Not So Landmark After All? Lawrence v. Texas: Classical Liberalism and Due Process Jurisprudence

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DUE PROCESS JURISPRUDENCE

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This Note sheds new light on Lawrence v. Texas. Instead of commenting on the political implications of Lawrence, this Note examines how the Supreme Court returned to an older form of substantive due process analysis without explicitly stating so. Although some of the Lawrence scholarship has pondered how Lawrence changed the type of history the Supreme Court should examine when finding fundamental rights, ultimately Lawrence really turned on a conception of classical liberal justice vis-à-vis an application of history. This Note concludes by arguing that whereas a postmodern philosophical approach best explains Lawrence, the Supreme Court ought to apply tenets of classical liberalism in its due process jurisprudence.

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INTRODUCTION

Originating in Lockean and Jeffersonian political theory, the Due Process Clauses of the Fifth and Fourteenth Amendments are hallmarks of American liberal democracy. Safeguarding citizens from state abuse, courts have interpreted the

* The author would like to thank Lou Baltman, Brendan Chandonnet, and the William & Mary Bill of Rights Journal staff. All errors and omissions are the author's.

1 539 U.S. 558 (2003).

2 See infra note 141 and accompanying text.


4 This Note uses the term "liberal" consistently with the doctrine of philosophical classical liberalism, which is a theory that advocates individual liberty, natural rights, and limited government. See Steven J. Heyman, Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence, 10 Wm. & Mary Bill Rights J. 647, 657 (2002) ("[A] central tenet of liberalism is that a boundary must be drawn between the
clauses as both protecting rights unenumerated in the text of the Federal Constitution\(^5\) and granting procedural guarantees that ensure that when the arms of government seek to deprive citizens of life, liberty, or property, they do so in a manner consistent with the Constitution.\(^6\) The former idea is commonly known as \textit{substantive due process} whereas the latter is known as \textit{procedural due process}.\(^7\) In particular, substantive due process has a mixed history in the eyes of the American public, the state and federal judiciary, and various elected officials.\(^8\) Supreme Court decisions that turn on an application of substantive due process are often a piece of a larger domestic debate. Since the Civil Rights era, many substantive due process cases have involved social issues that have sparked heated public discourse as well as a vast array of academic literature.\(^9\)

\textit{Lawrence v. Texas},\(^10\) which held that a Texas anti-sodomy statute violated the Fourteenth Amendment,\(^11\) will follow this trend. If the reaction to \textit{Lawrence} follows the history of reaction to controversial Supreme Court opinions, scholars, journalists, and policymakers will intensely comment on the decision. It is quite possible that individuals across the nation will celebrate \textit{Lawrence}, claiming it as one of the milestones for complete societal acceptance of the rights of homosexuals and the end of needless government regulation of morals.\(^12\) Furthermore, \textit{Lawrence} is interesting from a theoretical standpoint, to wit: academics can understand \textit{Lawrence} as an example of where the politics of tolerance superceded a given community’s interest in virtue.\(^13\) In this sense, \textit{Lawrence} is germane to the outward realm of the state and inward life of the individual.\(^\ast\)). When reading this Note, the reader must not confuse the term “liberal” with how some use the term today — that is, advocating progressive or left of center public policy.


\(^6\) \textit{Id.} at § 13.1 ("The due process clauses also have a procedural aspect in that they guarantee that each person shall be accorded a certain 'process' if they are deprived of life, liberty, or property.").

\(^7\) \textit{Id.}

\(^8\) \textit{See} Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) ("Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights."). \textit{See also infra} note 60.


\(^11\) \textit{Id.} at 558.

\(^12\) \textit{See}, e.g., Laurence H. Tribe, \textit{Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name}, 117 HARV. L. REV. 1893, 1938 n.174 (2004) ("One can expect libertarians and other champions of liberal individualism to claim \textit{Lawrence} as a victory for their camp and to trumpet it as a first salvo in a new war on government regulation generally . . .").

\(^13\) Generally, classical liberalism favors tolerance over community values in order to avoid zealous partisans from fighting with one another, thus ensuring civil peace. \textit{See}
of America v. Village of Skokie." 14 As much as these questions and issues concerning the political implications of Lawrence can and should provoke thoughts, this Note does not add to those inquiries.

Instead, this Note focuses on equally interesting questions of how Lawrence fits within the fundamental rights scheme from the viewpoint of structural analysis, and how lawyers will benefit from understanding Lawrence from the viewpoint of classical liberal political thought. As a beginning point, Lawrence does not follow the recent trend of fundamental rights cases. 15 To be sure, Lawrence has value as a political precedent that, when taken in conjunction with recent events, will hopefully lead to broader politics of inclusion. 16 However, Lawrence will have little effect on how the Rehnquist Court approaches fundamental rights in the future. 17 Whereas Lawrence appeared to be one of the most important cases of the 2003 Supreme Court term, ultimately it is not as landmark as one might perceive from a structural viewpoint, for Lawrence is akin to older Supreme Court opinions that invoked classical liberal ideals.

Part I introduces the reader to the familiar framework under which the Supreme Court has reviewed past fundamental rights cases. This framework presupposes that Justices may either impose a conception of justice or utilize an interpretation of history when determining whether to apply heightened review. 18 Part II then examines the structure of Lawrence itself to see how it fits within fundamental rights jurisprudence. Some argue that Lawrence changes the scope of evidence from.

generally STEVEN KAUTZ, LIBERALISM AND COMMUNITY 75 (1995) ("[P]eace and security, which is the fundamental condition of any civil politics, is permanently threatened by the naturally immoderate passions of human beings.").

14 432 U.S. 43 (1977) (per curiam). In Skokie, the Court reversed the Illinois Supreme Court’s denial of a stay that would have allowed the Nazis to march in Skokie, Illinois. The Court insisted that a denial of a group’s First Amendment right of free speech is unconstitutional without the requisite procedural safeguards of appellate review. Id. at 43–44. Interpreted broadly, Skokie illustrates the Court’s unwillingness to arbitrarily deny the rights of individuals who are unpopular, even if they offend a community’s sense of equality or virtue.

15 See infra Parts I.B.2, II.C–E.


17 See infra notes 176–89 and accompanying text.

which the Court will find fundamental rights, but in the end, the majority's invocation of classical liberal ideals, rather than a new evidentiary scope, controlled the opinion in Lawrence. The Court used "implicit in ordered liberty" analysis without explicitly stating so.

Assuming that is true, Part III then asks (a) whether the Court is going to return to ordered liberty analysis or an equivalent thereof, and (b) if it has or will, does it make a difference in the broader scheme of substantive due process jurisprudence? Part III answers both of these questions in the negative on the grounds of empiricism and a postmodern philosophical approach. Lawrence is not so landmark after all. Whereas the choice to employ natural justice analysis over history and tradition analysis may not make a difference in terms of results, Lawrence illustrates that a natural justice analysis is paramount in fundamental rights jurisprudence.

I. BACKGROUND: FRAMING SUBSTANTIVE DUE PROCESS JURISPRUDENCE

In order to understand how Lawrence fits within the fundamental rights scheme, one must first understand what is meant by a "fundamental right." This section introduces the reader to the relevant issues that frame an analysis of Lawrence. With that in mind, a preliminary description of what constitutes a fundamental right is it is the most significant liberty interest and is deserving of the highest judicial scrutiny:

[W]here fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

If a particular liberty interest is a fundamental right, then "legislative enactments must be narrowly drawn to express only the legitimate [and compelling] state interests at stake." Theoretically, this standard is more exacting than the newest standard articulated for abortion rights or other significant liberty interests.

19 See infra note 140 and accompanying text.
20 See Lawrence, 539 U.S. at 562-79 (2003) (lacking any references to the phrase "implicit in ordered liberty" in the majority opinion).
23 In stressing that Pennsylvania had a "[substantial] interest in potential life," while simultaneously recognizing a woman's right to have an abortion, Justice O'Connor announced
Fundamental rights include those that are enumerated or unenumerated in the Constitution. Moreover, the methods by which Justices find fundamental rights worthy of heightened review are varied and, at times, in theoretical opposition.

A. Method One: Justice as Foundation for Unenumerated Rights

As the Court in Bowers v. Hardwick stated, the Supreme Court has utilized two methods to determine whether a fundamental right exists:

[T]he Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In Palko v. Connecticut, it was said that this category includes those fundamental liberties that are “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [they] were sacrificed.” A different description of fundamental liberties appeared in Moore v. East Cleveland, where they are characterized as those liberties that are “deeply rooted in this Nation’s history and tradition.”

Essentially, the former category is an appeal to a claim of justice whereas the latter is an appeal to righteousness of community. Although not discussing substantive due process, Calder v. Bull characterized how the former category of natural justice could overrule an unjust legislative act:

her “undue burden” standard and concluded that “[a] statute which, ... while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.” Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992).

See, e.g., Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 279 (1990) (holding that the right to terminate life support is a protected liberty under the Due Process Clause of the Fourteenth Amendment after balancing that right against state interests to determine whether a state law passed constitutional muster).

For example, the Fourth Amendment right to be free from unreasonable searches and seizures is an enumerated fundamental right.

See Casey, 505 U.S. at 848 (“Neither 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 . . . .”).


Id. at 191–92 (citations omitted). Another theory, found in Poe v. Utman, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting), and Griswold v. Connecticut, 381 U.S. 479, 492–95 (1965), is that the basis for fundamental liberties is found within enumerations of liberties within the Bill of Rights. But see Tribe, supra note 12, at 1922 (“[T]he Court’s application of the Due Process Clause to give substantive protection to liberty is not and has never in truth been a naming game, and it would take more than language . . . to demote it to one.”).

3 U.S. (3 Dall.) 386 (1798).
The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. . . . There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power. . . . An ACT of the Legislature . . . contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.\(^3\)

The raison d'etre of this statement — that natural justice is the root of fundamental rights and principles — is the basis for many Justices' opinions during the history of Fourteenth Amendment due process jurisprudence.\(^3\)

1. Natural Justice Finds the Fourteenth Amendment

When promoting an economic substantive due process right reminiscent of Adam Smith’s economic philosophy,\(^3\) Justice Peckham wrote in *Lochner v. New York*\(^3\) that an individual possesses "the general right . . . to be free in his person and in his power to contract in relation to his own labor."\(^3\) Although Peckham did not write explicitly that natural justice dictated such a conclusion, the opinion lends itself to the conclusion that his conception of justice, rather than American history or tradition, was his basis for finding that a sixty-hour work week labor law violated the Fourteenth Amendment.\(^3\) Here, the Fourteenth Amendment guaranteed economic rights.

30 Id. at 388 (emphases added and omitted).
33 198 U.S. 45 (1905).
34 Id. at 58.
35 When asking if such a law was "within the police power of the state," Justice Peckham concluded that "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract." *Id.* at 57; cf. *Mulger v. Kansas*, 123 U.S. 623, 661 (1887) ("If . . . a statute purporting to have been enacted to protect . . . public morals . . . is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge . . . ").
The Supreme Court has used due process to evaluate non-economic fundamental rights as well. For example, in \textit{Palko v. Connecticut},\textsuperscript{36} an appellant-convict argued that the Fourteenth Amendment incorporated the Fifth Amendment's double jeopardy prohibition, which made it applicable to the states.\textsuperscript{37} The Court, per Justice Cardozo, interpreted the appellant's argument as stating that the Fourteenth Amendment incorporated all of the Bill of Rights.\textsuperscript{38} In finding for the government, Cardozo stated that the appropriate test for determining whether the Due Process Clause of the Fourteenth Amendment invalidates acts of state legislatures is whether the liberties they infringe are "implicit in the concept of ordered liberty."\textsuperscript{39} Furthermore, the dissenting opinions in \textit{Poe v. Ullman}\textsuperscript{40} explained that lawyers should view the concept of ordered liberty from the standpoint of natural justice. In arguing that a Connecticut ban on contraceptives was unconstitutional, Justice Douglas wrote that one purpose of the Due Process Clause is to grant unenumerated rights; for "to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees."\textsuperscript{41} 

Justice Harlan's dissent in \textit{Poe} is even more on point to this section's discussion. He stated that the only proper understanding of the Due Process Clause was to see it as a tool grounded in natural rights philosophy. He opined, "the reach of Fourteenth Amendment due process...[applies] those concepts which are considered to embrace those rights 'which are...fundamental; which belong...to the citizens of all free governments'...for 'the purposes [of securing] which men enter into society.'"\textsuperscript{42} The objective of substantive due process, according to Harlan, is to help citizens enforce their rights under the classical liberal social contract. Based on this interpretation of the Due Process Clause, it is unconstitutional for a government to act in any way contrary to natural rights or natural justice. This is different than claiming fundamental rights are based in various enumerations of liberty in the Constitution.\textsuperscript{43}

\textsuperscript{36} 302 U.S. 319 (1937).
\textsuperscript{37} Id. at 322.
\textsuperscript{38} Id. at 323.
\textsuperscript{39} Id. at 325. Justice Cardozo explained further that a violation of fundamental rights would be a "violat[i]on [of] those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" Id. at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).
\textsuperscript{40} 367 U.S. 497 (1961).
\textsuperscript{41} Id. at 518 (Douglas, J., dissenting).
\textsuperscript{42} Id. at 541 (Harlan, J., dissenting) (quoting Corfield v. Coryell, 6 F.Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3,230)).
\textsuperscript{43} Id. (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).
\textsuperscript{44} In Justice Douglas's dissent in \textit{Poe}, he stated that fundamental rights derive either from "emanations of other specific guarantees or from experience with the requirements of a free society." Id. at 517 (citations omitted). The majority's opinion in \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965), expanded the former idea, whereas the latter idea is the natural justice concept that this section describes. In \textit{Griswold}, the majority found that a contraceptive ban infringed upon the fundamental privacy rights of married couples because the Ninth
Juxtaposed to the natural justice formulation of fundamental rights is a concept of
due process rights that has its basis in the community.

B. Method Two: Community as Foundation for Unenumerated Rights

The second major foundation for fundamental rights is an appeal to community.
The Supreme Court ratifies the community approach when it appeals to deeply
rooted history and tradition.\(^4\) Here, the given values of a particular democratic
community are the underpinnings for fundamental rights more so than are beliefs
about natural justice. Instead of asking whether a violation of a given right is unconsti-
tutional because the right is "implicit in ordered liberty,"\(^5\) the community approach
argues that a state is free to act "unless in doing so it offends some principle of justice
so rooted in the traditions and conscience of our people as to be ranked as funda-
mental."\(^6\) The implicit in ordered liberty test is thus more akin to classical liberal
thought vis-à-vis the history and tradition test, which is a postmodern approach to
rights.\(^7\) Forthcoming sections of this Note will elaborate on the relevance of this
debate.\(^8\) For now, it is necessary for the reader to understand how the Supreme
Court has employed community as a foundation for substantive due process rights.\(^9\)

1. Appeals to Community Generally

In *Twining v. New Jersey,*\(^1\) the defendants appealed their convictions on, *inter
alia,* due process grounds.\(^2\) They argued that the Fourteenth Amendment incorpo-

Amendment gives citizens more rights than are just found within the text of the Constitution.
*Id.* at 492–95. The Ninth Amendment was the majority's tool to apply a fundamental right
One could argue that this is an indirect application of natural rights because the Preamble,
articles, and amendments of the Constitution have their grounding in classical liberalism;
Justice Harlan, however, would disagree as to the desirability of a penumbra theory. *See Poe,*
367 U.S. at 541 (Harlan, J., dissenting) ("It is not the particular enumeration of rights in the
first eight Amendments which spell out the reach of Fourteenth Amendment due process, but
rather . . . [natural justice].").

\(^4\) *See infra* note 48.
\(^5\) *See supra* note 39.
\(^6\) *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934).
1994) (1688) (basing the desirability of the social contract on the laws of Nature), with
RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989) (stressing the adherence
of liberal values because they are our values rather than the fact that Nature or Reason
dictates their existence).
\(^8\) *See infra* Parts III.B–C.
\(^9\) *See infra* Part I.B.1.

211 U.S. 78 (1908).

*Id.* at 91.
rated the Fifth Amendment’s privilege against self-incrimination as against the states. Taking an originalist approach, the Court asked the controlling question: “Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it?” In short, did the larger community of states view the privilege against self-incrimination as a fundamental right at the time of the founding of the United States? The Court investigated the legislative history on the issue and concluded that the answer was no. Twining thus stands for the proposition that if the majority of states protected a particular liberty by state law at the time of the founding, then that particular liberty is a fundamental right subject to the scrutiny of the Fourteenth Amendment.

2. More Recent Appeals to Community: from Moore to Glucksberg

In 1977, the Court in Moore v. City of East Cleveland examined the constitutionality of a housing ordinance that made it illegal for a grandmother to house more than one grandchild. Understanding that a grant of fundamental rights can cause political backlash, the Court in Moore nonetheless found that the statute activated due process analysis “because the institution of the family is deeply rooted in this Nation’s history and tradition.” The Court reasoned further that the statute “marginally” served the City’s ends of traffic safety and, therefore, the statute was not narrowly tailored.
With this analysis in mind, *Bowers v. Hardwick*\(^{62}\) seemed to ring the death knell for natural justice analysis with its affirmation of *Moore*.\(^{63}\) In reciting the two most relevant tests for fundamental rights\(^{64}\) when deciding that an anti-sodomy statute did not violate substantive due process, Justice White explained that because “[p]roscriptions against [sodomy] have ancient roots,”\(^{65}\) the respondent had no Fourteenth Amendment claim.\(^{66}\) Acknowledging the State’s legitimate interest, and therefore rational basis, in community virtue,\(^{67}\) White refused to apply a natural justice analysis, presumably out of fear of returning to the *Lochner* era: “Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law . . . .”\(^{68}\) *Bowers* thus signaled to the legal community that natural justice had no place in fundamental rights jurisprudence. The last case in this subsection, *Washington v. Glucksberg*,\(^{69}\) confirms the fact that Court has strayed from natural justice analysis in the years following *Bowers*.

*Glucksberg* decided whether due process requires that states respect a fundamental right to assisted suicide.\(^{70}\) From the outset of the opinion, the reader can infer Chief Justice Rehnquist’s structural analysis from his observation that, “[i]t has always been a crime to assist a suicide in the State of Washington.”\(^{71}\) If there was any doubt as to whether the Court would employ natural justice, Chief Justice Rehnquist dispelled such a thought. He wrote, “[w]e begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”\(^{72}\) In applying the communitarian standard for fundamental rights, Rehnquist concluded there was no fundamental right to assisted suicide because the State of Washington’s legal history, Western democracy’s legal history, the common law, and American legal history did not support that right.\(^{73}\) Even though some states, the federal government, and other Western countries were debating the plausibility of lifting assisted suicide bans, these facts were not enough evidence to conclude


\(^{63}\) *Id.* at 192.

\(^{64}\) *See supra* note 28 and accompanying text.

\(^{65}\) *Bowers*, 478 U.S. at 192. For a more full description of the reasoning in *Bowers*, see *infra* notes 91–97 and accompanying text.

\(^{66}\) *Bowers*, 478 U.S. at 194.

\(^{67}\) *Id.* at 196.

\(^{68}\) *Id.* at 194.

\(^{69}\) 521 U.S. 702 (1997).

\(^{70}\) *Id.* at 705.

\(^{71}\) *Id.* at 706.

\(^{72}\) *Id.* at 710 (emphasis added). Of course, this ignored the Court’s own precedent. *See supra* notes 28–51 (recalling the dual methods for finding fundamental rights pursuant to the Due Process Clause).

\(^{73}\) 521 U.S. at 710–17.
that assisted suicide was a deeply rooted fundamental right sufficient to invoke an analysis of whether a narrowly tailored compelling state interest would allow an infringement of the right. Assuming the foregoing is true, that in 1997 the Court deemed the investigation of deeply rooted history and tradition the only relevant inquiry as to whether a given liberty was a fundamental right for the purposes of the Fourteenth Amendment, then Glucksberg should have controlled the analysis in Lawrence. Although the Supreme Court adheres regularly to stare decisis, the following section argues that, in fact, Glucksberg did not control Lawrence. The Court instead returned to an older substantive due process decision-making model.

II. ANALYZING LAWRENCE: JUSTICE OR COMMUNITY AS FOUNDATION FOR PRIVACY RIGHTS?

Refusing to be bound by stare decisis, the Court in Lawrence overruled Bowers and extended the right of privacy to adult consensual homosexual sexual activity. The Court aimed to dispute the understanding of history in Bowers in order to discredit Justice White’s reasoning. With that in mind, the Court invoked both (a) recent changes in the state law and (b) European case law as its communitarian foundation for protecting the autonomy of practicing homosexuals. These invocations, however, were a mere façade for what really drove the majority opinion. Whereas the Court also implied that equal protection analysis was “tenable,” ultimately the Court’s decision turned on neither equal protection nor the above-mentioned community foundation for rights, but on sentiments reminiscent of implicit in ordered liberty analysis and classical liberal political truth. To be sure, the Court in Lawrence did not explicitly grant a new “fundamental right,” however, the Court’s philosophical opinion leads to no other conclusion.

74 Id. at 717–19, 725. The Court did, however, consider that the State’s interest was legitimate to pass a rational basis analysis. Id. at 728–30.
75 See, e.g., Dickerson v. United States, 530 U.S. 428, 443 (2000) (refusing to overrule the infamous Miranda rule because the “principles of stare decisis weigh heavily against overruling it now”).
77 See infra Part II.B (arguing that this attempt to discredit the Court’s reasoning in Bowers failed and as such the Court in Lawrence must have changed the fundamental rights decision-making model).
78 See infra Part II.E.
79 “Though there is discussion of ‘fundamental proposition[s],’ . . . nowhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause . . . .” Lawrence, 539 U.S. at 586 (Scalia, J., dissenting) (internal citations omitted). Although Scalia’s observation is correct, this Note shows that the Lawrence decision must be understood as a fundamental rights case. See generally Lofton v. Sec’y of Dep’t of Children & Family Servs., 377 F.3d 1275 (11th Cir. 2004) (Barkett, J., dissenting) (arguing that Lawrence reaffirmed a fundamental right to privacy based in part on recent history and tradition).
A. Necessary Facts

The relevant facts are as follows. Two police officers came to Lawrence's home for an alleged weapons violation.\(^80\) There was no issue over whether their entry into Lawrence's apartment triggered Fourth Amendment analysis.\(^81\) "The officers observed Lawrence and another man, Tyson Garner, engaging in a sexual act."\(^82\) Unlike the facts in Bowers, these men were arrested and convicted of violating a sodomy statute.\(^83\) Also, unlike the statute in Bowers, the Texas statute in Lawrence applied only to same-sex conduct: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex . . . [and a]n offense under this section is a Class C misdemeanor."\(^84\) The statute defines "[d]eviate sexual intercourse" as same-sex fellatio or any genital/anal intercourse.\(^85\) Lawrence and Garner were convicted and all attempts to appeal their convictions within the State of Texas failed.\(^86\) The Texas Court of Appeals, for example, cited the holding and reasoning in Bowers as one of the factors in affirming Lawrence and Garner's convictions.\(^87\) When the petitioners appeared before the United States Supreme Court, the questions they presented were (a) whether the Texas statute (Statute) violated the Equal Protection Clause, (b) whether the Statute violated due process, and (c) whether Bowers v. Hardwick should be overruled.\(^88\) The Lawrence decision focused on questions (b) and (c), ultimately overruling Bowers.\(^89\)

\(^{80}\) Lawrence, 539 U.S. at 562.
\(^{81}\) Id. at 563.
\(^{82}\) Id.
\(^{83}\) Id. In Bowers the respondent was arrested, but the charges were dropped at a preliminary hearing. See Bowers, 478 U.S. at 187–88. The respondent had standing to bring his case to the Supreme Court based on the fact that he was in "imminent danger of arrest." Id. at 188.
\(^{84}\) TEX. PENAL CODE ANN. § 21.06(a)-(b) (Vernon 2003). The applicable Georgia statute when Bowers was arrested applied both to heterosexual and homosexual couples. See GA. CODE ANN. § 16–6–2(a)-(b) (1984), overruled by Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998).
\(^{85}\) See TEX. PENAL CODE ANN. § 21.01(1) (Vernon 2003).
\(^{86}\) Lawrence, 539 U.S. at 563.
\(^{87}\) Id. ("The majority opinion indicates that the Court of Appeals considered our decision in Bowers v. Hardwick to be controlling . . . ") (citation omitted); Lawrence v. State, 41 S.W.3d 349, 361 (2001) ("In fact, there was such unanimity of condemnation that sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia. . . . In Texas, homosexual conduct has been a criminal offense for well over a century.") (citing Bowers, 478 U.S. at 193).
\(^{88}\) Lawrence, 539 U.S. at 564.
\(^{89}\) Id. at 578 ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.").
**B. Reasonable Minds Differ? The Lawrence Court Fails to Undercut Bowers**

In *Bowers*, Justice White began his analysis by stating that the question requiring resolution was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." As previously mentioned, the Court in *Bowers* meant only to examine American history and tradition in determining whether there was a "fundamental right . . . to engage in sodomy." The Court then attempted to explain why it thought that "[p]roscriptions against that conduct have ancient roots." The Court made statements about how sodomy was an act that many states prohibited since the colonial era. The Court added that all of the states outlawed sodomy at the time of the implementation of the Fourteenth Amendment, and that sodomy was outlawed by about half of the states in 1986. Thus, the Court purported to give enough historical information for those who think that (a) history and tradition should be seen through a colonial-originalist-antebellum lens, (b) a Fourteenth Amendment time-of-enactment lens, or (c) a more current-events lens.

In summary, the following analytical framework is a helpful way to understand the logic of *Bowers*:

(a) If something is a fundamental right, then it is supported by deeply rooted American history and tradition.
(b) Therefore, if something is not supported by deeply rooted American history and tradition, it is not a fundamental right.
(c) All homosexual sexual activities are acts of sodomy.
(d) Sodomy is not supported by history and tradition.
(e) Therefore, sodomy is not a fundamental right.
(f) Therefore, all homosexual sexual activities are not fundamental rights.

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90 *Bowers*, 478 U.S. at 190. The Court in *Lawrence* argued that framing the issue in that manner signaled what was to be a denial of Bowers's rights. Commenting on the issue framing in *Bowers*, Justice Kennedy wrote "[t]hat statement [in *Bowers*], we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567.
91 *Bowers*, 478 U.S. at 190; see also supra notes 63–69 and accompanying text.
92 *Bowers*, 478 U.S. at 192.
93 *Id.*
94 *Id.* at 193.
95 See *id* at 192–93.
96 See *id.* at 191–96.
Presuming this model is correct, a court that would want to undercut *Bowers* would have two options: (1) to attack the premises and conclusions within the model, which means that deeply rooted American history and tradition did in fact support the right to engage in sodomy, or (2) to change the analytical framework itself. The following subsections argue that because the Court in *Lawrence* failed to deconstruct the model, then the Court must have chosen to shift the analytical framework. This leads one to conclude that the new framework is either a slight alteration of the *Bowers-Glucksberg* history and tradition test or a new test based on natural justice.

In essence, the Court in *Lawrence* did not posit that American history “suggest[ed] approval of homosexual conduct” but that certain historical “considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.” The gist of the Court’s reasoning here is that (a) the state did not apply sodomy laws to consensual private activity between adults and (b) the state did not mean to enforce sodomy laws only against homosexuals.

To begin, the Court wrote that “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.” The Court noted that sodomy laws were meant to protect children and rape victims. The Court asserted that actual prosecutions were only of “relations between men and minor girls or minor boys . . . relations between adults implicating disparity in status, or relations between men and animals.” It seems, therefore, that history supported the “right to be let alone.”

Moreover, “[t]he absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual . . . did not emerge until the late 19th century.” If there was no real homosexual identity, then there would be no law to affect him/her. As the Court implied, one cannot assert that proscriptions against homosexual intimacy have ancient roots if there was no identity of persons for whom to proscribe that conduct.

This examination raises the issue of whether the Court in *Lawrence* negated the logic of *Bowers*. Resolution of this issue depends on how the reader interprets the

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97 See infra Part II.D.
98 See infra Part II.E.
99 Lawrence, 539 U.S. at 568–69.
100 Id. at 568.
101 Id. at 569.
102 Id.
103 Id.
104 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing the fundamental importance of the “right to be let alone”).
105 Lawrence, 539 U.S. at 568.
106 See id. at 568–69.
preceding discussion. One interpretation of *Lawrence* could be that there is a deeply rooted American history and tradition of letting private consensual adult sexual conduct occur without state interference. Accordingly, there may be a foundation for a fundamental right; this discussion would extend what the Court means by a right of privacy to all consensual adult sexual conduct. On the other hand, the correct interpretation of the foregoing discussion is that it failed to undercut the reasoning in *Bowers*.

As mentioned previously, in order for the *Bowers-Glucksberg* method of fundamental rights analysis to protect consensual homosexual sexual activity, it must be supported by deeply rooted American history and tradition. Commenting on the proposition that sodomy laws were not enforced specifically against practicing homosexuals in private, Justice Scalia in his *Lawrence* dissent countered, "[t]his observation in no way casts into doubt the 'definitive [historical] conclusion' on which *Bowers* relied: that our Nation has a longstanding history of laws prohibiting *sodomy in general* — regardless of whether it was performed by same-sex or opposite-sex couples." As a matter of logic, it follows that if all sodomy is prohibited, then private homosexual sodomy is prohibited also regardless of non-enforcement. This leads to the inevitable conclusion that an appeal to community, such as an invocation of long-standing majoritarian tradition, supports neither the idea of a fundamental right of sodomy nor private, homosexual, consensual adult sexual conduct. As the preceding section pointed out, the Court in *Lawrence* had two options: (1) to work within the *Bowers-Glucksberg* framework to overturn *Bowers* or (2) to change the analytical framework itself. Thus, the only way to counter Scalia's criticism is to conclude that the Court in *Lawrence* must have changed the analytical framework.

**C. Why Not Equal Protection?**

Before describing what that new framework is, it is necessary to take a brief aside into why the Court in *Lawrence* needed to change the analytical framework — that is, why the Court did not adopt Justice O'Connor's equal protection opinion. In her concurring opinion, Justice O'Connor focused on the fact that the Statute criminalized same-sex sodomy whereas it did not criminalize heterosexual

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107 This interpretation is comparable to part of Justice Stevens's dissent in *Bowers*. "Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." *Bowers*, 478 U.S. at 217 (Stevens, J., dissenting) (quoting Fitzgerald v. Porter Mem'l Hosp., 532 F.2d 716, 719–20 (7th Cir. 1975)).

108 See supra notes 73, 92 and accompanying text.

109 *Lawrence*, 539 U.S. at 596 (Scalia, J., dissenting) (citations omitted).

110 See supra notes 98–99 and accompanying text.
sodomy. The State of Texas argued that because homosexuals were not a suspect class, and because the State had a legitimate interest in the protection of morals, the Statute passed rational basis review. However, O'Connor distinguished Bowers, in which the sodomy statute outlawed all sodomy, from the facts in Lawrence, where Texas only outlawed homosexual sodomy:

This case raises a different issue than Bowers: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.

O'Connor suggested that Bowers's challenge in 1986 failed because (a) history and tradition did not support his due process claim and (b) the sodomy law was equally applied to all individuals. In Lawrence, however, the State purposefully attacked a group that offended the community's sense of virtue. Justice O'Connor thus joined the majority's result in Lawrence not because she thought the Statute infringed on a fundamental and natural right, but because she disapproved of how the Statute was a tool of majoritarian tyranny.

If the Statute was a tool of majoritarian tyranny, then why did the majority in Lawrence not adopt O'Connor's concurrence? After all, the Court implied that O'Connor's analysis was "a tenable argument." The reason the Court did not employ O'Connor's analysis was because it needed "to address whether Bowers

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111 Lawrence, 539 U.S. at 581 (O'Connor, J., concurring).
112 Id. at 582.
113 Id. See also supra notes 84-85 and accompanying text.
114 Lawrence, 539 U.S. at 582 (O'Connor, J., concurring) (citation omitted). In this respect, O'Connor's analysis follows the type of equal protection analysis described in Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), and Romer v. Evans, 517 U.S. 620 (1996). In Cleburne, the Court held that by forcing a mental health group home to apply for a special use zoning permit for no apparent rational reason illustrated a community's discriminatory purpose and, therefore, the Court deemed the requirement to be in violation of the Equal Protection Clause. Cleburne, 473 U.S. at 435, 447-51. In Romer, the Court invalidated a Colorado law stating that homosexuals could never be afforded any protection from discrimination because the law was arbitrarily discriminatory in nature and the government did not have a legitimate interest in being discriminatory for its own sake. Romer, 517 U.S. at 633-36.
115 See Lawrence, 539 U.S. at 582-83 (O'Connor, J., concurring).
116 See id. at 583 (O'Connor, J., concurring).
117 Id. at 574.
itself has continuing validity [under the Federal Constitution]."\textsuperscript{118} The Court had to announce an opinion that all sodomy statutes offended an individual’s right to privacy. Assuming that (1) history and tradition do not support a right to private consensual adult homosexual sexual activity but that (2) a state cannot legitimately target an unpopular group, then it is possible, according to O’Connor, for states to continue to have sodomy statutes that apply equally to both same-sex and opposite-sex couples.\textsuperscript{119} This is why the Court must have had to announce a new standard — it needed to find a way to ensure that such statutes would be invalid because they violated substantive due process. In summary, \textit{Lawrence} altered due process precedent because (1) equal protection analysis would fail to achieve the Court’s ultimate goal, and (2) as previously mentioned, the Court did not undercut the understanding of history in \textit{Bowers}.

\textbf{D. Understanding Lawrence: Relativistic Communitarianism or Classical Liberal Redux?}

\textit{Lawrence} was not in sync with the due process precedent of the last two decades. Evidence in \textit{Lawrence} supports two possible explanations of \textit{Lawrence}’s contribution to fundamental rights jurisprudence: that either (a) \textit{Lawrence} appealed to community as a foundation for finding a right, or (b) communitarian appeals in \textit{Lawrence} are irrelevant because of the Court’s classical liberal view of natural justice.\textsuperscript{120} If the former is true, then \textit{Lawrence} primarily appealed to community and invoked majoritarian history. Under view (a), a liberty interest can be a fundamental right only if the community deems it so. Some evidence in the case points to understanding \textit{Lawrence} as shifting the standard of \textit{Bowers-Glucksberg} from deeply rooted history and tradition to a more generational understanding of history, i.e., that

\textsuperscript{118} Id. at 575. The Court seemed to ignore O’Connor’s argument that if a sodomy law was applied to opposite-sex and same-sex couples alike, “such a law would not long stand in our democratic society.” Id. at 584–85 (O’Connor, J., concurring). Nor would it follow Justice Thomas’s call for judicial restraint such that even though this was an “uncommonly silly [statute],” id. at 605 (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. at 527) (Stewart, J., dissenting)), and that if he could “[he] would vote to repeal it,” id., such work is meant for the legislature only, \textit{see id}. The Lawrence Court was impatient with normal democratic processes and, as such, sought to instead teach America the virtues of liberal politics. \textit{See infra} notes 209–15 and accompanying text.

\textsuperscript{119} Id., 539 U.S. at 584–85 (O’Connor, J., concurring).

\textsuperscript{120} \textit{See infra} notes 122–173 and accompanying text. To be sure, \textit{Lawrence} does not explicitly hold that the liberty interest it found was a fundamental right, but the reader should understand \textit{Lawrence} in terms of fundamental rights.
rights are a function of the times.\textsuperscript{121} This Note shall call this view relativistic communitarianism.

In support of view (a), specifically relativistic communitarianism, Justice Kennedy wrote: "we think that our laws and traditions in the past half century are of most relevance here. [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."\textsuperscript{122} This emerging recognition began, "and should have been apparent when Bowers was decided,"\textsuperscript{123} when, in 1955, the American Law Institute wrote in its Model Penal Code that private and consensual acts should not be criminalized.\textsuperscript{124} The Court in Lawrence noted that before 1961, the year Illinois conformed to the American Law Institute's recommendation, states rarely enforced these laws.\textsuperscript{125} Moreover, by the time of Bowers, only half kept such laws as part of their respective statutory compilations.\textsuperscript{126} The Court concluded its discussion of changes in American law by stating that as of the summer of 2003, only thirteen states had sodomy laws, "of which 4 enforce their laws only against homosexual conduct."\textsuperscript{127} In the states that criminalize sodomy the pattern of non-enforcement continues.\textsuperscript{128}

Not only did the Court in Lawrence seem to invoke American relativistic communitarianism, but it professed to apply recent changes in European law. First, the Court cited Dudgeon v. United Kingdom,\textsuperscript{129} which was a 1981 European Court of Human Rights case in which the High Court invalidated an anti-sodomy law based on Article 8 of the European Convention on Human Rights.\textsuperscript{130} The Court also cited other European Court of Human Rights cases to support the notion that Europeans had changed their attitudes towards private consensual adult sexual conduct.\textsuperscript{131}

Furthermore, the Court cited an amicus brief from Amnesty

\textsuperscript{121} In fact, this is part of Professor Huhn's argument. See Wilson Huhn, The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence, 12 WM. & MARY BILL RTS. J. 65, 68–77, 83–90 (2003). Relativistic communitarianism fails to fully explain Lawrence. At best, the Court in Lawrence employed recent changes in American law merely to bolster its opinion grounded in terms of natural justice. For a thorough discussion of this, see infra notes 123–147 and accompanying text.

\textsuperscript{122} Lawrence, 539 U.S. at 571–72.

\textsuperscript{123} Id. at 572.

\textsuperscript{124} See MODEL PENAL CODE § 213.2 cmt. 2 at 372 (1980), quoted in Lawrence, 539 U.S. at 572.

\textsuperscript{125} Lawrence, 539 U.S. at 572.

\textsuperscript{126} Id. at 573.

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Id. (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. ¶ 52 (ser. A) (1981)).

\textsuperscript{130} See Dudgeon, 45 Eur. Ct. H.R. ¶¶ 49–51. For more on this case, see infra notes 157–60 and accompanying text.

\textsuperscript{131} See Lawrence, 539 U.S. at 576–77 (citing Dudgeon among other cases).
International noting that Canada, Israel, New Zealand, South Africa, Australia, and other nations repealed their sodomy laws. A cursory examination of the majority's recitation of these changes would lead a reader to think that the Court embraced global relativistic communitarianism.

Based on the facts presently before the reader, one may draw two possible conclusions from the foregoing analysis: (1) that the Court in Lawrence shifted away from the Bowers-Glucksberg method of analysis or (2) that this analysis does not necessarily mean that the Court implied a new due process standard, but that the Court made a weak attempt to further undercut the Bowers understanding of history, thus undercutting Bowers itself. In his dissent, Justice Scalia attacked the above-mentioned points of the majority opinion as dicta because the preferred due process test is that fundamental rights are only those that are "deeply rooted in this Nation's history and tradition." According to Scalia, the debate over whether one should apply recent changes in history is irrelevant because the phrase "deeply rooted history" only means relevant history of the 18th century founding or when the Fourteenth Amendment was ratified. Moreover, because the test was meant to investigate "this Nation's" history and tradition, attempts to investigate European case law have no bearing on American due process analysis cases.

Notwithstanding Scalia's contention that the Court's invocation of recent history was dicta, the reader must understand that if the Court in Lawrence was willing to embrace global relativistic communitarianism, that would further destroy the Court's capacity to be a counter-majoritarian institution. The reason for this is that since at least the 1940s, the fiction that the United States Supreme Court is a counter-majoritarian institution has come into question. For example, some political scientists have argued that the Court's most politically charged opinions have in fact followed trends in public opinion. If we were to accept the proposition that the Court could deem a particular liberty interest to have fundamental rights status solely based on the fact that a community has decided to capriciously accept the liberty interest as fundamental, then this calls into question the institutional legitimacy of the Supreme Court.

Furthermore, in spite of issues of institutional legitimacy, Justice Scalia correctly argued that if the Court in Lawrence embraced relativistic communitarian-

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132 Id.; see also Brief Amici Curiae of Mary Robinson et al. at 11–15, Lawrence (No. 02–102); Lawrence, 539 U.S. at 576–77. But see id. at 598 (Scalia, J., dissenting) ("The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is . . . dicta.").

133 Lawrence, 539 U.S. at 598 (Scalia, J., dissenting) (emphasis added).

134 Id.

ism, such an embrace would logically threaten abortion rights. He stated, *inter alia*, that the Court may have invalidated prior precedent if "[the precedent] has been subject to 'substantial and continuing' criticism." Just as *Bowers* was subject to criticism in the last two decades, "*Roe* too (and by extension *Casey*) ha[s] been (and still is) subject to unrelenting criticism." One may argue that if the Court articulated a relativistic communitarian standard for fundamental rights in *Lawrence*, such a standard could theoretically work to constrict rights just as much as it could expand rights based on the passions and whims of the community.

As much as Scalia’s critical points have a sound basis, one need not fret over them, for the Court in *Lawrence* did not announce a global relativistic communitarian standard. In the next section, this Note argues that the foundation for the Court’s opinion is its conception of natural justice. Because the Court is primarily concerned with maintaining the dignity and autonomy of free-willed individuals, such an idea is inconsistent with the notion of the Court announcing a relativistic communitarian standard. With that in mind, the reader should under

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136 *See Lawrence*, 539 U.S. at 586–89 (Scalia, J., dissenting).
137 Id. at 587 (Scalia, J., dissenting).
138 Id. at 589 (Scalia, J., dissenting).
139 The Court in *Lawrence* was somewhat aware of this and is why it distinguished the *Bowers-Lawrence* saga from the abortion rights saga. The Court reasoned that although *Roe* was subject to criticism, *Roe*, unlike *Bowers*, induced reliance on the part of many women such that they knew they had the freedom to choose. *Id.* at 577. The Court in *Lawrence* argued that no one really relied on the holding of *Bowers*. *Id.*. *But see id.* at 589 (Scalia, J., dissenting) (countering the majority’s claim that *Bowers* induced no reliance by showing that many states and the federal government have relied on *Bowers* to enforce morals legislation).
140 One argument is that *Lawrence* changed the substantive due process doctrine to apply a global relativistic communitarian standard. *See Huhn, supra* note 121, at 83–90. A recent Eleventh Circuit dissent echoes this sentiment. *See Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 377 F.3d 1275 (11th Cir. 2004) (Barkett, J. dissenting) (arguing that *Lawrence* reaffirmed a fundamental right to privacy based in part on recent history and tradition).
141 Whereas *Lawrence* seems to employ relativistic communitarianism, this Note argues that classical liberal political ideals controlled *Lawrence*.
142 If *Lawrence* had announced a relativistic communitarian standard, it would have endorsed a theory of constitutional interpretation that defers to true democratic impulses, for a relativistic communitarian standard would ground fundamental rights according to whether the community felt that they were fundamental. These majoritarian impulses may clash with the notion of protecting individual rights, such as the right to privacy. Commenting on the problems with direct democracy, Madison wrote that in a direct democracy, "[t]he passions, therefore, not the reason, of the public would sit in judgment." *The Federalist* No. 49, at 317 (James Madison) (Clinton Rossiter ed., 1961). Of course, "[k]nowledge makes men gentle; [and only] reason leads to humanity." *Montesquieu, The Spirit of the Laws, in Selected Political Writings* 203 (Melvin Richter trans., Hackett Pub. Co. 1990) (1748). Working back from this premise, if we presume that the Court in *Lawrence* intended humane ends, then it must have endorsed a theory that has in mind reason and not passions. Direct democratic impulses are irrational and contradict the dispassionate tenets of classical
stand all of the historical references in Lawrence as a shallow endeavor to attack the reasoning in Bowers. Even if one were to delete the description of history in Lawrence, the opinion would still have merit as a piece of classical liberal philosophy.

E. How the Lawrence Court Extended the Fundamental Right of Privacy and Association à la Means of Natural Justice

This Section argues that readers should understand Lawrence as an implicit in ordered liberty case that granted the fundamental right of privacy without ever using the terms “implicit in ordered liberty,” “natural justice,” or “fundamental right.” Three elements illustrate this point: (a) language in the majority opinion that proves the Court did not mean to rely solely on the community as a foundation for rights; (b) application of precedent where that precedent itself has its origins in classical liberal natural justice; and (c) elements of liberal political philosophy found within the opinion itself.

1. Whither Community?

To begin, Justice Kennedy quotes his own concurring opinion from County of Sacramento v. Lewis in Lawrence: “History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” Although Kennedy’s quote from Lewis was referring to the need to look at government interests, it has salience nonetheless as a starting point for this subsection’s argument that Lawrence did not primarily rely on history and tradition. More on point is Justice Stevens’s Bowers dissent that the Court in Lawrence: “The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” The Court in Lawrence thus implied that at times history liberalism, thus the Court could not have embraced a relativistic communitarian standard that invokes true democratic principles.

142 See supra Part I.A (describing how the Court has deemed a liberty interest to be fundamental and hence deserving of the strictest scrutiny only if it is implicit in ordered liberty or grounded in natural law).


144 Lawrence, 539 U.S. at 572 (quoting Lewis, 523 U.S. at 857 (Kennedy, J., concurring)).

145 The quote continues: “There is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amendment, is bound to respect.” Id. at 857–58.

and tradition could lead to unjust results, which is certainly true in Lawrence and Garner's case, and therefore, the Court needed to invoke a more natural justice oriented theory to overrule Bowers. Certainly, courts should not sustain laws merely because they were "laid down in the time of Henry IV."\textsuperscript{147}

2. Reliance on Precedent: Indirect Application of Liberal Theory

Not only did \textit{Lawrence} counsel against applying the community's will for its own sake, but the Court also referred to cases steeped in classical liberal thought. The Court commenced this process by initially citing \textit{Pierce v. Society of Sisters}\textsuperscript{148} and \textit{Meyer v. Nebraska},\textsuperscript{149} but it reasoned that "the most pertinent beginning point [was its] decision in \textit{Griswold v. Connecticut}.”\textsuperscript{150} This Note has observed that Justice Harlan's concurring opinion in \textit{Griswold} was grounded in natural justice.\textsuperscript{151} The Court also availed itself of its opinion in \textit{Roe v. Wade}.\textsuperscript{152} Commenting on the correctness of the decision in \textit{Roe}, the Court in \textit{Lawrence} wrote that the case "recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”\textsuperscript{153} This statement supporting free will is a liberal sentiment,\textsuperscript{154} and one that readers can analogize to a statement supporting the free will of a homosexual to make fundamental decisions controlling his or her destiny, such as the right to be intimate with another individual of the same sex.\textsuperscript{155}

Furthermore, albeit meant to undercut the reasoning of \textit{Bowers}, the Court's invocation of \textit{Dudgeon v. United Kingdom}\textsuperscript{156} indirectly supports the idea that \textit{Lawrence} is a natural justice case. As previously mentioned,\textsuperscript{157} that case invalidated

\textsuperscript{147} Oliver Wendell Holmes, \textit{The Path of the Law}, 10 Harv. L. Rev. 457, 469 (1897).
\textsuperscript{148} 268 U.S. 510 (1925). The Court in \textit{Pierce} made a claim to justice that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." \textit{Id.} at 535.
\textsuperscript{149} 262 U.S. 390 (1923).
\textsuperscript{150} \textit{Lawrence}, 539 U.S. at 564 (quoting Griswold v. Connecticut, 381 U.S. 479 (1965)).
\textsuperscript{151} For more on this and how the Court made other "broader statements" of liberty, see \textsuperscript{supra} Part I.A.1.
\textsuperscript{152} 410 U.S. 113 (1973).
\textsuperscript{153} \textit{Lawrence}, 539 U.S. at 565.
\textsuperscript{154} See, e.g., \textit{HOBSES}, \textsuperscript{supra} note 49, ch. xiv, at para. 1 ("\textit{THE RIGHT OF NATURE . . . jus naturale,} is the liberty each man hath to use his own power, as he will himself . . . and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto.").
\textsuperscript{155} \textit{See Lawrence}, 539 U.S. at 578–79.
\textsuperscript{157} \textit{See supra} notes 130–32 and accompanying text.
a European anti-sodomy law. In the process of doing so, Dudgeon cited liberal expressions:

The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfillment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. . . . [W]henever the State sets up rules for the behaviour of the individual within this sphere, it interferes with the respect for private life . . . .\(^{158}\)

Thus, Lawrence appealed to a case stressing liberal natural justice to support its larger conclusion that "[t]he liberty protected by the Constitution allows homosexual persons the right to make [the] choice [to choose to form intimate bonds in their private lives]."\(^{159}\) Whereas Lawrence recited precedent steeped in liberal theory, the strongest argument for the suggestion that classical liberal natural justice best explains Lawrence is that the language in Lawrence itself echoes classical liberal political theory.

3. Lawrence as Classical Liberal Political Philosophy

The portions of the Lawrence opinion that this Note calls philosophical in nature are found at the beginning and end of the majority's opinion.\(^{160}\) These portions lack citations to precedent or authority, indicating that they provide the best insight into how the majority (especially Justice Kennedy) thought about this issue.\(^{161}\) Although the Court never used the term "natural justice," the comparisons are plentiful.\(^{162}\) Likewise, even though the Court never wrote that Lawrence and Garner's rights were "implicit in ordered liberty," the beginning of the opinion spoke broadly to the nature of liberty.

In the third sentence of the opinion, the Court proclaimed that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence."\(^{163}\) This normative statement reflects a general sentiment against the omnipresent state; liberal philosophers argue that it is imperative that a


\(^{159}\) Lawrence, 539 U.S. at 567.

\(^{160}\) See id. at 562, 578–79.

\(^{161}\) See id.

\(^{162}\) See infra notes 164–74 and accompanying text.

\(^{163}\) Lawrence, 539 U.S. at 562 (emphasis added).
liberal government have limited ends. The Court continued, defining the concept of liberty in terms consistent with classical liberalism: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." The Court thus reasoned that within the ideal of protecting the individual from the omnipresent state is the promise that certain intimate conduct is also exempt from state interference.

Consistent with the classical liberal notion that freedom has spatial boundaries, the Court cautioned that its extension of an intimate privacy right did not give pure sexual license:

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 involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

The Court then spoke to the proper ends of the arms of government. Much like how classical liberalism is cautious to infringe on the personal autonomy of individuals

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164 For example, Locke teaches that the “natural liberty of man is to be free from any superior power on earth . . . .” Locke, supra note 3, § 17. Combining that precept with the concept that human beings only collectively participate in organized civil society for the “mutual preservation of their lives, liberties and estates,” then one must understand the liberal state as one that maximizes personal freedom while only limiting that freedom for the narrowest of ends. Id. § 123; cf. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (limiting the power of the sovereign to act when an act would violate classical liberal precepts). See generally Hobbes, supra note 49, ch. xxi, at para. 18 (“In cases where the sovereign has prescribed no rule, there the subject hath the liberty to do or forbear . . . .”).

165 Lawrence, 539 U.S. at 562. For a liberal statement of respect for liberty of thought, tolerance, and protection of minority rights thereof, see John Stuart Mill, On Liberty 18 (David Spitz ed., W.W. Norton & Co. 1975) (1859) (“If all mankind minus one were of one opinion . . . mankind would be no more justified in silencing that one person, than he . . . would be justified in silencing mankind.”).

166 See generally Hobbes, supra note 49, chs. xxi, at paras. 11–12, xlii, at paras. 126–27 (implying that when one subject invades the physical liberty of another subject, the attacker has broken the social contract between subjects and returned them to a state of nature, and thus the victim may exercise the subject's right of self-defense found within the state of nature).

167 Lawrence, 539 U.S. at 578. The reader should not confuse this cautionary expression with that found within Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring), in which the Justice reminded Griswold's readers about the narrow scope of the majority's opinion. See id. at 498–99 (“[I]t should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct.”). That cautionary expression was more concerned with community mores vis-à-vis liberal thought.
(for the liberal regime is supposed to have limited ends such as peace, security, and respect for autonomy), the Court in Lawrence wrote that "[the] Texas Statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."  

Next, the Court understood that its opinion would generate political backlash. Nevertheless, whereas it is true that for liberals truths are self-evident, the Court applied a theory of rights that holds true certain constants, yet makes them fluid to the times. "[P]ersons in every generation can invoke [Constitutional] principles in their own search for greater freedom." One could interpret this statement as embracing a relativistic communitarian standard but, on the other hand, this statement does not tell the reader that the community merely defines what liberty interests are fundamental rights. More correctly, this statement signifies that there are certain truths dictated by natural justice that the political community can come to realize apply to a particular set of facts. The truth itself remains constant.  

Although insightful, the historical analysis in Lawrence comes second to its philosophical teachings. The beginning and end of the opinion illustrate how Lawrence must be understood as an implicit in ordered liberty case and that the strong language the Court used to characterize the importance of Lawrence and Garner's liberty interest commands that one sees this interest as a fundamental right, notwithstanding the fact that the case appears to turn on a lack of legitimate state interest. Working from the presumption that Lawrence is a natural justice fundamental rights case, Part III explores (a) whether the federal courts will revisit implicit in ordered liberty analysis and (b) whether the observation that Lawrence overruled Bowers not only in terms of holding, but also in terms of proper due process reasoning makes a significant difference in substantive due process jurisprudence.

III. NOT SO LANDMARK AFTER ALL? LAWRENCE AS AN ISOLATED YET PHILOSOPHICALLY DEFENSIBLE CASE

Presuming that Part II of this Note is correct in claiming that a classical liberal conception of justice dictated the outcome in Lawrence, this Note must now address

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168 See KAUTZ, supra note 13, at 22–37.
169 Lawrence, 539 U.S. at 578 (emphasis added). On its face, this language suggests that the Court was using a heightened rational basis review to invalidate the Statute. Although one is correct to think that the Court was attacking the purported state interest, presumably morality, the language invoked by the Court suggests that the Court meant not only to chastise the purported state interest, but also to elevate Lawrence and Garner’s liberty interest.
170 This may be why the Court never used the terms “fundamental right” or “implicit in ordered liberty.” A fear of political backlash may also be why the Court limited its holding to the facts of the case so that the “government [did not have to] give formal recognition to any relationship that homosexual persons seek to enter.” Id.
171 Id. at 579.
172 See supra note 170 and accompanying text.
two consequences of that assessment. First, when the Supreme Court alters precedent, the obvious question to ask is: how will that alteration be binding on lower courts? An initial reaction from the reader should be that if the Court in Lawrence approached a due process case in a different manner than it had in previous years, then a logical conclusion is that lower courts would observe the Supreme Court’s behavior and follow suit. Such is not the case post-Lawrence. In fact, an investigation of recent circuit court opinions indicate that lower courts will not divert from the Bowers-Glucksberg line of cases any time soon.\textsuperscript{173}

Second, this Part recognizes a more abstract philosophical criticism of Lawrence that follows from the foregoing Part. This criticism claims that implicit in ordered liberty opinions, which Justices really mean to base in terms of Nature and Reason, are more reflective of a Justice’s subjective bias vis-à-vis objective and positive truth. By both circumventing normal democratic processes and imposing a bias couched in terms of objectivity, the Court in Lawrence was Nietzschean in the sense that it imposed its will-to-power on the nation. However, as this Note argues, it is a fallacy to presuppose that because a case like Bowers purported to apply a correct view of deeply rooted American history and tradition, that it was therefore any more objective than Lawrence. This Note explains both Bowers and Lawrence in Nietzschean terms.\textsuperscript{174} To claim that Bowers was any more correct than Lawrence because the Supreme Court invoked an objective view of history is naive. Lawrence is thus an inconsequential case in terms of due process jurisprudence because it will not seriously affect the decision-making models and because all due process opinions, whether they are history and tradition or implicit in ordered liberty opinions, illustrate a Justice’s will-to-power.

A. Substantive Due Process Post-Lawrence

Although this Note argues that Lawrence was an implicit in ordered liberty case, subsequent substantive due process cases still adhere to the Bowers-Glucksberg model, i.e., long-standing history and tradition. For example, Galdikas v. Fagan\textsuperscript{175} decided a controversy in which graduate students of a medical school appealed a denial of a § 1983 claim that their constitutional rights were violated when the public school discontinued their program.\textsuperscript{176} Specifically, they claimed, \textit{inter alia}, that they had a “fundamental right to a continuing education.”\textsuperscript{177} The Seventh Circuit denied the substantive due process aspect of their claim based on Glucksberg. That

\textsuperscript{173} See infra Part III.A.
\textsuperscript{174} That is, in the sense that the Bowers Court imposed its own will-to-power on the nation. See Part III.C.
\textsuperscript{175} 342 F.3d 684 (7th Cir. 2003).
\textsuperscript{176} Id. at 686.
\textsuperscript{177} Id. at 688.
court held that deeply rooted history and tradition did not support an affirmative duty on the part of public institutions to provide continuing education. The court did not, however, state that natural justice does or does not support the right, which would have been more akin to the Lawrence-like line of cases.

Likewise, in Bell v. Ohio State University, the Sixth Circuit reviewed a case where the plaintiff challenged that Ohio State University denied her, among other things, substantive due process by making her repeat certain medical school classes and examinations. The gist of her due process claim was that such action was arbitrary and discriminatory in nature. She claimed she had a "[fundamental] liberty interest in continued enrollment in the Medical College." The Sixth Circuit disagreed. Invoking Glucksberg, the court stated, "our Nation’s history, legal tradition, and practices thus provide the crucial guideposts for responsible decision making, that direct and restrain our exposition of the Due Process Clause." The appellate court asserted that no such right existed for the plaintiff.

Again, as in Fagan, this court did not use natural justice analysis.

The reason neither court applied natural justice analysis is rather straightforward. Nowhere in Lawrence did the Court expressly state that Lawrence and Garner’s privacy right was implicit in the concept of ordered liberty. Although Lawrence really applied a natural justice method of analysis, non-legal factors, such as fear of seeming too activist, likely played a role in the Lawrence Court’s odd opinion. Admittedly, this is a hypothesis that would require investigation in another paper. For the purposes of this Note, it is enough to conclude that although Lawrence was a natural justice case, the fact that the Supreme Court purposely omitted the phrase “implicit in ordered liberty” means that lower courts are left with no choice but to apply Glucksberg as the binding fundamental rights precedent. As Part II of this Note illustrated, the Lawrence opinion was a poorly written opinion by Supreme Court standards. The opinion is landmark in terms of applying the right of privacy to a new class of activity, but it is far from being a landmark opinion in terms of changing future fundamental rights jurisprudence.

178 Id. at 688–89.
179 351 F.3d 240 (6th Cir. 2003).
180 Id. at 244–46, 249.
181 Id. at 249.
182 Id.
183 Id. at 250.
184 Id. at 251.
185 See Lawrence, 539 U.S. at 562–79 (neglecting to mention the phrase “implicit in ordered liberty” in the majority opinion).
186 See id.
187 See id. at 593–94 n.3 (Scalia, J., dissenting) (pointing out that the majority never used the phrase “history and tradition,” let alone the phrase “implicit in ordered liberty”).
188 See supra notes 176–85 and accompanying text.
B. The Apparent Cosmopolitan Criticism of Lawrence

A critic of *Lawrence* may attack the case for that which gives it virtue: the fact that it turns on a conception of justice more so than an interpretation of history. Such a criticism insists that only an application of history and tradition, rather than a conception of justice, can prevent the Court from usurping the role of lawmaker vis-à-vis law interpreter. Arguing against a method of analysis that primarily applies justice over relativistic communitarianism, Justice White best articulated this sentiment:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Similarly, Robert Bork feared that judicial activism would lead to a situation where "[a] judge has begun to rule where a legislator should." Conservative critics of *Lawrence* may undoubtedly argue that the opinion’s reliance on natural justice illustrates the judiciary’s tendency to impose its will on the American people. These critics defend *Bowers* as being less of an example of judicial activism ‘a la the application of an elite body’s view of justice, and more of the objective application of historical truth. For the defenders of *Bowers* and relativistic communitarianism, the history and tradition test is a tool to enhance the separation of powers between the prescriptive and adjudicative branches of the federal government. The reality is that both *Bowers* and *Lawrence* are more similar than some scholars would think.

C. Viewing Lawrence and Bowers through a Nietzschean Lens

In essence, the argument against using an implicit in ordered liberty/natural justice analysis is that Justices who employ such tactics are fooling themselves if they think their means are objective. Unlike the subjective jurists, the judge who honestly examines history and tradition is more objective. At least, the judge views

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189 *See Bowers*, 478 U.S. 186; *see also infra* note 192 and accompanying text.
190 *Bowers*, 478 U.S. at 194.
192 This insight is more of a prediction than an actual fact as of the writing of this Note. Notwithstanding that fact, the aforementioned predicative criticism is a reasonable one.
him or herself as one who may not "override democratic majorities when the Constitution is silent [on whether an explicit fundamental right exists]." When Justice White wrote that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution," he implied that somehow a historical analysis of American constitutional history, by limiting judicial activism, was truer to a textual approach to Constitutional interpretation and hence more objective. One may attack this purported view of objective judicial restraint on two grounds: first, that this view is not as objective as one may think; second, that this view wrongly becomes an apology for a litany of injustices in American history.

With respect to problems of objectivity, an application of Nietzschean philosophy teaches that the history and tradition approach to substantive due process is just as subjective as the implicit in ordered liberty approach. Nietzsche criticized those who claimed that their reasoned deductions were objective:

They all pose as if they had discovered and reached their real opinions through the self-development of a cold, pure, divinely unconcerned dialectic . . . while at bottom it is an assumption, a hunch, indeed a kind of "inspiration" — most often a desire of the heart that has been filtered and made abstract — that they defend with reasons they have sought after the fact.

Although Nietzsche was generally speaking to deontologists like Immanuel Kant, this argument has applicability to both proponents of a natural justice based view of fundamental rights and proponents of a history and tradition model. According to Nietzsche, the natural law philosopher has a particular end and the philosophy he or she relies upon is a means to that end. The basis for that end, however, is not "divinely unconcerned," i.e., disinterested, for no rational thought is objective according to Nietzsche. In fact, the philosophical system is an artifice. The philosopher merely seeks to "discharge [his] strength . . . [and] will to power" through alleged objective truths.

If the natural law philosophical system is an artifice, then according to Nietzsche, proponents of the history and tradition approach seem to have an advan-

193 BORK, supra note 192, at 240.
194 Bowers, 478 U.S. at 194.
195 See id. at 195 ("There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.").
197 Id. at 21.
tage against proponents of the natural justice approach to fundamental rights. However, this position is simply not correct. An analysis of deeply rooted American history and tradition does not “confine[] judges to any particular range of results.”

To wit: “people have come to understand that ‘tradition’ can be invoked in support of almost any cause. There is obvious room to maneuver, along continua of both space and time, on the subject of which tradition to invoke.” In fact, much like the natural law philosopher, the historian-jurist has a certain subjective end and tailors an interpretation of history to that end — he too imposes his will-to-power on the readers of his opinions.

Justice White’s use of history to strike down the right to engage in sodomy in *Bowers* was as subjective as Justice Kennedy’s liberty-based promotion of autonomy in *Lawrence*. The history and tradition method of substantive due process analysis is subjective.

Not only is that method subjective, it is apologetic for unjust periods in American history. Notwithstanding the fact that Nietzsche would argue that there is no such thing as “injustice” in the objective sense, but only what an individual or group thinks is unjust, to argue that deeply rooted history and tradition should be society’s guiding beacon for fundamental rights leads one to find that history and tradition may not be supportive of rights. “[N]ot all traditions are admirable.”

For example, “the history of straight, white, wealthy males is often a history of the oppressor. As such, relying on tradition frequently legitimizes and perpetuates prior discrimination . . . [which] is at odds with the letter and spirit of the Fourteenth Amendment.” Of course, Nietzsche would claim that this statement is not necessarily an objective view, for the writer obviously had a biased intent when examining history. Nevertheless, the point of the statement is to rebut those who claim that history and tradition are good tools for finding unenumerated fundamental rights.

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198 BORK, supra note 192, at 235.
200 See Adam B. Wolf, Fundamentally Flawed: Tradition and Fundamental Rights, 57 U. MIAMI L. REV. 101, 154 (2002) (“[E]mploying tradition to assess a purported fundamental right does not lend to the jurisprudence the certainty or objectivity it is supposed to provide.”).
201 See NIETZSCHE, supra note 197.
202 BORK, supra note 192, at 235. See generally MILL, supra note 166, at 66 (“The despotism of custom is everywhere the standing hindrance to . . . the spirit of liberty . . . .”).
203 Wolf, supra note 201, at 154.
204 Not only is “history and tradition” a poor tool for finding unenumerated fundamental rights, an examination of only recent history and tradition, i.e., the relativistic communitarian standard, is akin to supporting direct democracy, because the historian-jurist only looks at the whims of the majority generation in power by researching current trends in legislation. “[T]radition is majoritarian . . . [because it is] deferential to legislative choices.” Gregory C. Cook, Note, Footnote 6: Justice Scalia’s Attempt to Impose a Rule of Law on Substantive
Whereas Lawrence does represent a shift from the more communitarian trend in fundamental rights analysis, the shift is not drastic. Lower courts that have decided substantive due process claims have ignored them in the months following the decision. This makes sense, for the Court in Lawrence never explicitly announced a change in doctrine. Besides not having an effect on stare decisis in terms of due process decision making, the differences between the Bowers line of cases and the Lawrence line of cases are not that great. In this sense, all forms of reasoning are based on the prejudices of the philosopher. Nevertheless, future courts should apply the type of analysis in Lawrence, i.e., the natural justice approach, in future cases.

1. Why Natural Justice?

Whereas the Court in Lawrence was right to utilize a substantive due process model grounded in natural justice, the Court stopped short of drafting the most desirable opinion. The correct understanding of Lawrence is to read the majority’s opinion as a piece of liberal political philosophy with legal ramifications. The Court in Lawrence lacked the will to explicitly state this, for it never used the terms “implicit in ordered liberty,” much less the phrases “natural justice” or “classical liberalism.” The question remains: in the future, should the Court craft opinions in terms of natural justice or classical liberal philosophy?

A substantive due process system that avails itself of natural law through means of the implicit in ordered liberty test compares a statement claiming that a liberty interest is implicit in the concept of ordered liberty with the statement that nature dictates that the law deems the liberty interest to be fundamental. When a fundamental rights claim presents itself before the Court, a Justice would reason whether that claim is essential to a classical understanding of the role of liberty in civil society vis-à-vis looking towards the history and tradition of the polity for support. This approach is more consistent with the Founding Fathers’ view of due process. “[I]t is clear that the Founders believed in unwritten natural rights . . . [that] deserved judicial protection even if they were not contained in the Constitution’s text . . . Therefore, higher law, or natural law, is ‘arguably the great founding principle of American constitutionalism.’” Natural justice principles, especially the teachings of Locke and Montesquieu, influenced the Founding Fathers.

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205 See supra Part I.A.


207 See Schmidt, supra note 207, at 207–12. The Anti-Federalists embraced precepts of
Not only is the natural justice approach more consistent with an originalist interpretation of the Constitution, but natural justice principles serve as better gap fillers for constitutional interpretation when one compares the principles to fluid history. On one hand, to argue in favor of natural justice principles may be an exercise in will-to-power, according to Nietzsche. On the other hand, to argue as such is not exactly to make the law up:

Rather, [the Constitution is] an open ended and complex document [that] is read in a certain spirit: in light of the principles that seem to underlie its specific phrases and larger structures, principles that help justify the document’s more specific aspects. Indeed, by interpreting the document in light of its underlying moral principles we extend the document’s meaning in a way that vindicates the preamble’s claim that the Constitution is meant to approximate justice and other basic moral goals...

... [Furthermore,] [s]upplementing the text with natural law theory it was premised upon... further explains the law...

Under this desirable view, a judge is wise to invoke classical liberal theory to shape the arguments surrounding an unenumerated rights claim. Although “[t]he ideas of natural justice are regulated by no fixed standard,” neither is the Justice’s choice of history. If both principles are equally vague and open to bias, the judge ought to use natural justice analysis in supplementing silent portions of the Constitution, because principles of natural justice are more in tune with the goals of the liberal community that the Founding Fathers wished to ensure.

natural law as well. “[I]n forming a government on its true principles, the foundation should be laid... by expressly reserving to the people such of their essential natural rights...” “Brutus,” To the Citizens of the State of New York, N.Y. J., Nov. 1, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 373 (Herbert J. Storing ed., 1981) (emphasis added). I mean not to offer a defense of originalism in this Note, but only to suggest that the backers of originalism could understand classical liberal thought as consistent with originalism.

See NIETZSCHE, supra note 197 (haranguing philosophers for claiming that their philosophies are objective).

Schmidt, supra note 207, at 209, 213 (quoting STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 40 (1986)).


See Ely, supra note 200 and accompanying text.

Among the goals of the classical liberal polity are peace, security, tolerance, moderation, and humanity. See KAUTZ, supra note 13, at 23–77, 171–91.
Critics of this proposal would argue not only that this view is arrogant, but also that it leads to the judiciary's further usurpation of Congress's legislative role. Proponents can claim that the history and tradition approach is more democratic, but the natural justice approach has the advantage to teach readers of Supreme Court opinions (however few there are!) the virtues of classical liberalism properly understood. Classical liberalism provides the strongest basis for substantive due process jurisprudence.

CONCLUSION

Echoing classical liberal thought, the Fourteenth Amendment provides, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Applying the Fourteenth Amendment, substantive due process jurisprudence teaches that states may not infringe upon unenumerated liberties that are either "implicit in the concept of ordered liberty" or "deeply rooted in American history and tradition." Before Lawrence, the Rehnquist Court applied heightened review only to those fundamental rights that were "deeply rooted in American history and tradition." If the Court in Lawrence meant to bind itself to stare decisis, it could not have granted Lawrence and Garner a desirable result. Whereas the Court did alter fundamental rights precedent, it did not merely change the Bowers-Glucksberg model, but in fact returned to a classical liberal-inspired implicit in ordered liberty analysis.

Working from the conclusion that lawyers must understand Lawrence as an opinion steeped in classical liberal thought, this Note recalls that some scholars would take issue with the Court for the reason that classical liberal-inspired opinions are a function of judicial activism. This Note counters by arguing that such a view is misguided on many accounts. First, Lawrence never actually used the phrases "implicit in ordered liberty" or "fundamental right." The reader just needs to recognize Lawrence as a fundamental rights opinion. Even so, lower
circuit courts continue to take their cue from the *Bowers-Glucksberg* line of communitarian cases.223

Notwithstanding these points on precedent, the defenders of the communitarian history and tradition approach could benefit from reading Nietzsche before criticizing *Lawrence* as an exacerbation of judicial activism. Nietzsche teaches that all claims to justice and all interpretations of history illustrate the philosopher’s will to impose his or her beliefs on others.224 Nietzschean postmodern thought thus instructs that both the implicit in ordered liberty approach and the history and tradition method reflect a court’s prejudice. *Lawrence* will not worsen the perceived threat of judicial activism, and the decision was not any less objective than *Bowers*. Because *Lawrence* and *Bowers* suffered from an identical subjectivism, and because *Lawrence* does not seriously change due process precedent on a thematic scale,225 *Lawrence* is indeed not so landmark after all.

The connection of *Lawrence* to classical liberal political philosophy gives the case virtue, however. This Note reminds its readers that classical liberalism and natural justice are of vital use in substantive due process jurisprudence. This Note’s rationale for classical liberalism is not just a theoretical argument, but also a sensible one. Classical liberalism was the ideological underpinning for the aspirations of the Constitution,226 and for that reason, the Supreme Court ought to invoke its principles when investigating whether a fundamental right exists.

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223 *See supra* notes 176–85 and accompanying text.
224 *See supra* notes 192–212 and accompanying text.
225 *See supra* notes 176–89 and accompanying text.