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# "Emerging Awareness" After the Emergence of Roberts: Reasonable Societal Reliance in Substantive Due Process Inquiry

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# NOTES

# "Emerging Awareness" After the Emergence of Roberts:

## REASONABLE SOCIETAL RELIANCE IN SUBSTANTIVE DUE PROCESS INQUIRY

## I. INTRODUCTION

Substantive due process[1] is under attack.[2] Judicially,[3] politically,[4] academically,[5] and even socially,[6] a coalition of

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[1] Defined as the practice of the courts, through the Fifth and Fourteenth Amendments, identifying "a set of personal activities in which individuals may engage [presumptively] free of government regulation. This list derives from American constitutional text and tradition . . . ." Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897 n.14 (2004) [hereinafter Tribe, *The "Fundamental Right"*]. *Compare* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("'Substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"), *with* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1333 (3d ed. 2000) ("[T]he phrase that follows 'due process' is 'of law,' and there is a reasonable historical argument that, by 1868, a recognized meaning of the qualifying phrase 'of law' was substantive.").

[2] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring in part and dissenting in part) (lamenting in and forewarning of the weakening of substantive due process protections: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."); Governor George W. Bush, First Presidential Debate (Oct. 3, 2000), *available at* http://www.cnn.com/ELECTION/2000/debates/transcripts/u221003.html ("I don't believe in liberal, activist judges. I believe in—I believe in strict constructionists. And those are the kind of judges I will appoint.") [hereinafter Bush, Debate].

[3] *See, e.g.*, Tribe, *The "Fundamental Right," supra* note 1, at 1925-26 (noting "forceful" dissents in *Casey*).

[4] *See, e.g.*, Bush, Debate, *supra* note 2.

[5] *See, e.g.*, ELY, *supra* note 1, at 18.

[6] *See, e.g.*, *The Rush Limbaugh Show: Liberalism Implemented by Activist Judges* (Dec. 1, 2004), http://www.rushlimbaugh.com/home/estack/liberalism_implemented_by_activist_judges.guest.html.

forces threatens substantive due process arguing against what it sees as "social legislation" from the bench.[7] A continued assault is even more likely now that the death of Chief Justice Rehnquist and the retirement of Justice O'Connor have each granted President George W. Bush the opportunity to appoint a new Justice to the Supreme Court.[8] Following the emergence of Chief Justice Roberts, Justice Alito replaced Justice O'Connor, who was often the swing vote on the Court.[9] Because President Bush has made it no secret that he favors those of the bench with the least regard for substantive due process,[10] the Court is likely only to tilt further against the analysis.[11]

But substantive due process is also on the march.[12] In *Lawrence v. Texas*, the Supreme Court used substantive due process[13] to hold that state laws cannot forbid private gay sexual behavior.[14] *Lawrence* was seen as a landmark both for

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[7] President George H.W. Bush, Teleconference Remarks to the National Association of Hispanic Journalists (Apr. 24, 1992), *available at* http://bushlibrary.tamu.edu/research/papers/1992/92042402.html.

[8] *See, e.g.*, Elisabeth Bumiller & Carl Hulse, *Bush Picks U.S. Appeals Judge to Take O'Connor's Court Seat*, N.Y. TIMES, Nov. 1, 2005, at A1.

[9] *See, e.g.*, Adam Liptak, *Alito Vote May Be Decisive in Marquee Cases This Term*, N.Y. TIMES, Jan. 31, 2006, at A1.

[10] *See* Katha Pollitt, *Bush's Court Picks: Be Afraid. Very Afraid.*, THE NATION, Oct. 7, 2004, *available at* http://www.thenation.com/doc/20041025/pollitt ("Bush has said he wants more Justices in the Scalia/Thomas mold."); *see also* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 85 (2003) ("Because substantive due process doctrine has historically engaged in remarkably candid efforts to interpret and apply cultural values, Scalia would abandon the doctrine altogether, viewing it as an improper 'springboard[] for judicial lawmaking.'") (citing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25, 142-43 (1997)).

[11] *See* Liptak, *supra* note 9.

[12] *See* Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1118 (2004) ("Justices Kennedy, Stevens, and Souter are moving the Court to a more flexible analytical structure for evaluating substantive due process claims.").

[13] Justice O'Connor would have preferred the Court reach its holding through the Equal Protection Clause. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring). Equal protection values are widely seen as prevalent in the *Lawrence* opinion. *See* Hunter, *supra* note 12, at 1103 (suggesting *Lawrence* "weaves together substantive due process and equal protection doctrine into a holistic analysis of the cultural weight of the individual rights involved"); Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1449 (2004) ("[L]iberty and equality are . . . intertwined in *Lawrence* . . . ."); Recent Case, *Eleventh Circuit Upholds Alabama Statute Banning Sale of Sex Toys*, 118 HARV. L. REV. 802, 806 (2004) (*Lawrence* was "heavily driven by equal protection principles") [hereinafter Recent Case, *Eleventh Circuit Upholds Alabama Statute*].

[14] *Lawrence*, 539 U.S. at 564, 574-75, 578.

gay rights and for substantive due process inquiry itself.[15] Shortly thereafter, the Massachusetts Supreme Court held that under state substantive due process, gays were entitled to the same marriage rights and protections as heterosexual couples.[16] Seen again as a major victory for gay rights,[17] the Massachusetts court certainly flexed substantive due process.[18] In response to these advances, eleven states passed amendments forbidding similar state constitutional interpretation,[19] Congress passed the so-called "Defense of Marriage Act,"[20] and President Bush forwarded a federal constitutional amendment defining marriage as between "one man and one woman."[21]

In this fray—where arguably the Supreme Court should be its most united and explicit[22]—the Court's explanation and

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[15] *See* Hunter, *supra* note 12, at 1137 ("*Lawrence* is a breakthrough."); Edward Stein, *Introducing* Lawrence v. Texas*: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 288 (2004) ("*Lawrence* is clearly a landmark decision for lesbian and gay rights . . . ."); Tribe, *The "Fundamental Right," supra* note 1, at 1895 (*Lawrence* is a "watershed decision"); *but cf.* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 31 (2003) ("The decision was possible only because of the ludicrously poor fit between the sodomy prohibition and the society in which the justices live. And if I am correct, *Lawrence* will have broad implications only if and to the extent that those broad implications receive general public support.") [hereinafter Sunstein, *What Did* Lawrence *Hold?*].

[16] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (citing state equal protection principles as well).

[17] *See, e.g.*, William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623, 636-42 (2004); Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights Not Moral Opinions*, 27 HARV. WOMEN'S L.J. 345 (2004); Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595 (2004).

[18] *See* Feigen, *supra* note 17, at 345 (describing *Goodridge* as a "revolutionary case").

[19] Thomas Roberts & Sean Gibbons, *Same-Sex Marriage Bans Winning on State Ballots: 11 States Approve Constitutional Amendments to Outlaw Gay Nuptials*, CNN, Nov. 3, 2004, http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/.

[20] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000)) (defining marriage exclusively as "a legal union between one man and one woman as husband and wife"); *see* Adrienne Butcher, Note, *Selective Constitutional Analysis in* Lawrence v. Texas*: An Exercise in Judicial Restraint or a Willingness to Reconsider Equal Protection Classification for Homosexuals?*, 41 HOUS. L. REV. 1407, 1409 (2004).

[21] Press Release, The White House: President George W. Bush, *President Calls for Constitutional Amendment Protecting Marriage*, Feb. 24, 2004, http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html.

[22] Unanimity and clarity are widely seen as critical to the legitimacy and effectiveness of some of the Court's landmark rulings. *See, e.g.*, Ken Garten, *A Landmark Decision Marks its 50th Anniversary*, THE EXAMINER (E. Jackson County, Mo.), May 10, 2004, *available at* http://www.examiner.net/stories/051004/

implementation of substantive due process has been divided[23] and ambiguous.[24] For example, in *Lawrence v. Texas* the Court seemed to depart from its longstanding two-tiered[25] analysis.[26] Consequentially, lower courts have shown confusion in applying *Lawrence*.[27]

To withstand the barrage and to secure its constitutional footing, this Note suggests those who see value

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ken_051004006.shtml ("Chief Justice Warren also knew that unanimity was critical to the social importance of the Court's action in *Brown* in declaring segregation unconstitutional."); Alain A. Levasseur, *Legitimacy of Judges*, 50 AM. J. COMP. L. 43, 81 (2002) ("The 'Warren Court' in the landmark case of *Brown v. Board of Education*, was very explicit as to the method of interpretation that it should adopt to address the emotional and highly divisive problem of segregation in public education.") (internal citation omitted).

[23] *See, e.g.*, Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 471 (2003) (noting the "shifting coalitions of a divided (often five-to-four) Rehnquist Court").

[24] *See, e.g.*, Hunter, *supra* note 12, at 1103 ("The Supreme Court's decision in *Lawrence v. Texas* is easy to read, but difficult to pin down.") (internal citation omitted); Sunstein, *What did* Lawrence *Hold?*, *supra* note 15, at 29, 45 (describing *Lawrence* as a "remarkably opaque opinion" that "raises a number of puzzles"); *but cf.* Karlan, *supra* note 13, at 1449 ("Like *Loving*, *Lawrence* marks a crystallization of doctrine.").

[25] *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."); *see also infra* Part III.A.

[26] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("Their right to liberty under the Due Process Clause gives [homosexuals] the full right to engage in their conduct without intervention of the government . . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); Karlan, *supra* note 13, at 1450 (suggesting *Lawrence* "undermines the traditional tiers of scrutiny altogether"); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 946 (2004) ("Nevertheless, it is not too soon to declare that the combined effect of the methods employed by the Court in *Lawrence* and *Grutter* has done serious damage to the health of tiered scrutiny [which may be] beginning to collapse."); Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 48 ("An alternative reading is that the Court deliberately refused to specify its 'tier' of analysis because it was rejecting the idea of tiers altogether."); *but cf.* Hunter, *supra* note 12, at 1117 ("In both *Casey* and *Lawrence*, the Court eschewed direct use of fundamental rights language, but made clear that the rights being compared were equivalent and therefore entitled, by whatever standard of review, to equivalent protection."); Tribe, *The "Fundamental Right," supra* note 1, at 1917 ("In any event, the strictness of the Court's standard in *Lawrence*, however articulated, could hardly have been more obvious."); *also cf.* Jeffrey Goehring, Note, Lawrence v. Texas*: Dignity, A New Standard for Substantive Rational Basis Review?*, 13 LAW & SEX. 727, 727 (2004) (arguing the *Lawrence* Court used "rational basis review").

[27] *Compare* Williams v. Att'y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004) (finding *Lawrence* did not demand a right to private use of sexual devices), *with* Williams v. Pryor, 220 F. Supp. 2d 1257 (N.D. Ala. 2002) (finding *Lawrence* did demand a right to private use of sexual devices); *see generally infra* Part V.

in substantive due process[28] should supplement its past justifications.[29] Inquiry into reasonable societal reliance—that is, judicial appreciation of the practices citizens have developed a real and rational *trust* in the protected nature of[30]—can help in this goal.[31] This Note argues that reasonable societal reliance underlies substantive due process's foundations, its prior[32] and current jurisprudence,[33] and should be explicitly announced as a vital aspect of continued substantive due process review.[34] In other words—to borrow from due process's classic phrasing—an "emerging awareness"[35] should be capable of "so root[ing] in the traditions and conscience of our people" that its predicate practice will be "ranked as fundamental" and therefore protected.[36]

Part II will briefly review and analyze the arguments surrounding proper constitutional interpretation in the substantive due process context. Part III will trace the history of substantive due process in relation to its consideration of reasonable societal reliance. Part IV will demonstrate how societal reliance inquiry is applied in the Court's recent cases of

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[28] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 763 (1997) (Souter, J., concurring) ("[Substantive due process's] enduring tradition of American constitutional practice is, in Justice Harlan's view, nothing more than what is required by the judicial authority and obligation to construe constitutional text and review legislation for conformity to that text. *See* Marbury v. Madison, 1 Cranch 137 (1803).").

[29] *See* Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (ridiculing past justifications for substantive due process holdings as meaningless "sweet-mystery-of-life passage[s]" that "'cast[] some doubt' upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all") (internal citation omitted).

[30] Post, *supra* note 10, at 11 ("[J]udicial authority might best be reconceived as a relationship of trust that courts forge with the American people. Constitutional law is not the ground of this relationship, but rather its consequence.").

[31] In another sense, another modest goal of this note is to add, in whatever way possible, to the growing debate surrounding the forecasted "new methodology" or "new vision" for substantive due process. *See* Massey, *supra* note 26, at 946-47.

[32] *See infra* Part III.

[33] *See infra* Part IV.

[34] *See* Post, *supra* note 10, at 8 ("[T]he Court in fact commonly constructs constitutional law in the context of an ongoing dialogue with culture, so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law.").

[35] Lawrence v. Texas, 539 U.S. 558, 571-72 (2003) ("[W]e think that our laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

[36] *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (describing substantive due process analysis as inquiry into those practices which have "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *see also infra* Part III.A.

*Glucksberg v. Washington*[37] and *Lawrence v. Texas*.[38] Through discussion of the Eleventh Circuit's handling of *Willams v. Attorney General of Alabama*,[39] Part V will highlight how lower courts are struggling with *Glucksberg* and *Lawrence* and argue that these recent precedents are best read as pointing to an appreciation of societal reliance in substantive due process inquiry. Part VI will conclude with a summary of how sensitivity towards reasonable societal reliance is an effective if not necessary strategy to safeguard substantive due process.

## II. CONSTITUTIONAL INTERPRETATION AND SUBSTANTIVE DUE PROCESS

The hottest controversies in constitutional interpretation arise when the courts, often through substantive due process inquiry, breach the so-called "culture wars."[40] A substantive due process inquiry centered on reasonable societal reliances would help ease the rifts that result.

### A. *The Current Debate*

The current debate over substantive due process volleys between whether a strong jurisprudence would be either integral or antithetical to proper constitutional interpretation.[41] Supporters of a strong substantive due process believe in its power to end national divides while those in opposition see the same as ultimately divisive.[42]

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[37] 521 U.S. 702 (1997).

[38] 539 U.S. 558 (2003).

[39] 378 F.3d 1232 (11th Cir. 2004).

[40] *Compare* Post, *supra* note 10, at 10 ("[C]onstitutional law will [continue being] as dynamic and as contested as the cultural values and beliefs that inevitably form part of the substance of constitutional law. Unless the Court were to cease protecting constitutional values altogether, it cannot avoid entanglement in the 'culture wars' that sometimes sweep the country."), *with* Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.").

[41] *See generally* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

[42] William N. Eskridge, Jr., Lawrence's *Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1078 (2004) ("The domestication of culture clashes is important in maintaining the advantages of

The main argument for a strong substantive due process is that in interpreting the Constitution, which was written in abstract and indeterminate language, the courts must, through an evolutionary process, forcefully articulate and preserve America's fundamental social and moral values.[43] Others have expressed similar conceptualizations through the idea of "translating" the liberties at the time of our framing into applicable rulings for the modern context.[44] For example, just as the First Amendment's freedom of the "press" should be *translated* to include freedom of broadcast television (even though our eighteenth-century "Constitution doesn't speak much about televisions"),[45] other freedoms should be translated into the modern era through the Due Process Clause. As Justice Harlan explained, "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."[46]

Inevitably, those opposed to such a method of constitutional interpretation retort that too much power then rests with the "subjective considerations" of the individual Justices.[47] Complaints about the elitist, anti-democratic nature of the interpretation follow.[48] Subsequently, those skeptical of

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political pluralism—moderation, stability, and the peaceful resolution of disputes. Judicial review helps social groups avoid mutually destructive Games of Chicken. This is a big boon for the modern regulatory state.").

[43] *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term, Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 47 (1989) ("Ultimately, constitutional law is a matter of defining and protecting society's most cherished values."); *id.* at 102 ("The Court provides content to the Constitution by applying the text's abstract values to concrete, modern problems.").

[44] *See* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1376-84 (1997); Tushnet, *supra* note 41, at 804-24.

[45] Lessig, *supra* note 44, at 1376.

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

[47] Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting); *see also* Washington v. Glucksberg, 521 U.S. 702, 722 (1997) ("This approach tends to rein in the subjective elements that are necessarily present in due process judicial review.").

[48] *Compare* Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) ("[T]his outcome . . . has been arrived at by . . . a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject."), *and Griswold*, 381 U.S. at 526-27 (Black, J., dissenting) ("The late Judge Learned Hand . . . made the statement, with which I fully agree, that: 'For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.'"), *with* Post, *supra* note 10, at 6 ("[J]udges . . . do not function as 'a small group of fortunately situated people with a roving commission to second-guess Congress [and] state legislatures . . . concerning what is best for the country.' Instead they exercise the authority that has been

the appropriateness or ability of the Court to keep the Constitution "in tune with the times"[49] cite the people's conspicuous power to amend it. Other criticisms of a broad substantive due process include that the Court disrespects the Constitution when it reads too much into it, the Court has become too political without sufficient political checks, and the Court, in moving too far beyond the text of the Constitution, has become too unstable.[50]

There is also the argument that the Court should isolate some issues from the democratic arena in order to end cancerous factions and preserve national unity.[51] The classic exemplar of this is when Justice O'Connor pushed *Roe v. Wade* to have "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[52] While this prospect may appear entirely undemocratic and therefore immediately repulsive, it is worth remembering that the Constitution was principled upon protecting minority rights and practices, even from majoritarian impulses.[53]

However, in response to Justice O'Connor's appeal to end a national division with a constitutionally mandated ruling, Justice Scalia easily rejoined twenty-seven years after

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assigned them to pronounce the law of the Constitution.") (quoting William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976)).

[49] *Griswold*, 381 U.S. at 522 (Black, J., dissenting); *see also* Eskridge, *supra* note 42, at 1042 (stating the "*Lawrence* dissenters objected that shifting regimes to require tolerance of a previously despised minority group is a political judgment that should be left to the legislature" or to "We the People' acting through an amendment to the Constitution."); Hunter, *supra* note 12, at 1104 ("In my view, the *Lawrence* opinion is in perfect tune with its times, articulating a new principle of equal liberty and resonating with a neoliberal political vision of civil rights.").

[50] *See* Eskridge, *supra* note 42, at 1043 ("This classic jurisprudence of original intent is inspired by many worthy values, including the rule of law, democracy, and deliberation. If judges follow an objectively determinable original meaning, they are imbuing constitutional law with the rule of law values of objectivity, transparency, and predictability."); *see also* Massey, *supra* note 26, at 946 (noting *Lawrence* has produced "instability").

[51] *See* THE FEDERALIST NO. 10 (James Madison), *in* GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 7 (4th ed., 2001) [hereinafter FEDERALIST NO. 10]; *see also* Eskridge, *supra* note 42, at 1078 ("Activist (but not too activist) judicial review can help domesticate culture clashes. By requiring each group in [the] culture clash to tone down its denigrating rhetoric, judicial review domesticates their conflict insofar as it occurs in the political arena.").

[52] Planned Parenthood v. Casey, 505 U.S. 833, 867 (1992).

[53] FEDERALIST NO. 10; *see* Chemerinsky, *supra* note 43, at 47 ("Abandoning the [Rehnquist Court's] search for value neutrality and the strong presumption for majoritarianism has the potential to improve significantly both the theory and practice of constitutional law.").

*Roe*[54] that abortion remained one of the "most contentious and controversial [issues] in contemporary American society."[55] Justice Scalia continued, "for the sake of its own preservation, the Court should return this matter to the people."[56] Conversely to Justice O'Connor's view, Justice Scalia believed that the Court's intervention "fan[s]" or "inflame[s]"[57] controversies, not helps to "end"[58] them.

In the end, because those who attack substantive due process are arguably ascendant,[59] those who see value in substantive due process must supplement their response.[60] Inquiry into reasonable societal reliance helps fill that role.[61] Unabated, the criticism of substantive due process will only grow until some of its most cherished and important holdings are thrown into jeopardy.[62]

### *B. Explanation of Reasonable Societal Reliance Inquiry*

A substantive due process inquiry centered on current reasonable societal reliances would protect those who have objectively sound trust in the ability to continue their questioned practice.[63] Judges would look to the reasonableness of this trust to determine whether protection is appropriate, and to what degree.[64] Substantive due process jurisprudence would more mirror, it could be said, the two-part procedural due process inquiry announced in *Mathews v. Eldridge*[65] and furthered by *Cleveland Board of Education v. Loudermill*.[66]

In *Mathews*, the Court held a plaintiff had received sufficient process before the state discontinued his disability

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[54] *See* Stenberg v. Carhart, 530 U.S. 914 (2000); Roe v. Wade, 410 U.S. 113 (1973).

[55] *Carhart*, 530 U.S. at 956 (Scalia, J., dissenting).

[56] *Id.*

[57] *Id.* (quoting *Casey*, 505 U.S. at 995).

[58] *Casey*, 505 U.S. at 867.

[59] *See supra* note 2 and accompanying text.

[60] *See supra* note 29 and accompanying text.

[61] *See infra* Part II.B.

[62] *See* Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) ("*Casey* must be overruled."); *but cf.* Hunter, *supra* note 12, at 1123 (arguing the "current line of privacy cases will remain essentially undisturbed").

[63] *See* Post, *supra* note 10, at 11 ("[J]udicial authority might best be reconceived as a relationship of trust that courts forge with the American people. Constitutional law is not the ground of this relationship, but rather its consequence.").

[64] *See id.*

[65] 424 U.S. 319 (1976).

[66] 470 U.S. 532 (1985).

benefits.[67] In *Loudermill* the Court found a state inappropriately fired a security guard.[68] In both cases, the state defined the *property* at question—the right to continue receiving one's disability benefits and the right to continue at one's employment—as what had been subject to reliance under the existing "rules and understanding."[69] That is, the existing norms in Loudermill's state would determine whether it was reasonable for him to rely on his continued employment as a security guard.[70] If it were, the courts would then determine whether the process in withholding that property was due, i.e. was there a sufficient opportunity for Loudermill to be heard before being fired.[71]

A substantive due process sensitive to reasonable societal reliances would borrow from this approach.[72] It would look to the existing *rules and understanding* to determine whether the plaintiff could objectively rely on continuing the questioned practice. If so, the Court would determine the degree of protection deserved.[73]

Such an inquiry into reasonable societal reliance is not wholly alien to substantive due process analysis. In dissent, Justice Harlan had spoken of an inquiry

> having regard to what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.[74]

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[67] *Mathews*, 424 U.S. at 349.

[68] *Loudermill*, 470 U.S. at 547-48.

[69] *Id.* at 538 ("Respondents' federal constitutional claim depends on their having had a property right in continued employment. If they did, the State could not deprive them of this property without due process.") (internal citation omitted).

[70] *Id.*

[71] *Id.* at 541.

[72] As well as procedural due process, a substantive due process inquiry centered on reasonable societal reliances could derive from several other jurisprudential parents. *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (instilling an inquiry into reasonable expectations of privacy into Fourth Amendment jurisprudence); Penn. Coal Co. v. Mahon, 260 U.S. 393, 402 (1922) (instilling an inquiry into reasonable investment-backed expectations into Takings Clause jurisprudence).

[73] *See* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 28, (arguing "*Lawrence* had a great deal to do with procedural due process, rather than the clause's substantive sibling").

[74] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

The status of Justice Harlan's formulation is uncertain.[75] Importantly, it articulated two fundamental principles for a substantive due process inquiry respectful of reasonable societal reliance. First, it conceived of an inquiry that necessarily departed from the time of the framing.[76] Second, it explicitly recognized the evolutionary process of American traditions.[77] Moreover, Justice Harlan's conceptualization implicitly called for an evolutionary theory of constitutional interpretation that can equally evolve to coherently ensure foundational principles of liberty endure.[78] But a substantive due process inquiry based upon reasonable societal reliances goes further; it permits an objective assessment of the developed or developing traditions in order to oblige due process protection.[79]

## III. REVIEW OF THE HISTORICAL UNDERPINNINGS AND FOUNDATIONAL HOLDINGS OF SUBSTANTIVE DUE PROCESS

Substantive due process analysis has drawn from inquiry into reasonable societal reliances throughout its history. While this Note argues that there is a consistency in

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[75] The formulation was interestingly unmentioned in any *Lawrence* opinion. *See* Lawrence v. Texas, 539 U.S. 558 (2003); *see also* Washington v. Glucksberg, 521 U.S. 702, 756 n.4 (1997) (Souter, J., concurring) ("The status of the Harlan dissent in *Poe v. Ullman* is shown by the Court's adoption of its result in *Griswold v. Connecticut*, and by the Court's acknowledgment of its status and adoption of its reasoning in *Planned Parenthood of Southeastern Pa. v. Casey*.") (internal citations omitted); Moore v. East Cleveland, 431 U.S. 494, 500-06 (1977) (plurality opinion) (opinion for four Justices treating Justice Harlan's *Poe* dissent as a central explication of the methodology of judicial review under the Due Process Clause); Hunter, *supra* note 12, at 1121 ("The fullest explication of an alternative position, now largely adopted through *Lawrence*, came in Justice Souter's concurring opinion in *Glucksberg*. Justice Souter drew extensively from Justice Harlan's dissent in *Poe v. Ullman*.") (internal citations omitted).

[76] *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (arguing the Court must not "radically depart[]" from tradition which is a "living thing").

[77] *Id.*

[78] *See id.*; *see also* Post, *supra* note 10, at 8 ("[L]aw and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.").

[79] This is similar to the objective way procedural due process defines property. *See supra* notes 67-71 and accompanying text; *see also Glucksberg*, 521 U.S. at 720-21 (emphasizing the requirement of some objectivity: "First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition.") (internal citation omitted); Post, *supra* note 10, at 91-92.

substantive due process inquiry, it is helpful to divide the Supreme Court's cases between those focused on "tradition" and those focused on "personal dignity and autonomy."[80] This Note's analysis of the case history of substantive due process follows such a division.

### A. *Traditional Substantive Due Process Inquiry and Reasonable Societal Reliance*

Traditional substantive due process analysis holds that a legislature may not impair "fundamental" practices, which are "so rooted in the traditions and conscience of our people,"[81] barring "narrowly tailored" action to promote a "compelling state interest."[82] Otherwise, a legislature would only need a "rational relation" to a "legitimate state interest" to act.[83] The debate over this analysis, as previously discussed, volleys between whether these "traditions" must have been "so rooted" at the time of our framing or whether they could have since taken root—so to speak—in the interim.[84] Even those arguing the former, however, implicitly recognize that there are certain rights, a list of which cannot be definitively numbered,[85] not mentioned in the four corners of the Constitution,[86] that the courts have and should still protect.[87] Equivalent to—if not even more precise than—these "traditions" are the practices

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[80] *See* Post, *supra* note 10 at 89 ("[T]he Court ha[s] adopted two distinct approaches to defining . . . substantive due process. The first, which I shall call the traditional approach, focuse[s] on a hermeneutics of history and tradition; the second, which I shall call the autonomy approach, focuse[s] on the forms of liberty prerequisite for personal dignity and autonomy.") (internal citation omitted).

[81] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[82] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

[83] *See id.* at 735.

[84] *See supra* notes 43-50 and accompanying text.

[85] *See* Pennell v. City of San Jose, 485 U.S. 1, 8 (1988) (observing "Art. III's proscription against advisory opinions"); *see also* Tribe, *The "Fundamental Right," supra* note 1, at 1899 ("[*Lawrence*] treated . . . substantive due process . . . not as a record of the inclusion of various activities in—and the exclusion of other activities from—a fixed list defined by tradition, but as reflections of a deeper pattern involving the allocation of decisionmaking roles . . . .").

[86] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 87 (1987) (protecting adult heterosexual marriage through the Due Process Clause); Loving v. Virginia, 388 U.S. 1, 12 (1967) (using the Equal Protection Clause to strike down state laws forbidding interracial marriage).

[87] For example, even Justice Scalia, the member of the Court with perhaps the least affection for a strong substantive due process inquiry, has upheld its use in protecting the "fundatmental" right of heterosexual adults to marry. *See Turner*, 482 U.S. at 78 (Scalia, J., joining the Court's majority).

which at the framing carried with them reasonable societal reliance.[88]

An example of traditional substantive due process inquiry can be found in the Court's heterosexual marriage cases. In *Zablocki v. Redhail* the Court invalidated a Wisconsin law forbidding a marriage if a court determined the groom would be unable to pay previously owed child support.[89] Similarly, in *Turner v. Safley* the Court unanimously struck down a prison regulation forbidding inmates from marrying unless the superintendent of the prison found a compelling reason to grant permission.[90] In both cases, the Court, though through different words, found the tradition of heterosexual marriage had "so rooted in the traditions and conscience of our people" that it required protection.[91] The Court thereby demanded the adverse legislation be sufficiently tailored to a compelling state interest; a bar the state failed to meet in both cases.[92] By finding that marriage restrictions were not reasonably related to legitimate state interests, the Court in both *Turner* and *Zabloki* could be read as having found that it was reasonable for a couple to rely on the right to marry, and not for a state to rely on its right to forbid.[93] In such a way, substantive due process inquiry has always carried with it a degree of analysis into reasonable societal reliances.[94]

### *B. Selected Substantive Due Process Decisions on Assorted Traditions*

In *Meyer v. Nebraska*, the Court invalidated a state law prohibiting teaching in a non-English language in state

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[88] A precise definition of the right questioned has been seen as vital to those opposed to the extension of substantive due process protections. *See* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1239 (11th Cir. 2004) (upholding a statute against sexual-devices: "First, in analyzing a request for recognition of a new fundamental right, or extension of an existing one, we 'must begin with a careful description of the asserted right.'") (internal citation omitted); *see also* Post, *supra* note 10, at 91-92; *but cf.* Eskridge, *supra* note 42, at 1048 (arguing "one can get whatever answer one wants by how one poses the question" of the right involved).

[89] Zablocki v. Redhail, 434 U.S. 374, 382 (1978).

[90] Turner v. Safley, 482 U.S. 78, 91 (1987).

[91] *Id.*; *Zablocki*, 434 U.S. at 382.

[92] *Turner*, 482 U.S. at 91; *Zablocki*, 434 U.S. at 382; *see also* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

[93] *See Turner*, 482 U.S. at 91; *Zablocki*, 434 U.S. at 382.

[94] *See* Post, *supra* note 10, at 11 ("The Court must maintain the distinctly legal authority of constitutional law, and yet it must also embed constitutional law within the beliefs and values of nonjudicial actors.").

schools.[95] The Court refused to attempt "to define with exactness the liberty thus guaranteed" by the Due Process Clause.[96] The Court did, however, note that "[w]ithout doubt" protections were afforded to "the common occupations of life" as well as "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free" persons.[97] In 1923—the year *Meyer* was decided—and before, significant numbers of children were being educated in foreign languages.[98] The practice was particularly widespread in Nebraska where over ten percent of the population was foreign-born in 1910, five percent born in Germany alone.[99] With vast numbers enjoying a certain practice, the Court refused to find such reliance unprotected. The reasonableness of the societal reliance in the liberty to teach one's child in a non-English language guided the Court to shield that "common occupation[] of life" from hostile legislation.[100]

Shortly thereafter, in *Pierce v. Society of Sisters*, the Court invalidated an Oregon law forbidding children from attending non-public schools.[101] Here, the Court even began noting the numbers of those who relied upon the practice the legislation challenged. That is, the Court noted an average of "one hundred" annually enrolled in religious schools.[102] As with teaching in foreign languages in *Meyer*, attending non-public schools was reasonably relied upon in *Society of Sisters*. In fact, around ten percent[103] of the population attended non-public schools at the time.[104] With so many relying on the

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[95] Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

[96] *Id.* at 399.

[97] *Id.*

[98] *See* Nebraska District of Evangelical Lutheran Synod v. McKelvie, 175 N.W. 531, 533 (Neb. 1919).

[99] *See* Stephen E. Sachs, Turning Aliens into Citizens: Americanization and the Foreign Language Laws (Jan. 12, 2001) (unpublished Seminar Paper, Yale Law School), http://www.stevesachs.com/papers/paper_98a.html (noting that Americanization of these immigrants was a particular target of the legislation). Statistics of foreign births in 1910 are appropriate for the Supreme Court decision of 1923 due to the time lags between a child's birth and her formal education and between a conflict's initial adjudication and Supreme Court review.

[100] *Meyer*, 262 U.S. at 399-400.

[101] Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925).

[102] *Id.* at 532-33.

[103] This is a similar percentage to those foreign-born in Nebraska in the 1920's and thereby targeted by the Americanizing legislation the Court ruled unconstitutional in *Meyer v. Nebraska*. *See supra* note 99 and accompanying text.

[104] NATIONAL SCHOOL BOARD ASSOCIATION, A COMPARISON: THE ROLE OF PRIVATE SCHOOLS, http://www.nsba.org/site/sec_peac.asp?CID=1235&DID=32916 (last visited Apr. 4, 2006).

practice, with it "common" and "long recognized,"[105] substantive due process protection soon followed.

Continuing, in *Moore v. East Cleveland*, the Court, in 1971, invalidated a city ordinance limiting those living together to only "family" members.[106] The questioned ordinance, as defined, precluded a woman from living with her son and her two grandchildren—who were cousins.[107] The Court cited scholarly work and newspaper accounts concerning the practice of households expanding beyond the classic nuclear family.[108] The Court even went into specific census reports to analyze the prevalence of the behavior:

> Recent census reports bear out the importance of family patterns other than the prototypical nuclear family. In 1970, 26.5% of all families contained one or more members over 18 years of age, other than the head of household and spouse. U.S. Department of Commerce, 1970 Census of Population, vol. 1, pt. 1, Table 208. In 1960 the comparable figure was 26.1%. U.S. Department of Commerce, 1960 Census of Population, vol. 1, pt. 1, Table 187. Earlier data are not available.[109]

The Court's investigation led it to determine that reliance on being able to live with those outside one's immediate family was reasonable.[110] This conclusion then directed the Court to protect the practice.[111] Implicitly, thereby, the Court recognized that substantive due process inquiry includes sensitivity towards reasonable societal reliance. Because a practice was objectively reasonably relied upon, the Court determined protection was appropriate.[112]

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[105] *Meyer*, 262 U.S. at 399.

[106] 431 U.S. 494, 506 (1977).

[107] *Id.* at 495-97.

[108] *Id.* at 504 n.14 (citing BETTY G. YORBURG, THE CHANGING FAMILY (1973); Urie Bronfenbrenner, *The Calamitous Decline of the American Family*, WASH. POST, Jan. 2, 1977, at C1).

[109] *Moore*, 431 U.S. at 504 n.14.

[110] *Id.* at 506; *see also id.* at 510 n.9 (Brennan, J., concurring) ("It is estimated that at least 26% of black children live in other than husband-wife families, 'including foster parents, the presence of other male or female relatives (grandfather or grandmother, older brother or sister, uncle or aunt), male or female nonrelatives, [or with] only *one* adult (usually mother) present . . . .'") (internal citation omitted).

[111] *Id.* at 506.

[112] *See* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1993) (emphasizing the requirement of some objectivity: "First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'") (internal citation omitted); *see also* Post, *supra* note 10, at 91-92.

In *Meyer*, *Pierce*, and *Moore*, traditions of liberty in the education of one's children and in the definition of one's household instigated plaintiffs to defend their relied upon expectations.[113] Because such reliance was reasonable, the Supreme Court honored those expectations.[114]

### C. *Selected Substantive Due Process Decisions on the Tradition of Autonomy*

Supreme Court precedents dealing with the issues of contraception and abortion have also demonstrated how reasonable societal reliance has been a continuous part of the Court's substantive due process inquiry. In *Griswold v. Connecticut*, the Court, in 1965, invalidated a state statute prohibiting the distribution of contraceptives.[115] With millions of American women already using "the Pill," reasonable reliance on the contraceptive was clearly widespread.[116] While the *Griswold* majority failed to mention the underlying fact that contraceptives were widely available regardless of the Connecticut statute, Justice White, in concurrence, finally stated the obvious: "[T]heir availability in that State is not seriously disputed."[117] In fact, around ten percent of pre-menopausal women were using the Pill in 1965.[118] In *Griswold*, the Court again found a reasonably relied upon practice

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[113] *Moore*, 431 U.S. at 494; Pierce v. Soc'y of Sisters, 268 U.S. 510, 510 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[114] *Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 536; *Moore*, 431 U.S. at 506.

[115] 381 U.S. 479, 479 (1965).

[116] *See Evolution and Revolution: The Past, Present, and Future of Contraception*, 10 THE CONTRACEPTION REP. 6 (Feb. 2000), http://www.contraceptiononline.org/contrareport/article01.cfm?art=93 ("Use of oral contraceptives grew rapidly. Within a year of their introduction, OCs were the method of choice for more than 400,000 US women. This number tripled the following year. By 1965, 3.8 million US women were using the pill."); PBS.org, Timeline: The Pill, http://www.pbs.org/wgbh/amex/pill/timeline/timeline2.html (last visited Apr. 10, 2005) [hereinafter Timeline: The Pill] ("[In 1965 j]ust five years after the Pill's FDA approval, more than 6.5 million American woman are taking oral contraceptives, making the Pill the most popular form of birth control in the U.S."); *see also* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 28 ("In *Griswold*, it will be recalled, the Court invalidated a Connecticut law forbidding married people to use contraceptives—a law that was ludicrously inconsistent with public convictions in Connecticut and throughout the nation.").

[117] *Griswold*, 381 U.S. at 505 (White, J., concurring).

[118] *See* Timeline: The Pill, *supra* note 116; Nationmaster.com, North America: United States: Age Distribution, http://www.nationmaster.com/country/us/Age_distribution (last visited Apr. 10, 2005) [hereinafter United States: Age Distribution].

protected.[119] In later substantive due process cases, the Court would strengthen their inquiry into reasonable societal reliances.

Adjudicating a case from Texas, the Court in *Roe v. Wade* in 1973 announced constitutional protections concerning the fundamental right of having access to an abortion.[120] In 1972, over 500,000 women received legal abortions.[121] That number was rising steadily by the year.[122] While the Court could not reach its holding in *Roe* through reasonable societal reliance alone, the Court did nevertheless note, "[i]n the past several years ... a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws [impeding access to an abortion], most of them patterned after the ALI Model Penal Code ...."[123] Recognition of this rising tide of societal reliance was therefore explicit in the Court's consideration.[124] This direction towards an emerging societal reliance, after all, included not only a virulent women's movement[125] but also 17,300 women in Texas alone waiting to obtain a legal abortion the year *Roe* was decided.[126]

In *Planned Parenthood v. Casey*, the Court developed a pre-viability "undue burden" test to address abortion protocols.[127] In doing so, the Court used *stare decisis* to bring societal reliance principles directly into substantive due

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[119] *See* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 27 ("My principal suggestion here is that the Court's remarkable decision in *Lawrence v. Texas* is best seen as a successor to *Griswold v. Connecticut*: judicial invalidation of a law that had become hopelessly out of touch with existing social convictions.") (internal citations omitted).

[120] 410 U.S. 113, 114 (1973).

[121] LISA M. KOONIN ET AL., CENTER FOR DISEASE CONTROL, ABORTION SURVEILLANCE—UNITED STATES 1997 (2000), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss4804a1.htm.

[122] *Id.*

[123] *Roe*, 410 U.S. at 139-40 (referring to the ALI Model Penal Code, § 230.3).

[124] *Id.*; *but cf.* Post, *supra* note 10, at 88 ("*Roe* used substantive due process to protect a liberty interest that the Court believed was constitutionally valuable, even if that interest was not immanent in the history and tradition of the nation.").

[125] *See* Eskridge, *supra* note 42, at 1026 ("The Supreme Court is responsive to the constitutional politics of social movements."); *see generally* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

[126] *See* ROBERT JOHNSTON, HISTORICAL ABORTION STATISTICS, TEXAS (USA), http://www.johnstonsarchive.net/policy/abortion/usa/ab-usa-tx.html (last visited March 2, 2006); THE ALAN GUTTMACHER INSTITUTE, TRENDS IN ABORTION IN TEXAS: 1973-2000 (Jan. 2003), http://www.agi-usa.org/presentations/state_ab_pt/texas.pdf.

[127] 505 U.S. 833, 874 (1992).

process analysis.[128] Justice O'Connor noted that "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society."[129] In other words, an entire generation reasonably relied upon *Roe* and this reasonable societal reliance compelled the Court to again protect abortion.[130] In 1992, two percent of women between the ages of 15 and 44 were annually having abortions.[131] Expounding on this understanding, Justice O'Connor stated, "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in *reliance* on the availability of abortion in the event that contraception should fail."[132] Even Chief Justice Rehnquist in dissent resigned to center his argument on reliance. He argued that failing to submit "any evidence to prove any true *reliance*, the joint opinion's argument is based solely on generalized assertions ... that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have 'ordered their thinking and living around' it."[133] In *Casey*, both the plurality and dissent focused on reasonable societal reliance in their substantive due process inquiry.

In sum, inquiries into reasonable societal reliance persist in the foundations and history of the Court's substantive due process analysis.[134] Mounting and consistent, these inquiries runs throughout the decisions.[135] This history lays a solid foundation from which the Court's recent decisions are best read as extending and solidifying substantive due process's sensitivity towards societal reliance.[136]

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[128] *Id.* at 845-46. Justice Stevens admitted that societal reliance on the ability to obtain an abortion was unquestionable in 1992 with "more than a million abortions each year." *Id.* at 914-915 (Stevens, J., concurring in part and dissenting in part). *See also* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 44.

[129] *Casey*, 505 U.S. at 860.

[130] *Id.*

[131] LISA M. KOONIN ET AL., CENTER FOR DISEASE CONTROL, ABORTION SURVEILLANCE—UNITED STATES, 1996 (1999), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss4804a1.htm [hereinafter CDC, SURVEILLANCE 1996].

[132] *Casey*, 505 U.S. at 856 (emphasis added).

[133] *Id.* at 957 (Rehnquist, C.J., dissenting) (emphasis added) (internal citation omitted).

[134] *See supra* notes 81-88 and accompanying text.

[135] *See supra* Part III.B & C.

[136] *See* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 27 ("[M]embers of the Supreme Court live in society, and they are inevitably influenced by what society

## IV. *GLUCKSBERG* AND *LAWRENCE*

*Washington v. Glucksberg*[137] and *Lawrence v. Texas*[138] are two recent and important substantive due process cases. Many scholars have debated the extent and methodology of their holdings.[139] Both cases, however, are best read when understood to further substantive due process's inquiry into reasonable societal reliance.[140]

### *A.* Washington v. Glucksberg

In *Washington v. Glucksberg*, the Supreme Court held one does not have a fundamental right to physician assisted suicide.[141] In doing so, the Supreme Court reversed the *en banc* Ninth Circuit.[142] That circuit had found constitutional due process protections for those seeking physician assisted suicide through its analysis of "historical" as well as "current societal attitudes"—which could very arguably be read as reasonable societal reliances.[143] Following the circuit court in its approach if not its holding, the Supreme Court through Chief Justice Rehnquist stated, "[w]e begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, *and practices*. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide."[144] Chief Justice Rehnquist dropped a footnote after the last sentence where six out of six citations discussed current practices and not solely the historical conventions of the eighteenth

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appears to think.") (citing Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957)).

[137] 521 U.S. 702 (1997).

[138] 539 U.S. 558 (2003).

[139] *See, e.g.*, Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140 (2004); Eskridge, *supra* note 42; Hunter, *supra* note 12; Karlan, *supra* note 13; Massey, *supra* note 26; Post, *supra* note 10; Stein, *supra* note 15; Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15; Tribe, *The "Fundamental Right," supra* note 1.

[140] *See* Post, *supra* note 10, at 8 ("Properly read . . . *Lawrence* . . . reveals a Court that defines the substance of constitutional law in the context of the beliefs and values of nonjudicial actors.").

[141] *Glucksberg*, 521 U.S. at 702.

[142] Compassion in Dying v. Washington, 79 F.3d 790, 798 (1996).

[143] *Glucksberg*, 521 U.S. at 708.

[144] *Id.* at 710 (emphasis added) (internal citation omitted).

century.[145] When Chief Justice Rehnquist wrote "practices" he was referring to "contemporary practices."[146]

In other words, substantive due process inquiry begins with both analysis of history *and* contemporary "practices"—or "societal attitudes" as the Ninth Circuit would articulate.[147] When Chief Justice Rehnquist inquired whether the right to physician assisted suicide had "any place in our Nation's traditions," he looked to both "centuries of legal doctrine" and to the current "policy choice of almost every State."[148] The term "practices," if not referring to "contemporary practices," would be superfluous, adding nothing to the term "history" in statements such as "[o]ur Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking . . . .'"[149] Chief Justice Rehnquist also stated, "[t]he history of the law's treatment of assisted suicide in this country has been *and continues to be* one of the rejection of nearly all efforts to permit it."[150] Clearly the Chief Justice was concerned with contemporary practices, or the reasonableness of societal reliance on physician assisted suicide.[151]

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[145] *Id.* at 710 n.8. The footnote reads:

> *See* Compassion in Dying v. Washington, 79 F.3d 790, 847 & nn.10-13 (9th Cir. 1996) (Beezer, J., dissenting) ("In total, forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide.") (citing statutes and cases); Rodriguez v. British Columbia (Att'y Gen.), [1993] 107 D.L.R. (4th) 342, 404 (Can.) ("[A] blanket prohibition on assisted suicide ... is the norm among western democracies.") (discussing assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France). Since the Ninth Circuit's decision, Louisiana, Rhode Island, and Iowa have enacted statutory assisted-suicide bans. La. Rev. Stat. Ann. § 14:32.12 (Supp. 1997); R. I. Gen. Laws §§ 11-60-1, 11-60-3 (Supp. 1996); Iowa Code Ann. §§ 707A.2, 707A.3 (Supp. 1997). For a detailed history of the States' statutes, see Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 148-242 (1985) (Appendix).

*Id.*

[146] *See* Williams v. Pryor, 240 F.3d 944, 955-56 (11th Cir. 2001), *rev'd,* 220 F. Supp. 2d 1257, 1275 (N.D. Ala. 2002).

[147] *Compassion in Dying*, 79 F.3d at 810.

[148] *Glucksberg*, 521 U.S. at 723.

[149] *Id.* at 721 (internal citation omitted).

[150] *Id.* at 728 (emphasis added).

[151] While this reading finds support in the text of the opinion, *see supra* notes 141-51 and accompanying text, and in lower court interpretation, *see infra* notes 242-44, it is not the majority reading. *See, e.g.*, Hunter, *supra* note 12, at 1119 ("Under the *Glucksberg* approach, fundamental rights constituted a frozen category and a limiting principle that operated to bar any meaningful protection for interests that could not meet its eligibility criteria.") (citing John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 568 (2002) ("The majority opinion [in *Glucksberg*] offered an analysis of fundamental rights that suggested that there would be few such announcements in the future.")); Post,

Chief Justice Rehnquist, in *Glucksberg*, also addressed Justice Harlan's formulation of substantive due process,[152] which Justice Souter proposed in his concurring opinion.[153] Justice Souter read Justice Harlan's formulation as a "reminder that the business of [substantive due process] review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people."[154] In other words, substantive due process inquiry should be an attempt to "balance"[155] respect for liberty against "arbitrary impositions" or "purposeless restraints."[156] That is, "[t]his approach calls for a court to assess the relative 'weights' or dignities of the contending interests, and to this extent the judicial method is familiar to the common law."[157]

Chief Justice Rehnquist, for the majority, disagreed.[158] He favored a "fundamental-rights-based analytical method"[159] over Justice Souter's "balanc[ing]."[160] To combat Justice Souter's argument for the reaffirmation of Justice Harlan's formulation,[161] the Chief Justice downplayed *Casey*'s acceptance of Justice Harlan's theory by noting that "opinion's emphasis on *stare decisis*."[162] Substantive due process's "reliance,"[163]

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*supra* note 10, at 91; Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 40 ("[I]n a dramatic departure from both *Bowers* and *Glucksberg*, the [*Lawrence*] Court said that long-standing traditions were not decisive."); Tribe, *The "Fundamental Right," supra* note 1, at 1924 ("That the *Glucksberg* gambit should not be allowed to succeed does not mean that it might not have succeeded. If Chief Justice Rehnquist had had his way, the *Glucksberg* decision might have become the forerunner of a general retreat from the jurisprudence of decisions like *Roe* and *Casey*."). Perhaps as the future writings of the courts and professors bring a fuller meaning to *Lawrence*, such will also bring a changed reading of *Glucksberg* reconciled, to some degree, with that future reading. *See* Hunter, *supra* note 12, at 1139 ("Perhaps the most significant point to bear in mind is that the function of lower federal courts, scholars, and practitioners now will be not so much to find the meaning of *Lawrence* as to create it.").

[152] *See Glucksberg*, 521 U.S. at 721, 721 n.17, 733 n.23.

[153] *Id.* at 752 (Souter, J., concurring).

[154] *Id.* at 764 (Souter, J., concurring).

[155] *Id.* at 756 n.4 (Souter, J., concurring).

[156] *Id.* at 752 (Souter, J., concurring) (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

[157] *Id.* at 767 (Souter, J., concurring) (internal citation omitted).

[158] *Glucksberg*, 521 U.S. at 705-22.

[159] *Id.* at 721 n.17.

[160] *Id.* at 756 n.4 (Souter, J., concurring).

[161] *See supra* notes 74-79 and accompanying text.

[162] *Glucksberg*, 521 U.S. at 721 n.17.

[163] Planned Parenthood v. Casey, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., dissenting).

however, surpassed mere *stare decisis* application in *Casey*. Just as *Casey* used assessment of reasonable societal reliance to affirm *Roe*, Chief Justice Rehnquist used the same assessment of reasonable societal reliance in his inquiry in *Glucksberg*.[164] The Chief Justice rejected Justice Harlan's formulation but did not reject Justice Harlan's implicit understanding that substantive due process inquiry should consider contemporary practices or current societal reliances.[165]

## *B.* Lawrence v. Texas

Hailed as a breakthrough,[166] the majority opinion in *Lawrence* was a watershed for both homosexual rights and for substantive due process analysis. A strong dissent, however, challenged that movement.

### 1. The *Lawrence* Majority's Breakthrough

In *Lawrence v. Texas*, the Supreme Court held that state laws cannot forbid private gay sexual behavior.[167] The "opaque" manner in which the *Lawrence* majority reached its holding, however, has been an impetus for debate.[168] Like the availability of contraceptives in *Griswold*, the *Lawrence* Court failed to explicitly inquire into the prevalence of homosexuality in 2003.[169] The actual number, according to conservative estimates, fell between three and six percent of the population.[170] On the other hand, the Court explicitly noted that proscriptions against private gay sexual behavior were

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[164] *See generally Glucksberg*, 521 U.S. at 710-19.

[165] *See id.*

[166] *See* Hunter, *supra* note 12, at 1137 ("*Lawrence* is a breakthrough.").

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

[168] *See* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 29, 45 (describing *Lawrence* as a "remarkably opaque opinion" that "raises a number of puzzles"); *see also* Hunter, *supra* note 12, at 1103 ("The Supreme Court's decision in *Lawrence v. Texas* is easy to read, but difficult to pin down.") (internal citation omitted); *but cf.* Karlan, *supra* note 13, at 1449 ("Like *Loving*, *Lawrence* marks a crystallization of doctrine.").

[169] *Lawrence*, 539 U.S. at 562-79.

[170] *See* Kirk Cameron, Family Research Inst., The Numbers Game: What Percentage of the Population is Gay? (May 1993), *available at* http://www.familyresearchinst.org/FRI_AIM_Talk.html; *see also* Katy Butler, *Many Couples Must Negotiate Terms of 'Brokeback' Marriages*, N.Y. TIMES, Mar. 7, 2006, at F5 (citing a 1990 study headed by Edward O. Laumann of the University of Chicago which found that 3.9 percent of American men who had ever been married had had sex with men in the previous five years).

systematically not enforced.[171] Continuing, the Court also ducked the question of whether *Glucksberg* should be interpreted as demanding substantive due process inquiry into contemporary practices by surprisingly failing to cite the opinion once.[172] This omission permitted Justice Scalia to forward his conceptualization of *Glucksberg* three times in dissent without challenge.[173] The Court also ducked the question of the relevance of Justice Harlan's "balancing" formulation[174] by failing to mention it once.[175] Despite all of this, *Lawrence*'s "emerging awareness" language and its holding make clear that substantive due process analysis must take into account present reliances.[176]

In determining the scope of proper substantive due process inquiry, Justice Kennedy stated:

> In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.[177]

Justice Kennedy could hardly be more explicit; he stated that substantive due process inquiry should not only engage contemporary practices but emphasized that those practices would, in fact, be given the "most relevance."[178] This is not

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[171] *Lawrence*, 539 U.S. at 573 ("In those states where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private."); *see* Karlan, *supra* note 13, at 1452 n.34 (noting "[t]he law [at issue in *Lawrence*] was virtually never enforced") (citing State v. Morales, 869 S.W.2d 941, 943 (Tex. 1994) (holding plaintiffs lacked standing to challenge the antisodomy statute ruled unconstitutional in *Lawrence* because of "the Attorney General's contention that [the statute] has not been, and in all probability will not be, enforced against private consensual conduct between adults.")); Sunstein, *What did* Lawrence *Hold?*, *supra* note 15, at 27-28 ("[W]hen constitutionally important interests are at stake, due process principles requiring fair notice, and banning arbitrary action, are violated if criminal prosecution is brought on the basis of moral judgments lacking public support, as exemplified by exceedingly rare enforcement activity.").

[172] *Lawrence*, 539 U.S. at 562-79.

[173] *Id.* at 588, 593 n.3 (Scalia, J., dissenting).

[174] *See supra* notes 74-79 and accompanying text.

[175] *Lawrence*, 539 U.S. at 562-79.

[176] *See* Post, *supra* note 10, at 8 ("Properly read . . . *Lawrence* . . . reveals a Court that defines the substance of constitutional law in the context of the beliefs and values of nonjudicial actors.").

[177] *Lawrence*, 539 U.S. at 571-72 (internal citations omitted).

[178] *Id.*

offhand *dicta* but a central formulation that persisted throughout his opinion.[179] For example, Justice Kennedy criticized Chief Justice Burger's "sweeping references ... to the history of Western civilization and to Judeo-Christian moral and ethical standards" in *Bowers v. Hardwick*,[180] the precedent *Lawrence* overruled. In doing so, Justice Kennedy noted that the then contemporary "authorities pointing in an opposite direction" should have been taken into account.[181] Justice Kennedy thereby insisted the Court should have been considering contemporary practices or current societal reliances when *Bowers* was decided. To the *Lawrence* Court, proper substantive due process inquiry has and should continue to include analysis of current societal reliances.[182]

Crucial as well was *Lawrence*'s treatment of *Casey*.[183] Justice Kennedy noted in *Lawrence* that the "foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*."[184] It is easy to understand why *Romer v. Evans*[185]—which struck down a Colorado constitutional amendment denying the possibility of specified protections for homosexuals—would have weakened *Bowers*. Less clear, however, is why *Casey* would have, especially if it were merely decided upon *stare decisis* of *Roe*.[186] Justice Kennedy, thankfully, clarified:

> In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or *societal reliance* on the existence of that liberty cautions with particular strength against reversing course. The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or *societal reliance* on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so.[187]

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[179] *See, e.g., id.* at 573 ("The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.").

[180] 478 U.S. 186 (1986) (permitting state criminalization of sodomy), *overruled by Lawrence*, 539 U.S. at 578.

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

[182] *See* Post, *supra* note 10, at 11 ("The Court must . . . embed constitutional law within the beliefs and values of nonjudicial actors.").

[183] *See Lawrence*, 539 U.S. at 571, 573, 574.

[184] *Id.* at 576.

[185] 517 U.S. 620 (1996).

[186] *See* Washington v. Glucksberg, 521 U.S. 702, 722 n.17 (1997).

[187] *Lawrence*, 539 U.S. at 577 (emphasis added) (internal citations omitted).

Reaffirming societal reliance's pivotal role in *Casey*, Justice Kennedy moved passed mere *stare decisis*: Just because society had rejected the logic of *Bowers* did not in itself mandate *Bowers*' ruin.[188] Reasonable societal reliance on precedent may caution against a precedent's reversal, but that logic in no way works in the reverse. Just because there was no societal reliance on *Bowers* does not mandate unlocking a new substantive due process right in *Lawrence*, unless reasonable societal reliance itself is intertwined with substantive due process inquiry.

*Lawrence* and *Glucksberg* therefore confirmed that *stare decisis* was merely a middleman in *Casey* and that proper substantive due process analysis demands inquiry into reasonable societal reliances.[189] Just as *Glucksberg* demanded understanding of contemporary practices,[190] *Lawrence* demanded investigation into "emerging awareness[es]" of recent years.[191] There is consistency, therefore, from *Lawrence* back through *Glucksberg*, through *Casey* and further: The societal reliances relevant to substantive due process inquiry are not just those of the framers' generation but also those of the generations that followed. As stated in *Casey*, "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society,"[192] *Lawrence* echoed, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[193]

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[188] The Court could have chosen to follow Justice O'Connor's narrower equal protection analysis and not overrule *Bowers*. *See Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring); *see also* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 37 ("An equal protection ruling in *Lawrence*, based on these cases, would have had a great deal of appeal. It would have made it unnecessary for the Court to reconsider *Bowers v Hardwick*."); *id.* at 73 ("I believe that an equal protection ruling, of the sort sketched by Justice O'Connor, would have been preferable, not least because it would have emphasized what should be clear to all: The problem in *Lawrence* had everything to [do] with the social subordination of gays and lesbians.").

[189] *See* Post, *supra* note 10, at 8, 11.

[190] *Glucksberg*, 521 U.S. at 710.

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

[192] Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992).

[193] *Lawrence*, 539 U.S. at 579; *see* Tribe, *The "Fundamental Right," supra* note 1, at 1942 ("[C]onstraints premised on the belief that the institutional design of a society organized with our constitutional aspirations must be flexible and permeable enough to accommodate new ways of experiencing connection and growth both within personal relationships and within associations whose size may preclude calling them 'personal' . . . ."); *see generally* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 290-321 (1975).

2. The *Lawrence* Dissent

*Lawrence* was a breakthrough,[194] but *Lawrence* had a dissent. Justice Scalia's "forceful"[195] opinion, joined by Chief Justice Rehnquist, the author of *Glucksberg*, arguably throws into question the strength of *Glucksberg*'s assertion that inquiry into reasonable societal reliance is vital in substantive due process analysis.[196] Justice Scalia described *Lawrence* as "quite right that history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[197] But Justice Scalia did not see *Glucksberg* as mandating understanding of contemporary practices. Instead, he believed the "ending point" is—quoting *Glucksberg*—whether "[a]n asserted 'fundamental liberty interest'" is *also* "'implicit in the concept of ordered liberty,' so that 'neither liberty nor justice would exist if [that interest] were sacrificed.'"[198]

More explicitly, Justice Scalia wrote, "*Roe* and *Casey* have been equally eroded by *Washington v. Glucksberg*, which held that *only* fundamental rights which are deeply rooted in this Nation's history and tradition qualify for anything other than rational basis scrutiny under the doctrine of substantive due process."[199] If Chief Justice Rehnquist believed that *only* deeply rooted rights at the founding qualified for substantive due process protection, his *Glucksberg* opinion's explicit search for the strength of contemporary practices is confused at best.[200] That is, if the then Chief Justice truly concurred with Justice Scalia that "[c]onstitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior,"[201] the question remains why so much of *Glucksberg* studied just such movement of state criminal sanctions on physician assisted suicide.[202]

A more coherent answer to why Chief Justice Rehnquist disapproved of the *Lawrence* majority would be that he had

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194 *See* Hunter, *supra* note 12, at 1137 ("*Lawrence* is a breakthrough.").

195 *See* Tribe, *The "Fundamental Right," supra* note 1, at 1925-26.

196 *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

197 *Id.* at 593 n.3 (Scalia, J., dissenting) (internal citations omitted).

198 *Id.* (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

199 *Id.* at 588 (Scalia, J., dissenting) (internal citations omitted).

200 *See supra* notes 141-51 and accompanying text.

201 *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

202 *See supra* notes 141-51 and accompanying text.

moved from his *Glucksberg* opinion,[203] if not from his intention, and he furthermore agreed with Justice Scalia's secondary argument: that *Lawrence* "laid waste the foundations of our rational-basis jurisprudence."[204] The dissenters argued the *Lawrence* majority subverted the Court's longstanding two-tiered substantive due process analysis.[205] Under classic substantive due process analysis, a certain practice is determined to be "fundamental," and thereby to trigger "strict scrutiny," or if it were not "fundamental," less demanding "rational basis review" is used.[206]

In the dissenters' view, the Court departed from this approach. The *Lawrence* majority never determined private homosexual conduct to be "fundamental."[207] As Justice Scalia expressed it, "[t]hough there is discussion of 'fundamental propositions,' and 'fundamental decisions,' nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause."[208] The dissent continued, "[i]nstead the Court simply describes petitioners' conduct as 'an exercise of their liberty'—which it undoubtedly is—and proceeds to apply an unheard-of form of

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[203] Chief Justice Rehnquist's opinion in *Glucksberg* is at odds with the dissent he joined in *Lawrence*. For example, Chief Justice Rehnquist "beg[a]n" his *Glucksberg* opinion by "examining our Nation's *history*, *legal traditions*, and *practices*. In almost every State—indeed, in almost every *western democracy*—it is a crime to assist a suicide. The States' assisted-suicide bans are not innovations [but] *longstanding expressions* of the States' commitment to the protection and preservation of all human life." Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (emphasis added) (internal citations omitted). He could not have begun as such in *Lawrence* and still dissented. For example, as the *Lawrence* majority observed, the Nation's "practices" included homosexual activity. *Lawrence*, 539 U.S. at 571-72 ("In all events we think that our laws and traditions in the past half century are of most relevance . . . ."). As the *Lawrence* majority also implied, "[w]estern democrac[ies]" have refused to criminalize homosexual conduct. *Id.* at 577 ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."). Furthermore, as the *Lawrence* majority noted, our Nation's "history" and "legal traditions" against homosexual activity are not "longstanding expressions" of rejection of homosexual conduct. *Id.* at 568 ("At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.").

[204] *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

[205] *See supra* notes 81-88 and accompanying text.

[206] *See supra* notes 81-88 and accompanying text; *see also Glucksberg*, 521 U.S. at 720.

[207] To a theory of constitutional interpretation that refuses to depart from the time of the framing, the dissent is probably correct that the "right to engage in homosexual acts is not deeply rooted in America's history and tradition." *See Lawrence*, 539 U.S. at 589 n.1 (Scalia, J., dissenting) (citing RICHARD A. POSNER, SEX AND REASON 343 (1992)).

[208] *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (internal citations omitted).

rational-basis review that will have far-reaching implications beyond this case."[209] The *Lawrence* opinion, thereby, could be read as moving towards Justice Harlan's unmentioned "balancing" formulation,[210] a move the *Lawrence* dissenters resisted.[211]

In going further, however, the dissent showed the coherence of the Court's movement towards a substantive due process analysis centered on inquiry into reasonable societal reliances. Justice Scalia wrote of the "impossibility of distinguishing homosexuality from other traditional 'morals' offenses."[212] That is, bans upon private consensual, homosexual conduct were supposedly indistinguishable from proscriptions against "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."[213] All of which were supposedly "called into question" by a *Lawrence* majority that allegedly held "none of the above-mentioned laws [could] survive rational-basis review."[214]

But there is an easy way to distinguish private consensual, homosexual behavior from conduct such as "bigamy" and "bestiality":[215] reasonable societal reliance. With the homosexual community becoming established,[216] reasonable

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[209] *Id.* (Scalia, J., dissenting) (internal citations omitted).

[210] *See supra* notes 74-79, 145-49 and accompanying text.

[211] *See* Hunter, *supra* note 12, at 1121 ("The fullest explication of an alternative position, now largely adopted through *Lawrence*, came in Justice Souter's concurring opinion in *Glucksberg*. Justice Souter drew extensively from Justice Harlan's dissent in *Poe v. Ullman*.").

[212] *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

[213] *Id.* (Scalia, J., dissenting).

[214] *Id.* at 590, 599 (Scalia, J., dissenting); *but see* Carpenter, *supra* note 139, at 1169 ("[T]he Court did not even broadly declare that morality is no longer a permissible basis for law."); Eskridge, *supra* note 42, at 1082-83 ("Is *Lawrence* the end of morals legislation in the United States? Don't believe it. England did not fall down Lord Devlin's slippery slope after it decriminalized consensual sodomy in 1967, and there is no reason the United States will fall down Scalia's slipperier slope.") (internal citations omitted); Hunter, *supra* note 12, at 1112 ("By finding that morality alone cannot justify a prohibition, the Court did not seal the fate of all the various statutes thought of as morals laws. Rather, a state must now demonstrate some other rationale for such laws, presumably some form of objectively harmful effects."); Karlan, *supra* note 13, at 1458 ("In this sense, Justice Scalia's hyperbolic dissent . . . misses the mark. While those laws unquestionably prevent some individuals from engaging in some behavior . . . that behavior is not tied as an empirical matter in contemporary America to membership in a recognized social group.").

[215] *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

[216] *See* Karlan, *supra* note 13, at 1458 ("[G]ay people in the United States do form a social group whose membership extends beyond their engaging in specific sexual acts.").

reliance on the ability to engage in such conduct easily separates it from say, "adult incest," even if any such "awareness"[217] of homosexuality were impracticable at the time of the framing.[218] Justice Scaila contended that *Lawrence* entailed "a massive disruption of the current social order."[219] Such a disruption is, however, diametrically opposed to *Lawrence*'s protection of private consensual homosexual conduct if its substantive due process analysis is based upon appreciation of contemporary reasonable societal reliances.[220]

*Glucksberg* refused to find a substantive due process right to physician assisted suicide.[221] *Lawrence* found a substantive due process right to private homosexual behavior.[222] Both found reasonable societal reliances central to substantive due process inquiry.[223]

## V. *WILLIAMS*: THE BATTLE FOR *LAWRENCE*

The impact of *Glucksberg* and *Lawrence* will be worked out in the lower federal courts in the years to come.[224] One example was the drama on display in the handling and rehandling of the *Willams* case in the Eleventh Circuit. Originally, in *Williams v. Pryor*, a district court foreshadowed *Lawrence* and read *Glucksberg* to demand inquiry into the "contemporary practices" of a questioned behavior in substantive due process review.[225] It thereby found constitutional protections for the use of certain devices in private sexual conduct.[226] However, the Eleventh Circuit, in *Williams v. Attorney General of Alabama*, even with the

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

[218] *Id.* at 589 n.1 (Scalia, J., dissenting) (citing RICHARD A. POSNER, SEX AND REASON 343 (1992) (reporting the "right to engage in homosexual acts is not deeply rooted in America's history and tradition")).

[219] *Id.* at 591 (Scalia, J., dissenting).

[220] *See* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 31 ("[*Lawrence*] was possible only because of the ludicrously poor fit between the sodomy prohibition and the society in which the justices live. And if I am correct, *Lawrence* will have broad implications only if and to the extent that those broad implications receive general public support.").

[221] Washington v. Glucksberg, 521 U.S. 702, 702 (1997).

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

[223] *See* Post, *supra* note 10, at 8 ("Properly read . . . *Lawrence* . . . reveals a Court that defines the substance of constitutional law in the context of the beliefs and values of nonjudicial actors.").

[224] *See* Hunter, *supra* note 12, at 1103, 1139.

[225] 220 F. Supp. 2d 1257, 1275 (N.D. Ala. 2002).

[226] *Id.* at 1307.

intervening "breakthrough" of *Lawrence*,[227] reversed.[228] Its reading of *Glucksberg* and *Lawrence* emphatically rejected the "contemporary practices" understanding of the district court.[229] The two cases, therefore, present a working framework to analyze how lower federal courts will grapple with the degree to which *Glucksberg* and *Lawrence* demand inquiry into reasonable societal reliance in substantive due process review.

To begin with, the history of *Williams* itself is wrapped in *Lawrence*. The case was first decided in favor of the plaintiffs, protecting use of devices in private sexual conduct, by a district court in March of 1999.[230] It was subsequently reversed and remanded by the Eleventh Circuit in January 2001.[231] Justice Scalia, in his *Lawrence* dissent, cited that opinion.[232] The district court again found for the plaintiffs in October 2002.[233] Interestingly, Justice Scalia failed to mention—nor did any other opinion in *Lawrence*—the district court's remand opinion, which was written eight months before the *Lawrence* decision.[234] Subsequently, the Eleventh Circuit again reversed the district court again in July 2004.[235] This Note addresses the second opinions of both the district court and the Eleventh Circuit.

### *A.* Williams v. Pryor

In *Williams v. Pryor*, the district court dealt with an Alabama statute[236] that made it "unlawful to sell or otherwise distribute any device designed or marketed as useful primarily for the stimulation of human genital organs."[237] The state argued such a law was necessary to "protect children" as well as "for its own sake" because the "commerce of sexual

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[227] *See* Hunter, *supra* note 12, at 1137 ("*Lawrence* is a breakthrough.").

[228] 378 F.3d 1232, 1250 (11th Cir. 2004).

[229] *Id.* at 1244 n.14.

[230] Williams v. Pryor, 41 F. Supp. 2d 1257 (N.D. Ala. 1999).

[231] Williams v. Pryor, 240 F.3d 944 (11th Cir. 2001).

[232] Lawrence v. Texas, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting) ("It seems to me that the 'societal reliance' on the principles confirmed in *Bowers* and discarded today has been overwhelming . . . . *See, e.g.*, *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001).").

[233] Williams v. Pryor, 220 F. Supp. 2d 1257, 1307 (N.D. Ala. 2002).

[234] *Lawrence*, 539 U.S. at 558-606.

[235] Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1250 (11th Cir. 2004).

[236] Alabama's Anti-Obscenity Enforcement Act, ALA. CODE § 13A-12-200.2 (2003).

[237] *Williams*, 378 F.3d at 1233 (internal citations omitted).

stimulation and auto-eroticism ... unrelated to marriage, procreation or familial relationships [is] an evil, an obscenity ... detrimental to the health and morality of the state."[238] Numerous plaintiffs, including retailers and consumers, joined to obtain an injunction against the law.[239] The district court held "this Nation's history, tradition, and *contemporary treatment* of sexual devices themselves evidences that this right of sexual privacy, even in its narrowest form, protects plaintiffs' use of sexual devices like those targeted by Alabama Code."[240]

In its holding, the district court affirmed *Glucksberg*'s instruction that substantive due process demands inquiry into contemporary practices. The court stated:

> Significantly, *Glucksberg* extended this analysis [of our Nation's history, legal traditions, and practices] to include a review of the *contemporary practices and attitudes* regarding assisted suicide: specifically, the Court looked to current statutes and those of "recent years," "public concern," "democratic action," and twentieth century model legislation and its effect on state legislation.[241]

The district court continued, "[i]n light of the fundamental rights analysis employed by the *Glucksberg* Court, the parties may also point to evidence of *contemporary practices* in this country that evince or contravene a fundamental right of sexual privacy."[242] Furthermore, it was appropriate for the "[p]laintiffs" to "rely on such evidence."[243]

The district court was not maverick in its reading of *Glucksberg*, even within the Eleventh Circuit. The court cited the Eleventh Circuit's previous *Williams v. Pryor* opinion[244] as "instructing [it] to conduct a review of contemporary practice in light of *Glucksberg*'s similar analysis."[245] The court also noted the Eleventh Circuit's citation of *Glucksberg's* discussion

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[238] *Williams*, 220 F. Supp. 2d at 1301.

[239] *Id.* at 1260-61.

[240] *Id.* at 1259 (emphasis added); *see also id.* ("[The] evidence has convinced this court that there exists a substantial history, legal tradition, and contemporary practice of deliberate state non-interference in the private, consensual, sexual relationships of married persons and unmarried adults.").

[241] *Id.* at 1275 (citing Washington v. Glucksberg, 521 U.S. 702, 715-716 (1997) (emphasis added)).

[242] *Id.* at 1289 (citing *Glucksberg,* 521 U.S. at 715-716 (emphasis added)).

[243] *Id.*

[244] 240 F.3d 944 (11th Cir. 2001); *see supra* notes 230-35 and accompanying text.

[245] Williams v. Pryor, 220 F. Supp 2d. 1257, 1275 (N.D. Ala. 2002) (internal citations omitted).

concerning the "considerable contemporary nationwide legislative action to preserve [anti-physician assisted suicide] laws."[246]

Moreover, despite the district court's ruling predating *Lawrence*, it appears to be in line with that decision as evidenced by its ability to foreshadow the holding. The district court noted the weakness of *Bowers v. Hardwick*, exemplified by the dwindling number of states with criminal sodomy prohibitions.[247] In addition, the district court cited the same Model Penal Code (MPC) commentary the *Lawrence* Court would later find so persuasive.[248] The district court specifically noted the MPC's recommendation that "private immorality should be beyond the reach of the penal law."[249] The district court continued, "states should punish only non-consensual sexual acts between any two people regardless of sex,"[250] observations the *Lawrence* Court would later embrace.[251]

### *B.* Williams v. Attorney General of Alabama

The Eleventh Circuit in *Williams v. Attorney General of Alabama*, however, reversed the district court's holding, even after the *Lawrence* decision.[252] In doing so, the circuit court specifically held that the district court "erred" in placing "too much weight on contemporary practice and attitudes."[253] In the circuit court's view, the district court "considerably overstate[d]" *Glucksberg*'s "reliance on contemporary attitudes."[254] To the circuit court, *Glucksberg*'s incessant reference of contemporary practices was mere "reinforcement"[255] or "merely one factor among many" or simple "buttressing," but "never essential" to the "Court's conclusion

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[246] *Id.* at 1274 (internal citations omitted).

[247] *Id.* at 1294.

[248] Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for 'criminal penalties for consensual sexual relations conducted in private.' ALI, Model Penal Code § 213.2, Comment 2, p. 372 (1980)."); *Williams*, 220 F. Supp. 2d. at 1288 n.135.

[249] *See Williams*, 220 F. Supp. 2d. at 1293.

[250] *Id.* (internal citations omitted).

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

[252] Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1250 (11th Cir. 2004).

[253] *Id.* at 1242.

[254] *Id.* at 1243.

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

that assisted suicide is not deeply rooted in the history and traditions of the nation."[256]

Continuing, the circuit court largely ignored *Lawrence*'s "emerging awareness" language,[257] until it appeared to reject it outright:

> The focus on the trajectory of contemporary practice ultimately proves too much. The fact that there is an emerging consensus scarcely provides justification for the courts, who often serve as an antimajoritarian seawall, to be swept up with the tide of popular culture. If anything, it is added reason for us to permit the democratic process to take its course.[258]

This response wants it both ways: The court is supposed to be both an "antimajoritarian seawall" as well as to let the legislative process "take its course."[259] The logic is contradictory. A court cannot logically reason that it should let the legislature alone because the bench rightly acts in an antimajoritarian manner. The "tide of popular culture" that the courts should raise themselves above is not the newly establishing—or rooting—practices but the majoritarian animus against them. Plaintiffs, after all, do not seek relief in the courts if the legislature has already provided it.[260]

Echoing Justice Scalia's dissent in *Lawrence*, the circuit court bypassed *Lawrence* fearing "[i]f we were to accept the invitation to recognize a right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity, and adult incest—even if we were to limit the right to consenting adults."[261] Again scorning the district court's analysis for too easily finding protected behavior, the circuit court derided the lower court's failure to correctly distinguish between historical "protection" and historical "non-interference."[262] "Under this approach," the circuit court

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[256] *Id.* at 1243-44.

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

[258] *Williams*, 378 F.3d at 1244 n.14.

[259] *Id.*

[260] *See* Post, *supra* note 10, at 8, 11; *cf.* Eskridge, *supra* note 42, at 1065 ("The political philosophy supporting that new floor is a jurisprudence of tolerance. Underlying that jurisprudence is not only the moral philosophy notion of tolerable variation, but also the political philosophy notion that mutual toleration is necessary for the flourishing (or even the survival) of a pluralist democracy.") (emphasis omitted).

[261] *Williams*, 378 F.3d at 1240.

[262] *See id.* at 1244-45; *but see id.* at 1258 (Barkett, J., dissenting).

> Contrary to the majority's claim, neither *Glucksberg* nor any other relevant Supreme Court precedent supports the requirement that there must be a

suggested, "the freedom to smoke, to pollute, to engage in private discrimination, to commit marital rape—at one time or another—all could have been elevated to fundamental-rights status."[263] Such is a caricature, at best, of substantive due process. First, a thorough due process analysis would demand some degree of inquiry into whether the right was "implicit in the concept of ordered liberty"[264] or intertwined to personal autonomy,[265] a test of the above examples unanimously fail. Second, whether a practice is becoming more or less prevalent, its direction so to speak, is an essential element in how reasonable it is to rely upon that practice. In other words, inquiry into reasonable current societal reliance and not the traditions of the founding is perhaps the best way to distinguish due process protected practices from marital rape and certain forms of government sanctioned discrimination, both of which are now abhorrent to our "concept of ordered liberty" but were once indeed well-rooted in our traditions.[266] Third, just because there is current societal reliance on a practice, e.g. smoking, does not mean that that practice is unassailable. It only means adverse legislation must be

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history of affirmative legislative protection before a right can be judicially protected. The majority simply invents this requirement, effectively redefining the doctrine of substantive due process to protect only those rights that are already explicitly protected by law. Such a requirement ignores not only *Lawrence* but also a complete body of Supreme Court jurisprudence. Had the Supreme Court required affirmative governmental protection of an asserted liberty interest, all of the Court's privacy cases would have been decided differently. For instance, there was no lengthy tradition of protecting abortion and the use of contraceptives, yet both were found to be protected by a right to privacy under the Due Process Clause.

[263] *Id.* at 1244.

[264] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[265] *See* Post, *supra* note 10, at 89 ("[T]he Court ha[s] adopted two distinct approaches to defining . . . substantive due process. The first, which I shall call the traditional approach, focuse[s] on a hermeneutics of history and tradition; the second, which I shall call the autonomy approach, focuse[s] on the forms of liberty prerequisite for personal dignity and autonomy.") (internal citation omitted); *but see* Randy E. Barnett, *Kennedy's Libertarian Revolution*, NATIONAL REVIEW ONLINE, July 10, 2003, http://www.nationalreview.com/comment/comment-barnett071003.asp ("[T]he Court in *Lawrence* did not protect a 'right of privacy.' Rather, it protected 'liberty' . . . ."); Hunter, *supra* note 12, at 1106 ("Perhaps the Court, while sounding like it is writing to praise privacy, has secretly come to bury it, by shifting in a subtle way back to the underlying concept of liberty, which—unlike privacy—has an unambiguous mooring in constitutional text.").

[266] *See, e.g.*, Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465 (2003); Alfreda Robinson, *Troubling "Settled" Waters: The Opportunity and Peril of African-American Reparations*, 24 B.C. THIRD WORLD L.J. 139 (2004).

sufficiently tailored (or perhaps balanced[267]) to a sufficiently compelling state interest, i.e. health.[268]

The Eleventh Circuit also wanted to have it both ways in accepting the logic of Justice Scalia's dissent in *Lawrence* but not his conclusions for the implications of *Lawrence*'s majority opinion. Justice Scalia reasoned that *Lawrence* eliminated the ability of states to legislate on the basis of public morality.[269] The circuit court, giving "all due respect to Justice Scalia's ominous dissent,"[270] decided otherwise.[271] Public morality, to them, despite *Lawrence*, remained fully capable of supporting legislation.[272]

Adversely, Judge Barkett's dissent in the Eleventh Circuit provided some counterbalance to the majority's holding and the direction it pulled both *Glucksberg* and *Lawrence*.[273] Judge Barkett exposed the majority's failure to understand how the Court's precedents mandated inquiry into contemporary practices—if not explicit reasonable societal reliance—in substantive due process inquiry.[274] She stressed, "[a]s the *Lawrence* Court emphasized, [h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[275] "Given this unequivocal statement," she continued, "the majority cannot legitimately criticize the district court for its attention to *contemporary practice and attitudes*."[276]

Judge Barkett's dissent more closely accords the spirit of *Lawrence* than does the Eleventh Circuit's majority's opinion.[277] Nevertheless, Judge Barkett was unable to convince

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[267] *See Glucksberg*, 521 U.S. at 756 n.4 (Souter, J., concurring).

[268] *Id.* at 721.

[269] Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

[270] *Williams*, 378 F.3d at 1238 n.8.

[271] *Id.* ("One would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principal has been jettisoned wholesale.").

[272] *Id.*

[273] *Id.* at 1250 (Barkett, J., dissenting).

[274] *Id.* at 1251 ("In cases solely involving adult consensual sexual privacy, the Court has never required that there be a long-standing history of affirmative legal protection of specific conduct before a right can be recognized under the Due Process Clause.").

[275] *Id.* at 1258 (internal citations omitted).

[276] *Williams*, 378 F.3d at 1258 (emphasis added) (internal citations omitted).

[277] *See* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 73 ("The Constitution probably forbids government from punishing, either criminally or civilly, those who have used sexual devices."); *but cf.* Recent Case, *Eleventh Circuit Upholds Alabama Statute*, *supra* note 13, at 802 ("Although the majority was ultimately correct

her circuit to strike Alabama's proscriptions against sexual devices.[278] *Williams* only underscores the need for those who see value in a strong substantive due process to supplement its constitutional justifications.[279]

### C. *The Reasonable Societal Reliance Approach*

A substantive due process analysis centered on reasonable societal reliance would have provided for better adjudication in *Williams*. The district court spent a great deal of time, close to 12,000 words, discussing the history of sexual devices.[280] The circuit court, in turn, spent a fair amount of time of its own disagreeing with that history.[281] While the historical trivialities surrounding the invention of the electromechanical vibrator may be relevant in the study of sexuality, it can seem strange to find them in substantive due process law. A substantive due process analysis strictly confined to the time of the framing necessitates such a detailed, time-sensitive understanding. Judge Barkett's dissenting urge for analysis of "contemporary practice and attitudes,"[282] if read as mandating inquiry into reasonable societal reliance, would position a court for a far more clear-sighted adjudication.[283]

In *Williams*, the evidence of reliance was mixed. For over five years Sherri Williams, a plaintiff, annually sold sexual devices to 14,960 customers through two stores receiving annual revenues of $448,837.[284] Decatur Pleasure, a second plaintiff, annually sold to 5,600 customers generating annual revenues of $169,093.[285] In 1997, Saucy Lady, a third

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to uphold the Alabama statute, its restrictive reading of *Lawrence* was well off the mark. The dissent, in contrast, favored an unjustifiably broad interpretation of *Lawrence* that went beyond the limits of that case.").

[278] *Williams*, 378 F.3d at 1250.

[279] *See supra* notes 28-36 and accompanying text.

[280] Williams v. Pryor, 220 F. Supp 2d. 1257, 1277-96 (N.D. Ala. 2002).

[281] *Williams*, 378 F.3d at 1244-50 (amassing close to 3,500 words itself).

[282] *Id.* at 1258 (Barkett, J., dissenting) (internal citations omitted).

[283] While the Justices may not be specialized social historians, they are certainly aware of the current political climate. As Mr. Dooley famously put it: "no matter whether th' constitution follows th' flag or not, th' supreme court follows th' ilection returns." *See* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 27 (citing PETER DUNNE, THE SUPREME COURT'S DECISIONS, IN MR. DOOLEY'S OPINIONS 26 (1900)).

[284] *Williams*, 220 F. Supp 2d. at 1263.

[285] *Id.*

plaintiff, held sales-parties[286] drawing an attendance of 7,700.[287] These statistics of reliance, and the direction in which they are moving,[288] are more in line with what Justice Kennedy referred to as the possibility of an "emerging awareness" and are better suited to determine substantive due process protection.[289]

In the end, Justice Kennedy, in his majority opinion, did not determine the final impact and extent of *Lawrence*. That will only be done in *Lawrence*'s future application by judges, lawyers, and law professors.[290] As *Williams* has shown, those who favor a strong substantive due process have lost the first contest.[291] To not lose the next, supplements to the past constitutional justifications for substantive due process need to be forwarded.[292] Adding explicit reasonable societal reliance inquiry to substantive due process analysis is one achievable way to keep substantive due process strong.[293]

## VI. CONCLUSION

As has been shown, inquiry into reasonable societal reliance has permeated the underpinnings and the jurisprudential history of substantive due process.[294] This inquiry is now, however, in doubt. On the one hand, *Glucksberg* and *Lawrence* arguably enshrined inquiry of "contemporary practices and attitudes" into substantive due process review.[295] On the other, Justice Scalia's "forceful"[296]

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[286] *Id.* at 1264 ("[V]endor plaintiff B.J. Bailey is an Alabama resident who owns and operates Saucy Lady, Inc., an Alabama corporation that conducts in-house Tupperware-style parties at which sexual aids and novelties are displayed and sold.") (internal citations omitted).

[287] *Id.* at 1265.

[288] Business seemed to be increasing. *See id.* at 1263 ("In 1998, through July 1, [Sherri Williams'] Huntsville store sold approximately 10,060 items and generated gross revenues of approximately $201,314 . . . Decatur Pleasures . . . [i]n 1998, through July 1 . . . sold approximately 5,170 items and generated gross revenues of approximately $103,438.").

[289] Lawrence v. Texas, 539 U.S. 558, 572 (2003).

[290] *See* Eskridge, *supra* note 42, at 1083, ("*Lawrence* does, however, clarify the constitutional status of morals laws, and the academic debate will clarify their status even more."); Hunter, *supra* note 12, at 1103, 1139.

[291] It should be noted that the Eleventh Circuit sat for this case in only a three-judge panel and therefore the margin of defeat was narrow. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1232 (11th Cir. 2004).

[292] *See supra* notes 28-36 and accompanying text.

[293] *See* Post, *supra* note 10, at 8, 11.

[294] *See supra* Part III.

[295] *See supra* Part IV.

[296] *See* Tribe, *The "Fundamental Right," supra* note 1, at 1925-26.

dissent in *Lawrence* read *Glucksberg* as making no such movement.[297] And that dissent has convinced a majority of judges on a split Eleventh Circuit Court to agree.[298]

It is on this unsettled footing that substantive due process is forced to defend itself.[299] Those who wish to solidify and expand the rights that substantive due process protects should redouble the argument that inquiry into reasonable societal reliance is a significant part of proper review.[300] Summarily, the guardians of substantive due process should push towards a jurisprudence sensitive to reasonable societal reliances. They should do so because, in part, such a strategy is more effective than merely amassing useful evidence of a questioned behavior's historical relevance.[301] Such a strategy is also more supportive of a strong substantive due process than is Justice Harlan's "balancing" formulation.[302] Furthermore, a substantive due process sensitive to reasonable societal reliances goes beyond merely ending morals-based legislation. It also withstands criticisms that accuse due process inquiry of resting solely with the subjective considerations of the individual Justices.[303] Additionally, it has a good chance at success.[304]

Amassing historical evidence to convince a court of the need for substantive due process protection is an insufficient strategy to protect the analysis. *Williams v. Attorney General of Alabama* demonstrated the futility of this approach.[305] Despite the district court's accumulation of 104 supportive footnotes[306] for its historical interpretation, the circuit court easily dismissed these as "uncritical acceptance" of "selective appendices of historical interpretations."[307] The circuit court even turned reliance on an admitted expert and concessions by

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297 Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

298 Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1250 (11th Cir. 2004).

299 *See supra* note 2 and accompanying text.

300 *See supra* notes 28-36 and accompanying text.

301 *See generally Williams*, 378 F.3d at 1244-50.

302 *See supra* notes 74-79 and accompanying text.

303 *See* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (emphasizing the requirement of some objectivity: "First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition.") (internal citation omitted); *see also* Post, *supra* note 10, at 91-92.

304 *See* Hunter, *supra* note 12, at 1118, 1122.

305 *See Williams*, 378 F.3d at 1244-50.

306 *Id.* at 1248.

307 *Id.* at 1246, 1248.

the state of Alabama into further evidence of the district court's imprudence.[308] Courts are well-skilled enough to read a historical record either way; a substantive due process jurisprudence that inquires upon objective reasonable societal reliance is not so easily misled.[309]

Moving towards a jurisprudence centered on reasonable societal reliance is also superior to Justice Harlan's substantive due process formulation.[310] After *Lawrence*, some commentators have suggested that Justice Harlan's formulation may be back in play:[311] Substantive due process inquiry may become a version of judicially "balanc[ing] our Nation, built upon postulates of respect for the liberty of the individual . . . between that liberty and the demands of organized society."[312] If true, however, this alone is arguably precarious for those who value a strong substantive due process. A judiciary increasingly constructed in the shadows of Justices Scalia and Thomas may only place a finger on the scale against any new protections.[313]

Those arguing that *Lawrence* decreed the end to morals-based legislation are also well supplemented by the assertion that substantive due process is becoming more sensitive of reasonable societal reliances.[314] Take the gay marriage debate for example. Foregoing equal protection arguments,[315]

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[308] *Id.* at 1248.

[309] Eskridge, *supra* note 42, at 1047 ("[Justice Kennedy's] subtle point was that Justice White [in *Bowers*] was using history as a mechanism for writing his own moral code into the Due Process Clause."); Post, *supra* note 10, at 90 ("It is true that White's opinion in *Bowers* reviewed the historical record in so flat and disdainful a manner as effectively to efface the Court's own normative involvement in evaluating the present worth of the nation's tradition.").

[310] *See supra* notes 74-79 and accompanying text.

[311] *See, e.g.*, Hunter, *supra* note 12, at 1121; *but see* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 48 ("[I]t would be quite surprising if the Court meant to adopt a sliding scale of analysis without saying so. The more natural interpretation is simpler: The Court's assimilation of the *Lawrence* problem to that in *Griswold* and its successors suggests that a fundamental right was involved.").

[312] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[313] *See* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 182-83 (1993) (equating courts use of "traditions" with normative value choices); *see also* Chemerinsky, *supra* note 43, at 47; Post, *supra* note 10, at 96 ("The [*Lawrence*] Court unabashedly engages the values it perceives to be at stake in the case . . . *Lawrence* plainly expresses its own vision of such truths.").

[314] *See* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1238 n.8 (11th Cir. 2004) ("One would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principal has been jettisoned wholesale.").

[315] *But see* Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941, 961 (Mass. 2003) (using the Equal Protection Clause as well as the Due Process Clause of the

heterosexual coupling can always be favored by a state on a non-morals basis, e.g., support for childbirth.[316] Once a gay couple can reasonably rely upon being able to marry, for example if several states were to follow Massachusetts' lead, if it were to become accepted, a substantive due process inquiry centered on reasonable societal reliance would be able to protect the practice.[317] A reading of *Lawrence* that only decreed the end to morals-based legislation could not.

Inquiry into reasonable societal reliance also rebuffs the arguments that substantive due process is merely the "subjective considerations" of judges inappropriately acting in an elitist, anti-democratic nature.[318] Reasonable societal reliance is at its essence an objective enterprise sensitive to democratic values.[319] Furthermore, it would be hard to argue that inquiry into societal reliance would either make interpretation of the Constitution "too unstable" or "too political" because the Justices would be bound by the well-rooting practices of American society that are by definition sufficiently stable and supra-political.[320] It would be equally difficult, though not impossible, to argue that knowledge of the American experience—its current *constitution* in a sense—is disrespectful to its formal constitution.[321]

Moreover, arguing for a substantive due process jurisprudence sensitive to reasonable societal reliance has a

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Massachusetts Constitution to find marriage benefits must be permitted to homosexual couples).

316 *But see* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 73 ("The hardest cases involve the failure to recognize same-sex marriages. If *Lawrence* is put together with *Loving* and *Zablocki*, it would seem plausible to say that the government would have to produce a compelling justification for refusing to recognize such marriages, and compelling justifications are not easy to find.").

317 *See* Eskridge, *supra* note 42, at 1026 ("Contrary to the *Lawrence* dissent, the Rehnquist Court will not, anytime soon, impose same-sex marriage on unwilling states, at least in part because such a ruling would raise the stakes of politics in this culture clash."); Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 72 ("[I]n my view, the major difference between *Lawrence* and a ban on same-sex marriage is that the sodomy law no longer fits with widespread public convictions, whereas the public does not (yet) support same-sex marriages.").

318 *See supra* note 48 and accompanying text.

319 *See* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 33, 73 ("[A]nachronistic" statutes that are "almost never enforced," as was the one at issue in *Lawrence*, present a "recipe for unpredictable and discriminatory enforcement practices; they do violence to both democratic values and the rule of law.").

320 *See* Carpenter, *supra* note 139, at 1141-42 ("To most Americans, however, [*Lawrence*] is less an *ipse dixit* announcing radical social change than it is a belated recognition of what they had already learned about the humanity and dignity of gay people.").

321 *See supra* note 41.

probability of success. With the death of Chief Justice Rehnquist and the retirement of Justice O'Connor, the future of substantive due process will largely rest on how Justices interpret the precedents scripted by others no longer serving on the Court. How *Casey* and *Glucksberg* are read will guide substantive due process either towards strength or towards weakness. As this Note has shown, there is considerable divergence as to how substantive due process precedents are read.[322] Those favoring a strong substantive due process review should forge an explicit sensitivity towards reasonable societal reliances into those precedents.[323] Nonetheless, the majority in *Lawrence*, Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer, point towards installing inquiry into reasonable societal reliances into substantive due process review.[324] Justices Thomas and Scalia dissent.[325] Even if President Bush's new appointees to the Court follow his favored Justices,[326] the tally would still be five to four in favor of a due process inquiry deferential to reasonable societal reliances.

A lot has been made about Chief Justice Roberts' supposed judicial philosophy of "deference" or "modesty."[327] While this is most likely deference to the other branches of the federal government,[328] it should be extended to include deference to reasonable societal reliances in substantive due process inquiry. As Justice Scalia said of abortion rights: "If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed."[329] To relieve feared political pressure from the judiciary, the Court could "return" a questioned practice to the people by finding that analysis into reasonable societal reliances is central to proper substantive due process inquiry. In the gay-marriage example, a deferential and modest Court could avoid making normative

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[322] *See, e.g.*, *supra* notes 273-79 and accompanying text.

[323] *See* Hunter, *supra* note 12, at 1139 ("Perhaps the most significant point to bear in mind is that the function of lower federal courts, scholars, and practitioners now will be not so much to find the meaning of *Lawrence* as to create it.").

[324] Lawrence v. Texas, 539 U.S. 558, 571-72 (2003).

[325] *See, e.g.*, *supra* notes 195-96 and accompanying text.

[326] *See* Pollitt, *supra* note 10.

[327] *See, e.g.*, Dahlia Lithwick, Editorial, *Deferential Calculus*, N.Y. TIMES, Oct. 21, 2005, at A25.

[328] *See id.*

[329] Stenberg v. Carhart, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting).

value judgments by looking to the reliance upon the practice. A Court not ready to find such reliance reasonable enough could "return" the issue to the people by holding that as more homosexuals adopt the practice, as it further roots in our traditions, it will gain constitutional protection. This would have the effect of bringing the activists surrounding this issue away from the judiciary; they would have to fight the so-called "culture wars" where arguably more appropriate, in the culture, not the courts.

Ultimately, a substantive due process inquiry centered on reasonable societal reliances may prove too conservative. Such is true if indeed "[t]he *Lawrence* opinion marks a new majority for Harlan's [formulation], in substance if not in name."[330] A new substantive due process jurisprudence *only* more sensitive to reasonable societal reliances, it could be said, might move too slowly towards social advances.[331] But returning to the gay marriage issue, a substantive due process inquiry centered on reasonable societal reliances may not, in fact, prove too frail to soon find equal marriage rights for homosexuals.[332] The Court's substantive due process cases have shown that when a significant minority continuously engages in a liberty-centered behavior, that behavior will

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[330] Hunter, *supra* note 12, at 1122; *but see* Carpenter, *supra* note 139, at 1170 (arguing predictions "of a newly activist judiciary seem overblown").

[331] Slow substantive due process is, however, better than dead. *See* Post, *supra* note 10, at 85 ("Because substantive due process doctrine has historically engaged in remarkably candid efforts to interpret and apply cultural values, Scalia would abandon the doctrine altogether, viewing it as an improper 'springboard[] for judicial lawmaking.'") (citing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25, 142-43 (1997)).

[332] This analysis does not take into account use of the Equal Protection Clause which is arguably better suited to underlie such a holding. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (using both due process and equal protection principals to hold that the Massachusetts Constitution demands equal marriage rights for homosexuals).

> Because the Equal Protection Clause was designed as an attack on traditions, it is a far more promising source of new constitutional doctrine than the right to privacy. Most generally, the Due Process Clause is associated with the protection of traditionally respected rights from novel or short-term change. It is largely Burkean and backward-looking. By contrast, the Equal Protection Clause is self-consciously directed against traditional practices. It was designed to counteract practices that were time-honored and expected to endure. It is based on a norm of equality that operates as a critique of past practices. Because opposition to homosexuality has deep historical roots, the Equal Protection Clause is the more sensible source of constitutional doctrine.

Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994) (internal citations omitted).

eventually receive due process protection.[333] Furthermore, the more essential the practice, the sooner and stronger the protection.[334] It is still widely believed that most homosexuals do not want to live as married couples.[335] Once it is accepted that a significant percentage of marriage-equivalent relationships are between homosexuals, when the awareness has emerged that a significant percent of all long-term, monogamous, loving, child-rearing relationships are between two people of the same sex, a substantive due process right will follow.[336]

Following, it is often argued that the Court's best and most prolific holdings occur when the Justices are ahead of, catalyzing, not trailing society's advance.[337] A substantive due process analysis centered on reasonable societal reliace would at best forbid the Court from betraying rights on which it has found reasonable reliance,[338] but not forbid the Court from moving forward and finding that a questioned practice, not yet reasonably relied upon, indeed must/should be.[339] That is,

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[333] *See supra* Part III.B & C.

[334] For example, the Court protected abortion rights although only two percent of women between the ages 15 to 44 annually obtained the procedure. Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992); CDC, SURVEILLANCE 1996, *supra* note 131.

[335] *See, e.g.*, Posting of David Blankenhorn to Family Scholars Blog, There's the Right to Do It, and Then There's Doing It, http://familyscholars.org/archives/2003_08_24_archive.html (Aug. 30, 2003, 20:31 EST) (citing Clifford Krauss, *Free to Marry, Canada Gays Say "Do I?,"* N.Y. TIMES, Aug. 30, 2003, at 1, *available at* http://www.nytimes.com/2003/08/31/international/americas/31CANA.html); Melissa Kilcoyne, Same-Sex Marriage Issue on State Ballot, MURRAY STATE NEWS, Sept. 17, 2004, *available at* http://www.thenews.org/news/2004/09/17/News/SameSex.Marriage.Issue.On.State.Ballot-721599.shtml; Posting of Jason Kuznicki to Positive Liberty, Freedom Riders, http://positiveliberty.com/2004/02/freedom-riders.html; Al Rantel, *Gay Talk Show Host Opposes Gay Marriage*, NEWSMAX, Feb. 11, 2004, http://www.newsmax.com/archives/articles/2004/2/11/140806.shtml.

[336] At which time it can be predicted that most of the hostile state legislation forbidding gay marriage will be popularly revoked. *See generally* Roberts & Gibbons, *supra* note 19.

[337] *See, e.g.*, Post, *supra* note 10, at 88 ("*Roe* used substantive due process to protect a liberty interest that the Court believed was constitutionally valuable, even if that interest was not immanent in the history and tradition of the nation."); *but cf.* Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 31 ("[I]f and when [the Court requires states to recognize same-sex marriages], it will be following public opinion, not leading it. Political and social change was a precondition for *Lawrence*, whose future reach will depend on the nature and extent of that change.").

[338] *See* Hunter, *supra* note 12, at 1123 (arguing the "current line of privacy cases will remain essentially undisturbed").

[339] *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

substantive due process would be at best a locked steering wheel, but not a pair of handcuffs.

Nonetheless, there is currently reason for those who value a strong substantive due process to be cautious, if not pessimistic. Professor Cass Sunstein expected *Lawrence* to demand a protected right to use sexual devices.[340] The Eleventh Circuit disagreed.[341] To have emerging rights finally recognized, and to not retreat any ground thus far gained, substantive due process should be argued to—and ultimately read to—explicitly demand inquiry into current reasonable societal reliances.[342]

*Brandon R. Johnson*[†]

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[340] Sunstein, *What Did* Lawrence *Hold?*, *supra* note 15, at 73 ("The Constitution probably forbids government from punishing, either criminally or civilly, those who have used sexual devices.").

[341] Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1250 (11th Cir. 2004).

[342] *See* Post, *supra* note 10, at 8, 11.

[†] Brooklyn Law School, Class of 2006, with much thanks and praise to *Brooklyn Law Review*.