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Beyond Gay Rights: Lawrence v. Texas and the Promise of Liberty

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BEYOND GAY RIGHTS: *LAWRENCE V. TEXAS* AND THE PROMISE OF LIBERTY

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INTRODUCTION

The popular press has generally characterized the Supreme Court's recent decision in *Lawrence v. Texas*[1] as a victory for gay rights, standing for a right to privacy in the bedroom.[2] Even articles that are more law-oriented primarily have discussed *Lawrence* in the context of gay rights and privacy.[3] This is understandable because the explicit issue in *Lawrence* was the state's criminalization of private, homosexual conduct.[4] But, by restricting their interpretation of the case to the arena of homosexual rights (or even, more broadly, to sexual or privacy rights), those observers miss much of the potential import of the Court's decision.

If the Court had viewed the case as one primarily about gay rights or privacy, it could have decided *Lawrence* on very narrow, equal protection grounds.[5] It would have been a simple matter to distinguish the Court's earlier decision in *Bowers v. Hardwick*[6] rather than to overturn it as the Court did.[7] Instead, Justice Kennedy's opinion for the Court is a sweeping affirmation of a more generalized liberty right,

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

[2] *See, e.g.*, Linda Greenhouse, *The Supreme Court: Homosexual Rights; Justices, 6–3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES, June 27, 2003, at A1; Charles Lane, *Justices Overturn Texas Sodomy Ban; Ruling is Landmark Victory for Gay Rights*, WASH. POST, June 27, 2003, at A1; Evan Thomas, *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 38.

[3] *See, e.g.*, Stephanie Francis Ward, *Toys in the Appellate Court*, 2 A.B.A. J. EREPORT 40 (referring to *Lawrence* as "the recent U.S. Supreme Court opinion that struck down a state law banning sodomy as an unconstitutional violation of a right to privacy").

[4] *Lawrence*, 539 U.S. at 562.

[5] *Id.* at 582 (O'Connor, J., concurring). Justice O'Connor distinguished the two cases on equal protection grounds, basing her decision not to join the Court in overruling *Bowers* on the fact that the statute at issue in *Bowers* applied to both heterosexual and homosexual sodomy, while the statute in *Lawrence* criminalized sodomy by homosexuals, but left legal the same conduct when performed by heterosexuals.

[6] 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

[7] *Lawrence*, 539 U.S. at 578.

premised not on whether the petitioners had a fundamental right to engage in homosexual sodomy, but on whether that conduct fell under the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment.[8]

While many media and legal observers may not appreciate the full impact of this aspect of the decision, Justice Scalia surely does.[9] In a scathing dissent in *Lawrence*, he recognized that the Court's holding that the Texas statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual . . . effectively decrees the end of all morals legislation."[10]

This Note argues that the Supreme Court's opinion in *Lawrence v. Texas* is an attempt to move away from the "fundamental rights" analysis that has characterized the Court's substantive due process jurisprudence since the 1938 case *United States v. Carolene Products Co.*[11] In its place, Justice Kennedy, and presumably the four other Justices who joined the majority opinion, would substitute what Boston University Law Professor Randy Barnett calls a "presumption of liberty."[12] If the attempt is successful, and the new analysis is consistently applied, the effect on substantive due process decisions could be profound, leading to a sweeping expansion of individual liberty in the United States. This Note's contention is that this is a desirable outcome, moving the nation toward fulfillment of the ideal vision of government stated in the Declaration of Independence: that all people have certain inalienable rights, including, foremost, the liberty to pursue their own happiness, and that the only legitimate purpose of government is to secure those rights.[13]

Part I of this Note is a brief discussion of the "fundamental rights" analysis used by the Court since the New Deal era. This traditional approach is exemplified in *Lawrence* by Justice Scalia's dissent.[14] Part II contrasts that traditional, "fundamental rights" analysis with the approach taken by Justice Kennedy in the majority opinion. In general, Justice Kennedy would "require[] the government to justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow 'fundamental.'"[15] Justice Kennedy's approach carries an implied two-part test. The first question is whether the conduct at issue is included under the right to liberty, i.e., is it private conduct that does not violate the rights of others? If the answer to the first question is yes, then the second question is whether the government can justify restricting that conduct. Part III of

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[8] U.S. CONST. amend. XIV, § 1.

[9] *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

[10] *Id.* (emphasis omitted).

[11] 304 U.S. 144 (1938).

[12] Randy E. Barnett, *Kennedy's Libertarian Revolution*, NAT'L REV. ONLINE (July 10, 2003), ¶ 17, *at* http://www.nationalreview.com/comment/comment-barnett071003.asp.

[13] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[14] 539 U.S. at 586 (Scalia, J., dissenting).

[15] Barnett, *supra* note 12.

this Note applies the "presumption of liberty" analysis to other morals legislation or "consensual crimes,"[16] and approvingly concludes that they cannot withstand its scrutiny.

Of course, the Court did not explicitly establish any such test, nor did it explicitly acknowledge a fundamental shift in its substantive due process analysis.[17] The Court is, therefore, not bound to follow the reasoning implied in *Lawrence*, and could very well resume its traditional demand that a substantive due process claimant demonstrate the violation of a "fundamental right." It may be just wishful thinking to assert, as this Note does, that *Lawrence* could herald a more libertarian approach by the Court to substantive due process claims. But, even if the Court opts not to follow Justice Kennedy's approach in the future, the decision in *Lawrence* will be a valuable arrow in the quiver of any litigant seeking to expand the scope of liberty.

I. BACKGROUND

Since the New Deal era, the Supreme Court has required petitioners with claims of violation of substantive due process rights to demonstrate that the right at issue is "fundamental."[18] To be "fundamental," an unenumerated right must be deeply rooted in the Nation's history and tradition or implicit in the concept of ordered liberty.[19] This approach, with its dependence on a subjective conception of liberty and a selective view of historical tradition, has led to confusing and inconsistent opinions and has been easily manipulated to arrive at outcomes that reflect the predilections of the Justices more than a coherent constitutional principle. In cases prior to *Lawrence*, several Justices have implicitly indicated a willingness to depart from the "fundamental rights" approach, but none has explicitly repudiated it.[20]

A. The "Fundamental Rights" Approach to Substantive Due Process Analysis[21]

In the famous "footnote four" in *United States v. Carolene Products Co.*, the Supreme Court laid out the exceptions to the presumption of constitutionality it

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[16] *See generally* PETER MCWILLIAMS, AIN'T NOBODY'S BUSINESS IF YOU DO: THE ABSURDITY OF CONSENSUAL CRIMES IN A FREE SOCIETY (1993) (defining and exploring "consensual crimes," and arguing that no consensual, adult conduct should be criminalized as long as it does not violate the rights of others).

[17] *See generally Lawrence*, 539 U.S. 558.

[18] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[19] *Id.*

[20] *See infra* Part I.C.

[21] *See generally* Peter Preiser, *Rediscovering a Coherent Rationale for Substantive Due Process*, 87 MARQ. L. REV. 1 (2003) (detailing the history of the Court's substantive due process tests).

gives to legislation.[22] The Court wrote that legislation was to be presumed constitutional unless it "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or is "directed at particular religious, or national, or racial minorities."[23] Ever since, with somewhat varying consistency, the Court has applied this presumption of constitutionality by requiring petitioners who claim violations of their Fourteenth Amendment rights under substantive due process theory to demonstrate that a challenged statute violates a "fundamental right." The Court described this approach in *Washington v. Glucksberg*:[24]

> Our 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, (so rooted in the traditions and conscience of our people as to be ranked as fundamental), 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.[25]

Under this approach, if the Court determines that the right at issue is "fundamental," it applies strict scrutiny, requiring the government to demonstrate that it has a compelling interest in restricting the right, and that the means employed are narrowly tailored.[26] If the Court finds that the right is not "fundamental," it applies rational basis review, requiring only that the government have a legitimate purpose and that the means employed are rationally related to that purpose.[27]

The Court in *Glucksberg* also recognized, however, a primary problem inherent in this approach: that it could easily become a cover for legislating from the bench, with Justices selectively interpreting history and tradition to suit their own views.

> [W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-

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[22] United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

[23] *Id.* (citations omitted).

[24] 521 U.S. 702 (1997).

[25] *Id.* at 720–21 (quotes and citations omitted).

[26] Reno v. Flores, 507 U.S. 292, 302 (1993).

[27] City of Dallas v. Stanglin, 490 U.S. 19, 23 (1989) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 414 (1973)).

> ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.[28]

In practice, the Court's examination into whether a particular activity is sufficiently encompassed by the Nation's history and traditions to afford it the status of a "fundamental right" has been conducted opportunistically. Different Justices, looking at the same activity, have arrived at very different conclusions as to its historical status by carefully choosing which historical context is worthy of consideration.[29] Historical attitudes, moreover, provide a very uncertain guide for evaluating modern claims to liberty.

> Some of these challenged restraints stem from religiously based concepts of morality and others from transient notions that cannot be attributed to any specific source or time. Historic pedigree furnishes no basis for concluding that restrictions formulated by past generations or civilizations are valid for fulfillment of present legitimate governmental objectives.[30]

As early as 1897, Justice Holmes criticized "the folly of preserving a rule based on blind imitation of the past."[31]

> It is revolting to have no better reason for a rule of law than that so it was laid down at the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[32]

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[28] *Glucksberg*, 521 U.S. at 720 (quotes and citations omitted).

[29] *Compare* Roe v. Wade, 410 U.S. 113, 129 (1973) (The Court rejected history and tradition as a justification for restricting the right to abortion because "criminal abortion laws in effect in a majority of States [were] of relatively recent vintage."), *with* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting) (Justice Scalia argued that restrictions on abortion were constitutional because "the long-standing traditions of American society have permitted it to be legally proscribed.").

[30] Preiser, *supra* note 21, at 51.

[31] *Id.*

[32] *Id.* (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

Additionally, the "fundamental rights" approach has enabled the Court to treat economic freedom as a separate, less important aspect of liberty, and to accord it relatively little protection from legislative intrusion.[33] In fact, one of the main reasons that the New Deal Court developed the "fundamental rights" approach in the first place was to allow it to uphold more favored aspects of liberty yet still accord great deference to government impositions on economic liberty.[34] Thus since its inception, the "fundamental rights" approach has enabled the Justices to indulge their own preferences as to which aspects of liberty are worthy of the protection of heightened scrutiny and which may be infringed at the whims of legislatures.

One of the Court's most narrow and restrictive applications of the "fundamental rights" approach was in *Bowers v. Hardwick*,[35] which the Court directly overruled in *Lawrence*.[36] There the Court, in upholding a Georgia anti-sodomy statute, framed the issue in the narrowest possible terms as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[37] After finding, of course, that there was no such fundamental right, the Court applied rational basis review and determined that the statute satisfied that standard solely based on the moral sentiments of a majority of the Georgia electorate.[38]

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy

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[33] *See* Barnett, *supra* note 12, at ¶ 4.

[34] Preiser, *supra* note 21, at 8. *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

> It is . . . well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Id. at 15.

[35] 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

[36] *Lawrence*, 539 U.S. at 578.

[37] *Bowers*, 478 U.S. at 190. The Court declined to express an opinion on the constitutionality of the Georgia statute as applied to acts of heterosexual sodomy. *Id.* at 188 n.2.

[38] *Id.* at 196.

> indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[39]

Justice Blackmun's dissent in *Bowers* anticipated Justice Kennedy's argument in *Lawrence* in its recognition of "[t]he Court's failure to comprehend the magnitude of the liberty interests at stake in this case . . . ."[40] Justice Blackmun's essential point was that through a similar, narrow formulation of the question at issue, the Court easily could determine that almost any *specific* behavior is not constitutionally protected. Thus, by characterizing the nature of the liberty interest involved more or less narrowly, a Court majority can arrive at any desired outcome, based not on sound constitutional principle, but on the predilections of the Justices. One would expect such an approach to lead to muddled, erratic opinions — and it has.

B. The "Fundamental Rights" Approach Has Led to Confusing and Inconsistent Opinions

A recent example of a case in which the characterization of the liberty interest involved played a major role is *Chavez v. Martinez*.[41] That case centered on the petitioner's allegation that his constitutional rights had been violated by a coercive police interrogation, even though he was never charged with any crime. Justice Thomas, writing for the majority, characterized the interest at stake as the right to be free from unwanted questioning by the police and found that that right was not fundamental.[42] Justice Kennedy, however, writing in dissent, framed the interest more generally as part of the petitioner's right to liberty of his person.[43]

The insistence that a liberty interest is only deserving of protection from government intrusion if it is somehow "fundamental," has engendered tortured logic in some of the Court's decisions. This occurred perhaps most famously in *Griswold v. Connecticut*.[44] Rather than simply and reasonably concluding that the concept of liberty guaranteed by the Fourteenth Amendment encompassed an inviolable right to control over one's own reproductive practices, the Court had to find some right to which it could pin the label "fundamental." Unable to look to any historical tradition tolerant of contraception, nor to any explicit guarantee of reproductive

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[39] *Id.*

[40] *Id.* at 208 (Blackmun, J., dissenting).

[41] 538 U.S. 760 (2003).

[42] *Id.* at 776.

[43] *Id.* at 796 (Kennedy, J., concurring in part and dissenting in part).

[44] 381 U.S. 479 (1965).

liberty in the Constitution, the Court fastened it upon the right to privacy which it notoriously found in "penumbras, formed by emanations" from the Bill of Rights.[45]

Even in *Griswold*, though, there were hints of recognition that the Court was engaging in an unnecessarily complex substantive due process analysis. In his concurring opinion, Justice Goldberg agreed with the majority's finding that the right to privacy is "fundamental," but emphasized the importance of the Ninth Amendment in his analysis.

> The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."[46]

Other observers have decried the unnecessary complexity of the Court's "fundamental rights" approach to substantive due process analysis. Christopher Schmidt argues that the Court's substantive due process doctrine "has provided unpredictable legal standards and results because it can be bent to meet any ends necessary."[47] He further contends that "this inconsistency can be easily eradicated by applying the text of the Ninth Amendment to determine unenumerated rights issues. . . . In contemporary constitutional discussions, the analytical process generally requires sifting through a tremendous amount of material to reach a result. The Ninth Amendment is almost the direct opposite."[48]

Peter Preiser finds that, in using the "fundamental rights" analysis, "the Court applies an artificially constructed system of values to judge the need for legislative

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[45] *Id.* at 484.

[46] *Id.* at 491–92 (Goldberg, J., concurring) (quoting U.S. CONST. amend. IX) (emphasis omitted).

[47] Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 169 (2003).

[48] *Id.* at 169–70.

restrictions upon liberty, rather than an equitable and rational system that would judge all restrictions on liberty by requiring government to demonstrate a substantial relation to an identified need for community welfare."[49] Preiser recommends a much simpler analysis: "When challenged, government should be required to demonstrate a substantial relation . . . between the curtailment of liberty and the needs of the community."[50]

It is sometimes difficult to find consistent, logical principles to distinguish the Court's holdings on which liberty interests are worthy of protection from government intrusion and which are not.

> Why, for example, does the Court favor the liberty to commercially sponsor virtually-nude dancing on a public taproom bar, advertise liquor prices, publicly promote health-impairing tobacco products, pander pornographic computer simulations of children's sexual activity, have an abortion, loiter without purpose in groups on public streets in neighborhoods where such gatherings have been found conducive to crime, but disfavor personal property rights, freedom to engage in harmless ancient religious practices, homosexual relations, professional assistance in terminating one's own life, and filiation rights of biological non-married fathers?[51]

The requirement that a historically disfavored activity must be made to fit within an enumerated right to be protected by anything more than rational basis scrutiny has led to some absurd reasoning. For example, *City of Erie v. Pap's A.M.*[52] involved a strip club owner's challenge to a city's indecency law banning public nudity. Rather than treating the right at issue as simply a general right to liberty, and requiring the government to demonstrate a substantial interest in infringing that right, Justice O'Connor analyzed it under the First Amendment right to free expression.[53] This attempt to stay within a framework of enumerated rights[54] led Justice O'Connor to an almost surreal discussion of whether mandatory pasties and g-strings had a significant effect on the messages the dancers intended to convey.[55]

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[49] Preiser, *supra* note 21, at 2.

[50] *Id.* at 53.

[51] *Id.* at 2 (citations omitted).

[52] 529 U.S. 277 (2000).

[53] *Id.* at 285.

[54] There was clearly no "fundamental right" to nude dancing grounded in history or tradition.

[55] 529 U.S. at 301. Incidentally, the author's own informal study of patrons of gentleman's clubs indicates that Justice O'Connor's unsupported conclusion on this point, that the effect of pasties and g-strings on erotic expression was "*de minimis*," *id.*, was clearly erroneous.

The conclusion seems virtually inescapable that the "fundamental rights" approach to substantive due process analysis is inherently flawed, leading to arbitrary and inconsistent outcomes. Some Supreme Court Justices have recognized this, and have indicated a willingness to move away from the approach.[56]

C. Previous Supreme Court Opinions Have Hinted at a Departure from the "Fundamental Rights" Analysis

Several members of the Court have previously made some tentative overtures toward altering its "fundamental rights" analysis. As previously discussed, Justice Goldberg's concurrence in *Griswold* relied on the Ninth Amendment's protection of unenumerated rights rather than finding, as the majority did, a textual right of privacy emanating from penumbras of the Bill of Rights.[57]

Justice Marshall's opinion for the Court in *Stanley v. Georgia*,[58] although couched in terms of privacy rights, effectively recognized a broad, generalized right to liberty, especially within the home. The Court recognized "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[59]

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man.[60]

Justice Marshall's formulation of the right to privacy in the home requires the government to justify any intrusions into that privacy rather than requiring the individual to demonstrate that the specific conduct at issue involved a "fundamental right" before it is worthy of constitutional protection.

Justice Brennan's opinion in *Eisenstadt v. Baird*,[61] similarly interpreted the right

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[56] *See infra* Part II.C.

[57] *See supra* note 45 and accompanying text.

[58] 394 U.S. 557 (1969) (holding that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime).

[59] *Id.* at 564.

[60] *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[61] 405 U.S. 438 (1972).

to privacy as the right to be free from arbitrary governmental intrusion on liberty. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[62]

All of the decisions discussed above, though implicitly supporting a fairly expansive view of liberty, explicitly depended on finding textual support for an unenumerated, fundamental right to privacy. This was largely due to constraints imposed by precedent. In each case, under "fundamental rights" analysis, the Justice writing the opinion had to find support for the specific right at issue in either history and tradition or in the text of the Constitution, or that right could not have been deemed fundamental and legislation restricting it would have to have been given substantial deference. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[63] however, Justice Kennedy began to break free from those constraints.

In the section of the joint opinion attributed to him, Justice Kennedy relied not on a right to privacy, but on a right to liberty.[64] He plainly stated that "[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.' The controlling word in the cases before us is 'liberty.'"[65] Justice Kennedy specifically rejected the traditional view of "fundamental rights" and their revelation in the history and traditions of the Nation, observing that, "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[66] He recalled the words of Justice Harlan from thirty-one years earlier:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require

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[62] *Id.* at 453 (emphasis omitted).

[63] 505 U.S. 833 (1992).

[64] *Id.* at 846.

[65] *Id.*

[66] *Id.* at 848.

> particularly careful scrutiny of the state needs asserted to justify their abridgment.[67]

This aspect of the *Casey* decision went largely unnoticed and unmentioned until *Lawrence*. Discussing Justice Kennedy's refusal to rest the abortion rights on a "right to privacy," Randy Barnett wrote:

> Resting abortion rights on liberty, as opposed to privacy, was newsworthy, but I seemed to be among the only one [sic] to get the news. To this day, everyone still talks of the "right of privacy," not the "right of liberty." Until *Lawrence*, the question for me was whether this right to liberty would ever be seen again, since it has not made another prominent appearance till now. But what an appearance![68]

With his opinion in *Lawrence*, Justice Kennedy has again attempted to nudge the Court away from its constrictive approach to analyzing liberty. It remains to be seen whether the Supreme Court will continue to follow his more expansive approach.[69]

II. ANALYSIS

In his dissent in *Lawrence*, Justice Scalia applied the standard "fundamental rights" approach that has characterized the Court's substantive due process analysis since the New Deal.[70] He would have required the petitioners to demonstrate that they possessed a fundamental right to engage in the practice of homosexual sodomy.[71] Justice Kennedy's opinion for the Court did not impose any such requirement. Instead, Justice Kennedy based his analysis on the right to liberty and required the state to justify its intrusion on that liberty.[72] Justice Kennedy rejected the contention of the state of Texas that the moral belief of a majority of the

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[67] *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

[68] Barnett, *supra* note 12, at ¶ 10.

[69] Lower courts have applied *Lawrence* inconsistently. *Compare* Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451, 457 (Ariz. Ct. App. 2003) (upholding Arizona's denial of a marriage license to a homosexual couple in part because the Court in *Lawrence* did not explicitly hold that homosexual conduct was a fundamental right), *and* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 816 (11th Cir. 2004) (upholding Florida's ban on adoption by homosexuals in part because the Court in *Lawrence* did not explicitly find a fundamental right to private sexual intimacy), *with* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that the Massachusetts ban on homosexual marriage violated the state constitution).

[70] *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

[71] *Id.*

[72] *Id.* at 564.

electorate provides a sufficient government interest to support a law that infringes on individual liberty.[73] The liberty on which Justice Kennedy relied, the liberty guaranteed by the Fourteenth Amendment of the Constitution, is an individual's broad right to be free from government intrusion so long as his conduct does not infringe on the rights of others.

A. Justice Scalia's Dissenting Opinion Typifies the Traditional, Post-New Deal "Fundamental Rights" Approach to Substantive Due Process[74]

In his dissent in *Lawrence*, Justice Scalia made it clear that he would adhere to the traditional "fundamental rights" approach to substantive due process analysis.[75] Thus, he decried the fact that "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'"[76] Justice Scalia stood by the holding in *Glucksberg* that "*only* fundamental rights which are 'deeply rooted in this Nation's history and tradition' qualify for anything other than rational basis scrutiny under the doctrine of 'substantive due process.'"[77] He, like the Court in *Bowers*, would find, under rational basis review, that a state anti-sodomy statute served a legitimate government purpose even if the only justification for it was that it expressed the moral sentiment of a majority of the electorate.[78] He approvingly refers to "the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[79]

Justice Scalia's view of the right to liberty is particularly narrow. Apparently, he would recognize no right to liberty beyond those specific rights enumerated in the Constitution and those strongly supported by American history and traditions.[80] Remarks he made in March of 2003 in a speech at John Carroll University in Cleveland reinforce this perception. Speaking in the context of the war on terror,

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[73] *Id.* at 578.

[74] In her concurring opinion, Justice O'Connor exclusively relied on the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, and eschewed any substantive due process analysis. *Id.* at 579 (O'Connor, J., concurring). As a result, though joining in the judgment, she declined to join the majority in overruling *Bowers*. *Id.*

[75] *Id.* at 586 (Scalia, J., dissenting). Justice Scalia's dissent was joined by Chief Justice Rehnquist and Justice Thomas.

[76] *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

[77] *Id.* at 588 (quoting *Glucksberg*, 521 U.S. at 721).

[78] *Id.* at 589.

[79] *Id.* (quoting Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001) (upholding Alabama's prohibition on the sale of sex toys)).

[80] *Id.* at 593.

he said that "[m]ost of the rights you enjoy go way beyond what the Constitution requires . . . the Constitution just sets minimums."[81] He stressed that in wartime "the protections will be ratcheted down to the constitutional minimum."[82]

Justice Scalia's view of unenumerated rights under the Ninth Amendment is similarly narrow, almost to the point of rendering that amendment a nullity.[83] While he agrees that there are unenumerated rights retained by the people within the meaning of the Ninth Amendment, he does not believe that it is within the power of the judiciary to discern those rights, let alone enforce them against the states.[84] "[T]he Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people."[85]

In his dissenting opinion in *Lawrence*, Justice Scalia attempted to fit the majority's opinion into the traditional "fundamental rights" framework, concluding that "[m]ost of the rest of today's opinion has no relevance to its actual holding — that the Texas statute 'furthers no legitimate state interest which can justify' its application to petitioners under rational basis review."[86] However, in spite of this attempt to critique the majority's opinion by analyzing it within the framework of the "fundamental rights" approach, Justice Scalia recognized that the Court had done something fundamentally different in its decision. "[T]he Court simply describes petitioners' conduct as 'an exercise of their liberty,' — which it undoubtedly is — and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case."[87]

Although he disapproves of the result, Justice Scalia is undoubtedly correct in his assessment of the impact of the majority's opinion. Justice Kennedy's approach, if followed by the Court in its future analysis of liberty under substantive due process, will have far-reaching implications because it recognizes a general right to liberty that is independent of specifically enumerated or fundamental rights.

B. Justice Kennedy Grounded the Court's Analysis in a General Right to Liberty Rather Than in Any Specific Fundamental Right

Justice Kennedy's opinion for the Court stands in strong contrast to Justice Scalia's dissent. In the very first paragraph, Justice Kennedy set the stage for his emphasis on a general right to liberty rather than specific "fundamental rights."

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[81] Nat Hentoff, *War on the Bill of Rights*, IN THESE TIMES, Sept. 29, 2003, at 23, 24.

[82] *Id.*

[83] *See* Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

[84] *Id.*

[85] *Id.*

[86] *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (quoting the majority opinion).

[87] *Id.*

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[88]

From the beginning of the opinion, Justice Kennedy made it clear that he was embarking on a very different method of analysis than that which the Court has employed ever since the New Deal.[89]

It is telling that Justice Kennedy uses the word "liberty" twenty-five times in his opinion, but uses the phrase "fundamental rights" only twice, and then only when discussing the Court's decision in *Bowers v. Hardwick*.[90] The word "privacy" appears only four times in the opinion and two of those appearances are in a quote from another decision.[91] In the other two places where "privacy" appears, Justice Kennedy made it clear that when he used the term "liberty," it was not to be equated with a mere right to privacy.[92] His second of three questions presented in the case was "[w]hether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?"[93] The interests in liberty and privacy are separate and distinct. Justice Kennedy's final use of the word "privacy" was in his discussion of *Griswold*.[94] He stated that in that case "[t]he Court described the protected interest as a right to privacy."[95] The subtle implication in his choice of wording was that the Court's description was not accurate, or at least that it was not the description that he would have used.

Elsewhere in his opinion, Justice Kennedy further indicated his belief that the protected interest at stake in *Griswold*, as well as in *Lawrence*, was a generalized right to liberty. In the first sentence of section II he clearly stated that the foundation for his analysis would be liberty: "We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private

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[88] *Id.* at 562.
[89] *See supra* Part I.
[90] *Lawrence*, 539 U.S. at 566.
[91] *Id.* at 565.
[92] *See id.* at 563–65.
[93] *Id.* at 564.
[94] *Id.*
[95] *Id.*

conduct *in the exercise of their liberty* under the Due Process Clause of the Fourteenth Amendment to the Constitution."[96] Referring to the Court's formulation of the issue in *Bowers* as whether there was a fundamental right under the Constitution to engage in homosexual sodomy, Justice Kennedy wrote: "That statement . . . discloses the Court's own failure to appreciate the extent of the *liberty* at stake."[97] Discussing anti-sodomy laws, he stated: "The statutes do seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[98]

Under the "fundamental rights" approach to substantive due process claims that it has followed since *Carolene Products*, the Court employs a presumption of constitutionality, giving great deference to federal and state legislation.[99] Justice Kennedy completely abandoned that presumption. Nowhere in his opinion did he even mention any deference to be given the Texas legislature with respect to the anti-sodomy statute t issue in the case. As a result, Justice Kennedy did not require the petitioners to rebut that presumption by demonstrating that the Texas law violated a "fundamental right." Instead, after concluding that the petitioners' private, adult, consensual behavior was encompassed within their right to liberty under the Fourteenth Amendment, he required the state to justify its intrusions on that liberty.[100]

Finding no purported justification for the anti-sodomy statute beyond the imposition of majoritarian morality, which he flatly rejected as a legitimate government interest, Justice Kennedy concluded that the law could not stand.[101]

C. Justice Kennedy's Opinion Concluded That the Moral Belief of the Majority Is Not a Sufficient Government Interest to Justify an Intrusion on Liberty

In *Bowers v. Hardwick*, the Court held that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable"[102] was a rationale adequate to support Georgia's anti-sodomy statute. As noted above, Justice Scalia would have come to the same conclusion in *Lawrence*.[103] Justice Kennedy and the majority, though, adopted the position Justice Stevens took in his dissent in *Bowers*. There, Justice Stevens stated that the Court's precedent made it "abundantly clear [that] the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for

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[96] *Lawrence*, 539 U.S. at 564 (emphasis added).

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

[98] *Id.*

[99] *See supra* notes 22–25 and accompanying text.

[100] *See Lawrence*, 539 U.S. at 578.

[101] *Id.* at 579.

[102] 478 U.S. 186, 196 (1986).

[103] *See supra* note 77 and accompanying text.

upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."[104]

Justice Kennedy cited Justice Stevens's *Bowers* dissent with approval.[105] He flatly rejected the proposition that the moral beliefs of a majority of citizens was sufficient to support the constitutionality of a law. "The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[106]

Justice Kennedy went further. He did not concede even that imposition of the majority's moral beliefs was a *legitimate* interest that was outweighed in this instance by the petitioners right to liberty. He found that "[t]he Texas statute furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual."[107]

D. What Is the Liberty That the Fourteenth Amendment Protects?

Throughout the *Lawrence* opinion, Justice Kennedy heavily relied on the right to liberty protected by the Fourteenth Amendment, but nowhere did he explicitly discuss the nature and extent of that liberty. He did, however, trace some of its contours.[108] Liberty protects the individual from government intrusions into the home; that much is uncontroversial and fully in accord with the Court's prior decisions based on a right to privacy.[109] But Justice Kennedy goes further — much further than required by the facts of the case.[110] Liberty also protects the individual from government intrusions into spheres of our lives outside the home; it "presumes an autonomy of self"; and it has both "spatial and more transcendent dimensions."[111]

Admittedly, these expressions are somewhat nebulous, but we can substantially clarify them by examining what the "liberty" was that the Framers of the Fourteenth Amendment intended to protect. The brief of the Cato Institute as amicus curiae in support of the *Lawrence* petitioners succinctly sums up that intent:

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[104] *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting).

[105] *Lawrence*, 539 U.S. at 577–78.

[106] *Id.* at 571 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)).

[107] *Id.* at 578 (emphasis added).

[108] *See supra* note 88 and accompanying text.

[109] *See Casey*, 505 U.S. 833; Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[110] The prohibited homosexual conduct at issue in *Lawrence* took place entirely within the home of petitioner John Lawrence. *Lawrence*, 539 U.S. at 562–63. Justice Kennedy could easily have rested his decision on this point, supported by the precedents that recognize a fundamental right to privacy in the home. In that regard, his sweeping affirmation of the right to liberty went much further than was necessary to find the Texas statute unconstitutional on due process grounds.

[111] *Id.* at 562.

> America's founding generation established our government to protect rather than invade fundamental liberties, including personal security, the sanctity of the home, and interpersonal relations. So long as people are not harming others, they can presumptively engage in the pursuit of their own happiness. The Fourteenth Amendment's Privileges or Immunities Clause and its Due Process Clause (as interpreted by this Court) made this principle applicable to the states.[112]

The Cato Institute brief explains that the Framers of the Constitution and the Bill of Rights believed that the fundamental purpose for the existence of government was to protect the individual liberties of its citizens.[113] The Framers of the Fourteenth Amendment incorporated this idea and applied it to the states. "By their lights, the second sentence of Section 1 rendered the states accountable to three precepts: the legality principle, . . . the equality principle, . . . and the liberty principle, which requires the state to respect Americans' fundamental freedoms."[114]

Elaborating on the historical provenance of that "liberty principle," the Cato Institute brief discusses what it entails:

> The American Revolution and the Constitution of 1789 sought to secure the blessings of liberty. The Declaration of Independence asserted that it was "self-evident" that men "are endowed by their Creator with certain unalienable Rights," to wit: "Life, Liberty, and the Pursuit of Happiness." Among the rights the Framers had in mind were rights of personal security, or "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation"; of personal liberty to move about; and of personal property, namely, "[t]he free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land."[115]

The Court's earlier opinions dealing with substantive due process are also illuminating with regard to the broader conception of liberty that prevailed prior to the narrow interpretation adopted during the New Deal era and followed since. In

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[112] Brief of Amicus Curiae Cato Institute at 2, *Lawrence* (No. 02–102).

[113] *Id.*

[114] *Id.* at 3.

[115] *Id.* at 5–6 (footnote omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *123–24, *125–29).

Lawrence, Justice Kennedy cited *Meyer v. Nebraska*[116] as an example of a "broad statement[] of the substantive reach of liberty under the Due Process Clause."[117]

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.[118]

Although it was not adopted as law, the Declaration of Independence contains the most eloquent statement of the purpose of our government; in modern business jargon it would be called the mission statement for the nation: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men . . . ."[119] Unfortunately, this clear and powerful statement was not included in the text of the Constitution. This omission, though weakening the moral authority of the document, was not unintentional. "The Founders deliberately omitted the Declaration's doctrine of equal rights from the Bill of Rights, not because that doctrine was considered mere rhetoric, but because its inclusion in the Constitution would have been dangerous to the continued existence of slavery."[120] As in other respects, the principles of liberty that inspired the founding of the nation

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[116] 262 U.S. 390 (1923).

[117] *Lawrence*, 539 U.S. at 564.

[118] *Meyer*, 262 U.S. at 399–400 (citations omitted).

[119] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[120] Robert Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 362–63 (1993).

were compromised right from the beginning and it was left to later generations to bring them closer to full realization.

Robert Reinstein argues that the Framers of the Fourteenth Amendment, in effect, incorporated the principles of the Declaration of Independence into the Constitution; that it was their express intention to complete the work of liberty that was left undone at the founding:

> [T]he Declaration of Independence was united with the Constitution in the enactment of the Fourteenth Amendment. The Declaration and its state constitutional embodiments (the free and equal clauses in state bills of rights) were central to antebellum legal and political challenges to slavery. The Declaration and its doctrine of equal rights were the unifying norms of all factions of the Republican Party. The Republicans in the 39th Congress were determined to complete the Constitution as they believed the Founders would have done but for slavery. Section 1 of the Fourteenth Amendment *is* the Declaration of Independence.
>
> Or, more precisely, the Republicans constitutionalized their view of the Declaration. The clauses of Section 1 track the Republican Party's conception of the Declaration's scope.[121]

The essence of Reinstein's argument is that the Due Process Clause of the Fourteenth Amendment was included to guarantee against the states the Declaration's natural rights to life, liberty, and property that the Fifth Amendment guaranteed against Congress.[122] Through its incorporation of the principles of the Declaration of Independence, the Fourteenth Amendment guaranteed to all Americans the natural rights whose protection is the principal object of any legitimate government.[123]

Reinstein argues that the liberty recognized and protected by Section 1 of the Fourteenth Amendment, in addition to guaranteeing the natural rights that belong to all human beings simply by virtue of their humanity, extends to all rights derived from English law as it existed at the time of the founding.

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[121] *Id.* at 363.

[122] *Id.*

[123] Of course at the time of its enactment, the Fourteenth Amendment was not interpreted as guaranteeing the same rights to women as it did to men. *See* JIM POWELL, THE TRIUMPH OF LIBERTY 502 (2000). This is another of the examples with which American history is replete of enactment of a principle of liberty followed by the failure to apply the principle with logical consistency.

> The inclusion of the Privileges and Immunities Clause reflected a broader conception of the Declaration — that in addition to natural rights, Americans are entitled to those rights, originally deriving from English law, which were recognized as preservative of liberty and which were included in the social compacts of the American States. This is the conception of the Declaration that was held by the Founders and that supported Bingham's goal of applying the Bill of Rights to the States.[124]

Reinstein's argument finds support in the Cato Institute's amicus brief in *Lawrence*. Discussing the rights of citizens that were protected by the Privileges or Immunities Clause of the Fourteenth Amendment, the brief states:

> When the Framers of the Fourteenth Amendment borrowed the due process and privileges and immunities language to frame rights in Section 1, they intended to protect fundamental liberties (including those in Blackstone and the Declaration) against state intrusion.
>
> . . . .
>
> Precisely what those national rights of citizenship were to be was a matter left somewhat open-ended, but the Framers of the Fourteenth Amendment repeatedly invoked Blackstone's understanding of traditional liberties, privileges, and immunities. . . . Blackstone's central theme was that Englishmen enjoyed natural rights to deploy their bodies and inhabit their properties, without state intrusion, so long as they were not themselves intruding upon the natural rights of third parties.[125]

This understanding of the liberty that the Framers of the Fourteenth Amendment intended to guarantee nicely coincides with Justice Kennedy's use of the right to liberty in his opinion in *Lawrence* as well as his earlier opinion in *Casey*. In *Casey*, he quoted with approval Justice Harlan's dissenting opinion in *Poe v. Ullman*:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms

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[124] Reinstein, *supra* note 120, at 393. Representative John Bingham was the author of Section 1 of the Fourteenth Amendment. *Id.* at 387.

[125] Brief of Cato Institute Amicus Curiae at 7, 29, *Lawrence* (No. 02–102) (footnote and citation omitted).

> of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[126]

In *Lawrence*, Justice Kennedy reiterated the view of liberty he explained in *Casey*, in which "the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause."[127]

> 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[128]

Justice Kennedy's vision of liberty is virtually the same as that of the Framers of the Fourteenth Amendment: Liberty is self-autonomy, the right of the individual to pursue his own happiness as he sees fit, free from unjustified government intrusion. Consistent with that view, and in contrast to the traditional "fundamental rights" approach taken by Justice Scalia in his dissent, Justice Kennedy presumes that private, adult, consensual conduct is protected under the Fourteenth Amendment's guarantee of the right to liberty and requires the government to justify its prohibition of that conduct. It is this presumption of liberty that gives the *Lawrence* opinion its potential to enlarge the scope of individual freedom in the United States.

E. Which Government Intrusions on Liberty are Warranted?

Liberty protects the individual from "unwarranted government intrusions." What principle then divides warranted from unwarranted government intrusions?

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[126] 505 U.S. at 848–49 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (citation omitted).

[127] *Lawrence*, 539 U.S. at 573.

[128] *Id.* at 574.

Justice Kennedy's opinion in *Lawrence* provides no ready answer to that question because the case did not require one. Once the Court held that Texas had no legitimate interest to support its anti-sodomy statute, the matter was decided. It is clear though, that the fact that a majority of a state's population disapproves of a behavior as immoral is not enough.[129] To warrant an infringement on liberty the government must have some legitimate interest unrelated to mere disapproval of the prohibited conduct.

Justice Kennedy did suggest some factors to be considered in deciding whether a government intrusion on liberty is warranted. He repeatedly emphasized that, in the case of the petitioners in *Lawrence*, the conduct at issue was adult, private, and consensual; for example:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.[130]

The logical implication of Justice Kennedy's opinion is that, under the right to liberty protected by the Fourteenth Amendment, adults are free to engage in any private, consensual behavior, subject, of course, to the condition that the behavior does not itself violate someone else's rights. Justice Kennedy came close to an explicit statement to that effect, although it is limited to the context of the homosexual relationship at issue in the case:

> The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.[131]

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[129] *See supra* Part II.C.

[130] *Lawrence*, 539 U.S. at 578.

[131] *Id.* at 567.

III. RECOMMENDATIONS

The fundamental promise behind the founding of the United States was that it would secure to its citizens their inalienable right to individual liberty.[132] Throughout its history, the United States has struggled to fulfill that promise, but has repeatedly fallen short. From the beginning, large segments of the population were not included as beneficiaries of the promise of liberty. African Americans were, of course, accorded none of the liberties guaranteed by the Constitution, and even after their emancipation from chattel slavery, were prevented from the full exercise of their rights. Asians and other racial and ethnic minorities were also denied the full benefits of citizenship. For much of our past, women, too, were not allowed the full enjoyment of the liberty promised by the Declaration. The history of the country is one of a constant fight to enlarge the bounds of liberty and to extend its benefits to an ever-widening number of inhabitants. Justice Kennedy's decision in *Lawrence* has the potential to play a significant role in that fight. In the interest of furthering liberty, the core value of our nation, the Supreme Court should adopt his approach and abandon the "fundamental rights" analysis that it has applied since the New Deal.

The three attributes of the sort of conduct protected by the Fourteenth Amendment right to liberty — adult, private, and consensual — are all characteristic of what Peter McWilliams labels "consensual crimes."[133] Among these McWilliams includes: gambling,[134] use of illegal drugs,[135] prostitution,[136] pornography and obscenity,[137] various violations of marital promises,[138] homosexuality,[139] certain unconventional religious practices,[140] suicide,[141] and violation of various "public safety" laws designed to protect people from the consequences of their own voluntary behavior.[142]

Although prohibitions against these consensual crimes are often rationalized by supposed secondary effects, the primary reason they are criminalized is the

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[132] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[133] MCWILLIAMS, *supra* note 16, at 16.
[134] *Id.* at 517.
[135] *Id.* at 521.
[136] *Id.* at 573.
[137] *Id.* at 585.
[138] *Id.* at 597.
[139] MCWILLIAMS, *supra* note 16, at 603.
[140] *Id.* at 621.
[141] *Id.* at 665.
[142] *Id.* at 671.

moral disapproval of a majority[143] of the electorate. But this is simply mob rule-coercion of the minority by an intolerant majority, and directly contrary to our basic, founding principle that government exists to allow the individual to pursue happiness in his own way.[144] Some principle other than the whim of the majority is needed to distinguish permissible behavior from that which may be constitutionally prohibited. That principle is provided by the recognition of a general right to liberty.

In his dissent to the *Lawrence* decision, Justice Scalia noted "[t]he impossibility of distinguishing homosexuality from other traditional 'morals' offenses."[145] He observed quite accurately that:

> State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.[146]

With the exception of bestiality,[147] each of the activities Justice Scalia mentions is a consensual crime, prohibited only because of moral disapproval. A large part of Justice Scalia's discomfort with Justice Kennedy's opinion comes from his recognition that, if Kennedy's approach to substantive due process is applied by the Court with logical consistency, then all of the conduct he mentions (and implicitly condemns) must be held to be protected against government prohibition.

Many social conservative critics of the Court's decision in *Lawrence* also clearly saw these implications. For example, Senator Rick Santorum, a Republican from Pennsylvania, said: "If the Supreme Court says that you have the right to consensual sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything."[148] Although he was roundly condemned for his remarks by many of the Democratic presidential candidates and congressional leaders, Senator

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[143] Sometimes, as in the case of the prohibition of alcohol, the necessary disapproval can be provided by a sufficiently vocal and politically active minority.

[144] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[145] *Lawrence*, 539 U.S. at 590.

[146] *Id.*

[147] Bestiality is presumably not a consensual activity because the animals involved are not capable of giving consent and laws prohibiting cruelty to animals would apply even in the absence of morals-based legislation.

[148] Alan Cooperman, *Frist and Specter Defend Santorum; Remarks on Gays Should Not Be Misconstrued, Leaders Say*, WASH. POST, Apr. 24 2003, at A6.

Santorum analyzed the principle at stake quite accurately: If private, consensual, adult conduct is protected under the right to liberty, then logically, that protection extends to all such conduct.[149] Senator Santorum, like Justice Scalia, arrived at the correct logical conclusion despite the fact that his personal preference would be to narrow the exercise of individual liberty rather than to expand it.

Percipient critics of the *Lawrence* decision such as Senator Santorum and Justice Scalia understand that there is no principled objection to homosexual conduct per se (and, by extension, other consensual crimes) beyond moral disapproval. They realize that if we apply a more principled method of evaluation, such as the libertarian standard that all consensual, adult behavior is permissible provided that it does not infringe on the rights of third parties, then behavior that is abhorrent to them will be protected. Justice Kennedy's opinion in *Lawrence* is a step toward applying such a standard. By holding that sexual freedom is a legitimate aspect of a general right to liberty rather than a fundamental right, Justice Kennedy moves us closer to a broader, more libertarian understanding of the liberty guaranteed to every American by the Fourteenth Amendment.

In *Lawrence*, Justice Kennedy stated that there is an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,"[150] but there is no valid reason why this emerging awareness should be limited to matters involving sex. The principle that the government should be required to justify any intrusion on an individual's exercise of his right to liberty by demonstrating a substantial government interest is equally valid and desirable in other contexts.

A. Marriage Rights for Homosexuals

Immediately following the Court's announcement of its decision in *Lawrence*, many observers predicted that the first issue to be pursued using the decision as a basis for argument was likely to be the right of homosexual couples to have their marriages recognized by state law.[151] This has proven to be an accurate prediction.[152] By early 2004, the pressure to extend marriage rights to homosexuals and the

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[149] Because Senator Santorum disapproves of such conduct, he did not add the necessary caveat that the conduct at issue would be protected only so long as no third party's rights were violated.

[150] *Lawrence*, 539 U.S. at 572.

[151] *See, e.g.*, Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, § 1, at 8.

[152] *See, e.g.*, Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451, 457 (Ariz. Ct. App. 2003) (upholding Arizona's denial of marriage licenses to homosexual couples); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (declaring Massachusetts's denial of marriage licenses to homosexual couples contrary to the state constitution).

conservative backlash to that pressure had both become so intense that President Bush proposed amending the Constitution to ban gay marriage.[153]

Justice Kennedy avoided the question of whether his opinion implied that state governments must recognize a right of homosexuals to marry members of the same sex.[154] His broad conception of the right to liberty, however, surely offers support for the contention that the right to marry a person of one's choice, of whatever sex, is included within that broad right. If, as *Lawrence* says, government has no legitimate interest justifying infringement of an individual's liberty to engage in consensual, adult, homosexual conduct,[155] and, in addition, "marriage is one of the 'basic civil rights of man,'"[156] then it is very difficult to argue logically that government has any legitimate interest in denying homosexuals the right to marry.

Indeed, some observers have argued that the gay marriage cases are the moral equivalent of *Loving v. Virginia*[157] in which the Supreme Court struck down Virginia's ban on interracial marriage.[158] In *Loving*, the Court wrote of marriage, that "[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."[159] With the growing awareness that classifications based on sexual orientation are every bit as insidious and subversive of equality as those based on race, the Court should conclude that denial of homosexuals' right to marry is also a violation of substantive due process under the Fourteenth Amendment.

Barring the passage of an amendment to the Constitution banning gay marriage, the Supreme Court is likely to face the issue at some point in the future. In keeping with the nation's struggle to fulfill its promise of liberty, the Court should apply Justice Kennedy's broad vision of liberty and recognize that the right to marry the person of one's choice equally applies to heterosexuals and homosexuals.

B. Medical Marijuana

In his opinion in *Lawrence*, Justice Kennedy employed an implicit presumption

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[153] Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage; President Says States Could Rule on Civil Unions*, WASH. POST, Feb. 25, 2004, at A1.

[154] *Lawrence*, 539 U.S. at 578.

[155] *Id.*

[156] Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[157] 388 U.S. 1 (1967).

[158] *See* Molly McDonough, *Gay Marriage Decision Harks Back 55 Years, Ruling on Interracial Marriage Plays a Role in Massachusetts Case*, 2 A.B.A. J. EREPORT 46.

[159] *Loving*, 388 U.S. at 12.

of liberty[160] for individual conduct rather than the Court's standard presumption of constitutionality[161] for acts of legislatures. Under this presumption, the government has the burden of justifying any restrictions that it imposes on liberty. Strict application of this presumption should result in a recognition that, included within the general right to liberty, is the right of an individual to choose his own medical treatment including the use of currently restricted drugs.

In many cases the use of illicit drugs falls into the category of consensual crimes, in that it is private, consensual, adult behavior that does not violate the rights of third parties. In such cases, under the reasoning in *Lawrence*, the government should have to demonstrate a substantial interest justifying infringement of the right to engage in that behavior. This is especially true in the case of medical marijuana where, in some cases, a person's life may depend on his liberty to choose the appropriate medical treatment for him.[162]

The Court's most recent foray into the medical marijuana issue, *United States v. Oakland Cannabis Buyers' Cooperative*,[163] does not reflect anything close to this understanding. In that case, however, the proponents of medical marijuana did not argue that the use of marijuana was within the individual right to liberty, but based their claim on medical necessity.[164] That claim was summarily rejected by Justice Thomas in his opinion for the Court, on the basis that the legislature had already made a determination that marijuana was without any medical value.[165] A liberty-based challenge to the federal government's prohibition of medical marijuana would present a different issue. If the Court consistently applied the logic of *Lawrence*, as it should, it would be compelled to balance the government's asserted justifications for prohibition against the acknowledgment that the private, consensual use of medical marijuana by adults is within the individual's right to liberty.[166]

As an aside, it is interesting to note that there is a plausible argument that marijuana use is deeply rooted in the history and tradition of America, implying that it could fit within the "fundamental rights" framework. The *Lawrence* decision contains an extensive examination of the history of sodomy laws in the United States and concluded that statutes specifically aimed at homosexual conduct are of

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[160] *See supra* note 12 and accompanying text.

[161] *See supra* notes 22–23 and accompanying text.

[162] *See, e.g.*, Jacob Sullum, *Fatal Condition*, REASON ONLINE, (June 21, 2000) (recounting the death of Peter McWilliams who was prevented by federal court order from using the medical marijuana that enabled him to keep down other medications for cancer and AIDS), *at* http://reason.com/sullum/062100.shtml.

[163] 532 U.S. 483 (2001).

[164] *Id.* at 490.

[165] *Id.* at 491.

[166] Of course the logic of this argument applies with equal force to private, consensual, adult use of any currently illegal drug, but it is more likely to gain acceptance first in the context of medicinal rather than recreational use.

relatively recent vintage.[167] A similar argument applies to the relatively recent criminalization of marijuana.[168] Marijuana was freely available as a medicine in the United States up until the early 1940s and was not restricted as a completely prohibited substance until the Controlled Substances Act of 1970.[169]

IV. CONCLUSION

The activities discussed above as well as others generally considered consensual crimes are all ones that are disfavored by large segments of society. Some of them carry the potential for great harm to those who engage in them, and to say that they are within the right of an individual to do without the threat of criminal prosecution is not to say that they are morally correct or desirable behaviors. The essential point is that if an individual is to be free to pursue his own happiness, he must be at liberty to engage in whatever conduct he decides is most likely to bring him that happiness. As long as that conduct violates no one else's rights, then the government can have no legitimate interest in prohibiting it.

Almost none of the activities that we engage in every day are specifically protected as enumerated rights in the Constitution, and many of them have no history or tradition of protection. According to Justice Scalia's narrow view of liberty, they could all be prohibited as long as the government asserted some non-discriminatory interest in doing so. He flatly stated that "[t]here is no right to 'liberty' under the Due Process Clause. . . . The Fourteenth Amendment *expressly allows* States to deprive their citizens of 'liberty,' so long as *'due process of law' is provided.*"[170] But his view, indeed the whole "fundamental rights" approach to substantive due process, takes the vision of the Framers of the Constitution and stands it on its head.

The original purpose of the Ninth and Tenth Amendments was to make it clear that the Constitution was established to restrain government, to restrict its powers to only those specifically enumerated, and that the people retained rights both enumerated and unenumerated.[171] If the right to liberty encompasses nothing but enumerated rights and selected rights with long pedigrees, then the Ninth

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[167] *Lawrence*, 539 U.S. at 568–70.

[168] *See* Cathryn L. Blaine, *Supreme Court "Just Says No" to Medical Marijuana: A Look at* United States v. Oakland Cannabis Buyer's Cooperative, 39 HOUS. L. REV. 1195, 1196–97 (2002).

[169] *Id.*

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

[171] If this were not the meaning intended by the framers of the Bill of Rights, then the clauses in the Ninth and Tenth Amendments alluding to unenumerated rights would be without effect, and that cannot be. "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

Amendment is virtually devoid of meaning. If acts of legislatures are given a presumption of constitutionality that can be rebutted only by the assertion of an enumerated or "fundamental" right, then the purpose of the Constitution has been inverted from a restraint upon the powers of government to a restraint upon the rights of citizens.

The importance of the decision in *Lawrence* is not that it will immediately lead to a dramatic expansion of freedom, but the expansive vision of liberty that it embraces and the promise of liberty that it holds out for the future. The Supreme Court is not likely to give up the "fundamental rights" approach altogether in the short term, but the decision in *Lawrence* will nevertheless be an important precedent for those seeking to expand the reach of liberty in America. Justice Kennedy, in the penultimate paragraph of the decision, seemed deliberately to encourage such use of his opinion:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[172]

[172] *Lawrence*, 539 U.S. at 578–79.