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The *Glucksberg* Renaissance: Substantive Due Process since *Lawrence v. Texas*

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NOTE

THE *GLUCKSBERG* RENAISSANCE: SUBSTANTIVE DUE PROCESS SINCE *LAWRENCE V. TEXAS*

*Brian Hawkins**

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INTRODUCTION

On their faces, *Washington v. Glucksberg*[1] and *Lawrence v. Texas*[2] seem to have little in common. In *Glucksberg*, the Supreme Court upheld a law prohibiting assisted suicide and rejected a claim that the Constitution protects a "right to die"; in *Lawrence*, the Court struck down a law prohibiting homosexual sodomy and embraced a claim that the Constitution protects homosexual persons' choices to engage in intimate relationships. Thus, in both subject matter and result, *Lawrence* and *Glucksberg* appear far apart.

The *Lawrence* Court, however, faced a peculiar challenge in reaching its decision, and its response to that challenge brings *Lawrence* and *Glucksberg* into conflict. Only seventeen years before *Lawrence*, the Court in *Bowers v. Hardwick*[3] faced essentially the same claim as in *Lawrence*, but reached the opposite conclusion—that is, *Bowers* declared that the Constitution provides *no* protection for homosexual sodomy. The *Lawrence* Court, therefore, had to justify overruling *Bowers* while simultaneously supporting its own conclusion.

As it happens, *Lawrence* did not so much seek to justify overruling *Bowers* as it sought to eviscerate it. *Lawrence* challenged nearly every aspect of *Bowers*, including assumptions found only in one justice's concurring opinion.[4] Most pertinent for this Note is *Lawrence*'s attack on *Bowers*'s method of constitutional interpretation—a method reflecting skepticism about the Supreme Court's authority to use the Due Process Clauses of the Fifth and Fourteenth Amendments to establish constitutional protection for rights not mentioned in the Constitution's text.[5] It is here that *Lawrence* and *Glucksberg* collide.

Glucksberg shared *Bowers*'s narrow view of the Due Process Clauses and its similarly restricted approach to interpreting them. This approach comprises five distinct analytical tools,[6] which I will refer to as the "*Glucksberg* Doctrine."

Although the *Lawrence* majority opinion never cited *Glucksberg*, the aspersions *Lawrence* cast on *Bowers* inevitably fell with equal force on *Glucksberg*. Indeed, *Lawrence* so strongly denounced narrow interpretations of the Due Process Clauses that one might reasonably wonder whether *Lawrence* intended implicitly to repudiate *Glucksberg* through its explicit

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

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

3. 478 U.S. 186 (1986).

4. *See Lawrence*, 539 U.S. at 571, 572–73 (impugning certain assertions made by Chief Justice Burger in his *Bowers* concurrence).

5. *See infra* note 33 and accompanying text.

6. *See infra* Part I.

rejection of *Bowers*. Many commentators have reached essentially this conclusion, predicting that *Lawrence* would usher in a new era of expanded constitutional freedoms.[7]

So far, the commentators have been wrong. My survey of 102 cases applying *Glucksberg* since the day the Supreme Court decided *Lawrence* (the "*Glucksberg* Survey") indicates that the *Glucksberg* Doctrine has not only survived *Lawrence*, but has flourished.[8] Most cases from the *Glucksberg* Survey ignore *Lawrence* completely; of the few cases that acknowledge *Lawrence* and its expansive view of constitutional rights, all but one eventually fall back on the *Glucksberg* Doctrine's restricted approach.[9]

Furthermore, a second survey of 86 cases applying only *Lawrence* and not *Glucksberg* (the "*Lawrence* Survey") shows that *Lawrence*'s approach to constitutional interpretation has languished on its own merits.[10] With the notable exception of certain decisions granting same-sex couples the right to marry under state constitutions,[11] *Lawrence* has inspired very little innovation with regard to constitutionally protected rights.[12]

All decisions in both the *Glucksberg* and *Lawrence* Surveys come from American courts other than the Supreme Court. *Lawrence* itself has not reappeared in a Supreme Court majority opinion since the day it was decided. *Glucksberg* has been mentioned only once in the same time frame, for a point relevant to assisted suicide and not to the *Glucksberg* Doctrine.[13]

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7. *See* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 60 (2003) ("My guess is that *Lawrence* will . . . inaugurate a set of judgments, from lower courts and the Court itself, that go, in case-by-case fashion, toward eliminating the most arbitrary and senseless restrictions on liberty and equality."); *see also* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002–03 CATO SUP. CT. REV. 21, 21 ("If the approach the Court took in the case is followed in other cases in the future, we have in *Lawrence* nothing short of a constitutional revolution, with implications reaching far beyond the 'personal liberty' at issue here."); Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 680 (2006) ("*Lawrence* . . . rejected precedent both as to gay rights and as to the methodology the Court ought to use in substantive due process cases."); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1121 (2004) (arguing that *Lawrence* "largely adopted" a standard that asks "whether [a challenged] statute 'sets up one of those arbitrary impositions or purposeless restraints at odds with the Due Process Clause' " (quoting Washington v. Glucksberg, 521 U.S. 702, 752 (1997) (Souter, J., concurring)) (quotation marks omitted)); Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (characterizing *Lawrence* as "a decision laying down a landmark that opens vistas").

8. The *Glucksberg* Survey can be found in tabular format *infra* Appendix A. This table is also available online in PDF format at http://students.law.umich.edu/mlr/archive/105/2/hawkins.pdf.

9. *See infra* Section II.A.2.

10. The *Lawrence* Survey can be found in tabular format *infra* Appendix B. This table is also available online in PDF format at http://students.law.umich.edu/mlr/archive/105/2/hawkins.pdf.

11. *See infra* note 179 and accompanying text.

12. *See infra* Section II.B.2.

13. *See* Gonzales v. Oregon, 126 S. Ct. 904, 911 (2006) ("As the Court has observed, 'Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.' " (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997))).

Therefore, the *Glucksberg* and *Lawrence* Surveys fairly represent the current state of the cases for which they are named.

One might be tempted to argue that the trends of the *Glucksberg* and *Lawrence* Surveys evince an epidemic of parochialism in the judiciary—or even a conservative counterstrike in the modern American culture war. While a handful of cases may fit this description, this Note argues that the persistence and expansion of the *Glucksberg* Doctrine in the wake of *Lawrence* is a multifaceted phenomenon—and for the most part better explained through *Lawrence*'s own weaknesses than through disdain for gay rights, sexual liberty, or substantive due process in general.

Part I of this Note sets forth the tension between *Glucksberg* and *Lawrence* that the lower courts have been forced to confront. More specifically, it describes the *Glucksberg* Doctrine, its roots in *Bowers*, and the many ways in which it conflicts with *Lawrence*. Part II summarizes the methodology and major trends of the *Glucksberg* and *Lawrence* Surveys. It shows that (a) most cases applying *Glucksberg* simply ignore *Lawrence*, (b) every element of the *Glucksberg* Doctrine remains alive and well, and (c) application of the *Glucksberg* Doctrine most often leads courts to deny the existence of a new constitutional right. It also shows that analysis purely under *Lawrence*, and not under *Glucksberg*, usually leads to the same conclusion.

The remainder of the Note wrestles with the various possible explanations for the results of the *Glucksberg* and *Lawrence* Surveys. It places most emphasis on explaining the *Glucksberg* Survey because it embodies courts' choices between two highly conflicting cases (*Glucksberg* and *Lawrence*). This calls for more justification than simply finding *Lawrence* distinguishable and *Glucksberg* not applicable—a common occurrence in the *Lawrence* Survey. Accordingly, Part III evaluates various theories under which *Lawrence* and *Glucksberg* might coexist. Each of these theories, if reflected in the *Glucksberg* Survey, would eliminate or reduce the anomaly inherent in *Glucksberg*'s persistence. Part III concludes that these theories fail to describe how courts have actually treated *Lawrence* and *Glucksberg*.

Part IV discusses pragmatic explanations for *Glucksberg*'s persistence and *Lawrence*'s marginalization. It begins by looking at the possibility that some courts have intentionally resisted *Lawrence* because of its cultural implications. It finds evidence suggestive of such behavior in certain cases, but concludes that such cases are not necessarily best interpreted as the product of cultural backlash. Rather, a number of benign explanations are more persuasive, including *Lawrence*'s lack of guidance, lower courts' desire to leave the biggest decisions to the Supreme Court, and *Glucksberg*'s value in handling the frequently bizarre claims of constitutional rights that courts routinely confront.

I. THE RISE AND POTENTIAL FALL OF THE *GLUCKSBERG* DOCTRINE

American legal circles have long debated whether the Constitution protects "unenumerated" rights—that is, rights not explicitly mentioned in the text of the Constitution itself—and whether courts have the authority to enforce such rights. Since the mid-nineteenth century, the Supreme Court has

been willing to assume that unenumerated rights exist,[14] and many decisions establishing and protecting such rights remain in force today.[15] These cases ground themselves in the belief that some laws violate the spirit of the Constitution, even though they may not run afoul of its letter.[16] This principle is said to emanate from the protection given to "liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments,[17] and is commonly known as *substantive due process*.[18]

While the threshold question of whether unenumerated rights exist is important in theory, it quickly meets a practical wall. Some substantive due process rights are taken for granted by the American public, such that no one will likely ask the Supreme Court to overturn the decisions establishing such rights.[19] Thus, the question of whether unenumerated rights exists devolves to a more functional inquiry: Assuming the existence of unenumerated rights, how does a court go about discerning the existence and scope of such rights? From the mid-1960s to the mid-1980s, the Supreme Court's use of substantive due process to strike down laws restricting contraception and abortion brought these questions to the forefront,[20] but no consistent rationale emerged.[21]

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14. *See* Andrew T. Hyman, *The Little Word "Due"*, 38 AKRON L. REV. 1, 23–25 (2005) (discussing the development of Supreme Court protection for unenumerated rights in cases such as *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855), and *Dred Scott v. Sandford*, 60 U.S. 393 (1856)).

15. *Glucksberg*, 521 U.S. at 720 (listing such cases and the rights that they declared).

16. *See id.* at 719–20 ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." (citation omitted)).

17. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

18. *See Glucksberg*, 521 U.S. at 720 (discussing "substantive due process").

19. Americans certainly continue to dispute whether, say, abortion should receive constitutional protection, *see* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 486 n.396 (2005) (citing survey evidence indicating continuing ambivalence about constitutional protection for abortion, despite its status as a constitutional right since 1973), and state legislatures might very well pass broad restrictions on it should the Supreme Court ever repudiate its abortion jurisprudence. However, most Court-declared rights inspire little controversy. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952) (recognizing a right to bodily integrity); Meyer v. Nebraska, 262 U.S. 390 (1923) (affirming the right to direct the upbringing of one's children).

20. One might question whether the contraception/abortion cases of the 1960s and '70s were the result of substantive due process. For instance, the first case in that line, *Griswold v. Connecticut*, rejected use of substantive due process, 381 U.S. 479, 481–82 (1965), instead finding a "right of privacy" in "penumbras, formed by emanations" from the rights explicitly protected by the Constitution, *id.* at 484 & n*. However, by the time of *Roe v. Wade*, the Supreme Court began referring to the right of privacy as a feature of the "liberty" protected by the Due Process Clause, although it admitted continuing debate about that proposition. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("Th[e] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

21. *See, e.g.*, Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625 (1980) (synthesizing Supreme Court decisions since 1965 regarding sex, procreation, marriage, and similar topics as expressing "a single theme: the freedom of intimate association," but observing that

From this confused climate emerged *Bowers v. Hardwick*.[22] *Bowers*, decided in 1986, centered around the assertion that substantive due process should protect a homosexual person's choice to engage in sodomy, and thus presented the Court with another opportunity to dispel the confusion regarding unenumerated rights. The *Bowers* Court seized this opportunity with surprising candor.[23] In refusing to establish constitutional protection for sodomy, the five-justice majority treated substantive due process as inherently suspect and in need of significant external constraint.[24] In fact, *Bowers*'s approach to substantive due process struck some commentators as so severe that they openly speculated that *Bowers* foreshadowed the Court's formal abandonment of substantive due process altogether.[25] As it happened, the Supreme Court, post-*Bowers*, did not put an end to substantive due process, but *Bowers*'s methodology continued to appear in many, though not all, subsequent substantive due process decisions.[26]

The Court's strongest restatement of the *Bowers* methodology came in a 1997 decision, *Washington v. Glucksberg*.[27] *Bowers* and *Glucksberg* are strikingly similar. Like *Bowers*, *Glucksberg* involved a highly controversial issue: whether substantive due process protects a right to assisted suicide, often characterized as the "right to die."[28] And, just as *Bowers* had come to the Court on appeal from a judgment finding a substantive due process right to engage in sodomy,[29] *Glucksberg* came to the Court on appeal from a judgment finding a substantive due process right to assisted suicide.[30] Furthermore, in both *Bowers* and *Glucksberg*, the Supreme Court rejected the appellate court's discernment of a theme unifying substantive due proc-

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"[t]he Supreme Court has not yet given explicit articulation to this freedom, or delineated with any clarity either its scope or the justifications for its limitation"); *see also supra* note 20.

22. 478 U.S. 186 (1986).

23. *See id.* at 190 ("Th[is] case . . . calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.").

24. *See infra* note 33 and accompanying text.

25. *See* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 215 (1987) ("[N]ow the Court [in *Bowers*] has called the evolution of [substantive due process] to a halt and, I believe, has rendered a decision that may portend the second death of substantive due process."); *see also* RICHARD A. POSNER, SEX AND REASON 343 (1992) ("[*Bowers*] appears to slam the door on any expansion of the right of sexual privacy beyond the holdings of the previous decisions read as narrowly as possible.").

26. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 302 (1993) (implementing the Narrowest Description Rule, discussed *infra* Section I.B); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (employing the Restraint Principle, discussed *infra* Section I.A). *But see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) (upholding a due process right to abortion without employing the elements of what I have named the *Glucksberg* Doctrine).

27. 521 U.S. 702 (1997). To speak of *Glucksberg* as the "strongest restatement of the *Bowers* methodology" may seem odd given that *Glucksberg* never once cites *Bowers*. This is an interesting issue in itself, but beyond the scope of this Note. As the remainder of this Part demonstrates, *Bowers* and *Glucksberg* are nearly identical twins, despite the absence of citations to the former in the latter.

28. *See id.* at 722–23.

29. Hardwick v. Bowers, 760 F.2d 1202, 1212–13 (11th Cir. 1985).

30. Compassion in Dying v. Washington, 79 F.3d 790, 793–94 (9th Cir. 1996) (en banc).

ess decisions.[31] Finally, in both cases the Supreme Court reversed the appellate court and declined to create a new substantive due process right.[32]

Beyond these formal similarities, *Bowers* and *Glucksberg* mirror each other in their approach to substantive due process. Each deploys five distinct analytical tools, the aggregation of which I have dubbed the "*Glucksberg* Doctrine." The *Glucksberg* Doctrine is discussed briefly here and then in greater depth in Sections I.A–D, below. First, under what I call the "Restraint Principle," courts must proceed with caution—and even skepticism—when asked to recognize a new constitutional right. Second, per the "Narrowest Description Rule," a court must define the proposed new right in the narrowest fashion possible, usually as the right to engage in an activity specifically forbidden by statute. The third element of the *Glucksberg* Doctrine is a corollary to the Narrowest Description Rule, which I call the "Narrow Precedent Corollary." It treats past decisions declaring new substantive due process rights as protecting no more than the specific right declared, rather than reflecting some overarching constitutional principle. Fourth, through the "History and Tradition Inquiry" the court must determine whether there exists a long history of protecting the particular activity at issue. If so, the right to engage in that activity is pronounced fundamental. Finally, in light of whether the right is fundamental, the "Tiered Review Rule" evaluates whether the government has a sufficient justification for its restriction of that right.

This Part demonstrates that the *Glucksberg* Doctrine reflects *Bowers* so precisely that *Lawrence*'s criticism of *Bowers* applies with equal force to the *Glucksberg* Doctrine. This Part proceeds by discussing each element of the *Glucksberg* Doctrine in turn. It first sketches the basic justifications for the element and shows how *Bowers* defined and applied it. Next, it provides the parallel provision in *Glucksberg*. Finally, it demonstrates how *Lawrence* conflicts directly with *Bowers* and *Glucksberg* on that element.

A. *The Restraint Principle*

The Restraint Principle expresses a certain view of judicial restraint. In the context of the *Glucksberg* Doctrine, it is essentially a strong presumption against finding new constitutional rights. *Bowers* enunciated this presumption in an unusually candid admission of substantive due process's troubled past and its attendant practical problems:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the

31. *See Glucksberg*, 521 U.S. at 726–28 (rejecting *Compassion in Dying*'s synthesis of prior substantive due process decisions); Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (registering "disagreement" with the Eleventh Circuit's interpretation of prior substantive due process decisions).

32. *See Glucksberg*, 521 U.S. at 728; *Bowers*, 478 U.S. at 194–95.

> substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.[33]

Eleven years later, *Glucksberg* expressed similar discomfort:

> [W]e "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.[34]

Lawrence, on the other hand, manifested a nearly unrestrained enthusiasm for substantive due process. Rather than conceding the possibility that judges may have shaped it to conform to their predilections, *Lawrence* consistently referred to the "liberty" of the Due Process Clauses as if it were self-defining and impervious to judicial bias.[35] Similarly, *Lawrence* discussed famously controversial decisions declaring rights to abortion and contraception—the decisions most widely criticized as the constitutionalization of judges' ideological preferences[36]—as if liberty made their outcomes a foregone conclusion.[37] Finally, *Lawrence* implied that as liberty increasingly reveals its "manifold possibilities," the American people should expect the Court to recognize even more substantive due process rights.[38] In other words, pausing to ponder the worries embodied in the Restraint Principle

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33. *Bowers*, 478 U.S. at 194–95.

34. *Glucksberg*, 521 U.S. at 720 (quoting Collins v. City of Harker Heights, 503 U.S. 115 (1992) (alteration "ha[ve]" in original) (citations omitted).

35. *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 564 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause . . . ."); *id.* at 567 ("[Laws criminalizing sodomy] seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.").

36. *See, e.g.*, Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353 (1980) (criticizing the Supreme Court's "sex-marriage-children" jurisprudence as constitutionalizing current attitudes about political morality).

37. *See Lawrence*, 539 U.S. at 565–66 (discussing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); and Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)); *id.* at 573–74 (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

38. *See id.* at 578–79 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

appears to be a needless exercise. According to *Lawrence*, liberty is a self-willed force that no amount of judicial restraint can hold back.[39]

B. *The Narrowest Description Rule and the Narrow Precedent Corollary*

The Narrowest Description Rule addresses the dilemma of defining the right for which a litigant seeks constitutional protection. Presumably one cannot answer the question, "Does the Constitution protect the right to x?" without knowing the content of x. The *Bowers* majority gave content to x through what I call the Narrowest Description Rule, which defines the purported right as the liberty to engage in a specific act explicitly forbidden by statute. In *Bowers*, then, the question considered was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[40]

To the Narrowest Description Rule, *Bowers* added a presumption necessary to sustain the rule as a rule—rather than as a tool for that case only—and to reinforce the Restraint Principle. This presumption, which I call the Narrow Precedent Corollary, counsels against extrapolating rights from previous substantive due process cases. Indeed, *Bowers* explicitly disagreed with the lower court's synthesis of previous substantive due process cases and cited each such decision as if limited to its facts—that is, standing for nothing more than protection of child rearing and family relationships, procreation, marriage, and abortion.[41] "Accepting the decisions in these cases and the above description of them," said the Court, "we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . ."[42] Thus, to those who might argue that a theme of autonomy in making intimate decisions unifies these rights, the Narrow Precedent Corollary counters that no substantive due process right necessarily shares a common element with any other right, nor does any established right imply the existence of other, as-yet-undeclared rights.

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39. Along similar lines, one commentator writing prior to *Lawrence* observed:

> In the recent past, when the Court has confronted . . . controversial questions of general interest, it has attempted to draw on our legal traditions to demonstrate the inevitability of its decision. This idea of judicial precedent possesses a certain Calvinistic fatalism: By ascribing to traditions or prior decisions a power beyond the present Court's ability to control, precedent absolves the present Court of responsibility for the decision the Court must make.

Jay S. Bybee, *The Equal Process Clause: A Note on the (Non)Relationship Between* Romer v. Evans *and* Hunter v. Erickson, 6 WM. & MARY BILL RTS. J. 201, 202–03 (1997) (footnote omitted); *see also* Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1575 (2004) ("Unless one supposes that liberty is a divinity like Nike or Eros, the reification or personification of liberty in [*Lawrence*] . . . accomplishes nothing except to dodge the obligation to say what exactly it is [in the Constitution] that protects against . . . unwarranted intrusions [into one's personal life].").

40. *Id.* at 190.

41. *See id.*

42. *Id.* at 190–91.

Glucksberg's approach to the Narrowest Description Rule followed *Bowers* step-for-step. As *Glucksberg* worked its way up to the Supreme Court, lower courts and the petitioners themselves variously characterized the right at stake as the right to " 'determin[e] the time and manner of one's death,' " the " 'right to die,' " the " 'liberty to choose how to die,' " the "right to 'control of one's final days,' " " 'the right to choose a humane, dignified death,' " and " 'the liberty to shape death.' "[43] Given that the petitioners, at bottom, challenged the State of Washington's criminal prohibition of " 'aid[ing] another person to attempt suicide,' "[44] the Court found the foregoing descriptions of the asserted right too broad. The appropriate question (i.e., the Narrowest Description) was whether substantive due process protects "a right to commit suicide which itself includes a right to assistance in doing so."[45]

Glucksberg also employed the Narrow Precedent Corollary. Similar to the lower court in *Bowers*, the lower court in *Glucksberg* had discerned a theme of "personal dignity and autonomy" running throughout previous substantive due process decisions,[46] and found that the right at stake (assistance in committing suicide) comported with that theme.[47] Even before evaluating this assertion, however, the *Glucksberg* majority opinion had already followed *Bowers*'s lead in citing previous substantive due process cases as standing only for protection of the specific rights declared therein, and not as expressing some broader principle.[48] Predictably, then, when *Glucksberg* directly tackled the lower court's reasoning, it saw things differently: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ."[49]

If *Glucksberg* and *Bowers* took a narrow approach to defining rights, *Lawrence* went to the opposite extreme. In contrast to the Narrow Precedent Corollary's aversion to articulating a common theme in substantive due process decisions, *Lawrence* openly supplied the very theme which *Glucksberg* rejected, suggesting that "liberty" and "autonomy" indeed unify all substantive due process decisions.[50] *Lawrence* further contradicted the Nar-

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43. Washington v. Glucksberg, 521 U.S. 702, 722 (1997) (quotation marks and citations omitted).

44. *Id.* at 723 (alteration in original) (quoting WASH. REV. CODE § 9A.36.060(1) (1994)).

45. *Id.*

46. *Id.* at 726 (quoting Compassion in Dying v. Washington, 79 F.3d 790, 813 (9th Cir. 1996) (en banc)).

47. *See id.* at 708–09, 726–28.

48. *Id.* at 720.

49. *Id.* at 727.

50. *See* Lawrence v. Texas, 539 U.S. 558, 564–65 (2003) (discussing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Roe v. Wade, 410 U.S. 113 (1973)); *id.* at 573–74 (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

row Precedent Corollary in declaring that liberty and autonomy have "manifold possibilities" yet to be recognized.[51]

Having thus dispensed with the Narrow Precedent Corollary, *Lawrence* apparently saw no need for the Narrowest Description Rule either. It avoided defining the right at stake with more specificity than a vague assertion that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[52] Such imprecise choice of words practically invites speculation regarding what other "matters pertaining to sex" the Constitution might also grant "substantial protection," and is anathema to both the Narrowest Description Rule and the Narrow Precedent Corollary.

C. *The History and Tradition Inquiry*

However one defines a purported right, the task remains to determine whether the Constitution should protect it. Perceiving two categories of unenumerated rights in previous Supreme Court decisions, *Bowers* asserted that substantive due process should protect only "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed,' "[53] or "those liberties that are 'deeply rooted in this Nation's history and tradition.' "[54] The *Bowers* Court found it "obvious . . . that neither of these [standards] would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[55] In support, it briefly recounted the history of sodomy laws from ancient times to the present[56] and emphasized the existence of sodomy prohibitions in all thirteen states at the time those states ratified the Bill of Rights.[57] It further noted that all fifty states outlawed sodomy until 1961,[58] and that at least twenty-four states continued to prohibit sodomy after 1961.[59] From this, *Bowers* concluded, "[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[60]

Glucksberg combined *Bowers*'s two possible sources of fundamental rights into one standard: "[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which

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51. *Id.* at 578.

52. *Id.* at 572.

53. Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) (alteration in original)).

54. *Id.* at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.)).

55. *Id.*

56. *Id.* at 192–94.

57. *Id.* at 192 & n.5.

58. *Id.* at 193.

59. *Id.*

60. *Id.* at 194.

are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' "[61] This statement describes the demands of the History and Tradition Inquiry as that term will be used throughout the remainder of this Note. Although it reworks the language of *Bowers*, the purpose of the Inquiry remains the same: to determine whether a purported right is historically "fundamental." With this in mind, *Glucksberg* recounted the history of laws prohibiting suicide and assistance thereto from as far back as the thirteenth century[62] to as recently as the year the case was decided.[63] This historical summary convinced the *Glucksberg* Court that "the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it," and therefore "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[64]

Like *Bowers* and *Glucksberg*, *Lawrence* also examined history and tradition, but with a different focus. Facing the same claim as in *Bowers*, *Lawrence* naturally grappled with much of the same history. Yet *Lawrence* did not attempt to disprove *Bowers*'s conclusions about America's history of criminalizing sodomy. Rather, it pointed out that "[l]aws prohibiting sodomy do not seem to have been *enforced* against consenting adults acting in private,"[65] and that a number of states had repealed their sodomy prohibitions in the decades before and since *Bowers*.[66] None of this, said *Lawrence*, shows that *Bowers*'s reading of history was clearly erroneous—only that the "historical premises [on which *Bowers* relied] are not without doubt and, at the very least, are overstated."[67]

Despite the doubt it placed on *Bowers*'s interpretation of history, *Lawrence* conceded that it could not present a countervailing history of widespread protection for homosexual sodomy, as the History and Tradition Inquiry would require. It acknowledged, for instance, that "for centuries there have been powerful voices to condemn homosexual conduct as immoral."[68] To overcome the force of such history, the *Lawrence* majority dismissed moral judgments as irrelevant[69] and expressly changed the scope

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61. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations omitted).

62. *Id.* at 711 (quoting from a thirteenth century legal treatise by Henry de Bracton).

63. *Id.* at 718 (noting President Clinton's signing of the Federal Assisted Suicide Funding Restriction Act of 1997).

64. *Id.* at 728.

65. Lawrence v. Texas, 539 U.S. 558, 569 (2003) (emphasis added).

66. *Id.* at 570–71, 573.

67. *Id.* at 571.

68. *Id.*

69. *Id.* (" '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))); *see also id.* at 577 (" '[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))).

of the pertinent historical inquiry: "In all events we think that our laws and traditions in the past half century are of most relevance here. . . . '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.' "[70]

This narrowed focus provided the *Lawrence* majority license to allow recent trends to control its analysis. *Lawrence* found it noteworthy, for instance, that by the time of *Bowers* only twenty-four states and the District of Columbia had retained their sodomy laws,[71] and that twelve of those jurisdictions had repealed such laws since *Bowers*.[72] It also mentioned various international developments, including *Dudgeon v. United Kingdom*, a pre-*Bowers* decision in which the European Court of Human Rights found that proscriptions of adult consensual sodomy violate the European Convention on Human Rights.[73] These and similar considerations, said *Lawrence*, evinced "an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[74]

Obviously, the notion of "emerging awareness[es]" from the past half-century, not necessarily within the United States, conflicts sharply with the History and Tradition Inquiry as understood in *Glucksberg*. *Lawrence* went further, however, with what appears to be an originalist critique of the History and Tradition Inquiry:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. 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.[75]

Such a fundamental attack on the History and Tradition Inquiry leaves little to salvage. Though *Lawrence* accused *Bowers* of "overstat[ing]" the history on which it relied,[76] *Lawrence* itself found it sufficient to demonstrate only that the relevant history was equivocal—and that in any event, such history may simply show that "laws once thought necessary and proper in fact serve only to oppress."[77] If a history of condemnation can serve either as the basis for upholding a law (as in *Glucksberg*) or the justification for striking it down (as *Lawrence* implied), then it becomes nothing more than

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70. *Id.* at 571–72 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (alteration in original)).

71. *Id.* at 572.

72. *Id.* at 573 (noting that only thirteen states continue to outlaw sodomy).

73. *Id.* at 572–73.

74. *Id.* at 572 (emphasis added).

75. *Id.* at 578–79.

76. *Id.* at 571.

77. *Id.* at 579.

an interesting sidelight, neither necessary nor sufficient to sustain any substantive due process holding.

D. *The Tiered Review Rule*

The Tiered Review Rule derives from the Supreme Court's practice since the mid-twentieth century of evaluating purported violations of equal protection or substantive due process under one of at least two analytical "tiers": "strict scrutiny" or "rational basis." With regard to substantive due process, any law infringing on a "fundamental" right must survive strict scrutiny—that is, the government carries the heavy burden of demonstrating a "compelling" justification and "narrow tailoring" for its law, such that it does not inhibit the fundamental right any more than necessary to achieve that "compelling" purpose.[78] In practice, strict scrutiny almost always leads the Court to strike down the law in question.[79] However, if the claimed right is not "fundamental," then the looser standard of rational basis review applies. Rational basis requires the petitioner to show that the law in question bears no rational relation to any "legitimate state interest."[80] Legitimate state interests are often defined as those things states may regulate through their traditional "police power"—health, safety, welfare, and morals.[81] A law is rationally related to that interest if a rational person could have thought that the law would help to advance that interest.[82] Essentially the antithesis of

78. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (quotation marks and citations omitted)).

79. Professor Gerald Gunther, writing about the Supreme Court's equal protection jurisprudence, famously described strict scrutiny as " 'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). However, some laws do survive strict scrutiny. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (declaring that "[s]trict scrutiny is not strict in theory and fatal in fact" and holding in the context of equal protection that the University of Michigan Law School's affirmative action admissions policy was narrowly tailored to serve a compelling state interest (quotation marks omitted)); Burson v. Freeman, 504 U.S. 191, 210 (1992) (finding Tennessee's prohibition of campaigning within 100 feet of the entrance to a polling location to be one of those "rare" laws that impinges on the First Amendment right to freedom of speech but nonetheless survives strict scrutiny).

80. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

81. *See, e.g.*, Manigault v. Springs, 199 U.S. 473, 480 (1905) ("[T]he police power[] is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people . . . ."). *Lawrence* calls into doubt the state's power to promote morality. *See infra* note 172 and accompanying text.

82. *See, e.g.*, *Dukes*, 427 U.S. at 304.

strict scrutiny, rational basis review almost never leads the Court to invalidate a law.[83]

Bowers shares the Tiered Review process with many cases that remain good law, but *Bowers* clarified the place of such review with respect to the History and Tradition Inquiry. In *Roe v. Wade*, for instance, the Court provided an elaborate discussion of the history of abortion,[84] but the connection between *Roe*'s historical conclusions and its choice to establish a right to abortion is not entirely clear. When the Court finally declared that "[the] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[85] it justified its holding based on normative considerations rather than the history it had previously set forth.[86]

Bowers, on the other hand, treated history and tradition as determinative of whether a right is "fundamental," and by extension, determinative of the appropriate form of analysis under the Tiered Review Rule: strict scrutiny or rational basis. Because *Bowers*'s History and Tradition Inquiry yielded no fundamental right to homosexual sodomy, the Court applied the rational basis test. Under that test, *Bowers* found the sodomy prohibition at issue rationally related to the state's interest in promoting morality.[87]

Glucksberg's application of Tiered Review straightforwardly applied the method laid down in *Bowers*. Having determined that assisted suicide was not a fundamental right,[88] it evaluated the law in question under the rational basis standard and found it rationally related to a number of legitimate state interests, including " 'the preservation of human life' "[89] and "protecting the integrity and ethics of the medical profession."[90]

Lawrence, however, muddled the Tiered Review Rule considerably. In fact, it is not clear whether the *Lawrence* majority opinion adhered to it at all. As Justice Scalia's dissent pointed out, "Though there is discussion of 'fundamental proposition[s],' and 'fundamental decisions,' nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause . . . ."[91] Furthermore, although *Lawrence* indeed struck down a law—a rare occurrence for substantive due process under any standard other than strict scrutiny—it nowhere contained any of

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83. Less famous than Professor Gunther's " 'strict' in theory and fatal in fact" phrase, *supra* note 79, is its rational basis counterpart: "minimal scrutiny in theory and virtually none in fact." Gunther, *supra* note 79.

84. Roe v. Wade, 410 U.S. 113, 129–41 (1973).

85. *Id.* at 153.

86. *Id.*

87. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

88. Washington v. Glucksberg, 521 U.S. 702, 728 (1997); *see also supra* notes 62–64 and accompanying text.

89. *Glucksberg*, 521 U.S. 702, 728 (1997) (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990)).

90. *Id.* at 731.

91. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (citations omitted) (altered "[s]" in original).

the language associated with strict scrutiny ("narrowly tailored" or "compelling state interest," for example). Instead, it ultimately declared that "[t]he [sodomy] statute [at issue] furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[92] The phrase *legitimate state interest*, of course, is one long-associated with rational basis review, not strict scrutiny.[93]

This ambiguity has generated a great deal of scholarly commentary, most of it concluding that *Lawrence* is a strict scrutiny case in disguise. Professor Laurence Tribe, for instance, perceives the language of Tiered Review throughout *Lawrence*, albeit in cryptic form:

> [P]assage after passage in the Court's opinion [invoked language commonly associated with] substantive due process . . . *in one unusual sequence or another*—as in the Court's declaration that it was dealing with a "protection of liberty under the Due Process Clause [that] has a substantive dimension of fundamental significance in defining the rights of the person."[94]

For Professor Tribe, strict scrutiny is further evident in "what the Court *did*" (i.e., strike down a law), and "what [the Court] *said* in declaring *Griswold v. Connecticut* 'the most pertinent beginning point' for its analysis and then proceeding to invoke precedents such as *Roe*" (i.e., discussing cases thought to stand for strict scrutiny).[95] Other scholars have used similar reasoning to reach essentially the same conclusion.[96]

For all this *ex post* analysis of allusions, the fact remains that *Lawrence* spoke only of "legitimate state interest[s]"—a choice of words associated with rational basis. The result is a Tiered Review Rule with no clear tiers. Given that *Lawrence* provided no substitute rule or principle to fill the void, the Tiered Review component of the *Glucksberg* Doctrine appears to be *Lawrence*'s final casualty.

II. A TALE OF TWO SURVEYS: *GLUCKSBERG* LIVES, *LAWRENCE* LANGUISHES

Although *Lawrence* overturned the *Glucksberg* Doctrine in theory, this Part reveals an ever-growing anomaly in practice: numerous courts applying the *Glucksberg* Doctrine to substantive due process claims as if *Lawrence* never happened. Even those relatively few cases that acknowledge *Lawrence*'s presence (usually suits regarding gay rights or sexual liberty) still find *Glucksberg* controlling. Furthermore, most decisions applying *Law-*

92. *Id.* at 578 (majority opinion).

93. *See supra* text accompanying note 80.

94. Tribe, *supra* note 7, at 1917 (quoting *Lawrence*, 539 U.S. at 565) (emphasis added) (altered "[that]" in original) (later emphases omitted).

95. *Id.*

96. *See, e.g.*, Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 387–88 (2006); *see also* Hunter, *supra* note 7, at 1113–17; Sunstein, *supra* note 7, at 46–48.

rence and not *Glucksberg* also find a way to render *Lawrence* inapplicable to the case at hand.

Presented below are brief overviews of two case surveys: the "*Glucksberg* Survey" and the "*Lawrence* Survey." The *Glucksberg* Survey comprises 102 substantive due process cases applying *Glucksberg*, including all of those that also discuss *Lawrence*. The *Lawrence* Survey, by contrast, comprises 86 cases applying *Lawrence* but *not* applying *Glucksberg*.[97] Because the continued use of *Glucksberg* in a post-*Lawrence* world is more anomalous than a narrow interpretation of *Lawrence* on its own merits, the remainder of this Note focuses primarily on the *Glucksberg* Survey.

Section II.A begins with a description of the *Glucksberg* Survey's methodology, followed by a brief discussion of its trends. Similarly, although with greater brevity, Section II.B describes the *Lawrence* Survey's methodology and comments on its broadest features. A more detailed analysis of the *Glucksberg* Survey (and the *Lawrence* Survey, where relevant) is reserved for Parts III and IV.

A. *The* Glucksberg *Survey*

1. *Methodology*

The data-gathering needed for the *Glucksberg* Survey began with a query in an online legal research database for every case citing *Glucksberg* since the day *Lawrence* was decided (June 26, 2003).[98] As of August 24, 2006, such a search yields 204 cases. The 102 that became the *Glucksberg* Survey are the product of culling the search results for only those decisions that (a) directly address whether substantive due process should protect an asserted right, and (b) apply at least one element of the *Glucksberg* Doctrine, either by citing *Glucksberg* or a case that *Glucksberg* itself cited in support of that element.[99] I then categorized those cases by subject matter (e.g., "criminal procedure," "same-sex marriage," "economic liberty") and noted which of the distinct elements of the *Glucksberg* Doctrine were employed therein. I also noted which cases cited *Lawrence* for any reason.

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97. This is not to say that *Glucksberg* is nowhere mentioned in the *Lawrence* Survey, only that it is nowhere cited for any controlling proposition. Two cases from the *Lawrence* Survey mention *Glucksberg*. Both originate from Washington State, both declare a right to same-sex marriage under the Washington Constitution, and both look to *Glucksberg*'s framing of the History and Tradition Inquiry as an example of one way a court might think about fundamental rights. Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *12 (Wash. Super. Ct. Sept. 7, 2004), *rev'd sub nom.* Andersen v. King County, 138 P.3d 963 (Wash. 2006); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *5 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 138 P.3d 963 (Wash. 2006).

98. To be specific, I ran the following search in Westlaw's "allcases" database: "washington v. glucksberg" & da(aft 06/26/2003).

99. The remainder of the cases (those I did not include in the *Glucksberg* Survey) cited *Glucksberg* for one of three reasons: (1) to support the general notion that there exists a concept known as substantive due process; (2) for some obscure point not relevant to substantive due process; or (3) as part of a string of citations with no clear indication of its relevance.

2. *Overall Trends*

From this survey, three clear trends stand out. First, most cases applying *Glucksberg* simply ignore *Lawrence*. Second, every element of the *Glucksberg* Doctrine remains alive and well, especially the History and Tradition Inquiry and the Tiered Review Rule. Third, the *Glucksberg* Doctrine continues to accomplish its purported purpose—near-universal denial of new constitutional rights. The following subsections expand on each of these observations.

a. Ignoring Lawrence

Given the degree to which *Lawrence* undermined *Glucksberg*, the extent to which *Lawrence* goes unnoticed in the *Glucksberg* Survey is surprising: 76 decisions (74.5 percent) never once cite *Lawrence*. Such surprise is perhaps mitigated when one looks at the subject matter of nearly all these cases: unusual constitutional claims that seem far afield from previously successful substantive due process claims.[100] In contrast, of the 26 cases that *do* cite *Lawrence*, 13 deal with same-sex marriage and 10 concern various other claims of gay rights or sexual liberty—matters much closer to *Lawrence* and established due process rights.

b. The Vibrancy of the Glucksberg *Doctrine*

The various elements of the *Glucksberg* Doctrine continue to pervade substantive due process decisions, although instances of all five elements in a single case are rare.[101] Far and away, the most commonly utilized element of the *Glucksberg* Doctrine is the History and Tradition Inquiry. Fully 73 cases (71.5 percent) rely on this element, often by directly quoting its formulation in *Glucksberg*.[102] Four decisions acknowledge *Lawrence*'s possible modification of the Inquiry,[103] although none does so wholeheartedly. Two of these decisions simply cite *Lawrence* and move on, giving it no substantive

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100. *See infra* notes 208–211 and accompanying text.

101. My survey revealed only five cases employing the *Glucksberg* Doctrine in its entirety. *See* Doe v. Moore, 410 F.3d 1337, 1342–46 (11th Cir. 2005), *cert. denied* 126 S. Ct. 624 (2005); Doe v. City of Lafayette, 377 F.3d 757, 767–74 (7th Cir. 2004) (en banc); Williams v. Att'y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004); Sanchez v. State, 692 N.W.2d 812, 819–20 (Iowa 2005); Andersen v. King County, 138 P.3d 963, 985–87 (Wash. 2006). Eleven cases employ four of the five elements, thirteen employ three, twenty-nine employ two, and forty-four employ only one.

102. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) ("[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." (quotation marks and citations omitted)).

103. "In all events we think that our laws and traditions in the past half century are of most relevance here. . . . '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.' " Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) (alteration in original) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

force.[104] A third decision spends a footnote directly addressing *Lawrence*'s possible effect on the History and Tradition Inquiry, but concludes (correctly, as far as the *Glucksberg* Survey indicates), "No court has regarded *Lawrence* as cabining *Glucksberg*['s approach to history and tradition]."[105] It then applies the History and Tradition Inquiry as if *Lawrence* did not exist.

The fourth decision, *Smelt v. County of Orange*, distinguishes itself in purporting to apply directly *Lawrence*'s narrowed scope of history and tradition.[106] *Smelt* wrestled with whether the Constitution protects the right to same-sex marriage. Unlike the trend toward decriminalization of sodomy in the last fifty years (on which *Lawrence* placed emphasis[107]), *Smelt* found that there has been no similarly prominent trend toward legal recognition of same-sex marriage in the same time frame.[108] *Smelt* then melded the "deeply rooted" portion of the History and Tradition Inquiry with the temporal scope of *Lawrence*'s historical inquiry and proclaimed, "A definition of marriage only recognized in Massachusetts and for less than two years cannot be said to be " 'deeply rooted in this Nation's history and tradition' " of the last half century."[109]

After the History and Tradition Inquiry, the Tiered Review Rule is the next-most popular element of the *Glucksberg* Doctrine (49 citations), followed by the Restraint Principle (32), the Narrowest Description Rule (31), and the Narrow Precedent Corollary (27).[110] In nearly all of these instances, courts make no mention of any change that *Lawrence* may have wrought.[111]

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104. *See In re* W.M., 851 A.2d 431, 448 (D.C. 2004); State v. Seering, 701 N.W.2d 655, 664 (Iowa 2005).

105. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 476 n.8 (D.C. Cir. 2006).

106. 374 F. Supp. 2d 861, 878–79 (C.D. Cal. 2005), *modified*, 447 F.3d 673 (9th Cir. 2006).

107. *See Lawrence*, 539 U.S. at 570–71.

108. *Smelt*, 374 F. Supp. 2d at 878.

109. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

110. While I present the Narrowest Description Rule and the Narrow Precedent Corollary as linked from a doctrinal standpoint, not all decisions from this survey use both. They frequently appear independently of each other, although they continue to perform their original functions.

111. *Hernandez v. Robles*, the New York Court of Appeals' decision denying same-sex couples the right to marry, included an interesting acknowledgement of *Lawrence*'s influence on the Narrowest Description Rule. Said the court:

> The difference between *Lawrence* and *Glucksberg* [with regard to the Narrowest Description Rule] is that in *Glucksberg* the relatively narrow definition of the right at issue was based on rational line-drawing. In *Lawrence*, by contrast, the court found the distinction between homosexual sodomy and intimate relations generally to be essentially arbitrary. Here, there are, as we have explained, rational grounds for limiting the definition of marriage to opposite-sex couples. This case is therefore, in the relevant way, like *Glucksberg* and not at all like *Lawrence*.

Hernandez v. Robles, 2006 N.Y. Slip Op. 05239, 2006 WL 1835429 (N.Y. July 6, 2006).

c. Near-Universal Denial of New Constitutional Rights

The third major feature of the *Glucksberg* Survey is its nearly universal result: refusal to create or extend constitutional rights. From my survey, only five cases employ *Glucksberg* to extend constitutional freedoms or to strike down laws. Two of these cases had or continue to have potential for significant publicity: *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*,[112] an innovative D.C. Circuit decision creating a right to noninterference in obtaining experimental drugs in certain circumstances;[113] and *Hernandez v. Robles*,[114] a trial court decision (since reversed) declaring a right of marriage for same-sex couples under the New York Constitution.

The remaining three cases protecting constitutional freedoms are more obscure: *In re Amanda D.*,[115] which struck down an Illinois adoption law that authorized the state to take away the adoptive child of a person convicted of certain offenses; *United States v. Stein*,[116] which found that government prosecutors' pressure on an accounting firm not to advance the costs of defense to indicted employees amounted to a constitutional violation; and *Hodgkins v. Peterson*,[117] which invalidated a juvenile curfew law.

With the exception of *Hernandez*,[118] use of *Lawrence* was minimal or nonexistent among these five decisions. *Abigail Alliance*, for instance, paid no more attention to *Lawrence* than necessary to argue that the History and Tradition Inquiry remains intact.[119] Both *In re Amanda D.* and *Stein* contained no mention of *Lawrence* at all.

Hodgkins, however, stands out in acknowledging *Lawrence*'s significant influence on the disposition of the case, albeit briefly. In *Hodgkins*, the court reevaluated an Indiana juvenile curfew law that it had previously held constitutional despite its claimed infringement on a parent's right "'to allow [his or her] minor children to be in public with parental permission during

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112. 445 F.3d 470 (D.C. Cir. 2006).

113. *Abigail Alliance* is discussed in detail *infra* notes 142–152 and accompanying text.

114. Hernandez v. Robles, 794 N.Y.S.2d 579 (Sup. Ct. 2005), *rev'd*, 805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, 2006 N.Y. Slip Op. 05239, 2006 WL 1835429 (N.Y. July 6, 2006).

115. *In re Amanda D.*, 811 N.E.2d 1237 (Ill. App. Ct. 2004), *modified sub nom. In re* D.W., 827 N.E.2d 466 (Ill. 2005).

116. 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

117. No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194 (S.D. Ind. July 23, 2004).

118. As one might expect, *Hernandez* made significant use of *Lawrence* in declaring a right to marriage for same-sex couples. For instance, it found important several passages in *Lawrence* regarding sexual autonomy, dignity for gays and lesbians, and the legitimacy of morals-based legislation. *See Hernandez*, 794 N.Y.S.2d at 594 & n.26. Through these and other sources, *Hernandez* determined that one possesses a fundamental right to choose one's spouse, regardless of sex, under the New York Constitution. *Id.* at 596. It then cited *Glucksberg* for the Tiered Review Rule and the strict scrutiny it entails under the Federal Constitution, although the court did not make clear what significance the Tiered Review Rule had in interpreting the New York Constitution. *Id.* Nonetheless, under strict scrutiny, the court found "no legitimate State purpose that is rationally served by a bar to same-sex marriage, let alone a compelling State interest in such a bar." *Id.* at 604.

119. Indeed, the entire discussion is relegated to a footnote. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 476 n.8 (D.C. Cir. 2006).

curfew hours.' "[120] On further reflection, the court concluded that its "earlier definition[] of the asserted right . . . [was] too specific and failed to appreciate the extent of the liberty interest at stake,"[121] and cited *Lawrence*'s rebuke of the *Bowers* Court for "fail[ing] to appreciate the extent of the liberty at stake."[122] It then recast the right at stake as "parents' interest in the care, custody, and control of their children,"[123] and struck down the curfew law as violative of this right,[124] but made no further mention of *Lawrence*.

Though *Abigail Alliance*, *In re Amanda D.*, *Hernandez*, *Hodgkins*, and *Stein* present exceptions to the overall trend of declining to extend constitutional freedoms, they are 5 cases among 102. Nearly all applications of *Glucksberg* have led courts to hold that no constitutional interest has been violated.

B. *The* Lawrence *Survey*

Later portions of this Note address the possibility that some judges consciously employ *Glucksberg* in order to resist *Lawrence*.[125] To determine the prevalence of such resistance, however, requires examining cases applying only *Lawrence*, to determine if judges in that setting still resist *Lawrence*'s possible implications. These decisions, 86 in all, comprise the *Lawrence* Survey. This Section describes the methodology of the *Lawrence* Survey and comments on its most prominent features.

1. *Methodology*

Because *Lawrence* eschews the notion of precise analytical tools for interpreting the Due Process Clauses, my methodology for this second survey was correspondingly less precise than that of the first. Rather than searching for cases applying "elements" of *Lawrence*, I relied on Westlaw's "Citing References" function to examine every case citing *Lawrence* under the categories denominated by Westlaw as "Not Followed as Dicta," "Declined to Extend by," "Distinguished by," "Limitation of Holding Recognized by," "Examined," and "Discussed."[126] As of my publication deadline, these categories encompass 132 cases.

From these 132 cases, I rejected those in which references to *Lawrence*, in my judgment, did not amount to actual "discussion." I also ignored cases applying *Glucksberg*, saving them for the *Glucksberg* Survey. This process of elimination left me with 86 cases challenging numerous types of laws,

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120. *Hodgkins*, 2004 WL 1854194, at *6 (quoting Hodgkins *ex rel.* Hodgkins v. Peterson, 175 F. Supp. 2d 1132, 1156–57 (S.D. Ind. 2001), *rev'd*, 355 F.3d 1048 (7th Cir. 2004)).

121. *Id.*

122. Lawrence v. Texas, 539 U.S. 558, 567 (2003), *cited in Hodgkins*, 2004 WL 1854194, at *6.

123. *Hodgkins*, 2004 WL 1854194, at *7.

124. *Id.* at *14.

125. *See infra* Section IV.A.

126. This leaves out only the "Cited" and "Mentioned" categories.

which, like the *Glucksberg* Survey, I categorized by subject matter (e.g., "adoption," "obscenity," "same-sex marriage").

2. *Overall Trends*

The *Lawrence* Survey, like the *Glucksberg* Survey, shows strong judicial reluctance to establish new constitutional protections. Only 9 cases (10.5 percent) find any law unconstitutional under *Lawrence*, facially or as applied. Five of those 9 strike down laws limiting marriage to heterosexual couples (with 2 since reversed),[127] and 1 other (also now reversed) strikes down a state constitutional amendment forbidding the creation of any institution similar to marriage for non-heterosexual couples.[128] The remaining 3 strike down or overturn, respectively, a state fornication law,[129] a state law imposing a heavier sentence on homosexual statutory rape than its heterosexual counterpart,[130] and a conviction under a military sodomy law as applied.[131]

While the results of the aforementioned decisions are noteworthy, *Lawrence* has resulted in little change beyond them—certainly not "the end of all morals legislation."[132] Of the 77 cases that do *not* strike down a law under *Lawrence*, 35 (45.4 percent of those 77 cases, or 40.7 percent of the entire *Lawrence* Survey) explicitly find that the subject matter fits within *Lawrence*'s peculiar declaration of what its holding is *not* about:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[133]

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127. Woo v. Lockyer, No. 4365 (Cal. Super. Ct. Mar. 14, 2005), http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/452.pdf; Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Castle v. State, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004), *rev'd sub nom.* Andersen v. King County, 138 P.3d 963 (Wash. 2006); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 138 P.3d 963 (Wash. 2006).

128. Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006).

129. Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005).

130. State v. Limon, 122 P.3d 22 (Kan. 2005).

131. United States v. Humphreys, NMCCA 200300750, 2005 WL 3591140 (N-M. Ct. Crim. App. Dec. 29, 2005).

132. Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting). Nonetheless, the *Lawrence* Survey shows Justice Scalia to be correct in his prediction that *Lawrence* would pave the way for "judicial imposition of homosexual marriage." *See id.* at 604–05.

133. *Id.* at 578 (majority opinion).

The various interpretations of this hedge raise questions worthy of investigation,[134] as does the entire *Lawrence* Survey. Nevertheless, for the sake of brevity, I decline to analyze the *Lawrence* Survey further except in comparison to the *Glucksberg* Survey, to which I now return.

III. The Persistence of the *Glucksberg* Doctrine, Take One: Doctrinal and Procedural Explanations

The Introduction to this Note advanced the possibility that courts have begun to wield *Glucksberg* as a weapon of conservativism in the culture war. Before tackling that hypothesis directly, this Part pauses to consider whether any real controversy exists. Three possible explanations for the continuing vitality of *Glucksberg* would, if established, eliminate or greatly reduce any perceived incongruity in the fact that *Lawrence* rarely has any effect on the cases of the *Glucksberg* Survey.[135] The first two explanations, discussed in Section III.A, rely on procedural hypotheses: first, perhaps courts only mention *Lawrence* when the litigants before them make *Lawrence*-based arguments; or second, perhaps it is overridingly significant that *Lawrence* did not actually overrule *Glucksberg*. The third theory, examined in Section III.B, speaks to substance rather than procedure, postulating that courts have perceived a principled doctrinal distinction allowing *Lawrence* and *Glucksberg* to coexist. This third theory comes in two forms, which I have named the "Subject Matter Distinction Theory" and the "Avoidance Theory." This Part argues that none of these explanations satisfactorily accounts for the *Glucksberg* Doctrine's persistence.

A. *Procedural Explanations*

Given that courts routinely shape their opinions to respond to arguments made in litigants' briefs, the relative absence of *Lawrence* in the *Glucksberg* Survey may indicate no more than litigants' failure to cite *Lawrence*. In other words, if the parties do not present a court with arguments based on *Lawrence*, the court will not bother with *Lawrence*. As a matter of judicial economy, this seems plausible. Unfortunately, given the widely varying availability of court briefs through online services, it does not lend itself easily to disproof through empirical means. For the time being, then, this particular theory must remain unevaluated and admittedly presents a gap in my overall analysis.

On the other hand, even if a comprehensive analysis of court briefs does confirm a lack of references to *Lawrence*, an anomaly remains. In the realm of substantive due process litigation, *Lawrence* is simply too prominent, too widely publicized and analyzed, and too potentially revolutionary for a court

134. For the curious, the tabular exposition of the *Lawrence* Survey, *infra* Appendix B, indicates which cases make use of *Lawrence*'s hedge.

135. These theories would not explain the relatively narrow treatment of *Lawrence* found throughout the *Lawrence* Survey.

to overlook. Whether courts *intentionally* ignore it is another matter, discussed in Part IV. But for a court not to *think* of it when faced with a substantive due process claim seems unlikely, regardless of its presence or absence in the litigants' briefs.

For this same reason, it is equally unlikely that *Glucksberg*'s persistence can be explained by the simple fact that *Lawrence* did not actually overrule it. *Lawrence* presents itself in such striking contrast to the *Glucksberg* Doctrine that it seems impossible to miss the many ways in which *Lawrence* undermined it.[136] In short, procedure does not explain *Glucksberg*'s continuing vitality at the expense of *Lawrence*. Therefore, the next Section turns to the possibility of substantive differences that might motivate courts to favor the former over the latter.

B. *Substantive Explanations*

1. *The "Subject Matter Distinction Theory"*

This Note has argued that *Bowers*'s and *Glucksberg*'s shared methodology makes those cases inseparable and that both are therefore incompatible with *Lawrence*. The prospect remains, however, that this argument overlooks a nonmethodological difference between *Bowers* and *Glucksberg*: *Bowers* is about homosexual sodomy and *Glucksberg* is about assisted suicide. If this distinction—the subject matter of the right at stake—is most relevant for substantive due process, then *Lawrence* and *Glucksberg* may peacefully coexist. *Lawrence*, one would argue, did not overrule *Bowers*'s approach to substantive due process as a general matter, but rather overturned its particular application to the right asserted in that case. Thus, *Lawrence* cast no aspersions on *Glucksberg*'s use of a *Bowers*-like methodology because *Glucksberg* was a "right to die" case—a type of right distinct from the sexual liberty claims put forward in *Bowers* and *Lawrence*. In sum, the argument goes, substantive due process requires a *Lawrence*-like analysis in some sorts of cases—probably those involving sexual liberty or gay rights—and a *Bowers*/*Glucksberg*-like approach for other sorts of cases. If the *Glucksberg* Survey substantially tracks this Subject Matter Distinction model, then it represents no anomaly after all.

In some respects, the data appear to comply with this theory. As observed in Section II.A.2.a, courts cite *Lawrence* most often in cases about sexual liberty or gay rights, just where one would expect it—and most of these cases indeed examine whether the asserted right is akin to the right

136. For example, when the *Lawrence* majority asserts that "[i]n all events we think that our laws and traditions in the past half century are of most relevance here," *Lawrence*, 539 U.S. at 571–72, it comes into explicit conflict with the History and Tradition Inquiry as formulated in *Glucksberg*. At least on this element of the *Glucksberg* Doctrine (the most commonly applied element, *see supra* Section II.A.2.b), one would expect courts to acknowledge that something may have changed about the way they should evaluate substantive due process claims. As noted previously, it appears that only four decisions since *Lawrence* have done so, yet three go on to analyze the claim presented as if the History and Tradition Inquiry remains unchanged, and the fourth blends it into *Lawrence*'s standard. *See supra* notes 103–109 and accompanying text.

which *Lawrence* vindicated. So far, then, the Subject Matter Distinction Theory holds up.

On the other hand, in only one case regarding sexual liberty or gay rights—issues at the heart of *Lawrence*—did the court find *Lawrence* to *control*, and that case has now been reversed.[137] All other such cases settle on the *Glucksberg* Doctrine as the appropriate method of adjudication.[138] This observation does not altogether undermine the Subject Matter Distinction Theory, but it casts doubt on whether courts have adopted it as a principled distinction.

Taking the *Glucksberg* and *Lawrence* Surveys together reveals an additional weakness to this theory. If courts truly adhered to it, one would expect them to cite both *Lawrence* and *Glucksberg* in nearly all cases from both surveys—if only to answer the threshold question of whether an asserted right is akin to one or the other.[139] Yet 74.5 percent of the *Glucksberg* Survey (76 decisions) contains no hint of *Lawrence*. And by design, 100 percent of the *Lawrence* Survey contains no use of *Glucksberg*,[140] representing 86 additional cases in which the theory here propounded would call for analysis of both *Lawrence* and *Glucksberg*.[141]

In short, the Subject Matter Distinction Theory has not caught on in the lower courts. Therefore it does not adequately explain why some courts continue to favor the *Glucksberg* Doctrine unmodified, especially in suits seeking expanded protection for gay rights or sexual liberty, for which *Lawrence* seems most applicable.

2. *The "Avoidance Theory" (a.k.a., the "*Abigail Alliance *Approach")*

The D.C. Circuit recently handed down a substantive due process decision that was unusual both in its result and its particularly long caption, *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*.[142] *Abigail Alliance* addresses the due process implications of the Food

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137. Hernandez v. Robles, 794 N.Y.S.2d 579 (Sup. Ct. 2005), *rev'd*, 805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, 2006 N.Y. Slip Op. 05239, 2006 WL 1835429 (N.Y. July 6, 2006).

138. Even *Hernandez*, for all its reliance on *Lawrence*, cites *Glucksberg* for the Tiered Review Rule. *See supra* note 118.

139. Only one decision of which I am aware attempts a thorough answer to this sort of inquiry. *See* Williams v. King, 420 F. Supp. 2d 1224, 1246–54 (N.D. Ala. 2006) (analyzing *Lawrence*, attempting to fit it into longstanding academic theories of substantive due process, and evaluating whether the interests that those theories seek to protect would counsel in favor of striking down Alabama's statutory prohibition on selling sex toys); *see also id.* at 1253 ("[T]his case simply is *different* from *Lawrence*.").

140. *See supra* Section II.B.1.

141. Conceivably, some courts could have made a threshold decision between *Lawrence* and *Glucksberg* that they chose not to mention or explain in their opinions. The *Glucksberg* Survey contains no evidence of such "behind the scenes" use of the Subject Matter Distinction Theory. If it exists, it calls for further explanation, namely, why a court would not openly explain such a crucial decision.

142. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470 (D.C. Cir. 2006).

and Drug Administration's (FDA) procedures for evaluating the safety of new drugs intended for human use. Under current FDA regulations, such drugs must first pass "Phase I" testing on a sample of twenty to eighty human volunteers.[143] Drugs that succeed at Phase I are "deemed 'sufficiently safe for substantial human testing, but [are] not yet proven to be safe and effective to the satisfaction of the FDA [to be commercially marketed].' "[144] These drugs move on to "Phase II" testing on "up to several hundred human subjects."[145]

The plaintiffs in *Abigail Alliance* argued that the FDA's unwillingness to make Phase II drugs available to terminally ill persons not accepted as Phase II volunteers violated their substantive due process rights to life and liberty.[146] Surprisingly, the D.C. Circuit agreed. Even more surprisingly, the court relied entirely on the *Glucksberg* Doctrine to discern this right,[147] circumventing *Lawrence* through an innovative reconciliation of *Lawrence* and *Glucksberg*.[148]

Abigail Alliance began its reconciliation by borrowing a proposition from the Subject Matter Distinction Theory: "[I]t appears the Supreme Court has employed two distinct approaches when faced with a claim to a fundamental right."[149] The contraception and abortion cases, said the court, appear to have been decided "by probing what 'personal dignity and autonomy' demand,"[150] whereas *Glucksberg* and similar cases present a "more restrictive" approach to substantive due process focusing on history and tradition.[151] From these observations, the court fashioned a classic "avoidance" principle: "Because we conclude, upon applying the seemingly more restrictive analysis of *Glucksberg*, that the claimed right warrants protection under

143. *Id.* at 473.

144. *Id.* (quoting Tape of Oral Argument at 15:57–15:59).

145. *Id.*

146. *Id.* at 472.

147. Although not terribly relevant to this Note, the curious may wish to know that the court framed the "right at issue, carefully described, [as] the right of a mentally competent, terminally ill adult patient to access potentially life-saving post-Phase I investigational new drugs, upon a doctor's advice, even where that medication carries risks for the patient." *Id.* It then found, "upon examining 'our Nation's history, legal traditions, and practices,' that the government has not blocked access to new drugs throughout the greater part of our Nation's history." *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 710 (1997)). The court also supported its History and Tradition Inquiry with analogies to the common law principles of "necessity" and liability for interfering with a rescue. *Id.* at 480–81. Having thus discerned a fundamental right, the court remanded the case to the district court "to determine whether the FDA's policy 'is narrowly tailored to serve a compelling [governmental] interest.' " *Id.* at 472 (quoting *Glucksberg*, 521 U.S. at 721 (alteration in original)).

148. *Abigail Alliance* did not purport to reconcile *Glucksberg* and *Lawrence* specifically, but rather tried to harmonize *Glucksberg* and the major contraception and abortion cases—*Griswold*, *Eisenstadt*, *Roe*, and *Casey*. *See id.* at 476. Because these are the very cases on which *Lawrence* relied to support its ruling, *see* Lawrence v. Texas, 539 U.S. 558, 564–66, 573–74 (2003), however, any method that squares *Glucksberg* with the contraception and abortion cases should also bring *Glucksberg* and *Lawrence* into harmony.

149. *Abigail Alliance*, 445 F.3d at 476.

150. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

151. *Id.* at 476–77.

the Due Process Clause, we need not decide whether the line of cases construing the concept of 'personal dignity and autonomy' would also lend protection to the claimed right."[152]

Abigail Alliance's Avoidance Theory cannot explain those cases in the *Glucksberg* Survey that preceded it; it merits attention here for the subtle circuit split it creates. The Avoidance Theory would have a court first evaluate an asserted right under the *Glucksberg* Doctrine and then turn to *Lawrence* only if *Glucksberg* yields a negative result. As noted in the preceding Section, however, those relatively few *Glucksberg* Survey decisions that acknowledge *Lawrence*'s existence tend first to evaluate the applicability of *Lawrence*, not *Glucksberg*.[153] Furthermore, the 86 decisions of the *Lawrence* Survey also proceed in a different fashion, apparently assuming that *Lawrence* is entirely adequate to resolve the case at hand, whether in favor of or against the litigant seeking constitutional protection.[154]

Abigail Alliance may yet influence other courts to adopt its approach, but it faces an uphill battle. As with most instances of "avoidance," there exist good practical reasons to steer clear of questions that defy tidy resolution. *Abigail Alliance* probably avoided *Lawrence* for this very reason, but *Abigail Alliance* was "lucky" in that it found the *Glucksberg* Doctrine sufficient to protect the asserted right.[155] In the vast majority of substantive due process cases, *Glucksberg* points the other way. *Abigail Alliance* would require future cases such as these to include an analysis of "what 'personal dignity and autonomy' demand."[156] The *Glucksberg* Survey contains strong evidence that courts have intentionally avoided the perils of such an inquiry. Part IV examines such evidence directly.

IV. The Persistence of the *Glucksberg* Doctrine, Take Two: Pragmatic Explanations

Having discerned no procedural or doctrinal explanation to account for courts' continuing use of the *Glucksberg* Doctrine, this Part explores several practical reasons for its persistence. Section IV.A addresses the possibility, asserted by many commentators,[157] that courts have intentionally resisted *Lawrence*, often using the *Glucksberg* Doctrine as a convenient vehicle for doing so. In other words, Section IV.A assesses whether the *Glucksberg* Survey can be explained simply through the lens of the modern American culture war. It presents the best evidence from the Survey in support of that proposition.

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152. *Id.* at 477.

153. *See supra* Section II.A.

154. *See supra* Section II.B.

155. *See supra* note 147.

156. *Abigail Alliance*, 445 F.3d at 476, 477.

157. *See infra* notes 163–171 and accompanying text.

Sections IV.B–D, however, analyze whether the American culture war adequately explains the *Glucksberg* and *Lawrence* Surveys. In particular, they examine three benign—and ultimately more persuasive—explanations for *Glucksberg*'s prevalence. First, Section IV.B shows that *Lawrence* is not an easy case from which to derive principles of substantive due process decision-making. Courts may continue to rely on *Glucksberg* because they prefer its clarity to *Lawrence*'s obscurity. Second, Section IV.C suggests that some courts feel strongly about their institutional charge to apply Supreme Court precedent rather than to extend it. These courts recognize that *Lawrence*'s expansive rhetoric might be interpreted as implicitly recognizing a host of new rights, but wish to leave explicit recognition of such rights to the Supreme Court. Finally, Section IV.D argues that, as a tool of judicial management, the *Glucksberg* Doctrine is far superior to *Lawrence*. *Glucksberg* enables courts to dismiss cases with ease, especially when faced with asserted rights that do not resemble previously recognized rights. Thus, some courts may continue to employ the *Glucksberg* Doctrine not because they disapprove of *Lawrence*'s position on gay rights or sexual liberty, but because they do not wish to expend the effort necessary to evaluate a substantive due process claim in a *Lawrence*-like manner.

A. The Glucksberg *Doctrine as Culture War Counterstrike: Accusations and Evidence*

In his dissent to a gay rights case from 1996, Justice Scalia first invoked the image of a culture war playing out in the courts.[158] Seven years later, in *Lawrence*, he plainly accused the Court of having "taken sides" in that war[159] and of "casting aside all pretense of neutrality."[160] A number of academic commentators have echoed Justice Scalia's sentiments.[161] Furthermore, below the ivory tower, the raging controversy over same-sex marriage—one of the central battlegrounds of the culture war—evinces a political climate that

158. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite."); *see also id.* at 652.

159. Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

160. *Id.* at 604.

161. *See* Lino A. Graglia, Lawrence v. Texas*: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1141–42 (2004) (finding *Lawrence* "illustrat[ive]" of the Supreme Court's tendency to use substantive due process as a method of bringing about social change preferred by America's cultural elite); Lund & McGinnis, *supra* note 39, at 1556 (describing *Lawrence* as a case in which the Supreme Court "flex[ed] its political muscles"); *id.* at 1582 (arguing that *Lawrence* transformed substantive due process into "a tool through which the Court can simply impose on the nation its own visions of human freedom, the meaning of the universe, and the mystery of human life"); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96 (2003) ("[B]ecause it directly makes value judgments [about what rights modern Americans consider fundamental], *Lawrence* necessarily implicates itself in cultural controversy. Scalia is therefore right to accuse the Court of losing its neutrality.").

views *Lawrence* as a bold step toward imposing same-sex marriage by judicial fiat.[162]

Given all this, one might suspect that the *Glucksberg* and *Lawrence* Surveys are the manifestation of lower court judges assuming a position opposite the Supreme Court in the culture war.[163] A number of commentators have reached essentially this conclusion. For instance, with respect to the Eleventh Circuit's decision to uphold a Florida law barring gay couples from adopting children,[164] Professor Nancy Marcus sees "an unusually open disdain for Supreme Court precedent,"[165] and Professor John Culhane argues that "one might summarize the [Eleventh Circuit]'s view of *Lawrence* as follows: Because of the potential sweep of the Supreme Court's decision, *Lawrence* does not mean much of anything—at least outside of the specific context of private, consensual sex."[166] When the Kansas Court of Appeals refused to declare unconstitutional a statute that prescribed a more severe penalty for homosexual statutory rape than heterosexual statutory rape,[167] Professor Berta Hernández-Truyol condemned it as having "ignored *Lawrence*,"[168] while Professor Katherine Franke criticized it for interpreting *Lawrence* as "impos[ing] absolutely no check on the legal enforcement of heteronormative preferences."[169] Even when the Kansas Supreme Court employed an arguably narrow interpretation of *Lawrence* to overrule the Court of Appeals in this same case,[170] one commentator nonetheless perceived a "resort to tortured reasoning" to avoid the "potentially radical consequences" of a broader interpretation of *Lawrence*.[171]

The *Glucksberg* and *Lawrence* Surveys seem to contain additional evidence of the resistance to *Lawrence* pointed out by these commentators. The *Glucksberg* Survey's most explicit examples of such defiance were provoked by *Lawrence*'s startling decree, " '[T]he fact that the governing majority in a

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162. *See* Klarman, *supra* note 19, at 459–73 (describing the conservative backlash sparked by *Lawrence*, especially with regard to the specter of same-sex marriage); *see also* Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) ("In the end, Justice Scalia was right—*Lawrence* emboldened, inspired, and indeed enabled the political claim that the state could no longer refuse to recognize same-sex marriages.").

163. *See, e.g.*, A. Jean Thomas, *The Hard Edge of* Kulturkampf*: Cultural Violence, Political Backlashes and Judicial Resistance to* Lawrence *and* Brown, 23 QUINNIPIAC L. REV. 707, 708–09 (2004) (locating narrow interpretations of *Lawrence* within the broader culture war).

164. Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 806 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004).

165. Marcus, *supra* note 96, at 386.

166. John G. Culhane, *Writing On, Around, and Through* Lawrence v. Texas, 38 CREIGHTON L. REV. 493, 500 (2005).

167. State v. Limon, 83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

168. Berta E. Hernández-Truyol, *Querying* Lawrence, 65 OHIO ST. L.J. 1151, 1251 (2004).

169. Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1413 (2004).

170. *Limon*, 122 P.3d 22 (Kan. 2005).

171. Recent Cases, State v. Limon, *122 P.3d 22 (Kan. 2005)*, 119 HARV. L. REV. 2276, 2276 (2006).

State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.' "[172] The Eleventh Circuit, in reversing a district court ruling striking down a statute banning the sale of sex toys, openly expressed skepticism about *Lawrence*'s sincerity: "[T]he Supreme Court has noted on repeated occasions that laws can be based on moral judgments. . . . One would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principal [sic] has been jettisoned wholesale."[173] The court also made plain that it considered much of *Lawrence* to be dicta,[174] and that it was "not prepared to infer a new fundamental right from an opinion [i.e., *Lawrence*] that never employed the usual *Glucksberg* analysis for identifying such rights."[175]

The district court on remand in this same case found itself in accord, at least with regard to *Lawrence*'s disparagement of morals legislation. Referring to such disparagement as "hyperbole," the court concluded that "if the effects of *Lawrence* are to be construed [to bar considerations of morality from public lawmaking], virtually our entire criminal code would be invalidated, because it is based on social conceptions of 'right' and 'wrong' behavior."[176]

Such unequivocal disagreement with *Lawrence* is rare, yet the lengths to which certain decisions go to avoid *Lawrence* and apply *Glucksberg* could lead one to suspect that resistance to *Lawrence* is real.[177] After all, those cases in which *Glucksberg* explicitly trumps *Lawrence* are usually cases regarding claims of sexual liberty or gay rights,[178] two of the culture war's main fronts. With respect to same-sex marriage lawsuits alone, nearly all cases that refuse to declare a right of marriage for same-sex couples distinguish *Lawrence* and rely on *Glucksberg*, while nearly all cases that reach the opposite conclusion ignore *Glucksberg* and rely on *Lawrence*.[179]

The *Lawrence* Survey may imply further support for the claim that lower courts have systematically undermined *Lawrence*. With no assistance from *Glucksberg*, courts have turned away challenges to numerous laws thought

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172. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

173. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1237 n.8 (11th Cir. 2004).

174. *Id.* at 1236–37.

175. *Id.* at 1237 (citation omitted).

176. Williams v. King, 420 F. Supp. 2d 1224, 1248 (N.D. Ala. 2006).

177. One appellate judge has been willing to accuse his fellow panelists of such implicit resistance. *See* Muth v. Frank, 412 F.3d 808, 818–19 (7th Cir. 2005) (Evans, J., concurring in judgment), *cert. denied*, 126 S. Ct. 575 (2005).

178. *See* cases categorized under "adoption," "military: DADT," "privacy," "prostitution," and "same-sex marriage" *infra* Appendix A.II.

179. *Compare* cases categorized under "same-sex marriage" *infra* Appendix A.II, *with* cases categorized under "same-sex marriage" *infra* Appendix B.II.

vulnerable in light of *Lawrence*—laws against polygamy,[180] sex clubs,[181] distribution of obscenity,[182] and adult consensual non-consanguineous incest,[183] to name a few. Many of these decisions rely on *Lawrence*'s hedge,[184] while other decisions reach the same result through different means.[185] In either event, these cases find no legal significance in *Lawrence*'s assertions that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"[186] or " 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.' "[187]

B. *First Rebuttal: Difficulties in Interpreting* Lawrence

Implicit in the predictable criticisms of these decisions is the notion that the courts handing them down are acting in bad faith when they refuse to perform their institutional role of faithfully applying Supreme Court precedent. Yet this very accusation vindicates the lower courts. *Glucksberg* remains good law—for a lower court to apply it *is* to conform to the mission of a lower court.

Moreover, even if *Lawrence* implicitly overruled *Glucksberg*,[188] it is not at all clear what *Lawrence* would require in *Glucksberg*'s stead. Indeed, whether in favor of or opposed to *Lawrence*, many legal academics concur with Professor Nan Hunter's description of *Lawrence* as "heavier on rhetoric than on clarity."[189] Numerous commentators also agree that the *Lawrence*

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180. *See* Bronson v. Swensen, 394 F. Supp. 2d 1329 (D. Utah 2005); State v. Holm, 137 P.3d 726 (Utah 2006).

181. *See, e.g.*, 832 Corp. v. Gloucester Township, 404 F. Supp. 2d 614 (D.N.J. 2005); Fleck & Assocs. v. City of Phoenix, 356 F. Supp. 2d 1034 (D. Ariz. 2005).

182. *See, e.g.*, United States v. Coil, 442 F.3d 912 (5th Cir. 2006); United States v. Extreme Assocs., Inc., 431 F.3d 150 (3d Cir. 2005); State v. Jenkins, No. C-040111, B-0105517-A, 2004 WL 3015091 (Ohio Ct. App. Dec. 30, 2004).

183. *See* State v. Lowe, No. 2004CA00292, 2005 WL 1983964 (Ohio Ct. App. Aug. 15, 2005) (upholding incest charge against a stepfather who had sex with his twenty-two year old stepdaughter). *But see* State v. John M., 894 A.2d 376 (Conn. App. Ct. 2006) (striking down an incest law as violative of equal protection insofar as it criminalized non-consanguineous heterosexual—but not homosexual—incest).

184. *See supra* note 133 and accompanying text.

185. *See, e.g.*, *832 Corp.*, 404 F. Supp. 2d at 623–25 (finding that sex clubs do not fall within the zone of privacy protected by the Constitution); *Fleck*, 356 F. Supp. 2d at 1039–41 (same).

186. Lawrence v. Texas, 539 U.S. 558, 572 (2003).

187. *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

188. *See supra* Part I.

189. Hunter, *supra* note 7, at 1103; *see also* Andrew Koppelman, Lawrence's *Penumbra*, 88 MINN. L. REV. 1171, 1180 (2004) ("*Lawrence* can easily be denounced as poor judicial craftsmanship. Its reasoning is obscure, and it lays down no clear rule."); Lund & McGinnis, *supra* note 39, at 1585 ("[W]e think that the most salient characteristic of *Lawrence* is the impossibility of determining what it means, other than that five Justices have decided to forbid laws proscribing sodomy.");

majority probably *intended* to write vaguely, perhaps to maximize the Court's discretion when applying *Lawrence* to future cases.[190] Professor Robert Post, for example, sees the *Lawrence* decision as attempting to advance simultaneously two possible justifications for its ruling—"the logic of private liberty or the logic of public respect"[191]—while committing itself to neither.[192] Based on public reaction to *Lawrence* and subsequent gay rights developments, says Post, the Court can shape future rulings to accord with the national mood.[193]

If these commentators have correctly divined the purposes behind *Lawrence*, one can hardly accuse lower courts of shirking their institutional role by not applying *Lawrence* faithfully. Indeed, many courts facing *Lawrence* directly have devoted substantial portions of their opinions simply to deciding whether *Lawrence* applies to the situation at bar.[194] *Abigail Alliance*, though not itself interpreting *Lawrence*, reads some of these cases as concluding that "*Lawrence* [is] not, properly speaking, a substantive due process decision."[195] In other words, from *Abigail Alliance*'s standpoint, certain courts have determined that *Lawrence* is an anomaly, not capable of being squared with previous substantive due process decisions. Perhaps other courts ignore *Lawrence* because they cannot reach a more satisfactory answer. These courts would naturally fall back on *Glucksberg*.

In addition, the *Lawrence* Survey shows that courts *are* applying *Lawrence* insofar as it provides unambiguous guidance. Indeed, *Lawrence*'s hedge[196]—perhaps the most concrete statement in the entire decision[197]—has been applied quite faithfully.[198] A lower court faced with a lawsuit seeking marriage rights for same-sex couples, for example, can hardly be blamed for taking *Lawrence* at its word when *Lawrence* categorically proclaimed that

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Tribe, *supra* note 7, at 1898 ("To be sure, the broad and bold strokes with which the Court painted in *Lawrence* left a good bit of this picture to the reader's imagination . . . .").

190. *See, e.g.*, Koppelman, *supra* note 189, at 480 ("[T]he [*Lawrence*] Court had very good political reasons for avoiding transparency in both its reasoning and its rule."); Lund & McGinnis, *supra* note 39 ("[A]lmost [no case in Supreme Court history] seeks so overtly to maximize future judicial discretion."); Post, *supra* note 161, at 105 ("[The Court] has crafted its opinion so as to allow itself flexibly to respond to the unfolding nature of public discussion [about the constitutional status of homosexuality].").

191. Post, *supra* note 161, at 106.

192. *See id.* at 105 ("[T]he Court has not committed itself to the full consequences of its position.").

193. *See id.* at 104–06.

194. From the *Glucksberg* Survey, most notable is Williams v. King, 420 F. Supp. 2d 1224, 1246–54 (N.D. Ala. 2006). From the *Lawrence* Survey, see State v. Limon, 122 P.3d 22, 25–26, 28–31, 34–35 (Kan. 2005).

195. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 476 n.8 (D.C. Cir. 2006).

196. *See supra* text accompanying note 133.

197. In the words of one commentator, "[*Lawrence* was] more careful to specify the conduct to which it does *not* apply than that to which it *does* apply . . . ." Note, *Unfixing* Lawrence, 118 HARV. L. REV. 2858, 2873 (2005) (second emphasis added).

198. See *infra* Appendix B, the column entitled "Use of 'hedge'?"

its holding "[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[199] By focusing on this passage, lower courts may "ignor[e] the *tone*" of *Lawrence*,[200] but they neither misapply the *language* of *Lawrence* nor avoid *Lawrence* in bad faith.

C. *Second Rebuttal: Institutional Restraint*

Closely related to the foregoing considerations is the possibility that some courts, perceiving in *Lawrence* more social philosophy than legal conclusions, simply do not want to misinterpret the implications of that philosophy and risk taking *Lawrence* in directions not intended by the Supreme Court. In fact, in the Eleventh Circuit decision regarding sex toys discussed above,[201] the court admits, "[T]he [Supreme] Court may in due course expand *Lawrence*'s precedent [to affirm an absolute right to sexual autonomy]. But for us preemptively to take that step would exceed our mandate as a lower court."[202]

Even more illustrative of this point is a Third Circuit decision, *United States v. Extreme Associates, Inc.*,[203] upholding federal obscenity laws from constitutional attack. The district court in *Extreme Associates* had declared such laws unconstitutional in light of *Lawrence*'s declaration that moral judgments no longer suffice to justify government action,[204] and the Third Circuit did not expressly disagree with this reasoning. Rather, it began its review by quoting Supreme Court precedent that admonished lower courts for concluding that one case had overruled another by implication,[205] and then took the district court to task for finding that *Lawrence* had implicitly overruled decades of Supreme Court jurisprudence upholding the very

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199. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

200. Culhane, *supra* note 166, at 500 (emphasis added). Professor Culhane here refers not to a same-sex marriage case, but to *Gilmore v. Secretary of the Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005), a decision upholding Florida's ban on adoptions by same-sex couples. In Professor Culhane's defense, I note that he says of *Lofton*, "Although one could make an argument that the *Lofton* court didn't read *Lawrence* broadly enough, the court acted well within a defensible realm in declining to find *Lawrence* applicable." Culhane, *supra* note 166, at 499.

201. *See supra* notes 173–175 and accompanying text.

202. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1238 (11th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005).

203. 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006).

204. United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 590–91 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006).

205. *Extreme Assocs.*, 431 F.3d at 155 (" 'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' " (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))).

obscenity laws in question.[206] It concluded that *Lawrence* "represents no . . . definitive step" toward disapproval of federal obscenity jurisprudence.[207]

D. *Final (Partial) Rebuttal: Judicial Management Considerations*

The foregoing two rebuttals have focused mainly on cases involving gay rights or sexual liberty. Yet most cases in the *Glucksberg* Survey have nothing to do with these categories. This final rebuttal attempts to bring those cases into the analytical fold as well. It is here styled a "partial" rebuttal because it is not as principled a reason for avoiding *Lawrence* as the previous two—yet neither is it as insidious as simple disdain for gay rights or sexual liberty.

To put it plainly, in terms of judicial resources, abandoning the *Glucksberg* Doctrine in favor of *Lawrence* would exact a costly tax. If the *Glucksberg* Survey demonstrates anything, it is the variety of unusual and sometimes silly claims of constitutional violation that courts routinely face: whether, for instance, the government violates one's fundamental liberties by handing out parking tickets,[208] requiring golfers to use golf carts rather than walk the course,[209] or denying the "right to conduct nondestructive testing" of a municipal runway to determine if one's 737 may safely land.[210] Even then-D.C. Circuit Judge John Roberts had occasion to ponder such oddities, evaluating the due process implications of arresting a twelve-year-old girl for eating a french fry in a D.C. Metro station.[211] In these and many other cases, the *Glucksberg* Doctrine provides courts a convenient template for dismissing the claim.

A serious application of *Lawrence*, by contrast, would require much more. It seems that a court would at least need to consider whether there exists an "emerging awareness" that this particular right should be protected, and perhaps whether Western European countries protect the right.[212] As compared to the *Glucksberg* Doctrine, such inquiries are unlikely to help decide the case of the man who wishes to land his 737 at the municipal airport. Other cases, however, wrestle with issues of much greater moral weight, such as the right to the companionship of one's adult children.[213]

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206. *Id.* at 155–61.

207. *Id.* at 161.

208. *See* Rector v. City & County of Denver, 348 F.3d 935 (10th Cir. 2003); Piekarczyk v. City of Chicago *ex rel.* Daley, No. 04 C 7935, 2006 WL 566449 (N.D. Ill. Mar. 3, 2006).

209. *See* Zurla v. City of Daytona Beach, 876 So. 2d 34 (Fla. Dist. Ct. App. 2004), *review denied*, 891 So. 2d 554 (Fla. 2004) (table), *cert. denied*, 544 U.S. 976 (2005).

210. *See* Tutor v. City of Hailey, No. CIV-02-475-S-BLW, 2004 WL 344437, at *3 (D. Idaho Jan. 20, 2004), *aff'd sub nom.* Tutor-Saliba Corp. v. City of Hailey, 452 F.3d 1055 (9th Cir. 2006).

211. *See* Hedgepeth *ex rel.* Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148, 1155–56 (D.C. Cir. 2004).

212. *See supra* notes 71–74 and accompanying text.

213. *See* Robertson v. Hecksel, 420 F.3d 1254 (11th Cir. 2005) (denying the existence of a fundamental right to the companionship of one's adult children), *cert. denied*, 126 S. Ct. 2319

Even something as seemingly trivial as the right not to be subject to a fluoridated water supply[214] becomes somewhat more complex if one must account for emerging trends and European approaches to the issue.[215] *Glucksberg* allows a court to avoid these detours on the road to dismissal of the case, an outcome the court may consider inevitable under any standard. This may not be a principled application of *Glucksberg*, but it is certainly not a bad faith attempt to undermine *Lawrence*.

CONCLUSION

The D.C. Circuit in *Abigail Alliance* could not have been more accurate when it observed, "[I]t appears the Supreme Court has employed *two distinct approaches* when faced with a claim to a fundamental right."[216] This Note has argued that these two approaches are not only "distinct," but incompatible. *Lawrence* and *Glucksberg* embody wholly different philosophies regarding the meaning of the Constitution and the role of courts in enforcing it.

Whatever substantive due process revolution *Lawrence* was intended to bring about has not come to fruition. As the *Glucksberg* and *Lawrence* Surveys demonstrate, precedent ignoring or distinguishing *Lawrence* continues to accumulate at a steady pace. While cultural backlash may explain a handful of cases from these surveys, it is probably not the best explanation for the entire phenomenon. The lower courts almost certainly understand the social and political message *Lawrence* intended to convey, but as a matter of law, the decision provides almost no guidance—except to say what the case "does not involve."[217] In short, the marginalization of *Lawrence* and reinvigoration of the *Glucksberg* Doctrine may very well be the result of *Lawrence*'s own failings.

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http://students.law.umich.edu/mlr/archive/105/2/hawkins.pdf

(2006); Russ v. Watts, 414 F.3d 783 (7th Cir. 2005) (same); McCurdy v. Dodd, 352 F.3d 820 (3d Cir. 2003) (same).

214. *See* Coshow v. City of Escondido, 34 Cal. Rptr. 3d 19 (Ct. App. 2005).

215. *See, e.g.*, Rudolph Ziegelbecker, Letter to the Editor, 31 FLUORIDE 171 (1998), *available at* http://www.fluoride-journal.com/98-31-3/313-171.htm (listing numerous European countries that have discontinued fluoridation, apparently due to scientific uncertainty as to its long-term effects).

216. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 476 (D.C. Cir. 2006) (emphasis added).

217. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

APPENDIX A: THE *GLUCKSBERG* SURVEY

(asterisk following citation indicates that the later case is also a part of this survey)

Note: Most cases from the *Glucksberg* Survey involved many claims, or the same claim stated in many different ways. This survey focuses only on the claims as they intersected with the various courts' analyses under *Glucksberg*.

I. IN CHRONOLOGICAL ORDER

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Moriarty v. Bradt	827 A.2d 203 (N.J. 2003), *cert. denied*, 540 U.S. 1177 (2004)	14-Jul-2003					214		Block grandparent-grandchildren visitation rights.	parents' rights
Sojourner A. v. N.J. Dep't of Human Servs.	828 A.2d 306 (N.J. 2003)	4-Aug-2003					313		Amount of welfare money when additional child is born.	state benefit
Griffin v. Dep't of Local Gov't Fin.	794 N.E.2d 1171 (Ind. Tax 2003)	9-Sep-2003				1176			Tax protest.	economic liberty
Bradley v. N.C. Dep't of Transp., Div. of Motor Vehicles	286 F. Supp. 2d 697 (W.D.N.C. 2003)	7-Oct-2003		706		706		Y	Job termination.	profession
Standhart v. Super. Ct. *ex rel.* County of Maricopa	77 P.3d 451 (Ariz. Ct. App. 2003)	8-Oct-2003	459			455	454–55	Y	Same-sex marriage under Federal and Arizona Constitutions.	same-sex marriage
City of Lauderhill v. Rhames	864 So. 2d 432 (Fla. Dist. Ct. App. 2003), *review denied*, 884 So. 2d 23 (Fla. 2004) (table)	22-Oct-2003		439	439 n.8	438–39	438 n.7		Job termination.	profession
Lewis v. Harris	No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Law Div. Nov. 5, 2003), *aff'd*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005)*	5-Nov-2003	*8			*7		Y	Same-sex marriage under New Jersey Constitution.	same-sex marriage

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Rector v. City and County of Denver	348 F.3d 935 (10th Cir. 2003)	6-Nov-2003		948		948			Too many parking tickets.	misc.
Bell v. Ohio State Univ.	351 F.3d 240 (6th Cir. 2003)	9-Dec-2003	250–51	250–51	250 n.1	250–51			Expulsion from medical school.	profession/ education
McCurdy v. Dodd	352 F.3d 820 (3d Cir. 2003)	17-Dec-2003					826		Companionship of adult son killed by police.	parents' rights
Braam *ex rel.* Braam v. State	81 P.3d 851 (Wash. 2003)	18-Dec-2003		857					Restrict number of times foster kids can be moved.	reasonable safety
Tutor v. City of Hailey, Idaho	No. CIV-02-475-S-BLW, 2004 WL 344437 (D. Idaho Jan. 20, 2004), *aff'd sub nom.* Tutor-Saliba Corp. v. City of Hailey, 452 F.3d 1055 (9th Cir. 2006)*	20-Jan-2004		*3	*3	*3			"Nondestructive testing" of municipal runway to challenge weight-based denial of 737 landing permit.	misc.
Cox for U.S. Senate Comm., Inc. v. FEC	No. 03 C 3715, 2004 WL 783435 (N.D. Ill. Jan. 22, 2004)	22-Jan-2004	*10		*10	*10	*11		FEC penalties for campaign violations.	fair punishment
Lofton v. Sec'y of Dep't of Children & Fam. Servs.	358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005)	28-Jan-2004	816	816		816	816–17	Y	Same-sex couple adoption.	adoption
Valley Christian Sch. v. Mont. High Sch. Ass'n	86 P.3d 554 (Mont. 2004)	24-Feb-2004			559	559–60			Regulations requiring state-certified teachers.	parents' rights
State v. Watson	86 P.3d 158 (Wash. App. 2004), *aff'd*, 122 P.3d 903 (Wash. 2005)	9-Mar-2004					164		Criminal sentence unduly long.	fair punishment
Doe v. Tandeske	361 F.3d 594 (9th Cir. 2004), *cert. denied*, 543 U.S. 817 (2004)	17-Mar-2004				596–97	597		Sex offender registration law.	privacy
S. Fla. Taxicab Ass'n v. Miami-Dade County	No. 00-1366-CIV-GOLD, 2004 WL 958073 (S.D. Fla. Mar. 18, 2004)	18-Mar-2004					*4		Taxicab regulations.	economic liberty
Sanders *ex rel.* Rayl v. Kan. Dep't of Soc. & Rehab. Servs.	317 F. Supp. 2d 1233 (D. Kan. 2004)	29-Apr-2004		1253 n.6		1253 & n.6			Medicaid coverage.	access to healthcare

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Zurla v. City of Daytona Beach	876 So. 2d 34 (Fla. Dist. Ct. App. 2004), *review denied*, 891 So. 2d 554 (Fla. 2004) (table), *cert. denied*, 544 U.S. 976 (2005)	28-May-2004			35	35			Golf course requirements that golf carts must be used at certain times.	movement/ travel
In re W.M.	851 A.2d 431 (D.C. 2004), *cert. denied*, 543 U.S. 1062 (2005)	3-Jun-2004	450		449	448	449	Y	Sex offender registration law.	privacy
In re Amanda D.	811 N.E.2d 1237 (Ill. App. Ct. 2004), *aff'd in part and rev'd in part sub nom. In re* D.W., 827 N.E.2d 466 (Ill. 2005)	24-Jun-2004				1241	1241		[+] Law authorizing taking away adopted children of convicted felons.	parents' rights
Hodgkins v. Peterson	No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194 (S.D. Ind. July 23, 2004)	23-Jul-2004				*7	*8	Y	[+] Juvenile curfew law.	parents' rights
Williams v. Att'y Gen. of Ala.	378 F.3d 1232 (11th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005), *on remand to* Williams v. King, 430 F. Supp. 2d 1224 (N.D. Ala. 2006)*	28-Jul-2004	1239	1239	1238	1235, 1239	1239	Y	Distribution of sex toys.	privacy
Doe v. Lafayette, Ind.	377 F.3d 757 (7th Cir. 2004) (en banc)	30-Jul-2004	768	768 & n.10	770	770	768		Sex offender banned from certain public locations.	movement/ travel
In re Kandu	315 B.R. 123 (Bankr. W.D. Wash. 2004)	17-Aug-2004				139	138	Y	Same-sex marriage under Federal Constitution.	same-sex marriage
Sagana v. Tenorio	384 F.3d 731 (9th Cir. 2004), *cert. denied*, 543 U.S. 1149 (2005)	7-Sep-2004				742			Nonresident restricted from working.	economic liberty
McIntyre v. United States	336 F. Supp. 2d 87 (D. Mass. 2004)	30-Sep-2004				107–08	108		Purported FBI action led to death of informant.	reasonable safety
Shields v. Madigan	783 N.Y.S.2d 270 (Sup. Ct. 2004)	18-Oct-2004	277			276		Y	Same-sex marriage under New York Constitution.	same-sex marriage

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Thorpe v. State	107 P.3d 1064 (Colo. Ct. App. 2004), *cert. denied*, 126 S. Ct. 545 (2005)	21-Oct-2004				1071			Tax protest.	economic liberty
Hedgepath *ex rel.* Hedgepath v. Wash. Metro. Area Transit Auth.	386 F.3d 1148 (D.C. Cir. 2004)	26-Oct-2004				1156			Girls arrested for eating french fry in metro station.	movement/ travel
Daggy v. Staunton City Sch.	No. Civ.A. 5:04CV00023, 2004 WL 2900653 (W.D. Va. Dec. 13, 2004), *aff'd*, 158 Fed. Appx. 487 (4th Cir. 2005)	13-Dec-2004				*3 n.5			Job termination.	profession
Wilson v. Ake	354 F. Supp. 2d 1298 (M.D. Fla. 2005)	19-Jan-2005	1307		1306	1305	1305	Y	Same-sex marriage under Federal Constitution.	same-sex marriage
Hernandez v. Robles	794 N.Y.S.2d 579 (Sup. Ct. 2005), *rev'd*, 2006 WL 1835429 (N.Y. July 6, 2006)*	4-Feb-2005					596	Y	[+] Same-sex marriage under New York Constitution.	same-sex marriage
Blau v. Fort Thomas Pub. Sch. Dist.	401 F.3d 381 (6th Cir. 2005)	8-Feb-2005	394		393–94	821			School dress code.	students' rights
Sanchez v. State	692 N.W.2d 812 (Iowa 2005)	18-Feb-2005	820	820	821	821	820–21		Illegal aliens want drivers licenses.	immigrants' rights
Seymour v. Holcomb	790 N.Y.S.2d 858 (Sup. Ct. 2005), *aff'd*, 811 N.Y.S.2d 134 (App. Div. 2006)	23-Feb-2005				865		Y	Same-sex marriage under New York Constitution.	same-sex marriage
DePoutot v. Raffaelly	No. Civ. 04-38-SM, 2005 WL 515853 (D.N.H. Mar. 3, 2005), *aff'd*, 424 F.3d 112 (1st Cir. 2005)	3-Mar-2005				*5	*5		Executive detention.	criminal procedure
Johnson v. Quander	370 F. Supp. 2d 79 (D.D.C. 2005), *aff'd*, 440 F.3d 489 (D.C. Cir. 2006)	21-Mar-2005		89		89	89		Law requires convicts to submit DNA sample.	privacy
Doe v. Miller	405 F.3d 700 (8th Cir. 2005), *cert. denied sub nom.* John Doe I v. Miller, 126 S. Ct. 757 (2005)	29-Apr-2005	713–14	713–14		714			Sex offender punishment unduly oppressive.	movement/ travel

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Jackson v. Placer County	No. CIV S0579FCDKJM, 2005 WL 1366486 (E.D. Cal. May 27, 2005)	27-May-2005		*4		*4			Deprivation of pets.	property
Jimenez v. County of L.A.	29 Cal. Rptr. 3d 553 (Ct. App. 2005)	2-Jun-2005	558	558		559	559		Long detention on a probable cause warrant.	criminal procedure
Doe v. Moore	410 F.3d 1337 (11th Cir. 2005), *cert. denied sub nom.* John Doe I v. Moore, 126 S. Ct. 624 (2005)	6-Jun-2005	1343	1343	1343	1343	1345		Sex offender registration law violates privacy.	privacy
Lewis v. Harris	875 A.2d 259 (N.J. Super. Ct. App. Div. 2005)	14-Jun-2005				267–68		Y	Same-sex marriage under New Jersey Constitution.	same-sex marriage
Smelt v. County of Orange	374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and rev'd in part*, 447 F.3d 673 (9th Cir. 2006)	16-Jun-2005		877		878	877	Y	Same-sex marriage under Federal Constitution.	same-sex marriage
Fields v. Legacy Health Sys.	413 F.3d 943 (9th Cir. 2005)	22-Jun-2005				956	955–56		Statute of limitations on medical malpractice.	right to sue
Muth v. Frank	412 F.3d 808 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 575 (2005)	22-Jun-2005		817		817		Y	Brother-sister marriage.	incest
Johansen v. La. High Sch. Athletic Ass'n	916 So. 2d 1081 (La. App. 2005)	29-Jun-2005				1088 n.3			Participation in interscholastic athletics.	students' rights
Russ v. Watts	414 F.3d 783 (7th Cir. 2005)	11-Jul-2005	789			789			Companionship of adult son killed by police.	parents' rights
Scherr v. Handgun Permit Review Bd.	880 A.2d 1137 (Md. Ct. Spec. App. 2005), *cert. denied*, 887 A.2d 656 (Md. 2005) (table)	11-Jul-2005	1152		1152	1152	1152		Possession of handgun.	property
State *ex rel.* Nixon v. Powell	167 S.W.3d 702 (Mo. 2005)	12-Jul-2005		705		705			Law requiring prisoners with money to pay for their care.	property
Nahas v. City of Mountain View	No. C 03-05057 JW, 2005 WL 1683617 (N.D. Cal. July 19, 2005)	19-Jul-2005		*4		*4			Business shut down.	economic liberty

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Lightsey v. Adm'r or Ex'r of Estate of Miles	No. Civ.A. CV203-171, 2005 WL 1799549 (S.D. Ga. July 27, 2005)	27-Jul-2005				*7			Public release of private records.	privacy
Luckes v. County of Hennepin, Minn.	415 F.3d 936 (8th Cir. 2005)	28-Jul-2005				939 n.5			24-hour arrest.	criminal procedure
State v. Small	833 N.E.2d 774 (Ohio Ct. App. 2005), *appeal denied*, 836 N.E.2d 583 (Ohio 2005) (table)	28-Jul-2005					778		Sex offender registration law.	privacy
State v. Seering	701 N.W.2d 655 (Iowa 2005)	29-Jul-2005				664		Y	Sex offender registration law.	privacy
Robertson v. Hecksel	420 F.3d 1254 (11th Cir. 2005), *cert. denied*, No. 05-935, 2006 WL 219376 (U.S. May 30, 2006).	16-Aug-2005	1256–57						Companionship of adult son killed by police.	parents' rights
Coshow v. City of Escondido	34 Cal. Rptr. 3d 19 (Ct. App. 2005)	17-Aug-2005	29–30	29–30		30	29		Water fluoridation.	misc.
State v. Acosta	No. 08-04-00312-CR, 2005 WL 2095290 (Tex. App. Aug. 31, 2005)	31-Aug-2005					*3	Y	Distribution of sex toys.	privacy
Velez-Diaz v. Vega-Irizarry	421 F.3d 71 (1st Cir. 2005)	2-Sep-2005					79		Cooperating witness murdered during negotiations with gang members.	reasonable safety
Starr v. Price	385 F. Supp. 2d 502 (M.D. Pa. 2005)	8-Sep-2005		507		507			Police returned firearm to estranged father who then shot and killed mother and son.	reasonable safety
Williams v. Detroit Bd. of Educ.	Nos. 04-71064 & 04-71841, 2005 WL 2219032 (W.D. Mich. Sept. 9, 2005)	9-Sep-2005	*8		*8	*8			Wrongful discharge.	reputation
Brown v. Mich. City, Ind.	No. 3:02 CV 572 RM, 2005 WL 2281502 (N.D. Ind. Sept. 19, 2005)	19-Sep-2005	*11			*11			Sex offender banned from certain public locations.	movement/ travel

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
United States v. Myers	426 F.3d 117 (2d Cir. 2005)	27-Sep-2005					126		Former sex offender wants to visit his son.	parents' rights
People v. Clay	361 Ill. App. Ct. 3d 310 (2005), *appeal denied*, 844 N.E.2d 968 (Ill. 2006) (table)	30-Sep-2005					325		Challenge to insanity statute.	criminal procedure
Hartford Park Tenants Ass'n v. R.I. Dep't of Enviro. Mgmt.	No. C.A. 99-3748, 2005 WL 2436227 (R.I. Super. 2005)	3-Oct-2005				*51	*52		Various claims against a building site.	parents' rights
Willis v. Town of Marshall, N.C.	426 F.3d 251 (4th Cir. 2005)	7-Oct-2005				264			Dancer wishes to dance at town festivals.	movement/ travel
Lisa I. v. Super. Ct.	34 Cal. Rptr. 3d 927 (Ct. App. 2005)	18-Oct-2005	939 n.5						Father wants custody of child being raised by mother and her ex-husband.	parents' rights
Doe v. Sturdivant	No. 05-70869, 2005 WL 2769000 (E.D. Mi. 2005)	25-Oct-2005	*6				*7		Sex offender registration law.	privacy
Pullen v. Moore	No. 05 C 4368, 2005 WL 2850124 (N.D. Ill. 2005)	26-Oct-2005	*5			*4			School disciplinary action.	students' rights
Fields v. Palmdale Sch. Dist.	427 F.3d 1197 (9th Cir. 2005), *opinion amended on denial of reh'g*, 2006 WL 1329950 (9th Cir. May 17, 2006)	2-Nov-2005				1203–04			School sex education program.	parents' rights
Loomis v. United States	68 Fed. Cl. 503 (2005)	7-Nov-2005					517	Y	Don't Ask/Don't Tell.	military: DADT
Vera-Natal v. Hulick	No. 05 C 1500, 2005 WL 3005613 (N.D. Ill. 2005)	7-Nov-2005			*10				Long incarceration.	fair punishment
Tinker v. Beasley	429 F.3d 1324 (11th Cir. 2005)	10-Nov-2005		1327		1327			Involuntary confession.	criminal procedure
Hernandez v. Robles	805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, 2006 WL 1835429 (N.Y. July 6, 2006)*	8-Dec-2005	362		360–61	362		Y	Same-sex marriage under New York Constitution.	same-sex marriage
In re R.A.	891 A.2d 564 (N.H. 2005)	30-Dec-2005					576		Child custody dispute.	parents' rights

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Townsend v. Padula	No. C/A0:0421879-RBH, 2005 WL 3591984 (D.S.C. 2005)	30-Dec-2005			*2				Prisoner denied opportunity to dine with other inmates.	movement/ travel
Payday Today, Inc. v. Ind. Dep't of Fin. Insts.	2006 WL 148943 (N.D. Ind. 2006)	17-Jan-2006			*8				Regulation of payday loans.	economic liberty
Creason v. City of Washington	435 F.3d 820 (8th Cir. 2006)	1-Feb-2006				824			Property condemnation.	property
Benzman v. Whitman	No. 04 Civ. 1888(DAB), 2006 WL 250527 (S.D.N.Y. Feb. 2, 2006)	2-Feb-2006					*14		Clean-up of World Trade Center debris.	misc.
Samuels v. N.Y. State Dep't of Health	811 N.Y.S.2d 136 (App. Div. 2006)	16-Feb-2006	140		139 n.5	144		Y	Same-sex marriage under New York Constitution.	same-sex marriage
Piekarczyk v. City of Chicago *ex rel.* Daley	No. 04 C 7935, 2006 WL 566449 (N.D. Ill. Mar. 3, 2006)	3-Mar-2006	*5						Too many parking tickets.	misc.
Williams v. King	430 F. Supp. 2d 1224 (N.D. Ala. 2006)	15-Mar-2006		1232		1232	1232–33	Y	Distribution of sex toys.	privacy
Butler v. State	923 So. 2d 566 (Fla. Dist. Ct. App. 2006)	22-Mar-2006		569	571–72	569, 571			Sex offender registration law.	privacy
Cote-Whitacre v. Dep't of Pub. Health	844 N.E.2d 623 (Mass. 2006)	30-Mar-2006				641			Non-resident same-sex couples denied marriage licenses.	same-sex marriage
Doe v. Baker	No. Civ.A. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006)	5-Apr-2006	*6		*6	*6	*7		Sex offender registration law.	privacy
Cook v. Rumsfeld	429 F. Supp. 2d 385 (D. Mass. 2006)	24-Apr-2006		394	393	392	395, 397	Y	Don't Ask/Don't Tell.	military: DADT
State v. Freitag	130 P.3d 544 (Ariz. Ct. App. 2006)	2-May-2006					546	Y	Solicitation of prostitution law.	prostitution
Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach	445 F.3d 470 (D.C. Cir. 2006)	2-May-2006		472, 477		472, 476–77, 479	472	Y	[+] FDA's denial of drugs in testing to terminally ill patients.	access to healthcare
United States v. White Plume	447 F.3d 1067 (8th Cir. 2006)	17-May-2006	1075				1075		Desire to farm hemp for industrial uses.	economic liberty

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Clements v. E. Ky. State Univ.	No. Civ.A. 5:05-466-JMH, 2006 WL 1464617 (E.D. Ky. May 22, 2006)	22-May-2006			*6	*6			Failure of oral exams for masters degree leads to expulsion from program.	profession
Shouse v. Ursitti	No. 5:05-CV-314 (DF), 2006 WL 1452791 (M.D. Ga. May 23, 2006)	23-May-2006				*5			Public release of sex offender status.	privacy
People v. Travis	44 Cal. Rptr. 3d 177 (Ct. App. 2006)	26-May-2006	195						Criminal offender DNA gathering program.	privacy
United States v. Stein	435 F. Supp. 2d 330 (S.D.N.Y. 2006)	26-Jun-2006				361	361, 362		[+] Government pressure leading corporation not to provide legal defense for employees.	criminal procedure
Larson v. Burmaster	No. 2005AP1433, 2006 WL 1737584 (Wis. Ct. App. June 27, 2006)	27-Jun-2006					¶ 42		Requirement that student complete summer homework.	students' rights
Tutor-Saliba Corp. v. City of Hailey	452 F.3d 1055 (9th Cir. 2006)	3-Jul-2006				1061			"Nondestructive testing" of municipal runway to challenge weight-based denial of 737 landing permit.	misc.
Hernandez v. Robles	2006 WL 1835429 (N.Y. July 6, 2006)	6-Jul-2006				[HN 4]	[HN 7]	Y	Same-sex marriage under New York Constitution.	same-sex marriage
Norcross v. Town of Hommonton	Civil No. 04-2536 (RBK), 2006 WL 1995021 (D.N.J. July 13, 2006)	13-Jul-2006	*3						Loss of wife's consortium due to her arrest.	misc.
Mitchell v. Beaumont Indep. Sch. Dist.	No. 1:05-CV-195, 2006 WL 2092585 (E.D. Tex. July 25, 2006)	25-Jul-2006					*8		Requirement that student comply with a special evaluation procedure.	students' rights
Perez v. Jim Hogg County	No. L-05-00019, 2006 WL 2092431 (S.D. Tex. July 26, 2006)	26-July-2006		*3	*3	*3			Sexual harassment by county official.	misc.
Andersen v. King County	138 P.3d 963 (Wash. 2006)	26-Jul-2006	977	977	977	976	983	Y	Same-sex marriage under the Washington Constitution.	same-sex marriage

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Guerrero-Bermudez v. U.S. Att'y Gen.	No. 05-16447, 2006 WL 2329357 (11th Cir. Aug. 11, 2006)	11-Aug-2006		*1					Denial of application for waiver on inadmissibility.	immigrants' rights

II. By Category

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Sanders ex rel. Rayl v. Kan. Dep't of Soc. & Rehab. Servs.	317 F. Supp. 2d 1233 (D. Kan. 2004)	29-Apr-2004		1253 n.6		1253 & n.6			Medicaid coverage.	access to healthcare
Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach	445 F.3d 470 (D.C. Cir. 2006)	2-May-2006		472, 477		472, 476–77, 479	472	Y	[+] FDA's denial of drugs in testing to terminally ill patients.	access to healthcare
Lofton v. Sec'y of Dep't of Children & Fam. Servs.	358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005)	28-Jan-2004	816	816		816	816–17	Y	Same-sex couple adoption.	adoption
DePoutot v. Raffaelly	No. Civ. 04-38-SM, 2005 WL 515853 (D.N.H. Mar. 3, 2005), *aff'd*, 424 F.3d 112 (1st Cir. 2005)	3-Mar-2005				*5	*5		Executive detention.	criminal procedure
Jimenez v. County of L.A.	29 Cal. Rptr. 3d 553 (Ct. App. 2005)	2-Jun-2005	558	558		559	559		Long detention on a probable cause warrant.	criminal procedure
Luckes v. County of Hennepin, Minn.	415 F.3d 936 (8th Cir. 2005)	28-Jul-2005				939 n.5			24-hour arrest.	criminal procedure
People v. Clay	361 Ill. App. Ct. 3d 310 (2005), *appeal denied*, 844 N.E.2d 968 (Ill. 2006) (table)	30-Sep-2005					325		Challenge to insanity statute.	criminal procedure
Tinker v. Beasley	429 F.3d 1324 (11th Cir. 2005)	10-Nov-2005		1327		1327			Involuntary confession.	criminal procedure

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
United States v. Stein	435 F. Supp. 2d 330 (S.D.N.Y. 2006)	26-Jun-2006				361	361, 362		[+] Government pressure leading corporation not to provide legal defense for employees.	criminal procedure
Griffin v. Dep't of Local Gov't Fin.	794 N.E.2d 1171 (Ind. Tax 2003)	9-Sep-2003				1176			Tax protest.	economic liberty
S. Fla. Taxicab Ass'n v. Miami-Dade County	No. 00-1366-CIV-GOLD, 2004 WL 958073 (S.D. Fla. Mar. 18, 2004)	18-Mar-2004					*4		Taxicab regulations.	economic liberty
Sagana v. Tenorio	384 F.3d 731 (9th Cir. 2004), *cert. denied*, 543 U.S. 1149 (2005)	7-Sep-2004				742			Nonresident restricted from working.	economic liberty
Thorpe v. State	107 P.3d 1064 (Colo. Ct. App. 2004), *cert. denied*, 126 S. Ct. 545 (2005)	21-Oct-2004				1071			Tax protest.	economic liberty
Nahas v. City of Mountain View	No. C 03-05057 JW, 2005 WL 1683617 (N.D. Cal. July 19, 2005)	19-Jul-2005		*4		*4			Business shut down.	economic liberty
Payday Today, Inc. v. Ind. Dep't of Fin. Insts.	2006 WL 148943 (N.D. Ind. 2006)	17-Jan-2006			*8				Regulation of payday loans.	economic liberty
United States v. White Plume	447 F.3d 1067 (8th Cir. 2006)	17-May-2006	1075				1075		Desire to farm hemp for industrial uses.	economic liberty
Cox for U.S. Senate Comm., Inc. v. FEC	No. 03 C 3715, 2004 WL 783435 (N.D. Ill. Jan. 22, 2004)	22-Jan-2004	*10		*10	*10	*11		FEC penalties for campaign violations.	fair punishment
State v. Watson	86 P.3d 158 (Wash. App. 2004), *aff'd*, 122 P.3d 903 (Wash. 2005)	9-Mar-2004					164		Criminal sentence unduly long.	fair punishment
Vera-Natal v. Hulick	No. 05 C 1500, 2005 WL 3005613 (N.D. Ill. 2005)	7-Nov-2005			*10				Long incarceration.	fair punishment
Sanchez v. State	692 N.W.2d 812 (Iowa 2005)	18-Feb-2005	820	820	821	821	820–21		Illegal aliens want drivers licenses.	immigrants' rights
Guerrero-Bermudez v. U.S. Att'y Gen.	No. 05-16447, 2006 WL 2329357 (11th Cir. Aug. 11, 2006)	11-Aug-2006		*1					Denial of application for waiver on inadmissibility.	immigrants' rights

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Muth v. Frank	412 F.3d 808 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 575 (2005)	22-Jun-2005		817		817		Y	Brother-sister marriage.	incest
Loomis v. United States	68 Fed. Cl. 503 (2005)	7-Nov-2005					517	Y	Don't Ask/Don't Tell.	military: DADT
Cook v. Rumsfeld	429 F. Supp. 2d 385 (D. Mass. 2006)	24-Apr-2006		394	393	392	395, 397	Y	Don't Ask/Don't Tell.	military: DADT
Rector v. City and County of Denver	348 F.3d 935 (10th Cir. 2003)	6-Nov-2003		948		948			Too many parking tickets.	misc.
Tutor v. City of Hailey, Idaho	No. CIV-02-475-S-BLW, 2004 WL 344437 (D. Idaho Jan. 20, 2004), *aff'd sub nom.* Tutor-Saliba Corp. v. City of Hailey, 452 F.3d 1055 (9th Cir. 2006)*	20-Jan-2004		*3	*3	*3			"Nondestructive testing" of municipal runway to challenge weight-based denial of 737 landing permit.	misc.
Coshow v. City of Escondido	34 Cal. Rptr. 3d 19 (Ct. App. 2005)	17-Aug-2005	29–30	29–30		30	29		Water fluoridation.	misc.
Benzman v. Whitman	No. 04 Civ. 1888(DAB), 2006 WL 250527 (S.D.N.Y. Feb. 2, 2006)	2-Feb-2006					*14		Clean-up of World Trade Center debris.	misc.
Piekarczyk v. City of Chicago ex rel. Daley	No. 04 C 7935, 2006 WL 566449 (N.D. Ill. Mar. 3, 2006)	3-Mar-2006	*5						Too many parking tickets.	misc.
Tutor-Saliba Corp. v. City of Hailey	452 F.3d 1055 (9th Cir. 2006)	3-Jul-2006				1061			"Nondestructive testing" of municipal runway to challenge weight-based denial of 737 landing permit.	misc.
Norcross v. Town of Hammonton	Civil No. 04-2536 (RBK), 2006 WL 1995021 (D.N.J. July 13, 2006)	13-Jul-2006	*3						Loss of wife's consortium due to her arrest.	misc.
Perez v. Jim Hogg County	No. L-05-00019, 2006 WL 2092431 (S.D. Tex. July 26, 2006)	26-July-2006		*3	*3	*3			Sexual harassment by county official.	misc.
Zurla v. City of Daytona Beach	876 So. 2d 34 (Fla. Dist. Ct. App. 2004), *review denied*, 891 So. 2d 554 (Fla. 2004) (table), *cert. denied*, 544 U.S. 976 (2005)	28-May-2004			35	35			Golf course requirements that golf carts must be used at certain times.	movement/ travel

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Doe v. Lafayette, Ind.	377 F.3d 757 (7th Cir. 2004) (en banc)	30-Jul-2004	768	768 & n.10	770	770	768		Sex offender banned from certain public locations.	movement/ travel
Hedgepath ex rel. Hedgepath v. Wash. Metro. Area Transit Auth.	386 F.3d 1148 (D.C. Cir. 2004)	26-Oct-2004				1156			Girls arrested for eating french fry in metro station.	movement/ travel
Doe v. Miller	405 F.3d 700 (8th Cir. 2005), *cert. denied sub nom.* John Doe I v. Miller, 126 S. Ct. 757 (2005)	29-Apr-2005	713–14	713–14		714			Sex offender punishment unduly oppressive.	movement/ travel
Brown v. Mich. City, Ind.	No. 3:02 CV 572 RM, 2005 WL 2281502 (N.D. Ind. Sept. 19, 2005)	19-Sep-2005	*11			*11			Sex offender banned from certain public locations.	movement/ travel
Willis v. Town of Marshall, N.C.	426 F.3d 251 (4th Cir. 2005)	7-Oct-2005				264			Dancer wishes to dance at town festivals.	movement/ travel
Townsend v. Padula	No. C/A0:0421879-RBH, 2005 WL 3591984 (D.S.C. 2005)	30-Dec-2005			*2				Prisoner denied opportunity to dine with other inmates.	movement/ travel
Moriarty v. Bradt	827 A.2d 203 (N.J. 2003), *cert. denied*, 540 U.S. 1177 (2004)	14-Jul-2003					214		Block grandparent-grandchildren visitation rights.	parents' rights
McCurdy v. Dodd	352 F.3d 820 (3d Cir. 2003)	17-Dec-2003					826		Companionship of adult son killed by police.	parents' rights
Valley Christian Sch. v. Mont. High Sch. Ass'n	86 P.3d 554 (Mont. 2004)	24-Feb-2004			559	559–60			Regulations requiring state-certified teachers.	parents' rights
In re Amanda D.	811 N.E.2d 1237 (Ill. App. Ct. 2004), *aff'd in part and rev'd in part sub nom.* In re D.W., 827 N.E.2d 466 (Ill. 2005)	24-Jun-2004				1241	1241		[+] Law authorizing taking away adopted children of convicted felons.	parents' rights
Hodgkins v. Peterson	No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194 (S.D. Ind. July 23, 2004)	23-Jul-2004				*7	*8	Y	[+] Juvenile curfew law.	parents' rights
Russ v. Watts	414 F.3d 783 (7th Cir. 2005)	11-Jul-2005	789			789			Companionship of adult son killed by police.	parents' rights
Robertson v. Hecksel	420 F.3d 1254 (11th Cir. 2005), *cert. denied*, No. 05-935, 2006 WL 219376 (U.S. May 30, 2006).	16-Aug-2005	1256–57						Companionship of adult son killed by police.	parents' rights
United States v. Myers	426 F.3d 117 (2d Cir. 2005)	27-Sep-2005					126		Former sex offender wants to visit his son.	parents' rights

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Hartford Park Tenants Ass'n v. R.I. Dep't of Enviro. Mgmt.	No. C.A. 99-3748, 2005 WL 2436227 (R.I. Super. 2005)	3-Oct-2005				*51	*52		Various claims against a building site.	parents' rights
Lisa I. v. Super. Ct.	34 Cal. Rptr. 3d 927 (Ct. App. 2005)	18-Oct-2005	939 n.5						Father wants custody of child being raised by mother and her ex-husband.	parents' rights
Fields v. Palmdale Sch. Dist.	427 F.3d 1197 (9th Cir. 2005), *opinion amended on denial of reh'g*, 2006 WL 1329950 (9th Cir. May 17, 2006)	2-Nov-2005				1203–04			School sex education program.	parents' rights
In re R.A.	891 A.2d 564 (N.H. 2005)	30-Dec-2005					576		Child custody dispute.	parents' rights
Doe v. Tandeske	361 F.3d 594 (9th Cir. 2004), *cert. denied*, 543 U.S. 817 (2004)	17-Mar-2004				596–97	597		Sex offender registration law.	privacy
In re W.M.	851 A.2d 431 (D.C. 2004), *cert. denied*, 543 U.S. 1062 (2005)	3-Jun-2004	450		449	448	449	Y	Sex offender registration law.	privacy
Williams v. Att'y Gen. of Ala.	378 F.3d 1232 (11th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005), *on remand to* Williams v. King, 430 F. Supp. 2d 1224 (N.D. Ala. 2006)*	28-Jul-2004	1239	1239	1238	1235, 1239	1239	Y	Distribution of sex toys.	privacy
Johnson v. Quander	370 F. Supp. 2d 79 (D.D.C. 2005), *aff'd*, 440 F.3d 489 (D.C. Cir. 2006)	21-Mar-2005		89		89	89		Law requires convicts to submit DNA sample.	privacy
Doe v. Moore	410 F.3d 1337 (11th Cir. 2005), *cert. denied sub nom.* John Doe I v. Moore, 126 S. Ct. 624 (2005)	6-Jun-2005	1343	1343	1343	1343	1345		Sex offender registration law violates privacy.	privacy
Lightsey v. Adm'r or Ex'r of Estate of Miles	No. Civ.A. CV203-171, 2005 WL 1799549 (S.D. Ga. July 27, 2005)	27-Jul-2005				*7			Public release of private records.	privacy
State v. Small	833 N.E.2d 774 (Ohio Ct. App. 2005), *appeal denied*, 836 N.E.2d 583 (Ohio 2005) (table)	28-Jul-2005					778		Sex offender registration law.	privacy
State v. Seering	701 N.W.2d 655 (Iowa 2005)	29-Jul-2005				664		Y	Sex offender registration law.	privacy

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State v. Acosta	No. 08-04-00312-CR, 2005 WL 2095290 (Tex. App. Aug. 31, 2005)	31-Aug-2005					*3	Y	Distribution of sex toys.	privacy
Doe v. Sturdivant	No. 05-70869, 2005 WL 2769000 (E.D. Mi. 2005)	25-Oct-2005	*6				*7		Sex offender registration law.	privacy
Williams v. King	430 F. Supp. 2d 1224 (N.D. Ala. 2006)	15-Mar-2006		1232		1232	1232–33	Y	Distribution of sex toys.	privacy
Butler v. State	923 So. 2d 566 (Fla. Dist. Ct. App. 2006)	22-Mar-2006		569	571–72	569, 571			Sex offender registration law.	privacy
Doe v. Baker	No. Civ.A. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006)	5-Apr-2006	*6		*6	*6	*7		Sex offender registration law.	privacy
Shouse v. Ursitti	No. 5:05-CV-314 (DF), 2006 WL 1452791 (M.D. Ga. May 23, 2006)	23-May-2006				*5			Public release of sex offender status.	privacy
People v. Travis	44 Cal. Rptr. 3d 177 (Ct. App. 2006)	26-May-2006	195						Criminal offender DNA gathering program.	privacy
Bradley v. N.C. Dep't of Transp., Div. of Motor Vehicles	286 F. Supp. 2d 697 (W.D.N.C. 2003)	7-Oct-2003		706		706		Y	Job termination.	profession
City of Lauderhill v. Rhames	864 So. 2d 432 (Fla. Dist. Ct. App. 2003), *review denied*, 884 So. 2d 23 (Fla. 2004) (table)	22-Oct-2003		439	439 n.8	438–39	438 n.7		Job termination.	profession
Daggy v. Staunton City Sch.	No. Civ.A. 5:04CV00023, 2004 WL 2900653 (W.D. Va. Dec. 13, 2004), *aff'd*, 158 Fed. Appx. 487 (4th Cir. 2005)	13-Dec-2004				*3 n.5			Job termination.	profession
Clements v. E. Ky. State Univ.	No. Civ.A. 5:05-466-JMH, 2006 WL 1464617 (E.D. Ky. May 22, 2006)	22-May-2006			*6	*6			Failure of oral exams for masters degree leads to expulsion from program.	profession
Bell v. Ohio State Univ.	351 F.3d 240 (6th Cir. 2003)	9-Dec-2003	250–51	250–51	250 n.1	250–51			Expulsion from medical school.	profession/ education
Jackson v. Placer County	No. CIV S0579FCDKJM, 2005 WL 1366486 (E.D. Cal. May 27, 2005)	27-May-2005		*4		*4			Deprivation of pets.	property

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Scherr v. Handgun Permit Review Bd.	880 A.2d 1137 (Md. Ct. Spec. App. 2005), *cert. denied*, 887 A.2d 656 (Md. 2005) (table)	11-Jul-2005	1152		1152	1152	1152		Possession of handgun.	property
State ex rel. Nixon v. Powell	167 S.W.3d 702 (Mo. 2005)	12-Jul-2005		705		705			Law requiring prisoners with money to pay for their care.	property
Creason v. City of Washington	435 F.3d 820 (8th Cir. 2006)	1-Feb-2006				824			Property condemnation.	property
State v. Freitag	130 P.3d 544 (Ariz. Ct. App. 2006)	2-May-2006					546	Y	Solicitation of prostitution law.	prostitution
Braam ex rel. Braam v. State	81 P.3d 851 (Wash. 2003)	18-Dec-2003		857					Restriction on number of times foster kids can be moved.	reasonable safety
McIntyre v. United States	336 F. Supp. 2d 87 (D. Mass. 2004)	30-Sep-2004				107–08	108		Purported FBI action led to death of informant.	reasonable safety
Velez-Diaz v. Vega-Irizarry	421 F.3d 71 (1st Cir. 2005)	2-Sep-2005					79		Cooperating witness murdered during negotiations with gang members.	reasonable safety
Starr v. Price	385 F. Supp. 2d 502 (M.D. Pa. 2005)	8-Sep-2005		507		507			Police returned firearm to estranged father who then shot and killed mother and son.	reasonable safety
Williams v. Detroit Bd. of Educ.	Nos. 04-71064 & 04-71841, 2005 WL 2219032 (W.D. Mich. Sept. 9, 2005)	9-Sep-2005	*8		*8	*8			Wrongful discharge.	reputation
Fields v. Legacy Health Sys.	413 F.3d 943 (9th Cir. 2005)	22-Jun-2005				956	955–56		Statute of limitations on medical malpractice.	right to sue
Standhart v. Super. Ct. ex rel. County of Maricopa	77 P.3d 451 (Ariz. Ct. App. 2003)	8-Oct-2003	459			455	454–55	Y	Same-sex marriage under Federal and Arizona Constitutions.	same-sex marriage
Lewis v. Harris	No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Law Div. Nov. 5, 2003), *aff'd*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005)*	5-Nov-2003	*8			*7		Y	Same-sex marriage under New Jersey Constitution.	same-sex marriage
In re Kandu	315 B.R. 123 (Bankr. W.D. Wash. 2004)	17-Aug-2004				139	138	Y	Same-sex marriage under Federal Constitution.	same-sex marriage
Shields v. Madigan	783 N.Y.S.2d 270 (Sup. Ct. 2004)	18-Oct-2004	277			276		Y	Same-sex marriage under New York Constitution.	same-sex marriage

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] ≈ successful claim)	Category
Wilson v. Ake	354 F. Supp. 2d 1298 (M.D. Fla. 2005)	19-Jan-2005	1307		1306	1305	1305	Y	Same-sex marriage under Federal Constitution.	same-sex marriage
Hernandez v. Robles	794 N.Y.S.2d 579 (Sup. Ct. 2005), *rev'd*, 2006 WL 1835429 (N.Y. July 6, 2006)*	4-Feb-2005					596	Y	[+] Same-sex marriage under New York Constitution.	same-sex marriage
Seymour v. Holcomb	790 N.Y.S.2d 858 (Sup. Ct. 2005), *aff'd*, 811 N.Y.S.2d 134 (App. Div. 2006)	23-Feb-2005				865		Y	Same-sex marriage under New York Constitution.	same-sex marriage
Lewis v. Harris	875 A.2d 259 (N.J. Super. Ct. App. Div. 2005)	14-Jun-2005				267–68		Y	Same-sex marriage under New Jersey Constitution.	same-sex marriage
Smelt v. County of Orange	374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and rev'd in part*, 447 F.3d 673 (9th Cir. 2006)	16-Jun-2005		877		878	877	Y	Same-sex marriage under Federal Constitution.	same-sex marriage
Hernandez v. Robles	805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, 2006 WL 1835429 (N.Y. July 6, 2006)*	8-Dec-2005	362		360–61	362		Y	Same-sex marriage under New York Constitution.	same-sex marriage
Samuels v. N.Y. State Dep't of Health	811 N.Y.S.2d 136 (App. Div. 2006)	16-Feb-2006	140		139 n.5	144		Y	Same-sex marriage under New York Constitution.	same-sex marriage
Cote-Whitacre v. Dep't of Pub. Health	844 N.E.2d 623 (Mass. 2006)	30-Mar-2006				641			Non-resident same-sex couples denied marriage licenses.	same-sex marriage
Hernandez v. Robles	2006 WL 1835429 (N.Y. July 6, 2006)	6-Jul-2006				[HN 4]	[HN 7]	Y	Same-sex marriage under New York Constitution.	same-sex marriage
Andersen v. King County	138 P.3d 963 (Wash. 2006)	26-Jul-2006	977	977	977	976	983	Y	Same-sex marriage under the Washington Constitution.	same-sex marriage
Sojourner A. v. N.J. Dep't of Human Servs.	828 A.2d 306 (N.J. 2003)	4-Aug-2003					313		Amount of welfare money when additional child is born.	state benefit
Blau v. Fort Thomas Pub. Sch. Dist.	401 F.3d 381 (6th Cir. 2005)	8-Feb-2005	394		393–94	821			School dress code.	students' *rights*
Johansen v. La. High Sch. Athletic Ass'n	916 So. 2d 1081 (La. App. 2005)	29-Jun-2005				1088 n.3			Participation in interscholastic athletics.	students' rights
Pullen v. Moore	No. 05 C 4368, 2005 WL 2850124 (N.D. Ill. 2005)	26-Oct-2005	*5			*4			School disciplinary action.	students' rights

Case Name	Citation	Date of Decision	Restraint Principle	Narrowest Description Rule	Narrow Precedent Corollary	History & Tradition Inquiry	Tiered Review Rule	Mentions Lawrence?	Nature of Controversy ([+] = successful claim)	Category
Larson v. Burmaster	No. 2005AP1433, 2006 WL 1737584 (Wis. Ct. App. June 27, 2006)	27-Jun-2006					¶ 42		Requirement that student complete summer homework.	students' rights
Mitchell v. Beaumont Indep. Sch. Dist.	No. 1:05-CV-195, 2006 WL 2092585 (E.D. Tex. July 25, 2006)	25-Jul-2006					*8		Requirement that student comply with a special evaluation procedure.	students' rights

APPENDIX B: THE *LAWRENCE* SURVEY

(asterisk following citation indicates that the later case is also a part of this survey)

I. IN CHRONOLOGICAL ORDER

Case Name	Citation	Date of Decision	Nature of Controversy ([+] = successful claim)	Use of "hedge"?	Category
In re Extradition of Waters	No. 03M1072(CLP), 2003 WL 23185666 (E.D.N.Y. Nov. 24, 2003)	24-Nov-2003	Extradition proceeding for man whose home country accuses him of sodomizing a minor.		rape: statutory
Goodridge v. Dep't of Pub. Health	798 N.E.2d 941 (Mass. 2003)	18-Nov-2003	[+] Same-sex marriage under Massachusetts Constitution.		same-sex marriage
State v. Clark	588 S.E.2d 66 (N.C. Ct. App. 2003), *review denied*, 593 S.E.2d 81 (N.C. 2005)	18-Nov-2003	Sexual intercourse with a minor.	Y	rape: statutory
United States v. Peterson	294 F. Supp. 2d 797 (D.S.C. 2003), *aff'd*, 145 Fed. Appx. 820 (4th Cir. 2005)	25-Nov-2003	Possession of child pornography.	Y	child pornography
State v. Freeman	801 N.E.2d 906 (Ohio Ct. App. 2003)	12-Dec-2003	Sodomy with adult daughter.		rape: incest
State v. Limon	83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005)*	30-Jan-2004	Harsher penalties for homosexual statutory rape than heterosexual statutory rape.	Y	rape: statutory

Case Name	Citation	Date of Decision	Nature of Controversy ([+] = successful claim)	Use of "hedge"?	Category
State v. Druktenis	86 P.3d 1050 (N.M. Ct. App. 2004)	30-Jan-2004	Sex offender registration law.	Y	privacy
Cawood v. Haggard	327 F. Supp. 2d 863 (E.D. Tenn. 2004), *aff'd sub nom.* Cawood v. Booth, 125 Fed. Appx. 700 (6th Cir. 2005)	11-Feb-2004	Sexual intercourse between attorney and client.		adultery
Burton v. York County Sheriff's Dep't	594 S.E.2d 888 (S.C. Ct. App. 2004)	5-Apr-2004	Release of information under South Carolina Freedom of Information Act.		privacy
Westhab, Inc. v. City of New Rochelle	No. 03 CIV. 8377(CM), 2004 WL 1171400 (S.D.N.Y. May 3, 2004)	3-May-2004	Zoning definition of "family."		zoning
People v. Williams	349 Ill. App. 3d 273 (2004), *review denied*, 823 N.E.2d 977 (Ill. 2004) (table)	26-May-2004	Law prohibiting prostitution.	Y	prostitution
Anderson v. Morrow	371 F.3d 1027 (9th Cir. 2004)	7-Jun-2004	Sexual intercourse with mentally handicapped person.		rape: statutory
Andersen v. King County	No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *rev'd* 138 P.3d 963 (Wash. 2006)	4-Aug-2004	[+] Same-sex marriage under Washington Constitution.		same-sex marriage
Lockyer v. City and County of San Francisco	95 P.3d 459 (Cal. 2004)	12-Aug-2004	Validity of marriage licenses issued to gay couples in contravention of state law.	Y	same-sex marriage
United States v. Marcum	60 M.J. 198 (C.A.A.F. 2004)	23-Aug-2004	Sodomy under the Uniform Code of Military Justice.	Y	military: sodomy
Castle v. State	No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004), *rev'd sub nom.* Andersen v. King County, 138 P.3d 963 (Wash. 2006)	7-Sep-2004	[+] Same-sex marriage under Washington Constitution.		same-sex marriage
McGriff v. McGriff	99 P.3d 111 (Idaho 2004)	21-Sep-2004	Custody battle between heterosexual mother and homosexual father.		parents' rights
Vanderveer v. Vanderveer	No. 0122-04-2, 2004 WL 2157930 (Va. Ct. App. Sept. 28, 2004)	28-Sep-2004	Custody battle between heterosexual father and homosexual mother.	Y	parents' rights
United States v. Stirewalt	60 M.J. 297 (C.A.A.F. 2004), *cert. denied*, 544 U.S. 923 (2005)	29-Sep-2004	Sodomy under the Uniform Code of Military Justice.		military: sodomy
State v. Van	688 N.W.2d 600 (Neb. 2004)	12-Nov-2004	Application of assault laws as applied to bondage-discipline-sadomasochism (BDSM) relationships.	Y	BDSM

Case Name	Citation	Date of Decision	Nature of Controversy ([+] = successful claim)	Use of "hedge"?	Category
State v. Oakley	605 S.E.2d 215 (N.C. Ct. App. 2004), *review denied*, 610 S.E.2d 386 (N.C. 2005)	7-Dec-2004	Criminalization of "sex act with substitute parent."	Y	rape: statutory
L.A.M. v. B.M.	906 So.2d 942 (Ala. Civ. App. 2004)	10-Dec-2004	Custody battle between heterosexual father and homosexual mother.		parents' rights
State v. Moore	606 S.E.2d 127 (N.C. Ct. App. 2004)	21-Dec-2004	Sexual intercourse with a minor.	Y	rape: statutory
Howard v. Child Welfare Agency Review Bd.	No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004)	29-Dec-2004	[+] Regulations prohibiting homosexual persons from becoming foster parents. (Regulation struck down as exceeding agency authority, not by virtue of *Lawrence*.)	Y	adoption
State v. Jenkins	No. C-040111, B-0105517-A., 2004 WL 3015091 (Ohio Ct. App. Dec. 30, 2004), *appeal denied*, 828 N.E.2d 118 (Ohio 2005) (table)	30-Dec-2004	Distribution of obscenity.		obscenity
Martin v. Ziherl	607 S.E.2d 367 (Va. 2005)	14-Jan-2005	[+] State fornication prohibition.		fornication
State v. Thomas	891 So. 2d 1233 (La. 2005)	19-Jan-2005	Solicitation of sodomy and lesbian sex.	Y	prostitution
Morrison v. Sadler	821 N.E.2d 15 (Ind. Ct. App. 2005)	20-Jan-2005	Gay marriage under Indiana Constitution.		same-sex marriage
United States v. Extreme Assocs., Inc.	352 F. Supp. 2d 578 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005),* *cert. denied*, 126 S. Ct. 2048 (2006)	20-Jan-2005	[+] Distribution of obscenity.		obscenity
Burt v. Rumsfeld	354 F. Supp. 2d 156 (D. Conn. 2005)	31-Jan-2005	Solomon Amendment.		educational autonomy
United States v. Myers	No. NMCCA 200201623, 2005 WL 318709 (N-M. Ct. Crim. App. Feb. 10, 2005)	10-Feb-2005	Adulterous sodomy under the Uniform Code of Military Justice.		military: sodomy
Fleck & Assocs., Inc. v. City of Phoenix	356 F. Supp. 2d 1034 (D. Ariz. 2005)	11-Feb-2005	Prohibition of businesses providing opportunity to engage in or watch live sex acts.		sex clubs
State v. Pope	608 S.E.2d 114 (N.C. Ct. App. 2005), *review denied*, 612 S.E.2d 636 (N.C. 2005)	15-Feb-2005	Solicitation of "crimes against nature."	Y	public sexuality: prostitution
Bronson v. Swensen	394 F. Supp. 2d 1329 (D. Utah 2005)	16-Feb-2005	Polygamy prohibition.	Y	polygamy
United States v. Avery	No. NMCCA 200400665, 2005 WL 453135 (N-M. Ct. Crim. App. Feb. 28, 2005)	28-Feb-2005	Sodomy under the Uniform Code of Military Justice.		military: adultery

Case Name	Citation	Date of Decision	Nature of Controversy ([+] = successful claim)	Use of "hedge"?	Category
United States v. Bach	400 F.3d 622 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 243 (2005)	14-Mar-2005	Creation, possession, and distribution of child pornography.	Y	child pornography
Woo v. Lockyer	Case No. 4365 (Cal. Super. Ct. Mar. 14, 2005), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/452.pdf	14-Mar-2005	[+] Same-sex marriage under California Constitution.		same-sex marriage
United States v. Gamez	No. ACM35576, 2005 WL 743052 (A.F. Ct. Crim. App. Mar. 30, 2005), *review denied*, 62 M.J. 214 (C.A.A.F. 2005)	30-Mar-2005	Adulterous sodomy under the Uniform Code of Military Justice.		military: sodomy
La. Electorate of Gays & Lesbians, Inc. v. Connick	902 So. 2d 1090 (La. Ct. App. 2005), *writ denied*, 916 So. 2d 1062 (La. 2005)	26-Apr-2005	"Crimes against nature" statute which still prohibits bestiality despite all other applications being invalidated.		bestiality
United States v. Heisler	No. NMCCA 200201325, 2005 WL 995677 (N-M. Ct. Crim. App. Apr. 29, 2005)	29-Apr-2005	Sodomy with a minor.	Y	military: sodomy
People v. McDermitt	No. C047482, 2005 WL 995520 (Cal. Ct. App. Apr. 29, 2005)	29-Apr-2005	Sexual intercourse with a minor.	Y	rape: statutory
People v. Downin	357 Ill. App. 3d 193 (2005), *appeal denied*, 839 N.E.2d 1029 (Ill. 2005) (table)	29-Apr-2005	Statutory rape based on age differential rather than absolute age.	Y	rape: statutory
Citizens for Equal Protection, Inc. v. Bruning	368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006)*	12-May-2005	[+] State constitutional amendment prohibiting establishment of any legal status similar to marriage.		same-sex marriage
United States v. Christian	61 M.J. 560 (N-M. Ct. Crim. App. 2005), *review denied*, 62 M.J. 451 (C.A.A.F. 2006)	16-May-2005	Sodomy under the Uniform Code of Military Justice.		military: sodomy
United States v. Bart	61 M.J. 578 (N-M. Ct. Crim. App. 2005)	26-May-2005	Adulterous sodomy under the Uniform Code of Military Justice.		military: sodomy
Beard v. State	No. M200402227CCAR3PC, 2005 WL 1334378 (Tenn. Crim. App. June 7, 2005)	7-Jun-2005	Incest statute.		rape: incest
People v. Westgarth	No. D044716, 2005 WL 1540137 (Cal. Ct. App. July 1, 2005)	1-Jul-2005	Sex offender registration law.	Y	privacy

Case Name	Citation	Date of Decision	Nature of Controversy ([+] = successful claim)	Use of "hedge"?	Category
Commonwealth v. Can-Port Amusement Corp.	19 Mass. L. Rptr. 562 (Super. Ct. 2005)	29-Jul-2005	Adult theater shut down as a public nuisance for permitting sexual activity on premises.	Y	sex clubs
State v. Lowe	No. 2004CA00292, 2005 WL 1983964 (Ohio Ct. App. Aug. 15, 2005), *appeal allowed*, 841 N.E.2d 317 (Ohio 2006)	15-Aug-2005	Consensual sexual intercourse with adult stepdaughter.		rape: incest
State v. Whitley	616 S.E.2d 576 (N.C. Ct. App. 2005)	16-Aug-2005	"Crimes against nature" statute.	Y	rape
United States v. Whorley	386 F. Supp. 2d 693 (E.D. Va. 2005)	18-Aug-2005	Obtaining obscenity through interstate commerce.		obscenity
People v. Jones	No. C045990, 2005 WL 2160425 (Cal. Ct. App. Sept. 7, 2005)	7-Sep-2005	Rape of unconscious woman.	Y	rape
Beecham v. Henderson County, Tenn.	422 F.3d 372 (6th Cir. 2005)	9-Sep-2005	Employment termination allegedly due to adultery.		adultery
United States v. Brown	No. 200201647, 2005 WL 2381094 (N-M. Ct. Crim. App. Sept. 14, 2005), *review denied*, 63 M.J. 198 (C.A.A.F. 2006)	14-Sep-2005	Sodomy under the Uniform Code of Military Justice.		military: adultery
United States v. Teague	No. NMCCA 200202276, 2005 WL 2375179 (N-M. Ct. Crim. App. Sept. 15, 2005)	15-Sep-2005	Sodomy under the Uniform Code of Military Justice.		military: sodomy
Griffith v. Dretke	No. CIV.A. H-04-4109, 2005 WL 2372044 (S.D. Tex. Sept. 27, 2005)	27-Sep-2005	Testimony of certain witness regarding murderer's homosexual activities alleged to have unfairly influenced jury's verdict and sentence.		fair punishment
Langan v. St. Vincent's Hosp. of N.Y.	802 N.Y.S.2d 476 (App. Div. 2005)	11-Oct-2005	Ability of surviving Vermont civil union partner to bring wrongful death action in New York.	Y	same-sex marriage
United States v. Weiner	152 Fed. Appx. 38 (2d Cir. 2005), *cert. denied*, No. 05-884, 2006 WL 123285 (U.S. May 30, 2006)	14-Oct-2005	Entrapment.		misc.
State v. Limon	122 P.3d 22 (Kan. 2005)	21-Oct-2005	[+] Harsher penalties for homosexual statutory rape than heterosexual statutory rape.		rape: statutory
People v. Sintay	No. B177202, 2005 WL 2789322 (Cal. Ct. App. Oct. 27, 2005)	27-Oct-2005	"Sexual misconduct" with a minor.	Y	rape: statutory
Singson v. Commonwealth	621 S.E.2d 682 (Va. Ct. App. 2005)	8-Nov-2005	Solicitation of sodomy.	Y	prostitution

Case Name	Citation	Date of Decision	Nature of Controversy ([+] = successful claim)	Use of "hedge"?	Category
Tjan v. Commonwealth	621 S.E.2d 669 (Va. Ct. App. 2005)	8-Nov-2005	Solicitation of sodomy.	Y	prostitution
United States v. Sherr	400 F. Supp. 2d 843 (D. Md. 2005)	16-Nov-2005	Possession of child pornography.		child pornography
United States v. Tate	No. NMCCA 200201202, 2005 WL 3111979 (N-M. Ct. Crim. App. Nov. 21, 2005)	21-Nov-2005	Sodomy under the Uniform Code of Military Justice.		military: sodomy
United States v. Orellana	62 M.J. 595 (N-M. Ct. Crim. App. 2005)	29-Nov-2005	Adultery under the Uniform Code of Military Justice.		military: adultery
United States v. Extreme Assocs., Inc.	431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006)	8-Dec-2005	Distribution of obscenity.		obscenity
832 Corp. v. Gloucester Twp.	404 F. Supp. 2d 614 (D.N.J. 2005)	12-Dec-2005	Regulation of sexually oriented establishments.		sex clubs
United States v. Humphreys	No. NMCCA200300750, 2005 WL 3591140 (N-M. Ct. Crim. App. Dec. 29, 2005)	29-Dec-2005	[+] Sodomy under the Uniform Code of Military Justice. (Conviction overturned as applied.)		military: sodomy
Crooks v. State	125 P.3d 1090 (Kan. Ct. App. 2006) (table) (text available in Westlaw)	13-Jan-2006	Sexual intercourse with a minor.	Y	rape: statutory
Deane v. Conaway	No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006)	20-Jan-2006	[+] Same-sex marriage under Maryland Constitution.		same-sex marriage
United States v. Taylor	NMCCA 200300876, 2006 WL 618435 (N-M. Ct. Crim. App. Feb. 28, 2006)	28-Feb-2006	Sodomy under the Uniform Code of Military Justice.	Y	military: sodomy
United States v. Coil	442 F.3d 912 (5th Cir. 2006)	14-Mar-2006	Distribution of obscenity.		obscenity
State v. John M.	894 A.2d 376 (Conn. App. Ct. 2006)	11-Apr-2006	Consensual sexual intercourse with adult stepdaughter.		rape: incest
United States v. McCoy	NMCCA 200101209, 2006 WL 1029163 (N-M. Ct. Crim. App. Apr. 20, 2006)	20-Apr-2006	Sodomy under the Uniform Code of Military Justice.	Y	military: sodomy
State v. Holm	137 P.3d 726 (Utah 2006)	16-May-2006	Polygamy prohibition.	Y	polygamy
State v. Browning	629 S.E.2d 299 (N.C. Ct. App. 2006)	16-May-2006	Mistake-of-age defense in statutory rape.	Y	rape: statutory
United States v. Diebel	ACM 35824, 2006 WL 1513017 (A.F. Ct. Crim. App. May 31, 2006)	31-May-2006	Sodomy under the Uniform Code of Military Justice.		military: sodomy
McDonald v. Commonwealth	630 S.E.2d 754 (Va. Ct. App. 2006)	13-Jun-2006	Consensual sodomy with a minor.	Y	rape: statutory

Case Name	Citation	Date of Decision	Nature of Controversy ([+] = successful claim)	Use of "hedge"?	Category
United States v. Banker	63 M.J. 657 (A.F. Ct. Crim. App. 2006)	29-Jun-2006	Consensual sodomy with a minor under the Uniform Code of Military Justice.	Y	military: sodomy
Hubbard v. State	849 N.E.2d 1165 (Ind. Ct. App. 2006)	29-Jun-2006	Sexual intercourse between a work-release inmate and a state-contracted supervisor.		privacy
United States v. *Gravenhorst*	No. 03-2057, 2006 WL 1813906 (1st Cir. July 3, 2006)	3-Jul-2006	Distribution of obscenity.		obscenity
Citizens for Equal Protection v. Bruning	455 F.3d 859 (8th Cir. 2006)	14-Jul-2006	State constitutional amendment prohibiting establishment of any legal status similar to marriage.	Y	same-sex marriage
State v. Mogler	719 N.W.2d 201 (Minn. Ct. App. 2006)	25-Jul-2006	Sexual intercourse between a police officer and a minor.		statutory rape
Witt v. United States Dep't of the Air Force	No. C06-5195 RBL, 2006 WL 2105052 (W.D. Wash. July 26, 2006)	26-Jul-2006	Don't Ask/Don't Tell.		military: DADT
Stadium Book & Video, Inc. v. Miami-Dade County	No. 04-20537-CIV-JORDAN, 2006 WL 2374740 (S.D. Fla. July 31, 2006)	31-Jul-2006	County ordinance requiring viewing booths in adult video establishments to have a permanently open entryway.		sex clubs
State v. Musser	*No. 04-0809, 2006 WL 2244640 (Iowa* Aug. 4, 2006)	4-Aug-2006	*Conviction for criminal transmission of HIV.*	Y	privacy

II. By Category

Case Name	Citation	Date of Decision	Nature of Controversy ([+] = successful claim)	Use of "hedge"?	Category
Howard v. Child Welfare Agency Review Bd.	No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004)	29-Dec-2004	[+] Regulations prohibiting homosexual persons from becoming foster parents. (Regulation struck down as exceeding agency authority, not by virtue of *Lawrence*.)	Y	adoption
Cawood v. Haggard	327 F. Supp. 2d 863 (E.D. Tenn. 2004), *aff'd sub nom.* Cawood v. Booth, 125 Fed. Appx. 700 (6th Cir. 2005)	11-Feb-2004	Sexual intercourse between attorney and client.		adultery
Beecham v. Henderson *County, Tenn.*	422 F.3d 372 (6th Cir. 2005)	9-Sep-2005	Employment termination allegedly due to adultery.		adultery
State v. Van	688 N.W.2d 600 (Neb. 2004)	12-Nov-2004	Application of assault laws as applied to bondage-discipline-sadomasochism (BDSM) relationships.	Y	BDSM

Case Name	Citation	Date of Decision	Nature of Controversy ([+] = successful claim)	Use of "hedge"?	Category
La. Electorate of Gays & Lesbians, Inc. v. Connick	902 So. 2d 1090 (La. Ct. App. 2005), *writ denied*, 916 So. 2d 1062 (La. 2005)	26-Apr-2005	"Crimes against nature" statute which still prohibits bestiality despite all other applications being invalidated.		bestiality
United States v. Peterson	294 F. Supp. 2d 797 (D.S.C. 2003), *aff'd*, 145 Fed. Appx. 820 (4th Cir. 2005)	25-Nov-2003	Possession of child pornography.	Y	child pornography
United States v. Bach	400 F.3d 622 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 243 (2005)	14-Mar-2005	Creation, possession, and distribution of child pornography.	Y	child pornography
United States v. Sherr	400 F. Supp. 2d 843 (D. Md. 2005)	16-Nov-2005	Possession of child pornography.		child pornography
Burt v. Rumsfeld	354 F. Supp. 2d 156 (D. Conn. 2005)	31-Jan-2005	Solomon Amendment.		educational autonomy
Griffith v. Dretke	No. CIV.A. H-04-4109, 2005 WL 2372044 (S.D. Tex. Sept. 27, 2005)	27-Sep-2005	Testimony of certain witness regarding murderer's homosexual activities alleged to have unfairly influenced jury's verdict and sentence.		fair punishment
Martin v. Ziherl	607 S.E.2d 367 (Va. 2005)	14-Jan-2005	[+] State fornication prohibition.		fornication
United States v. Avery	No. NMCCA 200400665, 2005 WL 453135 (N-M. Ct. Crim. App. Feb. 28, 2005)	28-Feb-2005	Adultery under the Uniform Code of Military Justice.		military: adultery
United States v. Brown	No. 200201647, 2005 WL 2381094 (N-M. Ct. Crim. App. Sept. 14, 2005), *review denied*, 63 M.J. 198 (C.A.A.F. 2006)	14-Sep-2005	Adultery under the Uniform Code of Military Justice.		military: adultery
United States v. Orellana	62 M.J. 595 (N-M. Ct. Crim. App. 2005)	29-Nov-2005	Adultery under the Uniform Code of Military Justice.		military: adultery
Witt v. United States Dep't of the Air Force	No. C06-5195 RBL, 2006 WL 2105052 (W.D. Wash. July 26, 2006)	26-Jul-2006	Don't Ask/Don't Tell.		military: DADT
United States v. Marcum	60 M.J. 198 (C.A.A.F. 2004)	23-Aug-2004	Sodomy under the Uniform Code of Military Justice.	Y	military: sodomy
United States v. Stirewalt	60 M.J. 297 (C.A.A.F. 2004), *cert. denied*, 544 U.S. 923 (2005)	29-Sep-2004	Sodomy under the Uniform Code of Military Justice.		military: sodomy
United States v. Myers	No. NMCCA 200201623, 2005 WL 318709 (N-M. Ct. Crim. App. Feb. 10, 2005)	10-Feb-2005	Adulterous sodomy under the Uniform Code of Military Justice.		military: sodomy
United States v. Gamez	No. ACM35576, 2005 WL 743052 (A.F. Ct. Crim. App. Mar. 30, 2005), *review denied*, 62 M.J. 214 (C.A.A.F. 2005)	30-Mar-2005	Adulterous sodomy under the Uniform Code of Military Justice.		military: sodomy

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United States v. Heisler	No. NMCCA 200201325, 2005 WL 995677 (N-M. Ct. Crim. App. Apr. 29, 2005)	29-Apr-2005	Sodomy with a minor.	Y	military: sodomy
United States v. Christian	61 M.J. 560 (N-M. Ct. Crim. App. 2005), *review denied*, 62 M.J. 451 (C.A.A.F. 2006)	16-May-2005	Sodomy under the Uniform Code of Military Justice.		military: sodomy
United States v. Bart	61 M.J. 578 (N-M. Ct. Crim. App. 2005)	26-May-2005	Adulterous sodomy under the Uniform Code of Military Justice.		military: sodomy
United States v. Teague	No. NMCCA 200202276, 2005 WL 2375179 (N-M. Ct. Crim. App. Sept. 15, 2005)	15-Sep-2005	Sodomy under the Uniform Code of Military Justice.		military: sodomy
United States v. Tate	No. NMCCA 200201202, 2005 WL 3111979 (N-M. Ct. Crim. App. Nov. 21, 2005)	21-Nov-2005	Sodomy under the Uniform Code of Military Justice.		military: sodomy
United States v. Humphreys	No. NMCCA200300750, 2005 WL 3591140 (N-M. Ct. Crim. App. Dec. 29, 2005)	29-Dec-2005	[+] Sodomy under the Uniform Code of Military Justice. (Conviction overturned as applied.)		military: sodomy
United States v. Taylor	NMCCA 200300876, 2006 WL 618435 (N-M. Ct. Crim. App. Feb. 28, 2006)	28-Feb-2006	Sodomy under the Uniform Code of Military Justice.	Y	military: sodomy
United States v. McCoy	NMCCA 200101209, 2006 WL 1029163 (N-M. Ct. Crim. App. Apr. 20, 2006)	20-Apr-2006	Sodomy under the Uniform Code of Military Justice.	Y	military: sodomy
United States v. Diebel	ACM 35824, 2006 WL 1513017 (A.F. Ct. Crim. App. May 31, 2006)	31-May-2006	Sodomy under the Uniform Code of Military Justice.		military: sodomy
United States v. Banker	63 M.J. 657 (A.F. Ct. Crim. App. 2006)	29-Jun-2006	Consensual sodomy with a minor under the Uniform Code of Military Justice.	Y	military: sodomy
United States v. Weiner	152 Fed. Appx. 38 (2d Cir. 2005), *cert. denied*, No. 05-884, 2006 WL 123285 (U.S. May 30, 2006)	14-Oct-2005	Entrapment.		misc.
State v. Jenkins	No. C-040111, B-0105517-A., 2004 WL 3015091 (Ohio Ct. App. Dec. 30, 2004), *appeal denied*, 828 N.E.2d 118 (Ohio 2005) (table)	30-Dec-2004	Distribution of obscenity.		obscenity

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United States v. Extreme Assocs., Inc.	352 F. Supp. 2d 578 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005),* *cert. denied*, 126 S. Ct. 2048 (2006)	20-Jan-2005	[+] Distribution of obscenity.		obscenity
United States v. Whorley	386 F. Supp. 2d 693 (E.D. Va. 2005)	18-Aug-2005	Obtaining obscenity through interstate commerce.		obscenity
United States v. Extreme Assocs., Inc.	431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006)	8-Dec-2005	Distribution of obscenity.		obscenity
United States v. Coil	442 F.3d 912 (5th Cir. 2006)	14-Mar-2006	Distribution of obscenity.		obscenity
United States v. Gravenhorst	No. 03-2057, 2006 WL 1813906 (1st Cir. July 3, 2006)	3-Jul-2006	Distribution of obscenity.		obscenity
McGriff v. McGriff	99 P.3d 111 (Idaho 2004)	21-Sep-2004	Custody battle between heterosexual mother and homosexual father.		parents' rights
Vanderveer v. Vanderveer	No. 0122-04-2, 2004 WL 2157930 (Va. Ct. App. Sept. 28, 2004)	28-Sep-2004	Custody battle between heterosexual father and homosexual mother.	Y	parents' rights
L.A.M. v. B.M.	906 So.2d 942 (Ala. Civ. App. 2004)	10-Dec-2004	Custody battle between heterosexual father and homosexual mother.		parents' rights
Bronson v. Swensen	394 F. Supp. 2d 1329 (D. Utah 2005)	16-Feb-2005	Polygamy prohibition.	Y	polygamy
State v. Holm	137 P.3d 726 (Utah 2006)	16-May-2006	Polygamy prohibition.	Y	polygamy
State v. Druktenis	86 P.3d 1050 (N.M. Ct. App. 2004)	30-Jan-2004	Sex offender registration law.	Y	privacy
Burton v. York County Sheriff's Dep't	594 S.E.2d 888 (S.C. Ct. App. 2004)	5-Apr-2004	Release of information under South Carolina Freedom of Information Act.		privacy
People v. Westgarth	No. D044716, 2005 WL 1540137 (Cal. Ct. App. July 1, 2005)	1-Jul-2005	Sex offender registration law.	Y	privacy
Hubbard v. State	849 N.E.2d 1165 (Ind. Ct. App. 2006)	29-Jun-2006	Sexual intercourse between a work-release inmate and a state-contracted supervisor.		privacy
State v. Musser	No. 04-0809, 2006 WL 2244640 (Iowa Aug. 4, 2006)	4-Aug-2006	Conviction for criminal transmission of HIV.	Y	privacy
People v. Williams	349 Ill. App. 3d 273 (2004), *review denied*, 823 N.E.2d 977 (Ill. 2004) (table)	26-May-2004	Law prohibiting prostitution.	Y	prostitution
State v. Thomas	891 So. 2d 1233 (La. 2005)	19-Jan-2005	Solicitation of sodomy and lesbian sex.	Y	prostitution

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Singson v. Commonwealth	621 S.E.2d 682 (Va. Ct. App. 2005)	8-Nov-2005	Solicitation of sodomy.	Y	prostitution
Tjan v. Commonwealth	621 S.E.2d 669 (Va. Ct. App. 2005)	8-Nov-2005	Solicitation of sodomy.	Y	prostitution
State v. Pope	608 S.E.2d 114 (N.C. Ct. App. 2005), *review denied*, 612 S.E.2d 636 (N.C. 2005)	15-Feb-2005	Solicitation of "crimes against nature."	Y	public sexuality: prostitution
State v. Whitley	616 S.E.2d 576 (N.C. Ct. App. 2005)	16-Aug-2005	"Crimes against nature" statute.	Y	rape
People v. Jones	No. C045990, 2005 WL 2160425 (Cal. Ct. App. Sept. 7, 2005)	7-Sep-2005	Rape of unconscious woman.	Y	rape
State v. Freeman	801 N.E.2d 906 (Ohio Ct. App. 2003)	12-Dec-2003	Sodomy with adult daughter.		rape: incest
Beard v. State	No. M200402227CCAR3PC, 2005 WL 1334378 (Tenn. Crim. App. June 7, 2005)	7-Jun-2005	Incest statute.		rape: incest
State v. Lowe	No. 2004CA00292, 2005 WL 1983964 (Ohio Ct. App. Aug. 15, 2005), *appeal allowed*, 841 N.E.2d 317 (Ohio 2006)	15-Aug-2005	Consensual sexual intercourse with adult stepdaughter.		rape: incest
State v. John M.	894 A.2d 376 (Conn. App. Ct. 2006)	11-Apr-2006	Consensual sexual intercourse with adult stepdaughter.		rape: incest
In re Extradition of Waters	No. 03M1072(CLP), 2003 WL 23185666 (E.D.N.Y. Nov. 24, 2003)	24-Nov-2003	Extradition proceeding for man whose home country accuses him of sodomizing a minor.		rape: statutory
State v. Clark	588 S.E.2d 66 (N.C. Ct. App. 2003), *review denied*, 593 S.E.2d 81 (N.C. 2005)	18-Nov-2003	Sexual intercourse with a minor.	Y	rape: statutory
State v. Limon	83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005)*	30-Jan-2004	Harsher penalties for homosexual statutory rape than heterosexual statutory rape.	Y	rape: statutory
Anderson v. Morrow	371 F.3d 1027 (9th Cir. 2004)	7-Jun-2004	Sexual intercourse with mentally handicapped person.		rape: statutory
State v. Oakley	605 S.E.2d 215 (N.C. Ct. App. 2004), *review denied*, 610 S.E.2d 386 (N.C. 2005)	7-Dec-2004	Criminalization of "sex act with substitute parent."	Y	rape: statutory
State v. Moore	606 S.E.2d 127 (N.C. Ct. App. 2004)	21-Dec-2004	Sexual intercourse with a minor.	Y	rape: statutory

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People v. McDermitt	No. C047482, 2005 WL 995520 (Cal. Ct. App. Apr. 29, 2005)	29-Apr-2005	Sexual intercourse with a minor.	Y	rape: statutory
People v. Downin	357 Ill. App. 3d 193 (2005), *appeal denied*, 839 N.E.2d 1029 (Ill. 2005) (table)	29-Apr-2005	Statutory rape based on age differential rather than absolute age.	Y	rape: statutory
State v. Limon	122 P.3d 22 (Kan. 2005)	21-Oct-2005	[+] Harsher penalties for homosexual statutory rape than heterosexual statutory rape.		rape: statutory
People v. Sintay	No. B177202, 2005 WL 2789322 (Cal. Ct. App. Oct. 27, 2005)	27-Oct-2005	"Sexual misconduct" with a minor.	Y	rape: statutory
Crooks v. State	125 P.3d 1090 (Kan. Ct. App. 2006) (table) (text available in Westlaw)	13-Jan-2006	Sexual intercourse with a minor.	Y	rape: statutory
State v. Browning	629 S.E.2d 299 (N.C. Ct. App. 2006)	16-May-2006	Mistake-of-age defense in statutory rape.	Y	rape: statutory
McDonald v. Commonwealth	630 S.E.2d 754 (Va. Ct. App. 2006)	13-Jun-2006	Consensual sodomy with a minor.	Y	rape: statutory
Goodridge v. Dep't of Pub. Health	798 N.E.2d 941 (Mass. 2003)	18-Nov-2003	[+] Same-sex marriage under Massachusetts Constitution.		same-sex marriage
Andersen v. King County	No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *rev'd* 138 P.3d 963 (Wash. 2006)	4-Aug-2004	[+] Same-sex marriage under Washington Constitution.		same-sex marriage
Lockyer v. City and County of San Francisco	95 P.3d 459 (Cal. 2004)	12-Aug-2004	Validity of marriage licenses issued to gay couples in contravention of state law.	Y	same-sex marriage
Castle v. State	No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004), *rev'd sub nom.* Andersen v. King County, 138 P.3d 963 (Wash. 2006)	7-Sep-2004	[+] Same-sex marriage under Washington Constitution.		same-sex marriage
Morrison v. Sadler	821 N.E.2d 15 (Ind. Ct. App. 2005)	20-Jan-2005	Gay marriage under Indiana Constitution.		same-sex marriage
Woo v. Lockyer	Case No. 4365 (Cal. Super. Ct. Mar. 14, 2005), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/452.pdf	14-Mar-2005	[+] Same-sex marriage under California Constitution.		same-sex marriage

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Citizens for Equal Protection, Inc. v. Bruning	368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006)*	12-May-2005	[+] State constitutional amendment prohibiting establishment of any legal status similar to marriage.		same-sex marriage
Langan v. St. Vincent's Hosp. of N.Y.	802 N.Y.S.2d 476 (App. Div. 2005)	11-Oct-2005	Ability of surviving Vermont civil union partner to bring wrongful death action in New York.	Y	same-sex marriage
Deane v. Conaway	No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006)	20-Jan-2006	[+] Same-sex marriage under Maryland Constitution.		same-sex marriage
Citizens for Equal Protection v. Bruning	455 F.3d 859 (8th Cir. 2006)	14-Jul-2006	State constitutional amendment prohibiting establishment of any legal status similar to marriage.	Y	same-sex marriage
Fleck & Assocs., Inc. v. City of Phoenix	356 F. Supp. 2d 1034 (D. Ariz. 2005)	11-Feb-2005	Prohibition of businesses providing opportunity to engage in or watch live sex acts.		sex clubs
Commonwealth v. Can-Port Amusement Corp.	19 Mass. L. Rptr. 562 (Super. Ct. 2005)	29-Jul-2005	Adult theater shut down as a public nuisance for permitting sexual activity on premises.	Y	sex clubs
832 Corp. v. Gloucester Twp.	404 F. Supp. 2d 614 (D.N.J. 2005)	12-Dec-2005	Regulation of sexually oriented establishments.		sex clubs
Stadium Book & Video, Inc. v. Miami-Dade County	No. 04-20537-CIV-JORDAN, 2006 WL 2374740 (S.D. Fla. July 31, 2006)	31-Jul-2006	County ordinance requiring viewing booths in adult video establishments to have a permanently open entryway.		sex clubs
State v. Mogler	719 N.W.2d 201 (Minn. Ct. App. 2006)	25-Jul-2006	Sexual intercourse between a police officer and a minor.		statutory rape
Westhab, Inc. v. City of New Rochelle	No. 03 CIV. 8377(CM), 2004 WL 1171400 (S.D.N.Y. May 3, 2004)	3-May-2004	Zoning definition of "family."		zoning