NOTES

SUBSTANTIVE DUE PROCESS AND A COMPARISON OF APPROACHES TO SEXUAL LIBERTY

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Over 150 years ago, Congress passed and the states ratified the Fourteenth Amendment, banning states from passing or enforcing laws based on unconstitutional classifications and protecting persons in the United States from adjudication without due process. For over one hundred years, however, courts and commentators have been fighting over the Fourteenth Amendment's Due Process Clause's controversial protections of substantive rights. The U.S. Supreme Court has applied inconsistent methodologies to these substantive due process claims, attempting to walk a tightrope between the Court's power to subjectively announce new rights as "fundamental" and the traditional role of the states' plenary police powers.

The Court's ability to announce new subjective rights has morphed and evolved over time—both in terms of the rights elevated, ranging from economic rights to contraception, child-rearing, and, most recently, marriage equality, and the methodology used to elevate those rights. Against this backdrop, there currently is a circuit split regarding the status of state laws criminalizing the sale of sex toys. According to some, these devices are an essential element of sexual liberty and their criminalization represents paradigmatic government overreach. Conversely, supporters of state laws criminalizing sex toys believe their regulation falls within the states' traditional authority to legislate questions of moral judgment.

This Note examines the tension between these two conceptions of sex toy regulation and criminalization and the broader ramifications for substantive due process methodology. Since choosing whether or not to use sex toys is a consequential decision implicating sexual autonomy and privacy, state laws that burden their use unconstitutionally step into the protected sphere of liberty that the Fourteenth Amendment protects.

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INTRODUCTION

Online retailers, brick-and-mortar shops, and other vendors sell a wide variety of sex toys to individuals and their partners that comport with their private desires and needs. However, no sale of sex toys will occur in Alabama where the state legislature has criminalized the sale of sexual devices, declaring them immoral.[1] Decisions regarding sexual privacy and expression are some of the most intimate and private that individuals and couples make.[2] In the United States, consenting adult couples are relatively free to engage in relationships as they see fit.[3] Further, while marriage equality for same-sex couples has existed for a short period since 2015, the law now legally protects the LGBTQIA+ community's sexual liberty[4] and grants it equal status.[5] At the same time, states and the federal government

1. ALA. CODE § 13A-12-200.2 (2020) (banning the sale of devices that stimulate human sexual organs).

2. *See* Donald H. Herman, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 912 (2005).

3. *See* Aziza Ahmed, *Adjudicating Risk: AIDS, Crime, and Culpability*, 2016 WIS. L. REV. 627, 630 (discussing a variety of laws that criminalize sexual activity or nondisclosure of status by HIV-positive persons). These laws exist with other laws that criminalize some forms of consensual sex. However, this Note does not address those issues; rather, it focuses on consenting adults' (who do not have HIV or a similar condition implicating other laws) choices to use sex toys.

4. *See infra* Part I.E (discussing Obergefell v. Hodges, 135 S. Ct. 2584 (2015), and the legalization of same-sex marriage).

5. *See infra* Part I.E.

regulate many aspects of our private lives.[6] For instance, states regulate marriage and divorce,[7] nearly all states have laws banning polygamy and[8] bestiality[9] and proscribing sex before the age of consent,[10] and many states prohibit marriage between first cousins.[11]

These regulations are commonly justified as protecting individuals from harm and coercion. However, many laws prohibiting private sexual conduct are justified solely under a pretense of "morality"—that is, a state using its criminal code to advance its own conception of morality by invading private decisions and criminalizing private, sexual conduct. This includes laws criminalizing the sale or possession of sex toys.

Laws targeting private, sexual decisions are primarily state driven, although there is tension between state and federal powers. Principles of federalism dictate that state governments should serve as the primary regulators of their citizens through the exercise of their police powers. At the same time, the Fourteenth Amendment incorporates the Bill of Rights against the states, requiring the equal protection of the laws and guaranteeing due process, thus restricting the permissible scope of state action.[12]

While scholars and commentators have considered the impact of sex toy regulations,[13] the issue has not received as much attention in scholarship or from the media as it may deserve. But the impact of regulations banning sex toys is far-reaching and the devices are hardly taboo to those who need them or would like to include them as part of their sexual experiences. Legal proscriptions against their use overtly limit and criminalize consenting adults' sexual liberty; they limit certain couples, particularly those with

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6. This Note explores the concept of morality as a justification for laws. Since the Mayflower Compact, lawmakers have justified many laws on morality grounds. *See* Sally Turner, *The Health Benefits of Sex Toys*, PATIENT (Sept. 27, 2018), https://patient.info/news-and-features/sex-toys-health-benefits-for-women [https://perma.cc/37UD-EAW5].

7. *See* Vivian E. Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 38 (2006). *See generally* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497 (2000).

8. *See* Peter Nicolas, *Fundamental Rights in a Post*-Obergefell *World*, 27 YALE J.L. & FEMINISM 331, 342 (2016).

9. *See* Julie Carr Smyth, *Bestiality Crimes Targeted by New State Laws, FBI Reporting*, SEATTLE TIMES (Apr. 1, 2017), https://www.seattletimes.com/nation-world/bestiality-crimes-targeted-by-new-state-laws-fbi-reporting [https://perma.cc/6EJJ-ZL5Z] (noting the general criminal prohibition on bestiality).

10. *See* Eugene Volokh, *Statutory Rape Laws and Age of Consent in the U.S.*, WASH. POST (May 1, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s [https://perma.cc/P9PU-M3U6] (surveying age of consent laws by state).

11. *See* Sheri Stritof, *What Are the Cousin Marriage Laws in Your State?*, THE SPRUCE (Jan. 1, 2019), https://www.thespruce.com/cousin-marriage-laws-listed-by-state-2300731 [https://perma.cc/4D2G-UBVC] (finding that fourteen states outright ban marriage between close cousins, while most other states allow it only under certain circumstances).

12. *See infra* note 194 and accompanying text.

13. *See, e.g.*, Curtis Waldo, *Toys Are Us: Sex Toys, Substantive Due Process, and the American Way*, 18 COLUM. J. GENDER & L. 807 (2011).

communicable diseases such as HIV, from practicing safe sex.[14] However, the status of sex toy regulation, and morality as the sole justification for invading liberty, has been questioned by modern substantive due process cases arising from the privacy and LGBTQIA+ rights litigation of the 1980s through the 2010s. Moreover, the unique barriers to intimacy that many sex toy users face provide a compelling argument that these devices are a necessary expression of liberty, privacy, autonomy, and self-definition that the government cannot invade, even under a rational basis test.

While the U.S. Supreme Court has yet to weigh in on the constitutionality of regulating sex toys, there is a split on this topic between the Fifth and Eleventh Circuits.[15] In *Reliable Consultants, Inc. v. Earle*,[16] the Fifth Circuit held that, in light of *Lawrence v. Texas*,[17] Texas had violated its citizens' substantive due process rights to intimacy and sexual autonomy by prohibiting the sale of sex toys.[18] Conversely, in *Williams v. Attorney General*,[19] the Eleventh Circuit found that Alabama's ban on the sale and marketing of sex toys was a permissible exercise of its police powers and inherent state sovereignty because neither *Lawrence* nor its predecessors or progeny ever created a general substantive due process right to sex or intimacy, let alone a specific right to use sex toys. The *Williams* court—instead of relying on *Lawrence*—relied on *Washington v. Glucksberg*,[20] finding that, for a right to be protected by substantive due process, it must be deeply rooted in the nation's history and tradition, a narrower standard.[21]

This Note examines the circuit split described above, the status of state regulation of sex toys more generally, and the broader ramifications for substantive due process methodology in anticipation of how the Supreme Court might rule. Further, this Note examines the development of sexual

14. *See HIV Prevention: Low/No Risk Sexual Practices*, AFAO, https://www.afao.org.au/about-hiv/hiv-prevention/low-no-risk-sexual-practices [https://perma.cc/4KTG-NWQC] (last visited June 22, 2020).

15. *Compare* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 742–43 (5th Cir. 2008) (finding that Texas's ban on sex toys violates the Due Process Clause), *with* Williams v. Att'y Gen., 378 F.3d 1232, 1250 (11th Cir. 2004) (finding Alabama's prohibition on sex toy sales constitutional under the Due Process Clause).

16. 517 F.3d 738 (5th Cir. 2008) (holding state and local laws outlawing consensual, private, and intimate same-sex sexual contact unconstitutional under the Fourteenth Amendment).

17. 539 U.S. 558 (2003). In *Lawrence*, the Court struck down a Texas statute that criminalized private sexual conduct between consenting LGBTQIA+ couples. *Id.* at 578. Importantly, the Court relied on the Due Process Clause of the Fourteenth Amendment to find that the Texas statute invaded a protected liberty interest, though the Court did not announce a substantive due process right to sex. *See id.*

18. *See Reliable Consultants, Inc.*, 517 F.3d at 744.

19. 378 F.3d 1232 (11th Cir. 2004).

20. 521 U.S. 702 (1997). In *Glucksberg*, the Court rejected the petitioner's claim that the Due Process Clause encompasses a right to physician-assisted suicide. *Id.* at 727–28. Of methodological significance, the Court found that the Fourteenth Amendment only protects fundamental rights that are "deeply rooted" in the nation's history and tradition. *See id.* at 720–21.

21. *Williams*, 378 F.3d at 1239.

rights—and the right to use sex toys—through the lens of *Romer v. Evans*,[22] *Lawrence*, and *Obergefell v. Hodges*.[23] Specifically, this Note looks at the liberty interest asserted by users of sex toys and retailers who assert the rights of individuals, the due process right implicated by state regulation of sex toys, the broad scope of liberty promised by the Fourteenth Amendment, and the current methodology for substantive due process claims.[24]

Part I.A of this Note explores how sex toys are defined under the law, details how they have been criminalized, and illuminates their practical necessity. Part I.B outlines the historical background of the Fourteenth Amendment's Due Process Clause and the development of the substantive due process doctrine. Part I.C analyzes substantive due process methodology, looking at a number of tests that have been used over the past one hundred years. Part I.D discusses the history of morals legislation[25] and morality as a justification for restricting individual liberty, offering background on Supreme Court jurisprudence prior to *Reliable Consultants, Inc.* and *Williams*. Part I.E explains how *Obergefell*, which the Court decided after *Reliable Consultants, Inc.* and *Williams*, altered morals jurisprudence and may cast the circuit split in a new light.[26]

Part II discusses the split between the Fifth and Eleventh Circuits and the different ways in which these courts have applied substantive due process methodology. The Fifth Circuit found that laws criminalizing sex toys burden the right to sexual privacy, which *Lawrence* classified as a protected liberty interest.[27] Conversely, the Eleventh Circuit found that, because *Lawrence* neither explicitly recognized a fundamental right to sexual privacy nor outwardly rejected morality as a justification, the state law only needed to be rationally related to the state's morality interest.[28]

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22. 517 U.S. 620 (1996) (holding invalid under the Equal Protection Clause a provision of Colorado's constitution that prohibited local communities from codifying protections for LGBTQIA+ individuals beyond those offered at the state level).

23. 135 S. Ct. 2584 (2015) (finding that under the Due Process Clause—and supported by the Equal Protection Clause—there is a fundamental right to marriage that same-sex couples cannot be deprived of).

24. As this Note explains, the Court has approached substantive due process questions with different and oftentimes competing methodologies. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (discussing the importance of autonomy and self-determination to the liberty inquiry). *Compare Lawrence v. Texas*, 539 U.S. 558 (2003) (finding that substantive due process is guided by history and tradition but informed by the Equal Protection Clause, societal changes, democratic consensus, and reasoned judgment), *with Glucksberg*, 521 U.S. 702 (holding that any substantive due process right must be deeply rooted in the nation's history and tradition to be considered "fundamental"). *But see* Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (subscribing to the strict history and tradition test).

25. While many U.S. laws, including criminal laws, have roots in basic Western and Judeo-Christian notions of morality, this Note focuses on criminal laws targeting activities that, on their own, neither present a harm or coercion risk to any group nor are dangerous as used by an individual or consenting couples.

26. *Obergefell* was decided in 2015, and the Court's application of equal protection analysis to the substantive due process question may be dispositive to the sex toy cases and to future substantive due process litigation. *See infra* Part I.E.

27. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008).

28. Williams v. Att'y Gen., 378 F.3d 1232, 1236 (11th Cir. 2004).

Part III examines what each of these two holdings would mean for broader substantive due process jurisprudence if adopted by the Supreme Court. Part III.A examines what the Fifth Circuit's interpretation of substantive due process methodology would mean for a broader right of sexual privacy. Part III.B examines how the Eleventh Circuit's deference to state police powers and use of history as a guidepost would suggest a narrower liberty interest and retain the state's traditional role of regulating morals.

Finally, Part IV suggests that, in light of *Obergefell*, *Williams* misidentified the liberty interest asserted and applied an overly narrow test for substantive due process. Specifically, this Note argues that state regulation of sex toys is a paradigmatic government overreach into the personal liberties of its citizens. From there, this Note concludes that the correct reading of *Lawrence* and *Obergefell* establishes that the proper analysis involves a heightened form of rational basis review for state action invading sexual autonomy, which can only be overcome by a showing of harm or coercion.

I. THE HISTORY OF SUBSTANTIVE DUE PROCESS, SEX TOY REGULATION, AND STATE LAWS GROUNDED IN MORALITY

Since its ratification, courts have interpreted the Fourteenth Amendment's Due Process Clause to protect more than just fair procedure in the adjudication of claims.[29] Indeed, the Fourteenth Amendment includes a substantive component, preventing the government from regulating certain aspects of life or activities that are deemed fundamental to the concept of liberty.[30] At the same time, sex toys have also existed for hundreds of years and have played a role in the sexual expression of individuals and couples.[31] Part I.A discusses sex toys and their practical uses. Part I.B provides background about substantive due process. Part I.C then discusses the concept of morals as a justification for state policies restricting liberty. Finally, Part I.D introduces *Obergefell*, a significant case for the development of substantive due process that is possibly dispositive to the resolution of this circuit split.

A. The Practical Necessity of Sex Toys and the Statutes at Issue

Sex toys are, in a legal sense, devices whose primary purpose is the stimulation of human sexual organs.[32] This includes manual and electronic

29. *See* David E. Bernstein, *The History of "Substantive" Due Process: It's Complicated*, 95 TEX. L. REV. SEE ALSO 1, 2–9 (2016) (identifying that substantive due process doctrine originated in the 1870s but recognizing that some scholars only date modern substantive due process doctrine back to the early twentieth century).

30. *See id.* at 2.

31. *See* Katie Heaney, *The 30,000-Year History of the Sex Toy*, THE CUT (Nov. 17, 2017), https://www.thecut.com/2017/11/the-30-000-year-history-of-the-sex-toy.html [https://perma.cc/8ZAK-2T2B].

32. *See* ALA. CODE § 13A-12-200.2 (2020) (defining a sex toy as a device for "the stimulation of human genital organs"); *see also* TEX. PENAL CODE ANN. § 43.21(a)(7) (West 2020), *invalidated by* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008).

devices that massage human genitals and prosthetic devices that simulate male and female sexual organs.[33] Sex toys serve a number of goals and interests for both consenting adults in intimate relationships and individuals outside of relationships.[34] First, sex toys enable intimacy for adults who are otherwise physically unable to replicate the devices' effects.[35] Second, in relationships where one partner is unable to perform sexually, sex toys allow the individual to provide sexual gratification to the other partner.[36] Third, for those with communicable diseases such as HIV, sex toys allow for safe sex and preserve dignity in intimate relationships by facilitating safe sexual intercourse without the stigma or risk of transmitting disease.[37] Fourth, sex toys are therapeutic for those suffering from certain sexual limitations, such as erectile dysfunction.[38] Finally, sex toys allow asexual adults, individuals without sexual partners, and others who choose to abstain from sex for any reason to find intimate gratification.[39]

Opposition to sex toys largely derives from taboos associated with their use and the view that they promote sexual promiscuity.[40] Sex toys are not necessary for procreation, which leads many religious and socially conservative groups to oppose their use as part of a general opposition to sexual expression that is detached from procreation.[41] In addition, the use of sex toys is particularly prevalent among two groups that have historically been politically disadvantaged: people with communicable sexually transmitted diseases and LGBTQIA+ couples.[42] Further, some states, including Alabama, contend that allowing the retail sale of sex toys is equivalent to selling sex, the regulation of which is a recognized valid interest of state governments.[43] However, sex toys do not present the same societal risks that prostitution,[44] underage sex,[45] or polygamy[46] do. For one, they are

33. *See* Marissa Gainsburg et al., *The 24 Best Sex Toys for Couples in 2020*, WOMEN'S HEALTH MAG. (Oct. 17, 2019), https://www.womenshealthmag.com/sex-and-love/g19984127/best-couples-sex-toys/ [https://perma.cc/F3BB-WSVA].

34. *Reliable Consultants, Inc.*, 517 F.3d at 742–43 (discussing the recognized uses of sex toys).

35. *See* Turner, *supra* note 6.

36. *See Reliable Consultants, Inc.*, 517 F.3d at 742.

37. *Id.*

38. *Id.*

39. *See* State v. Brenan, 772 So. 2d 64, 72–76 (La. 2000) (holding that Louisiana's obscene device statute fails rational basis review).

40. *See generally* Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326 (2006).

41. *See* GEOFFREY R. STONE, SEX AND THE CONSTITUTION 201–02 (2017) (discussing the severe penalties of the Comstock Act).

42. *See* Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 153–59 (2014) (discussing the history of sex toy legislation and its aims).

43. *See* Brief of Appellant William H. Pryor Jr. at 16–17, Williams v. Att'y Gen., 378 F.3d 1232 (11th Cir. 2004) (No. 02-16135-DD).

44. *See* Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 880 F.3d 450, 456 (9th Cir. 2018) (finding that substantive due process protects the choices of intimate couples in relationships and not sex per se, including prostitution).

45. *See id.*

46. *Id.*

not coercive and are designed for and marketed to consenting adults. Further, by their design, they do not transmit diseases and are not a risk to public health. Therefore, the use of sexual devices is fundamentally victimless, distinguishing it from other recognized government interests.[47] Contrast this with other pleasure-inducing, yet possibly dangerous, devices such as electronic cigarettes, which present the government with a bona fide regulatory interest.[48]

Proponents and opponents of sex toy use both analogize the devices to different sex-related products that have already been the subject of constitutional challenges. For supporters, sex toys are like contraceptives in that, even though they are commercial in nature, they are part of the liberty right of married and unmarried persons to engage in sexual activities detached from procreation. For detractors, sex toys are more akin to obscene materials, essentially constituting commercial sex that deserves no heightened constitutional status.[49]

Alabama and Texas both established, under similar pretenses, criminal penalties for the sale and distribution of sex toys.[50] This Note focuses on state laws that ban the sale or distribution of sex toys outright and impose criminal penalties for the activity of selling on a commercial scale.

Chapter 12 of Alabama's criminal code prohibits "Offenses Against Public Health and Morals."[51] This chapter includes the 1998 Anti-Obscenity Enforcement Act[52] ("Alabama Obscenity Act"), which, in relevant part, makes it a crime for "any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs."[53] The law provides harsh penalties for violators who sell or distribute sex toys: first-time offenders face up to a $10,000 fine and one year in jail or one year of hard labor, while repeat offenders face up to ten years in prison and, for corporations or business entities, $50,000 in fines.[54]

47. *But see* Sarah Sloat, *America Has an Extremely Disturbing Sex Toy Problem*, INVERSE (Sept. 14, 2017), https://www.inverse.com/article/30641-sex-toys-testing-regulations [https://perma.cc/9LQZ-MWTP] (noting that sex toys can be dangerous if not produced or sold under sanitary conditions). This Note does not assert that the state has no interest in regulating such devices but rather that criminalization or an outright ban represents an inappropriate overreach.

48. *See* Karen Zraick & Jacey Fortin, *Is It Time to Quit Vaping?*, N.Y. TIMES (Sept. 22, 2019), https://www.nytimes.com/2019/09/19/health/is-vaping-safe.html [https://perma.cc/7F8U-UR3X].

49. *See* Jess Joho, *We're in a Sex Toy Revolution. Here's How You Can Join*, MASHABLE (Nov. 4, 2019), https://mashable.com/article/sex-toy-revolution-beginners-guide [https://perma.cc/F6HK-TZ3U].

50. *See supra* note 32.

51. ALA. CODE § 13A-12-200.2 (2020).

52. *Id.*

53. *Id.*

54. A second violation of the Act is a Class C felony, *id.*, which carries a sentence of "not more than 10 years or less than 1 year and 1 day." *Id.* § 13A-5-6; *see also* Williams v. Att'y Gen., 378 F.3d 1232, 1233–34 (11th Cir. 2004).

The Alabama Obscenity Act was passed at an active moment for morals legislation, and challenges thereto, in the United States during the so-called "culture wars" of the 1980s and 1990s.[55] Congress had passed the Defense of Marriage Act[56] (DOMA) in 1996, which defined a marriage (for purposes of federal benefits) as a union between one man and one woman.[57] DOMA, which was later ruled unconstitutional under the Equal Protection Clause,[58] had been primarily justified under two government interests: (1) encouraging procreation and (2) "advanc[ing] the government's interest in defending traditional notions of morality."[59] Indeed, the House of Representatives's committee report accompanying DOMA said: "This judgement entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[60]

The Alabama Obscenity Act's drafters employed a similar justification. Efforts to pass the Act began with Alabama State Senator Tom Butler, whose primary interest was banning nude dancing.[61] The inclusion of sex toys in the final bill, which did not originally mention the devices, was the result of a concerted lobbying effort.[62] One of those lobbyists, Dan Ireland, former director of the Alabama Citizens Action Program, a conservative advocacy organization, suggested that sex toys were a greater public threat than firearms and articulated the urgency of regulating sex toys by proclaiming that while "there are moral ways and immoral ways to use a firearm . . . there is no moral way to use one of those devices."[63]

Passed in 1973, Texas Penal Code sections 43.21 and 43.22 criminalized the distribution, marketing, and advertising of obscene devices.[64] The statute defined an obscene device as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs."[65] While the Texas statute was eventually overturned, it too had been enacted to assert a state conception of morality.[66] The Texas attorney general

55. Jeffrey Aaron Snyder, *America Will Never Move Beyond the Culture Wars*, THE NEW REPUBLIC (Apr. 23, 2015), https://newrepublic.com/article/121627/war-soul-america-history-culture-wars-review [https://perma.cc/XQ7K-GUFP].

56. Pub. L. No. 104-199, 110 Stat. 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

57. *See* 1 U.S.C. § 7, *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

58. *See Windsor*, 570 U.S. at 769.

59. H.R. REP. NO. 104-664, at 15 (1996).

60. *Id.* at 15–16.

61. *See Sex Toy Ban May Be Enforced in Alabama*, UNITED PRESS INT'L (Oct. 2, 2007, 12:05 PM), https://www.upi.com/Top_News/2007/10/02/Sex-toy-ban-may-be-enforced-in-Alabama/90051191341143 [https://perma.cc/M8D8-XK4V].

62. *See* Jacob M. Appel, *Alabama's Bad Vibrations*, HUFFINGTON POST (Sept. 25, 2009), https://www.huffpost.com/entry/alabamas-bad-vibrations_b_300491 [https://perma.cc/Q9NH-NVHY].

63. *Id.*

64. *See* TEX. PENAL CODE ANN. § 43.21–43.22 (West 2020), *invalidated by* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008).

65. *Id.* § 43.21.

66. *See Reliable Consultants, Inc.*, 517 F.3d at 74.

noted that the law "is based on several police-power interests in protecting public morals—discouraging prurient interests in sexual gratification, combating the commercial sale of sex, and protecting minors."[67] However, these interests are not clearly served by the criminalization of sex toys, which inherently involve no coercive element.

The statute was first challenged under the Fourteenth Amendment in a Texas state court in 1985.[68] There, an individual was arrested, charged, and convicted of possession of an obscene device with intent to distribute.[69] The defendant received a $750 fine and three days in jail.[70] The court looked to the contraception and abortion cases of the 1960s and 1970s before finding that the statute did not violate any liberty interest under the Fourteenth Amendment or any similar provision of the Texas Constitution.[71] First, the court interpreted the right of privacy, articulated in *Roe v. Wade*[72] and *Griswold v. Connecticut*,[73] as applicable strictly to decisions of procreation and child-rearing[74] and held that the right protected "individual decisions in matters of childbearing from unjustified intrusion."[75] Finally, the court found that the rationale underlying the state's exercise of police power—order and morality—justified the state's criminalization of sex toys.[76] This justification fits within the traditional construction of the state's police powers and the traditionalist conception of a limited judicial role in rights declaration.

B. The History of the Fourteenth Amendment and Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[77] Since at least 1887, courts have found the word "liberty" to carry with it a substantive component that protects affirmative rights.[78] While substantive due process is one of the most controversial areas of constitutional law, with scholars differing on its exact meaning and history, the Supreme Court began to recognize certain unenumerated substantive

67. *See* Texas Attorney General Greg Abbott's Appellee's Brief at 7–8, *Reliable Consultants, Inc.*, 517 F.3d 738 (Nos. 06-51067 & 06-51104).
68. Yorko v. State, 690 S.W.2d 260 (Tex. Crim. App. 1985).
69. *Id.* at 261.
70. *Id.*
71. *Id.* at 262.
72. 410 U.S. 113 (1973) (finding that the Fourteenth Amendment protects a fundamental right to abortion).
73. 318 U.S. 479 (1965) (holding that married couples have a fundamental right to access contraception because the penumbras of the Constitution protect marital privacy); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the contraception right to unmarried couples under the Equal Protection Clause).
74. *See Yorko*, 690 S.W.2d at 262.
75. *Id.* at 264.
76. *Id.*
77. U.S. CONST. amend. XIV, § 1.
78. *See* Mugler v. Kansas, 123 U.S. 623, 630–31 (1887).

rights protected by the Due Process Clause beginning in the 1890s.[79] In these early cases, heard into the beginning of the twentieth century, the Court recognized that the Due Process Clause protected certain natural rights—including, most notably, freedom of contract.[80] While the modern doctrine has changed, these early cases set the foundation for judges using the Fourteenth Amendment to elevate unenumerated substantive rights to constitutional status. Importantly, judges have not given meaning to the notion of liberty contained in the Fourteenth Amendment merely because they feel they "owe" something to the constitutional text.[81] Rather, judges bring broad notions of liberty to the text based on their own conceptions of rights, informed by social norms, history, the common law, and beliefs about personal autonomy from government overreach.[82]

While relegated to the anticanon of constitutional law, *Lochner v. New York*[83] is unquestionably the building block of modern substantive due process.[84] The distinctive feature of *Lochner*'s essential holding—that New York could not impose certain wage and hour labor regulations because of a fundamental right to freedom of contract[85]—was that the Court focused on the liberty interest presented by the party bringing a claim against an allegedly intrusive government act.[86] That basic methodology remains a cornerstone of substantive due process cases. However, *Lochner*'s oft-criticized jurisprudential policy move was to exclusively find economic liberty interests, such as contract and property, with no regard for constitutional text or history.[87] To many, and notably Justice Oliver Wendall Holmes Jr. in his dissent, *Lochner* represented an activist Court reading an economic philosophy into the Constitution without any textual or historical support.[88] Just as *Lochner*'s basic weighing of the government's interest in regulation against the liberty interest endures in today's substantive due process doctrine, so too do Holmes's criticisms of judicial policymaking. In other words, throughout the history of substantive due process, there is a familiar dichotomy between deploying a balancing test to announce new rights or refraining from such drastic action unless there is clear textual and historical support.

However, while the Court began to move away from, and would eventually abandon, a fundamental right to contract, it also began retooling the doctrine

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79. *Compare* Joshua D. Hawley, *Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275 (2015), *with* David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 DUKE L. & CONTEMP. PROBS. 43 (2015).

80. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 57–58 (1905).

81. *See* Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965).

82. *See* Bernstein & Somin, *supra* note 79, at 47.

83. 198 U.S. 45 (1905).

84. *See* David E. Bernstein, Bolling*, Equal Protection, Due Process, and* Lochner*phobia*, 93 GEO. L.J. 1253, 1274 (2005).

85. *See Lochner*, 198 U.S. at 57.

86. *See id.* at 53; David E. Bernstein, Lochner's Legacy*'s Legacy*, 82 TEX. L. REV. 1, 10 (2003).

87. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 879 (1987).

88. *See Lochner*, 198 U.S. at 67.

to focus on the rights of individuals and their privacy against government overreach. In *Meyer v. Nebraska*,[89] the Court held that the Due Process Clause protects not just economic rights but the rights "to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[90] *Meyer*, which concerned a challenge to a Nebraska law that restricted foreign language education, introduced another component essential to modern substantive due process doctrine: it found that even though ensuring English proficiency was a laudable policy goal, the means used to accomplish that end were unconstitutional because of the liberty interest at stake.[91] In other words, the Court expanded the doctrine to scrutinize the policy tools used by states to accomplish facially constitutional ends when the legislation in question involved a protected liberty interest. This move, while decried as an infringement on state sovereignty and federalism,[92] is important for plaintiffs seeking to assert a liberty interest against the government because it allows the court to move beyond the facial text of a policy to examine the motivation of the policy makers.[93]

While the Court repudiated the doctrine in the New Deal era and substantive due process was absent from the Court's constitutional decisions for some time, the doctrine returned for good in 1965.[94] In *Griswold*, the Court found an unenumerated right to privacy via the Due Process Clause.[95] While Justice William O. Douglas, writing for the majority, claimed that he had merely identified this right within the "penumbras" of the Bill of Rights and had not created a new substantive right altogether, modern scholars agree in near unanimity that *Griswold* is a substantive due process case.[96]

Over the next several decades, the Court began to recognize other protected liberty interests, including abortion[97] and interracial marriage.[98] In these early cases, the Court followed a strict formula: it would either find a right fundamental and would subject it to strict scrutiny, or it would find that a right was not fundamental and would apply a highly deferential rational basis test.[99] However, this test is far from the only one the Court has used,

89. 262 U.S. 390 (1923).
90. *Id.* at 399.
91. *See id.* at 398.
92. *See* Lide E. Paterno, Note, *Federalism, Due Process, and Equal Protection: Stereoscopic Synergy in* Bond *and* Windsor, 100 VA. L. REV. 1819, 1824 (2014) (noting that the concepts of federalism—the division of power between state and federal governments—and fundamental rights protection can appear to be competing).
93. *See* Timothy Sandefur, *Why Substantive Due Process Makes Sense*, CATO UNBOUND (Feb. 6, 2012), https://www.cato-unbound.org/2012/02/06/timothy-sandefur/why-substantive-due-process-makes-sense [https://perma.cc/842J-WVGW] (describing why and how plaintiffs bring substantive due process claims).
94. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
95. *Id.* at 481–82.
96. *See* Bernstein & Somin, *supra* note 79, at 58.
97. *See* Roe v. Wade, 410 U.S. 113 (1973).
98. *See* Loving v. Virginia, 388 U.S. 1 (1967).
99. *See* Sunstein, *supra* note 87, at 877–78.

and, accordingly, the Court has struggled to articulate a bright-line rule for the circuits.[100]

Several elements of *Lochner* and the early substantive due process cases have vanished, probably for good. For one, the Court no longer recognizes economic rights as fundamental, though there has been a *Lochner*-revision movement.[101] For another, in an effort to bolster the Court's legitimacy and demonstrate judicial restraint, the modern Court has trended towards grounding substantive due process decisions with a textual hook, although it has continued to depart from the methodology on some major cases, including *Obergefell*.[102] However, the pre–New Deal Court and the modern Court still present a similar dichotomy: on the one hand, the Court seems to be elevating certain classes of rights by deploying a balancing test and, for the rest of the asserted liberty interests, using a formalistic approach.[103] Finally, this test, when tied to history and tradition, attempts to be objective but can become unbound from objectivity when new rights are elevated without any textual hook or historical significance.

C. Substantive Due Process Methodology

The Court has deployed a number of tests when evaluating substantive due process claims and has utilized different methodologies to determine whether a fundamental right or protected liberty interest exists. In exploring these methodologies, this section first looks at *Roe v. Wade* and its progeny as the building blocks of the modern personal liberties cases. Next, it briefly discusses conservative pushback on *Roe*, specifically against its purported lack of constitutional grounding for elevating unenumerated rights, and the implications for the democratic process and the Court's legitimacy. From there, this section introduces the fact that there are now two distinct forms of substantive due process. For decisions implicating sexual autonomy and privacy, the Court uses a harms test while applying an advanced form of rational basis, also known as rational basis with bite. At the same time, the Court has embraced a test that frames the right narrowly and only vindicates it if the liberty interest is supported by history and tradition.[104] This section describes the importance of how the Court frames the right at issue and the different considerations and factors the Court weighs, including the asserted state interest relative to the states' powers.

Finally, this section discusses the particulars of Justice Anthony Kennedy's approach to substantive due process in the LGBTQIA+ rights cases and what it means for state regulations and legislation predicated on

100. *See supra* note 24 and accompanying text (discussing the different tests for substantive due process).

101. *See supra* note 24 and accompanying text; *see also* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 103 (1995) (contending that *Lochner* was not about economic rights but an opposition to class legislation or special interest legislation).

102. *See* GILLMAN, *supra* note 101, at 103.

103. *See* Sunstein, *supra* note 87, at 880.

104. *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997).

bare morals. This section discusses how the Court dealt with the asserted state interest and what, if at all, it means to the future of the doctrine.

One of the substantive due process doctrine's defining and controversial characteristics, which has significant implications for the regulation of sex toys, is the confusing and inconsistent way the Court has applied it. This section tracks the development of the methodology and identifies the different jurisprudential policy concerns that judges look to when presented with a liberty claim.

By the time the Supreme Court heard *Roe*, the Court had clearly repudiated *Lochner* and lived in fear of returning to its approach to substantive due process.[105] At the same time, the Court sought a way to insulate unenumerated substantive rights from government overreach.[106] However, the doctrine was complicated and unclear.

Griswold set the groundwork for finding substantive rights to privacy and intimacy.[107] In *Griswold*, the Court considered Connecticut's criminal prohibition on contraceptives.[108] The Court defined the liberty interest in *Griswold* as the "intimate relation of husband and wife and their physician's role in one aspect of that relation."[109] Although the Court decided the case using the so-called "penumbral analysis," which vindicated liberty rights based on their relationship to the Bill of Rights, *Griswold* embraced the process of finding constitutionally protected liberty interests using the Fourteenth Amendment.[110] Two other aspects of the *Griswold* holding are significant: First, physicians and birth control providers had standing to assert the liberty interests of individual users of the products.[111] Second, the recognized right to marry carried with it other liberty interests, such as privacy and intimacy, detached from procreation.[112] The clearest articulation of substantive due process methodology came in a concurrence by Justice John Marshall Harlan. Building on his dissent in *Palko v. Connecticut*,[113] Justice Harlan contended that incorporation did not limit the Due Process Clause to the penumbras of the Bill of Rights and that the question posed must be whether the right asserted is one "implicit in the concept of ordered liberty."[114] While this is the most famous line of Harlan's concurrence, he also responded to Justices Hugo Black and Potter Stewart, who felt that the penumbral analysis provided the judicial restraint so lacking in the *Lochner* era.[115] To them he said:

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105. *See* Bernstein, *supra* note 84, at 1256.
106. *See* Hawley, *supra* note 79, at 284.
107. Griswold v. Connecticut, 381 U.S. 479, 480 (1965).
108. *Id.* at 480.
109. *Id.* at 482.
110. *Id.* at 484.
111. *Id.* at 480–81.
112. *Id.* at 485.
113. 302 U.S. 319 (1937) (finding that the Due Process Clause incorporated the Fifth Amendment against the states).
114. *See Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (quoting *Palko*, 302 U.S. at 325).
115. *Id.*

> Judicial self-restraint will not, I suggest, be brought about in the "due process area" by the historically unfounded incorporation formula long advanced by my Brother[s] . . . . It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teaching of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in preserving American freedoms.[116]

Justice Harlan's words have proven to be immensely influential for the Court, regardless of ideology. For those who have taken an expansive view of substantive due process, Justice Harlan's broad conceptions of liberty touch *Roe* and were explicitly at work years later[117] when the Court sustained the abortion right in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[118] For those who take a narrower view of substantive due process, history and tradition are the starting and ending points for finding a substantive due process right, and principles of federalism are crucial to democratic order.[119] Further, even though the majority opinion is grounded in the penumbral analysis, the Court states that the privacy described in *Griswold* is promised by the Fourteenth Amendment's Due Process Clause.[120]

After *Griswold*, Justice Harry Blackmun expanded the substantive due process doctrine with his majority opinion in *Roe*, in which he clarified that the pertinent privacy interest—the right to an abortion—encompassed more than just the right to be left alone.[121] Justice Blackmun said the right of privacy under the Fourteenth Amendment was about the right to be free from government influence when making life-changing moral decisions.[122] The private place *Roe* protected was not the bedroom or the home but the moral sphere where one has a right to make choices and act out those choices without state interference.[123]

Roe's implications, doctrinally and politically, were far-reaching at the time, and U.S. political culture continues to battle over the result.[124] While

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116. *See id.* at 501.

117. *See* Roe v. Wade, 410 U.S. 113, 169 (1973) (Stewart, J., concurring in the judgment) (quoting Justice Harlan for the proposition that the definition of "liberty" is necessarily ambiguous); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848–50 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (citing Poe v. Ullman, 497, 542 (1961) (Harlan, J., dissenting)).

118. 505 U.S. 833 (1992).

119. *See* McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.").

120. *See Griswold*, 381 U.S. at 500.

121. *See Roe*, 410 U.S. at 169.

122. *See id.* at 140.

123. *Id.*

124. *See* Sabrina Tavernise et al., Roe v. Wade, *Part 2: The Culture Wars*, N.Y. TIMES (July 24, 2018), https://www.nytimes.com/2018/07/24/podcasts/the-daily/roe-wade-abortion.html [https://perma.cc/4YDH-5RTT] (discussing the wide-ranging impacts of the *Roe* decision).

it signaled the Court's openness to a doctrine of liberty that vindicated individual rights in the public and private spheres, it also spawned a fierce political movement that engendered pushback from a number of judges and commentators.[125] Indeed, as conservative judges skeptical of the doctrine joined the Court, they sought a method to retool the doctrine to promote judicial self-restraint.[126]

In 1986, thirteen years after *Roe*, *Bowers v. Hardwick*[127] considered the constitutionality of a Georgia statute that outlawed "sodomy," defined as oral or anal sex between consenting adults.[128] The opinion, penned by Justice Byron White, backed away from *Roe*'s broad conceptions of autonomy when framing the liberty interest.[129] Instead, the Court framed the legal question as whether the Constitution confers "a fundamental right upon homosexuals to engage in sodomy."[130] To answer that question, explained Justice White, the petitioner must show "that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty.'"[131]

For the Justices who take a strict view of substantive due process, these two methodological moves are absolute necessities. For one, by narrowly tailoring the right, the Court limited its risk of ushering in dramatic social change. The consequences of judicially crafted social change have long been a chief concern of substantive due process critics. For example, in *Roe*, Justice William Rehnquist cautioned that the advent of judge-made policy would delegitimize the Court.[132] Former D.C. Court of Appeals judge and unsuccessful Supreme Court nominee Robert Bork made a similar point in his book *The Tempting of America*.[133] In a related vein, Chief Justice Roberts argued that by framing the liberty interest broadly in *Obergefell*, the Court was unjustly taking the gay marriage question out of the democratic process.[134] To Chief Justice Roberts, framing the liberty interest at its most granular level is the only way the Court can preserve its role deciding cases and controversies without stepping into the role of state legislatures.[135] Second, while Chief Justice Roberts's opinion focused on political process, Justice Alito's dissent demonstrates that by demanding that the narrowly tailored right be supported by history and tradition, the Court can attempt to

125. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 95 (1990).

126. *See, e.g.*, *Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 47 (1986) (statement of Hon Antonin Scalia, J., U.S. Court of Appeals for the District of Columbia Circuit; to be U.S. Supreme Court Associate J.).

127. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

128. *Id.* at 188.

129. *Id.*

130. *Id.* at 190.

131. *Id.* at 194 (first quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1976); and then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

132. *See* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (comparing the decision to *Lochner*).

133. *See* BORK, *supra* note 125, at 204–05.

134. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

135. *Id.*

align the asserted liberty with an originalist understanding of the Constitution.[136]

Finally, following *Roe*, the Court found another occasion to consider this controversial and expansive methodology.[137] In *Casey*, the Court considered a challenge to a Pennsylvania statute that placed a number of restrictions on the ability of women to obtain an abortion, such as requiring spousal notification and a mandatory twenty-four-hour waiting period.[138] While reaffirming the central holding of *Roe*, the Court embraced its expansive methodology.[139] The joint opinion by Justices Kennedy, O'Connor, and Souter rejected the strict history and tradition test deployed in *Bowers* and instead boiled the judge's role in a substantive due process case down to a single broad standard: reasoned judgment.[140] Further, the plurality also explained that the liberty interest at stake in the case was not the specific activity of abortion but the right to make personal choices crucial to defining one's own identity free from government intrusion.[141] Connecting the issue to abortion, the Court explained that what *Roe* sought to protect—and what *Casey* was upholding—was a woman's fundamental liberty to make decisions about her reproductive activity.[142] What is more, for liberty interests so central to the conception of self, there is no procedure—however fair—that the state may use to deprive an individual of that liberty.[143]

Today, the Supreme Court has simultaneously recognized two competing methodologies for finding a liberty interest in the Fourteenth Amendment. The conservative methodology is most clearly articulated, and was officially adopted for substantive due process cases, in *Glucksberg*.[144] There, the Court deployed a similar methodology to the one used in *Bowers* and held that the Court would find a substantive due process right and apply strict scrutiny only if the right was deeply rooted in the nation's history and tradition and carefully described.[145] In *Glucksberg*, the Court considered whether individuals had a fundamental right to end their own lives.[146] Answering the history question, the Court looked to centuries of "self-murder" law in the United States and other western democracies.[147] The Court traced the historical treatment of suicide and assisted suicide through common and statutory law and concluded that there was a deep-rooted tradition of its criminalization.[148] Further, the Court examined current state

136. *Id.* at 2640 (Alito, J., dissenting).
137. *Roe*, 410 U.S. at 173.
138. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).
139. *Id.* at 847–48.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. 521 U.S. 702, 710–11 (1997) (discussing the framework for the due process inquiry).
145. *Id.*
146. *Id.* at 705.
147. *Id.* at 712 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *189).
148. *Id.* at 710–13.

laws related to assisted suicide to demonstrate the robust public debate on the topic and illustrate that the democratic process was at work to resolve it.[149] Framing the legal question, the Court went to the most granular level, saying that the "careful description" in this case was whether "the protections of the Due Process Clause include a right to commit suicide."[150]

This description, while accurate, is far from the totality of the liberty interest actually at stake. For instance, the Court could have asked about end-of-life decisions, the rights of the terminally ill, and so forth.[151] Finally, in addition to narrowly tailoring the right and looking to history and legal traditions, the Court also looked to democratic alternatives for answering the question.[152] In her concurrence, Justice Sandra Day O'Connor wrote: "There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering, and the State's interests in protecting those who might seek to end life mistakenly or under pressure."[153]

The *Glucksberg* methodology held itself out to be a final articulation of the Court's substantive due process methodology. For its supporters, it finally provided a bright-line rule that would defer most issues to the political branches and provide judicial restraint.[154] For its detractors, however, it trivialized the right at stake and was circular in its reasoning.[155] For example, by requiring that the liberty interest be one that is deeply rooted, the Court was signaling that it would only protect long-standing interests, leaving modern invasions of liberty unprotected.

At the same time that *Glucksberg* stood as one formulation of the Court's substantive due process methodology, a separate doctrine began to emerge for sexual liberties cases. In 1996, the Court revisited LGBTQIA+ rights issues for the first time since *Bowers* in *Romer v. Evans*.[156] The case concerned a Colorado state constitutional amendment that prohibited municipalities from passing antidiscrimination statutes for gay men and lesbians beyond what the state already provided.[157] Writing for the majority, Justice Kennedy found that the provision violated the Equal Protection Clause of the Fourteenth Amendment because it showed "animus" to a politically unpopular group.[158] Further, while the Court did not hold that gay people are a protected class and subject to strict scrutiny, the Court found that the law failed rational basis scrutiny.[159] Significantly, this was a form of

149. *Id.* at 735.
150. *Id.* at 724 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).
151. *See* Diana Hassel, *Sex and Death:* Lawrence*'s Liberty and Physician-Assisted Suicide*, 9 U. PA. J. CONST. L. 1003, 1004–09 (2007).
152. *See Glucksberg*, 521 U.S. at 710.
153. *Id.* at 737 (O'Connor, J., concurring).
154. *See* Hawley, *supra* note 79, at 290.
155. *See* Erwin Chemerinsky, Washington v. Glucksberg *Was Tragically Wrong*, 106 MICH. L. REV. 1501, 1504–07 (2008).
156. 517 U.S. 620 (1996).
157. *See id.* at 624.
158. *Id.* at 632.
159. *See id.*

rational basis that was unrecognizable when compared to the highly deferential review applied in most cases.[160] While rational basis review is traditionally highly deferential, this version was searching, looking into pretext.

While not a substantive due process case, *Romer* is important to sexual liberty jurisprudence because it attacks the idea of morality as an independent justification for legislation aimed at a politically unpopular group and suggests that rational basis in this context is a less deferential standard than it is in other contexts. By finding that the Colorado state constitutional amendment failed even rational basis review, the Court was elevating not only minority groups but also the type of liberty the government was trying to restrict—autonomy and independence from government overreach.

Lawrence signaled a significant change in substantive due process methodology for sexual liberties cases. In *Lawrence*, the Court considered a Texas state sodomy law similar to the one previously found constitutional in *Bowers*. *Lawrence* is significant in its methodological approach and its practical implications for groups targeted by morals legislation, such as those who use sex toys, and the extent to which the government may regulate these groups' liberty. Justice Kennedy's opinion clarified that due process concerns are implicated by any regulation of "the most private human conduct, sexual behavior,"[161] in "the most private of places, the home."[162]

Overruling *Bowers*, Kennedy began with the historical analysis that animates *Glucksberg* but found that, for cases implicating intimacy, the historical analysis is the starting point but not "the ending point of the substantive due process inquiry."[163] Justice Kennedy also indicated that in intimacy cases, framing the right narrowly is also inappropriate, writing: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[164] In looking beyond the mere sexual interest involved, the Court said that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[165]

Finally, the Court made another important move, confirming that the type of intimacy and sexuality protected by the Fourteenth Amendment goes beyond decisions implicating child-rearing, finding that personal decisions "concerning the intimacies of . . . physical relationship[s], even when not intended to produce offspring, are a form of liberty protected by the Due

160. *See, e.g.*, Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.").

161. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

162. *Id.*

163. *Id.* at 572 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

164. *Id.* at 567.

165. *Id.*

Process Clause."[166] The Court also cited a long line of substantive due process cases, including *Griswold*, for the proposition that there is something different about the sphere of liberty implicated by state action regulating sexuality.[167]

Interestingly, while overturning *Bowers* and finding that the states' interest in regulating morality was insufficient to justify the intrusive regulation, the court did not elevate sex, intimacy, sexual orientation, or sexual autonomy to fundamental right status.[168] Instead, the Court found that the Texas statute failed some form of rational basis review that it did not define.[169] However, the Court did mention that the right implicated in *Lawrence* did not impact minors, cause injury or coercion, or involve any conduct spilling into the public forum, suggesting that these factors would implicate valid government interests.[170] Thus, the Court may have been implying that for regulation of sexual autonomy, the test is harm.[171] If a state is able to demonstrate that the activity causes a cognizable harm, then the activity may be regulated.[172] On the other hand, if the activity is purely personal and consensual, it would fail this version of rational basis review.[173]

D. Morals Legislation

Since the nation's founding, the government has used morality to justify legislation and regulation. In the early colonial period, blasphemy, homosexuality, rejecting Christianity, and disobeying one's parents were offenses punishable by death.[174] In early U.S. history, legal proscriptions based on common conceptions of morality were common, even essential, elements of local government.[175] However, public morality was defined by a local, rather than national, consensus and, thus, the intrusiveness of legislation varied greatly by state.[176] Prior to the ratification of the

166. *Id.* at 578 (quoting Bowers v. Hardwick , 478 U.S.186, 216 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)).

167. *Id.* at 564–65.

168. *See id.* at 578.

169. *See* Matthew J. Clark, Comment, *Rational Relation to What?: How* Lawrence v. Texas *Destroyed Our Understanding of What Constitutes a Legitimate State Interest*, 6 LIBERTY U. L. REV. 415, 416 (2012).

170. *See Lawrence*, 539 U.S. at 578.

171. *See* Ilya Shapiro & Devin Watkins, *Adult Rights for Adult Businesses*, CATO INST.: CATO AT LIBERTY (Apr. 18, 2017, 2:32 PM), https://www.cato.org/blog/adult-rights-adult-businesses [https://perma.cc/N8D6-C9CZ].

172. *See* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2078–97 (2016) (explaining rational basis review).

173. *Id.*

174. *See generally* THE LAWS AND LIBERTIES OF MASSACHUSETTS (photo. reprt. 1998) (1648) (describing capital punishment for certain offenses predicated on morals).

175. *See* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 141–42 (2012) (discussing the history of morals legislation).

176. *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 442–43 (1827) (coining the term "police power" and situating morality within those powers); *see also* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 781 (2007) (detailing the history of the police power in the United States as primarily regulatory and local).

Fourteenth Amendment, the states' police powers were at their apex, as the federal government was largely unable to influence state law.[177]

Since the ratification of the Fourteenth Amendment and the expansion of the Commerce Clause, the federal government has had a much larger role in shaping the landscape of state laws. This includes the power of the federal courts to scrutinize state laws for compliance with the Fourteenth Amendment.[178]

In modern terms, morals legislation can be generally defined as a law or regulation that prohibits or encourages certain conduct or associations based on a normative belief about how individuals should live their lives.[179] However, morals legislation is circumscribed by, among other things, the Fourteenth Amendment's Equal Protection Clause, the Fourteenth Amendment's Due Process Clause, and the First Amendment's Establishment Clause,[180] which mandate that all laws must serve a primarily secular purpose.[181] Further, as the Court has grappled with public morals legislation, it has struggled to articulate a specific test for determining which issues are legitimate state interests. On the one hand, laws that burden First Amendment expression, freedom of contract, and personal liberty may nevertheless further a recognized state interest when they aim to protect minors[182] or other parties vulnerable to coercion. Along these lines, laws banning sex in public have been upheld as furthering a valid government interest.[183]

For instance, in *Paris Adult Theatre I v. Slaton*,[184] the Court said that it "implicitly accepted that a legislature could legitimately act on" the state's belief that pornography is connected to antisocial behavior "to protect the social interest in order and morality."[185] Further, as Justice Antonin Scalia noted in *Lawrence*, because morality is viewed by some on the Court as the paradigmatic expression of the values and will of the people through their elected representatives, the Court should be hesitant to wade into the policy tools used by the legislature to effectuate that goal.[186] Additionally, citizens who view public morals legislation as government overreach have the

177. *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV 429, 433–34 (2004) (describing the Fourteenth Amendment's limiting effect on state powers).

178. *See generally* The Civil Rights Cases, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment applies against state action).

179. *See* Chemerinsky, *supra* note 155, at 142.

180. *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 743, 744 n.6 (1976) (finding laws that are excessively tangled with religion unconstitutional).

181. U.S. CONST. amend I.; *see also* Lemon v. Kurtzman, 403 U.S. 603, 612–13 (1971) (interpreting the Establishment Clause as including a secular purpose requirement).

182. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (noting that the unconstitutional Texas sodomy law was not about minors).

183. *See* Miller v. California, 413 U.S. 15, 23–24 (1973) (defining "obscene material" as that which is without "serious literary, artistic, political, or scientific" value).

184. 413 U.S. 49 (1973).

185. *Id.* at 61 (emphasis omitted) (quoting Roth v. United States, 354 U.S. 476, 485 (1957)).

186. *Lawrence*, 539 U.S. at 559–60 (Scalia, J., dissenting).

opportunity to elect new leaders at the state and federal levels every several years, thus providing a further check on such legislation.[187]

On the other hand, the Court has met public morals legislation with mounting skepticism and has been increasingly amenable to evaluating legislatures' motivations and the effects of laws on politically unpopular groups.[188] Further, as far back as 1969, the Court found that the "poisoning" of the minds of individuals who watch or consume obscene material in the privacy of their own homes is an insufficient morality interest.[189] In the Fourteenth Amendment context, the Court has looked to legislative history and the effects on certain classes and has struck down laws borne of animus toward a certain class under rational basis review.[190] In *U.S. Department of Agriculture v. Moreno*,[191] the Court considered the constitutionality of the Department of Agriculture's food stamp regulations, which denied benefits to otherwise eligible persons living with at least one unrelated person, finding the exclusion unconstitutional.[192] While setting limits and regulations for the administration of a social welfare program is well within Congress's purview, the Court struck down the law under rational basis review because the Act's legislative history demonstrated that it was intended to prevent "hippies" from accessing the program.[193] In finding that the Act violated the Equal Protection Clause of the Fifth Amendment,[194] the Court ruled that morality borne of animus toward a politically unpopular group is not a constitutional exercise of power.[195]

Finally, in *United States v. Windsor*,[196] the Court further explained the limits of morals legislation and, specifically, laws that burden intimate choices. The *Windsor* Court found that the federal definition of marriage as a marriage between one man and one woman, as codified by DOMA, violated the Fifth Amendment.[197] Importantly, the Court found that while DOMA did not interfere with a gay couple's sexual intimacy, the provision excluding their relationships from the definition of marriage "demean[ed] the couple[s], whose moral and sexual choices the constitution protects."[198] Thus, *Windsor* suggests that laws limiting the moral choices of citizens may be incompatible with the liberty promised by the Fourteenth Amendment.

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187. *See* Max J. Rosenthal, *What Are the Midterm Elections?*, WASH. POST (Nov. 5, 2018, 12:00 AM), https://www.washingtonpost.com/world/2018/11/05/what-are-midterm-elections [https://perma.cc/B9CD-GVK4].

188. *See Lawrence*, 539 U.S. at 582–83 (O'Connor, J., concurring).

189. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969).

190. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 898 (2012).

191. 413 U.S. 528 (1973).

192. *Id.* at 529.

193. *Id.* at 536–38.

194. Under the doctrine of reverse incorporation, the Court has incorporated the Equal Protection Clause of the Fourteenth Amendment into the Fifth Amendment. *See* Bolling v. Sharp, 347 U.S. 497, 499–500 (1954).

195. *See Moreno*, 413 U.S. at 534.

196. 570 U.S. 744 (2013).

197. *Id.* at 774.

198. *Id.* at 772.

E. Obergefell v. Hodges

After both the Fifth Circuit, in *Reliable Consultants, Inc.*, and the Eleventh Circuit, in *Williams*, took different views on sex toy regulations, the *Obergefell* Court legalized same-sex marriage federally. In *Obergefell*, decided twelve years after *Lawrence*, the Court expanded on its methodology for personal intimacy cases.[199] *Obergefell* concerned a number of lawsuits filed in states that prohibited or failed to recognize same-sex marriage.[200] Generally speaking, a majority of the states that prohibited same-sex marriage did so on a few related morality-based grounds: (1) that states should protect traditional definitions of marriage as a moral institution; (2) that states have a legitimate interest in promoting procreation; and (3) that allowing same-sex marriage would be a slippery slope to permitting more immoral activity, such as polygamy and bestiality.[201]

From the start, Justice Kennedy framed the right at issue broadly, looking to the rights of all persons, regardless of sexual orientation, to define themselves and set the parameters of their relationships.[202] Clearly, personal autonomy is a key feature of Justice Kennedy's substantive due process decisions.[203] Further, he described the importance of the institution of marriage as an independent liberty interest, as well as the implication marriage has on other interests, such as child-rearing, self-empowerment, self-expression, and the institution of the family.[204] Importantly, Justice Kennedy also built on *Lawrence* to articulate the heightened importance of individual autonomy cases and the broader methodology they require.[205] Responding to claims that the Court should follow *Glucksberg*, framing the right at issue narrowly and exclusively relying on history and tradition, he wrote that "while that approach may have been appropriate for the asserted right there involved . . . , it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[206] Further, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[207] Significantly, this signaled that the Court might alter and expand its analysis if an asserted liberty interest is grounded in intimacy and that *Glucksberg* was not the Court's final articulation of substantive due process methodology.

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199. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2590–600 (2015) (discussing the history of the right to marriage and the Fourteenth Amendment).

200. *See id.*

201. *See* Kim Forde-Mazruti, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 285 (2011).

202. *See Obergefell*, 135 S. Ct. at 2597.

203. *See supra* Part I.D.

204. *See Obergefell*, 135 S. Ct. at 2600.

205. *See id.* at 2599.

206. *See id.* at 2602.

207. *Id.*

While the *Obergefell* opinion is rife with lofty language and broad propositions,[208] Justice Kennedy introduces new elements into his methodology, building on *Romer*, *Lawrence*, and *Windsor*. For one, Kennedy still relied on history as a starting point, looking to the broadening conceptions of marriage between men and women as well as the rights of gay people generally.[209] For another, he looked to consensus, both in the United States and in other western democracies, on what marriage means.[210] Interestingly, he reframed the consensus point, looking not merely to legislative intent but also to studies, scientific consensus, and perceived social attitudes.[211] In other words, Justice Kennedy did not restrict his analysis to the existing legal definitions of marriage in the United States and around the world; he also considered how science and culture were beginning to define the concept.[212] Finally, he looked to the relationship between due process and equal protection, inferring that a right is more easily understood as fundamental if burdening that right based on a suspect classification—or one that has been treated with intermediate or heightened scrutiny—would offend equal protection.[213]

Justice Kennedy also expanded on morality as a justification for state restrictions on sexual liberty. Although Justice Kennedy did not make the same explicit reference to morality in *Obergefell* that he did in *Lawrence*, his discussion of the evolution of societal standards and mores, and how their progression shifts constitutional understandings, implies that traditional conceptions of morality may not continue to serve as a rational basis for legislation.[214] Further, by clarifying that the Due Process Clause protects a right to marriage and intimacy that is "fundamental"[215] and that the right of marriage and intimacy is closely related to other fundamental rights such as child-rearing and education, the *Obergefell* opinion challenged many of the traditional areas involving morals legislation.[216] Finally, while Justice Scalia ominously warned that *Lawrence* marked "the end of all morals legislation,"[217] *Obergefell* did not plunge a knife into the wound of morals

208. *See, e.g.*, *id.* at 2593 ("The Constitution promises liberty to all within its reach . . . ."); *see also* Michael H. v. Gerald D., 491 U.S. 110, 132 (O'Connor, J., concurring) ("[The] historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment . . . may be somewhat inconsistent with our past decisions in this area. On occasion the Court has characterized relevant traditions protecting asserted rights at [a higher] level[] of generality . . . . I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." (citing Poe v. Ullman, 367 U.S. 497, 542, 544 (1961))).

209. *See Obergefell*, 135 S. Ct. at 2593–97.

210. *See id.* at 2596.

211. *Id.*

212. *Id.*

213. *See id.* at 2602–03.

214. *Id.* at 2589 (discussing changes in public attitudes and knowledge about homosexuality).

215. *Id.* at 2584, 2602, 2606.

216. *See* William N. Eskridge Jr., *The Marriage Equality Cases and Constitutional Theory*, 2014–2015 CATO SUP. CT. REV. 111, 115.

217. Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

legislation as Scalia predicted. It did, however, question many of the grounds and assumptions on which morals legislation rests.

II. THE CIRCUIT SPLIT ON RIGHTS AND METHODOLOGY

Two circuits have ruled, with differing results, on whether the protection afforded by the Fourteenth Amendment extends to the possession or sale of sex toys. In *Reliable Consultants, Inc.*, the Fifth Circuit found that a Texas law banning the sale of sex toys violated the Fourteenth Amendment on substantive due process grounds. Four years earlier, in *Williams*, the Eleventh Circuit ruled that criminalizing the possession of sex toys does not infringe any fundamental right related to privacy or sexual autonomy and, therefore, that state regulations banning their sale are subject only to an exceedingly deferential rational basis review, which the court found Alabama had met.[218] This split of authority is due, in large part, to the shifting methodologies for framing substantive due process rights and divergent opinions as to which previous substantive due process cases are applicable precedent. Importantly, both cases were decided after *Lawrence* but before *Obergefell*.[219] Thus, the Fifth and Eleventh Circuits looked to drastically different methodologies—both recognized by the Supreme Court—to define the liberty interest at stake and the test used to evaluate government regulations.

Part II.A of this Note discusses *Reliable Consultants, Inc.* and examines the role *Lawrence* played in shaping the court's conception of liberty and permissible government regulations of sexuality and autonomy. Part II.B discusses *Williams* and examines how the court minimized the methodology used in *Lawrence* in favor of the test articulated in *Glucksberg*.

A. Reliable Consultants, Inc. v. Earle

In *Reliable Consultants, Inc.*, the plaintiff, a Texas boutique that sold a number of intimate devices, sought to invalidate a Texas state statutory provision prohibiting the sale and advertising of sexual devices.[220] The obscenity statute at issue was enacted in 1973 with the goal of keeping "obscene materials" from reaching the marketplace.[221] As it pertains to sex toys, the statute criminalized the sale or advertising of any device "designed or marketed as useful primarily for the stimulation of human genital organs."[222] While the plaintiffs[223] contended that the Texas statute violated a broad liberty interest in privacy and intimacy, Texas argued that the

218. Williams v. Att'y Gen., 378 F.3d 1232, 1249–50 (11th Cir. 2004).
219. *Lawrence* was decided in 2003, while *Obergefell* was announced in 2015.
220. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 739 (5th Cir. 2008).
221. *See id.* at 740.
222. *Id.* at 750–51 (quoting TEX. PENAL CODE ANN. § 43.21(a)(7) (West 1979), *invalidated by Reliable Consultants, Inc.*, 517 F.3d 738).
223. The plaintiff in *Reliable Consultants, Inc.* was a distribution company. *Id.* at 741–42. Considering whether they had standing, the court cited the birth control cases of the 1960s for the proposition that vendors may assert the liberty interests of their customers. *See id.* at 743 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683–91 (1977)).

regulation was rationally related to its interest in "discouraging prurient interests in autonomous sex . . . and prohibiting the commercial sale of sex."[224]

As in any substantive due process case, the Fifth Circuit was tasked with identifying the liberty interest and then applying the appropriate constitutional test to the state's regulation of that interest. First, the court engaged extensively with the practical uses and necessities of sex toys.[225] The court recognized a variety of reasons for the use of sex toys, including to meet therapeutic needs, assert personal desires, and avoid premarital intercourse.[226] The court also addressed Texas's argument that the plaintiff, as a distributor, did not have standing to assert the rights of individual sex toy users.[227] Answering that question, the court analogized sex toys to contraception, as in *Griswold*, which held that restricting commercial transactions unconstitutionally infringes on an individual's right.[228]

In its brief, Texas offered a narrow reading of the liberty interest at issue in *Reliable Consultants, Inc.*, defining it as the "right to stimulate one's genitals for non-medical purposes unrelated to procreation or outside of an interpersonal relationship."[229] However, the Fifth Circuit defined the liberty interest broadly as "the individual right under the Fourteenth Amendment to engage in private intimate conduct in the home without government intrusion."[230]

The court framed this right using its reading of *Lawrence*.[231] It engaged with *Lawrence*'s reasoning, concluding that the right *Lawrence* recognized was not the sexual act itself but the right to be free from government intrusion when making intimate decisions.[232] Further, the Fifth Circuit also took cues from *Lawrence*'s dismissal of *Bowers*.[233] The court found that in *Lawrence*, the Supreme Court recognized that in cases such as these, where sexual liberty is asserted as a right, defining the liberty interest as the specific act itself would trivialize the right.[234] Thus, the *Reliable Consultants, Inc.* court did not narrowly tailor the right to the specific use of sex toys but asked if penalizing the use of sex toys violated the recognized liberty right to make private decisions about consensual intimacy in the home.[235] Specifically, the Fifth Circuit read *Lawrence* as concluding that the sodomy law at issue violated the Fourteenth Amendment not because of a specific fundamental right to engage in sodomy but because the sodomy law more broadly violated

224. *Id.* at 745 (quoting Texas Attorney General Greg Abbott's Appellee's Brief, *supra* note 67, at 7–8).
225. *Id.* at 742.
226. *Id.*
227. *Id.*
228. *Id.* at 743.
229. Texas Attorney General Greg Abbott's Appellee's Brief, *supra* note 67, at 15.
230. *See Reliable Consultants, Inc.*, 517 F.3d at 742–43.
231. *Id.*
232. *Id.* at 743–44.
233. *Id.*
234. *Id.*
235. *Id.* at 742.

the substantive due process right to engage in consensual intimate conduct in the home free from government intrusion.[236] Thus, according to the *Reliable Consultants, Inc.* court, *Lawrence* instructed that the relevant question to ask was not whether the right to sex toys is deeply rooted in our nation's history and tradition but rather whether Texas's law criminalizing the sale of sex toys burdened the recognized constitutional right to make intimate decisions in the home unencumbered by government interference.

Next, the court had to grapple with which level of scrutiny applied to the Texas law. As previously mentioned, one of the mysteries of *Lawrence* is that it did not categorize the right to sexual privacy or intimacy as a fundamental right.[237] Following *Lawrence*, the Fifth Circuit did not find a fundamental right to sexual privacy or to sex toys.[238] Likewise, it did not employ typical rational basis review.[239] Instead, the Fifth Circuit looked at the governmental interests found constitutionally insufficient in *Lawrence* and applied them to sex toys.[240]

In both *Lawrence* and *Reliable Consultants, Inc.*, the states' arguments were morality-based: the statutes in question represented the moral judgments of the legislatures. Therefore, the Fifth Circuit held that if morality was an insufficient justification for restricting consensual sodomy, then "public morality also cannot serve as a rational basis for Texas's statute, which also regulates private sexual intimacy."[241]

Therefore, the Fifth Circuit's methodology in *Reliable Consultants, Inc.* was twofold. First, instead of analyzing whether the liberty interest in question infringed upon a fundamental right, the court looked to whether the individual liberty interest asserted—there, the implication of sex toys on sexual liberty—burdened the constitutionally protected realm of private decision-making.[242] This departed from the *Glucksberg* framework, which asked whether the specific liberty interest—detached from others—was worthy of protection on its own.[243] The second step was to examine the burden that the statute placed on that right, accepting that morality alone is an insufficient state justification.[244]

B. Williams v. Attorney General

In *Williams*, the Eleventh Circuit addressed a similar, but narrower, statute. The Alabama Obscenity Act, which is still in effect, "prohibits . . . the commercial distribution of 'any device designed or marketed as useful

236. *Id.* at 745.
237. *See* Lawrence v. Texas, 539 U.S. 558, 558 (2003).
238. *See Reliable Consultants, Inc.*, 517 F.3d at 746.
239. *See id.*
240. *Id.* at 746–47.
241. *Id.* at 745.
242. *Id.* at 743.
243. *See* Washington v. Glucksberg, 521 U.S. 702, 710–11 (1997).
244. *See Reliable Consultants, Inc.*, 517 F.3d at 745–46.

primarily for the stimulation of human genital organs.'"[245] But, the law does not prohibit mere possession or gifting of sex toys, and it allows the sale of certain devices that may be used as sex toys, so long as they are not primarily marketed or designed for that use.[246] Finally, the law provides a safe harbor for using sex toys when there is a genuine medical necessity.[247]

Plaintiffs' counsel, the American Civil Liberties Union (ACLU), on behalf of a number of sex toy vendors seeking to operate in Alabama, urged an expansive reading of the right to use sex toys within a broad right to private sexual conduct.[248] Further, the ACLU argued that *Lawrence*'s rejection of public morality as a justification for laws criminalizing consensual sodomy implies that public morality is likewise an insufficient justification for criminalizing sex toys.[249] Additionally, the ACLU contended that the Alabama statute burdened a substantive due process right to private sexual intimacy because it restricted decisions between consenting adults in their private relationships.[250]

Alabama, in contrast, took a different view. First, the state argued that *Lawrence* did not recognize a new fundamental right but rather rejected public morals as a justification for laws that burden *both* private and noncommercial sexual choices,[251] meaning that the sphere of privacy *Lawrence* protected was limited to those decisions made between consenting couples that implicate nothing beyond the four corners of their bedroom. Further, Alabama professed that reading *Lawrence* to foreclose justifying legislation with public morality would be a "radical" departure from legal and social norms, because all laws, including homicide, are based on a "social conceptions of 'right' and 'wrong.'"[252] Finally, Alabama warned that bestiality and necrophilia would quickly be legalized because they, too, are private and sexual acts.[253]

The Eleventh Circuit considered the liberty interest at stake and the ACLU's contention that *Lawrence* created a broad right to sexual privacy.[254] The court recounted a number of instances in which the Supreme Court had been granted the opportunity to recognize such a broad right but chose not to do so. Further, the Eleventh Circuit noted that, in *Lawrence*, the Supreme Court only established that criminal prohibitions on consensual adult sodomy

245. *See* Williams v. Att'y Gen., 378 F.3d 1232, 1233 (11th Cir. 2004) (quoting ALA. CODE § 13A-12-200.2 (Supp. 2003)).
246. *See* ALA. CODE § 13A-12-200.2 (2020).
247. *See id.*
248. *See Williams*, 378 F.3d at 1233–34.
249. *Id.* at 1234–35.
250. *Id.* at 1235.
251. *Id.* at 1239.
252. *See* Brief of Defendants-Appellees at 31–32, *Williams*, 378 F.3d 1232 (No. 06-11892-J) (quoting Williams v. King, 420 F. Supp. 2d 1224, 1248 (N.D. Ala. 2006)) (implying that any general attack on "morals-based laws" threatens the justifications for widely accepted crimes, such as murder, because such crimes "are premised, fundamentally, on a shared and inherited public morality").
253. *See* Lawrence v. Texas, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting).
254. *See Williams*, 378 F.3d at 1235–36.

are unconstitutional, intentionally failing to elevate a new fundamental right. Also, the Eleventh Circuit concluded that it was constrained from interpreting *Lawrence* as recognizing a fundamental right, since *Lawrence* did not use *Glucksberg*'s fundamental rights analysis and the Supreme Court struck down the Texas sodomy law at issue on rational basis review.[255] The Eleventh Circuit also concluded that if the *Lawrence* majority considered a broader right at all, it was in scattered dicta and had been "left for another day."[256]

Concluding that *Lawrence* did not establish a fundamental right that would trigger strict scrutiny, the Eleventh Circuit then utilized its own *Glucksberg* analysis.[257] After reciting the history of *Lawrence* and *Glucksberg*, it concluded that the right implicated was the "right to sell and purchase sexual devices."[258] However, recognizing that prohibiting the distribution of sex toys infringed upon an individual's ability to use sex toys, the court also considered whether the Constitution protects a right to use such devices.[259] Thus, the Eleventh Circuit carefully described the right at issue in line with *Glucksberg*, aiming to construct a formulation of substantive due process interests that sought to ensure that the only rights considered or expanded were those squarely before the court.

The Eleventh Circuit in *Williams* then turned to *Glucksberg*'s second prong—whether the right is deeply rooted in history and tradition and implicit in the concept of ordered liberty.[260] Importantly, this analysis was tightly constrained because of the court's narrow framing of the issue.[261] If, for instance, the court had framed the issue in terms of sexual privacy or autonomy, the court could have looked to a wider range of legal and political traditions that respect the choices of consenting adults. However, by limiting the right at issue to only the right to use sex toys, the court was more constrained. The Eleventh Circuit also pointed out that the historical analysis did not hinge on whether the activity at issue had been observed over the course of U.S history but rather on whether U.S. laws and legal traditions had *protected* a right to use sex toys over the course of U.S. history.[262] From there, the court found that, to the extent that U.S. statutory and common law had considered sex toys, it had not condoned them and, at times, prohibited their use. Therefore, the Eleventh Circuit in *Williams* found that the use of sex toys was not deeply rooted in the nation's history or traditions.[263]

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255. *Id.* at 1238 n.8.
256. *Id.* at 1238.
257. *Id.* at 1239.
258. *Id.* at 1242.
259. *Id.*
260. *Id.* at 1242–43.
261. When the right is described in narrow terms, it limits the scope and scale of the historical analysis and the considerations incorporated in the analysis. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 757 (1997).
262. *Williams*, 378 F.3d at 1243.
263. *Id.* at 1246.

The final matter the Eleventh Circuit considered was the government's interest in creating a ban on sex toys.[264] The court endorsed public morality as both inherent in the concept of state police powers and the paradigmatic expression of republican democracy.[265] Speaking on the "delicate area of morals legislation,"[266] the court emphasized the role of Alabama's citizens in the democratic process and, conversely, warned of the dangers of snatching the issue from the people and shifting its guardian to "unelected judges."[267]

III. THE BROADER PHILOSOPHY OF THE FIFTH AND ELEVENTH CIRCUITS

The Supreme Court has deployed a variety of tests in the substantive due process arena with varying levels of openness to recognizing new rights.[268] This varying methodology is clearly what leads to the divergent results between the Fifth and Eleventh Circuits.[269] The Fifth Circuit framed the right at stake broadly and did not restrict its analysis to history and tradition, finding a zone of sexual privacy within the Fourteenth Amendment's concept of liberty that can only be invaded by a compelling interest.[270] Conversely, the Eleventh Circuit framed the right at issue narrowly. The court showed deference to federalism by recognizing the state's broad police powers to criminalize the commercial sale of sex toys and looked to history and tradition to find that using sex toys is not implicit in our concept of ordered liberty and therefore not protected by the Fourteenth Amendment.[271]

Undoubtedly, the Supreme Court will again consider the boundaries of substantive due process in the sexual privacy sphere. While the Court may or may not consider the sex toy issue specifically, the methodology the Court uses will likely determine the scope of that right. This part considers the broader ramifications for Fourteenth Amendment jurisprudence if the Supreme Court were to accept either the Fifth Circuit's or Eleventh Circuits' methodology. Part III.A considers the philosophy and ramifications of a methodology similar to that used by the Fifth Circuit in *Reliable Consultants, Inc*. Part III.B considers the philosophy and ramifications of a methodology similar to that used by the Eleventh Circuit in *Williams*.

264. *Id.* at 1234.
265. *Id.* at 1250–53 (Barkett, J., dissenting).
266. *Id.* at 1250.
267. *Id.*
268. *Compare* Michael H. v. Gerald D., 491 U.S. 110 (1989), *and* Washington v. Glucksberg, 521 U.S. 702 (1997), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *and* Lawrence v. Texas, 539 U.S. 558 (2003).
269. *See Bernstein*, *supra* note 84, at 1282 (discussing the importance of methodology).
270. *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 746–47 (5th Cir. 2008).
271. *See Williams*, 378 F.3d at 1239–46.

A. Ramifications of the Fifth Circuit's Methodology

The Fifth Circuit, in *Reliable Consultants, Inc.*, supported a broad reading of Fourteenth Amendment liberty in the sexual privacy context.[272] If the Supreme Court were to embrace a methodology aligned with the Fifth Circuit's interpretation of *Lawrence*, the most far-reaching consequence would be an explicit recognition of a fundamental right to sexual privacy and autonomy. Furthermore, when facing claims predicated on this right, the Court would not be restrained by "narrowly tailoring" the right and ensuring that it is "deeply rooted" in our nation's history and tradition. Instead, the Court would apply a heightened form of rational basis—not the restrained jurist approach of Judge Bork, Chief Justice Rehnquist, Justice Scalia, and Chief Justice Roberts—but closer to the reasoned judgement described by Justice Robert Jackson.

In *Lawrence* and *Obergefell*, the Court refrained from explicitly recognizing a right to sexual privacy.[273] However, *Lawrence* acknowledges that Justice Stevens's dissent in *Bowers* was the better decision, and *Reliable Consultants, Inc.* explicitly relies on it as a key part of the jurisprudential groundwork for its holdings.[274] Therefore, if the Supreme Court were to embrace the *Reliable Consultants, Inc.* methodology, Justice Stevens's *Bowers* dissent may be insightful for how such a methodology would operate in practice. He begins his analysis with two significant propositions.

First, Justice Stevens proposed that the fact that a majority of a state finds a particular practice immoral is not, on its own, a sufficient justification for prohibiting the practice.[275] Crucially, this is the clearest statement from the Court that public morality is not a sufficient stand-alone justification for infringing on the personal liberties of consenting adults' private sexual experiences.[276] Second, he asserted that individuals' decisions concerning their intimate relationships—whether married or unmarried and whether intended to produce offspring or not—are a protected form of liberty under the Due Process Clause.[277] Again, this is significant because, for Justice Stevens, the right to intimacy precedes a substantive due process right.[278] Thus, the question is not whether any individual activity which may implicate intimate relationships is itself fundamental but rather whether it can properly be related to the existing liberty interest in private intimacy.[279] Finally, Justice Stevens explains that the state has a legitimate interest in encouraging

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272. *Reliable Consultants, Inc.*, 517 F.3d at 744 (discussing the wide parameters of the substantive due process right to sexual intimacy).

273. *See Lawrence*, 539 U.S. at 550; *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2600–01 (2015).

274. *See supra* Part I.D.

275. *See supra* Part I.D.

276. *See supra* Part I.D.

277. *See* Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by Lawrence*, 539 U.S. 558.

278. *Id.*

279. *Id.*

and, to a certain extent, defining the parameters of relationships.[280] However, he also explains that the state's interest ends when those couples are in private because the way they choose to conduct their intimate expression is not a matter for the state.[281]

The *Reliable Consultants, Inc.* court added to the analysis in two significant ways. First, after recognizing the right described by Justice Stevens, it focused its analysis on the burden the statute places "on the individual's right to make private decisions about consensual intimate conduct."[282] This is significant because it guides courts to look beyond the individual practice at hand and analyze the prohibition's impact on the protected right: intimate decision-making.[283] Second, while the court explicitly rejected public morality as a sufficient justification for the law, it viewed the justification in light of legitimate interests in infringing on intimate decision-making, such as when it implicates minors, coercion, public conduct, or prostitution.[284] Therefore, the *Reliable Consultants, Inc.* court pushed back on the fear of a slippery slope or overly expansive right by establishing a harm principle.

This analysis would also be in line with the Supreme Court's decision in *Obergefell*.[285] *Obergefell* introduced two ideas that could be dispositive of the issue of sex toys specifically and of future substantive due process cases more broadly. First, *Obergefell*'s reliance on consensus and societal attitudes would likely push the Court toward finding that bans on sex toys violate the Fourteenth Amendment, as the United States and other western democracies have adopted increasingly progressive views of sexuality and, perhaps more importantly, increasingly progressive views on the ability of individuals to decide for themselves what their sexual identities and experiences entail.[286] Second, the *Obergefell* Court's discussion of the connection between equal protection and substantive due process may also be informative[287] because laws banning sex toys are likely to most negatively impact LGBTQIA+ couples,[288] whom the Court has already protected under the animus doctrine,[289] and couples or individuals who are unable to engage in intimacy without sexual devices.[290]

Thus, the next time the Court considers a state law that burdens private decision-making, *Reliable Consultants, Inc.* would guide it toward rejecting

280. *Id.* at 217.
281. *Id.*
282. *Id.* at 746.
283. *Id.*
284. *Id.* at 745–46.
285. *See supra* Part I.D.
286. *See* Melissa Murray, *One Is the Loneliest Number: The Complicated Legacy of* Obergefell v. Hodges, 70 HASTINGS L.J. 1263, 1264 (2019).
287. *See supra* Part I.D.
288. *See* Katherine Schreiber, *How Sex Toys Impact Relationships*, PSYCH. TODAY (May 27, 2017), https://www.psychologytoday.com/us/blog/the-truth-about-exercise-addiction/201705/how-sex-toys-impact-relationships [https://perma.cc/48PP-BUBY].
289. *See supra* notes 156–58 (discussing *Romer* and the animus doctrine).
290. *See supra* Part I.A.

morality as a sufficient justification on its own and instead toward looking at harm or coercion as a justifying principle. As for methodology, the Court would place a higher premium on private decision-making and a smaller premium on deference to state police powers and common-law prohibitions.

B. Ramifications of the Eleventh Circuit's Methodology

The Eleventh Circuit's substantive due process methodology is grounded in the idea that the scope of substantive protections offered by the Fourteenth Amendment is narrow and that judges should take the utmost care before recognizing a new right.[291] This formulation values principles of federalism and relies on the democratic process to root out laws that no longer represent the moral judgments of a state, carried out by the state's electoral decisions.[292] Additionally, by holding that a liberty interest can only be recognized by a court if it is deeply rooted in American history and tradition, it configures the Due Process Clause to preserve certain common-law rights, as opposed to rooting out new forms of discrimination or overreach that no longer fit comfortably in the nation's body politic.[293]

Just as *Reliable Consultants, Inc.* is the progeny of *Lawrence* and Justice Stevens's dissent in *Bowers*, *Williams* finds its roots in *Glucksberg*.[294] For both *Glucksberg* and *Williams*, the historical analysis is extensive and looks to origins in U.S. law as well as the broader common-law tradition.[295] The real work of the *Glucksberg* methodology is done in framing the interest, because that sets the groundwork for testing the right against history.[296] However, while the *Glucksberg* Court framed the interest as the "right to commit suicide which itself includes a right to assistance in doing so,"[297] the *Williams* court framed the interest more narrowly as the right to use devices to stimulate one's genital organs.[298] The framing of the right is so significant because the broader the asserted right, the easier it is to connect it with other accepted liberty interests and vindicate a claim.[299] However, the *Williams* methodology would likely lead to a narrower substantive due process methodology because, unlike *Glucksberg*, *Williams* narrowed the right down to the specific *means* of the activity, rather than the activity itself.[300]

An adoption of the Eleventh Circuit's jurisprudential approach would also emphasize the democratic process and public debate over the Court's reasoned judgment. Specifically, the Court would be less likely to take an asserted liberty interest and remove it from the states' police powers if there were active legislation on the topic and a robust public debate underway. In

291. *See* Williams v. Att'y Gen., 378 F.3d 1232, 1235–36 (11th Cir. 2004).
292. *Id.* at 1244.
293. *Id.* at 1235.
294. *Id.* at 1239 (going through the *Glucksberg* analysis).
295. *Id.* at 1240.
296. *See* Hawley, *supra* note 79, at 339–40.
297. Washington v. Glucksberg, 521 U.S. 702, 703 (1997).
298. *Williams*, 378 F.3d at 1246 (discussing the framing of the issue).
299. *See* Hassell, *supra* note 151, at 1004–05.
300. *See Williams*, 378 F.3d at 1249.

adopting this approach, the Court would be recognizing prudential concerns, democratic legitimacy, and principles of federalism.

IV. RESOLUTION

This Note argues that in substantive due process cases where the asserted liberty interest is intimacy or sexual autonomy, *Lawrence* and *Obergefell* instruct a broader test, such as the one applied in *Reliable Consultants, Inc.*, and that the narrower test used in *Williams* is inappropriate. The complicated and controversial history of substantive due process, from the *Lochner* era to today, demonstrates that there are two tests for substantive due process claims. On the one hand, when the liberty interest is intimacy and self-definition, the Court focuses on a broader conception of liberty and the implications a violation has on all aspects of personal rights. The Court does not sustain bare morals as a justification for the invasion. Further, in these cases, the Court does not need to determine whether the specific liberty interest is one that is deeply rooted and narrowly tailored in our nation's history and tradition. Rather it may decide whether the government's intrusion offends an aspect of liberty—here, privacy and sexual autonomy vis-à-vis the use, possession, or sale of sex toys—that the Due Process Clause has traditionally protected in its substantive form and that the government cannot trample on, regardless of the process. On the other hand, when a claim is detached from sexual liberty and intimacy, such as the right to die,[301] and the government regulation is closer to traditional conceptions of the states' police powers, the Court adopts a stricter test that frames the right narrowly and only finds a right fundamental if it is supported by history and tradition.

The Court should clarify its substantive due process jurisprudence by formally recognizing a liberty interest in sexual privacy and autonomy. Only by openly and honestly recognizing this right can *Lawrence* and *Obergefell* be honestly interpreted and given their full effect by lower courts. *Reliable Consultants, Inc.* does that by recognizing that the Supreme Court established an expanded scope of liberty that the state cannot invade without a compelling interest in cases of sexual privacy.

CONCLUSION

The liberty interest of sex toy users and vendors deserves to be recognized and protected by the Fourteenth Amendment. The Court has struggled to articulate a consistent methodology for assessing sexual liberty claims, but as long as *Romer*, *Lawrence*, and *Obergefell* are good law, it is clear that courts must take an expansive view of sexual liberty. These cases instruct courts to examine history (but not be controlled by it), consider the liberty interest in light of the status of those affected, review and evaluate evolving social standards and views, and understand that laws burdening private, sexual decision-making are inherently suspect. Taken together, the liberty

301. *See Glucksberg*, 521 U.S. at 530.

interest implicated by sex toy use—private, intimate decision-making—is a liberty interest that the Fourteenth Amendment protects.