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The Underappreciated First Amendment Importance of Lawrence v. Texas

Michael P. Allen

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Abstract

In Lawrence v. Texas, *the Supreme Court declared that Texas's statute criminalizing "deviant sexual intercourse" between individuals of the same sex was unconstitutional. The Court opined that Texas's asserted interest in expressing moral disapproval of homosexual conduct was illegitimate. This Article discusses the First Amendment implications of the Court's morality-based rationale. Taken seriously,* Lawrence *has a significant effect in this area, undermining certain First Amendment doctrines while strengthening others.*

This Article first addresses what the Court said about morality and lawmaking and also what it must have meant. It concludes that the Court held that morality can still play a role in lawmaking but it cannot be the sole or dominant rationale for a law. This Article next turns to Lawrence*'s implications for First Amendment doctrine, focusing in particular on obscenity and "hate speech."*

While not universally accepted, it is conventional wisdom that the Court's decisions allowing the regulation of obscene material are largely based on moral disapproval of that type of expression. If this is the case, a faithful application of Lawrence *would at a minimum require a reexamination of current doctrine. Thus, consideration of the Court's obscenity jurisprudence illustrates* Lawrence*'s potential to undermine certain aspects of First Amendment doctrine.*

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* Professor of Law, *Stetson University College of Law*; B.A., 1989 *University of Rochester*; J.D., 1992 *Columbia University School of Law*. I would like to thank Ron Krotoszynski and Debbie Allen for their valuable comments on this Article. I also received significant feedback from participants in a workshop at the University of Louisville's Brandeis School of Law. I also express my gratitude to the staff of the *Washington and Lee Law Review* for excellent work on this Article. All errors remain my own. This Article was supported by a generous research grant from Stetson University College of Law.

Conversely, consideration of hate speech restrictions demonstrates how Lawrence could strengthen existing doctrine in other contexts. The Court has generally not been favorably disposed to hate speech legislation when the "speech" at issue did not amount to fighting words or their equivalent. This Article suggests that the Court's position as to this issue will be strengthened when Lawrence *'s prohibition on primarily morality-based legislation is added to the mix.*

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I. Introduction

In *Lawrence v. Texas*,[1] the United States Supreme Court declared that Texas's statute criminalizing "deviant sexual intercourse" between individuals of the same sex was unconstitutional under the Due Process Clause.[2] In reaching this conclusion, the Court opined that Texas's asserted interest in expressing moral disapproval of homosexual conduct was not legitimate.[3] This Article discusses the potential implications of the Court's morality-based

1. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (declaring that a Texas law criminalizing sodomy violated the Due Process Clause).

2. *Id.* ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

3. *See, e.g.*, *id.* at 577–78 ("'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'" (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))); *id.* at 584 (O'Connor, J., concurring in the judgment) ("[T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law.").

rationale in *Lawrence* for First Amendment jurisprudence. Taken seriously, *Lawrence* has a significant effect in this area, undermining certain First Amendment doctrines while strengthening others.

In order to assess what *Lawrence*'s holding might mean in the context of the First Amendment, one must first have a working definition of "morality." As Professor Michael Perry noted, "there is not just one morality in the world; there are many."[4] If this is the case, one needs to have at least a basic conception of the type of "morality" the Court was concerned with in *Lawrence*.

The morality with which the *Lawrence* Court was concerned appears to be the basic notion that there is a dichotomy between what is "right" and what is "wrong."[5] One can glimpse this view of morality in Justice Kennedy's description of why the Texas Legislature's actions were unconstitutional:[6]

> The condemnation [of homosexuality] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole of society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."[7]

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4. Michael J. Perry, *Morality and Normativity*, LEGAL THEORY (forthcoming) (manuscript at 2, on file with the Washington and Lee Law Review), *available at* http://ssrn.com/abstract=1009604.

5. This conception of "morality" comports with basic dictionary definitions as well. *See, e.g.*, BLACK'S LAW DICTIONARY 1030 (8th ed. 2004) (defining "morality" as "conformity with recognized rules of correct conduct" and "a system of duties; ethics"); *id.* (defining "moral law" as "[a] collection of principles defining right and wrong conduct; a standard to which an action must conform to be right or virtuous"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1174 (3d ed. 1992) (defining "morality" as "[a] system of ideas of right and wrong"). Other scholars have worked under the assumption that the *Lawrence* Court considered morality in this "right versus wrong" manner. *See, e.g.*, Susan B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1241–42 (2004) ("[T]he Court tends to invoke morality to refer to a systematic way of thinking about right and wrong forms of conduct, consistent with the term's dictionary definition. I also use the term in that general sense.").

6. I discuss this in greater detail below. *See infra* Part II.A.

7. Lawrence v. Texas, 539 U.S. 558, 571 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).

Thus, for the Court, morality was a determination based on some input such as religion, tradition, or merely what one might call ethics, dictating how all people should behave.

The Article has three additional sections. Part II focuses on *Lawrence* itself. It first addresses what the Court said about morality and lawmaking, but also considers what the Court must have meant by what it said. It is clear from *Lawrence* that the Court was deeply suspicious of Texas's morality-based justification for its law. However, the Court simply could not have been serious that morality has *no* constitutionally permissible role in making law. It is not difficult to think of laws that have a clear moral pedigree but that certainly remain on solid constitutional ground after *Lawrence*. For example, one could cite the Ten Commandments for the principle that "[y]ou shall not kill"[8]—a moral dictate to be sure. Yet, laws criminalizing murder are not likely to run afoul of *Lawrence*'s interpretation of the Due Process Clause.

As Part II explains, it must be that the Court believed that morality cannot be the sole (or perhaps dominant) rationale for a given law. Seen in this light, the decision does not call the criminalization of murder into question because such laws, at a minimum, serve the non-explicitly moral goal of assuring members of society that they will be protected from violence and, therefore, need not take basic survival matters into their own hands.

Yet, even if this is an accurate description of what *Lawrence* both said and meant, there is a second question: Does *Lawrence* relate only to legislative action or does it also constrain the courts in interpreting the Constitution? Part II addresses this issue as well. It is possible to accept *Lawrence*'s basic proposition that morality cannot be the sole (or dominant) purpose for legislative action and still conclude that certain portions of the Constitution—perhaps including the First Amendment—allow morality's use. However, this reading would provide the judiciary, with its power of judicial review, more moral latitude in the first instance than legislative bodies. Part II ultimately rejects this notion.

Part III turns to *Lawrence*'s potential implications for First Amendment doctrine. One could select any number of First Amendment principles to consider, including the Court's campaign finance decisions,[9] or its commercial

8. *Deuteronomy* 5:17.

9. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 262–63 (2006) (plurality opinion) (holding that portions of a Vermont campaign finance law were unconstitutional under the First Amendment); McConnell v. Fed. Elections Comm'n, 540 U.S. 93, 224, 233, 246 (2003) (upholding the constitutionality of the Bipartisan Campaign Finance Reform Act of 2002); Buckley v. Valeo, 424 U.S. 1, 143–44 (1976) (concluding that portions of the Federal Elections Campaign Act of 1971 were unconstitutional under the First Amendment).

speech jurisprudence.[10] After all, these decisions at least implicitly rest on moral judgments about right and wrong.[11] But there are First Amendment doctrines that are more *explicitly* morality-based and which, therefore, provide a starker example of how *Lawrence* might be relevant in this area of law. This Article discusses two such doctrines: (1) the Court's jurisprudence concerning obscenity; and (2) its decisions concerning "hate speech."

While it is not universally accepted, it is conventional wisdom that the Court's decisions allowing the regulation of obscene material are largely based on the moral disapproval a legislative body may show for that type of expression.[12] If that is the case, a faithful application of *Lawrence* would, at a minimum, require a reexamination of current doctrine. In other words, considering the Court's obscenity jurisprudence illustrates *Lawrence*'s potential to undermine certain aspects of First Amendment doctrine.

Conversely, consideration of hate speech restrictions demonstrates how *Lawrence* could strengthen existing doctrine in other contexts. The current Court has generally not been favorably disposed to hate speech legislation when the "speech" at issue did not amount to fighting words or their equivalent.[13] Part III suggests that the Court's position as to this issue will be strengthened when *Lawrence*'s prohibition on primarily morality-based legislation is added to the mix. Part IV provides a brief conclusion.

Before continuing, however, a few words are necessary concerning what this Article will *not* do. First, I do not seek to weigh in on the larger jurisprudential issues concerning the connections between law and morality. Those waters are deep indeed. Some of the most accomplished legal philosophers have debated,[14]

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10. *See, e.g.*, Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557, 571–72 (1980) (declaring that a regulation of the New York Public Service Commission which bars electric utilities from advertising to promote the use of electricity violates the First and Fourteenth Amendments).

11. For example, the campaign finance decisions could be said to be based at least in part on an argument that it is "wrong" for some people to have more influence in politics merely because they have less money than others. Similarly, the commercial speech cases could be viewed as embodying the moral principal that it is "wrong" to place business interests on lesser constitutional footing than political or private concerns.

12. *See infra* Part III.A.

13. *See infra* Part III.B.

14. For discussions of the connections between law and morality, see generally RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); LON L. FULLER, THE MORALITY OF LAW (1964); H. L. A. HART, THE CONCEPT OF LAW (2d ed. 1994); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY (1988); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89 (1988); Michael McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997); Michael Moore, *Moral*

and continue to debate,[15] this issue. Instead, my point is to take as a given the Court's apparent position that morality cannot be the sole reason on which law is based and transfer that principle to the First Amendment.

Second, the Article does not take a position on whether *Lawrence* was correct. Rather, it addresses the implications of the Court's decision with respect to morality and lawmaking on the assumption that the Court was correct. Thus, the Article is not a normative piece with respect to the proper interpretation of the Due Process Clause.

Finally, this Article is not predictive as to judicial behavior. That is, I do not argue that the Court will actually extend its *Lawrence* morality holding. I also do not address whether the state and lower federal courts will follow the *Lawrence* Court's lead.

II. Lawrence v. Texas *and the Court's Conception of Morality in Law*

There has been much written about what *Lawrence* might mean from a wide array of constitutional law and fundamental jurisprudential principles.[16] I do not intend to canvass this literature in depth or to take a position on the various implications the decision could have on law more generally. Rather, my focus is first on what the *Lawrence* Court said about morality in the context of lawmaking. Then, I address what the Court's statements mean in application. Finally, this Part turns to the specific application of *Lawrence*'s morality-based reasoning in the context of the interpretation of constitutional

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Reality, 1982 WIS. L. REV. 1061; Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992). Of course, one could go much further back in time and still find debates about law and morality on prominent display. *See generally, e.g.*, THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS (William P. Baumgarth & Richard J. Regan eds., Richard J. Regan trans., 2d ed. 2002). For an additional discussion of the connections between law and morality, see Goldberg, *supra* note 5, at 1235–36 n.9 (collecting sources).

15. *See, e.g.*, Symposium, *Law and Morality*, 48 WM. & MARY L. REV. 1523 (2007) (discussing the connections between law and morality, especially in the contexts of constitutional, contract, criminal, property, and tort law).

16. For representative academic work concerning *Lawrence*, see generally Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140 (2004); Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1016215; Goldberg, *supra* note 5; Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159 (2003); Paul M. Secunda, Lawrence*'s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117 (2005); Cass Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059 (2004); Laurence Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Jamal Greene, Note, *Beyond* Lawrence: *Metaprivacy and Punishment*, 115 YALE L.J. 1862 (2006).

text outside of the Due Process Clause. *Lawrence* considered the constraints imposed on legislative action by the Due Process Clause. In order to apply *Lawrence* to at least some aspects of First Amendment doctrine, it is necessary to consider whether some parts of the Constitution may be interpreted to allow morality-based lawmaking despite *Lawrence*'s general prohibition on such reasoning.

A. What the Court Said and What It Must Have Meant

Lawrence is a maddening decision.[17] For example, as Justice Scalia noted in his dissent,[18] and commentators have discussed,[19] the Court did not employ (at least transparently) the conventional standard for judging state action under the Due Process Clause. That standard requires that the Court determine whether a given liberty interest is fundamental and then assess the governmental action by either strict scrutiny or rational basis review.[20] Instead, the Court at times treated such interest as at least implicitly fundamental while at others it employed the language of rationality review.[21] From the perspective

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17. As Professor Hunter colorfully noted: "The Supreme Court's decision in *Lawrence v. Texas* is easy to read, but difficult to pin down." Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1103 (2004). More pointedly, Professor Andrew Koppelman has written: "In short, *Lawrence* can easily be denounced as poor judicial craftsmanship. Its reasoning is obscure, and it lays down no clear rule." Andrew Koppelman, Lawrence*'s Penumbra*, 88 MINN. L. REV. 1171, 1180 (2004).

18. *See* Lawrence v. Texas, 539 U.S. 558, 592–94 (2003) (Scalia, J., dissenting) (noting that the majority did not apply conventional due process analysis).

19. *See, e.g.*, Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy after* Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1, 31–32 (2004) (noting confusion in the Court's analysis between strict scrutiny and rational basis review); Hunter, *supra* note 17, at 1113–17 (discussing the Court's movement from traditional tiered scrutiny standards under *Lawrence*); Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 346–48 (2004) (discussing the mixed signals concerning the standard of review employed in *Lawrence* and commenting that the decision's "place within this traditional scheme [of constitutional review] is puzzling"); Cass Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 48 (arguing that the Court's citation of authority was most consistent with analysis under a fundamental rights rubric instead of the Court's purported application of mere rationality review); Tribe, *supra* note 16, at 1917 (stating that despite the Court's recitation of the rational review standard, it was "obvious" that the Court applied strict scrutiny).

20. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.1.2 (3d ed. 2006) ("If a right is deemed fundamental, the government usually will be able to prevail if it meets strict scrutiny; but if the right is not fundamental, generally only the rational basis test is applied.").

21. *Compare, e.g.*, *Lawrence*, 539 U.S. at 574 (discussing Romer v. Evans, 517 U.S. 620 (1996), as support and noting that in that case the Court had concluded that the law at issue "had

of clarity at least, there is much to criticize in the Court's muddying of waters that, while not clear, were at least reasonably capable of safe navigation.[22]

Whatever it meant to do in terms of constitutional review, however, there is clarity about one important matter: The Court was concerned with the Texas Legislature's use of morality—or notions of right and wrong—as a basis for criminalizing same-sex sodomy.[23] This concern is evident in Justice Kennedy's opinion for the Court. At several points, he cautions that in American pluralistic democracy the majority may not force its views of right and wrong on the minority.[24] Nowhere is this point clearer than in Justice Kennedy's citation to Justice Stevens's dissent in *Bowers v. Hardwick*:[25] "[T]he fact that

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no rational relation to a legitimate governmental purpose"), *and id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."), *with id.* at 564–66 (discussing cases in which the Court found that fundamental rights existed and applied strict scrutiny).

22. *Cf.* State v. Limon, 122 P.3d 22, 25–26, 29–30 (Kan. 2005) (noting the difficulty in determining which standard of review the Supreme Court applied in *Lawrence* and which standard lower courts should use in analogous situations).

23. While there is certainly disagreement about what *Lawrence* means with respect to morality and lawmaking, there is wide consensus that the Court was concerned with the issue. One can see this consensus in lower court opinions. *See infra* note 69 (collecting cases discussing *Lawrence* and morality in the context of the obscenity doctrine). It is also present in academic commentary. *See, e.g.*, William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1081–90 (2004) (discussing Justice Scalia's concern that *Lawrence* would end laws regulating public morals); Goldberg, *supra* note 5, at 1234 (arguing that the *Lawrence* Court did not depart from the Court's tradition of approving government action in the name of morality); Adil Ahmad Haque, Lawrence v. Texas *and the Limits of the Criminal Law*, 42 HARV. C.R.-C.L. L. REV. 1, 31–39 (2007) (arguing that the *Lawrence* Court was correct to refuse to include the enforcement of popular morality in the list of constitutionally legitimate aims of punishment); Herald, *supra* note 19, at 31 ("[T]he Supreme Court's cryptic prose in *Lawrence* makes it difficult to determine what the substantive due process doctrine actually protects, and where and when it protects us from government morality monitors."); Loewy, *supra* note 16, at 159–60 (stating that the *Lawrence* Court held that morality alone cannot justify legislation, but also noting that the Court is divided on this issue); Greene, *supra* note 16, at 1872 ("[*Lawrence*] does not reach the full panoply of morals regulation . . . .").

24. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct."); *id.* at 571 ("The issue is whether the majority may use the power of the State to enforce these [deeply held moral and religious] views on the whole society through the operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992))); *id.* at 574 ("'Beliefs about these matters [e.g., choices central to personal dignity and autonomy] could not define the attributes of personhood were they formed under compulsion of the State.'" (quoting *Casey*, 505 U.S. at 851)).

25. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding as constitutional a Georgia law criminalizing sodomy).

the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[26] This concern with morality was also present in Justice O'Connor's concurring opinion based on the Equal Protection Clause.[27] It was also clear that Justice Scalia, who dissented, read the majority opinion as based in large measure on the inappropriate place of morality in the Texas Legislature's decision-making.[28]

Recognizing that the Court's conclusion was compelled at least in part by a legislature's use of morality is only the beginning of the analysis. The Court's opinion is far from clear as to what specifically it was about the use of morality in *Lawrence* that triggered the conclusion that the Texas statute at issue failed constitutional scrutiny.[29] It seems intuitive that the Court could not have meant that if basic notions of right and wrong were *any* part of the

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26. *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

27. *See, e.g.*, *id.* at 582 (O'Connor, J., concurring in the judgment) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."); *id.* at 583 (O'Connor, J., concurring in the judgment) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" (quoting Romer v. Evans, 517 U.S. 620, 633 (1996))); *id.* at 585 (O'Connor, J., concurring in the judgment) ("A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.").

28. *See, e.g.*, *id.* 599 (Scalia, J., dissenting) ("If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws [e.g., fornication, bigamy, adultery, adult incest, bestiality, and obscenity] can survive rational-basis review.").

29. Other commentators have also discussed what *Lawrence* meant in this regard even if sometimes framing the discussion in more general jurisprudential terms. For example, some have argued that *Lawrence* stands for the proposition that it is unconstitutional for a legislature to impose punishment based on moral principles with respect to "harmless" acts. *See* Haque, *supra* note 23, at 21–31; Hunter, *supra* note 17, at 1112. Others have drawn from *Lawrence* the morality principle that criminalizing conduct must be based on "impersonal" factors and not the result of "status-based" reasoning. *See* Greene, *supra* note 16, at 1867. Yet another take is that *Lawrence* means that only moral principles that are "of long enough standing and still widely agreed upon by most Americans" are sufficient foundations for lawmaking. McDonnell, *supra* note 19, at 348. Some academics have also limited *Lawrence* either to laws concerning gays and lesbians, *see* Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer, Lawrence, *and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313–14 (2004), or, more broadly, only to fundamental rights, *see* Carpenter, *supra* note 16, at 1157. And, finally, some commentators have even read into *Lawrence* a psychological model of moral reasoning. *See* Christian J. Grostic, Note, *Evolving Objective Standards: A Developmental Approach to Constitutional Review of Morals Legislation*, 105 MICH. L. REV. 151, 157–58 (2006).

legislative calculus that the law was constitutionally infirm. Such a rule would sweep so broadly that it is difficult to imagine a law that would be constitutional under the Due Process Clause. As I illustrated in the Introduction, the prohibition on murder would likely fail under this reading of *Lawrence*.[30] Moreover, morality has been recognized traditionally as at least a part of the foundation upon which society's laws are based.[31] It would be odd for the Court to have made such a sea-change in the law without doing so more expressly.

If the Court did not mean to invalidate every law in which morality played a part, what did it mean to do? One possibility, of course, is that the Court's references to morality were merely makeweights and, in some sense, mean nothing at all beyond that case. This reading of *Lawrence* is as untenable as the one rejected above. The Court spent a fair amount of time in its relatively brief opinion discussing its concern about morality and lawmaking.[32] That concern was also apparent in both the concurring and dissenting opinions.[33] Thus, to read the decision in this manner would be to suggest that the Court spent

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30. *See supra* note 8 and accompanying text (noting the inherent morality in criminalizing murder and asserting that the presence of this morality would not lead a court to strike down murder laws on due process grounds). One could illustrate this same principle with scores of examples. For example, modern laws criminalizing robbery could be traced to the religious instruction: "You shall not steal." *Deuteronomy* 5:19. Similarly, perjury could be said to be based on the Biblical prohibition: "You shall not bear dishonest witness against your neighbor." *Id.* at 5:20. Professor Loewy has made similar comparisons in his work on morals legislation and the Establishment Clause of the First Amendment. *See* Loewy, *supra* note 16, at 162.

31. *See, e.g.*, Paris Adult Theater I v. Slaton, 413 U.S. 49, 109 (1973) (Brennan, J., dissenting) ("[M]uch legislation . . . is grounded, at least in part, on a concern with the morality of the community."); Poe v. Ullman, 367 U.S. 497, 545–46 (1961) (Harlan, J., dissenting) ("[T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well."). Professors Alexander and Schauer summarize this point:

> [I]n all common law systems, and in all systems that employ highly indeterminate constitutional or, less often, statutory language, law leaves many questions legally unanswered and many decisions legally undecided; and when that is the case, this incorporative role for morality, although modest in terms of its theoretical status, nonetheless plays a significant role in actual legal practice.

Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1591 (2007) (footnotes omitted); *see also* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 137 (1999) ("Morality is a pervasive feature of social life and is in the background of many legal principles."); Goldberg, *supra* note 5, at 1234 n.4, 1243–58 (collecting various examples of morals-based decisions of the Supreme Court).

32. *See, e.g.*, *supra* note 24 (discussing the majority opinion's references to morality).

33. *See supra* notes 27–28 (discussing references to morality in the concurring and dissenting opinions).

considerable time discussing morality and the law but did not mean to have that discussion bear any substantive weight. Such a reading simply does not make sense.

Instead, this Article suggests that *Lawrence* is best understood as prohibiting lawmaking when morality is the sole or dominant justification for acting.[34] Such a reading reconciles to a significant degree the tension between *Lawrence* and common sense. It allows one to accept that the choices made in lawmaking will inevitably reflect notions of right and wrong and yet not read out of the decision the Court's morality-based language. Indeed, while the majority opinion is silent about how its morality-based reasoning is to be applied, Justice O'Connor's concurrence seems to accept, at least in some respects, the reading of the decision this Article advances. At three places in her concurrence, Justice O'Connor adds an important qualifier on how she understands the *improper* role of morality: A legislature's moral purpose must not be the only one.[35]

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34. Other commentators have noted similar possible readings of *Lawrence*. For example, Professor Goldberg argued that *Lawrence* can be seen as support for the normative principle that lawmaking needs to be supported by "demonstrable facts." Goldberg, *supra* note 5, at 1236; *see also* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1221 (2004) ("[W]hen the liberty interests protected by the Fourteenth Amendment are at stake, morality by itself is an insufficient justification for state regulation."); Hunter, *supra* note 17, at 1112 ("[A] state must now demonstrate some other [non-morality based] rationale for such laws, presumably some form of objectively harmful effects."). In fact, Professor Goldberg maintains that pre-*Lawrence* decisions employed this same rule even if not as clearly as did *Lawrence*. *See* Goldberg, *supra* note 5, at 1243–58. Similarly, Professor McDonnell suggests that "[i]t may be that where the Court finds a law tainted by the illegitimate purpose of moral disapproval, it will now look more closely at other interests to see whether the state actually relied on such interests, and how well those interests justify the law." McDonnell, *supra* note 19, at 348. Of course, he makes this statement in the context of his broader claim that *Lawrence* can be understood as allowing the use of morality when the principle at issue is one that is traditionally and largely universally accepted. *See id.* But not all commentators agree with the reading I describe in the text. For example, then-Yale Law School student, Jamal Greene, appeared to reject the principle when he argued that the coercion implicit in prostitution would not be a sufficient reason under *Lawrence* to criminalize that activity. *See* Greene, *supra* note 16, at 1870. In addition, Professor McGowan has argued that "*Lawrence* has not ruled out moral distaste as a rational basis for state regulation." McGowan, *supra* note 29, at 1313. Instead, she argues that *Lawrence* should be limited to its context concerning gays and lesbians. *Id.* at 1313–14.

35. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring in the judgment) ("[W]e have never held that moral disapproval, *without any other asserted state interest*, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.") (emphasis added); *id.* at 584 (O'Connor, J., concurring in the judgment) ("A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as *the only asserted state interest for the law*.") (emphasis added); *id.* at 585 (O'Connor, J., concurring in the

This subpart has explained my understanding of *Lawrence* as it relates to morality in lawmaking. The next subpart considers what the decision means in terms of constitutional interpretation. I then apply *Lawrence* to the First Amendment.[36]

B. Legislative Action Versus Constitutional Interpretation

As explained above, *Lawrence* should be understood as limiting a legislature's ability to act based solely or dominantly on morality. There is an additional question to ask about *Lawrence*, however, before proceeding to consider the decision's First Amendment implications. Specifically, what does the decision mean in terms of a *court's* ability to use morality to interpret the Constitution?[37] Stated somewhat differently, is it possible that the Due Process Clause does not allow a legislature's use of morality but that certain provisions of the Constitution themselves incorporate moral principles for courts to apply?

It seems relatively uncontroversial that the Constitution does, in some measure at least, incorporate basic moral judgments.[38] In this regard, scholars point to the embedded moral judgments[39] in constitutional provisions

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judgment) ("A law branding one class of persons as criminal *based solely on the State's moral disapproval* of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.") (emphasis added).

36. *See infra* Part III. This morality-based aspect of *Lawrence* has received attention from commentators in a diverse range of areas. *See generally* Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law after* Lawrence v. Texas, 9 MARQ. INTELL. PROP. L. REV. 187 (2005) (discussing *Lawrence*'s implications for certain aspects of Trademark law); Paul. M. Secunda, *The (Neglected) Importance of Being* Lawrence: *The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85 (2006) (discussing *Lawrence*'s implications to the termination of public employees on morality-based grounds).

37. Others have discussed the more normative issue concerning the application of morality by legislatures on the one hand and courts on the other. *See generally* Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523 (2007).

38. *See, e.g.*, Alexander & Schauer, *supra* note 31, at 1579 ("That [certain] constitutional clauses appear to speak in moral language is relatively uncontroversial . . . ."); Ronald C. Den Otter, *The Place of Moral Judgment in Constitutional Interpretation*, 37 IND. L. REV. 375, 376 (2004) ("[A] judge who cannot exercise [moral] judgment is not a person who is qualified to decide the most important questions of constitutional law.").

39. *See, e.g.*, Alexander & Schauer, *supra* note 31, at 1579 (noting the debate among legal scholars regarding the degree of moral judgment within certain constitutional provisions); Moore, *supra* note 37, at 1527–28 (asserting that certain constitutional provisions require judges to reach legal questions based on moral premises).

privileging "freedom" of speech,[40] "free" exercise of religion[41] as well as protecting against "unreasonable" searches and seizures.[42] It is true that these broad provisions do speak to notions of right and wrong. It is "right" to allow people to freely exercise their religion while it is "wrong" to prevent them from doing so. But this recognition does not get us very far. The question remains how much latitude these broad principles give courts to interpret the Constitution "morally" under *Lawrence*'s rationale.

I believe that *Lawrence* significantly constrains courts in exercising the power of judicial review when interpreting constitutional text. Let me note again that I am not making a normative claim; others have covered this ground.[43] My goal is to see what *Lawrence* tells us about this issue. In fact, the decision itself is surprisingly useful on this point.

Justice Kennedy's majority opinion is quite remarkable in its fundamental recognition that the Constitution—as he apparently views it—is a document crafted for the ages. To be sure, Justice Kennedy focuses on the term "liberty" in the context of the Due Process Clauses.[44] But the vision of "liberty" he crafts has implications beyond the Fifth and Fourteenth Amendments. Indeed, in the first paragraph of the opinion, Justice Kennedy writes that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[45] Significantly, he includes in this almost metaphysical list three concepts—thought, belief, and expression—that go beyond due process principles and form the core of what the First Amendment protects.

He returns to this general theme again in the second to last paragraph of the opinion of the Court. He begins by referring to the Due Process Clauses, noting that had "those who drew and ratified" those provisions "known the components of liberty in their manifold possibilities, they might have been more specific."[46] He then continued, however, on a broader constitutional scale:

> They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. *As the Constitution endures,*

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40. U.S. CONST. amend. I.

41. *Id.*

42. U.S. CONST. amend. IV.

43. *See generally* Moore, *supra* note 37 (discussing the intersection of law and morality).

44. This is to be expected because the majority relied on the Due Process Clause to invalidate the Texas statute. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

45. *Id.* at 562.

46. *Id.* at 578.

> *persons in every generation can invoke its principles in their own search for greater freedom.*[47]

This "search for greater freedom" could be impeded equally by court rulings as by legislative action.

Yet, it is *possible* to read this near final passage of the majority opinion as only restricting the legislature. After all, it will be the courts that ultimately decide when certain hidden "truths" have been revealed such that laws passed by a legislative body are unconstitutional.[48] But that is almost certainly not what Justice Kennedy meant. Earlier in the opinion, he incorporated a quote from a previous decision that leaves little doubt that the enduring Constitution of which he writes in *Lawrence* is one that binds the courts equally with legislatures (and executives one supposes as well) with respect to at least overtly moral judgments. He quotes: "'*Our obligation* is to define the liberty of all, not to mandate *our own moral code*.'"[49] Thus, *Lawrence* itself embodies a view of the Constitution that strongly suggests dominantly morally-based reasoning is as inappropriate for courts as it is for legislatures.

The application of *Lawrence*'s morality principle to constitutional interpretation is also supported by the Constitution. As discussed above, one can view many provisions of the Constitution as incorporating moral judgments broadly construed.[50] However, this Article focuses on those parts of the Constitution that make far more concrete moral judgments than merely declaring that, for example, there should be freedom of speech and the like. At several places, the Constitution includes quite specific and focused moral commands. For example, the moral judgment that the sins of the parent should not be passed onto the children is reflected in the prohibition that Congress's power to punish treason is restricted in that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the life of the Person attained."[51] Most obviously, perhaps, there is the prohibition on "cruel and

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47. *Id.* at 578–79 (emphasis added); *see also id.* at 572 (noting that history and tradition are merely the starting point in substantive due process analysis, not the end of the analysis).

48. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (establishing the principle of judicial review).

49. *Lawrence*, 539 U.S. at 571 (emphasis added) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)). The Court also made a similar point earlier in the opinion more directly focused on the factual situation at hand. The Court stated that its discussion "should counsel against attempts by the State, *or a court*, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." *Id.* at 567 (emphasis added).

50. *See supra* notes 38–42 and accompanying text.

51. U.S. CONST. art. III, § 3, cl. 2.

unusual punishments"[52] reflecting the moral judgment that no matter what a person has done, certain punishments are out of bounds. And then there is the clear moral judgment reflected in the Constitution's (all too delayed) prohibition of slavery.[53] A final example is the now repealed effort to incorporate in the Constitution the moral judgment associated with the temperance movement.[54]

The inclusion in the Constitution of these express, concrete moral commandments supports the extension of *Lawrence*'s rule to courts interpreting the Constitution. When the framers and ratifiers wanted to articulate a clear moral judgment, they did so. Therefore, in the more open-textured provisions of the Constitution, courts should not "discover" hidden, embedded moral judgments just as legislatures should not base their actions solely (or primarily) on morality. Of course, just as legislatures will invariably use morality as part of the lawmaking process, courts will invariably use morality in their decision-making. Indeed, *Lawrence* itself is an example of that reality.[55] The key is that courts may not make moral judgments the sole or dominant basis for their rulings.

III. The First Amendment Implications of Lawrence v. Texas

This Part considers the implications of the decision's morality-based reasoning for First Amendment doctrine. I selected two particular aspects of doctrine in order to demonstrate that *Lawrence* has the potential to undermine certain portions of established doctrine while at the same time strengthening others. I begin with obscenity doctrine, which is on far shakier constitutional footing after *Lawrence*, and then turn to restrictions on hate speech in which *Lawrence* reinforces the Court's current position.

A. Obscenity: Undermining Doctrine

The Supreme Court has had a long and tortured history dealing with obscenity.[56] The Court has consistently held that obscene speech is

52. U.S. CONST. amend. VIII.

53. *See* U.S. CONST. amend. XIII (abolishing slavery).

54. *See* U.S. CONST. amend. XVIII (establishing prohibition).

55. *See, e.g.*, McGowan, *supra* note 29, at 1321 ("[The *Lawrence* Court] *is* mandating a moral code—one that protects the sexual liberties of gays and lesbians because those liberties are more important than the moral preferences of a majority of Texans.").

56. For overviews of obscenity and the First Amendment as well as the Court's tortured

categorically outside the bounds of the expression protected under the First Amendment.[57] As such, a law regulating or banning obscene material is subject to the lowest level of constitutional scrutiny—rational basis review.[58]

For present purposes, the important point is *why* the Court has interpreted the Constitution's guarantee of freedom of speech to exclude obscene material. The Court has made clear that obscene material is not protected because it has less moral value than other forms of speech. For example, in *Roth v. United States*[59] the Court stated: "'It has been well observed that such [obscene] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the *social interest in order and morality* . . . .'"[60] Indeed, the *Roth* Court expressly approved of a trial judge's jury instruction which provided in part that "[t]he words 'obscene, lewd and lascivious' as used in the law signify *that form of immorality* which has relation to sexual impurity and has a tendency to excite lustful thoughts."[61] Additionally, the Court continued this morality-based interpretative enterprise for years after *Roth*. For example, in 1973 the Court opined that prohibitions on obscenity were justified by the "right of the Nation and of the States to maintain a decent society."[62]

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path in the area, see CHEMERINSKY, *supra* note 20, § 11.3.4.2; RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT § 3.06 (2003); Glazer, *supra* note 16, at 18–28.

57. *See, e.g.*, Miller v. California, 413 U.S. 15, 20, 24–25 (1973) (defining instances in which states may regulate obscene behavior without violating the First Amendment); Paris Adult Theater I v. Slaton, 413 U.S. 49, 54 (1973) ("This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment."); *id.* at 69 ("[W]e have today reaffirmed the basic holding of *Roth v. United States* that obscene material has no protection under the First Amendment."); Roth v. United States, 354 U.S. 476, 481 (1957) ("[E]xpressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.").

58. *See, e.g.*, WEAVER & LIVELY, *supra* note 56, at 51 ("Minus constitutional protection, the standard of review for an obscenity statute is mere rationality.").

59. *See Roth*, 354 U.S. at 485 (holding that "obscenity is not within the area of constitutionally protected speech or press").

60. *Id.* (emphasis altered) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)); *see also id.* at 484 ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

61. *Id.* at 486 (emphasis altered).

62. *See Paris Adult Theater*, 413 U.S. at 69 (upholding a Georgia statute that regulated obscene material). The statute in question in *Paris Adult Theater* stated:

> "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretions and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or

Although he may have had another agenda at the time, Justice Scalia also has recently commented that "[s]tate laws against . . . obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices."[63]

One can also see the moral underpinnings of the obscenity doctrine in the Court's definitional enterprise. The Court had significant difficulty defining what made something "obscene" and thus categorically outside the First Amendment. Nothing captures the almost Quixotic efforts of the Court in this regard better than Justice Potter Stewart's famous statement that "I know it when I see it."[64] By 1973, the Court elected to move from its largely ad hoc descriptive efforts and adopted its current definition of obscenity, which in relevant part is "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as whole, do not have serious literary, artistic, political, or scientific value."[65] This standard was to be applied on the local "community" level.[66]

The Court's definition of "obscene" is built on a moral foundation: There are some types of interests in human sexuality that are "bad." It is also laced with morally loaded terms. What is "patently offensive"? What does it mean to not have "serious" value? Why are the values limited to the four the Court lists? The answer to each of these questions is built on (community) standards of right and wrong; in a word, they are based on morality.

Thus, the Court's modern obscenity doctrine, both in terms of the rationale for categorically excluding obscene material from First Amendment protection and in defining what is, in fact, obscene, is inextricably linked with morality. The Court has interpreted the Constitution's text with a significant moral gloss. I do not argue in this Article whether the Court was correct to do so in its earlier decisions or whether from a policy perspective the Court was on the right track. Many others have discussed these matters.[67] Rather, my point is

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representing such matters. . . ."

Id. at 51 n.1 (quoting GA. CODE ANN. § 26-2101 (1984)).

63. Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting); *see also id.* at 599 (Scalia, J., dissenting) ("The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable,'—the same interest furthered by criminal laws against . . . obscenity." (quoting Bowers v. Hardwick, 478 U.S. 11, 196 (1973))).

64. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

65. Miller v. California, 413 U.S. 15, 24 (1973).

66. *See, e.g., id.* at 30–34 (arguing that the standard for obscenity should be applied to the standard of the community not the standard of the nation as a whole).

67. The commentary on the Court's obscenity doctrine is wide and deep, for example, see generally HENRY CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY (1969); David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression,*

that *Lawrence* has significantly undermined the very foundation upon which the Court has built the obscenity doctrine.[68] *Lawrence* requires a reevaluation of the doctrine.[69]

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143 U. PA. L. REV. 111 (1994); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

68. Surprisingly, there has been relatively little in-depth academic discussion of *Lawrence* in connection with obscenity. To be sure, others have noted—often in passing and with sparse analysis—that *Lawrence* may call the obscenity doctrine into question. *See, e.g.*, United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 590 (W.D. Pa. 2005) ("[T]here are . . . constitutional scholars who have reached the . . . conclusion . . . that the nation's obscenity laws cannot stand in light of *Lawrence*."), *rev'd*, 431 F.3d 150 (3d Cir. 2005). This Article develops this point in more detail in order to expose the full potential impact of *Lawrence* if its morality-based rationale is taken seriously. A recent exception to the academic silence is Professor Elizabeth Dionne. She has argued that obscenity doctrine remains on solid footing after *Lawrence*. *See* Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why* Miller *Should Survive* Lawrence, 15 GEO. MASON L. REV. 611, 611–13 (2008). Significantly for present purposes, her argument is based on the harmful effects of obscenity on women. *See id.* at 612. Thus, in the end, her analysis is consistent with this Article's thesis.

69. The few lower courts that have addressed the connection between *Lawrence* and the obscenity doctrine (or closely-related matters) have reached varying conclusions about the continued viability of this morally-based constitutional doctrine. Certain courts have concluded that *Lawrence* did not work a significant change in the law. *See, e.g.*, Williams v. Morgan, 478 F.3d 1316, 1322 (11th Cir. 2007) ("To the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is *both* private *and* non-commercial."); United States v. Gartman, No. 3:04-170, 2005 U.S. Dist. LEXIS 1501, at *5 n.1 (N.D. Tex., Feb. 2, 2005) (rejecting the argument that *Lawrence* "made protecting morality an illegitimate government reason" in litigation challenging federal obscenity laws). On the other hand, some courts have concluded that *Lawrence* was far more significant. *See, e.g.*, Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745–47 (5th Cir. 2008) (concluding that *Lawrence* stands at least in part for the proposition that public morality cannot serve as a legitimate state interest to support a law banning the advertising and sale of sex toys), *reh'g denied en banc*, No. 06-51067, 2008 U.S. App. LEXIS 16434 (5th Cir., Aug. 1, 2008) (seven judges dissenting); State v. Limon, 122 P.3d 22, 40 (Kan. 2005) (noting in a case dealing with same-sex statutory rape laws that "[t]he *Lawrence* decision rejected a morality-based rationale as a legitimate state interest"); *Extreme Assocs.*, 352 F. Supp. 2d at 587 (concluding, in a case challenging the constitutionality of the federal obscenity laws, that "after *Lawrence*, the government can no longer rely on the advancement of a moral code *i.e.*, preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest"). Interestingly, the Third Circuit based its reversal of the district court's decision in *Extreme Assocs.*, not on a disagreement with the district court's reading of *Lawrence*, but rather on the doctrine that an inferior court may not determine that a precedent of the Supreme Court has been undermined by a later decision of that Court. *Extreme Assocs.*, 431 F.3d at 155–56, 161–62. Rather, the lower courts must await the Supreme Court's overruling of such directly applicable, even if undermined, precedents. *Id.* at 161.

Recognizing that *Lawrence* has undermined existing obscenity doctrine does not mean that all regulations of obscenity must now be declared unconstitutional. Instead, *Lawrence* alters the constitutional landscape in terms of *how* a court should evaluate legislation restricting obscene speech.[70] In the balance of this sub-part, I describe how one would operate on that altered landscape.

Assume that a court is faced with a local law banning the sale of obscene materials. Under current doctrine that law would be upheld against constitutional challenge so long as it was rationally related to a legitimate state interest. The law would unquestionably survive the attack. The analysis would be more complicated in a post-*Lawrence* world if one faithfully applies that decision. That is initially so because the court would not itself use morality to interpret the constitutional text.

Having eschewed morality as an interpretative device, the court would analyze the local ordinance under strict scrutiny because it is a content-based regulation.[71] As such, the state would need to demonstrate that it had a compelling state interest and that its regulation was narrowly tailored to serve that interest.[72] The locality would not be allowed to assert morality as its sole or dominate interest under *Lawrence*.[73] In order to meet the compelling interest prong of the analysis it would be forced to develop some other, non-morality-based reason for banning the sale of the obscene materials.[74]

But would a locality be able to meet this standard? I believe that it would in many cases. One can see how this is possible by considering two areas in which the Court has allowed restrictions on non-obscene speech using precisely

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70. I am assuming here that obscene speech is "speech" within the meaning of the First Amendment apart from the Court's morality-based exclusions. For a recent discussion of this issue including citations to conflicting academic views on the issue, see generally Andrew Koppelman, *Is Pornography "Speech"?*, 14 LEGAL THEORY 71 (2008).

71. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (repeating the Court's consistent refrain that content-based regulations must satisfy strict scrutiny while content-neutral regulations are judged under intermediate scrutiny).

72. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

73. Interestingly, there was some discussion in *Paris Adult Theater I* in 1973 concerning non-morality based justifications for Georgia's obscenity statute. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60–64 (1973). However, the discussion was in the context of why the state was rational to act in the manner it did. *See id.*

74. In addition, the locality would need to support its definition of obscene material on a basis other than morality. As mentioned earlier, under current law many statutory (and constitutional) descriptions of obscenity are themselves based on morality. *See supra* notes 59–66 and accompanying text.

this standard. First, take the regulation of non-obscene child pornography. In this situation, the Court has upheld content-based regulation because of the effect that the production of such material would have on the children involved.[75] Thus, regulation was allowed not because non-obscene child pornography is immoral (although it surely is and governments regulating the material surely believe it to be). Rather, the regulation is justified by a non-morality based reason—the protection of children.

One can see a similar approach at work in decisions dealing with the regulation and zoning of non-obscene adult entertainment such as bookstores, movie theaters, or nude dancing establishments. In a nutshell, the Court (although often fractured) has focused on the government's reliance on the negative secondary effects of such adult entertainment.[76] To the extent that there is sufficient evidence that the government based its decisions on such secondary effects, the regulation will be sustained. If not, the regulation will likely be overturned.[77]

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75. *See* New York v. Ferber, 458 U.S. 747, 756–58 (1982) ("It is evident beyond need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling . . . . [T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.") (internal quotation marks and citations omitted).

76. *See, e.g.*, City of Erie v. PAP's A. M., 529 U.S. 277, 296 (2000) (recognizing a city's interest in combating the secondary negative effects of adult entertainment establishments). The *Erie* Court stated:

> We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments . . . is unrelated to the suppression of the erotic message conveyed by nude dancing . . . . The asserted interests of regulating conduct through a public nudity ban of combating the harmful secondary effects associated with nude dancing are undeniably important.

Id.; *see also* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46–48 (1986) (accepting that the city's "predominate" interest in making the zoning decisions at issue concerning an adult entertainment business were "the secondary effects of adult theaters"); CHEMERINSKY, *supra* note 20, § 11.3.4.4 (providing an overview of the law regarding sexually oriented speech).

77. One can see the doctrine at work in two decisions in the Courts of Appeals in 2007. In one case, the Second Circuit considered the validity of a Vermont town's ordinance concerning nude dancing. *See* White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, 165 (2d Cir. 2007) (determining that a town ordinance that outlawed nude dancing was unconstitutional). The court considered the proffered evidence of secondary effects under the relevant Supreme Court precedent and concluded that "[b]ecause defendants cannot show that they relied on relevant evidence of negative secondary effects before enacting the Ordinance, they cannot establish that the Ordinance furthers a substantial government interest." *Id.* at 173. In contrast, when considering a similar issue in the context of zoning decisions of a Texas town, the Fifth Circuit determined that town officials had considered evidence of secondary effects sufficiently to support the town's substantial interest in acting. *See* H & A Land Corp. v. City of Kennedale, 480 F.3d 336, 341 (5th Cir. 2007) (finding that ordinances restricting the location of adult entertainment businesses were "narrowly tailored to advance a

The result, then, is one in which *Lawrence* acts as a device to force legislative bodies to act in a certain way. It requires that such bodies think about something other than their own members' (or the majority of their constituents') views of what is "right" or "wrong." Instead, the legislature will have to develop a rationale for acting that does not focus (at least dominantly) on such moral concerns.[78]

One might suggest, as Professor Koppelman colorfully put it, that such a case-by-case consideration of legislative rationales "leaves plenty of room to cook the books."[79] That might be the case. Nevertheless, the legislative-function forcing aspect of *Lawrence* should not be rejected so easily. First, and at the risk of appearing Pollyannaish, we perhaps should give elected officials as a group more credit than the objection does. We should at least give them the benefit of the doubt that they will act lawfully.[80]

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substantial government interest"). These differing results do not mean that the test is a bad one. Rather, they indicate that courts will take their jobs seriously and scrutinize government action to ensure that the relevant standard—here consideration of secondary effects of certain conduct—has been met. The same would be true in the context of an obscenity decision in the post-*Lawrence* world. Indeed, at least one court has similarly read *Lawrence*. In *Gold Diggers, L.L.C. v. Town of Berlin*, 469 F. Supp. 2d 43 (D. Conn. 2007), the district court considered a challenge to a town's ordinance regulating adult businesses. *See id.* at 49–51. In the course of its discussion, the court considered the plaintiff's argument that *Lawrence* precluded enforcement of the ordinance at issue. *See id.* at 64. The court rejected that challenge because the ordinance's "alleged intrusion on the liberty or privacy interests at issue—innocent socializing between entertainer and patron—is justified by the advancement of the Town's interest in reducing adverse effects such as the spread of sexual disease and prostitution associated with [the types of businesses at issue]." *Id.*

78. Others have suggested a similar effect of *Lawrence*. *See, e.g.*, Ball, *supra* note 34, at 1222 (noting that *Lawrence* "demand[s] that the state have some empirical basis for the targeting of lesbians and gay men through discriminatory policies"); Goldberg, *supra* note 5, at 1236 (arguing that *Lawrence* should be read as requiring "demonstrable facts" in order to support lawmaking); Herald, *supra* note 19, at 36 (arguing that *Lawrence* should require a "subtle burden shifting [that] would force more explicit legislative justification and a concrete rationalization beyond 'morality'"); Hunter, *supra* note 17, at 1112 (reading *Lawrence* as requiring states to show "objectively harmful effects").

79. Koppelman, *supra* note 17, at 1179. Professor Goldberg made a similar point concerning a potential argument against the legislative forcing rationale. *See* Goldberg, *supra* note 5, at 1240 ("Some might argue that drawing a distinction between explicitly empirical and explicitly moral justifications is overly formalistic because empirical justifications can be used to mask or support moral judgments.").

80. But even if we accept the "bad legislator" view, we should not so easily assume that courts will be so naive as to have the wool pulled over their eyes. For example, when considering a series of non-morality based justifications purportedly supporting a statutory rape regime that was harsher on same-sex participants, the Kansas Supreme Court methodically rejected each of them. *See* State v. Limon, 122 P.3d 22, 34–38 (Kan. 2005).

But even if we are to take a cynical view of government officials in this area, there are still reasons to think that *Lawrence*'s legislative-forcing effect is worth embracing. First, requiring legislative bodies to consider evidence is highly unlikely to make the process worse than simply relying on abstract notions of right and wrong. Sometimes, better results come by accident, which could be the case here.

Second, there is a public perception benefit that flows from requiring the assembly of a certain legislative record. That perception—even if it is just that—can serve as a potentially powerful sign to the general public (especially to those members of the public who most directly feel the impact of the regulation at issue) that there is a reason that the legislature has taken a certain action. Those affected members of the public may not like what the legislature has done, but at least some of them may have greater confidence in the *process* than they would have if morality plain and simple were the only justification offered for the law at issue.

Finally, as Professor Susan Goldberg has noted, at the very least, requiring legislatures and courts to provide morality-neutral reasons "may constrain some of the bias that can otherwise permeate the adjudication process virtually unfettered."[81]

In sum, when one applies *Lawrence* to current obscenity doctrine, it becomes clear that if the Court is to be faithful to that decision's reasoning, the doctrine's foundation must be fundamentally reexamined. It may be that many restrictions on obscenity will remain constitutional when considered in light of this altered foundation. But that reexamination should take place because sometimes in constitutional law, as in life, it is the journey that is most important, not the destination.

B. Hate Speech: Reinforcing Doctrine

As noted above, *Lawrence* has undermined the foundations of obscenity doctrine. But *Lawrence* can also provide additional support for other First Amendment doctrines. One such area concerns restrictions on so-called "hate speech." This part considers that issue, something not seriously discussed in the literature thus far.

Let me begin by setting out a definition of "hate speech." For purposes of this Article, hate speech is "expression that targets individuals or groups by

81. Goldberg, *supra* note 5, at 1240. She goes on to note that without this minimal check, morality-based rationales give the legislature "virtual carte blanche" to enact many laws. *Id.* at 1240–41.

reason of their race, ethnicity, sex, or sexual preference."[82] Examples of laws that seek to regulate hate speech include speech and conduct codes at many American universities,[83] penalty enhancements for crimes motivated by or associated with group-based hatred,[84] and, in other countries, laws concerning matters such as holocaust denial.[85]

There has been much written about the wisdom and constitutionality of hate speech regulation under the First Amendment.[86] I will not address these issues. As I will describe below, the Court has interpreted the First Amendment such that it is exceedingly difficult to enact hate speech regulations (outside of the sentence enhancement context). *Lawrence*'s morality-based rationale makes it even less likely that such hate speech regulation would survive a constitutional attack.

As matters currently stand, the Constitution would not prevent the government from prohibiting hate speech if that speech were deemed a "true

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82. WEAVER & LIVELY, *supra* note 56, § 7.02.

83. *See, e.g.*, UMW Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (invalidating, on First Amendment grounds, a University of Wisconsin student conduct code prohibiting hate speech); Doe v. Univ. of Mich., 721 F. Supp. 852, 853–54 (E.D. Mich. 1989) (invalidating, on First Amendment grounds, a University of Michigan student conduct code prohibiting hate speech). One commentator reports that "[o]ver 200 colleges and universities have adopted hate speech codes of various types." CHEMERINSKY, *supra* note 20, § 11.3.3.4.

84. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993) (upholding a penalty enhancement for certain crimes motivated by hatred for defined groups).

85. *See, e.g.*, John C. Knechtle, *Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLA. ST. U. L. REV. (forthcoming 2008) (discussing German law concerning hate speech and Holocaust denial) (on file with the Washington and Lee Law Review); Russell L. Weaver et al., *Holocaust Denial and Governmentally Declared "Truth": French and American Perspectives*, 36 FLA. ST. U. L. REV. (forthcoming 2008) (discussing La loi Gayssot, the French law interpreted to outlaw holocaust denial) (on file with the Washington and Lee Law Review).

86. For examples of literature on this topic, see generally LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986); Susan B. Gellman & Frederick M. Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421 (2004); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Frederick M. Lawrence, *The Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). For general overviews of this area of First Amendment law, see generally CHEMERINSKY, *supra* note 20, § 11.3.3.4; WEAVER & LIVELY, *supra* note 56, § 7.02. For discussions of hate speech regulations outside the United States, see generally Judith Bannister, *It's Not What You Say But the Way that You Say It: Australian Hate Speech Laws and the Exemption of "Reasonable" Expression*, 36 FLA. ST. U. L. REV. (forthcoming 2008) (on file with the Washington and Lee Law Review); Knechtle, *supra* note 85; Weaver et al., *supra* note 85.

threat"[87] or "fighting words."[88] *Lawrence* would not alter either of these basic conclusions because with respect to both true threats and fighting words there are non-morality-based rationales for interpreting the First Amendment not to provide protection to these types of utterances. In each instance, the threat of immediate violence that flows from this type of speech supports the current interpretation of constitutional text.

The summary statement of current law set forth above, however, does not do justice to the full respect in which the Court's interpretation has made hate speech regulation difficult to achieve. With respect to fighting words, for example, since the Court recognized the doctrine over sixty years ago,[89] "the Court has never again upheld a fighting words conviction."[90] Moreover, in the context of hate speech laws specifically, the Court has held that even hate speech that qualifies as fighting words is subject to the more general First Amendment aversion to content-based regulations.[91] Thus, a St. Paul, Minnesota ordinance that criminalized certain expressive conduct when based on "'race, color, creed, religion or gender'"[92] was unconstitutional because "[t]he First Amendment [did] not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[93] And, finally, should a regulation avoid the content-based issues that doomed the St. Paul ordinance, it will often run afoul of First Amendment concerns based on vagueness and/or overbreadth.[94]

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87. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359–63 (2003) (holding that a Virginia statute banning "cross burning carried out with the intent to intimidate" was consistent with the First Amendment because such an action was a "true threat").

88. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 383–86 (1992) (recognizing that the First Amendment would allow regulation of fighting words as long as done on a content-neutral basis). *R.A.V.* is not truly as supportive of government's ability to regulate hate speech as one might think. *See infra* notes 89–94 and accompanying text (describing how some hate speech might be subject to First Amendment protection).

89. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942) (upholding a fighting words conviction).

90. CHEMERINSKY, *supra* note 20, § 11.3.3.2.

91. *See R.A.V.*, 505 U.S. at 391 (declaring unconstitutional a statute criminalizing hate speech that qualified as fighting words because the statute was a content-based regulation).

92. *Id.* at 380 (quoting MINN. STAT. § 292.02 (1990)).

93. *Id.* at 391; *see also id.* at 392 ("One must wholeheartedly agree with the Minnesota Supreme Court that [i]t is the responsibility, even the obligation, of diverse communities to confront such notions [of racial supremacy] in whatever form they appear, but the manner of that confrontation cannot consist of selective limitations upon speech.") (citations and internal quotation marks omitted).

94. *See* CHEMERINSKY, *supra* note 20, § 11.3.3.2 ("[I]t will be extremely difficult for legislation to meet [the requirement of not drawing on content-based distinctions] without being so broad that the law will be invalidated on vagueness or overbreadth grounds.").

In a similar vein, the true threat doctrine is not as supportive of hate speech regulation as one might imagine. First, the very nature of the doctrine requires that there be a *threat*.[95] That is, hate speech laws that are aimed at preventing speech that is demeaning to a person based, for example, on their race, gender, or religion would not qualify. In addition, and related to this first point, the threat must be intentional.[96] This latter requirement can be a significant hurdle in certain instances where, for example, the state attempts to impose a presumption that a certain hate-related action signifies intent to make a true threat.[97]

In sum, then, current First Amendment doctrine makes it difficult to enact laws regulating hate speech. Such laws will be even more difficult to sustain once *Lawrence* and its morality-based principles are added to the constitutional mix. Imagine a situation in which there is a hate speech regulation that does not run afoul of any of the existing constitutional limitations on that type of government action. Or, perhaps more likely given the rocks and shoals that one must navigate under established law, imagine that some future Court alters some aspect of the doctrine.[98] At this point, *Lawrence* would require that the government have a non-morality-based reason for acting.[99]

Is it possible that a legislature could craft such a non-morality-based rationale for hate crimes legislation? The answer is the unsatisfying "perhaps." As with obscenity, the government would need to assemble evidence that it was acting for a reason other than what some might call "political correctness." That evidence might be based on social science studies concerning the effect of hate on victims. It could equally potentially find support in evidence

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95. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

96. *See id.* ("'True threats' encompass those statements where the speaker *means* to communicate a serious expression of an *intent* to commit an act of unlawful violence to a particular individual or group of individuals.") (emphasis added).

97. *See, e.g., id.* at 363–67 (plurality opinion) (striking down a presumption in the Virginia statute at issue that burning a cross showed an intent to intimidate or threaten).

98. This possibility is not difficult to envision given the path that some First Amendment law has taken. For example, the fighting words doctrine remains good law, but has changed substantially in substance since the court decided *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *See* CHEMERINSKY, *supra* note 20, § 11.3.3.2 (discussing development of the fighting words doctrine since *Chaplinsky*).

99. Some commentators take a different view. For example, Professor Haque has argued that *Lawrence* is best understood as prohibiting the criminalization of harmless acts. *See* Haque, *supra* note 23, at 21. Applying his principle to hate crimes legislation, he has suggested that *Lawrence*'s rule would not be violated when enacting such laws because the conduct the laws target is, in fact, harmful. *See id.* at 36–37.

suggesting that purveyors of hate are more likely to commit violence. The point again is that *Lawrence* requires the legislature to actually engage in such an enterprise in order to support its actions.

IV. Conclusion

There is little question that *Lawrence* is a significant decision in American constitutional law. How significant remains to be seen. As Professor Tribe wrote: "Even with the benefit of hindsight, it will be a daunting task at the midpoint of the twenty-first century to evaluate the differences *Lawrence* will have made . . . ."[100] Yet, it is possible to see some of the decision's potential impact now in areas such as the First Amendment.

Lawrence's prohibition on the use of morality as the sole or dominant rationale for both constitutional interpretation and legislating undermines certain aspects of established law while simultaneously providing support of others. Obscenity doctrine is a prime example of the former. *Lawrence* mandates that the doctrine be reevaluated. On the other hand, *Lawrence* buttresses the Court's current conclusions concerning the unconstitutionality of hate speech laws under the First Amendment.

In the end, this Article should be one part of a larger process in which scholars begin to connect the dots among the Court's various constitutional doctrines. Such an endeavor will ultimately make constitutional jurisprudence better, both normatively and descriptively.[101]

100. Tribe, *supra* note 16, at 1895.

101. As other commentators have noted, linking *Lawrence*, a due process and/or equal protection case, with other areas of constitutional law is an important project in and of itself. *See* Greene, *supra* note 16, at 1902 ("Recognizing the ways in which similar reasoning applies in different doctrinal contexts can make hard cases harder, but it has the benefit of enforcing the analytic consistency necessary to the legitimate exercise of judicial review.").