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Andrew D. Cohen

HOW THE ESTABLISHMENT CLAUSE CAN INFLUENCE SUBSTANTIVE DUE PROCESS: ADULTERY BANS AFTER *LAWRENCE*

*Andrew D. Cohen**

Criminal adultery bans, despite widespread transgression and lax enforcement, remain on the books in a substantial minority of states. The landmark Lawrence v. Texas *decision casts doubt on all state interference with consensual sexual activity among adults, including adultery bans. Additionally, adultery bans on their face implicate the Establishment Clause, due to adultery bans' and marriage's roots in religious doctrine and religiosity. This Note examines the constitutionality of adultery bans after* Lawrence v. Texas, *and proposes a novel approach to substantive due process analysis that applies Establishment Clause values. In proposing what this Note dubs the "Establishment Clause prism," through which a facially legitimate state interest is delegitimized if substantially motivated by religious forces, this Note concludes that adultery bans are unconstitutional.*

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* J.D. Candidate, 2012, Fordham University School of Law; Ph.D. Chemistry, 2006, Johns Hopkins University; A.B. Chemistry, 2000, Princeton University. I thank my advisor, Professor Abner S. Greene, without whose guidance and insight this Note would not have been possible. I extend my deep love and eternal gratitude to my wife Hanna, for her emotional and moral support throughout this writing process (and for strictly enforcing a ban on field research for this project).

INTRODUCTION

"Adultery is nothing new."[1] From dramatic works to television talk shows, marital infidelity is a hot topic that, in this increasingly liberal society, no longer repulses audiences, but rather engenders a voyeuristic gravity.[2] Stories of marital infidelity in television, film, and the tabloids are as commonplace as ever.[3] Niche Internet dating services now cater to extra-marital affairs.[4] Indeed, the adultery of our government leaders often headlines the papers and the television news.[5] Yet, perhaps ironically, it is our elected leaders who, in a substantial minority of states, criminally proscribe adultery.[6] Though adultery laws are rarely enforced,[7] they nevertheless remain on the books as an omnipresent specter.[8]

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1. Brenda Cossman, *The New Politics of Adultery*, 15 COLUM. J. GENDER & L. 274, 274 (2006).

2. *See id.* at 281–84 (discussing, inter alia, the film *Fatal Attraction*, the book *The Scarlet Letter*, and *The Oprah Winfrey Show* as some of the many examples of popularized infidelity).

3. *See, e.g.*, *id.* at 295 (discussing the Brad Pitt, Jennifer Aniston, and Angelina Jolie love triangle); *Mad Men* (AMC television series 2007–present) (centering on dapper Don Draper, the 1960s adulterous advertising executive whose extra-marital affairs are as important to him as his family and career); *This American Life: Infidelity*, Chicago Public Radio (Nov. 1, 2009) (downloaded using iTunes), *available at* http://www.thisamericanlife.org/radio-archives/episode/393/infidelity (interviewing blogger Jessica Pressler and discussing her recognition of a growing number of *New York Times* wedding and engagement announcements that highlight the adulterous origins of the couples' current nuptials).

4. *See* THE ASHLEY MADISON AGENCY, http://www.ashleymadison.com/ (last visited Oct. 23, 2010) (whose trademarked slogan is "Life is Short. Have an Affair.").

5. *See, e.g.*, Robbie Brown & Sheila Dewan, *Ending Mystery, a Governor Says He Had an Affair*, N.Y. TIMES, June 25, 2009, at A1 (describing South Carolina Governor Mark Sanford's adulterous tryst in Argentina and admission of infidelity); David Kocieniewski & Danny Hakim, *Spitzer Resigns: Felled by Sex Scandal, He Says His Focus Is on Family*, N.Y. TIMES, Mar. 13, 2008, at A1 (reporting New York Governor Eliot Spitzer's resignation after being caught planning to meet a prostitute); *see also* ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY 186–87 (1997) (suggesting that even one of our Founding Fathers committed adultery).

6. *See infra* notes 50–56 and accompanying text.

7. *See, e.g.*, State v. Holm, 137 P.3d 726, 772 n.22 (Utah 2006) ("The most recent adultery prosecution to have reached this court appears to have occurred in 1928, under a previous criminal provision." (citing State v. Lewellyn, 266 P. 261, 262 (Utah 1928))); Terri L. Mascherin et al., *Reforming the Illinois Criminal Code: Where the CLEAR Commission Stopped Short of Its Goals*, 41 J. MARSHALL L. REV. 741, 746–47 (2008) (noting no prosecution for adultery in Illinois for over forty years, and quoting a prosecutor indicating that there are no plans to start enforcing the adultery statute); *see also infra* note 140 and accompanying text.

8. Indeed, just this past June, a married New York woman was charged with adultery (as well as public lewdness) after the police found her having sex on a picnic table in a park. *See* Denise Jewell Gee, *A Rare Charge of Adultery Filed in Park Arrests*, BUFFALO NEWS, June 8, 2010, at B1. Although she first threatened a constitutional challenge to the adultery ban, *see* Eamon McNiff, *Woman Charged with Adultery To Challenge New York Law*, ABCNEWS.COM (June 8, 2010), http://abcnews.go.com/TheLaw/woman-charged-adultery-challenge-york-law/story?id=10857437, the District Attorney dropped the charge when the woman pled guilty to lewdness. *See* Matt Gryta, *Batavia Adultery Suspect Pleads Guilty to Lewdness*, BUFFALO NEWS, Aug. 12, 2010, at B1.

This Note examines the constitutionality of criminal adultery laws in the context of both substantive due process privacy rights and Establishment Clause values. This Note compares the arguments made by scholars and courts for and against governmental regulation of adultery, under both rubrics. Finally, this Note argues that, even if criminal adultery laws may withstand challenges under either a substantive due process or an Establishment Clause challenge alone, they are nevertheless unconstitutional. In reaching this conclusion, this Note proposes a new approach to substantive due process influenced by Establishment Clause values. Specifically, this Note proposes an "Establishment Clause prism," that refracts and delegitimizes the state's interest within the traditional substantive due process calculus, reasoning that the state's interest in passing laws that infringe important liberties—for example, sexual privacy—is less legitimate where such laws are motivated by substantial religious forces.

Part I of this Note describes both the institution of marriage and the history of adultery laws, as well as the relevant constitutional principles and doctrines. Part II explores the constitutionality of criminal adultery laws under each of the relevant areas of constitutional law. Finally, Part III proposes the Establishment Clause prism, applies the prism to criminal adultery laws, and shows that applying the prism to some of the Court's substantive due process decisions leads to the same results.

I. MARRIAGE, ADULTERY, SEXUAL PRIVACY, AND RELIGIOUS LIBERTY: A FACTUAL AND LEGAL BACKGROUND

The crime of adultery generally requires (1) *sexual* intercourse (2) with the *spouse* of another.[9] An analysis of adultery laws thus necessitates examination of both the institution of marriage (a necessary condition to the commission of adultery) and whether and how the state can regulate human sexuality (i.e., the right to sexual privacy).[10] This part lays the foundation for the analysis to come, providing a brief background of marriage itself and the history of adultery laws, and a synopsis of the relevant fields of constitutional jurisprudence.

Part I.A discusses the institution of marriage (i.e., the "but for" condition of an adultery offense) to provide an understanding of marriage as both a religious and a legal institution, which will be necessary to understand the purported state justifications for criminalizing adultery, and to appreciate the religious underpinnings of the institution. Part I.B describes the

9. *See generally* RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 103–10 (1996) (collecting both criminal and civil adultery statutes).

10. Sex outside of marriage is "fornication," an offense that, in contrast to adultery, has been decriminalized in the vast majority of states. *See* BLACK'S LAW DICTIONARY 725 (9th ed. 2009); Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 526 n.8 (2000) (collecting sources). While fornication and adultery bans both criminalize coitus, fornication requires that neither party is married, while adultery requires that one or both are. As such, there is substantial overlap in the constitutional analysis of laws criminalizing fornication. Nevertheless, this Note focuses exclusively on adultery.

evolution of laws criminalizing adultery, from Biblical to modern times, in an effort to similarly expound the state justifications (i.e., legislative purpose) for its criminalization, as well as to understand the role religion and its tenets have played in adultery's status as both sin and crime.

Part I.C discusses the relevant constitutional principles arising under the doctrine of substantive due process, namely the evolution of the right to privacy. This part culminates in a discussion of the U.S. Supreme Court's landmark sexual privacy decision, *Lawrence v. Texas*.[11] Part I.D discusses the Court's related intimate association jurisprudence, which sets forth a standard under which adulterous relationships have been analyzed. Finally, Part I.E summarizes a portion of the Supreme Court's Establishment Clause cases, with a focus on the standards by which the Court has invalidated laws enacted with religious motivations.

A. The Institution of Marriage

Marriage is ubiquitous.[12] As Justice William O. Douglas famously noted, "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being *sacred*."[13] This section discusses the legal institution of marriage, as evolved from its religious roots, and as recognized (or not) by law today. This section provides an understanding of the inseparably religious origins of marriage and its importance in the eyes of the state.

1. The Religious Foundations of the Legal Institution of Marriage

One might argue that marriage (or at least monogamy) exists in nature, and is thus of biological or natural origin.[14] Throughout the history of Western civilization, marriage was a central aspect of the family unit, from the ancient Greeks and Romans, to the biblical Israelites.[15] For the ancient Romans, marriage was primarily a personal contract, divorced, as it were,

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11. 539 U.S. 558 (2003).

12. According to 2004 census data, 68.8% of men and 74.2% of women over the age of fifteen had been married. *See* U.S. CENSUS BUREAU, MARITAL HISTORY FOR PEOPLE 15 YEARS AND OVER, BY AGE AND SEX: 2004, http://www.census.gov/population/socdemo/marital-hist/2004/Table3.2004.xls.

13. Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (emphasis added).

14. *See* Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 294 & n.77 (2004) (collecting sources containing "explanations for why humans may pair up in order to promote the survival of their individual gene pools"); *cf.* PARTNERSHIPS IN BIRDS: THE STUDY OF MONOGAMY (Jeffrey M. Black ed., 1996) (describing the natural monogamy of some species of birds). *But see* Emens, *supra*, at 294–96 (criticizing these theories of natural monogamy as merely the "stories we tell").

15. *See generally* MARRIAGE AND FAMILY IN THE BIBLICAL WORLD (Ken M. Campbell ed., 2003) (presenting accounts of marriage and family in the ancient Near East, ancient Israel, ancient Greek society, Roman society, Second Temple Judaism, and the New Testament).

from both religion and government.[16] Marriage was predominantly sociological—"an institution for protecting the assets and interests of the elites"—and generally lacked a transcendent purpose.[17]

With the advent and rise of Christianity, religious thought began to shape the institution of marriage.[18] Thus, not only did marriage remain a natural and a contractual relationship, but it also evolved into a distinctly religious endeavor, a sacrament.[19] As such, marriage and its mandates—for example, marital fidelity—were enforced not by the courts of the state, but by courts of the Catholic Church.[20] Although marriage as sacrament later was abandoned in the Anglo tradition during the English Reformation,[21] the "divine origin of marriage" nevertheless remained central to legal thought, as evidenced by the "English ecclesiastical courts retain[ing] jurisdiction over marriage and its incidents" until 1857.[22]

According to Christian philosophy, exemplified in the writings of Augustine, the purpose of marriage was threefold: procreation, fidelity, and permanence.[23] These formulations of marital purpose endured into the early American common law.[24] Courts of the day used language referencing the divine origin of marriage—particularly the paramount divine purpose of procreation—in their judicial opinions.[25] American courts persisted in invoking the religious origins of marriage well into the twentieth century to support their legal reasoning—at times even resorting to the citation of scripture.[26]

Today, although a significant percentage of Americans view marriage as a legal matter left for the courts, a majority of Americans nevertheless sees

16. *See* ERWIN J. HAEBERLE, THE SEX ATLAS: A NEW ILLUSTRATED GUIDE 408–09 (1978). *See generally* SUSAN TREGGIARI, ROMAN MARRIAGE: IUSTI CONIUGES FROM THE TIME OF CICERO TO THE TIME OF ULPIAN (1991).

17. *See* Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. PUB. L. 449, 451 (2004). Thus, ancients developed the "bride-price" concept, whereby a suitor provided a "bride-wealth" in exchange for his bride-to-be's consent. *See* Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 203–04 (1986). This does not imply that brides were treated as property—rather, the importance and value of marriage was reflected in its relation to property. *Id.* at 203–04 & n.49.

18. *See* Charles J. Reid, Jr., *Marriage: Its Relationship to Religion, Law, and the State*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 157, 159 (Douglas Laycock et al. eds., 2008).

19. *See* JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 22–23, 26–30 (1997).

20. *See id.* at 30–32; *see also* Weinstein, *supra* note 17, at 214.

21. *See* Reid, *supra* note 18, at 160 (citing WITTE, *supra* note 19, at 140–53).

22. *Id.* at 161.

23. *See id.* at 159 (citing AUGUSTINE, DE BONO CONIUGALI, DE SANCTA VIRGINITATE (P.G. Walsh ed., 2001)); Reid, *supra* note 17, at 452–53; *see also* WITTE, *supra* note 19, at 21–22.

24. *See* Reid, *supra* note 17, at 462–70 (describing implicit references to the three Augustinian "goods" in nineteenth century judicial decisions and commentaries).

25. *See* Reid, *supra* note 18, at 164–65.

26. *See, e.g.*, *id.* at 166 ("'[M]arriage is a divine institution.'" (quoting Pryor v. Pryor, 235 S.W. 419, 420–21 (Ark. 1921))); *id.* at 172–73 (quoting Maricopa Cnty. v. Douglas, 208 P.2d 646, 651 (Ariz. 1949) (quoting *Genesis* 2:24)).

marriage as principally a religious affair.[27] Our government and laws reflect this belief—indeed, all states recognize civil marriages officiated by members of the clergy.[28] The legislative history of the Defense of Marriage Act[29]—defining marriage as between one man and one woman and providing that states need not recognize any other form of marriage—also appears to ground itself in the religious foundations of marriage.[30] Even the Supreme Court, some argue, has relied on the religious dimension of marriage in its line of cases upholding a fundamental right to marry.[31]

The legal institution of marriage in America is thus an institution that, although secular in form, derives from unavoidably religious origins and retains ineluctably religious value.[32]

2. The Secular Importance of Marriage: Legal Recognition and Ramifications

The state has long retained sovereignty over marriage and, despite some constitutional limits, possesses the power to regulate and control entrance into it, and exit from it.[33] The legal recognition of marriage serves many purposes. The Supreme Court, in a decision regarding marital rights for prison inmates, identified several "important attributes of marriage": marriage as "expression[] of emotional support and public commitment," marriage as an institution of "spiritual significance," and marriage as a "precondition to the receipt of governmental benefits."[34] Thus, the Court has recognized that there is both a religious and a secular dimension to

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27. *See* Douglas Laycock, *Afterword*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 18, at 189, 205 (citing a 2003 poll indicating that fifty-three percent of Americans hold this view compared to thirty-three percent who view marriage as legal in nature).

28. *See* Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1137 (2009).

29. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006)).

30. *See* H.R. REP. NO. 104-664, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919 ("For many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities."); *id.* ("[T]he fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect.").

31. *See* Dane, *supra* note 28, at 1151–52 (referencing Loving v. Virginia, 388 U.S. 1 (1967) and Zablocki v. Redhail, 434 U.S. 374 (1978)); *see also infra* note 91.

32. The debate over the religious or secular character of marriage rages on, particularly in the context of same-sex marriage. *Compare* Dane, *supra* note 28, at 1129, 1159–72 (arguing that marriage is not a "wholly secular institution," and instead has irreducibly religious elements), *with* Laycock, *supra* note 27, at 201–07 (arguing for a clear separation of legal from religious marriage). In the recent battle over California's constitutional amendment banning same-sex marriage, the proponents advanced only secular justifications, according to the court, because the proponents "[p]erhaps recogniz[ed] that Proposition 8 must advance a secular purpose to be constitution." *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010).

33. *See Loving*, 388 U.S. at 7 ("[M]arriage is a social relation subject to the State's police power." (citing Maynard v. Hill, 125 U.S. 190 (1888))); *see also* Commonwealth v. Stowell, 449 N.E.2d 357, 360 (Mass. 1983).

34. Turner v. Safley, 482 U.S. 78, 95–96 (1987).

marriage, the latter located in part in the grant of certain benefits to married couples and not to others.[35]

The governmental benefits of marriage are many and varied, including Social Security and tax advantages, health benefits for government employees, and hospital visitation rights.[36] Indeed, Massachusetts alone has "'hundreds of statutes' . . . related to marriage and marital benefits."[37] These legal advantages of marriage remain central concerns in the recent and persistent national debate over same-sex marriage.[38]

B. The Criminalization of Adultery

Having described the legal origin and benefits of marriage, a condition necessary to be charged with the crime of adultery, this Note continues by outlining the history of the criminalization of adultery. As one of the criminal laws' means of protecting the institution of marriage, the history of marriage and the history of adultery's proscription—not surprisingly—run largely parallel. The road to the current status of adultery laws provides an understanding of the states' interests in preserving the criminal ban.

1. A Brief History of the Crime of Adultery[39]

As long as there has been monogamous marriage, there has been both the act of, and retribution for, infidelity.[40] All ancient cultures, from the Far Easterners to the Greco-Romans to the Eastern Europeans, punished adultery in one form or another.[41] One of the earliest and most well-known ancient adultery bans is present in the Ten Commandments: "You shall not commit adultery."[42] As Christianity spread, "adultery became a sin as well as a wrong against the husband."[43] As such, criminal prosecutions for

35. *See id.*

36. *See generally* Donald J. Cantor, *The Practical Benefits of Marriage*, *in* SAME-SEX MARRIAGE: THE LEGAL AND PSYCHOLOGICAL EVOLUTION IN AMERICA 135 (Donald J. Cantor et al. eds., 2006) (compiling governmental benefits of marriage).

37. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955–56 (Mass. 2003) (collecting statutes).

38. *See, e.g.*, Monica Davey, *Gay Couples in Iowa Win Right To Wed*, N.Y. TIMES, Apr. 4, 2009, at A1 (reporting the invalidation of an Iowa law limiting marriage to heterosexual unions); Abby Goodnough, *Gay Rights Rebuke May Result in a Change in Tactics*, N.Y. TIMES, Nov. 5, 2009, at A25 (describing Maine voters' referendum blocking same-sex marriage). *See generally* SAME-SEX MARRIAGE: THE LEGAL AND PSYCHOLOGICAL EVOLUTION IN AMERICA, *supra* note 36.

39. For a detailed history of ancient adultery laws, see Daniel E. Murray, *Ancient Laws on Adultery—A Synopsis*, 1 J. FAM. L. 89 (1961).

40. *See id.* at 89 ("The history of man indicates that as soon as he created the relationship of marriage, 'adultery was not far behind.'").

41. *See id.* at 91–103. For a collection of adultery prosecutions and sentences in ancient Roman times, see TREGGIARI, *supra* note 16, at 509–10.

42. *Deuteronomy* 5:18 (King James); *Exodus* 20:14 (King James).

43. Weinstein, *supra* note 17, at 207.

adultery were not favored in the common law of England, and enforcement was left to the courts of the church.[44]

Although America inherited much of England's common law, several early American colonies—with their Puritanical bent—broke from the English legal tradition and made adultery a capital offense, deriving authority for this punishment from religion.[45] Other punishments for adultery in the colonies included eighty lashes and the now-infamous "scarlet letter."[46] Adultery during this time "was seen almost entirely as an offense against morality and chastity," with almost no secular justification.[47] Despite rare enforcement of the laws, adultery remained a criminal offense through the time of the founding, and well into the twentieth century.[48]

2. Adultery Bans in the Present Day

a. State Survey

Adultery is recognized by most states as grounds for divorce,[49] but is a crime in only twenty-three states.[50] Adultery is a misdemeanor in a majority of these states,[51] but is punished as a felony in some.[52]

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44. *See* Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 47–48 (1991); *cf. supra* note 22 and accompanying text (English ecclesiastic courts have jurisdiction over marriage).

45. *See* Meghan E.B. Norton, *The Adulterous Wife: A Cross-Historical and Interdisciplinary Approach*, 16 BUFF. WOMEN'S L.J. 1, 3–4 (2008) ("The church was also a source for the law's power to condemn someone to death for committing adultery . . . ." (citing MARY BETH NORTON, FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY 325 (1996))); *see also* Siegel, *supra* note 44, at 48.

46. *See* Siegel, *supra* note 44, at 48 (referencing Nathaniel Hawthorne's well-known novel, *The Scarlet Letter*); Jonathan Turley, *Of Lust and the Law*, WASH. POST, Sept. 5, 2004, at B1.

47. Weinstein, *supra* note 17, at 225–26.

48. *See* Siegel, *supra* note 44, at 49; Melanie C. Falco, Note, *The Road Not Taken: Using the Eighth Amendment To Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts*, 82 N.C. L. REV. 723, 744 & nn.171–74 (2004).

49. *See generally* POSNER & SILBAUGH, *supra* note 9, at 103–10.

50. *See* ALA. CODE § 13A-13-2 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 13-1408 (2010); COLO. REV. STAT. § 18-6-501 (2009); FLA. STAT. ANN. § 798.01 (West 2007); GA. CODE ANN. § 16-6-19 (2007); IDAHO CODE ANN. § 18-6601 (2004); 720 ILL. COMP. STAT. ANN. 5/11-7 (West 2010); KAN. STAT. ANN. § 21-3507 (2007); MD. CODE ANN., CRIM. LAW § 10-501 (LexisNexis 2009); MASS. ANN. LAWS ch. 272, § 14 (LexisNexis 2010); MICH. COMP. LAWS ANN. § 750.30 (West 2004); MINN. STAT. ANN. § 609.36 (West 2009); MISS. CODE ANN. § 97-29-1 (West 2009); N.H. REV. STAT. ANN. § 645:3 (LexisNexis 2007); N.Y. PENAL LAW § 255.17 (McKinney 2010); N.C. GEN. STAT. § 14-184 (2009); N.D. CENT. CODE § 12.1-20-09 (1997); OKLA. STAT. ANN. tit. 21, § 871 (West 2002); R.I. GEN. LAWS § 11-6-2 (2002); S.C. CODE ANN. § 16-15-60 (2009); UTAH CODE ANN. § 76-7-103 (LexisNexis 2008); VA. CODE ANN. § 18.2-365 (2009); WIS. STAT. ANN. § 944.16 (West 2005).

51. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1408; 720 ILL. COMP. STAT. ANN. 5/11-7; N.H. REV. STAT. ANN. § 645:3.

52. *See, e.g.*, MASS. ANN. LAWS ch. 272, § 14, ch. 274, § 1; MICH. COMP. LAWS ANN. § 750.30.

Punishments range from nominal fines[53] to jail time.[54] The definitions of an adultery offense, as well as the conditions for initiating prosecution, vary from state to state, but all ban in some form this particular brand of adult consensual sexual activity.[55] Nevertheless, adultery proscriptions are rarely if ever enforced.[56]

While some of the current adultery bans were originally enacted in the nineteenth century,[57] others were enacted or re-enacted much more recently.[58] Some laws were on the books until only recently.[59] Others have

53. *See* MD. CODE ANN., CRIM. LAW § 10-501 (fine of ten dollars).

54. *See* IDAHO CODE ANN. § 18-6601 (up to one year in county jail or up to three years in state penitentiary); N.Y. PENAL LAW § 255.17 (listing adultery as a "class B misdemeanor," which can lead to a sentence of up to three months, *see* N.Y. PENAL LAW § 70.15(2)).

55. For example, some states require the conduct to be "open and notorious," while others criminalize the adulterous act per se. *Compare* 720 ILL. COMP. STAT. ANN. 5/11-7 (requiring adulterous behavior to be "open and notorious"), *with* R.I. GEN. LAWS § 11-6-2 (having no requirements other than sexual intercourse with a married person). Several states do not allow for prosecution unless initiated by the complaint of the offended spouse. *See* ARIZ. REV. STAT. ANN. § 13-1408(B); MINN. STAT. ANN. § 609.36(2); N.D. CENT. CODE § 12.1-20-09(2). Minnesota limits adultery to sexual intercourse with a married woman; intercourse with a married man does not constitute adultery. MINN. STAT. ANN. § 609.36.

56. Compare with the military, in which criminal prosecution of adultery under Article 134 (the "General Article") of the Uniform Code of Military Justice is not uncommon, and incarceration is a very real possibility. *See, e.g.*, United States v. Moore, ACM 37286, 2009 WL 1508506 (A.F. Ct. Crim. App. May 21, 2009) (upholding the lower court's sentence to discharge for, inter alia, an adultery conviction); United States v. Orellana, 62 M.J. 595 (N-M. Ct. Crim. App. 2005) (affirming the lower court's conviction and confinement sentence), *review denied*, 63 M.J. 295 (C.A.A.F. 2006). *See generally* Walter T. Cox, III, *Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed*, 14 DUKE J. GENDER L. & POL'Y 791, 795–99 (2007). Conviction for adultery in the military, however, requires conduct that was "to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. 4, ¶ 62 (2008), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2008.pdf. The military-specific rational for criminalizing adultery has been explained by one court:

> [T]he military has a particular interest in promoting the preservation of marriages within its ranks. Because military families are often required to endure extended separations from a spouse due to operational commitments, commanders have a unique responsibility to ensure that the morale of their deployed personnel (and that of the spouses left behind) is not adversely affected by concerns over the integrity of their marriages.

Orellana, 62 M.J. at 601.

One scholar has argued that military proscriptions of adultery are unconstitutional under *Lawrence v. Texas*, because such criminalization serves only to enforce a moral code. *See* Christopher Scott Maravilla, *The Other Don't Ask, Don't Tell: Adultery Under the Uniform Code of Military Justice After* Lawrence v. Texas, 37 CAP. U. L. REV. 659, 661 (2009). *But cf. infra* text accompanying notes 271–74.

57. *See* POSNER & SILBAUGH, *supra* note 9, at 107, 109 (Mississippi in 1848, Rhode Island in 1896).

58. *See, e.g.*, 1977 Ala. Acts 812, 909; 2002 Md. Laws 197, 732; *see also infra* notes 66–75 and accompanying text (detailing the 1965 enactment of New York's current adultery law).

59. *See* W. VA. CODE ANN. § 61-8-3 (LexisNexis 2009) (repealed 2010); *see also* 50 D.C. Reg. 10996 (Dec. 26, 2003) (repealing section 22-201 of the D.C. Code).

survived recent repeal attempts.[60] The commentary accompanying section 13A-13-2 of the Alabama Code provides a likely rationale as to why many adultery laws have not been repealed to this day: "While there is strong sentiment that adultery should not be regulated by criminal sanction, . . . the *political* success of a proposal formally to abolish this crime would, at the present time, be doubtful."[61]

b. The Legislative History of New York's Current Adultery Ban

The justifications for and the legislative history of adultery laws are critical components of a constitutional analysis of adultery, within either a substantive due process rubric (where a statute must be either rationally related to a legitimate state purpose or narrowly tailored to serve a compelling state interest)[62] or an Establishment Clause framework (where the actual legislative purpose must not be religious).[63] This section examines a case in point: the enactment of New York's current adultery ban.[64]

While New York has long criminalized adultery,[65] New York's present-day ban was enacted in 1965.[66] In the early 1960s, New York convened a Temporary Commission on Revision of the Penal Law and Criminal Code charged with studying and proposing revisions to its criminal code, which had not been fully updated since 1881.[67] The Commission presented its entire proposal to the state legislature.[68] The proposal purposely excluded an adultery ban (as well as a sodomy ban), stating that adultery "is a matter of private morality, not of law."[69]

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60. *See, e.g.*, Alberta I. Cook, *Adultery Statute Survives Debate in New Hampshire*, NAT'L L.J., Apr. 20, 1987, at 14; Turley, *supra* note 46 ("Virginia, which is seeking to repeal its anti-fornication and anti-sodomy statutes, decided to keep adultery a crime.").

61. ALA. CODE § 13A-13-2 (LexisNexis 2005) (emphasis added) (commentary accompanying statute). The commentary further states that "formal repudiation of the adultery offense was premature," and that "it may prove useful on occasions, as for example in plea bargaining." *Id.*

62. *See infra* notes 80–85 and accompanying text.

63. *See infra* Part I.E.

64. Section 255.17 of New York's Penal Law specifically provides that "[a] person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse." N.Y. PENAL LAW § 255.17 (McKinney 2010); *see supra* note 54.

65. New York's first adultery ban was enacted in 1907. *See* S.N. Tuckman, *Unfaithfulness a Crime: Effect of the Laws of 1907 upon Divorce Procedure*, N.Y. TIMES, Aug. 23, 1907, at 6.

66. 1965 N.Y. Laws 2683, 2683 (codified at N.Y. PENAL LAW § 255.17).

67. *See* N.Y. PENAL LAW § 255.17 note (William C. Donnino, Practice Commentary); John Sibley, *Overhaul Urged for Penal Code*, N.Y. TIMES, Mar. 17, 1964, at 1.

68. *See* Sibley, *supra* note 67.

69. *See id.* The Practice Commentary notes that:

> A majority of the Commission was of the opinion that the basic problem is one of private rather than public morals, and that its inclusion in a criminal code neither protects the public nor acts as a deterrent. It was further noted that proscribing conduct which is almost universally overlooked by law enforcement agencies tends to weaken the fabric of the whole penal law.

Over a year after the Commission's report was presented to the legislature, the New York State Assembly, with praise for the Commission and its chair, addressed and passed the revised code without an adultery ban.[70] Almost immediately, however, Assemblyman Julius Volker introduced amendments to the penal law to reinstate the adultery and sodomy provisions, citing the churchmen's fears.[71] Soon thereafter, the Assembly "voted overwhelmingly" to retain both the adultery and the sodomy ban.[72] The New York State Senate quickly followed suit.[73]

On June 15, 1965, Assemblyman Volker sent the bill to the Governor's office for approval, explaining the purpose for introducing the bill:

> The reaction to the omission of [the adultery and sodomy] offenses was so great, as expressed in letters, in the statements of church people at the hearings before the Commission, and in newspaper stories, that the minority members on the Commission decided to present the question to the Legislature by two separate bills. . . .
>
> The introducers of these bills agree with the representatives of the various churches that to omit these crimes from the new Penal Law would amount to tacit approval of immoral conduct. The introducers believe that the Legislature of the State of New York is not less conscious of the desires of the great majority of the people to present an aspect of a society which believes in good morals and in observing the conventions.[74]

Governor Nelson A. Rockefeller approved the Volker amendments soon thereafter as a package with the entire penal code revision without addressing their merits. According to the Governor, "[i]t was evident that the main bills would not have passed the Legislature without . . . assurance" that the amendments would be part of the package.[75]

N.Y. PENAL LAW § 255.17 note (William C. Donnino, Practice Commentary).

70. *See* John Sibley, *Assembly Passes a Total Revision of the Penal Law*, N.Y. TIMES, June 4, 1965, at 1.

71. *See id.* ("Mr. Volker said his bills were 'inspired by the entreaties of churchmen who fear we would be appearing to give passive approval to deviant sexual practices.'"); *see also* Emanuel Perlmutter, *Catholics and Episcopalians Differ on Law for Sex Deviates*, N.Y. TIMES, Nov. 26, 1964, at 1 (reporting on the Commission's public hearings and noting the Catholic spokesmen's entreaty to reinstate the adultery provision, stating that "adultery is a serious threat to the marriage bond, undermines family life and endangers the common good").

72. John Sibley, *Assembly Keeps Ban on Adultery*, N.Y. TIMES, June 8, 1965, at 1. Assemblyman Richard J. Bartlett, the chair of the Temporary Commission, opined that the Legislature acted to restore the adultery ban "upon the theory that elimination of this crime might be publicly construed as legislative approval of adultery." *See* Memorandum of Assemblyman Richard J. Bartlett on Penal Law Revision, *reprinted in* 1965 N.Y. ST. LEGIS. ANN.51.

73. John Sibley, *Senate Accepts Ban on Adultery*, N.Y. TIMES, June 10, 1965, at 43.

74. Letter from Julius Volker, Assemblyman, N.Y. State Assembly, to Sol Neil Corbin, Counsel to Governor Nelson Rockefeller (June 15, 1965), *microformed on* Bill Jacket, A.I. 4972, Pr. 5147, Ch. 1037, at C2 (accompanying bill sent to the governor for approval).

75. Memorandum of Governor Rockefeller on Approval, *reprinted in* 1965 N.Y. ST. LEGIS. ANN. 530, 531.

To summarize, New York enacted its current adultery ban over recommendations to the contrary, not for facially secular reasons (i.e., to prevent harm to innocent parties, to limit the spread of disease, or to protect the institution of marriage),[76] but—at least according to the bill's sponsor (and prompted by community outrage from the church)—to avoid the "tacit approval of immoral conduct."[77] This Note revisits New York's enactment in Parts II and III.

C. Substantive Due Process and the Right to Privacy

The Court has developed the doctrine of substantive due process over the years as it struggled to balance an individual's freedom against the needs of government. A contradiction in terms, "substantive due process" refers to the Court's application of the Due Process Clause of the Fourteenth Amendment to invalidate certain state action and to the analysis the Court uses in so doing. Indeed, substantive due process is the mechanism by which the Court has protected a certain scope of liberty from encroachment by government action.[78] This section provides a brief background of the Court's substantive due process doctrine, and summarizes its landmark ruling in *Lawrence v. Texas*,[79] the case that challenges the footing upon which the validity of adultery laws rests.

1. The Doctrinal Formulation

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[80] Modern substantive due process doctrine has developed into a two-step inquiry. First, a court inquires whether a "fundamental right" is at stake.[81] If so, then a "strict scrutiny" standard of review applies—there must be a "compelling state interest" and the state action must be "narrowly tailored" to serve that state interest.[82] If there is no fundamental right at stake, then the "rational basis" standard is applied—the statute must be only "rationally related" to a merely legitimate state interest.[83]

To determine whether a fundamental right is at stake, as opposed to some other mere "liberty interest," the Court generally applies a formulation that finds root in Justice Benjamin N. Cardozo's opinion for the Court in *Palko*

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76. *Cf. infra* Part II.A.2.a (noting that these goals are often cited as arguably legitimate state interests advanced by adultery bans).

77. *See* Letter from Julius Volker, *supra* note 74; text accompanying *supra* note 74.

78. *See infra* Part I.C.1.

79. 539 U.S. 558 (2003).

80. U.S. CONST. amend. XIV, § 1.

81. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

82. *See id.* at 721 (citing Reno v. Flores, 507 U.S. 292, 302 (1993)); *see also* Roe v. Wade, 410 U.S. 113, 155–56 (1973).

83. *See Glucksberg*, 521 U.S. at 728 (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993); *Flores*, 507 U.S. at 305).

v. Connecticut.[84] Specifically, the Court finds a fundamental right where it is "implicit in the concept of ordered liberty"—that is, a right "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[85]

The Court recognized early in the twentieth century the fundamental importance of the intimate family in upholding the right to direct the upbringing of one's children.[86] The Court also foreshadowed the heightened importance of the institution of marriage and its procreative purposes.[87] The Court, however, entered the modern "right to privacy" age of substantive due process with its 1965 contraception decision in *Griswold v. Connecticut*.[88]

In *Griswold*, the Court invalidated a statute banning the sale of contraceptives to married couples.[89] In a terse opinion, Justice Douglas, writing for the Court, identified a right of personal privacy within the "penumbras" and "emanations" of the specific guarantees of the Bill of Rights.[90] Relying on the special character of the institution of marriage—a "way of life," a "harmony in living," a "loyalty," a "noble" purpose—the Court struck the Connecticut statute.[91] Several years later, the Court, in an Equal Protection decision invalidating a Massachusetts statute banning the distribution of contraceptives, unhooked *Griswold*'s analysis from the institution of marriage.[92] In *Eisenstadt v. Baird*, the Court emphasized that a marriage is a union of two individuals, and that "it is the right of the

84. 302 U.S. 319 (1937).

85. *Id.* at 325. This formulation has been widely cited. *See, e.g.*, *Glucksberg*, 521 U.S. at 721; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 951 (1992) (Rehnquist, C.J., concurring in the judgment in part, dissenting in part); Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986); Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring in the judgment). "Careful description" of the asserted right is also required. *See Glucksberg*, 521 U.S. at 721 (citing *Flores*, 507 U.S. at 302; Collins v. Harker Heights, 503 U.S. 115, 125 (1992); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990)).

86. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

87. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *cf. supra* notes 23–26 and accompanying text (discussing the Augustinian marital "good" of procreation and its permeation into the American common law).

88. 381 U.S. 479 (1965).

89. *Id.* at 486.

90. *Id.* at 484.

91. *Id.* at 486; *cf. id.* at 495 (Goldberg, J., concurring) ("[T]he rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."). The Court has viewed the choice to enter into, and exit from, marriage as fundamentally important. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating an anti-miscegenation statute under the Due Process Clause by recognizing an unqualified freedom to marry which "cannot be infringed by the State"); *see also* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("[T]he right to marry is of fundamental importance for all individuals."); Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (relying on "the basic position of the marriage relationship in this society's hierarchy of values" in prohibiting states from burdening one's access to the courts in seeking a divorce).

92. Eisenstadt v. Baird, 405 U.S. 438 (1972).

individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[93] The Court later affirmed *Eisenstadt*'s dicta regarding *Griswold* in expressly holding that *Griswold* protects not a married couple's, but rather an individual's freedom to choose contraception.[94]

Whether to bear a child is the critical decision a would-be mother makes in contemplating an abortion, and is the critical liberty the Court addressed in *Roe v. Wade*[95] and later revisited in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[96] Expanding upon the protections of *Griswold* and *Eisenstadt*, the Court in *Roe* recognized that the right to choose whether to have an abortion is a fundamental right.[97] The Court, applying strict scrutiny, found a compelling state interest—at least after a certain point in the pregnancy—in regulating this choice.[98] *Casey*, although expanding the reach of this compelling state interest, nevertheless affirmed *Roe*'s fundamental rights holding.[99]

2. *Lawrence v. Texas* and the Right to Sexual Privacy

The line of cases discussed in Part I.C.1 established a right to privacy in matters of intimate human relationships. This right is related to (though not confined to) the institution of marriage—namely to marry,[100] to have and use contraception,[101] and to have an abortion.[102] *Lawrence v. Texas*,[103] however, addressed an altogether separate intimate human relationship—sexual intimacy.

a. The Lawrence v. Texas *Decision*

In 2003, the Supreme Court in *Lawrence v. Texas* invalidated a Texas statute criminalizing consensual homosexual sodomy among adults.[104] The challenge was brought by John Geddes Lawrence who, along with Tyron

93. *Id.* at 453 (emphasis in original).
94. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977).
95. 410 U.S. 113 (1973).
96. 505 U.S. 833 (1992).
97. *See Roe*, 410 U.S. at 153 ("The right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").
98. *See id.* at 162–64. In *Roe*, the compelling state interests were "preserving and protecting the health of the pregnant woman" and "protecting the potentiality of human life" (i.e., the fetus) after a certain point during the pregnancy. *See id.* at 162–63; *cf. infra* notes 333–36 and accompanying text (noting that the legislature's actual purpose in passing the anti-abortion statute of *Roe* was consistent with the state interest asserted during the litigation).
99. *See Casey*, 505 U.S. at 852–53.
100. *See supra* note 91.
101. *See supra* notes 89–94 and accompanying text.
102. *See supra* notes 95–99 and accompanying text.
103. 539 U.S. 558 (2003).
104. *Id.*

Garner, was arrested by police who observed him engaging in anal sex.[105] The defendants were charged with violation of a statute prohibiting "deviate sexual intercourse with another individual of the same sex."[106] The Harris County Criminal Court, and the Court of Appeals of Texas, Fourteenth District sitting en banc, both upheld the statute against both an Equal Protection and Due Process challenge, relying primarily on the Supreme Court's decision in *Bowers v. Hardwick*.[107]

The Supreme Court in *Lawrence* began its analysis by reviewing *Griswold*, *Eisenstadt*, *Roe*, and *Carey v. Population Services International*[108]—the Court's major substantive due process privacy decisions predating *Bowers*.[109] The Court reconsidered the *Bowers* decision, which addressed a similar Georgia statute with a similar factual background.[110] Justice Kennedy, writing for the Court, criticized *Bowers* as "misapprehend[ing] the claim of liberty there presented to it" as a right to engage in homosexual sodomy.[111] Instead, the Court cast the liberty at stake more generally, as "sexuality find[ing] overt expression in intimate conduct with another person."[112] Furthermore, the Court not only criticized *Bowers*' account of history,[113] but also rejected the temporal scope of the account, finding "our laws and traditions in the past half century [to be] of most relevance."[114] The Court thus identified "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[115] Noting that the *Bowers* holding was further eroded by *Casey*[116] and *Romer v. Evans*,[117] the Court expressly overruled *Bowers*.[118]

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105. *Id.* at 562–63.

106. *Id.* at 563 (quoting TEX. PENAL CODE ANN. § 21.06(a) (West 2003)).

107. *Id.* (citing Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld the constitutionality of a Georgia statute criminalizing sodomy, as being authoritative at the time).

108. 431 U.S. 678 (1977).

109. *See Lawrence*, 539 U.S. at 564–66; *cf. supra* notes 89–99 and accompanying text (discussing *Griswold*, *Eisentstadt*, and *Roe*).

110. *Lawrence*, 539 U.S. at 566.

111. *Id.* at 567.

112. *See id.* The Court apparently did not cabin this intimate association to long-term or "meaningful" relationships, given the "seemingly casual" nature of the conduct at issue. *See* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1904 (2004); *cf. infra* notes 142–50 and accompanying text (noting that the Court's intimate association jurisprudence considers the extent of "meaningfulness" of the relationship at issue, impliedly excluding mere "casual" encounters). For more on the effect of the level of generality at which an asserted right is analyzed on the outcome of the substantive due process analysis, see *infra* note 132.

113. *See Lawrence*, 539 U.S. at 568–71 (concluding that *Bowers*' "historical premises are not without doubt and, at the very least, are overstated").

114. *Id.* at 571–72.

115. *Id.* at 572.

116. *See id.* at 573–74 (citing *Casey*'s affirmation of "personal dignity and autonomy" in existential matters as central to the Fourteenth Amendment's liberty).

117. *See id.* at 574–75 ("When homosexual conduct is made criminal . . . , that declaration in and of itself is an invitation to subject homosexual persons to

Having overruled the apposite precedent, the Court invalidated the Texas statute as "further[ing] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[119] The Court did, however, limit the reach of its holding, qualifying that the case "does not involve minors . . . persons who might be injured . . . [or] public conduct or prostitution."[120] Apparently departing from traditional substantive due process analysis, the Court neither recounted nor specifically addressed the state interest that Texas asserted.[121]

b. Justice Scalia's Dissent

The *Lawrence* decision was not without its strong critics—particularly from within the *Lawrence* Court itself. Justice Scalia, imputing application of modern substantive due process doctrine to the majority's opinion, argued in dissent that the Court applies "an unheard-of form of rational-basis review that will have far-reaching implications beyond this case."[122] Recounting the modern calculus used to identify whether a fundamental right is at stake, Justice Scalia asserted that *Lawrence* does not overrule *Bowers*' core holding—that there is no fundamental right of homosexual sodomy—because the Court neither expressly announced a new fundamental right nor applied "strict scrutiny."[123]

Despite asserting that "the Court does not have the boldness" to announce a new fundamental right,[124] Scalia nevertheless did not ignore, and instead rebutted, the majority's reasoning undermining *Bowers*' holding

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discrimination . . . ." (considering an Equal Protection argument based on Romer v. Evans, 517 U.S. 620 (1996))).

118. *Id.* at 578 ("*Bowers* was not correct when it was decided, and it is not correct today.").

119. *Id.* at 578. Justice Scalia, writing in dissent, criticized this statement as reflecting an application of the "rational basis" standard. *See id.* at 594 (Scalia, J., dissenting). Whether the Court applied "strict scrutiny" or "rational basis"—and by extension whether the Court recognized a new "fundamental right"—has been debated among courts and in the academy. *See infra* Part I.C.2.c.

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

121. The asserted state interest was "the promotion of morality." *See id.* at 582 (O'Connor, J., concurring in the judgment). Whether morality *simpliciter* is a sufficiently legitimate state interest to survive either "strict scrutiny" or even "rational basis" review is one issue that continues to be addressed in the scholarly fallout of the *Lawrence* decision. *See, e.g.*, Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1236 (2004) (arguing that morality can suffice as a legitimate state interest after *Lawrence* if grounded in empirical fact); Gregory Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 7 (2006) (distinguishing between private morality and morality that serves a public order function); Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159, 161 (2003) (distinguishing between "morality simpliciter" and "purposive morality" as illegitimate and legitimate justifications, respectively).

122. *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

123. *See id.* at 586, 593–94 (citing, inter alia, Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

124. *Id.* at 594.

and arguably supporting a new fundamental right.[125] Scalia highlighted the inherent illogic of an "emerging awareness" being "deeply rooted," and further rebutted the factual premise of the "emerging awareness" by identifying, inter alia, long histories of adultery and prostitution proscriptions as counterexamples to the recognition of privacy in "matters pertaining to sex."[126]

Justice Scalia, believing that the Court applied a "rational-basis" test, thus feared that *Lawrence* "effectively decrees the end of all morals legislation."[127] According to Justice Scalia, "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" are no longer valid under *Lawrence* because they are supported by a now-illegitimate state interest, namely "the promotion of majoritarian sexual morality."[128]

c. The Lawrence*-ian Controversy*

As Justice Scalia's dissent portended, the failure of the *Lawrence* Court to use traditional substantive due process language left room for debate as to *Lawrence*'s holding and its reach. Did *Lawrence* announce any fundamental right or apply some form of heightened scrutiny?[129] Professor Laurence H. Tribe argues that, despite not using the exact verbiage, *Lawrence* did indeed apply strict scrutiny, and thus recognized a fundamental right.[130] Professor Nan Hunter agrees that the Court recognized a liberty interest that was on par with a fundamental right, even without using the magic words.[131]

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125. *See id.* at 594–98.

126. *See id.* at 598.

127. *See id.* at 599.

128. *Id.*

129. Lower courts have applied *Lawrence* inconsistently. *Compare* Muth v. Frank, 412 F.3d 808, 817 (7th Cir.) ("*Lawrence* . . . did not announce . . . a fundamental right . . . for adults to engage in all manner of consensual sexual conduct . . . ."), *cert. denied*, 546 U.S. 988 (2005), *and* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815–17 (11th Cir. 2004) (confining *Lawrence* to its facts in concluding that "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right"), *cert. denied* 543 U.S. 1081 (2005), *with* Cook v. Gates, 528 F.3d 42, 51–52 & n.6 (1st Cir. 2008) ("[W]e are persuaded that *Lawrence* did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy . . . ."), *cert. denied sub nom.* Pietrangelo v. Gates, 129 S. Ct. 2763 (2009), *and* Witt v. Dep't of the Air Force, 527 F.3d 806, 816 (9th Cir. 2008) ("We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review."), *reh'g en banc denied*, 548 F.3d 1264 (9th Cir. 2008), *and* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1254 (11th Cir. 2004) (Barkett, J., dissenting) ("*Lawrence* . . . affirm[ed] the right of consenting adults to make private sexual decisions.").

130. *See* Tribe, *supra* note 112, at 1917 & nn.83–84 (citing the Court's reliance on *Griswold* and *Roe*, and invocation of "the talismanic verbal formula . . . [albeit] in one unusual sequence or another").

131. *See* Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1116–17 (2004) (arguing that "the Court characterized the sexual rights at issue in *Lawrence* as *equivalent* to those previously established as fundamental").

If the Court did recognize a right, which right did it recognize? The answer depends on what level of generality one views the Court as having framed and analyzed the issue.[132] Professor Tribe suggests that *Lawrence*'s language is the broadest, a protection of the intimate relationship itself, fleeting though it may have been.[133] Professor Dale Carpenter agrees, finding *Lawrence* to support a right to private consensual sex among adults generally.[134] Others view the protection afforded by *Lawrence* to be much narrower—limited to homosexual sodomy or sodomy per se.[135]

By contrast, some scholars agree with Justice Scalia, interpreting *Lawrence* to have announced no new fundamental right.[136] Under this view, as Justice Scalia suggests, morality alone may indeed no longer be a legitimate state interest sufficient to satisfy "rational basis" review.[137]

Professor Cass Sunstein proffers a unique interpretation of *Lawrence* in which he, like Professor Tribe, finds the Court's analysis inviting of a "fundamental right"-recognizing interpretation.[138] Professor Sunstein, however, interprets the right as a unique "desuetude-informed" fundamental right, as opposed to simple sexual autonomy. [139] Specifically, in Professor Sunstein's view, the rare enforcement of a law itself—suggesting a lack of public support for the law's underlying purpose—delegitimizes the state's

132. The impact of selecting a level of generality is apparent in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), a case addressing the parental rights of a man—having sired a child with a married woman—given California's statutory presumption that a child born to married parents is a child of the marriage. Justice Scalia, writing for the plurality, framed the issue as a right of "an adulterous natural father," and accordingly found no fundamental right. *See id.* at 127 & n.6 (plurality opinion). Justice Brennan, in contrast, argued that the right should be framed more broadly, as a right of "parenthood" per se, and thus argued that there was indeed a fundamental right at stake. *See id.* at 139 (Brennan, J., dissenting). For a general discussion, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

133. *See* Tribe, *supra* note 112, at 1904.

134. *See* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1153 (2004) ("It is a right . . . of adults to engage in a noncommercial, consensual, sexual relationship in private . . . ."); *see also* Joel P. Cummings, *Is Article 125, Sodomy a Dead Letter in Light of* Lawrence v. Texas *and the New Article 120?*, 2009 ARMY LAW. 1, 3.

135. *See, e.g.*, Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1400 (2004) (arguing that *Lawrence* "relies on a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty").

136. *See, e.g.*, Jami Weinstein & Tobyn DeMarco, *Challenging Dissent: The Ontology and Logic of* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 423, 448 (2004) (noting that the Court overruled *Bowers*, which held that there was no fundamental right to commit sodomy, and therefore, by failing to explicitly assert a new fundamental right, failed to recognize one).

137. *See supra* note 121; *see also* Michael P. Allen, *The Underappreciated First Amendment Importance of* Lawrence v. Texas, 65 WASH. & LEE L. REV. 1045, 1055 (2008) (arguing that "*Lawrence* is best understood as prohibiting lawmaking when morality is the sole or dominant justification for acting").

138. *See* Cass R. Sunstein, *What Did* Lawrence *Hold?*, 2003 SUP. CT. REV. 27, 46–48.

139. *See id.* at 50–51.

justification when an important interest, like sexual autonomy, is at stake.[140]

D. The Freedom of Intimate Association

Closely related to the substantive due process right of privacy is the freedom of intimate association.[141] In *Roberts v. United States Jaycees*,[142] the Supreme Court, addressing state action forcing inclusion of women in an all-male organization, identified two types of protected associations: (1) the First Amendment right to associate for the purposes of free speech, assembly, and exercise of religion; and (2) the freedom of choice "to enter into and maintain certain intimate human relationships" on the other.[143] The latter is relevant to this Note as it deals with "highly personal relationships" which are "central to any concept of liberty."[144] The Court, citing a number of substantive due process cases, identified the exemplary relationships as "those that attend the creation and sustenance of the family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives."[145] The Court distinguished such protected relationships from more banal relationships by certain "attributes [including] relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[146]

Three years later, the Supreme Court affirmed the message of *Roberts* and the *Roberts* intimate association factors in *Board of Directors of Rotary International v. Rotary Club of Duarte*.[147] There, the Court, in another case involving forced admission of women into a men-only club, cited *Roberts* in finding no right to intimate association in this context.[148] Reiterating the factors relevant in determining which intimate relationships are protected,[149] the Court specifically noted that "constitutional protection is

140. *See id.* Professor Cass Sunstein differentiates this argument from a "freestanding desuetude" argument—under which some statutes (e.g., those criminalizing private possession of marijuana) could be called into question—on the grounds that there is a "constitutionally fundamental interest" at stake. *See id.* at 51 n.132. Indeed, the notice-due process problem of "freestanding desuetude" is also relevant in adultery. *Cf. supra* note 7 and accompanying text (detailing the lack of enforcement of adultery bans).

141. *See generally* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R. L.J. 269 (2006).

142. 468 U.S. 609 (1984).

143. *Id.* at 617–18.

144. *Id.* at 618–19.

145. *Id.* at 619 (citations omitted).

146. *Id.* at 620.

147. 481 U.S. 537 (1987).

148. *Id.* at 546.

149. *See id.* ("In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." (citing *Roberts*, 468 U.S. at 620)).

[not] restricted to relationships among family members."[150] Thus, between *Roberts* and *Rotary International*, the Court, at least in dicta, has provided a foundation, cumulative to substantive due process, under which an adulterous relationship might be analyzed as "intimate" and considered as constitutionally protected.

E. The Establishment Clause and Personal Liberty

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion."[151] The Supreme Court has read and applied the Establishment Clause somewhat expansively—not merely as a bar against establishing a state religion,[152] but also as a mandate to minimize governmental interference and maximize individual liberty in matters of religion (or irreligion).[153] Although commonly considered, along with the Free Exercise Clause, to maintain the metaphorical "wall" between church and state,[154] the Religion Clauses do not exclude religion or religious discourse from the public sphere completely.[155] Rather, the Establishment Clause serves, inter alia, to

150. *Id.* at 545.

151. U.S. CONST. amend. I. The Establishment Clause has been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

152. The most ominous state establishment at the time of the Founding was the Church of England, and its American progeny. *See generally* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107, 2110–30 (2003).

153. *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 860 (2005) ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))); Wallace v. Jaffree, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) ("Although a distinct jurisprudence has enveloped each of [the Religion] Clauses, their common purpose is to secure religious liberty." (citing Engel v. Vitale, 370 U.S. 421, 430 (1962))); *Epperson*, 393 U.S. at 103 (noting that the values embedded in the Establishment Clause "are rooted in the foundation soil of our Nation" and "are fundamental to freedom").

154. *See* Van Orden v. Perry, 545 U.S. 677, 709 n.4 (2005) (Stevens, J., dissenting) ("[T]his Court . . . has never questioned the concept of the 'separation of church and state' in our First Amendment jurisprudence."). *But see* Edwards v. Aguillard, 482 U.S. 578, 606 (1987) (Powell, J., concurring) ("'[T]his Nation's history has not been one of entirely sanitized separation between Church and State.'" (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973))). Members of the Court have reached no consensus on the role of religion in the founding. *Compare McCreary*, 545 U.S. at 887–88 (Scalia, J., dissenting) (arguing that "those who wrote the Constitution believed that . . . encouragement of religion was the best way to foster morality"), *and Wallace*, 472 U.S. at 100–04 (Rehnquist, J., dissenting) (describing President George Washington's "God"-laden Thanksgiving Day Proclamation given during the time of adoption of the Establishment Clause in its current form), *with Van Orden*, 545 U.S. at 724 (Stevens, J., dissenting) (citing Thomas Jefferson's refusal, on account of the Establishment Clause, to recite Washington's Thanksgiving Proclamation).

155. *See* McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating a law preventing members of the clergy from serving as delegates at Tennessee's 1977 constitutional convention); *cf. Wallace*, 472 U.S. at 91–106 (Rehnquist, J., dissenting) (presenting a detailed originalist account of the adoption of the Establishment Clause and early scholarship, noting the

maintain religious liberty by requiring a true secular purpose for government action.[156] This section discusses the Establishment Clause's secular purpose requirement, and cases that have invalidated laws under the Establishment Clause for lacking such a secular purpose. This Note will derive from this line of Establishment Clause cases what this Note dubs an Establishment Clause prism, through which to view the legitimacy of state interests in a substantive due process analysis.[157]

1. A Secular Purpose: The *Lemon* Test

In *Lemon v. Kurtzman*, the Court consolidated its Establishment Clause jurisprudence by articulating a three-pronged test for determining whether a law respects the establishment of religion in violation of the First Amendment.[158] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"[159] Should a law have no secular purpose, further inquiry is unnecessary, as the law's neutrality or lack of entanglement is impossible.[160] Thus, whether a law has a valid secular purpose is a threshold Establishment Clause inquiry.

In analyzing legislative purpose under the Establishment Clause, the Court has also characterized an invalid government action as that which has the purpose or effect of "endorsing" religion.[161] "Endorsement" is problematic as its principal effect is to treat believers as "insiders," leaving non-believers as "outsiders."[162]

Although oft-criticized by members of the Court and scholars alike, the Court regularly cites and applies the *Lemon* and "endorsement" tests.[163]

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pervasive quality of religion and religious values at the time); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 671 (2001) (suggesting that the Constitution does not prevent state action "based on religiously grounded moral belief").

156. *See infra* text accompanying notes 159–60.

157. *See infra* Part III. In contrast to other areas of law, legislative purpose or intent is the critical determinate of validity under the Establishment Clause. *See McDaniel*, 435 U.S. at 636 n.9; *cf. McCreary*, 545 U.S. at 865 n.13 ("While heightened deference to legislatures is appropriate for the review of economic legislation, an approach that credits any valid purpose, no matter how trivial, has not been the way the Court has approached government action that implicates establishment.").

158. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

159. *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (citing Bd. of Educ. v. Allen, 382 U.S. 236, 243 (1968)).

160. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

161. *See* Allegheny Cnty. v. ACLU, 492 U.S. 573, 592–93 (1989).

162. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *accord* McCreary Cnty. v. ACLU, 545 U.S. 844, 860 (2005).

163. *See, e.g.*, *McCreary*, 545 U.S. at 859–60; Zelman v. Simmons-Harris, 536 U.S. 639, 668 (2002) ("A central tool in our analysis of cases in this [Establishment Clause] area has been the *Lemon* test."). *But see* Van Orden v. Perry, 545 U.S. 677, 685–86 (2005) (plurality opinion) (citing inconsistent application of the *Lemon* test). For an ardent support of the secular purpose prong of the *Lemon* test, see Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).

2. The Establishment Clause at Work

The secular purpose analysis can clearly be seen in the Supreme Court's jurisprudence concerning creationism in public schools, prayer in public schools, and state displays of the Ten Commandments. This section illustrates the Court's approach to these three issues.

a. Creationism in Public Schools

In *Epperson v. Arkansas*,[164] the Court addressed an Establishment Clause challenge to the constitutionality of an Arkansas law prohibiting the teaching of evolution in public schools.[165] The Court found that the statute's sole purpose was to quash school teachings that conflicted with religious doctrine.[166] The Court reached this conclusion by examining in detail the objective legislative purpose of the enactment, as evidenced by the surrounding facts and circumstances.[167] For example, a newspaper advertisement used to garner public support for the enactment forewarned: "Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children?"[168] The Court rejected any argument of "neutrality," and, finding no secular purpose, struck down the law.[169]

In *Edwards v. Aguillard*,[170] the Court revisited a more "neutral" version of the statute at issue in *Epperson*. In *Edwards*, the statute did not proscribe the teaching of evolution outright, but instead required that evolution, if taught at all, be taught alongside "creation science."[171] As in *Epperson*, the Court scrutinized the actual legislative purpose of the statute through a detailed examination of the legislative history.[172] Although the statute's

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An inquiry into the validity of the *Lemon* test is outside this Note's scope. For a discussion of the three-pronged Establishment Clause doctrine under *Lemon*, see Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1 (2002).

164. 393 U.S. 97 (1968).

165. *Id.* at 98.

166. *See id.* at 103.

167. *See id.* at 107–09.

168. *Id.* at 108 n.16. The ad opened with the admonition: "All atheists favor evolution. If you agree with atheism vote against [the law]. If you agree with the Bible vote for [the law]." *Id.* This sort of proselytizing is exactly the kind of endorsement that supports the insider/outsider dichotomy. *See supra* notes 161–62 and accompanying text. Professor Abner S. Greene dubs this a "reference to an extrahuman source of value, of normative authority," which serves to exclude non-believers from meaningful dialogue. *See* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1617, 1621 (1993).

169. *See Epperson*, 393 U.S. at 109 (holding that the law "cannot be defended as an act of religious neutrality" because it "did not seek to excise . . . all discussion of the origin of man" from public schools).

170. 482 U.S. 578 (1987).

171. *Id.* at 581. The statute defined "creation science" as "the scientific evidences for creation and inferences from those scientific evidences." LA. REV. STAT. ANN. § 17:286.3(2) (1982).

172. *See Edwards*, 482 U.S. at 591–93.

express purpose was "to protect academic freedom,"[173] the Court found this to be a sham purpose,[174] and concluded that the law's objectively true purpose "was to restructure the science curriculum to conform with a particular religious viewpoint."[175] The Court thus invalidated the law as violating the Establishment Clause.[176]

b. Prayer in Public Schools

In *Wallace v. Jaffree*,[177] the Supreme Court addressed an Establishment Clause challenge to an Alabama statute authorizing a period of silence for meditation or voluntary prayer in public schools.[178] As with the creationism cases, the Court scrutinized the governmental purpose evidenced by the legislative history of the enactment.[179] The Court found that the statute's purpose was to return prayer to public schools, and thus concluded that, because prayer is religious on its face, the statute had no secular purpose.[180] Instead, the Court invalidated the statute, finding that it endorsed religion by characterizing prayer as a favored practice.[181]

c. The Ten Commandments on Public Property

The State's posting of the Ten Commandments in schools or on public property has prompted Establishment Clause challenges because, like prayer, the Decalogue is inherently religious. At issue in *Stone v. Graham*[182] was a Kentucky statute requiring the posting of the Ten Commandments in every public school classroom.[183] Despite the statute's

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173. *Id.* at 586 (citing LA. REV. STAT. ANN. § 17:286.2 (1982)).

174. *Id.* at 586–87; *see id.* at 587 (reasoning that neither eliminating evolution and creationism from curricula nor requiring both advances academic freedom because it either undermines comprehensive scientific education by elimination or provides no authority that was not already available to choose curricula).

175. *Id.* at 593. *But cf.* Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion As a Hobby*, 1987 DUKE L.J. 977, 981 (arguing that creationism and creation science are not necessarily entirely non-secular, and "that there is a nontrivial hermeneutic and a rational application of it behind the creationist rejection of evolutionary theory").

176. Although secular purpose alone will not save a statute, neither will "a religious purpose alone" invalidate it; "[t]he religious purpose must predominate." *See Edwards*, 482 U.S. at 599 (Powell, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Lynch v. Donnelly, 465 U.S. 608, 681 n.6 (1984)). The fact that a law aligns with a religious belief, inadvertently or otherwise, is not enough to run afoul of the Establishment Clause. *See* Harris v. McRae, 448 U.S. 297, 319 (1980) (citing McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

177. 472 U.S. 38 (1985).

178. *Id.* at 41–42.

179. *See id.* at 56–60.

180. *See id.* at 59. *But see* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayer as constitutional, primarily because of its long-established history, particularly during the time of adoption of the Bill of Rights).

181. *See Wallace*, 472 U.S. at 61.

182. 449 U.S. 39 (1980) (per curiam), *reh'g denied*, 449 U.S. 1104 (1981).

183. *Id.* at 39.

express pretense of secularity,[184] the Court concluded that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[185]

More recently, in *McCreary County v. ACLU of Kentucky*,[186] the Court upheld a lower court's preliminary injunction enjoining the posting of the Ten Commandments in county courthouses as unconstitutionally evidencing a "predominantly religious purpose" in violation of the Establishment Clause.[187] The Court reaffirmed the importance of a detailed inquiry into legislative purpose,[188] and proceeded to analyze the counties' manifest objective purpose.[189] The Court found that "[t]he reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message," and thus invalidated the law under the Establishment Clause.[190]

As these cases demonstrate, the Establishment Clause necessitates a detailed inquiry into the legislative purpose of an enactment to seek out an objectively true secular purpose and to ensure that no religious purpose predominates.[191]

II. ADULTERY BANS AND TRADITIONAL CONSTITUTIONAL DOCTRINE: SUBSTANTIVE DUE PROCESS, INTIMATE ASSOCIATION, AND ESTABLISHMENT CLAUSE ARGUMENTS

Part II of this Note proceeds to examine the various positions on the question of the constitutionality of adultery bans. Part II.A sets forth the "traditional" substantive due process approaches to adultery bans, examining both the "fundamental right" and the "state interest" poles of the

184. *See id.* at 41 ("'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" (quoting KY. REV. STAT. ANN. § 158.178 (LexisNexis 1980))).

185. *Id.* (footnote omitted).

186. 545 U.S. 844 (2005).

187. *Id.* at 851–52, 881.

188. *See id.* at 862 ("[S]crutinizing purpose does make practical sense . . . where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." (citing Wallace v. Jaffree, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring in the judgment))); *cf. id.* at 867 ("[U]nder the Establishment Clause detail is the key." (citing Allegheny Cnty. v. ACLU, 492 U.S. 573, 595 (1989))).

189. *See id.* at 868–69 (noting similarities to the displays in *Stone*, the lack of religious disclaimer, and the presence of the county executive's pastor at their posting in finding no secular purpose).

190. *Id.* at 869.

191. *But see* Van Orden v. Perry, 545 U.S. 677, 690–92 (2005) (plurality opinion) (avoiding an express analysis of the governmental purpose in upholding the legitimacy of a Ten Commandments monument on public grounds, because of its "dual significance, partaking of both religion and government"); McGowan v. Maryland, 366 U.S. 420, 449 (1961) (holding that Sunday closing laws do not violate the Establishment Clause because, despite the unmistakably religious motivation of the original enactment, a secular purpose had evolved such that the law's effect was no longer "to aid religion but to set aside a day of rest and recreation").

calculus. Part II.B discusses whether and how an adulterous relationship has been treated as an intimate association under *Roberts*. Finally, Part II.C discusses how adultery might be analyzed under Establishment Clause doctrine.

A. Substantive Due Process

The line of cases from *Griswold* through *Casey* shows that the Due Process Clause of the Fourteenth Amendment places at least some constitutional limits on a state's ability to regulate certain intimate conduct.[192] The *Lawrence* decision specifically limits the state's ability to regulate some, but not necessarily all, private consensual sexual activity among adults.[193] This section presents the substantive due process arguments regarding the constitutionality of criminal adultery bans. Part II.A.1 examines the first aspect of the inquiry: Is there a fundamental right to adulter? Part II.A.2 examines the second aspect of the inquiry: what the state's interests in regulating adultery are, and whether such state interests are sufficient to withstand either "strict scrutiny" or "rational basis" review.

1. Is There a Fundamental Right To Adulter?

Courts, in order to determine whether a fundamental right is at stake, most often apply the *Palko* formulation, and ask if the asserted right is "implicit in the concept of ordered liberty" and/or "deeply rooted in our history and traditions."[194] The level of generality at which the asserted right is framed is often determinative.[195] Thus, whether the right is framed broadly, as a right to sexual privacy, or more narrowly, as a right to adulter, often pre-determines the outcome of the fundamental rights analysis.[196]

192. *See supra* notes 88–99 and accompanying text.
193. *See supra* Part I.C.2.a.
194. *See supra* notes 84–85 and accompanying text.
195. *See supra* notes 132–35 and accompanying text.
196. This is the very mistake the *Lawrence* Court attributes to the *Bowers* Court. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003). The *Bowers* Court framed the liberty interest narrowly as "a fundamental right to engage in homosexual sodomy." *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986). Read in that way, the Court found no such liberty interest "deeply rooted in this Nation's tradition" or "implicit in the concept of ordered liberty," and instead found a long-standing history of quite the opposite—the criminalization of such conduct. *See id.* at 192–94. The *Lawrence* Court, by contrast, approached the issue more broadly, analyzing the asserted liberty interest as a right for adults to "decid[e] how to conduct their private lives in matters pertaining to sex." *See Lawrence*, 539 U.S. at 572; *see also Bowers*, 478 U.S. at 218 (Stevens, J., dissenting) (identifying the relevant liberty as a "right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral").

a. Arguments Supporting a Fundamental Right

The Virginia Supreme Court, in a case involving a challenge to Virginia's fornication statute, has interpreted *Lawrence* broadly.[197] In *Martin v. Ziherl*, the court viewed *Lawrence* as upholding a right "to enter and maintain a personal relationship without governmental interference."[198] Thus, framing the right infringed by the fornication statute as the right to engage in "certain private sexual conduct between two consenting adults," the court invalidated Virginia's fornication statute.[199] Although the *Martin* decision addressed fornication, not adultery, the similarities of the two offenses and the broad characterization of the right at issue suggest that an analogous application to adultery bans is appropriate.[200] Specifically, under this view, adultery would be encompassed by a general right to sexual privacy that *Lawrence* recognized.[201]

Several commentators agree that adultery is properly characterized as falling within a broad right to sexual privacy recognized by *Lawrence*.[202] Some have even found adultery to fall within a general fundamental right to privacy espoused by the Court in its pre-*Lawrence* jurisprudence.[203]

Even if the fundamental right is framed narrowly, as a right to adulter (i.e., a right to have consensual sex with another while married), plausible arguments remain for considering such a right as "deeply rooted." For example, despite the "ancient roots" of adultery proscriptions, adultery too has a long history, even among government leaders, including a number of

197. *See* Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005). The challenge arose in an unusual context—the plaintiff was seeking damages in tort for injuries inflicted during sexual intercourse with the defendant. *Id.* at 368. Under Virginia common law, no plaintiff could recover damages in tort for injuries suffered while participating in an illegal activity. *Id.* Because both parties were unmarried at the time of the sexual intercourse which led to the injury, the plaintiff was allegedly in violation of Virginia's fornication statute, and was thus unable to recover unless the statute was invalid. *See id.* at 369.

198. *Id.* at 369 (citing *Lawrence*, 539 U.S. at 567). *But see id.* at 370 ("The Supreme Court did not consider the liberty right vindicated in *Lawrence* as a fundamental constitutional right . . . ."). This Janus-like reading of *Lawrence* appears to be a hybridization of the traditional due process calculus. *See infra* notes 251–53 and accompanying text.

199. *See Martin*, 607 S.E.2d at 371; *accord* Hobbs v. Smith, No. 05 CVS 267, 2006 WL 3103008, at *1 & n.1 (N.C. Super. Ct. Aug. 25, 2006) (striking down North Carolina's fornication statute as a violation of "plaintiff's substantive due process right to liberty as explained in [*Lawrence*]").

200. *See* Thong v. Andre Chreky Salon, 634 F. Supp. 2d 40, 46–47 (D.D.C. 2009) (finding nothing in *Martin* to limit its holding to fornication, and implying that it could also apply to adultery); *see also supra* note 10.

201. *See supra* notes 129–34 and accompanying text.

202. *See* Jennifer A. Herold, Note, *A Breach of Vows but Not Criminal: Does* Lawrence v. Texas *Invalidate Utah's Statute Criminalizing Adultery?*, 7 J.L. & FAM. STUD. 253, 259 (2005); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After* Lawrence v. Texas, 39 SUFFOLK U. L. REV. 837, 853–54 (2006). Broad characterization is consistent with Professor Laurence H. Tribe's reading of *Lawrence*. *See supra* notes 130–33 and accompanying text.

203. *See, e.g.*, Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 399, 404–08 (1991); Siegel, *supra* note 44, at 82–86.

U.S. Presidents and at least one Founding Father.[204] Although "rights" are not necessarily equivalent to "practices," the more pervasive an activity is, the harder to distinguish between that which is "deeply rooted" and that which is simply widespread. Nevertheless, the pervasiveness of adultery in our culture today may too reflect an "emerging awareness" that *Lawrence* recognized as relevant to the analysis.[205]

b. Arguments Supporting No Fundamental Right

By contrast, many courts have interpreted *Lawrence* as announcing no new fundamental right, thus arguably confining *Lawrence*'s liberty interest to the specific acts at issue (sodomy or homosexual sodomy), and suggesting that adultery may not be constitutionally protected.[206] Under this view—that *Lawrence* changed nothing outside of the particular sexual conduct at issue—the pre-*Lawrence* analysis of adultery laws by some courts is instructive. In 1983, the Massachusetts Supreme Court directly addressed a substantive due process challenge to the constitutionality of a criminal adultery ban in *Commonwealth v. Stowell*.[207] The court, addressing a facial challenge to the statute, first concluded that the Supreme Court had recognized a fundamental right to privacy "relating to marriage, procreation, and family relations."[208] Framing the asserted right narrowly—analogous to *Bowers*[209]—and citing several federal district court opinions in support, the court held that "there is no fundamental personal privacy right implicit in the concept of ordered liberty barring the prosecution of consenting adults committing adultery in private."[210]

The United States Court of Appeals for the Sixth Circuit recently reached a similar conclusion regarding adultery by framing the asserted liberty as "a right to engage in an intimate sexual relationship with the spouse of another."[211] In *Marcum v. McWhorter*, the Sixth Circuit relied primarily on the historical criminalization of adultery to conclude that adultery was not a fundamental right.[212] By narrowly framing the asserted right, some courts

204. *See, e.g.*, BILL CLINTON, MY LIFE 773–74 (2004) (admitting his extramarital affair with Monica Lewinsky while in office); GORDON-REED, *supra* note 5, at 186–87 (affair of Thomas Jefferson). *See generally* CHARLES W. DUNN, THE SCARLET THREAD OF SCANDAL: MORALITY AND THE AMERICAN PRESIDENCY (2000) (describing the extramarital affairs of Warren G. Harding, Woodrow Wilson, John F. Kennedy, and other U.S. Presidents).

205. *See supra* notes 1–5, 115 and accompanying text.

206. *See supra* notes 129, 135.

207. 449 N.E.2d 357 (Mass. 1983).

208. *Id.* at 359. The Court cited, among others, *Meyer*, *Skinner*, *Griswold*, *Eisenstadt*, *Roe*, and *Loving*. *See supra* notes 86–98 and accompanying text.

209. *See supra* note 196.

210. *Stowell*, 449 N.E.2d at 360 (citations omitted).

211. *See* Marcum v. McWhorter, 308 F.3d 635, 641–42 (6th Cir. 2002); *see also infra* notes 259–63 and accompanying text.

212. *See Marcum*, 308 F.3d at 641–42 (comparing adultery to sodomy in a *Bowers*-like argument, and noting that "proscriptions against adultery have ancient roots"). *But see* Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) (relying on "an emerging awareness"

have been able to rely on the lengthy history of criminally punishing adultery—in this country and elsewhere[213]—in supporting their conclusion that there is no fundamental right to adultery.[214]

2. The State's Interest in Banning Adultery

If there is a fundamental right infringed by an adultery ban, a court would apply a strict scrutiny standard and ask whether there is a compelling state interest in banning adultery and whether the ban is narrowly tailored to meet that interest.[215] If, on the other hand, there is no fundamental right implicated, a court would instead apply a rational basis review, searching only for a legitimate state purpose to which the ban is rationally related.[216] Whatever a court decides, its analysis must include an investigation of the state's interest in and purpose for banning adultery.

a. Arguments That the State's Interest Is Legitimate or Compelling

The regulation of matters involving marriage has always been the province of the police power of the states—from the minimum age to the minimum degree of consanguinity to the grounds for divorce.[217] Additionally, the states, under their sovereign police power, have the authority to propound laws and regulations to protect the health and safety of their citizens.[218] Accordingly, to the extent that adultery is an act that causes harm to the institution of marriage, or to individuals involved in that institution (e.g., spouses and children), the state's interest in banning adultery is at least facially legitimate and possibly compelling.

When adultery is committed, the non-participating spouse may be harmed "as a matter of law, biology, and economics."[219] Specifically, adultery may violate a spouse's legal right inherent in the marital contract (i.e., a "legal right to fidelity."). [220] As the creator of this legal right, and as

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regarding aspects of sexual conduct, flying in the face of the "historical grounds relied upon in *Bowers*").

213. *See supra* Part I.B.1.

214. *See* Oliverson v. W. Valley City, 875 F. Supp. 1465, 1473–75, 1482 (D. Utah 1995) (providing an extensive account of the history of adultery laws and concluding that "[t]he historical development of the criminalization of adultery is directly opposite to any aspect of an historical right"); Owens v. State, 724 A.2d 43, 53 (Md. 1999) (noting, in dicta, that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); City of Sherman v. Henry, 928 S.W.2d 464, 470–72 (Tex. 1996) (citing ancient and current criminal proscriptions of, as well as current civil burdens to engaging in, adultery).

215. *See supra* text accompanying note 82.

216. *See supra* text accompanying note 83.

217. *See supra* note 33 and accompanying text.

218. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 162 (1973) (recognizing a compelling state interest in protecting the health of a pregnant woman).

219. *See* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 340 (2008).

220. *See id.*

the provider of benefits on account of that legal right,[221] the state may be justified in regulating violations of that legal right.[222] Furthermore, adultery may cause both emotional trauma and physical harm by increasing the risk of the spread of sexually-transmitted diseases to the innocent spouse.[223] Adultery can therefore be seen as an "offense against the spouse,"[224] whom the state has a legitimate interest in protecting.

A state may also have a legitimate interest in protecting the "traditional institution of marriage."[225] Justice Sandra Day O'Connor, concurring in the judgment of *Lawrence*, specifically asserted that "preserving the traditional institution of marriage" can be a legitimate state interest.[226] She is not the only Supreme Court Justice to hold this view.[227]

The Massachusetts Supreme Judicial Court in *Stowell* took judicial notice "that the act of adultery frequently has a destructive impact on the marital relationship and is a factor in many divorces."[228] Indeed, adultery is recognized as ground for divorce in a majority of states,[229] and in a fault-based state, adultery is often the only viable ground for divorce.[230] Banning

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221. *See supra* Part I.A.2.

222. *See* Bowers v. Hardwick, 478 U.S. 186, 209 n.4 (1986) (Blackmun, J., dissenting) ("A State might define the contractual commitment necessary to become eligible for these [government] benefits to include a commitment of [marital] fidelity and then punish individuals for breaching that contract."). Professor Tribe contrasts such protection of marriage with sodomy laws like that invalidated by *Lawrence*, that is laws that "cut [a] wide swath through the population to limit the options open to any particular oppressed minority." *See* Tribe, *supra* note 112, at 1944.

223. *See* ESKRIDGE, *supra* note 219, at 340; Siegel, *supra* note 44, at 87 (describing the prevention of disease as one of the "doubtless compelling goals of any government"); *cf.* Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 797 (1998) (arguing that fornication statutes, and by extension adultery statutes, advance a "state's interests in preventing disease and extramarital births, protecting the institution of marriage, and promoting morality").

224. *See* United States v. Taylor, 64 M.J. 416, 417, 420 (C.A.A.F. 2007) (characterizing adultery as "a crime against the person of the other spouse," and thus precluding spousal immunity under military evidence rules).

225. The protection of the "traditional" institution of marriage is an oft-cited reason for opposing the recognition of same-sex marriage. *See, e.g.*, Jeremy W. Peters, *New York Senate Turns Back Bill on Gay Marriage*, N.Y. TIMES, Dec. 3, 2009, at A1 (quoting Richard E. Barnes, director of New York's Catholic Conference, as saying "Americans continue to understand marriage the way it has always been understood"); *see also* H.R. REP. NO. 104-664, at 2 (1996) (citing the defense of the "institution of traditional heterosexual marriage" as a purpose of the Defense of Marriage Act), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

226. Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in the judgment).

227. *See, e.g.*, *Bowers*, 478 U.S. at 217 (Stevens, J., dissenting) ("[Society] also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage.").

228. Commonwealth v. Stowell, 449 N.E.2d 357, 360 (Mass. 1983); *see supra* notes 207–10 and accompanying text.

229. *See* POSNER & SILBAUGH, *supra* note 9, at 103–10 (collecting statutes).

230. For an attack on New York's recently-repealed fault-based divorce laws, including a discussion of the harms inherent in a divorce proceeding in which adultery is pled, see Rhona Bork, Note, *Taking Fault with New York's Fault-Based Divorce: Is the Law Constitutional?*, 16 ST. JOHN'S J. LEGAL COMMENT. 165, 169–72 (2002).

adultery may serve as a deterrent to divorce in cases involving marital infidelity, which "often rips apart families."[231] Adultery thus harms not only the marriage itself, but also the children of a marriage.[232]

Given these harms, states may argue that their interest is not only legitimate, but also compelling.[233] For example, in *Oliverson v. West Valley City*,[234] the District Court for the District of Utah in a lengthy opinion found the prevention of adultery to be a compelling state interest.[235] Specifically, the court identified prevention of harm to innocent parties (e.g., the spouse and children) and minimization of social costs (e.g., spread of disease, unwanted children, and the disruption of the family, "a positive social and economic unit and force in society") as sufficiently compelling interests.[236] To the extent that an adultery ban is at least rationally related to these interests—a proposition which is almost self-evident—such bans may survive at least rational basis review.

b. Arguments That the State's Interest Cannot Survive Strict Scrutiny or Rational Basis Review

Assuming that the state's interest in regulating adultery is compelling, an adultery ban may nevertheless fail strict scrutiny because adultery bans are not narrowly drawn to meet the state interest.[237] For example, regarding prevention of disease and unwanted children, an adultery ban is severely under-inclusive—any sexual intercourse, adulterous or otherwise, may lead to both harms.[238] Similarly, regarding the prevention of harm (to the spouse, the family, and the institution of marriage), an adultery ban is both over-inclusive (e.g., couples may agree to open polyamorous marriages[239]) and under-inclusive (e.g., infidelity not involving sexual intercourse may nonetheless cause equivalent harm and may be just as likely to break up a marriage[240]).[241] Additionally, an adultery ban may be ineffective in

231. City of Sherman v. Henry, 928 S.W.2d 464, 470 (Tex. 1996).

232. *See* Oliverson v. W. Valley City, 875 F. Supp. 1465, 1484 (D. Utah 1995) ("The results [of adultery] can be tragic and the social costs may impact innocent children and relatives."); *see also* ESKRIDGE, *supra* note 219, at 340. *See generally* ANNETTE LAWSON, ADULTERY: AN ANALYSIS OF LOVE AND BETRAYAL (1988).

233. *See* Siegel, *supra* note 44, at 87.

234. 875 F. Supp. 1465 (D. Utah 1995).

235. *See id.* at 1485.

236. *Id.* at 1484–85; *see also* Roberts v. Roberts, 586 S.E.2d 290, 295 (Va. Ct. App. 2003) (noting that the protection of children from any harm, including physical, emotional, and moral, is a compelling state interest (citing Knox v. Lynchburg Div. of Soc. Servs., 288 S.E.2d 399, 404 (Va. 1982))).

237. *See supra* text accompanying note 82.

238. *See* Siegel, *supra* note 44, at 87–88; *cf. Oliverson*, 875 F. Supp. at 1484 (impliedly recognizing the under-inclusiveness by reasoning that "adultery may be more deterrable than fornication").

239. *See generally* Emens, *supra* note 14 (juxtaposing polyamorous relationships with traditional monogamous marriage).

240. *Cf.* Cossman, *supra* note 1, at 276–80 (arguing for an expansive understanding of adultery to cover non-sexual acts of infidelity that can lead to these harms). *But cf. In re*

preventing the harms, as infidelity may be the result, not the cause, of marital difficulties.[242]

The state's interest in regulating adultery, however, may be neither compelling nor legitimate. For example, recent scholarship suggests that, in contrast to conventional wisdom, fracture of the family unit does not necessarily result in harm to the children.[243] Furthermore, absence of regular enforcement of a law can itself suggest illegitimacy of purpose.[244] Adultery laws are rarely if ever enforced,[245] a fact that itself defeats an adultery law's own purportedly deterrent purpose.[246] Indeed, the failure of deterrence is evidenced by the sheer ubiquity of marital infidelity.[247] Finally, the state's actual purpose in banning adultery may not necessarily align with plausibly legitimate interests discussed in Part II.A.2.a. For example, to the extent that the actual purpose evidenced by legislative history controls, as opposed to a later-asserted serendipitous purpose, then New York's adultery statute may not be supported by a legitimate state interest.[248]

c. The Lawrence *Hybrid: Arguments That No State Interest Is Legitimate When Balanced Against Sexual Liberty*

As discussed in Part I.C.2, the enigmatic *Lawrence* decision opened the door for a new type of substantive due process analysis when dealing with sexual liberty.[249] *Lawrence*'s key holding—that Texas's sodomy statute "furthers no legitimate state interest which can justify its intrusion into the

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Blanchflower, 834 A.2d 1010, 1012 (N.H. 2003) (holding that lesbian intimacy does not constitute adultery).

241. *See* Siegel, *supra* note 44, at 89–90.

242. *See* Denise Previti & Paul R. Amato, *Is Infidelity a Cause or Consequence of Poor Marital Quality?*, 21 J. SOC. & PERS. RELATIONSHIPS 217 (2004) (studying nearly 1500 individuals over a period of seventeen years and concluding that "infidelity is both a cause and a consequence of relationship deterioration").

243. Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 15 (arguing that existing divorce studies failed to look at long-term consequences, and when the consequences were examined over the long-term, the majority of children "looked a lot like their contemporaries from non-divorced homes" (citing E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 7 (2002))).

244. *See* Poe v. Ullman, 367 U.S. 497, 502 (1961) (plurality opinion) ("'Deeply embedded traditional ways of carrying out state policy . . .'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.'" (quoting Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362, 369 (1940)) (alteration in original)); Sunstein, *supra* note 138, at 54 (noting that such rarely enforced laws are able to persist "only because [they are] enforced so rarely").

245. *See supra* note 7.

246. *See* Mascherin et al., *supra* note 7, at 748.

247. *See* Coleman, *supra* note 203, at 410–11; *see also supra* notes 1–5 and accompanying text.

248. *See supra* Part I.B.2.b (describing the outcry from the Christian establishment and the interest in avoiding the appearance of immorality leading to the enactment of New York's current adultery ban).

249. *See supra* Part I.C.2.

personal and private life of the individual"[250]—suggests that a hybrid comparison may be required. That is, the legitimacy of the state interest may depend on the nature of the privacy into which it intrudes.

The Virginia Supreme Court, addressing Virginia's fornication statute, characterized this hybridization as a form of rational basis that "sweeps within it all manner of states' interests and finds them insufficient when measured against the intrusion upon a person's liberty interest when that interest is exercised in the form of private, consensual sexual conduct between adults."[251] The *Martin* court thus addressed the arguably legitimate state interests of fostering procreation in wedlock and preventing the spread of disease, and dismissed them outright under *Lawrence*, without even analyzing their legitimacy.[252] The Virginia Supreme Court, in invalidating a statute regulating private consensual sexual conduct under *Lawrence*, therefore appears to have both elevated the right at stake[253] and simultaneously delegitimized facially legitimate state interests.

B. Is Adultery a Protected Intimate Association?

The right to certain intimate associations free from state intrusion identified in *Roberts* suggests that adulterous relationships, which often can be products of deep love (despite being affronts to marriage), may be constitutionally protected.[254] The intimate association aspects of an extra-marital affair led one court to conclude that a particular adulterous relationship was constitutionally protected, despite a local criminal adultery ban.[255] In *Starling v. Board of County Commissioners*, the plaintiff alleged that he was demoted from his position as Captain in the Fire Department because he was having an adulterous affair.[256] Going through the *Roberts* factors, the magistrate judge found that the relationship was formed with the goal of marriage, involved a small number of people, and was exclusive of others (i.e., monogamous), and thus found the relationship to be constitutionally protected.[257] Even lacking marriage, the quintessential monogamous relationship, an adulterous affair can satisfy most of the

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

251. Martin v. Ziherl, 607 S.E.2d 367, 370 (Va. 2005).

252. *See id.* ("*Lawrence* indicated that such policies are insufficient to sustain the statute's constitutionality." (citing *Lawrence*, 539 U.S. at 578)).

253. Compare the "threshold" of "a constitutionally fundamental interest" (as opposed to a fundamental right) of Sunstein, *supra* note 138, at 51 & n.132. *See supra* note 140.

254. *See supra* Part I.D.

255. *See* Starling v. Bd. Of Cnty. Comm'rs, No. 08-80008-Civ, 2009 WL 248369, at *6 (S.D. Fla. Jan. 2, 2009) (report and recommendation of magistrate judge), *report rejected on other grounds*, 2009 WL 281051 (S.D. Fla. Feb. 2, 2009).

256. *See id.* at *1 & n.1.

257. *See id.* at *6. The magistrate judge seemed to be persuaded because the initially adulterous relationship was ultimately consummated as a legal marriage. *See id.* at *1, *6.

Roberts factors, particularly if the relationship is more than a casual fling.[258]

Several courts, however, have declined to extend such protection to adultery. In *Marcum v. McWhorter*, the plaintiff, a Kentucky Sheriff, alleged that he was fired from his office as a result of his affair with a married woman.[259] The lower court rejected the plaintiff's discrimination claim, and the Sixth Circuit affirmed.[260] The Sixth Circuit reviewed the *Roberts* and *Rotary Club* factors and noted that the defendant's relationship met most of them.[261] The "adulterous nature of the relationship," however, dissuaded the Court from finding that the relationship was constitutionally protected.[262] Specifically, the *Marcum* court held that an adulterous relationship per se cannot be compared to those relationships "that lie at the core of traditional notions of individual liberty" because "adulterous conduct is the very antithesis of marriage and family."[263] A later panel of the Sixth Circuit indicated that *Lawrence* did not alter this analysis.[264]

C. Adultery Bans and the Establishment Clause

The Establishment Clause prevents the government from, inter alia, passing laws with no objectively secular purpose—laws that have the purpose and effect of endorsing religion.[265] Both marriage itself and adultery bans have unavoidably religious roots, particularly in this country.[266] Furthermore, morality, one of the reasons cited for criminalizing adultery,[267] is often grounded in religious values.[268] Whether morality alone is a legitimate state interest for substantive due process

258. *See* Siegel, *supra* note 44, at 77–78 (identifying factors including fostering diversity, providing emotional sustenance, and relative smallness as no less present in an intimate and adulterous relationship than in an intimate non-adulterous relationship such as marriage).

259. Marcum v. McWhorter, 308 F.3d 635, 637 (6th Cir. 2002).

260. *Id.*

261. *See id.* at 640 (accepting Marcum's arguments "that the association was relatively small—just the two of them; highly selective in the decision to begin and maintain the affiliation; and others were secluded from the relationship" and noting that these factors "may weigh in favor of finding a protected relationship").

262. *See id.* at 641.

263. *Id.* at 642–43 (quoting Mercure v. Van Buren Twp., 81 F. Supp. 2d 814, 823 (E.D. Mich. 2000)); *see* Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984) (describing freedom of association as "an intrinsic element of personal liberty"); *accord* Caruso v. City of Cocoa, 260 F. Supp. 2d 1191 (M.D. Fla. 2003) (parroting the *Marcum* analysis in a case with similar facts).

264. *See* Beecham v. Henderson Cnty., 422 F.3d 372, 376 (6th Cir. 2005) ("[W]e are doubtful . . . that our decision in *Marcum* was overruled by *Lawrence*."); *see also* Matthew W. Green, Jr., Lawrence*: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims*, 29 BERKELEY J. EMP. & LAB. L. 311, 338–40 (2008) (arguing that *Lawrence* does not extend intimate association protection to police officers engaged in adulterous conduct).

265. *See supra* Part I.E.

266. *See supra* Part I.A–I.B.1.

267. *See supra* text accompanying note 74.

268. *See generally* WILLIAM J. WAINWRIGHT, RELIGION AND MORALITY (2005).

purposes is an open question after *Lawrence*.[269] Although posed in the context of the "rational basis" standard of the substantive due process calculus, this question nevertheless begs consideration of purpose (i.e., secular or religious?) in view of Establishment Clause values.[270]

Professor Scott C. Idleman has argued that laws "informed by religious moral premises generally do not, by that fact alone, violate the [Establishment Clause of the] First Amendment."[271] Professor Arnold H. Loewy has examined laws criminalizing adultery under the Establishment Clause and has concluded that they are valid in some instances.[272] Under Professor Loewy's test, laws "predicated on purposive morality, i.e., morality that serves a secular function," are valid.[273] Applying this test to criminal adultery laws, Professor Loewy concludes that they are not unconstitutional, because "[a]dultery can devastate people of all religious beliefs, as well as people bereft of religion."[274]

Nevertheless, laws predicated on arguably religious morality do raise questions under the Establishment Clause. Justice Harry Blackmun, for example, in his dissent from *Bowers*, criticized as illegitimate one of the state's rationales for regulating sodomy—that the conduct is morally reprehensible as evidenced by Judeo-Christian values.[275] "That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry."[276] Justice Blackmun further disparaged the *Bowers* Court's failure to appreciate the difference between "laws that protect public sensibilities and those that enforce private morality."[277] Justice Blackmun, in suggesting the illegitimacy of these state purposes, thus implicated Establishment Clause values.

Although plausibly secular purposes, such as preventing harm to the spouse or the family, are apparent for adultery laws,[278] under the Establishment Clause it is the objective purpose of the enactment that controls.[279] Most of the early enactments of adultery laws were Puritan in

269. *See supra* note 121; *see also* Lawrence v. Texas, 539 U.S. 558, 589–90 (2003) (Scalia, J., dissenting) (noting that *Bowers*, which *Lawrence* overturned, rested on the impossibility of distinguishing between homosexuality and other "moral" offenses such as adultery); State *ex rel.* Z.C., 2007 UT 54, ¶ 20, 165 P.3d 1206 (Utah 2007) (noting that adultery laws "demonstrate the legislature's disapproval of the acts of both participants for violating a moral standard").

270. *See* Loewy, *supra* note 121, at 160 ("The rationale for much moral legislation is religious . . . ." (citing Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring))).

271. Idleman, *supra* note 163, at 6.

272. *See* Loewy, *supra* note 121, at 165–66.

273. *Id.* at 161.

274. *Id.* at 166.

275. *See Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting).

276. *Id.*

277. *Id.* at 212.

278. *See supra* notes 219–36 and accompanying text.

279. *See supra* notes 164–91 and accompanying text.

nature, and thus overtly religious.[280] In New York's case, although updated in the 1960s, nothing in the enactment of its current adultery statute reflects an objectively secular legislative purpose, such as to prevent harm to the spouse.[281] Instead, the purpose, advocated by members of the Christian establishment, was to avoid the appearance of approval of immoral conduct.[282]

III. PROPOSING AND APPLYING THE "ESTABLISHMENT CLAUSE PRISM"

Part II of this Note presented the arguments for and against the constitutionality of adultery bans, examined under substantive due process doctrine (and its intimate association gloss), as well as Establishment Clause doctrine. Under substantive due process after *Lawrence*, it is possible that no adultery ban can withstand a challenge (if *Lawrence* is read to strike down any ban on private consensual sexual activity among adults).[283] It is also possible, however, that the plausible state interests in preventing harm to others,[284] considered with *Lawrence*'s own disavowal of application to situations that can cause injury,[285] may allow adultery bans to survive "rational basis" review or higher scrutiny. The Court's intimate association jurisprudence suggests that a subset of adulterous relationships (those that resemble a marriage) may be protected on a case-by-case basis,[286] but that the majority of run-of-the-mill extra-marital affairs will be tainted in the Court's eye by their adulterous nature.[287] Finally, under the Establishment Clause, adultery bans will probably survive, despite their religious origins, given their plausible secular purposes, including the prevention of harm to others.[288]

Even if adultery bans can survive each of these challenges independently, they should nevertheless be found unconstitutional. Part III presents this argument and, in so doing, proposes a novel approach to substantive due process analysis. Specifically, Part III proposes and applies what this note dubs an Establishment Clause prism, through which an arguably legitimate state interest in infringing a constitutionally important liberty interest is refracted and delegitimized by the enactment's religiosity. Though far from a natural pairing of constitutional doctrines, the Establishment Clause and the Due Process Clause (as interpreted in the substantive due process setting) do not offend one another's purpose, as both serve to protect individual liberty from encumbrance by state action.[289]

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280. *See supra* notes 45–47 and accompanying text.
281. *See supra* Part I.B.2.b.
282. *See supra* Part I.B.2.b.
283. *See supra* notes 243–53 and accompanying text.
284. *See supra* notes 219–36 and accompanying text.
285. *See supra* text accompanying note 120.
286. *See supra* notes 254–58 and accompanying text.
287. *See supra* notes 259–65 and accompanying text.
288. *See supra* Part II.C.
289. *Cf.* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881–82 (describing the U.S. Supreme Court's "hybrid rights" jurisprudence relating to the Free

A. Arriving at the Establishment Clause Prism

Lawrence ushered in a new era of constitutional law in the realm of sexual privacy, as evidenced at least by the amount of commentary it has generated.[290] Whether one understands *Lawrence* as establishing a fundamental right to sexual privacy (in line with *Griswold* and *Casey*)[291] or as standing for the proposition that the state can never have a legitimate interest in proscribing private, victimless, consensual sexual activity,[292] *Lawrence* at least signals that sexual privacy is a constitutionally important liberty interest,[293] and that regulations that encroach upon it should be carefully considered.

The Virginia Supreme Court's interpretation of *Lawrence* as an apparent "hybridization" of the traditional substantive due process analysis is instructive.[294] In *Martin v. Ziherl*, the court interpreted *Lawrence*'s statement—that the Texas statute furthered no legitimate state interest that can justify the state's intrusion—to mean that no state interest suffices to justify infringement of a constitutionally important liberty interest is at stake.[295] This approach implies that, under *Lawrence*, a state interest may be delegitimized when measured against a particular type of liberty interest, namely sexual privacy. This is not to say—and indeed *Lawrence* did not explicitly announce—that such a liberty interest warrants characterization as a "fundamental right."[296] Nevertheless, the "emerging awareness" regarding sexual privacy was sufficient to delegitimize and negate the state's interest.[297] Indeed, the fact that the majority opinion in *Lawrence* avoids mentioning the state's asserted interest suggests that *Lawrence*'s holding applies to *any* state interest, not just to the actually asserted interest of promoting morality.[298] The *Martin* Court went even further, identifying plausibly legitimate asserted state interests in maintaining a fornication ban (e.g., public health) and dismissing them outright under *Lawrence*.[299]

Exercise Clause in combination with other constitutional protections, whereby a neutral, generally applicable law that encumbers a religious activity is invalid if that activity relates to another constitutional protection, such as directing the education of one's children), *reh'g denied*, 496 U.S. 913 (1990). The "hybrid rights" doctrine, particularly in the context of the parental right to direct the upbringing of one's children, has not been uniformly applied. *See generally* Heather M. Good, Comment, *"The Forgotten Child of Our Constitution": The Parental Free Exercise Right To Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641 (2005); Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209 (2005).

290. As of October 1, 2010, LexisNexis identifies 3832 law review and journal articles that cite *Lawrence*.

291. *See supra* notes 130–34 and accompanying text.

292. *See supra* notes 249–53 and accompanying text.

293. *See supra* note 140 and accompanying text.

294. *See supra* notes 251–53 and accompanying text.

295. *See supra* text accompanying note 251.

296. *But see supra* notes 204–05 and accompanying text.

297. *See supra* notes 115–19 and accompanying text.

298. *See supra* note 121 and accompanying text.

299. *See supra* note 252 and accompanying text.

This Note proposes an analogous "hybridization," but where the state's interest is viewed not with reference to the liberty interest at stake, but instead with reference to the Establishment Clause and its values. This Establishment Clause prism serves to refract and delegitimize facially legitimate state interests where they implicate the individual liberty that the Establishment Clause serves to protect. Put another way, the proposed Establishment Clause prism devalues the purported legitimacy of a state's asserted interest as against the "rational basis" baseline threshold as a result of the religiosity of the state action.

The Establishment Clause serves to protect individual liberty by limiting the coercive force of the state in matters pertaining to religion.[300] To meet this objective, Establishment Clause jurisprudence has developed such that courts scrutinize the objective legislative purpose of an enactment to determine whether there is a secular purpose—in other words, no predominantly religious purpose. Courts do so not as a formal exercise of judicial limitations on state power, but instead as a protection of liberty, weeding out governmental enactments that serve, through force of law, to impair an individual's liberty by endorsing religion.[301]

In *Lawrence*, the Establishment Clause was neither mentioned nor asserted. Yet, the Supreme Court impliedly, and the court below expressly, analyzed Texas's legislative purpose; although not explicitly addressing purpose under the religious/secular dichotomy, the courts nevertheless sought to judge the merit of the "why" of the enactment.[302] The *Lawrence* Court, citing *Casey*, suggested that the sodomy ban was not an appropriate use of a criminal code, noting an "'obligation is to define the liberty of all, not to mandate our own moral code.'"[303] In so doing, *Lawrence* impliedly invoked the Establishment Clause, rejecting the legitimacy of a legislative purpose that is interrelated with religio-moral values (at least when it comes to "an emerging awareness" regarding matters of sexual privacy).[304] This Note proposes making explicit this approach to the state's interest in a substantive due process challenge—that is, refracting the state's interest through an Establishment Clause prism.

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300. *See supra* notes 151–57 and accompanying text.

301. *See supra* Part I.E.

302. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("The condemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."); Lawrence v. State, 41 S.W.3d 349, 361 (Tex. Ct. App. 2001) (citing repudiation of homosexual conduct by Western religions as supporting the "American tradition of statutory proscription"), *rev'd*, *Lawrence*, 539 U.S. 558 (2003); *see also Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring in the judgment) (noting Texas's assertion of "the promotion of morality" as a "legitimate state interest").

303. *See Lawrence*, 539 U.S. at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).

304. Some view this as a delegitimization based on morality-based justifications alone. *See supra* note 137 and accompanying text. This Note, however, proposes that it is the religiosity of morality *simpliciter* that is the basis for such a delegitimization.

The Establishment Clause prism provides that, in a substantive due process challenge to state action, even where a fundamental right is not at stake, if the enactment is substantially motivated by religious values, the state's asserted interest is delegitimized. Whether this is viewed as a form of rational basis with Establishment Clause bite, or some form of intermediate scrutiny, the result is the same. Where a recognized liberty interest is at stake, though not necessarily a fundamental right, a state's interest is less legitimate than it would otherwise be if it is infected with a purpose that implicates the Establishment Clause and its values.

B. Applying the Establishment Clause Prism to Adultery Bans

Applying the Establishment Clause prism, adultery bans should be found unconstitutional. Adultery, as consensual sex with the spouse of another, is conduct relating to the "personal and private life of the individual" "in matters pertaining to sex" recognized by *Lawrence*.[305] As such an important liberty interest, whether or not "fundamental," adultery at least merits closer investigation.

Closer investigation using the traditional substantive due process approach reveals numerous facially legitimate state interests beyond morality *simpliciter* (unlike the asserted state interest in *Lawrence*[306]), including protection of harm to the spouse and children, and prevention of the spread of disease.[307] Although an adultery proscription is not narrowly drawn to meet these ends,[308] and thus would likely not satisfy the Court's "strict scrutiny" standard where a "fundamental right" is at stake, an adultery ban at least bears some rational relationship to these goals.[309] For example, deterring adultery by criminal proscriptions would likely correlate with reduction of harm to spouses and the spread of disease.[310]

Closer investigation of the state's actual purpose in proscribing adultery, *à la* the Establishment Clause, reveals substantial religious underpinnings, implicating the Establishment Clause's mandate of maintaining religious and irreligious liberty free from the coercive power of the state.[311] First, the crime of adultery requires, as a necessary condition of liability, marriage.[312] Marriage, although increasingly secularized in American law, is a distinctly religious institution with deep, arguably inseparable, religious

305. *See Lawrence*, 539 U.S. at 572, 578; *supra* notes 115, 119 and accompanying text.
306. *See supra* note 121.
307. *See supra* notes 219–27 and accompanying text.
308. *See supra* notes 237–42 and accompanying text.
309. *But see supra* notes 243–48 and accompanying text.
310. The relative strength of this correlation or the lack of deterrence—particularly given the lax enforcement of these laws—would undermine the rational relationship. *See supra* notes 243–48 and accompanying text. Nevertheless, the "rational basis" standard sets a very low bar.
311. *See supra* notes 151–57 and accompanying text.
312. *See supra* Part I.B.

roots.[313] Thus, any attempts to protect the integrity of "holy matrimony" are attempts to protect a wholly, or at least predominantly, religious institution.[314]

Furthermore, adultery proscriptions, particularly in this country, have unmistakably religious, especially Puritanical, origins.[315] Despite plausible secular purposes that may have developed since colonial times, the actual legislative purpose of these enactments was religious.[316] New York's adultery statute is a representative example.[317] The New York ban was independently considered and re-enacted in 1965 along with the Penal Law overhaul.[318] The proposed elimination of the adultery statute caused an uproar in the community, particularly from the Christian establishment.[319] To allay the fears of state-sponsored moral decrepitude, Assemblyman Volker re-introduced New York's current adultery statute.[320] Upon its approval in both houses of the New York legislature, Volker sent the bill up to the Governor, with a cover letter specifically citing the religious uproar, and implying a legislative purpose to "observ[e] the conventions."[321] Such strongly suggestive religio-moral language was singular and alone, unaccompanied by any facially secular language, such as citation to the alleged harms of adultery.[322] The objective purpose of New York's adultery ban is thus left with the indelible religious watermark of avoiding "tacit approval for immoral conduct."[323]

Refracting New York's enactment through the Establishment Clause prism, its religious undertones, lacking an explicit or implicit secular purpose, should delegitimize any state interest (such as harm to third-

313. *See supra* Part I.A; *see also* Laycock, *supra* note 27, at 202 (calling marriage "our most fundamental and long lasting breach of separation of church and state").

314. To the extent that such attempts (e.g., adultery bans) are an endorsement of "traditional" religious marriage, causing those involved in polyamorous relationships, or same-sex relationships, to feel like disfavored outsiders, they may directly implicate the Establishment Clause. *See supra* text accompanying notes 161–62. This line of thought, however, may be a slippery slope towards the legal recognition of polygamy, bans of which have long been held to be constitutional. *See* Reynolds v. United States, 98 U.S. 145, 164–66 (1878).

315. *See supra* notes 42–48 and accompanying text.

316. *But cf.* McGowan v. Maryland, 366 U.S. 420, 449 (1961) (upholding Sunday closing laws because of an evolved secular purpose despite uncontested religious origins). The Court has squared *McGowan* with its other Establishment Clause cases by noting that the Sunday closing laws "advance[] religion only minimally because many working people would take the day as one of rest regardless." McCreary Cnty. v. ACLU, 545 U.S. 844, 861 (2005).

317. *See supra* Part I.B.2.b.

318. *See supra* Part I.B.2.b.

319. *See supra* note 71 and accompanying text.

320. *See supra* note 71 and accompanying text.

321. *See* Letter from Julius Volker, *supra* note 74; *see also supra* notes 72–74 and accompanying text.

322. *See supra* notes 72–74 and accompanying text.

323. *See* Letter from Julius Volker, *supra* note 74; *see also supra* text accompanying note 74. The Governor approved the bill without addressing its merits. *See supra* text accompanying note 75.

parties) asserted as a defense to a substantive due process challenge. The Establishment Clause prism is appropriate because the religious undertones of the law implicate the Establishment Clause's values of protecting individual liberty from the coercive force of the state. Thus, despite articulable harms of adultery that may be rationally related to a ban, the state interest, delegitimized when refracted through the Establishment clause prism, cannot "justify [the state's] intrusion into the personal and private life of the individual."[324]

C. The Establishment Clause Prism in Other Contexts

The proposed Establishment Clause prism does not require a radical departure from the Supreme Court's substantive due process jurisprudence. Indeed, application of the Establishment Clause prism to *Lawrence v. Texas*,[325] *Washington v. Glucksberg*,[326] and *Roe v. Wade*[327] does not alter their outcome.

In *Lawrence*, the sodomy bans were motivated purely by the asserted state interest of promoting morality, an interest wrought with religious underpinnings.[328] Thus, even if there is no fundamental right to homosexual sodomy or sexual privacy in general, the sodomy ban should not survive "rational basis" review because the state's interest, refracted through the Establishment Clause prism, is delegitimized due to its religiosity.

Applying the Establishment Clause prism to the substantive due process calculus likewise fails to alter the Court's decision in *Washington v. Glucksberg*, a case upholding bans on assisted suicide. Framed by the Court as a "right to die" case involving terminally ill patients, *Glucksberg* affirmed that there was no fundamental right to die, and thus analyzed the state's interest in criminalizing assisted suicide using the "rational basis" standard.[329] The state's asserted interests in *Glucksberg* were the preservation of human life, the protection of the integrity and ethics of the medical profession, the protection of vulnerable groups such as the poor and the elderly from abuse or coercion, and the prevention of involuntary euthanasia.[330] The actual purposes of the statute at issue in *Glucksberg*, as

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324. *Cf.* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

325. *See supra* Part I.C.2.

326. 521 U.S. 702 (1997).

327. *See supra* notes 95–98 and accompanying text.

328. *See supra* note 121. The Texas Legislators argued in their amici brief in *Lawrence* that their interests in the sodomy ban were the protection of public health and the promotion of marriage and procreation. *See* Brief for Texas Legislators et al. as Amici Curiae Supporting Respondent at 15–25, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 470181. The legislators cited no legislative history supporting that the asserted state interest was the actual legislative purpose of the enactment, however, despite touting the existence of "[h]ours and hours of tapes of hearings and testimony" during the 1973 legislative session "establish[ing] the legislative record." *See id.* at 13 n.5.

329. *See Glucksberg*, 521 U.S. at 728.

330. *See id.* at 728, 731–32, 734 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281–82 (1990)).

evidenced by the legislative history, are consistent with the state interests asserted during the litigation.[331] Though many or all of these interests might happen to align with religious beliefs or tenets,[332] there is no evidence of any religious undertone or moral justification for the enactment of this ban on assisted suicide. Thus, the Establishment Clause prism here fails to "bend" the substantive due process analysis.

Likewise, in *Roe v. Wade*,[333] the Establishment Clause prism would not alter the substantive due process calculus. In *Roe*, the Court found a compelling state interest in banning abortion, at least at a certain point during the pregnancy.[334] Consistent with the asserted state interest, the legislative history of the abortion statute in *Roe* suggests nothing other than a desire to protect the health of the mother.[335] Indeed, a religious justification for an abortion ban was non-existent at the time of the original enactment in 1854.[336] The Establishment Clause prism would therefore leave the substantive due process analysis unaltered in *Roe*.

In sum, applying the Establishment Clause prism to the facts of some of the Court's important substantive due process decisions leads to consistent results, whether the Court upheld a fundamental right as in *Roe*, refused to find a fundamental right as in *Glucksberg*, or left the question somewhat open as in *Lawrence*.

CONCLUSION

The Supreme Court's landmark sexual privacy decision *Lawrence v. Texas* has called into question all state encroachments into the realm of sexual autonomy. The opaque opinion has begot not only significant debate over what, if any, fundamental rights exist regarding sexual privacy, but also questions such as whether and to what extent a state's interest in abridging (or banning outright) certain sexual conduct is legitimate. All such regulations—addressing topics from sodomy to sexual devices, from bestiality to polygamy—are called into question.

Criminal adultery bans occupy a unique middle ground in Justice Scalia's parade of horribles.[337] On the one hand, there is a straightforward analogy

331. *See* Brief for the Petitioners at 5, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 656349 ("'[T]he introduction into the situation of another person who actively promotes the suicide could well increase the instability or irrationality of the potential suicide, affecting his judgment or emotional outlook.'" (quoting LEGISLATIVE COUNCIL'S JUDICIARY COMM., REPORT ON THE REVISED WASHINGTON CRIMINAL CODE 153 (1970))).

332. *Cf. supra* note 176.

333. 410 U.S. 113 (1973).

334. *See supra* notes 95–98 and accompanying text.

335. *See* Brief for Appellants at 35–36, *Roe*, 410 U.S. 113 (No. 70-18), 1971 WL 128054.

336. *See id.* at 38 (noting that "the [Church's] first enduring break from the theory that an embryo had life at 40 days if male and 80 days if female" occurred in 1869, and that "[i]n 1854 induced abortion was not an excommunicable offense when undertaken in the early stages").

337. *See* Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery,

to sodomy bans—a proscription of a certain type of sexual activity, predicated on the preservation of good morals. On the other hand, upon closer investigation, adultery bans are distinguishable—they directly implicate the nature of the institution of marriage and arguably prevent harm to third parties. Thus, in the world of substantive due process, adultery bans present an interesting conundrum.

Adultery bans, however, invite another avenue of constitutional analysis, under the Establishment Clause. Specifically, adultery is a non-violent crime, perpetrated by consenting adults, who participate in an act that is arguably protected by the Constitution but for the fact that they are not married to each other, but rather one or both are married to another. Since marriage itself has religious roots, and adultery bans originate from and are motivated by religious forces, adultery bans beg for scrutiny under the Establishment Clause. Nevertheless, the state's purpose in criminalizing adultery arguably extends beyond morality *simpliciter* to plausible secular justifications, and thus the Establishment Clause's protections may not be directly applicable.

This Note proffers that the Establishment Clause's values should not be ignored in a substantive due process analysis. Instead, the Establishment Clause should be applied as a prism, through which a state's purportedly legitimate interests are refracted. If the enactments are free of religiosity, the prism will leave the state's interests unbent. If, on the other hand, they are infected with religious motivation, the Establishment Clause prism will refract and delegitimize the state's interest. Specifically, although a state is absolutely barred from passing laws with no secular purpose that endorse a religion, a state's interest in passing a law with little secular purpose that is motivated substantially by religion and that infringes upon a constitutionally important liberty interest should at least be called into question. The Establishment Clause prism takes into account the protection of individual liberty from intrusion by the state afforded both by the Due Process Clause and the Establishment Clause. Under this approach, adultery bans should not withstand constitutional scrutiny against a substantive due process challenge because any plausibly legitimate state interests are delegitimized when refracted through the prism of the Establishment Clause.

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fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices.").