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## **JUSTICE KENNEDY'S LIBERTARIAN REVOLUTION: *LAWRENCE V. TEXAS***

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## Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas*

Randy E. Barnett

In *Lawrence v. Texas*,<sup>1</sup> the Supreme Court held unconstitutional a Texas law criminalizing sexual relations between persons of the same. This would be reason enough to consider the case a landmark decision. But the way the Court justified its ruling was stunning to those schooled in fundamental rights jurisprudence as it has developed since the New Deal. If the theory set forth in *Lawrence* is taken seriously by the Court in the future, it represents nothing shy of a constitutional revolution.

Contrary to how the decision was widely reported, the Court in *Lawrence* did not protect a “right of privacy.” Instead it protected “liberty”—and did so without any showing that the particular liberty in question was somehow “fundamental.” In *Lawrence*, Justice Kennedy and the four justices who signed on to his opinion without separate concurrences have finally broken free of the post-New Deal constitutional tension between the “presumption of constitutionality” on the one hand and “fundamental rights” on the other. To appreciate the significance of this major development in constitutional law requires some historical background.

### *Constitutional Liberty Meets the “Progressive” Movement*

At the end of the Nineteenth Century, as the so-called “progressive” movement grew in political strength, statutes were passed at the state level regulating and restricting economic activity. At the same time, “morals” legislation became much more pervasive, though often such laws were enacted under the rubric of “public health”—what historian Ronald Hamowy has called the “medicalization of sin.”<sup>2</sup> All this was part of an intellectual and political movement to improve upon the result of private personal and economic choices by aggressively using government power to enhance the general welfare.

As this sort of legislation gained in popularity, the Supreme Court sporadically resisted, striking down some, but far from all, statutes restricting

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<sup>1</sup> \_\_\_ S. Ct. \_\_\_ (2003).

<sup>2</sup>See Ronald Hamowy, *Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America*, in *Assessing the Criminal: Restitution, Retribution, and the Legal Process* 33(Randy Barnett & John Hagel III eds. 1977).

economic activities. The most famous of these cases was *Lochner v. New York*<sup>3</sup> in which the Supreme Court held unconstitutional a statute limiting the maximum hours that bake shop employees could work in a week (while at the same time upholding the rest of the statute imposing many detailed health regulations on how bakeshops were to be run). The Court found the maximum hours provision to be an unjustified restriction on the “liberty of contract” between employees and employers that, it said, was protected by the “liberty” portion of the Due Process Clause of the Fourteenth Amendment. In other cases, the Court struck down noneconomic legislation as well, such as laws mandating English only education of children,<sup>4</sup> or requiring parent to send their children to public school until the age of sixteen<sup>5</sup> as arbitrary infringements of liberty by states.

This use of the Due Process Clause, especially in the economic sphere, was bitterly criticized by progressives as thwarting the democratic political process, though only a small fraction of progressive legislation was voided. Moreover, the Supreme Court did not ban such statutes outright. Rather, it merely required that the government justify its regulations. Indeed, the principle problem with the Progressive Era Supreme Court’s jurisprudence is some sort of coherent distinction between legislation upheld and legislation stricken. Had more statutes been found unconstitutional, the results would have been easier to explain.

Critics also claimed that these cases represented a revolutionary departure from the constitutional principles of the founding,<sup>6</sup> but their case was weak. They offered little persuasive historical evidence, and what evidence they presented ignored the structural changes wrought by the enactment of the Fourteenth Amendment. Needless to say, these critics paid no attention to the original meaning of this provision. Today, even some constitutional scholars on the left, most notably Howard Gillman,<sup>7</sup> acknowledge the continuity between the principles of the

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<sup>3</sup>198 U.S. 45 (1905).

<sup>4</sup>*Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>5</sup>*Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925)

<sup>6</sup>See e.g. Walton H. Hamilton and Douglass Adair, *The Power to Govern: The Consitution—Then and Now* (1937). I respond to their historical claims in Randy E. Barnett, *The Original Meaning of the Commerce Clause* 68 U. Chi. L. Rev. 101, 130-132 (2001).

<sup>7</sup>Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993).

foundings and what the Progressive Era Supreme Court was trying to do in circumscribing state power via the Fourteenth Amendment.

With the Great Depression came the New Deal and its “progressive” measures enacted at the national level. Some of these measures were struck down by the Court as exceeding the powers of Congress under the Commerce Clause.<sup>8</sup> The story of how the Supreme Court came to reverse itself and eventually uphold this type of legislation as constitutional is fascinating, but too complicated to try to summarize here. In his pathbreaking and influential treatment of this era, historian Barry Cushman rejects the simple thesis that the Progressive Era Court’s jurisprudence was reversed in 1937, under pressure of Roosevelt’s court-packing scheme, by the “switch in time that saved nine.” Instead, he shows how Hoover appointees—Hoover considered himself a progressive—as early as the beginning of the 1930s softened the Court’s constitutional objections to progressive legislation, though this had the effect of further undermining the coherence of the restrictive doctrines. The final nail in the coffin did not come until the Supreme Court was thoroughly controlled by Roosevelt appointees in the early Forties.<sup>9</sup>

#### *Enter the Presumption of Constitutionality*

Be this as it may, for present purposes it is significant that in 1931—years before the so-called Revolution of ‘37 occurred—Justice Louis Brandeis adopted a “presumption of constitutionality” when evaluating the exercise of police powers by the states in the case of *O’Gorman & Young, Inc. v. Hartford Fire Insurance Co.*:

The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, *the presumption of constitutionality* must prevail in the absence of some factual foundation of record for overthrowing the statute.<sup>10</sup>

Writing glowingly of this case in the *Columbia Law Review*, Walton Hamilton sung the praises of Brandeis’s doctrinal maneuver:

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<sup>8</sup>See e.g. *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

<sup>9</sup>See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998).

<sup>10</sup>282 U.S. 251, 257-58 (1931) (emphasis added).

The demand is to find an escape from the recent holdings predicated upon “freedom of contract” as “the rule,” from which a departure is to be allowed only in exceptional cases. The occasion calls not for the deft use of tactics, but for a larger strategy. The device of presumptions is almost as old as law; Brandeis *revives the presumption that acts of a state legislature are valid and applies it to statutes regulating business activity*. The factual brief has many times been employed to make a case for social legislation; Brandeis demands of the opponents of legislative acts a recitation of fact showing that the evil did not exist or that the remedy was inappropriate. He appeals from precedents to more venerable precedents; *reverses the rules of presumption and proof in cases involving the control of industry*; and sets up a realistic test of constitutionality. It is all done with such legal verisimilitude that a discussion of particular cases is unnecessary; it all seems obvious—once Brandeis has shown how the trick is done. It is attended with so little of a fanfare of judicial trumpets that it might have passed almost unnoticed, save for the dissenters, who usurp the office of the chorus in a Greek tragedy and comment upon the action. Yet an argument which degrades “freedom of contract” to a constitutional doctrine of the second magnitude is compressed into a single compelling paragraph.<sup>11</sup>

*O’Gorman* illustrates Cushman’s thesis that, long before the so-called Revolution of ’37, the court was already increasingly deferring to state legislatures. As the quote from *O’Gorman* suggests, initially the presumption of constitutionality could, in theory at least, be rebutted by those objecting to a statute’s constitutionality. By the 1940s it became irrebuttable for all practical purposes. In the 1956 of *Williamson v. Lee Optical*,<sup>12</sup> for example, the Court reversed a lower court holding unconstitutional portions of a statute “which make it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.”<sup>13</sup> The district court had held that such a requirement was not “reasonably and rationally related to the health and welfare of the people.”<sup>14</sup> It found that through mechanical devices and ordinary skills the optician could take a broken lens or a fragment thereof, measure its power, and reduce it to prescriptive terms, and

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<sup>11</sup>Walton H. Hamilton, *The Jurist’s Art*, 31 Colum. L. Rev. 1073, 1074-75 (1931) (emphases added) (footnotes omitted). Hamilton coauthored, *The Power to Govern*, discussed above.

<sup>12</sup>348 U.S. 483 (1956).

<sup>13</sup>*Id.* at 485.

<sup>14</sup>*Lee Optical of Oklahoma v. Williamson*, 129 F.Supp. 128, 136 (1954).

held that: “Although on this precise issue of duplication, the legislature in the instant regulation was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved.”<sup>15</sup> It was, accordingly, the opinion of the trial court that this provision of the law violated the Due Process Clause by arbitrarily interfering with the optician’s right to do business.

The trial court was not, however, playing from the post-New Deal playbook. It still believed that the presumption of constitutionality was rebuttable:

It is recognized, without citation of authority, that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court’s opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. *A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.*<sup>16</sup>

Nope, not even then, as Roosevelt-appointee and former New Dealer Justice William O. Douglas<sup>17</sup> explained in his opinion for a unanimous Supreme Court reversing the wayward district court.

[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.<sup>18</sup>

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<sup>15</sup>Id. at 137.

<sup>16</sup>Id. at 132.

<sup>17</sup>Before his appointment to the Court to succeed Justice Brandeis, Douglas was Roosevelt’s nominee to chair the Securities and Exchange Commission in 1937. Prior to his appointment to the Commission, Douglas was a professor at Yale Law School. Roosevelt reportedly came close to picking Douglas as his running mate in the 1944 election.

<sup>18</sup>348 U.S. at 487-88.

Justice Douglas's opinion made clear that when restricting liberty, the legislature need not have had good reasons. It is enough if it *might* have had reason:

The legislature *might* have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, . . . the legislature *might* have concluded that one was needed often enough to require one in every case. Or the legislature *may* have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it.<sup>19</sup>

Consequently, Justice Douglas concluded, “[w]e cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds.”<sup>20</sup> With *Williamson v. Lee Optical* as the norm, what then was left of judicial review?

#### *Qualifying the Presumption of Constitutionality: The Theory of Footnote Four*

As *Williamson v. Lee Optical* makes plain, post-New Deal deference to state legislatures and to Congress meant that Courts simply will not safeguard against constitutional violations. “For protection against abuses by legislatures the people must resort to the polls, not to the courts.”<sup>21</sup> If applied consistently, this deferential attitude would obviously end the entire practice of judicial review. How then did the post-New Deal Court avoid this slippery slope? It did so in a case so fundamental to its jurisprudence, that a single footnote within it became famous in its own right for providing the entire post-New Deal theory of judicial review and constitutional rights.

I refer, of course, to the 1938 case of *United States v. Carolene Products Co.*,<sup>22</sup> which concerned legislative restrictions on the sale of a milk substitute that

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<sup>19</sup>Id. at 477-88 (emphases added).

<sup>20</sup>Id. at 489.

<sup>21</sup>Id. at 488.

<sup>22</sup>304 U.S. 144 (1938).

competed with the products of dairy farmers.<sup>23</sup> In the text of his opinion, Justice Harlan Fiske Stone<sup>24</sup> strongly asserted the presumption of constitutionality. “[T]he existence of facts supporting the legislative judgment is to be presumed,” he wrote,

for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>25</sup>

Carolene Products is famous, however, for the footnote that immediately followed this passage—Footnote Four,<sup>26</sup> which began as follows:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.<sup>27</sup>

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<sup>23</sup>See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

<sup>24</sup>Although a Coolidge appointee, Justice Stone was elevated to Chief Justice by FDR in 1941 the same year Stone authored the opinion of the Court in *United States v. Darby*, 312 U.S. 100 (1941). That opinion definitively expanded the powers of Congress under the Commerce and Necessary and Proper clauses in the same manner as the police power of states had previously been enlarged in 1937 in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). The 5-4 decision in *West Coast*, in which the Court abstained from policing the limits of the police power of the states, led to 1937 being identified as the year of the New Deal constitutional revolution.

<sup>25</sup>*Carolene Prods.*, 304 U.S. at 152.

<sup>26</sup>The fame of this footnote is illustrated by the fact it merits its own entry in *The Oxford Companion to the Supreme Court of the United States*. See Dean Alfange, Jr., *Footnote Four*, in OXFORD COMPANION 306-07 (Kermit L. Hall et al. eds., 1992).

<sup>27</sup>*Id.* at 152 n.4. The rest of Footnote 4 adds two more exceptions to the presumption of constitutionality for laws that restrict the political process or that are directed at discrete and insular minorities:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special

After *Carolene Products*, legislation was supposed to be presumed constitutional unless one of the three exceptions in Footnote Four was satisfied, in which case heightened scrutiny would be given to a statute. Due to the idiosyncracies of what was included in the first eight amendments, this brilliant doctrinal maneuver allowed the court to uphold economic regulations as in *Williamson*, while preserving judicial review such “personal” freedoms as that of speech, assembly and press. That the personal right to bear arms explicitly mentioned in the Second Amendment has not been judicially protected shows the ideological nature of this maneuver.

Ironically, no one has been more stalwart in their allegiance to the judicial philosophy of Footnote Four than today’s judicial conservatives. For all the reverence they express towards the framers of the Constitution, and other judicial conservatives such as Robert Bork and Raoul Berger are, jurisprudentially speaking, simply unreconstructed Roosevelt New Dealers.

*Enter the Unenumerated “Right of Privacy”*

Until the 1960s, the Supreme Court was content to confine judicial review to policing the enumerated rights contained in the Bill of Rights (minus the Second Amendment, of course) while deferring to legislative power in all other arenas. This post-New Deal jurisprudence of (partial) restraint is the holy grail of today’s judicial conservatives. Then came *Griswold v. Connecticut*<sup>28</sup> in which the court considered the constitutionality of a state using its police power to ban not only the “personal” liberty to use contraceptives, but also the “economic” liberty to sell and distributed contraceptives.

In *Griswold*, the Court struck down the statute for violating an unenumerated right it called, the right of privacy. The task of justifying this extension of judicial review to a right not specified in the Bill of Rights for the first time since *Carolene Products*, fell to former-New Dealer Justice Douglas, author of the opinion in

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condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.  
Id. at 152-53 n.4 (citations omitted).

<sup>28</sup>381 U.S. 479 (1965).

*Williamson v. Lee Optical*.<sup>29</sup> He did so by attempting to connect, however tenuously, this unenumerated right to those that are listed:

The foregoing cases suggest that *specific guarantees in the Bill of Rights* have *penumbras, formed by emanations* from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>30</sup>

This was probably the best he could do to reach the result in the case while ostensibly staying within the prevailing constitutional theory of Footnote Four. Had Douglas grounded the decision in “liberty” (which is mentioned in the text) rather than “privacy” (which is not), it would have risked undoing the strong deference to Congress and state legislatures that he and his fellow-New Deal justices had previously established.

On the other hand, by narrowly construing the unenumerated right being protected, Douglas ensured that procreative rights, and later abortion rights, were viewed as special interest rights. Had these liberties been protected as aspects of a general right to liberty, rather than based on the more narrow right to privacy, they

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<sup>29</sup>Douglas took pains to distinguish *Griswold* from *Lee Optical* and other cases rejecting the Due Process Clause jurisprudence of the Progressive-Era Court:

[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation, as we did in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *Williamson v. Lee Optical Co.*, 348 U.S. 483; *Giboney v. Empire Storage Co.*, 336 U.S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.

Id. at 481-82. Notice the rhetoric of “super-legislature” now associated with judicial conservatives.

<sup>30</sup>Id. at 484 (emphasis added).

would more likely have received broader support from those who wanted to see *their* favored liberties protected as well.

Douglas's choice also provoked the debate over "judicial activism" that remains with us to this day. Like the "progressives" decrying the Supreme Court that decided *Lochner*, judicial conservatives bitterly criticized the Warren Court for its deviation from the post-New Deal jurisprudence of Footnote Four. Indeed, Stanford law professor Gerald Gunther, no right-winger, paired *Griswold* with *Lochner* in his the then-leading casebook in constitutional law.<sup>31</sup> Though his objective was to undermine the legitimacy of *Griswold*, it had the unintended consequence of causing a more sympathetic reconsideration of *Lochner*.<sup>32</sup>

*Enter "Fundamental Rights" v. Mere "Liberty Interests"*

Emanations and penumbras could not conceal, however, that the protection of an unenumerated right of privacy was outside the framework of Footnote Four. The beauty of the Footnote Four solution was that it cleanly limited judicial review to enumerated rights, while allowing government free rein in the economic sphere. The problem created by the unenumerated right of privacy was that it now forced upon the Court the messy business of distinguishing those unenumerated liberties that rebut the presumption of constitutionality from those that do not. The former it called "fundamental rights," while the latter were dubbed mere "liberty interests." But how to tell the difference?

Eventually the Court settled on limiting fundamental rights to those that were in its opinion "implicit in the concept of ordered liberty" and which could be grounded in our "traditions and history." As the Justice White explained in *Bowers v. Hardwick*<sup>33</sup>:

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has

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<sup>31</sup> See Gerald Gunther, *Constitutional Law* 570-646 (10th ed. 1975).

<sup>32</sup>I know of Professor Gunther's authorial intentions from private correspondence with him. In my first article on constitutional law, I attributed to him as having rehabilitated the doctrine of substantive due process, citing his casebook. He wrote to me protesting that this was the opposite of what he was trying to achieve by juxtaposing the two cases as he did and that he was appalled at the thought it might have had the opposite effect.

<sup>33</sup>478 U.S. 186 (1986).

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.” . . . See also *Griswold v. Connecticut*. . . .<sup>34</sup>

The outcome of this analysis, however, depends almost entirely in how specifically you define the right being asserted. The more specifically you define the liberty at issue—for example, a “constitutional right of homosexuals to engage in acts of sodomy”<sup>35</sup>—the more difficult a burden this is to meet and the more easily the rights claim can be ridiculed. While “liberty” as a general matter is obviously deeply rooted in our history and traditions, the specific liberty to use contraceptives is not. Nor is almost *any* particular exercise of liberty, especially if it was a practice unknown at the founding. Even liberties that existed at the founding, like the liberty of self-medication, are not deemed to be fundamental by the Court.

Whenever a particular liberty is specified, therefore, it is always subject to the easy rejoinder: “Just where in the Constitution does it say that?”—notwithstanding that the Ninth Amendment to the Constitution specifies that: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”<sup>36</sup> With this background in mind, we are now in a position to appreciate the potentially revolutionary significance of the decision in *Lawrence v. Texas*.

### *Justice Kennedy’s Crucial Switch from Privacy to Liberty*

In the 1992 abortion rights case of *Planned Parenthood v. Casey*,<sup>37</sup> Justice Kennedy began to escape from the New Deal-era box in the part of the coauthored opinion that is commonly attributed to him.<sup>38</sup> In *Casey*, he refused to rest abortion

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<sup>34</sup>Id. at 191-92.

<sup>35</sup>Id. at 191.

<sup>36</sup>U.S. Const. Amend. IX.

<sup>37</sup>505 U.S. 833 (1992).

<sup>38</sup>Justice Souter is credited with the discussion of stare decisis—properly ridiculed by Justice Scalia in his dissent—and Justice O’Connor with the discussion of “undue burden.”

rights on a “right to privacy,” though this crucial move has been generally ignored. Instead he rested it on liberty and explicitly on the Ninth Amendment:

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 which the Fourteenth Amendment protects. See U.S. Const., Amend. 9.<sup>39</sup>

Resting abortion rights on liberty, as opposed to privacy, was newsworthy, but I seemed to be among the only one to get the news. To this day, scholars and public commentators alike still speak of the “right of privacy” not the “right of liberty.” Until *Lawrence*, the question for me was whether this right to liberty would ever be seen again.

In *Lawrence v. Texas*, it has reappeared with Justice Kennedy now writing for a majority of the Court (not including Justice O’Connor who concurred only in the result), rather than solely as part of a mere trio in *Casey*. Liberty, not privacy, pervades this opinion like none other, beginning with the very first paragraph:

*Liberty* protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. *Liberty* presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves *liberty* of the person both in its spatial and more transcendent dimensions.<sup>40</sup>

Other examples abound:

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their *liberty* under the Due Process Clause of the Fourteenth Amendment to the Constitution.<sup>41</sup>

There are broad statements of the substantive reach of *liberty* under the Due Process Clause in earlier [Progressive-era] cases, including *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), and *Meyer v. Nebraska*, 262 U. S. 390 (1923); but the most

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<sup>39</sup>505 U.S. at 848 (emphasis added).

<sup>40</sup>\_\_ S. Ct. at \_\_.

<sup>41</sup>*Id.* at \_\_ (emphasis added).

pertinent beginning point is our decision in *Griswold v. Connecticut*, 381 U. S. 479 (1965).<sup>42</sup>

Justice Kennedy puts rhetorical distance between the decision in *Lawrence* and the right of privacy protected in *Griswold*: “The Court [in *Griswold*] described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.”<sup>43</sup> Indeed, the “right of privacy” makes no other appearance in this opinion (apart from quotations from the grand of certiorari from a previous case discussing *Griswold*). In contrast “liberty” appears in the opinion at least twenty-five times.

Even Justice Kennedy’s rejection of the argument from *stare decisis* rests on the centrality of liberty.

In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. . . . The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved.<sup>44</sup>

In *Lawrence v. Texas*, therefore, liberty not privacy is doing all the work.

#### *Justice Kennedy Employs an Implicit “Presumption of Liberty”*

*Lawrence* is potentially revolutionary not only because it abandons a right to privacy in favor of liberty, but for another closely-related reason: In the majority’s opinion, there is not even a pretense of a “fundamental right” rebutting the “presumption of constitutionality.” Justice Kennedy never mentions any presumption to be accorded the Texas legislature.

More importantly, he never tries to justify the sexual liberty of same-sex couples as a fundamental right. Instead, he spends all his energies demonstrating that same-sex sexual freedom is a legitimate aspect of liberty—unlike, for example, actions that violate the rights of others, which are not liberty but license. Not only does this take the Court outside the framework of Footnote Four, it also removes it from the framework of unenumerated fundamental rights that was engrafted upon it

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<sup>42</sup>Id. at \_\_\_\_ (emphasis added).

<sup>43</sup>Id. at \_\_\_\_.

<sup>44</sup>Id. at \_\_\_\_.

in the wake of *Griswold*. Until *Lawrence*, every unenumerated rights case had to establish that the liberty at issue was fundamental, as opposed to a mere liberty interest.

Justice Scalia in dissent takes accurate note of all this:

Though there is discussion of “fundamental proposition[s],” . . . and “fundamental decisions,” . . . nowhere does the Court’s opinion declare that homosexual sodomy is a “fundamental right” under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a “fundamental right.” Thus, while overruling the outcome of *Bowers*, the Court leaves strangely untouched its central legal conclusion: “[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.” 478 U.S., at 191. Instead the Court simply describes petitioners’ conduct as “an exercise of their liberty”—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.<sup>45</sup>

In other words, with liberty as the baseline, the majority places the onus on the government to justify its statutory restriction.

Though he never acknowledges it, Justice Kennedy here is employing what I have called a “presumption of liberty”<sup>46</sup> that requires the government to justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow “fundamental.” In this manner, once an action is deemed to be a proper exercise of liberty (as opposed to license), the burden shifts to the government.

All that was offered by the government to justify this statute is the judgment of the legislature that the prohibited conduct is “immoral,” which for the majority (including on this issue Justice O’Connor) is simply not enough standing alone to justify the restriction of liberty. Why not? Here the Court is content to rest its conclusion on a quote from Justice Steven’s dissenting opinion *Bowers*:

Our prior cases make two propositions abundantly clear. First, 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. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce

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<sup>45</sup>Id. at \_\_\_\_ (J. Scalia dissenting).

<sup>46</sup>See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, forthcoming).

offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”<sup>47</sup>

A stronger defense of this conclusion is possible.<sup>48</sup> A legislative judgment of “immorality” means nothing more than that a majority of the legislature disapproves of this conduct. Not only is this true whenever a legislature decides to outlaw something, justifying legislation solely on grounds of morality would entirely eliminate judicial review of legislative powers. How can a court ever adjudicate between the claim of the legislature that a particular exercise of liberty is “immoral” from the contrary claim by a defendant that it is not?

In practice, therefore, a doctrine that allowed legislation to be justified solely on the basis of morality would recognize an unlimited police power in state legislatures. Unlimited power is the definition of tyranny. While the police power of states may be broad, it was never thought to be unlimited—although until passage of the Fourteenth Amendment, the federal government had no jurisdiction to protect the privileges or immunities of citizens from infringement by their own states.

#### *Defending Lawrence From Judicial Conservatives*

Given that they are still rooted in the post-New Deal constitutional jurisprudence, the responses of judicial conservatives (not to be equated with all *political* conservatives) are entirely predictable. Each fails upon critical inspection.

First, they argue that since all laws restrict some “freedom,” requiring legislatures to justify to a court their restrictions on liberty would enable judges an unbridled power to strike down any laws of which they disapprove. But this is to equate “liberty” and “license,” a mistake the founders never made. Liberty is and has always been the *properly defined* exercise of freedom. Liberty is and has always been constrained by the rights of others. Noone’s genuine right to liberty is violated by restricting his or her freedom to rape and murder, because there is no such right in the first place.

This is not to say that the rightful exercise of liberty may never be *regulated* or made regular (as opposed to prohibited outright). This is only to say that, as Justice Kennedy implicitly acknowledges, the existence of a right to liberty places a burden on the government to justify any regulations of liberty as necessary and

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<sup>47</sup>*Bowers*, 478 U.S., at 216 (footnotes and citations omitted).

<sup>48</sup>And was offered to the Court in an amicus brief filed by the Institute for Justice.

proper. Wrongful behavior that violates the rights of others may justly be prohibited without violating liberty rights—though “wrongful” is not the same as “immoral.”

Which brings me to a second judicial conservative objection: The majority’s position, they say, rejects any moral content of law. This is false. As was just explained, wrongful behavior that violates the rights of others may justly be prohibited without violating the liberty rights of others. Because it is usually (but not always<sup>49</sup>) immoral to wrongfully violate the rights of others, the entirely justified prohibition of wrongful behavior also necessarily prohibits some immoral behavior as well. But not all ostensibly immoral behavior is also unjust or wrongful, as Aquinas recognized when he wrote:

Now human law is framed for a number of human beings, the majority of which are not perfect in virtue. Therefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain, and *chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained; thus human law prohibits murder, theft and the like.*<sup>50</sup>

To the claim that allowing legislatures to prohibiting solely because they deem it to be immoral is to grant legislatures an unlimited and therefore tyrannical power, judicial conservatives might respond that the police powers of states are to be constrained by their own constitutions and their own courts, not by federal judges. This response, if made, would be a *non sequitur*. If state constitutions grant their legislatures a “police power” that includes an unlimited power to prohibit private conduct solely because it is immoral—a dubious claim—this does not make the power any less unlimited and tyrannical. Nor in the face of such a constitutional grant of power would state judges be in any better position to constrain their legislatures. If it is inappropriate for federal judges to restrict the assumedly constitutional powers of state legislatures, it would be equally inappropriate for state judges to do so as well.

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<sup>49</sup>Under emergency situations it may not be immoral to act wrongfully to violate some rights of others. For example, it may not be immoral for a stranded camper to break into an empty cabin for shelter, though the act would still be wrongful and the camper would be liable for the trespass. See Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* 169-72 (1998). The possible existence of these exceptional circumstances does not refute the normal case in which it is immoral or “bad” to act wrongfully or “unjustly” towards another.

<sup>50</sup>Thomas Aquinas, *Summa Theologica*, in *Great Books of the Western World* (Robert Hutchins, ed., 1952), at 232a (emphasis added).

On the other hand, if the police power of states is not so unlimited and tyrannical as is being claimed, then it is not beyond the “judicial power” of either state or federal judges to hold state legislatures within these limits. Federal judges may do so, of course, only if they have jurisdiction to protect citizens rights from violation by their own states. Although at the founding this power was lacking, the Privileges or Immunities Clause of the Fourteenth Amendment (which has been folded into the Due Process Clause) gives the federal government such a power.<sup>51</sup> Judicial conservatives must read the Fourteenth Amendment very narrowly and ahistorically to deprive federal courts of this power of judicial review.

Finally, judicial conservatives repeatedly assert that there is no textual basis for the protection of a general right to liberty. Unlike “privacy,” however, both Due Process clauses explicitly mention “liberty” so this is a much harder argument to sustain. The judicial conservative response to this text is to argue that liberty may properly be restricted so long as “due process” is followed. As Justice Scalia wrote in his dissent: “The Fourteenth Amendment *expressly allows* States to deprive their citizens of liberty, so long as due process of law is provided.”<sup>52</sup> This is textually and historically wrong.

Ever since the founding the “due process of law” includes judicial review. Historical claims the contrary are extraordinarily weak, relying exclusively (and ahistorically) on the seeming absence of an explicit grant of power in the text. This fails to consider the original meaning of the “judicial power” which is reposed in the Supreme Court. An examination of the historical record leaves no doubt that the judicial power originally included the power to nullify unconstitutional laws—especially those that exceeded the power of the legislature.<sup>53</sup>

At the federal level judicial review includes the power to nullify laws that exceed the delegated powers of Congress. That is why the Supreme Court in *United*

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<sup>51</sup>See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986). I discuss the original meaning and contemporary relevance of the Privileges or Immunities Clause of the Fourteenth Amendment at length in *Restoring the Lost Constitution*, Chapters 3 & 8.

<sup>52</sup> \_\_\_ S. Ct. at \_\_\_.

<sup>53</sup>For copious evidence supporting this historical claim, see *Restoring the Lost Constitution*, Chapter 6.

*States v. Lopez*<sup>54</sup> and *United States v. Morrison*<sup>55</sup> could properly strike down a federal statute that exceeded the power of Congress under the Commerce Clause. In addition, federal power is further constrained by the rights retained by the people—both those few that are enumerated and, as affirmed in the Ninth Amendment, those liberty rights that are unenumerated as well. At the state level, the Privileges or Immunities Clause of the Fourteenth Amendment prohibits states such as Texas from infringing the privileges or immunities of its U.S. citizens. These include both the liberty rights or “immunities” retained by the people, and the positive rights or “privileges” created by Constitution of the United States.

Judicial conservatives move heaven and earth to excise these two provisions from the text of the Constitution because they think neither is definite enough to confine judges. This charge is only true, however, if one ignores the original public meaning of these provisions at the time of their enactment. Moreover, disregarding the text of the Constitution because it does not comport with your vision of the “Rule of Law” is as much judicial “activism”—if one must use this phrase<sup>56</sup>—on the Right, as when the Left discards the text because it does not meet its vision of “Justice.” In either case, judges are substituting for the text something they prefer, which in this case is silence where the Constitution is in fact speaking quite eloquently.

#### *Conclusion: A Remarkably Simple Ruling*

In the end, *Lawrence* is a very simple, indeed elegant, ruling. Justice Kennedy examined the conduct at issue to see if it was properly an aspect of liberty (as opposed to license), and then asked the government to justify its restriction which it failed adequately to do. The decision would have been far more transparent and compelling if Justice Kennedy had acknowledged what was really happening (though perhaps this would have lost some votes by other Justices). Without this acknowledgment, the revolutionary aspect of his opinion is concealed, and it is rendered vulnerable to the ridicule of the dissent. Far better would have been to more closely track the superb amicus brief of the Cato Institute which he twice cites approvingly.

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<sup>54</sup>514 U.S. 549 (1995).

<sup>55</sup>529 U.S. 598 (2000).

<sup>56</sup>For my definition along with the reasons I have refrained from using this epithet in the past, see Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. Colorado L. Rev. 1275 (2002).

If the Court is serious in its ruling, Justice Scalia is right to contend that the shift from privacy to liberty, and away from the New Deal-induced tension between the presumption of constitutionality and fundamental rights, “will have far-reaching implications beyond this case.”<sup>57</sup> For example, the medical cannabis cases now wending their way through the Ninth Circuit would be greatly affected if those seeking to use or distribute medical cannabis pursuant to California law did not have to show that their liberty to do so was somehow “fundamental”—and the government was forced to justify its restriction on that liberty.<sup>58</sup> While wrongful behavior (or license) could be prohibited, rightful behavior (or liberty) could be regulated provided that the regulation was shown to be necessary and proper.

Although it may be possible to cabin this case to the protection of “personal” liberties of an intimate nature—and it is a fair prediction that this is what the Court will attempt—for *Lawrence v. Texas* to be constitutionally revolutionary, the Court’s defense of liberty must not be limited to sexual conduct. The more liberties it protects, the less ideological it will be and the more widespread political support it will enjoy. Recognizing a robust “presumption of liberty” might also enable the court to transcend the trench warfare over judicial appointments. Both left and right would then find their favored rights protected under the same doctrine. When the Court plays favorites with liberty, as it has since the New Deal, it loses rather than gains credibility with the public, and undermines its vital role as the guardian of the Constitution. *Lawrence v. Texas* could provide an important step in the direction of a more balanced protection of liberty that could find broad ideological support.

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<sup>57</sup> \_\_\_ S. Ct. at \_\_\_ (J. Scalia dissenting).

<sup>58</sup>I should disclose that I represent clients in two such pending cases: *United States v. Oakland Cannabis Buyers Cooperative* and *Raich v. Ashcroft*.