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Morals-Based Justifications for Lawmaking: Before and After *Lawrence v. Texas*

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Our obligation is . . . not to mandate our own moral code.
—*Lawrence v. Texas*[1]

[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .
—*Lawrence v. Texas*[2]

INTRODUCTION

Forever, it seems, the power to shape public morality has been seen as central to American governance.[3] As one of the

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1. Lawrence v. Texas, 123 S. Ct. 2472, 2480 (2003) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)).

2. *Id.* at 2483 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by Lawrence*, 123 S. Ct. 2472).

3. As Justice Harlan commented in *Poe v. Ullman*,

> [T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed, to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal.

* Indicates page numbering from journal of original publication — 88 Minnesota Law Review 1233 (2004).

morality tradition's chief promoters, the Supreme Court itself has regularly endorsed and applauded government's police power to regulate the public's morality along with the public's health and welfare.[4]

How, then, can we make sense of the Court's declaration in *Lawrence v. Texas*[5] that the state's interest in preserving or promoting a particular morality among its constituents did not amount even to a *legitimate* interest to justify a Texas law criminalizing sexual intimacy between consenting adults?[6] Has the Court unforeseeably and insupportably departed from its tradition of approving government action in the name of morality?[7]

In fact, *Lawrence* did no such thing.[8] Rather than repre-

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367 U.S. 497, 545–46 (1961) (Harlan, J., dissenting).

4. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 503 (1986) (citing *Manigault v. Springs*, 199 U.S. 473, 480 (1905), for the proposition that the police power "is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people"); *infra* Part I.

Official action concerned with morality has traditionally reached a wide variety of laws and policies. As Harry Clor observed regarding contemporary morals-related government action,

> Though applications of the criminal law are often at the cutting edge of controversies over public morality, it is important to see that much more is involved in the subject than that. Also involved are questions about family and education: parental custody of children, criteria for the definition of a family, the fitness of teachers in public (and private) schools, appropriate rules of behavior and disciplinary authority in the schools, and much else.

HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY 22–23 (1996).

5. 123 S. Ct. 2472 (2003).

6. *See Lawrence*, 123 S. Ct. at 2484 ("The Texas statute furthers no *legitimate* state interest which can justify its intrusion into the personal and private life of the individual." (emphasis added)). Justice O'Connor's concurrence characterized Texas's justification for the challenged law as "promotion of morality." *Id.* at 2486 (O'Connor, J., concurring).

7. *See infra* Part I and accompanying text regarding government reliance on morality to sustain official action. *See also infra* notes 24–31 for discussion of the meaning of morality.

8. The Court's ruling in *Lawrence* can be read most conservatively as rejecting the legitimacy of a morals-based justification only in the context of restrictions on the conduct of private, consensual, noncommercial sexual relationships between two adults. More broadly, it can be understood as rejecting the use of morality justifications to support restrictions on unpopular groups. *See Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring) ("When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."). Most broadly, *Lawrence* can be read as a com-

senting a break with tradition, *Lawrence* reflected the Court's long-standing jurisprudential discomfort with explicit morals-based rationales for lawmaking.[9] Notwithstanding its ubiqui-

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plete rejection of the legitimacy of the morality justification. *See id.* at 2495 (Scalia, J., dissenting) (stating that *Lawrence* "effectively decrees the end of all morals legislation").

Under any interpretation, the decision marks the first time that a majority of the Court has declared *illegitimate* a government's interest in preserving or advancing the public's morality. Thus, this Article's argument regarding the Court's steady distancing from morals justifications pertains to all interpretations of *Lawrence*'s morals-related holding.

9. By references to morals rationales and morality-based justifications, I mean justifications for government action that rely expressly on moral sentiment, such as Texas's "promotion of morality" justification in *Lawrence*. Although rationales that do not focus explicitly on promoting morality or deterring immorality may also reflect moral positions, as discussed *infra* note 37 and accompanying text, the focus here is on how the Court responds to overt claims that official action promotes the public's morality or gives effect to society's moral disapproval.

Although not the subject of this Article, the ages-old discourse about the role of law in enforcing morality supplies the backdrop against which the discussion here takes place. As Professor Louis Henkin observed, "[t]he relation of law to morals has been a favored preoccupation of legal philosophers for a thousand years." Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 402 (1963).

Recent scholarship on the question whether law should give effect to morality has been voluminous and varied, and includes: CLOR, *supra* note 4; PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985); LON FULLER, THE MORALITY OF LAW (rev. ed. 1969); ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 15 GEO. L.J. 1871 (1997); Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998); Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996); John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989); Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561 (1989); Don Welch, *The State As a Purveyor of Morality*, 56 GEO. WASH. L. REV. 540 (1988); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501 (1989) (reviewing PERRY, *supra*); Jeremy Waldron, *Ego-Bloated Hovel*, 94 NW. U. L. REV. 597 (2000) (reviewing Richard A. Posner, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999)).

For earlier scholarship on this question, see, for example, JOHN STUART MILL, ON LIBERTY (Alburey Castell ed., F.S. Crofts & Co. 1947) (1859);

tous rhetorical endorsements of government's police power to promote morality, it turns out that the Court has almost never relied exclusively and overtly on morality to justify government action. Indeed, since the middle of the twentieth century, the Court has never relied exclusively on an explicit morals-based justification in a majority opinion that is still good law.

This Article demonstrates and then explains this dissonance between the Supreme Court's rhetorical tradition and jurisprudential reality regarding morals-based justifications for lawmaking.[10] After elaborating the difficulties associated with judicial evaluation of morals rationales, I conclude that mere reference to morality should not suffice as a justification for lawmaking and propose, as a partial solution, that all justifications for government action, including those reflecting particular moral concerns, be tied to demonstrable facts.

To set the stage for this Article's arguments, Part I first develops a brief typology of morals-based rationales for government action as they are typically formulated in litigation before the Supreme Court. The discussion in Part I, together with the analysis in Part II, illustrates the clash between the Court's

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ROSCOE POUND, LAW AND MORALS (2d ed. 1926).

Outside of the scholarly literature, two of the best-known discussions of the relationship between law and morality include THE WOLFENDEN REPORT 52 (Stein and Day 1963) and MODEL PENAL CODE AND COMMENTARIES § 213.2, at 369–70 (Am. Law Inst. 1980) (recognizing that the criminal law "should be concerned with conduct that is morally reprehensible or culpable" but also that "[t]he criminal law cannot encompass all behavior that the average citizen may regard as immoral or deviate").

10. Although lower federal courts and state courts also decide cases implicating morals-based justifications, I focus on the Supreme Court here in part because most lower court jurisprudence regarding morality as a justification for lawmaking has been in reaction, both positive and negative, to *Bowers v. Hardwick*'s declaration of support for morality-based lawmaking. *See, e.g.*, Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001) (relying on a morals justification, in light of *Bowers*, to uphold Alabama's ban on sales of sex toys); Jegley v. Picado, 80 S.W.3d 332, 345–46, 353 (Ark. 2002) (invalidating Arkansas's sodomy law on privacy and equal protection grounds and distinguishing the reasoning of *Bowers*); Lawrence v. State, 41 S.W.3d 349, 354 (Tex. App. 2001) (relying on *Bowers* as the basis for accepting the State's argument that the Texas Homosexual Conduct Law was justified by moral disapproval of "homosexual sodomy"), *rev'd by* Lawrence v. Texas, 123 S. Ct. 2472 (2003); Commonwealth v. Wasson, 842 S.W.2d 487, 497–503 (Ky. 1992) (distinguishing *Bowers*'s privacy analysis and rejecting morality justification for a Kentucky sodomy prohibition). In addition, because *Lawrence* has ended *Bowers*'s reign as the contemporary poster case for the morals-justification argument, the time is ripe to reconsider the Court's actual, as opposed to rhetorical, morality jurisprudence.

rhetorically powerful embrace of morality and its actual practice of rarely relying on explicit morals rationales, even in the presumptive heyday of morals laws during the nineteenth century. As Part II also shows, the trend in the last half-century has been toward reliance on anything but morality to justify restrictions.

Part III develops two explanations for this trend that are related to the Court's apparent concern about institutional credibility and capacity to screen morals rationales. As the first explanation points out, if the Court accepts a morals-based justification out of respect for majoritarian views, it cannot ensure against the majority's misuse of morality as a benign cover for arbitrary or invidious aims,[11] such as bias based on race or sexual orientation.[12] Deferring to the majoritarian impulse, in other words, does not permit the Court meaningfully to screen the morals rationales before it.

On the other hand, as the second explanation highlights, if the Court does not defer to majoritarian sentiment, it may appear to be substituting its own views for those of the majority. Given the highly contested nature of morality in the United

11. The equal protection and due process guarantees require this assurance under any standard of review. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633 (1996) ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."); Foucha v. Louisiana, 504 U.S. 71, 79 (1992) ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" (citation omitted)); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985) (invalidating zoning decision because it reflected a fear of people with mental retardation); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (striking down a provision of the federal food stamp law because it reflected a dislike of an unpopular social group).

12. In *Lawrence*, for example, the Court found no legitimate state interest to justify Texas's Homosexual Conduct Law, implying that the morality justification was functioning as a benign-sounding cover for arbitrary or invidious aims. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2482 (2003) ("When homosexual conduct is made criminal by the law of the state, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."). Justice O'Connor's concurrence similarly compared moral disapproval to a "bare desire to harm." *Id.* at 2486 (O'Connor, J., concurring).

In the context of race discrimination, the Court rejected Virginia's anti-miscegenation law as impermissibly discriminatory in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The Court disagreed with the Virginia Supreme Court of Appeals, which had sustained the law in part based on the state's power to legislate regarding its constituents' morality. *See id.* at 7.

States,[13] judicial selection of one among numerous moral positions makes the potential for the appearance of countermajoritarian impropriety especially likely.[14] Without a definitive moral code, it becomes difficult, if not impossible, for the Court to demonstrate convincingly that its use of nonmajoritarian moral standards for screening morals-based justifications represents anything more than the individual Justices' personal views.

To escape this unpalatable bind, the Court has consistently avoided relying exclusively on explicit morals rationales to sustain government action. Moreover, until *Lawrence*, the Court avoided overtly rejecting morals rationales for the same credibility-related reasons.

Yet, despite the institutional tension that afflicts judicial review of morals-based justifications for government action, moral sentiment has not been—nor could it be—banished entirely from American law, as Part IV explains. Views about what constitutes good and bad behavior and about the consequences of those behaviors for the well-being of society inevitably affect opinions regarding the proper scope of government power.[15] For example, we typically deem conduct harmful if it causes tangible physical or economic harm to another person—say, throwing a pie at a political adversary. Our association of the pie throwing with bad behavior and cognizable harm is not inevitable, however. Instead it reflects a moral judgment about what constitutes harm. Rather than declaring the pie throwing to be a tort committed against the pie recipient, we might see the same act as a positive, self-actualizing, and nonharmful means of expressing emotion. We might celebrate the resulting

13. There may be broad societal agreement on certain types of conduct in interpersonal relationships, including regarding norms of courtesy and kindness, but neither the civil nor criminal law typically enforces rules regarding these aspects of interpersonal relationships.

14. For general discussion of the countermajoritarian difficulty, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. Yale Univ. Press 1986).

15. *See, e.g.*, NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 15 (1998) ("We differ dramatically in our assessments of what counts as a virtue or vice, much less their rank order."); Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 724 (1995) ("Moral judgment is needed to determine what count as relevant harms and to decide what are appropriate bases for legal regulation . . . ."). For a more detailed discussion of the definition of moral sentiment and its relationship to views about human behavior and government action, see also *infra* notes 24–31, 281–90 and accompanying text.

clothing stains, too, as a fashionable expression of that emotion rather than condemn them as an expensive injury entitled to redress. Similarly, the response of legislators and courts to a ban on nude dancing at bars as a means of reducing rising crime rates in surrounding neighborhoods[16] may give unexpressed effect to the moral views of lawmakers and judges regarding nude dancing. In other words, as the Supreme Court has acknowledged, one person's harm may be another's delight.[17]

How then can we reconcile the entangling of moral judgments and lawmaking with courts' inability to distinguish credibly between moral judgments and impermissible bias masquerading as morality? Or, put another way, what can be done to minimize the risk that moral justifications will be abused while still allowing moral judgments to remain a part of the law? After all, as just discussed, courts cannot rely simply on reference to morality alone to ensure that government action is nonarbitrary and free of impermissible bias.[18] At the same time, credibility concerns should stop most courts from offering independent pronouncements about the validity of particular moral judgments.[19]

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16. *See infra* notes 139–47 and accompanying text.

17. As the Court stated in *Cohen v. California*, 403 U.S. 15, 25 (1971), in reference to the defendant's wearing into a courthouse a jacket emblazoned with a four-letter expletive, "it is . . . often true that one man's vulgarity is another's lyric." *Cf.* Hill v. Colorado, 530 U.S. 703, 716 (2000) ("The right to free speech . . . may not be curtailed simply because the speaker's message may be offensive to his audience."); Papish v. Univ. of Mo. Curators, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); Bachellar v. Maryland, 397 U.S. 564, 567 (1970) ("'[U]nder our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers' . . . ." (citation omitted)).

18. *See supra* note 11 (describing equal protection and due process standards).

19. Although the Court in *Lawrence* had no choice but to assess the morals justification proffered for the Texas Homosexual Conduct Law since morality was the primary justification proffered, it avoided direct engagement with the law's justification to the extent possible. *See infra* notes 191–96 and accompanying text. In addition, because morals support for government punishment of private sexual relations between consenting private adults has diminished considerably in recent years, the credibility risk ordinarily associated with judicial rejection of a popular moral argument had diminished as well. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2480–81 (2003) (observing that contemporary laws and traditions reflect "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct

In Part V, I argue that only by steering clear of abstract, philosophical justifications for government action and relying instead on fact-based rationales can courts limit their exposure to this double-edged predicament. Thus, the solution that I explore here would permit morality-inspired government action only when it is supported by reference to empirical or otherwise demonstrable harms. While variations on this proposal have been addressed by others,[20] I aim to add to the discussion by showing why the factual-grounding requirement is not only helpful but also compelled by the institutional-competence concerns reflected in the Court's current discomfort with morals rationales.

Before proceeding with the analysis, I first want to defend the Article's implicit premise that engagement with the Court's doctrine regarding morals-based justifications for government action is a worthwhile enterprise. Some might argue that drawing a distinction between explicitly empirical and explicitly moral justifications is overly formalistic because empirical justifications can be used to mask or support moral judgments. A broader version of this critique would maintain that doctrinal analysis itself is pointless given that doctrine can always be marshaled to serve a judge's normative preferences.[21] To some extent, these arguments cannot be overcome; the enterprise of adjudication involves judgment, not mechanical application of law to facts. As a result, the normative visions of judges will necessarily shape not only legal analysis but also assessments of empirical evidence.

Still, even recognizing that doctrine reflects normative preferences, there are two ways in which attention to the Court's analytic framework may constrain some of the bias that can otherwise permeate the adjudication process virtually unfettered. First, to the extent morals rationales are treated in the doctrine as legitimate and sufficient justifications for lawmaking, they provide virtual carte blanche for government to act in the name of morality because they can be contested only

their private lives in matters pertaining to sex," and noting the decline in laws that prohibit sexual relations between consenting adults of the same sex).

20. *See, e.g.*, Cicchino, *supra* note 9.

21. *See* Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1177 (2002) (suggesting that scholars consider "jettison[ing] the whole enterprise of taking constitutional doctrine seriously" on the grounds that the Court develops doctrine and decides cases to achieve ideological aims).

by other moral philosophical arguments.[22] A doctrinal shift requiring empirically-rooted justifications for government action would make it possible to expose judicial acceptance of particular government interests to empirical as well as normative critiques.

Second, the Court's endorsement of morals rationales may have the effect of encouraging courts and legislators to accept noncredible empirical justifications for government action when a morality-based justification is also identified. Because a claim of morality can justify virtually any legislation, criticism of a court's empirical analysis will not likely affect either the analysis or the outcome of a case. Without the safety net of a doctrinally preapproved morals rationale, however, judges and legislators may be less enthusiastic about risking their reputations on acts for which the justification seems to be no more than thinly veiled dislike for the actors or actions being regulated.[23]

The definition of morality and its relationship to other normative frameworks for judgment also warrant attention as an introductory matter. After all, one could argue that characterizing a viewpoint as "moral" amounts to nothing more than a rhetorical flourish atop an ordinary normative judgment. On the other hand, a moral judgment could be said to have special qualities distinguishing it from other normative judgments or expressions of personal sentiment.[24] The Supreme Court, moreover, has not sought to define morality even in its most enthusiastic celebrations of the morals-based police power. However, as the next part's detailed discussion of the cases illustrates, the Court tends to invoke morality to refer to a systematic way of thinking about right and wrong forms of conduct, consistent

22. Even in *Lawrence*, which rejected the sufficiency of the morals rationale, the Court did not explain why the proffered morals justification was insufficient other than to indicate that a *tradition* of moral disapproval did not suffice. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2482–83 (2003); *see also infra* notes 194–96 and accompanying text.

23. Of course, shifting the doctrine is no guarantee of substantive change, as some courts will accept virtually any justification for government action that is framed in terms of facts. A shift, however, creates an opportunity to expose judicial reasoning to a fact-based, nonphilosophical analysis, which might be sufficient to constrain some of the undue judicial deference accorded to official articulations of government interests. See *infra* notes 293–99 and accompanying text for a discussion of the possible benefits of a fact-based inquiry.

24. *See, e.g.*, Dworkin, *supra* note 9, at 994–99 (analyzing the concept of a moral position).

with the term's dictionary definition.[25] I also use the term in that general sense.[26]

Although the discussion here focuses on morality-based justifications, its theories and analysis would also apply to rationales for lawmaking based on tradition, social conventions, decency, ethics, majoritarian disgust, and other similar sentiments.[27] That is, to the extent these positions reflect theoretical

25. *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining morality as "[a] system of ideas of right and wrong conduct").

26. Numerous scholars, however, have sought to develop a more refined definition of morality. Although these definitions do not pertain directly to our enterprise of assessing the Court's response to morality-based rationales, they illustrate the challenges of even defining morality, let alone relying on it as a justification for government action. *See, e.g.*, DEVLIN, *supra* note 9, at 15–17 (linking morality to the views of the "right-minded person" and explaining that to be categorized as immoral, conduct must trigger "a real feeling of reprobation" and "intolerance, indignation and disgust"); FEINBERG, *supra* note 9, at xi (distinguishing a "moral harm," which causes one to become a "worse person," from physical, psychological, or economic harms); PERRY, *supra* note 9, at 11, 138 (describing morality as a community's vision of how to lead a good life, but also advocating that communities "maintain a critical attitude towards the tradition"); POSNER, *supra* note 9, at 4 ("Morality is the set of duties to others (not necessarily just other people—the duties could run to animals as well, or, importantly, to God) that are supposed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human conduct."); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 479 n.1 (1989) (defining morality as including "principles about how a person should treat other people," and distinguishing it from ethics, which includes "convictions about which kinds of lives are good or bad for a person to lead"); Dworkin, *supra* note 9, at 994 (explaining that although morality is sometimes cited to refer to a group's views "about the propriety of human conduct, qualities, or goals," a moral position is more than mere sentiment and instead is supported by reasons that are not based in "prejudice, rationalizations, matters of personal aversion or taste, arbitrary stands, and the like."); H.L.A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 958 (1957) (defining morals as a form of "social control" and "an umbrella term sheltering many different objects requiring analysis"); Henkin, *supra* note 9, at 407 n.57 (arguing that while private morals "cannot be judged by standards of reasonableness," society's notions of "ordered liberty" influence morality nonetheless); *see also* Lawrence C. Becker, *Crimes Against Autonomy: Gerald Dworkin on the Enforcement of Morality*, 40 WM. & MARY L. REV. 959, 962 (1999) ("Both [H.L.A.] Hart and his predecessor [Mill] . . . have it in mind that morality encompasses ideals as well as duties, permissions as well as requirements, matters that seriously affect great numbers of people as well as matters of rather transient, local importance." (citing H.L.A. HART, LAW, LIBERTY AND MORALITY 70–74 (1963); JOHN STUART MILL, ON LIBERTY 12–13 (Currin V. Shields ed., Liberal Arts Press 1956) (1859))).

27. For discussion of the relationship between tradition and lawmaking, see Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95

positions about the dividing line between good and bad,[28] they present courts with challenges like those triggered by morals-based rationales.

Still, the analysis here focuses directly on invocations of morality rather than on these other potential explanations for lawmaking because morality has been celebrated historically as a legitimate basis for government action,[29] and as a result, has acquired enormous symbolic power.[30] Tradition, on the other hand, has received only qualified acceptance as a basis for official action,[31] and social conventions, disgust, and other norms are simply not cited at all by the Court as sufficient to justify lawmaking.

I. ENDORSEMENTS OF GOVERNMENT'S MORAL AUTHORITY

As just highlighted, *Lawrence v. Texas* is the first case in which a majority of the Supreme Court has rejected explicitly a morality-based justification for a law on the ground that it lacked legitimacy.[32] Yet the Court's refusal to rely on a prof-

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COLUM. L. REV. 523 (1995); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997).

On the relationship between social norms and lawmaking, see, for example, Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967 (2003); Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485 (2003).

Recent scholarship regarding the relationship between law and emotion includes, for example, Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) [hereinafter Kahan, *Anatomy of Disgust*]; Dan M. Kahan, *The Progressive Appropriation of Disgust*, *in* PASSIONS OF LAW 63 (Susan Bandes ed., 1999); Toni Massaro, *Show (Some) Emotions*, *in* PASSIONS OF LAW, *supra*, at 80; Martha C. Nussbaum, *"Secret Sewers of Vice": Disgust, Bodies, and the Law*, *in* PASSIONS OF LAW, *supra*, at 19; Harlon L. Dalton, *"Disgust" and Punishment*, 96 YALE L.J. 881 (1987) (reviewing FEINBERG, *supra* note 9). And on the relationship between law and ethics, see, for example, Dworkin, *supra* note 9.

28. *See, e.g.*, WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 194 (1997) (arguing that disgust "marks out moral matters for which we can have no compromise"); Kahan, *Anatomy of Disgust*, *supra* note 27, at 1624 (describing disgust as "brazenly and uncompromisingly judgmental").

29. *See infra* Part I.

30. *See generally* MURRAY J. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964); Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54 (1968) (analyzing the symbolically powerful effect of legal declarations of immorality to preserve societal norms).

31. *See infra* note 210 and accompanying text.

32. Lawrence v. Texas, 123 S. Ct. 2472, 2480–81 (2003); *see also* Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641,

fered morals rationale turns out not to be a sudden break with earlier jurisprudence, as we will see shortly. Still, the outright rejection of a morals rationale marks a stark shift from the consistent rhetorical embrace of morals-based lawmaking for the past two centuries, and that rhetorical history therefore warrants attention. To provide context for the analysis that follows, this section will first offer a typology of morals rationales and then sketch the contours of the surrounding jurisprudential landscape.

A. A TYPOLOGY OF MORALS RATIONALES

Morals-based justifications for lawmaking arise in a variety of ways. By grouping these appearances into four categories—pure, composite, embedded, and inert—the typology offered here is intended to provide a systematic framework for the analysis that follows.

Morality rationales appear, at times, in their purest form as the sole explicit rationale for government action. *Bowers v. Hardwick*[33] and *Lawrence* are prime examples of instances where the Court considered whether morality, alone, sufficed to justify challenged laws.[34] As the discussion below demonstrates,

663 (1990) (commenting that *Bowers* was "arguably . . . the first time" the Court had adopted an "explicitly conservative jurisprudential account of the 'natural' right of the community to define and enforce the good in law" by reference to conventional morality).

33. 478 U.S. 186 (1986), *overruled by Lawrence*, 123 S. Ct. 2472.

34. Texas had proffered a family values rationale for the Homosexual Conduct Law in addition to its morals-based justification, but the Court did not consider that argument in its opinion. *See Lawrence*, 123 S. Ct. at 2484 ("[The case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."); Respondent's Brief at 4, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102) (arguing that criminalizing the sexual acts of same-sex couples was "in keeping with long-standing national tradition, and bears a rational relationship to the worthy governmental goals of implementation of public morality *and* promotion of family values" (emphasis added)), *available at* 2003 WL 470184; *see also* Brief of Amici Curiae Pro Family Law Center et al. at 6, *Lawrence* (No. 02-102) ("While Petitioners strenuously compare themselves to the loving heterosexual families who have existed over the course of human history, this same history bears out the indisputable truth that monogamous marital/conjugal relationships do not ordinarily result in the transmission and spread of deadly diseases and other economically costly effects."), *available at* 2003 WL 470115; Brief of Amici Curiae Center for Arizona Policy and Pro-Family Network in Support of Respondent at 15, *Lawrence* (No. 02-102) ("[L]esbians and gay men do not characteristically form social units comparable to the family and sexual relationships of heterosexuals."), *available at* 2003 WL 367560; Amicus Brief of the Center for Marriage Law in Support of Re-

the Court has rarely relied solely on a pure invocation of morality and, since World War II, has never done so, with the exception of the now-reversed ruling in *Bowers*.[35]

At other times, a morals rationale for government action is relied on together with a government interest in reducing harms or increasing benefits that are material or otherwise observable. For example, the Court's older cases frequently sustained alcohol-related restrictions in the interests of the public health *and* morality.[36] We can describe these rationales as *composite* because the concern with morality does not stand alone but instead appears coupled with other grounds for the exercise of government power.

In addition to the pure and composite manifestations of morals rationales in the Court's decision making, the government's interest in morality may be accepted implicitly and, therefore, not surface in a superficial review of the Court's decisions. For example, in numerous cases that might be thought of as implicating morality, such as zoning limitations on adult entertainment businesses, bans on obscenity, and restrictions on the use of foul language, morality is not even mentioned in the majority's analysis of the challenged measures, let alone relied upon.[37] Still, in these cases, it is conceivable, or at times even probable, that the Court understood and accepted the government's moral interest, even as it relied on some other justification to sustain the law. I refer to these situations as involving an *embedded* morals rationale.

To a certain extent, the composite and embedded responses to morals rationales are coextensive; for both, moral considera-

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spondent at 1, *Lawrence* (No. 02-102) ("The Center is deeply anxious that nothing in this Court's decision establish precedent that would weaken the legal status of marriage and the family."), *available at* 2003 WL 367565.

35. Indeed, the Court has grappled with the sufficiency of a pure morals justification only in the rare instance that no harm-based argument has been advanced to support the government action at issue. Thus, the distinction between moral disapproval and harm-based justifications can be said to characterize the Court's analytic practice, even if the distinction itself is not philosophically valid to the extent that all harms ultimately reflect moral judgments. *See infra* notes 286–89 and accompanying text.

36. *See, e.g.*, Samuels v. McCurdy, 267 U.S. 188, 198 (1925) (recognizing the "possible vicious uses" of alcohol and holding that the legislature could suppress alcohol use "in the interest of public health and morality"); *see also infra* notes 51–52, 97–103 and accompanying text.

37. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (sustaining a ban on nude dancing based exclusively on secondary effects and without mention of morality in the majority opinion); *see also infra* Part II.C.1.

tions might underlie a justification that is not explicitly morals-based. For example, a public safety argument related to heightened crime rates in the vicinity of adult entertainment businesses might be offered on its own or jointly with a morals justification to support restrictions on a venue that offers shows with nude dancers. Yet it would be naïve to think that the public safety argument, which has the appearance of being rooted in empirical rather than moralistic concerns, might not function, in some (or many) cases, as a neutral-sounding cover for deeper moral disapprobation of that form of adult entertainment.

Finally, morals rationales also appear in an *inert* form. These are situations in which the Court touts moral sentiment as a component of the police power or otherwise as a legitimate and sufficient basis for government action but does not actually rely on morality in its analysis.[38] The inert appearance of morals rationales is thus unlike the composite use, because morality is not relied on formally by the Court, and unlike the embedded use, because the morals rationale is explicit.[39]

38. *See, e.g.*, Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. 104, 125, 129 (1978) (including morality within the scope of a state's police powers but sustaining application of a landmark preservation law based on a city's power "to enhance the quality of life by preserving the character and desirable aesthetic features of a city"); *see also infra* notes 72–75 and accompanying text.

39. Although this typology and the analysis that follows concentrate on the Supreme Court's reactions to morality as a justification for government action, the Court has also grappled with moral sentiment in other contexts, including discussions of the moral culpability of death row defendants, the scope of crimes of moral turpitude, and the application of good moral character requirements, among others. These other discussions of morality also help illustrate the ways in which moral judgments remain a constant part of lawmaking. However, they typically involve assessments of whether a party possessed a particular type of blameworthiness or had committed a specified type of misconduct and thus are not directly relevant to the project here, which focuses on the legitimacy and sufficiency of morality as a justification for government action. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 306, 321 (2002) (ruling that the capital punishment of people with mental retardation is unconstitutional because "disabilities in areas of reasoning, judgment, and control of their impulses" show that such defendants "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct"); Stanford v. Kentucky, 492 U.S. 361, 377–78 (1989) (rejecting the argument that sixteen- and seventeen-year olds are "less morally blameworthy" for purposes of the death penalty); Carter v. Jury Comm'n, 396 U.S. 320, 323 n.2, 334–35 (1970) (upholding a jury-selection procedure that excluded individuals for, *inter alia*, crimes of moral turpitude (citing Franklin v. South Carolina, 218 U.S. 161, 167–68 (1910) (affirming a jury-selection procedure that limited jury participation to those of "good moral character")); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957) ("A state can require high standards of

B. EXALTATION OF THE MORALS-BASED POLICE POWER THROUGH THE MID-TWENTIETH CENTURY

As this section will illustrate, the libertarian themes of individualism and liberty of contract that dominated nineteenth- and early twentieth-century jurisprudence did not carry over into the realm of morals-based lawmaking. Instead, a belief in communitarianism functioned as the norm that guided government oversight of the populus,[40] with morals concerns pervading the criminal law, licensing rules, and other measures.[41] Although historians disagree about the effect of these regulations on daily life,[42] there is no question, as the following dis-

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qualification, such as good moral character . . . before it admits an applicant to the bar . . . ."); Konigsberg v. State Bar, 353 U.S. 252, 273 (1957) (finding that a bar applicant's membership in an antiestablishment political party did not negate "good moral character"); Jordan v. De George, 341 U.S. 223, 227–32 (1951) (reviewing the use of the term "moral turpitude" in connection with commission of fraud in general and in immigration law specifically); State v. Horton, 248 S.E.2d 263, 264 (S.C. 1978) (concluding that a "hit and run" offense was a moral turpitude offense because it was "contrary to justice, honesty and good morals").

40. *See* Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427, 1444 (1997).

41. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 149–90 (1996).

42. Professor Novak has contended that "[i]f there was a transformation in attitudes toward morality around 1776, it lay in the direction of *increased* rather than decreased public attention. The postrevolutionary era witnessed the origins of one of the most concerted and energetic moral reform movements in American history." NOVAK, *supra* note 41, at 152; *see also id.* at 189 ("Despite historical talk of tolerance, cities of eros, Victorian compromises, or a wholesale paradigm shift from morals to property, the regulation of public morality continued to play an absolutely central role in nineteenth-century American life. Morals police remained one of the matter-of-fact obligations of government in a well-regulated society."). This interest in the public's morals was enabled further by the "relatively homogeneous opinion on a broad range of morality questions" among decision makers. Hovenkamp, *supra* note 40, at 1440; *see also* David H. Flaherty, *Law and the Enforcement of Morals in Early America*, *in* LAW IN AMERICAN HISTORY 209 (Donald Fleming & Bernard Bailyn eds., 1971) (noting "[t]he universal acceptance of Christianity in the American colonies" and the "accompanying harmoniousness of moral outlook"). As a result, according to Professor Hovenkamp, a veritable "fervor to use the state to regulate morals" took hold. *See* Hovenkamp, *supra* note 40, at 1439.

Others, however, have contended that the colonial-era treatment of sin as crime began to dissipate following the American Revolution. *See, e.g.*, JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 157 (1988) ("In the antebellum era, Americans seemed to be more interested in individual purification through internalized control than in the public regulation of sexual expression."); Flaherty, *supra*, at 214 ("[I]n many significant ways the colonists were not as strict as they might have been concerning the extent to which law and morals should be identi-

cussion illustrates, that government regularly exercised its authority with an eye to its constituents' morals as well as their physical well-being.[43]

The police power became the conceptual focal point for much of the discussion regarding morality during this period, with early commentators enthusiastically reinforcing the state's power over morals. For example, Judge Thomas M. Cooley, a leading commentator on the police power just after the enactment of the Fourteenth Amendment, declared that "preservation of the public morals is peculiarly subject to legislative supervision."[44] Ernst Freund, another leading expositor of the

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cal."); William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450 (1967) (tracing the shift from criminal laws based on morality to criminal laws focused on the preservation of property); Harry N. Scheiber, *Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America*, 107 YALE L.J. 823 (1997) (reviewing WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996)) (suggesting that the regulatory trend was not as strong as Novak contended). *See generally* Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 LAW & SOC. INQUIRY 369 (2002) (reviewing NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA (1988) and ALISON M. PARKER, PURIFYING AMERICA: WOMEN, CULTURAL REFORM, AND PRECENSORSHIP ACTIVISM, 1873–1933 (1997) and discussing the historiography of censorship and sexual speech in the United States during the nineteenth century).

43. Of course, the use of state powers to legislate morality did not begin in the nineteenth century. In the colonial era, for example, although the power to uphold community morality was vested in the secular rather than the religious leadership of the community, sin and crime were indistinguishable in the eyes of lawmakers. *See* Flaherty, *supra* note 42, at 206 ("The moral law was the official guideline for the enforcement of morals in the American colonies and the basis of the civil law itself. Sin and crime, divine law and secular law, the moral law and the criminal law were all closely intertwined."); *id.* at 208 ("The essential contribution of the moral law to the secular law was the equation of sin and crime.").

Laws of that era cut a broad swath, often covering not only an array of sexual interactions but also the use of profane language and the failure to attend Sabbath services, among other restrictions. *See id.* at 224.

44. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATION POWER OF THE STATES OF THE AMERICAN UNION 596 (1868).

Providing examples of the police power's reach, Judge Cooley illustrated the breadth of moral concerns a government might pursue.

> [The police power grants government the power to] forbid the keeping, exhibition, or sale of indecent books or pictures, and cause their destruction if seized; or prohibit or regulate the places of amusement that may be resorted to for the purpose of gaming; or forbid altogether the keeping of implements of gaming for unlawful games; or prevent

police power writing a few decades later, described morals laws as essential to our civilization.[45] He advocated that "[t]he cultivation of moral, intellectual and aesthetic forces and interests which advance civilization and benefit the community . . . cannot be a matter of indifference to the state."[46]

1. Supreme Court Support for Restrictions on Alcohol and Lotteries and Other Games of Chance

The Supreme Court likewise revealed its views on the relationship between law and morals through its police power jurisprudence during the late nineteenth century and early twentieth century. Although the earliest discussions concerned public health and safety,[47] the police power quickly came to be understood as providing carte blanche for a wide array of morals legislation.[48] Indeed, shortly after Judge Cooley set out his

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> the keeping and exhibition of stallions in public places. And the power to provide for the compulsory observance of the first day of the week is also to be referred to the same authority.

Id. (footnotes omitted).

45. *See* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 7 (1904).

46. *Id.* at 9.

47. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (describing police powers as an "immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government . . . . Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass.").

48. By 1847, the Court was speaking of the morality-based powers of states with respect and familiarity. *See, e.g.*, Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 592 (1847) ("[I]f [an item] . . . be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it."), *overruled in part by* Leisy v. Hardin, 135 U.S. 100 (1890); *cf.* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) (explaining that, until the Fourteenth Amendment's passage, "the propriety of state laws received minimal federal scrutiny" because neither the Bill of Rights nor most of the Constitution's provisions applied to the states).

In addition, although the Supreme Court first declared that the federal government's police powers operated only outside of state limits (e.g., the District of Columbia) in *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 45 (1869), it later relented and recognized Congress's power to regulate in the interest of public morals. *See, e.g.*, Lottery Case (Champion v. Ames), 188 U.S. 321, 356–57 (1903).

In later years, the police power has been characterized in a variety of ways but is generally viewed as the power of government to act on behalf of its constituents' welfare, broadly construed to encompass, *inter alia*, the public's health, safety, and morals. *See* BARNETT, *supra* (discussing the evolution of the police power). *See generally* Glenn H. Reynolds & David B. Kopel, *The*

view of the police power's parameters, the Court, in 1877, in *Beer Co. v. Massachusetts*,[49] affirmed the broad scope of the police power with respect to moral regulation while upholding a Massachusetts restriction on beer manufacture and sale.

> Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the *public morals*. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise.[50]

A decade later, in *Mugler v. Kansas*,[51] the Court also upheld a similar Kansas law prohibiting the manufacture and sale of liquor, reasoning that the state legislature may exert its police power "to determine, primarily, what measures are appropriate or needful for the protection of the public morals."[52]

Evolving Police Power: Some Observations for a New Century, 27 HASTINGS CONST. L.Q. 511 (2000) (analyzing the expansion and contraction of the police power).

49. 97 U.S. 25 (1877).

50. *Id.* at 33 (first emphasis added); *see also id.* ("[A]s a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States . . . ." (citing Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1873))). The Latin phrase *salus populi suprema lex* is frequently translated to mean "the welfare of the people is the supreme law."

51. 123 U.S. 623 (1887).

52. *Id.* at 661. In *Mugler*, the Court indicated that judicial review of exercises of the police power will consider whether "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety . . . [has a] substantial relation to those objects" and, if not, will invalidate the measure as "a palpable invasion of rights secured by the fundamental law." *Id.*

Numerous other cases involving liquor restrictions that were decided later in the nineteenth and early twentieth centuries reiterated the police powers' reach to morality as well as to public health and welfare. *See, e.g.*, Samuels v. McCurdy, 267 U.S. 188, 198 (1925) (noting that the legislature can seek to suppress the use of liquor in the interest of public health and morality); Crane v. Campbell, 245 U.S. 304, 307–08 (1917) (upholding a ban on alcohol possession because it was intended to protect public morality and did so); Cosmopolitan Club v. Virginia, 208 U.S. 378, 384 (1908) (finding that a state can protect "the health, the morals, and the prosperity of the people" through liquor regulation); Cronin v. Adams, 192 U.S. 108, 115 (1904) (upholding a law banning women from entering saloons and noting that the sale of liquor "is a question of public expediency and public morality"); Austin v. Tennessee, 179 U.S. 343, 348 (1900) (observing that the Commerce Clause does not forbid a legislative

In the context of government suppression of lotteries and other games of chance, the Court in the nineteenth century likewise applauded government regulation of morality at both the state and federal levels. Declaring that "the suppression of nuisances injurious to public health or morality is among the most important duties of Government,"[53] the Court in the *Lottery Case*[54] upheld Congress's power under the Commerce Clause to ban the use of interstate commerce for lotteries in the interest of morality.

> As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one state to another.[55]

In the related context of gaming, the Court added that no evidence would be necessary to establish moral danger.[56] As the Court explained,

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body from coming "deliberately to the conclusion that a due regard for the public safety and morals requires a suppression of the liquor traffic"); Scott v. Donald, 165 U.S. 58, 91–92 (1897) (upholding a liquor sale restriction on, *inter alia*, morals grounds); *In re* Rahrer, 140 U.S. 545, 558, 564–65 (1891) (same); Crowley v. Christensen, 137 U.S. 86, 91 (1890) (noting that the "police power of the State is fully competent to regulate the [liquor] business—to mitigate its evils or to suppress it entirely" for the purpose of public morality).

53. Lottery Case (Champion v. Ames), 188 U.S. 321, 356 (1903) (citing Phalen v. Virginia, 49 U.S. (8 How.) 163, 168 (1850)).

54. 188 U.S. 321 (1903).

55. *Id.* at 357. The Court added:

> In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.

Id. at 357–58. For additional cases affirming government regulation of morality in the lottery context, see Douglas v. Kentucky, 168 U.S. 488 (1897); Stone v. Mississippi, 101 U.S. 814 (1879); *Ex parte* Jackson, 96 U.S. 727 (1877); Phalen v. Virginia, 49 U.S. 163 (1850).

56. Murphy v. California, 225 U.S. 623, 629 (1912); *see also* Marvin v. Trout, 199 U.S. 212, 224 (1905) (observing that "[f]or a great many years past gambling has been very generally in this country regarded as a vice to be prevented and suppressed in the interest of the public morals and the public welfare").

> [t]hat the keeping of a billiard hall has a harmful tendency is a fact requiring no proof . . . . [M]unicipal authorities [may] tak[e] legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation.[57]

Further reinforcing the presumption of harm, the Court also invoked a 1672 decision by Lord Hale upholding a ban on bowling alleys "because of the known and demoralizing tendency of such places."[58]

2. Support for Early Sexuality Restrictions

The Court also sustained morals restrictions regarding sexuality. Outside the context of polygamy,[59] however, the Court did not address the constitutionality of a single sexuality-related prohibition in the nineteenth century.[60] Then, in 1900, the Court upheld a New Orleans ordinance designating the neighborhood in which a "'public prostitute or woman notoriously abandoned to lewdness'" could reside.[61] In *L'Hote v. New Orleans*, the Court reinforced that states not only have the authority but also the "duty" to exercise the police power "to protect the public health and morals."[62] That authority, the Court said, was "beyond question."[63]

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57. *Murphy*, 225 U.S. at 629.

58. *Id.* at 630 (citing Rex v. Hall, 2 Keble, 846 (1672)).

59. One of the leading cases to address polygamy during this era was *Reynolds v. United States*, 98 U.S. 145 (1878), which never specifically mentioned morality but upheld the application of a polygamy prohibition on the grounds that it was a permissible response to an "offence against society." *Id.* at 165.

60. Much state regulation, including laws restricting sexual conduct, was immune from federal constitutional challenge during the nineteenth century under the then-prevailing view that the Bill of Rights did not apply to state action. *See* Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 250 (1833) (holding the Takings Clause inapplicable to state action); *see also* Palko v. Connecticut, 302 U.S. 319, 323–25 (1937) (describing the process of selective incorporation of Bill of Rights guarantees against the states).

61. L'Hote v. New Orleans, 177 U.S. 587, 588 (1900) (quoting NEW ORLEANS, LA., ORDINANCE NO. 13,032 § 2 (1897)). In *Davis v. Beason*, 133 U.S. 333 (1890), *overruled in part on other grounds by* Romer v. Evans, 517 U.S. 620, 634 (1996), the Court upheld a polygamy-related restriction on voting rights, holding that to exempt polygamy from punishment would shock a community's moral judgment.

62. *L'Hote*, 177 U.S. at 596. *But see* Keller v. United States, 213 U.S. 138, 144, 148 (1909) (holding that Congress exceeded its power in making it a crime to support a non-citizen to become a prostitute or to participate in immoral behavior).

63. *L'Hote*, 177 U.S. at 596; *see also* Cosmopolitan Club v. Virginia, 208

Likewise, in *Hoke v. United States*,[64] the Court upheld the White Slave Traffic Act, commonly known as the Mann Act, which at that time prohibited transporting women and girls across state lines for "'the purpose of prostitution or debauchery, or for any other immoral purpose.'"[65] The Court drew a connection between the government's power to regulate morality in this sexuality-related context and its similar power in other contexts.

> [S]urely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.[66]

As the cases of this era illustrate, the Court did not merely

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U.S. 378, 384 (1908) (acknowledging a state's "power to care for the . . . morals of its people" through legislative enactments).

64. 227 U.S. 308 (1913).

65. *Id.* at 317–18 (quoting 36 Stat. 825 (1910)). The Act was amended in 1986 to authorize prosecution for "any sexual activity for which any person can be charged with a criminal offense" rather than for "debauchery" and "immoral purpose." 18 U.S.C.A. § 2421 (2000).

In upholding the Mann Act, the Court affirmed that Congress, through its interstate commerce powers, had as much authority to address moral welfare as it had to promote material welfare. *Hoke*, 227 U.S. at 322 ("[I]t must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."). The Court also, once again, affirmed the states' power to legislate in the name of morality: "There is unquestionably a control in the States over the morals of their citizens . . . ." *Id.* at 321.

66. *Id.* at 322. Although the transportation at issue in *Hoke* was for commercial purposes, four years later, in *Caminetti v. United States*, the Court relied on the same moral authority embodied in the interstate commerce powers to uphold the Mann Act's application to men who had crossed state lines with women for noncommercial purposes. Caminetti v. United States, 242 U.S. 470, 491–92 (1917). Eventually, the Mann Act's reference to "other immoral purposes" was construed to mean prostitution. *See* Hansen v. Haff, 291 U.S. 559, 563 (1934); *see also infra* note 157.

Around the same time, the Court also upheld censorship of films for the protection of public morals. *See, e.g.*, Mut. Film Corp. v. Hodges, 236 U.S. 248 (1915). *See generally* Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741 (1992) (reviewing censorship efforts and the judicial response to them throughout the late nineteenth and early twentieth centuries).

The early twentieth century also saw the Supreme Court invoke the protection of public morality to justify racial segregation. *See, e.g.*, Berea Coll. v. Kentucky, 211 U.S. 45, 48 (1908) (upholding a government effort to prevent children of different races from being educated together).

accept the proposition that government could properly concern itself with the public's morals. Instead, it went further, opining with some regularity that attention to the citizenry's morals was among government's most important responsibilities.

C. THE PRESUMED LEGITIMACY OF MORALS JUSTIFICATIONS SINCE THE MID-TWENTIETH CENTURY

From the mid-twentieth century onward, the Court continued to offer rhetorical support for morals-based laws, albeit with less fervor than it had in earlier opinions. Three points are noteworthy regarding the context of these contemporary endorsements of morals-based lawmaking. First, composite morals justifications came up increasingly often in connection with prohibitions on expression, rather than on conduct, and typically were accompanied by additional state interests in the general welfare. Second, the other major group of cases to endorse government's morals-based lawmaking authority fits within the inert type described above. These cases included morality in routine descriptions of government's police powers but did not appear to rely on it to sustain government action, as in environmental regulation cases. Third, in contrast to the first two types of post-war cases involving morals-based justifications, *Bowers* stands alone in its endorsement and acceptance of a pure morals-based justification for lawmaking.

Turning first to the expression-related cases, we find that *Chaplinsky v. New Hampshire*,[67] a 1942 case affirming a defendant's conviction for cursing at a police officer, laid the groundwork for repeated endorsements of the government's moral authority. In sustaining the restraint on expression at issue, the Court had observed that some words "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[68]

This "social interest in order and morality" phrase then began to appear routinely in other cases, typically without elaboration, to support state regulation of lewd and obscene publications and performances.[69] In *Paris Adult Theatre v. Slaton*, for

67. 315 U.S. 568 (1942).

68. *Id.* at 572.

69. The "social interest" phrase appeared in over twenty-five lead opinions of the Court between 1949 and 2003, most, but not all, of which concerned restraints on socially undesirable speech, including symbolic speech. *See, e.g.*, Virginia v. Black, 123 S. Ct. 1536, 1547 (2003) (ruling that a ban on cross

example, a majority of the Court, stressing the "'right of the Nation and of the States to maintain a decent society,'" upheld the exhibition of an allegedly obscene film at an "adult" theater.[70] In doing so, the Court reinforced the legitimacy of a legislature acting "to protect 'the social interest in order and morality.'"[71]

The second major category of cases to address the state's power to regulate morality since the mid-twentieth century includes opinions that reference moral authority in routine descriptions of the police power but do not otherwise mention morality. Zoning and environmental regulation cases are chief among these.

In *Berman v. Parker*, for example, the Court reiterated the familiar mantra regarding the police power's coverage in a unanimous decision that sustained governmental authority to consider aesthetics as well as public health in asserting eminent domain powers for redevelopment purposes.[72] "Public safety, public health, morality, peace and quiet, law and or-

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burning was constitutional); R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (striking down a blanket prohibition on hate or bias-motivated speech); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (finding no First Amendment protection for socially undesirable speech by a student in a secondary school setting); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 (1984) (affirming a decision against a loudspeaker manufacturer in a product disparagement suit in which a consumer product organization published an inaccurate, but nonmalicious, review of loudspeakers); New York v. Ferber, 458 U.S. 747, 754 (1982) (ruling that child pornography is beyond First Amendment protection); F.C.C. v. Pacifica Found., 438 U.S. 726, 746 (1978) (upholding a federal prohibition on the daytime broadcast of sexually explicit and offensive speech); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) (striking down a statute that prohibited the publication of the identity of a rape victim where information was a matter of public record); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (reversing a ruling against a magazine publisher that knowingly mischaracterized a nonpublic figure); Miller v. California, 413 U.S. 15, 21, 24 (1973) (limiting unprotected obscene speech to, *inter alia*, materials that "appeal to the prurient interest in sex" and "portray sexual conduct in a patently offensive way"); Roth v. United States, 354 U.S. 476, 485 (1957) (holding that there is no First Amendment protection for obscene materials); Beauharnais v. Illinois, 343 U.S. 250, 257 (1952) (sustaining a statute that criminalized libelous statements against particular groups).

70. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59–60 (1973) (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)). For further discussion of the relationship of decency to morality, see *infra* note 131 and accompanying text.

71. *Paris Adult Theatre I*, 413 U.S. at 61 (quoting *Roth*, 354 U.S. at 485 (affirming the government's power to regulate obscenity)).

72. 348 U.S. 26 (1954).

der—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs," the Court wrote.[73]

But immediately following this description of the police power, the Court suggested that none of those grounds was the precise source of the government's ability to exercise its power to condemn land for redevelopment. Instead, as the Court explained, the references to public safety, health and morality "merely illustrate the scope of the power and do not delimit it."[74] Thus, whatever the precise source of governmental authority to consider aesthetics as well as public health in redevelopment projects, it is different from the government's power to regulate morality.[75]

Third, in contrast to the often terse endorsement of morals-based lawmaking that appeared in *Chaplinsky* and the inert reference to morality in routine police powers descriptions just described, stands the Court's 1986 decision in *Bowers v. Hardwick*.[76] As the sole case to rely purely on an explicit morals justification, *Bowers* offered the strongest support for the morals-based lawmaking power in the latter half of the twentieth century.[77] Specifically, the Court wrote, "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" sufficed to justify the law's prohibi-

73. *Id.* at 32.

74. *Id.* In elaborating on the reach of the police power, the Court also emphasized the power's broad scope. "An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition." *Id.*

75. As in *Berman*, support for government regulation of morality appears frequently in dicta in cases challenging official restrictions on private property. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 503 (1987) (describing the police power as "'an exercise of the sovereign right of the Government to protect the lives, health, *morals*, comfort and general welfare of the people, and . . . paramount to any rights under contracts between individuals.'" (emphasis added) (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905))); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) (same); Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. 104, 144 (1978) (affirming "'[t]he power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public'" (quoting Mugler v. Kansas, 123 U.S. 623, 669 (1887))).

76. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

77. *Id.* at 196.

tion of oral and anal sex.[78]

Dissenting in *Lawrence*, Justice Scalia pointed to *Bowers* to reinforce the pervasiveness of "'laws representing essentially moral choices.'"[79] "Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation," he wrote.[80] Interestingly, though, Justice Scalia did not point to a single Supreme Court decision to support his arguments but instead cited to a smattering of lower court rulings that relied on *Bowers* to uphold laws implicating moral judgments.[81] The complete absence of Supreme Court holdings reinforcing *Bowers*'s support for morals-based regulation further highlights *Bowers*'s anomalous role amidst post–World War II precedent.[82]

Yet even if *Bowers* stood alone in its pure reliance on a morals justification, the array of cases described above, with their regularized repetition of government's moral regulatory powers, has produced and fortified the sense of normalcy of laws enacted for the purpose of controlling society's morals.[83]

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78. *Id.* As many commentators noted and the Supreme Court itself later acknowledged, the Georgia law did not single out sexual relations between same-sex partners and, instead, prohibited oral and anal sex to anyone in the state. *See*, Lawrence v. Texas, 123 S. Ct. 2472, 2477 (2003) ("[T]he Georgia statute [at issue in *Bowers*] prohibited [sodomy] whether or not the participants were of the same sex . . . ."); *see also, e.g.*, Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988) (analyzing the historical inaccuracy of the discussion in the majority and concurring opinions in *Bowers* regarding the Georgia law and the history of regulating sodomy).

79. *Lawrence*, 123 S. Ct. at 2490 (Scalia, J., dissenting) (quoting *Bowers*, 478 U.S. at 196).

80. *Id.* (citations omitted).

81. *Id.*

82. *See supra* note 32 and accompanying text (describing *Bowers* as the Court's first embrace of a purely morals-based justification for lawmaking).

83. Of course, neither the morals laws nor the Court's rhetoric has put an end to the behaviors they deem immoral. Not only did the laws not halt immoralities themselves, but they may also have played a role in encouraging and broadening the reach of behaviors deemed immoral, particularly in the area of sexuality. *See* Dennis, *supra* note 42, at 389 (observing "[t]he failure of obscenity law to control immorality" while examining the law's "significant and far-reaching consequences for antebellum cultural and economic practices" including "the development of both sexual speech and markets for 'obscene' publications"); Flaherty, *supra* note 42, at 227 ("Despite their good intentions about upholding public morality, . . . immorality had been and continued to be a significant problem."); R.W. Roetger, *The Transformation of Sexual Morality in "Puritan" New England: Evidence from New Haven Court Records, 1639–1698*, 15 CANADIAN REV. OF AM. STUD. 243, 255 (1984) (identi-

The Court in *Bowers* added force to this position by declaring that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[84] Although many lower courts distinguished or rejected *Bowers*'s support for pure morals-based restrictions,[85] others, including those relied on by Justice Scalia, embraced *Bowers*'s argument that moral concerns alone sufficed to justify government action.[86] Whether that embrace should continue in the absence of *Bowers* requires us to examine the relationship between the Court's actual reliance on morals justifications and its pro-morals regulation rhetoric. The next part takes up this inquiry.

II. THE SUPREME COURT'S MORAL DISCOMFORT

Given the near-reflexive support in the Supreme Court's opinions for states' interventions to protect the public morality, it may seem absurd even to question the Court's commitment

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fying "transformation in sexual morality . . . during the seventeenth century" when magistrates "used their discretionary powers to enforce laws in a manner that reflected popular attitudes toward sexual misconduct" and "'ordinary' sex crimes ceased being prosecuted and . . . fornicators received lenient sentences precisely as their numbers swelled"). *See generally* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (Robert Hurley trans., Vintage Books 1990) (1978) (discussing ways in which official constraints on sexual relations shaped interest in and meaning of sexual acts).

Further, as a practical matter, scholars tend to agree that people of color, poor people, and other marginalized populations bore the brunt of enforcement. These observations about disparate and targeted enforcement remain consistent even where scholars disagree about the overall severity or frequency of enforcement. *See, e.g.*, D'EMILIO & FREEDMAN, *supra* note 42, at 86 ("In the nineteenth century, sexuality continued to serve as a powerful means by which white Americans maintained dominance over people of other races."); *id.* at 215 (noting sterilization laws were passed "to prevent reproduction of those whom proponents viewed as undesirable").

84. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

85. *See, e.g.*, Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002) (invalidating Arkansas's sodomy law); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (striking down Kentucky's sodomy law); Gryczan v. State, 942 P.2d 112 (Mont. 1997) (striking down Montana's deviate sexual conduct law's criminalization of same-sex partners' sexual relations); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (holding Tennessee's sodomy prohibition invalid).

86. *See Lawrence*, 123 S. Ct. at 2490 (Scalia, J., dissenting) (maintaining that "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation" and citing several cases in support of that proposition).

to its own rhetoric.[87] After all, the possibility that the government's interest in morality might not be sufficient to justify government action had never been admitted by a majority of the Court prior to *Lawrence*, let alone the possibility that the government's interest in morality might be illegitimate.

By taking a closer look at the range of cases involving discussions of morality and some of the debate surrounding those cases, however, this part will demonstrate that little conviction has existed on the Court, especially since the mid-twentieth century, to rely on the moral authority promised to the states. Instead, majority opinions in cases referencing and endorsing government's power to regulate morals have almost never relied exclusively on an explicit, pure reference to morality to uphold a law, typically choosing instead to sustain government action based on observable societal harms. Further, even where morals justifications held sway in certain contexts, later, similar cases reveal the majority distancing itself from those morals rationales and relying on other grounds to uphold the challenged restriction.

A. CHRISTOPHER TIEDEMAN'S MORE LIMITED THEORY OF THE POLICE POWER

Another early leading theorist of the police power provides valuable context for this empirical argument about the Court's avoidance of morality-based justifications. As we saw above, several early scholars of the police power advocated precisely the type of broad, morals-encompassing authority for the state that I contend the Court actually shied away from in adjudicating morals cases. Their view, however, was not held universally, even in the nineteenth century. For example, in sharp contrast to Judge Cooley's view that the state could respond to violations of morality in the same manner as it would to trespasses and other injuries to persons or property[88] stood the work of Professor Christopher G. Tiedeman.

87. *See* Henkin, *supra* note 9, at 401–02 ("The authority of the state, under the Constitution, to enact 'morals legislation'—laws reflecting some traditional morality having no authentic social purpose to protect other persons or property—has always been assumed; it has deep roots, and it has seemed obvious and beyond question."); *id.* at 413 ("[T]he right of the state to legislate in the field of morals, to deprive the citizen of liberty or property for the sake of accepted notions of morality, is deeply part of our law; some will argue that it is beyond question or need for justification.").

88. *See supra* note 44 and accompanying text.

In his late nineteenth-century treatise, Professor Tiedeman described the police power as simply the power of the government to establish "measures for the enforcement of the legal maxim, *sic utere tuo, ut alienum non laedas*."[89] Echoing John Stuart Mill, who was writing around the same time, Professor Tiedeman asserted that "[t]he object of police power is the prevention of crime, the protection of rights against the assaults of others."[90]

Taking this argument further, Professor Tiedeman flatly rejected morality as a basis for regulating. He wrote: "The police power of the government cannot be brought into operation for the purpose of exacting obedience to the rules of morality, and banishing vice and sin from the world."[91]

Perhaps anticipating opposition to his position, Professor Tiedeman also spelled out a three-step argument supporting his denunciation of morals laws. First, he took as "conceded by all, that vice cannot be punished unless damage to others can be shown as accruing or threatening."[92] He then argued that because the connection between vice and damage is attenuated, at best, vice cannot be shown to be the cause of damage—"[t]he intervention of so many co-operating causes in all cases of remote damage makes this a practical impossibility."[93] As a result, he concluded, because it is a "practical impossibility" to prove that a vice caused harm to another, government should not regulate conduct solely on the ground that the conduct contravenes prevailing morality.[94]

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89. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH CIVIL AND CRIMINAL STANDPOINT 150 (St. Louis, F.H. Thomas Law Book Co. 1886). The Latin phrase translates to "use what is yours so as not to injure another's."

90. *Id.*; *see also* MILL, *supra* note 9.

91. TIEDEMAN, *supra* note 89, at 150.

92. *Id.* at 151.

93. *Id.*

94. *Id.* at 153. In another version of the same point, Professor Tiedeman emphasized the lack of connection between violation of moral prohibition and injuries to the rights of another:

> The moral laws can exact obedience only *in foro conscientioe.* The municipal law has only to do with trespasses. It cannot be called into play in order to save one from the evil consequences of his own vices, for the violation of a right by the action of another must exist or be threatened, in order to justify the interference of law. It is true that vice always carries in its train more or less damage to others, but it is an indirect and remote consequence; it is more incidental than consequential. At least it is so remote that very many other causes co-operate to produce the result, and it is difficult, if not impossible, to

Although we will see some exceptions to his theory, Professor Tiedeman has turned out largely to be correct in anticipating the future of morals justifications, if not the future of all laws that reflect moral visions. While I suggest in Part III that engagement with pluralism, rather than difficulty with causation, is primarily responsible for pushing the Court away from its support for morals-based rationales, Tiedeman's observations forecast well the difficulties presented by majoritarian morals laws.

The remainder of this section will focus on illustrating the trend away from reliance on morals justifications by looking first at what might be thought of as the cornerstone morals cases of the nineteenth and early twentieth century—those dealing with alcohol, lotteries and gaming, blasphemy, and polygamy. Then, the discussion will turn to the latter part of the twentieth century for an in-depth exploration of trends in adult sexual speech and expression cases, which are among the primary contemporary cases decided by the Supreme Court in which explicit references to morality have played a role. This section will also include discussion of developments in Supreme Court jurisprudence regarding Sunday closure laws, regulation of sexual acts, and family recognition law, where concerns about morals are not necessarily explicit but are inevitably integral to the underlying legislation at issue.[95]

B. THE NON-MORAL FOUNDATIONS OF THE CORNERSTONE MORALITY CASES

Notwithstanding the frequent endorsement of the state's moral authority in nearly all police power cases decided from the nineteenth century through the mid-1940s,[96] none of these cases rely exclusively on morality. Instead, the decisions tend to rely at least as much on governmental responsibility for public health or physical safety as on morality, fitting them neatly

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ascertain which is the controlling and real cause.

Id. at 150.

95. As illustrated above, the Court provides rhetorical support for government's power to enforce morals laws in numerous other cases. However, this section will limit discussion only to those cases in which a morals justification actually was at issue. Other cases, like the zoning and environmental regulation cases that provide rhetorical reinforcement of the government's power to regulate the public's morals, fall within the inert type and do not engage substantively with morals rationales. *See supra* notes 72–75 and accompanying text.

96. *See supra* notes 47–66 and accompanying text.

within the embedded type described earlier.

Among the cases that discuss morality in the context of the police power, those concerning alcohol restrictions are, far and away, the most numerous.[97] But for as much as those cases dramatize the moral threat posed by alcohol, the Court never left the morality concern to stand alone. Instead, risks to the public health and other secondary effects associated with alcohol consumption, such as crime, loomed at least as large as the prospect of moral decline. In 1877, for example, when analyzing a challenge to a Kansas prohibition law, the Court coupled discussion of alcohol's moral dangers[98] with concerns that "the public health . . . and the public safety, may be endangered by the general use of intoxicating drinks."[99] Pointing to specific harms, the Court stated that "we cannot shut out of view . . . the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country, are in some degree at least, traceable to this evil."[100]

Later cases picked up this theme and put even further stress on the harmful effects of liquor not just on morality but also on the public health and material welfare.[101] In *Samuels v. McCurdy*,[102] the last of the Supreme Court's early police power cases to address restrictions on alcohol, the Court acknowledged the "demoralizing" effect of alcohol, but it stressed equally that the state's power to control liquor included the

97. This can be understood, in part, because liquor regulations were among the few types of regulations potentially subject to federal constitutional review under *Barron v. Mayor of Baltimore*, 32 U.S. 242 (1833), which limited the Bill of Rights' application to state action. *See also supra* note 60.

98. Mugler v. Kansas, 123 U.S. 623, 662 (1887); *see also supra* notes 51–52 and accompanying text.

99. *Mugler*, 123 U.S. at 662.

100. *Id.*

101. For example, in *Crowley v. Christensen*, 137 U.S. 86 (1890), the Court explained that the injury to a drinker of alcohol

> first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him.

Id. at 91.

Underscoring the centrality of the multiple risks alcohol posed to society, the Court added that "[b]y the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying." *Id.*

102. 267 U.S. 188 (1925).

power "to avoid the abuses which follow in its train."[103]

In addition to the liquor cases, the lottery and gaming cases represent another cornerstone of ardent judicial support for morals legislation in nineteenth and early twentieth centuries. Yet, there too, the Supreme Court often refrained from relying exclusively on moral harms. In an observation made first in an 1850 case upholding a Virginia law banning the sale of lottery tickets and repeated in several subsequent lottery cases, the Court pointed not only to the lottery's moral dangers but also to its deleterious economic effects.[104] The lottery, it wrote, further impoverishes those who are poor; it "preys upon the hard earnings of the poor; it plunders the ignorant and simple."[105] In 1905, the Court again stressed the dangers of gambling to *both* the public welfare and the public morals. Reflecting popular support for gambling restrictions, the Court commented that "[f]or a great many years past gambling has been very generally in this country regarded as a vice to be prevented and suppressed in the interest of the public morals and the public welfare."[106]

If we consider the Court's analysis of gaming laws today, we find that morality-based aims, while still present, exist amidst an even broader array of concerns about the effects of gambling. For example, in a case analyzing Puerto Rico's authority to limit gambling advertisements, the Court recognized

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103. *Id.* at 197–98.

104. Phalen v. Virginia, 49 U.S. 163, 168 (1850).

105. *Id.*; *see also* Lottery Case (Champion v. Ames), 188 U.S. 321, 356 (1903) (making the same observation as in *Phalen* about the lottery's impoverishing effect); Douglas v. Kentucky, 168 U.S. 488, 496 (1897) (same); Stone v. Mississippi, 101 U.S. 814, 818 (1879) (same).

106. Marvin v. Trout, 199 U.S. 212, 224 (1905). Because the Court relied on interests in morality *and* public welfare in conjunction with each other, we can conclude that the two are conceptually distinct and that concern with welfare is not simply a restatement of the morals-based concern. In *Berman v. Parker*, 348 U.S. 26, 33 (1954), the Court isolated welfare from other police powers and described it in the following sense:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. (citation omitted); *see also* Cicchino, *supra* note 9, at 140–41 ("'Public welfare' arguments . . . assert[] that the law avoids harms or realizes goods other than the good of eliminating or increasing the behavior or characteristic that defines the classification the law creates—for example, health, safety, or economic prosperity.").

that concerns about crime, corruption, and other problems far more visible in daily life than breaches of moral precepts supported the Commonwealth's actions.

> The Tourism Company's brief before this Court explains the legislature's belief that "[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." These are some of the very same concerns, of course, that have motivated the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a "substantial" governmental interest.[107]

Given that almost every state currently allows some form of gambling and that federal law does not categorically bar all advertisement for gambling and lotteries, we can safely conclude that, today, the Court would not rely solely on morality to uphold official restrictions on a lottery.[108]

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107. Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986) (citation omitted). Indeed, in explaining Puerto Rico's authority to regulate speech regarding casinos, the Court analogized to a state's authority to regulate speech regarding cigarettes, alcohol, and prostitution. *Id.* at 346.

108. As of 1988, only two states did not permit any form of legalized gambling. *See* Thompson v. Oklahoma, 487 U.S. 815, 847–48 (1988) (detailing state laws related to minors' participation in gambling activities). Lotteries remain prohibited at the federal level. United States v. Edge Broad. Co., 509 U.S. 418 (1993). In *Edge Broadcasting*, the Court supplied a useful history of federal efforts to control lotteries.

> Congress has, since the early 19th century, sought to assist the States in controlling lotteries. In 1876, Congress made it a crime to deposit in the mails any letters or circulars concerning lotteries, whether illegal or chartered by state legislatures. This Court rejected a challenge to the 1876 Act on First Amendment grounds in *Ex parte Jackson*. In response to the persistence of lotteries, particularly the Louisiana Lottery, Congress closed a loophole allowing the advertisement of lotteries in newspapers in the Anti-Lottery Act of 1890, and this Court upheld that Act against a First Amendment challenge in *In re Rapier*. When the Louisiana Lottery moved its operations to Honduras, Congress passed the Act of Mar. 2, 1895, which outlawed the transportation of lottery tickets in interstate or foreign commerce. This Court upheld the constitutionality of that Act against a claim that it exceeded Congress's power under the Commerce Clause in *Lottery Case*. This federal antilottery legislation remains in effect. After the advent of broadcasting, Congress extended the federal lottery control scheme by prohibiting, in § 316 of the Communications Act of 1934, the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme." In 1975, Congress amended the statutory scheme to allow newspapers and broadcasters to advertise state-run lotteries if the newspaper is published in or the broadcast station is licensed to a State which conducts a state-run lottery.

Polygamy cases, which constitute the third cornerstone of early morals legislation, present more of a challenge than the alcohol and gambling cases because the Court has so vigorously highlighted the moral roots of the polygamy prohibition. As the Court effused in an 1885 case considering the disfranchisement of male voters with multiple wives, for example, monogamous marriage of a man and woman is "the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."[109]

Yet around the same time in another condemnation of polygamy, the Court took pains to identify not just the moral harm but the other, more visible injuries it associated with plural marriage. Bigamy and polygamy, the Court said, "tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man."[110] Even further, in *Reynolds v. United States*,[111] the majority opinion never once mentioned the word "morality," characterizing polygamy instead as an "offence [sic] against society."[112] Explaining that concept, the Court focused particularly on one commentator's observation that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy."[113] The risk of polygamy, in

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This exemption was enacted "to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States."

Id. at 421–23 (citations and footnotes omitted).

Similarly, with respect to lottery advertising, rather than prohibiting it entirely, the federal government has reflected a state's own preferences regarding lotteries within its advertising restrictions. *Id.* at 428 ("Instead of favoring either the lottery or the nonlottery State, Congress opted to support the anti-gambling policy of a State like North Carolina . . . and [a]t the same time it sought not to unduly interfere with the policy of a lottery sponsoring State such as Virginia."); *see also* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 176 (1999) (observing that federal law does not prohibit all advertising of gambling).

109. Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

110. Davis v. Beason, 133 U.S. 333, 341 (1890), *overruled on other grounds by* Romer v. Evans, 517 U.S. 620, 634 (1996).

111. 98 U.S. 145 (1878) (sustaining a criminal conviction for violation of bigamy prohibition).

112. *Id.* at 165.

113. *Id.* at 166. Interestingly, the Court conceded that the portended disastrous political consequences might not actually flow from sanction of polygamy. While endorsing the government's authority to restrict polygamy, the Court acknowledged that "[a]n exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to dis-

other words, was not moral debasement of the individuals involved but instead the undermining of American government.

This is not to say that the public's morality was only a secondary concern of polygamy prohibitions. Rather, this close look at the cases simply highlights that even assuming moral disapproval would have been sufficient to sustain polygamy prohibitions, the Court opted not to rely on morality alone and instead rested on a composite justification addressing other, concrete risks purportedly posed by plural marriage.[114]

The last of the classic morals law cornerstones, blasphemy prohibitions, has received virtually no substantive analysis by the Supreme Court.[115] Only two of the earliest cases offer an extended analysis of the government interest supporting a blasphemy prohibition, but those rely on religious reasoning that would not be acceptable today. For example, in considering whether a church could legally employ an English pastor in 1892, the Court's reasoning rested largely on the nation's embrace of Christianity:

> The people of this state . . . profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, ex-

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turb the social condition of the people who surround it." *Id.*

114. *See, e.g.*, Estin v. Estin, 334 U.S. 541, 546 (1948) (discussing the state's "considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized"). Because *Cleveland v. United States*, 329 U.S. 14 (1946), was a statutory interpretation case focused on whether a polygamous marriage fit within the Mann Act's prohibition of interstate transport of women for "immoral" purposes, its exclusive focus on the immoral nature of polygamy is not directly relevant here.

Further, for the purpose of identifying the Court's reliance on morals-based justifications to sustain law, it bears noting that only ten majority opinions since 1950 have even mentioned the word "polygamy" and none engaged in a substantive analysis of the reasons supporting prohibitions of polygamous marriage. *See, e.g.*, *Romer*, 517 U.S. at 634 (mentioning polygamy in the course of distinguishing *Davis*, 133 U.S. at 333, from a Colorado amendment precluding antidiscrimination protections for lesbians, gay men, and bisexuals); Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (noting the validation of polygamy convictions in the context of evaluating justifications for the Sunday closure law).

115. The Court has mentioned blasphemy in eight lead opinions since 1950 and four prior to that time. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 754 (1982) (noting the states' power to punish blasphemy in a ruling upholding a child pornography prohibition); Epperson v. Arkansas, 393 U.S. 97, 107 n.15 (1968) (mentioning a witness's reference to blasphemy law in a decision invalidating an evolution statute). For an insightful analysis of blasphemy jurisprudence and its relationship to First Amendment values, see generally Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1968).

> tremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order.[116]

Likewise, nearly fifty years earlier, the Court explained, in the context of a dispute regarding a trust, that "Christianity is a part of the law, so that blasphemy can be punished, but not for the purpose of invading the conscience of other persons."[117]

In addition, *Cantwell v. Connecticut*,[118] which is perhaps the closest contemporary relative of these cases, considered whether a speaker who criticized another's religion could be prosecuted for inciting a breach of the peace.[119] Its analysis, however, was entirely different from the analysis used in the two cases just discussed. In reversing the speaker's conviction, the Court emphasized that while government may prohibit speech that incites violence, it may not intervene on the grounds that listeners may be deeply offended.[120] Concerns about the preservation of a community's religious sensibilities, which presumably related to that community's moral norms, did not even appear in the Court's reasoning, much less guide the outcome of the case.

C. MORALS JUSTIFICATIONS IN THE POST–WORLD WAR II ERA

While the cases just discussed show that the Court did not rely exclusively on morality even in the supposed heyday of morals legislation, contemporary cases take the jurisprudence even further from pure dependence on morals rationales. The last several decades of cases bring into sharp relief that the post–World War II Court has *never* relied exclusively on morality to sustain government action with the exception of the now-

116. Church of the Holy Trinity v. United States, 143 U.S. 457, 470 (1892) (quoting People v. Ruggles, 8 Johns. 290, 294 (1811)). The Court added:

> The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the constitution as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the Grand *Lama*; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those impostors.

Id. at 470–71 (quoting *Ruggles*, 8 Johns. at 295).

117. Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127, 154 (1844).

118. 310 U.S. 296 (1940).

119. *Id.* at 303.

120. *Id.* at 308–09.

discredited *Bowers v. Hardwick*.[121] Although some of the cases discussed below amass a majority for the rhetorical proposition that moral concerns appropriately trigger government's regulatory powers, the lack of exclusive reliance on, and affirmative avoidance of, morals rationales is unmistakable.[122]

To expose this trend, I will turn first and primarily to the cases involving restrictions on "adult entertainment" establishments, including book stores, movie theaters, and nude dancing establishments that offer for sale sexually explicit performances or materials. Then, to demonstrate that disenchantment with morals rationales is not limited to the adult entertainment context, I will look to the Court's analysis of restrictions on particular sexual acts, the cases regarding restrictions on "offensive" noncommercial speech, the "blue laws" jurisprudence, the Court's treatment of non-nuclear family formations, and finally, to the analysis of the morals justification in *Lawrence*.

1. The Sexual Entertainment Cases

Given both the moralistic terms of the public debate about sexually explicit entertainment[123] and the Court's strong rhetorical support for morals-based lawmaking,[124] the argument that a majority of the Court has not relied exclusively on morals rationales in the last fifty years, other than in *Bowers*, may be somewhat surprising. Even more surprising may be the use

121. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003); *see also supra* notes 76–82 and accompanying text.

122. A related trend is the disappearance of litigation before the Supreme Court involving certain types of traditional morals regulations, like the prohibitions against lotteries and gambling, which were so heavily morality dependent in the Court's century-old opinions. *See supra* notes 49–66 and accompanying text. However, the reduction in these regulations cannot completely explain the Court's nonreliance on morals rationales in light of morality's continuing relevance to other contemporary restrictions.

The question whether the shifting away from morals justifications and concomitant embrace of new, harm-based rationales amounts to more than a semantic difference is addressed *infra* at notes 300–16 and accompanying text.

123. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 329 (2000) (Stevens, J., dissenting). Justice Stevens quoted a lawmaker's statement supporting Erie's ban on nude dancing establishments: "We're not talking about nudity. We're not talking about the theater or art . . . . We're talking about what is indecent and immoral . . . . We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." *Id.* (Stevens, J., dissenting) (alterations in original) (citation omitted).

124. *See supra* Part I.

here of the adult entertainment cases to illustrate that a majority of the Court has been leaving morals-based rationales entirely untouched. The against-the-current nature of these arguments is underscored further by Justice Scalia's regular contention that "[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' *i.e.*, immoral."[125]

It turns out, however, that the traditional presumption regarding the validity of morals-based justifications for lawmaking is not as reliable as Justice Scalia's statement suggests. Let us begin with *Paris Adult Theatre*,[126] the first case decided after the Court developed the framework that currently governs constitutional analysis of obscenity restrictions.[127] At issue in *Paris Adult Theatre* was the constitutionality of an injunction prohibiting the showing of two allegedly obscene films.[128] As was its habit, the Court rhetorically affirmed the sufficiency of morals-based rationales, referring to *Chaplinsky*'s determination that a legislature can act legitimately to protect "the social interest in order and morality."[129]

Yet the decision itself specifically disavowed reliance on moral interests. "The issue in this context," the Court wrote, "goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.'"[130] Stressing that the restriction of the films was not rooted in moral views, the Court

125. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991) (plurality opinion) (Scalia, J., concurring). Justice Scalia added:

> In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."

Id. (Scalia, J., concurring); *see also Pap's A.M.*, 529 U.S. at 310 (Scalia, J., concurring in judgment) (endorsing the government's power to encourage "good morals").

126. 413 U.S. 49 (1973).

127. *See* Miller v. California, 413 U.S. 15, 24 (1973) (establishing the framework for evaluating obscenity prohibitions).

128. *Paris Adult Theatre I*, 413 U.S. at 51–52.

129. *Id.* at 61 & n.12 (quoting Roth v. United States, 354 U.S. 476, 485 (1957), in turn quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

130. *Id.* at 69.

observed that

> [t]he States have the power to make a *morally neutral judgment* that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' "right . . . to maintain a decent society."[131]

The Court's reference to "decent society," although left undefined, must be understood to fall outside moral concerns, given the earlier stress on the morally neutral nature of the obscenity law.

The Court also identified several other interests that might legitimately support regulation of obscenity. In connection with public safety, for example, the Court pointed to reports of "an arguable correlation between obscene material and crime."[132] In addition, the Court noted the "social interest in order,"[133] describing it as a concern with "antisocial behavior" that might flow from the "crass commercial exploitation of sex."[134]

The next major shift away from reliance on morals justifications came in 1991 in *Barnes v. Glen Theatre, Inc.*[135] Although the Court in *Barnes* upheld an Indiana prohibition against nudity as applied to a nude dancing establishment, there was no longer majority support for the proposition that a government interest in "protecting societal order and morality" sufficed.[136]

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131. *Id.* (emphasis added) (second alteration in original) (citation omitted).

132. *See id.* at 58. In supporting the legitimacy of the safety and social order concerns, the Court dedicated a portion of its opinion to supporting the state's authority to embrace these concerns even absent empirical support for them. *Id.* at 60–64.

133. *Id.* at 61 (quoting *Roth*, 354 U.S. at 485, in turn quoting *Chaplinsky*, 315 U.S. at 572).

134. *Id.* at 63.

135. 501 U.S. 560 (1991).

136. A three-Justice plurality explained that public indecency laws, like the one at issue in *Barnes*, "reflect moral disapproval of people appearing in the nude among strangers in public places." *Id.* at 568. It then concluded that the Indiana ban on nudity "further[ed] a substantial government interest in protecting order and morality." *Id.* at 569. Justice Scalia opined that "[m]oral opposition to nudity suppl[ied] a rational basis for its prohibition." *Id.* at 580 (Scalia, J., concurring).

Earlier cases also sustained restrictions on adult entertainment theaters on nonmoral, secondary-effects grounds. However, the governments in those cases, unlike in *Barnes*, had not put the moral concerns in issue. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (observing that "the City Council's '*predominate* concerns' were with the secondary effects of adult theaters" (emphasis added)); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (analyzing the sufficiency of the city's "interest in preserving the character of its neighborhoods," including preventing "serious problems" of crime

Instead, Justice Souter, who provided the fifth vote to uphold the statute, disclaimed reliance on morals rationales. He rested his concurrence "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments."[137] Among the secondary effects he cited were increases in prostitution, sexual assault and "other criminal activity" that the state attributed to nude dancing.[138]

Nearly a decade later, in *City of Erie v. Pap's A.M.*,[139] a majority of the Court came around to Justice Souter's position, disregarding morals rationales entirely while upholding a public nudity restriction against a sex-related business under a statute that was practically identical to the statute at issue in *Barnes*.[140] In evaluating the public indecency ordinance's application to a business that promoted "totally nude erotic dancing performed by women,"[141] five of the seven Justices who voted to sustain the law did not even mention morality. Instead, they relied exclusively on the secondary effects of nude dancing,[142] accepting the city's contention that "crime and other public health and safety problems are caused by the presence of nude dancing establishments."[143]

Although the city had, on its own initiative, advanced secondary-effects concerns to justify the zoning rule,[144] this was not a situation where morality rationales were unimaginable or entirely absent. The ordinance, after all, updated provisions of an

caused by the concentration of adult entertainment businesses in the same neighborhood).

137. *Barnes*, 501 U.S. at 582 (Souter, J., concurring).

138. *See id.* (quoting Brief for Petitioners at 37, *Barnes* (No. 90-26)).

139. 529 U.S. 277 (2000) (plurality opinion).

140. *See id.* at 283–84 n.* (plurality opinion) (requiring otherwise nude dancers to wear pasties and g-strings); *Barnes*, 501 U.S. at 569 n.2 (same). Justice Scalia noted specifically that "[t]he city of Erie self-consciously modeled its ordinance on the public nudity statute" the Court upheld in *Barnes*. *Pap's A.M.*, 529 U.S. at 307 (Scalia, J., concurring).

141. *Pap's A.M.*, 529 U.S. at 284 (plurality opinion).

142. *See id.* at 300–01 (O'Connor, J., concurring).

143. *Id.* at 300.

144. The ordinance's preamble explained that the regulation was adopted because "nude live entertainment . . . adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects." *Id.* at 290 (citation omitted).

"'Indecency and Immorality' ordinance that ha[d] been on the books since 1866."[145] As a result, the majority's departure from even partial rhetorical support for and reliance on morals-related justifications sparked a sharp rebuke from Justice Scalia, who emphasized the continuing adequacy of morality as a sufficient basis for legislation.

> I do not feel the need, as the Court does, to identify some "secondary effects" associated with nude dancing that the city could properly seek to eliminate. (I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.) The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.[146]

As Justice Scalia himself acknowledged, the Court's thinking about morals-based justifications had changed in kind.[147]

Thus, although the Court consistently has sustained most adult entertainment restrictions, its jurisprudence in this area has undergone a dramatic analytic shift.[148] As early as 1973, in

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145. *Id.*; *see also supra* note 123 (discussing lawmakers' commentary regarding immorality of nude dancing).

146. *Pap's A.M.*, 529 U.S. at 310 (Scalia, J., concurring).

147. Justice Scalia emphasized this shift most recently in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), a case involving an ordinance prohibiting multiple adult entertainment businesses from locating in the same building. Justice O'Connor's opinion for the plurality sustained the ordinance based on the city's express interest in addressing the "higher rates of prostitution, robbery, assaults, and thefts" in communities where adult-oriented businesses are located. *See id.* at 430 (plurality opinion). Likewise, Justice Kennedy's concurrence focused entirely on the city planners' power to regulate sexually-oriented businesses to reduce crime. *Id.* at 451–53 (Kennedy, J., concurring). Justice Scalia, however, while joining the plurality, pointedly observed that "in a case such as this our First Amendment traditions make 'secondary effects' analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." *Id.* at 443–44 (Scalia, J., concurring).

148. *Compare* Adams Newark Theater Co. v. City of Newark, 354 U.S. 931 (1957) (per curium) (affirming without discussion *Adams Newark Theatre Co. v. City of Newark*, 126 A.2d 340 (1956), and sustaining a ban on nude burlesque productions where the city proffered morality justification), *with* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582–83 (1991) (Souter, J., concurring) (introducing secondary-effects doctrine in this area), *and* City of Erie v. Pap's A.M., 529 U.S. 277, 296–301 (2000) (plurality opinion) (outlining the plurality's analysis on a secondary-effects basis); *and id.* at 310 (Souter, J., concurring in part and dissenting in part) (stating his agreement with plurality's analytic framework). *See also* James S. Malloy, Recent Decision, *A Content Neutral Public Nudity Ordinance That Satisfies the* O'Brien *Test May Require*

Paris Adult Theatre, the majority emphasized the law's moral neutrality, even as it reinforced the permissibility of morals rationales to justify government action. Nearly twenty years later in *Barnes*, although the state's power to rely on morality was touted by some of the Justices, a majority could not even be garnered to recognize the sufficiency of morals justifications. And now, after *Erie*, the Court has pushed morals rationales completely off the table in the context of adult entertainment, with the secondary-effects analysis embraced only by Justice Souter in *Barnes* having become the preferred analytic method for assessing the most recent round of restrictions on adult entertainment.[149]

2. Sexuality and Sexual Conduct

The Court has likewise moved away from embracing morals-based arguments as independently sufficient to justify other

Erotic Dancers to Wear G-Strings and Pasties Without Violating Their First Amendment Right of Freedom of Expression: City of Erie v. Pap's A.M., 39 DUQ. L. REV. 705, 728 (2001) (noting that early "regulations on nude dancing were centered on social order and public morality" but that *Pap's A.M.* "allow[ed] the justification to be the prevention of secondary effects such as crime, alcohol abuse, and prostitution").

149. The Court also has focused largely on harmful material consequences in assessing regulation of child pornography. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court held that preventing "sexual exploitation and abuse of children constitutes a government objective of surpassing importance" and explained in some detail the concrete harms that child subjects in pornographic materials might suffer. *Id.* at 757–60; *see also* Osborne v. Ohio, 495 U.S. 103, 108–09, 111 (1990) (noting that "[t]he State does not rely on a paternalistic interest in regulating Osborne's mind . . . [but instead] hopes to destroy a market for the exploitative use of children" while sustaining a prohibition against possession and viewing of child pornography).

With respect to protecting children from adult-oriented pornography, the Court has also found "a compelling interest in protecting the physical and psychological well-being of minors." Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). Notably, several of the most recent challenges to restrictions on sexual entertainment have not found this child-related interest sufficient to justify the measures at issue. *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2001) (invalidating provisions of the Child Pornography Prevention Act of 1996 notwithstanding Congress's argument regarding consequential material harms to children); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (rejecting the requirement that cable television operators fully scramble or block channels offering sexually oriented programming, even though the law's aim was to protect children from exposure); Reno v. ACLU, 521 U.S. 844 (1997) (striking down provisions of the Communications Decency Act of 1996 for violating the First Amendment notwithstanding the concern that children might view sexually explicit material on the Internet).

restrictions related to sexuality. Most recently, of course, *Lawrence* firmly repudiated the Court's glib assertion in *Bowers* that morality sufficed as a legitimate government interest to justify Georgia's sodomy law.[150] Even before *Lawrence*, though, the Court began distancing itself from morals-based rationales for government action in this context.

In *Romer v. Evans*,[151] for example, the majority invalidated Colorado's constitutional amendment prohibiting government entities from protecting lesbians, gay men, and bisexuals from discrimination, never once mentioning morality.[152] Instead, in striking down the amendment, the Court focused entirely on the state's freedom-of-association and conservation-of-resources arguments and concluded that no legitimate explanation could justify the breadth of the amendment's prohibition.[153] This complete disregard of possible morals justifications was particularly striking in the face of Justice Scalia's dissent, which vigorously endorsed the moral authority of Coloradans to condemn homosexuality through the amendment at issue.[154] The amendment could have been sufficiently and legitimately supported, Justice Scalia wrote, by "the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*."[155]

Of the relatively few additional cases in which the Court has considered sexuality-related restrictions,[156] most have in-

150. For additional discussion of *Lawrence*'s rejection of *Bowers*, see *infra* notes 191–96 and accompanying text.

151. 517 U.S. 620 (1996).

152. *See id.*

153. *Id.* at 635 (noting that the Court "cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective").

154. *Id.* at 636 (Scalia, J., dissenting) (arguing that the Court "has no business imposing upon all Americans the resolution . . . pronouncing that 'animosity' toward homosexuality . . . is evil" (internal citations omitted)). Justice Scalia added: "The Court today, announcing that Amendment 2 'defies . . . conventional [constitutional] inquiry,' and 'confounds [the] normal process of judicial review,' employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values." *Id.* at 651 (Scalia, J., dissenting) (alterations in original) (internal citations omitted).

155. *Id.* at 644 (Scalia, J., dissenting).

156. The Court has never directly considered the constitutionality of adultery laws; the last time a majority of the Court implicitly endorsed adultery prohibitions was in *Bowers*. *See* Bowers v. Hardwick, 478 U.S. 186, 195–96 (1986) (noting the difficulty in "limit[ing] the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home"), *overruled by* Lawrence

volved a fundamental-rights analysis and have not even considered, much less relied upon, moral justifications.[157] For example, in *Griswold v. Connecticut*,[158] the majority opinion contained no mention of moral issues when it struck down Connecticut's ban on the use of contraceptives by married cou-

v. Texas, 123 S. Ct. 2472 (2003); *cf.* S. Sur. Co. v. Oklahoma, 241 U.S. 582, 586 (1916) ("Adultery is an offense against the marriage relation and belongs to the class of subjects which each State controls in its own way.").

The Court also has not directly analyzed the constitutionality of fornication laws, although majority opinions in several pre-*Lawrence* cases endorsed, in dicta, the constitutionality of prohibitions against fornication. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 (1973) ("[T]o say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take.") (footnote omitted); McLaughlin v. Florida, 379 U.S. 184, 193, 196 (1964) (appearing to accept as legitimate the government interests in "prevent[ing] breaches of the basic concepts of sexual decency," including promiscuous sexual conduct, and "protect[ing] the integrity of the marriage laws of the State"). *But see* Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977) ("We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [sexual] behavior among adults."). Notwithstanding the dicta, *Lawrence* seems to have signaled the death knell for fornication laws as well as sodomy prohibitions. *See Lawrence*, 123 S. Ct. at 2478 (stating that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a [constitutionally protected] personal bond").

157. For instance, in a case holding that organizers of a parade could not be required to permit a gay and lesbian group to march, the Court analyzed the case entirely on First Amendment grounds and never once considered moral disapproval as a possible justification for the exclusion of the gay organization. *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

In a different context, before the 1986 amendments to the Mann Act that removed the prohibition on transport "for any . . . immoral purpose," *see* 18 U.S.C. § 2421 (1976), *amended by* Pub. L. No. 99-628, § 5(b), 100 Stat. 3511, several Mann Act cases concentrated on construing the term "immoral purpose" rather than considering whether a claimed interest in morality, standing alone, could justify government action. However, as those cases evolved, the Supreme Court cut back on the broad meaning it had accorded to the Mann Act in the early part of the 1900s. *See* Amadio v. United States, 348 U.S. 892 (1954) (per curiam) (reversing *United States v. Amadio*, 215 F.2d 605 (7th Cir. 1954) and ordering the district court to dismiss the indictment as outside the Mann Act's purview in a case where the indictment for interstate transport for "immoral" purposes did not include prostitution). The Court's summary reversal in *Amadio* effectively overruled an earlier interpretation of the Mann Act in *Athanasaw v. United States*, 227 U.S. 326, 332–33 (1913) (holding that the Mann Act required only an intent to tempt a victim into a life of sexual immorality). *See generally* DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 213, 215–16, 238 (1994) (reviewing the decline in prosecutions under the Mann Act for noncommercial immoral acts).

158. 381 U.S. 479 (1965).

ples. Seven years later, in *Eisenstadt v. Baird*,[159] the Court acknowledged the morality justification addressed by the lower court but then immediately sidestepped it, saying that "[w]e need not and do not . . . decide that important question in this case."[160] Likewise in *Roe v. Wade*,[161] the Court acknowledged that individuals' moral standards may shape personal views about abortion but did not once consider morality as a possibly sufficient justification for laws criminalizing abortion.[162] Instead, the state interests acknowledged as important by the Court were "in safeguarding health, in maintaining medical standards, and in protecting potential life."[163]

3. Offensive Noncommercial Speech

Although most contemporary cases in which morality might provide the sole justification for a law or policy concern sexual conduct or commercial depictions of sexuality, as illustrated above, a few cases decided outside that context merit attention to illustrate further the Court's reluctance to rely exclusively on morals-based rationales. Perhaps most closely related to the cases just discussed are cases addressing the use of sexualized language in noncommercial settings, as they arguably implicate the state's interest in protecting constituents' moral well-being.

Two of these cases stand out. The first involved California's effort to punish Paul Cohen for "'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct,'" because Cohen wore his notorious "Fuck the Draft" jacket in the Los Angeles County courthouse.[164] At issue in the case, the Court explained, was whether California could punish Cohen "upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary."[165] Notwithstanding the widespread rhetorical reinforcement of the government's powers to do just that through the Court's police powers jurisprudence, the Court did not treat

159. 405 U.S. 438 (1972).

160. *Id.* at 452–53.

161. 410 U.S. 113 (1973).

162. *See id.* at 153.

163. *Id.* at 154.

164. Cohen v. California, 403 U.S. 15, 16 (1971) (alterations in original) (citation omitted).

165. *Id.* at 22–23.

morality as sufficient to justify the government's response to Cohen's jacket. The Court recognized that the state's interest in ridding public discourse of the "unseemly expletive" might seem reasonable but concluded that as distasteful as the word at issue might be, the First and Fourteenth Amendment forbid censorship of it.[166]

In the other significant noncommercial language use case, the Court spoke in the lofty terms of the schools' responsibility to "teach by example the shared values of a civilized social order," but then upheld Matthew Fraser's punishment for sexually suggestive speech during a high school assembly on harm-based grounds rather than on a morals rationale.[167] The majority concentrated the bulk of its discussion on the school's authority to protect vulnerable youth from developmental harm,[168] rather than simply relying on the school's authority to set a moral tone for the school.[169] For example, the Court commented

166. *See id.* at 23–24 (stating that while "it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic . . . , that examination and reflection will reveal the shortcomings of a contrary viewpoint" (footnote omitted)).

167. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 695–96 (1986). Fraser's speech nominating a candidate for student body president contained an "elaborate, graphic, and explicit sexual metaphor." *Id.* at 678. Although Justice Brennan concurred in the Court's judgment, he distanced himself from the majority's characterization of the speech, commenting that Fraser's remarks were "no more 'obscene,' 'lewd,' or 'sexually explicit' than the bulk of programs currently appearing on prime time television or in the local cinema." *Id.* at 689 n.2 (Brennan, J., concurring).

168. The Court commented that its "First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Bethel Sch. Dist.*, 478 U.S. at 684. For example, the Court wrote, prior cases "recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* The Court also cited the recognized "interest in protecting minors from exposure to vulgar and offensive spoken language." *Id.* "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Id.* at 685.

169. The Court acknowledged a point made earlier in *FCC v. Pacifica Foundation*, 438 U.S. 726, 746 (1978), that certain utterances "'are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Bethel Sch. Dist.*, 478 U.S. at 685 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). However, it did not actually rely on morality in analyzing either the speech itself or the school's authority to punish the speech giver. *Id.*

that "[t]he speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."[170] Indeed, the Court seemed troubled less by moral issues and more by misinformation about sexuality that younger students might absorb. "Some students," the Court noted, "were reported as bewildered by the speech and the reaction of mimicry it provoked."[171] The Court also stressed the particular harm it believed the speech caused to the young women in the audience: "By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students."[172] This sort of harm, rather than a morals-based concern, appears to have prompted the Court's conclusion that "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy." [173]

4. Sunday Closure Laws and Family Law

Cases involving Sunday closure laws, which fall even further outside the realm of sexuality regulation, also illustrate the steady coupling of morals justifications with other bases for government action. In an early opinion to address this type of law, the Court in *Hennington v. Georgia*[174] upheld a law prohibiting freight trains from operating on the Sabbath.[175] Even in that case, while recognizing the state's interest in its constituents' morality, the Court acknowledged that the restriction also fell within the legislature's power to promote the public's welfare.[176] It characterized the law, which was challenged not as an

170. *Bethel Sch. Dist.*, 478 U.S. at 683.

171. *Id.* at 683–84.

172. *Id.* at 683. Again, Justice Brennan disagreed with the Court's characterization of the harm. He wrote:

> There is no evidence in the record that any students, male or female, found the speech "insulting." And while it was not unreasonable for school officials to conclude that respondent's remarks were inappropriate for a school-sponsored assembly, the language respondent used does not even approach the sexually explicit speech regulated in *Ginsberg v. New York*, or the indecent speech banned in *FCC v. Pacifica Foundation*.

Id. at 689 n.2 (Brennan, J., concurring) (citations omitted).

173. *See id.* at 683.

174. 163 U.S. 299 (1896).

175. *Id.* at 318.

176. *See id.* at 304.

establishment of religion but rather as an impermissible interference with interstate commerce, as "an ordinary police regulation established by the State under its general power to protect the health and morals, and to promote the welfare, of its people."[177]

When the Court decided *McGowan v. Maryland*[178] and three related cases,[179] it again focused on justifications other than morality to sustain the Sunday closure laws.[180] But unlike in *Hennington*, its holding in these Establishment Clause cases did not even mention morality as a potential rationale. Although the Court cited two lower court opinions that mentioned morality in the course of analyzing the religious roots of Sunday closure laws,[181] morality ultimately played no explicit role in the Court's decision to sustain the Maryland law at issue in *McGowan*. Rather than focusing on the moral value of limiting Sunday activities embraced in earlier rulings, the Court stressed the variety of activities, including non-charitable events, permitted on Sunday[182] and the absence of rules requiring special comportment during the officially sanctioned day of

177. *Id.* at 302.

178. 366 U.S. 420 (1960).

179. *See* Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Supermarket of Mass., 366 U.S. 617 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

180. *See, e.g.*, *McGowan*, 366 U.S. at 433–34 ("[D]espite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor.").

181. *See id.* at 436–37 (observing that a once-a-week closure law was "'a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society'") (quoting *Ex parte* Newman, 9 Cal. 502 (1858) (Field, J., dissenting); *id.* at 449 (stating that the Sunday closure law was analogous to a police power action concerned with "'public health, morals and safety'" but actually derived from the government's power to protect "'the peace, order, and quiet of the community'") (quoting Hiller v. Maryland, 92 A. 842, 844 (1914)).

182. *Id.* at 424. The Court wrote:

> [W]e find that [the law at issue] permits the Sunday sale of tobaccos and sweets and a long list of sundry articles which we have enumerated above; we find that [a related provision] permits the Sunday operation of bathing beaches, amusement parks and similar facilities; we find that [another provision] permits the Sunday sale of alcoholic beverages, products strictly forbidden by predecessor statutes; we are told that Anne Arundel County allows Sunday bingo and the Sunday playing of pinball machines and slot machines, activities generally condemned by prior Maryland Sunday legislation. Certainly, these are not works of charity or necessity.

Id. at 448.

rest.[183] It then upheld the laws at issue as being legitimately concerned with "improvement of the health, safety, recreation and general well-being of our citizens."[184]

Finally, although few family law cases are decided at the Supreme Court level and none has been decided in recent decades that engaged directly with morals-based justifications for government action, trends in this area of the law bear noting because they echo the view that courts have become increasingly ill at ease with morality-based decision making. In an extensive study of the changing role of moral discourse in family law, Professor Carl Schneider observed "a diminution of the law's discourse in moral terms about the relations between family members."[185] According to Professor Schneider, this trend precipitated a "transfer of many moral decisions from the law to the people the law once regulated."[186] To take just one example, in the child custody context, courts have increasingly shifted toward a nexus test that requires a showing of actual harm to a child rather than presuming harm based on parental conduct or identities traditionally viewed as immoral.[187] For in-

183. The Court added that "[t]hese provisions . . . seem clearly to be fashioned for the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment. Coupled with the general proscription against other types of work, we believe that the air of the day is one of relaxation." *Id.* at 448. Further still, the Court observed that the statute "does talk in terms of 'profan[ing] the Lord's day,' but other sections permit the activities previously thought to be profane. Prior denunciation of Sunday drunkenness is now gone. Contemporary concern with these statutes is evidenced by the dozen changes made in 1959 and by the recent enactment of a majority of the exceptions." *Id.* at 448–49 (alteration in original).

Of course, the deliberately nonmoral focus of the Court's opinion also served to reinforce the Court's ultimate conclusion that the laws were not religious in nature. *Id.* at 444 ("In light of the evolution of our Sunday Closing Laws . . . , it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character.").

184. *Id.* at 444. The Court added:

> Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations.

Id. at 444–45.

185. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1807 (1985).

186. *Id.* at 1808.

187. James G. Dwyer, *A Taxonomy of Children's Existing Rights in State*

stance, where lesbian and gay parents in the past were routinely denied custody or visitation on the grounds that their sexual orientation was presumed to endanger their child's moral development, most states no longer permit such categorically negative presumptions.[188] Similar examples of the shift away from morals-based analysis to consideration only of concrete harms proliferate in other types of custody disputes as well as in the areas of divorce and alimony.[189]

5. *Lawrence* and Morality

This pervasive reluctance to rely on morals rationales finally came to a head in *Lawrence*, where the Court had no choice but to consider the state's interest in morality since it was Texas's leading rationale for its Homosexual Conduct Law.[190] Yet, even there, rather than elaborate on the morality component of the state's police power, the Court barely analyzed the proffered morals justification. The majority opinion mentioned moral concerns only five times and two of those mentions came in descriptions of *Bowers*.[191] The other three ref-

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Decision Making About Their Relationships, 11 WM. & MARY BILL RTS. J. 845, 925 (2003) (describing the nexus test as the "prevailing rule").

188. *See, e.g.*, Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 J. AM. ACAD. MATRIM. LAW. 95, 102 (2002).

> [P]arental sexual orientation alone is not a basis upon which visitation is denied. And, in recent years, even states generally considered most socially conservative on issues of homosexuality and parenting have disclaimed any *per se* rule restricting custody for lesbian or gay parents on the basis of sexual orientation alone. This trend is consistent with the generally accepted focus in custody matters on the circumstances and best interests of individual children.

Id. (footnote omitted).

This is not to suggest that lesbian and gay parents are always considered on equal footing with nongay parents but rather that the dominant trend has been against imposing negative categorical presumptions on account of a parent's sexual orientation. *See* Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1188 (1999).

189. *See, e.g.*, Murphy, *supra* note 188; Schneider, *supra* note 185.

190. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2486 (2003) (O'Connor, J., concurring) ("Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate government interest of the promotion of morality."); *cf. supra* note 34 (discussing a family values rationale also proffered to support the Texas statute).

191. *See Lawrence*, 123 S. Ct. at 2480 ("It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral."); *see also id.* (quoting *Bowers*'s observation that "Judeao-Christian

erences tellingly reinforce what we already know about the Court's disinclination to engage with morals-based arguments.

First, immediately after acknowledging the deep-rooted "moral principles" that shape many people's views about homosexuality, the Court asked "whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[192] The Court then immediately elided its question about the sufficiency of majoritarian moral views and commented instead on its own moral authority: "'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[193]

Toward the opinion's end, the Court finally returned to the question whether government may act on morals rationales. But even there, the Court seemed to resist a direct statement of its views on the viability of morals rationales. Instead, without paraphrasing or offering additional comment, it adopted, via quotation, Justice Stevens's dissenting analysis from *Bowers*: "'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"[194]

However, even Justice Stevens's approach does not answer fully the question whether Texas's morals justification was inadequate. Morality, after all, is not necessarily limited to traditional majoritarian views. Conceivably, some other source, such as moral disapproval of homosexuality derived via a natural law approach,[195] could have informed the morality rationale. Yet the Court did not address that possibility or even mention morality again. Instead, after reviewing the facts of the case, the Court simply noted that "[t]he Texas statute furthers no legitimate state interest."[196]

To the extent actions actually do speak louder than words, the Court's consistent disinclination to rely on, or even respond to, morals rationales for lawmaking tells us that the days in which mere reference to morality could justify government action are long over, if indeed they ever existed outside of *Bowers*. Yet we are left, still, with the question of why the Court would

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moral and ethical standards" concern "homosexual conduct").

192. *Id.* at 2480.

193. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)).

194. *Id.* at 2483 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting) (footnotes and citations omitted)).

195. *See generally* Finnis, *supra* note 9.

196. *Lawrence*, 123 S. Ct. at 2484.

balk at accepting the very justifications celebrated by its own rhetoric. The next part takes on that question and develops two interrelated explanations for the Court's avoidance of explicit morals rationales. These theories not only illuminate some of the challenges presented by morals-based lawmaking but also reinforce the inevitability of the explicit morals rationale's demise.

III. THEORIZING THE COURT'S MORAL DISCOMFORT

Out of the Supreme Court's jurisprudence come two explanations for why the Court has shied away from morals justifications in the past. The first, which I call the majoritarian impulse theory, highlights the flaws inherent in the *Bowers*-type reasoning that laws can be deemed to serve moral interests by virtue of having been popularly enacted. As I explain below, this majoritarian argument is impermissibly circular at worst and foreclosed by the Court's analysis of history and tradition at best.

The second, more powerful theory concerns institutional competence. Specifically, I argue that if a court does not embrace the majoritarian articulation of moral interests, it may appear to be rejecting the majority's views in favor of judges' personal preferences for a competing vision of the moral good. How are judges to select plausibly among many diverse moral frameworks other than by relying on their personal preferences? Given the diversity of moral visions held by Americans, as highlighted by the Court's increased engagement in the last half-century with the pluralistic nature of American society, it is extremely difficult, and perhaps not possible, for a court credibly to adopt the analytic framework necessary to distinguish between legitimate and impermissible majoritarian invocations of morality to justify government action.[197]

197. Not only has disagreement increased about the morality of particular forms of conduct but there has also been increasing respect for autonomy. *See, e.g.*, *id.* at 2480 (describing "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"). Since autonomy also could be characterized as a moral value, the Court's avoidance of morals rationales conceivably could be interpreted as reflecting a judicial shift to a new moral autonomy theory rather than as reflecting a deficiency of morality as an independent justification for lawmaking. If this shift has occurred, it may be that the difficulty of evaluating morals rationales accounts for the change. Still, persistent rhetorical embrace of the government's authority to promote constituents' morality coupled with the Court's long-standing reluctance to rely exclusively on ex-

Taken together, these two theories confirm that the Court's avoidance of morals rationales as the exclusive justifications for government action is not only reasonable but also necessary for institutional self-preservation.

A. THE CIRCULARITY OF THE MAJORITARIAN IMPULSE ARGUMENT

Because *Bowers v. Hardwick* is the only contemporary case to sustain a challenged law based explicitly on a pure morals justification, the Court's opinion offers a useful starting point for analyzing the claim that majority approval itself demonstrates the existence of a legally sufficient morals rationale. As we will see below, whether we take the simplest version of that argument and assume that all laws reflect moral positions or a more nuanced version and treat only certain laws as reflecting moral positions based on their long-standing or widespread popular approval, the analysis does not encourage resuscitation of reliance on morals-based justifications.

To take the simplest point first, let us consider how the Court knew in *Bowers* that Georgians considered "homosexual sodomy" to be "immoral and unacceptable."[198] No evidence had been admitted regarding Georgia voters' views.[199] Only the text of the statute was before the Court, and that text mentioned only the prohibited acts.[200] Yet from that information, the Court "presumed" that Georgians had enacted into law their moral disapproval of homosexuality.[201]

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plicit morals justifications suggests that the adoption of a new judicial moral theory, even if contemplated, is far from complete. Other recent decisions, including the Court's rejection of the right-to-die law at issue in *Washington v. Glucksberg*, 521 U.S. 702 (1997), and its acceptance of limitations on a woman's right to terminate her pregnancy, *see, e.g.*, *Planned Parenthood*, 505 U.S. at 833, suggest that moral autonomy has not become the Court's guiding value but instead remains only one value among many competing for the Court's commitment.

198. *Bowers*, 478 U.S. at 219.

199. The case was originally dismissed by the district court for failure to state a claim under FED. R. CIV. P. 12(b)(6). *Bowers*, 478 U.S. at 186.

200. The statute provided:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

GA. CODE ANN. § 16-6-2 (1984).

201. The Georgia Attorney General reinforced this point in his opening brief, arguing that "[i]f morality is a legitimate state purpose, the identifica-

In other words, the majority relied on the fact of the law's passage to establish moral disapproval of acts the law proscribed, and then relied on that moral disapproval to justify the law's proscription of the acts. Or, put more simply, the Court found that the law's passage justified a presumption that in turn justified the law's passage. This equation of law with moral judgment seems to be what Justice White intended by his comment that "[t]he law . . . is constantly based on notions of morality" and that "if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[202]

Perhaps needless to say, especially in light of *Lawrence* and the extensive literature critiquing the *Bowers* majority opinion,[203] the Court's reasoning is, at least at first glance, circular and unpersuasive. If a law's enactment is sufficient to demonstrate moral views and if moral views are enough to sustain a law, then all laws would have to be sustained. The majoritarian impulse thus functions as a justification that swallows the entire analysis; judicial review becomes a pointless exercise because every enacted law would bring with it a morals-based justification. If all laws reflect morality, why bother with judicial oversight?

Further, even at the time *Bowers* was decided, the Court had already rejected this self-justifying view that popular approval alone could insulate a law from legal challenge. In *City of Cleburne v. Cleburne Living Center*,[204] for example, the Court affirmed that "[i]t is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause and the City may not avoid the strictures of that Clause by deferring to the wishes or

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tion of that morality, 'the widely held values' of the people, should be voiced through their representatives." Petitioner's Brief, *Bowers* (No. 85-140), 1985 WL 776939, at *36.

As discussed above, the presumption regarding Georgians' views about homosexuality was factually inappropriate since the law did not single out sexual acts between same-sex partners but instead prohibited anyone, regardless of sexual orientation, from engaging in the proscribed forms of contact. *See supra* note 78.

202. *Bowers*, 478 U.S. at 196.

203. *See, e.g.*, Janet Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993); Nan Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); *see also* Lawrence v. Texas, 123 S. Ct. 2472, 2483 (2003) (discussing additional critiques of *Bowers*).

204. 473 U.S. 432 (1985).

objections of some fraction of the body politic."[205] Likewise, in *Lucas v. Forty-Fourth General Assembly*,[206] the Court opined that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."[207]

Perhaps, then, Justice White meant that the presumption of a legally sufficient morals justification would arise not from mere passage of a law but rather from a long-standing or widespread tradition supporting a prohibition. After all, both historically and at the time *Bowers* was decided, many other states had in place sodomy laws similar to Georgia's.[208] Chief Justice Burger's concurrence further supports the salience of history to the analysis by its reference to ancient proscriptions against same-sex couples' sexual intimacy.[209] This focus on the quality and quantity of support for a position would have the effect of closing the morals floodgates to some degree, since not all laws have long chronological or broad geographic pedigrees.

However, recharacterizing the existence of long-standing prohibitions under the rubric of tradition, history, or broad geographic support does not help the argument much. Mirroring its view that majoritarian approval alone cannot justify government action, the Court also has affirmed that "*[s]tanding alone*, historical patterns cannot justify contemporary violations of constitutional guarantees."[210] Likewise, the existence of

205. *Id.* at 448 (citation omitted).

206. 377 U.S. 713 (1964).

207. *Id.* at 736–37.

208. *See* Bowers v. Hardwick, 478 U.S. 186, 192 n.5, 193 n.6 (1986) (referencing current and past laws criminalizing "sodomy"), *overruled by Lawrence*, 123 S. Ct. 2472. As the *Lawrence* majority observed in reviewing *Bowers*'s observations about the history of sodomy laws, "[t]heir historical premises are not without doubt and, at the very least, are overstated." *Lawrence*, 123 S. Ct. at 2480.

209. *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring) ("[T]he proscriptions against sodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards.").

210. Marsh v. Chambers, 463 U.S. 783, 790 (1983) (emphasis added). The Court has made this point repeatedly. *See, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("'[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . .'" (alteration in original) (quoting Williams v. Illinois, 399 U.S. 235, 239 (1970))); Bowers v. Hardwick, 478 U.S. 186, 210 (1986) (Blackmun, J., dissenting) ("I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny.") (citing Roe v. Wade, 410 U.S. 113 (1973)), *overruled by Lawrence*, 123 S. Ct. 2472; Payton

similar laws in other jurisdictions may illustrate broad majoritarian support for the challenged action, but the fact of majoritarian support, again, cannot itself suffice to justify a law unless judicial review is to be rendered virtually meaningless.[211]

In sum, presuming moral disapproval based on the passage of a law, as was suggested by the majority opinion in *Bowers*, does not provide a means for distinguishing laws that warrant the presumption of a legitimate and sufficient morals justification from those that do not. Indeed, the majoritarian impulse argument embraced in *Bowers* actually may have reinforced the Court's distaste for morals-based claims precisely because it precludes the effective screening of morals justifications that is required for meaningful judicial review.

B. INSTITUTIONAL COMPETENCE, PLURALISM, AND THE INADEQUACY OF THE MORAL CODE

The remainder of this part considers whether a court could simply rely on the "traditional power of government to foster

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v. New York, 445 U.S. 573, 600 (1980) ("A longstanding, widespread practice is not immune from constitutional scrutiny."); Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."); Powell v. McCormack, 395 U.S. 486, 546–47 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating antimiscegenation law despite long tradition of prohibitions against interracial marriage); Brown v. Bd. of Ed., 347 U.S. 483 (1954) (rejecting school segregation by race despite extensive tradition of and support for racially segregated public education); *see also* Justice Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if [its foundation has] vanished long since, and the rule simply persists from blind imitation of the past."). *But see* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion) ("The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system.").

211. In striking down a Virginia law that permitted execution of people with mental retardation, the Court in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), observed that national legislative trends provide the "clearest and most reliable objective evidence of contemporary values." *Id.* at 311–12 (internal quotations and citations omitted). This reference to national trends as a resource for identifying contemporary values implicated in the Eighth Amendment's prohibition against cruel and unusual punishment reinforces the salience of widespread support or disapproval for a particular provision but does not contravene the Court's regular observation, *see supra* note 210 and accompanying text, that trends alone do not suffice to justify government action.

good morals (*bonos mores*)"[212] rather than looking to majoritarian approval to provide moral grounding for government action. The difficulty with this position, as will be developed below, is that absent an authoritative source of *bonos mores*, judges necessarily bring to bear their own moral positions any time they review the legal sufficiency of a morals-based rationale. Although numerous scholars have long recognized that all adjudication is affected, at some level, by individual judges' life experiences and philosophical stances,[213] the possibility that judges might displace legislative views on community morality with their own brings the countermajoritarian difficulty to new heights.[214]

The risk that judges would appear to be imposing their own views when they purport to be applying a definitive, authoritative moral framework has become especially apparent since World War II, with a surfeit of cases before the Supreme Court highlighting the multiplicity of moral views among the American public.[215] As these cases illustrate, the American pub-

212. *See* Erie v. Pap's A.M., 529 U.S. 277, 310 (2000) (Scalia, J., concurring).

213. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (elaborating on their political science research, which suggests that judicial outcomes are based primarily on the personal ideologies of judges); Howard Gillman, *What's Law Got To Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466 (2001) (commenting on "decades of social science research . . . [that] ha[ve] demonstrated . . . that ideological and political considerations drive decision making"); James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1677 (2003) ("[I]t seems fair to say that neither social scientists nor law professors would argue that personal preference and ideology never influence the outcome of a case. The disagreement concerns the magnitude of and occasions for this influence—not its existence."); Richard A. Posner, *Appeal and Consent*, THE NEW REPUBLIC, Aug. 16, 1999, at 36, 37 ("Where the Constitution is unclear, judicial review is likely to be guided by the political prejudices and the policy preferences of the judges rather than by the Constitution itself.").

214. *See generally* BICKEL, *supra* note 14 (analyzing the countermajoritarian exercise of power by courts); *cf.* McConnell, *supra* note 9, at 1517 ("After moral discourse is over, even if some parties remain unconvinced, the prevailing party's moral beliefs attain the force and effect of law. *That* is why politics is so scary."); Barbara J. Flagg, Comment, *"Animus" and Moral Disapproval: A Comment on* Romer v. Evans, 82 MINN. L. REV. 833, 851 (1998) ("State action undertaken for moral reasons alone is the antithesis of pluralism; it evinces no respect for the moral understanding or norms of those whom it situates as outsiders.").

215. *See* infra notes 254–77 and accompanying text (discussing cases that illustrate the multiplicity of moral views among the American public).

lic does not share a single, coherent vision to which courts might turn when evaluating a morals rationale.[216] Further, even the experts in this area—moral philosophers—cannot agree on what constitutes "good morals."[217] Whatever credibility the Court might have possessed previously to announce moral consensus on particular issues has slipped away entirely.[218] Consequently, a court asked to assess a morals justification winds up either deferring to the majority's representation of morality or bringing to the analysis the moral vision it prefers. The lack of an authoritative alternative to majoritarian preferences that could enable meaningful, objective assessment of proposed moral justifications has reinforced, in turn, the Court's disinclination to rely on morality-based justifications.[219]

The discussion here will proceed by first fleshing out arguments for the sufficiency of morals-based arguments as they have been framed by the Court and an assortment of moral philosophers. I will then turn to the post–World War II cases to illustrate how the multiplicity of moral views in those cases has heightened the challenge for courts charged with sorting out legitimate moral expressions from impermissible prejudices.

1. Judicial Development of the Morality-Based Justification

As the leading advocate of moral code–based arguments on the Court today, Justice Scalia has contended strenuously that moral views, standing alone, should suffice to justify government action.[220] Although his opinions do not elaborate how government should determine that particular forms of conduct are immoral, he has expressed absolute faith in government's authority to reinforce "traditional judgment[s]."[221] In *Pap's A.M.*,

216. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2314 (1997) (discussing "conflicting views about morality" in democratic societies).

217. *See infra* notes 228–53 and accompanying text.

218. As Judge Posner has observed, "there are no techniques for forging consensus on the premises of moral inquiry and the means of deriving and testing specific moral propositions." POSNER, *supra* note 9, at 63.

219. *Cf.* McConnell, *supra* note 9, at 1517 (explaining that "the political community" is "heterogeneous," that "it is better, insofar as possible, to agree to disagree, especially about the highest things," and that "the Constitution itself . . . forbids the government from even attempting to iron out our differences with respect to the highest things").

220. *See, e.g.*, Erie v. Pap's A.M., 529 U.S. 277, 310 (2000) (Scalia, J., concurring); Romer v. Evans, 517 U.S. 620, 644–48 (1996) (Scalia, J., dissenting); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 580 (1991) (Scalia, J., concurring).

221. *See, e.g.*, *Pap's A.M.*, 529 U.S. at 310 (Scalia, J., concurring).

for example, he stated without citation that "the acceptability of the traditional judgment . . . that nude public dancing *itself* is immoral" should suffice to uphold a zoning restriction imposed on an adult entertainment establishment.[222] Likewise, according to Justice Scalia, "[m]oral opposition to homosexuality" properly sufficed to justify the sodomy law in *Bowers*.[223] "Moral opposition to nudity supplie[d] a rational basis for its prohibition" in *Barnes* in Justice Scalia's view, as well.[224]

Although Chief Justice Burger provided even less elaboration, his concurrence in *Bowers* similarly endorsed the propriety of government action based on moral positions. In rejecting Michael Hardwick's challenge to Georgia's sodomy law, he accused Hardwick of seeking to have the Court "cast aside millennia of moral teaching."[225]

Thus, to the extent the positions of Justice Scalia and Chief Justice Burger hold themselves out as relying on something more than a compilation of popular dislikes,[226] they assume that an authoritative moral code can be ascertained and applied by courts. Professor Gerard Bradley, an advocate for the natural law position, found some hints of this in Chief Justice Burger's *Bowers* concurrence as opposed to Justice White's majoritarian impulse argument. He observed that "[t]he closest any of the *Bowers* conservatives came to a simple statement that sodomy is immoral was Chief Justice Burger's concurring observation that '[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.'"[227] Jus-

222. *Id.*

223. *Barnes*, 501 U.S. at 580 (Scalia, J., concurring).

224. *Id.*

225. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003). Perhaps given his view of the teachings' nearly infinite existence, Chief Justice Burger did not explain what qualified the teachings as not merely long-standing but also distinctly moral. Or perhaps he thought his reference to long-standing laws and a portion of Blackstone's Commentaries had given the teachings the quality of being moral as opposed to simply popular. Although the Chief Justice openly endorsed Judeao-Christian ethics as part of his analysis, we can presume even he would not have considered his citation to a book about Western Christianity and homosexuality as sufficient support for a nonsectarian morals-based justification for Georgia's law. *See id.* at 196–97.

226. The positions are arguably different, with Justice Scalia placing greater emphasis on popular taste, *see Barnes*, 501 U.S. at 580, and Chief Justice Burger seeking to attach his analysis to a set of views outside the whims of the majority, *see Bowers*, 478 U.S. at 197.

227. Gerard V. Bradley, *Pluralistic Perfectionism: A Review Essay of* Making Men Moral, 71 NOTRE DAME L. REV. 671, 675 (1996) (reviewing ROBERT P.

tice Scalia, however, for all of his defense of morals-based lawmaking, has not indicated how the code would be discerned beyond looking to the long-standing and widespread nature of particular prohibitions.

2. Moral Philosophers on Morals-Based Rationales for Government Action

Supplementing the Court's efforts to stake out (or avoid) a moral position have been moral philosophers devoted to defining *the* morality that governments should effectuate. Although Richard Posner has argued categorically that the work of moral philosophers is a "useless endeavor,"[228] a brief review here of several diverse philosophical positions regarding governmental reliance on morality aims to illustrate a smaller point. That is, simply, that the philosophers, through their diverse, highly developed views, reinforce the difficulty for courts that would declare as correct one particular version of morality.

Among the leading advocates for governmental reliance on a particularized moral code have been natural law adherents advancing the perfectionist view that the law should function not only to prevent harm but also to "help people to establish and preserve a virtuous character."[229] A central premise of the natural law position is that universally valid basic human goods can be identified and that the law, including morals-based laws, should enable people to realize those goods.[230] As Robert George has explained, these goods involve "integral hu-

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GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993)).

228. POSNER, *supra* note 9, at 17.

229. GEORGE, *supra* note 9, at 1. Specifically, Professor George contended, laws prohibiting "certain powerfully seductive and corrupting vices (some sexual, some not)" can encourage virtue by:

> (1) preventing the (further) self-corruption which follows from acting out a choice to indulge in immoral conduct;
>
> (2) preventing the bad example by which others are induced to emulate such behavior;
>
> (3) helping to preserve the moral ecology in which people make their morally self-constituting choices; and
>
> (4) educating people about moral right and wrong.

Id.

230. *See generally id.*; Bradley, *supra* note 227; Finnis, *supra* note 9. Kent Greenawalt has summarized the natural law position as holding that "human law is in some sense derived from moral norms that are universally valid and discoverable by reasoning about human nature or true human goods." KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 161 (1987).

man well-being and fulfillment" and are not "*means* to human flourishing" but rather "they are *constitutive* aspects of the persons whom they fulfill."[231]

Professor George and others have applied these theoretical approaches to reach more specific moral positions on a variety of issues, including the conduct that was at issue in *Lawrence*—sexual relations between same-sex partners. George and John Finnis, another leading natural law scholar, for example, both served as expert witnesses in *Romer v. Evans*,[232] where they sought to establish the immorality of same-sex sexual relations to help defend a state constitutional amendment forbidding government entities from prohibiting discrimination against lesbians, gay men, and bisexuals.[233] Professor Finnis argued, in particular, that "'homosexual acts' are 'morally bad' because 'genital activity between same-sex partners cannot actualize or allow them to really experience any common good to which they are jointly committed.'"[234] Likewise, Professor Bradley has opined that "[l]aws prohibiting 'victimless' sexual immoralities typically proceed from the conviction that the acts are truly wrong, that they really damage the characters of the persons who perform them, and that they block the path of those persons to virtue, and in specific ways offend against the common good."[235]

Harry Clor, another moralist who has advocated governmental reliance on a specific moral code, has argued that lawmakers should concern themselves less with the virtuous character of individuals and more with the worthiness of the community. Public morality, he wrote, "means that in principle the civic community has a legitimate interest in discouraging some ways of life and encouraging others."[236] In particular, he would have morals-based lawmaking "support the efforts of citizens to sustain a cultural milieu that reflects shared stan-

231. GEORGE, *supra* note 9, at 13–14. Professor George has elaborated that the "complete" basic human good is "integral human well-being and fulfillment." *Id.* at 13. This good, in turn, is comprised of "life (in a broad sense that includes health and vitality); knowledge; play; aesthetic experience; sociability (i.e. friendship broadly conceived); practical reasonableness; and religion." *Id.*

232. 517 U.S. 620 (1996).

233. LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 162, 166 (1998).

234. *Id.* at 162 (citation omitted).

235. Bradley, *supra* note 227, at 676.

236. CLOR, *supra* note 4, at 103.

dards of civility and decency,"[237] and described those standards, in turn, as implicating "notions of what is humanly respectable (or degrading) conduct and what is a civilized mode of life."[238]

According to Professor Clor, prohibitions on pornography, for example, are important not to prevent any material harms that might occur to the actors or others but instead to guard against "debasement of character."[239] "[S]tandards supportive of monogamous family life" similarly "support certain important human qualities or standards of value," he contended.[240]

Other moral philosophers also accept government's role in reinforcing morality but maintain that government should prioritize a different moral good. Liberal perfectionists, for example, agree with natural law scholars that government has a responsibility to assist people in doing good but take a different view of how that good should be realized. Joseph Raz, for example, has argued that "[a]utonomy is a constituent element of the good life."[241] From that, he concluded that while "it is the function of government to promote morality,"[242] it is also important that "within bounds, respect for personal autonomy requires tolerating bad or evil actions."[243] Otherwise, his argument goes, the government potentially could risk enacting undue restrictions on individual autonomy. According to Raz, "there is no practical way of ensuring that the coercion [to make morally acceptable choices] will restrict the victims' choice of repugnant options but will not interfere with their other choices."[244]

Like Professor Raz, Ronald Dworkin has also advocated minimal government interference with individual decision making, growing in part from his commitment to "equal concern and respect,"[245] which engenders a "right to moral independence."[246] He has instructed that "[a] conscientious legisla-

237. *Id.* at 226.

238. *Id.* at 14. Clor elaborated that this ethic "is associated . . . with judgments about the worthy and the unworthy—and ultimately with ideas of the good and the appropriate for human beings." *Id.*

239. *Id.* at 226.

240. *Id.* at 17.

241. JOSEPH RAZ, THE MORALITY OF FREEDOM 408 (1986).

242. *Id.* at 415.

243. *Id.* at 403–04.

244. *Id.* at 419.

245. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180–83 (1977).

246. RONALD DWORKIN, A MATTER OF PRINCIPLE 353 (1985); *cf.* William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L.

tor who is told a moral consensus exists must test the credentials of that consensus" because "the principles of democracy we follow do not call for the enforcement of the consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality."[247] Without adequate screening, which is difficult to achieve,[248] this equality right is put at risk.

Others, such as David Richards, have expressed less concern with the state's authority to instill morality and more concern with the substantive moral conclusion of many natural law advocates that consensual sexual activity between unmarried adults, particularly same-sex partners, is inconsistent with human worth and dignity.[249] To the contrary, Professor Richards has argued, these acts fulfill basic human goods in much the same way that Finnis, Bradley, and George advocate for sexual relations between a man and a woman within a marriage.[250] More recently, other scholars, including Michael Sandel, Carlos Ball, and Chai Feldblum, have advanced related arguments that the sexual intimacy of lesbian and gay couples has positive moral value.[251]

REV. 236, 239 (1998) ("If . . . our moral world contains plural and conflicting values, then the overzealous enforcement of general public principles runs the risk of interfering with morally legitimate individual and associational practices.").

247. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 245, at 254.

248. *See id.* at 254–55 (describing the legislator's difficult task of sifting through arguments, "trying to determine which are prejudices or rationalizations, which presuppose general principles or theories vast parts of the population could not be supposed to accept, and so on"). With respect to pornography, Professor Dworkin has commented that "it is no substitute simply to report that the ordinary man . . . turns his thumb down on the whole business." *Id.* at 258.

249. *See generally* David A.J. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977).

250. *See id.* at 1344–45 ("[A]nti-homosexuality laws violate the moral right of people to be treated as persons with fair access to love and self-respect.").

251. *See generally* Ball, *supra* note 9; Feldblum, *supra* note 9; Sandel, *supra* note 9. Debate also has raged over the positions of some of the earliest moral philosophers specifically with respect to sexual relations between same-sex partners. While natural law scholars maintain, for example, that Aristotle and Plato universally condemned homosexuality, the eminent classicist Martha Nussbaum has taken the position that not only did homosexual sexual acts take place between consenting male and female partners, but also that those acts "'took place with social approval and that they were regarded not as subverting the fabric of society but rather as tending to reinforce the fabric of society.'" *See* KEEN & GOLDBERG, *supra* note 233, at 164–65; *see also* Daniel

Thus, even among the moral philosophers who advocate a role for moral judgments in lawmaking, profound disagreement exists about the scope and contents of those judgments.[252] This disagreement persists notwithstanding the view of many philosophers that a philosophically correct position exists.[253] When coupled with the views of those who reject reliance on morals rationales for official action, it becomes apparent that moral philosophers, while usefully elaborating arguments, can provide limited assistance, at best, to help courts discern definitively which moral arguments are legitimate and which merely cover for impermissible intentions.

3. A Jurisprudence of Unsettled and Contested Mores

Like the profound disagreements reflected in the work of the moral philosophers, the competing moral views at issue in the Court's individual rights cases also demonstrate how difficult it would be for the Court to adopt a definitive moral framework for evaluating morals rationales. Although the Court has not always embraced the position of those contesting a particular moral mandate in these cases, it unavoidably has had to consider the existence of deeply held and divergent moral positions on a wide range of issues.

The post–World War II cases, in particular, markedly heightened the Court's exposure to differing moral positions. At that time, much of the country shifted its focus from the "labor question" to the political and practical challenges related to the country's demographic diversity.[254] Contributing to the change

Mendelsohn, *Expert Witness and Ancient Mysteries in a Colorado Courtroom*, LINGUA FRANCA 34–36 (Sept./Oct. 1996), *available at* http://www.learnedhand.com/nussbaum.htm (discussing debate among classics scholars regarding ancient philosophers views of homosexuality during trial of Colorado's Amendment 2).

252. Many philosophers, of course, reject the proposition that any type of moral consideration is sufficient for lawmaking. *See, e.g.*, HART, *supra* note 9; MILL, *supra* note 9. As Sanford Levinson has observed, those holding this position tend to be "fundamentally dubious of the existence of a shared moral reality." SANFORD LEVINSON, CONSTITUTIONAL FAITH 78 (1988).

253. *See generally* Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992) (describing moral realist arguments that moral truths exist and can become known by reasoned analysis).

254. *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 424–25 (2001) (explaining that the labor movement pre-1950 "sought reallocation of economic rights and workplace entitlements" while "the new social movements of the late twentieth century sought to change the status of marginalized groups. Theirs was a politics of recognition.") (emphasis removed); Hovenkamp, *supra* note 40, at

in judicial and popular consciousness were individuals and groups whose views and practices had been disapproved by majoritarian lawmakers and who were demanding with increasing regularity that popular sentiment not be given legal effect.[255]

With such a varied array of moral positions being litigated relentlessly, the idea that the Court might select one moral framework among many and demonstrate its validity (as opposed to its reflection of the Justices' personal moral views) is, to paraphrase Justice White in *Bowers*, "at best facetious."[256] Little possibility would exist for the Court, if it rejected the majoritarian position, to avoid the appearance of displacing the majority's moral philosophy in favor of its own.

Term after term, post–World War II, the Court adjudicated numerous cases growing out of the women's liberation movement, the sexual revolution, and other social movements that sought to enhance various freedoms and to unsettle social mores previously treated as set in stone.[257] In the equal protection context, for example, in the span of several decades, jurisprudence regarding the role of women shifted pointedly away from embracing a morals-laden view of sex roles to rejecting the ex-

1431 ("As democracy's participants have become more diverse, moral questions traditionally regarded as settled often provoke widespread debate."); *cf.* Steve Fraser, *The "Labor Question"*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER: 1930–1980 (Steve Fraser & Gary Gerstle eds., 1989) (discussing the predominance of labor issues from World War I to World War II).

Of course, in some respects, American history can be described as a product of ongoing efforts of social movements to achieve change. From the time of the American revolution, groups have been organizing and demanding that government provide greater justice to those who live and work in this country. *See* Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 64–69 (2001) (advocating and developing an analysis of legal history through consideration of social movements). As Reva Siegel has observed: "Over the life of the Republic, social movements have played a significant role in shaping constitutional understandings, but constitutional theory barely recognizes the role that constitutional mobilizations play in the construction of constitutional meaning." Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 345 (2001).

255. *See generally* Eskridge, *supra* note 254 (describing and analyzing advocacy by social movements).

256. *See* Bowers v. Hardwick, 478 U.S. 186, 194 (1986), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

257. In response, the Court began to tackle many of the issues presented by these cases rather than glibly rejecting any challenge to majoritarian views as it had earlier in the century. *See, e.g.*, Cleveland v. United States, 329 U.S. 14 (1946) (sustaining a polygamy conviction under the Mann Act); Lottery Case (Champion v. Ames), 188 U.S. 321 (1903) (rejecting a challenge to a state restriction of lotteries).

istence of sex roles in most contexts.[258] Justice Bradley's nineteenth-century concurrence in *Bradwell v. Illinois*,[259] with its exposition of the "divine ordinance" and "the nature of things" that had given rise to sex-specific social roles, famously legalized popular presumptions about the natural aptitudes of women and men.[260] But by the mid-1970s, the easy acceptance of majoritarian judgments about the proper roles of men and women had gone by the wayside and, in numerous cases, the Court carefully reviewed sex-based classifications to insure against the very moral or otherwise "natural" roles that it had embraced earlier.[261]

Similarly, the status of nonmarital children underwent significant transformation as the Court shifted from generalized acceptance of common law rules privileging "natural" children over "illegitimate" children[262] to an approach that regularly rejected classifications of children according to their parents' marital status. In 1968, for example, the Court allowed nonmarital children to sue for the wrongful death of their mother, concluding that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on

258. *See generally* Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998) (reviewing sex discrimination litigation and analysis from the 1920s through the late 1990s).

259. 83 U.S. (16 Wall.) 130 (1872).

260. *Id.* at 141 (Bradley, J., concurring). Even shortly before the midpoint of the twentieth century, the Court hearkened back to Justice Bradley's sentiments in *Bradwell* by concluding that "bartending by women may, in the allowable legislative judgment, give rise to moral and social problems." Goesaert v. Cleary, 335 U.S. 464, 466 (1948), *overruled by* Craig v. Boren, 429 U.S.190 (1976).

261. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982) (reviewing a sex-based classification to insure that it did not rely on "fixed notions concerning the roles and abilities of males and females" or presume that members of one sex were "innately inferior" to the other); Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973) (invalidating sex-based distribution scheme for military benefits and recognizing that through "romantic paternalism" toward women, "our statute books gradually became laden with gross, stereotyped distinctions between the sexes" that gave rise to "pervasive discrimination"); *cf.* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (rejecting the argument that the Privileges and Immunities Clause mandated women's suffrage).

262. *See, e.g.*, Naeglin v. De Cordoba, 171 U.S. 638, 640–41 (1898) ("[U]nder the common law illegitimate children did not inherit from their father," but "the statutes of New Mexico introduced a new rule of inheritance: 'Natural children, in the absence of legitimate, are heirs to their father's estate . . . .' In other words, under this statute, there being no legitimate children, illegitimate children inherit.").

the mother" and that discrimination on that basis would be "invidious."[263]

Substantive due process doctrine likewise reveals the Court's awareness of the unstable, contested nature of contemporary mores. In contrast to its equal protection cases, the Court did not directly reject the moral concerns regarding restrictions on access to contraception and abortion at issue in *Griswold*, *Eisenstadt*, *Roe* and numerous other cases related to human sexuality decided in the 1960s and 1970s.[264] Still, these "modern" cases[265] necessarily reinforced for the Court the absence of a monolithic moral code governing the people of the United States.

Challenges to restrictive family definitions also brought before the Court the many different ways in which people construct their lives and the widely varying moral codes that might support those constructions.[266] In *Michael H. v. Gerald D.*,[267] for example, Justice Scalia expressed his hope that a situation in which a married woman conceived a child with a man other than her husband and had an intimate relationship with a third man was "extraordinary."[268] While the Court ruled that parental status belonged only to the husband and wife unit, notwithstanding the facts of parentage, *Michael H.* nonetheless illustrates the Court's exposure to individuals living lives outside the dominant norm.[269]

In addition to the equal protection and due process cases that exposed the Court to changing mores, cases seeking protection for free speech rights presented even more vividly the

263. Levy v. Louisiana, 391 U.S. 68, 72 (1968). *Levy* was the first of "[t]he modern Court's frequent encounters with illegitimacy classifications." GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 723 (13th ed. 1997).

264. *See supra* Part II.

265. GUNTHER & SULLIVAN, *supra* note 263, at 516.

266. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (invalidating an ordinance that restricted occupancy to nuclear families rather than extended families when challenged by a woman who lived with her son and two grandsons); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (striking down an administrative rule that prohibited households comprised of unrelated persons from receiving food stamps); *cf.* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the application of a compulsory school attendance law to the parent of a child in an Amish society violated the Free Exercise Clause of the First Amendment).

267. 491 U.S. 110 (1989).

268. *Id.* at 113.

269. *Id.*

diversity of moral views in American society. Many of these were in the form of obscenity cases, which exposed the Court to sexual practices and values well outside any majoritarian moral code.[270] Other cases called attention to the discrimination faced by socially subordinated groups. In 1958, in *One, Inc. v. Olesen*,[271] for example, the Court examined a magazine about homosexuality that aimed, in part, "to sponsor educational programs, lectures and concerts for the aid and benefit of social variants."[272] It then summarily reversed the Ninth Circuit's determination that the magazine was "non-mailable" because it contained "cheap pornography" and was otherwise "dirty, vulgar, and offensive."[273]

Likewise, through the free exercise cases, the Court was exposed not only to those whose views mandated polygamous marriage[274] but also to individuals whose religious precepts embraced animal sacrifice[275] and ingestion of peyote.[276] Through

270. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957). *See generally* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 192–94 (1979) (describing the Court's practice under *Redrup v. New York*, 386 U.S. 767 (1967), of reviewing sexually explicit films that had been declared obscene).

271. 355 U.S. 371 (1958) (per curiam), *rev'g* 241 F.2d 772 (9th Cir. 1957).

272. 241 F.2d at 777.

273. *One, Inc.*, 355 U.S. 371, *rev'g* 241 F.2d 772, 774, 777; *see also* Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1270, *aff'd by an equally divided Court*, 470 U.S. 903 (1985). Much more recently, the Court considered, in the First Amendment context, the right of an Irish gay and lesbian organization to march in a St. Patrick's Day parade and the right of an openly gay man to serve as a troop leader in the Boy Scouts. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, Inc., 515 U.S. 557 (1995) (holding that Massachusetts may not require organizers of a parade to include a gay and lesbian group); Boy Scouts of Am. v. Dale, 430 U.S. 640 (2000) (ruling that the Boy Scouts had a First Amendment right to exclude an openly gay scout leader); *cf.* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987) (finding that a "Gay Olympics" event infringed the trademark of the U.S. Olympic Committee).

274. Unlike many of the other instances of exposure to individual diversity, the Court first faced the issue of polygamy in the nineteenth century. *See, e.g.*, Church of The Holy Trinity v. United States, 143 U.S. 457 (1892); Reynolds v. United States, 98 U.S. 145 (1878) (rejecting the free exercise defense of a Mormon man convicted of plural marriage).

275. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (invalidating an ordinance targeted at prohibiting animal sacrifice by adherents of Santeria).

276. *See, e.g.*, Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (upholding in the unemployment benefits context the application of a law criminalizing peyote use to individuals who ingested peyote as part of a religious ceremony in a Native American church).

the conscientious objector cases, the Court similarly became familiar with varied individual belief systems.[277]

Once the Court began to grapple with these diverse challenges to traditional mores, the inadequacy of presuming that all laws could be justified by reference to promotion of public morality became starkly apparent.[278] How could the Court rely on morality as a justification for sustaining a restriction of conduct when it was wrestling each term with the absence of societal consensus on moral questions and the active shifting of popular moral views? What expertise could the Court reasonably claim to assess the relationship between a law and its purported moral aim or to evaluate the legitimacy of the moral aim itself? Not surprisingly, then, the Supreme Court, through its actions if not its rhetoric, has sought strenuously to preserve its credibility by avoiding engagement with morals-based rationales at nearly every turn.[279]

IV. THE NOT-SO-PUZZLING PERSISTENCE OF MORAL JUDGMENTS

Even as the Supreme Court has eschewed reliance on explicit morality-based justifications, it has not sought to remove all elements of moral judgment from its jurisprudence. Notwithstanding *Bowers*'s flawed conclusion that statements of majoritarian morality alone sufficed to justify Georgia's sodomy law, Justice White was probably correct that "[t]he law . . . is

277. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965) (finding the objections to warfare of three conscientious objectors to fit within the statutory exemption from training and service in combat); *see also* Welsh v. United States, 398 U.S. 333 (1970) (upholding an exemption from combat service for an individual who did not characterize his views as religious).

278. Arguably, these presentations of American diversity to the Court should have created discomfort with morals-based justifications historically as they have more recently. And perhaps they did, if we understand the Court's low level of reliance on morality even in the 1800s to signal early recognition of the potential arbitrariness of moral code–based rationales for government action.

279. Even the Court's rhetoric has, at times, responded almost defensively to the possibility that the Court might appear to be selecting among morals rationales according to its members' preferences. *See, e.g*, Lawrence v. Texas, 123 S. Ct. 2472, 2480 (2003) (stating that the Court was not mandating its own moral code regarding the Homosexual Conduct Law); Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (making same statement regarding abortion regulation); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 47 (1966) (stating that it was not the province of the courts to draw on jurists' moral views regarding liquor regulation), *overruled on other grounds by* Healy v. Beer Inst., 491 U.S. 324 (1989).

constantly based on notions of morality."[280]

This section will identify three levels at which moral judgments remain influential in lawmaking and adjudication, even while the Court avoids overt reliance on morals rationales. This discussion, coupled with the previous section's analysis, aims to reinforce the urgent need to facilitate meaningful review of majoritarian invocations of morality without demanding the complete eradication of morals-based interests from lawmaking. The conclusion, which follows, offers one potential approach to resolve this tension.

First, most broadly, normative judgments about individual and societal well-being underlie arguments about the quality and quantity of authority that should be accorded to both courts and legislators.[281] For example, those who believe that the harm from restricting individual autonomy outweighs the harm caused by the behavior of autonomous individuals might advocate a libertarian position that would allow official intervention only to prevent "harm to others."[282] On the other hand, a different moral vision would support the Aristotelian view that all branches of government should concern themselves with individual moral goodness[283] or a position that encouraged government to balance concern for individual morality with protection of individual autonomy.[284] Even pragmatists who oppose morals-based laws on the consequentialist ground that they present more dangers than benefits bring to that position a normative vision regarding the relative dangers presented by

280. Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 123 S. Ct. 2472. *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 109 (1973) (Brennan, J., dissenting) (observing that "much legislation . . . is grounded, *at least in part*, on a concern with the morality of the community") (emphasis added). Reinforcing the difficulty in ascertaining dominant moral views that could appropriately be the basis for regulation, Justice Brennan observed in *Paris Adult Theatre I* that "the State's interest in regulating morality by suppressing obscenity, while often asserted, remains essentially unfocused and ill defined." *Id.* (Brennan, J., dissenting); *see also* POSNER, *supra* note 9, at 137 ("Morality is a pervasive feature of social life and is in the background of many legal principles.").

281. *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981) (arguing that liberalism's support for governmental neutrality among diverse aims does not represent a non-neutral position).

282. *See* MILL, *supra* note 9, at 82.

283. *See, e.g.*, ARISTOTLE, THE NICHOMACHEAN ETHICS (David Ross trans., Oxford Univ. Press 1988).

284. *See, e.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 245, at 180–83 (advocating limited government intervention to secure equal concern and respect); RAZ, *supra* note 241 (advancing a perfectionist position).

individual action and government oversight.

Second, and more narrowly, moral judgments help determine whether and how society should respond to acts that are viewed as having a negative impact on constitutive conditions or other negative consequences. The decisions about whether and how to regulate nude dancing because of heightened crime rates in neighboring communities provide a useful illustration.[285] While widespread agreement exists that crime is harmful, some legislators or judges might accept any action that would reduce crime, while others might advocate or sustain only limited restrictions (or no restrictions at all) to safeguard freedom of expression. This valuation process necessarily works from a moral framework—or at least a framework that reflects nonempirical, abstract views about what is good for society.

Third, and perhaps most profoundly, moral judgments inform how judges and lawmakers define "harm."[286] As we have seen, different moral philosophers can, with absolute conviction, deem the same act, such as sexual intimacy between same-sex partners, to be either constitutive of or instrumental in enhancing or destroying human goodness, the only difference between them being their moral philosophical stances.[287] Or, to consider an example touched on in *Lawrence*, some would consider the denial of marriage rights to gay people to be grossly injurious to the dignity of lesbians and gay men and the communities in which they live.[288] Others consider the prospect of

285. *See supra* notes 126–49 and accompanying text (discussing cases regulating nude dancing establishments).

286. As Professor Dworkin has observed in connection with his critique of Lord Devlin's position regarding the relationship between law and morality, "[w]hat is shocking and wrong is not [Devlin's] idea that the community's morality counts, but his idea of what counts as the community's morality." *See* Dworkin, *Lord Devlin*, *supra* note 9, at 1001.

287. *See supra* notes 232–35, 249–51 and accompanying text; *cf.* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 101 (2003) (observing that the Court in *Lawrence* "avoid[ed] inflammatory accusations of bigotry by acknowledging the 'profound and deep convictions accepted as ethical and moral principles' that support condemnation of 'homosexual conduct as immoral'" (quoting Lawrence v. Texas, 123 S. Ct. 2472, 2480 (2003)).

288. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996) (championing the legalization of marriage for lesbian and gay couples); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, *in* LESBIANS, GAY MEN, AND THE LAW 398 (William B. Rubenstein ed., 1993) (same); Mary C. Dunlap, *The Lesbian and Gay Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 L. & SEXUALITY 63 (1991) (noting that marriage for same-sex

same-sex couples' marriages to represent one of the greatest present dangers to civilization.[289]

But the influence of moral judgment is not limited to assessments of nonmaterial harms. Even determinations that concrete injuries amount to cognizable harms to others are, ultimately, informed by judgments about what harm means. Earlier, in the Introduction, I offered the example of a pie-throwing incident, which could be considered either harmful or not depending on one's definition of harm. Many other weightier examples could be analyzed similarly. Consider, for example, the use of race discrimination to sustain apartheid, the facilitation of murder to preserve a family's honor, and the imposition of the death penalty as a form of deterrence and retribution. By some, these actions are considered to be profound harms that endanger both individuals and society; to others, these same acts are essential to preserving individual and societal well-being.[290] Thus, no matter how carefully we might disavow moral

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couples will lead to greater societal acceptance of homosexuality).

In *Lawrence*, the majority never mentioned marriage directly, commenting instead that the case did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 123 U.S. at 2484. Justice O'Connor and Justice Scalia, in their respective opinions, each addressed specifically the relationship of *Lawrence* to marriage rights for same-sex couples. *See id.* at 2488 (suggesting that reasons other than morality "exist to promote the institution of marriage") (O'Connor, J., concurring); *id.* at 2495–96 (urging that morality supplies a sufficient justification to support "laws refusing to recognize homosexual marriage") (Scalia, J., dissenting).

289. *See, e.g.*, James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 522 (2002) (noting that conservatives' position on marriage rights for same-sex couples "inevitably leads to predications of apocalyptic cries warning of 'death of marriage and civilization itself'" (quoting E.J. GRAFF, WHAT IS MARRIAGE FOR? 32 (1999))); Wendy Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-Sex "Marriage"?*, 12 B.U. PUB. INT. L.J. 137, 181 (2002) (characterizing the recent Massachusetts same-sex marriage decision as "judicial tyranny"); Molly McDonough, *Gay Marriage Decision Harks Back 55 Years*, ABA J. E-REPORT, Nov. 21, 2003 (observing that opponents of marriage for lesbians and gay men, including President George W. Bush, were extremely critical of the Massachusetts Supreme Judicial Court ruling that marriage restrictions based on sex violated the state's constitution in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003)), *at* http://www.abanet.org/journal/ereport/nov21marry.html.

290. For general discussion of differing viewpoints on these issues, see, respectively, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); Rachel A. Ruane, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 EMORY INT'L L. REV. 1523, 1527–28, 1528 n.30 (2000); LOUIS P.

judgments in light of the challenges they present for adjudicators, they are inextricably bound up in our lawmaking and, as a result, inevitably present in our adjudication as well.

V. CONCLUSION: A TENTATIVE PROPOSAL TO RELIEVE MORAL DISCOMFORT

The Court's reluctance to engage with morals justifications coupled with the unavoidable presence of moral judgments in lawmaking leave us with a final question: How can courts best ensure that morals rationales will not be misused, given the difficulty inherent in distinguishing legitimate moral sentiment from impermissible bias? The previous sections suggest at least one proposal for minimizing judicial moral discomfort that I will develop and analyze here.

To recap the problems with judicial reliance on morals justifications, we saw earlier that the equal protection and due process guarantees require courts to ensure that moral justifications are not being proffered to cover up impermissible government interests. By presuming morals rationales to be legitimate because they have received popular approval, a court may fail to uncover invidious bias. But a court that does not presume majoritarian moral sentiment to be legitimate risks appearing to substitute its moral judgment for that of the people. The diversity of available moral positions makes it virtually impossible for a court that doubts the majority's moral aims to demonstrate that it has discerned *the* correct moral position from among all others. That moral philosophers cannot persuade each other to agree on a single moral code underscores further the implausibility of a court ever credibly making the case that it has found the moral answer.

Still, courts select regularly among competing analyses of situations proffered by experts and lay witnesses,[291] so the diversity of moral philosophical positions and popular views regarding a particular moral stance should not in itself create an insurmountable barrier to successful review.

The challenge for courts, then, stems not so much from the existence of competing expert or lay views as from judges' inability to point to an external source—i.e., something other

POJMAN & JEFFREY REIMAN, THE DEATH PENALTY: FOR AND AGAINST (1998).

291. *See generally* Edward K. Cheng, *Changing Scientific Evidence*, 88 MINN. L. REV. 315 (2003) (discussing the difficulties faced by courts in analyzing evolving scientific evidence).

than personal preferences—to justify the selection of a particular moral framework. In contrast to the ordinary situation, where fact-finding is used to justify judicial decision making, factual assessment is irrelevant to weighing the legitimacy of an abstract, nonconsequentialist moral prohibition. Yet without factual references, a court has little to demonstrate that its evaluation of a morals justification reflects objective, reasoned judgment rather than deference to its own views or to the likes and dislikes of those who dominate the lawmaking process.

So, for example, if a government maintains that moral concerns justify a prohibition against particular sexual conduct, as in *Lawrence*, no evidence can be taken to address meaningfully the existence of that moral position. A court deciding a challenge to that law must instead attempt to develop a moral philosophical analysis that avoids the Scylla of unquestioning deference to majoritarian preferences and the Charybdis of imposing its own moral views without the benefit of empirical evidence to guide its course.

This sort of philosophical tightrope walking is not a task for which courts, which are structured to elicit facts and interpret and apply relevant law, are institutionally well suited. Indeed, Georgia defended its sodomy law in *Bowers* in part based on this institutional competence theory, arguing that "[t]he legislative process is acutely designed for [the purpose of assessing societal values and morality] whereas the judiciary may be inclined to make determinations based upon more empirical evidence, to which this area is not particularly amenable."[292]

Because the absence of factual grounding seems to be at the root of the Court's difficulties in evaluating morals rationales, a requirement that fact-based rationales exist to explain government action could represent an important step, albeit a partial one, toward a solution. In particular, if governments are limited to adopting laws and policies that can be justified by reference to observable or otherwise demonstrable harms, the tension that arises from courts being asked to analyze justifications in the absence of evidence, such as morals rationales, will be mitigated.[293]

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292. Petitioner's Brief at 36, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).

293. Even if government action gives effect to moral aims (or other abstract norms, such as decency or disgust), the presence of a factual justification in addition to a purely morals-based rationale would enable a court to make a meaningful evaluation of the fact-based interest.

As an example, consider the way a fact-based evaluation might proceed with respect to the highly contested regulation of marijuana.[294] If government prohibits people from smoking marijuana, evidence could be introduced regarding potential health-related harms caused by that activity.[295] Debate could ensue between the parties or among members of a judicial panel regarding whether marijuana actually causes the alleged harm.[296] Debate also could take place as to whether the government's action in this instance responds appropriately to the identified harm.[297] Although there will likely be disagreement, whatever the outcome, a court's acceptance of a particular set of facts can be studied and critiqued in a way that a court's embrace of an abstract moral norm cannot.

Likewise, in *Romer*, the Court considered, as a factual matter, the validity of Colorado's proffered justification that the state constitutional ban on antidiscrimination protections for gay people would save limited resources or protect individuals' associational rights.[298] It was then able to reach the empirically supportable conclusion that the connection between the

294. *See, e.g.*, Suzanne D. McGuire, Comment, *Medical Marijuana: State Law Undermines Federal Marijuana Policy—Is the Establishment Going to Pot?*, 7 SAN JOAQUIN AGRIC. L. REV. 73, 73 (1997) ("Availability of medical marijuana . . . remains . . . the subject of heated debate at the federal level, both in the legislature and with administrative agencies. . . . [V]arious state legislatures, courts and voters have moved toward easier availability of marijuana for medicinal use."); *see also* Joel Stein, *The New Politics of Pot*, TIME, Nov. 4, 2002, at 57 (reporting on the heated debate on the legalization of marijuana that rages in social, political, and legal fora).

295. *See, e.g.*, LESTER GRINSPOON, M.D. & JAMES B. BAKALAR, MARIHUANA, THE FORBIDDEN MEDICINE 3–4 (1993) (describing the historical development of therapeutic and other uses of marijuana); Jerome P. Kassirer, M.D., *Federal Foolishness and Marijuana*, 336 NEW ENG. J. MED. 366, 366–67 (1997) (arguing that federal policy prohibiting marijuana use is absurd in light of the medical benefits of marijuana); Eric E. Sterling, *Drug Policy: A Smorgasbord of Conundrums Spiced by Emotions Around Children and Violence*, 31 VAL. U. L. REV. 597, 622 (1997) (detailing the modern trend of criminalizing marijuana); *cf.* John Cloud, *Is Pot Good for You?*, TIME, Nov. 4, 2002, at 62 (providing support that marijuana, despite potentially providing relief on certain illnesses, is nevertheless unhealthy, but only mildly so).

296. *See, e.g.*, GLEN HANSON ET AL., DRUGS AND SOCIETY 377 (6th ed. 2001) (discussing negative effects of marijuana use); GARY J. MILLER, DRUGS AND THE LAW: DETECTION, RECOGNITION, & INVESTIGATION 409–11 (1992) (same); John P. Walters, *The Myth of "Harmless" Marijuana*, WASH. POST, May 1, 2002, at A25.

297. *See, e.g.*, Stein, *supra* note 294, at 57 (reflecting polls demonstrating that the overwhelming majority of Americans would legalize marijuana for medical purposes and penalize recreational use with, at most, a fine).

298. Romer v. Evans, 517 U.S. 620, 635 (1996).

amendment and the aims was too attenuated to accomplish either goal in a nonarbitrary fashion.[299] In contrast, had the Court decided the case based on the morality justification offered for the Colorado amendment, it would not have needed to disclose its reasoning because current doctrine simply presumes the legitimacy of a morals rationale.

To be sure, the proposal would not fully resolve the difficulty inherent in judicial review of government action based on composite or embedded moral concerns. Indeed, some would argue, empirical evidence can always be marshaled to veil a morals rationale. In addition, as discussed in Part IV, above, both conscious and unconscious biases can shape a court's response to factual, as well as morals-based, justifications.[300] Further still, courts may, whether out of bias or deference to the legislative branch, accept highly speculative arguments about factual harms and thereby render the empirical grounding requirement useless.

These limitations are illustrated well by two of the first post-*Lawrence* cases to address governmental discrimination based on sexual orientation. In *Lofton v. Secretary of the Department of Children & Family Service*,[301] the 11th Circuit sustained Florida's ban on adoption by lesbians and gay men and accepted as a rational basis for the law the argument that heterosexuals are better situated to provide a stable, nurturing environment for the education of adopted children than lesbians and gay men.[302] Yet, the preference for heterosexual parents, when examined closely, does not appear to rest on any factual considerations other than that heterosexuals can, presumably, provide post-puberty guidance to their children regarding heterosexual relationships.[303] If it was not otherwise

299. *Id.*

300. For discussion of these biases in the context of race discrimination, see Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

301. Lofton v. Sec'y of the Dep't of Children & Family Servs., 2004 WL 161275 (11th Cir. 2003).

302. *Id.* at *11.

303. *Id.* at *14. Related to this point, the Court highlighted the historical acceptance of parenthood within marriage of a man and a woman, writing:

> Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior

apparent, the inability of these purported factual justifications to explain meaningfully the state's line-drawing becomes particularly clear when the state's ban on adoption by lesbian and gay parents is considered within the overall framework of the state's adoption law, which permits adoption by unmarried heterosexual individuals and permits foster parenting by lesbians and gay men.[304] Notwithstanding the thinness of the factual grounds, the Court upheld Florida's ban under an analysis consistent with the one proposed here, suggesting that the empirical support requirement may not provide a meaningful constraint.

Similarly, in *State v. Limon*, the Kansas Court of Appeals upheld a state law that subjected the defendant to a seventeen-year sentence rather than a fifteen-month sentence because he had consensual oral sex with a fourteen-year-old boy rather than a girl of the same age.[305] As in *Lofton*, the justifications accepted by the Court amounted to factual characterizations of normative preferences for heterosexuality. For example, the Court found the differential punishment to be "rationally related to the purpose of protecting and preserving the traditional sexual mores of society and the historical sexual development of children."[306] Although that rationale described the criminal law's preference for heterosexuality, it did not *explain* why heterosexuality was preferable, as equal protection requires.[307]

Indeed, the justifications accepted in *Limon* and *Lofton* are reminiscent of the fact-based justification rejected by the Supreme Court in *Palmore v. Sidoti*.[308] There, a white father had

> model. Against this "sum of experience," it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother.

See id. at *11 (internal citations omitted).

304. *Id.* at *13–15.

305. 2004 WL 177649 (Kan. Ct. App. 2004).

306. *Id.* at *7.

307. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."); *see also* State v. Limon, 2004 WL 177649, *20 (Kan. Ct. App. 2004) (Pierron, J., dissenting) ("Legislative disapproval of homosexuality alone is not enough to justify any measures the legislature might choose to express its disapproval. . . . A rational basis must be rational and supported by a reasonable cause and effect relationship to qualify.").

308. 466 U.S. 429, 432 (1984).

argued for transferring custody of his daughter to him because of his former wife's relationship with an African-American man. The Court considered the factually grounded concern that the child would be subjected to heightened pressures as a result of her mother's interracial relationship[309] but ultimately rejected it. "Private biases may be outside the reach of the law," the Court wrote, "but the law cannot, directly or indirectly, give them effect."[310] Although *Palmore* involved a racial classification and received higher scrutiny[311] than the sexual orientation–based classifications in *Lofton* and *Limon*, under rational basis review it is also well settled that courts cannot give effect to prejudice, even when those prejudices are expressed in factual rather than moral or other abstract terms.[312]

While the factual grounding requirement would not forbid judicial acceptance of the types of justifications accepted in *Lofton* and *Limon* (and rejected in *Palmore*), the proposed framework still would be preferable to the current approach because it demands at least some analysis rather than according carte blanche any time the government justifies its actions in terms of morality. Because fact-based reasoning, as opposed to moral philosophical arguments, tends to be publicly accessible, a court potentially will be exposed to greater scrutiny—and greater criticism—by both dissenting judges[313] and the general public if it accepts dubious facts to allow a traditional moral regulation to survive.[314] This, in turn, may have a constraining

309. *Id.* at 433 ("It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.").

310. *Id.*

311. *Id.* at 432–33.

312. *See supra* note 11 and accompanying text.

313. For example, Judge Pierron's dissent in *Limon* considered and rejected the factually framed justifications for the state's differential criminal punishment of same-sex and different-sex sexual relations between eighteen-year-olds and fourteen-year-olds. *See, e.g.*, State v. Limon, 2004 WL 177649, *20–22 (2004) (Pierron, J., dissenting) (considering justifications related to pregnancy, marriage and venereal diseases and concluding that "[t]he purpose of the law is not to accomplish any of the stated aims other than to punish homosexuals more severely than heterosexuals for doing the same admittedly criminal acts").

314. Though the factual grounding requirement could be strengthened to address the problem of facts as well as abstract rationales being used to cover impermissibly biased aims, ordinary rational basis review should, at least in theory, require meaningful legitimate explanations for government action. *See*

effect on courts otherwise inclined to accept nonlegitimate or nonexplanatory morals rationales.

Finally, some will reject the proposal as reflecting values inconsistent with their preferred method of governance. Libertarians, for example, would likely find the requirement that government can act in response to empirically demonstrable harms to be insufficiently restrictive. As proposed here, the standard does not limit government action to harms to *others* but rather would allow government to address all harms, including harms to *self*, that are capable of factual demonstration. For example, to the extent research demonstrated physical harms flowing from marijuana use, as in the example above, government conceivably could regulate on that basis, even if the use was purely personal and in the home.

Others will find the proposal to limit reliance on morals-based rationales undesirable because they view morality as not only sufficient but also an important independent basis for lawmaking.[315] Still others may find the proposal impractical because they see moral judgments as so fundamentally intertwined with the most concrete- and practical-seeming harms so as to render empirical and morals rationales analytically

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Romer v. Evans, 517 U.S. 620, 632 (1996) (describing the need for rational connection between the classification and the justification offered for it, even under the lowest level of review); *cf.* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (contrasting the weak and strong versions of rational basis review).

A related concern about the factual evidence requirement would be that it might heighten the otherwise weak burden on governments defending measures that do not make suspect classifications or infringe fundamental rights. However, the requirement does not mandate the introduction at trial admissible evidence amounting to conclusive proof of the need for the regulation. Instead, whether proffered by the government or identified by the court itself, the facts considered for purpose of rational basis review would need to illustrate only that the government could reasonably conceive that its act would serve a legitimate government interest. *Cf.* Heller v. Doe, 509 U.S. 312, 320–21 (1993) ("A statute is presumed constitutional and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." (internal citation omitted)). This analytic framework provides a meaningful opportunity for courts to fulfill their responsibility under rational basis review rather than taking entirely on faith the government's morals-based defense of its actions. An abstract rationale like morality would not suffice because without a minimal empirical grounding, a court cannot perform the most basic function of assessing whether the government's acts are reasonable or wholly arbitrary.

315. *See, e.g.*, GEORGE, *supra* note 9; Finnis, *supra* note 9.

indistinguishable.[316]

From whatever vantage point, however, the institutional-competence question posed here can no longer be sidestepped with a paean to lawmakers' traditional powers to forbid actions *contra bonos mores*. Whatever one thinks of the propriety or necessity of government action to protect the public's morals, the question of how to ensure that morality does not wind up providing a benign cloak for invidious preferences must be answered. Although *Bowers*'s explicit embrace of a moral disapproval argument coupled with the Court's staunch rhetorical support for morals-based exercises of the police power long obscured this difficulty, *Lawrence* has now called the question. Those who would defend morals-based lawmaking cannot credibly avoid responding.

316. *See, e.g.*, Dworkin, *Lord Devlin*, *supra* note 9.