

SUBSTANTIVE DUE PROCESS AFTER *GONZALES V. CARHART*

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This Article begins in Part I with a doctrinal evaluation of the status of Washington v. Glucksberg ten years after that decision was handed down. Discussion begins with consideration of the Roberts Court's recent decision in Gonzales v. Carhart and then turns to the subject of Justice Kennedy's views in particular on substantive due process. In Part II, the Article goes on to consider whether the Glucksberg test for substantive due process decision making is correct in light of the original meaning of the Fourteenth Amendment. The Article concludes in Parts II and III that Glucksberg is right to confine substantive due process rights recognition to recognition only of those rights that are deeply rooted in history and tradition.

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* Professor of Law, Northwestern University. I would like to thank Gary Lawson and John McGinnis for helpful comments. I would also like to thank the Julius Rosenthal Fund for research support, and Diona Narae Park and Nicholas Stabile for their help as my research assistants. This Article draws to some extent on two prior articles of mine: Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004) [hereinafter Calabresi, *An Originalist Reappraisal*], and Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006) [hereinafter Calabresi, *American Exceptionalism*].

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INTRODUCTION

The big question on the tenth anniversary of *Washington v. Glucksberg*¹ is whether the case is still good law after the intervening decision in *Lawrence v. Texas*.² *Glucksberg* appeared to foreshadow the end of free-wheeling substantive due process analysis until in *Lawrence* Justice Kennedy seemed to take back everything that *Glucksberg* had said. *Glucksberg* had purported to limit substantive due process to only those rights that are deeply rooted in history and tradition, while *Lawrence* waxed poetic about the Supreme Court using an unhinged substantive due process doctrine to protect all of the sweet “myster[ies] of human life”³ from morals laws. Which case is good law today? Was Justice Kennedy serious when he joined Chief Justice Rehnquist’s opinion in *Glucksberg*? Or was he serious when he wrote *Lawrence*? Or is he perhaps just deeply conflicted and confused?

This Article will argue in Part I that *Glucksberg* is good law today and that the opinion in *Lawrence* is void for vagueness. Justice Kennedy’s narrow, restrained approach to substantive due process in *Gonzales v. Carhart*,⁴ the blockbuster partial birth abortion case decided this past term, shows that he and four other Justices have recommitted themselves to the narrow, restrained approach of *Glucksberg* in substantive due process cases. This approach is consistent with other past Kennedy opinions in substantive due process cases, and with the approach taken by lower federal and state courts since *Lawrence* was decided in 2003. I have no doubt that the holding of *Lawrence* is good law, and I consider it possible that the case might still govern in a narrow range of matters involving private, non-commercial sexual acts between two unrelated consenting adults, but I think the overwhelming majority of future substantive due process cases are going to be decided, as *Gonzales* was, with citation to *Glucksberg* and without reference to *Lawrence*.

In Parts II and III, I will argue that as a practical matter, there are three sources to which the Supreme Court can look to identify substantive due process rights: tradition, current-day consensus, and comparative constitutional law. I will argue that as a legal and policy matter, neither current day

1. 521 U.S. 702 (1997).

2. 539 U.S. 558 (2003).

3. This phrase comes from the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), and from Justice Kennedy’s opinion for the Court in *Lawrence*, 539 U.S. at 574. It has been thought by some to epitomize his approach to substantive due process cases.

4. 127 S. Ct. 1610 (2007).

consensus nor the rulings of other constitutional courts around the world are an appropriate source of new substantive due process rights. Tradition may be problematic as a source of substantive due process rights as well, and it therefore ought to be used only in the clearest of cases. As it happens, I will argue, this is precisely what the framers of the Fourteenth Amendment originally meant for that Amendment to do.

I. THE DOCTRINE: WHY LOWER FEDERAL COURT AND STATE JUDGES
MUST FOLLOW *GLUCKSBERG* AND NOT *LAWRENCE*

The first issue one must consider in any ten-year retrospective on *Glucksberg* is whether it or the intervening opinion in *Lawrence* governs the Supreme Court's approach to substantive due process cases. I will first address this question by considering the Supreme Court's decision last term in *Gonzales v. Carhart*; then I will look at Justice Kennedy's views on substantive due process; and finally I will look at recent lower federal court and state court decisions.

A. *The Roberts Court Speaks: Gonzales v. Carhart*

The decision this past term in *Gonzales v. Carhart*, the partial birth abortion case, was eagerly awaited by many as an indicator of how the appointments of John Roberts and Samuel Alito might have reshaped the Supreme Court on the issue of abortion rights. Would the new Court overrule *Roe v. Wade*,⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶ or *Stenberg v. Carhart*?⁷ What would be the Court's approach to the question of abortion rights? What would be its approach with regard to following precedent? Finally, and of critical interest here, what would be the new Court's approach to substantive due process? Would the substitution of Roberts and Alito for William Rehnquist and Sandra Day O'Connor change the balance of the Court on matters of finding new constitutional rights unmoored to text and history?

The opinion in *Gonzales* offers only cryptic hints on these questions, but the hints all point to *Glucksberg*. Significantly, the opinion of the Court was written by Justice Kennedy, the author of *Lawrence* and the probable swing vote on the current Court. Kennedy's opinion was joined in full by Chief Justice Roberts and by Justice Alito. Strikingly, Kennedy's opinion was also joined by Justices Scalia and Thomas, the *Lawrence* and *Casey* dissenters, although these latter two Justices did sign a brief concurrence indicating that they still favored the overruling of *Roe* and of *Casey*.⁸ The opinion in *Gonzales* therefore commanded five votes and represents the most definitive

5. 410 U.S. 113 (1973).

6. 505 U.S. 833 (1991).

7. 530 U.S. 914 (2000).

8. *Gonzales*, 127 S. Ct. at 1639 (Scalia, J., concurring).

statement to date from the Roberts Court of its approach to substantive due process methodology.

There are three significant hints in *Gonzales* that Justice Kennedy favors the approach of *Glucksberg* over *Lawrence*. First, his opinion cites *Glucksberg* approvingly twice, but it never once cites his prior opinion in *Lawrence* or the expansive language on substantive due process, liberty, and the sweet mystery of life that the *Lawrence* opinion quoted from *Casey*.⁹ One cite to *Glucksberg* reaffirms the government's interest in protecting life¹⁰ while the other quotes *Glucksberg* as saying that there can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession."¹¹ Kennedy's opinion in *Gonzales* therefore appears to resurrect *Glucksberg* and to ignore *Lawrence*.

Second, at the beginning of his analysis in Part II of the *Gonzales* opinion, Justice Kennedy acknowledges that "[t]he principles set forth in the joint opinion in [*Casey*] did not find support from all those who join the instant opinion;"¹² he then adds that "[w]hatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals."¹³ Justice Kennedy then proceeds to talk about the state's interest in fetal life with no further attention to—or discussion whatsoever of—a woman's liberty interest in procuring abortions. The failure of the majority opinion in *Gonzales* to in any way reaffirm the abortion right derived from *Roe* and *Casey* is striking. It adds to the sense that *Gonzales* is a pro-judicial restraint, anti-substantive due process decision.

The third hint, and the most strikingly novel feature of *Gonzales v. Carhart*, is its rejection of the easy use of facial challenges rather than as-applied challenges in abortion cases.¹⁴ This represents a departure from the Court's practice in *Stenberg v. Carhart*, as Ruth Bader Ginsburg's dissent points out.¹⁵ This cautious, pro-judicial restraint approach suggests a greatly reduced role for the Court in inventing new constitutional rights that is dramatically opposed to the expansive language of *Casey* and *Lawrence*. Ginsburg's dissent notes this in frustration when she quotes *Casey*: "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the

9. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851).

10. *Gonzales*, 127 S. Ct. at 1634 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 732–35 (1997)).

11. *Id.* at 1633 (quoting *Glucksberg*, 521 U.S. at 731).

12. *Id.* at 1626.

13. *Id.*

14. *Id.* at 1638–39.

15. *Id.* at 1650 (Ginsburg, J., dissenting).

liberty of all, not to mandate our own moral code.”¹⁶ The *Gonzales* Court appears to disagree with Justice Ginsburg that it is the Supreme Court’s obligation to define the liberty of all. Justice Ginsburg also cites *Lawrence* as saying that “[f]or many persons [objections to homosexual conduct] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles.”¹⁷ She adds that the *Lawrence* Court said that “the power of the State may not be used ‘to enforce these views on the whole society through operation of the criminal law.’”¹⁸ Clearly, the *Gonzales* Court takes a different view from the *Casey* and *Lawrence* Courts when it comes to government enforcement of morals legislation.

Technically, the holdings of *Gonzales*, *Casey*, and *Lawrence* are all consistent with one another, but Kennedy’s writing style is dramatically different and more restrained in *Gonzales* than it was in the prior cases. It is worth stressing that Justice Kennedy did not need to write the narrow opinion he did in *Gonzales* to reach the result he appears to have believed is correct. He could perfectly well have chosen to write a more ambivalent controlling concurrence and to have left Roberts, Scalia, Thomas, and Alito to speak for themselves. The fact that Chief Justice Roberts and Justice Alito were able to talk Justice Kennedy out of doing this and into producing an opinion that all five restraintist Justices could join is a striking achievement. If Justice Kennedy sticks with an insistence on as applied over facial challenges in future substantive due process cases, there will be a whole lot fewer new constitutional rights that will be found either by the Supreme Court or by lower federal and state courts relying on the Supreme Court’s loose language. Kennedy’s opinion in *Gonzales* seems not to regard the courts as the arbiters of our liberty but as the modest adjudicators of very concrete cases and controversies in situations where the Court absolutely must rule because the facts force it to do so. *Gonzales v. Carhart*, with its rejection of judicial supremacy,¹⁹ its insistence on there being one opinion for the Court, and its narrow and modest language, is the polar opposite of *Lawrence v. Texas*. *Gonzales* should be read as the first Roberts Court substantive due process decision and as a clear indicator that the Roberts Court will henceforth produce much more modest substantive due process decisions than the late Rehnquist Court did. This modest judicial role happens to be the very one that Chief Justice Roberts and Justice Alito defended so ably in their confirmation hearings.²⁰

16. *Id.* at 1647 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1973)).

17. *Id.* at 1647–48 (quoting *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

18. *Id.* at 1648 (quoting *Lawrence*, 539 U.S. at 571).

19. The classic statement of judicial supremacy came in *Cooper v. Aaron*, 358 U.S. 1 (1958).

20. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005).

B. Whither Justice Kennedy?

This raises rather insistently, however, the question of what Justice Kennedy himself really thinks about the role of the Supreme Court in substantive due process cases. How could the author of *Lawrence* and the author of *Gonzales* be the same person? Only Justice Kennedy knows the answer to this question, but it is worth noting that Justice Kennedy is now about to observe the twentieth anniversary of his appointment to the Supreme Court—during which time he has had ample opportunity to carve out a role for himself in substantive due process rights creation. What does Kennedy's record over the last twenty years indicate about his views on judicial activism versus judicial restraint—and on substantive due process in particular?

First, the hype surrounding *Lawrence* obscured the fact that over the last twenty years Justice Kennedy has unapologetically signed on to some rather restraintist substantive due process decisions. Justice Kennedy signed Chief Justice Rehnquist's restrained opinion in *Glucksberg* without reservation and that opinion clearly indicated that substantive due process rights were only to be found where they were deeply rooted in history and tradition. Unlike Justice O'Connor, who joined the *Glucksberg* opinion but wrote a narrowing concurrence,²¹ Justice Kennedy joined *Glucksberg* without writing separately at all.

Justice Kennedy also endorsed a version of the deeply rooted in history and tradition test when he joined Scalia's opinion in *Michael H. v. Gerald D.*,²² but Rehnquist's formulation in *Glucksberg* takes the test further than Justice Kennedy was willing to go in *Michael H.* The only significant difference between *Michael H.* and *Glucksberg* is that in the former, Justice Scalia insisted in footnote six that one must look at tradition at the most specific level of generality available,²³ while in *Glucksberg*, Chief Justice Rehnquist was a bit more ambiguous on that point.²⁴ Justices Kennedy and O'Connor signed all of Scalia's opinion in *Michael H.* except for footnote six.²⁵ Thus the most accurate description of Rehnquist's achievement in *Washington v. Glucksberg* may be that he got Justices Kennedy and O'Connor to sign on to a similar version of the deeply rooted in history and tradition test that Justice Scalia had been unable to get them to commit to in *Michael H.*

One must ask, however, why Justice Kennedy objected to the language in footnote six. The answer is evident from the brief concurring opinion in *Michael H.* that Justices Kennedy and O'Connor filed. In that opinion, the two swing justices noted that Scalia's proposed methodology for substantive due process cases would have been inconsistent with some of the Court's

21. *Washington v. Glucksberg*, 521 U.S. 702, 736–38 (1997) (O'Connor, J., concurring).

22. 491 U.S. 110, 123–27 (1989) (plurality opinion).

23. *Michael H.*, 491 U.S. at 127 n.6.

24. *Glucksberg*, 521 U.S. at 721 (requiring only a “careful description” of the tradition).

25. *Michael H.*, 491 U.S. at 112.

prior substantive due process decisions.²⁶ The most obvious decision that footnote six of *Michael H.* is inconsistent with is *Griswold v. Connecticut*.²⁷ Thus, the fact that Justice Kennedy joined both *Glucksberg* and *Michael H.* probably signifies that he believes in history and tradition as a guide in substantive due process cases but thinks that *Griswold* was correctly decided or at least that it should not be overruled. This position has been publicly defended by such conservatives as Ken Starr²⁸ and Charles Fried,²⁹ and hardly leads to the conclusion that *Roe v. Wade* was correctly decided. Indeed, there is one Justice of the Supreme Court, Byron White, who voted with the majority in *Griswold* and with the dissent in *Roe*. Justice White went on to write the paean to judicial restraint in *Bowers v. Hardwick*³⁰ which Justice Kennedy later overruled in *Lawrence v. Texas*.

Could one believe in history, tradition, and judicial restraint as the guideposts for substantive due process and still think *Griswold* was correctly decided? I think the answer is plainly yes, although I think *Griswold* was wrongly decided. Justice White believed in judicial restraint but was in the majority in *Griswold* and so was Justice Harlan the younger. The Connecticut statute struck down in *Griswold* was the only state law of its kind in the nation and it had almost never been enforced.³¹ It was a real outlier when the *Griswold* case reached the Supreme Court in 1965. There was no substantial history of state regulation of the use of contraceptives by married couples in this country.³² The *Griswold* decision changed no long settled practices, disrupted no expectations, and produced very little legal change even in the state of Connecticut. Its significance was one hundred percent symbolic. A conservative Justice could perfectly well have believed in judicial restraint, have believed that substantive due process rights had to be deeply rooted in history and tradition, and still have thought, as Justices Harlan and White did, that the Connecticut birth control statute in *Griswold* was unconstitutional.³³

Could Justice Kennedy have also refused to join footnote six of *Michael H.* in part because he thought *Roe* was rightly decided as an original matter? It is theoretically possible, but it seems unlikely. Justice Kennedy is reported

26. *Id.* at 132 (O'Connor, J., concurring) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

27. *Id.*; see generally *Griswold*, 381 U.S. 479.

28. KENNETH W. STARR, *FIRST AMONG EQUALS* 120–42 (2002).

29. CHARLES FRIED, *ORDER AND LAW* 71–88 (1991).

30. 478 U.S. 186 (1986).

31. *Griswold*, 381 U.S. at 506 (White, J., concurring) (citing *Poe v. Ullman*, 367 U.S. 497, 502 (1961)).

32. See, e.g., Leonard J. Nelson, III, *God and Woman in the Catholic Hospital*, 31 J. LEGIS. 69, 75 (2004).

33. *Griswold*, 381 U.S. at 499 (Harlan, J., concurring); *id.* at 502 (White, J., concurring).

to have initially voted to overrule *Roe* at the Justices' conference in *Casey*.³⁴ Kennedy also joined Chief Justice Rehnquist's opinion in *Webster v. Reproductive Health Services*, which would have gutted *Roe*.³⁵ He wrote a passionate dissent in *Stenberg v. Carhart*³⁶ as well as this past term's majority opinion in *Gonzales v. Carhart*, both approving of efforts to outlaw partial birth abortion. And he declined to write an opinion endorsing a constitutional right to assisted suicide in *Glucksberg*. All of these facts suggest that Justice Kennedy has stuck with *Roe v. Wade*, to the extent that he has, because of *stare decisis* concerns and not because he thinks the case was originally correctly decided. The joint opinion in *Casey* comes close to saying as much.³⁷ I think there is no evidence on the record that Justice Kennedy would have voted with the majority in *Roe* in 1973 and a lot of evidence that he would have been with Justice White in dissent.

It is worth remembering at this point that Justice White complained in his dissent in *Doe v. Bolton*, a companion case to *Roe*, that the Supreme Court perhaps had the raw power to do what it did in that case but that the majority was guilty of using that raw power improvidently and unwisely.³⁸ Whereas *Griswold* struck down the law of one state, a law which was not even being enforced, *Roe* struck down the abortion laws of all fifty states. *Roe* was much more activist than *Griswold*; *Roe* used the Supreme Court as an engine of social change while *Griswold* was, in practice, a reaffirmation of the status quo. This raises the question whether in his twenty years on the Supreme Court, Justice Kennedy has used substantive due process doctrine as an engine of social change. There are two areas of case law where Justice Kennedy might be argued to have done this: cases like *BMW of North America, Inc. v. Gore*³⁹ that set outer limits on the reasonableness of punitive damages awards and gay rights cases like *Lawrence v. Texas*.

The punitive damages awards cases have so far set only the vaguest limits on punitive damages awards. They are not an effort to alter radically the status quo so much as they are a response to the torts revolution of the 1960s and 1970s. Moreover, while these cases have been decided as substantive due process cases, there is an express clause in the Constitution which could theoretically support the *BMW v. Gore* line of cases: the Eighth Amendment's ban on excessive fines.⁴⁰ Thus, both the textual underpinnings and the

34. EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 470 (1998). When he changed his mind, Supreme Court law clerks did an end of year skit in which Kennedy was portrayed as "Flipper" the dolphin.

35. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 513–21 (1989) (plurality opinion).

36. 530 U.S. 914, 956 (2000) (Kennedy, J., dissenting).

37. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992) ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

38. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

39. 517 U.S. 559 (1996).

40. I recognize that Justice Scalia has argued that a punitive damage award by a jury is not a fine as he reads the original meaning of the word "fine," but the point is debatable. See *BMW of N. Am.*, 517 U.S. at 598–99 (Scalia, J., dissenting) (saying excessive punitive damages do not violate

modest impact of the *BMW v. Gore* line of cases differentiate it entirely from *Roe v. Wade*. Kennedy's signing on to the use of substantive due process to rein in punitive damages does not vitiate his endorsement of tradition in substantive due process cases in *Glucksberg* and *Michael H.*

This brings us to *Lawrence v. Texas*, which admittedly contains sweeping but almost incomprehensible language about how it is the role of the Supreme Court to define the liberty of us all and to protect us against all morals laws.⁴¹ The language of *Lawrence* is plainly incompatible with the deeply-rooted-in-history-and-tradition test that Justice Kennedy signed on to in *Glucksberg* and *Michael H.* This raises the question whether Justice Kennedy meant in writing *Lawrence* to indicate that the Court was back into the role of mandating sweeping social change.

The first question to consider is whether *Lawrence* in fact was a big, judicially mandated, social change opinion, like *Roe*, or whether it was a symbolic opinion that changed very little in practice, like *Griswold*. I think the answer is that *Lawrence* is a whole lot more like *Griswold* than it is like *Roe*. The opinion in *Lawrence* invalidated the sodomy laws of only thirteen states. Thirty-seven states and the District of Columbia had repealed laws criminalizing sodomy between 1960 and 2003.⁴² The thirteen state laws held to be unconstitutional in *Lawrence* were, like the law in *Griswold*, almost never enforced.⁴³ Even Justice Thomas, a dissenter in *Lawrence*, called laws against sodomy "silly" and said he would vote to repeal them if he were a legislator,⁴⁴ much as Justice Potter Stewart had said about the Connecticut birth control statute in *Griswold*.⁴⁵ As a practical matter, very little changed as a result of the Supreme Court's decision in *Lawrence v. Texas*. Instead, it is an acknowledgment of the gay rights revolution of the late 1960s and 1970s—*thirty years after that revolution happened!*⁴⁶ That does not make *Lawrence* good constitutional law, and I have argued previously⁴⁷ and will argue again below that it is bad constitutional law. But this is not an example of the Supreme Court acting as an engine of radical social change. *Lawrence* is at most an example of the Supreme Court ratifying a relatively recent current

the Due Process Clause); *Ornelos v. United States*, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting). The problem of excessive punitive damage awards on the scale we have today is as new to us as the use of libel and slander suits is new to the suppression of First Amendment speech. If the Court could use the First Amendment appropriately, as it did in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to rein in libel and slander judgments, it can just as legitimately use the Excessive Fines Clause to rein in run-away punitive damages. See *Ollman v. Evans*, 750 F.2d 970, 993 (1984) (Bork, J., concurring).

41. *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

42. *Id.* at 596.

43. *Id.* at 572 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986)).

44. *Id.* at 605 (Thomas, J., dissenting).

45. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

46. DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION 2* (2004) ("It is common today to trace the tremendous gains made for lesbian and gay rights since the early 1970s back to the Stonewall Riots of 1969.").

47. Calabresi, *An Originalist Reappraisal*, *supra* note *.

day consensus that using the criminal law to punish sodomy is excessive. It is a huge mistake to equate *Lawrence* and *Roe*. The one was an affirmation of the status quo while the other was an attempt to do again what the Court mistakenly thought it had done in *Brown v. Board of Education*.⁴⁸

An immediate response might be that my reading of *Lawrence* is radically less apocalyptic than Scalia's reading in his dissent in that case. Justice Scalia argued in *Lawrence* that the opinion was a harbinger of gay marriage and the end of all morals laws.⁴⁹ Many other commentators hailed *Lawrence* as foreshadowing the beginning of a new era of substantive due process activism.⁵⁰ Was Justice Scalia right or wrong? How much did *Lawrence* affect the culture war over how far the country ought to go in recognizing gay rights?

The main effect of *Lawrence* is that it may have been an impetus for the Massachusetts Supreme Judicial Court to recognize a right to gay marriage.⁵¹ The stress here should be on the word "may," because even before *Lawrence*, the Supreme Courts of Hawaii and Vermont had recognized a right to gay civil unions in those states.⁵² But even assuming *Lawrence* aided the legalization of gay marriage in Massachusetts, a huge number of states responded to Massachusetts's legalization of gay marriage by banning it by initiative, referendum, or statute.⁵³ Thus, as of 2007, four years after *Lawrence*, little has changed. At most, it led to the legalization of gay marriage in one state and of civil unions in six states.⁵⁴ This is hardly an indication that the *Lawrence* Court acted as a radical engine of social change.

Moving beyond gay marriage, has *Lawrence* appreciably affected the culture war over gay rights in other ways, either as a result of court rulings or of policy changes? The answer is clearly no. The "don't ask, don't tell"

48. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *Lawrence* did not legalize gay sex but instead ratified a sweeping change in social attitudes that had occurred a generation before that case was decided. *Roe*, in contrast, invalidated the abortion laws of all fifty states, even the so-called "liberalized" abortion law of New York state. Moreover, the fifty state laws struck down in *Roe* were laws that were actually being enforced whereas the thirteen state laws struck down in *Lawrence* were not. *Roe* actually changed the law on the ground; *Lawrence* did not.

49. *Lawrence*, 539 U.S. at 604–05 ("If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution?'" (citations omitted)).

50. See, e.g., Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 26 (2005); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 64 (2006); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1899–1900 (2004).

51. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (citing *Lawrence*, 539 U.S. 558).

52. *Baehr v. Lewin*, 852 P.2d 44, 70 (Haw. 1993); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

53. Vickie Chachere, *Gay Marriage Loses Court Fight District Court in Florida Upholds Defense of Marriage Act*, PITTSBURGH POST-GAZETTE, Jan. 23, 2005, at A11.

54. See *Lexington: Out and Proud Parents*, ECONOMIST, June 30, 2007, at 81.

policy⁵⁵ for gays in the military remains unchanged. The failure of federal civil rights laws to ban discrimination in employment on the basis of sexual orientation remains unchanged. George W. Bush left in place an executive order of Bill Clinton's forbidding the federal government from discriminating on the basis of sexual orientation in hiring,⁵⁶ but he made that decision when he took office on January 20, 2001. If a conservative Republican president like George W. Bush was willing to ban hiring discrimination against gays in 2001, how radical could a 2003 Supreme Court decision legalizing gay sex have been? The answer is that *Lawrence* itself was not radical at all. It could have become something more radical, but as of 2007 that has plainly failed to happen. If the Democrats win the presidency in 2008 and make three new Supreme Court appointments, *Lawrence* might be reinterpreted to be something more radical than it now is. But if that happens, the cause of the change will lie not with Justice Kennedy but with the American people.

1. Lower Court and State Court Rulings

There is, however, even more proof that in 2007, even before *Gonzales v. Carhart*, it is *Glucksberg* that states the rule of substantive due process and *Lawrence* that is the exception. A recent student note in the *Michigan Law Review* called *The Glucksberg Renaissance*⁵⁷ examined the citation and use of *Glucksberg* and of *Lawrence* in lower federal court and state court opinions since *Lawrence* was decided in 2003.⁵⁸ This note found that lower federal and state courts are overwhelmingly relying on *Glucksberg* and ignoring *Lawrence*.⁵⁹ This is probably in part because these courts think it is up to the Supreme Court to make new substantive due process case law, if it wants to, and in part because *Glucksberg* gives courts a good way of getting rid of spurious claims of constitutional right while *Lawrence* does not.⁶⁰ These lower and state court decisions to follow *Glucksberg* and ignore *Lawrence* suggest that the latter is essentially void for vagueness. No one knows what it means, including, as *Gonzales v. Carhart* now suggests, Justice Kennedy himself. The responsible thing for a lower or state court to do now is to follow *Glucksberg* over *Lawrence*, except when dealing with consensual, noncommercial sexual activity by no more than two unrelated adults that occurs in private and does not involve violence.

55. 10 U.S.C. § 654 (2000).

56. Exec. Order No. 13,160, 3 C.F.R. 279 (2001).

57. Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409 (2006).

58. *Id.*

59. *Id.* at 411.

60. *Id.* at 442–43.

2. Other Substantive Due Process Rights

Justice Kennedy's support for *Griswold* and his opinion in *Lawrence* suggest that he thinks there is a realm of sexual autonomy that is beyond the reach of the government. But in his twenty years on the Supreme Court he has never used the sweet mystery of life to protect, for example, polygamy, prostitution, incest, drug use, assisted suicide, or even the right of a parent to control the upbringing of her child. *Lawrence* itself specifically does not apply to polygamy, gay marriage, prostitution, or incest, and there is nothing in Kennedy's twenty-year record on the Court that would make one think it did apply to those things. Justice Kennedy has read the First Amendment very broadly in pornography and obscenity cases,⁶¹ but those are the only other area in which he has to date supported protecting so-called sexual liberties. Kennedy's values seem more Californian and suburban than they are Bohemian. Contraceptive use, consensual oral and anal sex, and pornography may be protected, but not prostitution, polygamy, incest, or sadomasochism.

With respect to drug use, Justice Kennedy had a chance on eminently solid federalism grounds to forbid the use of the Controlled Substances Act to prosecute possession of small amounts of medical marijuana. Kennedy's native state of California and eleven other states had voted to do precisely that.⁶² If Justice Kennedy had had any leaning to interpret the sweet mystery of life as including drug use, surely one would have heard about it in *Gonzales v. Raich*?⁶³ To the contrary, Justice Kennedy went out of his way—in violation of his usual beliefs about federalism—to make sure that possession of small amounts of medicinal marijuana would remain a federal crime. No aging flower child here!

The same thing happened with assisted suicide. Many defenders of *Roe* thought it was a case about the right to control one's bodily integrity.⁶⁴ If so, a right to assisted suicide might have followed from *Roe*. But we know that Justice Kennedy categorically rejected such a right in *Glucksberg*, a case he approvingly cited twice in *Gonzales v. Carhart*.⁶⁵ Whatever the sweet mystery of life encompasses, assisted suicide apparently is not on the list.

3. Troxel and Historical Substantive Due Process

This leaves at least one other important substantive due process right and case undiscussed so far: the right of a parent to control the upbringing

61. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 444–53 (2002) (Kennedy, J., concurring); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

62. See Trip Jennings, *Medical Pot Users Shut Out By N.M.*, ALBUQUERQUE J., Aug. 16, 2007, at A1.

63. 545 U.S. 1 (2005).

64. See, e.g., Brief of Respondents at 11, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110).

65. See *supra* text accompanying notes 10–11.

of her child by controlling grandparental visitation rights. As it happens, this precise issue was addressed by the Supreme Court in its June 5, 2000 decision in *Troxel v. Granville*.⁶⁶ The case split the Justices six to three in favor of finding a parental substantive due process right that was deeply rooted in history and tradition to prevent a state judge's order of grandparental visits.⁶⁷ A plurality opinion for four Justices was written by Justice O'Connor and signed by Chief Justice Rehnquist and by Justices Ginsburg and Breyer; Justices Souter and Thomas concurred in the judgment. Justices Stevens,⁶⁸ Scalia,⁶⁹ and Kennedy⁷⁰ each wrote separate dissents refusing to find a substantive due process right. Justice Scalia, changing his position from *Michael H. and Glucksberg*, denied that any judicially enforceable substantive due process rights exist, including even those that are deeply rooted in history and tradition.⁷¹ Justice Stevens dissented in part because of the facial breadth of the parental substantive due process challenge, which is striking given that he was unconcerned about this very issue in *Gonzales v. Carhart* where he joined Ginsburg's dissent.⁷²

The most striking dissent for purposes of this Article was Kennedy's.⁷³ Justice Kennedy picked up on Stevens's complaint about facial substantive due process challenges and denied that the Washington state statute under review was invalid on its face, although he conceded that he could think of as-applied substantive due process challenges to it that might succeed in his view.⁷⁴ Kennedy's rejection of a broad facial challenge in *Troxel* is striking because of his similar rejection of a broad facial challenge in *Gonzales v. Carhart*. Opponents of substantive due process who are eager to win Kennedy's critical fifth vote ought to remember that he has twice objected to broad facial challenges in this area.

Kennedy's dissent in *Troxel* is also striking because it twice cites *Glucksberg* as the authoritative last word on the test that ought to be used in defining new substantive due process rights.⁷⁵ The first cite quotes *Glucksberg* as saying that substantive due process rights must come from "[o]ur Nation's history, legal traditions, and practices," while the second cite concludes as follows:

In light of the inconclusive historical record and case law, as well as the almost universal adoption of the best interests standard for visitation

66. 530 U.S. 57 (2000).

67. *Troxel*, 530 U.S. at 59, 65–66.

68. *Id.* at 80 (Stevens, J., dissenting).

69. *Id.* at 91 (Scalia, J., dissenting).

70. *Id.* at 93 (Kennedy, J., dissenting).

71. *Id.* at 92 (Scalia, J., dissenting).

72. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1640 (2007).

73. *Troxel*, 530 U.S. at 93 (Kennedy, J., dissenting).

74. *Id.* at 95.

75. *Id.* at 96, 100.

disputes, I would be hard pressed to conclude the right to be free of such review in all cases is itself “‘implicit in the concept of ordered liberty.’”⁷⁶

Here again Justice Kennedy relies on history and tradition, as well as present day consensus, in finding new substantive due process rights. Kennedy’s reliance on *Palko* reveals him to be a disciple of Felix Frankfurter and the second Justice Harlan—as does the very restrained tone of his dissent in *Troxel*. Indeed, when discussing *Meyer v. Nebraska*⁷⁷ and *Pierce v. Society of Sisters*,⁷⁸ Justice Kennedy even says that those two substantive due process antecedents of *Troxel v. Granville* might have been viewed by the Court today as First Amendment cases.⁷⁹ The comment seems to confine and narrow *Meyer* and *Pierce* rather than to extend them to new contexts.

The final strain of Kennedy’s dissent in *Troxel* which bears comment is that he openly acknowledges that not all children today are raised in traditional two-parent families and that for some children a grandparent or another relative may be a parental substitute.⁸⁰ Justice Kennedy neither approves nor disapproves of this. He merely acknowledges it as a reality that makes him hesitate to constitutionalize this area of family law.⁸¹ This aspect of Kennedy’s dissent foreshadows *Lawrence* in its realism about current day consensus and practice with respect to matters bearing on the family and on sex.

Kennedy’s dissent in *Troxel* is thus of a piece with (1) his joining of the opinion in *Glucksberg*, (2) his refusal over twenty years on the Supreme Court to develop new constitutional rights except for in *Lawrence*, and (3) his very restrained opinion this past term in *Gonzales v. Carhart*. I deny that the jury is still out on where Justice Kennedy stands on substantive due process. I think he is a follower of the position staked out by Justice Harlan’s concurrence in *Griswold*. Justice Kennedy may not be Robert Bork, but he is not William Brennan or Harry Blackmun either. Those lower federal court and state court judges wondering whether to follow the doctrine of *Glucksberg* or of *Lawrence* ought plainly to follow *Glucksberg*. The vast weight of the evidence suggests that is the position that commands five votes today on the Supreme Court, especially in light of *Gonzales v. Carhart*.

There is one final objection to saying that Justice Kennedy believes in following tradition when evaluating alleged violations of substantive due process rights: his apparent endorsement of *Griswold* and his opinion in *Lawrence* both protect traditions that are not deeply rooted in American history. Whatever the roots of *Griswold* in history and tradition, it is clear that

76. *Id.* at 100 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

77. 262 U.S. 390 (1923).

78. 268 U.S. 510 (1925).

79. *Troxel*, 530 U.S. at 95.

80. *Id.* at 98.

81. *Id.*

no reasonable observer of the legal system would ever have argued prior to 1960 that a right to engage in oral or anal sex was deeply rooted in history and tradition given that at that time all fifty states outlawed sodomy. This point is true, and it is one of the reasons why I think Kennedy's opinion in *Lawrence* is wrong. I think Justice Kennedy would respond, however, by saying that in *Lawrence* he was also following a tradition of American commitment to liberty as that commitment has evolved over time.

Kennedy is thus a Burkean, not an originalist.⁸² He does not ask what traditions were in place in 1868 when the Fourteenth Amendment was ratified. He is with Justice Harlan in viewing tradition as a gradually evolving and changing source of guidance. Unlike Justices Brennan and Blackmun, Kennedy does not seek to drive the evolution of our traditions; he seeks mostly to discern it—hence his emphasis on current day consensus along with tradition in substantive due process law.

I do not agree with Justice Kennedy's approach, but I also think it is a mistake to equate it with the activism of *Roe v. Wade*. This gives a mistaken sense to lower federal court and state court judges striving to follow the Supreme Court's guidance of what *Lawrence*, taken in context, really signifies. Justice Kennedy's twenty years on the Supreme Court make it clear that *Lawrence* must be read and harmonized with *Glucksberg* and with his consistent failure to find new constitutional rights unmoored to text and history. Judges seeking to follow Supreme Court doctrine in substantive due process cases should follow *Glucksberg*.

II. CONSTITUTIONAL THEORY: TRADITION AND CONSENSUS AS SOURCES OF SUBSTANTIVE DUE PROCESS RIGHTS

Moving beyond the analysis of what the Supreme Court doctrine is, the question arises as to what the Supreme Court's role ought to be in substantive due process cases. What position ought a new Justice to take with respect to following either the implications of *Glucksberg* or of *Lawrence*? I have previously expressed my views on this subject in an article in the *Ohio State Law Journal* where I made it clear that I think *Lawrence* was wrongly decided.⁸³ I will not rehearse here what I explained at length in the *Ohio State* article but will briefly summarize my argument there instead.

For me as an originalist, the very notion of substantive due process is an oxymoron. The Due Process Clause of the Fourteenth Amendment does not protect "life, liberty, or property" absolutely: it merely says that if the state deprives a person of any of those things it must do so with "due process of law."⁸⁴ The two Due Process Clauses ought never to be read as being a constraint on arbitrary and capricious lawmaking; they are only a constraint on arbitrary and capricious action by executive personnel, such as the King's

82. See Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 509–10 (1996).

83. Calabresi, *An Originalist Reappraisal*, *supra* note *.

84. U.S. CONST. amend. XIV, § 1.

sheriffs. Under an originalist reading of the Due Process Clauses, therefore, there is no requirement that legislation be “reasonable” in the eyes of federal and state judges.

*A. Another Home for Substantive Due Process: The Privileges
and Immunities Clause*

As I argued in the *Ohio State* article, analysis cannot end there for a good originalist because there is another Clause in Section One of the Fourteenth Amendment that is a far more plausible basis for judicial protection of unenumerated individual rights from legislative infringement—the Privileges or Immunities Clause.⁸⁵ This Clause forbids the states from making or enforcing “any law which shall abridge the privileges or immunities of citizens of the United States.”⁸⁶ This Clause was gutted by the Supreme Court in the *Slaughterhouse Cases*,⁸⁷ but for a good originalist like me that does not matter. The next question then is whether the Privileges or Immunities Clause protects unenumerated individual rights or whether it imposes a reasonableness requirement on state legislatures.

The plain text of the Privileges or Immunities Clause suggests that it protects a category of fundamental rights called “privileges or immunities” from abridgement (“lessening”) by the making or enforcing of any state law. The Clause thus does not read on its face as if it imposes a reasonableness requirement policed by courts on state legislatures. Examination of the original historical meaning of the Clause confirms that this is indeed how the Clause should be read. The Privileges or Immunities Clause was meant to be the most important Clause in the Amendment,⁸⁸ and its language was borrowed from the analogous Privileges and Immunities Clause of Article IV⁸⁹ which itself came from the Articles of Confederation.⁹⁰

The history of this Clause is somewhat complex, and it is best laid out in a superb law review article by John Harrison.⁹¹ Most of the framers of the Fourteenth Amendment understood the words “privileges or immunities” to mean what Bushrod Washington (George’s nephew) had said they meant in the dicta of a rambling opinion he wrote when riding circuit as an

85. See Calabresi, *An Originalist Reappraisal*, *supra* note *, at 1108.

86. U.S. CONST. amend. XIV, § 1.

87. 83 U.S. (16 Wall.) 36, 74–79 (1873).

88. See John Harrison, *Review of Structure and Relationship in Constitutional Law*, 89 VA. L. REV. 1779, 1790–91 (2003) (book review).

89. U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

90. ARTICLES OF CONFEDERATION art. IV (U.S. 1781).

91. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

Associate Justice in a case called *Corfield v. Coryell*.⁹² Washington's dictum, which was quoted over and over again by the framers of the Fourteenth Amendment,⁹³ reads as follows:

The inquiry is, what are the privileges and immunities of citizens in the several states? *We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental;* which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; *subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.* The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.⁹⁴

As I explained in my *Ohio State Law Journal* article, two passages in Justice Washington's opinion here deserve major emphasis.⁹⁵ First, Justice Washington is explicit that "Privileges and Immunities" is an expression that is confined to those rights "which are, in their nature, *fundamental*."⁹⁶ He said those fundamental rights belong to "citizens of all free governments," and they "have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign."⁹⁷ It is thus crystal clear that, under Justice Washington's approach in *Corfield*, a right must be deeply rooted in *American* history and tradition for it to be a "Privilege and Immunity."⁹⁸ Such rights must have been first, recognized at all times, and second, they

92. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230); Calabresi, *An Originalist Reappraisal*, *supra* note *, at 1111–15. To top matters off, Washington probably construed the Privileges and Immunities Clause of Article IV incorrectly. *Id.*

93. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 28 (1980).

94. *Corfield*, 6 F. Cas. at 551–52 (emphasis added).

95. Calabresi, *An Originalist Reappraisal*, *supra* note *, at 1110.

96. *Corfield*, 6 F. Cas. at 551 (emphasis added).

97. *Id.* (emphasis added).

98. Calabresi, *An Originalist Reappraisal*, *supra* note *, at 1110.

must have been recognized since 1776 when the States became free, independent, and sovereign. At a bare minimum then under Washington's approach in *Corfield*, the Privileges or Immunities Clause of the Fourteenth Amendment protects, at most, fundamental rights that were widely recognized in 1868 when the amendment was ratified.⁹⁹ This means that the original meaning of the Privileges or Immunities Clause was that it protected rights so deeply rooted in history and tradition that they were widely followed in 1868. The correct test then, as a matter of positive law, for discerning substantive due process rights is that they must be deeply rooted in history and tradition.

There is a second statement in the famous *Corfield* dictum which also suggests that the judicial restraint of *Glucksberg* is the right course for the Court. Justice Washington said that even fundamental rights, which are deeply rooted in the nation's history and traditions, are "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."¹⁰⁰ This passage suggests that state exercises of the police power with a strong historical pedigree remain permissible *even if a fundamental right is burdened thereby!*¹⁰¹ Thus, compelling governmental interests trump even fundamental rights protected by the Fourteenth Amendment. A long history of the use of the police power to forbid oral or anal sex or assisted suicide would thus trump any fundamental right to engage in those activities because such a use of the police power would suggest a compelling governmental interest. It is thus absolutely crystal clear as a matter of positive constitutional law that the Privileges or Immunities Clause protects at most rights deeply rooted in history and tradition that date back to 1868, and that even those rights can be regulated by "just" restraints prescribed "for the general good of the whole."¹⁰²

B. *Individual and Class-Based Rights under the Privileges and Immunities Clause*

John Harrison has argued further that the Privileges or Immunities Clause of the Fourteenth Amendment does not protect individual rights at

99. One could argue that following Justice Washington literally means that only privileges and immunities recognized in 1776, and not any additional ones recognized in 1868, ought to be protected. This, however, overlooks the fact that the 1823 decision in *Corfield* was construing a Clause that was in Article IV of the Constitution of 1787 and that derived from a clause in the Articles of Confederation. *Corfield*, 6 F. Cas. at 552. It is thus fair to say that for that clause, given its history, one must look for rights that were fundamental in 1776. The Privileges or Immunities language in the Fourteenth Amendment, in contrast, was added in 1868. It is thus at least arguable that the referent point for rights deeply rooted in history and tradition is different for the Privileges or Immunities Clause of the Fourteenth Amendment than it is for the Privileges and Immunities Clause of Article IV. What is clear, however, is that for a right under the Fourteenth Amendment to be deeply rooted in history and tradition it must at least have been so recognized in 1868.

100. *Id.*

101. Calabresi, *An Originalist Reappraisal*, *supra* note *, at 1110–11.

102. *Corfield*, 6 F. Cas. at 552.

all. He says it protects only against discriminatory class-based legislation.¹⁰³ In Harrison's view, only these types of laws "abridge" (or shorten) privileges or immunities in the way the Black Codes,¹⁰⁴ for example, clearly did.¹⁰⁵ Harrison argues the Privileges and Immunities Clause of Article IV is an anti-discrimination clause that protects out-of-staters from being treated differently than are in-state citizens.¹⁰⁶ He thus argues that the Privileges or Immunities Clause of the Fourteenth Amendment is a ban on discrimination and not a protection of individual rights at all.¹⁰⁷

As I said in my *Ohio State Law Journal* article, Harrison's argument is impeccably well researched, and I think he shows beyond a doubt that the Privileges or Immunities Clause forbids class-based discrimination like the Black Codes. I part company with him, however, in concluding that the Clause does not also protect those individual rights so deeply rooted in history and tradition that they might have been on Washington's *Corfield* list. The constitutional text plainly forbids the states from making or enforcing *any* law which shall "abridge" privileges or immunities. The question thus is what does the word "abridge" mean? Does it forbid only class-based discrimination or does it also protect individuals from abridgements?

The word "abridge" is used in two other places in the Constitution: once with an anti-discrimination meaning and once with an individual-rights-protecting meaning. The Fifteenth Amendment uses it in an anti-discrimination sense when it forbids laws that "den[y]" or "abridge[]" the right to vote on account of race, color, or previous condition of servitude.¹⁰⁸ The First Amendment uses the word "abridg[e]" in an individual-rights-protecting sense when it bars laws that "abridg[e]" the freedom of speech.¹⁰⁹ What then is the original meaning of the word abridge?

Samuel Johnson's dictionary, which would have controlled the meaning of the word "abridge" as it is used in the individual rights sense in the First Amendment,¹¹⁰ offers the following three definitions of the word abridge:

1. To make shorter in words, keeping still the same substance. . . .
2. To contract, to diminish, to cut short. . . .

103. See Harrison, *supra* note 91, at 1420–24.

104. PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 301–02 (5th ed. 2006).

105. See Harrison, *supra* note 91, at 1421.

106. *Id.* at 1414–15.

107. For an excellent discussion of how this reading of the clause can be harmonized with the Equal Protection Clause, see Harrison, *supra* note 91, at 1433–51.

108. U.S. CONST. amend. XV, § 1.

109. *Id.* amend. I.

110. Samuel Johnson's dictionary is widely recognized as having been the authoritative dictionary that the Framers would have consulted at the time of the drafting and ratification of the Bill of Rights. See Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 420 (1994) (citing Samuel Johnson's Dictionary as "the only one in existence when the Bill of Rights was adopted").

3. To deprive of; in which sense it is followed by the particle *from*, or *of*, preceding the thing taken away. . . .¹¹¹

These meanings are confirmed by the etymological origins of the word “abridge” which comes from the Latin word “abbreviare” which meant to make brief. “The sense ‘to make shorter, condense’ appeared about 1384 in the Wycliffe Bible.”¹¹² Abridgments of privileges or immunities then would occur whenever those rights are contracted, shortened, or to some degree taken away.

As I said in my *Ohio State Law Journal* article, the paradigmatic taking away or shortening of rights that the Framers of the Fourteenth Amendment meant to render unconstitutional was plainly the Black Codes which took away basic common law rights of property, contract, and inheritance from the freed African Americans.¹¹³ The Black Codes set up a forbidden class system not unlike the Hindu caste system or medieval European feudalism where one class of citizens by birth had one set of privileges or immunities while another class had a shortened or lesser set of those same privileges or immunities.¹¹⁴ The setting up of such caste systems is thus plainly unconstitutional, as Harrison argues.¹¹⁵

But it does not follow that laws denying only one or a few individuals privileges or immunities are constitutional. One can “abridge” or shorten or lessen the rights of a single person as readily as one can abridge the rights of a class of people. Indeed, the First Amendment uses the word “abridg[e]” in exactly this sense. Surely, the framers and ratifiers of the Fourteenth Amendment must have been familiar with the First Amendment’s use of the word “abridge.” Moreover, there is substantial evidence that the Framers of the Amendment meant for the Amendment to protect the individual rights of white northern Republicans living in the South—rights that were not threatened by class-based discrimination.¹¹⁶ I thus think it is implausible as a matter of textual interpretation to confine Section One of the Fourteenth Amendment to an antidiscrimination command.¹¹⁷ The plain meaning of the words of the Privileges or Immunities Clause also protects from “abridgment” individual rights so deeply rooted in history and tradition as of 1868 that they are ranked as being fundamental.

111. JOHNSON’S DICTIONARY: AN ANTHOLOGY 47 (David Crystal ed., Penguin Books 2005).

112. THE BARNHART DICTIONARY OF ETYMOLOGY 4 (Robert K. Barnhart ed., 1988).

113. BREST ET AL., *supra* note 104, at 301–02.

114. 1 JOHN WILSON, INDIAN CASTE (photo reprint 2005) (1877).

115. Harrison, *supra* note 91, at 1458.

116. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 21 (1998).

117. *Id.* at 22–23.

C. *The Scope of Protection under the Privileges
or Immunities Clause*

What might some of these rights include? I think rights protected by more than three-fourths of the states in their state constitutions in 1868 might be viewed as being fundamental rights. Article V of the Constitution suggests a rule of recognition of three-quarters of the states for determining when there is a consensus about a matter that is sufficient to be of constitutional import.¹¹⁸ I am in the process of writing a study of the state constitutions as they existed in 1868 to see what rights were protected by three-quarters of them, and what I have found so far is that one would find in most of them protection for freedom of speech, freedom of the press, and freedom of religion; protection against unreasonable searches and seizures; and protection of private property against takings without just compensation. One does not find a three-quarters consensus for the exclusionary rule, for *Miranda* warnings, for assisted suicide, or for a right to engage in oral and anal sex.¹¹⁹

There probably was in 1868 a consensus of three-quarters of the states that various common law rights were deeply rooted in history and tradition and thus fundamental even if they were not mentioned in state constitutions, but there also would have been a consensus that those rights could be regulated in all sorts of ways by reasonable uses of the police power.¹²⁰ It is possible that the right to control the education of one's own children or who has visitation rights to see them was a fundamental right in 1868. It is certain that the right to marry¹²¹ and to have as many or as few children as one might like to have were fundamental rights in 1868.

The inquiry does not end, however, with the recognition of a fundamental right. Was there a fundamental right to work in a bakery for more than sixty hours a week, as *Lochner v. New York*¹²² so controversially held? Liberty of contract is plainly a fundamental right that is deeply rooted in history and tradition. In fact, one of the objections the framers of the Fourteenth Amendment had to the Black Codes was that they limited the liberty of contract of the Freedmen.¹²³ But, as the *Corfield* dicta show, fundamental rights can be overridden by the police power with "just" laws "for the general good of the whole."¹²⁴ Are maximum hours of work per week or minimum wage laws valid publicly-interested legislation, or are they instances of special interest rent seeking? It is a debatable question—which means that, as a

118. U.S. CONST. art. V.

119. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutional Law in 1868: What Rights Are Deeply Rooted in History and Tradition?* (Mar. 1, 2008) (unpublished manuscript, on file with author).

120. *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting).

121. *Loving v. Virginia*, 388 U.S. 1 (1967).

122. 198 U.S. 45 (1905).

123. BREST ET AL., *supra* note 104, at 301–09.

124. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

matter of judicial restraint, the legislature ought to have its way precisely as Justice Holmes and the elder Justice Harlan said in their *Lochner* dissents.¹²⁵ The Constitution is enforced by legislators and executives when they make laws just as much as it is by courts when they decide cases or controversies. Accordingly, laws arrive at the door of the Supreme Court with a presumption of constitutionality. The evidence that maximum hours of work per week or minimum wage laws are not for the general good of the whole is sufficiently contested so that a court ought not to strike such laws down in light of the presumption of constitutionality. This is true today, and it was true when *Lochner* was decided in 1905.

I do not know how many states had maximum hours of employment laws in 1905 like the New York law struck down in *Lochner*, but let us imagine for the moment that New York was in a category of one all by itself. Suppose that New York was experimenting by introducing European-style socialist ideas about labor-management relations—ideas that had not yet been accepted in any other state. Ought the courts to use the Privileges or Immunities Clause of the Fourteenth Amendment to shut down such novel experiments because the state in question is an outlier given the then current consensus?

I think the answer is no. The *Corfield* dicta allows for the police power to trump fundamental rights whenever it is used justly on behalf of the general good of the whole. If a state is conducting a good faith experiment with some novel use of the police power and the law in question has many proponents active in public life, the mere fact that only one state has chosen to conduct the experiment ought not to cause the Supreme Court to shut that experiment down.¹²⁶ If Oregon wants to experiment with assisted suicide,¹²⁷ or Massachusetts wants to experiment with gay marriage,¹²⁸ or if thirteen states want to keep in place centuries-old proscriptions on oral and anal sex, I think the implication of the *Corfield* dicta is that those experiments ought to be allowed to continue. The issue of what laws are “just” exercises of power “for the general good of the whole” is a political question in all but the very clearest cases. Police power justifications for overriding freedom of speech, of the press, and of religion might get closer judicial scrutiny on the ground that the very functioning of democracy itself is imperiled by laws that do such things. And laws that burden single individuals in grossly disproportionate ways, like uncompensated takings, might get special judicial scrutiny because the political process cannot be expected to protect single individuals and because such laws might be “unjust” and not for the “general” good of the whole. But the vast majority of state legislation would survive judicial scrutiny under a fair application of the *Corfield* dicta.

125. *Lochner*, 198 U.S. at 65 (Harlan, J., dissenting).

126. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

127. Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–.995 (1997).

128. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

What does all this suggest for the jurisprudence of Justice Kennedy? I think it shows he was on solid ground when he joined *Glucksberg*, dissented in *Troxel v. Granville*, and upheld a partial birth abortion law in *Gonzales v. Carhart*. I think he was standing on quicksand in *Lawrence v. Texas* when he struck down laws banning oral and anal sex for being isolated outliers. The *Corfield* dicta does not support Justice Kennedy's idea that the Supreme Court has a mopping up power anymore than it supported Ronald Dworkin and William Brennan's idea that the Court could invent new constitutional rights.¹²⁹ Kennedy's mopping up power is a lot less dangerous than the power Dworkin and Brennan claimed for the Court, but it is still illegitimate.

III. CONSTITUTIONAL THEORY: COMPARATIVE CONSTITUTIONAL LAW AS A SOURCE OF SUBSTANTIVE DUE PROCESS RIGHTS

The *Corfield* dicta plainly does not allow the recognition of new fundamental rights that have not "been enjoyed by the citizens of the several states which compose this Union" since at least 1868. I think this means that fundamental rights are not truly "implicit in the concept of ordered liberty" unless they were recognized by three-quarters of the states in 1868. Thus, I think, as I have argued in previous articles, that *Lawrence* was quite misguided to rely on comparative constitutional law in striking down laws against oral and anal sex on Fourteenth Amendment grounds. *Lawrence* effectively offers an additional source from which new substantive due process rights might be derived beyond tradition and current day consensus. That source is foreign constitutional law. For a variety of reasons, as I have argued previously, I think it is not appropriate either as a legal matter or as a policy matter for the U.S. Supreme Court to derive new substantive due process rights from foreign constitutional law.

But what about the opposite kind of use of comparative constitutional law? What about the claim that a law that violates some fundamental right recognized by three-quarters of the states in 1868 ought nonetheless to be upheld today because similar laws exist in other advanced Western democracies? The claim would be that the police power under *Corfield* extends to allowing the passage of all "just" laws "for the general good of the whole" and that a way of identifying what those laws are today might be looking at the practice of other advanced Western democracies. It would be insane to conclude that the police power extends only to those evils the Framers of the Fourteenth Amendment were aware of, and *Corfield* does not seem to discuss the police

129. See *Eisenstadt v. Baird*, 405 U.S. 438, 447–55 (1972); RONALD DWORKIN, *LAW'S EMPIRE* (1986). It might be objected that earlier I noted that Justices Harlan and White used the deeply-rooted-in-history-and-tradition approach to justify the Court's mopping up opinion in *Griswold v. Connecticut*. If this was legitimate, the next question might be why not a mopping up operation in *Lawrence v. Texas*? The answer is that the law in *Griswold* was much more unusual and anomalous than the thirteen state laws struck down in *Lawrence* which were rooted in thousands of years of history and tradition. Moreover, even *Griswold* is hard to justify relying on the *Corfield* dicta.

power that way. How do we figure out then what laws are “just” and for the “general good of the whole” if not by considering the practice in other countries with legal systems related to our own? These could be just the legal systems of English speaking peoples, as Justice Felix Frankfurter liked to call them,¹³⁰ or it could include all Western legal systems more broadly. Is the idea of what laws are “just” or are “for the general good of the whole” an idea that can be informed by reference to practice in England, Canada, France, or Germany?

I do not think it is. I think the United States is a fundamentally different country with different attitudes and different historical traditions from those of the other Western democracies. I thus think it would be a huge mistake for reasons of law, politics, and policy for the Supreme Court to allow its understanding of the police power to be informed by the constitutional practice of other Western democracies. This is the case, first, because the United States is in reality a very different country from the other Western democracies and, second, because that difference grows out of the United States’ very unique historical experience. I have discussed these points at great length in a recent law review article in the *Boston University Law Review*,¹³¹ so I will not repeat here what I said there. The bottom line is that America is in fact, and has always thought of itself as being, an exceptional country. We are a special people, with special laws, a special history, and a special calling in the world.

The best expression of the idea that America is an exceptional nation comes the speeches given by Ronald Reagan, a former actor who acted in many westerns. Reagan repeatedly and powerfully described America as being “a shining city upon a hill.”¹³² In sum, I think there is no question that rightly or wrongly, Americans for 400 years since the days of John Winthrop have had a vision of this country as being a special place, with a special people, with a special mission in the world. This is simply part of the public ideology of being an American.

This brings me to my final point: What are the implications of the ideology and the reality of American exceptionalism for constitutional law? What do the 400-year tradition of exceptionalist rhetoric and the enormous numbers of ways in which Americans are in reality exceptional suggest for our constitutional law? Most especially, what does this suggest for the Supreme Court’s practice of relying on foreign sources of law either in upholding or in striking down U.S. statutes as unconstitutional?

I submit that the American Constitution is the focal point of the American exceptionalist creed. The Constitution is our Ark of the Covenant, the

130. See Steven G. Calabresi & Stephanie D. Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 822 (2005).

131. Calabresi, *American Exceptionalism*, *supra* note *.

132. Governor Ronald Reagan, Address before the Conservative Political Action Committee (Jan. 25, 1974), in 2 CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT 852 (Scott J. Hammond et al. eds., 2007), available at <http://www.conservative.org/pressroom/reagan/reagan1974.asp>.

holiest of holies of the new Israel that is America.¹³³ Given the enormous differences between the United States and England, Canada, France, Germany, and Japan, and given our unique history and self image, I think it would be both improper and probably impossible for the Supreme Court to construe the scope of the police power in substantive due process cases in light of foreign constitutional law.

CONCLUSION

The Supreme Court's decision in *Gonzales v. Carhart* this past term makes it clear that the *Glucksberg* approach to substantive due process is the approach lower federal and state courts—and the Supreme Court itself—ought to follow in future substantive due process cases. The Court's intervening decision in *Lawrence* has not displaced *Glucksberg*. It is itself an outlier that neither the Supreme Court nor the lower federal and state courts are following. As a matter of the reigning doctrine, it is *Glucksberg* and not *Lawrence* which accurately states the law. Justice Kennedy, Chief Justice Roberts, and Justice Alito all appear to believe that *Glucksberg* was right when it called for judicial restraint in substantive due process case law and for protecting only those rights that are deeply rooted in history and tradition.

Given the original meaning of the various Clauses in Section One of the Fourteenth Amendment, the *Glucksberg* opinion correctly states the rule with respect to judicial protection of unenumerated rights. While the original meaning of the Due Process Clause is antithetical to the substantive due process doctrine, a limited, modest substantive due process doctrine is correct as an original matter based on the Privileges or Immunities Clause of the Fourteenth Amendment. Under this doctrine, only rights that are so implicit in the concept of ordered liberty, and are so deeply rooted in history and tradition that three-quarters of the states would have embraced them in 1868, should be constitutionally protected. And even these protected rights can be trumped by just laws enacted for the general good of the whole.

Neither current-day consensus nor comparative constitutional law can or ought to inform any aspect of the Supreme Court's substantive due process case law. The United States is an exceptional country both in its current preferences and in its history. Both rule of law and policy considerations suggest that the Supreme Court ought not to consider current-day consensus or comparative constitutional law in substantive due process cases. The doctrine of the assisted suicide cases both is and ought to be alive and well on the tenth anniversary of the *Glucksberg* decision. The Supreme Court's intervening opinion in *Lawrence* is void for vagueness.

133. See MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

