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# Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete

Sonu Bedi

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# REPUDIATING MORALS LEGISLATION: RENDERING THE CONSTITUTIONAL RIGHT TO PRIVACY OBSOLETE

SONU BEDI<sup>1</sup>

I. INTRODUCTION .....	447
II. THE PROBLEMATIC RIGHT TO PRIVACY .....	448
III. THE RELATIONSHIP BETWEEN MORALS LEGISLATION AND THE RIGHT TO PRIVACY .....	452
IV. <i>LAWRENCE'S</i> REPUDIATION OF MORALS LEGISLATION .....	454
V. CONCLUSION.....	464

## I. INTRODUCTION

Constitutional law's commitment to a privacy right is not only problematic, but also unnecessary. With the recent decision in *Lawrence v. Texas*,<sup>2</sup> the Court has laid the groundwork for finally rendering the right to privacy obsolete. While lip service has been paid to the decision's revolutionary character,<sup>3</sup> most scholars have failed to realize its true conceptual import.<sup>4</sup> That is, scholars have failed to realize that a repudiation of morals legislation—legislation based solely on morality—renders the substantive due process right to privacy obsolete.

This article is set out in three parts. Part II outlines the difficulties with the right to privacy. Part III articulates the relationship between morals legislation and privacy, demonstrating that we no longer need the latter as long as the state eschews the former. Part IV argues that the Court in *Lawrence* articulates a new standard of

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<sup>2</sup>539 U.S. 558 (2003).

<sup>3</sup>See Philip Chapman, Note, *Beyond Gay Rights: Lawrence v. Texas and the Promise of Liberty*, 13 WM. & MARY BILL RTS. J. 245 (2004); Randy E. Barnett, *Kennedy's Libertarian Revolution*, NAT'L REVIEW ONLINE (July 10, 2003), at <http://www.nationalreview.com/comment/comment-barnett071003.asap>. Both Chapman and Barnett essentially argue that the revolutionary character of the decision stems from the Court's switch from a fundamental rights based analysis to a more liberty-centered approach. While their arguments are not wrong, they miss the more important relationship between morals legislation and privacy. After all, liberty is the value to be promoted. The question is how best to achieve it. I argue that by repudiating morals legislation and rejecting the right to privacy we can less problematically ensure freedom. Chapman and Barnett fail to capture this insight.

<sup>4</sup>*But see* JEB RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW*, 184-190 (2005); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004). Though Rubenfeld and Goldberg realize that the decision could call into question morals legislation, they fail to connect this to the right to privacy.

rational review where specific appeal to morality is constitutionally suspect, allowing us to reject the right to privacy.

## II. THE PROBLEMATIC RIGHT TO PRIVACY

My essay speaks to liberals—to those, for instance, who value sexual freedom—to abandon the constitutional right to privacy and instead, stick with a conception of rational review that prohibits appeal to mere morality. To be sure, those who reject sexual freedom may find my account unpersuasive or even offensive. Nevertheless, if one believes—as I certainly do—that all consensual adult relationships ought to be equally permitted and acknowledged by the state, one should reject the right to privacy, and instead adopt a limitation on the constitutional grounds for justifying legislation. The purpose of this essay is to purge constitutional law of its longstanding right to privacy.

Now, a general right to privacy can be taken to mean (and this is not an exhaustive list) my right to keep my thoughts to myself, my right not to have my home searched, my right not to have my appearance used without my consent, or my right to sleep with whomever I choose. A right to privacy can be seen, for example, in tort law, in Fourth Amendment jurisprudence, and in the right to property.<sup>5</sup> My focus is on the right to privacy as manifested and articulated in *Griswold v. Connecticut*.<sup>6</sup> That is, I understand the right to privacy as the right, grounded in the doctrine of substantive due process, that protects otherwise non-harmful behavior in private. Presumably, constitutional law's adherence to this right is meant to ensure our liberty. After all, by subjecting state laws that regulate such intimate activities to strict scrutiny, constitutional law aims to protect our freedom.<sup>7</sup>

Nevertheless, this constitutional right to privacy suffers from at least two problems: one constitutional, and the other normative. First, there seems to be little textual basis in the Constitution for such a right. In *Griswold*, for instance, Justice Stewart argues that while the Connecticut ban against the use of contraceptives may very well be a “silly law,” there is no provision in the Constitution that seems to invalidate it.<sup>8</sup> John Ely argues that this appeal to substantive due process to articulate a right to privacy may be just as problematic as generating a right to contract under *Lochner v. New York*<sup>9</sup> or, at the extreme, generating a right for slaveholders under *Dred Scott v. Sandford*.<sup>10 11</sup> Both cases appeal to substantive due

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<sup>5</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In their seminal article on privacy, Warren and Brandeis primarily discuss these other conceptualizations of privacy. In this article, I tackle only the right to privacy that primarily concerns sexual freedom.

<sup>6</sup>381 U.S. 479 (1965).

<sup>7</sup>Although my article concerns only the problem of heightened scrutiny that accompanies presumptive violations of the substantive due process right to privacy, a repudiation of morals legislation may very well also relieve the need to appeal to suspect classification doctrine.

<sup>8</sup>*Griswold*, 381 U.S. at 527. See also *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting).

<sup>9</sup>198 U.S. 45 (1905) (invalidating state law imposing maximum number of hours one could work in a bakery).

<sup>10</sup>60 U.S. 393 (1857) (commenting on due process rights of slaveholders in the context of the Missouri Compromise).

process. Thus, we are faced with the difficulty that constructing such rights out of due process turns out a mere generational phenomenon.<sup>12</sup> After all, as Ely goes on to state, “that attitude, of course, is precisely the point of the *Lochner* philosophy, which would grant unusual protection to those ‘rights’ that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them.”<sup>13</sup>

Second, and more importantly, this right to privacy creates the problem of tolerance. While liberal thought generally extols the value of tolerance,<sup>14</sup> the right to privacy ultimately shields behavior by demeaning it. Michael Sandel criticizes the right to privacy on this very basis.<sup>15</sup> For instance, although much of society may find gay sex disgusting, it chooses to allow it to occur in the privacy of a bedroom. The appeal to privacy, as Sandel rightly argues, stigmatizes the act as deviant and abnormal.<sup>16</sup> By forcing the act into the bedroom (this is the only way it can be protected), the act becomes unworthy of public consumption. It is a shameful practice that must stay within the confines of a private space, or so this argument contends.

It is critical to realize that toleration is permitting a deviation from a standard.<sup>17</sup> In this context, the standard is heterosexual, procreative sex between a man and a woman who are married.<sup>18</sup> Thus, those engaging in the standard sexual practice have no need for the right to privacy. There is no worry that a law will forbid the “standard” or “normal” sexual practice. After all, the constitutional right to privacy arose in a case concerning the use of contraception. Admittedly, while *Griswold* concerned married heterosexual couples, the sex was clearly non-procreative—hence the need for contraception and the appeal to privacy. Before *Griswold*, there was no

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<sup>11</sup>JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14-22 (1980).

<sup>12</sup>John Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 939 (1973).

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

<sup>14</sup>Tolerance, in fact, seems the common refrain of the conventional liberal.

<sup>15</sup>MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT* 106-08 (1992).

<sup>16</sup>*Id.*

<sup>17</sup>The *American Heritage Dictionary* defines tolerance as “leeway for variation from a standard.” *AMERICAN HERITAGE DICTIONARY* 858 (4th ed. 2001). In the religious context, Catholic theologian, John Murray writes that toleration “implies a moral judgment on error and the consequent adoption of a moral attitude, based on charity, toward the good faith of those who err.” JOHN COURTNEY MURRAY, *RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM* 150 (1993). Thus, religious toleration (as opposed to acceptance) means that the deviating religion is most certainly seen as in error. However, due to privacy, such a practice is reluctantly permitted.

<sup>18</sup>Of course, heterosexuals may also require the use of privacy. To be sure, non-procreative sex (oral sex, for example) may still be considered “abnormal” or “deviant.” In this essay, when I refer to heterosexual sex, I mean procreative, monogamous sex carried out between one man and woman within the bounds of marriage.

question that married couples had a right to engage in procreative sex. Such activity does not need privacy protection.

Not surprisingly, no one ever says to the straight married couple about to engage in procreative, non-kinky sex, “what you do in your bedroom is your business!” This often-used mantra, under the right to privacy, applies only to those acts we disapprove of, but must begrudgingly tolerate in private. Certainly, murder and assault cannot take place in private. Rather, privacy is used to protect those non-harmful activities that the majority simply finds morally wrong or offensive. In this way, deviations or leeway from this standard require appeal to privacy. The right to privacy, then, is necessary to protect only minority sexual practices that take place in private—i.e., behind closed doors.

This method of protection, however, protects by simply *tolerating* certain behavior—by recognizing the non-procreative sex act (sodomy, for instance) as aberrant and anomalous, but allowing it anyway. While heterosexual sex within marriage, at least the monogamous, procreative kind, is no doubt valued in society, gay sex is short changed by being swept under the proverbial right to privacy rug. It is seen as a deviation that is reluctantly permitted. As Sandel writes, “by refusing to articulate the human goods that homosexual intimacy may share with heterosexual unions[,]” the right to privacy argument used to protect gay sex is woefully inadequate.<sup>19</sup>

To be sure, this problem of tolerance is unavoidable. For example, Jeb Rubenfeld’s attempt to justify the right to privacy fails on its own terms.<sup>20</sup> He argues that such a right staves off normalization. I argue, though, that even with a privacy right the state ends up engaging in a subtle form of normalization. Rubenfeld contends that without such a right, the state can compel us to lead certain kinds of lives. As a threshold matter, he rightly repudiates the personhood thesis as a possible explanation.<sup>21</sup> The personhood thesis maintains that certain aspects of our lives are necessary for us to become true persons.<sup>22</sup> Under this thesis, sexual acts, for example, define who we are or play a large role in our self-definition. As a result, the state cannot exercise its power in regards to these things. Even assuming, as Rubenfeld does, that we can figure out when self-definition is at stake—that is, when privacy should kick in—the problem is that sometimes we engage in these allegedly self-defining acts for reasons that have nothing to do with personhood. I agree with Rubenfeld that one may partake in gay sex for purely physical pleasure having nothing at all to do with any gay-identity formation.<sup>23</sup> The sex act itself should be protected, regardless of the actor’s intention or the act’s role in self-definition.

Rubenfeld, then, opts for normalization as standing beneath the intuition of a right to privacy. Rubenfeld believes that such a right ensures that the government does not force or compel us to standardize ourselves, to live cookie-cutter lives. For

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<sup>19</sup>SANDEL, *supra* note 15, at 107.

<sup>20</sup>Jeb Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

<sup>21</sup>*Id.* at 782.

<sup>22</sup>*Id.* at 752-54.

<sup>23</sup>Rubenfeld also employs a republican and Foucault based analysis in his criticism of personhood. *See id.* at 761-82.

example, limiting sex only to heterosexual intercourse pushes us to lead a certain way of life. Privacy prevents this standardization.

By invoking the right to privacy to protect certain behavior, however, we have *ipso facto* deemed it abnormal. It is true that under Rubinfeld's argument for the maintenance of the right to privacy, the state cannot stop me from having sex with a man. Nevertheless, by the very fact that I must appeal to this right to protect my "life-style," that I must take cover under privacy, the state has implicitly rendered my "life-style" abnormal and shameful. As demonstrated above, this is Sandel's very critique of the right to privacy.

Since straight sex does not require the protection of the right to privacy, the state ends up implicitly compelling us to engage in certain sexual acts and not others. The normalization that Rubinfeld so decries occurs not only through laws prohibiting certain acts, but also by the social stigma that attaches to sexual acts that, although legally permitted, require the suspect appeal to privacy and its theory of tolerance. Thus, Rubinfeld is caught in a catch-22: his reason for the right to privacy (i.e., his contention that the problem of normalization will disappear) pushes against its very adoption. In other words, Rubinfeld's justification fails on its own terms. The constitutional right to privacy, then, needs to be rejected.

Sandel's panacea to this very real problem of tolerance is a move toward a regime of acceptance. He argues that the solution is to create another, legitimate standard to stand alongside the traditional procreative one. By touting the obvious merits to gay intimacy (such relations are similarly valuable and fulfilling), the state *via* judicial opinions can set up another norm. Thus, gay sex, under an acceptance regime, is no longer just tolerated but is actually *accepted* as another legitimate sexual activity. He writes that a "fuller respect would require, if not admiration, at least some appreciation of the lives homosexuals live."<sup>24</sup>

However, what about sex that is anonymous or purely physical such as the paradigmatic one-night stand or even the consensual bathhouse orgy? Would Sandel have us publicly articulate the valuable qualities of such sexual acts as well? This seems trickier. How many standards or norms do we create?<sup>25</sup> In fact, how do we

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<sup>24</sup> SANDEL, *supra* note 15, at 107.

<sup>25</sup> In fact, appeal to suspect classification seems similarly problematic. The experimenting college student may not be gay but her decision to sleep with someone of the same sex should still be protected. A repudiation of morals legislation may very well render the doctrine of suspect classification obsolete. After all, this doctrine came about in *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating anti-miscegenation statute). It seems that such laws (including segregation laws like the one in *Plessy v. Ferguson*, 163 U.S. 537 (1896)) would not pass the re-conceptualized rational review that I offer in this article. What would the state appeal to in justifying such legislation? Claims of white supremacy and racial inferiority, for instance, invariably appeal only to mere morality—that is, some race is superior to another. There is no legitimate harm here; rather, it is some conception of morality that stands behind such legislation. In fact, the rationale that mixing of the races is bad is just as irrational as the claim that gay sex is a sin. Both appeal to mere prejudice. There is no evidence that such acts are harmful. Consequently, both fail a rational review where mere morals legislation is impermissible. In this way, race-based affirmative action programs would not suffer the same fate because, unlike their irrational counterparts—segregation or miscegenation, they can appeal to some non-moral reason, such as remedying the harm of historical discrimination. Still, this argument, as it applies to suspect classification, needs a much more robust defense.

even go about extolling the virtues of these sexual practices? The simple point is that while I may find no redeeming value in a one-night stand, someone else may. The problem with a regime of acceptance is that Sandel ends up fighting morals legislation with more morality. But two wrongs certainly do not make a right. Ultimately, Sandel sees the choice as resting only between tolerance and acceptance. This article submits that by repudiating morals legislation—that is, by rejecting mere morality as a legitimate purpose under rational review—we may adopt a third, more promising alternative. Rather than articulating numerous problematic standards of legitimacy and fighting morality with more morality, constitutional law ought to be seen as having *no standard* and no norm of sexual activity. Gay and straight sex share the same status due to the fact that the state has no legitimate reason to prohibit either.

### III. THE RELATIONSHIP BETWEEN MORALS LEGISLATION AND THE RIGHT TO PRIVACY

In order to avoid the problematic right to privacy and simultaneously secure our freedom without falling into the trap of acceptance, constitutional law need only prohibit morals legislation. That is, we must re-conceptualize rational review analysis. Morals legislation includes those laws or regulations that are based solely on morality. In these cases, morality “rationales appear, at times, in their purest form as the sole explicit rationale for government action.”<sup>26</sup> Rather than appeal to harm or the general welfare, these laws look *only* to morality.

Traditionally, such laws passed rational review, which requires that the regulation serve a legitimate purpose and that it be rationally related to that purpose. It is the first part of this doctrine—the legitimate purpose requirement—that is most relevant here. The Court views the conventional police powers of the state as sufficient for meeting the legitimate purpose test.<sup>27</sup> Specifically, legislation passes rational review if enacted to protect the “health, safety, and *morals* of the general public.”<sup>28</sup> As I argue later in this article, the fact that *Bowers v. Hardwick*<sup>29</sup> upholds morals legislation will be of central importance.

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For now, recognizing that the suspect classification doctrine may not be as normatively problematic as substantive due process, I simply focus on the right to privacy.

<sup>26</sup>Goldberg, *supra* note 4, at 1244. While Goldberg also believes that *Lawrence* rejects such pure morals legislation, she does not find such a decision revolutionary. I submit that her failure to do so stems from the fact that she does not realize the important (and consequential) relationship between such legislation and the right to privacy.

<sup>27</sup>Such police powers are reserved to the states by the Tenth Amendment.

<sup>28</sup>PAUL BREST, ET. AL. PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 351 (2000) (emphasis added). See D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, U. ILL. L. REV. 67 (1993) (examining the philosophical and legal justifications and applications of rational review—specifically moral legislation in the context of due process and equal protection). See also *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>29</sup>478 U.S. 186 (1986).

Morality alone, not just health and safety, has served as a legitimate justification for legislation under rational review.<sup>30</sup> For example, in upholding an Indiana statute prohibiting all-nude dancing in public establishments, the Court in *Barnes v. Glen Theatre, Inc.* explicitly stated that the purpose of the statute was to protect “societal order and morality.”<sup>31</sup> The Court went on to write that the “traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.”<sup>32</sup> Since the Court held that the statute did not directly encroach upon constitutionally protected activities, it did not evaluate the law under a strict scrutiny standard. It is this central tenet that *Lawrence v. Texas* repudiates, thereby opening the way for the rejection of the right to privacy.

Richard Posner also seems to reject morals legislation. He argues that sexuality ought to be approached functionally. He advocates an understanding of sexual activity that is “resolutely secular, scientific in either a broad or narrow sense.”<sup>33</sup> As he rightly points out, Devlin does not nor could not support his famous claim that allowing gay sex would lead to “national disintegration.”<sup>34</sup> Devlin makes gestures to the conclusion that “a recognized morality is as necessary to society as, say, a recognized government,” but simply fails to offer the necessary evidence.<sup>35</sup> Moral condemnation then, turns out an improper justification. The state will be hard pressed to find an appropriate reason to condemn any consensual adult relationships.

The concept of prohibiting morals legislation is certainly not a novel one. In fact, much liberal political theory, under the banner of neutrality, holds that legislation cannot be based solely on comprehensive moral or religious viewpoints. Such rationales are seen as illegitimate.<sup>36</sup> What scholars have failed to realize, however, is that such a repudiation of morals legislation renders the right to privacy obsolete. For example, Sandel correctly captures the conception of the liberal state as prohibiting morals legislation, yet goes on to articulate the problem of tolerance inherent in the right to privacy.<sup>37</sup> He states that “[t]he principle that government must be neutral among conceptions of the good life finds further constitutional expression

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<sup>30</sup>See *Griswold*, 381 U.S. at 498. Justice Goldberg’s concurrence admits that the “discouraging of extra-marital relations” (only sex within marriage is worthwhile) is a “legitimate subject of state concern.” *Id.* (emphasis added).

<sup>31</sup>501 U.S. 560, 568 (1991).

<sup>32</sup>*Id.*

<sup>33</sup>RICHARD POSNER, *SEX AND REASON* 220 (1992).

<sup>34</sup>*Id.* at 234.

<sup>35</sup>*Id.* See also Devlin, Lord Patrick, *Morals and the Criminal Law*, in *THE PHILOSOPHY OF LAW* 68 (Ronald Dworkin ed., 1977); Hart, H.L.A. *Immorality and Treason*, in *MORALITY AND THE LAW* (Richard Wasserstrom ed., 1971).

<sup>36</sup>See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* (1980); BRIAN BARRY, *THEORIES OF JUSTICE* (1989); JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans.) (2001); CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* (1987); JOHN RAWLS, *POLITICAL LIBERALISM* (1996); T.M. SCANLON, *WHAT WE OWE EACH OTHER* (1998).

<sup>37</sup>SANDEL, *supra* note 15, at 91-119.

in the area of privacy rights.”<sup>38</sup> Privacy is assumed, incorrectly, to be *integral* to this prohibition on morals legislation. It is no wonder that Sandel offers acceptance as an alternative. He, like others, misses the conceptual point: we do not need a right to privacy as long as the state cannot appeal to mere morality in justifying legislation.

If mere morality is insufficient, then the state has no good reason to prohibit certain sexual practices or even to limit the institution of civil marriage to heterosexual couples. For instance, the following rationales for state legislation are illegitimate under this re-conceptualized rational review: the virtuous path of monogamy; God deems gay sex, and even certain kinds of heterosexual sex, a sin; oral sex between men is disgusting; marriage is a holy bond between only a man and a woman. If moral disgust is seen as insufficient to pass rational review, we have no need for the problematic right to privacy. In fact, freedom is enhanced by the rejection of both privacy and morals legislation. At the very least, a ban on morals legislation secures the liberty we previously and problematically protected via a right to privacy.

Deeming mere morality an illegitimate reason under rational review not only secures our freedom. It also avoids problematic appeals to substantive due process and tolerance. First, the textual argument against the right to privacy is immediately avoided. By repudiating legislation that curtails consensual sexual behavior on the ground that such legislation does not serve a legitimate purpose, we simply avoid any appeal to substantive due process. We, therefore, do not need to search the Constitution for this enigmatic right to privacy, and the problematic pedigree of *Lochner* in grounding rights in substantive due process is circumvented.

Second, and more importantly, the problem of tolerance inherent in the right to privacy is altogether not present under this re-conceptualized rational review. But rather than moving toward acceptance and articulating another standard of valuable sexual relations, as Sandel would have us do, the ban on morals legislation refuses to endorse *any standard*. A simpler, less problematic solution is to simply reject the right to privacy and adopt this new understanding of rational review. Thus, all kinds of activities are permitted for the very same reason, namely that the state has no legitimate reason to prohibit any of them. Consequently, my gay sex life, her polyamorous one-night stands, and their monogamous straight relationship are all protected for the same reason. Under this reformed version of rational review, purged of the right to privacy, legislation prohibiting straight sex and legislation prohibiting sodomy are both unconstitutional. Gay sex, straight sex, and polyamorous sex are all justified by the same principle. There is no disparity in status and we have avoided the pitfalls of both toleration and acceptance.

#### IV. LAWRENCE'S REPUDIATION OF MORALS LEGISLATION

*Lawrence v. Texas*, by invalidating a Texas sodomy statute, took an unprecedented step towards re-conceptualizing rational review by rejecting mere morality as a legitimate rationale. My argument to support this reading consists of two parts. First, I briefly outline the constitutional history of the modern right to privacy and the often-overlooked relationship between rational review, morals legislation, and privacy protection. Second, I interpret *Lawrence* as simultaneously

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<sup>38</sup>*Id.* at 91.

repudiating morals legislation and laying the foundation for the necessary constitutional rejection of the right to privacy.

With its decision in *Griswold*, which overturned a ban on contraception for married people, the Court articulated the modern right to privacy by appealing to the penumbra argument.<sup>39</sup> By looking to the due process clause of the 14th Amendment,<sup>40</sup> the Court held that a law banning the use of contraceptives for married individuals interferes with their right to privacy.<sup>41</sup>

Since the legislation in *Griswold* implicated the right to privacy, the Court applied strict scrutiny. The Court reasoned that the legislation “[could not] stand in light of the familiar principle” that a state purpose “to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly.”<sup>42</sup> Thus, the Court struck down the law, and held that the contraceptive ban did not meet this heightened standard of scrutiny because it was not narrowly tailored.<sup>43</sup>

The modern right to privacy was expanded in *Roe v. Wade* to include the right to abort a fetus.<sup>44</sup> In that decision, the Court reiterated the holdings of the other cases, reasoning that while the “Constitution does not explicitly mention any right of privacy[,] . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy does exist.”<sup>45</sup> The Court further held that this zone is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>46</sup> Having established that a woman’s decision whether to have an

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<sup>39</sup>*Griswold*, 381 U.S. 485 (“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional arrangements.”).

<sup>40</sup> “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

<sup>41</sup> *Griswold*, 381 U.S. at 485.

<sup>42</sup> *Id.* (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

<sup>43</sup> In *Eisenstadt v. Baird*, the Court, strictly on equal protection grounds, held that since the right to privacy allowed married couples the ability to use contraception, the right extended to unmarried couples as well. 405 U.S. 438 (1972).

<sup>44</sup> *Roe v. Wade*, 410 U.S. 113 (1973). The right to abortion is somewhat different from the right to engage in certain sexual acts. Abortion is not a simple issue under either the regime of privacy or a regime that simply prohibits morals legislation sans privacy. Certainly, even with privacy doctrine, murder would be impermissible no matter where it took place (in the home, on a street corner, etc.). Thus, if the fetus is a person under the Constitution, there is a prima facie case against abortion under both regimes. Leaving aside whether the fetus is a person with constitutional standing—no case has held that it is, abortion jurisprudence has, in fact, moved away from privacy to considerations of harm. *Roe* secured the right to abortion via the right to privacy—in line with *Griswold* and *Eisenstadt*. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) on the other hand, the Court moved to an undue burden (harm) standard to maintain a woman’s right to choose. This appeal to harm to justify abortion avoids the appeal to a mere moral consideration. The harm here is the disadvantage *only* the woman suffers in bearing children. Thus, remedying this harm may very well involve allowing her to abort. For an excellent discussion of this shift in abortion case law see the introduction of *ABORTION: THE SUPREME COURT DECISIONS 1965-2000* (Ian Shapiro ed., 2nd ed. 2001).

<sup>45</sup> *Roe*, 410 U.S. at 152.

<sup>46</sup> *Id.* at 153.

abortion falls within the zone of privacy, the Court acknowledged that “some state regulation in areas protected by the right to privacy is appropriate.”<sup>47</sup> It is just that when fundamental rights are implicated, the “regulation[s] limiting these rights may be justified only by a ‘compelling state interest,’ and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”<sup>48</sup> The Court ultimately held that there was no compelling state interest to warrant the privacy infringement.

In this way, *Roe*, like *Griswold*, did not consider the law under rational review. Since both regulations, the prohibition on contraceptive use and the prohibition on abortion, interfered with the right to privacy, the Court applied strict scrutiny. Unfortunately, as long as morals legislation—legislation that is based not on the health and safety of citizens (the prevention of harm) but on a specific conception of morality—continues to pass rational review, the right to privacy will invariably be needed. As mentioned earlier, the concept of “tolerance” relates to permitting a deviation from the standard. Accordingly, while certain kinds of non-procreative sex may be deemed immoral by a polity, tolerance allows such behavior to be begrudgingly permitted. In *Griswold*, for example, the “deviant” behavior was the use of contraception in the bedroom. Effectively, privacy is our defense against morals legislation. By way of strict scrutiny, it sweeps under the rug private behavior that, though not harmful, is deemed immoral or “deviant” by the majority. Unfortunately, case law does not explicitly articulate this relationship. In fact, as I argue below, the Court in *Bowers* fails to follow this very principle of tolerance. As a result, constitutional theory has not noticed that a repudiation of morals legislation renders the right to privacy obsolete.

Following *Griswold*, *Eisenstadt*, and *Roe*, it seems reasonable that gay sex would have come to be located within the zone of privacy. Again, even if a polity may characterize certain consensual sexual behavior as immoral, privacy ought to permit such victimless activity that occurs behind closed doors. This is, after all, the very purpose of tolerance. In *Bowers*, however, the Court held that the right of privacy could not protect gay sex between consenting adults in the bedroom.<sup>49</sup> It upheld a Georgia sodomy statute that, as applied, primarily affected gays.<sup>50</sup> The *Bowers* Court commits two mistakes, the first more egregious than the second. First, even in admitting that private consensual acts of sodomy are not harmful, but simply offensive or immoral,<sup>51</sup> it failed to afford such behavior protection under the right to privacy. That is, *Bowers* did not follow privacy’s own internal logic. It failed to enforce tolerance. Second, the opinion reaffirms the constitutional principle that mere morality alone can justify laws under rational review. As a result, while *Bowers* is (at least from this author’s perspective) undoubtedly the most haunting decision of the modern right to privacy cases, it is for our purposes, also the most illuminating.

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<sup>47</sup>*Id.* at 154.

<sup>48</sup>*Id.* at 155.

<sup>49</sup>*Bowers*, 478 U.S. 186.

<sup>50</sup>*Id.* at 187.

<sup>51</sup>*Id.* at 195. The majority admits that gay sex is a “victimless crime.”

*Bowers* addressed both types of challenges outlined above. First, as a threshold matter, it found that gay sex did not trigger the right to privacy. By appealing to, among other things, early American history and the common law's proscription against gay sex, it held that such activity was not a part of the due process right to privacy. For conduct to qualify as a fundamental right under due process, it must be "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty."<sup>52</sup> The Court concluded that sodomy is not such an activity. But here is where the opinion goes wrong. The right to privacy and its corresponding regime of tolerance have deep-seated roots. After all, Locke's *Letter Concerning Toleration*, published anonymously for the first time in 1689, stands as testament to the historical pedigree of the liberal principle of tolerance.<sup>53</sup> The protection *via* the right to privacy is no doubt "deeply rooted." By its very nature, however, such a right protects behavior that is "deviant" and abnormal, that is not deeply rooted or popular. Just as the rights to free speech and due process have a rich tradition, so too does the right to privacy and the commitment to tolerance. Yet, the activities that privacy allegedly protects must be anything but traditional. After all, such activities are deviations from the norm. Simply put, if an activity *were* deeply rooted in our nation's history and tradition, such as procreative sex within the bounds of marriage, there would be no need for the right to privacy. Acts that are so rooted and implicit in the concept of ordered liberty seem anything but private.

In fact, it is as if the Court requires that the majority tradition and culture "accept" the activity before the right to privacy will apply. This seems to turn the right to privacy and the regime of tolerance on its very head. In *Griswold*, no one claimed that contraceptive use has a deeply rooted past. Rather, tolerance (the right to privacy) itself has the long pedigree. The principle may be deep seated, but the activities it seeks to protect invariably are not. This is the function of such a right. It is because this non-harmful but offensive practice is carried out in the bedroom by a *minority* that the right to privacy is needed. Sodomy's alleged abnormal status pushes for tolerance. Thus, it would be a mistake to simply criticize the *Bowers* opinion for characterizing gay sex as abnormal and non-traditional. Even if gay sex is a "deviant" sexual practice that takes place behind closed doors, it is this conclusion that deems it suitable and proper for protection under the right to privacy. If it were otherwise, privacy would not be needed.

Of course, I reject this regime of tolerance, because the protection it offers is not genuinely equal. Still, the *Bowers* majority should have gone at least this far. The conventional, and for me suspect, principle of privacy has the perverse advantage of distinguishing gay sex from gay marriage. The majority may find the former activity disgusting and immoral, but as long as it is done in private, as was the case in *Bowers*, it should be tolerated. Marriage, on the other hand, is not a private activity, and as a result, does not implicate the right to privacy or the commitment to tolerance. Here, we are not shielded from morals legislation because the activity is public in nature. For some, the upshot of a right to privacy and its regime of tolerance is the ability to permit gay sex, but not gay marriage. *Bowers* should have at least endorsed this troublesome distinction. This concern with privacy, however,

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<sup>52</sup>*Id.* at 193.

<sup>53</sup>John Locke, *A Letter Concerning Toleration*, in *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Ian Shapiro ed., 2003).

is entirely unnecessary if we simply reject morals legislation and declare that mere morality is insufficient to pass rational review.

The second part of the *Bowers* decision declares the exact opposite. It maintains that mere disgust is sufficient to satisfy rational review. That is, having bizarrely cut off the appeal to privacy, *Bowers* also rejects appeal to rational review. Since gay sex does not fall within the zone of privacy (an argument that seems to fail on its own terms), the *Bowers* Court considers the sodomy statute under rational review. Significantly, in the last paragraph of its decision, the Court states:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. *The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.* Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis.<sup>54</sup>

*Bowers*, thus, validated the state's ability to legislate morals. Undoubtedly, the sodomy statute was based solely on society's disapproval of homosexuality, or at least gay sex. The *Bowers* decision, then, stands for the proposition that such justifications are permissible. The decision in *Lawrence* must be seen as reacting to the *Bowers*' rationale, as eschewing morals legislation and allowing for the rejection of the right to privacy.

The facts of *Lawrence* were as follows. Police officers from Harris County in Houston, Texas entered an apartment on a report that there was a weapons disturbance.<sup>55</sup> The officers observed two men, John Lawrence and Tyron Garner, engaging in a sexual act.<sup>56</sup> The two were arrested and convicted under Texas Penal Code 21.06, which made it a crime for a person of one sex to engage in oral or anal sex with someone else of the same sex.<sup>57</sup> The defendants appealed their convictions on due process and equal protection and grounds.<sup>58</sup> The Fourteenth District Court of Appeals of Texas affirmed the convictions, basing its decision on the controlling status of *Bowers*.<sup>59</sup> The Supreme Court reversed. Writing for the majority, Justice Kennedy overturned both parts of *Bowers*.<sup>60</sup> First, the majority held that sodomy is

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<sup>54</sup>*Bowers*, 478 U.S. 186, at 196 (emphasis added).

<sup>55</sup>*Lawrence*, 539 U.S. at 562.

<sup>56</sup>*Id.* at 563.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

<sup>60</sup>Justice Kennedy was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 561. Justice O'Connor concurred in invalidating the statute but refused to join in the

protected under the constitutional right to privacy. Second, and far more interestingly, it held that a law fails rational review if based solely on morality.

The *Lawrence* opinion squarely addresses the *Bowers* decision. The Court says as much when it “conclude[s] [that this] case requires us to address whether *Bowers* itself has continuing validity.”<sup>61</sup> Justice Kennedy spends most of the first part of the opinion arguing that sodomy deserves protection under the right to privacy. On the privacy prong of the argument he re-appraises the notion that the proscription against sodomy has longstanding roots. In countering the *Bowers* reasoning, the *Lawrence* Court observes that not only was there an “absence of legal prohibitions focusing on homosexual conduct”<sup>62</sup> in early American history, but also sodomy laws were, in fact, rarely enforced “against consenting adults acting in private.”<sup>63</sup> The Court comments that it “was not until the 1970’s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.”<sup>64</sup>

Moreover, the *Lawrence* Court counters the assertion in *Bowers* that history has condemned this type of activity.<sup>65</sup> Even before *Bowers*, the Wolfenden Report, in 1957, recommended the “repeal of laws punishing homosexual conduct” to the British Parliament.<sup>66</sup> Additionally, the European Court of Human Rights, five years before *Bowers*, held in *Dudgeon v. United Kingdom*, that sodomy laws were invalid under the European Convention of Human Rights.<sup>67</sup> As a post-*Bowers* decision, the *Lawrence* opinion cites *Planned Parenthood v. Casey*<sup>68</sup> as reaffirming “the substantive force of the liberty protected by the Due Process Clause.”<sup>69</sup>

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overturning of *Bowers*. *Id.* at 579 (O’Connor, J., concurring). O’Conner put forth a novel rational review plus argument. *Id.* at 579-81. She argued that morality cannot be used in rational review analysis when there is a *prima facie* equal protection claim, as was the case here—the sodomy statute only applied to gay sex. The majority clearly refused to entertain the equal protection argument. Justice Scalia dissented, joined by Justices Rehnquist and Thomas.

<sup>61</sup>*Lawrence*, 539 U.S. at 575.

<sup>62</sup>*Id.* at 568.

<sup>63</sup>*Id.* at 569.

<sup>64</sup>*Id.*

<sup>65</sup>Such exhortations are, of course, unnecessary given the purpose of privacy –to protect activities that do not have such an entrenched tradition. The *Lawrence* majority failed to see the internal problem with the reasoning in *Bowers*. Behavior that is not harmful, but deemed non-traditional, deviating, or offensive is the paradigmatic kind of activity privacy seeks to protect.

<sup>66</sup>*Id.* at 572-73.

<sup>67</sup>*Lawrence*, 539 U.S. at 573.

<sup>68</sup>505 U.S. 833 (1992) (upholding *Roe*’s central holding, but replacing the trimester framework with viability).

<sup>69</sup>*Lawrence*, 539 U.S. at 573. The majority specifically avoided application of the Equal Protection Clause. The statute in *Lawrence* specifically outlawed gay sex (the one in *Bowers* outlawed sodomy between same sex couples and opposite sex ones). If, as the *Lawrence* Court realizes, it were to “hold the statute invalid under the Equal Protection Clause some

More importantly, in overturning *Bowers*, the Court also reconsiders the role of morality in rational review analysis. This is the second component of the *Lawrence* opinion. While morality has traditionally served as a legitimate purpose satisfying rational review, the Court in *Lawrence* delegitimizes this appeal to morality. Toward the end of the opinion, Justice Kennedy quotes Justice Stevens' dissent in *Bowers*, in which he countered the two holdings of the *Bowers* majority (that the right to privacy does not include the right to have gay sex and that legislation can be based on mere morality).<sup>70</sup> The *Lawrence* court explicitly relies on Stevens' words to invalidate the gay-specific sodomy statute:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice *as immoral is not a sufficient reason for upholding a law prohibiting the practice*; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.<sup>71</sup>

This is the crux of the *Lawrence* decision. It expands the right of privacy to include gay sex, but more importantly, it deems mere morality an insufficient basis for legislation. The state cannot legislate merely on grounds of morality. Claiming that homosexuality is wrong or an improper lifestyle is not enough. To be sure, the ruling ought to be interpreted as applying to all areas of life. It would be a mistake to interpret the decision as holding that morality could not serve as a basis for legislation *only* when it regulates private behavior.

By quoting the dissent, the *Lawrence* Court heralds in a new understanding of rational review. The opinion states that morality is "not [a] sufficient reason for upholding a law prohibiting the practice [of sodomy]."<sup>72</sup> It does not say that laws that interfere with fundamental rights such as the right to privacy cannot be based on morals. In fact, the Court states that the gay sodomy statute furthers no "legitimate state interest."<sup>73</sup> This is undoubtedly the language of rational review, which applies to all regulations. The majority could have said that the statute furthers no "compelling state interest," thereby leaving the door open for morality to justify non-fundamental-interest-violating laws, but it did not. It thus gave rational review new life.

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might question whether a prohibition would be valid if drawn differently, say, to prohibit conduct both between same-sex and different-sex participants." *Id.*

<sup>70</sup>*Bowers*, 478 U.S. at 216 (1986).

<sup>71</sup>*Lawrence*, 539 U.S. at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, at 216 (1986) (Stevens, J., dissenting)).

<sup>72</sup>*Id.* at 577.

<sup>73</sup>*Id.* at 578.

The second part of the *Lawrence* decision, rejecting morality as the only basis for legislation, may seem controversial. By eschewing tolerance and endorsing a regime where there is no standard of appropriate sexual activity, it lays the foundation for the ultimate rejection of the right to privacy. This reading is supported by Justice Scalia's perceptive dissent. Justice Scalia hones in on the real import of the decision when he writes that most "of the [majority] opinion has no relevance to its actual holding—that the Texas statute 'furthers no legitimate state interest which can justify' its application to petitioners under rational-basis review."<sup>74</sup> To be sure, Justice Scalia believes that the majority opinion renders suspect laws "against fornication, bigamy, adultery, adult incest, bestiality, and obscenity."<sup>75</sup> In so far as these laws are solely based on morality, may be right. However, and we will revisit this issue towards the end of the essay, as long as an appropriate justification can be given, such as the prevention of harm, they pass rational review. Even if Justice Scalia exaggerates the ramifications of the holding, I do agree with his understanding of it.

What Justice Scalia does not mention in his dissent is that the majority could have avoided the discussion of privacy altogether, simply by holding that laws cannot be based solely on morality. As discussed in Part II, once this is appreciated, there is no need for the problematic right to privacy. Why shield gay sex from state regulation (subject laws prohibiting it to strict scrutiny), if such laws cannot be based solely on morality? Certainly, the legislation in *Griswold* would have fallen if morality could not have been used to justify it. We would not have been burdened with the problematic right to privacy if the Court, in any of the modern sexual freedom cases, had simply proclaimed, as the *Lawrence* court finally did, that morals legislation is impermissible. Again, privacy is needed to protect the minority from such legislation. Once we reject the appeal to mere morality, privacy serves no function. It becomes obsolete.

It was a mere moral consideration, the belief that sex should be carried out within the bonds of marriage for procreative purposes, that lead to the *Griswold* regulation. Rather than seek to include such activities within the ambit of privacy by fighting to characterize the proscription against such behavior as violating due process, constitutional law need only deem as illegitimate legislation based solely on comprehensive moral or religious doctrines.

The *Lawrence* Court, then, took an unnecessary step in acknowledging that gay sex falls within the zone of privacy. It could have simply articulated the new standard for rational review. Why did the Court seek to do both things? Why not simply state that rational review fails if based solely on morality or on a certain conception of the good, and leave it at that? The Court's intention could have been one of strategy. Just five months after *Lawrence* was decided, the Massachusetts Supreme Judicial Court, under the Massachusetts Constitution, invalidated the state's refusal to grant marriage licenses to same-sex couples.<sup>76</sup> It was the marriage issue that the *Lawrence* majority was worried about. If the majority had not also expanded the right to privacy, if it had simply said we no longer need privacy and had

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<sup>74</sup>*Id.* at 586.

<sup>75</sup>*Id.* at 599.

<sup>76</sup>*Goodridge v. Dep't of Public Health*, 798 N.E. 2d 941 (2003).

invalidated the sodomy law under rational review, the ban on same-sex marriage would seem blatantly illegitimate. By choosing to additionally decide the issue on privacy grounds, the majority gives the *semblance* that the decision does not implicate behavior such as gay marriage, which occurs outside the bedroom. Perhaps the gesture to privacy protection is to assure us that a conventional regime of tolerance is still in place, allowing us to distinguish between gay sex and gay marriage. In other words, we may safely allow the former, but not the latter. The Court says as much when it disingenuously writes that this case “does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>77</sup>

Yet, if the majority’s purpose was truly to limit the holding to intimate activities, it did not have to further hold that morality serves no legitimate state interest. It did not need to give teeth to the otherwise permissive standard of rational review. The *Lawrence* Court did not have to go as far as it did in order to strike down sodomy laws. By its very reasoning it implicates much more. It goes farther than tolerance.

Admittedly, the language of privacy occupies a primary role in the Court’s opinion. For example, from the very start, Justice Kennedy writes that liberty protects us from intrusion in “private places.”<sup>78</sup> Later he writes that the due process clause protects “private conduct.”<sup>79</sup> To be sure, most of the opinion makes this conventional right to privacy argument. Conceding that, I suggest that the argument on privacy is a dog and pony show, or at the very least it should be read as such. Justice Kennedy spends almost seven of the eight pages of the *Lawrence* opinion demonstrating that gay sex implicates the right to privacy. Gay sex, like the use of contraceptives, falls within the zone of privacy and is generally beyond government regulation. Having put those at ease who fear the day when same-sex marriage is permitted, he spells out the end of morals legislation in the last page of the decision. It is this reasoning that opens the way for the rejection of privacy and the demise of legislation based solely on morality.

Not distracted by the show, Justice Scalia quite rightly points out the following:

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’? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of the Court. Many will hope that, as the Court comfortingly assures us, this is so.<sup>80</sup>

Scalia is absolutely correct that there is no justification for the ban on gay marriage, because this would invariably involve the now illegitimate appeal to certain conceptions of morality. Appeal to the sanctity of marriage would be insufficient

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<sup>77</sup>*Lawrence*, 539 U.S. at 578.

<sup>78</sup>*Id.* at 562.

<sup>79</sup>*Id.* at 564.

<sup>80</sup>*Id.* at 605 (citation omitted).

under rational review to justify the prohibition on same-sex marriage. In this way, with no right to privacy, laws against gay sex and same-sex marriage fail for the same reason. Although the majority could have been more forthright and candid with its decision, perhaps the gratuitous right to privacy argument was necessary for other justices to sign on to the opinion or to make the decision palatable to their audience. Maybe the justices, like most liberal theorists, failed to realize that a right to privacy is obsolete under a repudiation of morals legislation. This may very well be the most likely explanation. We can only speculate.

In any case, *Lawrence* ought to be interpreted as laying the foundation for the ultimate rejection of the right to privacy. Undoubtedly, as more cases arise under this new conception of rational review, I hope constitutional law scholars and litigants will realize that the right to privacy is no longer needed. *Lawrence* is groundbreaking, not because it holds that gay sex implicates the right to privacy.<sup>81</sup> Rather, the true power of *Lawrence* comes from its holding that no law can be based simply on certain conceptions of the good on grounds of mere morality.

Now Rubenfeld finds this reading of *Lawrence* unpersuasive.<sup>82</sup> Sharing some of Justice Scalia's concerns, Rubenfeld contends that if the opinion truly repudiates morals legislation, it calls into question laws against prostitution, bigamy, polygamy, obscenity, and even racial discrimination in the workplace. He maintains that legislating against these activities invariably requires appeal to morality, and thus finds them indistinguishable from sodomy. For example, he writes that laws against racial discrimination would "certainly be unconstitutional under a principle that the state may not legislate morality. Discrimination inflicts no force or fraud on anyone."<sup>83</sup> Thus, according to Rubenfeld, *Lawrence* cannot stand for the proposition that morals legislation is unconstitutional. If it did, it would have too far-reaching implications for the present state of constitutional law.

I find his argument too hasty and exaggerated. Sodomy laws can certainly be distinguished from prohibitions against prostitution, bigamy, polygamy, and obscenity. Feminists have argued that the latter four can lead to the domination and subjugation of women<sup>84</sup>—a claim that certainly cannot be made in regards to gay sex. Moreover, laws that prohibit discrimination in the workplace, such as Title VII, are not based on mere appeals to morality. Rather, and Rubenfeld seems to miss this point, such laws aim to remedy some notion of harm—here, the very real chance of not securing a job on account of one's unchosen minority status. For example, having an employer discriminate against you on account of your race undoubtedly harms you, leaving you without a job or a livelihood. Additionally, such discrimination reaffirms the very real structures of power and domination. It seems outrageous to claim that this kind of discrimination is a harmless activity like

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<sup>81</sup>The right to privacy argument should have carried the day in *Bowers*. The classic liberal mantra, "what you do in your bedroom is your business," should have worked in 1986.

<sup>82</sup>Rubenfeld, *supra* note 4, at 184-90.

<sup>83</sup>*Id.* at 189.

<sup>84</sup>See, e.g., CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); Susan Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* (Joshua Cohen & Mathew Howard eds., 1999).

consensual sodomy, invariably requiring appeal to mere morality to legislate against. Whereas sodomy laws regulate harmless behavior, laws like Title VII seem entirely inapposite as they prevent very real harm.

Moreover, in carefully analyzing the Court's review of alleged morals legislation, Suzanne Goldberg contends that even before *Lawrence*, morals legislation was already headed out the door. For example, in *Reynolds v. US*<sup>85</sup> and *Paris Adult Theatre I v. Slaton*,<sup>86</sup> the Court partially appealed to non-morality based (neutral) language in failing to provide constitutional protection for bigamy and obscenity, respectively.<sup>87</sup> The *Reynolds* decision, as Goldberg interestingly points out, never once uses the word "morality." In that decision the Court argues that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy,"<sup>88</sup> thereby looking to harm and not just morality. Similarly, in *Paris Adult Theatre I*, the Court noted that this case "goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful'."<sup>89</sup> This was not the language of *Bowers* where the majority's moral disapproval was deemed sufficient *on its own* to uphold sodomy laws. Instead, the *Paris Adult Theatre I* decision reasoned that "States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' right . . . to maintain a decent society."<sup>90</sup> Unsurprisingly, in upholding sodomy laws, *Bowers*, unlike *Reynolds* and *Paris Adult Theatre I*, did not rely on even a *partial* appeal to the prevention of harm, to neutral, non-moral rationales. Thus, repudiating morals legislation need not lead to Rubenfeld's and Scalia's slippery slope.

Still, reading *Lawrence* as overturning the sodomy statute on the basis of rational review alone—declaring morals legislation unconstitutional—may very well call into question the ban on gay marriage, and rightly so. After all, it is only this result that Justice Kennedy's opinion disingenuously tries to protect against. Under my reading, the ban on gay marriage must fall. Eventually, the right to privacy will become obsolete, carrying no constitutional purchase.

## V. CONCLUSION

A constitutional rejection of morals legislation renders the right to privacy obsolete. Thus, Constitutional law can finally reject the problematic right to privacy by simply refashioning rational review. As long as appeal to mere morality is not enough to pass rational review, such review will be robust enough to ensure our liberty. To be sure, repudiation of morals legislation has consequences that go beyond the confines of the bedroom. *Lawrence* has taken the bold step of ushering

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<sup>85</sup> 98 U.S. 145 (1878).

<sup>86</sup> 413 U.S. 49 (1973).

<sup>87</sup> Goldberg, *supra* note 4, at 1261-81.

<sup>88</sup> *Id.* at 1264 (quoting *Reynolds*, 98 U.S. at 166).

<sup>89</sup> *Id.* at 1269 (quoting *Paris Adult Theatre I*, 413 U.S. at 69).

<sup>90</sup> *Id.* at 1270 (quoting *Paris Adult Theatre I*, 413 U.S. at 69).

in a new constitutional regime in which the right to privacy is obsolete. Constitutional legal thought *sans* the right to privacy has just begun.