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Grading Justice Kennedy: A Reply to Professor Carpenter

Randy E. Barnett†

I want to thank the editors of the *Minnesota Law Review* for soliciting this Reply to Professor Dale Carpenter's provocative analysis¹ of my assessment² of Justice Kennedy's opinion in *Lawrence v. Texas*.³ As it turns out, though we do disagree about *Lawrence*, Professor Carpenter and I have fewer disagreements than he thinks. To begin to see why, let us imagine that, like many other professors, he had used the facts and lower opinion in *Lawrence* as the basis for his final examination in his course on Constitutional Law. On the exam, he asked his students to write an opinion for the Court. Now imagine that one of his students submitted the words of Justice Kennedy's opinion in *Lawrence* as her answer. Would Professor Carpenter have given it an A?

Unless he gives more points for creativity or flowery prose than I expect he does, I seriously doubt it. The reason for my prediction is basic: the student's answer simply would have failed to demonstrate a mastery of the constitutional doctrine Professor Carpenter undoubtedly taught before 2003 and likely still does. Had the student come to see him to complain about her grade, here is how I think he would explain the deficiencies of her performance.

First, the student failed to identify the liberty in question as fundamental. Professor Carpenter would tell the student

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that, while she was free to write an answer based on the Equal Protection Clause (thereby anticipating Justice O'Connor's concurring opinion in *Lawrence*), she chose instead to rest her opinion on the Due Process Clause of the Fourteenth Amendment. Under well-settled, post-New Deal Due Process Clause doctrine, unless the liberty in question is deemed by the Court to be fundamental, it receives the lowest level of scrutiny. This means that the law is presumed to be constitutional unless there is no conceivable rational basis for its passage; and there is almost always a conceivable rational basis. In this case, for example, the student might have argued that the Texas statute served the State's interest in preventing a potential harm to the public health.

When traditional rational basis scrutiny is applied to a mere liberty interest, it is not necessary to show that the legislature actually had a sound basis for restricting a liberty. All that is needed is a possible reason the Court could imagine for why the law might have been enacted. As Justice Thomas has explained:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.... In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

At minimum, unless she was going to find the liberty in question to be fundamental, the student should have noted in her answer the need to find a rational basis for upholding the stat-

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5. See, e.g., Brief of Amicus Curiae American Center for Law and Justice at 19–20, *Lawrence* v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Amicus Curiae Concerned Women for America at 26–27, *Lawrence* (No. 02-102); Brief of Amicus Curiae Pro Family Law Center et al. at 18–23, *Lawrence* (No. 02-102).

6. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 415 (1997) ("[T]he government's objective only need be a goal that is legitimate for government to pursue.... Under the rational basis test, the challenger of a law has the burden of proof.").

7. Fed. Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 315 (1993). Admittedly, this is the broadest version of rational basis scrutiny, but to demand more justification than this to restrict a mere liberty interest is to question, rather than adhere to, the traditional approach.
ute and asserted its absence. But it would be really pushing the envelope for her to allege the lack of any rational basis whatsoever. Professor Carpenter is sure to have taught his students that, except possibly for a few oddball cases, if the Court fails to find that a liberty is fundamental, the challenged restriction is always found to be rational.

Second, the student failed to identify the fundamental right at issue here to be the "right of privacy." Professor Carpenter would patiently explain to her that, because there is no textually enumerated right (e.g., the rights of speech, press, or assembly) conceivably at issue here, the right in question must be unenumerated. And among the very few unenumerated rights that have been protected by the Court since the New Deal is the right of privacy. Indeed, he would note that, because the student mentions the right of privacy in her hypothetical opinion, she obviously was aware of its doctrinal existence. Yet in analyzing the anti-sodomy statute in Lawrence, she writes repeatedly (and rather naïvely) of "liberty" rather than of a right of privacy.

As everyone knows, and as Professor Carpenter surely would have mentioned in class had the issue been raised, there is no general constitutional right to liberty. After all, every law restricts liberty to some degree. So invoking the "liberty" mentioned in the Due Process Clause is insufficient to identify the particular right being protected—and fundamental rights, he would continue, need be specified precisely to avoid protecting liberty writ large—a project the Court abandoned after the New Deal.

If the student protests by pointing to the several times in her answer where she mentions "private" conduct, Professor Carpenter might reply that these references were the reason she got a B on the exam rather than a C. What she needed to do to get a higher score was identify this interest as a privacy right, thereby linking her analysis to such landmark unenu-

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8. For an example of a more demanding rational basis approach, see Justice Kennedy's opinion for the Court in Romer v. Evans, 517 U.S. 620 (1996).

9. In Troxel v. Granville, 530 U.S. 57 (2000), the Court protected "the fundamental right of parents to rear their children." Id. at 63. For an analysis that Lawrence is really a family privacy case, see David D. Meyer, Domesticating Lawrence, 2004 U. CHI. LEGAL F. 453.

10. See Carpenter, supra note 1, at 1160–62 (identifying several places in Lawrence where the Court uses "private").
merated privacy rights cases as *Griswold v. Connecticut*\(^ {11}\) and *Roe v. Wade*.\(^ {12}\) Had she done this, she immediately would have seen the need to apply the Court's fundamental rights methodology to the facts of the case.

Third, the student **failed to apply the Court's well-established fundamental rights methodology**. Lest the judicial protection of unenumerated rights get out of hand and we create a "newly activist judiciary,"\(^ {13}\) Professor Carpenter undoubtedly would have taught that a liberty is not to be identified as fundamental unless it is "deeply rooted in [the] [n]ation's tradition or history," "implicit in the concept of ordered liberty," or both.\(^ {14}\) In her answer, the student never even mentions these bedrock methodological standards, despite the fact that she discusses the wrongness of *Bowers v. Hardwick*\(^ {15}\) in which these standards were applied.

This is perhaps the biggest reason for her middling grade. Either she should have identified the law as infringing the right of privacy, in which case she could have relied on precedent covered in class to establish the right as fundamental, or she needed to identify the particular right at issue here—e.g., a right of same-sex couples to engage in sexual relations—in which event she would then have needed to justify this right as deeply rooted in the nation's tradition and history or implicit in the concept of ordered liberty. Had she realized the need to do this and made the attempt, she would have seen how problematic her answer really was. Her best approach would have been to shoehorn the right under the privacy rubric, but this she failed to do. Her repeated invocations of "liberty" resembled the "Lochner-era" opinions that had been rejected by the Court, in Professor Carpenter's view quite rightly, in the Enlightenment Period following the New Deal.

For all these reasons, the student's answer did not demonstrate her mastery of the doctrines he had presented in class. To get an A, she needed to show she understood the above doctrinal principles and demonstrate the creativity and effort necessary to explain why the liberty at issue here was indeed an

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\(^ {11}\) 381 U.S. 479 (1965).
\(^ {12}\) 410 U.S. 113 (1973).
\(^ {13}\) Carpenter, *supra* note 1, at 1170.
aspect of the fundamental right of privacy. That this would not be insurmountably difficult was evidenced by other student answers that had explained why the private, intimate sexual relations of even same-sex couples partake in the general right of privacy—as the student herself implicitly acknowledges at various points in her answer. But while implicit acknowledgment is enough to get her a B, she needed to be more explicit to merit an A, if for no other reason than making the claim explicit would have forced her to avoid the difficult objections likely to be made in dissent by Justice Scalia.

Professor Carpenter might have added (though I doubt he would) that were the Court ever to issue an opinion resembling her answer, it would be truly revolutionary. In the interests of diplomacy, he would never mention (but I imagine he really would have thought) that for the Court to actually issue an opinion written as the student had done would have been sloppy, undisciplined, and unlawlike. Such an opinion would leave it open to observers to claim that the Court had abandoned, at least for this one case, its doctrinal method of handling infringements of liberty under the Due Process Clause. To repeat this performance in other cases would truly be revolutionary.

In my article, this was all I was claiming about Justice Kennedy's "revolution." I never predicted whether or not the Court would ever use the methodology employed in Lawrence in another case, or apply it beyond something like the realm of sexual intimacy. To the contrary, I say that "it may be possible to cabin this case to the protection of 'personal' liberties of an intimate nature—and it is a fair prediction that that is what the Court will attempt . . . ." Although I do claim that Justice Kennedy employed the "presumption of liberty" that I have been recommending for many years, I do not claim that the Court adopted the presumption as its doctrine to be applied in the future.

16. See Barnett, supra note 2, at 41.
17. See id. at 36 ("Although he never acknowledges it, Justice Kennedy is employing here what I have called a 'presumption of liberty' that requires the government to justify its restriction on liberty, instead of requiring the citizen to establish that the liberty in question is somehow 'fundamental.'") (emphasis added, footnote omitted). For an extended defense of this approach, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).
My principal claim was how far Justice Kennedy's opinion strayed from the seemingly well-settled due process doctrines that both Professor Carpenter and I teach our students—doctrines that were adopted and followed for a reason. My only additional claim was this: if the approach actually used in Lawrence were to be applied more generally, this would be truly revolutionary. Or as I wrote in my opening paragraph: "If the approach the Court took in this case is followed in other cases in the future, we have in Lawrence nothing short of a constitutional revolution, with implications reaching far beyond the 'personal liberty' at issue here." 18 I never predicted that it would be so applied and, regrettably, I tend to share Professor Carpenter's skepticism that this is very likely.

There is one criticism that Professor Carpenter never would have made of the student's exam answer, however, that he does repeatedly make of my analysis of Lawrence. He would never accuse the student of saying anything in her answer about "economic rights." Similarly, in my analysis of Lawrence, I never claim that "the Court is now protecting a broad range of liberties, not just sexual privacy, from government intrusion." 19 Certainly, no such assertion appears on the page of my article cited by Professor Carpenter following his characterization of my "claim." 20 Equally inaccurate, therefore, is the following characterization of my analysis: "Barnett thinks the new presumption of liberty applies to economic liberty as well as to sexual and other personal liberties." 21 Nor do I ever claim that "Lawrence now requires" the "state to show that its regulation of a liberty interest is 'necessary and proper,'" 22 though I do favor this reform and defend it elsewhere. 23

In sum, Professor Carpenter thinks I have over-read Lawrence to make it fit my own predilections better than it actually does. I think he has over-read my article, perhaps to better fit his need for a foil against which to tilt. In truth we both believe

18. Barnett, supra note 2, at 21; see also id. ("Reflecting on Lawrence in that larger context will show the potential the decision has . . .") (emphasis added); id. at 41 ("If the Court is true to its reasoning, Lawrence v. Texas could provide an important step in the direction of a more balanced protection of liberty . . .") (emphasis added).
19. Carpenter, supra note 1, at 1145.
21. Carpenter, supra note 1, at 1146–47.
22. Id. at 1165.
that "[t]he opinion is so opaque that it bears a great many inter-
pretations." He cannot deny that the opinion lacks the
standard features of doctrinal analysis that he would, previ-
ously at least, have demanded of his own students—which to
me is what signals its potentially revolutionary impact, if it
was consistently followed in subsequent cases. I believe I am as
titled to take Justice Kennedy's analysis at face value to il-
lustrate how a general presumption of liberty would operate
were it generally to be adopted by the Court (without making
any predictions about its future use), as Professor Carpenter is
to scoff at the likelihood of any such development. These are
not mutually inconsistent claims.

There is one respect, however, in which Professor Carpen-
ter's argument directly confronts my reading of the case and
scores. I claim that "[l]iberty, not privacy, pervades this opinion
like none other." In support of this claim, I stress the number
of times "liberty" is mentioned in the case—at least twenty-five
times (not including the number of times "freedom" is also men-
tioned)—and the paucity of mentions of the right of privacy—
just four. Professor Carpenter rightly, and relevantly, points
out that many more references to "private" conduct appear in
the opinion.

While he somewhat cattily remarks that "the deeper mean-
ing of the Court's opinion . . . cannot be resolved by counting
words," Professor Carpenter tellingly notes that his "examples
of the Court's emphasis on privacy could be multiplied many
times." Although certainly not dispositive, perhaps quantity is
probative of meaning after all. The number of times that the
Court references "liberty" as compared with its use of the "right
of privacy" may especially be useful to demonstrate the plausi-
bility of one's descriptive claims to skeptical readers—in my
case to readers who were subjected to initial press accounts of
how the case protected the right of privacy.

24. Carpenter, supra note 1, at 1149.
27. Id. at 1160.
28. Id. at 1161.
29. See, e.g., Joan Biskupic, Gay Sex Ban Struck Down: Supreme Court
Majority Says Such Laws Violate Privacy, USA TODAY, June 27, 2003, at 1A;
Robert S. Greenberger, Top Court Rejects Sodomy Laws in Privacy Victory,
WALL ST. J., June 27, 2003, at A4; Patty Reinert et al., Court Voids Texas Sod-
omy Law: 6-3 Ruling Backs Right of Privacy, HOUSTON CHRON., June 27,
2003, at 1.
Nevertheless, Professor Carpenter's point that the Court's repeated emphasis is on the "private" nature of the conduct in question here is entirely fair and germane. It does reduce the extent to which the opinion in Lawrence can be characterized as implicitly rejecting a right of privacy in favor of a right of liberty. The fact remains, however, that it would have been the easiest thing in the world for Justice Kennedy to move from these characterizations of the conduct in question as "private" to an application of the fundamental right of privacy to the facts of the case, which is what I am guessing Professor Carpenter would require of his hypothetical student. The fact that Justice Kennedy does not take this step—that this doctrinal dog does not bark—makes Lawrence in my view a "potentially revolutionary"30 liberty-protecting case.

CONCLUSION

Let me conclude by offering the following thought experiment to illustrate, and hopefully render more plausible, my original thesis to readers of Professor Carpenter's engaging critique. Suppose in the future, as is likely to be the case, the Court limits the reach of Lawrence in the manner that Professor Carpenter predicts. Would his theory of the case be an unwarranted way for the Court to position Lawrence in its sequence of due process cases? Hardly, which is why Professor Carpenter's prediction is both reasonable and lawyerly.

Now suppose instead that a future Supreme Court is inclined to reject the "fundamental right-strict scrutiny" vs. "mere liberty interest-no scrutiny" approach in favor of an across-the-board presumption of liberty that I have been urging. Could this future Court look back to Justice Kennedy's opinion in Lawrence—along with his jointly authored opinion in Planned Parenthood v. Casey31—as a harbinger of such a libertarian constitutional revolution? I think doing so would be an entirely fair reading of the opinion. If so, then it is worth noting that Justice Kennedy's opinion potentially does far more than correct the travesty that was Bowers precisely because it does far less than might have been expected by careful constitutional lawyers such as Professor Carpenter. Indeed, the opinion

30. Barnett, supra note 2, at 35 (emphasis added).
31. 505 U.S. 833 (1992); see Barnett, supra note 17, at 232–33 (connecting Casey with Lawrence).
does far less than even would be expected of a law student on a final exam. For this I would give Justice Kennedy an A.