

IT'S A DILDO IN 49 STATES, BUT IT'S A DILDON'T IN
ALABAMA: ALABAMA'S ANTI-OBSCENITY ENFORCEMENT
ACT AND THE ASSAULT ON CIVIL LIBERTY AND PERSONAL
FREEDOM

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I. INTRODUCTION

Nearly every town has one. It is tucked off into a corner, sometimes miles outside of town—technically located within city limits—but only barely.¹ It is usually a dilapidated shack,² and the windows are blacked out or boarded over.³ Sometimes it has a name, but that name is never uttered in polite conversation. If it must be included in any conversation, it is known as: “you know, that place way at the end of [middle of nowhere] road.” By now, most people know what business is being referred to. With a few rare exceptions,⁴ the business is low key, and the only advertisement it has is a

1. Sometimes it is not even in city limits, and it may not even be in the same county—or even state—as its target city. In the case of Alabama, a notable example is located off of I-65 just north of the Alabama-Tennessee border somewhere between Elkmont Springs, Elkton, and Dickson Town. These three small towns are in *Tennessee*, about 30 miles away from the target city of Huntsville, *Alabama*.

2. It may be an abandoned warehouse.

3. The Author assumes that there are windows, but based on admittedly unscientific research—i.e. anecdotal evidence—fewer than 30% of such stores actually have windows.

4. Six of Hustler Hollywood's nine locations are a notable exception to the low key majority: New Orleans on Bourbon Street; the heart of Downtown San Diego; across I-70 from the St. Louis airport; straddling I-65 in Nashville; conspicuously located on US-1 in the middle of Fort Lauderdale; and, of course, the original store located on the Sunset Strip in West Hollywood. However, the Lexington, KY location is completely outside of the Lexington Loop (KY-4/New Circle Road), though it is still only

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billboard on the interstate that screams “TRUCKERS WELCOME.”⁵ Even then, the billboards rarely state what is sold here that cannot be found anywhere else, relying on the words “adult novelty store” to drum up interest. Sometimes the billboard includes a list that incorporates some combination of the following words: lingerie,⁶ movies,⁷ books,⁸ magazines.^{9,10} Those items are not the reason that the store is off the beaten path—they are mere sideshows to the items that cannot be found anywhere else.¹¹ dildos.¹²

five miles from the center of the city. The “Cincinnati, OH” location is actually in Monroe, OH, nearly 30 miles from downtown Cincinnati, and the “Seattle” location is over thirty miles away from Seattle and is actually located in Tacoma, WA. Even Larry Flynt sometimes has to place his store 30 miles away from the main strip.

5. Occasional advertisements will show up in the local college newspaper, but only if both the newspaper and the business are really hurting for money.

6. Available for purchase at numerous businesses, including Wal-Mart, Victoria’s Secret, and Frederick’s of Hollywood.

7. Available for purchase at numerous businesses, including Wal-Mart, Blockbuster Video, and Best Buy.

8. Available for purchase at numerous businesses, including Wal-Mart, Books-A-Million, and Borders.

9. Available for purchase at numerous businesses, including Wal-Mart, Barnes & Noble, and many gasoline stations.

10. While *expressio unius est exclusio alterius* is a canon of statutory construction, it is not a canon of adult store advertisement, as there are often items in the store that are not explicitly mentioned on the billboard. See NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:23 (*expressio unius est exclusio alterius* is a canon of statutory construction meaning express mentions lead to implicit exclusions), § 47:24 (explaining the principle’s application), and especially § 47:25 (explaining the principle’s limitations) (7th ed. 2007). The billboard is illustrative, not exhaustive.

11. In the internet-era, it is no longer true that these establishments are the only place to procure dildos, but it is generally true that they are the only places where one can walk in and purchase a dildo for same day usage. And with the bankruptcy of The Sharper Image in 2008, Brookstone is the only place with numerous types of personal massagers, but such devices are not marketed expressly—or even implicitly—for exhilarating self stimulation, no matter whether or not they would be well received in that role. See *Sex and the City: Critical Condition* (HBO television broadcast originally August 25, 2002) (Samantha enters The Sharper Image and repeatedly asks a bewildered male clerk where the vibrators are, much to his chagrin. He repeatedly replies they do not sell vibrators, and she finally replies with an annoyed and exasperated query as to where personal massagers are located.). See also Brie Cadman, *Conair Two Speed Vibrator—Er, Massager*, available at <http://www.divinecaroline.com/22705/37656-conair-speed-vibrator-er-massager> (last visited October 25, 2010) (author’s review of the Conair Two Speed Massager for use as a sex toy on a site with tips for females: it received four and a half stars out of five). Even in the internet era with online ordering, many distributors do not ship to Alabama. They will ship pornographic materials, adult attire, personal lubricants, and even Liberator™ Shapes, but they will not ship dildos. A non-exhaustive list of online stores that will not ship sex toys to Alabama are: Adam & Eve’s adameve.com, Hustler’s hustlerhollywood.com, vibratorwarehouse.com, edenfantasys.com, sextoy.com, and discreet-romance.com. The Passion Parties™ brand will host their Tupperware-style parties in Alabama (see *infra* note 87), but they will not sell statutorily-barred sex toys at such a party and limit their catalog to “Alabama-safe” materials, including items such as flavored lubricants, adult-themed lingerie, pre-sex herbal pills for performance or enjoyment enhancement, massage oils, and other concoctions marketed as sexual stimulants. The Author has been unable to find any service that would ship statutorily-barred sex toys to Alabama, but The Author refuses to make a blanket statement that no internet source will ship statutorily-barred sexual items to Alabama.

12. For the remainder of this Note, items banned by the Alabama Anti-Obsecenity Enforcement Act will be synecdochically referenced as dildos. The statutory definition of banned items is “any device designed or marketed as useful primarily for the stimulation of human genital organs.” ALA. CODE § 13A-12-200.2(a)(1) (1998). The Author recognizes that dildos are only a part of items comprising the class of items banned from sale under § 13A-12-200.2 and asks the Reader to recognize the Author’s use of part-for-whole metonymy is done to avoid having to repeat the fifteen word long statutory definition of items banned for sale under § 13A-12-200.2, not due to a mistaken belief by the Author that dildos are

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But no longer can *every* town have such a store. Recently, the United States Court of Appeals for the Eleventh Circuit and (even more recently) the Alabama Supreme Court ruled on challenges to the Alabama Anti-Obscenity Enforcement Act,¹³ and both courts found that there was no *per se* substantive due process right to being able to purchase a dildo.¹⁴ The decision was unsurprising, given the background of the state, the decisions made in nearby states, and the twisted history of the case through the federal judiciary.

This Note analyzes recent trends in sexual privacy jurisprudence dealing with anti-obscenity acts banning dildos post-*Lawrence*, using Alabama's Anti-Obscenity law as a centerpiece in the post-*Lawrence* assault on liberty. In order to do so, a comprehensive background on several areas of law for the past fifty years is necessary. Thus, the Note first lays out the history of Supreme Court sexual privacy jurisprudence, obscenity jurisprudence, and general privacy jurisprudence. Next, the Note examines the history of the Alabama Anti-Obscenity Enforcement Act. Third, the procedural and legal history of the nearly decade-long Federal Court challenge to the dildo ban is examined. Fourth, similar court challenges in nearby states and circuits striking down similar bans are analyzed. Next, the recent Alabama Supreme Court decision to uphold the law is examined. Finally, those decisions are examined in light of state interference and privacy issues. While the decisions of the Eleventh Circuit and the Alabama Supreme Court are by no means surprising, the Note seeks to show the cases would have been better decided under the analysis and reasoning followed both by the Supreme Court in *Lawrence v. Texas*¹⁵ and by the Fifth Circuit in *Reliable Consultants*,¹⁶ instead of the line followed in the Eleventh Circuit *Williams*,¹⁷ Mississippi *Adam & Eve*,¹⁸ and Alabama *Love Stuff*¹⁹ cases distinguishing or ignoring *Lawrence*.²⁰

the only type of item banned by § 13A-12-200.2. Thus, unless the word 'dildo' is being used in language quoted from a court, all subsequent uses of the word 'dildo' mean "a sexual item banned from being sold under § 13A-12-200.2."

13. ALA. CODE §§ 13A-12-200.1 through 13A-12-200.12 (1998).

14. *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007); 1568 Montgomery Highway (d/b/a Love Stuff) v. City of Hoover, 2010 WL 753354 (Ala. March 5, 2010) [hereinafter *Love Stuff*]. Neither decision held that owning a dildo was illegal *per se*. (Nor could they, *see infra* note 67.) The law itself does not prohibit possession and private use. Both decisions held that the state had a legitimate basis and a right to regulate the sale of—*inter alia*—dildos, Fleshlights™, and latex molds of the orifices of famous pornographic film stars. Prohibiting their sale was merely a legitimate exercise of the state's power of commercial regulation. Neither decision focused on whether such restrictions on sale were an unreasonable burden on the ability to acquire a dildo.

15. 539 U.S. 558 (2003).

16. *Reliable Consultants v. Earle*, 517 F.3d 738 (5th Cir. 2008).

17. *See infra* note 86.

18. *P.H.E. Inc., (d/b/a Adam & Eve) v. Mississippi*, 877 So.2d 1244 (Miss. 2004) [hereinafter *Adam & Eve*].

19. *Love Stuff*, 2010 WL 753354 (Ala. March 5, 2010).

20. It is important to note that while this topic has already been tackled in scholarly legal works, the relative recentness of the Alabama Supreme Court decision—*supra* note 19—merits this Note's discussion of the topic. For previous examples, *see, e.g.*, Angela Holt, Note, *From My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927

II. IN WHICH THE GRADUAL LENGTHENING AND ENGORGING OF THE RIGHT TO SEXUAL PRIVACY OCCURS

The constitutional development and Supreme Court sexual privacy jurisprudence comes from many different directions, but it follows a somewhat basic timeline. The Warren Court created the right to sexual privacy, routinely expanding it through substantive due process means or Equal Protection means. During the Burger Court, the Court reluctantly protected the right to privacy, however, but it did not expand it.²¹ During the Rehnquist Court, the Court dialed back and restricted the right to privacy in most cases, and preserved the *status quo* in others, except in the outlier case of *Lawrence*.²²

What is currently recognized as the seminal case on sexual privacy is *Griswold v. Connecticut*.²³ In it, the Court struck down a Connecticut law banning the sale of contraceptives to married couples.²⁴ In doing so, the Court expressly stated a right to privacy, although the Justices had no idea where it came from.²⁵ The majority agreed that it was mentioned nowhere explicitly in the Constitution, but also that it was in the Constitution somewhere.²⁶ They did, however, cite decades-old precedent,²⁷ that cited dec-

(2002) (a pre-*Lawrence* analysis and critique through *Williams III*) and Richard Glover, *Can't Buy a Thrill: Substantive Due Process, Equal Protection, and Criminalizing Sex Toys*, 100 J. CRIM. L. & CRIMINOLOGY 552 (2010) (discussing the circuit split between *Williams VII* and *Reliable Consultants* and arguing the *Williams* line of cases should prevail).

21. One could argue that *Bowers v. Hardwick*, 478 U.S. 186 (1986), restricted privacy rights, but, given the attitudes of the times, it is characterized by The Author as having refused to extend sexual privacy rights to homosexuals rather than as having restricted the generalized right to privacy. See *infra* notes 39-54. One could also argue that *Eisenstadt v. Baird*, 405 U.S. 438 (1972) expanded the right to privacy from married persons to everyone, but, given that the Supreme Court justified it as a right that should be enjoyed by all under Equal Protection—and not just married individuals—the Author is disinclined to note it as having expanded the substantive due process right to privacy. See *infra* note 29.

22. *Lawrence v. Texas*, 539 U.S. 558 (2003).

23. 381 U.S. 479 (1965).

24. *Id.* The statute as written banned all sales of contraceptives, but the Court considered the challenge only as-applied to married couples.

25. Justice Douglas' majority opinion—joined by Chief Justice Warren, and Justices Clark, Brennan, and Goldberg—held that the right emanated from the Fourteenth Amendment and some sort of due process penumbra. *Id.* at 481-82, 486. However, Justice Goldberg, in a concurrence joined by Chief Justice Warren and Justice Brennan stated his belief that it emanated from some sort of Ninth Amendment penumbra. *Id.* at 486-87 (Goldberg, J., concurring). Justice Harlan, in his concurrence, did not recognize a right to privacy, holding that the statute infringed basic values “implicit in the concept of ordered liberty.” *Id.* at 500 (Harlan, J., concurring in the judgment) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Justice White, in his concurrence, also did not recognize a right to privacy, instead stating that a statute that infringed on the marital arrangement would have to pass strict scrutiny, and this statute failed it. *Id.* at 502-05 (White, J., concurring in the judgment). Justice Stewart, in a dissent joined by Justice Black, called the law “uncommonly silly,” but saw that as no reason to deem it unconstitutional. *Id.* at 527-31 (Stewart, J., dissenting). Justice Black, in a dissent joined by Justice Stewart, stated that the word privacy appeared nowhere in the Constitution, and thus, as distasteful as the law was, it was not unconstitutional. *Id.* at 507-09 (Black, J., dissenting).

26. “The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” *Griswold*, 381 U.S. at 484 (Douglas, J., majority op.). A concurrence stated:

My conclusion that the concept of liberty is not so restricted, and that it embraces the right of marital privacy, though that right is not mentioned explicitly in the Constitution, is supported

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ades-even-older precedent.²⁸ While *Griswold* held the statute unconstitutional as applied to married couples, the Court held it unconstitutional as applied to unmarried couples as well less than a decade later.²⁹ The Court extended the right to privacy to unmarried persons under the Equal Protection Clause.³⁰ Thus, acting in concert, the so-called “penumbral rights” espoused in the Fourteenth Amendment³¹ combined with that Amendment’s

both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment.

Griswold, 381 U.S. at 486-87 (Goldberg, J., concurring).

27. “The Fourth and Fifth Amendments were described in *Boyd v. United States*, as protection against all governmental invasions ‘of the sanctity of a man's home and the privacies of life.’” *Griswold*, 381 U.S. at 484, (Douglas, J., majority op.) quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886) (internal citations omitted).

28. *Boyd* stated:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other.

Boyd, 116 U.S. at 630. The Lord Camden of whom Justice Bradley wrote was the Chief Justice of the Common Pleas in England from 1762-1766. The Supreme Court decision positively cited *Entick v. Carrington*, [1765] EWHC KB J98, 19 How. St. Tr. 1029, 95 Eng. Rep. 807, which stated:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him.

Absent a showing of a reasonably compelling need to intrude, privacy was sacrosanct in England, and that principle was followed in New World jurisprudence. While *Boyd* was eventually abrogated as to the specific level of probable cause required of the state to receive and execute a warrant, its basic idea of requiring the state to have an extremely compelling reason to trespass on the privacy of the individual endures in Fourth Amendment jurisprudence even today. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 606-07 (2006) (discussing the exclusionary rule and its beginnings in *Boyd*), *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986) (discussing the development of Fourth Amendment reasonable privacy expectations as well as the common law development of the curtilage area whereby privacy was to be expected, citing both *Boyd* and Blackstone's Commentaries), and *Payton v. New York*, 445 U.S. 573, 585 (1980) (discussing the “sanctity of a man's home” in language directly quoted from *Boyd*).

29. *Eisenstadt*, 405 U.S. 438 (1972).

30. Unmarried persons deserved the same protection as married persons:

The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. . . . “The Equal Protection Clause of that amendment does . . . deny to [the State] the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”

Eisenstadt, 405 U.S. at 446-47, quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1971), quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

31. Assuming that is where substantive due process emanates from.

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Equal Protection Clause³² helped to expand the right to privacy beyond the marital bedroom and into the free-love era just three years after the Woodstock Festival took place.

Then, in an opinion with no clear majority, the Court held unconstitutional a New York statute banning the distribution of contraceptives to anyone under sixteen, requiring those over sixteen who sought contraceptives to purchase them from a pharmacist, and prohibiting anyone—even pharmacists—from advertising contraceptives.³³ Four Justices³⁴ held that the right to privacy extended to minors as well as adults, and the statute did not serve its intended purpose to deter underage sexual activity by making the activity more hazardous. Justice White stated that the statute did not measurably contribute to the state's stated deterrent purposes and refused to comment on a right to privacy, which sounds much like his concurrence in *Griswold*.³⁵ Justice Powell concluded that the statute both violated the rights of married girls between fourteen and sixteen, and it violated the rights of parents to distribute contraceptives to their children if they so wished.³⁶ Justice Stevens stated in his concurrence that making the activity hazardous denied persons the choice to practice safe sex, and the prohibition could not be a justifiable way of discouraging sexual activities by minors.³⁷ Justice Rehnquist wrote a blistering dissent,³⁸ while Chief Justice Burger dissented without opinion. While this decision somewhat protected the right to priva-

32. “[No State shall] deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

33. *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

34. Justices Brennan, Stewart, Marshall, and Blackmun. It is interesting that merely 12 years after Justice Stewart called a law encroaching on privacy uncommonly silly but not unconstitutional due to there being no right to privacy—*see supra* note 25—he signed on to an opinion based on the right to privacy. *Carey*, 431 U.S. at 684-85. The 1970s were a magical place where Supreme Court Justices changed their minds in only a dozen years.

35. *Carey*, 431 U.S. at 702-03 (White, J., concurring). Well, at least some Supreme Court Justices changed their minds.

36. *Carey*, 421 U.S. at 703-712 (Powell, J., concurring). It is conceivable that, were there a marital exception and a parental exception, Justice Powell would have voted to uphold the law, while he probably would not have joined (then) Justice Rehnquist's vigorous dissent.

37. *Id.* at 714-15 (Stevens, J., concurring).

38. Justice Rehnquist, while invoking the Founding Fathers, wrote:

Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.

Carey, 431 U.S. at 717 (Rehnquist, J. dissenting). Justice Rehnquist failed to note that those who valiantly but vainly defended the heights of Bunker Hill in 1775 did not fight in defense of the rights of blacks or women, either. The Author is sure that this was just a mere oversight by one of his law clerks, as he famously only had three per term in order to be able to play doubles tennis.

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cy, the Burger Court refused to expand the right any further in *Bowers v. Hardwick*.³⁹

The sharply-divided 5-4⁴⁰ Court in *Bowers* held that there was no Constitutional right for homosexuals to engage in sodomy,⁴¹ and claims that any kind of private sexual conduct between adults who consent cannot be reached by state interference were wrong.⁴² Furthermore, the fact that numerous states criminalized sodomy means that sodomy was neither “deeply rooted in the Nation’s history and tradition” nor was it “implicit in the concept of ordered liberty.”⁴³ A societal belief that sodomy is immoral was enough to create a rational basis for the law,⁴⁴ and the Court stated that it did not matter that the homosexual conduct occurred completely in the privacy of the home.⁴⁵ Finally, the Court laid down a basic resistance to ex-

39. 478 U.S. 186 (1986).

40. Justice White authored the Court’s opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O’Connor. Chief Justice Burger and Justice Powell each wrote separate concurrences. Justice Blackmun authored the principal dissent, and he was joined by Justices Brennan, Marshall, and Stevens. Justice Stevens authored a dissent joined by Justices Brennan and Marshall that would prove to be extremely important seventeen years later during the consideration of *Lawrence*.

41. The Georgia statute at issue banned sodomy between all adults, but as the Court itself wrote:

John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by § 16-6-2 in the privacy of their home, and that they had been chilled and deterred from engaging in such activity by both the existence of the statute and Hardwick’s arrest. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. The Court of Appeals affirmed the District Court’s judgment dismissing the Does’ claim for lack of standing, and the Does do not challenge that holding in this Court.

The only claim properly before the Court, therefore, is Hardwick’s challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.

Bowers, 478 U.S. at 188, n. 2 (internal citations and quotations omitted).

42. “Moreover, any claim that these cases [*inter alia* *Griswold*, *Eisenstadt*, and *Carey*] nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupported.” *Bowers*, 478 U.S. at 191.

43. “Against this background [24 states and D.C. had laws criminalizing sodomy at the time], to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.” *Bowers*, 478 U.S. at 194 (internal citations omitted).

44. The Court stated:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, 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. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Bowers, 478 U.S. at 196.

45. The Court continued:

[*Stanley v. Georgia*, 394 U.S. 557 (1969), *see infra* note 67] was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are commit-

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panding the reach of the Due Process Clause to cover new fundamental rights,⁴⁶ and refused to consider whether other parts of the Constitution may have invalidated the statute.⁴⁷ In a short concurrence, Chief Justice Burger wrote to remind the readers that homosexual sodomy⁴⁸ had long been found distasteful and there could be no fundamental right to commit homosexual sodomy.⁴⁹ In his short concurrence, Justice Powell wrote that he could be persuaded on an Eighth Amendment argument, but the argument was not ripe.⁵⁰ In dissent, Justice Blackmun pilloried the majority for its obsession⁵¹ with homosexual sex as a right in and of itself as the end of the definition of the right,⁵² and chastised them for ignoring the Eighth and Ninth Amend-

ted at home . . . And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit 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. We are unwilling to start down that road.

Bowers, 478 U.S. at 195-96.

46. The Court stated:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Bowers, 478 U.S. at 194.

47. "Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment." *Bowers*, 478 U.S. at 196, n. 8.

48. The Chief Justice neglected to mention, either purposely or inadvertently, that the word "sodomy" itself is descended from the Bible and is rooted to the stories of the perversities permeating the culture of Sodom (and Gomorrah). (See *Genesis* 19:1-25.) The Chief Justice *did* mention that the opposition to sodomy was "firmly rooted in Judaeo-Christian moral and ethical standards." *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

49. "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring).

50. In recognizing the Eighth Amendment argument—but dismissing it as unripe—Justice Powell wrote:

This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case authorizes a court to imprison a person for *up to 20 years* for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to *serious felonies such as aggravated battery, first-degree arson, and robbery*. . . . In this case, however, respondent has not been tried, much less convicted and sentenced. Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us.

Bowers, 478 U.S. at 197-98 (Powell, J., concurring, emphasis added).

51. In describing the majority as obsessed with outlawing homosexuality, Justice Blackmun wrote: In its haste to reverse the Court of Appeals and hold that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy, the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

Id. at 200 (Blackmun, J., dissenting).

52. He continued:

This case is no more about a fundamental right to engage in homosexual sodomy, as the Court purports to declare than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone.

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ment arguments, as well as the Equal Protection argument.⁵³ In a separate dissent, Justice Stevens stated that it did not make sense to separate and focus on homosexual conduct and followed a privacy analysis.⁵⁴ While Justice Stevens' dissent did not persuade the Court in 1986, the Court was persuaded by that argument in 2003, when a divided⁵⁵ Court overruled *Bowers*.⁵⁶ There, the Court expressly overruled *Bowers* as completely wrongly decided under a substantive due process privacy analysis.⁵⁷ Justice O'Connor (herself a member of the five-Justice *Bowers* majority) could not agree with explicitly overturning an opinion she had signed onto; since the Texas statute applied only to homosexuals, she instead concurred on Equal Protection grounds.⁵⁸

However, sexual privacy jurisprudence was not decided in a vacuum, as other cases substantially, tangentially, or marginally affecting the right to privacy and state interference were decided from the mid-1960s to the present. Two cases decided under Equal Protection struck down prohibitions on sexual, marital, and cohabitation choices dealing with mixed-races.⁵⁹ A few

Id. at 199 (Blackmun, J., dissenting, internal citations omitted).

53. In wondering why the Court refused to hear alternative theories of the statutes unconstitutionality, Justice Blackmun admonished:

It is a well-settled principle of law that a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.

Id. at 201 (Blackmun, J., dissenting).

54. In the dissent which would become the foundation for the *Lawrence* overruling of *Bowers*, Justice Stevens wrote:

The Court states that the issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present for a very long time. Moreover, the reasoning the Court employs would provide the same support for the statute as it is written as it does for the statute as it is narrowly construed by the Court.

Id. at 214, n.2 (Stevens, J., dissenting, internal citations omitted).

55. Justice Kennedy wrote the majority opinion, joined by Justices Stevens, Souter, Breyer, and Ginsburg, and that opinion tracked the dissent penned by Justice Stevens in *Bowers*. Justice O'Connor wrote a concurrence. Justice Scalia wrote a scathing dissent, joined by Chief Justice Rehnquist and Justice Thomas. Justice Thomas wrote his own short and sweet dissent, channeling Justice Stewart in *Griswold*:

I write separately to note that the law before the Court today is . . . uncommonly silly. If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Lawrence, 539 U.S. at 605.

56. *Id.*

57. "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Lawrence*, 539 U.S. at 578.

58. *Id.* at 579 (O'Connor, J., concurring in the judgment). One wonders how she could reconcile that position with the position of the Court that she joined in *Bowers* as stated *supra* note 40. For those who do not wish to look back, the *Bowers* decision used judicial jujitsu to change a general challenge of the statute into a challenge only as-applied to homosexuals.

59. *McLaughlin v. Florida*, 379 U.S. 184 (1964) held that a law banning unmarried couples from

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abortion cases held that the right to privacy covered pre-viability abortions for any reason⁶⁰ and it extended to post-viability abortions for the health of the mother.⁶¹ However, it was also clear that the state could protect and had an interest in protecting unborn life.⁶² Furthermore, so long as restrictions were not overly burdensome, the state could impose restrictions on abortion access.⁶³ Also, it was found that the state could also impose restrictions on certain abortion procedures if it could make a finding that such procedures were never necessary for the health of the mother.⁶⁴ Finally, one case was decided on how to define a fundamental right that is protected by the substantive due process penumbra granted by the Fourteenth⁶⁵ Amendment.⁶⁶

In addition, two obscenity cases were decided. One found it unconstitutional to criminalize the mere possession of obscene material,⁶⁷ and the other defined obscenity.⁶⁸ This is the changing landscape of privacy, sexual autonomy, and state interference that permeated the last fifty years of Su-

living together and occupying the same room at nighttime violated Equal Protection as it was only prosecuted against mixed-race couples. *Loving v. Virginia*, 388 U.S. 1 (1967) held statutes banning interracial marriage were unconstitutional under the Equal Protection clause. Until the Supreme Court put the kibosh on it, the Virginia trial court, the intermediary court of appeals, and the Virginia Supreme Court all agreed with the following “legal” reasoning:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Loving, 388 U.S. at 3. But for the Warren Court’s repudiation of this logic, it would have remained the law of the South. Fifteen states had laws or constitutional provisions banning miscegenation when *Loving* was decided, including every single state to the south and east of Texas, Oklahoma, Missouri, Kentucky, West Virginia and Virginia, and including those states. Alabama amended its constitution to remove the offending provision in 2000, the last state to do so. The ballot measure to excise the original 1901 Alabama Constitution’s anti-miscegenation language passed 59% to 41%. See *Voters Remove State Interracial Marriage Ban*, THE BIRMINGHAM NEWS (Birmingham, AL), November 8, 2000, at 1. Over two out of every five Alabama voters wanted to keep the provision in the constitution despite its unenforceability. The Author can only speculate as to the reason, but the Author’s speculative reasoning is not kind to those who voted to continue to enshrine bigotry in Alabama’s Constitution.

60. *Roe v. Wade*, 410 U.S. 113 (1973).

61. *Doe v. Bolton*, 410 U.S. 179 (1973).

62. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

63. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). While the case did hold that some restrictions on access to abortion were excessive and other restrictions were reasonable to protect the life of the unborn child, the decision itself was unclear as to how to decide which restrictions were overly burdensome and which restrictions were permissible.

64. *Stenberg v. Carhart*, 530 U.S. 914 (2000), held that a ban on partial-birth abortion was unconstitutional without an exception for the health of the mother. *Gonzales v. Carhart*, 550 U.S. 124 (2007) held a similar ban constitutional with Congressional findings that the specific procedure was never medically necessary. The dubiousness and discord with reality of those Congressional findings were not taken into account.

65. Or Ninth, or Fourth, or Fifth.

66. *Washington v. Glucksberg*, 521 U.S. 702 (1997), held that, in defining a right protected by substantive due process, (1) the right must be defined narrowly, and (2) it should be a traditional right, deeply rooted in the history of the country or a concept fundamental to ordered liberty. The Author has no idea what that means either, as is evinced by the Constitutional Law grade appearing on the Author’s transcript. The decision was made in the context of holding constitutional a Washington law banning physician-assisted suicide. The court held that there was no Due Process right to suicide, and thus no unreasonable restriction on access to suicide caused by the ban on assisted suicide.

67. *Stanley v. Georgia*, 394 U.S. 557 (1969).

68. *Miller v. California*, 413 U.S. 15 (1973).

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preme Court jurisprudence and the backdrop that the Alabama Anti-Obscenity Act has been painted upon.

III. IN WHICH ALABAMA LEARNS TO START WORRYING AND HATE THE DILDO⁶⁹

Before 1989, the codified obscenity law in Alabama mirrored the *Miller*⁷⁰ Test.⁷¹ In 1989, at 6:20p.m. on May 2, the Alabama Legislature codified the Alabama Anti-Obscenity Enforcement Act (“The Act”).⁷² The language in the original Act did not mention dildos. The first enactment of the Act primarily concerned the prohibition of distribution of obscene material,⁷³ especially the distribution of such material to minors.⁷⁴ The law as it was in 1989 seemed to serve the public interest of keeping minors’ prurient interest from being sated through exposure to obscene material.⁷⁵ The Act kept the status quo on prostitution laws and child pornography laws,⁷⁶ and it

69. This is an homage to DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB, Columbia Pictures (1964).

70. In *Miller*, 431 U.S. at 24, the Supreme Court, in an opinion authored by Chief Justice Burger, laid out a tripartite test in order to determine whether material was obscene. The standard is:

1) Would an average person, applying the standards of the community, find that the work appeals to the prurient interest? (The *Miller* Test assumes the average person knows the word prurient. The Supreme Court gives the average person a lot of credit.)

2) Does the work describe or depict, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law?

3) Does the work, taken as a whole, lack serious literary, artistic, political, or scientific value? (This is colloquially known as the SLAPS test: *S*erious *L*iterary, *A*rtistic, *P*olitical, or *S*cientific.)

Materials are only found to be obscene if the answer to all three queries is “yes.” (But not if the answer is “yes, yes, Oh God, yes!”) Obscene material is not subject to First Amendment protections of free speech and can be subject to state regulation.

71. Normally, one would find the actual wording of the statute here as it was until May 2, 1989. However, Alabama Legislative History is much like Bigfoot: it is impossible to find more than intermittent, confusing glimpses—if it even exists at all. The closest thing to legislative history found for the pre-1989 language is found in footnote 1 of *Council for Periodical Distributors Association v. Evans*, 642 F.Supp. 552, 556 (1986) (describing ALA. CODE § 13A-12-151 (1975) as criminalizing the sale and distribution of obscene works and also noting obscenity was defined in ALA. CODE § 13A-12-150(4) in language that tracked the *Miller* Test). The Author is forced to take the Court’s reading as correct, as the language itself has been lost to the ether due to the inability of Alabama to track its legislative history.

72. Act of Alabama No. 89-402 (May 2, 1989). The Act repealed ALA. CODE §§ 13A-12-150 through 159 and replaced that language with most of the current language dealing with obscene materials. Section 1 of the Act states: “This division shall be known as the Alabama Anti-Obscenity Enforcement Act.”

73. Section 4 of the 1989 Act makes it illegal “to knowingly distribute, possess with intent to distribute, agree to distribute, distribute as a wholesaler, or produce any obscene material for any thing of pecuniary value.” Section 5 makes it illegal “to disseminate publicly any obscene material.”

74. Section 7 of the 1989 Act makes it illegal “to knowingly or recklessly distribute obscene material to a minor.”

75. More simply put, the point of the 1989 Act was to make it more difficult for teenage boys to look at a Playboy Magazine. It did not prohibit them from using National Geographic magazines featuring nude African tribes to appeal to their prurient interests, as Nat Geo would pass the *Miller* SLAPS test stated *supra* note 70 despite its illicit use in the specific case of the preceding hypothetical.

76. Section 11 of the Act states “this Act shall not be deemed to repeal, amend, affect, or limit the Alabama Red Light Abatement Act or the provisions of the Code of Alabama pertaining to obscene materials displaying or depicting children.” (Such sections are at ALA. CODE §§ 13A-12-190 through 13A-12-198 (2006), but they are outside the scope of this Note.) Courts have held, and the Author agrees, that minors cannot consent to sexual acts or to being sexually depicted. For the remainder of the

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allowed municipalities to set stricter standards if they so wished as to the distribution of obscene material.⁷⁷ Between 1989 and the 1998 Amendment to the Act, there were only a handful of prosecutions, many of which were tacked on as lesser-included offenses in child pornography stings.⁷⁸ The Legislature must have felt⁷⁹ the Act was not being used enough. In 1998,⁸⁰ it amended the Act in ways which included an increase in fines,⁸¹ increased the fines even more for habitual offenders,⁸² provided a civil remedy in a private attorney general model,⁸³ and, most importantly for this Note, provided for the definition and regulation of adult stores⁸⁴ and banned the sale of dildos.⁸⁵ There was an immediate challenge in a federal district court as to the constitutionality of the amended Act.

Note, “consensual sexual activity” refers either to a person acting alone, or a group of individuals where all participants have the legal ability to consent, all participants have consented, and the action is private.

77. Section 11 further states “[n]othing in this Act shall be presumed to invalidate, repeal, or preempt, any city or county ordinance governing the subject matter of this Act and not in conflict with the provisions of this Act.” More simply stated, the Legislature came up with the most stringent restrictions it could think of, but it did not want to limit the ingenuity of rural Alabamians to come up with even more strict standards of limiting access to anything they deem sinful items.*

* Author’s Note: The first two prongs of the *Miller* Test (dealing with community standards, *supra* note 70), set a bar—low or high, depending on the viewpoint—that make it extremely easy for the first two questions to be answered “yes.” The community’s behavior notwithstanding, one finds conversations about dildos are few and far between in Alabama. None of those conversations occur in a civil setting among proper people, except those conversations had in law schools about §§ 13A-12-200.1 through 13A-12-200.12 (1998). (It is beyond the scope of this Note as to the determination of whether law schools are a civil setting among proper people, but they are the only place that could reasonably be called a civil setting among proper people where conversations about dildos may take place.)

78. *See, e.g., King v. State*, 674 So.2d 1381 (Ala. Crim. App. 1995).

79. Due to the aforementioned absence of Legislative History (*see supra* note 71), a complete absence of Legislative Committee notes, Floor Debate, and detailed Meeting Minutes of the Legislature, the Author can only guess at the intent of the Legislature. In such a case, saying the Legislature “must have felt” something is meant in both an ironic and glib fashion. The Author is not sure even the Legislature knows what it felt, let alone able to conjecture conclusively what the Legislature felt or what actions guided its decision-making process. The Author is pretty sure that this Act was based on feelings and not facts but cannot authoritatively state so.

80. Act of Alabama No. 98-467 (April 29, 1998) [hereinafter the Act or the 1998 Act].

81. For an individual, the fine was increased from a maximum of \$10,000 in the 1989 Act to between \$10,000 and \$30,000 in the 1998 Amendments. For a corporation, business, or wholesaler, the fine was increased from a maximum of \$20,000 in the 1989 Act to between \$20,000 and \$50,000 in the 1998 Act. *See* §§ 5 and 6 of the 1998 Act respectively.

82. *See* § 6 of the 1998 Act.

83. *See* § 4 of the 1998 Act.

84. Section 6 of the 1998 Act reads in part: “(1) ADULT BOOKSTORES and ADULT VIDEO STORES. [are defined as] A commercial establishment in which is offered for sale or rent any book, video, film, or other medium which in the aggregate constitute substantially all of its stock or inventory which depicts sexual conduct as defined herein.” Later on in the same section, there is a limitation on where such businesses can be established, and there must be at least a 1000 foot buffer—here buffer means an appropriate distance, instead of its meaning in adult film contexts—between the establishment and any “church, place of worship, church bookstore, public park, public housing project, day-care center, public or private school, college, recreation center, skating rink, video arcade, public swimming pool, private residence, or other place frequented by minors.”

85. *See* § 6 of the 1998 Act: “It shall be unlawful to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.” Surprisingly, stores in Alabama still sell baby oil notwithstanding this provision of the 1998 Act.

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IV. IN WHICH MS. WILLIAMS WISHES TO MARKET DEVICES DESIGNED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITAL ORGANS

Sherri Williams, an enterprising entrepreneur from Birmingham, wished to operate an establishment which would sell dildos among other products. Through a protracted jaunt through the legal system,⁸⁶ the Eleventh Circuit found the law constitutional. Here is what happened:

First in 1999, Ms. Williams filed a deprivation of civil rights claim, under 42 U.S.C. § 1983, challenging ALA. CODE § 13A-12-200.2(a)(1)—as amended in 1998—as violating her civil rights and unconstitutional. In this suit, she filed a claim for herself as owner of an adult-themed store. A second plaintiff, B.J. Bailey, also sought to sell such devices, but at private parties held solely for the purposes of selling adult products.⁸⁷ Ms. Williams and Ms. Bailey sought enjoinder of enforcement of the law as vendor plaintiffs. The two above-named plaintiffs also sought to join four other plaintiffs—Betty Faye Haggermaker, Sherry Taylor-Williams,⁸⁸ Alice Jean Cope, and a Jane Doe—who each averred that she personally used sexual devices either for therapeutic purposes related to sexual dysfunction or as an alternative to sexual intercourse.⁸⁹ The first group of plaintiffs also sought to enjoin enforcement of the law on behalf of the second group as consumer plaintiffs.

The district court did not reach the third-party standing issue, as it decided that Ms. Williams had standing as a vendor. The court did, however, decide that although there was no fundamental right to a dildo,⁹⁰ the statute could not survive a rational basis review as to whether a legitimate government interest supported the Code section.⁹¹ The court thus enjoined the At-

86. In order to disambiguate the cases, they shall be referred to as such:

Williams I: Williams v. Pryor, 41 F. Supp. 2d 1257 (N.D. Ala. 1999) (held The Act unconstitutional as applied to vendor plaintiffs)

Williams II: Williams v. Pryor, 229 F.3d 1331 (11th Cir. 2000) (overturned *Williams I*)

Williams III: Williams v. Pryor, 240 F.3d 944 (11th Cir. 2001) (superseded *Williams II* and strongly overturned *Williams I*)

Williams IV: Williams v. Pryor, 220 F. Supp. 2d 1257 (N.D. Ala. 2002) (held the Act unconstitutional as applied to consumer plaintiffs and held vendor plaintiffs had third party standing)

Williams V: Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004) (overturned *Williams IV*)

Williams VI: Williams v. King, 420 F. Supp. 2d 1224 (N.D. Ala. 2006) (held, even post-*Lawrence*, morality could serve as adequate basis for a law)

Williams VII: Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007) (affirmed *Williams VI* and positively cited *Williams V*)

The Author wishes the Reader Godspeed and good luck following the procedural history, the holdings, reversals, remands, and all other twists and turns.

87. The Court, in its infinite wisdom and in an attempt to make sure that higher courts understood what was going on, compared the parties to “Tupperware”-style parties. *Williams I*, 41 F. Supp. 2d at 1260. While the Author would have used “Pampered Chef,” the Court’s comparison is apropos.

88. Unrelated to Sherri Williams.

89. Sadly, no John Does joined as Fleshlight™ users.

90. *Williams I*, 41 F. Supp. 2d at 1276-77.

91. The statute was: 1) not tailored to banning public displays of obscene material, which was a legitimate state interest; 2) not tailored to banning “the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships” – *Williams I*,

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torney General of Alabama from enforcing the statute.⁹² *Williams I* was just the beginning of this saga.

The Eleventh Circuit reversed on appeal.⁹³ While it affirmed the lower court's ruling on the facial challenge to the law (there was no fundamental right to sexual privacy), it remanded to the district court a decision on an as-applied challenge raised by the "user" plaintiffs, stating that the district court failed to adequately consider those plaintiffs' challenge to the law.⁹⁴ It also disagreed with the lower court's ruling on rational basis review.^{95,96} The Eleventh Circuit relied on *Washington v. Glucksberg*⁹⁷ in its analysis of whether or not there was a fundamental right to sexual privacy. However, the Eleventh Circuit stated that the district court erred in its analysis of a fundamental right to dildos as the court only analyzed the dildos *qua* dildos and was too preoccupied with the dildos to finish its analysis: it neglected to analyze state interference or the protection of such a right, should it exist.⁹⁸ It thus remanded further fact-finding to the district court as it felt it did not have enough facts to decide how much meddling the state could do with regards to dildos.

Before the district court could get another crack at the case, the Eleventh Circuit withdrew the opinion in and superseded *Williams II*.⁹⁹ The court seemed to feel that its admonishment of the lower court was not adequately abrasive in its language toward the lower court in *Williams II*,¹⁰⁰ so it ameliorated those deficiencies in its *Williams II* language. Instead of merely concluding the district court erred in striking down the law under rational basis review, the court reminded the lower court that exceptional circumstances were required in order to strike down a law under rational

41 F. Supp. 2d at 1288-89, quoting *Brief of Attorney General* at 21; and 3) did not ban commerce of obscene material, as dildos were not obscene as a matter of law under the *Miller* test. The statute itself implicitly stated that dildos are not obscene: "It shall be unlawful . . . to distribute *any obscene material* or *any device designed* . . . primarily for the stimulation of human genital organs." ALA. CODE § 13A-12-200.2(a)(1) (emphases added). By listing obscene material separate from dildos, the statute—possibly inadvertently—states they are separate from obscene material.

92. *Williams I*, 41 F.Supp.2d at 1293.

93. *Williams II*, 229 F.3d 1331.

94. *Id.* at 1341-42.

95. *Id.* at 1335-36.

96. The Court snarkily added in a footnote that it refused to recognize a broad fundamental right to sexual privacy. Its reason? The last time it had done so, the Supreme Court reversed it:

A panel of this Court had recognized a broad fundamental right to sexual privacy, relying particularly upon the Supreme Court's contraception and abortion cases, in precluding Georgia from criminalizing private consensual adult sodomy. *See Hardwick v. Bowers*, 760 F.2d 1202, 1210-13 (11th Cir.1985). The Supreme Court reversed, by a 5-4 majority, emphasizing the traditional prohibition of homosexual sodomy. *See Bowers*, 478 U.S. [186 (1986)] at 190-96.

Williams II, 229 F.3d at 1341 n. 7. It is important to note that *Williams II* was written before *Lawrence* overturned *Bowers*.

97. *Glucksberg*, 521 U.S. 702 (1997) (held that in order for something to be a fundamental right, it must be deeply rooted in the nation's history and tradition, and the fundamental right or liberty interest must be carefully described). *See supra* note 66.

98. *Williams II*, 229 F.3d at 1342.

99. *Williams III*, 240 F.3d 944.

100. *Id.*

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basis scrutiny.¹⁰¹ It, like *Williams II*, relied on the reasoning of *Bowers v. Hardwick* in finding that sexual privacy was not a right that did not need to be protected.¹⁰²

The district court, still smarting from the tongue-lashing from above, then went on to decide whether or not the consumer plaintiffs had standing,¹⁰³ whether they were unconstitutionally burdened by the statute as applied to them,¹⁰⁴ what the asserted liberty interest was,¹⁰⁵ and whether the law was still to be declared unconstitutional.¹⁰⁶

Once again, the Eleventh Circuit decided that it needed to step in and clear up the law. However, between *Williams IV* and *Williams V*, there appeared a saucy interloper by the name of *Lawrence v. Texas*.¹⁰⁷ At this point, the court wondered how it could both follow the precedent of *Lawrence* as well as continue to abuse the district court for not ruling the “right” way. In a novel approach, the court sidestepped *Lawrence* as inapposite through an impressive process of narrowing and distinguishing that holding.¹⁰⁸ Since *Lawrence* dealt with sodomy, the Eleventh Circuit decided that the liberty interest identified was an extremely narrow one, encompassing only consenting adults participating in sodomy. According to the court, such

101. *Id.* at 948-54. Over half of the opinion was spent chastising the lower Court for daring to strike down a law when it faced rational basis review. The final two pages affirmed that the statute was facially constitutional, and the District Court needed to look beyond just the dildo before deciding an as-applied challenge.

102. *Id.* at 949.

103. They did. *Williams IV*, 220 F. Supp. 2d at 1271-73.

104. They were. “[Plaintiffs declare and the Court agrees] that there is a deeply rooted history of state non-interference in the private, consensual, sexual activity of married persons, and, that contemporary practice has extended that state non-interference to include the private, consensual, sexual activity of unmarried adults.” *Id.* 220 F. Supp. 2d at 1276.

105. It was the right to dildos as indicative of a general right to sexual privacy. “In fact, however, the Eleventh Circuit in [*Williams III*] properly and more broadly characterized the liberty interest at issue as a fundamental right to *sexual privacy* of the specific plaintiffs in this case.” *Id.* at 1276 (emphasis in original, internal citations and quotations omitted).

106. It was. *Id.* at 1307.

107. *Lawrence*, 539 U.S. 558 struck down Texas’ sodomy law as unconstitutional under a substantive due process analysis, overruling *Bowers v. Hardwick* in the process. See *supra* notes 39-54.

108. In distinguishing *Lawrence*, the court stated:

Our de novo review begins with a discussion of the asserted right [to sexual privacy unfettered by state interference as found by the District Court]. Here, we reaffirm our conclusion in [*Williams III*] that no Supreme Court precedents, including the recent decision in *Lawrence v. Texas* are decisive on the question of the existence of such a right.

Williams V, 378 F.3d at 1234-35 (internal citations omitted).

Judge Barkett, in dissent, wrote:

The majority’s decision rests on the erroneous foundation that there is no substantive due process right to adult consensual sexual intimacy in the home and erroneously assumes that the promotion of public morality provides a rational basis to criminally burden such private intimate activity. These premises directly conflict with the Supreme Court’s holding in *Lawrence*.

Williams V, 378 F.3d at 1250 (Barkett, J., dissenting). How the Eleventh Circuit declared *Lawrence* as not defining—or at least protecting—such a right is unclear, as Justice Kennedy wrote:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Lawrence, 539 U.S. at 578.

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a right was not subject to extension by analogy since there was no *Glucksberg* analysis performed by the Supreme Court.¹⁰⁹ The court was also disdainful of the plaintiff-appellees, as the American Civil Liberties Union (ACLU) had come into the picture as counsel for Ms. Bailey.¹¹⁰ In a blistering rebuke to the ACLU,¹¹¹ the court held that the ACLU was wrong,¹¹² wrong,¹¹³ wrong.¹¹⁴ The court then remanded to the district court for further proceedings not inconsistent with the opinion that the ACLU was wrong,¹¹⁵ wrong,¹¹⁶ wrong.¹¹⁷

On this second remand, the district court, beaten and broken, held that the law could be upheld under public morality grounds under a rational basis review.¹¹⁸ The district court continued to smart from the wounds of be-

109. The Eleventh Circuit seemed to suggest that it knew how to perform a constitutional analysis better than the Supreme Court: in a bold statement, the Eleventh Circuit stated: “we are not prepared to infer a new fundamental right from an opinion that never employed the usual *Glucksberg* analysis for identifying such rights.” *Williams V*, 378 F.3d at 1237. Far be it from the Author to impugn the motives or feelings of the Eleventh Circuit, but the Court seemed determined to do its best to limit or even eliminate the right identified (if any) by the Supreme Court in *Lawrence*. However, language such as “[t]he dissent seizes on scattered *dicta* from *Lawrence* to argue that *Lawrence* recognized a substantive due process right of consenting adults to engage in private intimate sexual conduct, such that all infringements of this right must be subjected to strict scrutiny” is not helpful in undercutting the perception that the Eleventh Circuit did not view the entire *Lawrence* decision itself as “scattered *dicta*.” *Williams V*, 378 F.3d at 1236-37.

110. “Because the various user appellees and vendor appellees are all represented by the ACLU, the driving force behind this litigation, ‘the ACLU’ will be used to refer collectively to appellees.” *Williams V*, 378 F.3d at 1233, n.1. “Because the ACLU is asking us to recognize a new fundamental right, we then apply the analysis required by [*Glucksberg*]. As we explain, we conclude that the asserted right does not clear the *Glucksberg* bar.” *Williams V*, 378 F.3d at 1235 (internal citations omitted).

111. The opinion used the acronym “ACLU” forty times in seventeen pages in referring to the plaintiff-appellees’ arguments. The Court only referred to them as appellees in one sentence. *See supra* note 110 for that sole sentence.

112. “We are compelled to agree with Alabama and must decline the ACLU’s invitation [to create and protect a right to privacy].” *Williams V*, 378 F.3d at 1233.

113. “The ACLU invokes ‘privacy’ and ‘personal autonomy’ as if such phrases were constitutional talismans. In the abstract, however, there is no fundamental right to either.” *Williams V*, 378 F.3d at 1235.

114. The Court did stop barely short of telling the ACLU that they were glue and the Court was rubber.

115. “Nor, contrary to the ACLU’s assertion, have the Supreme Court’s substantive-due-process precedents recognized a free-standing ‘right to sexual privacy.’” *Williams V*, 378 F.3d at 1235.

116. “[W]e note our recognition of the district court’s uncritical acceptance of the bare assertions contained in the ACLU’s expert declarations—particularly in reaching conclusions outside, or even in apparent contradiction to, the documented historical record.” *Williams V*, 378 F.3d at 1246.

117. “The district court’s rationale for its wholesale adoption of the ACLU’s evidence appears to have been its mistaken view that the Alabama Attorney General had conceded the ACLU’s evidence on the history and tradition question.” *Williams V*, 378 F.3d at 1248.

118. The District Court started:

Thus far, the Supreme Court has characterized the following, non-textual liberty interests as “fundamental” and, as such, rights that should prevail if in conflict with governmental authority or other, less valued, liberties: (*i*) the right to marry; (*ii*) the right to procreate; (*iii*) the right to purchase and use contraceptives; (*iv*) the qualified right to an abortion; (*v*) the right to custody of one’s children; (*vi*) the right to keep a family together; (*vii*) the right of parents to direct the education and upbringing of their children; (*viii*) the right to marital privacy; (*ix*) the right to bodily integrity; (*x*) the right to refuse unwanted, lifesaving, medical treatment; (*xi*) the right to travel within the United States; (*xii*) the right to vote; (*xiii*) the qualified right to control the dissemination of private information; (*xiv*) the right of all per-

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ing reversed twice already by the Eleventh Circuit.¹¹⁹ “The [*Williams V*] panel's criticism was no less harsh. This lowly court can only hope that it has not again so woefully misconstrued the Eleventh Circuit's directives.”¹²⁰ And, reluctantly, the court did what it was told, hoping not to have the Eleventh Circuit take a switch to it for a third time.¹²¹

On third reading, the Eleventh Circuit focused on one narrow issue: is public morality a sufficient rational basis on which to pass a law even post-*Lawrence*? Like *Williams V*, it reaffirmed *Williams III* and, in doing so, did its best to distance itself from the intervening *Lawrence* decision.¹²² Also, the court read the statute as a restriction on the sale of dildos,¹²³ and it was not persuaded by arguments that regulating the sale was a *de facto* regulation of the ownership and ability to use dildos.¹²⁴ As the activity regulated was commercial,¹²⁵ it implicated neither a fundamental right, nor was it private activity,¹²⁶ and a desire to uphold public morals was a legitimate basis for legislation whether or not the Court agreed with it.¹²⁷ In an irony

sons to equal access to the courts; and *arguably* (*xv*) the right of adults to engage in private, consensual, non-commercial, sexual activity common to a homosexual lifestyle.

Williams VI, 420 F. Supp. 2d at 1229-30 (internal citations omitted, emphasis in original). The District Court clearly did not believe in the Eleventh Circuit's analysis in *Williams V*, but it applied the law as handed down from its Mount Sinai unquestioningly.

119. “The dissenting opinion described the majority's analysis as ‘demeaning and dismissive.’ This court does not enjoy a similar privilege of characterization. Nevertheless, it does seem somewhat unfair to be chastised for attempting to comply with what this court perceived to be the instructions of the first Eleventh Circuit reviewing panel.” *Williams VI*, 420 F. Supp. 2d at 1246, n.102 (internal citations omitted).

120. *Williams VI*, 420 F. Supp. 2d at 1246, n.102.

121. Ironically, if the Eleventh Circuit were literally to do such a thing, it may border on sado-masochistic abuse. See ALA. CODE § 13A-12-200.1(21)a. (1998) (“flagellation or torture” can constitute sado-masochistic abuse).

122. “[W]e do not read *Lawrence*, the overruling of *Bowers*, or the *Lawrence* court's reliance on Justice Stevens's dissent [in *Bowers*], to have rendered public morality altogether illegitimate as a rational basis [upon which to base a law].” *Williams VII*, 478 F.3d at 1323. The Author is unsure whether to laugh or to weep.

123. “Unlike *Lawrence*, the activity regulated here is *neither private nor non-commercial*.” *Williams VII*, 478 F.3d at 1322.

124. The court wrote:

The ACLU emphasizes language in [*Williams V*] where we stated that ‘for purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item.’ However, the [*Williams V*] court connected the sale of sexual devices with their use only in the limited context of framing the scope of the liberty interest at stake under the fundamental rights analysis of *Glucksberg*. We were clear in [*Williams V*] that the challenged statute did not implicate private or consensual activity.

Williams VII, 478 F.3d at 1322, n.6 (internal citations omitted).

125 “This statute targets *commerce* in sexual devices, an inherently public activity, whether it occurs on a street corner, in a shopping mall, or in a living room.” *Williams VII*, 478 F.3d at 1322 (emphasis in original).

126. “There is nothing ‘private’ or ‘consensual’ about the advertising and sale of a dildo.” *Williams V*, 378 F.2d at 1238, n. 8.

127. In finding that *Lawrence* did not ban public morality as a rational basis for legislation, the Eleventh Circuit wrote:

Accordingly, we find that public morality survives as a rational basis for legislation even after *Lawrence*, and we find that in this case the State's interest in the preservation of public morality remains a rational basis for the challenged statute. By upholding the statute, we do not endorse the judgment of the Alabama legislature.

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unappreciated by the Court itself, the final decision was published on Valentine's Day of 2007, and the Alabama statute was free to be enforced.¹²⁸ Or was it?

V. IN WHICH EVERY OPERATIVE DILDO BAN IN THE COUNTRY OUTSIDE OF ALABAMA WAS STRUCK DOWN OR QUESTIONED IN STATE OR FEDERAL COURT POST-*LAWRENCE*

Alabama was not the only state with a dildo problem.¹²⁹ At the time *Williams I* was filed, seven other states also had statutes in their codes banning—either directly or indirectly—the sale of a dildo.¹³⁰ most were challenged, some were held unconstitutional by state courts,¹³¹ and others were upheld.¹³² However, two cases are comparable to the *Williams* saga and the soon-to-be discussed *Love Stuff*¹³³ case: *Reliable Consultants, Inc. v.*

Williams VII, 478 F.3d at 1323. To translate the Court's language: After doing our best dance to sidestep a very recent Supreme Court case that seems to invalidate the law, to invent reasons to go to previous Supreme Court jurisprudence, and to state this decision as inapposite and non-binding, we do not want to be seen as if we are endorsing this law we fought so hard to keep on the books.

128. Twice in this process, certiorari was denied by the Supreme Court: it was denied after *Williams V* and after *Williams VII*. The injunction imposed against the law in *Williams I* was not lifted until the final decision of the Eleventh Circuit in *Williams VII* in 2007. See *Williams v. King*, 543 U.S. 1152 (2005) and *Williams v. King*, 552 U.S. 814 (2007) (both denying certiorari without opinion).

129. If one desires a dildo and one cannot secure a dildo, that is the epitome of 'a dildo problem.'

130. The states were: Colorado (see COLO. REV. STAT. §§ 18-7-101 & 102), Georgia (see GA. CODE ANN. § 16-12-80), Kansas (see K.S.A. § 21-4301), Mississippi (see MISS. CODE ANN. § 97-29-101-109), Texas (see TEX. PENAL CODE ANN. §§ 43.21 and 43.23), Virginia (see VA. CODE ANN. §18.2-373) (only deals with "obscene" items and is mute on the question of dildos; no Virginia Court has decided whether they are obscene material *per se*)*, and Louisiana (statute repealed in 2008 by legislature and removed from Code after State Supreme Court decision striking down the law—see *infra* note 131).

* The Author is discounting Virginia's law hereinafter for the purposes of counting as a dildo ban, both because the law itself is mute on the question of dildos and because the Author has personally observed them for sale in Virginia. While such an action is not dispositive nor binding on a court of law, the Author assumes that the State of Virginia did not and still does not worry about enforcing this statute, unlike the other states mentioned. The place in which the observation was made is not discreet in any sense of the word: while it is located outside city limits, it advertises with large billboards and is located within 500 feet of both a neighborhood and an apartment complex (i.e. if the state of Virginia cared to shut it down, it would have done so by now).

131. See e.g. *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (holding that an outright ban was unconstitutional as there were legitimate scientific and medical uses) and *State v. Hughes*, 792 P.2d 1023 (Kan. 1990) (holding that the statute's excessive overbreadth was unduly burdensome to the fundamental right to privacy under the Fourteenth Amendment). See also *State v. Brenan*, 772 So.2d 64 (La. 2000), which held the State's ban failed rational basis review under the Fourteenth Amendment.

132. See *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985); *Pierce v. State*, 239 S.E.2d 28 (Ga. 1977) (both expressing a reluctance to extend the right to privacy to cover dildos). But see *This That & The Other Gift and Tobacco, Inc. v. Cobb County, Georgia*, 439 F.3d 1275 (11th Cir. 2006) (holding that Georgia's statute banning advertisements for adult-only stores violated the owner's First Amendment rights; the case never reached the merits of Georgia's ban). Surprisingly, the *Williams VII* Court did not mention this case's holding at all, merely using it to state principles of *stare decisis* and law-of-the-case doctrine (when the law-of-the-case itself held that the statute was unconstitutional).

133. *Love Stuff*, 2010 WL 753354 (Ala. Mar. 5, 2010). This decision on application for rehearing was substituted for the original opinion which was withdrawn. The original opinion, released Sept. 11, 2009, is available at 1568 Montgomery Highway, Inc. v. City of Hoover, 2009 WL 2903458 (Ala. 2009). *Love Stuff* is discussed *infra* part VI.

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*Earle*¹³⁴ in the Fifth Circuit and *PHE, Inc. (d/b/a Adam & Eve) v. Mississippi* in the Mississippi Supreme Court.¹³⁵ The first case was a constitutional challenge to strike down the Texas law and the second case was a challenge to Mississippi's law around when *Lawrence* was decided. The Mississippi Supreme Court did not mention *Lawrence* in its opinion,¹³⁶ instead holding that *Williams III* controlled substantive due process analysis and proceeded to query whether the law was unconstitutional under the Mississippi Constitution. Given Mississippi courts' extremely deferential standard toward its legislature, that analysis was over before it even started.¹³⁷

In the Fifth Circuit, the *Reliable Consultants* case dealt with vendors and users who challenged the Texas law in Federal District Court in much the manner the dreaded ACLU challenged the Alabama law in Federal Court. As the court in *Reliable Consultants* noted, as of 2008, only Alabama, Texas, and Mississippi had dildo bans,¹³⁸ and Alabama's Supreme Court had not (at that time) addressed the constitutionality of the ban under state law.¹³⁹ Unlike the multiple *Williams* courts who defined the right narrowly, the court in *Reliable Consultants* defined the right much more broad-

134. *Reliable Consultants v. Earle*, 517 F.3d 738 (5th Cir. 2008) (holding Texas ban on sale unconstitutional in light of the *Lawrence* holding). Texas chose not to appeal to the Supreme Court to resolve the apparent circuit split in light of the Fifth Circuit's disagreement with the Eleventh Circuit. Texas instead chose to let the ruling stand without further challenge.

135. *Adam & Eve*, 877 So. 2d 1244 (Miss. 2004).

136. This case was decided nine months (March 18, 2004) after the *Lawrence* decision was announced (June 26, 2003), and thus the complete lack of mention of *Lawrence* in this case, even if only to distinguish it, is surprising. A first-year law student would not be able to pass a Constitutional Law exam any semester after the summer of 2003 without mentioning *Lawrence*. At least the Mississippi Supreme Court did not cite *Bowers*, instead relying on *Williams III*, which was dubious law at best due to the shadow that had been cast upon it by *Lawrence*. The Reader is reminded that *Williams III* had its basis in *Bowers*—see *supra* note 96—and the reader is also reminded that Mississippi is in the Fifth Circuit, not the Eleventh Circuit, so at best, *Williams III* was persuasive authority. The Author conjectures perhaps Mississippi does not have any news services: that would be one of the few plausible explanations why news of the *Lawrence* decision never reached Mississippi's court system in the nine months separating the *Lawrence* decision and the *Adam & Eve* decision. A rudimentary Westlaw search shows nearly 200 news articles written nationwide in the week after *Lawrence*. A similar Lexis-Nexis search shows nearly 250 such articles in the same time period: one of those articles appeared in the Biloxi Sun Herald. *See High Court Throws Out Sodomy Ban, South Mississippi Minister Calls Decision a Tragedy*, SUN HERALD (Biloxi, MS), June 27, 2003, at D1. A South Mississippi minister was able to offer his opinion on the decision the day after the case was decided, but the Mississippi Supreme Court was unable to cite the case nine months later.

137. The Mississippi standard of review is highly deferential to the legislature, even more deferential than basic rational-basis review:

A Mississippi court may strike down an act of the legislature *only where it appears beyond all reasonable doubt that the statute violates the clear language of the constitution*. All doubts must be resolved in favor of validity of a statute, and any challenge will fail if the statute does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity. As we have stated, the rule is well established that any exercise of police power is valid if it has for its object the protection and promotion of the public health, safety, morality or welfare, if it is reasonably related to the attainment of that object, and if it is not oppressive, arbitrary or discriminatory.

Adam & Eve, 877 So. 2d at 1247 (internal quotations and citations omitted, emphasis added).

138. The Eleventh Circuit had already struck down Georgia's ban by now in *This, That, & The Other*, see *supra* note 132.

139. Texas and Mississippi had already upheld their bans. See *supra* notes 132 and 135.

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ly.¹⁴⁰ It took a swipe at the Eleventh Circuit in the *Williams V/VII* courts' narrow definitions of the right to privacy,¹⁴¹ and the Fifth Circuit complied with both the spirit and the letter of the law in disagreeing vehemently with the *Williams V* and *Williams VII* rulings.¹⁴² While *Reliable Consultants* refused to characterize *Lawrence* as creating a fundamental right to sexual privacy, it nonetheless stated that the Texas law as written was not workable under the reasoning set forth in *Lawrence*.¹⁴³ The Court also refused to recognize interests in public morality as a rational basis for upholding a law.¹⁴⁴ Unable to leave well enough alone, Texas petitioned for a rehearing *en banc* and was denied a rehearing, over the vehement dissents of seven judges.¹⁴⁵ The holding of *Reliable Consultants* left Alabama's ban the only operative one in the country.¹⁴⁶

It is this backdrop that the Alabama Supreme Court was looking at when it decided the seminal case of *1568 Montgomery Highway, Inc. v. City of Hoover*.¹⁴⁷

140. In discussing the different interests at stake, the Fifth Circuit wrote:

To determine the constitutional standard applicable to this claim, we must address what right is at stake. Plaintiffs claim that the right at stake is the individual's substantive due process right to engage in private intimate conduct free from government intrusion. The State proposes a different right for the Plaintiffs: the right to stimulate one's genitals for non-medical purposes unrelated to procreation or outside of an interpersonal relationship.

Reliable Consultants, 517 F.3d at 743.

141. "The State narrowly describes the right as the court did in [*Williams V*.] But this would concoct a right contrary to the holding in *Lawrence* and evade the Court's ruling." *Reliable Consultants*, 517 F.3d at 743 n. 23.

142. In dismissing Texas' characterization of the law's purpose, the court wrote:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.

Reliable Consultants, 517 F.3d at 743, quoting *Lawrence*, 539 U.S. at 567.

143. "*Lawrence* did not categorize the right to sexual privacy as a fundamental right, and we do not purport to do so here. Instead, we simply follow the precise instructions from *Lawrence* and hold that the statute violates the right to sexual privacy, however it is otherwise described." *Reliable Consultants*, 517 F.3d at 745, n. 32.

144. Finally, in stating that public morality is not a rational basis for a law, the Fifth Circuit stated:

These interests in public morality cannot constitutionally sustain the statute after *Lawrence*. To uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive. . . Thus, if in *Lawrence* public morality was an insufficient justification for a law that restricted adult consensual intimacy in the home, then public morality also cannot serve as a rational basis for Texas's statute, which also regulates private sexual intimacy.

Reliable Consultants, 517 F.3d at 745 (internal quotations and citations omitted).

145. *Reliable Consultants v. Earle*, 538 F.3d 355 (5th Cir. 2008) (denial of rehearing *en banc*) (judges argued that the *Williams V* and *Williams VII* approach was the correct interpretation of *Lawrence* in three separate dissents from the denial of rehearing *en banc*).

146. As both Mississippi and Texas are in the Fifth Circuit, the *Reliable Consultants* holding enjoined both states' laws from being applied. Alabama, as a former—but not current—member of the Fifth Circuit, gets to keep its dildo ban for another day. Georgia is left smarting in the wind, wishing that it had drawn either of the Eleventh Circuit panels that decided *Williams V* or *Williams VII*, instead of the panel that decided *This That and the Other*. See *supra* note 132.

147. *Love Stuff*, 2010 WL 753354 (Ala. Mar. 5, 2010).

VI. IN WHICH ALABAMA'S SUPREME COURT LEARNED TO CONTINUE
WORRYING AND HATE THE DILDO

The city of Hoover, Alabama, has a local anti-obscenity statute that mirrors the language of the Alabama's Anti-Obsecenity Enforcement Act exactly. In March of 2005, Hoover filed a complaint against Love Stuff, a local adult-themed store, and refused to grant it a permit to put up a sign advertising its wares. The Alabama Circuit Court judge in that case refused to enter judgment until the *Williams* case made its way through the Federal Court system in order to decide the constitutionality of the law under the United States Constitution. In November of 2007, the court entered an order following a bench trial stating that the ban in § 13A-12-200.2 was constitutional.¹⁴⁸ In determining constitutionality under the U.S. Constitution, the Alabama Supreme Court rejected *Reliable Consultants* and espoused the *Williams VII* approach.¹⁴⁹ Seven Justices agreed, but two dissented, preferring the *Reliable Consultants* approach.¹⁵⁰ After discounting the substantive due process analysis, the court then delved into whether or not the law was unconstitutional under the Alabama Constitution of 1901.¹⁵¹ The Justices made short work of that as well, stating the statute was not unconstitutional under Alabama's Constitution as it was a legitimate governmental restraint on commercial activity.¹⁵² The right to sexual privacy under Alabama's Constitution was not even considered, as all knew it was an argument that would take less than a second to laugh off.¹⁵³

148. *Love Stuff*, 2010 WL 753354 at *8, reproducing the lower court's order. The lower court did hold the ban on the location of adult-themed businesses in § 13A-12-200.5(4) was unconstitutionally vague as to the definition of "other form of adult-only enterprise," but that portion of the holding is outside the scope of the Note.

149. In wholeheartedly embracing the *Williams* line of cases, the Alabama Supreme Court stated Alabama's reasoning as such:

The State asserts that the trial court properly found that § 13A-12-200.2 did not violate the United States Constitution, applying the reasoning of the decision of the Eleventh Circuit Court of Appeals in *Williams [VII]*. The State argues that the Supreme Court in *Lawrence*, did not create a new fundamental right to sexual privacy and that § 13A-12-200.2 has the rational bases of public morality and furthering the public welfare. The State argues that this Court should find *Williams [VII]* persuasive and reject the Fifth Circuit Court of Appeals' opinion in *Reliable Consultants [I]*.

Love Stuff, 2010 WL 753354 at *10 (internal citations omitted). The court then proceeded to embrace that reasoning.

150. *Love Stuff*, 2010 WL 753354 at *27, (Woodall, J., dissenting).

151. The Alabama Constitution is, at 357,157 words, the longest operative* constitution in the world. The document is 12 times longer than the average state constitution and 40 times longer than the U.S. Constitution. Deciphering anything under the Alabama Constitution is either a Sisyphean or an Herculean task. Or both.

* Author's Note: In this context, the Author uses the word "operative" loosely.

152. *Love Stuff*, 2010 WL 753554 at *27 (Ala. Mar. 5, 2010).

153. The Author does not purport to be familiar with what the Justices of the Alabama Supreme Court know or do not know. The Author merely implies that the Justices have at least a modicum of common sense and a great understanding of the climate of public opinion permeating Alabama. Thus, it would be far more insulting for the Author to imply that the Alabama Supreme Court Justices did *not* know such an argument would be laughed off than it would be to thrust an implication of some kind of knowledge on the part of the Justices.

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While the court in *Love Stuff* worked with what it had, it may not have had the right tools for the job. It had Eleventh Circuit precedent allowing it to ignore *Lawrence*, and it had no reason to look to the persuasive authority provided by *Reliable Consultants*. In *Williams V* and *Williams VII*, the Eleventh Circuit narrowed and distinguished *Lawrence* to the point where it may as well not have been decided at all as far as the Eleventh Circuit states of Alabama, Georgia, and Florida are concerned. While that may be the result that many of the judges would have preferred, they are an inferior court to the Supreme Court, just as the Northern District of Alabama is an inferior court to the Eleventh Circuit. The court misconstrued the directives and holding of *Lawrence*, instead preferring to substitute its own morality and squeamishness for constitutional analysis and substantive due process jurisprudence.

VII. IN WHICH THE DILDO IS SO MUCH MORE THAN JUST A DILDO

The biggest problem in substituting morality for constitutional jurisprudence is not just the incorrect result in this one case—though that is a problem—the problem is the precedents the court sets in ignoring the rules of constitutional analysis. When the Eleventh Circuit went rogue, it set two precedents: first, it allowed *any* court to ignore a higher court if it did not like the ruling by narrowing the higher court's decision to the specific facts of the case above; and second, it provided for courts in the future to use their own feelings in place of the law. In the *Love Stuff* case, especially, this allowed the Alabama Supreme Court to ignore *Lawrence* and its implications. While the Fifth Circuit in *Reliable Consultants* attempted to point out the flaws in the Eleventh Circuit's approach in the *Williams* cases, the Eleventh Circuit has no reason to follow the Fifth Circuit's reasoning or to find the Fifth Circuit persuasive. The Eleventh Circuit took *Lawrence* for only its facts and failed to heed the larger conclusions of law espoused by the Supreme Court.¹⁵⁴

Our prior cases make two propositions abundantly clear. First, *the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice*; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, *individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this pro-*

154. Arguably, the Supreme Court meant to broadly interpret the protections afforded constitutional rights (of which privacy has been held to be one) and to subject state infringements of those rights to a strict scrutiny standard.

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*tection extends to intimate choices by unmarried as well as married persons.*¹⁵⁵

That language is unequivocal in its protection of a general right to sexual privacy absent a strong and compelling state reason to intrude on that right.¹⁵⁶ While *Lawrence* may not create a general fundamental right to sexual privacy, it does state a rather high bar for state interference with such a right, however it is defined. Or at least it should have, until the Eleventh Circuit gutted the decision. *Lawrence* held that the state had to have a compelling reason—of which public notions of morality was *not* one—to interfere with the ability of two adults to enjoy consensual sexual activities in private.¹⁵⁷ The Eleventh Circuit held that *Lawrence* did not hold anything at all beyond the right of homosexuals to participate in homosexual activities: instead of reading *Lawrence* in conjunction with *Glucksberg*, the court dismissed *Lawrence* and went straight to a *Glucksberg* analysis, justifying it as something the Supreme Court should have done.¹⁵⁸

The privacy aspect of this case did not receive much judicial analysis or scrutiny, probably because the puritanical majorities in both *Williams VII* and *Love Stuff* preferred to marginalize the argument that would void their logic. The language in *Griswold* securing the right to privacy was not made from whole cloth. While it was certainly judge-made common-law, it was not made by Justice Douglas or Justice Goldberg: it was made two centuries prior by Lord Camden in England's second highest common-law court, and adopted by Justice Bradley writing for a unanimous Supreme Court a little over a century later in *Boyd*.¹⁵⁹ A man's home is his castle,¹⁶⁰ and even the state cannot trespass absent sufficient reason. *Boyd* held this Old World precedent made before the Revolutionary War was integral to New World jurisprudence on ideas of privacy and personal property, though not specifying whether the right to privacy came from the Fourth or the Fifth Amendment.¹⁶¹ The privacy of one's home, while not inviolable, is a veil which the

155. *Lawrence*, 539 U.S. at 577-78 (Kennedy, J., writing for the court) quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting) (emphasis added).

156. Perhaps Justice Stevens in 1986 or Justice Kennedy in 2003 should have added another more-over sentence. Here is a suggestion by the Author for such a sentence: "Moreover, the protection need not be asserted by only two people: one, three, five, or even twelve people, if acting in private, can make any consensual sexual choices they desire."

157. 539 U.S. at 558

158. See *supra* notes 66 and 109. Interestingly, the crux of the Eleventh Circuit decision seemed to be its suggestion that the Supreme Court did not use the correct *Glucksberg* process in deciding *Lawrence*, which thus required the Eleventh Circuit to perform the analysis correctly on behalf of the Supreme Court.

159. *Boyd*, 116 U.S. at 630.

160. See *infra* note 179.

161. Because it did not matter from where the right to privacy came: it was there. That was the point of Justice Bradley's quotation reproduced *supra* notes 27 and 28: whether the right came from the Fourth or Fifth Amendment was immaterial. The right existed, and that was good enough for the Court. That right, no matter where it has come from, has been found both to exist and to be protected from infringement by the states via Fourteenth Amendment incorporation. See generally *Griswold*, 381 U.S. 479.

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State cannot pierce absent a showing of good cause. A dead body in the closet is good cause to violate privacy; a dildo is not.

The Alabama Supreme Court followed exactly the Eleventh Circuit's plan of ignoring the Supreme Court precedent it did not like as inapposite, and it decided against a discussion of privacy rights. *Williams V* was decided four months after the *Adam & Eve* case,¹⁶² but if it were decided prior to that case, surely the Mississippi Supreme Court would have cited *Lawrence* as inapposite or distinguishable instead of ignoring its existence.¹⁶³ In total, only two of the eighteen state Supreme Court Justices to have heard a post-*Lawrence* challenge to a dildo ban have ascribed to the belief that *Lawrence* affords some sort of protection to private sexual conduct between consenting adults.¹⁶⁴ The remaining sixteen prefer to believe that public morals trump personal privacy, personal beliefs trump the law, and the judges of the Eleventh Circuit trump the Justices of the Supreme Court.¹⁶⁵

In addition, two Supreme Court dissents¹⁶⁶ over the years have expressed their willingness to uphold "uncommonly silly" laws that violate "privacy" since "privacy" is not an enumerated right in the Constitution.¹⁶⁷ But nowhere has the point been made that the state should not pass "uncommonly silly" laws interfering with (the right to) privacy in the home, nor should those laws be constitutional. Returning once more to Lord Camden's quarter-millennium old sagacity, we must remember "every invasion of private property, be it ever so minute, is a trespass."¹⁶⁸ The State should not

162. And one year after *Lawrence*.

163. While The Author mentioned this *supra* note 136, the Author would be remiss not to mention it again: nine months after *Lawrence* was decided in the United States Supreme Court, a State Supreme Court deciding on an issue of law dealing with intimate sexual privacy failed to mention, distinguish, or state as inapposite the ruling in *Lawrence* when dealing with analysis of a sexual privacy question under the U.S. Constitution. Instead, the Court relied on out-of-circuit precedent (*Williams III*) which was questionable, to say the least, after the Supreme Court's decision in *Lawrence* explicitly overruled *Bowers*. *Bowers* was the foundation of the *Williams II* and *Williams III* rulings. See *supra* note 96, in addition to *supra* notes 39-54. In plain English: Mississippi's Supreme Court failed to perform a basic substantive due process analysis that first-year law students must perform to pass Constitutional Law. In addition, Mississippi is in the Fifth Circuit: Eleventh Circuit decisions are at best persuasive, not mandatory, authority.

164. Left unsaid in most cases is that, in the case of dildos, there need not even be consenting adults (plural). It is as if the Supreme Court struck down a law banning high fives, and in response, the Eleventh Circuit and two State Supreme Courts said that it was still constitutional to ban clapping, as the Supreme Court decision said nothing about high fiving oneself.

165. Both states elect their judges. Elected judges are, of course, completely impartial and always rule only according to the law and not due to money interests or concerns over garnering votes. Cf. *Caperton v. AT Massey Coal Co.*, 129 S. Ct. 2252, 2267-2275 (2009) (Roberts, C.J., dissenting vigorously) (judges have more integrity than that and do not take silly little things like voter perceptions and millions of dollars in campaign donations and independent expenditures into concern when deciding cases). But see *Caperton*, 129 S. Ct. at 2256-67 (Kennedy, J., majority op.) (no, judges might not have as much integrity and yes, judges may take those campaign donations and independent expenditures into account in violation of the due process right to a fair adjudication of a hearing).

166. Justice Stewart's dissent in *Griswold* (joined by Justice Black), and Justice Thomas' dissent in *Lawrence*.

167. Those Justices either chose to ignore or did not feel the Ninth Amendment includes a right to privacy. The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

168. *Entick v. Carrington*, [1765] EWHC KB J98, 95 Eng. Rep. 807.

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be allowed to infringe privacy for “silly” reasons, whether or not such a right is enumerated in the constitution. Furthermore, even the lack of a right to privacy does not impose on the State a positive obligation to create “silly” laws in order to make the point that there is no right to privacy. The State has no obligation to make the point that it can invade in the private bedroom just for kicks and giggles. Whether or not there is a right to privacy is nearly immaterial to whether or not the State has a need to create and to enforce “uncommonly silly” laws. In this case, the ban is not only “uncommonly silly,” but the ban on the sale also amounts to a substantial burden on ownership and access to a dildo.¹⁶⁹ Furthermore, the reason behind the restriction, if there even is any reason, is “silly.”

The question is not about dildos *qua* dildos: to paraphrase Justice Blackmun, this case is no more about dildos than *Lawrence* was about homosexual anal or oral sex or *Carey* was about securing the rights of children to participate in protected sexual dalliances: rather, the cases were about the most important right, namely, *the right to be left alone*.¹⁷⁰ The dildos are so much more than 15 inch long rubber implements: serious rights and liberties are implicated by the bans. Love Stuff's owner Ross Winner states the clearest and most succinct argument in favor of sexual privacy: “We feel a person should have the ability to come in and purchase a sexual device *without having to have a reason*.”¹⁷¹ Currently, the only exceptions in Alabama for the purchasing of dildos are for *bona fide* medical reasons, educational purposes or, law enforcement purposes. What right does the state have to interfere in a person's private sexual decisions? For what reason does the state need to document the names and addresses for those who use a dildo to mitigate or cure their sexual dysfunctions? For that matter, what reason does the state need to document the names of all those who use a dildo, regardless of their reason of use?

The right to be free from state interference in one's own sexual decisions is no laughing matter: Patrick Henry may as well have said “give me a dildo or give me death.”¹⁷² Justice Rehnquist may have been correct in sur-

169. The Fifth Circuit stated that the burden on access amounts to an unconstitutional ban: Supreme Court precedent [holds] that (1) bans on commercial transactions involving a product can unconstitutionally burden individual substantive due process rights and (2) lawsuits making this claim may be brought by providers of the product. . . . [T]he statute must be scrutinized for impermissible burdens on the constitutional rights of those who wish to use sexual devices.

Reliable Consultants, 517 F.3d at 743.

170. See *supra* note 52.

171. Kimberly Rankin, *Love Stuff*, Sept. 13, 2009, <http://www.cbs42.com/content/localnews/story/Love-Stuff/rDqpEpIHT0iO3X6ibdiLXA.csp> (last visited Oct. 6, 2010) (emphasis added).

172. Paraphrased from Patrick Henry's speech at St. John's Church in Richmond, Virginia on March 23, 1775 addressing The Virginia House of Burgesses. While no contemporaneous transcript of the famous speech survives, anecdotal accounts agree that Mr. Henry made the famous quotation in order to convince the House of Burgesses to stand up to the excessive interference of King George III and the British Parliament in the matters of the Thirteen Colonies. Text of the speech can be found at numerous web sites, including one from Oklahoma University's School of Law: <http://www.law.ou.edu/ushistory/henry.shtml> (last visited Oct. 7, 2010).

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mising that Patrick Henry and James Madison did not fight a revolution for the right to sell a dildo or for the right to engage in sodomy.¹⁷³ However, liberty is not defined by what society thinks is immoral or by what the Framers and the Founders believed in or practiced:¹⁷⁴ liberty is defined by a society which features a lack of excessive state interference in personal matters.¹⁷⁵ The intrusive control of the state in the privacy of one's own home oversteps government power in much the same manner as the arbitrary and intrusive control of King George from across the Atlantic Ocean.

The right of a consenting adult to achieve orgasm however she desires implicates liberty interests. However, some Southern courts have dismissed these liberty interests as unimportant compared to the interests of appearing moral for the public.¹⁷⁶ The cynical among us would say that it is not as much about morality as it is about winning the next election, or even worse, just to solicit campaign donations;¹⁷⁷ but judges most certainly would not ever subject their notions of justice or jurisprudential decisions to the whims of an electorate that is—mostly—untrained in the law, the notion of a qualified right to privacy, and constitutional analysis.¹⁷⁸ Whatever the reasons these judges and these courts have for making the decisions they have made, and whether or not one believes in a general (or even a qualified) right to privacy, all can agree that these judicial decisions are extremely intrusive into what are some of the most intimate personal activities.

The state's right to regulate sexual behavior stops at the doorstep and does not break the close,¹⁷⁹ no matter what the consensual sexual activity being performed. At least it does everywhere except in Alabama.¹⁸⁰

173. See *supra* note 38. He was Justice Rehnquist at the time, not yet having been elevated to Chief Justice.

174. For example: John Adams attempted to subvert the rule of law with his appointment of the so-called Midnight Judges (*see generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); George Washington was a slave owner; Thomas Jefferson fathered octroons out of wedlock with his slave Sally Hemings; and Benjamin Franklin had a hunger and a weakness for prostitutes. Other Founding Fathers have similar indiscretions recorded in history. Even other Founding Fathers may have had indiscretions censored or lost from the historical record.

175. The Colonists revolted due to the heavy hand of the state imposing burdens upon their private property rights. See, e.g., The Duties in American Colonies Act ("The Stamp Act"), 1765, 5 Geo. 3, c. 12; The Tea Act, 1773, 13 Geo. 3, c. 44; The Administration of Justice Act, 1774, 14 Geo. 3, c. 39; and The Quartering Act of 1774, 1774, 14 Geo. 3, c. 54. The liberty they wanted may not have expressly been the right to make private sexual decisions, but none of the men who helped draft and create the Constitution or the Bill of Rights—*see e.g.*, U.S. Const. Amends. III and IV—would be for the state to intrude onto private property to seize or to prevent the sale of dildos for private use.

176. This is not meant to suggest that public sexual morals are not important somewhere. They just are not important in the bedroom (because that is private, not public), behind the couch (because that is private, not public), or anywhere else in the home private enough for intimate sexual activity that others reasonably will not accidentally come across (because that is private, not public). The state has no business enforcing public sexual morals in a private setting (because that is private, not public).

177. See *supra* note 165 for the pertinent citation of Justice Kennedy's majority opinion in *Caperton*.

178. See *supra* note 165 for the pertinent citation of Chief Justice Roberts' dissent in *Caperton*.

179. Ironically, Alabama is a "stand-your-ground" state (*see* ALA. CODE § 13A-3-23 (2006)), which implicitly means that it has also adopted the Castle Doctrine, where a person's house is her castle and she has no duty to retreat. See *Semayne's Case*, (1604) 77 Eng. Rep. 194, 195-96 (K.B.) (setting forth the maxim "*domus sua cuique est tutissimum refugium*," which roughly translates to "get out of my house, lest you get shot"). But she cannot buy a dildo to use while being "Queen of the Castle," nor,

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The Eleventh Circuit and Alabama Supreme Court framed the liberty interest in question too narrowly; instead they should have asked: *What would you rather have in your bedroom: a dildo by your own choice or the State by intrusive force?*

*Karthik Subramanian**

apparently, can he buy a Fleshlight™ to use while he is “Lord of the Manor.” *See Seinfeld: The Contest* (NBC television broadcast originally November 18, 1992) (if the Reader needs a parenthetical to explain this reference, the Reader somehow missed the complete decade of the 1990s and should find *Seinfeld* either on television syndication or on DVD). When it comes to defending one’s home and one’s honor, one can be “Master of his Domain,” but when it comes to privately pleasuring oneself in that home, the State is apparently the Master of that Domain.

180. Arguably, Georgia, Mississippi, and Texas still have the laws on their books, but they have all been struck down to varying degrees by Federal Courts of Appeals, despite any contrary wishes of the state in question. *See Varkonyi v. State*, 276 S.W.3d 27, 38 (Tex. App. 2008) (“We decline to follow *Reliable Consultants* because we do not read *Lawrence* as overruling this line of [Texas] authority [upholding the constitutionality of banning dildos.]”); *see also Villareal v. State*, 267 S.W.3d 204, 207 (Tex. App. 2008) (“[A judge] succinctly expressed his displeasure with the statute in a concurring opinion, stating: ‘Here we go raising the price of dildos again. Since this appears to be the law in Texas I must concur.’ We share Chief Justice Brown’s sentiments; moreover, we agree with the legal reasoning set out by the *Reliable* majority. And though we embrace the Fifth Circuit’s decision, we are unfortunately constrained from following it [due to Texas law].” quoting *Regalado v. State*, 872, S.W.2d 7, 11 (Tex. App. 1994) (Curtiss Brown, J., concurring)). Alabama is the cheese standing alone with a pristine and unencumbered anti-obscenity law banning the sale of dildos, which has survived both State and Federal challenges post-*Lawrence*.

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