

POPE JOHN PAUL II, FREEDOM, AND CONSTITUTIONAL LAW

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INTRODUCTION

This is an important conference in the history of the law school.¹ The thought of Pope John Paul II was extremely important in the formation of the Ave Maria School of Law. Dean Bernard Dobranski and other law school leaders were involved in the discussions of *Ex Corde Ecclesiae*² and the nature of Catholic higher education that took place throughout the 1990s.³ Pope John Paul II's encyclicals in the 1990s, particularly *Centesimus Annus*,⁴ *Veritatis Splendor*,⁵ *Evangelium Vitae*,⁶ and *Fides et Ratio*,⁷ influenced the thinking of those involved in these efforts.⁸ Many of the ideas developed at that

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1. We are grateful to the Our Sunday Visitor Institute for its generous grant in support of the conference.

2. Pope John Paul II, *Ex Corde Ecclesiae* [*Apostolic Constitution on Catholic Universities*] (1990).

3. See Bernard Dobranski, *Law and the Autonomy of the Catholic University*, in THE NATURE OF CATHOLIC HIGHER EDUCATION 87 (Proceedings from the Eighteenth Convention of the Fellowship of Catholic Scholars, Anthony J. Mastroeni ed. 1996).

4. Pope John Paul II, *Centesimus Annus* [*Encyclical Letter on the Hundredth Anniversary of Rerum Novarum*] (1991) [hereinafter *Centesimus Annus*].

5. Pope John Paul II, *Veritatis Splendor* [*Encyclical Letter Regarding Certain Fundamental Questions of the Church's Moral Teaching*] (1993) [hereinafter *Veritatis Splendor*].

6. Pope John Paul II, *Evangelium Vitae* [*Encyclical Letter on the Value and Inviolability of Human Life*] (1995) [hereinafter *Evangelium Vitae*].

7. Pope John Paul II, *Fides et Ratio* [*Encyclical Letter on the Relationship Between Faith and Reason*] (1998) [hereinafter *Fides et Ratio*].

8. See Richard S. Myers, *A Catholic Law School for the New Millennium*, in AVE MARIA SCHOOL OF LAW SPECIAL FIFTH-ANNIVERSARY REPORT 29, 30 (2005); Richard S. Myers, *A Critique of John Noonan's Approach to Development of Doctrine*, 1 U. ST. THOMAS L.J. 285, 285 (2003); Stephen J. Safranek, *The Founding of Ave Maria School of Law: A Five Year Perspective* (Oct. 1, 2005) (transcript available from the Ave Maria Law Review).

time came to fruition in the founding documents of Ave Maria School of Law.⁹

One thing that struck me during that time was how these encyclicals seemed to respond directly to developments in the constitutional law of the United States. This is not as surprising as it might at first appear. Particularly in certain areas of American constitutional law (substantive due process is perhaps the best example), the Supreme Court seems to reflect strains of thought prevalent in the broader culture.¹⁰ The Court's opinions engage profound issues such as the nature of freedom, the value of human life, and the relationship between religion and political life. The Pope's encyclicals of this era, which directly engage currents of modern thought, speak almost directly to the same issues.

In this Article, I will briefly describe certain trends in American constitutional law, with a particular focus on the doctrine of substantive due process. These trends reflect seriously misguided approaches. The Court has, to a certain degree, absorbed the worst aspects of modern culture. In certain opinions, the Court has embraced an extreme form of moral autonomy and the privatization of religion. These views, which have not yet completely carried the day in the lower courts, have serious inadequacies, and are ultimately threatening to the individual freedoms they purport to protect. Pope John Paul II's writings offer a helpful alternative; his thought emphasizes the link between freedom and truth, and the need to understand freedom within the limits of the objective moral law. This is a perspective we would do well to consider as we think through these issues in constitutional law and in public policy debates outside the courts.

I. SUBSTANTIVE DUE PROCESS AND A MISGUIDED UNDERSTANDING OF FREEDOM

The modern doctrine of substantive due process is complex, and a full treatment would require several full-length articles.¹¹ In brief, the

9. *Mission Statement*, reprinted in AVE MARIA SCH. L. ADVOC., Winter 2006, at 43.

10. The Court does something similar in interpreting the Eighth Amendment, U.S. CONST. amend. VIII. See Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 130-33 (2006).

11. See generally, Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987); Conkle, *supra* note 10; Richard S. Myers, *An Analysis of the Constitutionality of*

Due Process Clause of the Fourteenth Amendment provides that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.”¹² Although this clause sounds “procedural,” the Court has long used the doctrine of substantive due process to “hold[] unconstitutional state statutes that violate a ‘liberty’ interest the Court believes is protected by the clause, regardless of the manner in which the deprivation occurs.”¹³ This doctrine, “which affords constitutional protection to individual rights claims without a clear textual warrant,” has long been controversial.¹⁴ The main disagreement has been about how to define the “fundamental rights” or “liberty interests” that deserve heightened constitutional protection.

A. *Two Approaches to Substantive Due Process*

In the modern era of substantive due process (since the 1965 decision in *Griswold v. Connecticut*¹⁵), the Court has vacillated between a narrow and a broad approach to deciding what constitutes a “fundamental right,” typically the key inquiry in such cases. Neither approach is strictly textual.¹⁶ Both frequently pay due

Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching, 72 U. DET. MERCY L. REV. 771 (1995) [hereinafter Myers, *Banning Assisted Suicide*]; Richard S. Myers, *Physician-Assisted Suicide and Euthanasia: A Current Legal Perspective*, in LIFE AND LEARNING XI: PROCEEDINGS OF THE ELEVENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 3 (Joseph W. Koterski, S.J. ed., 2002) [hereinafter Myers, *Physician-Assisted Suicide*]; Richard S. Myers, *The End of Substantive Due Process?*, 45 WASH. & LEE L. REV. 557 (1988) [hereinafter Myers, *Substantive Due Process*]; John Safranek & Stephen Safranek, *Finding Rights Specifically*, 111 PENN ST. L. REV. 945 (2007).

12. U.S. CONST. amend. XIV, § 1. There is, of course, another due process clause in the Constitution. U.S. CONST. amend. V. For further discussion, see Myers, *Substantive Due Process*, *supra* note 11, at 557 n.1; see also Conkle, *supra* note 10, at 69 n.25.

13. Myers, *Substantive Due Process*, *supra* note 11, at 557 n.1.

14. *Id.* at 557. Professor Conkle describes the doctrine of substantive due process in this fashion: “Focusing especially on the word ‘liberty,’ [the Court] has declared for itself the power to define otherwise unenumerated constitutional rights, rights that are protected from governmental deprivation, no matter the procedure.” Conkle, *supra* note 10, at 69.

15. 381 U.S. 479 (1965).

16. Justice Scalia, who seems to favor a conservative approach, has even described himself as a “faint-hearted originalist.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). This has led several scholars to criticize Scalia for his apostasy. *E.g.*, Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7 (2006); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 240 (1990).

homage to Justice Harlan's dissent in *Poe v. Ullman*.¹⁷ That opinion has assumed near canonical status, given how frequently it is cited in Supreme Court opinions,¹⁸ confirmation hearings for nominees to the Court,¹⁹ and scholarly commentary.²⁰ Its ubiquity in substantive due process opinions makes it a useful focal point for distinguishing the two approaches to that doctrine.

Many opinions contain the following obligatory quote:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.²¹

17. 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting).

18. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 765–73 (1997) (Souter, J., concurring). For a critique that characterizes Justice Souter as having misappropriated Justice Harlan, see Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 698–700.

19. At his confirmation hearings, Justice Souter expressed his admiration for Justice Harlan's approach. See TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 130 (2005). At his confirmation hearings, Justice Thomas stated: "I believe the approach that Justice Harlan took in *Poe v. Ullman* and again reaffirmed in *Griswold* in determining the—or assessing the right of privacy was an appropriate way to go." *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Congress 310 (1991) (statement of Judge Thomas).

20. E.g., BORK, *supra* note 16, at 231–35; Conkle, *supra* note 10, at 83–85; McConnell, *supra* note 18, at 697–98; Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 85–86 (2003) ("Modern substantive due process began with Justice Harlan's magisterial dissent in *Poe v. Ullman* . . .").

21. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). Opinions citing this passage include: *Glucksberg*, 521 U.S. at 765–66 (Souter, J., concurring in judgment); *Montana v. Egelhoff*, 518

As was once said about a passage from Justice Cardozo, “This is prose so beautiful that it seems almost profane to analyze it,”²² which I think is why Harlan has proven so popular. His language sets a tone for further inquiry but does not provide much specific guidance. With its denial of formulas and reference to a living tradition, however, it has come to stand for a broad approach to substantive due process, and is typically rejected by those favoring a more conservative methodology.

1. *The Narrow Approach*

Under the “narrow” or “conservative” approach to substantive due process, the Court asks whether a claimed liberty is, one, “deeply rooted in this Nation’s history and tradition”²³ and, two, “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if [it] were sacrificed.”²⁴ Under this conservative view,

U.S. 37, 74 n.1 (1996) (Souter, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849–50 (1992); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 780 n.10 (1986) (Stevens, J., concurring); *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977); *Roe II v. Butterworth*, 958 F. Supp. 1569, 1575 (S.D. Fla. 1997) (rejecting the claim that the fundamental right to privacy extended to prostitution); *People v. Kevorkian*, 527 N.W.2d 714, 749 n.17 (Mich. 1994) (Levin, J., concurring in part and dissenting in part); *Andersen v. King County*, 138 P.3d 963, 1020 (Wash. 2006) (Fairhurst, J., dissenting). The following passage from Justice Harlan’s dissent in *Poe* is also quoted frequently:

[T]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

Poe, 367 U.S. at 543 (Harlan, J., dissenting) (citations omitted). Opinions citing this passage include: *Albright v. Oliver*, 510 U.S. 266, 306–07 (1994) (Stevens, J., dissenting); *Casey*, 505 U.S. at 848; *Moore*, 431 U.S. at 502; *Moore*, 431 U.S. at 542–43 (White, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 169 (1973) (Stewart, J., concurring).

22. James H. Chadbourne & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 671 (1942). The authors were commenting on a passage from Justice Cardozo describing federal question jurisdiction in *Gully v. First National Bank*, 299 U.S. 109, 117–18 (1936). Chadbourne & Levin, *supra* at 670–71.

23. *Moore*, 431 U.S. at 503.

24. *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937).

the Court defines the liberty narrowly and is quite reluctant to expand the category of fundamental rights.²⁵

The conservative approach is perhaps best expressed in cases such as *Bowers v. Hardwick*²⁶ and *Washington v. Glucksberg*.²⁷ In *Glucksberg*, for example, the Court rejected the claim that there was a fundamental right to assisted suicide protected by the doctrine of substantive due process.²⁸ Chief Justice Rehnquist's opinion was all about judicial restraint and deference to history and tradition.²⁹ It rejected reliance on Harlan's approach,³⁰ and, although it stated the familiar two-pronged method in defining liberty,³¹ the opinion primarily focused on the first prong, history. Its methodology—"careful description" of the asserted fundamental liberty interest, objective decision making, and emphasis on judicial restraint and caution³²—avoided general abstract reasoning about the nature of liberty.³³ The Court acknowledged the claim that earlier cases had set

25. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 719–28 (1997) (narrowly defining the issue as the right to commit suicide with another's assistance, and refusing to find that this is a protected liberty interest).

26. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In *Bowers*, the Court rejected the view that there was a fundamental right to engage in homosexual sodomy and upheld the constitutionality of Georgia's sodomy statute as applied to consensual homosexual sodomy. The Court, in an opinion by Justice White, read the Court's substantive due process precedents narrowly and expressed its reluctance to create new fundamental rights. The Court emphasized the long-standing proscriptions against homosexual consensual sodomy and concluded that the statute did not implicate a fundamental right. Accordingly, the Court refused to apply strict scrutiny and found that the Georgia statute easily satisfied the rational basis test based on the state's moral views on homosexual conduct. *Id.* at 196; see Myers, *Substantive Due Process*, *supra* note 11, at 579–83 (discussing *Bowers*).

27. 521 U.S. 702.

28. *Id.* at 728.

29. Post, *supra* note 20, at 91–92.

30. *Glucksberg*, 521 U.S. at 721–22 n.17.

31. *Id.* at 720–21. See *supra* text accompanying notes 23–24 for a description of this two-pronged method.

32. *Glucksberg*, 521 U.S. at 720–24.

33. Professor (now Judge) McConnell made this point in this way:

The traditionalist approach adopted in *Glucksberg* differs sharply from the moral philosophic approach not just in its substance but in its intellectual style. The moral philosophic approach is deductive and theoretical, deriving specific prescriptions from more general theoretical propositions. . . . The traditionalist approach, by contrast, is inductive and experiential. Rather than reasoning down from abstract principles, it reasons up from concrete cases and circumstances. It can be seen as the conservative heir to legal realism: cautious, empirical, flexible, skeptical of claims of overarching theory.

McConnell, *supra* note 18, at 672.

forth a right to “self-sovereignty” and “personal autonomy,” but disclaimed any interest in engaging this sort of inquiry.³⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁵ perhaps the most famous example of broad due process reasoning, was given almost a back-of-the-hand treatment.

2. *The Broad Approach*

In contrast, under the “broad” or “liberal” approach, the Court does not emphasize judicial restraint. Rather, it engages in an abstract discussion of the nature of liberty, a wide-ranging inquiry untethered from historical moorings. When it follows this approach, the Court is far more willing to accept “new” fundamental rights—such as abortion or some sort of sexual license. The most famous example is perhaps the Court’s “mystery” passage in *Casey*,³⁶ which I will discuss below.³⁷

Proponents of this approach rely on Harlan, but his *Poe* dissent does not necessarily imply a liberal methodology. In the hands of someone like former Chief Justice Rehnquist or Justices Scalia and Thomas, Harlan’s approach might not be so objectionable. It is sometimes forgotten that Justice Harlan’s opinion in *Poe* endorsed governmental regulation of traditional morality. He stated that he did “not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.”³⁸ He also seemed to accept state laws prohibiting abortion.³⁹ After *Roe v. Wade*,⁴⁰ this led to a variety of strained efforts to explain how Justice Harlan’s viewpoint harmonized with the Court’s opinion.⁴¹

34. *Glucksberg*, 521 U.S. at 724, 726–28.

35. 505 U.S. 833 (1992).

36. *Id.* at 851.

37. See *infra* text accompanying note 50 and Part I.B.

38. *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

39. *Id.* at 547 (Harlan, J., dissenting) (“Connecticut’s judgment [that all use of contraceptives is improper] is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexuality, abortion, and sterilization, or euthanasia and suicide.”).

40. 410 U.S. 113 (1973).

41. See Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81, 97 (1991); Norman Redlich, *A Black-Harlan Dialogue on Due Process and Equal Protection: Overheard in Heaven and Dedicated to Robert B. McKay*, 50 N.Y.U. L. REV. 20, 26 (1975); see also Ronald J. Krotoszynski, Jr., *Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48

Nevertheless, the early modern cases on substantive due process (such as *Griswold*), display a strain of moral relativism.⁴² While these early cases tried to make a nod to history and tradition,⁴³ this was completely unconvincing, particularly in the context of abortion.⁴⁴ Justice Brennan's opinion in *Eisenstadt v. Baird*⁴⁵ and Justice Blackmun's dissent in *Bowers*⁴⁶ are early examples of an individualistic morality, but the fullest expression of this came in *Casey*.⁴⁷ The *Casey* joint opinion clearly indicated that the Court was not doing textual analysis, and that the inquiry into the nature of liberty would not be constrained by history and tradition and concrete examples. The Court, citing the key passages from Harlan but without a sense of restraint, stated that it would exercise "reasoned judgment" about the nature of liberty.⁴⁸ The approach was abstract, and concluded with the infamous "sweet-mystery-of-life passage."⁴⁹ There, the Court stated:

WM. & MARY L. REV. 923, 1014–15 (2006) (suggesting Harlan's methodology supports the result in *Lawrence*). *But see* Safranek & Safranek, *supra* note 11, at 951 (explaining that Justice Harlan's approach does not support interpreting substantive due process rights in an abstract, general manner).

42. *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring) ("[I]f upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid."); *see also* Myers, *Banning Assisted Suicide*, *supra* note 11, at 773–74 (discussing moral relativism in Supreme Court cases).

43. *Roe*, 410 U.S. at 129–52 (suggesting that history supports the conclusion that the right to privacy protects the right to an abortion); *Griswold*, 381 U.S. at 486 ("We deal with a right of privacy older than the Bill of Rights . . .").

44. *See, e.g.*, JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* ch. 21, at 1053–98 (2006); John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 *ISSUES IN L. & MED.* 3 (2006); Mary Meehan, *How the Supremes Flunked History*, 32 *HUM. LIFE REV.* 41 (2006).

45. 405 U.S. 438 (1972). For critical commentary, *see* John Finnis, *The "Value of Human Life" and "The Right to Death": Some Reflections on Cruzan and Ronald Dworkin*, 17 *S. ILL. U. L.J.* 559, 561 (1993).

46. *Bowers v. Hardwick*, 478 U.S. 186, 199–214 (1986) (Blackmun, J., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). For critical commentary, *see* Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the Bowers v. Hardwick Dissent*, 25 *WAKE FOREST L. REV.* 501 (1990); Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, *BYU L. REV.* 1, 7–18 (1991); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 *CATH. U. L. REV.* 19, 67–79 (1991).

47. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

48. *Id.* at 848–49.

49. *See* *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

[M]atters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁵⁰

It was difficult to tell how seriously to take this language since the joint opinion rested so significantly on *stare decisis*. Despite that ambiguity, some courts and commentators decided to take *Casey's* reasoning quite seriously indeed.

B. *The Liberal Approach Ascendant*

Professor Steven Gey has argued that moral relativism is now a constitutional command: "[T]he typical focus on the mechanics of *Casey* and *Roe* has unfortunately overshadowed the fact that a very conservative Supreme Court has strongly reaffirmed the principle that moral autonomy is the philosophical basis for the constitutional privacy right."⁵¹ Gey explained his view that a democratic system necessarily requires a "radical skepticism" and adherence to the "principle of individual autonomy."⁵² Judges have taken this view to heart in interpreting the Due Process Clause.

In the mid-1990s, certain lower courts explicitly relied on *Casey's* mystery passage and extended the scope of substantive due process. For example:

[S]ome lower courts dealing with the constitutionality of laws banning assisted suicide cited the broad language in *Casey* in support of the argument that there is a fundamental right to assisted suicide. These opinions ignored the opposition to assisted suicide in our history and tradition and appealed to *Casey's* abstract rhetoric. These opinions regarded the broad language as "highly instructive" and "almost prescriptive" in resolving the assisted suicide issue. According to this view, "the right to die with dignity accords with

50. *Casey*, 505 U.S. at 851.

51. Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 363 (1995).

52. *Id.* at 368.

American values of self-determination and privacy regarding personal decisions."⁵³

And according to a Michigan state court judge, in a ruling supporting Jack Kevorkian:

Liberty in the context of our constitution means the freedom of an individual to determine matters about himself for himself and not have others, even if they are in the majority and thus comprise the government, force their will upon the individual. The basic concept of self-determination and personal autonomy is the central point of our constitutional structure. In matters that relate solely to ourselves, we alone are free to decide our personal fate and neither the mob nor the government may take that away from us.⁵⁴

The Supreme Court seemed to bury this approach in *Glucksberg*,⁵⁵ which came just five years after *Casey*.⁵⁶ In 2003, however, the Court revived the broad methodology in *Lawrence v. Texas*.⁵⁷ In *Lawrence*, the Court invalidated a Texas law proscribing "deviate sexual intercourse" between persons of the same sex.⁵⁸ The majority opinion by Justice Kennedy is almost a complete disaster in terms of judicial craftsmanship,⁵⁹ in that respect, the opinion shares much in common with Justice Blackmun's opinion in *Roe*.⁶⁰ The *Lawrence* opinion is perhaps most notable for reviving the "mystery passage" in *Casey*.⁶¹

53. Myers, *Physician-Assisted Suicide*, *supra* note 11, at 4–5 (footnotes omitted).

54. *Hobbins v. Att'y Gen.*, 518 N.W.2d 487, 498 (Mich. Ct. App. 1994) (Shelton, J., concurring in part and dissenting in part), *rev'd in part sub nom.*, *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994); *see also* Myers, *Banning Assisted Suicide*, *supra* note 11, at 778–79 & n.42 (discussing the divide between the liberal and conservative approaches).

55. 521 U.S. 702 (1997).

56. *See* Myers, *Physician-Assisted Suicide*, *supra* note 11, at 6–7; *see also* McConnell, *supra* note 18.

57. 539 U.S. 558 (2003).

58. *Id.* at 563.

59. *See* 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."); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1575 (2004) ("Justice Kennedy's opinion for the Court . . . simply abandons legal analysis. Freed from the chains even of rational argument, the *Lawrence* Court issued an ukase wrapped up in oracular riddles.").

60. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (presenting one of the earliest and best critiques of *Roe*); *see also Lawrence*, 539 U.S. at 588–89 (Scalia, J., dissenting) (noting severe criticisms of Justice Blackmun's opinion in *Roe*).

61. *See Lawrence*, 539 U.S. at 573–74.

It also extolled the extreme moral autonomy approach: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."⁶² The Court rejected the idea that Texas could condemn homosexual conduct as immoral. As the Court stated, "The issue is whether the majority may use the power of the State to enforce these [moral] views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"⁶³ This effort to impose morality was particularly troublesome because the Court viewed Texas as trying "to define the meaning of the relationship [between two consenting adults] or to set its boundaries absent injury to a person or abuse of an institution the law protects."⁶⁴

Justice Kennedy's opinion made it clear that the Court was not trying to do a textual or historical analysis. As commentators have noted, the majority did not so much as cite *Glucksberg*, which seemed to set forth the governing analytical framework for substantive due process cases.⁶⁵ The *Lawrence* Court argued that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."⁶⁶ The key for the Court was its own assessment of contemporary trends and understandings about the nature of liberty. The Court emphasized that its analysis of recent history demonstrated "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."⁶⁷ The Court closed with this passage:

62. *Id.* at 562.

63. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

64. *Id.* at 567.

65. Lund & McGinnis, *supra* note 59, at 1578–79.

Another striking manifestation of *Lawrence*'s haughtiness toward the kind of legal analysis that had become conventional in the case law is its treatment of *Glucksberg*, which had articulated, just six years earlier, the governing test for expansions of substantive due process protection. Without so much as citing *Glucksberg*, *Lawrence* abandons both of its core requirements: that a fundamental right be carefully described and that there be objective evidence that the right is deeply rooted in our nation's history and tradition. The rejection of the *Glucksberg* test is not only unacknowledged and unexplained, but it is a total rejection.

Id.

66. *Lawrence*, 539 U.S. at 572 (quoting *Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

67. *Id.*

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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.⁶⁸

C. *Lawrence: Moral Autonomy and an Uncertain Future*

Lawrence is difficult to read. The opinion is, as noted, a disaster.⁶⁹ Some view *Lawrence* as just an “opening bid” in an ongoing national conversation about these issues.⁷⁰ It is a conversation, though, in which one participant has the power to enshrine its views in the constitutional law.⁷¹ The source of those views is readily apparent. The Court is clearly absorbing (and celebrating) ways of thinking prevalent in the broader culture. The Court is simply reflecting its reading of a societal consensus, or at least a consensus of the elite culture, or as *Casey* expressed it: “the thoughtful part of the Nation.”⁷² Although *Lawrence*’s philosophical underpinnings are clear, it is not yet certain whether the courts will accept all the implications of the *Lawrence* approach.

68. *Id.* at 578–79.

69. See *supra* text accompanying note 59.

70. Post, *supra* note 20, at 104; see also Cass R. Sunstein, *Due Process Traditionalism* 3 (John M. Olin Law & Econ., Working Paper No. 336, Pub. Law & Legal Theory, Working Paper No. 158, 2007), available at <http://ssrn.com/abstract=223729>. Sunstein writes:

In striking down bans on same-sex relations, *Lawrence v. Texas* explicitly relies on “evolving” judgments, rather than longstanding practices. But the battle between traditionalist and more rationalist or critical approaches, allowing courts to scrutinize social practices, has yet to be authoritatively resolved. The Court remains sharply divided on the proper role of tradition, which continues to play a large role in lower court decisions.

Id. (footnotes omitted).

71. Lund & McGinnis, *supra* note 59, at 1588 (“This is a ‘conversation’ in which the Court issues commands, and those who disagree must obey.”).

72. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992). See generally 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 (2004) (discussing and critiquing the tendency of federal judges to absorb the social views of elite culture).

1. *Moral Autonomy as Constitutional Command*

Lawrence's expansive notion of moral autonomy is a rejection of the idea that morality is a sufficient state interest to justify an interference with liberty. Justice Kennedy made this clear by endorsing a key passage in Justice Stevens's dissent in *Bowers*, in which Justice Stevens argued that "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."⁷³ Shortly after explicitly endorsing this view, Justice Kennedy stated: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."⁷⁴ Commenting on this precise point, Justice Scalia's dissent argued that the Court's view "effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, [laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity] can[not] survive rational-basis review."⁷⁵

In cases reflecting this broad notion of autonomy, the Court has also rejected the role of religiously influenced moral judgments. The Court has a narrow understanding of secular morality that it considers a legitimate basis for governmental action. The Court here has absorbed an idea common in modern culture—the privatization of religion.⁷⁶

73. *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by Lawrence*, 539 U.S. at 578). The *Lawrence* Court then noted that Justice Stevens's view should be controlling. *Id.* at 578; see also Gregory Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 31 (2006) (noting the importance of Justice Kennedy's agreement with the view expressed by Justice Stevens in *Bowers*).

74. *Lawrence*, 539 U.S. at 578.

75. *Id.* at 599 (Scalia, J., dissenting).

76. I have discussed the privatization of religion in other articles. See generally Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1991); Richard S. Myers, *The United States Supreme Court and the Privatization of Religion*, 6 CATH. SOC. SCI. REV. 223 (2001). See also Richard S. Myers, *Reflections on "Looking Back on Planned Parenthood v. Casey,"* in LIFE AND LEARNING XIII: PROCEEDINGS OF THE THIRTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 3, 12–14 (Joseph W. Koterski ed., 2004) (rejecting the argument that the abortion question is a "religious" one and beyond the capacity of the government to decide); Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 59–65 (1998) (stating that the Court has rejected that legislation must be justified in terms of secular rationality); Myers, *Substantive Due Process*, *supra* note 11, at 572–83 (discussing the 1985 term of the Supreme Court wherein the Court suggested that religion and

2. *Lawrence's Impact*

Lawrence is a potentially earth-shattering development, but it has been limited thus far. In some sense, the current situation parallels the mid-1990s, the years after *Casey* and before *Glucksberg*. Lower courts have been faced with the task of trying to discern *Lawrence's* implications.⁷⁷ Some of the post-*Lawrence* cases have been entirely predictable and have not represented any major innovations. I am thinking, for example, of the *Martin* case in Virginia in which the Virginia Supreme Court invalidated Virginia's fornication law.⁷⁸ Other opinions have taken up *Lawrence's* more expansive statements with real enthusiasm.

In *United States v. Extreme Associates, Inc.*,⁷⁹ for example, a federal district court held the federal obscenity statute unconstitutional on substantive due process grounds. The court's rationale was that *Lawrence* makes it clear that "public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality."⁸⁰ And, in the *Williams* case, Judge Barkett of the Eleventh Circuit also read *Lawrence* broadly, concluding that *Lawrence* recognized a substantive due process right to sexual privacy that was broad

moral principles should not shape legislation). For an extensive treatment of this issue that rejects the idea that laws influenced by religiously informed moral premises violate the Establishment Clause, see Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1 (2002). But see Arnold H. Loewy, Essay, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159 (2003).

77. See generally Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409 (2006).

78. *Martin v. Zihler*, 607 S.E.2d 367, 371 (Va. 2005). In *Martin*, the Virginia Supreme Court held Virginia's fornication statute unconstitutional. *Id.* The court viewed its decision as a straightforward application of *Lawrence*. *Id.* The Virginia statute was "unconstitutional because by subjecting certain private sexual conduct between two consenting adults to criminal penalties it infringes on the rights of adults to 'engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.'" *Id.* (quoting *Lawrence*, 539 U.S. at 564). This view has not extended to cases involving minors. *McDonald v. Commonwealth*, 645 S.E.2d 918, 924 (Va. 2007) (upholding the constitutionality of Virginia's sodomy statute as applied to an adult who committed sodomy with minors). Courts have declined to extend this view even when the minor was beyond the age of consent. *State v. Senters*, 699 N.W.2d 810, 813-14 (Neb. 2005) (upholding child pornography laws); *State v. McKenzie-Adams*, 915 A.2d 822, 836-37 (Conn. 2007) (rejecting a constitutional challenge to a statute prohibiting sexual activity between teachers and students).

79. 352 F. Supp. 2d 578 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005).

80. *Id.* at 591.

enough to protect the fundamental right to purchase “sex toys,” and that *Lawrence* prevented a state from relying on public morality to criminalize private sexual activity.⁸¹

These opinions, though, have not held up. The *Extreme Associates* case was reversed by the Third Circuit.⁸² Judge Barkett’s opinion in *Williams* was in dissent.⁸³ The Eleventh Circuit’s majority opinion in *Williams* is fascinating because the court made it clear that it was going to read *Lawrence* narrowly. In fact, the Eleventh Circuit applied the *Glucksberg* analysis, which the Supreme Court had ignored in *Lawrence*.⁸⁴ The Eleventh Circuit’s opinion in *Williams* is a great example of the narrow history and tradition approach that I mentioned earlier, and almost reads as if *Lawrence* had not been decided at all.⁸⁵

81. *Williams v. Att’y Gen. of Alabama*, 378 F.3d 1232, 1251–52 (11th Cir. 2004) (Barkett, J., dissenting). Judge Barkett concluded: “Applying the analytical framework of *Lawrence* compels the conclusion that the Due Process Clause protects a right to sexual privacy that encompasses the use of sexual devices.” *Id.* at 1251.

82. *United States v. Extreme Assoc., Inc.*, 431 F.3d 150 (3d Cir. 2005).

83. *Williams*, 378 F.3d at 1250–60 (Barkett, J., dissenting).

84. *Id.* at 1235 (majority opinion) (“Because the ACLU is asking us to recognize a new fundamental right, we then apply the analysis required by *Washington v. Glucksberg*.”); *id.* at 1237 (“Nor are we prepared to assume that *Glucksberg*—a precedent that *Lawrence* never once mentions—is overruled by implication.”).

85. This was a principal theme of Judge Barkett’s dissenting opinion in *Williams*. She stated: “I believe the majority errs in its strained effort to avoid the fair import of a Supreme Court precedent.” *Id.* at 1256 (Barkett, J., dissenting). She also noted: “Ignoring *Lawrence*, the majority turns a reluctance to expand substantive due process into a stubborn unwillingness to consider relevant Supreme Court authority.” *Id.* at 1260. On remand, the United States District Court for the Northern District of Alabama upheld the constitutionality of the Alabama statute. *Williams v. King*, 420 F. Supp. 2d 1224, 1254 (N.D. Ala. 2006), *aff’d sub nom. Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007), *cert. denied sub nom., Williams v. King*, No. 06-1501, 2007 WL 1433336 (U.S. Oct. 1, 2007). The district court found that, despite some of the statements in the *Lawrence* opinion and in Justice Scalia’s dissent in *Lawrence*, public morality was not always an illegitimate state interest, *id.* at 1249–50, and that “*Lawrence*’s holding—that public morality was not a sufficiently rational basis to support the Texas legislation in question there—does not apply to strike down the Alabama law here.” *Id.* at 1254. On appeal, the Eleventh Circuit affirmed. *Williams*, 478 F.3d at 1318. The court stated: “[W]e do not read *Lawrence*, the overruling of *Bowers*, or the *Lawrence* court’s reliance on Justice Stevens’s dissent, to have rendered public morality altogether illegitimate as a rational basis.” *Id.* at 1323.

Another Eleventh Circuit decision bears similarities to *Williams*. In *Lofton v. Secretary of the Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004), the court rejected a constitutional attack on a Florida law “prevent[ing] adoption by practicing homosexuals.” *Id.* at 806. The court viewed the substantive due process challenge to this Florida law in the same way the court did in *Williams*. That is, the court read *Lawrence* narrowly, applied the *Glucksberg* analysis, and did not find that the Florida law burdened a fundamental right. *Id.* at 815–17. The court also endorsed the idea that public morality is a legitimate state interest,

I could discuss other cases; there are a variety of opinions dealing with same-sex “marriage” that discuss *Lawrence*, but most have been cautious about extending its reach.⁸⁶ I think, however, that the basic point is clear. Certain judges have read *Lawrence* seriously and have tried to apply it in new contexts. But most judges have been more cautious and seem inclined to let the Supreme Court take responsibility for pushing the underlying logic of *Casey* and *Lawrence* to its limits.⁸⁷ I think that explains decisions upholding laws prohibiting adult incest⁸⁸ and bigamy,⁸⁹ even though one need

see id. at 819 n.17, a view that proved important in *Williams*. *See Williams v. Morgan*, 478 F.3d at 1323 (citing *Lofton* on this point). It is useful to compare Judge Birch’s opinion specially concurring in the subsequent denial of rehearing en banc, in which Judge Birch defended these aspects of *Lofton*, with Judge Barkett’s dissent from the denial of rehearing en banc. *Compare Lofton v. Sec’y of Children & Family Serv.*, 377 F.3d 1275, 1275–90 (2004) (Birch, J., specially concurring), *with id.* at 1290–1313 (Barkett, J., dissenting). Judge Barkett took a much more expansive reading of *Lawrence* and exhibited a greater willingness to find that a state statute implicated a fundamental right than did Judge Birch. *Id.*

86. *See Hernandez v. Robles*, 855 N.E.2d 1, 10–11 (N.Y. 2006) (rejecting constitutional challenges to a New York law limiting marriage to opposite-sex couples and stating that “[t]his case is . . . like *Glucksberg* and not at all like *Lawrence*”); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (also employing the *Glucksberg* analysis rather than that of *Lawrence* in rejecting constitutional challenges to a Washington law that limited marriage to opposite-sex couples). *But see Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that excluding same-sex couples from civil marriage violates the Massachusetts Constitution); *Hernandez*, 855 N.E.2d at 23–24 (Kaye, C.J., dissenting) (arguing that *Lawrence* sets the proper tone to the substantive due process inquiry, not the narrow, historical approach); *Andersen*, 138 P.3d at 1021 (Fairhurst, J., dissenting) (same).

87. *Williams*, 378 F.3d at 1238 (“Of course, the Court may in due course expand *Lawrence*’s precedent in the direction anticipated by the dissent. But for us preemptively to take that step would exceed our mandate as a lower court.”).

88. *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005). Judge Manion’s opinion for the Seventh Circuit in *Muth* read *Lawrence* narrowly. He stated:

Given, therefore, the specific focus in *Lawrence* on homosexual sodomy, the absence from the Court’s opinion of its own “established method” for resolving a claim that a particular practice implicates a fundamental liberty interest, and the absence of strict scrutiny review, we conclude that *Lawrence* did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct.

Id. at 818. Judge Manion noted that future litigants might try to use *Lawrence* in a broader fashion, but expressed no interest in taking up that invitation. *Id.* Judge Evans’s concurring opinion criticized Judge Manion for expressing “a certain degree of unease, even disdain, for the majority opinion in *Lawrence*.” *Id.* at 819 (Evans, J., concurring).

In *State v. Lowe*, the Supreme Court of Ohio rejected a constitutional challenge to Ohio’s incest statute “as applied to the consensual sexual conduct between a stepparent and adult stepchild.” *State v. Lowe*, N.E.2d 512, 514 (Ohio 2007), *cert. denied*, No. 06-11381, 2007 WL 1480694 (U.S. Oct. 1, 2007). The court refused to read *Lawrence* as “announc[ing] a

not push *Lawrence* too far to conclude that these laws are in trouble, as Justice Scalia noted in his *Lawrence* dissent.⁹⁰

Even though *Lawrence* has not been pushed too far yet, Justice Kennedy's opinion awaits judges or justices with the willingness to extend its principles to their logical conclusion. Those principles are quite clear. Moral relativism is a constitutional command.⁹¹ Morality is purely private and purely a matter for the subjective will of the individual. The key values are autonomy, choice, and self-determination or self-sovereignty. The content of the individual's choice must be a matter of indifference to the government.

II. THE THOUGHT OF POPE JOHN PAUL II: AN ALTERNATIVE TO PREVAILING TRENDS

The *Lawrence* Court's understanding of freedom is, of course, not without alternatives. The thought of Pope John Paul II, who considered the interplay between truth and freedom throughout his years of

'fundamental' right to all consensual adult sexual activity, let alone consensual sex with one's adult children or stepchildren." *Id.* at 517.

89. *State v. Holm*, 137 P.3d 726, 730 (Utah 2006), *cert. denied*, 127 S. Ct. 1371 (2007).

90. *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting). With regard to the constitutionality of laws proscribing incest, Matthew Franck criticized Judge Manion's opinion in *Muth* with this comment:

It is understandable that Judge Manion, like the rest of us, recoiled from the absurdity that the Constitution protects incest. But his effort to avert the consequences of *Lawrence*'s radicalism is unsustainable, for a fair reading of that case makes it hard to avoid the conclusion that the Supreme Court's version of the Constitution does indeed protect incest (just as Justice Scalia claimed in his *Lawrence* dissent).

Matthew J. Franck, *Kissing Sibs*, NAT'L REV. ONLINE, Aug. 4, 2005, <http://www.nationalreview.com/comment/franck200508040812.asp>.

With regard to bigamy, the dissent in *Holm*, which was based on state constitutional grounds, also expressed disagreement with the majority's discussion of substantive due process. The dissent concluded: "I believe the majority has erred in suggesting that the Supreme Court's decision in *Lawrence v. Texas* does not recognize private relationships between consenting adults as entitled to protection under the Fourteenth Amendment's Due Process Clause." *Holm*, 137 P.3d at 779 (Durham, C.J., concurring in part and dissenting in part) (citation omitted). The majority had avoided this reading in large part by interpreting *Lawrence* narrowly. Justice Durrant's opinion stated: "Despite its use of seemingly sweeping language, the holding in *Lawrence* is actually quite narrow." *Id.* at 742 (majority opinion). The concurring opinion in *Holm* also agreed with the *Holm* majority's narrower approach to *Lawrence*. *Id.* at 757 (Nehring, J., concurring).

91. See generally Gey, *supra* note 51 (defending the view that moral relativism is commanded by the Constitution).

service, is a profound answer to the moral relativism dominating today's Supreme Court.

A. Pope John Paul II's View of Freedom

Pope John Paul II fought against the extreme view of freedom reflected in *Casey* and *Lawrence* throughout his life. This is clear in his early philosophical work.⁹² It is also clear in his actions to shape some of the key documents of the Second Vatican Council. I have in mind here his critical work on *Gaudium et Spes*⁹³ and *Dignitatis Humanae*.⁹⁴ As George Weigel commented in *Witness to Hope*:

This intense focus on the human person, evident in both *Dignitatis Humanae* and *Gaudium et Spes*, was neither a "concession" to modernity nor a lapse into subjectivism and relativism. Truth and freedom were always linked, and an emphasis on religious freedom was, at the same time, an "augmentation" of human responsibility. If men and women were truly free to seek the truth, they were ever more obliged to take that search seriously [and to do so within the confines of the objective moral law]. The relationship of freedom to duty and truth took human beings into the heart of the relationship between creation and Creator.⁹⁵

Brian Harrison notes that the reference to objective moral norms in *Dignitatis Humanae* was inserted after an intervention by then-Archbishop Wojtyła.⁹⁶

This theme, this view of the human person and the nature of human freedom, was taken up repeatedly by John Paul II throughout

92. See generally ROCCO BUTTIGLIONE, KAROL WOJTYŁA: THE THOUGHT OF THE MAN WHO BECAME POPE JOHN PAUL II (Paolo Guietti & Francesca Murphy trans., 1997). The translators' afterword notes, "It appears, after reading Buttiglione, that Wojtyła does not understand anything *but* freedom and its relationship with the truth, which can be presented *freely* only to a person." Paolo Guietti & Francesca Murphy, *Translators' Afterword to supra*, at 313.

93. Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 17 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 513, 528 (Nat'l Catholic Welfare Conference trans., 1967) [hereinafter *Gaudium et Spes*].

94. Second Vatican Council, *Dignitatis Humanae* [*Declaration on Religious Freedom*] (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 395 (Nat'l Catholic Welfare Conference trans., 1967).

95. GEORGE WEIGEL, *WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II* 171 (1999).

96. BRIAN W. HARRISON, *RELIGIOUS LIBERTY AND CONTRACEPTION* 98-99 (1988); see also WEIGEL, *supra* note 95, at 164-65.

his pontificate, from his first encyclical (*Redemptor Hominis*⁹⁷) and especially through two of the encyclicals I mentioned at the outset—*Veritatis Splendor*⁹⁸ and *Evangelium Vitae*.⁹⁹ Pope John Paul II's battle with liberation theology is also noteworthy here; a useful summary of that conflict can be found in the Congregation for the Doctrine of the Faith's documents on liberation theology from 1984¹⁰⁰ and in 1986's *Instruction on Christian Freedom and Liberation*.¹⁰¹ The latter *Instruction* was specifically approved by Pope John Paul II, and on the Vatican website it carries the quotation "[t]he truth makes us free" under the title.¹⁰²

B. *Veritatis Splendor: An Answer to the Supreme Court*

Pope John Paul II definitively rejected the modern idea of freedom in *Veritatis Splendor*, his great encyclical on moral theology. As a teacher of constitutional law in the early 1990s, it seemed to me that the Pope was responding directly to the joint opinion in *Casey*, which had been decided just a year earlier. Obviously, the Pope was not directly responding to the United States Supreme Court, but in a sense he was, because he was criticizing a way of thinking about freedom that had found its way into the *United States Reports*.¹⁰³

97. Pope John Paul II, *Redemptor Hominis* [Encyclical Letter on the Redeemer of Man] ¶ 12 (1979).

98. *Veritatis Splendor*, *supra* note 5.

99. *Evangelium Vitae*, *supra* note 6, ¶ 2.

100. Congregation for the Doctrine of the Faith, *Libertatis Nuntius* [Instruction on Certain Aspects of the "Theology of Liberation"] (1984).

101. Congregation for the Doctrine of the Faith, *Libertatis Conscientia* [Instruction on Christian Freedom and Liberation] (1986).

102. *Id.* at 727; see also Congregation for the Doctrine of the Faith, *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*, Nov. 24, 2002, reprinted in READINGS ON CATHOLICS IN POLITICAL LIFE 99 (2006). That Note states:

[T]he Church teaches that authentic freedom does not exist without the truth. "Truth and freedom either go together hand in hand or together they perish in misery." In a society in which truth is neither mentioned nor sought, every form of authentic exercise of freedom will be weakened, opening the way to libertine and individualistic distortions and undermining the protection of the good of the human person and of the entire society.

Id. at 108 (footnote call number omitted) (quoting *Fides et Ratio*, *supra* note 7, ¶ 90).

103. See *supra* Part I for a discussion of the United States Supreme Court's thought on freedom.

Casey reflected the culture's divinization of choice, freedom, and autonomy.¹⁰⁴ In *Veritatis Splendor*, John Paul II responded in this fashion:

Certain currents of modern thought have gone so far as to *exalt freedom to such an extent that it becomes an absolute, which would then be the source of values*. This is the direction taken by doctrines which have lost the sense of the transcendent or which are explicitly atheistic. The individual conscience is accorded the status of a supreme tribunal of moral judgment which hands down categorical and infallible decisions about good and evil.¹⁰⁵ To the affirmation that one has a duty to follow one's conscience is unduly added the affirmation that one's moral judgment is true merely by the fact that it has its origins in the conscience. But in this way the inescapable claims of truth disappear, yielding their place to a criterion of sincerity, authenticity and "being at peace with oneself," so much so that some have come to adopt a radically subjectivist conception of moral judgment.

As is immediately evident, *the crisis of truth* is not unconnected with this development. Once the idea of a universal truth about the good, knowable by human reason, is lost, inevitably the notion of conscience also changes. Conscience is no longer considered in its primordial reality as an act of a person's intelligence, the function of which is to apply the universal knowledge of the good in a specific situation and thus to express a judgment about the right conduct to be chosen here and now. Instead, there is a tendency to grant to the individual conscience the prerogative of independently determining the criteria of good and evil and then acting accordingly. Such an outlook is quite congenial to an individualistic ethic, wherein each individual is faced with his own truth, different from the truth of others. Taken to its extreme consequences, this individualism leads to the denial of the very idea of human nature.¹⁰⁶

104. See generally Myers, *Banning Assisted Suicide*, *supra* note 11, at 780.

105. Pope John Paul II here sounds as if he is describing the Supreme Court, or at least the Court when it views itself as having a preeminent role in our system of government. The most notorious example of this was in *Casey*, where the joint opinion viewed the Court as "speak[ing] before all others" and setting forth an understanding of the Constitution that the people would be "tested by following." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992). Justice Scalia's critique of this understanding of the Court's role was scathing. *Id.* at 996-98 (Scalia, J., dissenting).

106. *Veritatis Splendor*, *supra* note 5, ¶ 32.

John Paul II rejects this view of freedom, and his basic point is reflected in the idea of truth emphasized in the title of the encyclical: Freedom is linked to truth.¹⁰⁷ Rather than being left to our own individual choices, our conscience calls us to obedience. *Gaudium et Spes* made this point with great clarity: “In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience.”¹⁰⁸ As *Veritatis Splendor* put it: “Conscience is not an independent and exclusive capacity to decide what is good and what is evil. Rather there is profoundly imprinted upon it a principle of obedience vis-à-vis the objective [moral] norm”¹⁰⁹ The autonomy perspective ignores this moral tradition. It defines rights by the mere fact of choice, not by the content of the individual’s choice.

C. *Pope John Paul II’s Thought as a Surer Foundation for Human Rights*

The autonomy perspective sounds liberating. Yet, Pope John Paul II’s writings continually affirmed the view that radical notions of freedom are ultimately threatening to human rights. Detaching freedom from truth does not serve the interest of the person or of society. As *Evangelium Vitae* put it: “[W]hen freedom is detached from objective truth it becomes impossible to establish personal rights on a firm rational basis; and the ground is laid for society to be at the mercy of the unrestrained will of individuals or the oppressive totalitarianism of public authority.”¹¹⁰

Veritatis Splendor states this even more strongly, quoting *Centesimus Annus*:

Totalitarianism arises out of a denial of truth in the objective sense. If there is no transcendent truth, in obedience to which man achieves his full identity, then there is no sure principle for guaranteeing just relations between people. Their self-interest as a class, group or nation would inevitably set them in opposition to one another. If

107. Myers, *Banning Assisted Suicide*, *supra* note 11, at 781–82.

108. *Gaudium et Spes*, *supra* note 93, ¶ 16.

109. *Veritatis Splendor*, *supra* note 5, ¶ 60 (quoting Pope John Paul II, *Dominum et Vivificantem* [Encyclical Letter on the Holy Spirit and the Life of the Church in the World] ¶ 43 (1986)).

110. *Evangelium Vitae*, *supra* note 6, ¶ 96.

one does not acknowledge transcendent truth, then the force of power takes over, and each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the rights of others. . . . Thus, the root of modern totalitarianism is to be found in the denial of the transcendent dignity of the human person who, as the visible image of the invisible God, is therefore by his very nature the subject of rights which no one may violate—no individual, group, class, nation or State. Not even the majority of a social body may violate these rights, by going against the minority, by isolating, oppressing, or exploiting it, or by attempting to annihilate it.¹¹¹

One consequence of severing the link between freedom and truth is that these individual acts of self-creation must go unconstrained by objective moral norms. That is clearly the consequence of the *Lawrence* Court's rejection of morality as a legitimate state interest. It also follows from the Court's idea that freedom must be unconstrained by objective norms that the Court regards as "religious"—such as the idea that human life is a good that must always be respected.¹¹² We see the hazards of this with regard to abortion and also increasingly (despite *Glucksberg*) with euthanasia and assisted suicide, as the Terri Schiavo situation, among other developments, reflects.¹¹³

One way the Court and modern culture expand the range of individual choices is by adopting a very limited idea of the sort of reason that may justify restrictions on liberty, and Pope John Paul II critiqued this impoverished understanding at length.¹¹⁴ Pope

111. *Veritatis Splendor*, *supra* note 5, ¶ 99 (quoting *Centesimus Annus*, *supra* note 4, ¶ 44); see Myers, *Banning Assisted Suicide*, *supra* note 11, at 781–82.

112. See Myers, *Banning Assisted Suicide*, *supra* note 11, at 782–83 (commenting on this theme).

113. See generally Richard S. Myers, *Reflections on the Terri Schindler-Schiavo Controversy*, in LIFE & LEARNING XIV: THE PROCEEDINGS OF THE FOURTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 27 (Joseph W. Koterski, ed., 2004). This paper was also published at 11 CATH. SOC. SCI. REV. 65 (2006).

114. See *Fides et Ratio*, *supra* note 7. In a key passage, Pope John Paul II stated:

[S]cientism consigns all that has to do with the question of the meaning of life to the realm of the irrational or imaginary. No less disappointing is the way in which it approaches the other great problems of philosophy which, if they are not ignored, are subjected to analyses based on superficial analogies, lacking all rational foundation. This leads to the impoverishment of human thought, which no longer addresses the ultimate problem which the human being, as the *animal rationale*, has pondered constantly from the beginning of time. And since it leaves no space for the critique

Benedict XVI is carrying forward with great urgency this critique of the modern understanding of reason, most notably in his address on *Faith, Reason and the University*, which he delivered on September 12, 2006 at Regensburg.¹¹⁵

CONCLUSION

I think Pope John Paul II's view is far more attractive than the Court's. I am not suggesting that the Court ought to read his views into our constitutional law. Yet, to the extent the Court takes account of "emerging recognitions" and modern understandings of freedom, the powerful critiques of these positions ought to be taken into account. At a minimum, the Court ought not employ the force of constitutional law to prevent the State from acting on traditional moral judgments. And these critiques of the modern understanding of freedom ought to play an important role in the broader political and cultural debate.

offered by ethical judgment, the scientific mentality has succeeded in leading many to think that if something is technically possible it is therefore morally admissible.

Id. ¶ 88.

115. Pope Benedict XVI, *Faith, Reason and the University: Memories and Reflections*, L'OSSERVATORE ROMANO (English ed.), Sept. 20, 2006, at 6. This address was delivered just days before the John Paul II symposium conference at Ave Maria School of Law. See also JAMES V. SCHALL, S.J., THE REGENSBURG LECTURE (2007). Much of the Pope's Regensburg address focused on the question of the narrowing of reason to the scientific and the empirical. Pope Benedict XVI, *supra*. As Father Schall states, the modern understanding that Pope Benedict XVI is challenging "is the denial of reason in the name of reason, the 'self-limitation' of reason so that it does not confront what is within its full scope." SCHALL, *supra*, at 122. Benedict's address is, in the end, an exhortation on the need for "courage to engage the whole breadth of reason." Pope Benedict XVI, *supra*, at 11.