REDEFINING DUE PROCESS ANALYSIS: JUSTICE ANTHONY M. KENNEDY AND THE CONCEPT OF EMERGENT RIGHTS

*Lisa K. Parshall**

I. INTRODUCTION

Justice Anthony M. Kennedy's decision for the Supreme Court in *Lawrence v. Texas*[1] was a significant ruling in numerous respects. *Lawrence* overruled *Bowers v. Hardwick*,[2] a landmark case vindicating the power of the state to criminally proscribe homosexual conduct deemed immoral by a legislative majority. Perhaps more important than the policy victory for homosexual rights, however, was the shift in methodology reflected in *Lawrence*'s majority opinion. Whereas *Bowers* had employed the traditional standards of modern due process analysis, categorizing rights as fundamental or non-fundamental and applying either strict or minimal scrutiny respectively, *Lawrence* neither defined the liberty interest it protected as fundamental, nor clearly applied the traditional rational basis test associated with non-fundamental rights. The ambiguity of the ruling has resulted in attempts to discern *Lawrence*'s ramifications for future liberty claims. There is substantial disagreement over whether *Lawrence* merely clarifies that discriminatory animus is not a legitimate state interest under the traditional rational basis test, whether it embraces a new form of heightened rational review, or whether it irrevocably alters the traditional tiered scrutiny standard that is the foundation of the Supreme Court's modern due process and equal protection jurisprudence.

While Justice Kennedy has always supported the doctrine of substantive due process, his increasing acceptance of a methodology

* Assistant Professor, Department of History & Government, Daemen College, Amherst, NY. Ph.D. 2001 SUNY Buffalo.

[1] 539 U.S. 558 (2003).

[2] 478 U.S. 186 (1986).

that gives an expansive interpretation of liberty shaped by evolving societal standards is detailed in Part II. Part III explores various interpretations of *Lawrence*'s impact on due process analysis by focusing on lower court applications and scholarly analyses of the ruling. Part IV offers an alternative interpretation that is informed by a brief examination of Kennedy's Ninth Circuit Court of Appeals jurisprudence involving gay rights. This part of the article argues that, rather than jettisoning the tiered review of modern due process analysis, Justice Kennedy may be carving out a new category of rights that are entitled to the Court's heightened solicitude. These rights may be classified as emergent rights—rights that while perhaps not yet sufficiently well-grounded in history and tradition as to be considered fundamental have nevertheless emerged from "the continuing traditions of our society" or are so closely connected "with interests recognized as private and protected" as to be entitled to more than minimal review.[3] Part IV also recognizes that the disagreement that has evolved between Justice Kennedy and Justice Antonin Scalia over homosexual rights is part of the larger, ongoing methodological debate between adherents of originalism and proponents of a "living Constitution" over the proper method of constitutional interpretation.

II. JUSTICE KENNEDY AND SUBSTANTIVE DUE PROCESS

A. An Evolving Jurisprudence

With regard to expressing support for substantive due process, Justice Kennedy has always been distinct from his conservative colleagues. There are deep-rooted jurisprudential foundations for his broad interpretation of liberty that have gravitated him toward his particular support of gay rights.[4] Indeed, questioned extensively on privacy and liberty rights throughout his confirmation proceedings, he explicitly stated that "there is a substantive component to the due process clause" and that "the value of privacy

[3] Beller v. Middendorf, 632 F.2d 788, 807–08 (9th Cir. 1980) (recognizing that "[a]lthough the Court's approaches to equal protection and due process cases differ, there are important analytic and rhetorical similarities in the doctrines").

[4] *See generally* Lisa K. Parshall, The Evolution of Justice Kennedy? A Judicial Conservative's Support for Gay Rights (Apr. 2004) (unpublished manuscript prepared for presentation at the Midwest Political Science Association Conference, Chicago, Ill.) (on file with author).

is a very important part of that substantive component."[5] "Liberty," in his view, was intended to be a "spacious phrase" central to which was the belief "[t]hat . . . there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go."[6]

Although he expressed a consistent preference for the term "liberty" over either "privacy" or "unenumerated rights," he nevertheless seemed to view privacy as a component of liberty.[7] Thus, when asked whether he believed the Constitution includes right to marital privacy, Justice Kennedy answered affirmatively.[8] "[T]he concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage."[9] When asked what he regarded as the outer boundaries of these substantive rights, Justice Kennedy responded that "we are very much in a stage of evolution and debate" over their exact parameters—a debate to which, in his view, "the public and the legislature have every right to contribute."[10]

As a member of the Supreme Court, Justice Kennedy consistently reflected this willingness to find substantive protection in the Due Process Clause of the Fourteenth Amendment. Thus, he has voted to preserve the privacy and liberty interests that the Court had previously announced.[11] At the same time, however, Justice Kennedy's jurisprudence has subtly evolved. Whereas he initially displayed a more cautious, constrained approach to adjudicating due process claims and was reluctant to recognize *new* fundamental rights,[12] he has recently adopted a methodology that more

[5] *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. 165 (1989) [hereinafter *Hearings*].

[6] *Id.* at 86.

[7] There have been treatments in which "liberty and privacy are complementary aspects of personal autonomy, which the common law protects against governmental burdens unjustified by a need to advance the public welfare." EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY 155 (1996).

[8] S. REP. NO. 100-13, at 19 (1988).

[9] *Hearings*, *supra* note 5, at 164. Whereas it was "not clear to [him] that substituting the word 'privacy' is much of an advance over interpreting the word 'liberty,'" Kennedy believed that "liberty does protect the value of privacy in some instances." *Id.* at 233.

[10] *Id.* at 166.

[11] *See* M.L.B. v. S.L.J., 519 U.S. 102, 128–29 (1996) (upholding parental rights); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (affirming the central holding of Roe v. Wade, 410 U.S. 113 (1973)).

[12] With the exception of his vote to join a majority in recognizing that right to "life" includes a reciprocal, limited "right to die" in *Cruzan v. Director, Missouri Department of*

appropriately reflects his reluctance to limit substantive due process to the confines of narrow historical inquiry. Concurring in *County of Sacramento v. Lewis*, Justice Kennedy reiterated that "[i]t can no longer be controverted that due process has a substantive component."[13] He cautioned, however, that "history and tradition *are the starting point but not in all cases the ending point of the substantive due process inquiry*."[14] This observation would later serve as the crux of his opinion in *Lawrence* and his rejection of a historically constrained approach to identifying protected liberty interests.

Although he concurred in the judgment in *Michael H. v. Gerald D.*,[15] Justice Kennedy signaled discomfort with the restrictive methodology used by the majority in denying the asserted liberty interest in that case.[16] Justice Kennedy signed onto Justice Sandra Day O'Connor's concurrence that objected to the majority's assertion that the historical analysis used to identify traditional liberty interests must be conducted at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[17] By distancing themselves from the majority opinion's approach, Justices Kennedy and O'Connor indicated their unwillingness to "foreclose the unanticipated by the

Health, 497 U.S. 261, 282 (1990), Kennedy generally eschewed the recognition of any new life or liberty interests. *See* Sandin v. Conner, 515 U.S. 472, 486 (1995) (denying a liberty interest to inmate disciplined in segregated confinement); Siegert v. Gilley, 500 U.S. 226, 231 (1991) (denying liberty interest for employee harmed by negative work evaluation); Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (denying visitation rights for biological parents); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 198 (1989) (denying minor child's right to state protection from private actors); Ky. Dep't of Corrs. v. Thompson, 490 U.S. 454, 465 (1989) (denying liberty interest in receiving visitors in prison). *But see* Washington v. Harper, 494 U.S. 210 (1990) (Kennedy recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs).

[13] 523 U.S. 833, 856 (1998). In *Lewis*, Kennedy agreed that the "shocks the conscience" standard was the appropriate method for conducting the necessary due process inquiry to determine whether a death resulting from a high speed police chase violated the Fourteenth Amendment. *Id.* at 857. He noted that the "shocks the conscience" standard was a sufficiently well established one in which precedent served as a useful *starting point* for the inquiry. *Id.*

[14] *Id.* (emphasis added).

[15] 491 U.S. 110 (1989) (denying that a biological father's liberty interest in maintaining a relationship and visitation rights with a minor child was so deeply rooted in history and tradition as to be secured by the liberty clause of the Fourteenth Amendment, and concluding that state law, granting legal parental rights to the individual lawfully married to the child's mother, rationally served the state's legitimate interest in preserving the traditional family and marital relationship).

[16] *Id.* at 132.

[17] *Id.* at 128 n.6, 132.

prior imposition of a single mode of historical analysis."[18]

Despite his reluctance to cabin the scope of substantive due process displayed in both *Lewis* and *Michael H.*, Justice Kennedy seemingly shifted methodologies when he ascribed to the majority opinions in *Vacco v. Quill*[19] and *Washington v. Glucksberg*[20]—cases which upheld state laws criminalizing physician-assisted suicide. In *Glucksberg*, the Court concluded that "the asserted 'right' to assistance in committing suicide [was] not a fundamental liberty interest protected by the Due Process Clause."[21] Joining the Chief Justice, Kennedy committed himself to the proposition that the

> established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed[.]" Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.[22]

Under *Glucksberg*'s specific test, the discovery of *new* rights was virtually foreclosed; fundamental status was preserved for only those rights firmly embedded in the nation's history and tradition. By joining *Glucksberg*, Justice Kennedy seemed to move away from a generous interpretation of liberty rights, embracing a more restrictive methodology instead.

Yet, Justice Kennedy continued to entertain the potentiality of evolving societal trends when considering the scope of due process claims. When the Court was asked in *Troxel v. Granville* to uphold state laws granting visitation privileges to grandparents, it conceded that parental liberty "is perhaps the oldest of the fundamental liberty interests recognized by this Court."[23] Given the historical acceptance of that right, the majority was unwilling to announce that the Due Process Clause protected the competing interest that grandparents had in securing visitation privileges against parental consent.[24] Justice Kennedy dissented because,

---

[18] *Id.* at 132.
[19] 521 U.S. 793, 794 (1997).
[20] 521 U.S. 702, 704 (1997).
[21] *Id.* at 728.
[22] *Id.* at 720–21 (citations omitted).
[23] 530 U.S. 57, 65 (2000).
[24] *Id.* at 66–67.

unlike the majority, he was willing to entertain the expansion of visitation rights. He expressed concern that the state visitation law presumed traditional families to be the norm, thereby discounting the importance of non-parental relationships to a child.[25] Given the extent to which the conventional understanding of familial relationships had evolved, he believed that more careful consideration needed to be given as to whether the Court's usual deference to parental liberty needed to be revised.[26]

Justice Kennedy's sensitivity to evolving social trends was apparent as well in his refusal to overturn *Roe v. Wade*.[27] By the time he had joined the Court in 1988, it was widely believed that one more vote was all that was necessary to rescind *Roe*'s protections. In the first several abortion-related cases in which he participated, he voted in favor of the states' asserted interests in regulating abortion.[28] However, when the opportunity to dispense with *Roe* was squarely presented, Justice Kennedy demurred. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[29] the Court's three moderate conservatives—Justices O'Connor, Kennedy, and Souter—co-authored an opinion that modified the framework of *Roe* while reaffirming its central holding. The plurality wrote that "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty" and that "no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant."[30] Although the plurality's statement indicated that its members had struggled with the decision,[31] Justice Kennedy's vote to reaffirm *Roe* demonstrated a commitment to preserving established privacy rights.

Casey stands as an extraordinary example of Justice Kennedy's commitment to an expansive interpretation of the protections afforded by the liberty clause. The plurality opinion again rejected the claim that "the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified" as "inconsistent with our

[25] *Id.* at 98 (Kennedy, J., dissenting).
[26] *Id.* at 98–99.
[27] 410 U.S. 113 (1973).
[28] *See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 506–07 (1990); Hodgson v. Minnesota, 497 U.S. 417, 480–81 (1990) (Kennedy, J., concurring in part and dissenting in part); Webster v. Reprod. Health Servs., 492 U.S. 490, 499 (1989).
[29] 505 U.S. 833 (1992).
[30] *Id.* at 860.
[31] *Id.* at 850.

law."[32] More importantly, *Casey* spoke to the appropriate level of deference the Court must give legislative judgments when reviewing due process claims. The Court explained that "[i]t is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty."[33]

The plurality went on to explain that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[34] These rights were secured for all individuals, whether married or single, and explicitly established a sphere of personal autonomy guarded from governmental intrusion.[35]

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[36]

Bearing a striking resemblance to the treatment of liberty subsequently expressed in *Lawrence*, this statement (sometimes referred to as the "mystery of life" passage) restores an expansive view of liberty in a tone that extols the evolving aspirations of self-governance. Justice Kennedy's support for the passage, and probable authorship, indicates an approach that is vastly different from that manifested in *Glucksberg*. The full extent of just how broadly Justice Kennedy was willing to construe liberty rights, however, would not be fully revealed until his authorship of two landmark rulings involving homosexual rights.[37]

B. Substantive Due Process and the Homosexual Rights Cases

Justice Kennedy's first major opportunity to address homosexual rights was presented when the State of Colorado amended its constitution to explicitly prohibit the recognition of homosexuals as

---

[32] *Id.* at 847.
[33] *Id.* at 851 (citations omitted).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003).

a specially protected class under state law.[38] The state legislature defended the action as merely repealing rights which the state was not obligated to provide, arguing that the amendment did not leave homosexuals as a class any worse off than they were prior to its passage.[39] However, a six-member majority of the Court disagreed.[40] Although decided on equal protection grounds,[41] *Romer* would have important doctrinal implications for Justice Kennedy's subsequent ruling in *Lawrence*.

According to *Romer*, Colorado had impermissibly singled out homosexuals in a manner that "deprive[d] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."[42] Justice Kennedy prefaced the ruling with language from a famous dissent, declaring that "the Constitution 'neither knows nor tolerates classes among citizens.'"[43] He wrote, "Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake."[44]

In so ruling, Justice Kennedy declined an opportunity to elevate homosexuality to a suspect classification, and "never directly discussed whether sexual orientation discrimination claims would merit heightened scrutiny, or how such claims would fall along the equal protection scale between suspect and non-suspect classifications."[45] To do so would have been unnecessary, for in his view, Colorado's amendment failed to meet even the lowest level of review; Justice Kennedy could discover no legitimate state interest justifying the law.[46] To the contrary, Justice Kennedy concluded that Amendment Two seemed "inexplicable by anything but animus toward the class it affects."[47] A law motivated by no interest other than prejudice and disfavor was anathema to the Constitution. He explained, "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial

[38] *Romer*, 517 U.S. at 624.
[39] *Id.* at 626.
[40] *Id.* at 635.
[41] *Id.*
[42] *Id.* at 630.
[43] *Id.* at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).
[44] *Id.*
[45] Arthur S. Leonard, Lawrence v. Texas *and the New Law of Gay Rights*, 30 OHIO N.U. L. REV. 189, 200 (2004).
[46] *Romer*, 517 U.S. at 631–32.
[47] *Id.* at 632.

terms to all who seek its assistance."[48] By enacting the amendment, Colorado had, without legitimate reason, burdened and ostracized an entire class. "A State cannot so deem a class of persons a stranger to its laws."[49]

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, bitterly dissented. "The Court has mistaken a Kulturkampf for a fit of spite," Justice Scalia proclaimed, and so had usurped the right of citizens of Colorado to "preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[50] He contended that the state had a legitimate and well-recognized interest in maintaining public morality[51] and that the majority opinion's depiction of the state's prerogative as "evil" reflected the Justices' own elitist views.[52] If a state was allowed to criminalize homosexual conduct under *Bowers*, Justice Scalia reasoned, it was surely allowed to express social and moral disapprobation by refusing to grant special status to those practicing what a legislative majority deemed aberrant behavior.[53]

Justice Scalia also characterized the ruling as "a novel and extravagant constitutional doctrine."[54] Beyond unfairly assuming that the law was motivated by animus, the majority, he argued, had strayed from the traditional employment of the rational basis test. "The Court's entire novel theory," he wrote, "rests upon the proposition that there is something *special*—something that cannot be justified by normal 'rational basis' analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decision-making level."[55] In his view, the Court had employed an elevated form of rational basis inquiry that swept past any legitimate interest attributable to the state. There was, he argued, "no support in law or logic" for the level of review that Justice Kennedy employed.[56]

At least one author has argued that *Romer* did not reflect much solicitude for gay interests, arguing that the ruling "did not presume that the [Colorado] Amendment was tainted by an

[48] *Id.* at 633.
[49] *Id.* at 635.
[50] *Id.* at 636 (Scalia, J., dissenting).
[51] *Id.* at 648.
[52] *Id.* at 636.
[53] *Id.* at 641.
[54] *Id.* at 652.
[55] *Id.* at 640.
[56] *Id.*

impermissible dislike for gays," but rather focused narrowly on its sweeping nature.[57] Indeed, despite using the broad, uplifting rhetoric of a color-blind Constitution, *Romer* addressed discrimination against gays in rather abstract terms, failing to reference *Bowers* or comment on state criminalization of same-sex intimacy.[58] *Romer* was a spare opinion, only fourteen pages long[59] and its failure to confront *Bowers* seemed a cautious effort to avoid addressing its continued legitimacy. Furthermore, *Romer* "represent[ed] an incremental, but important step in affording gay Americans the full benefits of the Equal Protection Clause."[60]

For others, the ruling portended far more significant developments. "*Evans* is seen by many conservatives as the first step down a long road of changing cherished and long-standing beliefs about the legal and social standing of gays in American society."[61] Its condemnation of state laws motivated solely by moral opprobrium was enough to spark one scholar to write that with Justice Kennedy's opening sentence he "knew something profound had changed, if not entirely in the law, then at least in our hearts."[62] Indeed, Justice Scalia's wrath lent credence to the charge that the Court was signaling a major shift on gay rights.

That shift came in *Lawrence v. Texas*,[63] a case involving a remarkably similar factual pattern to that presented in *Bowers*. As in *Bowers*, police officers, entering private premises for unrelated but ostensibly legitimate reasons, had witnessed conduct proscribed by state statute.[64] In the Texas case, however, state law criminalized only those acts of consensual sodomy involving members of the same sex.[65] In a surprisingly broad ruling written by Justice Kennedy, the Court invalidated the Texas same-sex sodomy statute, explicitly overruling *Bowers* in the process.[66]

Justice Kennedy began *Lawrence* with an expansive discussion of liberty that "presumes an autonomy of self that includes freedom of

---

[57] Richard F. Duncan, *"They Call Me 'Eight-Eyes": Hardwick's Respectability,* Romer*'s Narrowness, and Same-Sex Marriage,* 32 CREIGHTON L. REV. 241, 250 (1998).

[58] *Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

[59] KENNETH JOST, THE SUPREME COURT YEARBOOK: 1995–1996, at 36 (1996).

[60] Katherine M. Hamill, Comment, Romer v. Evans*: Dulling the Equal Protection Gloss on* Bowers v. Hardwick, 77 B.U. L. REV. 655, 684 (1997).

[61] Dale Carpenter, *A Conservative Defense of* Romer v. Evans, 76 IND. L.J. 403, 441 (2001).

[62] *Id.*

[63] 539 U.S. 558 (2003).

[64] *Id.* at 562–63.

[65] *Id.* at 563.

[66] *Id.* at 578.

thought, belief, expression, and certain intimate conduct."[67] Once again, he drew a distinction between privacy and liberty, noting that liberty has both "spatial and more transcendent" components that extend beyond the general expectation of privacy one has in the home.[68] Whereas *Bowers* had asked whether the Constitution conferred a fundamental right to practice homosexual sodomy, Justice Kennedy's inquiry asked "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause."[69] The refocusing of the central question rejected analysis at the most specific level of the exercise of the asserted right. "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."[70] The principle that the government could not intrude into the private intimacies of marriage, he explained, was established in *Griswold v. Connecticut*,[71] and subsequently expanded to include the intimate conduct of unmarried adults as well, even where such conduct was removed from the purposes of procreation.[72] But whereas *Griswold* and its progeny centered on the constitutional right of privacy, Justice Kennedy's opinion in *Lawrence* revolved around the concept of *liberty* for which he had expressed a consistent preference.

As in *Romer*, Justice Kennedy refrained from employing the traditional application of the Court's modern due process jurisprudence. He did not directly acknowledge the protected liberty interest as a "fundamental right." Instead, he stated, "It suffices for us to acknowledge that adults may *choose* to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[73] Whether the state must formally recognize, or grant protections to the private associations of those engaging in homosexual conduct, he intimated, was a separate question.[74] *Lawrence* also did not utilize the usual vernacular of elevated review associated with strict

[67] *Id.* at 562.
[68] *Id.*
[69] *Id.* at 564.
[70] *Id.* at 567.
[71] 381 U.S. 479, 485–86 (1965).
[72] *Lawrence*, 539 U.S. at 565.
[73] *Id.* at 567 (emphasis added).
[74] *Id.* at 566–67.

scrutiny. As with *Romer*, he found state law invalid under the lesser rational basis standard, declaring that the "statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[75]

Justice Kennedy's spokesmanship in a pro-gay rights ruling with such broad implications again drew sharp criticism from his conservative colleagues. Justice Thomas argued that the Constitution confers neither a right to privacy "[n]or as the Court terms it today, the 'liberty of the person both in its spatial and more transcendent dimensions.'"[76] Justice Scalia was even more scathing, mocking the Court for what he claimed was "manipulative" and unprincipled decision-making.[77] The primary thrust of Justice Scalia's dissent was his belief that *Bowers* ought to have been retained.[78] The only rights that are fundamental, he argued, are those that, as stated in *Glucksberg*, "are 'deeply rooted in this Nation's history and tradition.'"[79] According to his review, the weight of history supported the definitive conclusion of *Bowers*—there was no fundamental right to engage in homosexual sodomy.[80] Moreover, societal reliance supported the state's conclusion that same-sex intimacy was "immoral and unacceptable," and therefore was an adequate basis for prohibiting the conduct.[81]

At the same time, Justice Scalia scorned Justice Kennedy for overruling *Bowers* while refusing to declare same-sex intimacy a "fundamental right." He argued that by applying "an unheard-of form of rational-basis review that will have far-reaching implications beyond this case,"[82] the Court had engaged in result-oriented decision-making and muddied applicable constitutional standards. He wrote:

> Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . .
>
> . . . It is clear from this [ruling's language] that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of

[75] *Id.* at 578.
[76] *Id.* at 606 (Thomas, J., dissenting).
[77] *Id.* at 587 (Scalia, J., dissenting).
[78] *See id.* at 586–92.
[79] *Id.* at 593 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
[80] *Id.* at 596–98.
[81] *Id.* at 589–90.
[82] *Id.* at 586.

engagement are observed.[83]

In so accusing the Court, Justice Scalia noted that he was not opposed to homosexuals' rights achieved through "democratic means," but objected to the evolution of those rights through what he considered judicial fiat.[84]

The dissent also expressed grave concern that the scope of the majority's ruling would jeopardize a myriad of state laws predicated on traditional views of morality. Justice Kennedy had included several disclaimers, noting that the case does not involve "minors[,] . . . persons who might be injured or coerced or who are in relationships where consent might not be easily refused[,] . . . public conduct[,] or prostitution."[85] Additionally, the Court did not ask the government to "give formal recognition to any relationship that homosexual persons seek to enter."[86] Still, Justice Scalia feared that the ruling's alteration of the traditional rational basis test had eroded the presumption of validity given to "[s]tate laws 'against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."[87]

Justice Scalia's concern that *Lawrence* would serve as the precursor to sexual liberty revolution was not wholly without foundation. In a spate of cases, *Lawrence* has been invoked to challenge laws prohibiting a variety of the activities identified in Justice Scalia's dissent, including prostitution, public sex, the sale of sex toys, statutory rape, sexual assault, fornication, and domestic battery. *Lawrence* has also been relied upon to challenge federal obscenity statutes, state sex offender registry requirements, and restrictions on homosexuals seeking to adopt. Most notably perhaps, *Lawrence* has taken center stage in the so-called "culture war" that is being waged over the issue of same-sex marriage.

III. INTERPRETATIONS OF *LAWRENCE*

A. Lower Court Applications

The various interpretations given *Lawrence* by the lower courts are instructive in understanding the ramifications of Justice

[83] *Id.* at 602.
[84] *Id.* at 603.
[85] *Id.* at 578 (majority opinion).
[86] *Id.*
[87] *Id.* at 590 (Scalia, J., dissenting).

Kennedy's ruling. In some of these cases, *Lawrence* has been cited merely to support the conclusion that *stare decisis* is not an "inexorable command."[88] In others, it has been interpreted as requiring some degree of deference to international jurisprudence and trends.[89] *Lawrence* has sparked numerous questions and a heated debate. Does Justice Kennedy's ruling nullify all morals-based legislation? Are expressions of animus toward a particular group, or moral reprehension of prohibited conduct, legitimate state interests? Or, must there be some additional harm that the legislature has an interest in addressing (with the law being rationally related to that alternative end)?

Most critically, *Lawrence* raises important questions regarding the future trajectory of modern due process analysis. Clearly, *Lawrence* is an affirmation of substantive due process.[90] However,

[88] *See* Glazner v. Glazner, 347 F.3d 1212, 1216 (11th Cir. 2003) (overruling prior recognized exception for interspousal wire tapping under Title III); Summerlin v. Stewart, 341 F.3d 1082, 1122 (9th Cir. 2003) (Reinhardt, J., concurring) (supporting Court's retroactive application of the Ring v. Arizona, 536 U.S. 584 (2002), decision because although it overrules previous court holdings, it increases the validity of the judicial process); Kyocera Corp. v. Prudential-Bache Trade Servs., 341 F.3d 987, 996–97 (9th Cir. 2003) (overruling LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (1997), which granted private parties the right to contract for a more expansive standard of judicial review for arbitration awards); Dodge v. County of Orange, 282 F. Supp. 2d 41, 80 (S.D.N.Y. 2003) (prohibiting officers from exercising previously held right to strip search newly admitted detainees); State v. Brown, 156 S.W.3d 722, 731 (Ark. 2004) (overruling the King v. State, 557 S.W.2d 386 (Ark. 1977), decision which required police to make homeowners aware of their right to refuse consent to searches made by the "knock and talk" method); Vitro v. Mihelcic, 806 N.E.2d 632, 640 (Ill. 2004) (Fitzgerald, J., dissenting) (arguing the Court was wrong in following stare decisis because the loss of filial society injury sustained by parents when a child is permanently injured is compelling evidence to abandon precedent); State v. Marsh, 102 P.3d 445, 462–63 (Kan. 2004) (explaining stare decisis is not designed to protect questionable law that should be abandoned); Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1268–69, 1268 n.5 (Ohio 2003) (abandoning stare decisis to return to the original precedent that a person's insurance status should not be interpreted in favor of a party not participating in the contract).

[89] *See* United States v. Quinones, No. 00 CR.761(JSR), 2004 WL 1234044, at *2–3 (S.D.N.Y. June 3, 2004) (holding that while the Supreme Court "has not been unmindful of the impact of international law," it has not indicated that "international law bars the death penalty"); Kane v. Winn, 319 F. Supp. 2d 162, 201 (D. Mass. 2004) (noting *Lawrence* as a recent example of the "importance of international law in defining the liberties protected by the Bill of Rights"); United States v. Sampson, 275 F. Supp. 2d 49, 66 (D. Mass. 2003) (noting that international views are "less meaningful than legislation or jury verdicts" but are relevant to considering consensus on what constitutes cruel and unusual punishment); *see also* Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (citing *Lawrence* as an example of the Court improperly giving consideration to international jurisprudence).

[90] *See* Tennessee v. Lane, 541 U.S. 509, 562–63 (2004) (Scalia, J., dissenting) (referring to the "so-called 'substantive due process'" under which the Court protects unenumerated rights); Flaskamp v. Dearborn Pub. Schs., 385 F.3d 935, 941–42 (6th Cir. 2004); Hutchison v. Brookshire Bros., 284 F. Supp. 2d 459, 467 (E.D. Tex. 2003); *In re* Marshall, 300 B.R. 507, 524 (Bankr. C.D. Cal. 2003).

there is still sharp disagreement over whether or not the decision created a fundamental right to sexual intimacy[91] and what level of review is to be appropriately applied in the consideration of asserted liberty interests. As will be seen, some courts have concluded that in the aftermath of *Lawrence* the rational basis test is "no longer as toothless,"[92] and some have read *Lawrence* to repudiate "pigeonhole analysis"[93] or to require a higher level of generality when reviewing liberty interests.[94] In terms of impacting the basic approach to identifying fundamental rights, *Lawrence* has also served as affirmation that history alone is not solely determinative.[95]

Thus, *Lawrence* sharply draws into question the appropriate methodology to be used in adjudicating substantive due process claims. There is disagreement in the lower courts whether

[91] For cases concluding that *Lawrence* did not announce a fundamental right, see Williams v. Att'y Gen., 378 F.3d 1232, 1236 (11th Cir. 2004); United States v. Extreme Assocs., 352 F. Supp. 2d 578, 591 (W.D. Pa. 2005); United States v. Gartman, No. 3:04-CR-170-H, 2005 U.S. Dist. LEXIS 1501, at *4 (N.D. Tex. Feb. 2, 2005); Wilson v. Ake, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005); Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451, 457 (Ariz. Ct. App. 2003); People v. Downin, 828 N.E.2d 341, 348 (Ill. App. Ct. 2005); State v. Thomas, 891 So. 2d 1233, 1235 (La. 2005) (noting that "as the dissent points out, the [*Lawrence*] majority stopped short of declaring 'that homosexual sodomy is a "fundamental right" under the Due Process Clause.'"); State v. Jenkins, No. C-040111, B-0105517-A, 2004 WL 3015091, at *3 (Ohio Ct. App. Dec. 30, 2004); and Martin v. Ziherl, 607 S.E.2d 367, 370 (Va. 2005). For cases that include *Lawrence* within citations of precedent establishing fundamental rights, see Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 547 n.6 (S.D.N.Y. 2004); Doe v. Miller, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004) *rev'd on other grounds*, 405 F.3d 700 (8th Cir. 2005); Bradley v. N.C. Dep't of Transp., 286 F. Supp. 2d 697, 706 (W.D.N.C. 2003); Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003); and Burton v. York County Sheriff's Dep't, 594 S.E.2d 888, 896 (S.C. Ct. App. 2004). *See also In re* W.M., 851 A.2d 431, 449 n.24 (D.C. 2004) (implying that *Lawrence* created a fundamental right and suggesting that Kennedy refrained from being precise only because state law in that case served not even a legitimate interest).

[92] Bell v. Duperrault, 367 F.3d 703, 710 (7th Cir. 2004); *see* State v. Druktenis, 86 P.3d 1050, 1080 (N.M. Ct. App. 2004); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 769–70 (7th Cir. 2003) (Posner, J., dissenting) (suggesting that *Lawrence* fits within a line of cases expanding rationality review).

[93] *Druktenis*, 86 P.3d at 1067 (quoting M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996)).

[94] Hodgkins v. Peterson, No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194, at *7, *14 (S.D. Ind. July 23, 2004) (holding that the liberty interest at issue ought to be framed as parents' interest in controlling and upbringing their children rather than the previous narrowly tailored right to "allow their minor children to be in public places with their permission and without direct supervision during curfew hours"; thus, framed as a fundamental right, the state curfew law did not survive strict scrutiny); State v. J.P., 29 Fla. L. Weekly S691 (Sup. Ct. 2004) (implying that judicial analysis should reflect the nature of the liberty interest at stake).

[95] Lofton v. Sec'y of the Dep't of Children and Family Servs., 377 F.3d 1275, 1309 (11th Cir. 2004) (Barkett, J., dissenting); *Williams*, 378 F.3d at 1251 (Barkett, J., dissenting); Hernandez v. Robles, 794 N.Y.S.2d 579, 603 (Sup. Ct. 2005); *In re W.M.*, 851 A.2d at 448; *In re* Det. of Cubbage, 671 N.W.2d 442, 447 (Iowa 2003); Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *12 (Wash. Super. Ct. 2004).

Lawrence merely clarifies that discriminatory animus is not a legitimate state interest under the traditional rational basis test, or whether it embraces a new form of heightened rational review. The lower court cases also suggest that *Lawrence* has possibly altered the traditional tiered scrutiny standard which is the foundation of the Court's modern due process and equal protection jurisprudence.[96]

It was in an equal protection case that had little to do with sexual privacy rights that the Tenth Circuit recognized that the application and use of the rational basis test in *Lawrence* differs from the traditional view.[97] According to the court in *Powers v. Harris*, the debate over appropriate standards actually predates *Lawrence* and can be traced back to Justice Byron White's ruling in *City of Cleburne v. Cleburne Living Center, Inc.*[98] In pondering whether

[96] *Bell*, 367 F.3d at 710 (Posner, J., concurring); *Druktenis*, 86 P.3d at 1080; *see also Civil Liberties for Urban Believers*, 342 F.3d at 769–70 (Posner, J., dissenting) (suggesting that *Lawrence* fits within a line of cases expanding rationality review). *Lawrence* has been frequently cited, namely for the statement that "all persons similarly situated should be treated alike." *See* Sweeney v. City of New York, No. 03 Civ. 4410 JSRRLE, 2004 WL 744198, at *5 (S.D.N.Y. Apr. 2, 2004) (quoting Curran v. Teacher's Ret. Sys., No. 02Civ.0953DABRLE, 2003 WL 21804270, at *2 (S.D.N.Y. July 28, 2003) (quoting Lawrence v. Texas, 539 U.S. 558, 579 (2003))); s*ee also* Barton v. City of Bristol, 294 F. Supp. 2d 184, 194 (D. Conn. 2003) (quoting *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985))); Green v. City of Tucson, 340 F.3d 891, 896 (9th Cir. 2003) (quoting *Cleburne*, 473 U.S. at 439). Additionally, *Lawrence* has been read as limiting equal protection consideration to situations in which there is a claim of suspect or protected classes. *See* Timoney v. Upper Merion Twp., No. CUV, A, 01-1622, 2004 WL 2823227, at *4 (E.D. Pa. Dec. 8, 2004); NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 461, 482–83 (S.D.N.Y. 2004) (refusing to recognize smokers as a class entitled to heightened solicitude and rejecting any analogy to the heightened solicitude afforded homosexuals); *see also* Albright v. Morton, 321 F. Supp. 2d 130, 137 (D. Mass. 2004) (holding that the decriminalization of same-sex sodomy in *Lawrence* mitigates a defamation claim wherein an individual was incorrectly identified as a homosexual, and further ruling that to label homosexuality as defamatory would effectuate prejudices which *Lawrence* rejected), *aff'd*, Amrak Prods., Inc. v. Morton, 410 F.3d 69 (1st Cir. 2005).

[97] Powers v. Harris, 379 F.3d 1208, 1224 (10th Cir. 2004) (involving the constitutionality of a state law prohibiting the internet sale of burial caskets by non-licensed funeral directors).

[98] *See id.* at 1224 (discussing *Cleburne*, 473 U.S. 432); *see also* Moore v. City of E. Cleveland, 431 U.S. 494, 547 (1977) (White, J., dissenting). Although circumspect regarding substantive due process, Justice White articulated several approaches to adjudicating claims under this clause. In addition to generally demanding that statutes not be impermissibly vague or over-broad, the Court had also imposed a "means-end" test requiring "that any statute restrictive of liberty have an ascertainable purpose and represent a rational means to achieve that purpose." *Moore*, 431 U.S. at 547. According to Justice White, this was the tact taken in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and its progeny. *Moore*, 431 U.S. at 547–48 (White, J., dissenting). He acknowledged that while the earlier cases "made serious inroads on the presumption of constitutionality supposedly accorded to state and federal legislation," the Court subsequently "came to demand far less from and to accord far more deference to legislative judgments." *Id.* at 548. He believed that the Court had never discarded the concept of means-end rationality, yet suggested that the degree of emphasis the Court placed

"*Cleburne* and *Romer* represent the embryonic stages of a new category of equal protection review,"[99] the *Powers* court noted Justice O'Connor's assertion that "[w]hen a law exhibits such a desire to harm a politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[100]

Still, *Powers* acknowledged that O'Connor was alone in her concurrence and that no majority of the Court had announced "that the rational-basis review found in *Cleburne* and *Romer* . . . differs from the traditional variety."[101] Here the judges dropped a cryptic "but see," reference to *Lawrence*.[102] It could be, the court speculated, that *Lawrence* had merely found that "a bare . . . desire to harm a politically unpopular group,"[103] was not sufficiently a legitimate state interest.

Alternatively, *Powers* theorized, *Cleburne*, *Romer* and *Lawrence*

on the presumption of validity was variable. He described the current approach as one generally deferring to legislative judgment, but noted that the recognized importance of what he termed "various 'liberties'" required "closer judicial scrutiny, not only with respect to existence of a purpose and the means employed, but also with respect to the importance of the purpose itself relative to the invaded interest." *Id.* at 548.

White distinguished between those rights that are enumerated and have been incorporated by the Fourteenth Amendment, the protections of which he deemed "impregnable," and those rights which are "*implicit* in the concept of ordered liberty," and which "also weigh very heavily against state claims of authority to regulate." *Id.* at 548, 549 (emphasis added). Applying that distinction, he found that the asserted right in this case—the right to cohabitate with multiple members of extended family—was a protected liberty, "but, because of the nature of that particular interest, the demands of the [Due Process] Clause are satisfied once the Court is assured that the challenged proscription is the product of a duly enacted . . . [law] that . . . is not wholly lacking in purpose or utility." *Id.* at 550. His differentiation between the status of enumerated and implicit rights reflects his ambivalence towards substantive due process; he recognized that the clause has a substantive component yet was cautious in embracing a doctrine that would allow judges to discover rights not explicitly provided in the Constitution. *See id.* at 543–44.

Whites' dissent in *Moore* further explicated what he viewed as two distinct approaches to identifying the protections of substantive due process. One was the Cardozo framework established in the Palko v. Connecticut, 302 U.S. 319 (1937), line of cases, holding that those rights "implicit in the concept of ordered liberty" trigger a heightened solicitude. *Moore*, 431 U.S. at 546, 549 (White, J., dissenting). The other was the approach championed by Justice Powell which White described as protecting "from all but quite important state regulatory interests any right or privilege that in [Powell's] estimate [was] deeply rooted in the country's traditions." *Id.* at 549. Interestingly, White characterized the second methodology as more subjective, arguing that it would "broaden enormously the horizons of the Clause; and . . . [would result in] the courts . . . substantively weighing and very likely invalidating a wide range of measures that Congress and state legislatures think appropriate to respond to a changing economic and social order." *Id.* at 549–50.

[99] *Powers*, 379 F.3d at 1224.

[100] *Id.* (quoting *Lawrence*, 539 U.S. at 580).

[101] *Id.* at 1223–24.

[102] *Id.* at 1224.

[103] *Id.* (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

were perhaps singular "exceptions to traditional rational basis review fashioned by the Court to correct perceived inequities unique to those cases."[104] Nonetheless, having found that there was a myriad of state interests justifying the regulation of the funeral services industry before them, and concluding that "*Cleburne*-style rational-basis review" had never been applied to economic regulations, the Court did not try to resolve this issue in *Powers*.[105] The Court offered no definitive conclusions in *Powers*, despite having considered the potential import of *Lawrence* in altering the standard approach to tiered review, and left the answer to be extracted from other lower court opinions.[106]

Minimally, *Lawrence* has been applied to effectively nullify state sodomy statutes banning private, consensual acts between adults.[107] Its nullification of a morals-based statute has similarly placed state bans on other private sexual conduct in jeopardy. In *Martin v. Ziherl*,[108] the Virginia Supreme Court found that state fornication statutes were obsolete in the wake of the anti-sodomy ruling.[109] Interpreting *Lawrence*, the court concluded that "the liberty interest at issue was not a fundamental right to engage in certain conduct but was the right to enter and maintain a personal relationship

[104] *Id.*

[105] *Id.* at 1224–25.

[106] *Id.*

[107] *See* D.L.S. v. Utah, 374 F.3d 971, 975, 976 (10th Cir. 2004) (affirming dismissal, for lack of standing, of a challenge to state sodomy statutes because potential for sodomy prosecutions in Utah are highly unlikely in wake of *Lawrence*); Doe v. Pryor, 344 F.3d 1282, 1283 (11th Cir. 2003) (dismissing for lack of standing a challenge to state statute against "deviate sexual intercourse," in part, due to a lack of credible threat of enforcement post-*Lawrence*); Barbee v. Household Auto. Fin. Corp., 6 Cal. Rptr.3d 406, 411 (Ct. App. 2003) (assuming, but not deciding, that in wake of *Lawrence*, state constitutional privacy might extend to employer's intimate association with a subordinate); Commonwealth v. Coleman, 854 A.2d 978, 983 (Pa. Super. Ct. 2004) (noting that military proscription against consensual sodomy would be unconstitutional as applied to the civilian population post-*Lawrence*); Berg v. State, 100 P.3d 261, 266 (Utah Ct. App. 2004) (dismissing for lack of standing a challenge to state fornication and sodomy laws as prosecution unlikely in the aftermath of *Lawrence*). *But see* United States v. Morales-de Jesús, 372 F.3d 6, 18 & n.10 (1st Cir. 2004) (upholding a federal statute prohibiting child pornography and finding that *Lawrence* did not include the sexual exploitation of minors within the Constitutional right to privacy).

[108] 607 S.E.2d 367 (Va. 2005). The case centered around a civil suit in which an unmarried female claimed that her ex-boyfriend had knowingly engaged her in unprotected sexual relations without advising her that he had contracted a sexually transmitted disease. *Id.* at 368. In reply to her claims of negligence, battery, and intentional infliction of emotional distress, the defendant filed a motion of demurrer invoking state law which prohibits recovery of damages by individuals involved in illegal activity. *Id.* Since the State prohibited fornication, he argued, the plaintiff's willful participation in illegal conduct precluded the tort. *Id.*

[109] *Id.* at 370.

without governmental interference."[110] This protection includes the "overt expression in intimate conduct" that occurs between consenting adults within the privacy of the home.[111]

In so reading *Lawrence*, the Virginia court treated Justice Stevens' *Bowers* dissent—refuting the legitimacy of state laws based exclusively on morality and extending liberty protections to unmarried couples—as ultimately controlling.[112] Application of *Lawrence*'s principles convinced the court that Virginia had unconstitutionally "abridged a personal relationship that was within the liberty interest of [adult] persons to choose."[113] But, it is important to note that the Virginia court's interpretation of *Lawrence* did not characterize this "liberty interest" as a fundamental right subject to strict scrutiny analysis. Rather, the court concluded that Justice Kennedy employed mere rational basis review.[114] At the same time, however, the state justices found that *Lawrence* had recognized a "liberty interest" for married and unmarried individuals to engage in private, consensual behavior.[115] *Lawrence*'s rationale, they concluded, "sweeps within it all manner of states' interests and finds them insufficient when measured against the intrusion upon a person's liberty interest when that interest is exercised in the form of private, consensual sexual conduct between adults."[116] Noting the specific limitations which Justice Kennedy placed on the *Lawrence* ruling, the court cautioned that its "holding does not affect the Commonwealth's police power regarding regulation of public fornication, prostitution, or other such crimes."[117]

Indeed, there has been consensus among the lower courts that, by its own terms, *Lawrence* is limited to only the most private of intimate conduct[118] and does not apply to commercial sexual

[110] *Id.* at 369.
[111] *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003)).
[112] *Id.* at 370.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 371.
[118] *See* Burt v. Rumsfeld, 354 F. Supp. 2d 156, 189 (D. Conn. 2005) (holding that military recruiting in educational environment does not implicate personal, intimate conduct); Dodge v. Trustees of the Nat'l Gallery of Art, 326 F. Supp. 2d 1, 15 (D.D.C. 2004) (citing *Lawrence* in support of holding that security regulations that include posting an individual's social security number as part of a security alert do not violate any protected privacy interests); *In re* Bd. of County Comm'rs of Arapahoe, 95 P.3d 593, 601 (Colo. Ct. App. 2003) (citing *Lawrence* as support that "sexual behavior is the most private human conduct"); *see also* Hensala v. Dep't of the Air Force, 343 F.3d 951, 956, 959 (9th Cir. 2003) (remanding a claim

activities or prostitution.[119] Similarly, the lower courts have refused to extend *Lawrence*'s protections to public sex acts,[120] non-consensual sexual activity,[121] or conduct which poses risk to another.[122] Additionally, as one court noted, any asserted interests in being free of sex-offender registry requirements "are not among those that the Supreme Court has heretofore declared to be 'fundamental' or, as the Court said in *Lawrence*, 'central' to the liberty protected by the Fourteenth Amendment."[123]

---

that *Lawrence* nullifies military policy for recoupment of educational expenses where violation of the "Don't Ask, Don't Tell" policy results in separation). *Lawrence* has also been interpreted as applying to only human relationships. *See* La. Electorate of Gays and Lesbians, Inc. v. Connick, 902 So. 2d 1090, 1094 (La. Ct. App. 2005) (affirming a 2000 state supreme court ruling that upheld state prohibitions on bestiality).

[119] *See* Cawood v. Haggard, 327 F. Supp. 2d 863, 878–79 (E.D. Tenn. 2004) (deciding that *Lawrence*'s rationale is not applicable in a case of prostitution involving a nonconsensual, adulterous, and short-lived sexual arrangement where one of the parties goes to the police for assistance in extricating herself from an arrangement involving sexual favors to pay off legal fees); People v. Williams, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004) (concluding that *Lawrence* does not protect commercial sex); State v. Thomas, 891 So. 2d 1233, 1238 (La. 2005) (holding that "*Lawrence* left unaffected charges involving public conduct or prostitution"); State v. Pope, 608 S.E.2d 114, 116 (N.C. Ct. App. 2005) (holding that *Lawrence* "expressly excluded prostitution and public conduct from its holding," thus allowing the state to "properly criminalize the solicitation of a sexual act it deems a crime against nature").

[120] *See* Fleck & Assocs. v. City of Phoenix, 356 F. Supp. 2d 1034, 1041 (D. Ariz. 2005) (concluding that "*Lawrence* does not suggest that sexual activities in a place of pubic accommodation are Constitutionally protected"); Commonwealth v. Can-Port Amusement Corp., No. 2005-0295, 2005 WL 937312, at *10 (Mass. Super. Ct. Mar. 31, 2005) (deducing that *Lawrence* does not create a right to sexual relations in public places like a movie theater); Askew v. Commonwealth, No. 0235-03-1, 2004 WL 234810, at *2 (Va. Ct. App. Feb. 10, 2004) (holding that *Lawrence* does not apply to the sexual conduct of inmates in the recreational facility of a prison since it is not a "dwelling or other private place[]"); *see also* United States v. Quaempts, 411 F.3d 1046, 1048–49 (9th Cir. 2005) (citing *Lawrence* to conclude that arrest of defendant was inappropriate because he "was in his bed, the sanctuary of the right to privacy").

[121] *See* Commonwealth v. Mayfield, 832 A.2d 418, 425 (Pa. 2003) (holding that *Lawrence* does not extend to sexual contact between public correctional staff and inmates that occurs within a state correctional facility); *see also In re* Extradition of Waters, No. 03M1072(CLP), 2003 WL 23185666, at *7 (E.D.N.Y. Nov. 24, 2003) (interpreting *Lawrence* as inapplicable to sexual conduct involving non-consensual acts with minors and upholding international extradition of a child sexual abuser); People v. Sanches, No. G032738, 2004 WL 2757435, at *6 (Cal. Ct. App. Dec. 2, 2004) (concluding that *Lawrence* does not apply to a privacy claim in protest of conviction for spousal rape); Kupper v. State, No. 05-03-00486-CR, 2004 WL 60768, at *4 (Tex. App. Jan. 14, 2004) (dismissing, as waived, a claim that admission of photographs of the defendant engaging in homosexual conduct at his trial for aggravated assault of a minor was a harmful error in light of *Lawrence*).

[122] *See* State v. Van, 688 N.W.2d 600, 615 (Neb. 2004) (ruling that *Lawrence* does not extend to bondage or other sadomasochistic acts that pose a risk of injury); Doe v. Moe, 827 N.E.2d 240, 245–46 & n.5 (Mass. App. Ct. 2005) (noting that *Lawrence* exemplified a trend away from state regulation of private, intimate conduct in refusing to find a standard of reasonable care when engaging in consensual sexual relations, and thus dismissing suit for damages for physical injuries sustained through alleged negligence of a sexual partner).

[123] *In re* W.M., 851 A.2d 431, 450 (D.C. 2004), *cert. denied*, 125 S. Ct. 885 (2005).

There has also been consensus that the privacy rights announced in *Lawrence* do not extend to minors.[124] Most prominently, *State v. Limon* concluded that "the legislature can punish those adults who engage in heterosexual sodomy with a child less severely than those adults who engage in homosexual sodomy with a child."[125] The decision was reached on remand, accompanied by a Supreme Court directive to reconsider on the basis of its *Lawrence* ruling.[126] The Kansas Court of Appeals determined that *Lawrence* could be distinguished from the issue before it, both because of its explicit exemption of sexual conduct involving minors and its reliance on due process instead of the equal protection claims presented in *Limon*.[127] However, the court did scrutinize both *Lawrence* and *Romer* when determining whether to apply rational basis standards in upholding the state's statutory scheme.[128]

Because of the states' special role in protecting minors, *Lawrence* has also been found to have only limited impact on child custody proceedings.[129] However, although the lower courts have eschewed its applicability to the state regulation of custody or adoption,[130]

[124] *See* United States v. Bach, 400 F.3d 622, 628–29 (8th Cir. 2005) (finding no support in *Lawrence* for privacy claim involving sexual conduct with minor); Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 566 n.9 (N.D. Tex. 2004) (discussing the Kansas Court of Appeals' distinction between laws applicable to minors and the law invalidated in *Lawrence*); United States v. Peterson, 294 F. Supp. 2d 797, 803 (D. S.C. 2003) (ruling that "*Lawrence* does not provide a rationale for the extension of Due Process protection for possessors of child pornography"); *Waters*, 2003 WL 23185666, at *4 n.2 (interpreting *Lawrence* as inapplicable to sexual conduct involving either minors or non-consensual acts); People v. Downin, 828 N.E.2d 341, 348 (Ill. App. Ct. 2005) (holding that *Lawrence* was directed only to consensual sex involving "adults"); State v. Horn, No. 91,692, 2005 WL 823896, at *2 (Kan. App. Ct. Apr. 8, 2005) (holding that *Lawrence* does not constitutionally protect sexual contact with minors); State v. Druktenis, 86 P.3d 1050, 1078 (N.M. Ct. App. 2004) (distinguishing claimed privacy interest of convicted sex offenders from the protection *Lawrence* gives to private, consensual, adult relationships); State v. Oakley, 605 S.E.2d 215, 218 (N.C. Ct. App. 2004) (ruling that "*Lawrence*'s recognition of autonomy and personal choice within consensual adult relationships does not offer constitutional protection to evidence presented in a charge of criminally prohibited activity with minors"); State v. Moore, 606 S.E.2d 127, 131 (N.C. Ct. App. 2004) (upholding application of statutory rape laws to unmarried persons while exempting lawfully married couples as constitutional on the grounds that the privacy right announced in *Lawrence* does not extend to sexual activity with minors); State v. Clark, 588 S.E.2d 66, 68–69 (N.C. Ct. App. 2003) (concluding that *Lawrence* does not invalidate statutory rape law).

[125] 83 P.3d 229, 235 (Kan. Ct. App. 2004).

[126] Limon v. Kansas, 539 U.S. 955 (2003).

[127] State v. Limon, 83 P.3d at 234–35.

[128] *Id.* at 239, 240 (noting that Limon's reliance on *Romer* was misplaced and deciding that "a rational basis exists for placing adult heterosexual sex acts with children in a class by themselves").

[129] *See* McGriff v. McGriff, 99 P.3d 111, 117, 118 (Idaho 2004) (affirming that homosexuality *alone* "cannot be a circumstance upon which custody can be modified").

[130] *See* L.A.M. v. B.M., No. 2030734, 2004 WL 2829052, at *4 (Ala. Civ. App. Dec. 10, 2004)

Lawrence has factored into the controversy surrounding homosexual adoption, prompting a vigorous debate in at least one circuit.[131] In 2004, the Eleventh Circuit upheld a Florida adoption scheme banning active homosexuals from becoming adoptive parents.[132] Finding that *Lawrence* did not confer any fundamental right to "private sexual intimacy,"[133] the panel suggested that the interest protected in *Lawrence* was the "by-product of several different constitutional principles and liberty interests."[134] The panel pointed to *Lawrence*'s failure to fully articulate the nature of the right, including a careful delineation of its boundaries as was required under *Glucksberg*.[135] Unwilling to discover a "new" fundamental right where it determined the Supreme Court had declined to do so, the court applied the rational basis test[136] and found that the state had a legitimate interest in advancing the legislatively determined "optimal family structure."[137] While the panel declined to resolve the issue of whether the legislature's sense of public morality was a sufficient state interest, the judges nevertheless noted that the Supreme Court had found morals-based regulations acceptable as legitimate, and even substantial, state interests in the past.[138]

Additionally, the *Lofton* panel concluded that because the Florida statute dealt with public rather than private acts, and because it involved a civil rather than a criminal matter, *Lawrence* simply did not apply.[139] The court made a similar distinction between the case before it and *City of Cleburne v. Cleburne Living Center, Inc.* insofar

(holding that *Lawrence* does not overrule state precedent allowing homosexual lifestyle to be considered as a factor in granting or modifying custody of a minor); Buckner v. Family Servs. of Cent. Fla., Inc., 876 So.2d 1285, 1288 (Fla. Dist. Ct. App. 2004) (holding that unlike criminal law, in adoption law "the paramount substantive concern is not intruding on individuals' liberty interests" such as those protected by *Lawrence*); *In re* Bobbijean P., No. 03626-03, 2004 WL 834480, at *4 (N.Y. Fam. Ct. Mar. 31, 2004) (citing *Lawrence* as evidence of a right to privacy yet holding that any privacy interest negligent parents may have "is outweighed by society's right to not have the additional physical and financial burden of providing for that child"); Vanderveer v. Vanderveer, No. 0122-04-2, 2004 WL 2157930, at *4–5 (Va. Ct. App. Sept. 28, 2004) (stating *Lawrence* applies only to criminal context and thus has no bearing on modification of custody based on a parent's unmarried cohabitation).

[131] *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

[132] *Id.* at 827 (finding nothing in the Constitution prohibiting such a decision).

[133] *Id.* at 817.

[134] *Id.* at 816.

[135] *Id.*

[136] *Id.* at 818.

[137] *Id.* at 819.

[138] *See id.* at 819 n.17 (citing Barnes v. Glen Theatre, 501 U.S. 560 (1991) and Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion)).

[139] *Id.* at 817.

as it found that the Florida legislature "could rationally conclude that homosexuals and heterosexual singles are not 'similarly situated in relevant respects.'"[140] Thus, the panel foreclosed any elevated rationality review that might be alternatively afforded under the Equal Protection Clause.[141]

The decision to deny a petition for an *en banc* rehearing in *Lofton*[142] sparked a second, bitter exchange between the Eleventh Circuit's members. In a special concurrence, Judge Birch sought to debunk what he considered the dissent's attempt at creating a theory of "heightened rational-basis review" based on what he deemed an improper interpretation of *Lawrence*.[143] In his view, nothing beyond Justice O'Connor's concurring opinion in *Lawrence* suggested the Court had meant to elevate rational basis review.[144] *Romer*, he found, was inapposite having determined only that the proposed amendment to the state constitution had far "exceeded its proffered rationales."[145] Moreover, Birch's concurrence argued that animus was not an impermissible state interest, conceding only that animus *alone*, without any additional state interest, would not be sufficient to sustain a law.[146] The concurrence thus reiterated the original *Lofton* panel's conclusion that *Lawrence* had not altered the legal landscape to the point of undermining Florida's adoption laws. Insisting that *Lawrence* was a narrow opinion that conferred no fundamental rights, Judge Birch accused the dissent of cobbling from *Lawrence*'s dicta a specious argument for a general right to private sexual intimacy.[147] *Lawrence*'s recognition of a liberty interest, he argued, was not tantamount to a finding that heightened review was warranted for all laws impinging such a claimed right.[148]

For her part, the lead dissenter from the *Lofton* rehearing denial put forward a substantially different interpretation of *Lawrence* and relevant case law. First, she argued that the Supreme Court's equal protection rulings in *Cleburne*, *Moreno*, and *Romer* required invalidation of the adoption law where it could be properly inferred that animus towards an unpopular group was the likely motivation

[140] *Id.* at 821–22.
[141] *Id.* at 817–18.
[142] Lofton v. Sec'y of Dep't of Children and Family Servs., 377 F.3d 1275 (11th Cir. 2004).
[143] *Id.* at 1279 (Birch, J., specially concurring in the denial of rehearing en banc).
[144] *Id.*
[145] *Id.*
[146] *Id.* at 1280.
[147] *Id.* at 1286.
[148] *Id.* at 1289–90.

behind the regulation.[149] More importantly, she read *Lawrence* as directly recognizing a right to sexual privacy that invalidated Florida's adoption scheme on substantive due process grounds.[150] Noting that the very question for which *certioriari* had been granted in *Lawrence* spoke directly to the possible existence of such a right, she read Justice Kennedy's opinion as a clear affirmation of its fundamental nature.[151] Judge Barkett did not find that this right was "new," but rather that Justice Kennedy had interpreted existing fundamental rights cases to include a right to sexual privacy that was equally applicable to homosexual conduct.[152] Rather than refusing to apply heightened scrutiny, she argued, *Lawrence* merely found such an inquiry unnecessary as the statute failed even the lowest level of review.[153] That the case involved a fundamental right, she further argued, could be inferred from its *clarification* of *Glucksberg* that "history and tradition do not themselves resolve the due process inquiry."[154] Justice Kennedy's emphasis on what the case *did not* involve, she argued, was the "careful description" that traditionally accompanies the elucidation of a fundamental right.[155]

The argument that *Lawrence* amplifies rights previously announced also arose in the debate over anti-pornography laws. It was reliance on the pre-existing fundamental right to view pornographic material in the privacy of one's own home that led to the invalidation of federal obscenity statutes in *United States v. Extreme Associates*.[156] In that case, the Federal District Court for the Western District of Pennsylvania interpreted *Lawrence* as embracing the traditional standards of modern due process review. Citing *Lawrence* as support, the court declared that laws impinging fundamental rights are subject to strict scrutiny while non-fundamental protections are subject only to rational review.[157] Thus, the court neither interpreted *Lawrence* as announcing a "'new' and/or 'broad' fundamental right to engage in private sexual

[149] *Id.* at 1291 (Barkett, J, dissenting in the denial of rehearing en banc).
[150] *Id.* at 1291, 1313.
[151] *Id.* at 1305.
[152] *Id.* at 1307.
[153] *Id.* at 1309–10.
[154] *Id.* at 1308–09.
[155] *Id.* at 1308.
[156] United States v. Extreme Assocs., 352 F. Supp. 2d. 578, 588 (W.D. Pa. 2005); *see also* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (invalidating laws "making mere private possession of obscene material a crime").
[157] *Extreme Assocs*., 352 F. Supp. 2d. at 585–86.

conduct," nor felt it necessary to do so.[158] Concluding instead that Justice Kennedy's ambiguous opinion ultimately employed rational basis review, the district court found *Lawrence* primarily applicable in its holding that "public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality."[159] Thus the court's invalidation of the federal obscenity statute was based, in substantial part, on its belief that *Lawrence* had delegitimized morality as a justification for state intrusion into private, sexual conduct.

> Because the [*Lawrence*] case involved two consenting adults engaged in sexual activity in the privacy of their own home and not minors, persons who might be coerced or injured, public conduct, or prostitution, the Court found that no state interest—including promoting a moral code—could justify the law's intrusion into the personal and private life of the individuals involved.[160]

Another federal district court, however, disputed the conclusion that *Lawrence* nullified morality as a legitimate state interest. *United States v. Gartman* agreed that "*Lawrence v. Texas* did not create a new fundamental right to sexual privacy."[161] However, in applying rational basis, the *Gartman* court found there were other legitimate interests, beyond morality, that were sufficient to uphold federal obscenity law.[162] In *State v. Jenkins*,[163] an Ohio appellate court similarly found that *Lawrence*'s logic does not "transpose[] to the commercial enterprise of selling obscene materials to the public."[164] Nor did the state court "perceive any 'emerging awareness' opposing obscenity laws or a pattern of nonenforcement

---

[158] *Id.* at 591.

[159] *Id.*; *see also* Williams v. Att'y Gen., 378 F.3d 1232, 1238 n.8 (11th Cir. 2004) (discussing morality issues and arguing that "[o]ne would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principal has been jettisoned wholesale (with all due respect to Justice Scalia's ominous dissent notwithstanding)").

[160] *Extreme Assocs.*, 352 F. Supp. 2d. at 590. The District Court was convinced of this aspect of *Lawrence*, in part, because of the concerns flagged by *Lawrence*'s dissenters. "It is reasonable to assume that these three members of the Court came to this conclusion only after reflection and that the opinion was not merely a result of over-reactive hyperbole by those on the losing side of the argument." *Id.*

[161] United States v. Gartman, No. 3:04-CR-170-H, 2005 U.S. Dist. LEXIS 1501, at *4 (N.D. Tex. Feb. 2, 2005) (citation omitted).

[162] *Id.* at *4–5, *6 n.1.

[163] State v. Jenkins, No. C-040111, B-0105517-A, 2004 WL 3015091 (Ohio Ct. App. Dec. 30, 2004).

[164] *Id.* at *4.

that would suggest that the right to sell materials deemed obscene has become part of the concept of ordered liberty."[165]

The Eleventh Circuit also rejected a *Lawrence*-based challenge to an Alabama law prohibiting the in-state sale of sex toys in *Williams v. Attorney General*.[166] In doing so, the justices of the Eleventh Circuit reprised their feud over the meaning of *Lawrence* that had erupted in their consideration of anti-gay adoption laws. Writing for the majority and relying on *Lofton*, Judge Birch again denied that *Lawrence* conferred any fundamental right protected by the highest level of review.[167] He accused those who found such a right emanating from *Lawrence* as improperly stitching together bits of unrelated dicta.[168] Opting to adhere to the standards of *Glucksberg* and its consideration of claimed rights viewed at the most particular level, the panel could not find the right to use sex toys or paraphernalia deeply rooted in the nation's history or tradition.[169] Leaving aside the question of whether or not *Lawrence* had definitively undercut all morals-based legislation, the panel found that the regulation of the *public* sale of sex products was a legitimate exercise of state police powers.[170]

Reiterating her conclusion that *Lawrence* did indeed establish a fundamental right to sexual privacy that is entitled to elevated review, Judge Barkett accused the majority of a deliberate effort to misinterpret its clear directive by dismissing the centrality of its ruling as dicta.[171] Arguing that public morality was not sufficient to overcome the right to sexual privacy in *Lawrence*, she concluded that it therefore was not an adequate state interest in the present case.[172]

Although the ruling has sparked debate on a variety of issues, undoubtedly the most controversial aspect of *Lawrence* has been its

---

[165] *Id.*

[166] 378 F.3d 1232, 1233 (11th Cir. 2004).

[167] *Id.* at 1236–37.

[168] *Id.* The panel also argued that *Lawrence* was not merely announcing a right that was fairly discoverable in Supreme Court precedent, pointing to a statement by the Court that it "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults, and [does] not purport to answer that question now." *Id.* at 1236 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5 (1977)). The dissent, on the other hand, disputed that a footnote from a 1977 ruling was controlling on the issue. *Id.* at 1254 (Barkett, J., dissenting).

[169] *Id.* at 1237, 1240–41, 1244–45.

[170] *Id.* at 1233, 1238 n.9.

[171] *Id.* at 1250, 1256 (Barkett, J., dissenting).

[172] *Id.* at 1259.

potential applicability to the gay marriage controversy.[173] In this area too, discussions of whether *Lawrence* confers a substantive right-to-marry are inextricably interwoven with questions regarding how Justice Kennedy's ruling alters the traditional application of modern due process standards, the appropriate level of review to be employed, and the weight to be given state interests in promoting a particular view of morality.

In terms of establishing a substantive right, Justice Kennedy's majority opinion distinguished marriage, although some have argued it might signal support for the legalization of civil unions.[174] Arguably, Justice Kennedy undercut *Lawrence* as a foundation for gay marriage by indicating that the ruling did not require formal recognition of homosexual relations by the state. Although he repudiated state attempts to interfere with interpersonal relationships, he was direct in stating that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[175] Additionally, he hinted at a possible state interest for justifying gay marriage bans by suggesting that states should not "define the meaning of the relationship or [attempt] to set its boundaries absent injury to a person *or abuse of an institution the law protects*."[176] Justice O'Connor's concurrence echoed a similar thought, noting that in promulgating a ban on same-sex sodomy, the state could not "assert any legitimate interest . . . such as national security or preserving the traditional institution of marriage."[177]

On the other hand, Justice Kennedy's rhetoric on the nature and scope of individual liberty holds great promise in the sweeping endorsement it gives to the self-definition of interpersonal relationships. As one scholar has noted, "[a]ll the ammunition the Court needs is contained in just three cases: *Loving*, *Romer*, and last year's *Lawrence v. Texas*."[178] In some ways, Justice Kennedy

[173] Reliance on *Lawrence* has also made an appearance in cases seeking to establish a constitutional right to polygamy. *See* Bronson v. Swensen, 2:04-CV-21-TS, 2005 WL 1310538, at *5 (D. Utah Feb. 16, 2005) (concluding that *Lawrence* cannot be read to require "formal recognition to a public relationship of a polygamous marriage").

[174] Lynn D. Wardle, *The Curious Case of the Missing Legal Analysis*, 18 BYU J. PUB. L. 309, 349–350 (2004).

[175] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[176] *Id.* at 567 (emphasis added).

[177] *Id.* at 585 (O'Connor, J., concurring).

[178] Matthew J. Franck, *Not* Loving *It: "Full Faith and Credit" is Not the Only Constitutional Issue in the Gay-Marriage Debate*, NATIONAL REVIEW ONLINE, Mar. 16, 2004, http://www.nationalreview.com/script/printpage.p?ref=/comment/franck200403160942.asp (referring to Loving v. Va., 388 U.S. 1 (1967)).

has carefully laid the foundation for the recognition of gay marriage by granting protection to homosexual conduct and rejecting moral opprobrium as a legitimate basis for the disparate treatment of lesbians and gays.[179]

Ironically, the suggestion that Justice Kennedy's *Romer* and *Lawrence* opinions lay the groundwork for the recognition of same-sex marriage was most compellingly presented by the dissenters, who portrayed the prospect in *Lawrence* as but one of the inevitable parade of horribles resulting from the ruling. Justice Scalia accused that "[t]his case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."[180]

Within days of *Lawrence* being announced, homosexual couples sought to test its reach. They were dealt a setback in one of these earliest cases, *Standhardt v. Superior Court*,[181] when an Arizona state court interpreted *Lawrence* as containing specific disclaimers regarding same-sex marriage. Quoting *Lawrence*'s caution that it did not require states to give "formal recognition" to same-sex relationships and its clarification that state criminalization of intimacy was forbidden "absent injury to a person or abuse of an institution the law protects,"[182] the court concluded that *Lawrence* did not contemplate extension of its protection to gay marriage—Justice Scalia's proclamations notwithstanding.[183] Beyond finding no specific right for gays to marry, the *Standhardt* court also denied that *Lawrence*'s expansive language regarding the right to define one's own existence conferred any such guarantee.[184]

Moreover, the *Standhardt* court, surmising that *Lawrence* did not create a *fundamental* right to homosexual conduct (implied by its application of mere rational basis in striking down the Texas law), rejected "any notion that the Court intended to confer such status on the right to secure state-sanctioned recognition of such a union."[185] The state court therefore refused to announce such a right where the Supreme Court had failed to announce one, despite what the court confessed were changing societal attitudes towards

[179] *Lawrence*, 539 U.S. at 571, 578.
[180] *Id.* at 605 (Scalia, J., dissenting).
[181] 77 P.3d 451 (Ariz. Ct. App. 2003).
[182] *Id.* at 456–57 (quoting *Lawrence*, 539 U.S. at 567).
[183] *Id.*
[184] *Id.* at 457.
[185] *Id.*

gays.[186] Under the standards of mere rationality, the court determined that states had a legitimate interest in preserving heterosexual marriage as "the foundation of the family and of society."[187]

The claim that *Lawrence* did not nullify the states' legitimate interest in denying gays the right to marry was echoed in *Lewis v. Harris*,[188] and *Lockyer v. City and County of San Francisco*,[189] where a state court found that because *Lawrence* included a "very specific disclaimer" on the issue, it was not "plausibl[e]" that the ruling had created a constitutional right to same-sex marriage.[190] An Indiana appellate court similarly concluded that

> [t]he five justices of the Lawrence majority, as well as Justice O'Connor in her concurring opinion, do not appear to be prepared to extend the logic of their reasoning to the recognition of same-sex marriage. Nonetheless, the State conceded at oral argument in this case that Lawrence effectively forecloses the possibility of relying upon moral disapproval of homosexual relationships as the sole justification for limiting marriage to opposite-sex couples only.[191]

One federal court has agreed that "[i]t is disingenuous to argue that the Supreme Court's precise language in *Lawrence* established a fundamental right to enter into a same-sex marriage."[192] Hearing a challenge to the federal Defense of Marriage Act[193] and Florida's so-called mini-DOMA law,[194] the U.S. District Court for the Middle District of Florida concluded in *Wilson v. Ake* that *Lawrence* had announced no new fundamental right as evinced by its employment of mere rational basis review to invalidate state criminalization of same-sex sodomy.[195] *Wilson* too noted *Lawrence*'s explicit statement

---

[186] *Id.* at 459–60.

[187] *Id.* at 461 (quoting Moran v. Moran, 933 P.2d 1207, 1212 (Ariz. Ct. App. 1996)).

[188] No. MER-L-15-03, 2003 WL 23191114, at *23 (N.J. Super. Ct. Law Div. Nov. 5, 2003); *see also* Hennefeld v. Twp. of Montclair, 22 N.J. Tax 166, 181–82, 184 (N.J. Tax Ct. 2005) (refusing to grant comity to Canadian-granted same-sex marriage or to recognize a constitutional right to gay marriage, but recognizing couples' tax rights under state domestic partnership law).

[189] 95 P.3d 459 (Cal. 2004).

[190] *Id.* at 487 n.32.

[191] Morrison v. Sadler, 821 N.E.2d 15, 20 (Ind. Ct. App. 2005).

[192] Wilson v. Ake, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005).

[193] 1 U.S.C. § 7 (2000).

[194] FLA. STAT. ANN. § 741.212 (2005).

[195] *Wilson*, 354 F. Supp. 2d at 1306.

"that its holding did not extend to the issue of same-sex marriage.[196]

Despite the assertion that it is disingenuous to parlay *Lawrence* into a right to same-sex marriage, several courts have found that *Lawrence* does pave the way for just such a right. In a major victory for gay marriage proponents, the Supreme Judicial Court of Massachusetts declared in *Goodridge v. Department of Public Health*,[197] held that the state constitution protected the right of same-sex couples to marry.[198] *Goodridge* was informed, in part, by *Lawrence*'s conclusion that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects."[199] As in *Lawrence*, the court denied that history and tradition were dispositive, opting instead to view the state's asserted interest in promoting stable environments for procreation in light of ongoing developments and social attitudes that had reshaped the norms of conventional family units.[200] The freedom to marry a person of one's choosing, the court further determined, was properly included among the basic, personal liberties that *Lawrence* protected and could not be unreasonably restricted absent some legitimate

[196] *Id.* at 1306; *see also In re* Kandu, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004) (denying a fundamental right to same-sex marriage "[b]ased on the specific directives provided by the Supreme Court for fundamental rights analysis [under *Glucksberg*], and in the absence of binding precedent holding same-sex marriages to be a fundamental right"); Hennefeld v. Twp. of Montclair, 22 N.J. Tax 166, 181 (2005) (failing to find a fundamental right to gay marriage under *Lawrence*). Some state courts also have refused to declare that same-sex marriage bans are an equal protection violation. *See, e.g.*, Shields v. Madigan, 783 N.Y.S.2d 270, 276 (Sup. Ct. Rockland County 2004). Claiming deference to the legislature, the court in *Shields* declined to announce a fundamental right to homosexual marriage under either state or federal law. *Id.* at 275–76. "The morality of same-sex relationships is not at issue here," *Id.* at 277, the court determined, citing Justice O'Connor's concurring remark in *Lawrence* that "preserving the traditional institution of marriage," *Id.* at 276 (quoting Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring)), is a legitimate state reason to ban same-sex civil marriages. *Id.* at 276. *But see* Citizens for Equal Prot. v. Bruning, 368 F. Supp. 2d 980, 995, 1005 (D. Neb. 2005) (striking state's anti-gay marriage constitutional amendment under principles of intimate association and equal protection); Castle v. Washington, No. 04-2-00614-4, 2004 WL 1985215, at *11 n.33 (Wash. Super. Ct. Sept. 7, 2004) (suggesting the validity of High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) and Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *5 (Wash. Super. Ct. Aug. 4, 2004)—both concluding that the determination that homosexuals are not a suspect class under federal precedent—had been undercut by *Lawrence*).

[197] 798 N.E.2d 941 (Mass. 2003).

[198] *Id.* at 968.

[199] *See id.* at 953 (quoting *Lawerence,* 539 U.S. at 575).

[200] *See Goodridge*, 798 N.E.2d at 958. In the court's view, it would constitute "circular reasoning" to use the "[p]unitive notions" of homosexuality banned by *Lawrence* "to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Id.* at 962 n.23.

reason.[201] Alluding to the principles of *Romer*, the court rejected the state's asserted interests (in preserving state resources for the promotion of the more stable child-rearing environment of two-parent, heterosexual partners) as impermissibly "singl[ing] out" and discriminating against gays on the basis of "a single trait," thus "confer[ring] an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships."[202]

Yet another victory came in *Andersen v. King County*,[203] when a state superior court relied upon *Lawrence* as a statement that constitutional rights evolve in light of emerging trends.[204] Citing *Lawrence* as but one piece of evidence of changing attitudes on gay rights, the court noted that "societal change, coupled with the sound proposition that the courts have a key role in identifying an 'emerging awareness' of the evolving parameters of individual liberty, make it entirely appropriate [to visit the issue of gay marriage]."[205] Examining the implication of federal precedent on the same-sex marriage question, the *Andersen* court concluded that there was a fundamental right to marry under *Loving v. Virginia*,[206] *Zablocki v. Redhail*,[207] and *Turner v. Safley*.[208] Acknowledging that these cases had admittedly contemplated that right in conjunction with heterosexual couples, the court took a cue from *Lawrence*: in addition to construing constitutional rights broadly, "[t]he recent trend, both in our society and in the Supreme Court, has been to focus even more on the fundamental liberty of personal autonomy in connection with one's intimate affairs and family relations."[209] Thus, rather than narrowly construing the issue as to whether there is a fundamental right to same-sex marriage, the court opted to address whether the state had a compelling reason to restrict the broad, fundamental right to marry to opposite-sex couples only.[210] Rejecting tradition and morality as even a legitimate, rational basis for denying a fundamental right to gays, the court further concluded that the law was not narrowly tailored to promote the additional

[201] *Id.* at 958–59.
[202] *Id.* at 962.
[203] No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004).
[204] *Id.* at *2.
[205] *Id.*
[206] 388 U.S. 1, 12 (1967).
[207] 434 U.S. 374, 386 (1978).
[208] 482 U.S. 78, 95 (1987).
[209] *Andersen*, 2004 WL 1738447 at *6.
[210] *Id.* at *7.

proffered interest of promoting nurturing and stable environments for child-rearing.[211] If anything, the court found that *granting* same-sex couples the right to marry would be more beneficial in serving the laudable purpose the state was claiming.[212]

Castle v. State[213] relied on *Andersen*, in part, to invalidate Washington's defense of marriage statute as a violation of the privileges and immunities clause of the state constitution. The issue was decided on state grounds and therefore did not reach any conclusions on the federal constitutional claims.[214] In the course of deciding the scope of protection due under the state privileges and immunities clause, however, the court did make a number of observations informed by the Supreme Court's jurisprudence. First, although conceding that there is no fundamental right to same-sex marriage under the standards required by *Glucksberg*, the court did conclude that, under prior precedents, "marriage is a fundamental right."[215] Insofar as *Lawrence* required that "[p]ersons in a homosexual relationship may seek the same personal dignity and liberty to make personal choices as heterosexual persons do," the court suggested there needed to be some *compelling* reason for the state to deny the right to marry to same-sex couples.[216] The proffered rationale of the state, "to encourage procreation and stable environments for children," the court concluded, was simply not narrowly tailored to those ends, but instead "work[ed] to invalidate forms of family that the community recognizes and supports."[217] Thus, contrary to supporting family stability, the state's marriage restriction was actually detrimental to creating stable family environments for children being raised by same-sex couples who wished to marry.[218]

There also have been at least two cases in which New York State courts have found that *Lawrence* substantiates a right to same-sex marriage.[219] In *People v. Greenleaf*,[220] an Ulster County judge

[211] *Id.* at *10–11.
[212] *Id.* at *10.
[213] No. 04-2-00614-4, 2004 WL 1985215, at *12 n.34 (Wash. Super. Ct. Sept. 7, 2004).
[214] *Id.* at *16.
[215] *Id.* at *12.
[216] *Id.*
[217] *Id.* at *16.
[218] *Id.*
[219] Hernandez v. Robles, 794 N.Y.S.2d 579, 601, 609–10 (Sup. Ct. 2005); People v. Greenleaf, 780 N.Y.S.2d 899, 905 (Just. Ct. 2004). *But see* Seymour v. Holcomb, 790 N.Y.S.2d 858, 865 (Sup. Ct. 2005) (holding that there is no fundamental right to same-sex marriage and that any decision to enact gay marriage must emanate from the legislature). Citing Justice Scalia's dissent in *Lawrence*, the court in *Seymour* found that city clerks did not have

dismissed criminal charges against two ordained ministers who had presided over same-sex ceremonies. Utilizing rational basis review, the judge found that "'tradition' [was] not a legitimate state interest, and that prohibiting same-sex couples from marrying [was] not rationally related to furthering the state's legitimate interest in providing a favorable environment for procreation and child-rearing."[221] In her view, *Lawrence* had "all but abolished" any legitimate reason a state might have for proscribing same-sex relationships.[222]

Even more recently, in *Hernandez v. Robles*,[223] a trial court judge found that marriage was a fundamental right under federal precedent. According to the court, "it [was] beyond question that the right to liberty, and the concomitant right to privacy, extend to protect marriage."[224] Relying upon the language of *Lawrence* and *Casey*, as well as state precedent, the judge interpreted the liberty interest that served to protect the choice of whom to marry as extending to intimate, sexual association between unmarried couples as well.[225] In deciding *Lawrence*, the Supreme Court had thus "join[ed] New York in recognizing that the liberty to enter into intimate relationships with another is protected by the federal constitution."[226]

The *Hernandez* court utilized strict scrutiny to decide whether prohibition on same-sex marriage violated the fundamental right to choose whom to marry, which the court found to exist under both the New York and federal constitutions.[227] Finding that the asserted state interests of protecting the traditional institution of marriage were not compelling, the court noted that both *Romer* and *Lawrence* had rejected "a singular desire to 'disadvantag[e] the group burdened by [a] law'" as sufficient to serve even a legitimate

the authority to grant same-sex marriage licenses. *Id.* at 866 (citing Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

[220] 780 N.Y.S.2d at 905.

[221] *Id.* at 901.

[222] *Id.* at 904; *see also* Coordination Proceeding, Special Title [Rule 1550(c)], Marriage Cases, No. 4365, 2005 WL 583129, at *4 (Cal. Super. Ct. Mar. 14, 2005) (interpreting *Lawrence* as precluding history and tradition as the sole state interest in upholding gay-marriage bans). Although *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), supersedes it, *Marriage Cases* has not yet been overruled. The Federal Court in *Smelt* abstained from issuing a decision on the California statutes challenges, awaiting outcome in the California Court System through appeals. *Id.* at 880 (2005).

[223] 794 N.Y.S.2d 579, 594 (Sup. Ct. 2005).

[224] *Id.* at 593.

[225] *Id.* at 594.

[226] *Id.* at 594, n26.

[227] *Id.* at 596.

state interest.[228] At the same time, because the court found that liberty protections of the Fourteenth Amendment included a fundamental right to choose whom to marry, the judge held that it was neither necessary to declare a fundamental right to same-sex marriage nor require plaintiffs to demonstrate that such a right was "rooted in . . . tradition[]."[229] Here, the court took a cue from *Lawrence*, choosing to construe the liberty at stake broadly (as in the right to choose whom to marry) rather than in the narrower terms (as in a specific right to homosexual marriage). The court thus chose to expand the understanding of existing liberty interests rather than to declare a new one.[230] If the right to choose whom to marry was already constitutionally enshrined, then it would be arbitrary to refuse to extend that protection to same-sex partners.[231]

Lawrence too served to guide the appropriate interpretation of history in construing emerging liberty interests. Citing its language that "[t]imes can blind us to certain truths" the court relied on *Lawrence* to conclude that the concept of liberty is neither immutable nor static.[232] "Recent decisions of the New York Court of Appeals and other New York courts evince *an evolving public policy* favoring the recognition of rights for committed same-sex couples."[233]

Just as many of the lower courts have understood *Lawrence* to embrace evolving societal trends, the ongoing process of interpreting *Lawrence* continues to shape its meaning. Overall, there has been some limited consensus on the type of behavior that is exempted from *Lawrence*'s reach; on the larger questions of how *Lawrence* impacts traditional due process standards, including application of the rational basis test and legitimacy of morals-based legislation, there is far less agreement. The discord over *Lawrence*'s ramifications is not limited to the state and lower federal courts, as scholars too have similarly sought to elucidate the decision's implications.

---

[228] *Id.* at 597 (quoting Romer v. Evans, 517 U.S. 620, 633 (1995)) (alteration in original).

[229] *Id.* at 601.

[230] *Id.*

[231] *Id.*

[232] *Id.* at 603 (quoting Lawrence v. Texas, 539 U.S. 558, 579 (2003)).

[233] *Id.* at 605 (emphasis added); *see also* Citizens for Equal Prot. v. Bruning, 368 F. Supp. 2d 980, 1004–05 (D. Neb. 2005) (striking down the state's constitutional ban on same-sex marriage as unconstitutional under the First Amendment and equal protection principles and quoting *Lawrence* as support for the proposition that "times can blind us to certain truths," *Lawrence*, 539 U.S. at 579).

B. Scholarly Analyses of Lawrence

Understandably, scholarly interpretations of *Lawrence* devote much attention to the evolution of Justice Kennedy, examining the motivations and the influences underlying his decisions. Many of these interpretations characterize the movement in Justice Kennedy's jurisprudence as a revolutionary shift. For example, despite a less than flattering depiction of Justice Kennedy in his self-proclaimed exposé, *Closed Chambers*, Edward Lazarus explores Justice Kennedy's romantic view of judicial power,[234] which may well contribute to Justice Kennedy's support in the homosexual rights cases. As described by Lazarus, this "romantic view of the Court holds that it is an institution largely above politics, throwing down moral thunderbolts that reshape American life."[235] Such romanticism, he argues, is evident not only in Justice Kennedy's *Lawrence* decision, but also resonates in his federalism jurisprudence, his affirmation of *Roe*, and his support for affirmative action in higher education.[236] "[I]n each instance, Kennedy showed himself to be utterly enthralled with the ability of the Court to declare the moral good."[237]

Lazarus is astute in recognizing Justice Kennedy's exulted view of the judicial role and faith in the institutional capacity of the Court. The grandiloquent exegesis of liberty and use of aspirational language suggests an expectation that *Romer* and *Lawrence* will one day reside in the pantheon of great cases. There is a sense that Justice Kennedy is attempting to speak to future generations who may better appreciate the momentous nature of these rulings. Yet, Justice Kennedy has not been a frequent or loquacious champion for individual rights; he generally displays a cautious, incremental approach to the law that is difficult to reconcile with his depiction as a jurist guided by some broad, roving notion of judicial romanticism or moral good.

---

[234] EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 428–29 (1998).

[235] Edward Lazarus, *The Pivotal Role of Justice Anthony Kennedy: Why the Supreme Court's Romantic May Only Become More Influential Over Time*, FINDLAW'S WRIT: LEGAL COMMENTARY, Aug. 7, 2003, http://writ. news.findlaw.com/lazarus/20030807.html.

[236] *Id.*

[237] *Id.*; *see also* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 177 (2005) ("The difficulty for conservatives was that Kennedy's conservatism centered on a moderate libertarian streak, about which he himself was somewhat conflicted, complemented by a vague optimism about the good sense of the American people.").

Randy Barnett presents an equally ambitious argument that *Lawrence* is nothing less than a "libertarian revolution," in which Justice Kennedy is moving away from the Court's modern due process framework of two-tiered review and toward a retrenchment of its pre-1937 jurisprudence.[238] Barnett places great significance on Justice Kennedy's reliance on liberty rather than privacy.[239] According to Barnett, Justice Kennedy made the crucial transition in *Planned Parenthood v. Casey*,[240] but it is in *Lawrence* where Justice Kennedy speaks for a majority when he abandons the familiar rhetoric of privacy in favor of the phrase "liberty." He argues that, more than a mere semantic preference, the reframing of the debate embraces a distinction between liberty and license in which activities that do not pose a harm to others are protected as aspects of liberties.[241] More importantly, the shift meant that "now there is no pretense of a 'fundamental right' rebutting the 'presumption of constitutionality.'"[242] In Barnett's view, *Lawrence* signals that the burden no longer rests on those challenging an exercise of state regulatory power, but now rests upon the state in

[238] Randy E. Barnett, *Kennedy's Libertarian Revolution*, NAT'L REV. ONLINE, July 10, 2003, http://www.nationalreview.com/comment/comment-barnett071003.asp.

[239] *Id.* Barnett is not alone in attributing import to Kennedy's reliance on "liberty." James Paulsen notes that Kennedy's opinion opens and closes with the theme of liberty. "Between these bookends, the word 'liberty' is mentioned 23 times" whereas privacy is used a mere "4 times, and even then, only in innocuous contexts." James W. Paulsen, *The Significance of* Lawrence v. Texas, 41 HOUS. LAW. 32, 38 (2004), *available at* http://www.thehoustonlawyer.com//aa_jan04/aa_feature/page32/page32.htm. Kennedy may have eschewed using the word privacy, but its concept factored heavily into his ruling. He noted that the criminalized conduct took place inside the home and that it was private, consensual, and noncommercial in nature. Indeed, he thought the inherently intimate nature of the conduct likely explained the infrequent enforcement of the law. For Kennedy, it was the intimate nature of the act that secured it as an aspect of liberty. "The petitioners are entitled to respect for their private lives," he wrote, and "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime." Lawrence v. Texas, 539 U.S. 558, 578 (2003). The rhetoric he uses in describing the contours of this right bespeak of its fundamental nature and close association with the constitutional right to privacy already articulated by the Court. More importantly, while he does not use the term "fundamental right," his opinion forcefully overruled *Bowers*. If *Bowers* declared that there was "no fundamental right" to engage in homosexual conduct, what, if not to announce that there is one, is the point of *Lawrence* having overruled it?

[240] Barnett, *supra* note 238.

[241] The only clear reference to such a distinction in the lower court interpretations of *Lawrence* seems to be the Eleventh Circuit's noting that *Lawrence*'s limitation of its protection to consenting adults "is a corollary to John Stuart Mill's celebrated 'harm principle,' which would allow the state to proscribe only conduct that causes identifiable harm to another." Williams v. Att'y Gen., 378 F.3d 1232, 1240 (2004). The court went on to note, however, that "[r]egardless of its force as a policy argument, however, [the principle] does not translate *ipse dixit* into a constitutionally cognizable standard." *Id.*

[242] Barnett, *supra* note 238.

defending any intrusion on liberty.

> Justice Kennedy never mentions any presumption to be accorded the Texas legislature. More importantly, he never tries to justify the right to same-sex sexuality as fundamental. Instead, he puts all his energy into demonstrating that same-sex sexual freedom is a legitimate aspect of liberty . . . . [T]he onus then falls on the government to justify the restriction of liberty. Once an action is deemed to be a proper exercise of liberty . . . the burden shifts to the government.[243]

This shift, Barnett argues, is both revolutionary and potentially profound[244]—particularly if the Court were to expand such an approach beyond the area of sexual rights—and harkens back to the era of *Lochner v. New York*.[245] At the same time, Barnett acknowledges that the transition, if true, is not openly disclosed by Justice Kennedy's opinion. "The decision would have been far more transparent if Justice Kennedy had acknowledged what was really happening (though perhaps this would have lost some votes by other justices)."[246]

Calvin Massey does not outright reject Barnett's thesis, accepting that *Lawrence* possibly adopted what Massey calls a "highly diluted" variation of Barnett's championed approach.[247] Moreover, Massey gives some support to the idea that, in the exercise of rational basis review, the Court has adjusted the scope of the inquiry. He points to specific examples of the Court applying an "enhanced brand of minimal scrutiny" in reviewing equal protection claims.[248] In *Moreno* and *Romer*, the Court eschewed the proffered state interest as motivated by "a bare congressional desire to harm a politically unpopular group,"[249] while failing to entertain any additional or hypothetical interests that might exist as legitimate grounds to sustain the law.[250] The statute in *Cleburne* was struck because "the extraordinarily underinclusive nature of the classification so poorly

---

[243] *Id.* *See also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 334 (2004).

[244] Barnett, *supra* note 238.

[245] 198 U.S. 45 (1905).

[246] Barnett, *supra* note 238.

[247] Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 969–70 (2004).

[248] *Id.* at 954.

[249] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[250] Massey, *supra* note 247, at 952.

served the [state's] ostensible purposes,"[251] while *Plyler v. Doe* rejected state concerns as "insufficiently substantial."[252]

Yet, for Massey, *Lawrence* portends the demise of formal tiered scrutiny and "suggests that the neat compartments of tiered scrutiny are beginning to collapse."[253] What is problematic about *Lawrence*, in his view, is that while it provided "eloquent endorsement of the presumptive liberty of competent adults voluntarily to enter into personal relationships that involve sexual intimacy without criminal punishment, the Court did not apply strict scrutiny."[254] Despite tantalizing hints at fundamental rights, *Lawrence*, Massey claims, "stands as the lone instance in the modern era of substantive due process in which the Court has struck down a law on the grounds that it failed even minimal scrutiny."[255] Leonard offers a similar critique:

> Perhaps the Court is abandoning the project of identifying "fundamental" rights so that lower courts can no longer simply apply a mechanistic tiered approach to judicial review. And instead is challenging the lower courts (and legislators who care whether their proposals are constitutional) to engage in a more nuanced, more "searching" (to use Justice O'Connor's term) evaluation of legislation that imposes hardship or disadvantage on identifiable groups of people. If so, then the Court is revolutionizing the framework of constitutional analysis . . . .[256]

---

[251] *Id.* at 955.

[252] *Id.* at 955–56.

[253] *Id.* at 946.

[254] *Id.* at 959. Massey does dismiss out of hand the possibility that the Court was "covertly declaring a fundamental liberty interest" but argues:

> [T]o reach the conclusion that this interest is constitutionally fundamental, we must ignore or dismiss the Court's branding as illegitimate Texas's interest in the preservation of morality; the Court must have been stupid, or deliberately misleading, or sloppy, or analytically confused . . . . This will not do; the Court is not readily susceptible to any of these charges.

Id. at 960–61.

[255] *Id.* at 959.

[256] Leonard, *supra* note 45, at 209–10. Darren Hutchinson agrees that the *Lawrence* Court "has moved away from [the] principle" of fundamental rights. Darren Lenard Hutchinson, *The* Majoritarian *Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 41 (2005). Yet, in his view, the change is the result of majoritarian pressures. "The shift away from strict scrutiny and fundamental rights in *Lawrence* . . . responds to majoritarian disfavor of gay, lesbian, bisexual, and transgender politics" as well as answering "ongoing democracy critiques of judicial review." *Id.* at 42. Thus, failure to identify "fundamental rights" in favor of use of the term "liberty," he argues "could provide the doctrinal basis for lower courts to uphold laws that restrict liberty, when such regulations

Dale Carpenter disagrees with both Barnett's expansive interpretation of *Lawrence* and the claims that *Lawrence* portends the demise of traditional due process analysis.[257] In Carpenter's view, *Lawrence* is best understood as "atonement" for the negative treatment of gays under *Bowers* that "is not broadly libertarian."[258] He argues that Barnett and others who impart libertarian overtones to *Lawrence* infer far too much from the vagueness of Justice Kennedy's ruling.[259] Part of Carpenter's skepticism regarding Barnett's thesis is his belief that "[i]t is very unlikely there are five Justices (and [he] doubt[s] 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."[260]

Indeed, Carpenter concludes that *Lawrence* does, in fact, recognize a fundamental right and thus adheres to the modern framework of substantive due process.[261] In addition to characterizing the liberty interest at issue in *Lawrence* in terms reflective of the Court's fundamental rights jurisprudence, he argues that the ruling *does* attempt to ground protection of the right in the nation's history and tradition.

> 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 Justice Scalia and other critics contend; it has corrected its misunderstanding and

might not have survived a strict scrutiny analysis." *Id.* at 41–42.

[257] Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140 (2004).

[258] *Id.* at 1148–49 (2004).

[259] *Id.* at 1150.

[260] *Id.* at 1152.

[261] The ambiguity of Kennedy's ruling is complicated by his having invalidated Texas' sodomy statute under the lowest level of review. Presumably, if he had considered the right to engage in same-sex intimacy fundamental, he should have required that Texas produce some compelling reason for its legislation. Whether owing to incompetence (*see* Franck, *supra* note 178) or a jurisprudential revolution (*see* Barnett, *supra* note 238), one might argue that his reliance on the lesser standard is nevertheless irrelevant. If the legislation was not justified by even a legitimate state interest then it is reasonable to assume that the state could not produce a compelling one. Indeed, Texas had apparently conceded that it had no compelling rationale to present. "At oral argument in the Court of Appeals, counsel for the State conceded that 'he could not even see how he could begin to frame an argument that there was a compelling State interest'. . . ." Brief for Petitioner at 4, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) [hereinafter *Brief*].

misapplication of an old one.[262]

At the same time, however, Carpenter too hints that this right was not "discovered" fully formed but, rather, has evolved. The "emerging awareness" of which *Lawrence* spoke

> could be seen in several legal developments . . . including the omission of crimes for consensual sexual conduct in the 1955 Model Penal Code, the gradual decriminalization of sodomy in the states . . . the nonenforcement of sodomy laws in the minority of states that retained them, and the Court's own decisions in *Casey* and *Romer*, which seriously eroded *Hardwick* as a precedent.[263]

Carpenter offers an explanation of the level of review used to invalidate the state's same-sex sodomy statute. He refutes assertions that Justice Kennedy's statement that the statute failed to serve a "legitimate" state interest indicates that he was employing rational basis review and eschewing fundamental rights. Instead, Carpenter argues that Justice Kennedy was following the lead provided by Stevens' *Bowers* dissent in which "a morality[-based] justification is an insufficient state interest where a *fundamental* right is concerned."[264]

To substantiate his claim, Carpenter points out that if *Lawrence* truly relied upon a mere rational basis rationale, the law could have been readily defended as a public health measure, even though Texas had not proffered such a basis. That the "public-health dog-of-an-argument . . . did not bark," in his view was indicative that the Court was utilizing strict scrutiny, under which it "neither accepts a

---

[262] Carpenter, *supra* note 257, at 1153.

[263] *Id.* at 1163–64.

[264] *Id.* at 1158 (emphasis added). *See* Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 68–69 (2004) (arguing that *Lawrence* has possibly undermined all morality-based legislation); *see also* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1234–35, 1274–75 (2004) (viewing *Lawrence* not as a "depart[ure] from [the Court's] tradition of approving government action in the name of morality" and concluding that, in the area of sexual privacy, the Court has infrequently "considered, much less relied upon, moral justifications"). Goldberg nicely ties disagreement over the impact *Lawrence* has had on morals-based legislation to the long-standing debate over the level of deference that is appropriate when the Justices review the exercise of police power. At the heart of this debate is both the legitimacy of the Court displacing legislative judgment and, as Goldberg describes it, the "institutional tension" of the courts in making reasoned moral judgments, particularly in the face of competing moral claims. *See id.* at 1238. In her view, the Court has been right to refrain from sanctioning explicit morals-based justifications. She argues that the Court can avoid criticism yet fulfill its constitutional obligation "only by steering clear of abstract, philosophical justifications for government action and relying instead on fact-based rationales." *Id.* at 1240.

loose means-ends fit nor hypothesizes justifications the state does not advance."[265]

Carpenter's conclusion that *Lawrence* announced a fundamental right consistent with the Court's modern due process approach is shared by Laurence Tribe.[266] Although *Lawrence* failed to fully explicate the standard of review under which it invalidated the law, Tribe explains that

> [t]he practice of announcing such a standard—naming a point somewhere on the spectrum from minimum rationality to per se prohibition in order to signal the appropriate level of judicial deference to the legislature and the proper degree of care the legislature should expect of itself—is of relatively recent vintage, is often more conclusory than informative, has frequently been subjected to cogent criticism, and has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis.[267]

Nevertheless, Tribe argues that the standard applied was "obvious."[268] He writes that, "[t]o search for the magic words proclaiming the right protected in *Lawrence* to be 'fundamental,' and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice."[269] Throughout the ruling, "the Court's basic approach placed it squarely in the tradition of the substantive due process jurisprudence that links the surviving *Lochner*-era precedents of *Meyer* and *Pierce* . . . with the line of decisions leading to, and extending past, *Casey*."[270]

Although Tribe found *Lawrence*'s outcome to be squarely grounded in precedent, he argues that it nevertheless represents "an obviously important doctrinal innovation."[271] That innovation, he argues, is the hybrid review that incorporates elements of both

---

[265] Carpenter, *supra* note 257, at 1158–59.

[266] Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934 (2004).

[267] *Id.* at 1916–17.

[268] *Id.* at 1917.

[269] *Id.*; *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 449–50 (7th ed. 2004) (agreeing that the Supreme Court has decided cases involving fundamental rights without a clear explication of the standard of review being utilized).

[270] Tribe, *supra* note 266, at 1931 (referring to Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)). Contrast this to *Bowers*, in which "[t]he majority pigeonholed the earlier cases to ensure that no right to privacy broad enough to encompass Hardwick's behavior would emerge." Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1066 (1990).

[271] Tribe, *supra* note 266, at 1934.

due process and equal protection.[272] Tribe describes *Lawrence* as "a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."[273]

> *Lawrence*, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty. The "liberty" of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact.[274]

Justice Kennedy's approach refrains from enumerating specific activities protected by the concept of protected intimacy. This, according to Tribe, conforms nicely to the blending of due process and equal protection principles. "[I]f one is to broaden the vistas of freedom beyond the list, one must turn from the properly conservative and suitably backward-looking domain of substantive due process to the domain of a norm focused more on the present and the future—the more aspirational domain of equal protection."[275]

Moreover, Tribe argues that "[t]he *Lawrence* Court's blend of equal protection and substantive due process themes was neither unprecedented nor accidental," tracing the antecedents of the approach back to the *Meyer* (1923) and *Pierce* (1925) line of cases.[276] "In doing so, *Lawrence* significantly altered the historical trajectory of substantive due process and thus of liberty."[277]

Cass Sunstein agrees that the Due Process and Equal Protection Clauses have traditionally embraced very different purposes and design, with the Equal Protection Clause generally serving a more forward-looking approach.[278] But even under the admittedly more

---

[272] *Id.*

[273] *Id.* at 1898.

[274] *Id.*

[275] *Id.* at 1897.

[276] *Id.* at 1902 & n.32.

[277] *Id.* at 1899.

[278] Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). Sunstein wrote:

> From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures . . . .
>
> The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the

backward-oriented Due Process Clause, Sunstein argued that "[t]radition has not been and should not be the exclusive focus."[279] Moreover, "tradition is sometimes treated as aspirational" and therefore necessarily involves evolving and changing standards.[280]

A limited equal protection argument was one that Justice Kennedy might have easily embraced had he been inclined to rule on narrow grounds. The written briefs and oral argument in *Lawrence* had included an equal protection challenge[281] and O'Connor's concurring opinion rested squarely on an equal protection rationale.[282] The long tradition of anti-sodomy statutes, lauded by Justice Scalia as refuting the existence of a fundamental right to engage in homosexual sodomy, might have served as the very basis for identifying gays and lesbians as a historically disadvantaged class. Justice Kennedy's rhetoric in *Romer* certainly indicated that he was not blind to the animus directed toward homosexuals as a class. *Lawrence*, however, was framed as an individual rights case. Mr. Lawrence's "right" to engage in the conduct for which he was prosecuted was violated not because the law discriminated against him as a member of a defined group, but rather because, as *any* individual, he had the right to participate in intimate sexual behavior free from state interference.

A straightforward equal protection argument, in other words, "was not sufficient to secure the broad liberty interest that Kennedy was about to recognize."[283] O'Connor's concurrence had noted the

> potential dilemma: should the Court declare same-sex-only-bans a denial of equal protection, a state intent on preserving the criminalization of homosexual conduct could redress the constitutional infirmity by criminalizing all acts of sodomy, including those performed by consenting heterosexual couples. O'Connor seemed confident that the state would be unwilling to do so and so was content to utilize the more narrow approach afforded by equal protection.[284]

> Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. The two clauses therefore operate along different tracks.

Id. at 1163.

[279] *Id.* at 1171.

[280] *Id.* at 1173.

[281] *Brief*, *supra* note 261, at 9–10.

[282] Lawrence v. Texas, 539 U.S. 558, 579–585 (2003) (O'Connor, J., concurring).

[283] Parshall, *supra* note 4, at 24–25.

[284] *Id.* at 25.

Justice Kennedy, on the other hand, acknowledged that "[w]ere [the Court] to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[285]

Tribe too argues that "narrower equal protection grounds, though logically available to the *Lawrence* Court, would have been woefully inadequate with respect to the twin constitutional commitments of equal respect and equal dignity."[286] Not only would such an approach have precluded Justice Kennedy from having declared that *Bowers* was wrongly decided, it would have perpetuated the stigmatization of homosexuals whose presumed sexual activity would violate state law. Whether enforced or not, the mere existence of laws banning "sexual practices common to a homosexual lifestyle"[287] would diminish the "right to dignity and self-respect of those who enter into such relationships."[288]

That he joined with the liberal bloc of the Court to "announce an expansive liberty interest indicated that, even though he had not directly declared . . . same-sex sodomy a 'fundamental right,' he had gone beyond a mere [ban] on discrimination" aimed specifically at gays.[289] And, under his privacy-as-liberty approach, "all laws banning similar consenting, adult, private sexual conduct would be unconstitutional *regardless* of the gender of the participants."[290] "More importantly, resolving the matter under the [D]ue [P]rocess [C]lause meant the invocation of substantive due process-terrain with which Kennedy was comfortable."[291] Indeed, *Lawrence* did not depart markedly from the principles of substantive due process analysis that Justice Kennedy had already expressed. By looking *backward* into Justice Kennedy's jurisprudence, one can identify elements of the rationale underlying *Lawrence*'s treatment of important liberty interests. Furthermore, a foray into Justice Kennedy's early appreciation for emergent rights, expressed during his confirmation proceedings and in his lower court decision-making, provides additional insight into *Lawrence*'s potential redefinition of substantive due process.

---

[285] Lawrence v. Texas, 539 U.S. 558, 575 (2003).
[286] Tribe, *supra* note 266, at 1908–09.
[287] *Id.* at 1915 (quoting *Lawrence*, 539 U.S. at 578).
[288] *Id.*
[289] Parshall, *supra* note 4, at 27–28.
[290] *Id.* at 28.
[291] *Id.* at 25.

IV. EMERGENT RIGHTS

A. An Early Appreciation for Emergent Rights?

Justice Kennedy's support for liberty interests in *Lawrence v. Texas* cohered with his confirmation testimony expressing his belief that there is a sphere of personal autonomy into which the government may not intrude. The idea that one has the right to be let alone was certainly not a new principle—nor was it foreign to his assertion that there is "a line," however uncertain and wavering, that demarcates the appropriate reach of governmental authority.[292] Justice Kennedy also indicated in his confirmation proceedings that the judiciary plays an indispensable role in determining the parameters of personal autonomy.[293] While he argued that the Court must find "objective referents" in determining what types of private conduct are protected, he gave a very expansive explanation of the types of interests the Court must balance that included "the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, [and] the inability of a person to reach his or her own potential."[294] The same expansive criteria would be manifested in *Lawrence*, as would his reliance on objective referents.

That Justice Kennedy would ultimately author a Supreme Court ruling supporting a liberty interest broad enough to protect same-sex intimacy was not, however, necessarily portended by his circuit court rulings. While serving on the Ninth Circuit from 1975–1987, Justice Kennedy had confronted gay rights issues in five cases, ruling against the gay claimant in every instance.[295] In perhaps the most important of these rulings, *Beller v. Middendorf*, he considered

[292] *Hearings*, *supra* note 5, at 86.

[293] *Id.* at 87.

[294] *Id.* at 180.

[295] *See* Sullivan v. Immigration and Naturalization Serv., 772 F.2d 609, 609–11 (9th Cir. 1985) (denying that a long-term gay relationship met statutory hardship exception under deportation regulations); Beller v. Middendorf, 632 F.2d 788, 792 (9th Cir. 1980) (upholding policy excluding gays from military service); United States v. Smith, 574 F.2d 988, 990–91 (9th Cir. 1978) (holding that a defendant can be convicted under state law for forcible same-sex sodomy because federal rape laws do not encompass such acts); Singer v. U.S. Civil Serv. Comm'n, 530 F.2d 247, 255–56 (9th Cir. 1976) (upholding dismissal of an openly-gay federal employee); Soc'y for Individual Rights, Inc. v. Hampton, 528 F.2d 905, 906–07 (9th Cir. 1975) (per curiam) (upholding refusal to grant retroactive relief to gays who had been dismissed from federal service under a categorical ban that was invalidated for over-breadth).

the exclusion of gays under Naval regulations as a possible denial of substantive due process.[296] Justice Kennedy's opinion in *Beller* is particularly instructive in interpreting *Lawrence.*

In *Beller*, Justice Kennedy avoided employing formal, tiered review, opting instead for a balancing of interests when considering substantive due process claims. Justice Kennedy wrote that "this case does not require us to address the question whether consensual private homosexual conduct is a fundamental right, as that term is used in equal protection and some due process cases."[297] Pronouncement of a fundamental right, he acknowledged, would necessitate that the Navy demonstrate a compelling interest for excluding practicing homosexuals from active service.[298] "To formulate the issue in those terms would reflect, we think, a misunderstanding of proper substantive due process analysis."[299] Instead, he concluded:

> Recent decisions indicate that substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals.[300]

Justice Kennedy's distinguishing of the regulations at issue in *Beller* from criminal sanction of homosexual conduct by the state suggests that it was the unique interest in regulating the military that tipped the balance.[301] Because *Beller* dealt with a military regulation rather than criminal sanction by the state, Justice Kennedy found that "the importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever *heightened solicitude* is appropriate for consensual private homosexual conduct."[302] Central to this conclusion was the well-established recognition that individual freedoms must succumb to

[296] 632 F.2d at 792, 807.
[297] *Id.* at 807.
[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *See id.* at 810.
[302] *Id.* (emphasis added).

the special needs associated with military or police service.[303]

Justice Kennedy also rejected applying the "rather formal three-tier analysis" associated with the consideration of equal protection claims, explaining that "[t]hese appeals were not presented to us as implicating a suspect or quasi-suspect classification" but "rather, were based on the claim that the conduct prohibited by the regulation was protected as an aspect of the fundamental right of privacy."[304] But he did find "important analytic and rhetorical similarities" between the doctrines of equal protection and substantive due process.[305]

> When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. At the other extreme, where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis.[306]

The conceptualization of rights reflected in Justice Kennedy's *Beller* opinion does not strictly dichotomize liberty interests as fundamental or non-fundamental according to historic tradition. Rather, the opinion suggests a continuum of rights ranging from

---

[303] *Id.* at 810–11. "In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts," Kennedy concluded the discharge "regulation represents a reasonable effort to accommodate the needs of the Government with the interests of the individual." *Id.* at 812. He cautioned, however, that his ruling was not tantamount to a judgment that the discharge policy was desirable or "wise," and warned that no such determination should be implied. *Id.* He was "mindful" that the Navy's rule in this case was "a harsh one," and that it had since revised its regulations to allow greater discretion in retaining valued personnel. *Id.* at 802 n.9, 812. Most importantly, he reiterated that "the constitutionality of the regulations stems from the needs of the military, the Navy in particular, and from the unique accommodation between military demands and *what might be constitutionally protected activity in some other contexts*." *Id.* at 812 (emphasis added).

[304] *Id.* at 807.

[305] *Id.* at 807–08.

[306] *Id.* at 808.

those that have an "inadequate foundation in the *continuing traditions of our society*" to those that lie at the very core of the concept of liberty.[307] The nature of the right and the severity of the burden dictate the level of scrutiny to be afforded.

In *Beller*, Justice Kennedy found that resolution must "lie[] somewhere between these two standards."[308] He recognized that there was "substantial academic comment which argue[d] that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right [to] privacy."[309] There was also "substantial authority to the contrary," including the Supreme Court's "summary affirmance of a lower court decision denying a challenge to a state criminal statute prohibiting sodomy as applied to private consensual homosexual conduct."[310] Confronted with contradictions among the authorities, his court accepted *arguendo* that "some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge."[311]

His explanation in *Beller* suggests that Justice Kennedy was not quite willing to entertain homosexual conduct as a fundamental right, yet neither was he content to conclude that it might not be entitled to some "heightened solicitude."[312] From his discussion in *Lawrence* it would seem that Justice Kennedy was not convinced that the right to engage in private, consensual behavior, even for same-sex couples, has no foundation in the traditions of society.[313] He did not accept the sweeping historical generalizations that asserted a long-standing tradition of homosexual conduct being consistently reviled and regulated by the government.[314] Perhaps more importantly, these opinions reveal that he saw a connection between the asserted right to engage in homosexual conduct and other interests "recognized as private and protected."[315] That connected interest was the right to privacy which protects people in their homes and in the sphere of personal autonomy and intimate

[307] *Id.* (emphasis added).
[308] *Id.* at 809.
[309] *Id.*
[310] *Id.* (citing Doe v. Commonwealth's Att'y for Richmond, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975)).
[311] *Id.* at 810.
[312] *See id.* at 809–10.
[313] Lawrence v. Texas, 539 U.S. 558, 568–71 (2003).
[314] *See id.*
[315] *Beller*, 632 F.2d at 808, 810.

behavior.[316]

Although suggesting that tiered review has been undercut by *Lawrence*, Massey does not find it inescapable that the Court has yet to, or inevitably will, jettison the modern approach to substantive due process.[317] A reinvigoration of tiered review is possible, but so too may it be plausible that the Court may adopt an approach akin to that proposed by Justice Marshall, wherein rights are not viewed according to a strict fundamental–non-fundamental dichotomy, but instead as points on a continuum, the protection of which will necessitate a case-by-case weighing of the competing right and state interests at stake.[318] According to Massey, the Court may yet embark on a "radical departure," embracing the libertarian values advocated by Barnett, or else adopt the more rigid historical methodology championed by Justice Scalia.[319] Or, as Massey finally suggests, it may be that the Court's jurisprudence is evolving toward some new standard that has not yet been fully articulated.[320]

Rather than destabilizing tiered review, what if *Lawrence* is the first, tentative step toward establishing greater parity between the level of review afforded equal protection and due process claims? Under the modern standards, suspect classes and fundamental rights are afforded strict scrutiny and the exacting scrutiny which that test entails, whereas non-suspect classifications and non-fundamental rights receive only minimal review.[321] There is currently no due process analogy for the heightened review that attends the intermediate category of equal protection claims. The tiered review of substantive due process, in other words, is less nuanced than that afforded by equal protection.

What if due process review was transformed to mirror the three-tiered review of equal protection categories? What would go in the box between fundamental and non-fundamental rights? One suggestion might be emergent rights: those rights, which as Justice Kennedy described in *Beller*, are neither wholly lacking foundation in the "continuing traditions" of our society nor are without close connection to "interests recognized as private and protected."[322] These rights, between the extremes, might be entitled to protection

[316] *See id.* at 810; *Lawrence*, 539 U.S. at 562.
[317] Massey, *supra* note 247, at 946.
[318] *Id.* at 946–47 & n.3.
[319] *Id.* at 947 & n.4.
[320] *Id.* at 947.
[321] *Id.* at 949.
[322] Beller v. Middendorf, 632 F.2d 788, 808 (9th Cir. 1980).

in some instances.

Rather than rejecting the modern standards, it may be possible that Justice Kennedy is carving a new one—a middle tier of due process analysis—one that is appropriate for rights which, although not fully formed, are emerging and therefore entitled to the Court's "heightened solicitude."[323] If so, then Justice Kennedy is indeed breaking new ground, but he is doing so in a manner that is consistent with his expressed jurisprudence and indicative of a cautious and incremental approach to the development of law.

As in *Beller*, under such an approach, rights would not be strictly dichotomized as fundamental or not, but could be recognized as developing out of the force of continuing events and developing attitudes. However, the continuum would not be infinite—some rights may still be recognized as so deeply rooted as to be fundamental, entitled to the highest level of review, while other liberty interests that are neither the product of *continuing* traditions nor closely associated with rights that are fundamental would remain subject to minimal scrutiny. However, the introduction of an additional, middle tier would add the value of a constitutional niche for new and emerging rights by creating a category of due process review that explicitly acknowledges that rights neither emerge nor remain in stasis.

A more nuanced structure of due process would mirror the hierarchical structure of equal protection review, which more readily contemplates mid-range constitutional protection. As with the standards of intermediate level scrutiny under the Equal Protection Clause, there need not be any presumption of validity. Thus, laws that infringe on emergent rights or that are motivated by animus toward a particular group are subjected to a less deferential standard than minimal review. As Massey has noted, there is already support for an "enhanced brand of minimal scrutiny" under the Equal Protection Clause.[324] The blending of equal protection and due process principles apparent in Justice Kennedy's jurisprudence supports the concept of bringing tiered review into closer alignment.

Expanding the tiers of due process review to accommodate the evolution of rights would give recognition to the concept of a living constitution but would not necessarily leave the power of the justices untrammeled. In identifying emergent rights, the Court

[323] *See id.* at 809–10.

[324] Massey, *supra* note 247, at 954.

must be guided by objective indice-specific referents that can be identified to ascertain whether the liberty interest in question is one which society, as a whole, has come to accept as deserving more than minimal protection. At the same time, the justices would be called upon to make reasoned judgments in consideration of newly claimed liberty rights. This middle tier would thus involve a sort of balancing (much like that which already occurs under intermediate scrutiny), under which certain rights not yet fully grounded as to be ranked "fundamental" are nevertheless protected in some instances.

The idea of an *emergent* right is closely related to the changing attitudes of political participants that occur in light of shifting events and evolving standards. One prominent political scientist, Morris Fiorina, describes American attitudes on homosexuality as rapidly evolving "reactions to current political events."[325] According to Fiorina, "[l]ess than two decades ago solid majorities of Americans felt that homosexual relations should be illegal, but today a majority rejects that position."[326] Thus, he concludes that "[i]f commandants on the 'orthodox' side intend to fight a culture war over homosexuality, they had better do it soon—their potential ranks are being thinned by mortality."[327]

Examining public attitudes towards gay marriage following the *Lawrence* ruling, Fiorina found that "[o]pposition ranged from 52 percent to 66 percent, with a median of 55 percent. Opposition to civil unions or domestic partnerships is slightly lower—fourteen polls reported a median opposition of 50 percent."[328] Despite what he characterizes as "a clear divide in public opinion," Fiorina's research "did not find any noticeable backlash" to Justice Kennedy's ruling.[329] "A Gallup survey immediately after the decision reported a five-percentage–point *increase* in support for gay marriage, while another one in July reported a nine-point decrease in support for civil unions. Pew found no change," thus leading Fiorina to conclude that no "deeply felt backlash" had materialized.[330] Fiorina did speculate, however, that gay marriage might "well be an

[325] MORRIS P. FIORINA ET AL., CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA 56 (2005).

[326] *Id.* at 58.

[327] *Id.* at 62.

[328] *Id.* at 60. For an excellent treatment of the legal, social, and political shifts framing American culture, as well as the gay rights movement, see ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 114–21 (2005).

[329] FIORINA ET AL., *supra* note 325, at 61.

[330] *Id.*

important issue in the 2004 [Presidential] campaign which, in turn, might lead to changes in the public's view of the issue."[331]

Other political observers agreed that *Lawrence* mobilized partisans on both sides of the issue.[332] "Because the voting public is divided right down the middle, politicians both in state capitals and in Washington press for any partisan advantage they can find, playing up the issues that help divide and reinforce their coalitions."[333] In late July 2003, President Bush proposed a federal constitutional amendment that would limit the definition of marriage to one man and one woman. "Some say Bush's proposed amendment banning same-sex marriages is being used as just such a[n] . . . issue. Because Congress is unlikely to approve such an amendment this year, most pundits say, Bush proposed it this year primarily to motivate conservative voters to go to the polls."[334]

In 2004, a clear majority of the voters in eleven states did in fact approve amending their state constitutions to ban same-sex marriages, by an average margin of 40%.[335] The greatest support for such a measure was found in Mississippi with 86% of the voters in support and only 14% opposed.[336] According to the national exit

[331] *Id.* at 62; *see also* Elisabeth Bumiller, *The Nation: Cold Feet; Why America Has Gay Marriage Jitters*, N.Y. TIMES, Aug. 10, 2003, § 4, at 1 (reporting an eight point post-*Lawrence* downward trend in America's opposition to gay civil unions); Howard Fineman & Debra Rosenberg, *A Wedge is Born: Gay Marriage and 2004*, NEWSWEEK, July 14, 2003, at 38 (anticipating that the *Lawrence* decision will be a heavily debated issue in the 2004 campaign); Alan Cooperman, *Sodomy Ruling Fuels Battle Over Gay Marriage*, WASH. POST, July 31, 2003, at A1 (predicting gay marriage will be heavily debated in a difficult attempt to resolve the issue in the face of continuous shifting public opinion); Dana Milbank, *A Move to Satisfy Conservative Base*, WASH. POST, Feb. 25, 2004, at A1 (discussing Bush's decision to allow gay marriage to become a central campaign issue). For the contrary claim that support for the legal recognition of gay marriages declined sharply, indicating just such a backlash, see Kenneth Jost, *Gay Marriage,* 13 CQ RESEARCHER 723, 725 (Sept. 5, 2003) *available at* www. pflagsanjose.org/advocacy/CQResearcher-GayMarriage.pdf ("[O]pinion polls indicate an apparent backlash on the issue in the weeks since the *Lawrence* decision. Support for civil unions had been increasing, but it dropped by 10 percentage points or more in polls conducted in May and July."); Alan Cooperman, *Gay Marriage as 'the New Abortion'; Debate Becomes Polarizing as Both Sides Become Better Organized, Spend Millions*, WASH. POST, July 26, 2004, at A3.

[332] Nancy Gibbs, *A Yea for Gays; The Supreme Court Scraps Sodomy Laws, Setting Off a Hot Debate*, TIME, July 7, 2003, at 38; *see also* Susan Page, *Bush's Gay-Marriage Tack Risks Clash with His Base*, USA TODAY, Dec. 18, 2003, at 6A (presenting poll information indicating an increase in opposition for same-sex marriage).

[333] Alan Greenblatt, *The Partisan Divide*, 14 CQ RESEARCHER 375, 376 (Apr. 30, 2004) (on file with Albany Law Review).

[334] *Id.* at 381.

[335] Dean E. Murphy, *Defying Bush Administration, Voters in California Back $3 Billion for Stem Cell Research*, N.Y. TIMES, Nov. 4, 2004, at P10 (charting results of "Major Ballot Measures").

[336] *Id.*

polls, only 25% of the voters supported the right of same-sex couples to marry (with 77% of those voting for John Kerry for president).[337] However, another 35% of the voters supported civil unions (with a 52%-47% split for Bush and Kerry, respectively).[338] Of the 37% of voters who favored no legal recognition for same-sex couples, 70% supported Bush and 29% Kerry.[339]

Nevertheless, some have argued that the overall trend of "public culture [is] moving" in favor of gay rights.[340] *Lawrence* is thus "reflective of the growing persistence and success of gay rights claims in America";[341] its ruling merely "legitimized and endorsed a cultural consensus"[342] by "catching up to public opinion."[343] This confidence in the general direction of attitudes towards homosexuality has prompted some to believe that full equality for gays, including gay marriage, is on the way.[344]

Clearly, *Lawrence* spoke of an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[345] Throughout his opinion,

> Justice Kennedy dwelt on the way that knowledge and societal attitudes had changed over the past half a century regarding homosexuality, treating this just as significant, if not more so, than prior history in deciding whether the right claimed was important enough to merit constitutional protection as an aspect of "liberty."[346]

Thus it may be that the Court was "finally . . . acknowledging through this shift in rhetoric and method that as the pace of social change has accelerated, a jurisprudence of rationality evaluation for challenged legislation must become more meaningful if the basic principles of substantive due process . . .

---

[337] CNN.com, Election Results (2004), http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html.

[338] *Id.*

[339] *Id.*

[340] TUSHNET, *supra* note 237, at 157; *see also* Jeni Loftus, *America's Liberalization in Attitudes toward Homosexuality, 1973 to 1998*, 66 AM. SOC. REV. 762**,** 764 (2001).

[341] Artemus Ward, The Gay Rights Jurisprudence of Anthony Kennedy: An Institutional Analysis 20 (Apr. 2004) (unpublished manuscript prepared for presentation at the Midwest Political Science Association Conference, Chicago, Ill.) (on file with Albany Law Review).

[342] Joe Klein, *How the Supremes Redeemed Bush*, TIME, July 7, 2003, at 27.

[343] Evan Thomas, *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 38.

[344] Ramesh Ponnuru, *Coming Out Ahead: Why Gay Marriage is on the Way*, NAT'L REV., July 28, 2003.

[345] Lawrence v. Texas, 539 U.S. 558, 572 (2003).

[346] Leonard, *supra* note 45, at 209.

are to be given due weight."[347]

Justice Kennedy may have eschewed announcing "a fundamental right" to engage in consensual homosexual sodomy because doing so would have further inflamed the culture war.[348] Massey suggested another thesis: the Court was "testing public opinion by floating a 'weak' liberty . . . [that] would bring the judicial and legislative pots to a boil on the larger issue of recognizing the equal legal dignity of homosexuals."[349]

On the other hand, an extensive treatment of the history of sodomy laws may have simply been dismissed as unnecessary and even counterproductive to his approach. There was no need to announce a fundamental right to same-sex intimacy if the correct question was whether the class of activities (private, adult, consensual, intimate conduct) proscribed by state law were included within the scope of liberty already removed from governmental intrusion. Furthermore, Justice Kennedy made clear that he did not agree with *Bowers*' consideration of the question on that level of specificity.[350] To allow *Bowers* to continue to frame the debate by simply reversing on the question of whether same-sex sodomy was a fundamental right, as some have suggested,[351] would be tantamount to effectuating a policy change without a convincing accompanying legal rationale. Indeed, insofar as *Bowers* had asked the wrong question, the historic referents on which it relied were obsolete. Thus, in resemblance to Chief Justice Warren's admonition against turning the clock backward in the effort to ascertain constitutional meaning in *Brown v. Board of Education*,[352] Justice Kennedy took a more forward-looking approach. In his view, history was but a starting point; more relevant to him were the emerging trends of contemporary society.[353]

To justify invalidation of *Bowers* under a method of due process analysis that guarantees protection to only deeply rooted traditions would also have required extensive historical debate. Gary Allison certainly presents impressive evidence that even if *Bowers*'

---

[347] *Id.*

[348] Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 152–53 (2003).

[349] Massey, *supra* note 247, at 986–87.

[350] *Lawrence*, 539 U.S. at 567.

[351] *See, e.g.*, Jeffrey Goehring, Note, Lawrence v. Texas*: Dignity, A New Standard for Substantive Rational Basis Review?*, 13 L. & SEXUALITY 727, 736 (2004).

[352] 347 U.S. 483, 492 (1954).

[353] *Lawrence*, 539 U.S. at 571–72.

historical conclusions were not of questionable accuracy in 1986, the ruling itself may have produced a "developing empathy" for gay interests.[354] But Justice Kennedy, perhaps rightly, did not want to engage in the war of historical interpretation (or reinterpretation, however the case may be) to demonstrate either that *Bowers* was wrongly decided in the first place, or that a right that was not previously thought to be fundamental had now suddenly become so. By forcefully declaring that *Bowers* had been wrong when it was decided, insofar as it had addressed the wrong question, it sufficed to simply point out that the general direction of legislative enforcement, as well as popular and international trends, only served as further confirmation that *Bowers* had centered on a faulty constitutional framing of the issue.[355]

Moreover, by eschewing a historically grounded rationale, *Lawrence* revealed "a Court willing to shoulder the responsibility for judgment, a Court that does not seek to extort from history a crutch for its results."[356] Such an approach was entirely consistent with the sentiment expressed in *Casey*:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.[357]

For many, however, the Court's institutional capacity and legitimacy in undertaking the responsibility for giving substantive meaning to constitutional text is questionable at best. Most notably, Justice Scalia's dissenting opinions in *Romer*[358] and *Lawrence*[359] reveal that there is a vigorous, current debate over the appropriate methodological approach that should be utilized in analyzing due process claims.[360]

---

[354] Allison, *supra* note 348, at 100. For additional historical treatments of homosexual rights issues, see JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994) and WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 15–50 (1996).

[355] *Lawrence*, 539 U.S. at 567, 572–73, 578.

[356] ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 47 (1978).

[357] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992).

[358] Romer v. Evans, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting).

[359] *Lawrence*, 539 U.S. at 592, 602 (Scalia, J., dissenting).

[360] For expressions of Justice Scalia's continued displeasure with *Lawrence*'s methodology

B. The Methodological Debate: Kennedy v. Scalia

The schism over substantive due process methodology has separated Justice Kennedy from his conservative colleagues and has potential ramifications for future nomination politics. To the extent that Justice Kennedy might ever have been a viable candidate for the Court's center seat, his majority opinions in *Romer* and *Lawrence* have likely diminished his chances.[361] The most observable, perhaps short-term, consequence of Justice Kennedy's shift, however, has been his designation as front man in the methodological debate opposite Justice Scalia.[362] Justice Scalia portrays *Lawrence* as in the vein of *Lochner*-era rulings in which the Court imperially displaces legislative judgment with its own. Justice Kennedy's approach in *Lawrence* does bear similarity to Justice Peckham's assertion that the purpose of an act "must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person."[363]

While some might decry such judicial scrutiny of proffered state interests, Michael Perry suggests that an overly deferential approach inappropriately absolves the Court of the responsibility of enforcing the Constitution's "antidiscrimination directive."[364] He argued that "[a] deferential judicial posture is inappropriate if and when the Court is engaged in a task that, institutionally, in consequence of its relative insularity from the exigencies of ordinary politics, it is uniquely well suited to perform, namely, guarding against, and *ferreting out, illicit discrimination*."[365] Thus, he suggested in 1994:

---

and its reliance on substantive due process, see Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (criticizing the use of foreign precedent in domestic interpretations of the U.S. Constitution); Tennessee v. Lane, 541 U.S. 509, 562–63 (2004) (Scalia, J., dissenting) (criticizing "so-called 'substantive due process'"); and Roper v. Simmons, 125 S. Ct. 1183, 1228 n.9 (2005) (Scalia, J., dissenting).

[361] As one editorial argued, it is unlikely that the conservative majority "who re-elected President Bush, and gave Republicans a larger majority in the Senate, did so to promote a Justice who thinks their values are an affront to 'standards of decency.'" Editorial, *The Blue State Court: The Justices Continue Their Liberal Social Activism*, WALL ST. J., Mar. 2, 2005, at A16.

[362] For a discussion of Stevens' influence, see Warren Richley, *The Quiet Ascent of Justice Stevens*, CHRISTIAN SCI. MONITOR, July 9, 2004, at 1. Stevens was responsible for assigning both *Romer* and *Lawrence* to Justice Kennedy; moreover, it is Stevens' dissenting opinion in *Bowers* that largely guides the majority opinion in *Lawrence*.

[363] Lochner v. New York, 198 U.S. 45, 57–58 (1905).

[364] MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 168 (1994).

[365] *Id.* (emphasis added).

> If a law banning homosexual sexual activity is indeed predicated on the view that to be homosexual is somehow to be not merely different but defective—the view that a person's sexual orientation is relevant to his or her status or worth as a human being—then a state may not, consistently with the antidiscrimination directive represented by section 1 [of the Fourteenth Amendment], outlaw homosexual sexual activity.[366]

This statement is, in many ways, an apt description of Justice Kennedy's ruling that "ferrets out" the animus underlying Texas' choice to criminalize only homosexual conduct under its sodomy laws. In so doing, *Lawrence* side-steps the reasonableness inquiry: Justice Kennedy does not address whether a legislator could reasonably conclude that homosexuality is immoral, after a majority of the Texas legislature had made just that determination. To displace that judgment, and precedent along with it, on reasonableness grounds, would not only contradict principles of self-restraint Justice Kennedy had long espoused, it would also require debating the morality of particular sexual conduct. Instead, Justice Kennedy's inquiry focused on whether the expression of moral repulsion over same-sex sodomy could reasonably be attributed to any legitimate legislative purpose beyond animus toward the group most obviously affected by its enactment and enforcement.[367]

If nothing else, *Romer* had perhaps opened Justice Kennedy's eyes to the cold reality that a majority's hostility toward homosexuals *as a class* was the primary if not the sole impetus behind the enactment of most anti-gay legislation.[368] That restrictions like sodomy bans were only rarely enforced merely contributed to his conclusion that animus was the most likely legislative motive. As an exercise of private expression and association, expressed disapproval of homosexuality is constitutionally permissible;[369] as

---

[366] *Id.* at 176.

[367] *Lawrence*, 539 U.S. at 574.

[368] To the extent that Judge Kennedy may have wrestled with the "heightened solicitude" due gay rights, the opposition he faced from gay and lesbian groups during his confirmation proceedings may have further sensitized him to the issue. Regarded as an "agonizer," Kennedy has purportedly shown concern for how he will be regarded by history. *See* Terry Carter, *Crossing the Rubicon*, 12 CAL. LAW., 39, 104 (1992); Terry Eastland, *The Tempting of Justice Kennedy*, AM. SPECTATOR, Feb. 1993, at 32, 33. The language and rhetoric used in both *Romer* and *Lawrence*— invoking the dissent from *Plessy* and the search for "greater principles"—perhaps indicates his own cognizance of the momentous nature of his rulings.

[369] *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (Kennedy joins unanimous ruling upholding right of private parade organizers to exclude gay marchers as an exercise of associational freedom); *see also* Boy Scouts of Am. v.

an exercise of state power (and state criminal sanction at that), mere animus towards a particular group was not. Thus, to the extent the state sought to justify the intrusion into the sphere of personal autonomy in *Lawrence*, it had resorted to a rationale already discredited by *Romer*.

"[M]arch[ing] under the banner of majoritarianism,"[370] Justice Scalia, on the other hand, defended moral opprobrium as a legitimate state rationale for maintaining sodomy laws, decrying the majority for displacing laws that had garnered the majority's blessing.[371] The allure of Justice Scalia's argument is its self-contained reasoning. Beyond possessing the bonus of proclaimed judicial deference, his approach implicitly validates any morality-based legislation successfully enacted, regardless of whether or not it is actively enforced. For example, characterizing the morality underlying the challenged anti-contraceptive law in the *Eisenstadt* case as "expressive" of the state's disapproval of non-procreative sex, Perry argued that the

> Massachusetts law did not, because it could not, fail as a means to an end: The law achieved its principal end simply in virtue of being enacted, and it achieved that end whether or not the law succeeded to any particular extent in achieving the additional goal of deterring the prohibited conduct.[372]

Goldberg stated the matter more succinctly: "If a law's enactment is sufficient to demonstrate moral views and if moral views are enough to sustain a law, then all [morals-based] laws would have to be sustained."[373]

Erwin Chemerinsky argues that, contrary to their assertions, the conservatives' votes are the "result of value choices" and are "not at all about methodology"[374] But, one might counter that in adjudicating substantive due process claims, the conservatives' method *is* the result. In Justice Scalia's case, the methodology certainly reflects his value choices; by steadfastly demanding that

Dale, 530 U.S. 640 (2000) (Kennedy in majority of 5–4 decision upholding expressive association right of a private organization to exclude homosexuals from positions of leadership).

[370] Tribe & Dorf, *supra* note 270, at 1075.

[371] Tribe, *supra* note 266, at 1911–12; Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

[372] PERRY, *supra* note 364, at 173.

[373] Goldberg, *supra* note 264, at 1285.

[374] Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 LAW & CONTEMP. PROBS., 53, 59 (2004).

due process protects only those rights "rooted in history," he virtually ensures that no new rights can be ever declared. "The *Glucksberg* opinion does indeed put forth an effort to collapse claims of liberty into the unidimensional and binary business of determining which personal activities belong to the historically venerated catalog of privileged acts and which do not," but not all agree that *Glucksberg* is necessarily controlling.[375] "Nothing in *Glucksberg* can fairly be understood to have cemented the *Bowers* transmutation into our constitutional law."[376] Instead, Tribe views that ruling as little more than Rehnquist's failed "gambit" to curtail the expansive reach of substantive due process.[377] As demonstrated in Part III, others have noted that, since the methodology of *Glucksberg* was specific to endeavor or recognizing *new* constitutional rights, it was not applicable in *Lawrence*. But yet other interpretations suggest that *Lawrence* may portend the outright demise of *Glucksberg*[378] by rejecting its cabined methodology.

Lawrence certainly seems to repudiate *Glucksberg*, embracing a far more dynamic nature of rights as was once expressed by Justice Harlan.

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . . The balance . . . is . . . struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[379]

Although *Lawrence* indicates that *Bowers* was wrong when decided, the reader of *Lawrence* might well be left with the feeling that

---

[375] Tribe, *supra* note 266, at 1924.

[376] *Id.* at 1923.

[377] *Id.*

[378] David M. Wagner, *Hints, not Holdings: Use of Precedent in* Lawrence v. Texas, 18 BYU J. PUB. L. 681, 691 n.77 (2004).

[379] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

adhering to its outcome is even more wrong today. The flux apparent in public opinion across the land, if not evidence of at least some break with a consistently hostile attitude toward gays, is indicative that cultural, political, and legal views on homosexual rights appear to be in transition.

Contrary to Justice Scalia's approach, Justice Kennedy's acceptance of self-definition of liberty does not impose a specific itemization of protected intimate conduct, interpreting the phrase instead to include the freedom of *all* individuals to determine the type of intimate behavior that is personally acceptable, free from governmental intrusion. The ability of the state to either limit or mandate a particular definition of personhood or intimate association—absent some overriding public concern—is fundamentally at odds with the understanding of "liberty." As the plurality explained in *Casey*, the fact that some, or even a majority, find the prohibited conduct "offensive to our most basic principles of morality . . . cannot control [the Court's] decision."[380]

The originalist methodology adopted by Justice Scalia, as reflected in dissenting opinions in *Romer* and *Lawrence*, negates the emergence of new constitutional rights. Under Justice Scalia's approach, rights are stagnant, and the Court would effectively stake out an immutable position in the culture war, favoring the status quo of existing fundamental protections. The methodology adopted by Justice Kennedy, on the other hand, allows judicial recognition and protection of emergent rights—those rights which, whether through an emerging awareness of their importance or connectivity with those rights already recognized as fundamental, are deserving of more than minimal judicial scrutiny.

Lawrence would seem to be a redefinition of the constitutional standards under which the Court is to conduct substantive due process inquiry. The ruling exemplifies a forward-looking aspiration, suggesting that adhering to a rigid methodology of constitutional interpretation is less important than fulfilling the promise the Constitution embodies.[381] The *Casey* plurality wrote,

> Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation

[380] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992).

[381] "Better to recognize candidly that judicial judgment [is] statesmanship superimposed on the democratic political process, and its final test [is] the future." BICKEL, *supra* note 356, at 38.

> must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.[382]

Lawrence recaptures these themes and is part of a larger constitutional dialogue regarding the appropriate mode of constitutional interpretation. The debate between Justices Kennedy and Justice Scalia in the homosexual rights cases is far deeper than a dispute over homosexual equality rights or even the proper standards for adjudication substantive due process claims. As evidenced in the recent decision regarding the death penalty for juveniles,[383] *Lawrence* is part of a larger battle over whether and how to afford protection to rights that emerge from the evolving sensibilities of a maturing society.

V. CONCLUSIONS

The overall significance of *Lawrence v. Texas* in redefining modern due process analysis and in the larger methodological debate over the appropriate mode of constitutional interpretation remains to be seen. Clearly, the decision was an important victory for homosexual rights and a culmination of Justice Kennedy's evolving substantive due process jurisprudence. The degree to which *Lawrence* has altered the traditional standards of modern due process or has potentially impacted the future of formal tiered review under the Due Process Clause, however, raises a far more significant and strenuous debate.

Lower court applications and scholarly analyses of the decision present an array of possibilities, portraying *Lawrence* as everything from a less than straightforward, but still discernable, application of the traditional standards of due process analysis, to a "libertarian revolution" that departs markedly from the modern approach of

---

[382] *Casey*, 505 U.S. at 901.

[383] Roper v. Simmons, 125 S. Ct. 1183 (2005). Writing for the majority, Kennedy declared the death penalty for offenders under the age of eighteen was cruel and unusual based on the majority's independent "review of objective indicia of [societal] consensus," as well as international trends. *Id.* at 1192. In dissent, Justice Scalia scorns the "'maturing values' rationale" that was similarly used "to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause." *Id.* at 1228 n.9 (Scalia, J., dissenting) (citing *Lawrence* in support of his assertion).

classifying fundamental rights. Among the potential interpretations of the decision is that Justice Kennedy is subtly evolving the traditional standards to incorporate a middle ground between fundamental and non-fundamental rights. Such an approach takes into account the idea of emergent rights, recognizing that there are some protections which, while perhaps not yet elevated to the status of fundamental, are nevertheless entitled to the Court's heightened solicitude because of continuing traditions or their close association with rights already protected.

The concept of emerging rights is reflected in the shifting attitudes toward gay and lesbian issues. To the extent that societal attitudes toward homosexuals have evolved, the Court has taken note, treating the changes in public opinion and legislative enactments as objective referents in determining that an asserted liberty interest to engage in private, intimate conduct deserves protection under the Fourteenth Amendment's Due Process Clause. In recognizing the evolving nature of liberty rights, *Lawrence* is but part of the larger dialogue over the appropriate mode of constitutional decision-making. At the same time, the ruling and its author have become centerpieces in the continuing methodological debate. Thus, *Lawrence* has been alternatively praised and excoriated for having taken an approach to substantive due process that moves us closer to the notion of a living, evolving Constitution by embracing the concept of emergent rights.