The Liberty of Innocent Delights: Obscene Devices and the Limits of State Power After
Lawrence v. Texas

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Introduction

L. Carlin . . . entered the Adult Video Store, a licensed sexually oriented business. [Dawn E. Webber] came forward and offered to help Carlin. Carlin told appellant that she was experiencing marital problems and that she was looking for a vibrator—something for sexual gratification. [Webber] showed Carlin her four best selling devices. [Webber] placed batteries in these devices and demonstrated their range of speed and flexibility. Carlin selected one of the devices . . .

L. Carlin was a deputy sheriff conducting an undercover investigation of Dawn Webber’s business. 2 For selling Carlin a vibrator, Webber was arrested and later convicted of promoting an "obscene device"3 in violation of Texas law.4 She was sentenced to thirty days in jail and fined $4,000.5 Her conviction and sentence were affirmed on appeal.6 Justice Bea Ann Smith lamented in her concurrence, "I do not understand why Texas law criminalizes the sale of dildos devices . . . Even less do I understand why law enforcement officers and prosecutors expend limited resources to prosecute such activity. Because this is the law, I reluctantly concur."7

The Fifth Circuit would later invalidate Texas’ obscene devices statute, reasoning that in the aftermath of Lawrence v. Texas,8 the State’s interests in "public morality [] cannot serve as a rational basis . . . [in

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1. Webber v. State, 21 S.W.3d 726, 728–29 (Tex. App. 2000); id. at 729–730 (holding that a dildo was an obscene device as matter of law and that the defendant failed to preserve issue of whether statute prohibiting promotion of obscene devices violated federal and state constitutions); see also Marybeth Herald, A Bedroom of One’s Own: Morality and Sexual Privacy after Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1, 27 (2004) (describing the facts of Webber as a “typical” prosecution under an obscene device statute).
2. Webber, 21 S.W.3d at 728.
3. See Tex. Penal Code Ann. § 43.21(a)(7) (West 1994) (“Obscene device’ means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.”), invalidated by Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008).
4. See Tex. Penal Code Ann. § 43.23(c)(1) (West 1994) (“A person commits an offense, if knowing its content and character, he . . . promotes or possesses with intent to promote any obscene material or obscene device . . . .”).
5. Webber, 21 S.W.3d at 728.
6. Id. at 732.
7. Id. (Smith, J., concurring).
8. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding Texas statute that criminalized same-sex sodomy violated the Due Process Clause, reasoning that it furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual").
regulating] private sexual intimacy." The Court rejected the state’s other arguments, concluding that the case was "not about public sex . . . [nor] about controlling commerce in sex."10

In upholding a nearly identical Alabama statute11 in Williams v. Morgan,12 the Eleventh Circuit reasoned that the statute furthered those legitimate state interests—the regulation of public, commercial activity.13 Because Lawrence’s limited holding invalidated a state prohibition on same-sex sodomy which criminalized private, non-commercial sexual activity, Lawrence provided no support to the vendor and consumer plaintiffs challenging the Alabama statute.14

This Note argues that the Fifth Circuit reached the correct result in invalidating Texas’s obscene devices statute, but not on the grounds that Reliable Consultants is a more faithful application of the Supreme Court’s Lawrence decision than was the Eleventh Circuit’s analysis in Williams VI. This Note will demonstrate that both decisions can be read as plausible doctrinal interpretations of Lawrence, which was itself consistent with the Court’s Fourteenth Amendment jurisprudence, albeit in some combined form of its equal protection and substantive due process lines of cases. Instead, the first part of this Note argues that the Lawrence decision and its progeny demonstrate the inherent instability of the Court’s whimsical approach to personal liberties under the Fourteenth Amendment, such that sounder doctrinal footing is needed to adequately protect the rights of gays, lesbians, and other sexual minorities against legislative use of majoritarian morality and its concomitant judicial standard of tiered scrutiny. The second part of this Note finds doctrinal support for sexual privacy in an originalist conception of the states’ police power, as informed by the Ninth Amendment and the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment.

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9. Reliable Consultants, 517 F.3d at 745.
10. Id. at 746.
11. See Ala. Code § 13A-12-200.2 (prohibiting the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs").
12. See Williams v. Morgan (Williams VI), 478 F.3d 1316, 1324 (11th Cir. 2007) (holding that the statute prohibiting the distribution of devices designed or marketed for stimulation of genital organs furthered legitimate state interests).
13. Id. at 1322.
14. See id. ("To the extent Lawrence rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is both private and non-commercial.").
PART I: What Lawrence Hath Wrought: Substantive Due Process Put Asunder

The opinion is so opaque that it bears a great many interpretations. . . . It is at once self-important and self-preservative. It instructs the nation how to think about grand concepts but leaves maximum room for the Justices themselves to maneuver in the future.¹⁵

Analyzing and criticizing Lawrence has become something of a cottage industry in the legal academic community. Scholars have argued that Lawrence marks the Court’s implicit shift toward a "presumption of liberty,"¹⁶ that it is merely an extension of prior substantive due process cases;¹⁷ that it is incoherent and takes substantive due process too far from its moorings;¹⁸ that it does not go far enough in protecting gay rights;¹⁹ that its analysis of substantive due process is just about correct;²⁰ that it

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¹⁷. See Carpenter, supra note 15, at 1152 (explaining that the Court does not declare a generalized "presumption of liberty."). As explained by Carpenter:

Nowhere does the Court declare a generalized "presumption of liberty." Nor does it engage in a libertarian analysis finding a "liberty," distinguishing it from "license," then shifting the burden of persuasion of constitutionality to the state, a burden that could be met only upon a finding that the law was "necessary and proper" to the achievement of its objective.

Id.


²⁰. See Laurence H. Tribe, Lawrence v. Texas: The "Fundamental Right" That Dare
represents good judicial "statesmanship;"21 that it "undermined the very foundation upon which the Court has built the obscenity doctrine;"22 that it leaves a substantial portion of obscenity doctrine untouched;23 and that it may mark the end of tiered scrutiny.24 Since the Lawrence opinion is apparently grounded in some form of substantive due process,25 this Note proceeds with a discussion of the origins of that doctrine.

A. Substantive Due Process: From the Magna Carta to Lawrence

The intellectual origins of the doctrine of substantive due process can be traced to the Magna Carta. Chapter 39 of the Magna Carta, which read that "[n]o free man shall be taken, imprisoned, dispossessed, outlawed, banished, or in any way destroyed...[unless] by the lawful judgment of his peers and by the law of the land,"26 was intended to ensure that no free

Not Speak its Name, 117 HARV. L. REV. 1893, 1937 (2004) [hereinafter "Tribe, Fundamental Right"] ("The whole of substantive due process, Lawrence teaches us, is larger than, and conceptually different from, the sum of its parts...[suggesting] the globally unifying theme of shielding from state control value-forming and value-transmitting relationships...") (emphasis omitted).

21. See Andrew Koppelman, Lawrence’s Penumbra, 88 MINN. L. REV. 1171, 1180 (2004) [hereinafter "Koppelman, Penumbra"] (arguing that "the Court had very good political reasons for avoiding transparency in both its reasoning and its rule"); cf. Witt v. Dep’t of the Air Force, 527 F.3d 806, 814 (9th Cir. 2008) ("Lawrence is, perhaps intentionally so, silent as to the level of scrutiny that it applied...").


24. See Massey, The New Formalism, supra note 16, at 957 (arguing that Lawrence "may prove to further destabilize the already leaning tower of tiered scrutiny"); Paul M. Secunda, Lawrence’s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions, 50 VILL. L. REV. 117, 120 (2005) ("[T]he Court softens the hard edges of the normal tiered approach and engages in a more informal constitutional balancing of the relevant state and individual interests to determine which interests should prevail.").

25. See Lawrence v. Texas, 539 U.S. 558, 564 (2003) ("[W]e granted certiorari...[to resolve whether] petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment."). The other questions raised in the grant of certiorari concerned whether to overrule Bowers v. Hardwick, 478 U.S. 186 (1986)—a substantive due process case—and whether the statutes denied petitioners the right to equal protection of the laws under the Fourteenth Amendment, which the Lawrence court declined to directly address. See also Lawrence, 539 U.S. at 574–75 (admitting the possibility of deciding the case on equal protection grounds but refusing to do so).

Englishman "could be deprived of life, liberty, or property except by (1) judgment prior to execution of sentence, (2) delivered by one’s peers, and (3) according to the laws of England." Lord Edward Coke in some contexts "implie[d] that the law of the land incorporates a substantive limitation on the authority of the king, acting either in his legislative capacity or in his executive capacity." Sir William Blackstone likewise construed "the law of the land" to contain a substantive prohibition on the Crown and Parliament as well. References from the founding era through the antebellum period indicate that American jurists understood the Fifth Amendment’s Due Process Clause as embodying the Magna Carta’s understanding of the law of the land. Numerous state bills of rights contained provisions paralleling that of the law of the land. Four such provisions were introduced at state conventions during the ratification of the federal constitution. While there was little debate on the proposed amendment, an early Supreme Court case alluded to the possibility that there were natural substantive limitations on legislative power as a result of the social compact. In *Murrays’ Lessee v. Hoboken Land & Improvement Co.*, Justice Benjamin Curtis determined that "the [Due Process Clause] is a restraint on the legislative as well as on the executive and judicial powers of the government." Curtis’s reasoning linked the Fifth Amendment with the Magna Carta’s law of the land language. The most famous Fifth

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28. *See id.* at 12 (citing the granting of monopolies as substantively against "the law of the land").


30. *See id.* (describing Blackstone’s treatment of the Magna Carta’s protection of personal security as referring "not just to procedure but to definition of the offense and its punishment").


32. *See id.* at 17–18 (explaining that Pennsylvania, New York, North Carolina and Virginia were the four states that introduced provisions).

33. *See id.* at 20–21 ("Men have a sense of property: property is necessary to their subsistence . . . . No man could become a member of a community in which he could not enjoy the fruits of his honest labor and industry.") (citing Samuel Chase’s dictum in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).


35. *Id.* at 276.

36. *See id.* ("The words, ‘due process of law,’ were undoubtedly intended to
Amendment due process case is probably *Dred Scott v. Sandford*\(^37\) in which Chief Justice Taney determined that the Fifth Amendment protected the "property" of U.S. citizens in their slaves in U.S. territories, thus invalidating the Missouri Compromise.\(^38\)

The Due Process Clauses of the Fifth and Fourteenth Amendments "guarantee[] more than fair process."\(^39\) Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests."\(^40\) The Court deems fundamental those asserted rights and liberty interests "which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’"\(^41\) Among the rights protected by heightened scrutiny under the Fourteenth Amendment are the rights to marriage and marital privacy, to reproduction, to raise children, to access and use contraceptives, to maintain bodily integrity, to have an abortion, and to refuse unwanted medical treatment.\(^42\) The Court is generally reluctant to expand the

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\(^{37}\) *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (stating that the Fifth Amendment prohibited Congress from depriving a citizen of property merely because the citizen brought the property into a particular territory of the United States). In so holding, the Court stated:

> The rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

*Id.* at 450.

\(^{38}\) *Id.* at 449–51.

\(^{39}\) *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal quotation marks omitted); see *id.* (holding that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court").

\(^{40}\) *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); see *Troxel*, 530 U.S. at 65 (refusing to find fundamental right to assisted suicide in upholding statute that prohibited the practice).


\(^{42}\) *See Washington*, 521 U.S. at 720 (citing cases that have identified rights under the Fourteenth Amendment requiring strict scrutiny).
protections of substantive due process "because guideposts for responsible
decision-making in this unchartered area are scarce and open-ended."45

In Washington v. Glucksberg,44 the Court attempted to provide such
guideposts by establishing a two-part inquiry for evaluating whether
asserted rights and liberty interests are fundamental. First, the right must be
"deeply rooted in this Nation’s history and tradition."45 Second, the right
asserted must be carefully described such that the Court can look to the
interest’s place within American "history, legal traditions, and practices."46
Plaintiffs in Glucksberg sought to invalidate a Washington statute banning
assisted suicide.47 The Court carefully described the plaintiffs’ claimed
right not as the "right to die," but "a right to commit suicide which itself
includes a right to assistance in doing so."48 Finding that right has not been
protected in American legal history, and instead has been persistently
rejected, the Court concluded that, "the asserted ‘right’ to assistance in
committing suicide is not a fundamental liberty interest protected by the
Due Process Clause."49

Many scholars criticized the Glucksberg Court’s emphasis on a
"carefully described" interest’s place within our traditions. Professor
Randy Barnett of Georgetown University Law Center argues that
Glucksberg’s attempt to provide clear rules in the confusing realm of
substantive due process is itself confusing.50 Pre-eminent constitutional
scholar Laurence Tribe views Glucksberg as inconsistent with the roots of

43. Id. (internal quotation marks and citations omitted).
44. Id.
45. Id. at 721 (internal quotation marks omitted).
46. Id.
47. Id. at 705.
48. Id. at 723.
49. Id. at 728.
[hereinafter "Barnett, Scrutiny Land"] (observing the lack of clarity in the Glucksberg
Court’s reasoning and how the decision raised several ambiguities in due process
jurisprudence). Barnett explained that:

There is much that is unclear about the Glucksberg version of this formulation.
Does a right have to be both deeply rooted in tradition and implicit in the
concept of ordered liberty, or just one or the other? Is a right’s rootedness in
history and tradition a sign that it is implicit in the concept of ordered liberty?
Or, more likely, is the absence of its traditional protection a sign that it is not
implicit? Perhaps most importantly, does a liberty need to have been legally
protected in our traditions or merely traditionally unregulated?

Id.
modern substantive due process. Tribe and Michael Dorf, currently a professor at Cornell University Law School, previously had criticized attempts to limit substantive due process protections by narrowing the definition of the asserted interest. In Michael H. v. Gerald D., Justice Scalia, in a portion of his plurality opinion joined only by Chief Justice Rehnquist, suggested that the Court "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." As Tribe and Dorf point out, this approach would not only undermine due process protection of the rights of political minorities, but would also fail to achieve its purported goal of judicial restraint. Since determining the historical traditions requires a subjective selection of historical sources, "extraction of fundamental rights from societal traditions is no more value-neutral than the extraction of fundamental rights from legal precedent." While such criticisms went unheeded in Glucksberg, the Court would again face the issue of how to evaluate fundamental liberty interests in Lawrence v. Texas.

51. See Tribe, Fundamental Right, supra note 20, at 1934. Stating that:
Meyer and Pierce, the two sturdiest pillars of the substantive due process
temple . . . did not describe what they were protecting merely as the personal
activities of sending one’s child to a religious school (Pierce v. Society of
Sisters) or . . . of hiring a teacher to educate one’s child in the German language
(Meyer).

Id.

52. See generally Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the

claim by a man claiming to be the natural father of the right to visit his child conceived by a
married woman).

54. Id. at 127 n.6 (Scalia, J. Opinion).

55. See Tribe & Dorf, supra note 52, at 1086-87 ("[E]ven if Justice Scalia’s program
were workable, it would achieve judicial neutrality by all but abdicating the judicial
responsibility to protect individual rights . . . Legally cognizable ‘traditions’ . . . tend to
mirror majoritarian, middle-class conventions.").

56. See id. at 1087 ("To acknowledge the manipulability of historical traditions is to
recognize that all history is summary. The lens of the historical camera, in focusing on one
event, necessarily blurs others.").

57. Id. at 1086.
B. The Lawrence Decision

*Lawrence* cannot be addressed without some introductory discussion of the case it overruled, *Bowers v. Hardwick*.\(^{58}\) There the Court upheld Georgia’s prohibition of sodomy against constitutional challenge: respondent Michael Hardwick, an adult male, had been convicted of violating in engaging in sodomy with another adult male under Georgia’s prohibition of sodomy statute.\(^{59}\) In an approach foreshadowing that of Chief Justice Rehnquist in *Glucksberg*,\(^{60}\) Justice White framed the issue for the *Bowers* majority as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."\(^{61}\) White’s opinion emphasized, "proscriptions against [sodomy] have ancient roots."\(^{62}\) Thus, "to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious."\(^{63}\) Finding no fundamental right to homosexual sodomy, the *Bowers* majority rejected Hardwick’s argument that the legislature’s views on morality could not provide a rational basis for sustaining the statute, noting that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."\(^{64}\) The statute therefore was upheld and Hardwick’s conviction affirmed.\(^{65}\)

Justice Blackmun in dissent attacked the majority’s conduct-based fundamental rights analysis, arguing that the case was not about the fundamental right to engage in homosexual sodomy but "[r]ather . . . is about the most comprehensive of rights and the right most valued by

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60. See, e.g., Barnett, *Scrutiny Land*, supra note 50, at 1488 ("The first step of Rehnquist’s formula in *Glucksberg* was borrowed (without attribution) from Justice White’s opinion for the majority in *Bowers v. Hardwick*. . . .").


62. *Id.* at 191–94.

63. *Id.* at 194.

64. *Id.*

65. *Id.*
civilized men, namely, the right to be let alone." Justice Stevens noted that the statute by its terms is intended to apply to heterosexuals as well as homosexuals, and the Court’s prior substantive due process cases preclude application of the statute against heterosexuals. Justice Stevens then argued that the State’s purported basis for the selective application of the statute against homosexuals was not "supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group." Strands of both Bowers’ dissents can be found in Justice Kennedy’s opinion in Lawrence. The Court disagreed with the issue as stated in Bowers: "[t]o say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." Lawrence viewed the continued validity of Bowers and criminal sodomy statutes as a "stigma" on homosexuals that could be removed only by explicitly overruling Bowers and invalidating all such statutes. As part of its "judicial decision as atonement," the Lawrence majority cloaked its opinion in the language of liberty, autonomy of self, meaning, and existence. Tribe approvingly describes the Court’s analysis: "in order to assess the constitutionality of the state’s preferred allocation of roles, the Court traversed time and space, encompassing contemporary as well as historical understandings and values we share with a wider civilization."

The Lawrence Court explicitly adopted Stevens’ analysis in Bowers that "the fact that the governing majority in a State has traditionally viewed

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66. Id. at 199 (Blackmun, J., dissenting) (internal quotation marks and citations omitted).
67. See id. at 216–18 (Stevens, J., dissenting) (citing Griswold v. Connecticut, 381 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972) as cases limiting the power of States to reach private, consensual sexual relations among heterosexual adults).
70. See id. at 575 (declining to adopt Justice O’Connor’s equal protection clause analysis to invalidate the Texas statute in order to overrule the central holding of Bowers); accord Tribe, Fundamental Right, supra note 20, at 1910 (arguing that a sex-neutral ban on sodomy would be akin to a "Sword of Damocles that does its awful work not by beheading its victim but simply by dangling above its victim’s neck").
71. Carpenter, supra note 15, at 1148.
72. See, e.g., Lawrence, 539 U.S. at 562 ("Liberty presumes an autonomy of self . . . ").
73. Tribe, Fundamental Right, supra note 20, at 1931 (internal quotation marks omitted).
a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”

Without declaring whether there was a fundamental right to private, consensual sexual relations among homosexual adults or stating the standard of review it was applying, the Court opaquely held that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” In his dissent, Justice Scalia attacked the Court for overruling Bowers while failing to specifically overrule its holding that there is no fundamental right to homosexual sodomy. Scalia then criticized the Court for "decre[ing] the end of all morals legislation" in holding that a statute cannot survive rational basis review solely on the grounds that it promotes majoritarian sexual morality.

Constitutional scholars have generally agreed that—whether its outcome was correct or its reasons for opacity beneficial—Lawrence provided no clear rule by which to govern future cases concerning privacy, morality, and substantive due process. Despite Scalia’s criticism to the contrary, the Court suggested in portions of its opinion that there was a fundamental liberty interest in private sexual relations among adult homosexuals. Justice Kennedy cites the Court’s landmark substantive due

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74. See Lawrence, 539 U.S. at 577–78 (quoting Stevens’ dissent in Bowers and emphasizing that "Justice Stevens’ analysis, in our view, should have been controlling in Bowers and should control here") (internal quotation marks omitted).

75. Id.

76. See id. at 594 (Scalia, J., dissenting) ("The Court today does not overrule [the Bowers] holding. Not once does it describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest,’ nor does it subject the Texas statute to strict scrutiny.").

77. See id. at 599 (Scalia, J., dissenting) (citing prohibitions "against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" as laws furthering majoritarian sexual morality).

78. See generally Koppelman, Penumbra, supra note 21.

79. See Tribe, Fundamental Right, supra note 20, at 1916 ("One aspect of Lawrence that was bound to draw criticism and is likely to generate confusion unless promptly put into proper perspective is the absence of any explicit statement in the majority opinion about the standard of review the Court employed . . . ."); Lund & McGinnis, supra note 18, at 1585 ("[T]he most salient characteristic of Lawrence is the impossibility of determining what it means . . . ."); Carpenter, supra note 15, at 1149 ("The opinion . . . bears a great many interpretations."); John Allon Garland, Sex as a Form of Gender and Expression after Lawrence v. Texas, 15 COLUM. J. GENDER & L. 297, 307 (2006) ("Lawrence’s lack of clarity about the nature of the right it recognized may already be promoting its narrowing."); Secunda, supra note 24, at 128 ("[T]he exercise in divining the proper judicial standard of review from the Lawrence majority is rendered difficult by the exceedingly enigmatic nature of the opinion."); cf. Tribe, Fundamental Right, supra note 20, at 1895 ("[I]t will be daunting task at the midpoint of the twenty-first century to evaluate the differences Lawrence will have made . . . .").
process decisions in his discussion of liberty. In holding that Texas’s ban on homosexual sodomy "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," the Court uses the terminology of rational basis review, but in a comparative context that suggests that a more exacting form of scrutiny than traditional rational basis is actually at work. Since traditional rational basis review does not balance the interest of the individual against that of the state, some view Lawrence’s holding as an implicit recognition of a fundamental right to homosexual sodomy. But if this is so, Justice Kennedy’s failure either to apply or to distinguish Glucksberg is difficult to explain. Justice Kennedy was careful elsewhere to explain why stare decisis did not preclude the majority from overruling Bowers. The Court’s refusal to address Glucksberg—which borrowed from Bowers in its two-pronged fundamental rights analysis—thus indicates that the Court did not find a new fundamental right in Lawrence.

80. Lawrence, 539 U.S. at 578.

81. Id. (emphasis added).

82. See Cook v. Gates, 528 F.3d 42, 55 (1st Cir. 2008) (arguing that the Lawrence Court "recognized a protected liberty interest for adults to engage in consensual sexual intimacy in the home"). The case also proposes that the Court applied more than minimal scrutiny in evaluating the sodomy statute in part because "[r]ational basis review does not permit consideration of the strength of the individual’s interest or the extent of the intrusion on that interest caused by the law; the focus is entirely on the rationality of the state’s reason for enacting the law."); Matthew Coles, Lawrence v. Texas & the Refinement of Substantive Due Process, 16 STAN. L. & POL’Y REV. 23, 30 (2005) ("Assessing whether the state’s interest is significant enough to vindicate what the state has done—balancing the state’s interest against that of the individual—is not rational basis review. It is, however, typical of protected liberty cases . . . ."); Carpenter, supra note 15, at 1150–51, 1157 (noting the recognition of "the personal and private life of an individual" as a fundamental right means that a mere legitimate state interest in regulating the personal and private life of an individual is an insufficient basis for upholding the contested statute). In so noting, Carpenter observed that Lawrence "does not declare categorically that Texas’s interest in the statute is not ‘legitimate’ . . . the interest is measured against the strength of the right claimed. If ‘the personal and private life of the individual’ involves the exercise of a fundamental right . . . then the state’s mere legitimate interest in regulating it for morality’s sake is of course insufficient." Id.; cf. Massey, The New Formalism, supra note 16, at 959 ("[T]here are textual morsels in the Court’s opinion . . . that hint that there is something more than minimal scrutiny at work . . . .").

83. See Lawrence, 539 U.S. at 577 (finding a lack of "individual or societal reliance on Bowers of the sort that could counsel against overturning its holding once there are compelling reasons to do so").

84. See supra notes 47–48 and accompanying text.

85. See Barnett, Libertarian Revolution, supra note 16, at 35 ("In the majority’s opinion, there is not even the pretense of a ‘fundamental right’ rebutting the ‘presumption of constitutionality.’"); Massey, The New Formalism, supra note 16, at 959 ("Lawrence
Lawrence can also be read as fitting somewhere between the Court’s fundamental rights-strict scrutiny line of cases and traditional minimal scrutiny. The Court’s emphasis on Romer v. Evans,86 which used imputed legislative animus against homosexuals as a class to invalidate a state constitutional amendment, is instructive. Just as Romer did not find that homosexuals were a "suspect class" under the Equal Protection Clause for purposes of triggering strict scrutiny of the challenged amendment, Lawrence did not declare a "fundamental liberty interest" in private homosexual conduct, such that laws abridging that interest would be subject to strict scrutiny review.87 Both Romer and Lawrence invalidated state laws that had the effect of discriminating against homosexuals without providing homosexuals the protection of strict scrutiny when legislative majorities enact statutes that either infringe on their liberties either as individuals or as a class of persons. Andrew Koppelman, a constitutional scholar who has published extensively on gay rights issues88 and morals legislation,89 argues that the primary contribution of Lawrence to substantive due process jurisprudence is that it contains a "penumbra" serving as a basis to strike down antigay laws.90

Presently stands as the lone instance in the modern era of substantive due process in which the Court has struck down a law on the grounds that it failed even minimal scrutiny."). But cf. Carpenter, supra note 15, at 1163 (arguing that "Lawrence can be squared with Glucksberg" because bans on same-sex sodomy are a recent innovation and the Bowers characterization of the asserted liberty interest in sodomy is not a "careful description" of the claimed right because it trivializes it).

86. See Romer v. Evans, 517 U.S. 620, 634–35 (1996) (holding that the amendment, which denied protected status under Colorado law to homosexuals, raised "the inevitable inference that the disadvantage imposed is born of animosity toward [homosexuals]" such that the Amendment was not "directed to any identifiable legitimate purpose or discrete objective").

87. See Lawrence, 539 U.S. at 578 (overturning Lawrence on the grounds that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").


89. See, e.g., Andrew Koppelman, Does Obscenity Cause Moral Harm?, 105 COLUM. L. REV. 1635 (2005) (discussing whether obscenity does cause moral harm and whether legislation should be used to prevent that harm).

90. See Koppelman, Penumbra, supra note 21, at 1180, 1182–83 (arguing that Limon v. Kansas, 539 U.S. 955 (2003) (mem.), which vacated a pre-Lawrence sentence for same-sex statutory rape under a statute that punished the offense more harshly than heterosexual statutory rape, indicates that the Court views Lawrence as putting "all anti-gay laws under suspicion").
Not surprisingly, the lower courts have mirrored academics in their disparate interpretations of the Lawrence opinion. The Seventh, Tenth, and Eleventh Circuits have taken the view that Lawrence did not announce a fundamental right to consensual sexual privacy. In addressing a challenge to the military’s “Don’t Ask, Don’t Tell” policy, the Ninth Circuit determined that intermediate scrutiny applies to challenges implicating liberty interests such as those at issue in Lawrence. The First Circuit, however, found that there is something like a fundamental liberty interest recognized by Lawrence, but that it is a narrow one.

Addressing nearly identical obscene devices statutes, the Fifth and Eleventh Circuits reached opposite results, which this Note will now address.

C. The Fifth Circuit’s Interpretation of Lawrence

In Reliable Consultants, Inc. v. Earle, plaintiff businesses wishing to advertise and sell sexual devices in Texas filed for declaratory and

91. See Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005) ("Lawrence also did not announce, as Muth claims it did, a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, specifically in this case, incest.").

92. See Seegmiller v. LaVerkin City, 528 F.3d 762, 771 (10th Cir. 2008) (emphasizing that "nowhere in Lawrence does the Court describe the right at issue in that case as a fundamental right or a fundamental liberty interest. It instead applied rational basis review to the law and found it lacking").

93. See Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) (concluding that "it is a strained and ultimately incorrect reading of Lawrence to interpret it to announce a new fundamental right").

94. The Eighth Circuit is likewise dubious that there exists a fundamental right to sexual privacy. See Sylvester v. Fogley, 465 F.3d 851, 857 (8th Cir. 2006) (emphasizing that the Lawrence opinion’s "language implies that the Court applied a rational-basis standard of review instead of a strict-scrutiny standard, inferring that the right to engage in homosexual sodomy is not a fundamental right") (dictum).

95. See Witt v. Dep’t of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008) ("[W]hen the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest.").

96. See Cook v. Gates 528 F.3d 42, 56 ("Lawrence recognized . . . a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one’s home and one’s own private life.").

97. See Reliable Consultants v. Earle, 517 F.3d 738, 747 (5th Cir. 2008) (holding that Texas could not, by statute declare the devices at issue as obscene, though advertisements for those devices could, under the Supreme Court’s jurisprudence, be deemed obscene).
injunctive relief, seeking an injunction against enforcement of the obscene devices statute on the grounds that it violated their substantive liberty rights under the Fourteenth Amendment. The district court dismissed plaintiffs’ action for failure to state a claim, holding that as there was no constitutionally protected right to promote obscene devices, the Texas statute did not violate due process. The Fifth Circuit rejected the state’s threshold argument that the businesses lacked standing to assert the individual rights of their potential customers. The court determined that Supreme Court precedent established that denial of access to a proscribed product is akin to denial of use of the product itself. On the merits of the constitutional claim, the plaintiffs argued that "the right at stake is the individual’s substantive due process right to engage in private intimate conduct free from government intrusion," while the State argued that it was "the right to stimulate one’s genitals for non-medical purposes unrelated to procreation or outside of an interpersonal relationship." The court rejected the State’s framing of the issue, noting Justice Kennedy’s criticism of the Bowers majority’s characterization of the right at issue there. The appellate court determined that Lawrence applied because it "explain[ed] the contours of the substantive due process right to sexual intimacy."

The Court in Reliable Consultants court stressed throughout its opinion that it was applying Lawrence to the statute, attempting to analogize the litigants’ arguments in Lawrence to those of the litigants in

98. See id. at 742 ("Just as in Lawrence the State here wants to use its laws to enforce a public moral code by restricting private intimate conduct.").

99. See id. ("The district court held, inter alia, that the statute does not violate the Fourteenth Amendment because there is no constitutionally protected right to publicly promote obscene devices.").

100. See id. at 743 (finding that plaintiffs had standing under Supreme court precedent established in Griswold v. Connecticut, 381, U.S. 479 (1965)). The Fifth Circuit explained that the "State argues that Plaintiffs, who distribute sexual devices for profit, cannot assert the individual rights of their customers. This argument fails under the Supreme Court precedent holding that (1) bans on commercial transactions involving a product can unconstitutionally burden individual substantive due process rights and (2) lawsuits making this claim may be brought by providers of the product.” Id.


102. Reliable Consultants, 517 F.3d at 743 (internal quotation marks omitted).

103. See id. (declaring that Lawrence recognized "a right to be free from governmental intrusion regarding ‘the most private human conduct, sexual behavior’") (quoting Lawrence v. Texas, 539 U.S. 558, 564 (2003)).

104. Reliable Consultants, 517 F.3d. at 744.
Reliable Consultants to produce a straightforward result. The Fifth Circuit determined that, since the Supreme Court did not address what standard of review applied to the statute in Lawrence, the Fifth Circuit did not need to determine whether to apply rational basis review or strict scrutiny in evaluating the obscene devices statute. Like the Lawrence Court, the Fifth Circuit weighed the state’s interest in public morality against the individual liberty interest claimed, and determined that, post-Lawrence, "public morality . . . cannot serve as a rational basis for Texas’s statute, which . . . regulates private sexual intimacy." The court determined that the statute was too "heavy-handed" a restriction to provide a rational relationship with the state’s interest in the "protection of minors . . . from exposure to sexual devices." Texas’s similar interest in protecting "unwilling adults" from exposure to obscene devices likewise failed to sustain the statute because the Supreme Court "has consistently refused to burden individual rights out of concern for the protection of unwilling recipients." The state argued that striking down the statute in this manner would effectively extend due process protection to "the commercial sale of sex." The appellate court rejected this argument, distinguishing the liberty to purchase the device for later use in private from the actual "sale of sex." The court again analogized the asserted rights and interests to those at issue in Lawrence, determining that, "[j]ust as in Lawrence, the State here wants to use its laws to enforce a public moral code by restricting private intimate conduct." The court couched its disapproval of Texas’ statutory declaration that sexual devices are obscene per se within the language of Lawrence. The obscene devices statute was struck down as unconstitutional.

105. See id. at 745–46 ("[O]ur responsibility as an inferior federal court is mandatory and straightforward [w]e must apply Lawrence . . . . Just as in Lawrence, the State here wants to use its laws to enforce a public moral code by restricting private intimate conduct.").

106. See id. at 744–45 ("Because of Lawrence, the issue before us is whether the Texas statute impermissibly burdens the individual’s substantive due process right to engage in private intimate conduct of his or her choosing.").

107. Id. at 745.

108. Id. at 746.

109. Id. (internal quotation marks omitted).

110. Id. (internal quotation marks omitted).

111. Id.

112. Id.

113. Compare id. ("The case is not about public sex. It is not about controlling commerce in sex. It is about controlling what people do in the privacy of their own homes.

114. Id.

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While the Fifth Circuit used the terminology of rational basis review in its opinion, it was careful to avoid declaring or denying that any particular standard of review applied, such that it could apply Lawrence in as simple a fashion as possible.\textsuperscript{115} Perhaps coincidentally, just as the Lawrence majority omitted any discussion of Justice Scalia’s concerns about the scope of the Lawrence holding, so too did the Fifth Circuit in Reliable Consultants fail to address the arguments of the dissent.\textsuperscript{116} Judge Barksdale, concurring in part and dissenting in part, distinguished Lawrence on the grounds that the conduct protected in that case was entirely private, whereas the obscene devices statute regulated "the sale of what [Texas] defines as obscene devices . . . conduct [that] is both public and commercial."\textsuperscript{117} As noted in the dissent, this was the rationale adopted by the Eleventh Circuit in upholding an identical Alabama statute after several remands and appeals.\textsuperscript{118}

\textit{D. The Eleventh Circuit’s Interpretation of Lawrence}

The Supreme Court handed down the Lawrence decision at a time when the Eleventh Circuit and Northern District of Alabama were

\footnotesize{because the State is morally opposed to a certain type of consensual private conduct."}, with Lawrence v. Texas, 539 U.S. 558, 578 (2003) (noting that the case at hand involved two adults engaged in consensual homosexual practices). The Lawrence Court explained more fully:

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

\textit{Id.}

\textsuperscript{114} See Reliable Consultants, 517 F.3d at 747 ("Whatever one might think or believe about these devices, government interference with their personal and private use violates the Constitution.").

\textsuperscript{115} See id. at 744 ("The Supreme Court did not address the classification [of the applicable standard of review], nor do we need to do so.").

\textsuperscript{116} See id. (noting the differing standards of reviews discussed in the dissent without addressing them).

\textsuperscript{117} Id. at 749 (Barksdale, J., concurring in part and dissenting in part).

\textsuperscript{118} See id. ("I agree that, [t]o the extent Lawrence rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is both private and non-commercial." (Barksdale, J., concurring in part and dissenting in part) (alteration in original) (quoting Williams v. Morgan, 478 F.3d 1316, 1322 (11th Cir. 2007))).
deliberating upon whether there was a fundamental right of sexual privacy.\footnote{See Williams v. Pryor (Williams I), 41 F. Supp. 2d. 1257 (N.D. Ala. 1999), rev’d and remanded Williams v. Pryor (Williams II), 240 F.3d 944 (11th Cir. 2001), on remand, Williams v. Pryor (Williams III), 220 F. Supp. 2d. 1257 (N.D. Ala. 2002), rev’d and remanded Williams v. Attorney General of Ala. (Williams IV), 378 F.3d 1232 (11th Cir. 2004), on remand, Williams v. King (Williams V), 420 F. Supp. 2d 1224 (N.D. Ala. 2006); aff’d sub nom. Williams v. Morgan (Williams VI), 478 F.3d 1316 (11th Cir. 2007).} In Williams v. Pryor,\footnote{See Williams v. Pryor (Williams I), 41 F. Supp. 2d. at 1288–93 (applying rational basis review to the Alabama statute at issue and holding that the statute reflected legitimate state interests but that none of the interests were rationally related to the statute at issue).} vendors and users of sexual devices challenged the constitutionality of an Alabama statute that defined those devices as obscene and banned their distribution.\footnote{Id.} The vendor and user plaintiffs sought to enjoin the Attorney General from enforcing the statute on the grounds that it "will infringe upon their fundamental right to privacy and personal autonomy secured by the United States Constitution." The district court determined that while the plaintiffs’ fundamental right argument that the statute burdened a fundamental right had some appeal,\footnote{Id. at 1284 (quoting Ala. Code § 13A-12-200.2(a)(1)).}

[B]ased on the Supreme Court’s focus on history and tradition, [its] express reluctance to extend the protection of the Due Process Clause, its narrow readings of cases recognizing liberty interests as fundamental, and its statements that it has not yet decided a case squarely on point, this court refuses to extend the fundamental right of privacy to protect the plaintiffs’ interest in using devices "designed or marketed as useful primarily for the stimulation of human genital organs" when engaging in lawful, private, sexual activity, and thereby impose a strict scrutiny frame of analysis when reviewing the Alabama statute at issue.\footnote{See Williams I, 41 F. Supp. 2d at 1284 ("Although Alabama Code § 13A–12–200.2(a)(1) has escaped strict scrutiny, it still must survive review under the rational basis test.").}

The district court then proceeded to evaluate the statute under rational basis review.\footnote{Id. at 1288–90 (first alteration in original).} The court found that the state’s asserted interests in banning public displays of obscenity; banning "commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or family relationships"; and "banning commerce of obscene material" were all legitimate state interests.\footnote{Id. at 1288 (quoting Ala. Code § 13A-12-200.2(a)(1)).}
The court found none of these interests rationally related to the statute, however.126 The court deemed the state’s interest in banning the public display of obscene material was too weak an interest to support a general prohibition on the distribution of sexual devices.127 Indeed, it would have been "absolutely arbitrary" for the legislature to have enacted the statute solely upon that basis.128 The court found that Alabama’s interest in banning "the commerce of sexual stimulation and auto-eroticism" was not rationally related to the statute, because the statute by its terms interfered with such conduct regardless of the marital status of the individuals using the devices while the asserted interest was limited to such conduct "unrelated to marriage, procreation[,] or familial relationships."129 The statute was also an irrational means of banning obscenity, as it swept within its prohibition "all sexual devices in an effort to prohibit the few which may be found obscene."130 Since the statute was thus "an exaggerated response to the State’s concerns,"131 it failed rational basis review.132

On appeal, the Eleventh Circuit disagreed with the district court’s rational basis analysis.133 The appellate court stressed that rational basis review is a "highly deferential standard"134 that requires a finding of constitutionality "so long as ‘there is any reasonably conceivable state of

126. See id. at 1288–93 ("[T]his court finds that the prohibition on the distribution of sexual devices found in Alabama Code § 13A–12–200.2(a)(1), bears no reasonable, rational relation to a legitimate state interest.").

127. See id. at 1288 ("Innumerable measures far short of an absolute ban on the distribution of sexual devices would accomplish the State’s goals.").

128. See id. ("The proscription [against sexual devices is] . . . absolutely arbitrary. Innumerable measures far short of an absolute ban on the distribution of sexual devices would accomplish the State’s goals.").

129. See id. at 1288–90 ("Banning commerce of sexual devices is not rationally related to this end, because such a ban inevitably interferes with sexual stimulation and auto-eroticism which is related to marriage, procreation, and familial relationships.").

130. See id. at 1293 (alteration in original) (stating that, while certain devices may be obscene, and therefore legitimately proscribed, many of the devices proscribed by the challenged statute are not obscene, so the prohibition is an exaggerated response to the State’s concerns).

131. Id.

132. See id. (noting that the statute in question was "an overly broad means of regulating or prohibiting commerce in obscenity.").

133. See Williams v. Pryor (Williams II), 240 F.3d 944, 949 (11th Cir. 2001) ("[T]he district court erred in determining the statute lacks a rational basis. The State’s interest in public morality is a legitimate interest rationally served by the statute.").

facts that could provide a rational basis for the statute." The court noted that incremental steps are not a defect in legislation under rational basis scrutiny, so Alabama did not act irrationally by prohibiting only the commercial distribution of sexual devices rather than some more narrow prohibition. The court thus held that the statute was constitutional under the Fourteenth Amendment because there was at least one rational basis justifying its provisions.

The court then addressed plaintiffs' fundamental rights claims, determining that the district court was correct insofar as it rejected a facial challenge to the statute on the grounds that it burdened a fundamental right, because "[a]pplication of Alabama’s statute to those who sell sexual devices to minors, to such extent that those devices are deemed harmful to minors, would not violate any fundamental right." Since the statute could conceivably be applied in a constitutional fashion it was not facially unconstitutional. The Eleventh Circuit nonetheless found that the district court erred in failing to properly consider the statute as applied against the fundamental rights claims of the user plaintiffs, since the plaintiffs' as-applied challenge "implicate[d] different and important interests in sexual privacy." The appellate court cited Glucksberg’s requirement of careful consideration of fundamental rights claims and found the record before it "bare" of the kind of evidence needed to apply the Glucksberg framework. The case was thus remanded to the Northern District of Alabama for further consideration of the plaintiffs’ as-applied challenge.

On remand, the district court conducted a Glucksberg analysis, examining America’s legal tradition regarding sexual privacy to determine

135. Williams II, 240 F.3d at 948.
136. See id. at 950 ("[T]he analysis of incremental steps are not a defect in legislation under rational basis scrutiny, so Alabama did not act irrationally by prohibiting only the commercial distribution of sexual devices.").
137. See id. at 949 ("The State’s interest in public morality is a legitimate interest rationally served by the statute.").
138. Id. at 954–55.
139. See id. at 955 ("The statute has possible constitutional applications and therefore is not facially unconstitutional.").
140. Id.
141. See id. at 956 ("The court analyzed neither whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons nor whether contemporary practice bolsters or undermines such history.").
142. See id. ("[P]laintiffs' as-applied fundamental rights challenges must be considered further by the district court.").
whether the Alabama statute burdened a fundamental right to, or liberty interest in, sexual privacy. The court assessed plaintiffs’ undisputed evidence describing the use of sexual devices in the nineteenth century, which concluded that proscriptions against their use were historically rare, as was enforcement of broader laws restricting sexual activity, even at the height of the Victorian era.

The court distinguished the outcome in *Glucksberg*, determining that "plaintiffs’ evidence establishes that there exists a constitutionally inherent right to sexual privacy that firmly encompasses state non-interference with private, adult, consensual sexual relationships." The district court saw this trend continuing throughout the twentieth century as well, citing favorably developments in the Model Penal Code and "the Griswold Court’s instruction [that] ‘a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom.’" The court concluded that plaintiffs had met the *Glucksberg* standard in establishing a fundamental right to sexual privacy, and that this right encompassed the use of sexual devices free from state interference. Since the statute burdened plaintiffs’ exercise of this right, the district court applied strict scrutiny review to determine


144. *See id.* at 1283–85, 1287–88 ("[P]laintiffs claim, without dispute, that state regulation of consensual adult sexual activity had declined by the end of the nineteenth century, thereby continuing to protect the marital sexual relationship, and continuing the liberalizing trend of state non-interference with private, consensual, sexual relationships between unmarried adults.").

145. *Id.* at 1296 (alteration removed).

146. *See id.* at 1292 ("So-called deviate sexual intercourse between spouses [like sodomy] may contravene [a] . . . notion that there is one ‘right’ way to achieve sexual gratification, but there is nothing approaching societal consensus on this point. . . . popular literature and available empirical data reveal that such practices are anything but uncommon.") (internal quotation marks, alterations, and citations omitted).

147. *Id.* at 1297 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

148. *See id.* at 1296 ("[P]laintiffs have met their burden of showing that there is a ‘history, legal tradition, and practice’ in this country of deliberate state non-interference with private sexual relationships between married couples, and a contemporary practice of the same between unmarried persons.").

149. *See id.* ("The fact that history and contemporary practice demonstrate a conscious avoidance of regulation of these devices by the states, along with the fact that such devices are used in the performance of deeply private sexual acts, supports [such] a finding . . . ").

150. *See id.* at 1298 ("[The statute] severely limits [the user plaintiffs’] ability to access, and thus to use, sexual devices within their sexual relationships.").
whether the statute justified this burden by furthering a compelling state interest with narrowly tailored means.\textsuperscript{151} In an analysis similar to that of its prior opinion, the district court determined that the statute failed strict scrutiny review because the statute's all-encompassing prohibition on the distribution of sexual devices was not a narrowly tailored means of furthering Alabama's interests, even if they were deemed "compelling."\textsuperscript{152}

The Supreme Court then issued its \textit{Lawrence} opinion, muddying the waters of substantive due process.\textsuperscript{153} After \textit{Lawrence} and prior to its next decision in the \textit{Williams} case, the Eleventh Circuit decided \textit{Lofton v. Secretary of the Dept. of Children and Family Services}.\textsuperscript{154} Plaintiffs in Lofton challenged a Florida statute that prohibited adoption by homosexuals, alleging that it burdened their fundamental substantive due process rights to sexual intimacy.\textsuperscript{155} Disposing of this claim and foreshadowing its next decision in \textit{Williams}, the Eleventh Circuit read \textit{Lawrence} to mean that while "substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct . . . it is a strained and ultimately incorrect reading of \textit{Lawrence} to interpret it to announce a new fundamental right."\textsuperscript{156} 

\textit{Williams} made another trip to the Eleventh Circuit shortly after \textit{Lofton} was decided.\textsuperscript{157} The court reiterated its view from \textit{Lofton} that it would not infer from \textit{Lawrence} the recognition of a substantive due process right to sexual privacy since \textit{Lawrence} did not apply the \textit{Glucksberg} analysis.\textsuperscript{158}

\begin{itemize}
\item[151.] See id. at 1300 ("If a statute is found to infringe a fundamental constitutional right, it will be subject to strict scrutiny . . . .").
\item[152.] See id. at 1304–1307 ( scrutinizing the state interests of protecting children and unwilling adults from exposure to obscenity, banning commerce in stimulation and auto-eroticism for its own sake unrelated to certain relationships, and banning commerce in obscenity). Given that the district court found the statute was not rationally related to furthering these interests in Williams I, it should not be surprising that the statute was found not narrowly tailored in Williams III. \textit{Id.}
\item[153.] See supra Part I.
\item[154.] See Lofton v. Sec'y of the Dept. of Children and Family Services, 358 F.3d 804 (11th Cir. 2004) (deciding that after Lawrence states could not prohibit private, consensual homosexual practices).
\item[155.] See id. at 815 ("[Plaintiffs] contend that the Florida statute, by disallowing adoption to any individual who chooses to engage in homosexual conduct, impermissibly burdens the exercise of this right [to private sexual intimacy].").
\item[156.] Id. at 805.
\item[157.] See Williams v. Att'y General of Ala. (Williams IV), 378 F.3d 1232 (11th Cir. 2004) (noting that Williams was decided six months after Lofton).
\item[158.] See id. at 1238 ("[W]e decline to extrapolate from Lawrence and its dicta a right to sexual privacy triggering strict scrutiny. To do so would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in
The Eleventh Circuit thus proceeded to analyze the district court’s application of Glucksberg to plaintiffs’ challenge to the Alabama obscene devices statute. 159 Regarding Glucksberg’s requirement of a careful description of the right asserted, the appellate court noted that it had earlier agreed with the district court’s "narrowly framed" analysis of the right asserted in Williams I as to "whether the concept of a constitutionally protected right to privacy protects an individual’s liberty to use sexual devices when engaging in lawful, private, sexual activity." 160 The appellate court then criticized the district court’s most recent analysis in the case, which it viewed as re-framing asserted right "as a generalized right of sexual privacy." 161 As to the second prong of the Glucksberg analysis, requiring an evaluation of the carefully described right at issue in our nation’s history and traditions, the Eleventh Circuit found the district court erred on four levels. 162 The court thus concluded that the liberty protected by the Due Process Clause does not "encompass[] a right to use sexual devices like . . . vibrators, dildos, anal beads, and artificial vaginas," and reversed the district court. 163 The Eleventh Circuit judges hearing the case composed an entirely different panel from the panel that heard the first appeal in the Williams case. 164

With the fundamental rights issue removed from consideration, the district court on remand focused on whether public morality could still

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159. See id. at 1239 ("[W]e must turn to the two-step [Glucksberg] analytical framework that the Court has established for evaluating new fundamental-rights claims.").
160. Id. at 1239.
161. Id. (internal quotation marks omitted).
162. See id. at 1242 (noting what the court saw as the four district court errors). Those errors were:

The first error relates back to the district court’s over-broad framing of the asserted right in question. Having framed the relevant right as a generalized "right to sexual privacy," the district court’s history and tradition analysis consisted largely of an irrelevant exploration of the history of sex in America. Second, we find that this analysis placed too much weight on contemporary practice and attitudes with respect to sexual conduct and sexual devices. Third, rather than look for a history and tradition of protection of the asserted right, the district court asked whether there was a history and tradition of state non-interference with the right. Finally, we find that the district court’s uncritical reliance on certain expert declarations in interpreting the historical record was flawed and that its reliance on certain putative "concessions" was unfounded.

Id. (alterations in original).
163. Id. at 1250 (internal quotation marks omitted).
164. Williams II was heard by circuit judges Anderson, Black, and Hall, while Williams IV was heard by circuit judges Birch, Barkett, and Hill.
provide a rational basis for upholding the Alabama statute in the aftermath of Lawrence’s reversal of Bowers. The court distinguished Lawrence, noting that the obscene devices statute did not implicate the Supreme Court’s equal protection jurisprudence, nor did it target entirely private, non-commercial behavior like the Texas statute invalidated in Lawrence. The district court thus concluded that public morality provided a rational basis for the Alabama statute’s prohibition on the distribution of obscene sexual devices. The Eleventh Circuit affirmed the judgment without dissent.

The divergence between the Fifth and Eleventh Circuits on sex toys bans demonstrates just how far Lawrence has taken substantive due process from its moorings. It is at once a substantive due process case mindful of equal protection, a rational basis case that balanced the interests of state and individual, and a fundamental rights case that apparently found a fundamental right without ever declaring the presence of a fundamental right. Lawrence provides only as much protection for private sexual liberties as the next court interpreting it is willing to allow.

**PART II: An Originalist Case for Sexual Privacy**

*Nothing in the Constitution’s text remotely forecloses the argument that there is a fundamental right to control one’s intimate associations, a right which encompasses unconventional sexual behavior.*

While Part I addressed the flaws of the Court’s scattershot approach under the Fourteenth Amendment to individual liberties in general and sexual privacy in particular, this Note proceeds to a discussion of first

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165. See Williams v. King (Williams V), 420 F. Supp. 2d 1224, 1246 (N.D. Ala. 2006) ("[F]ollowing remand, this court may examine whether our holding in Williams II that Alabama’s law has a rational basis (e.g., public morality) remains good law now that Bowers has been overruled.") (internal quotation marks omitted).

166. See id. at 1250–54 ("[T]he Alabama statute does not offend the human dignity of a stigmatized class of individuals, nor implicate equal protection concerns about targeting a ‘discrete and insular minority’ for discrimination or harm out of simple hostility, in a way that requires the court to find the law unconstitutional under Lawrence.").

167. See id. at 1254 ("[P]ublic morality still may constitutionally serve as a rational basis for the law in question here.").

168. See Williams v. Morgan (Williams VI), 478 F.3d 1316, 1324 (11th Cir. 2007) (noting a unanimous affirmation of the district court’s previous decision).

169. Tribe & Dorf, supra note 52, at 1100.
principles regarding unenumerated rights. While judicial conservatives may decry the discovery of unenumerated rights via the Due Process Clause, there is a more "conservative," originalist case to be made as well for limiting the power of government to reach the conduct at issue in Lawrence, Williams, and Reliable Consultants. This Note proceeds to sketch that argument.

A. The Ninth Amendment and Tiered Scrutiny

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.\(^{171}\)

"[T]he body of scholarship concerning the ninth amendment does not reach a consensus; arguably all it suggests is that lawyers do not make good historians."\(^{172}\) While constitutional scholars might disagree over the meaning of Ninth Amendment's words, there is little dispute as to how they came to be in the Bill of Rights.\(^{173}\) During the debate on ratification of the Constitution, Antifederalists in several state legislatures demanded, as a condition for ratification, that a bill of rights be appended to the Constitution.\(^{174}\) The Federalists responded that a bill of rights was unnecessary because the Constitution's enumerated limits on federal power provided the same protections against expansive federal power that a bill of rights would.\(^{175}\) Additionally, they argued that a bill of rights could endanger the rights of the people, in that the enumeration of certain rights

\(^{170}\) See, e.g., Lund & McGinnis, supra note 18 at 1575 ("[W]e think Griswold and Roe are such erroneous glosses on the Constitution that they should be repudiated rather than extended.").

\(^{171}\) U.S. CONST. amend. IX.


\(^{174}\) See, e.g., LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 163 (1988) ("The Constitution was ratified only because crucial states, where ratification had been in doubt [like New York], were willing to accept the promise of a bill of rights in the form of subsequent amendments to the Constitution.").

\(^{175}\) See Barnett, It Means What It Says, supra note 173, at 7 ("Because the Constitution was one of limited and enumerated powers, these enumerated limits constituted a bill of rights.").
could imply that those not listed were left unprotected by the Constitution. The Antifederalists countered that the Constitution posed precisely the same problem, since it contained a partial enumeration of protected rights in Article I, Section 9. They argued likewise that the existence of the Necessary and Proper Clause diminished whatever limiting force the enumeration of powers would have on the power of the federal government under the proposed Constitution.

James Madison led the House in the first Congress in its consideration of proposed amendments. He considered the Federalist objection that an enumeration of rights would leave unenumerated rights unprotected to be "one of the most plausible arguments I have ever heard urged against the admission of a bill of rights." To address these concerns, Madison drafted language that would prove a precursor to the Ninth Amendment:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Madison’s proposals then went to a Select Committee of the House for deliberation. Little is known about the Select Committee’s deliberations

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176. See id. at 8 ("By attempting to enumerate any rights to be protected, it would imply that all that were not listed were surrendered. And it would be impossible to enumerate all the rights of the people.").

177. See CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UENUMERATED RIGHTS 65 (1995) [hereinafter MASSEY, SILENT RIGHTS] ("[T]he Federalist-dominated Convention . . . had already enumerated in the Constitution such rights as the right to jury trial in criminal cases, the right to habeas corpus, and the prohibition of bills of attainder and ex post facto laws.").

178. See U.S. CONST. art. I, § 8, cl. 18 ("To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States . . . ").

179. See MASSEY, SILENT RIGHTS, supra note 177, at 64–65 ("To Antifederalists [the "general welfare" and "necessary and proper" clauses] seemed to convey to the central government great expanses of power . . . ").

180. See Barnett, It Means What It Says, supra note 173, at 9 (noting that Madison introduced the "proposed precursor of the Ninth Amendment").

181. Id. (quoting James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS 437, 448–49 (Jack N. Rakove ed., 1999)).

182. Id. (internal citations omitted).

183. See id. (noting that the proposal which became the Ninth Amendment was one of several proposals sent for consideration).
on what eventually became the Ninth Amendment. A House Committee on the whole added a comma, the Senate added another comma, and the Ninth Amendment in its present textual form emerged from a joint resolution of Congress as the eleventh proposed amendment.

While fleshing out the details of each school of Ninth Amendment interpretation is beyond the scope of this Note, two schools in particular have emerged recently as the primary models of the Ninth Amendment: the federalist and individual natural rights models. These models are in accord that the Ninth provides a rule of construction by which to preserve rights. The distinction between the two is that Randy Barnett, of the individualist school, views the Ninth Amendment as protecting unenumerated rights from disparagement at any level of government, while Kurt Lash, the primary exponent of the federalist model, views it as a limitation leaving unenumerated rights to state and local majoritarian control. It is inconsistent with the anti-majoritarianism of James Madison and the Federalists, whose concerns animated the Ninth Amendment, to hold that the retained rights of the people are subject to majoritarian

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184. See, e.g., Russell L. Caplan, The History and Meaning of the Ninth Amendment, 69 VA. L. REV. 223, 258–59 (describing the only briefly recorded debate in the House regarding the Ninth Amendment’s language).

185. See id. (noting that the “eleventh article” became the Ninth Amendment when two other proposed amendments failed to be ratified by the States).

186. See, e.g., Kurt T. Lash, A Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV. 895, 914 (2008) (“[A]ll retained rights are federalist in their operative effect in that they are retained to the majoritarian control of the people in the several states.”).

187. See, e.g., Barnett, It Means What It Says, supra note 173, at 13–16 (discussing the contribution of the individual natural rights model versus the collective rights model to the Ninth Amendment).

188. Compare id. at 14 (interpreting the Ninth as “requir[ing] that all natural rights be protected equally—not be ‘disparaged’—whether or not they are enumerated”), MASSEY, SILENT RIGHTS, supra, note 177 at 13 (“[E]numerated and unenumerated rights are entitled to some sort of parity . . . .”), and Tribe & Dorf, supra note 52 at 1100 (“The Ninth Amendment counsels against the portrayal of enumerated rights as isolated islands of special protection, elevated above the surrounding sea of possible unenumerated rights ‘retained by the people,’ for to elevate the enumerated rights in this way would surely "disparage" those that remain underwater.”), with Lash, supra note 186, at 897 (viewing “the Ninth as a rule of construction preserving the autonomy of the states”).

189. Compare Barnett, LOST CONSTITUTION, supra note 175, at 242 (arguing that “both the plain and original meanings of the Ninth Amendment require the strict construction of any power that restricts the exercise of individual liberty . . . ”) (emphasis added), with Kurt Lash, The Inescapable Federalism of the Ninth Amendment, 93 IOWA L. REV. 801, 806 (2008) (“The Ninth Amendment was understood to preserve all retained rights, whether individual, majoritarian, or collective, from undue federal interference, reserving control of the same to state majorities.”).
control. 190 Using what Akhil Amar would call "intratextualism," 191 Barnett demonstrates that the majoritarian view of retained rights would require that the Framers meant "the people" of the Ninth Amendment to be fundamentally different from "the people" referred to elsewhere in the Bill of Rights. 192 Barnett also notes that the founding era Court viewed sovereignty as residing in the individual, 193 as did early commentators such as St. George Tucker, whom Lash relies upon as a founding era source for the majoritarian view of retained rights. 194 This Note takes the view that the Ninth Amendment protects retained, individual rights by construing unenumerated rights on equal terms as enumerated ones.

It may seem inappropriate to devote a section to a Note dealing entirely with state law to a discussion of the Ninth Amendment, but it is important to emphasize that that the Ninth Amendment, by its plain language, furnished a rule of construction contrary to that of footnote four of United States v. Carolene Products, 195 which has since been extended to

190. See Randy E. Barnett, Kurt Lash’s Majoritarian Difficulty: A Response to the Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV. 937, 940–43 (2008) [hereinafter “Barnett, Majoritarian Difficulty”] (citing Madison’s concern that “[i]n all cases where a majority are united . . . the rights of the minority are in danger” as well as Madison’s support for revision of the Articles of Confederation” to address the vice of “the injustice of state laws” that resulted from majoritarian rule”) (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 76 (Adrienne Koch ed., 1984) (1840) (statement of James Madison)).

191. See Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747, 748 (1998-1999) (“Intratextualists read a word or phrase in a given clause by self-consciously comparing and contrasting it to identical or similar words or phrases elsewhere in the Constitution.”).

192. See Barnett, Majoritarian Difficulty, supra note 190, at 947 (“When the Bill of Rights uses the term ‘the people,’ it consistently refers to individuals, . . . and all the enumerated rights it protects belong to individuals . . . proponents of a collective rights . . . reading of ‘the people’ in the Ninth and Tenth Amendments must claim that its meaning shifts in these provisions.”).

193. See id. at 954–60 (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) for the initial proposition and Fletcher v. Peck, 10 U.S. (6 Cranch.) 87, 139 (1810), for the proposition that this view survived the ratification of the Eleventh Amendment, which granted the states sovereign immunity thereby reversing the holding of Chisholm).

194. See id. at 963 (“[A]ccording to Tucker, and contrary to Lash, both the Ninth and Tenth Amendments justify a narrow construction of federal powers. The former when the personal rights of individuals are threatened; the latter when the rights and powers of states are threatened.”). Tucker further invokes the Tenth Amendment when he refers to the states’ "rights and power." Id.

195. See U.S. v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (declaring a general presumption of constitutionality for statutes such as the congressional enactment at issue, but cautioning that "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution").
cases challenging the constitutionality of state statutes as well.\textsuperscript{196} The effect of a weaker presumption of constitutionality for statutes that burden a "specific prohibition" within the Bill of Rights is to disparage those rights and liberty interests that are not specifically enumerated by placing upon litigants challenging state and federal laws the nearly impossible burden of overcoming rational basis review. By turning the Ninth Amendment on its head, the Court effectively put upon itself the burden of carving out specific freedoms to protect against statutes reviewed under minimal scrutiny.\textsuperscript{197} Thus the Court’s misconstruction of the Ninth Amendment has furthered a jurisprudence of selective liberty, which in turn produces inscrutable outcomes like \textit{Lawrence v. Texas}.\textsuperscript{198}

The Ninth Amendment is additionally relevant in evaluating constitutional claims to state laws because—as Section B will demonstrate—the ratification of the Fourteenth Amendment fundamentally reoriented the role of the Ninth Amendment in American constitutional law.

\textsuperscript{196} See, e.g., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955) (applying rational relationship test to an Oklahoma statute that barred those engaged in the business of retailing merchandise from permitting any person purporting to do visual care to occupy space in such retail store and deciding that there was a rational relationship between the state’s purported purpose and the statute). Note that while footnote four of \textit{Carolene Products} provided the rule of construction by which some rights could rebut the presumption of constitutionality, the presumption itself dates to O’Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251 (1931), which declared that "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." \textit{Id.} at 257–58.

\textsuperscript{197} See \textit{Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence} 204 (1993) ("[The \textit{Carolene Products} decision] required the Court to do something unprecedented; that is, to enumerate the specific freedoms and privileges that should be considered virtually inviolate even in a regime of expanded powers."). Gillman further notes that "under the contemporary model, it has been assumed that the government’s power should be left undisturbed unless an individual can convince a court the law infringed on a discrete fundamental right," differing from the nineteenth century understanding which "assumed that government should leave individuals alone unless the state could convince a court that the exercise of power advanced a valid public purpose." \textit{Id.}

\textsuperscript{198} \textit{But cf.} Tribe, \textit{Fundamental Right, supra} note 20, at 1936 ("\textit{Lawrence’s} focus on the role of self-regulating relationships in American liberty suggests that the ‘Trivial pursuit’ version of the due process ‘name that liberty’ game . . . has finally given way to a focus on the underlying pattern of self-government . . . defined by the rights enumerated or implicit in the Constitution. . . ."); Poe v. Ullman, 367 U.S. 497, 543 (1961) ("This [liberty guaranteed by the Due Process Clause] is not a series of isolated points pricked out in terms of [the provisions of the Bill of Rights] . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .") (Harlan, J., dissenting) (emphasis added).
B. The Privileges and Immunities of Article IV\textsuperscript{199} and the Fourteenth Amendment\textsuperscript{200}

The privileges and immunities of citizens were viewed as fundamental substantive restrictions on the power of government from the time of the founding.\textsuperscript{201} As constitutional historian Michael Kent Curtis points out, "Blackstone's Commentaries on the Laws of England, published in the colonies on the eve of the Revolution, had divided the rights and liberties of Englishmen into those 'immunities' that were the residuum of natural liberties and those 'privileges' that society had provided in lieu of natural rights."\textsuperscript{202} Blackstone's Commentaries reflects a contemporary view of rights that is distinctly Lockean—a theory in which man, upon entering into society, gives up some of his natural rights in exchange for the protection of his retained rights, and adds to them certain government-created civil rights.\textsuperscript{203} It is thus not surprising that Alexander Hamilton, writing in The Federalist, viewed the Privileges and Immunities Clause of Article IV of the Constitution as "the basis of the union" and the "fundamental provision against all [state] evasion and subterfuge[.]."\textsuperscript{204} Early courts took a similar view. In Corfield v. Coryell,\textsuperscript{205} Justice Bushrod Washington, riding circuit, interpreted the Privileges and Immunities Clause as protecting those rights

\textsuperscript{199} See U.S. Const., art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").
\textsuperscript{200} See U.S. Const., amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").
\textsuperscript{201} See Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 63–65 (1986) (highlighting the history of how the Privileges and Immunities Clause became part of the Constitution).
\textsuperscript{202} Id. at 64 (emphasis added).
\textsuperscript{203} See John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1455–56 (1992) ("The rhetoric of privileges and immunities of citizens in the nineteenth century was heavily Lockean. It was based on the theory that individuals have natural rights that they bring into society, and that the purpose of government is to secure those rights."); Massey, Silent Rights, supra note 157, at 118 (distinguishing natural rights retained when power is ceded to the legislature, such as speech, from positive civil rights, such as the right to jury trial, which "result from the nature of the compact" between the individual and government) (internal quotation marks omitted).
\textsuperscript{204} The Federalist No. 80 at 413 (Alexander Hamilton) (George W. Carey & James McClellan eds., The Gideon ed. 2001).
\textsuperscript{205} See Corfield v. Coryell 6 F. Cas. 546, 553 (C.C.E.D. Pa. 1832) (No. 3230) (holding that "the power to regulate the fisheries belonging to the several states . . . was exclusively vested in the states, . . . and that it was not surrendered to the United States, by the mere grant of admiralty and maritime jurisdiction to the judicial branch of the government").
"which are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign." Washington did not attempt a full enumeration of such fundamental rights, conceding that the endeavor "would perhaps be more tedious than difficult," but offered general categories of rights by way of illustration, including the ability "to pursue and obtain happiness and safety". Prior to the Civil War, these fundamental privileges and immunities operated only to restrict the federal government. Animated in part by a desire to secure these rights against invasion by the states, the Reconstruction Congress drafted the Fourteenth Amendment to the Constitution. In his speech in favor of the proposed amendment, Senator Jacob Howard began his substantive argument with a discussion of the Privileges or Immunities Clause, tying it to Justice Washington's exposition of Article IV in Corfield and proposing to add to it the rights protected by the Bill of Rights. As Curtis notes, several other congressmen in the Thirty-ninth Congress emphasized their support for a constitutional amendment that would "secure and enforce all the guaranties of the Constitution" while "[n]ot a single Republican in the Thirty-ninth Congress said in debate that states were not and should not be required to obey the Bill of Rights." Shortly after ratification of the Fourteenth Amendment, Justice Samuel Miller's infamous opinion in the Slaughter-House Cases gutted the clause of this substantive protection by

206. Id. at 551.
207. Id. at 551–52.
208. See Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) ("[A]ll these immunities, privileges, rights . . . are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them . . . .")
209. See id. at 2766 ("The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."); id. at 2542 ("There was a want hitherto, and there remains a want now . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction . . . .")
210. See id. at 2765 (quoting the opinion in Corfield and noting that "[t]o these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed ([sic]) and secured [by the Bill of Rights] ")
211. CURTIS, supra note 201, at 130 n.293 (citing Cong. Globe, 39th Cong., 1st Sess. 566, 741, 868, 1032, 586 (1866)) (emphasis added).
212. See Slaughter-House Cases, 83 U.S. 63, 81 (1873) (ruling that the Due Process Clause cannot be used to invalidate state economic laws as creating deprivations of property).
limiting its protection to the privileges and immunities of national citizenship. Not surprisingly, his opinion did not rely on any direct commentary from the Members of the Thirty-Ninth Congress, nor did it address squarely the arguments of the dissenting Justices who relied upon such evidence, Justice Field in particular.

Thus, there is strong evidence that the framers of the Fourteenth Amendment viewed the Privileges or Immunities Clause as a substantive restriction on the states, preventing the abridgment of fundamental rights and liberties. While these rights cannot be fully defined or enumerated, they are illuminated by the Lockean tradition of retained, natural rights. After ratification of the Fourteenth Amendment, Senator John Sherman, speaking on behalf of a bill to provide blacks with certain accommodations not enumerated in the constitution, "pointed to the Ninth Amendment as evidencing the existence of other rights beyond those recognized in the Bill of Rights." According to Sherman, these rights included "the ordinary rights of citizenship, which no law has ever attempted to define exactly, the privileges, immunities, and rights, (because I do not distinguish between them, and cannot do it), of citizens of the United States . . ."

While Barnett notes that this was "perhaps an overly expansive" reading of the Privileges or Immunities Clause, it is entirely in keeping with the animating spirit of Article IV, the Ninth Amendment, and the Fourteenth Amendment to link the provisions as a bulwark against denying and disparaging the unenumerated retained rights of the people. This

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213. See id. at 78 (declaring that the privileges and immunities of state citizenship "are those which belong to citizens of the States as such, and . . . they are left to the State governments for security and protection, and not by . . . [the Fourteenth Amendment's Privileges or Immunities Clause]"). But cf. Harrison, supra note 189, at 1465–67 (arguing that even within the limitations of Slaughter-House, the Privileges or Immunities Clause can be construed as incorporating the Bill of Rights by defining its provisions as containing immunities of national citizenship—such as the freedom of speech—that are thereby protected from state interference).


218. See id. at 463 ("Just as the Fourteenth Amendment extended protection of the enumerated rights of the first eight amendments to violations by state governments, so too did it extend federal protection of the preexisting unenumerated rights 'retained by the people.'").
heritage of individual sovereignty informs the following analysis of the scope of what liberties states may abridge pursuant to the police power and how reviewing courts are to evaluate such abridgments.

C. Limits on the Police Power of the States

The Tenth Amendment states only that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amorphous concept of the police power of the states began to be fleshed out in the nineteenth century. Thomas M. Cooley, Justice of the Michigan Supreme Court, was one of the preeminent early scholars on the police power, which he defined as:

[Embracing a State’s] whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.

While this commonly accepted definition of the police power is full of loaded legal terms that can be expanded and contracted to comport with whichever view of state power one might have, generally speaking, Cooley’s definition echoes John Stuart Mill’s view of government power. Writing contemporaneously with Cooley, Mill viewed "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others... Over himself, over his own body and mind, the individual is sovereign."

219. U.S. CONST. amend. X.


[R]equires liberty of tastes and pursuits; of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.

Id. at 201.
course, like the terms within Cooley’s definition, what constitutes third-party harm is open to interpretation. In the context of the present discussion, the question is whether moral vices can constitute the subject of police power regulation. Prominent police power theorist Christopher Tiedeman has posited that "[n]o law can make vice a crime, unless it becomes by its consequence a trespass upon the rights of the public."

Additionally Tiedeman argued that "no trade can be subjected to police regulation of any kind . . . unless its prosecution involves some harm or injury to the public or to third persons, and in any case the regulation cannot extend beyond the evil which is to be restrained."

Both Tiedeman and Cooley nonetheless recognized some role of the state in regulating public morality. As others have noted, even "Mill was not opposed to legislating morality; he was opposed to legislating morality where there is no victim. But under any conception of the police power, what constitutes harm is the dispositive question. Even conceding that states can regulate morals in some fashion or that businesses pandering vices can be proscribed, the propriety of the state regulation still depends on the content given to the labels of "vice" and "morals. In considering the validity of a morals-based state regulation, it is important to

222. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 291 (1971 ed.) (1886); cf. (Thomas Aquinas), Summa Theologica, reprinted in 2 THE BASIC WRITINGS OF SAINT THOMAS AQUINAS: MAN AND THE CONDUCT OF LIFE 792 (Anton C. Pegis ed. 1997) ("[H]uman laws do not forbid all vices, . . . but only the more grievous vices: . . . chiefly those that are injurious to others, without the prohibition of which human society could not be maintained. Thus human law prohibits murder, theft, and the like.").

223. TIEDMAN, supra note 222, at 301.

224. See id. at 291 (arguing that vices such as fornication, gambling, and fraud can be indirectly regulated through state business regulations).

225. See COOLEY, supra note 220, at 830 (noting that "[r]ights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious . . . ").


228. See id. at 1241 ("[C]haracterizing a viewpoint as ‘moral’ amounts to nothing more than a rhetorical flourish atop an ordinary normative judgment. On the other hand, a moral judgment could be said to have special qualities distinguishing it from other normative judgments or expressions of personal sentiment.").
emphasize that courts reviewing state statutes must be able to divine some manner of reviewing state statutes. As Randy Barnett has argued, were a statute allowed to regulate private behavior "on the sole ground that a majority of the legislature deems it to be immoral, there would be no limit on state power since no court could review the rationality of such a judgment."\(^{229}\) Even the scholar most cited for his broad exposition of the police power,\(^{230}\) Ernst Freund,\(^{231}\) voiced a concern similar to Barnett’s: "Effective judicial limitations on the police power would be impossible, if the legislature were the sole judge of the necessity of the measures it enacted . . . Liberty and property yield to the police power, but not to the point of destruction."\(^{232}\)

**D. Whither Obscene Devices?**

It follows that, in attempting to give content to the role of a right to a liberty interest in sexual privacy vis-à-vis the police power’s vague subjective labels of "morals" and "harm," we should focus on the extent to which our ideas lend themselves to clear and consistent application by the courts. The point of this note is, after all, to ensure greater sexual privacy rights via the more consistent, clear jurisprudential doctrine of originalism.

Constitutional commentators Glenn Reynolds and David Kopel point out that state courts in traditionally conservative jurisdictions have reached seemingly liberal outcomes via police power analysis. For example in *Commonwealth v. Wesson*,\(^{233}\) the Kentucky Supreme Court held that Kentucky’s criminal prohibition on consensual homosexual sodomy violated the right to privacy under the Kentucky Constitution. In so holding, the Kentucky court relied heavily on an earlier decision that, in

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230. See Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 6 (1904) ("The state . . . exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts.") (emphasis in original).


233. See Com. v. Wesson, 842 S.W.2d 487 (Ky. 1993) (holding that a statute prohibiting consensual homosexual sodomy violated privacy and equal protection guarantees of Kentucky’s Constitution).
very Millian terms, declared "let a man be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself... he is out of the reach of human laws."\(^{234}\) State bans on sodomy were also struck down on police power grounds in the courts of Pennsylvania,\(^{235}\) Tennessee,\(^{236}\) and Georgia.\(^{237}\) There is thus a tradition, at least at the state level, of recognizing that some activities are beyond the reach of state regulation, not because the conduct is itself protected under some majoritarian conception of "fundamental rights," but because the state simply lacks the power to reach the activity.

Obscenity is a different matter, however. Justice Potter Stewart’s famous maxim on obscenity—that "I know it when I see it"\(^ {238}\)—hardly lends itself to consistent application. The Court’s bedrock rules on obscenity attempt to clarify the concept. Obscenity is entitled to no constitutional protection whatsoever.\(^{239}\) Obscene materials are those "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as whole, do not have serious literary, artistic, political, or scientific value."\(^ {240}\) The trier of fact must resolve this question with reference to local community standards.\(^ {241}\) While states are free to regulate obscenity, they may not criminalize mere private possession of obscene material.\(^ {242}\) The paradox of the Court’s obscenity jurisprudence is that it allows

\(^{234}\) Id. at 495 (quoting Com. v. Campbell, 117 S.W. 383, 386 (Ky. 1909)) (emphasis added).

\(^{235}\) See Com. v. Bonadio, 415 A.2d 47, 50 (Pa. 1980) ("With respect to regulation of morals, the police power should properly be exercised to protect each individual’s right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others.").

\(^{236}\) See Campbell v. Sundquist, 926 S.W.2d 250, 265 (Tenn. App. 1996) (finding the court’s holding in Bonadio persuasive, abrogated on other grounds by Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008).

\(^{237}\) See Powell v. State, 510 S.E.2d 18, 25 (Ga. 1998) ("Since, as determined earlier, the only possible purpose for the statute is to regulate the private conduct of consenting adults... the individual is unduly oppressed by the invasion of the right to privacy. Consequently, we must conclude that the legislation exceeds the permissible bound of the police power.").

\(^{238}\) Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

\(^{239}\) See, e.g., Roth v. United States, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press.").


\(^{241}\) See id. at 30–32 (emphasizing that it is local community standards that govern the definition of obscenity, not a national standard).

\(^{242}\) See Stanley v. Georgia, 394 U.S. 557, 559 (1969) ("[T]he mere private possession of obscene matter cannot constitutionally be made a crime.").
constitutional protection of potentially offensive speech content to turn on the values of local majorities. As reproductive rights scholar Kim Shayo Buchanan points out, the Court’s rules as applied tend to favor traditionalist notions of sexual behavior. In *Brockett v. Spokane Arcades, Inc.* Justice White favorably cited the appellate court’s reversal of an obscenity ordinance on the grounds that the material proscribed "does no more than arouse, ‘good, old fashioned, healthy’ interest in sex." Based on this and similar precedents, Buchanan concludes that "[s]exual materials and educational resources for lesbian, gay, and other queer audiences are much more likely to be deemed obscene for offending heterosexist community standards." In some ways, *Lawrence* represents an improvement in protecting access to sexual resources for marginalized groups against community standards. Professor James Allon Garland, for example, argues that *Lawrence* recognizes sex is a valid form of expression. Buchanan agrees, and extends the argument, stating that "[t]he use of sex toys, like other sexual activities, may be argued to convey messages of love, eroticism, or sexual transgression." Additionally, to the extent *Lawrence* rejected a morality-alone basis under rational basis review, it called into question much of the Court’s obscenity jurisprudence. As Harvard Law School fellow Elizabeth Harmer Dionne points out, in a companion case to *Miller*,

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243. See Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 Emory L.J. 1235, 1246 (2007) (citing cases concerning books, magazines, moving images, nude dancing, and phone sex in support of the proposition that "[s]ince the mid-twentieth century, the Supreme Court has afforded robust constitutional protection to the practices and materials . . . that are normally associated with straight men’s sexual pleasure").

244. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985) (holding that Washington’s moral nuisance statute should not have been invalidated in its entirety on the ground that it reached material that incited normal, as well as unhealthy, interests in sex where the statute contained a severability clause).

245. Id. at 499 (quoting J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 492 (9th Cir. 1984)).

246. Buchanan, *supra* note 243, at 1249 (internal quotation marks and citation omitted).

247. See Garland, *supra* note 79, at 304 ("Lawrence’s inclusion of sex among constitutionally protected liberties is anchored on the notion that sex involves ‘intimate and personal choices’ that ‘define one’s own concept of existence’—the virtues of intimate and expressive associations protected by the First Amendment."). But see Franke, *supra* note 19, at 1409 (arguing that *Lawrence* "leaves little or no justification for protecting less-than-transcendental sex that is not part of an ongoing relationship.") (internal quotation marks and citations omitted).

Paris Adult Theater I v. Slaton,249 the Supreme Court indicated that "states do not need to demonstrate harm in order to restrict obscenity."250 If read as eliminating a morals-only justification for obscenity laws, then Lawrence may require a showing of third-party harm for such laws.251 Dionne makes a convincing argument as to why Miller still allows courts to grant legislatures deference in finding harm-based justifications for restrictions on pornography.252 These justifications do not apply, however, to restrictions on the sale of "obscene devices," which by their artificial nature do not exploit live human subjects in the production or distribution of the product.

Absent a third-party harm justification, the obscene devices statutes at issue in Reliable Consultants and Williams are constitutionally dubious under both the Supreme Court’s current obscenity jurisprudence and a hypothetical jurisprudence rooted in an originalist understanding of the police power.253 A proper conception of the police power provides an answer to Justice Scalia’s parade of horribles in his Lawrence dissent, activities that entail some measure of objective, third party harm, such that the police power can still regulate them. Laws against bestiality could still be upheld on public health grounds. So, too, could laws against prostitution and adult incest, both of which trigger the legitimate state authority to deter fraud and coercion that inflict third-party harm.

249. See Paris Adult Theater I v. Slaton, 413 U.S. 49, 69 (1973) (holding that nothing in the Constitution precluded the State of Georgia from regulating allegedly obscene materials exhibited at an adult theater, provided that the applicable Georgia law, as written or interpreted by the Georgia courts, met First Amendment standards).

250. See Dionne, supra note 23, at 628 (citing Paris Adult Theater I, 413 U.S. at 60–61) ("Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could reasonably determine that such connection does or might exist.").

251. Suzanne Goldberg also demonstrates that third-party harm emerged as the dominant justification for obscenity restrictions in Barnes v. Glen Theatre, 501 U.S. 560 (1991), in which Justice Souter concurred in upholding an Indiana ban on nude dancing while rejecting "the sufficiency of society’s moral views." Id. at 582. This, Goldberg notes, was the first time that a morals-based justification did not command a majority of the court in upholding an obscenity law. Goldberg, supra note 227, at 1270.

252. See Dionne, supra note 23, at 628 ("Rather than eviscerating the states’ already limited ability to regulate obscenity, the [Miller] Court chose to avoid any requirement that the states provide compelling evidence of pornography’s third-party harms.").

253. The enforcement of these statutes as described in the INTRODUCTION, supra, would likewise fall beyond the manner of enforcement endorsed by Cooley. See Cooley, supra note 220 and accompanying text.
Conclusion

The Ninth and Fourteenth Amendments provide vehicles by which the Constitution circumscribes the police power of the states. A proper adjudication of individual liberties cases should be premised on these principles, and not on the disjointed doctrine of substantive due process, which, in its most recent iteration, combines the majoritarian bias feared by civil libertarians\(^{254}\) with the susceptibility toward judicial activism feared by conservatives.\(^{255}\)

By shifting away from the Ninth Amendment’s rule of construction and the Fourteenth Amendment’s explicit substantive protection of unenumerated rights, the Supreme Court began the era of fundamental rights litigation, which has yielded the occasional victory for minority rights. But as the divergence on the constitutionality of sex toy bans between the Fifth and Eleventh Circuits demonstrates, Lawrence’s purported extension of substantive due process jurisprudence has unmoored the doctrine from any clear standard of adjudication. Charles Lund Black, Jr., wrote that "a corpus juris of human rights . . . will never be built; it will always be building, like the common law."\(^{256}\) To the extent he is referring to defining the contour of unenumerated rights generally, he is correct. The inherent flaw in the majority opinion in Lawrence—and substantive due process adjudication in general—is that it requires building this corpus juris of individual rights via some form of majoritarian consensus.

Implicit in the Lawrence opinion’s focus on recent history in evaluating a fundamental rights claim, and in Justice Harlan’s dissent in Poe v. Ullman\(^{257}\) that "tradition is a living thing[,]"\(^{258}\) is the idea that courts can view upon the jurisprudential horizon some idealized set of individual rights that, once glimpsed, can no more be turned back upon than the rising sun.\(^{259}\) There is no guarantee, however, that these rights will be protected

\(^{254}\) See, e.g., Barnett, Majoritarian Difficulty, supra note 192 and accompanying text.

\(^{255}\) See, e.g., Lund & McGinnis, supra note 18, at 1585 (arguing that in Lawrence the reasoning used indicates that "due process jurisprudence has transcended the bounds of rational discourse").

\(^{256}\) Charles L. Black, Jr., The Humane Imagination 194 (1986).

\(^{257}\) See Poe v. Ullman, 367 U.S. 497, 508–09 (1961) (dismissing the case for a lack of a justifiable constitutional question because the plaintiffs had not shown that the statutes would be enforced against them).

\(^{258}\) Id. at 542 (Harlan, J., dissenting).

\(^{259}\) Cf. Lawrence, 539 U.S. at 578–79 (explaining that those who drew and ratified the Due Process Clauses "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress . . . ." As the
long by courts rooted more in a subjective understanding of majoritarian preferences than in the proper scope of government power.

In urging the dispersion of power in the American republic, the anti-majoritarian James Madison warned that "[e]nlightened statesmen will not always be at the helm . . . ."260 This Note was written upon the premise that enlightened judges will not always be at the helm, either. A greater emphasis on first principles and the limits of state power would help to diminish the relevance of this warning.

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