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## Is *Lawrence* Libertarian?

Dale Carpenter<sup>†</sup>

*Lawrence v. Texas*<sup>1</sup> begins with “Liberty” and ends with “freedom.”<sup>2</sup> For the first time in its history the Supreme Court invalidated a law criminalizing sexual conduct. Add to that sweeping statements in *Lawrence* celebrating individual “autonomy.”<sup>3</sup> Consider too the Court’s surprising revival of substantive due process, a doctrine entombed with musty traditions in liberty-denying decisions like *Bowers v. Hardwick*<sup>4</sup> and *Washington v. Glucksberg*.<sup>5</sup> What is more, *Lawrence* is not your father’s substantive due process. The pre-*Lawrence* doctrine bifurcated the world into a large domain of almost unprotected “liberty interests” and a very small and increasingly choosy domain of strongly protected “fundamental rights.” *Lawrence* collapsed these claims into one, liberty, by avoiding the standard levels of scrutiny. And even *that* is not all it did. *Lawrence* undermined the quaint and unprincipled distinction between personal rights (some of which were protected) and economic rights (not protected). That distinction had divided pre-New Deal America from post-New Deal America, ratifying a dramatic expansion of government power at all levels and sharply limiting judicial authority to exalt individual rights. Now all “liberty,” whether of the economic or personal sort, will be protected. Henceforth, the burden rests with the government to justify its regulations or denials of liberty, not with individuals to prove their liberties are “fundamental.” The bureaucrats with their stifling regulations, the lobbyists with their rent-seeking ways, and the moralists with their nosy preferences

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1. 123 S. Ct. 2472 (2003).
2. *Id.* at 2475, 2484.
3. *E.g., id.* at 2475 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).
4. 478 U.S. 186 (1986), *overruled by Lawrence*, 123 S. Ct. at 2485.
5. 521 U.S. 702 (1997).

must pay heed. If the Court really means what it wrote, a libertarian revolution is coming. An emboldened judiciary will lead it.

That is one way to understand *Lawrence*. It is largely the way Justice Scalia, who opposes the decision, understands it (minus, of course, the tendentious criticism of pre-*Lawrence* substantive due process). It is the way many libertarians, who cheer the decision, understand it. Scalia urges this reading to discredit the decision, to show how it is an act of judicial will, not judgment, has no basis in our jurisprudence, and sets a dangerous precedent for future judicial adventurism. Libertarians, by contrast, urge this reading to expand the reach of *Lawrence* beyond “gay rights” or even consensual adult sexual activity.

I will argue that the broad libertarian reading of *Lawrence* misunderstands the decision. First, the libertarian reading is not the best reading of the opinion itself, taken as a whole. That is, the broad libertarian reading lacks *internal persuasiveness*. Second, it is not the best reading of the opinion considered against the backdrop of the Court’s substantive due process decisions. It lacks *doctrinal persuasiveness*. Third, it is not the best reading of the opinion in light of the Court’s (and the nation’s) understanding of historical experience, especially the lessons of the *Lochner*<sup>6</sup> era and the New Deal. It lacks *historical persuasiveness*. Finally, it is not normatively the best reading, either from the vantage of democracy or from the vantage of individual rights. It lacks *normative persuasiveness*. The irony, I will argue, is that the libertarian reading of *Lawrence* actually weakens individual rights by throwing them together onto an undifferentiated pile called “liberty,” where all will get some protection but none will get much. This is because, in the hands of judges fearful of the “activist” label and properly reticent about their role, weak empirical claims of third-party harm will often trump liberty claims.

I will, instead, suggest a reading of *Lawrence* that notes its new understanding of the role of gay people in American life but nonetheless places the decision within a conservative tradition favoring incremental change over sudden and wholesale ruptures with the past. *Lawrence* is no doubt a shock to those pursuing an antihomosexual agenda.<sup>7</sup> To most Americans,

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6. *Lochner v. New York*, 198 U.S. 45 (1905).

7. Compare Justice Scalia’s comment that the Court “has largely signed

however, the decision is less an *ipse dixit* announcing radical social change than it is a belated recognition of what they had already learned about the humanity and dignity of gay people. Rather than radically changing constitutional principle, the Court has corrected its own erroneous understanding of the facts that underlay its application of constitutional principle in the past. Rather than leading the nation, the Court has caught up to it.

Part I lays out the broad libertarian reading of *Lawrence*, drawing on Scalia's dissent and on an article by a leading libertarian scholar, Randy Barnett. Part II criticizes the broad libertarian reading as lacking internal, doctrinal, historical, and normative persuasiveness. Properly understood on its own terms, and in its doctrinal, historical, and normative setting, *Lawrence* is limited both in its departure from what preceded it and in its immediate effects on many other controversies.

### I. THE LIBERTARIAN READING OF *LAWRENCE*

Let's start with Justice Scalia's critique of the majority opinion. While Scalia is certainly no advocate of judicially enforcing libertarian ideas as constitutional law, his dissent usefully presages the broad libertarian reading in key respects. He offers an expansive reading of *Lawrence*, not to praise the decision, but to prepare the way for burying it.

First, Scalia notes that *Lawrence* does not actually say that a fundamental right is in play. "Though there is discussion of 'fundamental proposition[s],' and 'fundamental decisions,'" Scalia writes, "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'"<sup>8</sup> Because the Court does not explicitly say that a fundamental right is involved, on Scalia's view, there must not be a fundamental right involved.<sup>9</sup>

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on to the so-called homosexual agenda." *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting).

8. *Id.* at 2488 (citations omitted). As I note below, Scalia is right that the Court finds no "fundamental right" to "homosexual sodomy" only because he repeats the error of *Hardwick* in asking and answering the wrong question. See *infra* notes 61-67 and accompanying text.

9. Already, several courts have followed Scalia's conclusion that *Lawrence* did not involve the exercise of a fundamental right. These courts have

Once this conclusion is reached, there are two directions one might go to understand the holding of *Lawrence*. Either (1) the Court is by default applying rational-basis scrutiny and is therefore invalidating the law as failing to be rationally related to a legitimate state purpose, or (2) it is abandoning the traditional tiers of scrutiny in its substantive due process analysis and is replacing it with something new, perhaps a general liberty presumption. Scalia believes the first has occurred. As we shall see, Randy Barnett believes the second has occurred. Under either reading, however, *Lawrence* places substantial and new judicial restraints on the power of the state to curtail liberty.

Second, Scalia specifies the far-reaching consequences of the Court's decision in the area of sexual regulation. In his view, the Court has adopted an "unheard-of form of rational-basis review"<sup>10</sup> because it will no longer accept a moral justification alone as a legitimate basis for law. The Court's opinion "effectively decrees the end of all morals legislation."<sup>11</sup> Under the new regime, "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" will fail rational-basis review.<sup>12</sup> Even laws excluding gay couples from marriage are invalid since *Lawrence* "dismantles the structure

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been uniformly unfavorable to gay rights litigants post-*Lawrence* in the context of marriage, *Standhardt v. Superior Court*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003), a state ban on adoptions by gays, *Lofton v. Kearney*, No. 01-16723, 2004 WL 161275, at \*9 (11th Cir. Jan. 28, 2004), and a state law criminalizing homosexual sex with a minor far more severely than heterosexual sex with a minor, *State v. Limon*, No. 85,898, 2004 WL 177649, at \*6 (Kan. Ct. App. Jan. 30, 2004). While I believe each of these courts has seriously misread *Lawrence*, there is no doubt the Supreme Court in *Lawrence* left room for these results by failing to state explicitly that it was dealing with the exercise of a fundamental right.

10. *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

11. *Id.* at 2495.

12. *Id.* This slippery slope appears, in one form or another, no fewer than four times in Scalia's dissent. See *id.* (noting that Texas's interest in criminalizing homosexual sodomy is "the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity"); *id.* at 2490 (listing laws against "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity"); *id.* at 2494 (listing laws against "prostitution, adult incest, adultery, obscenity, and child pornography"); *id.* at 2496 (listing laws against "adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage"). Only "adult incest" and "adultery" make the cut all four times. While "bestiality" makes a surprisingly strong showing (two references), "masturbation" gets a back of the hand (one reference). Laws against "coveting thy neighbor's wife" go completely unmentioned.

of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions."<sup>13</sup>

Third, Scalia implies the Court's libertarian opinion may not be limited to laws regulating sexual activity. The Texas sodomy law "undoubtedly imposes constraints on liberty," he writes, adding, "So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to 'liberty' under the Due Process Clause, though today's opinion repeatedly makes that claim."<sup>14</sup>

Scalia thus sees potentially broad libertarian consequences in the Court's opinion, consequences that stretch to commercial sex, the regulation of illicit drugs, and economic regulation. The reference to bakery hours, for example, is an unmistakable warning that the Court's decision points back to the pre-New Deal laissez-faire judicial activism of *Lochner v. New York*.<sup>15</sup> In the *Lochner* era, the Court relied on the liberty protected by the Due Process Clause to invalidate a host of state economic regulations thought to trample the freedom of contract, including laws setting minimum wages and maximum hours for employees of private businesses.<sup>16</sup> Greater judicial scrutiny of economic regulations, abandoned since the New Deal, has long been on the wish list of libertarian theorists.<sup>17</sup>

I doubt Scalia truly believes the Court is about to embark again on a crusade against laws setting maximum hours for bakery employees. No doubt he would observe that the Court will find some unprincipled way to cabin protected liberty to those freedoms favored by "the lawyer class from which the Court's Members are drawn."<sup>18</sup> But for Scalia, the logic of *Law-*

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13. *Id.* at 2498. Notably, Scalia sees no conceivable rational basis for the exclusion of gay couples from marriage other than morality. *Id.* He argues that a justification frequently offered for the exclusion, that gay couples cannot conceive children, will not work because sterile people and old people may marry. *Id.* Scalia's conclusion is a striking acknowledgment of the thinness of the arguments for excluding gay couples from marriage. His reasoning will surely find its way into legal arguments for gay marriage.

14. *Id.* at 2491.

15. 198 U.S. 45 (1905).

16. See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating a District of Columbia law setting minimum wages for women); *Lochner v. New York*, 198 U.S. 45 (invalidating a state law limiting bakery employees to sixty hours per week).

17. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 141-43 (1992).

18. *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

rence ought to lead there. And in Scalia's view the decision will certainly lead to much greater judicial supervision of democratic outcomes in many areas of life, all in the name of liberty. *Lawrence* is "a massive disruption of the current social order"<sup>19</sup>—a judge-made revolution—along libertarian lines.

What Scalia fears, Randy Barnett cheers. In an important article published shortly after the decision, Barnett hails it as "Kennedy's Libertarian Revolution."<sup>20</sup> For Barnett, the libertarian character of *Lawrence* is demonstrated in several ways.

First, Barnett argues the opinion is about liberty, not privacy. As support for this view, he observes that "[l]iberty, not privacy, pervades this opinion like none other, beginning with the very first paragraph," in which Justice Kennedy mentions liberty three times.<sup>21</sup> There are more examples of the emphasis on liberty throughout the opinion, he argues, including importantly the Court's framing of the issue presented: "We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their *liberty* under the Due Process Clause of the Fourteenth Amendment to the Constitution."<sup>22</sup>

Contrast this emphasis on liberty to the paucity of references to the word "privacy," which appears just four times.<sup>23</sup> The phrase "right of/to privacy" appears just three times, and two of those are in quotes from an earlier opinion of the Court.<sup>24</sup> The significance of this shift, which Barnett claims began in *Planned Parenthood v. Casey*,<sup>25</sup> is that the Court is now protecting a broad range of liberties, not just sexual privacy, from government intrusion.<sup>26</sup> More on this latter point below.

Second, in Barnett's view the Court has abandoned the

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19. *Lawrence*, 123 S. Ct. at 2491 (Scalia, J., dissenting).

20. Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, in *CATO SUPREME COURT REVIEW 2002–2003* 21, 21 (James L. Swanson ed., 2003) [hereinafter Barnett]. Barnett's analysis is fleshed out further in his recently published book, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

21. Barnett, *supra* note 20, at 33.

22. *Id.* at 34. (quoting *Lawrence*, 123 S. Ct. at 2476 (Kennedy, J., majority opinion)). The emphasis on liberty in the quote is Barnett's, not the Court's.

23. *Lawrence*, 123 S. Ct. at 2476 (quoting the petition for certiorari); *id.* at 2477 (referring to "privacy" three times, twice in direct quotes from previous decisions).

24. Barnett, *supra* note 20, at 39.

25. 505 U.S. 833 (1992).

26. Barnett, *supra* note 20, at 33.

fundamental rights/liberty interests dichotomy of traditional substantive due process analysis. Barnett, like Scalia, argues the Court "never tries to justify the sexual liberty of same-sex couples as a fundamental right."<sup>27</sup> Scalia thinks this means the Court must be employing rational-basis analysis, albeit an unprecedented version of it, but Barnett draws a different conclusion. The Court "never mentions any presumption to be accorded the Texas statute,"<sup>28</sup> notes Barnett, as it would if it were using rational-basis analysis. So Barnett concludes the Court is adopting a new methodology.<sup>29</sup>

Third, Barnett explains what he thinks must be the new substantive due process methodology. It asks initially whether a "liberty" is infringed by state regulation but is indifferent to whether the liberty is "fundamental" or not.<sup>30</sup> Excluded from liberty is "wrongful behavior that violates the rights of others," which is not liberty but license.<sup>31</sup> Once the Court determines liberty is involved, "the onus then falls on the government to justify the restriction of liberty."<sup>32</sup> Barnett sums up the new approach this way: "Although he never acknowledges it, Justice Kennedy is employing here what I have called a 'presumption of liberty' that requires the government to justify its restrictions on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow 'fundamental.'"<sup>33</sup>

The Court, according to Barnett, has thus adopted a "presumption of liberty" that Barnett himself has been urging in his scholarship for almost a decade now.<sup>34</sup> To meet its burden, the government must show its restriction on liberty is "necessary and proper."<sup>35</sup> A morals justification, standing alone, is not enough to justify an intrusion on liberty.<sup>36</sup> In Barnett's view, this is why Texas lost.

Fourth, it is clear that Barnett thinks the new presumption of liberty applies to economic liberty as well as to sexual

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27. *Id.* at 35.

28. *Id.*

29. *Id.* at 36.

30. *Id.*

31. *Id.* at 37.

32. *Id.* at 36.

33. *Id.* (footnote omitted).

34. See, e.g., Randy E. Barnett, *Getting Normative*, 12 CONST. COMMENT. 93, 113-21 (1995).

35. Barnett, *supra* note 20, at 37.

36. *Id.* at 37-38.



and other personal liberties. The Court, he argues, has “finally broken free of the post-New Deal constitutional tension between the ‘presumption of constitutionality,’ on the one hand, and ‘fundamental rights’ on the other.”<sup>37</sup> According to Barnett, the New Deal bargain between the Court and the nation, enshrined in *United States v. Carolene Products Co.*,<sup>38</sup> was that the Court would give up its efforts to limit economic regulation by Congress and the states. But, the Court would intervene under three narrow circumstances: (1) where a law is specifically prohibited by the Constitution, for example, by violating a right found in the Bill of Rights; (2) where a law impedes the proper functioning of the political process; and (3) where a law results from prejudice against a “discrete and insular minority.”<sup>39</sup>

Now, under the broad libertarian reading of *Lawrence*, the Court’s supervision of democratic outcomes will extend well beyond these categories. For Barnett, the consequences are profound.<sup>40</sup> Yet, “for *Lawrence v. Texas* to be constitutionally revolutionary, the Court’s defense of liberty must not be limited to sexual conduct.”<sup>41</sup> On this view, since the New Deal, the Court has under-protected liberty by ignoring economic rights and nontraditional personal rights. An example of the latter is the liberty to use marijuana for medical reasons, a federal restriction Barnett claims is now constitutionally dubious.<sup>42</sup> For Barnett, the selective judicial protection of liberty is a fatal political error the Court is now poised to correct—if only it has the courage to do so. This new approach has political advantages:

The more liberties [the Court] protects, the less ideological it will be and the more widespread political support it will enjoy. Recognizing a robust ‘presumption of liberty’ might also enable the Court to transcend the trench warfare over judicial appointments. Both Left and Right would then find their favored rights protected under the same doctrine. When the Court plays favorites with liberty, as it has since

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37. *Id.* at 21.

38. 304 U.S. 144, 147 (1938).

39. *Id.* at 153 n.4.

40. Barnett, *supra* note 20, at 41. (“If the Court is serious in its ruling, Justice Scalia is right to contend that the shift from privacy to liberty, and away from the New Deal-induced tension between the presumption of constitutionality and fundamental rights, ‘will have far-reaching implications beyond [*Lawrence*].’” (quoting *Lawrence v. Texas*, 123 S. Ct. 2472, 2488 (2003) (Scalia, J., dissenting))).

41. Barnett, *supra* note 20, at 41.

42. *Id.*

the New Deal, it loses rather than gains credibility with the public.<sup>43</sup>

If Scalia and Barnett are right, *Lawrence* is not simply the gay revolution its critics fear. It is something much more sweeping. It is a wholesale reordering of the balance of power between the federal courts, on the one hand, and the states and the other branches of the federal government, on the other. If the broad libertarian reading is correct, *Lawrence* is a tectonic shift the likes of which we have not seen in constitutional law for almost seventy years.

## II. THE UNLIBERTARIAN LAWRENCE

But the broad libertarian reading of *Lawrence* is not the best understanding of the decision. *Lawrence* is many things, some of them quite remarkable, unexpected, and even astonishing. It is, for one thing, judicial decision as atonement. Having gone out of its way to insult gay Americans in *Bowers v. Hardwick*,<sup>44</sup> the Court in *Lawrence* went out of its way to assist gays in the quest for full citizenship. Claims for the protection of gay sexual relations that the Court found “at best, facetious”<sup>45</sup> in 1986, triumphed resoundingly in 2003. Where the *Hardwick* Court took a law that banned both homosexual and heterosexual sodomy and used it to focus on homosexuals alone,<sup>46</sup> the *Lawrence* Court took a law that focused on homosexuals alone and used it to strike down laws that banned both homosexual and heterosexual sodomy. And, the Court did so on the ground that striking down laws facially aimed at gays and straights was necessary to protect gays.<sup>47</sup>

Instead of relying on a narrow equal protection rationale to strike down laws of the four states that targeted gay sex,<sup>48</sup> the Court dramatically and unexpectedly revived substantive due process to strike down the laws of all thirteen states with sodomy laws. Against claims by Texas that gays were a class defined by immoral conduct,<sup>49</sup> the Court repeatedly affirmed the dignity of gay lives. Where *Hardwick* conceived of gays as *hav-*

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43. *Id.*

44. 478 U.S. 186 (1986), overruled by *Lawrence*, 123 S. Ct. at 2485.

45. *Id.* at 194.

46. *See id.* at 190–92.

47. *Lawrence*, 123 S. Ct. at 2488.

48. This is an approach that I urged in an *amicus* brief filed in *Lawrence*. *See* Brief of Amici Curiae Republican Unity Coalition and the Honorable Alan K. Simpson at 7–13, *Lawrence* (No. 02-102).

49. Respondent’s Brief at 45–46, *Lawrence* (No. 02-102).

ing sex, *Lawrence* conceives of gays as *having relationships*. Page after page of the majority decision is devoted to a harsh critique of *Hardwick* for being wrong about history, wrong about doctrine, wrong about precedent, and wrong about facts.<sup>50</sup> It is an extended and heartfelt apology to gays for the harm done.

But for all that, *Lawrence* is not broadly libertarian. It is probably not even broadly liberty-affirming in matters sexual, though that is a closer call. The state can probably continue to prohibit prostitution and adult incest, for example, even when these acts result from the fully consensual choices of adults. In this section, I will argue the broad libertarian reading of *Lawrence* is an over-reading of the decision, and implausible doctrinally, historically, and normatively.

#### A. INTERNAL IMPLAUSIBILITY

The problem with the broad libertarian reading of *Lawrence* begins on the face of the opinion itself. This is not to say there is nothing in the opinion to support a broad libertarian reading. The opinion is so opaque that it bears a great many interpretations. Parts of it, especially the opening Autonomy-and-Transcendence paragraph,<sup>51</sup> seem self-consciously written to be history-making, to be read aloud in college courses on political theory, to be revered in law schools in the way we have come to revere the great Brandeis and Holmes free-speech opinions.<sup>52</sup> At moments like this, the Justices speak in their We-the-Court voice.<sup>53</sup> It is at once self-important and self-preservative. It instructs the nation how to think about grand concepts but leaves maximum room for the Justices themselves to maneuver in the

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50. See *Lawrence*, 123 S. Ct. at 2477–84.

51. According to the Court, “Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.” *Id.* at 2475.

52. These grandiloquent excursions are a favorite of Justice Kennedy, who also apparently authored the Mystery-of-Life passage from *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See Jeffrey Rosen, *The Agonizer*, THE NEW YORKER, Nov. 11, 1996, at 87–88 (stating that “Kennedy . . . contributed the lofty adages within the [*Casey*] opinion”). In *Casey*, the Court stated, “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.” 505 U.S. at 851.

53. Larry Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 4–16 (2001).

future.<sup>54</sup> So I do not argue that there is no basis whatsoever in *Lawrence* for the broad libertarian reading. The argument here is only that it is not the most persuasive reading of *Lawrence*, taken as a whole. The errors in the broad libertarian reading are several.

### 1. Fundamental Rights and Wrongs

A key part of the libertarian reading is to establish that *Lawrence* failed to classify consensual, adult sexual conduct as a fundamental right. Both Scalia and Barnett make this argument. If *Lawrence* has abandoned the fundamental right/liberty interest dichotomy that has marked its substantive due process cases (Barnett), or even if it has only jettisoned the morals justification for the regulation of liberty interests (Scalia), the field is open to many new rights claims.

#### *a. Inferences from Silence*

The main support for this conclusion is a conspicuous silence in the opinion about just what kind of liberty the Court thinks it is protecting. *Lawrence* contains no sentence akin to, "Sodomy is a fundamental right," or even, "Private, consensual sexual relations between adults are a fundamental right." Further, in another conspicuous silence, the Court does not explicitly subject the law to strict scrutiny. So we find no sentence in the opinion like this: "The Texas sodomy law is not necessary to the achievement of a compelling state interest." Nor is any part of that traditional test present. The Court does not tell us that the Texas law is either too broad or too narrow in achieving its objective. It does not say that Texas's interest in the statute is not "compelling." So, the libertarian argument goes, the Court must be doing something very new—and liberty-affirming—in *Lawrence*.

But this implies too much from silence on these particular questions of doctrine. First, there is a significant counter-silence in the opinion. If the opinion is silent about strict scrutiny, it is also silent about rational-basis scrutiny. So we find no sentence in the opinion like this: "The Texas sodomy law is not rationally related to the achievement of a legitimate state interest." Nor is any part of *that* test present. The Court does not tell us the Texas law is utterly unrelated to achieving its objective, or that it suffers some other defect, like animus, that

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54. *Id.*

would make it invalid even on rational-basis review.<sup>55</sup> It does not declare categorically that Texas's interest in the statute is not "legitimate." The closest it comes to this is its claim that Texas has "no legitimate state interest which can justify its intrusion" into the personal lives of the petitioners.<sup>56</sup> This is an ambiguous passage that, as we shall see, is best understood as a comment only on the comparative weakness of the morality claim against the strong interests of John Lawrence and Tyron Garner. This undercuts Scalia's assumption that the Court is applying rational-basis scrutiny at least as much as the omission of explicit strict-scrutiny analysis undercuts a conclusion that a fundamental right is involved. Scalia's conclusion that sodomy is not now a fundamental right seems more a hope than an interpretation.

But does the omission of any explicit level of scrutiny prove Barnett's claim that the Court is doing something new? Nowhere does the Court actually say it is abandoning the familiar substantive due process analysis. Such a major departure ought to be announced by the Court, not interpolated by others. Perhaps *Lawrence* is a first, tentative step in that direction, so we shall have to wait to be sure. But past departures from, or omissions of, familiar tests of constitutionality have not necessarily augured the end of these tests. *Casey* did not apply standard strict-scrutiny analysis to what it had previously declared was a fundamental right to abortion and, indeed, there are numerous open-ended references to "liberty" in *Casey*.<sup>57</sup> Yet, in an opinion joined by Kennedy, the Court returned to the traditional analysis in *Washington v. Glucksberg*.<sup>58</sup>

There are yet more troubling silences for a broad libertarian reading of *Lawrence*. There are no references in the opinion to protecting economic liberties. There are no citations to

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55. See *Romer v. Evans*, 517 U.S. 620, 632–35 (1996). Though *Romer* is an equal protection case, there is no reason to believe that its holding that animus-based classifications are unconstitutional under the Equal Protection Clause would not also apply to animus-based denials of liberty under the Due Process Clause. The defect in animus-based legislation is the same: a failure of the political process to take serious, as opposed to mean-spirited and irrational, account of the interests or classes being targeted.

56. *Lawrence*, 123 S. Ct. at 2484.

57. See, e.g., *Casey*, 505 U.S. at 844 ("Liberty finds no refuge in a jurisprudence of doubt."); *id.* at 846 ("The controlling word in the cases before us is 'liberty.'").

58. 521 U.S. 702 (1997) (reaffirming the due process methodology of finding fundamental rights only when rooted in history and the concept of ordered liberty, then applying rational-basis scrutiny to uphold the state law).

*Lochner* or to the many other old substantive due process cases upholding economic liberty. Where the Court cites to *Lochner*-era cases at all it is to those involving personal rights—child-rearing and education—not economic or contract rights.<sup>59</sup> A Court about to embark on a new and highly controversial adventure into judicially mandated laissez-faire economics would at least drop a hint. That hint would surely be stronger than simply using the word “liberty” multiple times.

As for what might replace the tiers of scrutiny in a now-abandoned standard due process analysis, the Court says not a word. Nowhere does the Court declare a generalized “presumption of liberty.” Nor does it engage in a libertarian analysis finding a “liberty,” distinguishing it from “license,” then shifting the burden of persuasion of constitutionality to the state, a burden that could be met only upon a finding that the law was “necessary and proper” to the achievement of its objective.

Barnett acknowledges these omissions, but then excuses them by saying that a bold announcement of the new liberty presumption and attendant burden shifting might have “lost votes.”<sup>60</sup> But, that is the point. It is very unlikely there are five Justices (and I doubt there is even one) for a revolutionary analysis presuming against the constitutionality of all legislation affecting some liberty, however unprecedented the protection of that liberty. Whatever its lineage and support in American legal history and doctrine, the broad libertarian framework does not come from *Lawrence*.

### b. *The Level-of-Generality Problem*

More importantly, the opinion is not all silence on the nature or fundamentality of the right involved. Consider first the nature of the right. It is true, as Scalia observes, the Court does not declare a fundamental right to “homosexual sodomy.”<sup>61</sup> But that formulation only shows how mired Scalia is in the crabbed worldview of *Hardwick*, one that “demean[s]” the lives of gay persons by reducing them to a specific sexual practice.<sup>62</sup>

The Texas sodomy law, in the Court’s view, sought “to control a personal relationship” between adults by prohibiting “the

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59. *Lawrence*, 123 S. Ct. at 2476 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

60. Barnett, *supra* note 20, at 41.

61. *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

62. *Id.* at 2478 (Kennedy, J., majority opinion).

most private human conduct, sexual behavior, and in the most private of places, the home.”<sup>63</sup> It is the congruence of these three elements—a personal relationship between adults,<sup>64</sup> expressed sexually, in private—that defines the important interest involved. All three of these elements appear prominently throughout the Court’s opinion. A fourth element appears necessary for *judicial* protection of the interest as a “fundamental” one rooted in the nation’s history and traditions. The Court will guard the interest from state regulation where the nation has already moved substantially toward protecting it through a process of sustained, widespread critique and revision of laws curtailing the claimed liberty.<sup>65</sup> Revision, in the case of sodomy, has taken the form of decriminalization and nonenforcement.<sup>66</sup> The key insight of the Court here, an insight missed entirely by Scalia, is that tradition evolves in light of lived experience. It is not static.<sup>67</sup>

The right at stake, then, is not “a right to engage in homosexual sodomy.” It is a right, already largely recognized in American law, of adults to engage in a noncommercial, consensual, sexual relationship in private, where their activity involves no injury to a person or harm to an institution (like marriage) the law protects. *Lawrence* has not found a “new” right, as Scalia and other critics contend; it has corrected its misunderstanding and misapplication of an old one.

If that is correct, most of Scalia’s slippery slope will either not fall within the right articulated in *Lawrence* or will not otherwise be protected judicially as fundamental. The right would not include bestiality, which is not a relationship between adult

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63. *Id.*

64. The Court frequently describes the importance of the conduct at issue in terms of its potential relational consequences. Though sex is not always a precursor to a deeper human connection, it is often an important step toward it and part of it. “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” *Id.*

65. *Id.* at 2478–82 (noting historical developments including: nonenforcement of sodomy laws against private activity, lack of specification against gays as a class, recommended decriminalization under the Model Penal Code and in the Wolfenden Report, gradual decriminalization by state legislatures and judicial invalidations by state courts, decriminalization in other Western countries, and erosion of *Hardwick* in subsequent case law).

66. *Id.* at 2481 (noting state-by-state decriminalization).

67. This insight did not originate with *Lawrence*. In his influential substantive due process dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan wrote that “tradition is a living thing.” *Id.* at 542.

persons, is not meaningfully consensual, and would not in any event enjoy judicial protection as “fundamental.” The right would not protect obscenity or child pornography, which do not involve a relationship between adults, and laws against which have not already been largely dismantled or disregarded through critique and revision. The right would not mandate the recognition of same-sex marriage, which is a claim for *public* recognition and *public* benefits. And while laws excluding gay couples from marriage are subject to ongoing critique, only modest and scattered inroads have so far been made against the marriage exclusion.<sup>68</sup> The right would not extend to prostitution, which does not involve a “personal” relationship, but a commercial one, and is thus subject to rational regulation as any commercial exchange would be. Additionally, prostitution has been decriminalized by only one state,<sup>69</sup> which is hardly evidence of serious critique and revision. Adult incest, which might otherwise fit the definition of the interest, would nonetheless not be protected *judicially* under the Due Process Clause because it cannot claim support in the nation’s developed tradition through the process of sustained, widespread critique and revision.<sup>70</sup> The only remaining destination down the

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68. There may be other sound constitutional arguments for the recognition of same-sex marriages. The most persuasive of these may be the Court’s recognition of a fundamental right to marry. See *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 284–86 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Laws excluding same-sex couples from marriage are currently undergoing a process of critique and, so far, partial revision. The recent decision of the Massachusetts Supreme Judicial Court extending the protections and benefits of marriage to gay couples, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), the recognition of civil unions in Vermont, the creation of a near-marriage equivalent in California, and the establishment of domestic partnerships in other states and municipalities and among private employers, all suggest a strong cultural and legal movement in the direction of recognizing gay relationships. These reforms are still in their infancy. While the federal government has taken a small step toward recognizing same-sex couples by giving compensation to some gay partners of the victims of the September 11 terrorist attacks, see Jane Gross, *U.S. Fund for Tower Victims Will Aid Some Gay Partners*, N.Y. TIMES, May 30, 2002, at A1, federal policy overall remains hostile. See Defense of Marriage Act., Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000) (defining marriage as a union between a man and a woman and allowing states to choose if they wish to recognize another state’s recognition of same-sex marriage)). The movement is still too tentative and modest to qualify same-sex marriage for fundamental-right status under a *Lawrence* critique-and-revision analysis.

69. Nevada allows legal prostitution in limited areas of the state. NEV. REV. STAT. 201.354 (2001).

70. For an excellent discussion of the likely constitutionality of most



slope, laws against fornication (sex between unmarried people), are indeed constitutionally suspect after *Lawrence*. If all these laws, save fornication laws, are still constitutional after *Lawrence* then the right it recognized hardly seems robustly libertarian, even in the limited domain of consensual adult sex.

*c. Fundamental Rights: Doctrine and the Dog That Didn't Bark*

Still, is the right protected in *Lawrence* a fundamental one, or just a liberty interest? The better reading of *Lawrence* is that the Court views the right as fundamental. The first reason to conclude this is that the Court devotes a long opening section of its opinion to the history of its privacy jurisprudence, including the canonical cases now regarded as having involved the exercise of fundamental rights.<sup>71</sup> *Griswold*, says the Court, declared a "right to privacy" that shielded "the marriage relation and the protected space of the marital bedroom."<sup>72</sup> *Eisenstadt*, the Court argues, extended *Griswold* to protect a "right to make certain decisions regarding sexual conduct . . . beyond the marital relationship."<sup>73</sup> *Eisenstadt* invalidated a state law prohibiting the distribution of contraceptives to unmarried people and so involved a law infringing "fundamental human rights."<sup>74</sup> The Court characterizes *Roe v. Wade* as recognizing a "right of a woman to make certain fundamental decisions affecting her destiny. . . ."<sup>75</sup> *Carey*, for the *Lawrence* Court, confirmed that the reasoning of *Griswold* (protecting a sexual relationship within the privacy of the home) "could not be confined to the

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prohibitions on adult incest after *Lawrence*, see Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. (forthcoming 2004). As for (hypothetical) laws against masturbation, it is hard to see how a person has a right to possess masturbatory aids in the home, but cannot put them to their intended use. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that private possession of pornography is not a crime). As there are no laws against masturbation in the United States, and none seem likely to be adopted in the future, this is one destination on the slippery slope to which we already have come.

71. *Lawrence v. Texas*, 123 S. Ct. 2472, 2476–77 (2003). The canonical cases of privacy jurisprudence include *Carey v. Population Services International*, 431 U.S. 678 (1977), *Roe v. Wade*, 410 U.S. 113 (1973), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

72. *Lawrence*, 123 S. Ct. at 2477 (discussing *Griswold*, 381 U.S. at 485).

73. *Id.* (discussing *Eisenstadt*, 405 U.S. at 454).

74. *Id.*

75. *Id.* (discussing *Roe*, 410 U.S. at 113).

protection of rights of married adults.”<sup>76</sup> Through this retelling, *Lawrence* thus settles a debate among academics<sup>77</sup> about the underlying meaning of its line of privacy decisions; they were, broadly speaking, about a form of sexual autonomy.

It does not matter, for present purposes, whether the Court’s characterization of these cases is correct. The point is that the Court describes the cases in a way that lines them up very well with what it believes is at stake in *Lawrence*. The discussion places the claimed right in *Lawrence* squarely within the context of the prior cases involving a fundamental liberty to engage in private sexual conduct. Note how the description of *Griswold* tracks the Court’s understanding of the interest involved in *Lawrence*, implicating both the relational and spatial dimensions. Like *Eisenstadt* and *Carey*, *Lawrence* involves “sexual conduct” outside the “marital relation.”

Choosing one’s own life path, free of state compulsion, is important to this Court. As the state in *Roe* could not abridge a woman’s right to “make certain fundamental decisions affecting her destiny,”<sup>78</sup> the state in *Lawrence* could not “control [petitioners’] destiny” by making their private lives criminal.<sup>79</sup> The parallels to the Court’s fundamental-rights cases are unmistakable. Unless the Court means to argue that the interest involved in *Lawrence* is like the fundamental rights involved in its privacy cases, this entire section of the opinion is an unnecessary aside. That is not an impossibility, I suppose, but it is surely an improbability.

#### d. *The State’s Interest*

Further support for the fundamental-right interpretation comes from the Court’s consideration of the state interests involved. Texas defended the law as a promotion of public morality.<sup>80</sup> To overcome a fundamental right, the state interest would need to be compelling. A mere “legitimate” interest would be insufficient. What kind of state interest did the Court think it

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76. *Id.* (discussing *Carey*, 431 U.S. at 678).

77. See ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 35–52 (2002); David B. Cruz, “*The Second Freedom Cases?*” *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 328–53 (2002) (summarizing academic interpretations of the privacy rights decisions).

78. *Lawrence*, 123 S. Ct. at 2477 (discussing *Roe*, 410 U.S. at 113).

79. *Id.* at 2484.

80. *Id.* at 2486.

was dealing with? The answer should help determine whether the Court believes a scrutiny appropriate to a fundamental right or to a mere liberty interest is applicable.

The Court comes closest to characterizing the morality interest in two oblique passages. In one, the Court notes there had been no showing that the state interest "is somehow more legitimate or urgent" than had been shown in other western countries rejecting sodomy laws.<sup>81</sup> In the second passage, the Court concludes the Texas law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."<sup>82</sup>

Neither of these passages, in context, supports the view that the Court is applying rational-basis scrutiny. Though the Court speaks in terms of the "legitimacy" of the state's interests, a word usually reserved for rational-basis review, it does not stop there. It does not say, for example, "the promotion of morality is not a legitimate state interest." Standing alone, the second passage could be understood two ways. One understanding would be that the state's interest is not "legitimate" and so is not sufficient to overcome even the nonfundamental right at stake. The second understanding would be that the state's interest, though legitimate, is not sufficient to overcome the important liberty infringed by the law.

The context suggests the second understanding is the better one. The legitimacy of the interest seems comparative. That is, the interest is measured against the strength of the right claimed. If "the personal and private life of the individual" involves the exercise of a fundamental right, as I argued above, then the state's mere legitimate interest in regulating it for morality's sake is of course insufficient.

The Court's other reference to the strength of the state's morals justification comes in its adoption of part of Justice Stevens's dissenting opinion in *Hardwick*.<sup>83</sup> In *Hardwick*, Stevens argued that "[o]ur prior cases"—meaning the Court's fundamental-rights cases—held that "the fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."<sup>84</sup> In context, it is clear that Stevens was

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81. *Id.* at 2483.

82. *Id.* at 2484.

83. *Id.* ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.")

84. *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissent-)

arguing that a morality justification is an insufficient state interest where a fundamental right is concerned. In adopting Stevens's argument, the Court is saying no more than that.

If I am correct, then Scalia is wrong to say *Lawrence* decrees an end to all morals regulation. Instead, under my reading, *Lawrence* is an application of the old rule that morals justifications for regulation do not count as a state interest sufficient to trump a fundamental right.

Consider too the public-health dog-of-an-argument that did not bark.<sup>85</sup> Many of the *amicus* briefs supporting Texas argued that the state law rationally served the legitimate interest of protecting public health by discouraging sexual practices, namely anal and oral sex, that spread communicable diseases, including HIV.<sup>86</sup> Whether same-sex sodomy laws actually serve public health objectives is empirically and logically very doubtful. While the public-health objective is legitimate, same-sex sodomy laws are only tenuously related to it, if at all. The laws are over-inclusive in that they prohibit sex between two women, yet lesbians are among the most STD-free segments of the population.<sup>87</sup> The laws are under-inclusive in that they do not prohibit dangerous sexual practices between opposite-sex couples. Further, because the laws are almost never enforced against private sexual activity, it is doubtful that they deter much sex, a point Texas implicitly conceded in its brief.<sup>88</sup> Indeed the laws may inhibit the reporting and treatment of communicable sexual diseases by criminalizing and stigmatizing the conduct that leads to them, undermining public health goals.<sup>89</sup>

None of this should matter if the Court were applying rational-basis review, as Justice Scalia asserts. The law could

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ing).

85. Eugene Volokh has made a similar argument for the fundamental-right reading of *Lawrence*. See Eugene Volokh, *Lawrence v. Texas and a Sexual Autonomy Right, The Volokh Conspiracy*, at [http://volokh.com/2003\\_07\\_13\\_volokh\\_archive.html](http://volokh.com/2003_07_13_volokh_archive.html) (July 17, 2003).

86. See, e.g., Brief of Amici Curiae American Center for Law and Justice at 19–20, *Lawrence* (No. 02-102); Brief of Amici Curiae Concerned Women for America at 26–27, *Lawrence* (No. 02-102); Brief of Amici Curiae Pro Family Law Center et al., at 19–22, *Lawrence* (No. 02-102).

87. See *Health Care Needs of Gay Men and Lesbians in the United States*, 275 JAMA 1354, 1355 (1996) (stating that lesbians are less likely to contract syphilis, gonorrhea, and chlamydia than heterosexual women and that transmission of HIV between lesbians is believed to be rare).

88. Respondent's Brief at 48 n.31, *Lawrence* (No. 02-102).

89. RICHARD A. POSNER, *SEX AND REASON*, 164–65 (1992).

have been sustained on a public-health rationale, imprecise as the regulation might be. On rational-basis review, laws may be under- or over-inclusive. It should make no difference that Texas itself did not urge a public-health justification for the law. Under rational-basis review, the Court hypothesizes possible justifications for a law.<sup>90</sup>

But where a fundamental right is at stake, and strict scrutiny applies, the Court neither accepts a loose means-ends fit nor hypothesizes justifications the state does not advance. That the Court did not accept the public-health argument—or even bother to mention it<sup>91</sup>—signals that it is dealing with something more than a run-of-the-mill liberty interest drawing only rational-basis review.

If you still doubt this conclusion and suspect the Court was applying rationality review to the Texas law, consider this scenario. Suppose after *Lawrence* the Texas legislature held extensive hearings on the public-health threat represented by sexually transmitted diseases, the homosexual contribution to those diseases, and the corresponding desirability of reducing the incidence of homosexual conduct. Suppose further that the legislature took testimony from medical experts supporting these views, with others opposed. Then suppose that the Texas legislature passed “The Public Health Protection Act,” criminalizing same-sex sodomy just as did in its Homosexual Conduct Law. When the law is challenged, suppose this time Texas squarely defends the law on the grounds that it is rationally related to the protection of public health, and that *Lawrence* is no barrier because it did not consider this interest. Texas should win. But is it really plausible to suppose the Court—confronted squarely with this justification and the support for it—would now uphold the law?

It is very hard to read the opinion as a whole and come to that conclusion. The Court’s hostility to the Texas law—evinced in its concern about its intrusion on a “personal” and “private” “relationship” and the stigmatizing effects of the law<sup>92</sup>—are too pervasive and deep to think that the Court would accept an empirically weak but rational justification. This intuition about *Lawrence* suggests something more than rational-basis review

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90. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88, 491 (2003).

91. Curiously, neither did Justice Scalia. It could be that he recognizes that the argument is such a lemon that he could not bring himself to dignify it with even a footnote.

92. See *supra* notes 63–65 and accompanying text.

is being applied.

## 2. Liberty v. Privacy

A key point for the broad libertarian reading is that *Lawrence* is not a “right to privacy” case, but a “right to liberty” case. This argument expands the scope of *Lawrence* well beyond sexual freedom, to include other nontraditional personal liberties and even economic liberties. The argument is largely rhetorical, relying on the Court’s frequent references to “liberty” throughout the opinion while noting that references to “privacy” or the “right to privacy” are few.<sup>93</sup> The deeper meaning of the Court’s opinion, however, cannot be resolved by counting words.

It is true that the Court grounds its opinion in the liberty protected by the Due Process Clause. But that is nothing new in itself. The modern Court has been doing that, with more or less emphasis, since *Roe*. *Casey* is notable for its invocations of liberty.

However, grounding the result doctrinally in liberty makes *Lawrence* no less a “privacy” opinion. It is not liberty *generally* that is protected. It is the *privacy component* of the substantive liberty protected by the Due Process Clause that drives the opinion both rhetorically and substantively. Other aspects of liberty may or may not be protected as fundamental, but privacy is.

Privacy, even more than liberty, pervades the opinion. The emphasis is evident from the opening paragraph. What does liberty protect against? “[U]nwarranted government intrusions into a dwelling or *other private* places.”<sup>94</sup> What substantive rights are encompassed by liberty? “[F]reedom of thought, belief, expression, and *certain intimate conduct*.”<sup>95</sup> Note that nothing on that list refers to economic activity, or even to private conduct in general. It is only *certain* intimate conduct—private sexual conduct—that is protected.

The Court states the issue as involving whether John Lawrence and Tyron Garner were free “to engage in the *private conduct*” as part of their Fourteenth Amendment liberty.<sup>96</sup> Next the Court notes the criminal law reaches “the most private hu-

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93. See Barnett, *supra* note 20, at 33–34.

94. *Lawrence v. Texas*, 123 S. Ct. 2472, 2475 (2003) (emphasis added).

95. *Id.* (emphasis added).

96. *Id.* at 2476 (emphasis added).

man conduct” in “the most private of places.”<sup>97</sup> It declares that the men were free “to enter upon this relationship in the confines of their homes and their own private lives” without being made criminals.<sup>98</sup> In its discussion of the history of sodomy laws, the Court repeatedly notes the lack of enforcement against activity occurring “in private.” The emerging tradition recognized by the Court gives “substantial protection to adult persons in deciding how to conduct their *private* lives in matters pertaining to sex.”<sup>99</sup>

These examples of the Court’s emphasis on privacy could be multiplied many times. In the penultimate paragraph, the Court sums things up this way:

The petitioners are entitled to respect for their *private* lives. The State cannot demean their existence or control their destiny by making their *private* sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and *private* life of the individual.<sup>100</sup>

Yes, as the Court sees it, “liberty” is the textual basis for the protection of privacy. It is also true that the Court’s recent substantive due process decisions, including *Casey* and *Lawrence*, have tended to use the word “liberty” more than in the past. But this is attributable, I suspect, to the Court’s sensitivity to criticisms that its decisions in this area are activist ones untethered to the text of the Constitution. “Liberty” appears in the Constitution, so the Court has begun to use the word more and more to describe what it is doing in its substantive due process cases. I do not find the effort very persuasive as a textual matter, but the Court’s effort is understandable.

The important thing to take away, for my present purpose, is that the liberty protected in *Lawrence* is not a general right to liberty. It is the privacy dimension of liberty that gets judicial attention. The idea that the Court is doing something entirely new with its substantive due process analysis—protecting a generalized “liberty,” discarding its familiar framework for analyzing due process claims, inventing a new

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97. *Id.* at 2478.

98. *Id.*

99. *Id.* at 2484 (emphasis added).

100. *Id.* (emphasis added) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)).

burden-shifting analysis—is not justified on the face of the opinion.

## B. DOCTRINAL, HISTORICAL, AND NORMATIVE IMPLAUSIBILITY

The broad libertarian reading of *Lawrence* is also unattractive doctrinally, historically, and normatively.

### 1. Doctrinal Implausibility

The broad libertarian reading does not fit well with the Court's other decisions in substantive due process cases. While that jurisprudence has protected "a realm of personal liberty,"<sup>101</sup> it has not been broadly libertarian, striking down state economic regulation, disallowing all state morals regulation, or shifting the burden to the state where any pedestrian "liberty" is involved. The Court, even when vindicating rights, has been careful to note the limits of the doctrine. Justice Harlan's classic dissent in *Poe v. Ullman*, laying out the tradition-based approach to determining the scope of substantive liberty protected by the Due Process Clause, recognized morality as a legitimate concern of the state.<sup>102</sup> In *Griswold*, Justice Douglas's opinion noted that the Court does not "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."<sup>103</sup> In *Moore v. City of East Cleveland*,<sup>104</sup> the Court warned that substantive due process was a "treacherous field," given the experience of the Court with *Lochner*.<sup>105</sup> In *Casey*, too, which Barnett proclaims the first liberty-emphasizing decision of the modern age,<sup>106</sup> the Court noted the errors of the *Lochner* era.<sup>107</sup> Even in *Roe*, which stretched the outer limits of substantive due process, the Court noted that the right of privacy is not "absolute" and specifically rejected "an unlimited right to do with one's body as one pleases,"<sup>108</sup> citing cases upholding mandatory vaccination and sterilization laws.<sup>109</sup>

101. *Casey*, 505 U.S. at 847.

102. 367 U.S. 497, 542–45 (1961) (Harlan, J., dissenting).

103. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

104. 431 U.S. 494 (1977) (plurality opinion) (striking down zoning restriction limiting single-home occupancy to traditional nuclear families).

105. *Id.* at 502 (plurality opinion).

106. Barnett, *supra* note 20, at 33.

107. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

108. *Roe v. Wade*, 410 U.S. 113 (1973).

109. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (mandatory



There is, to be sure, a serious question about whether *Lawrence* is consistent with *Glucksberg*, which goes unmentioned in the majority opinion. If *Lawrence* represents a departure from the *Glucksberg* mode of substantive due process analysis, then perhaps we are witnessing a libertarian rupture with the past. In *Glucksberg*, the Court turned away a claimed fundamental right to assisted suicide.<sup>110</sup> For our purposes, there are three important elements of the *Glucksberg* substantive due process analysis. First, the Court found it significant that “assisted-suicide bans are not innovations.”<sup>111</sup> Instead, “they are long standing expressions of the states’ commitment to the protection and preservation of all human life.”<sup>112</sup> Second, the Court repeated its long standing definition of fundamental rights as those that are “‘deeply rooted in this Nation’s history and tradition,’<sup>113</sup> and ‘implicit in the concept of ordered liberty.’”<sup>114</sup> Third, it required a “‘careful description’ of the asserted fundamental liberty interest.”<sup>115</sup> This suggests a preference for describing the claimed right at a fairly specific level of generality.

*Lawrence* can be squared with *Glucksberg*, though the Court made no explicit attempt to do so. Unlike assisted-suicide bans, bans on same-sex sexual activity are an innovation, a fact the *Lawrence* Court noted when it observed that laws targeting gay couples did not appear until the last third of the twentieth century.<sup>116</sup> Generally applicable sodomy laws, though long-standing, have long been disregarded as constraints on private activity, another point the *Lawrence* Court noted.<sup>117</sup>

On the protection of sodomy as part of the nation’s history and tradition, *Lawrence* relied on what it called “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>118</sup> This emerging awareness could be

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vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization)).

110. *Washington v. Glucksberg*, 521 U.S. 702, 706 (1997).

111. *Id.* at 710.

112. *Id.*

113. *Id.* at 721 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

114. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

115. *Id.* (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 277–78 (1990)).

116. *Lawrence v. Texas*, 123 S. Ct. 2472, 2479–80 (2003).

117. *Id.* at 2479.

118. *Id.* at 2480.

seen in several legal developments in the United States over the prior half century, including the omission of crimes for consensual sexual conduct in the 1955 Model Penal Code, the gradual decriminalization of sodomy in the states beginning in 1961, the nonenforcement of sodomy laws in the minority of states that retained them, and the Court's own decisions in *Cassidy* and *Romer*, which seriously eroded *Hardwick* as a precedent.<sup>119</sup> As for whether the petitioners' activity was "implicit in the concept of ordered liberty," the Court offered the observation that it "has been accepted as an integral part of human freedom" in many western nations.<sup>120</sup>

There remains the Court's description of the asserted right in *Lawrence*. Was it the "careful description" contemplated in *Glucksberg*? To be sure, the Court describes the right at a higher level of generality than it did in *Hardwick*. No longer is the Court considering the existence of a fundamental "right to engage in homosexual sodomy."<sup>121</sup> That *Hardwick* characterization of the asserted right, though narrow, is not "careful" because it trivializes the claim involved. Now the right at stake is that of adults to have noncommercial, consensual sex with other adults in private places like the home, where that sex does not injure a person or harm an institution (like marriage) that the state may constitutionally protect.<sup>122</sup> This is a broader right than that conceived in *Hardwick*, to be sure, but it is hardly unlimited. It allows plenty of room for state regulation of consensual adult sexual activity involving, for example, prostitution and adultery. It is not a description of the right that a broad libertarian philosophy would urge.

Another ill-fitting attribute of a broad libertarian reading of *Lawrence* concerns the state's morality interest. The Court has never before repudiated morality as a legitimate state interest, a holding that the libertarian reading of *Lawrence* entails. Instead, the protection of public morals has always been thought within the state's police powers. There is a very good and rather obvious reason for this: Morality is at the bottom of all law. Consider: Why have a law against murder? Certainly to prevent harm to people. But why is harm to people something to be avoided? Because human life is valuable. But why is hu-

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119. *Id.* at 2480-83.

120. *Id.* at 2483.

121. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by Lawrence*, 123 S. Ct. at 2485.

122. *Lawrence*, 123 S. Ct. at 2484.

man life valuable?

I am not really sure how to answer this last question, unless the answer is found in religious-moral precepts or in what Justice Holmes called “can’t helps,” those things one cannot help but believe to be true.<sup>123</sup> Either way, they are moral intuitions and principles. Every law, no matter how harm-based we now think its justification to be, is only a few such “why” questions away from being founded upon some moral principle or intuition. What counts as “harm” that the state can by all accounts legitimately prevent and punish are only those moral intuitions and principles that are so widely shared that we no longer think of them as involving morality at all. “Morality” has today often come to stand for those intuitions and principles of virtuous living that are seriously contested. The Due Process Clause, as interpreted before *Lawrence*, allowed the contestation of morals provided the experiment did not infringe a fundamental right. The libertarian reading of *Lawrence*—under which morals regulation is disallowed as applied to all “liberty”—would have courts for the first time end this deference to moral flux and experimentation. To read *Lawrence* in that way would be to make it a dramatic rupture from the doctrine.

Nor have the substantive due process cases, prior to *Lawrence*, placed the burden on the state to show that its regulation of a liberty interest is “necessary and proper,” as Barnett claims *Lawrence* now requires.<sup>124</sup> Neither the burden shift nor the necessary-and-proper standard has appeared in any of the Court’s substantive due process cases, including *Lawrence*. The broad libertarian reading would involve, in this sense, yet another unannounced departure from all that has come before.

## 2. Historical Implausibility

The broad libertarian reading of *Lawrence* is also implausible in light of the lessons of history, or at least the Court’s present understanding of those lessons. Foremost among those lessons is the Court’s confrontation with the New Deal in the 1930s, when it backed away from stringent review of economic

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123. “[A]s I have said before all I mean by truth is what I can’t help thinking. But my can’t helps are outside the scope of exhortation.” Letter from Oliver Wendell Holmes, Jr., to Lewis Einstein (June 17, 1908), in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 70 (Richard A. Posner ed., 1992).

124. See Barnett, *supra* note 20, at 37.

regulation. Consider one view of why the Court changed course at that point. Between *Lochner* and *West Coast Hotel*,

the Depression had come and, with it, the lesson that seemed unmistakable . . . by 1937, that the interpretation of contractual freedom protected in [the *Lochner* era] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. The facts upon which the earlier case [*Lochner*] had premised a constitutional resolution of social controversy had proved to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.<sup>125</sup>

Debatable though it may be,<sup>126</sup> that is the current Court's view of the lessons learned from the mistakes of *Lochner*. Moreover, it comes straight from the liberty-focused plurality opinion in *Casey*. It is very hard to imagine the Justices who signed onto that opinion embracing a new *Lochnerism* dressed up as a general liberty presumption.

A related point should be made here. Rather than representing a surreptitious return to *Lochner*, *Lawrence* is more like a gay rights *West Coast Hotel*. *Lawrence* recognizes the humanity of gays, understands that gays have relationships and not just sex, and sympathetically compares those relationships to the ones formed by straight people. That is a very different understanding of gays and gay life than the one that prevailed in *Hardwick*. The *Hardwick* era, the Court now understands, rested on "fundamentally false factual assumptions" about gay people.<sup>127</sup> One might put it this way: "The facts upon which [*Hardwick*] had premised a constitutional resolution of social controversy had proved to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that [*Lawrence*] announced."<sup>128</sup> This new, enlightened understanding of "the facts

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125. *Planned Parenthood v. Casey*, 505 U.S. 833, 861–62 (1992) (citation omitted).

126. See, e.g., David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 56–60, 62 n.317 (2003) (criticizing the approach of "the four current liberal Justices" to understanding *Lochner's* legacy).

127. Cf. *Casey*, 505 U.S. at 861–62 (stating that the *Lochner*-era Courts relied on "fundamentally false factual assumptions").

128. Cf. *id.* at 862.

of [social] life were different from those previously assumed” and “warranted the repudiation of the old law.”<sup>129</sup>

Thus, *Lawrence* represents a fundamental, but limited, shift in the Court’s understanding of the application of due process principles. It is fundamental in that it recognizes the relation of gay life to the long-protected and traditional rights to family life and privacy, a connection *Hardwick* had summarily dismissed.<sup>130</sup> It is limited, though, in that it betrays no shift in the Court’s understanding of the strength of other liberty claims, especially economic liberties. History has moved, but it has not disappeared. It still precludes the broad libertarian project.

### 3. Normative Implausibility

Finally, the broad libertarian reading of *Lawrence* is normatively unappealing, both because of its disruptive effects on democracy and, counterintuitively, for its possible erosion of liberty. For democratic decision making the consequences of the broad libertarian reading could be profound. Much state and federal regulation would become subject to a searching judicial scrutiny, whereas now very little of it is. Judges might strike down many more laws than they do now, raising the risk that judges will impose their own biases in the name of the Constitution. To that extent, the ability of the people to govern themselves through elected representatives would be diminished. At the very least, Congress and state legislatures would be less certain about which laws would pass the new constitutional standard and which would not. Though the risk of judicial bias and subjectivity are present in any approach to constitutional law that includes the power of judicial review, the broad libertarian reading would extend judicial scrutiny over a far broader domain than what it covers now.

The broad libertarian reading, with its attendant invitation to judicial hyperactivity, would invite yet more disruption. Contrary to Barnett’s prediction that broad judicial protection for liberty would appease partisans on both sides by vindicating their most cherished rights—economic on the one side and personal/sexual on the other<sup>131</sup>—the opposite is likely to occur. Po-

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129. *Cf. id.*

130. *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003).

131. *See supra* notes 39–42 and accompanying text.

litical partisans love not only their favored rights. They also love their favored regulation. Conservatives will hardly be mollified if religious and economic liberties are judicially protected in a world where "fornication, bigamy, adultery, adult incest, bestiality, and obscenity"<sup>132</sup> prevail. Liberals will hardly be mollified if sexual and personal choices are protected in a world where maximum-hours and minimum-wage laws are history. The rancor over judicial appointments will not end. It will get worse.

Paradoxically, broader protection for liberty might also undermine the protection of the really important liberties. This is because judges, concerned about criticism that they are too activist, will develop methods of avoiding invalidation. This could be accomplished by defining some conduct as "license," rather than liberty, as Barnett's framework would allow.<sup>133</sup> Or, even if a liberty is involved, judges might tend to uphold the regulation where the state can show some harm addressed by the law. That much would be called for by libertarian theory, which holds that the state may prohibit conduct that harms others.<sup>134</sup> Yet the state will almost always be able to show some harm; Texas's defense of its sodomy law was unusual in that the state offered no commonly recognized harm as a justification.

But the fact that some conduct can be said to cause harm ought not always be sufficient to warrant its criminalization, at least if the conduct involves the exercise of a fundamental liberty. An invitation to judges to validate liberty-infringing laws where some harm can be detected from the exercise of the liberty would provide weak protection for important human freedoms. As my colleague Don Dripps has pointed out:

First, the concept of harm is vague, vague enough that the proponents of morals laws could frequently point to some immediate consequence of private vice that can plausibly be characterized as harm. Second, even if a narrow understanding of harm could be counted on, seemingly private behavior very often initiates a causal sequence that ends in harm, albeit the chain may be long and speculative. Third, because the harm principle takes a categorical form, the principle allows the imposition of criminal liability upon a showing of any harm, however slight. . . . The second and third application problems together mean that the harm principle would be at best a feeble check on a majority's

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132. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

133. See *supra* notes 30–33 and accompanying text.

134. JOHN STUART MILL, ON LIBERTY 81–82 (Albury Castell ed., F.S. Crofts & Co. 1947) (1859).

inclination to punish nonconformity as vice.<sup>135</sup>

In short, harm can always be found. Liberties regarded as fundamental—like the right to privacy or the freedom of speech—are protected because they have some special value to the person or to the functioning of the political system. They are not protected because protecting them entails no cost. They are not protected because the conduct they shield is thought to cause no harm. Indeed, they are protected *despite* a frank acknowledgment that harm may ensue.

A prominent example of this is the constitutional protection given to pornography that degrades women. Pornography that depicts the subordination of women tends to perpetuate their subordination. Women's lower status leads to lower pay, domestic violence, and insult and rape in public spheres. Nevertheless, the government may not restrict pornography on the grounds that it perpetuates women's subordination. That is, the liberty is protected despite the harm it is acknowledged to cause.<sup>136</sup>

A substantive due process analysis that allows judges simply to balance the exercise of liberty against the harm it causes may result in less protection for liberty, especially compared to the strict scrutiny given to restrictions on fundamental liberties. Sexually transmitted diseases, including AIDS, introduce collective stakes into private bedroom activity.<sup>137</sup> If sexual liberty is to be protected it must be protected despite the harm it often causes third parties who are exposed to more disease and to society as a whole, which must bear the cost of health care and lower productivity.

## CONCLUSION

*Lawrence* is probably not a broadly libertarian decision. The Court repeatedly emphasized the privacy dimension of the liberty at stake. There is no hint that the Court will return to the days when it closely scrutinized state economic regulation as an infringement on the "liberty" protected by the Due Process Clause. Indeed, the Court did not even broadly declare that morality is no longer a permissible basis for law. By linking the

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135. Donald A. Dripps, *The Liberal Critique of the Harm Principle*, CRIM. JUST. ETHICS, Summer/Fall 1998 at 3, 8 (footnote omitted).

136. *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985).

137. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 259 (1999).

right involved to the Court's own past recognition of fundamental privacy rights, the Court strongly suggested that it is dealing with a special aspect of personal life that no ordinary state interest can intrude upon. This makes Justice Scalia's fears—and libertarians' hopes—of a newly activist judiciary seem overblown.