

Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law

LINO A. GRAGLIA*

Lawrence v. Texas is less interesting for its holding, invalidating all anti-sodomy laws, than for its bold and candid acceptance of philosophic libertarianism as the basis of constitutional law, authorizing the Court to invalidate any deprivation of liberty (i.e., any law) of which it disapproves. The result is to convert the constitutional system of representative self-government in a federalist system with separation of powers into a totally centralized undemocratic system of rule by judges.

It is not true that, as Professor Randy Barnett argues, the libertarianism “no harm” principle provides judges with an objective legal standard. Nor are judges peculiarly competent to determine that standard and peculiarly trustworthy to apply it in their policymaking decisions. Policy decisions require policy judgments as to which judges have no peculiar expertise and, as electorally unaccountable lawyers, are the least trustworthy government officials.

Judge Learned Hand famously compared the Supreme Court’s “substantive due process” constitutional lawmaking to Plato’s government by philosopher-kings.¹ Though it was meant and seen as a devastating criticism in the 1950’s, the power, prestige, and self-confidence of the Court have so greatly expanded in the past half century that the Court now sees it as an accolade and accurate description of its proper role. The Court made this particularly clear in its lead opinion in *Planned Parenthood v. Casey*, signed by Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter.² The opinion began with the statement, worthy less of Plato than of postmodernism, “[l]iberty finds no refuge in a jurisprudence of doubt.”³ “At the heart of liberty,” it later explained, “is the right to defend one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” in short, of “the attributes of personhood.”⁴ Though this statement was seen as an embarrassment and object of derision by some, it was proudly, if not defiantly, repeated, this time by a majority, in *Lawrence v. Texas*⁵ as the basis for declaring unconstitutional not only Texas’s anti-homosexual sodomy law, but all anti-sodomy laws, invalidating the laws of

* A. Dalton Cross Professor of Law, University of Texas School of Law.

¹ LEARNED HAND, THE BILL OF RIGHTS (1958).

² 505 U.S. 833, 833 (1992).

³ *Id.* at 844.

⁴ *Id.* at 851.

⁵ 539 U.S. 558, 574 (2003).

thirteen states. The Court's jurisprudence is clearly not one "of doubt"; though "liberty" may find refuge there, democracy and federalism certainly do not.

It has long ceased to be a matter of surprise that a ruling of unconstitutionality by the Court cannot in any sense be said to be a product of law—of judicial application of a pre-existing authoritative legal rule precluding the policy choice involved—as that can be said of virtually all such rulings. *Lawrence* is particularly noteworthy and potentially important because the opinion of the Court, by Justice Kennedy, was exceptionally candid in basing the decision on the adoption of a particular, well-defined political philosophy: libertarianism.

Justice Holmes famously wrote that the Constitution did not enact Herbert Spenser's *Social Statics*,⁶ and John Hart Ely added that neither did it enact John Rawls's *A Theory of Justice*.⁷ In *Lawrence*, however, the Court in effect held, in agreement with and at the urging of the libertarian Cato Institute, that the Constitution does enact John Stuart Mill's *On Liberty*. The result, if consistently followed, would be to presume unconstitutional all laws limiting "liberty," i.e., substantially all laws, and put on the states or national government the burden of justifying them. As a corollary of this philosophic position and illustrating its potential, the Court explicitly rejected traditional standards of morality as a means of meeting the government's burden of justification.⁸

The threshold question presented by any Court ruling of unconstitutionality is not, of course, whether the Court's policy choice is superior to the choice that was made in the ordinary political process. It is not, in *Lawrence*, whether libertarianism requiring the invalidation of anti-sodomy laws is, all things considered, the best available political philosophy, even though political theorists from James Fitzjames Stephen,⁹ to present-day communitarians such as Amitai Etzioni¹⁰ have argued persuasively that it is not. The threshold question is what, if anything, authorizes the Court to substitute its policy preference for that of the people's elected representatives. The question, more broadly stated, is whether government by the Supreme Court—decisionmaking by the Justices on any issue of social policy they choose to remove from the ordinary political process and assign for final decision to themselves—is an improvement on the system of government created by the Constitution.

The three basic principles of the Constitution are democracy or republicanism—self-government through elected representatives; federalism—decentralized government with most issues of domestic social policy made on the

⁶ *Lochner v. New York*, 198 U.S. 45, 75 (1905).

⁷ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 58 (1980).

⁸ *Lawrence*, 539 U.S. at 577.

⁹ See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (R.J. White ed., 1967).

¹⁰ See AMITAI ETZIONI, *THE MONOCHROME SOCIETY*, Ch. 5 (2001).

state rather than the national level; and separation of powers—with the legislature making and the judiciary applying the laws. Policymaking by the Supreme Court, by majority vote of a committee of nine lawyers unelected and holding office for life, making decisions for the nation as a whole from Washington, D.C., is the antithesis of the constitutional system, itself unconstitutional in the deepest sense.

Government by the Supreme Court should be rejected not merely because it violates the basic principles of the Constitution, but for the even better reason that those principles are deserving of respect. Democracy, federalism, and separation of powers are probably the best, if not the only, effective means citizens have of protecting themselves against government tyranny, rule of the many by the few. They are the principles that are almost surely largely responsible for the freedom and prosperity that has made for our exceptional success as a nation. It seems extremely unlikely, on the basis of both theory and experience, that replacing them with centralized policymaking by electorally unaccountable officials pretending to be performing the judicial function will in the long run prove to be a better form of government. Indeed, the *Dred Scott*¹¹ decision alone, invalidating on no real constitutional basis Congress's attempt to settle the slavery issue, leaving it for settlement by the Civil War, should be taken as conclusive proof that it is not. Whatever may be the best form of government, government by the Supreme Court, it is possible to believe, surely has to be one of the worst.

Why then do constitutional law scholars overwhelmingly favor decisionmaking on basic issues of social policy—such as the legal status of homosexuality—by the Supreme Court? The answer in a word is, of course, that it has for some time operated and, as *Lawrence* illustrates, is likely to continue to operate overwhelmingly to give them the policies they prefer and cannot get in any other way. The salient fact of American political life for the past half-century has been a deep cultural divide—in effect, a “culture war”—between the great majority of the American people and a cultural elite, made up of the “knowledge” or “verbal” class. This class is consisted primarily of academics, especially in elite institutions, and their progeny in the media, mainline churches, and elsewhere, whose only tools and products are words.¹² Supreme Court Justices are almost always themselves products of elite academia and members of the cultural elite, seeking its approval and sharing its deep distrust of the mass of their fellow citizens. For the cultural elite, therefore, decisionmaking by the Supreme Court, tyrannical or not, is indeed an improvement on the constitutional system of decentralized representative self-government.

The nightmare of the cultural elite is that control of public policymaking should fall into the hands of the American people. A majority of Americans favor capital punishment, prayer in the schools, restrictions on abortion, suppression of

¹¹ *Dred Scott v. Sandford*, 60 U.S. 393, 449–54 (1856) (Chief Justice Taney found a novel violation of “due process” in a law declaring free a slave brought into a non-slave state).

¹² See GERTRUDE HIMMELFARB, *ONE NATION, TWO CULTURES* (1999).

pornography, and strict and effective enforcement of the criminal law, and oppose busing for school “racial balance,” all anathema of the cultural elite. It would hardly seem possible to live, the typical liberal academic believes, in a society with such policies. Because it is only their ideological compatriots on the Supreme Court that saves professors of constitutional law from that fate, they consider it their primary function to find means of defending and justifying the Court’s policymaking powers. A cottage industry has sprung up in the production of ever more esoteric theories of constitutional interpretation.

Constitutional law is for most practical purposes the product of judicial review, the power of courts and ultimately the Supreme Court to disallow policy choices made by other officials of government on the ground that they are prohibited by the Constitution. The most significant fact about the power, initially, is that it is not explicitly provided for in the Constitution, as one would expect of a practice both without precedence in British law and obviously dangerous to democratic government. It was apparently contemplated but not thought through and definitely settled on by the Framers (authors and ratifiers of the Constitution), or they presumably would have, as with the analogous veto power of the president,¹³ spelled out conditions of its exercise and made some provision for Congress to have the last word. To the extent they did contemplate it, they apparently did so on the basis of a belief in some form of “natural law” that they did not realize amounts in practice to simply a transfer of decisionmaking power to judges.

Alexander Hamilton, perhaps the least democratic of the Founders, defended judicial review on the ground that judges would invalidate only laws in “irreconcilable variance”¹⁴ with the Constitution and that the “natural feebleness of the judiciary”¹⁵ and ready availability of impeachment presented a “complete security”¹⁶ against possible abuse. He insisted, in addition, that to “avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”¹⁷ Whatever else might be concluded from this history, there can be no doubt that the Founders did not intend the Supreme Court to be a policymaking institution, much less the primary decisionmaker for the nation as a whole on matters of domestic social policy that it has become. Essential to Hamilton’s defense of judicial review was his insistence that it would not have this result.

Even the strictly limited judicially enforced constitutionalism defended by Hamilton is inherently undemocratic and therefore in need of justification in a

¹³ U.S. CONST. art. I, § 7.

¹⁴ THE FEDERALIST NO. 78, at 229 (Alexander Hamilton) (Roy Fairfield ed., 1961).

¹⁵ *Id.* at 228.

¹⁶ *Id.* NO. 81, at 245.

¹⁷ *Id.* NO. 78, at 232–33.

supposedly democratic system of government. Its effect is to preclude policy choices favored by a majority of today's people because of contrary choices made of other people in the past, raising the issue of government of the living by the dead. It follows that additional constitutional restrictions on policy choices should be disfavored, and existing restrictions should not be expanded beyond their core meanings.

Hamilton attempted to justify judicially enforced constitutionalism as a safeguard against the occasional, temporary "ill humors" to which he supposed the populace is subject. Experience since his time seems to indicate that "ill humors"—intellectual fads, willful misperceptions of reality—are more likely among the cultural elite than ordinary people. Some ideas are so preposterous, George Orwell once pointed out, that only the highly educated can believe them.¹⁸ It would be difficult to find a Supreme Court ruling of unconstitutionality—for example, prohibiting state-sponsored prayer in public schools¹⁹ or requiring busing for school racial balance²⁰—that most Americans came to be grateful for as a protection against a passing "ill humor."

The problem posed by a decision like *Lawrence* is not, in any event, constitutionalism. The Constitution, a very short and apparently straightforward document, wisely precludes very few policy choices and even fewer that American legislators—at least as committed as judges to American values—would be tempted to make. The problem is constitutional judicial activism, rulings of unconstitutionality not clearly required by the Constitution—"clearly" because in a system of representative self-government, the judgment of elected legislators should prevail over that of unelected judges in cases of doubt. The problem is not rule by the dead, but rule by judges all too much alive. Judicial activism is simply judges substituting their policy preference on an issue for the preference that prevailed in the ordinary political process. The more constitutional restrictions are expanded the more difficult it becomes to find that an alleged violation is clear, and the more, therefore, constitutionalism shades into activism. The ultimate expansion and lack of clarity results when, as in *Lawrence*, the Constitution is "read" as authorizing the Court, by means of the doctrine of substantive due process, to invalidate any law—any restriction of "liberty"—of which it disapproves. The result is obviously rule by judges, pure and simple.

Defenders of expansive judicial review face the dilemma that it is extremely difficult to defend the Court's rulings of unconstitutionality as mandated by the Constitution in any meaningful or limiting sense. It is even more difficult—in fact, politically impossible—for the defenders to simply come clean and openly state their preference for judicial over democratic policymaking. Plato favored rule by philosopher-kings, but who could defend rule by lawyer-kings? The task

¹⁸ THE OXFORD DICTIONARY OF HUMOROUS QUOTATIONS 158 (Ned Sherrin ed., 1995).

¹⁹ *Engel v. Vitale*, 370 U.S. 421, 421 (1962).

²⁰ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 1 (1971).

of defenders of judicial policymaking, therefore, is to show that while the Court's rulings of unconstitutionality may not be clear mandates of the Constitution, neither are they simply the result of the Justices' personal policy preferences.

But if not the Constitution or personal preference, what could be the source of the justices' rulings of unconstitutionality? The only options are metaphysical, and it is to metaphysics—obscurantism—that the defenders of judicial policymaking necessarily turn. Constitutional scholars, otherwise the most secular, become for this purpose adherents of a faith in some form of “natural law”: pre-existing, objectively determinable principles of right and wrong that are not dependent on human devising. The Constitution, we must then understand, incorporates this law and authorizes judges to enforce it. If this were so, the Constitution would, of course, drop out of the picture, leaving only the question of the dictates of the natural law, except that invalidated laws would still be called “unconstitutional.” The result is to make criticism of defenses of judicial activism difficult or pointless: one either subscribes to their faith that judges decide constitutional cases by the impersonal application of indisputable principles (that happen almost always, as in *Lawrence*, to move the policy choice to the left), or one doesn't, in which case the argument is seen, as Jeremy Bentham saw it, as “nonsense upon stilts.”²¹

Boston University law professor Randy Barnett, co-author of an *amicus* brief filed by the Cato Institute and cited by the Court in *Lawrence*²² urging invalidation of the Texas statute, is a true believer in a form of natural law (or, as he usually prefers, “natural rights”) and a major evangelist. In his version, natural law mandates libertarianism, the basic principle of which as stated by Mill in *On Liberty*, is that the sole justification for coercive legal action “is to prevent harm to others.”²³ Like all defenders of judicial policymaking, Barnett has a very high opinion of judges (“independent tribunals of justice”)²⁴ and judge-made law and a very low opinion of legislators and legislation, (representative self-government). The Constitution—primarily the Privileges and Immunities Clause of the Fourteenth Amendment and the Ninth Amendment—he argues, should be read as creating a “Presumption of Liberty” making all laws that restrict “liberty” presumptively unconstitutional unless justified to the satisfaction of judges (and ultimately the Supreme Court) as a “necessary and proper” application of the libertarian principle.²⁵ All law is bad unless and until approved by judges.

²¹ “*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.” 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 501 (J. Bowring ed., 1962).

²² *Lawrence*, 539 U.S. at 567–68.

²³ JOHN STUART MILL, ON LIBERTY 15 (Oxford Univ. Press 1966).

²⁴ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 264 (2004).

²⁵ *Id.* at 259–60.

It is not true, Barnett says, that the result would be, as “judicial conservatives argue,” to give “judges an unbridled power to strike down laws of which they disapprove.”²⁶ Judges will invalidate only laws that improperly limit “liberty” as distinguished from “license.”²⁷ This is an objectively determinable distinction that judges can be trusted impartially to make, he believes, without telling us what will require them to do so. The distinction is objectively determinable, because “liberty” can be defined on the basis of “background natural rights.”²⁸

The advantage of a natural law theory, John Hart Ely cleverly pointed out, is that “you can invoke natural law to support anything you want. The disadvantage is that everybody understands that.”²⁹ Natural law theorists continue to argue nonetheless as if they don’t understand that, or at least on the assumption that others do not. Natural law or natural rights theories are essentially attempts to give rhetorical force to an argument by stating an “ought” as an “is,” by asserting an interest as a “right.” The nature of the world and of human beings makes it true that there are better and worse means of attempting to achieve a given objective: if a high level of agricultural production is the objective, for example, it is probably better to create by law—the only way they can be created—individual ownership rights. Nothing is added by asserting that one therefore has a “natural right” to own private property. The rhetorical force of the assertion derives from the implication from the word “right” that the interest is legally protected, when what is actually being asserted is that it should be.

Barnett attempts to give content to his “natural rights” definition of “liberty” and distinguish it from “license” by adding, not too helpfully, that it “is and always has been the *properly defined* exercise of freedom.”³⁰ By “properly defined” he means “rightful,” and by “rightful” he means in accordance with judge-made common law, which is to be considered incorporated into the Constitution as soon as judges make it: “[t]he freedom to act within the boundaries provided by one’s common law or ‘civil’ rights may be viewed as a central background presumption of Constitution”³¹ The result is that what is not in accord with the common law is unconstitutional. This does not mean, as one might conclude, “that all legislative alterations of common law rights are constitutionally prohibited.”³² But it does mean that they are strongly disfavored,

²⁶ Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, in CATO SUP. CT. REV. 37 (James L. Swanson ed., 2002–03).

²⁷ *Id.*

²⁸ BARNETT, *supra* note 24, at 262.

²⁹ ELY, *supra* note 7, at 50. “If there is such a thing as natural law, and if it can be discovered, it would be folly . . . to ignore it as a source of constitutional values” The idea is a discredited one in our society, however, and for good reason.” *Id.*

³⁰ Barnett, *supra* note 26, at 37.

³¹ BARNETT, *supra* note 24, at 263.

³² *Id.*

because they “complicate the story a bit,”³³ and that the legislative function is extremely limited: “legislation can be occasionally used to correct doctrinal errors perpetuated by a strong doctrine of precedent, to establish needed conventions, and to achieve uniformity among diverse legal systems.”³⁴ But even then, of course, it “must be scrutinized by independent tribunals of justice to see whether, in the guise of performing these permitted functions, the legislature is seeking instead to invade individual rights.”³⁵

Barnett denies that this amounts, as “judicial conservatives argue,” to simply recommending a system of government by judges. The denial rests on two beliefs, shared by all defenders of judicial policymaking. The first is a belief in some form of unenacted (“natural”) law—in Barnett’s case, Mill’s libertarian principle—that provides objectively “correct” solutions to controversial problems of social choice. The second is the belief that judges are exceptionally qualified to discover this law and uniquely to be trusted to apply it impartially to decide the issues. Both beliefs, unfortunately, are at least to a secularist or realist, clearly mistaken.

Law, disappointing as the fact may be to some, comes only from people; there’s nobody here but us. The libertarian all-resolving principle that only prevention of harm to others justifies legal coercion, far from providing an objective legal standard, proves in practice to be hopelessly abstract and simplistic. It notoriously entirely depends on what one decides to consider “harm.” It does not seem reasonable to most people to decide such questions as legalization of prostitution or of drug distribution on the basis of the principle without considering the actual effects of legalization on a particular community at a particular time.³⁶

The reality is that a problem of social choice is a problem, not because we have not discovered the pre-existing authoritative resolving principle, but because we have many principles which, like the interests they protect, inevitably come into conflict and therefore cannot, as an economist would say, both simultaneously be maximized. The conflict cannot be resolved purely by logic or empirical investigation or, to the extent that, as usual, incommensurables, are

³³ *Id.* at 264.

³⁴ *Id.* at 263.

³⁵ *Id.* at 264.

³⁶ JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 85 (Red White ed., 1967), responding to Mill’s *On Liberty*, seems more realistic:

I do not believe that the state of our knowledge is such as to enable us to enunciate any ‘very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control.’ We must proceed in a far more cautious way, and confine ourselves to such remarks as experience suggests about the advantages and disadvantages of compulsion and liberty respectively in particular cases.

Id. (citing MILL, *supra* note 23, at 14–15).

involved, by “balancing.” It can only be resolved by evaluating the conflicting interests and making a policy judgment, typically sacrificing each to some extent to the other.

A question can arise, for example, as to whether leafleting or loudspeakers should be allowed in a public park. Because interests recognized as legitimate—providing an additional opportunity for communication and providing an additional place for rest and recreation—are in conflict, a policy judgment must be made. The essence of self-government is that it is to be made by the people who will be affected, not made for them by some supposedly superior person or persons. Leaving the decision to a judge will not produce the “correct” decision, but only one likely to be more in accordance with views of the cultural elite, more protective of the speech interest, because speaking is what the cultural elite do, and less concerned with avoiding the harms, from which the elite are usually best able to protect themselves. You may not need a public park, for example, if you have a private country club.

There is no reason to expect expertise in decisionmaking on social policy issues, even if there were such a thing, from Supreme Court Justices, whose only professional qualification is that they are lawyers. Attendance at law school is less a means of studying a substantive academic discipline than a means of avoiding doing so. Law training may be particularly unsuited to training policymakers, because lawyers, having specialized in nothing, easily come to consider themselves (as “generalists”) experts in everything, substituting rhetorical skill for knowledge. Supreme Court Justices ordinarily not only know little of the issues they pass on in constitutional cases—for example, the consequences of different social policies on homosexuality—but, worse, as lawyers, typically don’t know that they don’t know.

The premise that judges are peculiarly trustworthy policymakers, more likely than other public officials to make policy decisions on an impartial or disinterested basis free of political or ideological commitments is, if anything, even more mistaken than the belief that the answer to real problems of social choice can be found in natural law. Lawyers do not cease being lawyers, trained in the manipulation of language to support pre-ordained results, when they put on a robe. There is nothing in the study or practice of law likely to inculcate habits of exceptional honesty or ethical refinement.³⁷ It serves instead to accommodate the mind to the unembarrassed assertion of fiction.

³⁷ “Lawyers, whether as practicing attorneys or judges, have been post-modernists *avant le lettre* inasmuch as the ‘facts’ they have offered to juries, judges, and other legal decisionmakers were always self-conscious constructions in the services of a particular agenda,” Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMM. 255, 265 (2003).

See also Stephen J. Dubner & Steven D. Levitt, *What the Bagel Man Saw*, N.Y. TIMES MAGAZINE, June 6, 2004, at 64 (Vendor found that bagels could be sold to office workers on an

More important, judges are the public officials least to be trusted to make policy decisions on any basis other than personal preference because they are the public officials least subject to external control. The judiciary has become not the least but the most dangerous branch of government as it has grown from the “natural feebleness” and “next to nothing” Hamilton spoke of to our most powerful decisionmaker on issues of domestic social policy. Judges are not more immune than other officials from the corrupting effect of power, which works less to make men (or women) venal than to give them an exaggerated notion of their wisdom, goodness, and authority and skepticism as to the existence of the qualities in others.

The corrupting effect of uncontrolled power can be clearly seen in the career of, for example, Justice William J. Brennan, Jr. It is a shameful fact in a purportedly democratic system of government that Brennan was the most important figure in American public life during the last half of the twentieth century, even though his name was and is virtually unknown to the people, his fellow citizens, whose lives he substantially governed. It is also a fact that it would be difficult to find an American public figure of comparable importance, at least outside of the Court itself, more unscrupulous in the pursuit of his political objectives, less deterred by inconveniences of fact or logic, or requirements of good faith. Ample justification for this statement can be seen by studying his work in almost any major area of constitutional law. On the issue of race and the schools, for example, he led the Court to change *Brown*'s³⁸ prohibition of segregation into a requirement of integration while denying that any change had been made.³⁹ He successfully performed the nearly incredible feat, possible only for a decisionmaker subject to no review, of imposing a requirement of race discrimination in the assignment of students to schools in the name of enforcing a prohibition of all official racial discrimination.⁴⁰

When the newly-appointed Chief Justice Burger, appointed by President Nixon, who ran as an opponent of forced busing, tried to get the Court to tell school districts honestly whether the supposed requirement of a “unitary system” really meant the absence of race discrimination, as the Court claimed, or the practice of race discrimination to increase racial balance, as the Court in fact required, Brennan successfully prevented the Court from doing so. For the Court to admit that the requirement was not really just desegregation—the ending and undoing of unconstitutional segregation as required by *Brown*—but integration for its own sake, Brennan argued, “would, given the views of most whites, simply

honor system because 90 to 95 percent of the people voluntarily paid, except that “law firms aren’t worth the trouble.”)

³⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

³⁹ *Green v. County Sch. Bd.*, 391 U.S. 430, 430 (1968).

⁴⁰ For a full discussion, see LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT’S DECISIONS ON RACE AND THE SCHOOLS* 67 (1976).

be impractical.”⁴¹ When honesty is “impractical” for the Justices, they are able, more than any other public officials, to simply turn to the alternative with no fear of electoral or other sanction. Legislators no doubt sometimes fail to act “carefully, accurately, and in good faith,”⁴² as Professor Barnett fears, but probably much less often and with less serious potential consequences than Supreme Court Justices. Legislators do not have to engage in pretenses to make policy choices, and unlike Supreme Court Justices, they can lose their jobs.

Professor Barnett has good reason to rejoice at what he correctly identifies as “Justice Kennedy’s Libertarian Revolution: *Lawrence v. Texas*.”⁴³ Justice Kennedy has indeed seemingly written libertarianism into the Constitution. *Lawrence* illustrates the Court’s readiness to substitute its left-liberal policy choices for choices made in the ordinary political process. But that has been the case at least since the eventual success of *Brown*, and the consequent enhancement of the Court’s prestige, convinced academic liberals and the Justices themselves of the superiority of policymaking by the Court over policymaking by electorally accountable officials. The enhanced role of the Court in our system of government became so accepted and secure that the Court could already, before *Lawrence*, invalidate any law (disallow any restriction on “liberty”) it found “unreasonable” by simply discovering a “fundamental right” and citing the Due Process Clause of the Fourteenth or Fifth Amendments. In the alternative, it could cite the Equal Protection Clause (redundantly, as it turned out)⁴⁴ to disallow any classification it found unreasonable. It has long been clear, that is, that there isn’t much the Court can’t do. The Court’s disallowing a state law on the basis of rights found in the “penumbras, formed by emanations” from constitutional provisions⁴⁵ or on the basis of a quotation from Shakespeare⁴⁶ illustrated in effect that the Court hardly considered it necessary to attempt to conceal that fact.

It is true that every ruling of unconstitutionality is a bombshell waiting to go off (in that it provides the basis for additional such rulings) and do further damage to what was once a system of federalist self-government, but it is not clear that there is much more damage left for *Lawrence*’s incorporation of libertarianism into the Constitution to do. Its main contribution to constitutional doctrine may be that the Court will no longer feel called upon to announce discovery of a new

⁴¹ Lino A. Graglia, *When Honesty is “Simply . . . Impractical” for the Supreme Court: How the Constitution Came to Require Busing for School Racial Balance*, 85 MICH. L. REV. 1153, 1174 (1987) (quoting BERNARD SCHWARTZ, SWANN’S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT 89–90 (1986)).

⁴² BARNETT, *supra* note 24, at 260.

⁴³ Barnett, *supra* note 26.

⁴⁴ See *Bolling v. Sharpe*, 347 U.S. 497, 497 (1954).

⁴⁵ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁴⁶ *Levy v. Louisiana*, 391 U.S. 68, 72 n.6 (1968) (holding that discrimination on the basis of illegitimacy is unconstitutional, citing a speech of Edmund the Bastard in *King Lear*).

“fundamental right” before disallowing a policy choice of which it disapproves as a violation of ‘substantive due process.’