TOYS ARE US: SEX TOYS, SUBSTANTIVE DUE PROCESS, AND THE AMERICAN WAY

CURTIS WALDO*

In the six years since the Supreme Court decided *Lawrence v. Texas*,[1] circuit courts have disagreed over the proper standard of review for statutes that implicate sexual privacy.[2] Two cases stand out: *Williams v. Attorney General of Alabama*, from the Eleventh Circuit in 2004,[3] and *Reliable Consultants v. Earle*, from the Fifth Circuit in 2008.[4] In *Williams*, the court upheld an Alabama statute that prohibited the sale of sex toys;[5] in *Reliable*, the court struck down a Texas statute with similar wording.[6] The judges in both cases, whether writing for the majority or for the dissent, measured the statutes against Justice Kennedy's opinion in *Lawrence*,[7] but their interpretations differed in significant respects.[8] The majority in

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* J.D. Candidate, Columbia Law School, 2010; B.A. University of Texas at Austin, 2007.

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

[2] *See* Brian Hawkins, Note, *The* Glucksberg *Renaissance: Substantive Due Process Since* Lawrence v. Texas, 105 MICH. L. REV. 409 (2006) (surveying substantive due process claims after *Lawrence*); *see also infra* Part I.C.

[3] Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004).

[4] Reliable Consultants v. Earle, 517 F.3d 738 (5th Cir. 2008).

[5] *Williams*, 378 F.3d at 1233.

[6] *Reliable*, 517 F.3d at 740.

[7] *See infra* Part II.A–B.

[8] *See* Michael J. Hooi, Comment, *Substantive Due Process: Sex Toys After* Lawrence, 60 FLA. L. REV. 507 (2008) (noting circuit split between Fifth and Eleventh Circuits and urging Supreme Court to resolve). Texas has since declined to appeal the Fifth Circuit's decision. *See* Mark Kernes, *Sex Toy Sales Now Completely Legal in Fifth Circuit*, AVN, Nov. 2, 2008, http://www.avn.com/law/articles/33144.html (noting state's decision not to file for writ of certiorari). Three states still prohibit the sale of sex toys and/or the production and distribution of obscene material. *See* ALA. CODE § 13A-12-200.2 (2009); GA.

Williams, along with the dissent in *Reliable*, thought *Lawrence* required rational basis review and that the sex toy statute would easily pass. Conversely, the dissent in *Williams* believed that the Alabama statute should be assessed under strict scrutiny but that it would fail even rational basis review.[9] Finally, the majority in *Reliable* was careful to apply neither rational basis nor strict scrutiny, instead simply "apply[ing] *Lawrence*."[10]

After *Lawrence*, those who have written about the circuit courts' treatment of sex toy statutes have generally focused on the right to sexual privacy threatened by these bans, which they contend that the majority in *Williams* and the dissent in *Reliable* failed to appreciate.[11] However, this Article will argue that the circuit courts' disagreement in *Williams* and *Reliable* is a result of the courts' continued, but misguided, practice of evaluating the *nature* of the right asserted by the claimant.[12] *Lawrence* should be regarded as a retreat from this practice.[13] The *Lawrence* Court,

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CODE ANN. § 16-12-80 (2009); VA. CODE ANN. § 18.2-373 (2009). Alabama's ban on sex toys and obscene materials has been upheld on two occasions: *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004) and *1568 Montgomery Highway, Inc. v. City of Hoover*, 2009 WL 2903458 (Ala. Sept. 11, 2009). Mississippi also had a longstanding ban on the sale of sex toys, but since Mississippi is located in the Fifth Circuit, this law is presumably no longer valid.

[9] *See infra* Parts II.A–B.

[10] *Reliable*, 517 F.3d at 745.

[11] The literature on sex toy cases is generally confined to *Williams*, as *Reliable* is a more recent case. *See* Jota Borgmann, *Hunting Expeditions: Perverting Substantive Due Process and Undermining Sexual Privacy in the Pursuit of Moral Trophy Game*, 15 UCLA WOMEN'S L.J. 171 (2006) (criticizing *Williams* court for not protecting right to sexual privacy); Shelly Elimelekh, *The Constitutional Validity of Circuit Court Opinions Limiting the Right to Sexual Privacy*, 24 CARDOZO ARTS & ENT. L.J. 261 (2006) (same).

[12] *See infra* Part I.A.

[13] *See infra* Part I.B. Others have also argued that *Lawrence* may be a move away from the strict scrutiny-rational basis dichotomy. *See* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21 (2003) (arguing that *Lawrence* should usher in an era in which laws infringing on liberty are assumed to be unconstitutional); Philip Chapman, Note, *Beyond Gay Rights:* Lawrence v. Texas *and the Promise of Liberty*, 13 WM. & MARY BILL RTS. J. 245 (2004) (same). Barnett's method of protecting liberty demands too much. It presumes a wide swath of activity to be protected, and then allows the state to justify incursions onto any portion of that activity , as long as the state's purpose is accomplished through a narrowly tailored means and is the least restrictive alternative. In contrast, this Article's suggested approach, *see infra* Part III.A, would use a more lenient standard in determining whether a law impermissibly infringes on liberty.

after finding that the statute at issue addressed a relationship that was outside the proper realm of state action,[14] struck it down as prohibiting activity which was "within the liberty of persons to choose."[15] What *Lawrence* left unresolved was how future courts should determine when state action impermissibly treads upon this "liberty." That is the problem which this Article aims to solve.[16]

Part I will summarize the Court's modern substantive due process cases, starting with *Griswold v. Connecticut*[17] and ending with *Lawrence*. Part I.B argues that *Lawrence* applied neither rational basis nor strict scrutiny review. Part I.C considers how scholars and judges have interpreted *Lawrence*. Part I.D concludes that after *Lawrence*, the preservation of public morality can no longer be the sole justification for restricting liberty.

Part II explores the split between the Eleventh Circuit's *Williams* opinion and the Fifth Circuit's judgment in *Reliable*. It argues that their primary shortcoming is that they assume, even after *Lawrence*, that unenumerated rights may be protected only if they can be singled out and/or classified as "fundamental."[18] Finally, this section argues that reading *Lawrence* to have created a right to sexual privacy, as several of the judges in *Williams* and *Reliable* did, would not invalidate statutes prohibiting the sale of sex toys.[19]

Part III proposes an interpretation of *Lawrence* that embodies a narrow but absolute right to liberty. The nature or importance of the right being asserted is not important; what is important is the state's justification, or lack thereof, for its choice to legislate in a certain area. Part III.A argues that this justification can only be shown when the state's legislation substantially relates to preventing harm. Part III.B addresses changes in pre-*Lawrence* doctrine suggested by this Article, and Part III.C addresses the

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However, if the law does impermissibly infringe on liberty, it should be struck down, regardless of government interests.

[14] *See infra* Part I.D.

[15] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[16] *See infra* Part III.

[17] 381 U.S. 479 (1965).

[18] *See infra* Part II.A–B.

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

objection that a "substantial relation" standard might be too indeterminate. Finally, Part III.D demonstrates how this interpretation of *Lawrence* would be applied to statutes banning the sale of sex toys, as well as to other cases. Though most laws would survive this interpretation of *Lawrence*, those banning the sale of sex toys, as well as various protectionist and paternalistic laws, would most likely be struck down,[20] not because such laws infringe on a fundamental right,[21] but because the state would have difficulty justifying its actions in these areas.

Judicial treatments upholding the constitutionality of statutes banning the sale of sex toys have generally relied on the distinction between private, autonomous conduct (which cannot be banned), and public, commercial conduct (which can be banned). Conversely, judicial opinions and scholarly works advocating for the unconstitutionality of laws banning the sale of sex toys have generally focused on the stifling impact such laws have on the private, autonomous conduct of individuals who wish to use sex toys. In focusing on the rights of vendors, this Article suggests a different, but ultimately more consistent, approach than either side of this debate has yet taken.

I. THE LAST FORTY YEARS OF SUBSTANTIVE DUE PROCESS: FROM PRIVACY TO LIBERTY

Part I.A of this Article discusses the modern history of substantive due process. This is necessary in order to appreciate how Justice Kennedy's analysis in *Lawrence*, discussed in Parts I.B and I.C, marked a shift away from the fundamental/non-fundamental rights approach of previous substantive due process cases. Part I.D argues that *Lawrence* should be read to invalidate laws justified solely on the basis that they preserve public morality.

A. *Griswold* Through *Glucksberg*

Griswold v. Connecticut is the typical starting point for a survey of modern substantive due process cases.[22] Although it did not explicitly rely

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[20] *See infra* Part III.D.

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

[22] 381 U.S. 479 (1965). This is where Justice Kennedy started in *Lawrence*. Lawrence v. Texas, 539 U.S. 558, 564 (2003). For a look at substantive due process before *Griswold*, see generally EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 58–115 (1948) (discussing substantive due process in the state courts before the Civil War); James

on substantive due process,[23] the *Griswold* Court struck down a Connecticut law prohibiting the use of contraceptives.[24] The Court based its reasoning on the "right to privacy," found in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments.[25] *Griswold* was followed two years later by *Loving v. Virginia*,[26] in which the Court ruled that anti-miscegenation statutes violated not only the Equal Protection Clause of the Fourteenth Amendment,[27] but also the "vital personal right[]" to marry.[28] In *Roe v.*

W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999) (finding that even before the Civil War, "due process" was seen as protection against laws that transferred property from one person to another without consent). The entire idea of substantive due process has also been criticized. *See, e.g.*, Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982) (Judge Posner writing that substantive due process is an "exotic constitutional doctrine" and "ubiquitous oxymoron"); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990) (arguing that substantive due process is a "sham"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) [hereinafter, ELY, DEMOCRACY AND DISTRUST] ("[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms——sort of like 'green pastel redness.'").

[23] *Griswold*, 381 U.S. at 481–82 ("Overtones of some arguments suggest that *Lochner* should be our guide. But we decline that invitation.") (citations omitted).

[24] *Id.* at 485.

[25] *Id.* at 483–84. In this way, Justice Douglas distinguished the privacy right at issue in *Griswold* from the "natural law due process philosophy" of earlier substantive due process decisions. *Id.* at 515 (Black, J., dissenting). Some have argued that by listing specific privacy rights, the Constitution implicitly does not recognize any other privacy rights. *See* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421–22 (1974); Thomas E. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case*, 64 MICH. L. REV. 235, 252–53 (1964). *But see* CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 110 (1999) (arguing that *Griswold* was about desuetude, as opposed to a broad right of privacy).

[26] 388 U.S. 1 (1967).

[27] U.S. CONST. amend. XIV, § 1.

[28] *Loving*, 388 U.S. at 9. Some see *Lawrence* as an extension of *Loving*'s promise of equality in marriage. *See, e.g.*, Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1449 (2004) (arguing that the logic of *Lawrence* demands some recognition of equality); Jason Montgomery, *An Examination of Same-Sex Marriage and the Ramifications of* Lawrence v. Texas, 14 KAN. J.L. & PUB. POL'Y 687, 692 (2005) (same); Marc Stein, Boutilier *and the U.S. Supreme Court's Sexual Revolution*, 23 LAW & HIST. REV. 491, 493 (2005) (arguing that *Lawrence* "revised the heteronormative vision of sexual freedom, equality, and citizenship that had guided the Court since the 1960s"). *But see* Berta E. Hernández-Truyol, *Querying* Lawrence, 65 OHIO ST. L.J. 1151, 1262 (2004) (criticizing

Wade,[29] the Court explained that because the "right to personal privacy" was fundamental, the state had to have a "compelling" interest before it could regulate the choice of whether to have an abortion or not.[30]

Four years later, the Court ruled in *Carey v. Population Services* that prohibiting the sale of contraceptives was equivalent to prohibiting the use of contraceptives for purposes of fundamental rights analysis, further extending the right of privacy.[31] As prohibiting the sale of contraceptives placed a "significant burden" on the exercise of a fundamental right, such laws were unconstitutional, even though they regulated commercial relationships.[32]

Nine years after *Carey*, the Court's extension of privacy rights was interrupted by *Bowers v. Hardwick,* in which the Court upheld a ban on oral and anal sex between consenting adults.[33] Writing for the majority, Justice White ruled that a homosexual right to engage in sodomy is not "deeply rooted in this Nation's history and tradition or implicit in the concept of

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Lawrence for not focusing on the subordination aspect of sodomy statutes); Robert C.L. Moffat, *"Not the Law's Business:" The Politics of Tolerance and the Enforcement of Morality*, 57 FLA. L. REV. 1097, 1128–29 (2005) (arguing that society is not yet ready for constitutionally mandated gay marriage); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005) (arguing that right to marry can better be understood as an Equal Protection right, as opposed to substantive due process right). *See also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (ruling that the Massachusetts Constitution demands same-sex marriage and citing *Lawrence* as support).

[29] 410 U.S. 113 (1973).

[30] *Id.* at 154–55. The *Roe* Court's decision to apply a right of privacy to abortion has been criticized. *See* John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 930 (1973) (arguing that outlawing abortion is not about "governmental snooping" into citizens' private lives). *But see* Philip Heymann & Douglas Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765, 772 (1973) (arguing that the "core" of past privacy cases justifies some protection of abortion right).

[31] 431 U.S. 678 (1977).

[32] *Id.* at 689. Limiting access to abortion or contraception, not to mention sex toys, could be said to discriminate against women on the basis of sex. After all, women are affected disproportionately by these limitations. For more on this view, see generally Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 382 (1985) (arguing that the abortion question should be seen in terms of women's rights); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (arguing that modern constitutional law has not sufficiently focused on sexual equality).

[33] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

ordered liberty."[34] These were the hallmarks, according to White, of any fundamental, unenumerated right.[35] Four justices dissented, criticizing White for framing the fundamental right in such a narrow way.[36]

Nineteen years after *Roe*,[37] the Court reaffirmed *Roe*'s "central holding" in *Casey v. Planned Parenthood*.[38] While the per curiam opinion in *Casey* preserved *Roe*'s casting of the choice to seek out an abortion as a fundamental right, it shifted from a trimester analysis to an undue burden standard, in which any law regulating a woman's choice to seek out an abortion may not place an "undue burden" on the woman's fundamental right.[39] *Casey* was therefore a departure from the traditional practice of applying strict scrutiny to violations of fundamental rights.[40] *Casey* also represented a change in how the Supreme Court spoke of fundamental rights. The per curiam opinion emphasized balancing "liberty and the demands of organized society."[41] Indeed, the Court recast *Roe* as having

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[34] *Id.* at 194 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)); Palko v. Connecticut, 302 U.S. 319, 325 (1937). Many have criticized Justice White's choice to phrase the right at stake in this way. *See, e.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI L. REV. 1057, 1108 (1990) (calling Justice White's phrasing "egregiously wrong").

[35] *Bowers*, 478 U.S. at 191–92.

[36] *Id.* at 199.

[37] The closest *Roe* came to falling was most likely *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), in which Justices Rehnquist, White, and Kennedy were willing to relegate the right to abortion to a liberty interest that could have been overridden by the state's rational interest in potential life. *Id.* at 520. Justice Scalia would have gone even further, overturning *Roe* completely. *Id.* at 532. *Roe* was saved only by Justice O'Connor, who believed the state could not place an undue burden on the woman's right to attain an abortion. *Id.* at 530.

[38] 505 U.S. 833, 853 (1992).

[39] *Id.* at 876. Some have lauded the undue burden standard as a "plausible and coherent" reaction to the moral problems associated with abortion. *See* David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 27. *But see* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 679–81 (1995) (criticizing *Casey* as disingenuous).

[40] *See* Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 496 (2002) (calling the *Casey* undue burden standard an "intermediate standard of review").

[41] *Casey*, 505 U.S. at 850 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

protected a "dimension of personal liberty."[42] The right to privacy in *Roe* was now a subset of a general right to personal liberty.[43]

Compare the reasoning in *Casey* to the Court's analysis five years later in *Washington v. Glucksberg*,[44] in which Chief Justice Rehnquist criticized the more open-ended approach of the per curiam opinion in *Casey*.[45] Eschewing *Casey*'s "liberty" analysis, Rehnquist began by "carefully formulating" the specific right at issue and then inquiring "whether this asserted right has any place in our Nation's history."[46] Not surprisingly, since Rehnquist was able to phrase the "right" at stake as the "right to commit suicide which itself includes a right to assistance in doing so,"[47] it was not difficult for him to find evidence that the right to commit

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[42] *Id.* at 853.

[43] Randy Barnett explored this transformation further in Barnett, *supra* note 13. *See also* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 680 (2006) (noting Justice Kennedy's switch from privacy to liberty); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1108–09 (2004) (same); Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237 (2005) (same). *But see* Dale Carpenter, *Is* Lawrence *Libertarian?* 88 MINN. L. REV. 1140 (2004) (responding to Professor Barnett's libertarian interpretation of *Lawrence*); Jamal Greene, *Beyond* Lawrence: *Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1872 (2006) (calling "*Lawrence*'s libertarian overtures . . . too brazen to be countenanced fully"); Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 60–61 (2003) (arguing that *Lawrence* was primarily about striking down silly and generally unenforced laws and will probably not have much of a practical impact on substantive due process jurisprudence); Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1938 n.174 (2004) (arguing that a libertarian interpretation of *Lawrence* is "dubious").

[44] 521 U.S. 702 (1997).

[45] *See id.* at 721–22. In his *Glucksberg* opinion, Rehnquist explicitly pointed out he was *not* adopting Justice Harlan's substantive due process analysis in *Poe*. *Id.* at 722 n.17. The historical approach of *Glucksberg* has been criticized. *See, e.g.*, Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008). *But see* Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 232 (2007) (arguing that *Glucksberg* offered a "better reading of constitutional substantive due process analysis," compared to a reading emphasizing personal autonomy).

[46] *Glucksberg*, 521 U.S. at 722–23. Rehnquist distinguished *Casey* and therefore did not overrule it by arguing that while "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy . . . all important, intimate, and personal decisions are [not] so protected." *Id.* at 727.

suicide had not been historically protected. As such, the Court upheld Washington's ban on assisted suicide.[48]

B. *Lawrence v. Texas*

Casey and *Glucksberg* sent mixed messages to lower courts about how to approach substantive due process cases.[49] The *Casey* opinion diminished the importance of the fundamental/non-fundamental rights distinction; the *Glucksberg* approach rigidly depended on the distinction.[50] As Part I.B shows, *Lawrence v. Texas*[51] represented a shift toward the *Casey* approach, which placed less emphasis on a strict classification of rights.

In *Lawrence,* Justice Kennedy, joined by four other Justices, struck down a Texas statute that prohibited sodomy between homosexuals.[52] Extending the practice seen in *Casey*, Justice Kennedy framed the Court's decision as protecting liberty, not privacy.[53] For example, he wrote of a liberty that protects persons from unwanted government intrusion,[54] a liberty under the Due Process Clause,[55] and a substantive guarantee of liberty.[56] In fact, one commentator noted that Justice Kennedy mentioned

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[47] *Id.* at 723. For more on the level of generality problem, see Tribe & Dorf, *supra* note 34; *infra* Part III.B.1.

[48] *See Glucksberg*, 521 U.S. at 773 (Souter, J., concurring).

[49] Scholars have noted this disparate treatment of unenumerated rights. *See* Barnett, *supra* note 13 (noting conflict between *Glucksberg* and *Casey*); Lois Shepard, *Looking Forward With the Right of Privacy*, 49 U. KAN. L. REV. 251, 263–64 (2001) ("While *Casey* . . . may have suggested the demise of fundamental rights analysis, the Court in *Washington v. Glucksberg* discussed and affirmed in principle the idea that rights of privacy are fundamental rights deserving of strict scrutiny.").

[50] *See supra* note 49 (citing scholars who have noted this difference).

[51] 539 U.S. 558 (2003).

[52] *Id.* at 567.

[53] *See supra* note 43 and accompanying text (noting shift from privacy to liberty).

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

[55] *Id.* at 564.

[56] *Id.* at 575.

the right to "liberty" twenty-five times in *Lawrence*, whereas he discussed privacy only in descriptive terms as to the conduct in question.[57] Indeed, privacy shifted from the focal point in *Griswold* and *Roe* to a subset of a general right to liberty after *Casey* and *Lawrence*.[58]

Justice Kennedy also never mentioned whether he was applying "rational basis" or "strict scrutiny" review to the Texas statute. One could argue that he applied rational basis review, as he did not engage in *Glucksberg* analysis or mention the creation of any "new" fundamental rights. Justice Kennedy also noted that the Texas statute "further[ed] no legitimate state interest,"[59] which recalls the rational basis test.

Justice Kennedy also discussed rights of "fundamental significance"[60] and "vital interests."[61] These phrases imply more than typical rational basis review. Additionally, Justice Kennedy adopted a portion of Justice Stevens' dissent in *Bowers*, which read in part, "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."[62] Therefore, if the choice to be intimate with one's partner, even if procreation or marriage is not involved, is a "form of 'liberty' protected by the Due Process Clause," then Justice

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[57] *See* Barnett, *supra* note 13.

[58] *See supra* note 43 and accompanying text (noting shift from privacy to liberty).

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

[60] *Id.* at 565.

[61] *Id.* at 564. Laurence Tribe has noted this "talismanic verbal formula." *See* Tribe, *supra* note 43, at 1917 (referring to Kennedy's "protection of liberty under the Due Process Clause [that] has a substantive dimension of fundamental significance in defining the rights of a person." (quoting Lawrence v. Texas, 539 U.S. 558, 565 (2003))).

[62] *Lawrence*, 539 U.S. at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

Kennedy *was* protecting a fundamental right.[63] If Justice Kennedy was protecting a fundamental right, he must have been applying strict scrutiny.[64]

This Article's argument is that Justice Kennedy applied neither strict scrutiny nor rational basis review to the Texas sodomy statute. His opinion in *Lawrence* contained no reference to *Glucksberg*'s two-part framework, and though Justice Kennedy did critique the historical approach of the *Bowers*' majority,[65] he never said that any particular right has a firm "place in our Nation's traditions," as required in *Glucksberg*.[66] Instead, Justice Kennedy's approach was more straightforward. The Texas statute sought to control a relationship that was within the liberty of people to determine for themselves.[67] Whether the right claimed was a right to engage in sodomy, or a right to be left alone, or a right to sexual privacy, was not the focus of the inquiry. In fact, although Justice Kennedy criticized the narrow way in which the *Bowers* majority phrased the right at stake,[68] as Justice Scalia pointed out in dissent,[69] Justice Kennedy never proposed a different, "better" formulation.

Regardless of whether Justice Kennedy applied rational basis or strict scrutiny to the Texas statute, he *did* identify the relationship at stake and declare that the citizen's interest in such a relationship was "within the liberty of persons to choose."[70] The state could not justify this restriction, and so it was struck down. The wording of the right, therefore, was not

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[63] *Id.* Presumably this is because other such Fourteenth Amendment rights have been labeled "fundamental" in the past.

[64] This was the argument Judge Barkett made in dissent in *Williams v. Attorney General of Alabama*, 378 F.3d 1232, 1252–53 (2004). For more discussion of Barkett's *Williams* dissent, see *infra* Part II.A.

[65] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas 539 U.S. 558 (2003).

[66] Washington v. Glucksberg, 521 U.S. 702, 723 (1997). For an argument that *Lawrence* could be read to implicitly overrule *Glucksberg*, see Diana Hassel, *Sex and Death:* Lawrence's *Liberty and Physician-Assisted Suicide*, 9 U. PA. J. CONST. L. 1003 (2007). *But see* Hawkins, *supra* note 2 (noting lower courts' reluctance to extend *Lawrence*).

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

[68] *Id.* (characterizing the *Bowers* Court as having "misapprehended the claim of liberty there presented to it").

[69] For more on Justice Scalia's dissent, see *infra* Part I.C.2.

[70] *Lawrence* 539 U.S. at 567.

important; what was important was that the state was infringing on the liberty of its citizens in a way that was not justifiable.

C. Scholarly Reaction to *Lawrence*

Many judges and commentators have speculated about what level of scrutiny Justice Kennedy's opinion in *Lawrence* demands for laws that may impermissibly infringe on liberty.[71] A related source of speculation centers around laws *Lawrence* might invalidate and which laws might survive.[72] Part I.C examines these questions in turn.

1. Level of Scrutiny Required

In regards to what level of scrutiny *Lawrence* demands, circuit courts generally prefer remaining with the more conservative *Glucksberg* approach,[73] but responses have hardly been unanimous. Some have interpreted *Lawrence* as a rational basis decision,[74] while others have interpreted *Lawrence* as having applied strict scrutiny.[75] Still others have seen *Lawrence* as standing for an intermediate level of scrutiny.[76]

Scholarly treatment of *Lawrence* has been similarly divided. Some have assumed that *Lawrence* is a fundamental rights decision,[77] and others

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[71] *See infra* notes 73–85 and accompanying text.

[72] *See infra* notes 87–97 and accompanying text.

[73] *See* Hawkins, *supra* note 2 (surveying substantive due process claims after *Lawrence* and finding that most courts prefer the *Glucksberg* approach).

[74] *See* Sylvester v. Fogley, 465 F.3d 851, 858 (8th Cir. 2006); Muth v. Frank, 412 F.3d 808, 818 (7th Cir. 2005); Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1238 (11th Cir. 2004); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004); Witt v. U.S. Dep't of Air Force, 444 F. Supp. 2d 1138, 1143 (W.D. Wash. 2006); United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 591 (W.D. Pa. 2005).

[75] *See Williams*, 378 F.3d at 1252 (Barkett, J., dissenting); Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003) (including *Lawrence* within citations of precedent establishing fundamental rights); Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 548 (S.D.N.Y. 2004) (same).

[76] *See* United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

[77] *See* Donald H.J. Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 910 (2005); Tribe, *supra* note 43, at 1917.

see it as a rational basis decision.[78] Some see *Lawrence* as suggesting an intermediate, balancing approach to substantive due process cases.[79]

Still others see *Lawrence* as not having applied any specific level of scrutiny.[80] Some have argued,[81] for example, that *Lawrence* marks a return to Justice Harlan's dissent in *Poe v. Ullman*,[82] in which Justice Harlan argued that the Fourteenth Amendment[83] protects citizens against "all substantial arbitrary impositions and purposeless restraints" on liberty.[84] Still others have argued that *Lawrence* represents a shift toward a libertarian approach to substantive due process analysis, in which laws that infringe on the liberty of citizens are assumed to be unconstitutional.[85] Judge Reavley of the Fifth Circuit also took the position that *Lawrence* did not fit neatly into either the strict scrutiny or the rational basis box.[86]

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[78] *See* Sarah Catherine Mowchan, *A Supreme Court That is "Willing to Start Down That Road": The Slippery Slope of* Lawrence v. Texas, 17 REGENT U. L. REV. 125, 130–32 (2004); Sunstein, *supra* note 43 (arguing that courts will ultimately read *Lawrence* as narrow decision); Note, *Unfixing Lawrence*, 118 HARV L. REV. 2858 (2005) (same).

[79] *See* Donald L. Beschle, Lawrence *Beyond Gay Rights: Taking the Rationality Requirement for Justifying Criminal Statutes Seriously*, 53 DRAKE L. REV. 231 (2005); John G. Culhane, *Writing On, Around and Through* Lawrence v. Texas, 38 CREIGHTON L. REV. 493 (2005); Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes out of the Closet*, 15 COLUM. J. GENDER & L. 355 (2006); Jerald A. Sharum, Comment, *Controlling Conduct: The Emerging Protection of Sodomy in the Military*, 69 ALB. L. REV. 1195, 1202 (2006).

[80] This is the position taken by this Article. *See supra* Part I.B.

[81] *See, e.g.*, Hunter, *supra* note 43, at 1108–09.

[82] 367 U.S. 497 (1961).

[83] U.S. CONST. amend. XIV, § 1.

[84] *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

[85] *See, e.g.*, Barnett, *supra* note 13; Chapman, *supra* note 13. *But see* Karlan, *supra* note 28, at 1449–50 (arguing that while *Lawrence* may not fit within the strict scrutiny-rational basis framework, this is because cases involving homosexuals require another framework altogether).

[86] *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (2008). For more on the *Reliable* case, see *infra* Part II.B.

2. Types of Laws That Will Be Struck Down

Justice Scalia's dissent in *Lawrence* offered the most immediate, and one of the more expansive, predictions of what types of laws might be struck down under *Lawrence*.[87] His dissent highlighted many of the changes he thought the Court's opinion represented.[88] Specifically, Scalia predicted that Justice Kennedy's opinion would lead to constitutionalizing same-sex marriage.[89] In responding to this portion of Scalia's dissent, Kennedy added a disclaimer noting that *Lawrence* in no way affected same-sex marriage, conduct involving minors, coercive conduct, or public conduct.[90] *Lawrence*, he said, involved only "personal and private" conduct.[91]

The problem, as Scalia pointed out, was that Kennedy's disclaimer was a tautology.[92] Of course the facts of *Lawrence* did not involve minors or same-sex marriage. By itself, this does not mean that the reasoning of Kennedy's opinion could not be applied to a different set of facts in the future.

Not all predictions have been as far-reaching as Justice Scalia's. Cass Sunstein has speculated that *Lawrence* would only strike down unenforced, "silly" laws, and that a significant shift is unlikely.[93] On the other hand, some authors have suggested that *Lawrence* might demand that

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[87] Perhaps ironically, Justice Scalia's dissent has now become the "authoritative" guide to lower circuit courts as to the meaning of *Lawrence*. *See* Posting of Dale Carpenter to Volokh Conspiracy, http://volokh.com/posts/1217696454.shtml (Aug. 2, 2008, 13:00 EST).

[88] Lawrence v. Texas, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting) ("What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.").

[89] *Id.* at 604.

[90] *Id.* at 578. Neither Justice Kennedy nor Justice Scalia mentions the possibility that *Lawrence* could require sex toy statutes to be struck down. For more on *Lawrence*'s relationship to same-sex marriage, see *supra* note 28.

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

[92] One could also criticize Justice Kennedy's disclaimer as being internally inconsistent with the rest of his opinion. *See* Tribe, *supra* note 43, at 1950–51 (arguing that the Court's conception of harms that same-sex marriage would bring is the same set of harms that the Court said was not sufficient to justify statutes banning sodomy).

[93] Sunstein, *supra* note 43; Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059 (2004). *See also* Note, *supra* note 78 (arguing that lower courts have not fully embraced *Lawrence*, and so future extension is improbable).

many laws be struck down, including those against physician-assisted suicide[94] and growing marijuana for medicinal use.[95] Laurence Tribe has argued that despite Justice Kennedy's disclaimer to the contrary, laws banning same-sex marriage and same-sex adoption are "bound to follow" and be similarly struck down.[96] Others have argued that *Lawrence* logically requires statutes banning adult incest to be struck down.[97]

D. ***Lawrence*** as an End to Morals Legislation

Building off the scholarship discussed in Part I.C, this Article takes the position that *Lawrence* will ultimately invalidate laws justified solely on the basis that they preserve public morality.[98] In light of the Court's recent precedents, this shift is not as groundbreaking as some have made it out to be.[99] However, what is notable about this move in *Lawrence* is the Court's focus on the state's *justification* for its law as opposed to the fundamental nature of the right at stake.

Much of *Lawrence*'s text suggests that preserving public morality can no longer justify laws which infringe on liberty. For example, the Court quoted its previous decision in *Casey*, which stated that it is not the Court's place to "mandate [its] own moral code."[100] The Court also adopted Justice

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[94] *See* Hassel, *supra* note 66.

[95] *See* Barnett, *supra* note 45.

[96] Tribe, *supra* note 43, at 1945. The Eleventh Circuit declined Professor Tribe's invitation to apply *Lawrence* to same-sex adoption cases in *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

[97] *See infra* note 313 and accompanying text (discussing *Lawrence*'s implications for incest).

[98] Suzanne Goldberg has argued this. *See* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1234–35 (2004) ("Rather than representing a break with tradition, *Lawrence* reflected the Court's long-standing jurisprudential discomfort with explicit morals-based rationales for lawmaking."). *But see* Greene, *supra* note 43, at 1872 (arguing that "[*Lawrence*] does not reach the full panoply of morals regulation").

[99] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting) ("What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.").

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

Stevens' position in *Bowers* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[101]

This shift is further justified by tradition. Many prominent members of the founding generation understood the Ninth Amendment as codifying a right to be left alone.[102] This view survived into the nineteenth century, through the passage of the Fourteenth Amendment[103] and the Industrial Revolution.[104] While the Supreme Court has frequently invoked the legislature's right to make laws based on the preservation of public morality,[105] the Court has not upheld a law solely on this basis for more than fifty years.[106] Although the Supreme Court widely upheld state

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[101] *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986)).

[102] *See* THOMAS JEFFERSON, QUERY 17, 157–161 (1784) ("The legitimate powers of government extend to such acts only as are injurious to others."). *See also* RANDY BARNETT, RESTORING THE LOST CONSTITUTION 54–60 (2004) (describing Founders' conception of natural rights as the right to liberty).

[103] *See* THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 572 (1868) (describing the police power as the power to "insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with the like enjoyment of rights by others").

[104] *See* CHRISTOPHER TIEDEMAN, TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 1 (1886) ("The object of government is to impose that degree of restraint upon human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights."). *But see* Bork, *supra* note 22, at 44–45 ("The better view of the state legislative power is that . . . it encompasses the power to make any enactment whatever that is not forbidden by a provision of a constitution.").

[105] *See, e.g.*, Samuels v. McCurdy, 267 U.S. 188, 198 (1925) (noting that the legislature can seek to suppress the use of liquor in the interest of public health and morality); Crane v. Campbell, 245 U.S. 304, 307–08 (1917) (upholding a ban on alcohol possession because it was intended to protect public morality and did so); Cosmopolitan Club v. Virginia, 208 U.S. 378, 384 (1908) (arguing that a state can protect "the health, the morals, and the prosperity of the people" through liquor regulation); Cronin v. Adams, 192 U.S. 108, 115 (1904) (upholding a law banning women from entering saloons and noting that the sale of liquor "is a question of public expediency and public morality").

[106] Suzanne Goldberg has explored many of these cases in depth. *See* Goldberg, *supra* note 98. Specifically, Professor Goldberg pointed to *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), in which Justice Souter, who provided the crucial fifth vote, justified his decision not on grounds of public morality, but "on the State's substantial interest in combating the secondary effects of adult entertainment establishments." *Id.* at 582. *See also*

prohibition laws in the latter part of the nineteenth century, it usually noted the harm to the "public health . . . and the public safety" posed by such laws.[107] While preserving public morality was enough to uphold a prohibition on bigamy in the 1878 case *Reynold v. United States*,[108] the Court also noted the harm to women and children often brought by bigamy.[109]

Logic and consistency also suggest that the preservation of public morality alone should never be enough to sustain an incursion on liberty. If moral disapproval by a majority of the legislature were sufficient to uphold an incursion onto personal liberty, then few laws infringing on an unenumerated liberty right could ever be struck down. This is because the legislature could justify any infringement by arguing that it disapproves of the morality of the prohibited action.[110] Moral disapproval alone might not be enough to justify an incursion on a "fundamental" liberty right. In such a case the Court would still be required to first balance the interests of the state against the interests of the individual, and second to label a certain right as fundamental or non-fundamental. This Article will suggest these two steps are misguided.[111]

Part I argued that *Lawrence* signals two propositions: First, that the Court is moving away from the rational basis/strict scrutiny dichotomy, and second, that the preservation of public morality is no longer a permissible justification for the state to restrict liberty. Part II will examine one disagreement that has emerged from the *Lawrence* controversy, with the goal of showing the problems associated with protecting unenumerated rights according to the fundamental or non-fundamental nature of the asserted right.

City of Erie v. Pap's A.M., 529 U.S. 277 (2000), in which five of the seven justices voting to sustain an ordinance forbidding nude dancing did not even mention morality, but instead relied on the harmful secondary effects of nude dancing. *Id.* at 300–01.

[107] *E.g.*, Mugler v. Kansas, 123 U.S. 623, 662 (1887).

[108] 98 U.S. 145, 165 (1878).

[109] *See id.* at 167–68.

[110] *See* BARNETT, *supra* note 102, at 331 ("[W]ere the state allowed the power to prohibit any purely private activity *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.").

[111] *See infra* Part III.B.

II. HOW SEX TOYS ILLUSTRATE THE SHORTCOMINGS OF A TIERED APPROACH TO PROTECTING UNENUMERATED RIGHTS

Lawyers have argued that *Lawrence* should be applied to a number of different types of statutes, including the right to use medical marijuana;[112] the right for a cop to have sexual relations with a crime victim;[113] and the right of homosexual parents to adopt children.[114] However, this Part will focus on decisions in which courts have considered the application of *Lawrence* to statutes banning the sale of sex toys.[115] It will focus on these cases for two reasons: first, the Fifth and Eleventh Circuit opinions both read *Lawrence* as having different effects on the constitutionality of two virtually identical statutes; second, unlike the statute at issue in *Carey*, sex toy statutes do not "significant[ly] burden"[116] the "right" of individuals to maintain whatever level of sexual intimacy they and their partners deem worthwhile.[117] This means that reading *Lawrence* to have created a fundamental right to sexual privacy[118] and striking down bans on the sale of sex toys based on this created right is misguided. Taking a narrow view of *Lawrence* and upholding these bans because of their

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[112] Raich v. Gonzales, 500 F.3d 850, 864 (9th Cir. 2007).

[113] Sylvester v. Fogley, 465 F.3d 851, 858 (8th Cir. 2006).

[114] Lofton v. Sec'y of the Dept. of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004).

[115] This Part will focus on *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004) and *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008).

[116] The Supreme Court used this standard in *Carey v. Population Servs. Int'l*, 431 U.S. 678, 689 (1977), discussed *supra* Part I.A and *infra* Part II.C.

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

[118] Some judges and scholars have argued this. *See Reliable*, 517 F.3d at 743 (arguing that *Lawrence* created a right to sexual privacy, which statutes that ban the sale of sex toys violate); Elimelekh, *supra* note 11 (same); Borgmann, *supra* note 11 (arguing that if *Lawrence* created a right to sexual privacy then laws banning the sale of sex toys would violate such a right); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947, 966 (speculating about the "very real likelihood" that "U.S. traditions ha[ve] evolved to a point where they favored the recognition of a protected right to sexual privacy").

commercial nature is similarly misguided.[119] Part II will explore the variations on these errors in the *Williams* and *Reliable* opinions, and Part III will propose a more coherent approach that examines the nature of the government's justification for its choice to restrict liberty, as opposed to an approach that examines the nature of the right asserted by the claimant.

A. The Eleventh Circuit and *Williams*

Part II.A will discuss *Williams v. Attorney General of Alabama*[120]—the first post-*Lawrence*[121] federal case[122] to address a state law banning the sale of sex toys. The *Williams* court upheld Alabama's law as consistent with *Lawrence*.

In *Williams*, the American Civil Liberties Union sued the state of Alabama, arguing that a ban on the exchange of any object "useful primarily for the stimulation of human genital organs for any thing of

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[119] This is the preferred approach of the majority in *Williams* and the dissents in *Reliable*. *See infra* Part II.A–B.

[120] 378 F.3d 1232 (11th Cir. 2004).

[121] The statute that would eventually be upheld in *Williams* had first been challenged in July of 1998, a month after the statute had taken effect. Williams v. Pryor (*Williams I*), 41 F. Supp. 2d. 1257, 1282–84 (N.D. Ala. 1999). Despite applying only rational basis review, the district court struck down the statute. On appeal, however, the Eleventh Circuit upheld the statute, finding that the promotion and preservation of public morality *did* constitute a rational basis for the statute. Williams v. Pryor (*Williams II*), 240 F.3d 944 (11th Cir. 2001). On remand, the district court decided that contrary to its previous decision, there was a *fundamental right* to sexual privacy, and that the Alabama statute violated this right. Williams v. Pryor (*Williams III*), 220 F. Supp. 2d 1257, 1257 (N.D. Ala. 2002) (pre-*Lawrence*). The district court found the statute could not withstand strict scrutiny and so struck it down. *Id.* at 1260.

[122] Three state supreme courts had already struck down sex toy statutes on Fourteenth Amendment grounds before *Lawrence*, beginning with *Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 370 (Colo. 1985) (ruling Colorado's general prescription of sex toys was too broad and "impermissibly burden[ed] the right of privacy" of those who had "legitimate" uses for such devices). In *State v. Hughes*, 792 P.2d 1023, 1031 (Kan. 1990), the Kansas Supreme Court agreed, finding that because the Kansas law did not isolate itself only to obscene devices, the statute impermissibly infringed on a privacy right which "encompasses therapy for medical and psychological disorders." *Id.* After *Hughes*, the Kansas legislature changed its law to include a medical exception. *See supra* note 8. In *State v. Brenan*, 772 So.2d 64, 72–76 (La. 2000), while the Louisiana Supreme Court specifically did *not* find a fundamental right to be at stake, the Court still struck down a Louisiana statute on rational basis grounds, finding that an unqualified ban on sex toys was overbroad in combating the supposed purpose of protecting unconsenting adults and minors.

pecuniary value" violated the fundamental right to sexual privacy of those who use sex toys.[123] Chief Judge Birch, writing for the majority, disagreed with the proposition that *Lawrence* had created such a fundamental "right to sexual privacy,"[124] noting that the Supreme Court specifically left open the question of whether there was a fundamental right to sexual privacy,[125] and, moreover, that it had pointedly decided not to recognize such a right in *Lawrence*.[126] Scholars have criticized this interpretation. For example, Shelly Elimelekh criticized Birch for not finding that *Lawrence* recognized "some sort of right to sexual privacy."[127] In addition, Donald Hermann has argued that because Justice Kennedy adopted Justice Stevens' dissent in *Bowers*, Justice Kennedy must have agreed that "essential 'liberty' . . . surely embraces the right to engage in nonreproductive, sexual conduct,"[128] meaning *Lawrence* finally recognized a fundamental right to sexual privacy.[129]

Birch next argued that since *Lawrence* contained no *Glucksberg* analysis, no fundamental right could have been "created,"[130] and Justice Kennedy must therefore have applied rational basis analysis.[131] This made *Lawrence* a rational basis case, and because no fundamental right to sexual privacy had been created there, the *Williams* claimants were trying to convince the court to recognize a new fundamental right. However, to do so

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[123] ALA. CODE § 13A-12-200.2 (2009).

[124] *See* Williams v. Att'y Gen of Ala., 378 F.3d 1232, 1235 (11th Cir. 2004).

[125] In *Carey v. Population Services International*, 431 U.S. 678, 688 n.5 (1977) the Supreme Court declared it had "definitively [not] answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) behavior among adults, and we do not purport to answer that question now."

[126] See *Williams*, 378 F.3d at 1238.

[127] *See* Elimelekh, *supra* note 11, at 280.

[128] *See* Hermann, *supra* note 77, at 940–41 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

[129] *See supra* notes 62–64 and accompanying text.

[130] Judge Birch mentions the phrase "new fundamental right" numerous times throughout his *Williams* opinion. *Williams*, 378 F.3d *passim*. However, one might be rightly skeptical as to how something fundamental could be "new." *See infra* note 281 and accompanying text.

[131] *Williams* 378 F.3d at 1238.

would require *Glucksberg* analysis.[132] Birch then analyzed whether that right was "deeply rooted in this nation's history" and "implicit in the concept of ordered liberty."[133] He framed the right at issue narrowly, as the right to sell, buy, and use sexual devices.[134] Unsurprisingly, Birch found that the right was not historically protected and thus not fundamental.[135]

In applying rational basis review[136] Birch held that if, as the dissent argued,[137] *Lawrence did* remove "public morality" as a sufficient rational basis for laws banning private, non-commercial conduct, the facts in *Williams* were distinguishable. The facts involved activity beyond the "private" and "consensual" conduct at issue in *Lawrence*.[138]

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[132] *See id.* at 1239 ("Because the ACLU is seeking recognition of a right neither mentioned in the Constitution nor encompassed within the reach of the Supreme Court's existing fundamental-right precedents, we must turn to [*Glucksberg* analysis].").

[133] *Id.* at 1239 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[134] *Id.* at 1242. For more on the cumbersome process of framing rights, see *infra* Part III.B.1.

[135] *Id.* Birch also chastised the district court for confusing historical non-interference with historical protection. *Id.* at 1244. In order to pass the second *Glucksberg* barrier, according to Birch, a practice must not only have been historically *permitted*, but it also must have been affirmatively *protected*. *Id.* The dissent criticized this characterization of *Glucksberg*, arguing that "[h]ad the Supreme Court required affirmative governmental protection of an asserted liberty interest, all of the Court's privacy cases would have been decided differently." *Id.* at 1258.

[136] *Id.* at 1238 n.8.

[137] The dissent's position was that *Lawrence* was a fundamental rights case, but that even if one read *Lawrence* as a rational basis decision, *Lawrence*'s holding would mandate that public morality was no longer a sufficient rational basis for banning private, non-commercial conduct. *Id.* at 1259–60. Birch did not necessarily agree or disagree with this phrasing. He argued in footnote eight that all he can justifiably take from *Lawrence* is that Texas's sodomy prohibition furthered no legitimate state interest. *Id.* at 1238 n.8. The Eleventh Circuit later ruled in *Williams v. Morgan*, 478 F.3d 1316, 1320 (11th Cir. 2007), that the preservation of public morality provided a rational basis for Alabama's sex toy statute.

[138] *Williams*, 378 F.3d at 1238 n.8. What if the Alabama law had proscribed the use of sex toys and not the sale? On one hand, Birch himself wrote that, "restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item," and so a ban on use would presumably be just as permissible as a ban on sale. *Id.* at 1242. On the other hand, Birch's response to the dissent's rational basis interpretation of *Lawrence* (that *Lawrence* involved private, consensual conduct) depended on the public, commercial nature of selling sex toys. In this way, Birch's opinion is oxymoronic: The constitutionality of the statute *depends* on the public, commercial nature of the proscribed activity, yet such

The primary shortcoming of the *Williams* majority was to assume that *Lawrence* must have been either a strict scrutiny or rational basis case. While phrases in *Lawrence* such as "legitimate state interest"[139] do point toward rational basis analysis, Birch overlooks portions of the text in *Lawrence* that imply strict scrutiny, such as references to rights of "fundamental significance"[140] and Justice Kennedy's adoption of Justice Stevens' dissent in *Bowers*.[141] One could also argue that by favorably quoting Justice Stevens' dissent in *Bowers*, which took issue with the majority's conservative, historical approach to protecting fundamental rights, Justice Kennedy was implicitly criticizing, if not overruling, *Glucksberg*.[142] Birch's opinion should be faulted not necessarily for failing to "find" a fundamental right to sexual privacy in *Lawrence*, but for setting out on such a search in the first place.

Judge Barkett's dissent challenged the majority's limitation of *Lawrence* to the "unconstitutionality of criminal prohibitions of consensual adult sodomy."[143] If one does not confine *Lawrence* to its specific facts, Barkett argued, one must recognize that *Lawrence* was based on a substantive due process right to private sexual intimacy.[144] This right was "fundamental" and required strict scrutiny analysis.[145] Furthermore, Barkett maintained that Alabama's only post-*Lawrence* justification for its statute—

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commercial activity is also equivalent for constitutional purposes to the underlying, non-commercial activity. This inconsistency disappears, however, if one isolates *Lawrence* to its facts, which seems to be Birch's interpretation and is shared by some in academia. *See* Mowchan, *supra* note 78, at 142–43 (2004) (warning against a broad interpretation of *Lawrence*); Sunstein, *supra* note 43 (arguing that *Lawrence* will not be read broadly); Note, *supra* note 78 (observing that as of 2005 *Lawrence* had not been read broadly). For more on the sale-use distinction, see *infra* Part II.C.

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

[140] *Id.* at 565.

[141] *Id.* at 577–78.

[142] Despite joining the majority in Glucksberg, Kennedy did not cite Glucksberg even once.in the *Lawrence* opinion.

[143] *Williams*, 378 F.3d at 1236.

[144] *Id.* at 1252. In contrast, Judge Birch's opinion essentially did isolate *Lawrence* to its facts. *See id.* at 1238 n.8; *see also supra* note 138.

[145] *Id.*; *see also supra* note 64 and accompanying text.

preserving public morality—was insufficient to survive rational basis review.[146]

Although Judge Barkett dissented from the majority, her reasoning utilized the same framework as that of Judge Birch, where rights are either fundamental or non-fundamental.[147] However, that framework is not required by *Lawrence*.[148] Significantly, Justice Kennedy applied neither rational basis nor strict scrutiny review in *Lawrence*. Forcing *Lawrence* into a bipolar model is to remain mired in an old paradigm.[149]

B. The Fifth Circuit and *Reliable*

In *Reliable Consultants, Inc. v. Earle*,[150] the Fifth Circuit struck down a Texas statute similar to the one upheld four years earlier in *Williams*, ruling that the statute was inconsistent with *Lawrence*.[151] This Part will argue that while *Reliable* correctly held the statute unconstitutional, Judge Reavley's opinion incorrectly framed the right at stake as a right to sexual privacy.

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[146] *Id.* at 1260; *see also supra* Part I.D.

[147] *See id.* at 1252.

[148] *See supra* Part I.B.

[149] *See supra* Part I.B.

[150] 517 F.3d 738 (5th Cir. 2008).

[151] As opposed to the three state supreme courts which have struck down their state's sex toy statutes, *see supra* note 122, Texas state courts have upheld such laws. *See* Yorko v. State, 690 S.W.2d 260, 265 (Tex. Crim. App. 1985) (holding that Texas could outlaw the promotion of sex toys). However, the *Yorko* court found that Texas could not outlaw the presence or use of obscene devices writ large due to the Supreme Court's rulings in *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime") and United States v. 12 200-Foot Reels of Super 8mm Film, 413 U.S. 123, 128 (1973) (finding that "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others."). Twenty years later, after *Lawrence*, in *State v. Acosta*, No. 08-04-00312-CR, 2005 WL 2095290 (Tex. App. Aug. 31, 2005), a Texas appellate court once again upheld a statute banning the sale of sex toys, noting that the statute applied only to public conduct, as opposed to the statute in *Lawrence*, which prohibited private conduct.

1. Opinion of Panel

In *Reliable*, the Fifth Circuit struck down a Texas statute that prohibited the "selling, advertising, giving, or lending of a device designed or marketed for sexual stimulation."[152] Judge Reavley applied neither rational basis nor strict scrutiny to the Texas statute in contrast to the *Williams* majority and dissent.[153] Reavley stated that the court's job was to "apply *Lawrence*,"[154] and recognize the establishment of a "right to sexual privacy."[155] Reavley argued the fundamental/non-fundamental distinction in this case was just an argument about nomenclature;[156] such a right exists, and the court's job is to apply it.[157] Having found a "right to sexual privacy," Reavley stated that the state's justification—public morality—for infringing on that right to sexual privacy was insufficient after *Lawrence*.[158] Reavley was the only judge in either *Williams* or *Reliable* with the foresight to argue that *Lawrence* was not necessarily a strict scrutiny or rational basis case.[159]

Reavley's opinion could be criticized for interpreting the "right" that *Lawrence* protected as a right to sexual privacy. However, Justice Kennedy offered no insight as to what particular right, if any, *Lawrence* was

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[152] *Reliable*, 517 F.3d at 741 (paraphrasing the Texas statute). The Texas statute at issue was TEX. PENAL CODE ANN. §§ 43.21–23 (Vernon 1993). It is similar to the statute at issue in *Williams*, except the Texas statute also proscribed the lending or giving away of sex toys to others. Statutorily-approved purposes included "bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose[s]." *Id.*

[153] Judge Reavley is not the only one to take this position. *See supra* notes 80–85.

[154] *Reliable*, 517 F.3d at 745.

[155] *Id.* at 745 n.32 ("*Lawrence* did not categorize the right to sexual privacy as a fundamental right, and we do not purport to do so here. Instead, we simply follow the precise instructions from *Lawrence* and hold that the statute violates the right to sexual privacy, however it is otherwise described.").

[156] *Id.*

[157] *Id.*

[158] *Id.* at 745–46. The majority also considered the "compelling interest" in protecting children from improper sexual expression, but found the statute too overbroad to fend off constitutional challenge. *Id.* at 746. They found the same with regards to protecting "unwilling adults." *Id.*

[159] *See supra* Part I.B.

creating or protecting.[160] In the first sentence of *Lawrence*, Kennedy wrote, "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."[161] Given the many possible interpretations of *Lawrence*—the isolated facts on one side,[162] and a broad, harm principle-based holding on the other[163]—there is no reason for insisting that *Lawrence* created a precise "right to sexual privacy."[164] Between these extremes, there is a plethora of possible "fundamental rights" that could have been created. For instance, *Lawrence* might have created a general fundamental right of adults to engage in consensual sexual conduct or a narrower fundamental right of adults to engage in sexual intercourse, in the home for example.[165]

One might argue that Kennedy's disclaimer, noting that *Lawrence* involved only private, personal conduct, could imply a right to sexual privacy.[166] This is certainly an implication one could draw, but sexual conduct is hardly the only sort of conduct that is private or personal. Furthermore, just because the facts of *Lawrence* involved only private conduct does not mean *Lawrence*'s *reasoning* could not be applied to instances of public or commercial conduct.

The *Reliable* dissent challenged Reavley's "simplified" due process analysis, chiding Reavley for not specifically applying rational basis or strict scrutiny review.[167] Judge Barksdale argued that *Lawrence* clearly

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[160] *See supra* text accompanying note 69. In footnote thirty-two of his *Reliable* opinion, quoted *supra* note 155, Reavley referred to the right to sexual privacy, but then added "however it is otherwise described," implying that phrasing the right in that way was a decision made mostly out of convenience.

[161] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[162] This is essentially the position taken by Birch in *Williams*. *See supra* note 138.

[163] Professor Barnett, for example, has taken this view. *See* Barnett, *supra* note 13.

[164] Kennedy certainly never used the phrase. For more on the level of generality problem, see *infra* Part III.B.1.

[165] *See* Carpenter, *supra* note 87 (listing possible holdings of *Lawrence*).

[166] *Lawrence*, 539 U.S. at 578. For more on Justice Kennedy's disclaimer, see *supra* notes 90–92 and accompanying text.

[167] Reliable Consultants v. Earle, 517 F.3d 738, 749 (5th Cir. 2008) ("I believe, however, that the level of scrutiny to be employed is of critical importance to our review.").

applied rational basis review.[168] He also noted, similar to Judge Birch in *Williams*, that the Texas statute in *Reliable* banned conduct that was public and commercial,[169] unlike the statute in *Lawrence*, which banned conduct that was private and non-commercial. Barksdale seized upon this distinction and reasoned that since the conduct at issue in *Reliable* was public and commercial, it must pass rational basis analysis.[170]

This reasoning is surprising for two reasons. First, Barksdale did not refer to *Carey v. Population Services International*,[171] cited by the majority for the proposition that a ban on sale can be equivalent to a ban on use for constitutional purposes. Cass Sunstein, for instance, implicitly criticized Barksdale on this count, arguing that because of *Carey*, bans on the use and sale of sex toys would be effectively equivalent for constitutional purposes.[172] Second, Barksdale did not address the possibility that a law regulating "conduct . . . both public and commercial" could ever fail the rational basis test.[173] Supreme Court precedents are generally lenient in allowing public commercial regulation,[174] but one could argue that bans on the sale of sex toys address types of harms not contemplated by these precedents. As such, commercial regulation in this area should be more readily scrutinized.

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[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Carey* is discussed *supra* Part I.A and *infra* Part III.D.

[172] *See* Sunstein, *supra* note 93. *But see* United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 128 (1973) (finding that "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others").

[173] *Reliable*, 517 F.3d at 749.

[174] *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (writing that the state retains "power to regulate commercial activity deemed harmful to the public" and can therefore regulate attorney qualifications).

2. Denial of Rehearing En Banc

Judge Garza's dissent from denial of rehearing en banc presented a more extensive critique of the *Reliable* majority's reasoning.[175] Garza also criticized the *Reliable* majority both for failing to apply either rational basis or strict scrutiny and for protecting a commercial right, whereas *Lawrence* was specifically isolated to what Garza deemed a "*personal* liberty interest."[176] Like Judge Barksdale, Garza disagreed that a ban on the *sale* of sex toys equates to a ban on the *use* of sex toys.[177] To Garza the former involves only bans on "*commercial* conduct."[178] Such bans are apparently so clearly rational that their rationality need not be explained.[179]

Like Judge Birch in *Williams*, Garza could be faulted for overlooking portions of *Lawrence* that imply strict scrutiny analysis.[180] However, as with Birch's opinion in *Williams*, the dissent's primary flaw was assuming that *Lawrence* demanded either strict scrutiny or rational basis review in the first place.[181] Therefore, all the opinions in *Williams* and *Reliable* have the same general shortcoming—namely, assuming that rights must be singled out. Moreover, except for Reavley's opinion, they assume incursions on rights must be subject to strict scrutiny or rational basis review. Part II.C will argue that a right to sexual privacy, fundamental or not, does not protect the right of a vendor to sell sex toys to his customers, as such a ban does not present a significant burden on the sexual privacy rights of sex toy users.

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[175] Reliable Consultants v. Earle, 538 F.3d 355, 359–60 (5th Cir. 2008) (Garza, J., dissenting). The dissent is also notable for persuading seven circuit judges to dissent from a denial of rehearing. *See* Carpenter, *supra* note 87.

[176] *Id.* at 360.

[177] *Id.*

[178] *Id.*

[179] Unlike Garza, Judge Birch made the argument for rationality in his *Williams* opinion, in which he noted, "There is nothing 'private' or 'consensual' about the advertising and sale of a dildo. And such advertising and sale is just as likely to be exhibited to children as to 'consenting adults.'" Williams v. Att'y Gen. of Ala, 378 F.3d 1232, 1238 n.8 (11th Cir. 2004).

[180] *See supra* Parts I.B, II.A.

[181] *See supra* Parts I.B, II.A.

C. Sex Toy Statutes and the Right to Sexual Privacy

As noted in Parts II.A and II.B, the statutes at issue in *Williams* and *Reliable* regulated only the sale and advertising of sex toys, not their use. Some have argued this distinction is constitutionally insignificant.[182] In contrast, Part II.C will argue that laws prohibiting the sale of sex toys are of a different character than laws truly proscribing private sexual activity. This means that if one remains in the fundamental/non-fundamental rights framework, a fundamental "right to sexual privacy" would not invalidate laws prohibiting the sale of sex toys.

States' justification for statutes that proscribe the sale of sex toys, especially after *Lawrence*, will almost invariably relate to the public harm that could be done in advertising or displaying these devices.[183] Contrast this to *Lawrence*, in which Texas made no plausible argument that outlawing sodomy between homosexuals prevented a public harm. In the wake of *Lawrence*, preventing public harm, whether it be obscenity or harm to innocent children, would be at the center of the state's argument in defending its sex toy statutes.[184]

The result of this distinction is that the state could acknowledge that *Lawrence* established a right to sexual privacy, yet still plausibly argue that statutes prohibiting the sale of sex toys should be upheld.[185] The claimant could then overcome this public harm justification by convincing the court that a ban on the sale of sex toys equates to a ban on the use of sex toys.[186]

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[182] *See* Elimelekh, *supra* note 11; Sunstein, *supra* note 93; John Tuskey, *What's a Lower Court to Do? Limiting* Lawrence v. Texas *and the Right to Sexual Autonomy*, 21 TOURO L. REV. 597 (2005). This view has been disputed, however, by Judge Birch in *Williams* and Judge Barksdale in *Reliable*, both of whom differentiated between laws prohibiting public commercial conduct and private, non-commercial conduct.

[183] *See* Brief of Defendant-Appellee at 43, Williams v. Att'y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2002) (No. 06-11892-J) (arguing that injunction invalidating entire Alabama law was overbroad since the district court could have invalidated the law only insofar as it did not prohibit the sale of sex toys to minors).

[184] *See id.*

[185] How plausible such an argument might be would depend on the degree of regulation. Indeed, the Eleventh Circuit has struck down sex toy statutes on commercial speech grounds but not substantive due process grounds. *See* This That and the Other Gift and Tobacco, Inc. v. Cobb County, Ga., 439 F.3d 1275 (11th Cir. 2006). The Fifth Circuit in *Reliable* did not reach the issue of commercial speech. Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008).

[186] *See infra* notes 187–189 and accompanying text.

Once the court makes this leap, the value of the state's public harm justification would be greatly diminished since the state would be venturing into a private arena—an intrusion that normally receives strict scrutiny.[187]

The primary obstacle facing the state in arguing that its ban on the sale of sex toys does *not* equate to a ban on the *use* of sex toys is *Carey v. Population Services International*.[188] Here, the Supreme Court ruled that a ban on the sale of contraceptives placed enough of a burden on the right to use contraceptives as to be constitutionally equivalent.[189] Justice Brennan reached this conclusion in *Carey* for two reasons. First, under *Griswold* and *Roe*, the choice to control one's procreation is at the core of personal autonomy rights.[190] Second, bans on the sale of contraceptives significantly burden one's ability to *use* contraceptives.[191] Indeed, as Brennan noted, such bans might even pose more of a burden on an individual's ability to use contraceptives than a ban on use.[192]

Neither of these two justifications for equating bans on sale to bans on use hold up for statutes banning the sale of sex toys. First, the Supreme Court has never ruled that the ability to enjoy the use of sex toys rises to the "fundamental" level of the ability to control one's family as recognized in *Griswold* and *Roe*.[193] After all, the right to enjoy sexual intimacy should be understood as something separate from the right to be sexually intimate in

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[187] Although no Supreme Court case directly cites the proposition, an outright ban on the use or possession of sex toys would probably be unconstitutional on First Amendment grounds. *See* Stanley v. Georgia, 394 U.S. 557 (1969) (finding the right to possess pornographic material in the home is protected by the First Amendment). While *Stanley* does speak of a broad, "fundamental . . . right to be free," *id.* at 564, the Court specifically rested its decision on First Amendment grounds, not on an unenumerated right to liberty. *See id.* at 565 ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

[188] 431 U.S. 678 (1977).

[189] Griswold v. Connecticut, 381 U.S. 479 (1965) (declaring a ban on the use of contraceptives unconstitutional). For more on *Griswold* and *Carey*, see *supra* Part I.A.

[190] *See Carey*, 431 U.S. at 685.

[191] *See Griswold*, 381 U.S. at 485.

[192] *See Carey*, 431 U.S. at 678 ("Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception.").

[193] *But see* Stanley v. Georgia, 394 U.S. 557 (1969) (upholding right to possess pornographic material); discussion *supra* note 187.

the first place.[194] The Texas Court of Criminal Appeals expounded on this distinction in the 1985 case *Yorko v. State,*[195] in which the court argued that while the decision to have an abortion or use contraception touches on "the most intimate of human activities,"[196] the decision to use sexual devices furthers mere sexual gratification.[197]

Second, whereas a prohibition on the sale of contraceptives impaired one's ability to exercise a fundamental right in *Carey*, a ban on the sale of sex toys presents no such barrier. Citizens of Alabama who feel so compelled are free to purchase sex toys in other states. In fact, the claimants in Williams already possessed multiple sex toys.[198] The internet also allows for commercial transactions unavailable at the time of *Carey*.[199] Finally, the state would presumably point to the different characteristics of

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[194] Lee Goldman takes this view. *See* Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 642–43 (2006) (arguing that a ban on the sale of sex toys has a *de minimis* affect on an individual's privacy rights). Goldman argues for a Lockean view of substantive due process rights in which courts look to balance interests between the public good and the privacy of the individuals. For Goldman, sex toy statutes do not sufficiently tip the scales in favor of individual privacy. *But see* Williams v. Pryor, 41 F. Supp. 2d 1257, 1265–66 (N.D. Ala. 1999) (discussing health difficulties faced by women who use sex toys); Obstetrical & Gynecological Devices, 21 FDA § 884.5940 (2000) (certifying "vaginal muscle stimulators" for therapeutic purposes such as combating post partum depression or avoiding sexually transmitted diseases). *See also* Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326 (2006) (examining therapeutic uses for sex toys).; and *supra* note 122 and accompanying text (citing state supreme court decisions which held statutes prohibiting the sale of sex toys unconstitutional because they did not have exceptions for therapeutic uses).

[195] 690 S.W.2d 260 (Tex. Crim. App. 1985). For more discussion of *Yorko*, see *supra* note 151.

[196] *Yorko*, 690 S.W.2d at 268 (quoting Carey v. Population Servs. Int'l, 431 U.S. 684, 685 (1977)).

[197] *Id.* at 265.

[198] Williams v. Att. Gen. of Ala., 378 F.3d 1232, 1233 (11th Cir. 2004) ("[I]n fact, the users involved in this litigation acknowledge that they already possess multiple sex toys.").

[199] Websites selling sex toys on the internet present no obstacle to someone living in Alabama who wanted to order sex toys. *See, e.g.*, Eden Fantasys, http://www.edenfantasys.com (last visited Nov. 1, 2009); The Adult Toy Shoppe, http://www.theadulttoyshoppe.com (last visited Nov. 1, 2009). This does not mean, however, that a determined state district attorney could not prosecute an Alabama resident whom the district attorney found to be purchasing such devices on the internet.

contraceptives and sex toys: contraception needs to be purchased on a consistent basis, whereas sex toys can be purchased once and used multiple times thereafter. Therefore, not being able to purchase contraception at a local grocery store or pharmacy would present a greater burden on the claimant's right than would the inability to purchase sex toys at a local strip mall.

Therefore, while bans on the sale of sex toys may restrict liberty in a significant way, focusing on the limitations to sexual privacy implicated by these bans is misleading, for the bans' effect on sexual privacy is negligible at best. Part III proposes that examining the state's justification for its restriction on liberty, as opposed to the nature of the right at stake, is a superior approach.[200] Part III will also examine the consequences of such an approach for the statutes discussed in Part II.[201]

III. AN ABSOLUTE BUT CONSERVATIVE APPROACH TOWARD PROTECTING LIBERTY

Part III.A presents an interpretation of *Lawrence* that rejects the rational basis/strict scrutiny dichotomy, and that requires the state to justify its laws as substantially related to the prevention of harm. Part III.B addresses the changes this Article's analysis would make to pre-*Lawrence* doctrine. Part III.C discusses the practical benefits of this Article's interpretation of *Lawrence*, and finally Part III.D illustrates how this Article's analysis would be applied to sex toy cases and in other contexts.

A. An Absolute Right to Liberty

1. Outline of Proposed Analysis

There seemingly has never been a shortage of ideas about how the judiciary should treat unenumerated rights to liberty. The Supreme Court's practice since *Griswold* has been to divide such rights into either "liberty interests" or "fundamental rights."[202] Burdens on the former receive passive[203] rational basis analysis, while burdens on the latter receive strict

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[200] *See infra* Part III.A.1.

[201] *See infra* Part III.D.1.

[202] *See supra* Part I.A.

[203] In *Williamson v. Lee Optical Oklahoma, Inc.*, for example, Justice Douglas, speaking for a unanimous Court, wrote that in order for a law infringing on an unenumerated

scrutiny. As an alternative, some scholars[204] and judges have advocated a balancing approach where "'liberty' is not a series of isolated points," but a "rational continuum."[205] The Court's job is then to decide when the interests of "organized society" are so pressing that they justify an infringement of citizens' rights.[206] Some have favored no protection for unenumerated rights,[207] whereas others believe any infringement on liberty ought to require a means-end fit and a showing that no less restrictive alternative exists.[208]

The approach taken in *Lawrence*, which this Article suggests that the Court take to its logical conclusion, would codify[209] a narrow but

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right to liberty to pass constitutional muster, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." 348 U.S. 483, 488 (1955). *See also* Fed. Commc'ns Comm'n v. Beach Commc'ns, 508 U.S. 307, 315 (1993) (Justice Thomas writing that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data . . . ."). It is this lax attitude toward laws infringing on liberty that this Article urges the Court to move away from.

[204] *See, e.g.*, Goldman, *supra* note 194 (advocating balancing of interests in cases when government infringes on liberty in pursuit of a proper purpose); Hunter, *supra* note 43 (arguing that *Lawrence* embraced Harlan's dissent in *Poe*); Tribe & Dorf, *supra* note 34, at 1069 (pointing approvingly toward Harlan's reference to a rational continuum of rights).

[205] Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

[206] *Id.* at 542–3 (Harlan, J., dissenting) (quoting U.S. Const. amend. XIV, § 1). *See also* RONALD DWORKIN, FREEDOM'S LAW: A MORAL READING OF THE AMERICAN CONSTITUTION (1996) (arguing that the Constitution sets out broad moral principles which judges must interpret and apply). *But see* BORK, *supra* note 22, at 234–35 (arguing Harlan's "vision of a due process clause" places "effectively no limits [on] the judge's power to govern us").

[207] *See, e.g.*, BORK, *supra* note 22, at 234–35. Judge Bork's unwillingness to protect unenumerated rights is not wholly consistent with his professed allegiance to history and tradition. *See* Calder v. Bull, 3 U.S. 386, 388 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."); BARNETT, LOST CONSTITUTION, *supra* note 102 (describing Founders' respect for higher, unwritten law); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 716 (1975) (describing Founders' respect for higher, unwritten law); Noah Webster, *America*, N.Y. DAILY ADVERTISER, Dec. 31, 1787(mocking the practice of enumerating specific rights for protection).

[208] *See* Barnett, *supra* note 13.

[209] I use the word "codifies" instead of "grants" or "creates" because as James Madison, the writer of the Ninth Amendment, understood, the Ninth Amendment did not

absolute right to liberty that cannot be infringed upon. Because a broadly construed absolute right could seriously damper the state's ability to maintain law and order, the right ought to protect a narrow bandwidth of activity in a firm, consistent manner. Generally, the judiciary ought to defer to the legislature's judgment in deciding what falls into this narrow bandwidth; however, the judiciary should interfere when it believes the legislature has acted in a way that is not substantially related to preventing harm.[210]

The words "substantial relation" or "substantially related" are usually associated with intermediate scrutiny analysis, under which a law must advance an important government interest by substantially related means.[211] To clarify, this Article is not advocating intermediate scrutiny for laws that infringe on liberty. Instead, it urges courts to employ a "substantial relation" standard to determine whether a law infringes on a narrow bandwidth of activity, which ought to be protected regardless of government interests.[212]

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create new rights—it simply embodied rights that men had always enjoyed. *See generally* RANDY BARNETT, THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (1989). However, some have argued that the Ninth Amendment applied only to "those individual rights contained in the state constitutions, statutes, and common law." *See* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 259 (1983). *But see* ELY, DEMOCRACY AND DISTRUST, *supra* note 22, at 204 (pointing out that state constitutions contained provisions similar to the Ninth Amendment, which implies the Ninth Amendment cannot be seen solely as a restriction on state power); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 1008 (1993) (altering the language of the Ninth Amendment implies that the Founders intended to limit the ability of a "National People" to exert sovereignty). Another argument is that the Ninth Amendment was meant only to limit the *powers* delegated by the Constitution to the federal government. *See* Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1306 (1990). *But see* BARNETT, *supra* note 102, at 244–52 (disputing this view); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000) (same).

[210] *See infra* Part III.A.2 (discussing concept of harm).

[211] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 415 (1997). Donald Beschle has also argued that *Lawrence* might hint at an intermediate scrutiny approach to substantive due process cases, although Professor Beschle favors an "open-ended balancing approach to Fourteenth Amendment cases." Beschle, *supra* note 79, at 252. This Article, however, would disfavor a balancing approach. *See infra* Part III.B.2.

[212] *See infra* Part III.B.2. The approach suggested by this Article closely mirrors that of the first Justice Harlan, dissenting in *Lochner v. New York*, 198 U.S. 45 (1905). Justice Harlan argued that "[a]ll [federal and state] cases agree that [the police] power extends at least to the protection of the lives, the health, and the safety of the public against

This approach would unquestionably lead to government infringement of some liberty rights. While unfortunate, this is a natural consequence of organized government, a consequence considered by the Founders.[213] Men surrender some natural rights in joining society, but the Founders believed that men could not possibly surrender them all.[214] Randy Barnett has argued that natural rights given up include only the right to enforce infractions against one's own natural rights, which would have been permissible in a state of nature.[215] In contrast, this Article's position is that these surrendered rights encompass activity which does not inflict harm on others, yet can still be rightly prohibited because the law at issue substantially relates to preventing harm.

2. What Does "Harm" Mean?

The concept of "harm" is nebulous, as most actions, public or private, could be said to harm some people in some way.[216] While arguing for a specific definition of what constitutes harm is outside the scope of this Article, Part III.A.2 will nevertheless suggest a foundation from which courts can build in the future.[217]

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the injurious exercise by any citizen of his own rights," *id.* at 65, and the legislation at issue should be required to have a "substantial relation" to meeting this end. *Id.* at 69.

[213] *See, e.g.*, 4 Jonathan Elliot, *South Carolina (in Legislature), in* ELLIOT'S DEBATES: THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 295 (1836) [hereinafter ELLIOT'S DEBATES] (Robert Barnwell arguing "[i]n the compacts which unite men into society, it always is necessary to give up a part of our natural rights to secure the remainder."). *But see* 3 Jonathan Elliot, *Bill of Rights, in* ELLIOT'S DEBATES, *supra*, at 657 ("[T]here are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity.").

[214] *See* BARNETT, *supra* note 102, at 70–71.

[215] *Id.*

[216] *See* Goldman, *supra* note 194 at 622 ("Unless one is a hermit living in the woods, all actions can cause some harm to others.").

[217] This Article uses the word "foundation" because presumably the courts would expound upon the definitions of "substantial relation" and "harm" over time, similar to the ways in which courts expound the common law. *See* Washington v. Glucksberg, 521 U.S. 702 (1997) (Souter, J., concurring) (urging a common law approach to substantive due process cases). *But see* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1996) (criticizing common law approach to constitutional adjudication). For an extensive look at the ambiguity involved in defining "harm," see Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS. 1 (2006).

John Stuart Mill's conception of harm is useful. Mill wrote of preventing harm only "in the first instance," meaning the state should not concern itself with preventing harm to others that is derivative of the harm to the principal.[218] Therefore, under this Article's proposed analysis, the state could not justify laws prohibiting cocaine use or suicide merely because the cocaine user's plight causes harm to the user's family. This is because the harm caused to the family would be derivative of the harm to the principal.

Whether the harm self-inflicted by a cocaine user should be prevented by the state presents a different question. After all, such an act might partially or completely deprive the individual of his ability to make choices for himself—the very end that Mill sought to advance.[219] However, Mill also argued that because the person who takes a risk (crossing a rickety bridge, for example) is in the best position to measure the value of his own life, the state should not replace the risk taker's assessment of risk with its own.[220] While not seeking to resolve this debate, this Article takes the latter position—that harm to oneself does not constitute harm the state should seek to prevent. This Article also takes the position that the state should not aim to prevent offense to one's moral sensibilities, whether that harm be caused by sodomy,[221] incest,[222] or sex toys.[223]

The common law of torts has spelled out some activity that, while not physically harmful to a person or his property, should still be

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[218] JOHN S. MILL, ON LIBERTY 17 (Electric Books Co. 2001) (1859). The elevation of so-called negative rights (the right to be left alone) has been criticized. *See, e.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (W. M. Norton & Co. 1999) (arguing that even negative rights require positive obligations, such as taxes, to enforce). Nevertheless, some scholars have seen *Lawrence*, discussed *supra* Part I, as embracing the harm principle in criminal law. *See* Goldberg, *supra* note 98; Eric Tennen, *Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law*, 8 CAL. CRIM. L. REV. 3 (2004).

[219] MILL, *supra* note 218, at 60 ("He therefore defeats, in [the case of suicide], the very purpose which is the justification of allowing him to dispose of himself.").

[220] *Id.* at 57.

[221] *See supra* Part I.B.

[222] *See infra* Part III.D.2.

[223] *See infra* Part III.D.1. For an argument that *Lawrence* reached this result, see *supra* Part I.D.

compensable by the state.[224] For example, the common law of torts recognizes the infliction of emotional distress,[225] defamation,[226] incursions on privacy,[227] and fraud,[228] as compensable harms. These sorts of harms are neither self-inflicted, nor derivative of the harm to the principal, so this Article's proposed analysis would do nothing to frustrate the continuing compensation (or regulation) of such harms.

This leaves unresolved, among other issues,[229] how courts should go about determining when an action by the legislature addresses one of these preventable harms. An overly lax standard will allow the state to justify almost all of its actions by pointing to some hypothetical harm it aims to prevent.[230] An overly strict standard, however, will frustrate the legislature's ability to regulate legitimate public harms.[231]

3. How to Determine When Actions by the Legislature Prevent Harm?

This Article proposes that the judiciary intervene whenever the legislature's actions are not substantially related to preventing harm. Such intervention would allow the state to proscribe some activity that arguably does not harm others, as long as the legislation substantially relates to preventing harm.[232] This represents a middle ground between the passive[233]

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[224] For more on the types of harm compensated in tort law, as well as the evolving methods of compensating such harms, see generally Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1797 n.35 (1995) (exploring idea of nonpecuniary loss and how it should be compensated); John Oberdiek, *Philosophical Issues in Tort Law*, 3 PHIL. COMPASS 734 (2008) (exploring nature of harm compensated in tort).

[225] RESTATEMENT (SECOND) OF TORTS § 46 (1977).

[226] *Id.* at § 577.

[227] *Id.* at § 652B.

[228] *Id.* at § 525.

[229] *See supra* note 217 and accompanying text.

[230] *See supra* note 203.

[231] *See supra* note 13.

[232] While relevant, the legislature's motives would not be dispositive under this Article's analysis. Consider laws banning the possession or sale of marijuana. The possibility of such a prohibition would most likely provoke myriad motivations from legislators, some of which involve preventing harm and some of which involve expressing disapproval of a

rational basis analysis that is often applied to laws infringing on mere liberty interests and the demanding strict scrutiny analysis that is applied to laws infringing on fundamental rights.[234]

A "substantial relation" standard has played a prominent role in the Supreme Court's Equal Protection jurisprudence, in which laws differentiating on the basis of gender must bear a substantial relation toward furthering an important government interest.[235] *Craig v. Boren*, for example, presented the Supreme Court with a law that allowed vendors to sell beer to females at age eighteen, but restricted sale to males until they reached the age of twenty-one.[236] The Supreme Court found that research showing young males were involved in more traffic accidents than women was insufficient to spare the law.[237] The Court considered that even the statistics presented by the state[238] found that a mere two percent of young males were arrested for alcohol-related driving offenses.[239] Moreover, the statute only addressed beer and not other types of alcohol.[240] The Court also found that

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minority's choice in recreational activity. Similarly, some individual legislators might act with multiple purposes and with different levels of conviction. This problem has not stopped courts from nevertheless evaluating a legislature's motives in other circumstances. A violation of the Equal Protection Clause, for example, requires "proof of racially discriminatory intent or purpose," despite the fact that the intentions of legislators might differ dramatically. Village of Arlington Heights v. Metropolitan Housing Dev. Corp, 429 U.S. 252, 253 (1977). This choice, however, has been criticized. *See, e.g.*, David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989) (calling focusing only on intent "inadequate in a fundamental way").

[233] *See supra* note 203.

[234] This heightened rational basis review has also been called "rational basis with bite." *See* BARNETT, *supra* note 102, at 344.

[235] *See* CHEMERINSKY, *supra* note 211, at 415.

[236] Craig v. Boren, 429 U.S. 190 (1976). For more on intermediate scrutiny in cases of gender classifications, see generally William R. Engles, Comment, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149 (1985).

[237] *Craig*, 429 U.S. at 201.

[238] The Court criticized the methodology of the state's statistics, noting the state's study was "lacking in controls necessary for appraisal of the actual effectiveness of the male 3.2% beer prohibition." *Id.* at n.14.

[239] "Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'" *Id.* at 201–02.

the law was likely motivated by stereotypes about the personalities of young men and women, as opposed to a legitimate belief that the legislature was honestly trying to prevent traffic accidents.[241] Together, these factors persuaded the Court that the law's discriminatory nature was impermissible.

The 1985 case of *City of Cleburne v. Cleburne Living Center*[242] similarly illustrates the type of scrutiny a "substantial relation" requirement would demand. In *Cleburne*, the city required that the operator of a group home for mentally handicapped persons obtain a special building permit that other group home operators were not required to obtain.[243] The city justified this measure on the grounds that the neighboring property owners would be upset; that the facility would be near a school, which would subject the residents of the group home to ridicule by schoolchildren; that the home was on a flood plain; and finally, that there were concerns about the group home's size.[244] The Supreme Court rejected the first two justifications as improper concerns for a zoning proceeding and the last two because these were not problems unique to group homes for the mentally handicapped.[245] While the Supreme Court called this rational basis

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[240] "None [of the state's evidence] purports to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally." *Id.* at 203.

[241] *See id.* at n.14 ("Hence 'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home.") (citing WALTER RECKLESS & BARBARA KAY, THE FEMALE OFFENDER: REPORT TO THE PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 4, 7, 13, 16–17 (1967)). As mentioned *supra* note 232, while this Article's proposed analysis does not focus exclusively on searching for illegitimate legislative motives, evidence of such motives may indicate that the law at hand is not substantially related to preventing harm.

[242] 473 U.S. 432 (1985).

[243] *Id.* at 447.

[244] *Id.* at 448–50.

[245] *Id.* at 450.

analysis,[246] such review is not in accord with the passive level of review applied in other rational basis cases.[247]

B. Changes in Pre-*Lawrence* Doctrine

This Article's proposed analysis changes two key elements of pre-*Lawrence* substantive due process doctrine.[248] Building off of Justice Kennedy's opinion in *Lawrence*,[249] this Article discards the distinction between fundamental and non-fundamental rights, and it eliminates the caveat of a compelling government interest. While these two changes are substantial, Part II.B will argue that they are justified.

1. Fundamental v. Non-Fundamental Rights

Abandoning the fundamental/non-fundamental rights dichotomy is justified for both functional and normative reasons. Functionally, in substantive due process cases,[250] this dichotomy in arguments about

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[246] One could argue that the Court in *Cleburne* should have seen the mentally retarded as a suspect class, and that the heightened rational basis analysis in *Cleburne* was a result of the Court's discomfort with recognizing such a classification. *See The Supreme Court—Leading Cases: Discrimination Against the Mentally Retarded*, 99 HARV. L. REV. 161 (1985) (making this argument).

[247] *See supra* note 203. Similarly, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court upheld the Michigan Law School's affirmative action program, applying strict scrutiny. *Id.* at 343. Some have argued, however, that the Court's review of the Law School's program was closer to intermediate scrutiny. *See* Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (arguing that *Grutter* and *Gratz* signal a new unifying approach to Equal Protection cases). *See also* Beschle, *supra* note 79, at 248 ("[The *Grutter* case] demonstrates an application of strict scrutiny less rigid than that commonly applied.").

[248] One could also argue it changes a third key element—namely, that laws must be targeted at preventing some tangible harm and not promoting the legislature's idea of a moral life. As Part I.D argued, this is not a substantial change from the Court's jurisprudence over the last fifty years, and it is a change that *Lawrence* embraced.

[249] *See supra* Part I.B.

[250] Although the problem of phrasing rights is highlighted in substantive due process cases, it is not a dilemma unique to such cases. The Constitution says nothing, for instance, about whipping prisoners, yet it is generally assumed such behavior would be precluded by the Eighth Amendment. U.S. Const. amend. VIII. This is not because "the right to not be whipped" is spelled out in the Constitution, but because "the right to not be whipped" falls under the umbrella of cruel and unusual punishment. In substantive due

unenumerated liberty rights devolves into arguments over whether the rights ought to be labeled as "fundamental"[251] or as a liberty interest. As a discussion of this "level of generality" problem will show, an inquiry into the specific right being protected is more confusing than an appraisal of the government's justification for its law.[252]

While Justice Scalia has proposed a method by which substantive due process rights ought to be deemed fundamental or non-fundamental, his method of phrasing the right as narrowly as possible would never uphold any rights at all when taken to its logical conclusion.[253] A specific right can always be phrased more narrowly to the point where the specific plaintiffs and defendants are named. For instance, in *Reliable,*[254] if the Fifth Circuit had inquired as to whether history and tradition upheld Reliable Consultants' right to sell sex toys to some specific customer, then no historical analysis would have been possible because the parties in a case like *Reliable* are not likely to have been in the business for very long, let alone long enough to constitute a long-standing tradition.

Some scholars have argued that the "level of generality" problem ought to be fixed by conceptualizing rights as points along a rational continuum.[255] While this approach has been criticized for aggrandizing the

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process analysis, however, matters are made more difficult since there is no textual source under which rights can be included or not included.

[251] This is because incursions on fundamental rights receive strict scrutiny. *See* CHEMERINSKY, *supra* note 211, at 417.

[252] For more discussion of the way in which fundamental rights are framed in substantive due process analysis, see John F. Basiak, *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 U. FLA. J.L. & PUB. POL'Y 401 (2005) (arguing for consistent yet moderate level of generality); Tribe & Dorf, *supra* note 34, at 1071 (arguing for a value-free way of pinpointing one certain, "correct" level of generality for how a right is to be phrased).

[253] In footnote six of *Michael H. v. Gerald D.*, Justice Scalia, joined by Chief Justice Rehnquist, argued that one ought to look to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Michael H. v. Gerald D, 491 U.S. 110, 127 n.6 (1989). For more criticism of footnote six, see Tribe & Dorf, *supra* note 34, at 1085–92.

[254] Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008). For more on *Reliable*, see *supra* Part II.B.

[255] Laurence Tribe and Michael Dorf have argued for a level of generality that mimics Justice Harlan's proposed "rational continuum" in his dissent in *Poe v. Ullman*. In this way, the level of generality problem may be solved by acknowledging a range of possible outcomes, all of which could be consistent with prior precedent. Judges then make

role of judges in constitutional jurisprudence,[256] the argument's primary flaw is that it still requires rights to be labeled fundamental or non-fundamental. The rational continuum view tries to answer the same problem that Scalia was trying to solve—it simply offers a different solution.[257] Alternatively, abandoning the fundamental/non-fundamental distinction would add clarity to the discussion about protecting unenumerated rights, for courts would no longer be forced to engage in ad hoc phraseology and instead be allowed to examine the state's justification for its action.

Furthermore, from a functional perspective, it is often difficult to describe what specific "right" a particular activity involves. *Pierce v. Society of Sisters* is an excellent example of this sort of problem.[258] While *Pierce* is often cited for the proposition that the Constitution grants a fundamental right to parents to direct their children's education,[259] claimants in the case were actually private Catholic schools concerned about going out of business when their students were forced to attend public schools.[260] The business of the schools was "remunerative"[261] and "for profit."[262] The schools' *business* was "useful and meritorious,"[263] and the

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appeals to outside moral values in arguing for one particular level of generality. *See* Tribe & Dorf, *supra* note 34. *But see* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that constitutional principles must be neutrally derived, free of ad hoc political judgments).

[256] *See* BORK, *supra* note 22, at 234–35.

[257] Tribe & Dorf, *supra* note 34, at 1057 ("[We] focus[] on one important aspect of the quest for constitutional meaning: how to determine whether a particular liberty . . . is a 'fundamental' right.").

[258] 268 U.S. 510 (1925).

[259] *See, e.g.*, Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 783 (1989) (citing *Pierce* as standing for the right to educate children); Louis M. Seidman, *The* Dale *Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1545 n.28 (2008) (citing *Pierce* as providing the right to choose private education for one's children).

[260] *See* Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce, *70 Years Later*, 27 SETON HALL L. REV. 1194, 1200 (1997) (stating that the "livelihood of the private schools the [Oregon] law effectively outlawed").

[261] *Pierce*, 268 U.S. at 532.

[262] *Id.* at 533.

[263] *Id.* at 534.

schools had "business and property for which they claim[ed] protection."[264] While the Court did note that "[t]he child is not the mere creature of the state,"[265] most of the opinion is dedicated to espousing the virtues of the privately run, corporate schools that would lose business if Oregon's law came into effect. *Pierce* illustrates that it is often unclear where one right ends and another begins. What *is* clearer is that the state in *Pierce* could offer no *justification* as to why private schools could not educate whomever they pleased.[266]

Shifting focus away from examining the *nature* of the right asserted would also provide additional protection for incursions on commercial rights, which currently receive only passive rational basis review[267] as they are usually labeled mere liberty interests.[268] On top of historical[269] and functional[270] justifications, the normative justification for protecting personal rights above commercial rights is weak.[271] While the virtues of

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[264] *Id.* at 535.

[265] *Id.*

[266] For a general history of *Pierce* and its impact, see Carter, *supra* note 259.

[267] *See supra* note 203.

[268] *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–99 (1937) (deferring to legislature on reasonableness of commercial regulation).

[269] *See* Loan Ass'n v. Topeka, 87 U.S. 655, 663 (1875) (noting that just as the government's transferring homestead A from B to C would be unconstitutional, so would the ordering of B's wife to marry C); James Madison, *The Federalist No. 10*, *in* THE FEDERALIST PAPERS 79 (Charles Kesler & Clinton Rossiter eds., Penguin 1961) (1788) [hereinafter Madison, *The Federalist*] (writing that government's "first object" is to protect the faculties which allow men to acquire property); James Madison, *Property*, NATIONAL GAZETTE, Mar. 29, 1792, at 174 [hereinafter Madison, *Property*] ("[property] embraces every thing to which a man might attach value"). *Cf.* 2 MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 496–502 (1988) (arguing that substantive due process emerged as a protective mechanism for industry in the late nineteenth century).

[270] *See* Ronald H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974) (arguing that for the same reasons government yields to the virtues of the marketplace in matters of goods, it should also yield to the marketplace in matters of free speech). *But see* Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) (arguing that because the government can never be "neutral" toward speech, it should give up entirely).

[271] *But see* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 247–72 (1992); Goldman, *supra* note 194 at 621 ("[Commercial activity] is engaged in with others and does not by itself involve any sense of

controlling one's body and expressive relationships must remain unquestioned, the virtues of controlling one's livelihood are no less important.[272] To deny or seriously impair one's right to earn a living can have just as deleterious an impact on one's life as the denial of the right to engage in consensual sexual relations[273] or the right to marry.[274]

Founders such as James Madison did not form a government so that the right to "life" could be protected against the outside use of force, though the right to property could be infringed as the majority saw fit.[275] Madison

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intimacy."); Tribe, *supra* note 43, at 1940–41 (arguing that human relationships are either "instrumental" or "expressive," the latter of which is "indispensable" and deserves greater protection by the government). *But see* Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2004 CATO SUP. CT. REV. 9 (2004) (arguing that preservation of personal rights and preservation of commercial rights are mutually dependent).

[272] Successful or not, claimants often try to convince courts that the state's preventing them from earning a living is unconstitutional. *See, e.g.*, State v. Balance, 51 S.E.2d 731, 735 (N.C. 1949) (the right to be a photographer); Meadows v. Odom, 360 F.Supp.2d 811 (M.D. La. 2005) (the right to arrange flowers, discussed infra Part III.D.2). Jed Rubenfeld has argued that courts should invoke substantive due process when the resulting *impact* of the state's regulation has a profound effect on the citizen's livelihood. *See* Rubenfeld, *supra* note 259.

[273] Prostitution is a common example of an instance when the right to earn a living can overlap with the right to engage in consensual sexual relations. Under this Article's proposed analysis, the state would argue that its prohibition of prostitution substantially related to preventing some harm—namely the harm presented by coercion or exploitation of women. The state would argue that its solution—prohibition of all prostitution—was substantially related to preventing this harm. The state's argument in such a case would be strong—the presence of even some regulated prostitution still allows for the possibility that women will be coerced, either by their pimps or by johns. For more on *Lawrence*'s impact on prostitution, see Belkys Garcia, *Reimagining the Right to Commercial Sex: The Impact of* Lawrence v. Texas *on Prostitution Statutes*, 9 N.Y. CITY L. REV. 161 (2005) (arguing that while *Lawrence* may not invalidate prostitution statutes in the short term, it may pave the way for decriminalization in the future). *But see* Sunstein, *supra* note 43 (stating that "*Lawrence* is best taken not to affect existing law" concerning prostitution).

[274] *See supra* note 28.

[275] *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 194 (2001) (surveying early state constitutions and finding that "[t]he first state constitutions thus clearly emphasized the individual's claim to legal protection of his property"); Madison, *Property supra* note 269, at 1 (emphasizing need for government protection of property). Indeed, Madison saw property as *more* vulnerable to legislative majorities than "rights of conscience." *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 314–315 (1996) (describing how Madison recognized that because government would always have to regulate economic matters to some degree,

understood that a person's body and his property are inseparable—each is the product of human individuality and rationality.[276] To say that one supersedes the other is to say the right half of a cup of coffee is more deserving of consumption than the left half. Abandoning the fundamental/non-fundamental distinction would protect these vital commercial interests since courts would scrutinize more intently laws that, while not concerning personal autonomy, do not prevent harm in any appreciable way.

2. No More Compelling Interests

Abandoning the compelling interest aspect of substantive due process analysis raises different objections. Even strong advocates of protecting liberty would allow the government to intrude on such rights as long as these intrusions are narrowly tailored to address some proper purpose and are the least restrictive alternative available.[277]

Just as scholars have argued that a narrow but absolute right is preferable for free speech and free exercise cases,[278] protecting a narrow bandwidth of activity absolutely is preferable to protecting a wide span of activity, subject to the interests of government. This Article's proposed analysis would therefore consider government interests, but only insofar as determining whether a right exists—not whether the government interests are pressing enough to allow an incursion on that right.

This is not merely a rhetorical shift. If one is skeptical of government power, as certain Founders surely were,[279] one would prefer

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derogation of property rights would always be likelier than a derogation of rights of conscience).

[276] *See* Madison, *Property*, *supra* note 269.

[277] *See* BARNETT, *supra* note 102, at 336.

[278] *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 452–59 (1985) (arguing that free speech rights can become politically vulnerable when interpreted expansively); Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835 (2004) (arguing the same for right to free exercise of religion).

[279] *See, e.g.*, JAMES MADISON, PROCEEDINGS OF MAY 31, NOTES (1787) *reprinted in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 51 (Max Farrand ed., 1966) (referring to "turbulence and follies of democracy"). Some scholars have seen the Founding in more democratic terms. *See, e.g.*, LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (arguing that Founders trusted people to preserve their rights). *But see* RAKOVE, *supra* note 275, at 49 ("Madison traced the sources of unjust legislation to . . . 'the people themselves'").

that a right be protected in a narrow but absolute way, compared to a manner that is broad but flexible to the changing needs of government.[280] Individual rights are often most vulnerable during times of national hardship, so conceptualizing these rights as subject to the interests of the state could very well lead to the derogation of the interests of the individual during times of military or economic turmoil.[281] Balancing rights also ignores the natural soil from which individual rights spring. The Founders spoke of inalienable rights—rights that government could not take away because government never owned them in the first place.[282]

C. Avoiding Indeterminacy and Promoting Efficacy

Both for purposes of consistency[283] and restraint,[284] any constitutional standard ought to be practicable. Part III.C will argue that this Article's proposed analysis would not lead to expansive, indeterminate

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[280] *See* Hamburger, *supra* note 278, at 890–91 (arguing that growingly expansive conception of free exercise right by the Supreme Court and academia has led to derogation of right).

[281] *But see* RAKOVE, *supra* note 275, at 332–33 (describing Madison's belief that not even an enumeration of rights could prevent the majority from suspending habeas corpus during time of "civil turmoil").

[282] *See, e.g.*, 1 ANNALS OF CONGRESS 759 (1789) (Rep. Sedgwick stating that the right to assemble is a "self-evident, unalienable right which the people possess"); Thomas Jefferson, *Query 17*, *in* NOTES ON THE STATE OF VIRGINIA 157–61 (William Peden ed., U. of N.C. Press 1954) (1784) ("The rights of conscience we never submitted, we could not submit."); Grey, *supra* note 207 (arguing that the Founders favored a higher, unwritten, fundamental law); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127–28 (1987) (same). *See also* United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (rev'd on other grounds) (referring to right to not be slave as among those "discoverable by the light of reason").

[283] For example, in his *Lawrence* dissent, Justice Scalia expressed worry that the majority opinion could produce inconsistency. Lawrence v. Texas, 539 U.S. 558, 604 (2003) ("The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly."). *See also* Bork, *supra* note 255 (arguing for judicial consistency).

[284] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 133–34 (2d ed. 1986) (arguing for virtues of deferring to legislature on matters of policy); J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009) (same).

litigation and that it is sufficiently, but not overly, deferential to a legislature's fact-finding power.

While adoption of this Article's analysis might increase the number of plaintiffs claiming that the government is infringing on their liberty rights, the number of claims would eventually decline as claimants discover that an absolute but narrow right to liberty is not a license to partake in any activity one wishes.[285] Even if the number of cases decided in the claimants' favor is greater than previously, such an increase would be justifiable since it would mean the legislature had been passing laws not substantially related to preventing harm. Furthermore, many of the Supreme Court's most famous (albeit controversial) decisions, such as *Brown v. Board of Education*,[286] have led to initial increases in the number of constitutional claims filed.[287] Although the implications of such cases were initially unclear, over time the outcomes of potential cases became clearer, and indeterminacy was less of a problem.[288]

Some might argue that this Article's solution would require the judicial branch to find facts that are outside its normal area of expertise: that is, the facts necessary to determine whether or not a law substantially relates to preventing harm. This point, however, ignores the constitutional fact-finding in which courts already engage and in which they must engage in order to protect individual rights, whether they be enumerated *or* unenumerated.[289] For example, in First Amendment cases, courts must ensure that laws regulating the time, place, and manner of speech are narrowly tailored to meet a substantial government interest, do not

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[285] *See infra* Part III.D (exploring applications of this Article's proposed analysis).

[286] 347 U.S. 483 (1954).

[287] *See* MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT (2007).

[288] *See id.*

[289] Several state courts also engage in extensive fact-finding as to the propriety of economic regulations. *See, e.g.*, Susan Boyd, *A Doctrine Adrift: Land Use Regulation and the Substantive Due Process of* Lawton v. Steele *in the Supreme Court of Washington*, 74 WASH. L. REV. 69 (1999) (discussing how substantive due process has been used on the state level to invalidate naked wealth transfers between private parties). The Supreme Court has also ruled that substantive due process protection applies to punitive damages in civil cases. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). While this "protection" in punitive damage cases does not require the pinpointing of any certain economic "right," the normative reasons for protecting a claimant's money in punitive damage cases could surely extend to cases in which legislatures regulate commercial rights.

unreasonably limit other avenues of expression, and present the least possible intrusion upon the freedom of expression.[290] Such analysis is impossible unless courts independently evaluate the extent to which a law is over- or under-inclusive. Unlike speech, the liberty rights of which this Article has spoken are not enumerated in the text of the Constitution, but the "necessity" evaluation that courts typically perform for speech cases is also not enumerated.[291] Nevertheless, courts have not stopped formulating precedent regarding what is a necessary regulation of speech.[292] Judges are comfortable making "necessity" evaluations because they understand that such determinations are indispensible for simultaneously safeguarding freedom *and* allowing the sort of common sense regulation that governments must enforce. There is no reason to believe that, given an appropriate standard, the judiciary could not also perform this function in cases pertaining to unenumerated rights.[293]

D. Application

Any constitutional standard should be capable of producing consistent, predictable results.[294] The goal of Part III.D is to demonstrate that the application of this Article's proposed analysis to sex toy cases and

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[290] *See* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

[291] *See id.*

[292] *See id.* One could also call this sort of elaboration on what constitutes a violation of a constitutional right a "constitutional construction." This term is popular among modern originalists. *See, e.g.*, Lawrence Solum, *Heller and Originalism, Part III: The Interpretation—Construction Distinction*, LEGAL THEORY BLOG, July 3, 2008, http://lsolum.typepad.com/legaltheory/2008/07/heller-and-orig.html (defining constitutional construction as "the activity of translating the semantic content of a legal text into legal rules, paradigmatically in cases where the meaning of the text is vague").

[293] Some might argue that this sort of analysis would be just as inappropriate for enumerated rights as it is for unenumerated rights. This sort of argument, described in BICKEL, *supra* note 284, necessarily takes issue with the entire logic of judicial review. *See also* BORK, *supra* note 22, at 139–41 (describing countermajoritarian difficulty). However, even critics of judicial review, such as Bickel and Bork, acknowledge that the courts must protect *some* rights, which requires some evaluation as to the necessity or reasonableness of a regulation, which requires some extra-textual standard.

[294] *See supra* notes 283–284 and accompanying text.

to other cases would not lead to the sort of indeterminacy often associated with intermediate scrutiny analysis in other contexts.[295]

1. Sex Toy Statutes

To determine the constitutionality of laws banning the sale of sex toys, judges would have to determine whether the legislation is substantially related to preventing harm. This analysis[296] would allow the court to honestly evaluate the state's justification for its statute. This is a superior and more direct approach than that taken in *Williams* and *Reliable*, which hinged on which box the "right" at stake should be placed into.[297]

The state could present two reasons why such statutes substantially relate to targeting a preventable harm. First, it could argue that the sale of sex toys must be prohibited in order to prevent unsuspecting or naïve minors from purchasing products they do not understand or that their parents do not want them to see. Second, the state could argue that the advertising of adult material would infringe upon public decency in a way similar to the harm caused by an offensive billboard on the side of a highway.[298]

An outright prohibition on the sale of sex toys is not substantially related to preventing these harms. A vast majority of vendors already restrict entrance to their stores to those over eighteen or twenty-one.[299] If

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[295] *See* Beschle, *supra* note 79 (calling intermediate scrutiny far less determinate than strict scrutiny or rational basis, yet still advocating that it be applied in substantive due process cases).

[296] *See supra* Part II.

[297] For criticism of this approach, see *supra* Parts I.B, II.A–B, III.B.1.

[298] For more on *Lawrence*'s potential impact on obscenity statutes, see Michael P. Allen, *The Underappreciated First Amendment Importance of* Lawrence v. Texas, 65 WASH. & LEE L. REV. 1045 (2008); Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379 (2008). State efforts to prohibit billboards advertising the presence of adult stores have often been found unconstitutional on First Amendment grounds. *See Federal Judge Blocks Kan. Ban on Sexy Billboards*, ASSOCIATED PRESS, July 1, 2009, *available at* http://www.firstamendmentcenter.org/Speech/adultent/%5Cnews.aspx?id=21778 (surveying cases in which courts have found restrictions on such signs unconstitutional on First Amendment grounds). The content of such signs was usually textual and did not have sexual imagery.

[299] For instance, in *Williams I*, the stores at issue had prominent signs posted outside their doors stating, "If offended by explicit sexuality, Please do not enter, You must be 21 years of age." Williams v. Pryor, 41 F. Supp. 2d 1257, 1262 (N.D. Ala. 1999). In order

the state is concerned that stores are not adhering to these self-imposed restrictions, it could simply pass laws prohibiting minors from entering stores that sell sex toys, as opposed to prohibiting all sales.

As for laws banning the advertising of sex toys, an outright prohibition is not substantially related to preventing the harm posed by an offensive, public advertisement.[300] Again, the state could prohibit the public advertising of sex toys, yet still permit the sex toys to be sold. Furthermore, some vendors of sex toys do not engage in public advertising at all and function instead by word of mouth.[301]

Statutes banning the sale of sex toys also provide a good example of how the "substantial relation" test can filter out insincere justifications from the legislature.[302] A possible motivation behind these statutes might be that certain legislators disapprove of the use of sex toys, and banning their sale is a way for the legislators to symbolically express their disapproval. Requiring the legislature to present a reason that its law substantially relates to preventing harm uncovers the "real" justification.

2. Other Statutes

This Article's proposed analysis would have little impact on most environmental and commercial regulations. It is likely these laws substantially relate to preventing harm by preventing fraud or externalities and should be upheld. This is in contrast to what would happen if all environmental or commercial regulation had to be narrowly tailored and in

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to justify an outright ban, the state would also have to present at least some evidence that so many minors are trying to infiltrate sex toy shops that the only solution must be to prohibit all sales. The state did not present such evidence in the *Williams* case, and it probably could not make such a showing. *See* Brief of Defendant-Appellee, Williams v. Att'y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2002) (No. 06-11892-J).

[300] The Court in *Reliable* dismissed the vendors' commercial speech based First Amendment claims. Reliable Consultants v. Earle, 517 F.3d 738, 747 (5th Cir. 2008).

[301] "Saucy Lady, Incorporated," for example, gains customers primarily through referrals. *See Williams*, 41 F. Supp. 2d at 1263. In contrast, certain magazines sold in Alabama do advertise the sale of sex toys. *Id.* at 1268. However, one could argue that minors are most likely to be exposed to advertisements on the internet, the presence of which Alabama's law does nothing to prevent. While a fact like this would not be dispositive under this Article's analysis, it is surely something that the court should consider in evaluating whether or not the statute substantially relates to preventing harm.

[302] *See supra* note 232.

the least restrictive way available.[303] For example, if this were the case, the state would have to prove that its carbon dioxide emissions standards were the most narrowly tailored and least restrictive means available to protect air quality. This would be a very high standard for the state to meet, and most such regulations would be struck down since the claimant could almost always show that some other unregulated source of carbon dioxide existed, or that a claimant's carbon dioxide emissions could be regulated in a less restrictive way.[304] The rational basis alternative, however, would be just as undesirable.[305] The state would simply assert that a particular regulation preserved a public good, and the court would likely accept the state's justification.[306]

Certain state licensing statutes provide an example of commercial regulation that would not substantially relate to preventing harm. Many such laws are targeted more at protecting existing members of those industries,[307] rather than ensuring an applicant's fitness or regulating that profession in a reasonable manner.[308] For example, in *Meadows v. Odom,*[309]

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[303] *See supra* note 13.

[304] *See supra* note 277.

[305] *See supra* note 203.

[306] *But see* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (striking down a zoning law under rational basis review). For more on *Cleburne,* see *supra* Part III.A.3.

[307] The Sixth Circuit ruled in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir.2002), that "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* at 224 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected."). *See also* Santos v. City of Houston, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (holding that "economic protectionism in its most glaring form . . . [is] not legitimate"). *But see* Powers v. Harris, 379 F.3d 1208, 1220 (10th Cir. 2004) ("[T]he Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest."); Meadows v. Odom, 360 F. Supp. 2d 811, 821 (M.D. La. 2005) (agreeing with the *Powers* court). *See also* Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023 (2006) (arguing that protectionism is not legitimate state interest).

[308] Fitness and reasonable regulation have typically been the permissible bases for state licensing statutes. *See* Schware v. Board of Bar Exam'rs, 353 U.S. 232, 239 (1957) (outlining reasons why state can regulate licensing of lawyers). However, because such laws

a Louisiana District Court upheld a rigid[310] licensing process for those applying to be floral arrangers. Some licensing of floral arrangers might be substantially related to ensuring fitness or reasonable regulation.[311] However, the requirements in the *Meadows* case were so high that the legislation could not have substantially related to preventing harm.[312] The rational basis review was not enough to strike down the licensing requirements in *Meadows*. However, the alternative, a strict scrutiny standard, would demand a narrow tailoring and the least restrictive alternative. This would be just as undesirable since strict scrutiny might not permit any licensing by the state at all, possibly resulting in fraud or low quality service.

Additionally, laws banning incest most likely do not substantially relate to preventing harm. The legislature could potentially present two reasons to the contrary: first, that outlawing incest prevents the long-term corruption of the gene pool, and second, that outlawing incest prevents the subjugation of impressionable relatives.[313] To determine whether outlawing

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are subject only to rational basis analysis, courts can almost always find licensing laws are rationally connected to promoting fitness or permissible regulation. *Cf. supra* note 307.

[309] 360 F. Supp. 2d 811 (M.D. La. 2005).

[310] The licensing process is divided into written and practical portions. The applicants' arrangements are graded on such qualities as "whether the applicant's floral arrangement has 'the proper focal point,' whether the flowers in the arrangement are 'spaced effectively,' and whether 'the greenery was picked properly.'" Plaintiff's Complaint, Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005) (No. CIV.A. 03-960-B-2). Tests are graded by arrangers already licensed by the state; pass rates are typically less than fifty percent; many arrangements receive perfect scores from certain judges, while receiving a score of zero from other judges on the same panel; and applicants who have been floral arrangers for decades outside Louisiana often fail the exam. *Id.*

[311] The plaintiffs in *Meadows* challenged the rationality of any licensing requirement for floral arrangers. *Meadows*, 360 F. Supp. 2d at 823 ("[T]he plaintiffs contend they are only challenging the right of the state to license the florist occupation and are not challenging the fairness of the examination or the manner in which it is given."). Regardless of the plaintiffs' strategy in *Meadows*, this Article's analysis would not demand that no state license florists. Instead, such licensing must substantially relate to preventing the sort of harm usually addressed by licensing statutes (fitness and reasonable regulation). For more on the plaintiffs' strategy in *Meadows*, see Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & Liberty 898 (2005).

[312] *See supra* note 310.

[313] *See* Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 352–53 (2004) (discussing justifications for incest laws and finding that "core forms of incest"

incest substantially relates to preventing these harms, courts would have to debate whether statutes banning all incest actually address the danger presented by corruption of the gene pool. Some incest laws, for example, outlaw sex between stepchildren or sex between those of the same gender.[314] Evidence also shows that the risk of corrupting the gene pool is insignificant for sex between cousins.[315]

The concern regarding subjugation would raise the different question of whether the subjugation harm is not already adequately addressed by statutory rape laws, or other laws concerning coercive sexual relations. The state would have to argue that instances of one adult having sex with another adult in the same family were so pressing that all sexual relations between family members should be prohibited, no matter what the level of coercion. Since it is doubtful that the state could meet this burden,[316] laws prohibiting all sexual relations between consenting adult relatives would not substantially relate to preventing the harm posed by subjugation.

Most important in these examples is how this Article's analysis would shift the court's attention from evaluating the importance of the asserted right—whether it be the right to arrange flowers or the right to have sex with one's cousin—to evaluating the state's justification for its laws. Forcing the state to justify its laws using a "substantial relation" standard would place *some* check on the legislative power, while not entangling the courts in the everyday regulation of public goods.

IV. CONCLUSION

For forty years, the Supreme Court has protected unenumerated liberty rights by labeling some rights "fundamental" and others "liberty

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would probably "survive rational basis with bite"). *But see* Karlan, *supra* note 28, at 1458 (arguing that because laws against incest do not "draw lines" around individuals in the same way that prohibitions on same-sex marriage do, the two sorts of laws are of different characters entirely); Tribe, *supra* note 43, at 1944 (same).

[314] *See, e.g.*, KAN. STAT. ANN. § 21-3602 (2009) (outlawing same-sex incestuous sodomy).

[315] *See* Denise Grady, *Few Risks Seen to the Children of 1st Cousins*, N.Y. TIMES, Apr. 4, 2002, at A1 (reporting on a review of six major studies).

[316] *See* McDonnell, *supra* note 313, at 354 ("Since we are focused on relationships between adults it appears paternalistic to assume that most such relationships would be coercive in a way that courts could not observe.").

interests," with violations of the latter receiving passive rational basis review and violations of the former receiving strict scrutiny. This tiered approach has led to the disparagement of commercial interests, which rarely receive "fundamental" status. It has also produced rhetorical confusion, as arguments over unenumerated rights devolve into disputes about how the specific right at stake should be phrased. *Williams* and *Reliable* are good examples of both problems. To invoke strict scrutiny, claimants in these cases invariably argue that the Supreme Court has "created" a right to sexual privacy, even though bans on the sale of sex toys have a negligible impact on sexual privacy. Instead, the statutes should be understood as burdening the commercial interests of the affected vendors and sellers. These are burdens that neither the *Williams* nor the *Reliable* courts appreciated, and burdens that the state cannot sufficiently justify. Requiring that all legislation substantially relate to preventing harm would avoid these difficulties and present a limited, yet defined, check against the power of the legislature to restrict the liberty of its citizens.