* Court was able to reach this conclusion only by misapplying the well-established rational basis test. It was at least as easy to attribute an unquestionably legitimate anti-fraud purpose to this statute as it was to impute any legitimate purpose to regulations upheld against equal protection challenges in cases like *Railway Express Agency v. New York*, 336 U.S. 106 (1949), and *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

provision that sought to prevent the enactment of special legal protections for homosexuals, while permitting such protections for other groups.⁷² It is a fairly small step in logic—though perhaps one with extraordinary consequences—to conclude, as O’Connor does in *Lawrence*, that “[m]oral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”⁷³ Without taking a position on the question whether the Texas statute should have been held to violate equal protection, we can at least see an argument from *Moreno* and *Romer* to the conclusion that equal protection is violated when the law proscribes sodomy in private among homosexuals while permitting identical conduct among heterosexuals.⁷⁴

Alternatively, the Court might have concluded that the right of privacy created by the *Griswold-Roe* line of cases implies a right of consenting adults to engage privately in whatever sort of sexual contact they like. Contraception and abortion are obviously not ends in themselves, and these decisions, whatever else they may also do, all operate to abolish laws that create obstacles to sexual activity. Furthermore, as we discussed above, the right to homosexual conduct seems to follow *a fortiori* from the right to abortion, because sodomy, unlike abortion, cannot be thought to result in any immediate and direct harm to third parties. An opinion confirming that the “right of privacy” decisions are at their core about the right to sexual freedom would hardly have stated more than what has been obvious for many years. *Bowers*, which purported to limit the *Griswold-Roe*

⁷² 517 U.S. 620 (1996).

⁷³ 123 S. Ct. at 2486 (O’Connor, J., concurring in the judgment) (citing *Moreno*). *Moreno* and *Romer* might be read narrowly to forbid governments from discriminating solely on moral grounds against people whose behavior has not been made illegal, in which case their principle would not apply in *Lawrence*. *Romer* in particular, however, had suggested a broader principle, making unconstitutional *any* legal “disadvantage [] born of animosity toward the class of persons affected.” *Romer*, 517 U.S. at 634 (invoking *Moreno*). This would not necessarily imply that moral disapproval of certain behavior always entails animosity toward those who engage in that behavior, but Justice O’Connor’s logical leap is still relatively small.

⁷⁴ Whether or not Justice O’Connor’s proposal is an appropriate extension of *Moreno* and *Romer*, a question that we do not address in this paper, the *Lawrence* majority’s holding is significantly broader than the holding proposed by O’Connor.

line of cases to matters of “family, marriage, or procreation,”⁷⁵ could have been overruled on the ground that it was inconsistent with their underlying rationale.⁷⁶

We would have disagreed with a decision based on this argument because we think *Griswold* and *Roe* are such erroneous glosses on the Constitution that they should be repudiated rather than extended. But at least we could have understood what the Court was doing in standard legal terms. Justice Kennedy’s opinion for the Court, by way of sharp contrast, simply abandons legal analysis. Freed from the chains even of rational argument, the *Lawrence* Court issued an ukase wrapped up in oracular riddles.

A. *The Court’s Ascent into More Transcendent Dimensions*

The *Lawrence* opinion begins with six sweeping sentences:

[1] Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. [2] In our tradition the State is not omnipresent in the home. [3] And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. [4] Freedom extends beyond spatial bounds. [5] Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. [6] The instant case involves liberty of the person both in its spatial and more transcendent dimensions.⁷⁷

This stirring introduction may leave some readers eager to rush on in hopes of finding out more about these transcendent dimensions. Unfortunately, if one pauses

⁷⁵ 478 U.S. at 190-91.

⁷⁶ The argument sketched in this paragraph is hinted at in *Lawrence*, both in the manner in which the majority opinion describes the *Griswold-Roe* line of cases and in its endorsement of the claim, made by Justice Stevens in his *Bowers* dissent, that these cases implied a general right to make “intimate choices.” As we will see, however, *Lawrence* goes well beyond the relatively small doctrinal step entailed in this argument.

⁷⁷ 123 S. Ct. at 2475 (bracketed sentence numbers added).

to ask just exactly what this passage means, one finds oneself rather more bewildered than enlightened. Some of the more obvious difficulties include the following:

- Unless one supposes that liberty is a divinity like Nike or Eros, the reification or personification of liberty in sentence [1] accomplishes nothing except to dodge the obligation to say what exactly it is that protects against the (unspecified) unwarranted intrusions.
- Sentence [2] is similarly high flown, and empty. Does saying that the State “is not omnipresent in the home” mean that the State dwells in some rooms of the house but not others? What would that mean, exactly? And if that is not what the sentence means, what does it mean?
- Sentence [3] suggests that the author may believe (incorrectly) that “omnipresent” means “being a dominant presence,” though it’s hard to be sure about much of anything here. Are our lives and our existence two different things? Who claims that the State should be a “dominant presence” in *every* sphere of our lives, and what is the point of denying such a far-fetched claim?
- Sentence [4] creates more mysteries. Is freedom different from liberty? How exactly does freedom extend beyond spatial bounds? By spreading through space despite some kind of physical obstacles? By spreading beyond space itself into some other dimension? What dimension would that be? Maybe the sentence just means that freedom can entail more than an absence of physical obstacles to physical movement. But who has ever denied such an obvious proposition?
- In sentence [5], we finally seem to get the main point of the paragraph, which is apparently a claim that there should be limits on governmental intrusions on “freedom of thought, belief, expression, and certain intimate conduct.” But that is not what the sentence says. Instead, we have “liberty” presuming an “autonomy” that includes certain forms of “freedom.” Does that mean that liberty and freedom are different things, and that both of them are different from autonomy? What would the differences be? As to “an autonomy of self,” is this just a pointless

redundancy, or are we meant to contrast autonomy of self with an autonomy of something other than self? What might such a thing be?

- With respect to sentence [6], we will confine ourselves to noting first, that while “transcendent dimensions” has a splendiferous ring to it, the term has no obvious determinate meaning at all in this context; and second, that this difficulty is aggravated by the author’s assumption that there are degrees of transcendence among these dimensions.

When the United States Supreme Court opens an opinion with a pronouncement whose meaning can only be guessed at, one may be tempted to pass on with a chuckle or an embarrassed sigh. But Justice Kennedy has made that hard to do, for *Lawrence* repeats a similar flight of rhetoric from the opinion he coauthored in the *Casey* abortion case:

These matters [i.e. marriage, procreation, contraception, family relationships, child rearing, and education], 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 not define the attributes of personhood were they formed under compulsion of the State.⁷⁸

The problems here resemble those we noted in connection with *Lawrence*’s opening passage. What exactly would be involved, for example, in defining one’s own concept of existence, meaning, etc.? We suppose that Americans have a right to define words however they wish, especially if they do not care to communicate with other people. But how would one define one’s own “concept” of these things? Maybe by adopting an opinion—such as that the material universe is expanding or that practicing sodomy will help solve the mystery of human life—that others might not share? People do that all the time, without the Supreme

⁷⁸ *Lawrence*, 123 S. Ct. at 2481 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

Court's assistance. In any event, whatever this "heart of liberty" might be, what does it have to do with the last sentence in the quotation? If the State could find a way to compel an individual to believe one thing or another about such matters as existence or the universe, we are told that the beliefs could not "define the attributes of personhood." Does this mean that the attributes would be determined in some other way? Or that personhood would then have no attributes? Or that the person would have no personhood? What is personhood, anyway, and how does it differ from its attributes?

We do not know the answers to questions such as these, and we strongly suspect that Justice Kennedy does not know either. There are three legal, rather than mystical, propositions that the Court might be groping for in this passage, and we agree with them all: (1) Supreme Court precedents protect the freedom to make certain choices about matters relating to sex; (2) people are free to think whatever they want to think about existence, meaning, the universe, and the mystery of human life; and (3) the First Amendment sharply limits the power of government to attempt to compel beliefs about these matters. But what could propositions (2) and (3) possibly have to do with the legality of governmental restrictions on abortion or sodomy? Aborting a pregnancy is not a thought or a belief, nor is an act of sodomy.

Perhaps the Court has ascended to one of those "more transcendent dimensions" referred to in *Lawrence*'s opening passage, and perhaps such distinctions as that between beliefs and acts have been transcended in that dimension. Unfortunately, there are indications that something like this may well have occurred. *Lawrence* utterly demolishes all those aspects of substantive due process doctrine through which previous Courts had sought to give it an intelligible and law-like character. In *Lawrence*, as we shall see, nothing is left except bombast and the naked preferences of Supreme Court majorities.

B. *Transcending Prior Doctrine*

As an initial matter, *Lawrence* does not bother even to say what standard of review it is purporting to apply. Since *Carolene Products*, the most important threshold question in substantive due process cases has been whether they involve a fundamental right. If such a right is found, the Court demands a strong justification for infringing it, and gives little or no deference to legislative judgments; if no fundamental right has been infringed, rational basis review applies, and the

legislature will receive almost unquestioning deference. *Lawrence* refuses to make express use of these categories, leaving its standard of review indeterminate.⁷⁹

Even more significantly, the Court neither analyzes the interests of the government, as heightened scrutiny would require, nor makes any effort to imagine what legitimate purpose the statute might serve, as rational basis review would require. Nor, as we shall see, does the Court supply any alternative rational analysis, legal or otherwise. Inflated and empty pronouncements about more transcendent dimensions and defining one's own concept of meaning do not constitute rational analysis. And without such analysis, we have not been told more than what the Court wants and that it has the power to do what it wants.

Another striking manifestation of *Lawrence*'s haughtiness toward the kind of legal analysis that had become conventional in the case law is its treatment of *Glucksberg*, which had articulated, just six years earlier, the governing test for expansions of substantive due process protection. Without so much as citing *Glucksberg*, *Lawrence* abandons both of its core requirements: that a fundamental right be carefully described and that there be objective evidence that the right is deeply rooted in our nation's history and tradition. The rejection of the *Glucksberg* test is not only unacknowledged and unexplained, but it is a total rejection.

We can see how complete the rejection is by examining *Lawrence*'s purportedly legal explanation for its decision to overrule *Bowers*. As we suggested earlier, the Court could have tried to articulate a logically coherent argument based on existing case law, for *Bowers* is difficult or impossible to reconcile with the *Griswold-Roe* line of cases. But that is not the basis on which *Lawrence* overrules *Bowers*. The Court comes closest to making a legal argument when it contends that the deeply rooted tradition of proscribing sodomy, on which *Bowers* had

⁷⁹ Justice Scalia concludes that the majority must be employing rational basis review because it never identifies a fundamental right. We think that Scalia may be too generous. It is true that language suggestive of rational basis review does make an appearance in the majority opinion: "Texas furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." 123 S. Ct. at 2484. But language suggestive of the fundamental rights approach also makes an appearance: "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." *Id.* at 2475. In any event, the majority's failure to specify a fundamental right does not imply the use of rational basis review unless one assumes that the Court must have been faithful to the traditional categories of review.

relied, did not support the holding in that case because sodomy laws traditionally applied to heterosexual conduct as well as homosexual conduct: “[T]here is no longstanding history in this country of laws directed at homosexual conduct *as a distinct matter*.”⁸⁰ By the *Lawrence* Court’s logic, the traditional proscription against prostitution must be quite compatible with a fundamental right to engage in homosexual prostitution, or heterosexual prostitution for that matter, since the law has generally not singled out either of them “as a distinct matter.” That is absurd.

Let us assume, furthermore, that *Lawrence* is right to claim that *Bowers* overstated what the Court calls its “historical premises” about anti-sodomy laws.⁸¹ Even if this were true, it would be no more than a red herring. The Court’s perfectly plausible claim that the states have not aggressively and consistently punished homosexual conduct does not advance one whit the argument that a *right* to homosexual sex specifically, or nonprocreative sex in general, is deeply rooted in the Nation’s history and tradition. The absence of consistent condemnation does not imply the existence of consistent protection. If it did, there would be deeply rooted traditional rights to incest, prostitution, bestiality, cocaine, gambling, child labor, animal cruelty, and thousands of other practices that have been tolerated at some times but not others.⁸²

The Court’s next attack on *Bowers* involves a play on words. Whereas almost all previous substantive due process decisions had expressly or implicitly claimed that there was a deeply rooted legal tradition of protecting the conduct at issue in the case, *Lawrence* appeals instead to what it calls an “emerging awareness” that it finds reflected in “our laws and traditions in the past half

⁸⁰ 123 S. Ct. at 2478 (emphasis added). *See also id.* at 2479 (early American sodomy laws were not directed at homosexuals “as such”). We assume, *arguendo*, that the Court’s statements about the history of sodomy laws are accurate. One scholar, however, has checked the laws in five colonies, and discovered that three of them had laws specifically targeted at homosexual sodomy. *See* <http://www.claytoncramer.com/primary.html#SodomyLaws> [last visited April 27, 2004].

⁸¹ *Id.* at 2480. Actually, *Bowers* only stated, quite indisputably, that proscriptions against homosexual sodomy have “ancient roots,” and it pointed out a number of undisputed facts about the state of the law at several points in American history. *See* 478 U.S. at 192-94.

⁸² Furthermore, it is no more than a sign of good sense that the states have generally not engaged in the kind of espionage needed to uncover evidence of private sexual conduct, and such governmental self-restraint does not in any way imply the recognition of a right to engage in conduct that the law itself has frequently proscribed.

century.”⁸³ This turns the meaning of a deeply rooted legal tradition of protection upside down. But even within this new upside down world, the Court fails to establish any such new tradition. It is true, as the majority observes, that in 1955 a private group of reformers (the ALI) failed to recommend criminal penalties for sexual relations committed in private, thus proposing that the laws of every state in the union be changed.⁸⁴ And it is also true that some states subsequently changed their laws. Whatever the merits of the ALI’s recommendation, however, or the motivation behind it, half the states still had laws against sodomy thirty years later when *Bowers* was decided.⁸⁵ A “tradition” that half the states had never adopted is a spoof.

C. *Transcending America*

In yet another significant attack on the core meaning of a deeply rooted tradition and on any meaningful limits on judicial discretion, *Lawrence* appeals to *foreign* legal decisions.⁸⁶ The Court notes portentously that prior to *Bowers*, the European Court of Justice held that laws proscribing homosexual conduct were

⁸³ 123 S. Ct. at 2480.

⁸⁴ *Id.* at 2480-81.

⁸⁵ See *Bowers*, 478 U.S. at 192-93. Moving to even more recent times—the period after *Bowers*—the *Lawrence* Court observes that only a quarter of the states still have laws against sodomy, and that only four of those are directed only at homosexuals. 123 S. Ct. at 2481. This development is irrelevant to *Lawrence*’s claim that *Bowers* was “was not correct when it was decided.” *Id.* at 2484. Nor does this development show that a right to this form of sexual conduct is deeply rooted in our nation’s history or tradition. It merely shows that state governments are perfectly capable of changing their policies to reflect the views of their citizens even after the Supreme Court has announced, as it did in *Bowers*, that the Constitution does not require them to do so.

⁸⁶ We, of course, do not suggest that foreign and international decisions have no role to play in constitutional law. Constitutional law sometimes requires investigation of facts about the world, such as whether one consequence inevitably follows from another. Foreign law can sometimes provide empirical evidence about such regularities. Moreover, concepts in the United States Constitution such as executive power were drawn from British law and thus the original meaning of the Constitution may reflect such foreign understandings. Our objection is to using contemporary foreign law as a gloss on the meaning of constitutional provisions or traditions of the United States.

invalid under the European Convention on Human Rights. This citation might be an appropriate response to someone who made the silly claim that homosexual conduct has never been tolerated in Western civilization. Contrary to suggestions in *Lawrence*, however, neither the majority opinion in *Bowers* nor Chief Justice Burger's concurrence made any such claim. And if even if they had, it would have been irrelevant dicta in a case that required the identification of a fundamental right in *our Nation's* history and tradition.

Unfortunately, *Lawrence's* invocation of the European Court of Justice cannot easily be dismissed as a gratuitous refutation of a claim that *Bowers* never made. Later in *Lawrence*, the Court points out that the European Court has followed its own precedent rather than overruling its precedent in order to follow *Bowers*. What a surprise! But what does this shocker have to do with the issue in *Lawrence*?

The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.⁸⁷

Can the Court really be implying, as its language suggests, that the decisions of foreign courts have more authority than decisions of American legislatures or even prior decisions of the United States Supreme Court itself? Probably not. More likely, the *Lawrence* Court simply felt free to pick and choose from decisions around the world the ones that it likes, to use them as justification or at least decoration for its own ruling, and to ignore decisions that are contrary. It is hard to think of a more *ad hoc* and manipulable basis for interpreting the United States Constitution, and the use of foreign decisions to bolster substantive due process claims is yet another example of the way *Lawrence* maximizes and reflects the Court's now completely undisciplined discretion.⁸⁸

⁸⁷ 123 S. Ct. at 2483.

⁸⁸ The Court may be headed in this direction, not only in substantive due process, but in other areas as well. See J. Harvie Wilkinson III, *International Law and American Constitutionalism* 12 (copy on file with authors) (wondering what principle judges can use to decide which foreign decisions to cite).

D. *Exploring More Transcendent Dimensions*

The arguments just discussed, as weak as they are and destabilizing of law as they may turn out to be, are not as corrosive and illogical as the core arguments of *Lawrence*. Consider, for example, the Court's most fundamental attack on *Bowers*. The real mistake in that case, according to *Lawrence*, was to ask whether the sexual conduct proscribed by the statute was protected by the Constitution: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."⁸⁹ This is a transparent debater's trick. If a married couple challenged a statute forbidding them to have sexual intercourse, a court could obviously decide whether they had a right to do so without implying that marriage is about nothing other than the exercise of that right. Indeed, courts commonly make decisions about married people's rights to control their property and their children without implying that marriage is "simply" about property or "simply" about the care of children.

This bizarre reformulation of the issue in *Bowers* is part of a broader move that alters the whole nature of substantive due process. What was once a relatively coherent—albeit mistaken—effort by the Court to protect certain fundamental rights from legislative interference has now become a tool through which the Court can simply impose on the nation its own visions of human freedom, the meaning of the universe, and the mystery of human life. While it would be foolhardy to make any confident predictions about what decisions will eventually emerge from these visions, *Lawrence* pretty strongly suggests that the Court has concluded that unregulated sexual activity is at the very least central to The Meaning of Human Liberty. This resembles nothing so much as the Playboy Philosophy articulated by Hugh Hefner during the 1960's in a long, ambitious series of essays in *Playboy* magazine.⁹⁰

⁸⁹ 123 S. Ct. at 2478.

⁹⁰ The essays are available at <http://www.playboy.com/worldofplayboy/hmh/philosophy/>. For a more concise summary of the Philosophy—including the claim that "sex in a very real way is the most civilizing force on this planet"—see a recent interview with Hefner at <http://www.gwu.edu/~nsarchiv/coldwar/interviews/episode-13/hefner1.html>.

This inference is strengthened by the Court’s rejection of the course proposed in Justice O’Connor’s concurrence—to strike down a statute targeted exclusively at homosexuals on the basis of equal protection analysis. The *Lawrence* majority itself calls her argument “tenable.”⁹¹ Why then reach out to invalidate all statutes proscribing sodomy, including those that do not discriminate against homosexuals? One possible answer might have been that general proscriptions against sodomy have a disparate impact on homosexuals. Whatever the merits of that suggestion, it is not the Court’s answer. Instead, the Court declares that a failure to examine the “substantive” validity of the Texas statute would somehow allow that statute’s “stigma” to remain.⁹² Or, in another formulation, a failure to overrule *Bowers* would “demean” the lives of homosexuals and invite some kind of discrimination against them.⁹³ The Court does not elaborate on the meaning of these cryptic statements, but it appears that *Lawrence* may have created a constitutional right, not just to engage in sodomy, but to enjoy the government’s *respect* for engaging in sodomy.⁹⁴ That might explain why it seemed so imperative to overrule *Bowers*, which at the very least evinced no admiration for homosexual sodomy or for those who engage in it. And it is the most obvious way to explain the Court’s reference to “the *due process right to demand respect for conduct* protected by the substantive guarantee of liberty.”⁹⁵

If this is what *Lawrence* means, it may presage a new jurisprudence in which governments are forbidden from doing anything that might convey disapproval of any sexual practices that the Court believes are somehow connected with efforts “to define one’s own concept of existence, of meaning, of

⁹¹ 123 S. Ct. at 2482.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ There are, of course, many kinds of behavior that adults have a right to engage in, but which the government treats disrespectfully and seeks to discourage. Familiar examples include smoking, making racist comments, gluttony, and desecrating the American flag.

⁹⁵ 123 S. Ct. at 2482 (emphasis added).

the universe, and of the mystery of human life.’⁹⁶ In light of the Court’s apparent enthusiasm about the spiritual or mystical nature of sexual activity, this could mean that something resembling the Playboy Philosophy will become the official doctrine of the United States.⁹⁷ It certainly points toward the abolition of all laws denying any of the benefits of marriage, including the dignitary benefits associated with the term “marriage,” to homosexual couples.⁹⁸ And it probably also points toward the abolition of all laws that try to “define the meaning of the relationship or to set its boundaries,” as for example by limiting the number of people who can simultaneously be married to one another or by defining adultery as a violation of the marital relationship.⁹⁹ And it is hard to see why laws against prostitution should survive, since this may be the only sexual outlet through which some people wish to, or even can, exercise “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁰⁰

⁹⁶ *Id.* at 2481.

⁹⁷ Whatever the merits of Hugh Hefner’s views as a matter of social policy or philosophy, a question that we do not address here, we think that the constitutionalization of such views by the Supreme Court could hardly be regarded as an insignificant development.

⁹⁸ The Court twice goes out of its way to leave open the possibility that homosexual relationships may be entitled to formal recognition in the law. *Id.* at 2478, 2484. We should note that invoking *Lawrence* in support of a claimed right to same-sex marriages would not imply that “marriage is simply about the right to have sex[].” See *Lawrence*, 123 S. Ct. at 2478; *supra* notes xx and accompanying text. Rather, it would simply recognize that a central purpose of marriage has always been to define legitimate sexual relations, and that laws denying this form of legitimation to homosexual relationships may foster the kind of “stigma” and “discrimination” that *Lawrence* condemns. See *id.* at 2482. But for an argument that the *Lawrence* Court eschewed equal protection analysis because it feared it would then be committed to legalizing same-sex marriage, see Pamela S. Karlan, *Loving Lawrence*, Stanford Working Paper No. 85 (2004) (available at <http://ssrn.com/abstract=512662>).

⁹⁹ See *id.* at 2478. In the quoted passage, the Court may seem to discourage this inference through a cryptic suggestion that government may prevent “abuse of an institution the law protects,” but no examples of such abuse are provided.

¹⁰⁰ *Id.* at 2481. The Court expressly leaves open the question whether laws proscribing prostitution can survive due process review. *Id.* at 2484. A sensible legislature might well conclude that prostitution or adultery has more substantial effects on third parties than sodomy does, and that this justifies different treatment under the law. But such analysis

It is also possible, given the *Lawrence* Court's habitually sloppy use of language, that its proclamation of a "right to demand respect for [protected sexual] conduct" is just an unsuccessful attempt to say that the Constitution demands that a right to engage in this conduct be respected to the extent of not being criminalized. Under that interpretation, the passages in *Lawrence* that seem to celebrate nonprocreative sex might be dismissed as so much self-indulgent fluff.

This interpretation, however, may entail radical consequences as well. Nowhere in the *Lawrence* opinion does the Court so much as entertain the possibility that state legislatures could have any valid reason for proscribing sodomy in general or homosexual sodomy in particular. Furthermore, the Court comes very close to implying that one obvious basis for such proscriptions—a desire to discourage behavior considered immoral by the majority—is inherently illegitimate.¹⁰¹ Even if we leave aside other possible rationales for the statute, such as public health and promoting the institution of marriage, how is the desire to discourage putatively immoral behavior really different in any way marked out by the Constitution from the paternalistic desire to discourage other forms of putatively dangerous or self-destructive behavior? When the government outlaws conduct that it regards as risky or unhealthy—such as the recreational use of drugs, or working long hours in a bakery, or driving a motorcycle without a helmet—it is making a *moral* decision that assigns a higher value to health and physical safety than to the spiritual insights that some people have said they get from LSD, or the moral satisfaction that some people get from following a strict work ethic, or the mystical exhilaration of flirting with danger on the open road.¹⁰²

does not appear to be part of the *Lawrence* enterprise, for the Court's opinion fails even to examine the justifications offered in defense of the Texas sodomy statute. The focus in *Lawrence* is instead on the contribution of sex to defining the meaning of life, and it is not at all obvious how a court could conclude that sodomy contributes more to this constitutionally significant function than prostitution or adultery.

¹⁰¹ "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 2484. This statement comes shortly after the Court expressly approves Justice Stevens' claim in his *Bowers* dissent that prior cases had established 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." *Id.* at 2483.

¹⁰² Some may object that health and safety laws are justified because society is required to incur costs in caring for those who injure themselves through reckless behavior.

Unless the Court were to distinguish without any constitutional justification between the different moral judgments reflected in different forms of paternalistic legislation, it is hard to see how any regulatory statute could survive unless it is demonstrably necessary to prevent immediate injuries to people other than those who want to engage in the conduct.

We certainly do not believe that the *Lawrence* Court consciously decided to embrace any such radically libertarian interpretation of the Due Process Clauses. Nor do we assume that the apparent sympathy for the more limited Playboy Philosophy actually reflects a conscious adoption of Hugh Hefner's views by all the Justices who joined the majority opinion. In fact, we think that the most salient characteristic of *Lawrence* is the impossibility of determining what it means, other than that five Justices have decided to forbid laws proscribing sodomy. Whatever new rights the Court may find or refuse to find among "the components of liberty in its manifold possibilities,"¹⁰³ *Lawrence* will stand primarily for the proposition that due process jurisprudence has transcended the bounds of rational discourse.

III. CAN *LAWRENCE* BE DEFENDED?

Our claim that *Lawrence*'s version of substantive due process is a travesty may be met with two basic objections. One is that our understanding of constitutional law is not sufficiently sophisticated. The other response is the opposite, namely that *Lawrence* correctly interprets the text of the Constitution. Substantial articles defending *Lawrence* on these disparate grounds have already appeared. Both are fine examples of their kind, and worth examining in some detail.

Whatever the validity of this justification, a legislature could rationally conclude that society incurs costs of various kinds when its citizens adopt lifestyles in which sodomy plays a significant role. Texas and several *amici* had articulated a number of relevant state interests that could be advanced by the Texas statute, including public health, protecting traditional morality, and promoting the institution of marriage. *Lawrence* simply ignores these interests, as though it were beneath the Court's dignity to discuss them, and the Court certainly did not require those challenging the statute to prove the non-existence of "any state of facts either known or which could reasonably be assumed affords support for" the Texas statute. *Carolene Products*, 304 U.S. at 154.

¹⁰³ 123 S. Ct. at 2484.

A. *Lawrence as Sophisticated Law*

Writing in the *Harvard Law Review*, Professor Robert Post celebrates the principal features of *Lawrence* to which we object. He agrees that *Lawrence* “shatters” *Glucksberg*’s attempt to cabin substantive due process,¹⁰⁴ and reflects changing moral views within the elite culture.¹⁰⁵ He agrees that its holding lacks clear contours and that its effects depend on the future resolution of its multiple ambiguities, such as whether it applies only to private conduct or extends to public recognition of homosexual relationships.¹⁰⁶ For Post these are not deficiencies, but admirable aspects of an opinion that tests the waters and gives the Court the option of retreating from its position if the public becomes “inflamed by the decision.”¹⁰⁷

Far from treating *Lawrence* as an affront, as we do, Post suggests that complaints like ours merely reveal an unsophisticated understanding of the nature of constitutional law. According to Post, constitutional law is always a product of “constitutional culture.” The Court will participate in the creation of that culture by holding a “conversation” with the American people, who will either show confidence in the Court’s decisions or repudiate them.¹⁰⁸ But Post’s defense of *Lawrence* actually confirms our point because, as we will show, he is forced to hollow out the meaning of constitutional law itself and to misrepresent what it means to have a “conversation.”

¹⁰⁴ See Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 Harv. L. Rev. 4, 96 (2003).

¹⁰⁵ *Id.* at 106.

¹⁰⁶ *Id.* at 105-106.

¹⁰⁷ *Id.* at 105.

¹⁰⁸ It might be thought the Post is merely making a noncontroversial positive point, namely that constitutional law is whatever the Supreme Court can get away with saying that it is. But this does not appear to be the case. Post affirmatively recommends that the Court should “conceive of constitutional law as a consequence of a relationship of trust that it seeks continuously to establish with the American people.” *Id.* at 107. For Post, constitutional law is legitimated by the degree to which the Court retains “the warranted confidence of the American people,” *id.*, though he never explains how warranted confidence could be distinguished from unwarranted confidence.

The radical nature of Post's position is somewhat obscured by his effort to portray his favored approach as a moderate alternative to excessively formal and excessively political approaches to constitutional law.¹⁰⁹ He concedes that the text should be controlling when it is clear, as for example in its requirement that each state have two Senators.¹¹⁰ But how is the text any less clear about "substantive due process"? Whatever the exact meaning of the Due Process Clauses may be, the Court has never so much as attempted to derive *this* doctrine from the text, as we have already discussed. Inserting provisions into the Constitution is no less a violation of the text than taking provisions out. Why, moreover, would it be any worse for the Court to eliminate the uneven apportionment in the U.S. Senate than it was to make this change in the state senates? *Reynolds v. Sims* plus "reverse incorporation"¹¹¹ could easily yield the conclusion that our "constitutional culture" has rendered the applicable provisions of Article I and Article V obsolete. If the Court drew that conclusion, and still retained the confidence of the American people, it is difficult to see why Post should object.¹¹²

Post obscures his approval of the Court's exercise of raw political power

¹⁰⁹ Post's defense of *Lawrence* can usefully be compared with John Hart Ely's defense of the Warren Court revolution. Ely argued that Warren Court jurisprudence made sense because special efforts by the judiciary are needed to enforce a coherent and overarching principle—reinforcement of democracy—which can be derived from the constitutional text taken as a whole. *Democracy and Distrust* (1980). Whatever the merits of Ely's argument, he at least attempted to reconcile the Court's decisions with the text of the Constitution. Post does not.

¹¹⁰ Post, *supra* note x, at 82.

¹¹¹ This is the branch of substantive due process that has rendered equal protection doctrine applicable to the federal government. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1945) (implicitly); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (explicitly).

¹¹² Post also tries to distinguish his conception of constitutional law from raw politics by asserting that the Court "must endow [the doctrine of substantive due process] with attributes of administrability, consistency, stability and so forth." Post, *supra* note x, at 107. This list provides very weak criteria—so weak that many political processes could satisfy them. In any event, by Post's own account, the history of substantive due process has been inconsistent and unstable, and he never explains how *Lawrence* could possibly be seen as contributing to any increased consistency or stability. Indeed, by celebrating the opinion's ambiguity, Post seems to admit that it does not.

by calling *Lawrence* “the opening bid in a conversation the Court expects to hold with the American public.”¹¹³ This conversation is a fiction. The *Lawrence* Court did not try to persuade the people in states with anti-sodomy laws to change their statutes, and indeed did not even discuss the reasons they may have had for enacting such statutes. Nor can the people of these states respond to the Court by reenacting their statutes. This is a “conversation” in which the Court issues commands, and those who disagree must obey. Nor can the “American public” have any effect on *Lawrence* by “conversing.” Instead, they must secure the votes of two-thirds of each house of Congress and majorities in three-fourths of the state legislatures.¹¹⁴ Thus, we can translate Post’s conversation metaphor as follows: when the Court speaks, the American public is effectively silenced so long as the Court secures the agreement of the very small number of people required to block a constitutional amendment.

Lest this be thought to give too little credit to the Court’s willingness to listen to those who disagree with its decisions, consider *Planned Parenthood v. Casey*.¹¹⁵ If ever a sizable number of people became “inflamed” by a modern Supreme Court decision it was in the wake of *Roe v. Wade*. In *Casey*, however, the Court contended that the inflamed public response to *Roe* was a powerful reason to *reaffirm* the right to abortion, even for Justices who doubted that *Roe* had been correctly decided.¹¹⁶ This makes the dialogue between the Court and the public a pretty one sided conversation.

Post also never shows why the Constitution cannot or should not be read to leave the Court without a roving commission to invalidate laws that it really dislikes. Although he claims that judicial neutrality is a “chimerical objective,”¹¹⁷ he never shows why *Lawrence*’s form of substantive due process is compelling, let alone inevitable. Instead, he simply begins with the brute fact that the Court has

¹¹³ *Id.* at 104.

¹¹⁴ Alternatively, they can try to elect Presidents and Senators who will try to fill vacancies on the Court with judges likely to overrule *Lawrence*. To put it mildly, this is a unreliable strategy.

¹¹⁵ 505 U.S. 833 (1992).

¹¹⁶ *Id.* at 866-69 (majority opinion); 871 (plurality opinion).

¹¹⁷ Post, *supra* note x, at 84.

adopted the doctrine of substantive due process.¹¹⁸ That observation, however, does not establish that the Court had to do so. Moreover, by beginning his discussion of substantive due process with Justice Harlan's dissent in *Poe v. Ullman*,¹¹⁹ Post ignores long stretches of history in which the Court was able to interpret the Constitution without embracing substantive due process, and even longer stretches of history in which the Court avoided anything like *Lawrence*'s free form version of the doctrine. A world without substantive due process is not only possible, it has actually existed.

In defending the imposition of the Court's cultural judgments and elite values, Post plays the usual trump card: *Brown v. Board of Education*, which he assumes was nothing more than the imposition of elite cultural values.¹²⁰ Contrary to Post's assumption, the unconstitutionality of segregated public schools can plausibly be derived from the text and history of the Fourteenth Amendment,¹²¹ so *Brown* does not trump our objections to his theory of "constitutional culture" after all.

Even more damaging to Post's position, however, is that it lends itself very well to a defense of *Plessy v. Ferguson*. Like *Lawrence* today, *Plessy* and its progeny reflected much elite opinion of the time—not only in the South but in the

¹¹⁸ *Id.* at 85.

¹¹⁹ 367 U.S. 497, 539 (1961).

¹²⁰ Post, *supra* note x, at 106 n.494 (quoting Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 Wake Forest L. Rev. 513, 548 (2003)).

¹²¹ See Michael W. McConnell, *Originalism and The Desegregation Decisions*, 81 Va. L. Rev. 1881 (1995). Professor McConnell shows that proponents of the Civil Rights Act of 1875 acknowledged that the Act would require that public accommodations, including common schools, be available to all without regard to race. *Id.* at 990-97. Because the only source available for authorizing that act was the Fourteenth Amendment, and because proponents expressly relied upon this constitutional provision, *id.* at 990-91, these assertions constitute an interpretation by members of Congress that the Fourteenth Amendment rendered segregated public schools unconstitutional. That interpretation in turn provides good evidence of the original understanding of the Amendment because it came so soon after ratification and because support for that interpretation was widespread. See *id.* at 1101-1105.

North, not only in conservative but also in quite progressive circles.¹²² With the help of Professor Post's metaphor, we can now see that *Plessy*'s embrace of the separate but equal doctrine was the Court's bid to start a conversation with the American public on the subject of race. The American public never did become so "inflamed" as to repudiate *Plessy* by adopting a constitutional amendment, and the Court apparently retained the trust and confidence of the public throughout the many long decades of judicially sanctioned Jim Crow. If Post wants to defend *Brown* and *Lawrence* because they successfully imposed elite opinion on a reluctant nation, he should find it even easier to defend *Plessy*'s embrace of elite judgments that were less reluctantly accepted by the nation.

Post's jurisprudence of constitutional culture is a jurisprudence of extreme constitutional relativism. No longer does the Constitution represent a set of rules and constraints that the American people have imposed on themselves through formal action outside the context of ordinary politics. Instead, it represents the restraints of the moment that an unapologetically elitist Court wants to impose on the people—good until it wants to impose some other set of restraints. We cannot agree that this is a more sophisticated view of constitutional law than our more traditional approach. Rather, we think it represents the repudiation of law as a concept distinct from politics.

B. *Lawrence as Textual Interpretation*

Taking a tack that seems at first to be the opposite of Post's, Professor Randy Barnett contends that *Lawrence* articulates a text-based theory of constitutional liberty.¹²³ We do not believe that Barnett succeeds in showing how Justice Kennedy's "elegant ruling"¹²⁴ provides either a definable rule of decision for future cases or a plausible interpretation of the constitutional text. And, as a positive matter, the *Lawrence* opinion is much less likely to be a step toward the

¹²² See, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 260 (2002) (*Plessy* consistent with much of elite opinion).

¹²³ Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2002-2003 Cato Sup. Ct. Rev. 21.

¹²⁴ *Id.* at 40.

principled libertarian revolution that Barnett favors than toward a habit of imposing judicial whims and fads, whatever they happen to be.

First, Barnett approvingly notes that *Lawrence* abandons the requirement that an asserted right be deeply rooted in the nation's history and tradition. According to Barnett, this is appropriate because liberty itself is deeply rooted in the nation's traditions.¹²⁵ Thus, *Lawrence* properly adopted a "presumption of liberty" that requires the government to demonstrate that any behavior it seeks to prevent is not an exercise of liberty but of "license." License, in turn, is defined by Barnett as violating the rights of others,¹²⁶ thus producing what he claims is a coherent theory that can readily be applied as law.

This defense of *Lawrence* is unsatisfactory. The distinction between liberty and license is wholly dependent on an unstated conception of what "the rights of others" are and what it means to infringe them. A list of the "rights of others" certainly cannot be found anywhere in the Constitution, and they are by no means self-evident. Political philosophers have engaged for centuries in sharp and unsettled debates about the appropriate line between liberty and license, and American history contains any number of competing strands of argument on this question. Barnett adopts a view drawn from classical liberalism and contemporary libertarian theory. We are personally sympathetic to that approach, and we are willing to assume that a Supreme Court staffed with nine Randy Barnetts might well produce an intellectually coherent and in many ways salutary set of social policies. But we cannot claim that our policy views are self-evidently embodied in the Constitution, while others, such as President Franklin Roosevelt's notion of the four freedoms, are self-evidently unconstitutional.¹²⁷ Indeed, even the classical liberal tradition encompasses sharp debates about what constitutes a harm to third parties that is sufficient to justify curtailing liberty. "Liberty" is exactly like "justice" in this respect:

¹²⁵ *Id.* at 32.

¹²⁶ *Id.* at 35, 37.

¹²⁷ It should be noted that other law professors who are celebrating *Lawrence* are hoping that it will usher in the use of international law to give renewed purchase in the United States to the creation of rights that advance Roosevelt's conception of freedom from want. See Harold Hongju Koh, *America and Human Rights*, *The Economist*, Nov. 1, 2003, at 24.

[T]he ablest and the purest men have differed upon the subject; and all that the Court could properly say . . . would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with [certain] abstract principles.¹²⁸

Barnett not only wants to claim that *Lawrence* provides a coherent legal test, he also wants to root the source of that test in the text of the Constitution. Unfortunately, his textual argument is quite untenable. Barnett suggests that all of the rights protected in the Ninth Amendment against the federal government are also protected against the states by the Privileges or Immunities Clause of the Fourteenth Amendment.¹²⁹

¹²⁸ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.).

¹²⁹ Barnett, *supra* note x, at 40:

In addition, federal power is further constrained by the rights retained by the people—both those few that are enumerated and, as affirmed in the Ninth Amendment, those liberty rights that are unenumerated as well. At the state level, the Privileges and Immunities Clause of the Fourteenth Amendment prohibits states such as Texas from infringing the privileges or immunities of its U.S. citizens. These include both the liberty rights or “immunities” retained by the people, and the positive rights or “privileges” created by the Constitution of the United States.

This passage appears to argue for the incorporation of the Ninth Amendment. Professor Barnett defines the Ninth Amendment as protecting “those liberty rights that are unenumerated as well.” *Id.* Two sentences later he then defines immunities in the Privileges and Immunities Clause by reference to “liberty rights . . . retained by the people.” *Id.* The phrase “rights retained by the people” is, of course, from the Ninth Amendment, so it is natural to read this reference to “liberty rights” as a reference back to the protections of the Ninth Amendment whose unenumerated “liberty rights” Professor Barnett just mentioned. Earlier in this essay, moreover, Professor Barnett responded to complaints that the Constitution does not protect unenumerated rights by noting:

Whenever a particular liberty is specified, therefore, it is always subject to the easy rejoinder: “Just where in the Constitution does it say that?” And that rejoinder is offered notwithstanding the plain language of the Ninth Amendment: “The enumeration of certain rights shall not be construed to deny or disparage others retained by the people.” With that background

The Ninth Amendment by its terms is a rule of construction rather than a substantive guarantee of rights.¹³⁰ It simply warns against misinterpreting the Constitution to mean that the enumeration of certain rights might authorize the federal government to infringe other rights. It is thus a reminder that the people retain *all* their rights against the federal government—including the right to govern themselves as they see fit within their own states—except to the extent that the federal government is authorized to infringe those rights in the exercise of its enumerated powers. We think that the meaning of the Ninth Amendment is perfectly plain on its face, but our understanding of its meaning has now been confirmed with overwhelming historical evidence by Professor Kurt Lash.¹³¹

If the Fourteenth Amendment forbade the state governments to infringe any right that the Ninth Amendment forbids the federal government to infringe, it would follow that the state governments may only exercise the same enumerated powers that the Constitution confers on the federal government. But that conclusion is absurd. To see why Barnett's argument is vulnerable to this *reductio ad absurdum* refutation, it is important to understand the function of the Ninth Amendment, which is a complement to the Tenth Amendment. Just as the Tenth Amendment affirms that the enumeration of powers in the Constitution is exhaustive, so the Ninth Amendment affirms that the enumeration of rights in the

in mind, we are now in a position to appreciate the potentially revolutionary significance of the decision in *Lawrence v. Texas*."

Id. at 32.

Professor Barnett's recent book also appears to confirm that he believes the Ninth Amendment applies to state as well as federal laws. See Randy E. Barnett, *Restoring the Lost Constitution* 232-233 (2004) (approving of the use of Ninth Amendment to strike down state as well as federal laws). Indeed, he entitles one chapter: "The Mandate of the Ninth Amendment: Why Footnote 4 Is Wrong." *Id.* at 224. Footnote 4, of course, has applied to both state and federal law.

¹³⁰ Cf. Leslie Dunbar, *James Madison and the Ninth Amendment*, 42 Va. L. Rev. 627 (1956).

¹³¹ See Kurt Lash, *The Lost History of the Ninth Amendment (I): The Lost Original Meaning* (available at <http://ssrn.com/abstract=505482>); Kurt Lash, *The Lost History of the Ninth Amendment (II): The Lost Jurisprudence* (available at <http://ssrn.com/abstract=505484>).

Constitution is *not* exhaustive. This makes perfect sense because rights and powers are correlative: if a government does not have the power to impose a regulation in a particular area, the citizen has a right not to have his conduct in that area regulated by that government.¹³² Thus, the Ninth Amendment protects a vast number of unenumerated rights *against the federal government*, namely all those rights that the federal government is not empowered to infringe in the exercise of its enumerated powers.¹³³ It makes no sense at all, however, to think that the Fourteenth Amendment would have protected this same vast number of rights against the state governments, for that would imply that the powers of the state governments were limited to the powers possessed by the federal government. Not surprisingly, while the legislative history of the Fourteenth Amendment contains suggestions that specific rights included in the first eight amendments would be “incorporated” and made applicable to the states by the Privileges or Immunities Clause, the evidence indicates that this incorporation theory was not applied to the Ninth Amendment.¹³⁴

Although the theory that the Fourteenth Amendment “incorporates” the Ninth Amendment has no foundation, this does not rule out the possibility that the Privileges or Immunities Clause was meant to protect a right to sodomy quite apart

¹³² See, e.g., Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment’s Forgotten Lessons*, 4 J.L. & Pol. 63, 65 (1987).

¹³³ *Id.* It might be objected that our reading of the Ninth Amendment makes the Tenth Amendment superfluous because our view implies that the Ninth Amendment, like the Tenth, just means that the federal government possesses only the powers enumerated in the Constitution. This objection is not well founded. First, there is no rule that forbids the Constitution from having superfluous provisions. See, e.g., Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 Va. L. Rev. 647, 648 (1996) (“Even a casual look at the Constitution reveals clauses that are in some sense redundant or superfluous.”). Second, any such “superfluity” objection would have to apply to the accepted interpretation of the Tenth Amendment as well because that provision simply confirms and emphasizes what was already plain, namely that the federal government has only those powers delegated to it by the Constitution.

¹³⁴ See Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment*, 64 Chi. L.-Kent L. Rev. 981, 982 (1988); Lash, *The Lost History of the Ninth Amendment (II): The Lost Jurisprudence*, *supra* note x, at [Part II.A]. The Ninth Amendment does provide support for *our* version of a constitution of liberty, discussed below, in which states are largely free to experiment in providing various bundles of rights, and citizens are free to choose which state to live in.

from whatever the Ninth Amendment means. In his recent book, *Restoring the Lost Constitution*,¹³⁵ Professor Barnett attempts to show that the Privileges or Immunities Clause “puts the burden upon states to justify any interference with liberty as both necessary and proper.”¹³⁶ This burden can be met by showing that an abridgement of liberty is “necessary to protect the rights that everyone possesses” or to “manage government-controlled public space so as to enable members of the public to enjoy its use.”¹³⁷

Barnett’s evidence for this interpretation of the Privileges or Immunities Clause consists primarily of familiar quotations from the legislative history of the Fourteenth Amendment.¹³⁸ At no point in his book, however, does he confront or refute the interpretation of Privileges or Immunities that we discussed earlier and endorsed: the anti-discrimination interpretation advanced by Justice Field and defended in detail by David Currie and John Harrison.¹³⁹ Nor does Barnett’s defense of *Lawrence* provide any adequate response to the utter lack of any evidence supporting the proposition that the framers of the Fourteenth Amendment meant to invalidate anti-sodomy statutes, which 32 out of 37 states had on their books in 1868.¹⁴⁰

¹³⁵ Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

¹³⁶ *Id.* at 333.

¹³⁷ *Id.* at 333-34. Barnett adds that the government may restrict the use of its own property. *Id.* at 334.

¹³⁸ *See, e.g., id.* at 60-68.

¹³⁹ *See supra* notes xx and accompanying text.

¹⁴⁰ Barnett says that “the protection of ‘morals’ is the most dubious aspect of the traditional construction of the police power—although typically this power was used to prohibit conduct that took place *in public places* where it could interfere with the use and enjoyment of public property by other citizens.” *Id.* at 334. Unfortunately for this argument, governments have a great many powers that they “typically” refrain from using, but which they do not thereby lose. Moreover, it is not clear at all to us, and certainly not proven by Barnett, that the power to regulate morals was “typically” reserved to activity in public places. Drinking, gambling and prostitution, for example, have often been regulated even if they were done on private premises and we do not understand by what metric one can declare such regulations “atypical.” Indeed, Barnett himself shows that while a few treatise

More recently, Professor Barnett has offered a novel way of identifying violations of the Privileges or Immunities Clause:

[T]he question of whether someone has or has not violated the rights of others has traditionally been handled by the private law categories of property, contracts and torts. Rather than authorize an independent philosophical inquiry by federal judges, I would have them generally defer to state law on this issue, as they now do in diversity cases.¹⁴¹

It is difficult for us to understand how this would work. Deferring to state law in deciding whether a state law violates the Fourteenth Amendment seems impossible. And whether one has violated the rights of others has traditionally been handled by public law, including the criminal law, as well as by private law.¹⁴²

We must also dispute Barnett's positive claim that *Lawrence* will lead to a libertarian revolution "[i]f the Court is serious in its ruling."¹⁴³ It is true that any number of revolutions would in some sense be consistent with *Lawrence*'s empty and indeterminate rhetoric. And it is also true, as Barnett emphasizes, that *Lawrence* substitutes the general word "liberty" for the "right to privacy" formulation in previous sexual freedom cases. But we do not believe that this reflects anything more than a taste for grandiosity, or perhaps the Court's effort to promote public and private respect for homosexuals and/or for sodomy.¹⁴⁴

Moreover, nothing in *Lawrence*'s use of the term liberty suggests that it

writers in the nineteenth century wanted to confine the reach of morals legislation, the Court upheld regulations designed to safeguard the morals of the community. Barnett, *Restoring the Lost Constitution* at 329.

¹⁴¹ Volokh Conspiracy Weblog, April 26, 2004.

¹⁴² We discuss above the reasons that it is difficult to choose an uncontested definition of the rights of others. *See supra* text accompanying notes xx.

¹⁴³ Barnett, *supra* note x, at 41.

¹⁴⁴ Rhetorically, at least, there would be considerable tension between demanding a right of privacy and a "right to demand respect for conduct protected by the [Constitution]." *Lawrence*, 123 S. Ct. at 2482.

will be given a meaning beyond the context of sexual autonomy. “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁴⁵ Other than matters that are already covered by express provisions of the Constitution, the list mentions only “intimate conduct,” which is just another euphemism for sexual conduct. The Court does not refer to other kinds of liberty, and it certainly does not even suggest any willingness to protect the economic liberties that are central in classical liberalism. Kennedy’s failure to ground the opinion in the Ninth Amendment or the Privileges or Immunities Clause—the textual hooks proffered by Barnett—also suggests that the Court is far from accepting anything like Barnett’s broadly libertarian views.¹⁴⁶

Assuming that the Court does decide to expand the *Lawrence* approach outside the area of sexual conduct, we think that this may well lead to a *diminution* of liberties that Barnett (and we) think most valuable. Of course, we do not deny that the vacuous rhetoric of *Lawrence* could be logically deployed to protect economic liberties. Take rent control for instance, which certainly infringes liberty. In American history, state governments have failed to regulate rents even more often than they have failed to regulate homosexual sodomy.¹⁴⁷ And since the

¹⁴⁵ *Lawrence* at 2475. It is also true that Justice Kennedy speaks of liberty “beyond spatial bounds” and “liberty of the person in its more spatial and transcendent dimensions.” As we have discussed, this hyperinflation of verbiage puffs up the Court’s opinion without creating any determinate meaning. It certainly does not create a revolution with any determinate direction.

¹⁴⁶ Nor do other recent decisions portend the libertarian revolution favored by Barnett. It is true that Justice Kennedy wanted to use due process to strike down one economic regulation, namely the retroactive imposition on certain coal mining companies of financial responsibility for coal miners’ health care. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1988) (Kennedy, J., concurring in the judgment and dissenting in part). Apart from the fact that nobody on the Court agreed with him, limits on retroactive legislation are quite different from the kind of prospective protections that are central to Barnett’s vision of liberty. It is also true that the Court has begun to apply due process analysis to put limits on punitive damages. *See, e.g., BMW v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). But these decisions rest largely on the notion that disproportionate punitive damages are so arbitrary as not to give fair notice to potential defendants, *Gore* 517 U.S. at 574-85; *State Farm*, 123 S. Ct. at 1519-20. Unlike *Lawrence* and similar substantive due process cases, these decisions do not prevent conduct from being punished, but merely limit the degree of sanction.

¹⁴⁷ *Cf. Lawrence*, 123 S. Ct. at 2478-80.

high point of rent regulation during the New Deal and World War II, many localities have been getting rid of rent control,¹⁴⁸ thus suggesting an “emerging awareness” reflected in “our laws and traditions in the past half century.”¹⁴⁹ Rent control, moreover, is often motivated by hostility to property owners, and its results are socially pernicious.¹⁵⁰ Thus, a libertarian-minded group of Justices could easily fashion from *Lawrence* the conclusion that rent control violates due process.

On the other hand, *Lawrence* could also be used to argue that government must provide health care to children or even health care to all citizens. It would be said by many that genuine liberty requires adequate health care, particularly when children are involved. A libertarian would object that health care is not a part of liberty because it is a claim against government, not an immunity from government. But this conception of liberty is contestable. Certainly, Americans throughout history have not prevented their government from providing health care to children. And more states are beginning to mandate such care, particularly for children. More importantly, in the new style of legal reasoning bequeathed by *Lawrence*, one could note that many European nations provide for it, and that a right to health care is enshrined in the social charter of the European Union.¹⁵¹ Why not conclude that a right to health care can be found among liberty’s “more transcendent dimensions”?

To be clear, we do not think that the Court is likely to adopt either of these extensions of *Lawrence* any time soon, for elite opinion does not strongly favor a constitutional prohibition against rent control or a constitutional right to health care. Our point is only that the *Lawrence* opinion could as logically be used as precedent for the one as for the other. Thus, if one takes a result oriented approach, to embrace *Lawrence* is simply to make a bet on which new rights elites are likely to embrace in the future.

¹⁴⁸ See David W. Chen, *When Rent Control Just Vanishes*, N.Y. Times at A-23, June 15, 2003 (discussing elimination of rent control in Massachusetts and relaxation of rent controls in New York City).

¹⁴⁹ *Lawrence*, 123 S. Ct. at 2480.

¹⁵⁰ For a discussion of the effects of rent control, see Richard Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brooklyn L. Rev. 741 (1988).

¹⁵¹ See European Social Charter, Article 11 *printed in* European Social Charter 9 (Council of European Directorate of Information)

Barnett concludes by suggesting that a jurisprudence with a presumption of liberty ought to grow beyond the sexual arena because “[t]he more liberties the Court protects, the less ideological it will be and the more widespread political support it will enjoy.”¹⁵² It is true that if the Court used substantive due process to strike down drug laws, the minimum wage, and large swathes of regulation, it might seem admirably nonideological to the rather small band of citizens who are ideological libertarians. But such a series of decisions would merely succeed in enraging much of the rest of the nation who by their votes in every election suggest they endorse a very different philosophy of social governance. That might really start a revolution, but not quite the one that Barnett is hoping for.¹⁵³

IV. THE COSTS AND BENEFITS OF *LAWRENCE*

The *Griswold-Roe-Lawrence* line of cases has no apparent basis in the text or original meaning of the Due Process Clauses, and the Justices have never tried to show that there is one. But perhaps we should not be so fussy about this little shortcoming, in light of the practical benefits of substantive due process. Neither of us will weep for the demise of statutes like those at issue in *Lawrence* and *Griswold*, and a great many intelligent people are genuinely enthusiastic about the liberating effects of substantive due process as a general matter.

Here we respond to such pragmatic justifications. Even on a strictly consequentialist analysis, *Lawrence*’s free-wheeling approach to constitutional law should be rejected, and it should be rejected even by those who dislike all the statutes that modern substantive due process has eliminated. This branch of constitutional law imposes substantial costs on the nation, particularly when the institutional costs of such a jurisprudence are considered, and it creates few actual

¹⁵² Barnett, *supra* note x, at 41.

¹⁵³ Conversely, one possible strategy for getting rid of substantive due process would be to persuade the Court to adopt a very broad version of substantive due process that incorporated the principles of *Lochner* along with the principles favored by the contemporary Left, in hopes of provoking a political counterreaction against substantive due process as such. This will not work. The same Justices who want to use substantive due process to expand their power beyond what the Constitution grants them will easily recognize that they must deploy the doctrine selectively in order to prevent the creation of a political coalition willing to take away from them the extraconstitutional power they have assumed for themselves.

benefits.

It is particularly important to focus on the institutional effects because the direct costs and benefits in policy terms are very hard to calculate. First, the actual effects of Supreme Court decisions that invalidate statutes are often indeterminate; estimating the effects requires the evaluation of difficult counterfactuals, such as whether the laws would soon have been repealed or left unenforced without the Court's intervention. Second, many of the costs and benefits of the rules imposed by the Court in these cases are still hotly contested as a policy matter, and all of us should be prepared to acknowledge that our own judgments may not be infallible. Finally, some of the results reached by substantive due process might legitimately be achieved through actual constitutional provisions, without incurring the institutional costs entailed in the undisciplined use of substantive due process.

For purposes of our argument here, let us resolve the principal doubts in favor of the Court's approach, and count as beneficial policy effects all of the substantive due process norms around which a political consensus seems to have developed. Even with this generous assumption, and even if we focus narrowly on the policy effects of modern due process, the net result is not clearly beneficial. The decisions that have become well-accepted on policy grounds, like *Griswold*, appear to have had relatively small benefits: they prevented few actual infringements of people's liberty, they invalidated laws that would probably have soon become a dead letter anyway, and they likely prevented the enactment of few, if any, new laws.¹⁵⁴ In contrast, the decisions that have not been supported by a strong political consensus, like *Roe v. Wade*, have had large effects whose net value is at best open to very serious question.¹⁵⁵

¹⁵⁴ Of course, we do not claim that there were no benefits. The statute challenged in *Griswold*, for example, apparently was inhibiting the distribution of contraceptives to impecunious women in Connecticut. See David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 196 (1994). This effect, however, was the result of political alignments that appear to have been peculiar to that state, and which may have been quite transient.

¹⁵⁵ As for pre-modern cases, *Dred Scott* clearly had important effects, and they were not good. The *Lochner*-era cases are more difficult to evaluate. We are less inclined to denounce these decisions on policy grounds than most other commentators today. Apart from that issue, however, it is difficult to conclude that the effects of these decisions were particularly significant. First, the Court did not invalidate very much legislation under economic substantive due process, and legislatures were left with a great deal of discretion

The relatively insubstantial nature of the good consequences and the enduring nature of the much more dubious consequences suggest that there ought to be a better way of generating new norms of liberty. And there is. The Constitution itself provides a process—competitive federalism—through which “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”¹⁵⁶ Apart from the fact (which we are treating as unimportant for purposes of the present analysis) that this mechanism actually derives from the text and structure of the Constitution, it is well designed to capture emerging beneficial norms and to correct the mistakes that are inevitable in any process of policy development.¹⁵⁷ In contrast, centralized acts of pure judicial discretion, exemplified by the *Griswold-Lawrence* line of decisions, will tend to operate in an excessively random manner and will generate mistakes that are extremely hard to correct.

Under the Constitution’s design, the federal government possesses only limited powers, leaving to the states most of the responsibility for setting social

to effectuate their regulatory purposes. See Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* 55-58 (2001). Second, the Court might have reached some of the results in these cases in a more legitimate fashion, such as by correctly interpreting the Privileges or Immunities Clause. Finally, given the economic competition among the states in the pre-New Deal era, some of the more economically pernicious statutes might have succumbed to ordinary political forces.

¹⁵⁶ *Lawrence*, 123 S. Ct. at 2484.

¹⁵⁷ It might be thought that our defense of competitive federalism proves too much unless we are willing to denounce decisions like *Brown v. Board of Education*, which imposed a national rule. Our claim, however, is not that competitive federalism is always the best mechanism for establishing rights, but only that it is generally superior to judicial free-lancing. The Fourteenth Amendment was adopted after experience had demonstrated that competitive federalism did not provide adequate protection for the ex-slaves and their descendants. More generally, there are good theoretical reasons to expect that centrally enforced antidiscrimination provisions will be needed to protect what Footnote 4 called “discrete and insular minorities.” See John O. McGinnis, *Decentralizing Constitutional Provisions v. Judicial Oligarchy, A Reply to Professor Koppelman*, — Const. Comm.— (2003). But that is a pragmatic justification for provisions like the Privileges and Immunities Clause of Article IV and its analog in the Fourteenth Amendment, not for substantive due process.

policy.¹⁵⁸ Representative legislatures throughout the country can make the hard decisions about the proper line to draw between liberty and license.¹⁵⁹ These legislatures are subjected to considerable market discipline because constitutional law protects free movement and the free flow of information among the states.¹⁶⁰ Individuals can and do take advantage of this freedom,¹⁶¹ and state governments respond both to changing preferences among their citizens and to the threat of

¹⁵⁸ See John O. McGinnis, *Reviving Tocqueville's America*, 90 Cal. L. Rev. 485, 508 (2002).

¹⁵⁹ See, e.g., Nelson Lund, *Federalism and Civil Liberties*, 45 U. Kan. L. Rev. 1045, 1060-66 (1997).

¹⁶⁰ See, e.g., *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868) (free movement); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (free flow of information). It is not the case that all, or even most, citizens adversely affected by a state policy need move, or even be able to move, for migration or potential migration to influence a state to rescind (or not adopt) a policy favored by the majority or by a controlling faction of citizens or legislators. So long as those migrants willing to move can impose costs (such as loss of tax revenues) on the state that outweigh whatever advantages the legal decisionmakers are reaping from the offending policy, the state will have incentives to avoid that policy. This is the same phenomenon that occurs when a company calculates how many customers will switch products because of a price increase, and takes account of the costs stemming from the loss of such "marginal" customers. See, e.g., Jerry Hausman & Gregory K. Leonard, *Product Differentiation: Economic Analysis of Differentiated Product Mergers Using Real World Data*, 5 Geo. Mason L. Rev. 321, 323 (1997). Thus, a company may rescind a price increase because of the behavior of marginal customers even if many other customers—the so-called "inframarginal customers"—would not switch products because of the price increase. Analogously, the presence of many "inframarginal" citizens who are unlikely to move would not prevent "marginal" citizens from imposing significant market discipline on legislatures that might otherwise adopt or leave in place laws that impose inefficiently high costs on some citizens.

¹⁶¹ Even poor individuals vote with their feet. See, e.g., Margaret E. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. Leg. Stud. 201, 209-210 (1996) (finding that higher welfare payments were significantly and positively correlated with immigration and lower welfare payments were significantly and positively correlated with emigration). Moreover, states that make themselves attractive to low wage workers will tend to attract businesses that require such workers, and those businesses will pay corporate taxes. See Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restrictions of Federal Subsidies to State Governments*, 90 Geo. L. Rev. 461, 469 n.39 (2001).

emigration.¹⁶² As the costs of transportation and information have fallen, geographic mobility has increased.¹⁶³ Far from being an eighteenth century leftover, federalism has become an ever more effective device for promoting the kind of interjurisdictional competition that can promote the expansion of human liberty.¹⁶⁴

This argument is not simply abstract or theoretical. The sexual freedom that has attracted so much solicitude from the Supreme Court has gotten a much bigger boost from the operation of our federalist system. Individuals who have felt oppressed by local sexual regulations, not to mention by the social mores that even the Supreme Court has not yet pretended to dictate, have migrated to more tolerant jurisdictions like New York and San Francisco.¹⁶⁵ There they have publicized their life style, and used the media to promote the loosening of sexual inhibitions, which they contend will enhance individual happiness without posing a

¹⁶² Thus, for example, even at a time when the federal government was hostile or indifferent to the interests of black Americans, and the Supreme Court had failed to invalidate legal obstacles that Southern states had established to impede emigration, a significant movement of blacks from North to South improved conditions for those who remained, because important economic interests in the southern states wanted to retain their labor. *See, e.g.,* David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 844-47 (1998).

¹⁶³ The percentage of the population consisting of individuals born outside their state of current residence has risen slowly but fairly steadily from 21 percent in 1900 to 40 percent today. *See* Series C-14, Native Population by Residence within Outside State, Division and Region of Birth, by Race: 1850-1970 *printed in* Historical Statistics of the United States: Colonial Times to 1970; <http://www.census.gov/population/socdemo/migration/80pob.txt> (1980 data); <http://www.census.gov/population/socdemo/migration/90pob.txt> (1990); American Fact Finder, Table QT-P22; http://factfinder.census.gov/servlet/QTTable?_bm=y&01000US&-qr-name=DEC_ (2000 data).

¹⁶⁴ *See* Robert D. Cooter, *The Strategic Constitution* 132 (2000) (“Parochial rights fit mobile societies and universal rights fit immobile societies”). Thus, we do not agree with Professor Post that opposition to substantive due process means that one puts a low value on liberty interests. Post, *supra* at 106 n. 495. We believe competitive federalism provides a superior mechanism for protecting liberty.

¹⁶⁵ *See* Richard A. Posner, *Sex and Reason* 127 (1992) (discussing advantages of urban environments for homosexuals).

threat to social stability.¹⁶⁶ *Lawrence* (as well as *Griswold* and the other decisions whose policy consequences are not particularly controversial) can probably have only a relatively small accelerating effect on a process of decriminalizing sex between consenting adults that is taking place independently.¹⁶⁷ Indeed, *Lawrence* itself seems implicitly to concede this point when it emphasizes that state legislatures have steadily been repealing their anti-sodomy statutes and that prosecutions for sodomy are exceedingly rare.¹⁶⁸

Compared with substantive due process, moreover, competitive federalism reduces the risks of error. It does not require judges to determine the right line between liberty and license through armchair analysis, but instead provides

¹⁶⁶ Indeed, identifiable communities have been founded on the proposition that sexual emancipation is an important aspect of human emancipation. See Ross Wetzsteon, *Republic of Dreams: America Bohemia 1910-1960* at xvi (1998). According to some studies, a climate tolerant of diverse sexual mores can even make communities wealthier by attracting creative individuals who spark innovation and new forms of enterprise.

¹⁶⁷ Of course, *Lawrence* may have accelerated a movement toward the legalization of same-sex marriages. *Lawrence* was prominently invoked in *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), a case that declared a state constitutional right to such marriages. Like abortion, however, same-sex marriage remains intensely controversial, and it is much too early to know whether the Massachusetts decision will prove to have been the harbinger of a consensus akin to the broad tolerance that we observe for contraception and private sodomy.

¹⁶⁸ 123 S. Ct. at 2479; 2480-81. The *Lawrence* opinion seems to claim that invalidating the remaining anti-sodomy laws will prevent discrimination against homosexuals, *id.* at 2482, but the Court does not explain or substantiate this claim. Some scholars have attempted to provide evidence that sodomy laws are likely to generate substantial discrimination both by encouraging private persons to discriminate and by providing a legal rationale for public entities to discriminate against homosexuals. See Christopher R. Leslie, *Creating Criminals: The Injuries Caused by Unenforced Sodomy Laws*, 35 Harv. Civil Rights-Civil Liberties Review 103 (2000). We are dubious about the claim that this is a really significant problem. Sodomy laws seem unlikely to be the but-for cause of private discrimination, for individuals are rarely motivated in their dislike of homosexuals by sodomy laws and those who want to discriminate can find rationales for discrimination other than those enshrined in law. Most uses of sodomy laws to justify state discrimination recorded in Professor Leslie's article are from almost a decade or more ago and thus do not reflect the accelerating acceptance of homosexuals through changes in popular culture. In any event, we believe that even without the judicial invalidation of state sodomy laws, competitive federalism would have continued to reduce the incidence of such governmental discrimination.

feedback information on a range of possible balances as

states experiment with different social policies.¹⁶⁹ Its flexibility permits incremental change in response to changing social conditions, new information, and the preferences of citizens. It also reduces the cost of correcting errors by making it much easier to change direction when appealing new norms prove to have unforeseen drawbacks. Creating a universal constitutional rule deprives the nation of the sober second thoughts that competitive federalism permits.

For that reason, claims that *Lawrence* properly invalidated laws on the basis of a principle of desuetude overlook this substantial benefit of competitive federalism as an alternative way of generating new social norms.⁹⁸ Sometimes communities fail to enforce laws because of enthusiasms that later fade. For instance, many cities let their laws against graffiti fall into desuetude, but then began to enforce them again in response to the broken windows theory of crime prevention. The people of New York should be especially grateful that the courts did not employ a desuetude argument to create a right to this particular form of artistic expression.

The Supreme Court's failure to recognize that competitive federalism may bring most of the benefits of substantive due process, without its dangers, is a natural consequence of judicial hubris. Courts have a comparative advantage in the analysis of legal texts and precedent. They have no comparative or absolute advantage in making policy judgments about the proper line between liberty and license, and our political system already provides better mechanisms for making those judgments.⁹⁹ But if the Supreme Court limited itself to protecting this system

¹⁶⁹ Astute pragmatists, who may disagree with our approach to law and with our condemnation of *Lawrence*, will nonetheless recognize the value of such experimentation as a general matter. See, e.g., Richard A. Posner, *Law, Pragmatism, and Democracy* 121-28 (2003).

⁹⁸ See Cass R. Sunstein, *What did Lawrence Hold: Of Autonomy, Desuetude, Sexuality and Marriage*, Univ. Of Chicago Working Paper No. 196 (2003) (suggesting that *Lawrence* should be understood as rooted in a doctrine of desuetude). Even on its own terms, Sunstein's argument would not justify *Lawrence*'s permanent invalidation of sodomy laws. If the absence of fair notice and arbitrary discretion were the key to the decision, *Lawrence* should have allowed states to give notice of their intent to enforce such laws and then enforce them consistently.

⁹⁹ It might be argued that our defense of competitive federalism is defective because we do not set out a thick or detailed version of the good against which to evaluate its results.

that the Constitution established, there would be one great disadvantage: the Justices would not get credit for the good results.¹⁰⁰

Accordingly, it should be no surprise that some Justices have simply assumed that the Constitution must include a provision that gives them the discretionary power to impose their personal visions of justice and what they think of as the more transcendent dimensions of liberty. This is also the power to burnish their reputations with the elites with whom they socialize, and who will determine their historical reputations.¹⁰¹

Unlike federalism, however, this discretion lacks competitive or democratic discipline. Supreme Court Justices are a much smaller and less representative groups than state legislatures. They are all lawyers and live in or near Washington, an artificial city that is in many ways quite isolated from the major civic and economic enterprises of the nation.¹⁰² And, of course, they answer to no one. It is anything but self-evident that their policy decisions on such matters as the proper contours of sexual regulation will be systematically better than the results produced by state legislatures that are disciplined directly by their

We count this as a virtue of our approach, not a vice. Unlike some members of the Court, and many legal academics, we do not assume that we have enough wisdom to prescribe a comprehensive and binding set of good social norms to our fellow citizens. On the contrary, we believe that competitive federalism, combined with the restrictions on state governments actually included in the Constitution, will exhibit greater wisdom over time than we, or any other assemblage of law professors, or any five Supreme Court Justices, are likely to possess.

¹⁰⁰ Professor Frederick Schauer argues that judges act to maximize their reputation among peer groups, such as academics and editorialists. See Frederick Schauer, *Incentives, Reputations and the Inglorious Determinants of Judicial Reputation*, 68 U. Cin. L. Rev. 615, 627-28 (2000). It seems to us consistent with this analysis of Justices' motivations that they can burnish their reputations by decisions that directly bring into being policies that would be approved by these peer groups.

¹⁰¹ See William Ross, *Supreme Court Justices in the Ratings Game: Factors that Influence Judicial Reputation*, 79 Marq. L. Rev. 401 (1996) (showing through study of historical ratings of Supreme Court Justices that their reputations are shaped in part by "politically correct" ideology of academics).

¹⁰² See John O. McGinnis, *Justice without Justices*, 16 Const. Comment. 541, 543 (1999).

constituents and indirectly by the competitive pressures of federalism.¹⁰³

There are constitutional theories that take account of this difficulty, and offer pragmatic justifications for judicial supervision of decisions by state legislatures. But those theories cannot justify the kind of due process review that we find in *Lawrence*. Invalidating legislation on the basis of the original understanding of the Constitution can be defended on practical grounds because its provisions were endorsed during ratification by a very substantial proportion of voters and thus deserve a presumption of beneficence.¹⁰⁴ A theory like John Hart Ely's takes a different approach, and makes the argument that courts can produce good effects by correcting systematic defects in the democratic process, such as tendencies to disregard the interests of discrete and insular minorities and to entrench incumbent politicians.¹⁰⁵ *Lawrence*-style substantive due process has no such limiting principle, and there is no apparent reason to expect that its results will be systematically better than those produced by American democracy.

In this connection, *Lawrence*'s use of foreign law seems particularly out of place because foreign decisions may themselves emerge from centralized and antidemocratic procedures. European traditions are more favorable than American traditions to the imposition of elite moral views. Indeed, the European notion of human rights in constitutionalism is fundamentally different from ours: they are the product of a search for eternal normative truths to be imposed against democracy.¹⁰⁶ This is quite different from the American conception of rights as products of democracy, including of course the special democratic processes that

¹⁰³ Another possible effect of the Supreme Court's creation of new rights is unforeseen popular backlashes against the very rights that the Court would protect. *See, e.g.*, Jeffrey Rosen, *How to Reignite the Culture Wars*, New York Times, Sept. 7, 2003 at 48. While we do not believe that constitutionalizing a right to private sodomy is likely to provoke such a backlash, extensions of *Lawrence* into areas like gay marriage and prostitution certainly could do so.

¹⁰⁴ *See* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 705, 791 (2002). Of course, this is not a *guarantee* of beneficence, as the Eighteenth and Twenty-First Amendments illustrate.

¹⁰⁵ *See* John Hart Ely, *Democracy and Distrust* (1980).

¹⁰⁶ *See* Jed Rubenfeld, *The Two World Orders*, Wilson Quarterly, Autumn 2003, at 23.

produce the state and federal constitutions and their amendments.¹⁰⁷ Moreover, the United States has a structure of federalism and more general traditions of decentralization that are important processes for testing the content of rights.

Thus, foreign constitutional norms do not just reflect certain views about the content of substantive rights but also a foreign mode of defining them. Any judicial opinion from another culture is the culmination of a complex institutional structure for producing norms. The low cost of accessing the mere words of a foreign judicial opinion can blind us to the fact that we are only seeing the surface of a far deeper social structure that is in tension with American institutions. This does not necessarily mean that the American political system as a whole is better than that of some others, but it does caution against assuming that judicial decisions from other nations will produce the same good effects here that they may produce in a significantly different political system.

Unlike the policy decisions of state legislatures, the Supreme Court's exercise of discretion under substantive due process is also not subject to competitive pressure. If a decision of the Supreme Court has bad consequences, its national scope prevents citizens from creating pressure for change by moving to a jurisdiction that follows a different rule. Moreover, the doctrine of *stare decisis* will protect norms from judicial overruling even if they have bad consequences. Thus, it is very likely that the effects of a free-wheeling jurisprudence like that exemplified by *Lawrence* will on balance be harmful: most of the good effects would emerge from the democratic process anyway, and the bad effects will be difficult and costly to eliminate.

Beyond the direct policy costs of an undisciplined due process jurisprudence, we think this approach to constitutional law necessarily inflicts substantial collateral damage on important social institutions. Consider first the social costs of a Court that creates a common law of substantive due process that attempts to locate a clear rule of decision in its cases and apply it consistently. It holds consistently for instance that substantive due process protects all consensual sex. One difficulty with this approach is that such lawyers' logic will constantly bump up against the citizens' wishes because democratic conclusions are much less logically coherent and consistent. Citizens may be ready for unrestricted contraception and private sodomy, but not unrestricted prostitution or bestiality. The friction with abstract principle will in turn undermine another of democracy's

¹⁰⁷ *Id.*

virtues—its ability to represent somewhat discordant views in a process that permits the slow evolution of social norms rather than the swift overthrow of one social paradigm by another. The latter kind of change risks the substantial social costs stemming from political backlashes and the alienation of citizens.

Of course, it is not at all clear from the history of the doctrine that the Supreme Court is even capable of reasoning in this legally constrained way in substantive due process cases. In cases of high political salience, like many decided under this rubric, judges are most in need of guidance from the Constitution because these are the cases where their raw personal preferences are most likely to distort the judicial norm of dispassionate analysis. Common law reasoning, with its dependence on analogy and relatively fluid tools of judgment, is likely to work least well when passions are high. Thus, the *ad hoc* due process approach that has culminated in *Lawrence* is the more likely alternative to genuine common law reasoning. Judicial behavior becomes indistinguishable from naked political judgments: judges reach their decisions by deciding what they think is just and socially beneficial, what will please the elites who shape their reputations, and what they guess the nation will tolerate.

This openly discretionary mode of judging has long term costs—costs that the Justices can impose on future generations with relative impunity. If constitutional debates about contentious issues of the day become simply politics by other means, the Constitution will have failed in one of its primary purposes—to create a framework by which disputes are authoritatively and predictably settled without simply replicating the strong moral and political disagreements that lead to the need for such rules in the first place.¹⁰⁸ When the Court refuses to resolve such disputes by resorting to settled legal rules, and instead injects its members' personal ideological preferences, it sharply reduces the value of this settlement function. Other politicians, moreover, and occasionally even the people themselves, will come to recognize that the Court is engaging in ordinary politics while exempting itself from the mechanisms of political accountability. Once this extraordinary leverage is widely recognized, it is likely that Justices will be nominated and confirmed on increasingly narrow ideological grounds, which

¹⁰⁸ See, e.g., Larry Alexander, “*For Me It’s all er Nuttin:* ” *Formalism in Law and Morality*, 66 U. Chi. L. Rev. 530, 534 (2000) (detailing the benefits in reducing coordination and decisionmaking costs that constitutions provide when interpreted in a formal way and that are lost when they become simply a vehicle for ideological disagreement.).

eventually may threaten a general dissolution of the Court's constitutional function.

The Court's increasingly casual imposition of elite—and even foreign—views about the appropriate content of constitutional rights may also have the cost of alienating the people from their Constitution. If the Supreme Court doesn't take the Constitution seriously, why should anybody else? And if the Constitution is not actually our unifying law, why should the people treat the constitutional order with more than benign neglect? One important feature of the American tradition is the bond of affection that citizens have for their founding document, in some measure because it is theirs.¹⁰⁹ Imposing elitist views in general, and citing international or foreign judicial decisions as justification for doing so, exacerbates this danger.¹¹⁰ Flaunting a cosmopolitan sensibility may be quite chic, but this high style comes with a price. The emphatically American nature of our Constitution has been a source of affection and pride that have contributed to our social stability.¹¹¹

Thus, we believe that the *Lawrence* approach to constitutional law does not satisfy any reasonable cost-benefit test. Its policy benefits are likely to be small and short-lived, while its policy costs are likely to be significant and enduring. At best it is an expression of judicial self-indulgence, and at worst a real threat to core features of American democracy.

V. *GLUCKSBERG* REDUX AND THE ELIMINATION OF THE *GRISWOLD-ROE-LAWRENCE* LINE

The final question is what should be done after *Lawrence*. Without endorsing any form of substantive due process, we contend that the best practicable alternative for the Court would be to repudiate the entire *Griswold-Roe-Lawrence* line of decisions, and to use *Glucksberg* as the standard for future substantive due process cases. In this Part, we begin by defending *Glucksberg*'s

¹⁰⁹ Cf. Alexis de Tocqueville, *Democracy in America*, Vol. I, Part II, ch. 6, § 4 (“On Respect for the Law in the United States”) (1835).

¹¹⁰ There are, of course, certain contexts where it is perfectly traditional and appropriate to take account of foreign law.

¹¹¹ See Wilkinson, *supra* note x at 8 (suggesting that too much citing of foreign law will make the Justices seem out of touch with American culture).

test, while acknowledging its imperfections. Second, we explain why embracing *Glucksberg* requires the repudiation of *Griswold* and its progeny. Third, we argue that stare decisis should not be an obstacle to our proposal.

Our proposal is not likely to be adopted, and certainly not before some of the current Justices are replaced. Another possible response would be a constitutional amendment aimed at preventing the most worrisome extensions of *Lawrence*. In this Part, we briefly discuss this possibility.

A. Reviving *Glucksberg*

Glucksberg is the Court's most serious modern attempt to reduce substantive due process to something like law. The requirements that rights protected by this doctrine be carefully described, and that there be objective evidence that they are deeply rooted in this Nation's history and tradition, reflect an effort to ensure that the Court is enforcing the kind of genuine social consensus that is required for provisions that actually make it into the text of the Constitution. While the enduring consensus that *Glucksberg* demands is not the same kind of consensus that produces actual constitutional text, the passage of time provides at least a rough substitute for that formality. A deeply rooted national tradition is obviously more than a mere majoritarian preference of this year's legislature or this generation's Supreme Court Justices. The clarity of the test would be further improved by adopting Justice Scalia's proposal that the supporting tradition be found at the most specific level of generality at which a tradition could be perceived.¹¹²

This test addresses our principal practical objections to *Lawrence*. First, the test assures that rights protected by substantive due process have long standing and overwhelming support, and this gives us some reason to believe that the policy judgments reflected in the decisions will be sounder than those of the occasional outlier legislature that deviates from a deeply rooted tradition. Second, *Glucksberg*'s requirement of objective evidence of a deep tradition should discipline the Justices' ideological discretion. Thus, the *Glucksberg* approach does not collapse constitutional law into a matter of mere political preference, undermining the judicial function. Finally, because of its restrictive nature, the test

¹¹² Michael H. v. Gerard D., 491 U.S. 110, 128 n. 6. (1989) (Scalia, J., joined by Rehnquist, C.J.).

still allows a substantial role for competitive federalism to be the primary discovery mechanism for new rights.

To be sure, this test for substantive due process does not rescue the doctrine from all reasonable practical criticism. First, even a strong tradition of allowing citizens a particular liberty does not necessarily imply that there is a consensus in favor of creating a rigid constitutional right. Citizens may value certain traditions, but also believe that they are best enforced through more informal social and political norms. The process for ratifying and amending the Constitution forces citizens to choose which traditions they want to enforce as law. Moreover, understanding that a matter is going to be enshrined as a formal right may well raise the seriousness of debates on the issue: citizens will deliberate in a more serious and reflective manner when they are deciding to place a norm in the Constitution.¹¹³

Second, the scope of traditions is less clear than the scope of language, particularly when the language is put into a legal document like the Constitution. While legal terms have cores and fringes that generate hard and easy cases, traditions are composed of a collection of incidents, omissions, statements, and silences in a variety of contexts over many years, which makes for greater ambiguity. And that ambiguity inevitably invests the Justices with significant and undesirable discretion in identifying the nation's deeply rooted traditions.

Despite these shortcomings, we think that the *Glucksberg* approach could effectively tame substantive due process. The most important line of cases that would be preserved are the “incorporation” decisions. As we have already explained, these are among the least problematic expressions of the doctrine because they involve the application of provisions that are actually in the constitutional text and because there is some evidence that the Privileges or Immunities Clause was meant to require much of what the “incorporation” doctrine has achieved. The cases protecting parental rights, from *Myers*¹¹⁴ to *Troxel*,¹¹⁵ are more problematic and more subject to abuse, but this does not appear to be an

¹¹³ See McGinnis & Rappaport, *supra* note x, at 795.

¹¹⁴ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹¹⁵ *Troxel v. Granville*, 530 U.S. 57 (2000).

area in which the Court is likely to start swinging for the fences.¹¹⁶

Our defense of *Glucksberg*, we should stress, does not imply approval of the doctrine of substantive due process. Nevertheless, we believe that it would be necessary or proper for the Court to completely repudiate this doctrine, a step that would entail a wholesale rewriting of constitutional law. As we noted above, substantive due process is the route by which the Court has incorporated most of the Bill of Rights. While the route was wrong, we do not think the Court should engage in a disruptive spring cleaning of a century's worth of case law only to reach the same result through a plausible interpretation of the Privileges or Immunities Clause.¹¹⁷ Similarly, if the *Glucksberg* test provides the Court with little leeway to engage in new judicial adventurism, we do not see a need to discard it merely to create an immaculate jurisprudence. The case law will never be perfect when measured against the original meaning of the Constitution, but the most important reason for overruling past decisions is to rid the Constitution of precedent that will be the engine of future error.

B. *Repudiating Griswold and Its Progeny*

Apart from the *Griswold* line of cases and the “incorporation” decisions, not much is left of substantive due process these days, and *Glucksberg* should not lead to significant new additions. We do not believe, however, that the Court could really commit itself to *Glucksberg* so long as it leaves the *Griswold-Lawrence* line of cases in place. These decisions have raised a great many serious and pressing questions about the scope of the right to sexual liberty. The courts are going to have to answer those questions, and they cannot use *Glucksberg* because

¹¹⁶ We do not believe that there is a basic tension in principle between *Glucksberg* and the substantive due process right to marry recognized by the Supreme Court in cases like *Zablocki v. Redhail*, 434 U.S.374 (1977). The right to marry is certainly a right deeply rooted in the nation's history and tradition. That tradition, of course, has also defined the basic contours of the right, most importantly that marriage is available only to two adults of the opposite sex. Whatever the merits of some Supreme Court decisions in this area, the Court has never presumed to rewrite the traditional definition of the institution, and these decisions are therefore not obviously incompatible with *Glucksberg*.

¹¹⁷ This disruptive and unnecessary spring cleaning might also sweep in a great many equal protection decisions that are much easier to justify under the Privileges or Immunities Clause than under the Equal Protection Clause.

the basic right created by these decisions cannot itself meet the *Glucksberg* test. Second, if the Court tries to draw distinctions between these questions and the questions that have already been answered, it will create patent anomalies like the anomaly created by *Bowers*. Thus, for example, the Court might say that a right to prostitution does not exist because it involves a class of “commercial” transactions that falls under *Carolene Products* rather than under the *Griswold* line. But who would believe that, any more than anyone believed *Bowers*’s claim that the *Griswold-Roe* line was only about “family, marriage, or procreation”? For all its other faults, *Lawrence* was right to recognize the absurdity of insisting on a constitutional right to abortion while denying a constitutional right to sodomy.

Some might argue that *Lawrence* did not need to discard the *Glucksberg* test because the *Griswold-Roe* line of cases themselves created a deeply rooted tradition on which the right to sodomy could rest. We believe that this argument has three deficiencies. The first is that establishing a tradition through reliance on Supreme Court cases is bootstrapping. The whole point of rooting substantive due process in deep traditions is to prevent an unrepresentative and unaccountable group of Justices from fabricating the rights that are pleasing to them. The problem is compounded because the “privacy” cases themselves do not provide any objective evidence of a deeply rooted tradition, but rest instead on bizarre and facetious constructions of the constitutional text (*Griswold*) or on a twisted interpretation of evidence that really showed the absence of a deeply rooted right (*Roe*).

Second, this line of cases began only forty years ago, and the abortion decisions are still subject to the most heated political debate. It seems difficult to claim that a right to nonprocreative sex has achieved the status of a “tradition deeply rooted in the nation’s history.” Traditions, of course, can evolve. But if the Court is to create a constitutional right without the benefit of the formal deliberation that the constitutional amendment process provides, it should require a stable consensus over a long period of time—one that has withstood the vicissitudes of events and ideas that change social attitudes.

Third, case law does not work the same way that tradition does. The case method depends on drawing a principle from a line of cases and showing that it should logically dictate the result in a different case. Thus, for instance one could find that constitutionalizing the rights to contraception and abortion have the common purpose of removing obstacles to nonprocreative sex, which pretty powerfully implies that one must have a right to nonprocreative sex itself. But

traditions, like democracy, do not proceed by lawyers' logic.¹¹⁸ They represent the accumulation and distillation of intuitions and experience over many generations, and the wisdom they embody depends in large part on their being unconstrained by abstract logic.¹¹⁹

C. *Stare Decisis*

Finally, the doctrine of stare decisis should present no obstacle to repudiating the sexual liberation cases. Stare decisis may properly call for retaining some doctrines based on decisions that were incorrect as an original matter. Stare decisis, however, is generally justified on two grounds that do not have force here. First, stare decisis is said to promote stability and predictability in the law.¹²⁰ Second, adhering to long standing decisions may bolster the legitimacy of the Court as an institution because it is much harder to believe that the Court is just applying the law if its interpretation of the law is constantly being revised in significant ways.¹²¹

Adhering to the *Griswold-Roe-Lawrence* strand of due process advances neither goal. This line of doctrine creates instability in the law because it lacks any coherent core that the Court has, or likely will, apply in any predictable or principled fashion. Thus, we have already seen *Lawrence*'s outright overruling of

¹¹⁸ See Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 Duke L. J. 427, 439 (contrasting tradition and the logic of lawyers).

¹¹⁹ See, e.g., Michael McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, Yale L. J. 1501, 1504 (1989) (book review) ("An individual has only his own necessarily limited intelligence and experience . . . to draw upon. Tradition by contrast is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time . . . [T]radition is superior to seemingly more 'rational' modes of decisionmaking for the attainment of moral knowledge").

¹²⁰ See, e.g., Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz. L. Rev. 1108, 1112 (1995).

¹²¹ See, e.g., Richard Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429, 494 (2002) (discussing stare decisis as preserving judicial legitimacy).

Bowers, as well as *Casey*'s modification of *Roe*¹²² and its implicit overruling of some post-*Roe* decisions.¹²³ Perhaps most important, this line has not only failed to develop in a consistent way, but it has now culminated in the utter analytical confusion that is *Lawrence*, which offers no guidance at all for the future. Continuing on this pathless journey is the real threat to legal stability.

Nor do we think that anyone could seriously maintain that the Court's adventures in the realm of sexual liberty have enhanced its public reputation as an institution devoted to applying the law rather than making it up. The political discretion at the heart of the doctrine of substantive due process has created ripples of institutional instability outside the Court, for it is one of the causes of the increasingly dysfunctional nature of the judicial confirmation process. Senator Charles Schumer did not invent out of thin air the notion that judging is really all about the judge's "ideology."¹²⁴ We wish he could be accused of that, and we hope that it is not too late for the Court to prove him wrong. But if the Justices continue on their current odyssey among the "more transcendent dimensions" of liberty, we fear that they will soon pass the point of no return.

To the argument that asking the Court to abandon substantive due process is the equivalent of Xerxes ordering the Hellespont to be whipped into submission, it should be stressed that with *Carolene Products* the Court did tame substantive due process to a large extent and for a significant period of time. Of course, substantive due process will always remain a temptation, but that does not mean that it is impossible to enjoy periodic eras of relative restraint. And these eras are important because substantive due process has a tendency to become more internally undisciplined and incoherent as it progresses. If substantive due process were eventually to return in a more aggressive form sometime after a revival of the *Glucksberg* approach, as we suppose it probably would, it could hardly fail to be more modest and less open-ended than what we find in *Lawrence*. For this reason, we think that returning to *Glucksberg* would at least reduce the risk of a

¹²² *Casey*, 505 U.S. at 873.

¹²³ See *id.* at 882 (plurality opinion).

¹²⁴ For discussion of Senator Schumer's drive to put "ideology" at the center of confirmation hearings, see Stephen B. Presser, *Some Thoughts on Our Present Discontents and Duties: The Cardinal, Oliver Wendell Holmes, The Unborn, The Senate and Us*, 1 Ave Maria L. Rev. 113, 123 (2003).

general dissolution of constitutionalism.

D. *A Constitutional Amendment on Same-Sex Marriage?*

As we have indicated, we do not expect *Lawrence* itself to trigger any significant backlash from the public. But now that the Massachusetts judiciary has taken the most obvious next step by creating a right to same-sex marriage,¹²⁵ serious consideration is being given to a constitutional amendment that would address this much more controversial decision. President Bush has endorsed amending the Constitution to define marriage as “as a union of man and woman as husband and wife,”¹²⁶ and even his probable opponent in this year’s election, Massachusetts’ own John Kerry, has spoken out against same-sex marriage.¹²⁷

We think it would be a mistake to add a provision to the Constitution creating a national definition of marriage. Laws affecting marriage vary among the states and have varied over time, and this is exactly the kind of area in which competitive federalism provides an effective mechanism for conducting experiments that may or may not mature into a lasting consensus. The *Lawrence* decision, however, does make us suspect that a different kind of constitutional amendment may be needed. *Lawrence*’s strong suggestion that mere governmental disrespect for homosexual behavior is unconstitutional may prefigure decisions by the Supreme Court declaring that the states must allow same-sex couples to marry, or that they must at least recognize same-sex marriages approved by other states. Such decisions would seriously undermine the very valuable mechanism of competitive federalism. Once such judicial decisions were made, moreover, they would be especially difficult to undo because of expectations and vested interests that they would generate. For that reason, we think that serious consideration should be given to a preemptive constitutional

¹²⁵ See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003); In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. Feb 03, 2004) (No. SJC-09163).

¹²⁶ Remarks by the President (Feb. 24, 2004).

¹²⁷ David R. Guarino, *Same-Sex Marriage Debate; Strategizing Pols Keep Gay Ban Alive; Heated Campaign Issue Puts Kerry on Hot Seat*, Boston Herald, Mar. 12, 2004 (2004 WL 57715640).

amendment designed to protect competitive federalism from such judicial mischief.¹²⁸

CONCLUSION

Many Supreme Court decisions have had worse immediate consequences than *Lawrence*. But few decisions in its entire history are so poorly reasoned, and almost none seeks so overtly to maximize future judicial discretion. Because *Lawrence* represents the final dissolution of meaningful legal constraints on substantive due process, it is likely to generate bad policy results in the future and it will certainly undermine the Court's role as an institution that is more than a reservoir of political discretion for whatever forces can control it. The one possibly happy consequence is that the transparent emptiness of *Lawrence*'s analysis will cause a rethinking of the trends in substantive due process that have estranged the Court from anything that resembles the rule of law in such cases. Unfortunately, the better prediction may well be that *Lawrence*'s style of judicial hubris will prove contagious, and that other doctrinal areas will succumb to its virulent lawlessness.

¹²⁸ What we have in mind is something along the following lines:

Sec. 1. Nothing in this Constitution shall be construed to require any institution of government in the United States to recognize as marriage, or grant any benefits or incidents of marriage to, any union except that of one man and one woman.

Sec. 2. No state shall be required by any federal law, or by any provision of this Constitution, to recognize the validity of any marriage except a marriage of one man and one woman.

Sec. 3. Nothing in this article shall be construed as an endorsement of any prior judicial interpretation of any provision of this Constitution.