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# The Myth of Strict Scrutiny for Fundamental Rights

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# THE MYTH OF STRICT SCRUTINY FOR FUNDAMENTAL RIGHTS*

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Dissenting in *Lawrence v. Texas,* Justice Scalia stated that, under the Due Process Clause, if an asserted liberty is a "fundamental right," it triggers "strict scrutiny" that almost automatically invalidates any statute restricting that liberty. For strict scrutiny requires that the challenged statute, to be upheld, must further a "compelling governmental interest" and must be "necessary" or "narrowly tailored" to doing so. Scalia also wrote that if an asserted liberty is not a fundamental right, it is merely a "liberty interest" that triggers rational basis scrutiny that is so deferential that the Court all but automatically upholds the statute in question. For deferential rational basis scrutiny requires merely that the challenged statute, to be valid, must further a "legitimate governmental interest" and need only be "rationally related" to doing so.[1]

*Lawrence* deviated from this regime. The Court did not hold that

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[1] 539 U.S. 558, 593–594 (2003) (Scalia, J., dissenting).

homosexuals' right to autonomy was a fundamental right requiring strict scrutiny. Nor did it hold that their right was merely a liberty interest calling for highly deferential rational basis scrutiny. Instead, the Court applied an intermediate standard—what we call "rational basis scrutiny with bite"—and struck down the statute forbidding same-sex sexual conduct. Consequently, Scalia cried foul, chastising the Court for not following the rigid two-tier framework that all but automatically decides rights questions one way or the other.[2] In equal protection cases, Scalia has cried foul because strict scrutiny for affirmative action plans has not been "fatal in fact" but has required judgment.[3] In due process cases, he has cried foul because rational basis scrutiny for laws forbidding same- sex sexual conduct has not been nonexistent in fact. In both domains, and in the application of both tiers, he has called for absolute, automatic decisions that do not require judgment. Such a jurisprudence manifests both the illusion of absoluteness and the impoverishment of judgment.

We shall expose the myth of strict scrutiny for fundamental rights under the Due Process Clause. Scalia's formulation of the framework for substantive due process sounds familiar and uncontroversial. Indeed, you'll find this formulation in leading treatises and commercial outlines because these sources seek neat, rigidly maintained frameworks with clearly delineated tiers of analysis. Yet we show that the only substantive due process case ever to recognize a fundamental right implicating strict scrutiny—requiring that the statute further a compelling governmental interest and be necessary to doing so—was *Roe v. Wade.*[4] And we point out that those aspects of *Roe* were overruled in *Planned Parenthood v. Casey,* which pointedly avoided calling the right of a woman to decide whether to terminate a pregnancy a "fundamental right" and substituted an "undue burden" standard for strict scrutiny.[5] Going through due process cases protecting liberty and autonomy—from *Meyer v. Nebraska* (1923) through *Casey* (1992) and *Lawrence* (2003)—we show that due process jurisprudence is not absolutist nor does it reflect an impoverishment of judgment. None of these cases applies the framework that Scalia propounds. To the contrary, these cases reflect what *Casey* and Justice Harlan called "reasoned judgment" concerning our "rational continuum" of "ordered liberty."[6] Indeed, they have involved judgment of the very sort that Glendon calls for and that Scalia would banish. The constitutional liberalism developed in our book does not seek to protect rights absolutely or to avoid judgment in interpreting rights. Instead, it justifies such

[2] Id., 593–594.
[3] See Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., dissenting).
[4] 410 U.S. 113 (1973).
[5] 505 U.S. 833, 847, 876 (1992).
[6] Id., 848–849; *Poe v. Ullman*, 367 U.S. 497, 543, 549 (1961) (Harlan, J.,dissenting).

reasoned judgment, which protects important rights stringently but does not preclude government from encouraging responsibility or inculcating civic virtues.

Whence derives the myth of strict scrutiny for fundamental rights under the Due Process Clause? How did it take hold in our constitutional culture despite lacking a firm footing in the cases protecting liberty or autonomy under that clause? This myth has been propounded and perpetuated mostly by opponents of substantive due process like Scalia and Chief Justice Rehnquist. As stated previously, it has not been put forward in cases *recognizing* asserted liberties as protected under the Due Process Clause (besides *Roe,* itself repudiated in this respect in *Casey).* Instead, opponents of substantive due process have advanced the myth of strict scrutiny for fundamental rights in opinions *refusing to recognize* asserted rights. Examples include Justice White's majority opinion in *Bowers v. Hardwick,* rejecting a right of homosexuals to sexual privacy[7] (Bowers was overruled in *Lawrence,* hence provoking Scalia's rage in dissent); Scalia's plurality opinion in *Michael H. v. Gerald D.,* rejecting a right of unwed fathers to visit their biological children;[8] Rehnquist's majority opinion in *Washington v. Glucksberg,* rejecting a right to die including physician-assisted suicide;[9] and, most pointedly, Scalia's dissent in *Lawrence,* objecting to the Court's protection of a right of homosexuals to sexual privacy or autonomy. We will focus on the latter two.

These opponents of substantive due process perpetuate the myth in order to narrow the interpretation of the Due Process Clause, to make it harder to justify protecting rights under it. Somehow, the defenders of substantive due process have fallen for the myth and been enlisted in perpetuating it. We suppose that they have been willing participants, not because they want to make it hard to protect rights of privacy or autonomy, but instead because they want stringent protection for rights of privacy or autonomy under the Due Process Clause. After all, liberal constitutional theorists who defend substantive due process typically love talk of "taking rights seriously," and it is no surprise that they might think that the best way to take rights seriously is to declare them to be "fundamental rights" and to subject restrictions upon or regulations of them to "strict scrutiny." Indeed, typically in constitutional law, what drives jurists and scholars to impose or argue for a requirement of strict scrutiny is a desire stringently to protect the right in question, as is the case with the First Amendment and the Equal Protection Clause, two main areas of strict scrutiny. We do not, for example, trust government when it restricts freedom of speech on the

[7] 478 U.S. 186 (1986).
[8] 491 U.S. 110 (1989).
[9] 521 U.S. 702 (1997).

basis of the content of ideas, and we are suspicious of government when it passes laws reflecting racial prejudice. In substantive due process, by contrast, what typically drives jurists like Scalia and Rehnquist to argue for the requirement of strict scrutiny is a desire narrowly to limit the recognition and protection of rights of liberty or autonomy.

Indeed, the twofold result of Scalia's and Rehnquist's myth is to make it harder to recognize rights under the Due Process Clause and then to make all cases recognizing rights but not tracking this doctrinal template of strict scrutiny—which is to say all cases protecting rights under substantive due process (besides *Roe)—seem* problematic, messy, and unrigorous. Every time the Court does not use the formulations "fundamental right," "strict scrutiny," "compelling," and "necessary," people say that something illegitimate is going on. Even liberal proponents of substantive due process are sometimes complicit in perpetuating the myth.[10]

...

If the familiar framework of strict scrutiny for fundamental rights is a myth, what framework (or standards) has the Court actually applied? Put another way, what framework best fits and justifies the line of cases actually protecting substantive liberties under the Due Process Clause? We have already given away the answer: Harlan's famous conception of the Due Process inquiry advanced in his dissent in *Poe v. Ullman.* We offer interpretations of Harlan's conception that bring out how well it fits and justifies the cases over and against Scalia's and Rehnquist's conception propounding the myth of strict scrutiny for fundamental rights. And we show that the cases have not protected rights absolutely so as to preclude government from encouraging responsibility or inculcating civic virtues in the ways prescribed by our constitutional liberalism.

## I. REASONED JUDGMENT CONCERNING THE RATIONAL CONTINUUM OF ORDERED LIBERTY

The joint opinion of Justices O'Connor, Kennedy, and Souter in *Casey* embraced Justice Harlan's conception of the Due Process inquiry as put forward in dissent in *Poe.* It quoted the following two passages from Harlan:

[10] Michael C. Dorf with Trevor Morrison, Constitutional Law (New York:Oxford University Press, 2011), 209. Ultimately, after speaking of the Court's "doctrinal meanderings," they put the matter rightly: "Nonetheless, taking a bird's eye, rather than a worm's eye, view of the topic, we can see that the Court will apply some form of heightened scrutiny to laws that infringe the freedom of competent adults to make important decisions about family formation, child-rearing, and bodily autonomy."

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that...it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance...is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
>
> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints,...and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[11]

Interpreting these passages, the joint opinion in *Casey* added:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.

[11] *Poe*, 542, 543.

> Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.[12]

...

We shall distill five characteristics of Harlan's substantive due process jurisprudence, in contradistinction from the hankerings seen in Scalia's and Rehnquist's myth of strict scrutiny for fundamental rights under the Due Process Clause. First, Harlan conceives liberty as a "rational continuum" of "ordered liberty," not a list of fundamental rights or isolated points pricked out in the text of the Constitution. It is an abstract concept (as *Casey* put it, "ideas and aspirations"[13]), not a code of concrete, specific enumerated rights. Second, he conceives interpretation of abstract commitments like liberty as a "rational process" of "reasoned judgment," not a quest for a formula, code, or bright-line framework to avoid judgment. Third, applying these conceptions of liberty and interpretation yields a rational continuum of judgmental responses, not a rigidly maintained two-tier framework. ourth, and relatedly, doing so requires judgment about the balance between liberty and order ("ordered liberty") and uses common-law constitutionlist reasoning by analogy from one case to the next, as opposed to making decisions by automatically invalidating or automatically upholding challenged legislation. Fifth, while Harlan agrees with Scalia that judgments about liberties must be grounded in history and tradition, Harlan unlike Scalia conceives tradition as a "living thing" or evolving contemporary consensus, not hidebound historical practices as of the time the Due Process Clause was ratified (in 1868).[14]

If the Supreme Court were to have applied Harlan's conception of the Due Process inquiry, what would our substantive due process jurisprudence look like? Instead of having two rigidly maintained tiers—strict scrutiny and deferential rational basis scrutiny—we would have a spectrum of standards or continuum of judgmental responses. That is, this jurisprudence would look basically the very way it looks today! To preview our findings, see the figure below for the spectrum of standards or continuum of judgmental responses we will see in the substantive due process cases. We have ordered them from the most stringent review to the most lenient or deferential review.

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[12] *Casey*, 849.

[13] Id., 901.

[14] Contrast *Poe*, 542 (Harlan's view of tradition as a "living thing") with Michael H. v. Gerald D., 491 U.S. 110 (1989) (Scalia's view of tradition as concrete historical practices embodied in the common law and statute books as of 1868, the year the Fourteenth Amendment was ratified).

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|---|---|
| Strict scrutiny | ↓ |
| Roe; Loving (EP Clause) | Undue burden standard |
| | Casey |
| | ↑"Means may not sweep unnecessarily broadly" |
| Intermediate scrutiny | Griswold |
| Moore; Craig (EP Clause) | |
| | ↑Rational basis scrutiny with "bite" |
| | Lawrence; Romer (EP Clause); Meyer; Pierce |
| | ↑Balancing of liberty interest against state interest |
| Deferential rational basis scrutiny | Cruzan |
| Bowers; Michael H.; Glucksberg | |

Throughout, we shall be inquiring which framework for the Due Process inquiry—that of Scalia/Rehnquist or that of Harlan—better fits and justifies the cases. We will conclude that Harlan's framework can fit and justify all of the cases protecting rights under the Due Process Clause, and that that of Scalia and Rehnquist can fit and justify none of them.

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## III. SCALIA'S DISSENT IN *LAWRENCE*

We are now in a position to assess Scalia's dissent in *Lawrence,* with which this chapter opened. Again, Scalia says that the Court's established framework for the Due Process Clause has two rigidly policed,

dichotomous tiers: either fundamental right, triggering strict scrutiny, or mere liberty interest, triggering deferential rational basis scrutiny.[15] As stated, Scalia claims that only "fundamental rights" get greater protection than that afforded under deferential rational basis scrutiny. What is more, White in *Bowers* had offered the two famous phrases from *Palko* and *Moore—"implicit* in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition"—as *alternative* formulations for deciding whether an asserted liberty was protected—as if you just had to satisfy one or the other.[16] By contrast, Scalia in dissent in *Lawrence* offers them as independent requirements—and claims that you have to satisfy *both.* He claims that an asserted liberty has to be both implicit in the concept of ordered liberty and deeply rooted in this nation's history and tradition.[17]

Whereas *Bowers,* much like *Glucksberg,* spoke of "heightened" scrutiny but did not specify a framework of what that heightened scrutiny would consist of, Scalia speaks of "strict" scrutiny and says that the established framework is to require a compelling governmental interest and a necessary relationship between the statute and that interest.[18] *Bowers, Glucksberg,* and Scalia's dissent in *Lawrence* contemplate a rigid two-tier framework: if the Court is not prepared to declare an asserted liberty a "fundamental right" triggering heightened or strict scrutiny, it falls back on deferential rational basis scrutiny. For them, there is nothing in between—notwithstanding all of the cases that have gone before and which we have shown to lie in between. We have shown this framework to be false through and through, a myth of Scalia's and Rehnquist's making.

Scalia also refers to the Court's method in *Lawrence—which* we call rational basis scrutiny with "bite"—as "unheard of."[19] To say that an approach is "unheard of" is one of Scalia's favorite put-downs. In *Casey,* he referred to the joint opinion's conception of "reasoned judgment" as unheard of, even though it was a well-known and much celebrated approach famously propounded by Justice Harlan. The joint opinion there claimed to be following the Court's "established method" and we have shown that it can account for the cases protecting liberties under the Due Process Clause. That was not enough to stop Scalia from haughtily asserting that this was a "new" method never heard of before that day.[20]

Let's address Scalia's claim that Kennedy's approach to scrutinizing the Texas law in *Lawrence* was "unheard of." It is

[15] *Lawrence,* 586 (Scalia, J., dissenting).
[16] *Bowers,* 191–192.
[17] *Lawrence,* 596.
[18] Id., 593.
[19] Id., 586.
[20] *Casey,* 1000 (Scalia, J., concurring in part and dissenting in part).

demonstrably false in two important respects. For one thing, Kennedy's method closely resembles Harlan's well-known framework (as shown above). For another, Kennedy's method closely resembles Kennedy's own approach, under the Equal Protection Clause, to measures reflecting animus against gays and lesbians in *Romer.*[21] And let's not forget that Scalia there objected to this very approach as unheard of.[22] In *Romer,* instead of applying strict scrutiny, intermediate scrutiny, or deferential rational basis scrutiny, the Court applied rational basis scrutiny with "bite"–putting some teeth into its scrutiny of both the legitimacy of the end and the fit between means and end. *Lawrence* is not the first case in which the Court has adapted an analysis in the Equal Protection Clause context to the Due Process Clause context. And that analysis was already familiar in the Equal Protection Clause context from cases like *City of Cleburne v. Cleburne Living Center* and *U.S. Department of Agriculture v. Moreno,* which had looked askance at laws reflecting "animosity" toward, or a "bare desire to harm," a "politically unpopular group" without applying "strict scrutiny" to them.[23]

We have analogous situations regarding gays and lesbians in relation to the Equal Protection Clause and the Due Process Clause. In *Romer,* the Court was not about to say that discrimination on the basis of sexual orientation should be recognized as a suspect classification triggering strict scrutiny under the Equal Protection Clause. Nor, on the other hand, was it about to say that discrimination on the basis of sexual orientation should be subjected to merely deferential rational basis scrutiny (just like regulations discriminating against opticians in *Williamson).* Similarly, in *Lawrence,* the Court was not about to say that the right of gays and lesbians to sexual autonomy is a fundamental right triggering strict scrutiny. (In fact, the joint opinion in *Casey* wouldn't even any longer say that the right to abortion is a "fundamental right.") Nor, on the other hand, was it about to say that laws criminalizing homosexual sexual intimacy should be subjected to merely deferential rational basis scrutiny (just like regulations of opticians in *Williamson).* And so, in *Romer* under the Equal Protection Clause as well as in *Lawrence* under the Due Process Clause, the Court has eschewed rigorously policing frameworks of three tiers or two tiers and instead applied rational basis scrutiny with "bite"; not as stringent as strict scrutiny and not as lenient as deferential rational basis scrutiny. In *Romer,* the Court put some bite into its scrutiny of the asserted legitimate governmental interest: whereas *Bowers* presumed that the preservation of traditional sexual morality was a legitimate governmental

[21] Romer v. Evans, 517 U.S. 620, 634–635 (1996).
[22] Id., 639 (Scalia, J., dissenting).
[23] *Romer*, 634–635 (citing U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-447 (1985) (also citing *Moreno*).

interest,[24] *Romer* saw "animosity" toward a "politically unpopular group" and held this not to be a legitimate governmental interest.[25] In *Romer,* the Court also put some teeth into its analysis of the fit between the means and the end.[26] *Lawrence* applies a similar analysis with "bite."[27] And so, contrary to Scalia, the level of scrutiny in *Lawrence* had been heard of in *Romer.*

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## V. DEBUNKING THE MYTH OF STRICT SCRUTINY FOR FUNDAMENTAL RIGHTS

To recapitulate: Scalia and Rehnquist have propounded the myth of strict scrutiny for fundamental rights under the Due Process Clause to make it harder to protect liberties. For Scalia and Rehnquist (not to mention White in *Bowers),* the ideal state of affairs would be to abolish substantive due process altogether, to overrule all of the precedents protecting substantive liberties under the Due Process Clause and, going forward, to protect no such substantive liberties. But they do not have the votes to accomplish their ideal state of affairs. For Scalia and Rehnquist (along with White), the second-best state of affairs is to formulate a framework that will narrow the precedents, drain them of generative vitality, and make it difficult if not impossible to protect "new" liberties under the Due Process Clause and make it easy to uphold laws restricting liberty.

It might seem that the fact that the cases have not followed this framework would be a strike against the framework. That is, when one offers a framework to account for an area of doctrine, ordinarily one seeks to show that it fits and justifies the cases. If the framework doesn't fit and justify the cases, that suggests that the framework is inadequate. But Scalia and Rehnquist treat the fact that the cases have not followed this framework as a strike against the cases! They propound the myth of strict scrutiny for fundamental rights under the Due Process Clause, even though none of the cases protecting liberties under the Due Process Clause have conformed to that framework (besides *Roe,* itself repudiated in this respect in *Casey).* Then they criticize those cases for failing to follow the framework. They criticize the cases, accordingly, as illegitimate and as a mess suggesting the inherent unruliness, incoherence, and illegitimacy of the whole undertaking. Again, instead of acknowledging, from the fact that the cases don't fit the framework, that the framework is inadequate, Scalia can criticize the cases for not following the framework. Thus, Scalia and

[24] *Bowers,* 196.
[25] *Romer,* 634.
[26] Id., 635.
[27] See *Lawrence,* 578.

Rehnquist try to have it both ways: propound a new framework to shut down the protection of liberty under the Due Process Clause and then criticize the precedents for failing rigorously to have followed that framework! Tellingly, opinions by White, Scalia, and Rehnquist (in *Bowers, Michael H., Glucksberg,* and dissent in *Bowers)* proclaim that this is the established framework and cite one another (cases denying protection of liberties) in support of this claim, but they do not—and cannot—cite cases actually protecting rights as supporting this framework.

Notwithstanding the myth of strict scrutiny for fundamental rights under the Due Process Clause and the absoluteness critique, the cases protecting basic liberties under the Due Process Clause reflect what *Casey* and Justice Harlan called "reasoned judgment" concerning our "rational continuum" of "ordered liberty."[28] The cases themselves dispel any illusion of absoluteness concerning rights of privacy or autonomy and avoid the impoverishment of judgment that Scalia seeks and Glendon decries. Our constitutional liberalism justifies such reasoned judgment, protecting important rights stringently but not precluding government from encouraging responsibility or inculcating civic virtues. It enables us to pursue ordered liberty through taking rights, responsibilities, and virtues seriously.

[28] *Poe*, 543 (Harlan, J., dissenting) ("rational continuum"); *Casey*, at 849 ("reasoned judgment").