Rational Relationship to What? How Lawrence v. Texas Destroyed Our Understanding of What Constitutes a Legitimate State Interest

Matthew J. Clark

Follow this and additional works at: http://digitalcommons.liberty.edu/lu_law_review

Recommended Citation
Available at: http://digitalcommons.liberty.edu/lu_law_review/vol6/iss2/9

This Article is brought to you for free and open access by the Liberty University School of Law at DigitalCommons@Liberty University. It has been accepted for inclusion in Liberty University Law Review by an authorized administrator of DigitalCommons@Liberty University. For more information, please contact scholarlycommunication@liberty.edu.
COMMENT

RATIONAL RELATIONSHIP TO WHAT?
HOW LAWRENCE V. TEXAS DESTROYED OUR UNDERSTANDING OF WHAT CONSTITUTES A LEGITIMATE STATE INTEREST

Matthew J. Clark†

I. INTRODUCTION

Exactly what is a legitimate state interest? Any lawyer or law student who has been through a constitutional law course is familiar with the phrase "legitimate state interest." It appears whenever a court conducts a rational basis review. Under that standard of review, a court is supposed to uphold a law so long as it is rationally related to a legitimate state interest. Most of

† Marketing Director, LIBERTY UNIVERSITY LAW REVIEW, Volume 6; J.D. Candidate (2012), Liberty University School of Law; B.S. in Government—Politics and Policy, Liberty University, 2009. The author would like to thank his parents, Mike and Margo Clark, for their love, support, and encouragement. The author also would like to thank Dr. Gai Ferdon of Liberty University and Professor Cynthia Dunbar and Dean Jeffrey Tuomala of the Liberty University School of Law for equipping me with the tools needed to create this Comment. Additionally, the author would like to thank the members of the Liberty University Law Review for their edits, suggestions, and feedback, especially Mrs. Lisa Williams. Finally, I would like to thank my Advocate, the Lord Jesus Christ, because when I stood guilty before the Supreme Judge of the World, He took the judgment I deserved upon Himself so that I could be acquitted along with all who believe.


2. Id. In a 2004 case, the Supreme Court said that the modern-day rational basis test was established in M’Culloch v. Maryland, in which Chief Justice Marshall first interpreted the Necessary and Proper Clause of Article I § 8 of the Federal Constitution. Sabri v. United States, 541 U.S. 600, 605 (2004). Justice Thomas concurred but thought that the M’Culloch test was more sophisticated than the modern-day rational basis test and required a slightly higher level of review than mere rationality. Id. at 611-13 (Thomas, J., concurring in judgment). Justice Thomas’s belief appears to be well-founded. Compare M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.") with Massey, supra note 1, at 46 (stating the modern view that a law will be upheld unless the challenger can prove that the law is "not rationally related to a legitimate government objective."). Nevertheless, because the Supreme Court has long used the rational basis test and does not appear to be ready to reconsider it, this Comment assumes the rational basis test is valid.
the time, a rational basis review will focus on whether the connection between the statute and purported government interest is rational. One commentator observed that a law must be "truly bizarre" to fail this test. Nevertheless, sometimes the issue is not whether the connection between the law and the purported government interest is rational, but whether the end—or the purported government interest—is legitimate. Courts will sometimes declare that the end is illegitimate. But often when this occurs, the court's declaration that the purported interest is illegitimate is nothing more than a conclusory statement with little legal analysis. Perhaps the courts think that the meaning of "legitimate state interest" is so obvious that a lengthy legal analysis is not required because most individuals should know what the government can and cannot legitimately do. But in today's increasingly pluralistic society, with so many different views of the state's role, it is no longer safe to assume that the standard for determining the legitimacy of the state's interests is a given.

For a long time, however, our country was unified by a standard for knowing whether the state's actions were legitimate—that standard was the law of nature. This law of nature, according to the common law and the Founders, was knowable through three sources—reason, the conscience, and the Scriptures. The legitimacy of the government's interests was further restricted by written constitutions. Thus, if a purported government interest violated either the law of nature or the Constitution, then the state's interest was illegitimate. A series of Supreme Court cases in the early to mid twentieth century removed reason and the Scriptures as

3. Massey, supra note 1, at 46.
4. Id.
5. Id.
6. E.g., U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.").
7. See, e.g., id.; cf. Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) ("The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication.") (emphasis added). This footnote does not seek to comment on particular holdings, but rather to show that courts sometimes jump to conclusions without much legal analysis.
8. See infra Part II.A-B.
9. See infra Part II.A-B.
10. See infra Part II.B.
11. See infra Part II.B.
a means for knowing the law of nature, leaving only the conscience for knowing whether the state's interests were legitimate.  

In 2003, the Supreme Court held, in Lawrence v. Texas, that state laws prohibiting homosexual sodomy were unconstitutional. In its analysis, the Court appears to have assumed that protecting morality is not a legitimate state interest. The effect of this holding is to remove the last means of knowing the law of nature because the conscience no longer has a place in determining the legitimacy of the state's interests.

Notwithstanding this effect of the Lawrence Court's decision, the rational basis test remains the same. Courts still must determine whether a purported state interest is legitimate, but now they have no standard to guide their judgment. This means that judges will incorporate their own personal views into the law, and consequently, a legitimate state interest will be whatever the judges say. This is a problem because the power to declare whether a purported government interest is legitimate is the power to say, as a philosophical matter, what the government can and cannot do. Subjecting this power to ipse dixit is unacceptable, and this problem demands a solution.

This Comment proposes a test for when a purported government interest is challenged as illegitimate. First, if neither a fundamental right nor a suspect class is targeted, then the burden should be on the challenger to prove that the purported government interest is illegitimate. In considering whether the purported interest is legitimate, the Court should consider whether it is a legitimate power that the government can exercise under the law of nature and whether it is a legitimate power that the government can exercise under the Constitution. In considering whether the interest is illegitimate under the law of nature, judges may consider evidence from reason, morality, and the Scriptures. If the purported interest does not contradict the law of nature or the federal (and state, if a state law) constitution(s), then the interest is legitimate, and the law should be struck down only if it is not rationally related to that legitimate state interest.

12. See infra Part II.C.
14. See infra Part II.D.
15. See infra Part II.D.
16. See infra Part II.D.
17. Ipse dixit is a Latin phrase; literally, "[H]e himself said it," meaning, "Something asserted but not proved." BLACK'S LAW DICTIONARY 905 (9th ed. 2009). In other words, when something is law just because a court says so, it is an ipse dixit.
This Comment’s discussion of *Lawrence* does not discuss the issue of gay rights, *Lawrence’s* societal consequences, or whether the use of the rational basis test in *Lawrence* was proper, since those subjects have already been discussed extensively. Instead, this Comment focuses on how *Lawrence* destroyed the standard for determining whether something is a legitimate state interest and left a void that judges now are free to fill with their own theories. Furthermore, although the rational basis test currently determines whether a law is rationally related to a legitimate state interest, no test exists to determine whether a purported state interest is legitimate, which this Comment proposes.

This Comment begins by discussing the common law and early American standard for determining whether something was a legitimate state interest and concludes that the standard was based on the law of nature, which was knowable through reason, the conscience, and the Scriptures. In the same section, this Comment explores how twentieth-century Supreme Court cases deviated from the law of nature standard and completely abandoned that standard in 2003 in *Lawrence v. Texas*. Next, this Comment explores the effect of *Lawrence* on the lower courts, which left them without a standard to determine whether something is a legitimate state interest and ultimately allowed judges to use their own theories to determine whether something is a legitimate state interest. This Comment also briefly explores various theories that could become the new standard for assessing whether a purported state interest is legitimate. Finally, this Comment proposes that the Court reverse *Lawrence* and other cases that rejected the law of nature standard, proposes a test for when a purported state interest is challenged as illegitimate in a rational basis review, and provides examples of how this analysis would work.

---

II. BACKGROUND: THE FOUNDERS’ STANDARD AND ITS DEMISE

A. The Common Law Standard for Determining the Legitimacy of State Interests

As the Magna Carta demonstrates, the Anglo-American tradition has always recognized that the civil government has limits. But this view inevitably presents a problem. If the civil government is sovereign yet limited, then society must have an objective standard for limiting the government’s authority. In other words, if one says that government is limited, then one needs to have an objective standard that provides a basis for telling the government what it can and cannot do.

Sir Edward Coke, one of England’s most respected jurists, explained the basis for limiting the government’s authority in his Reports. Coke explained that the common law of England assumed that there was a law that preexisted the Crown and the courts. Coke called that law the law of nature. To Coke, there were four key principles about the law of nature: first, it commanded loyalty of the subject to the king; second, it was part of the law of England; third, it existed before any judicial or municipal authority; and fourth, it was immutable. According to Coke, “The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is lex aeterna, the moral law, called also the law of nature.” Coke also noted that because this law preceded civil authorities, it was the standard by which kings administered justice before any written law existed. For this reason,

This law of nature, which indeed is the eternal law of the Creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written, and before any judicial or municipal laws. And certain it is, that before judicial or municipal laws were made, Kings did decide causes according to natural equity, and were not tied to any rule or formality of law, but did dare jura.

Id.
Coke said that courts had the authority to void acts of Parliament if they were contrary to the common law, which included the law of nature.26

This view of the law of nature continued as the common law developed. Sir William Blackstone27 discussed the common law in his work, Commentaries on the Laws of England.28 Like Coke, Blackstone explained the basis for law and civil authority. “[W]hen the Supreme Being formed the universe,” Blackstone wrote, “and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. . . . This will of [man’s] Maker is called the law of nature.”29 Blackstone believed that God endowed man with the faculty of reason to be able to discover this law.30 Nevertheless, Blackstone also believed that because man’s reason is imperfect and corrupt, God “hath been pleased . . . [to communicate His laws] by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures.”31 Blackstone argued that the precepts found in the Scriptures were also part of the original law of nature.32 Blackstone viewed this law as the basis for limiting the government’s authority. He wrote, “Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.”33 Blackstone also wrote that if human law compelled us to transgress the law of nature, then we would be bound to disobey the human law and obey the divine law.34

In sum, according to the common law, the basis for evaluating the state’s interests was the law of nature. According to Coke and Blackstone, there were three ways of knowing that law: the infusion of the law on the heart


27. Blackstone was the most frequently cited source by the Founders, other than the Bible and Montesquieu, respectively. Donald Lutz, The Origins of American Constitutionalism 140-42 (1988). Thus, Blackstone’s understanding of the law of nature should be given great weight in interpreting how the Founders understood the law of nature.

28. 1 WILLIAM BLACKSTONE, COMMENTARIES.

29. Id. at *38-39.

30. Id. at *41.

31. Id. at *41-42.

32. Id. at *42.

33. Id.

34. Id. at *42-43.
(the “conscience”),\textsuperscript{35} observation of creation through reason (“reason”), and the Holy Scriptures (“Scriptures”).\textsuperscript{36} This Comment will repeatedly refer back to this framework, so it is important to keep it in mind.

B. The Early American Standard for Determining the Legitimacy of State Interests

The British tradition of using the law of nature to determine the legitimacy of government interests was brought to the British Colonies, which eventually became the United States. When the colonies rebelled against England, the colonies explained their basis for rebelling in the Declaration of Independence (the “Declaration”).\textsuperscript{37} If there were no higher standard than the government to evaluate the government’s actions, then the colonies would have had no legitimate reason to assert that the actions

\textsuperscript{35} Some readers may be familiar with the sociological jurisprudence of Lord Patrick Devlin, who believed that law is based on morals, but that morals are whatever the people say they are. \textit{Patrick Devlin, The Enforcement of Morals} 7, 22-23 (1965) (arguing that because the people are free to reject Christianity they are free to reject Christian morals, and thus morality is whatever “sense of right and wrong which resides in the community as a whole[,]”). The Anglo-American tradition, however, does not endorse that view. Thus, the term “conscience” in this Comment neither refers to the subjective, collective conscience of the people nor to the subjective conscience of a judge, but rather presumes that the conscience is a God-given means of knowing an objective, transcendent standard. \textit{See infra Part IV.A.}

\textsuperscript{36} Interestingly, the Bible establishes the same framework. First, Romans 1:18-20 states that God’s truth is self-evident to man through what has been seen.

For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men who suppress the truth in unrighteousness, because that which is known about God is evident within them. For since the creation of the world His invisible attributes, His eternal power and divine nature, have been \textit{clearly seen, being understood through what has been made}, so that they are without excuse.

\textit{Romans} 1:18-20 (New American Standard) (emphasis added). Second, Romans 2:14-15 says that God’s truth is written on man’s heart and calls it the conscience.

For when Gentiles who do not have the Law do instinctively the things of the Law, these, not having the Law, are a law to themselves, in that they show the work of the Law \textit{written in their hearts}, their \textit{conscience} bearing witness and their thoughts alternately accusing or else defending them[.]

\textit{Romans} 2:14-15 (New American Standard) (emphasis added). Finally, 2 Timothy 3:16 states that Scripture is given by God for the same purposes. “All Scripture is inspired by God and \textit{profitable for teaching, for reproof, for correction, and for training in righteousness[,]”} 2 \textit{Timothy} 3:16 (New American Standard).

\textsuperscript{37} \textit{The Declaration of Independence} (U.S. 1776).
of the Crown were illegal. Nevertheless, the Continental Congress asserted that when a government treats its people the way that the Crown did, "it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them . . . ."\textsuperscript{38}

The Declaration continues with the law of nature rhetoric, saying,

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive to these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.\textsuperscript{39}

The standard of the Founders is evident by that statement. The Founders believed that the law of nature vested people with rights, required governments to be formed to secure those rights, and required the government's powers to be derived from the consent of the governed.\textsuperscript{40} The Declaration also says that the people have the right to abolish their government if it becomes destructive of those ends.\textsuperscript{41} Nevertheless, this inevitably raises the question: what gives the people the right to throw off that government? The first paragraph of the Declaration goes back to the law of nature as the standard for determining that right.\textsuperscript{42} It is evident, then, that the law of nature is the standard by which the Founders assessed what constitutes a legitimate state interest.

Perhaps the boldest and clearest assertion of the law of nature as the standard for assessing legitimate state interests came from Justice Joseph Story, who wrote, "One of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the common law . . . . There

\textsuperscript{38} Id. at para. 1 (emphasis added).
\textsuperscript{39} Id. at para. 2.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at para. 1.
never has been a period, in which the common law did not recognise Christianity as lying at its foundations.”43 Addressing the law of nature issue specifically, Justice Story said, “Christianity becomes, not merely an auxiliary, but a guide to the law of nature, establishing its conclusions, removing its doubts, and elevating its precepts.”44 Justice Story’s position was consistent with Blackstone’s—each believed that using the Scriptures was epistemologically superior to deducing the law of nature through reason alone.45

Justice Story continued by describing how the law of nature determined the legitimacy of the state’s interests. He first said that the God-given law of nature “consider[s] [man] in the various relations of life, in which he may be placed, and ascertains in each his obligations and duties.”46 The law of nature considers man in various situations, including “as a solitary being, as a member of a family, as a parent, and lastly as a member of the commonwealth.”47 In the very next sentence, Justice Story said:

The consideration of this last relation [man as a member of a commonwealth] introduces us at once to the most interesting and important topics; the nature, objects, and end of government; the institution of marriage; the origins of the rights of property; the nature and limits of social liberty; the structure of civil and political rights; the authority of policy laws; and indeed all those institutions, which form the defence and the ornament of civilized society.48

43. JOSEPH STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, ON THE TWENTY-FIFTH DAY OF AUGUST, 1829, at 20-21 (Boston, Hilliard, Gray, Little, and Wilkins 1829). Justice Story did, however, note that the flaw in the common law system was that it only respected Christianity “as taught by its own church.” Id. at 21. Thus the church was allowed to tell the state to punish unbelief, which Justice Story said was a power that “belong[ed] exclusively to God.” Id. Nevertheless, he said, “But apart from this defect, the morals of the law are of the purest and most irreproachable character.” Id.

44. Id. at 44.

45. Id. It is worth noting, however, that Justice Story did not reject deducing morality through reason. Id. He also made a connection between happiness and virtue that cannot be dissolved. Id.

46. Id.

47. Id.

48. Id. at 44-45 (emphasis added).
Justice Story began with the law of nature and argued that it defined man's obligations and duties as a member of society, which gave rise to "the nature, objects, and end of government." 49 Justice Story could not have stated his position more clearly. 50 For him, as it was for the Founders and the great English jurists before them, the law of nature was the standard that determined what government could and could not do. 51 In other words, the law of nature determined what constituted a legitimate state interest.

During the early republic, the federal judiciary did not have to concern itself with determining how the law of nature applied. The federal government was established by a written constitution, which gave only certain, limited powers to the newly-formed government. 52 Whichever powers were not granted to the federal government, nor prohibited to the states, were reserved to the states or to the people. 53 Because of this framework, the Court dealt mainly with federal issues, and therefore did not have to assess whether state actions were legitimate state interests by the law of nature standard. 54 In fact, many of the Court's cases involving federal law dealt with how state law comported with the Federal Constitution. 55

The Fourteenth Amendment changed the structure of the early republic and gave the federal government broader power to review state laws. 56 Consequently, the federal judiciary began to strike down state laws under the Due Process and Equal Protection Clauses of the Fourteenth

---

49. Id.
50. Id.
51. See supra Part II.
52. The Supreme Court did, however, have to wrestle with issues of how the law of nature affected the powers of the new Constitution, especially in Marbury v. Madison. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). For a detailed analysis, see See Tuomala, supra note 26.
53. U.S. CONST. amend. X.
54. Id. This flows logically out of the Tenth Amendment. If all the other rights, which are vested by the law of nature, are reserved to the people or the states, then the people or the states would be responsible for deciding law of nature issues, not the federal government.
55. See, e.g., Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851) (declaring that state and federal governments have concurrent power to regulate interstate commerce); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (discussing the difference between federal power to regulate interstate commerce and state police powers that incidentally affect interstate commerce); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (discussing the nature and power of the Commerce Clause and how it relates to state actions).
56. U.S. CONST. amend. XIV.
Amendment. The strict scrutiny, intermediate scrutiny, and rational basis tests under the Fourteenth Amendment gave the federal judiciary the opportunity to consider what limits were placed on state laws that were not expressly prohibited to the states by the Constitution. The question, then, was this: what standard would the Court use to determine what limits were placed on state laws? In other words, what standard would the Court use to determine whether the state’s interests were legitimate?

57. See, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (striking down various laws requiring segregated education under the Equal Protection Clause); Palko v. Connecticut, 302 U.S. 319, 326 (1937) (holding that the Due Process Clause has absorbed certain rights under the belief that “neither liberty nor justice would exist if they were sacrificed”); Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (ruling that the Takings Clause of the Fifth Amendment was applicable to the States via the Fourteenth Amendment’s Due Process Clause).

58. Strict scrutiny is triggered when a government action is presumptively invalid (usually when a fundamental right is being abridged) and requires the government interest to be compelling and the means narrowly tailored in order to survive. See Massey, supra note 1, at 46. For a discussion of fundamental rights, see Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (“[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed[,]’” (citations omitted).

59. Intermediate scrutiny is triggered “when the government action comes with some taint of presumptive invalidity but not quite enough to invoke strict scrutiny.” Massey, supra note 1, at 47.

60. Romer v. Evans, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”).

61. Cf. supra note 53.

62. One scholar attempted to define the standard for determining whether something was a legitimate state interest by saying that a purported interest is legitimate if it is “within the granted powers of the government in question and not violative of some constitutional restraint on the exercise of those powers[.]” Massey, supra note 1. There are two problems with this view. First, the requirement that the end be legitimate first appeared in Chief Justice Marshall’s opinion in M’Cullough (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”) M’Cullough v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). If “legitimate” meant “within the granted powers of the government,” then Chief Justice Marshall’s next phrase “let it be within the scope of the constitution” would be redundant. The standard that Chief Justice Marshall was referring to was the law of nature. See Tuomala, supra note 26, at 305-07 (arguing that Chief Justice Marshall’s jurisprudence was based on the Declaration of Independence, which was based on the law of nature). Second, the Court already uses extraconstitutional standards in reviewing state actions under the Fourteenth Amendment.
C. The Demise of Using the Law of Nature for Determining the Legitimacy of State Interests

According to Coke, Blackstone, the Founders, and Justice Story, the law of nature, which was the basis for determining whether the state’s interests were legitimate, was accessible to man by three means: observation of creation through reason, the Scriptures, and the conscience.\(^\text{63}\)

In *Erie Railroad Company v. Tompkins*, the Supreme Court barred observation of creation through reason as a means of assessing the legitimacy of the state’s interests.\(^\text{64}\) The issue in *Erie* was whether federal courts should apply state supreme court decisions or “general principles of law,” which had been called “federal common law,” in federal diversity cases.\(^\text{65}\) Prior to *Erie*, Justice Story’s analysis from *Swift v. Tyson*\(^\text{66}\) was controlling.\(^\text{67}\) In *Swift*, Justice Story held that there were general principles of law that the courts were bound to respect.\(^\text{68}\) Nevertheless, *Erie* overruled *Swift*\(^\text{69}\) and replaced the general principles of law, or those law-of-nature

---

that are not derived from the plain text of the Fourteenth Amendment itself. See, e.g., Palko v. Connecticut, 302 U.S. 319, 326 (1937) (holding that the Due Process Clause has absorbed certain rights under the belief that “neither liberty nor justice would exist if they were sacrificed”). This author’s view is that the Fourteenth Amendment’s Due Process and Equal Protection Clauses were intended to place some law-of-nature limitations on the states. See Kurt T. Lash, *The Origins of the Privileges and Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 346-47 (2011) (discussing the views of John Bingham and his fellow Republicans); David Smolin, *Equal Protection*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 401 (Edwin Meese III et al. eds., 2005) (discussing the link between the Equal Protection Clause and the Declaration of Independence). Thus, whether the Court uses its modern-day Due Process analysis or follows the original intent by using the Privileges and Immunities Clause, the Court still faces the problem of needing to use an extraconstitutional source (or rather preconstitutional source) to review state laws in certain situations.

63. See supra Part II.A-B.

64. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938). *Erie* expressly rejected the proposition that there was any “transcendental body of law outside of any particular State[,]” *Id.* at 79. According to the *Erie* Court, “[t]he authority and only authority is the State[,]” *Id.* One commentator observed that by rejecting *Swift*, the Court broke with the Anglo-American tradition “dating back at least to Bracton,” making “a radical declaration that law does not pertain primarily to reason, but rather to will.” Tuomala, supra note 26, at 324.


68. *Swift*, 41 U.S. at 17.

69. *Erie*, 304 U.S. at 77-78.
principles accessible by reason, with judges' opinions. This was essentially a rejection of what the Declaration called self-evident truths, which was a major blow to the nation's jurisprudence—moving away from using transcendent law and towards using legal positivism to determine what the state can do.

Shortly after *Erie*, the Court developed a doctrine that separated religion from politics, which would ultimately preclude using the Scriptures to determine the legitimacy of government interests. This began with *Everson v. Board of Education of Ewing Township*, where the Court held that the First Amendment's Establishment Clause erected a wall of separation between church and state. Nevertheless, the effect of *Everson* and its progeny has not been to separate the *institutions* of church and state, but rather to separate religion from politics. While no case since *Everson* has addressed using the Scriptures as a legal standard specifically, if a teacher-led prayer in a public school violates the Establishment Clause, then surely a judge using a Bible to determine a legal standard would as well.

---

70. *Id.* at 78-79.
73. *Id.* at 18.
76. Interestingly, Justice Scalia used a Bible verse to support a legal argument in *California v. Hodari D.* In *Hodari*, a group of teenagers fled when a police car approached them, and the police officers pursued. *California v. Hodari D.*, 499 U.S. 621, 622-23 (1991). California conceded that the officers did not have reasonable suspicion to justify stopping the suspects. *Id.* at 624 n.1. Justice Scalia argued, "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See *Proverbs* 28:1 ('The wicked flee when no man pursueth')." *Id.* Justice Scalia then noted that the Court did not decide this point, but relied on California's concession. *Id.* It would be interesting to see if Justice Scalia's verse would withstand scrutiny under the *Everson* doctrine if it were used to decide a point in a case.
D. Two Down, One to Go—The Attack on the Conscience

Since courts could no longer use reason or Scripture to assess the law of nature, there remained only one means of knowing the law of nature and determining the legitimacy of the state's interests: the conscience. The groundwork for the attack on the conscience began in Griswold v. Connecticut, which established the constitutional right to privacy. Griswold held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." While Griswold held only that the right to privacy protected the sexual conduct of married couples, the effect of Griswold established the idea that one is free to do whatever he pleases as long as he does not harm anyone else. Justice O'Connor explained this position in Planned Parenthood of Southeastern Pennsylvania v. Casey, stating, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." This rationale set privacy jurisprudence on an inevitable collision course with conscience-based jurisprudence.

The first clash of the two values occurred in Bowers v. Hardwick. In Bowers, two men were convicted under a Georgia statute prohibiting sodomy. The court of appeals found that the Georgia statute violated the defendants' fundamental rights, drawing on Griswold. The Supreme Court

---

78. Id. at 484 (citations omitted).
79. Id. at 485-86.
82. One could certainly argue that Roe v. Wade was the first major clash of privacy jurisprudence and conscience jurisprudence. However, the rationale in Roe did not focus on attacking morality but rather on balancing the privacy of the mother against the government interests in protecting the mother's health and protecting the life of the child. Roe v. Wade, 410 U.S. 113, 153-54 (1973). While Roe certainly affected conscience-based jurisprudence, the Court did not address any moral arguments in that opinion. It was not until Bowers that the legitimacy of protecting morality was seriously challenged, and thus this Comment treats Bowers as the first clash of conscience-based jurisprudence and privacy jurisprudence.
84. Id. at 187-88.
85. Id. at 189.
disagreed. In a 5-4 decision, the Court rejected the defendants’ arguments after conducting a fundamental rights analysis. The defendants, however, claimed that there was not a rational basis for upholding the law merely because Georgia’s electorate thought that sodomy was immoral. In response, Justice White wrote, “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.”

Chief Justice Burger concurred, citing the Judeo-Christian moral and ethical standards as the standard for condemning this particular act. Justice Stevens dissented, arguing “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 . . . .” In support of his proposition, Justice Stevens wrote, “The essential ‘liberty’ that animated the development of the law in cases like Griswold . . . surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.” Although Justice Stevens lost the battle in Bowers, he eventually won the war. For a time, Bowers held that upholding a law based on morality was a legitimate function of the state. At that point, the Court still partially recognized the law of nature as the basis for evaluating what a state can do, and consequently, for determining whether a purported state interest was legitimate.

The issue of conscience-based legislation presented itself to the Court again seventeen years later in a 2003 case, Lawrence v. Texas. In Lawrence, two men challenged a Texas statute that prohibited same-sex sodomy as unconstitutional under the Due Process and Equal Protection Clauses of the

86. Id. at 196.
87. Id. at 190-194 (showing that sodomy was not deeply rooted in our nation’s traditions).
88. Id. at 196.
89. Id.
90. Id. at 196 (Burger, C.J., concurring).
91. Id.
92. Id. at 216 (Stevens, J., dissenting).
93. Id. at 218.
94. See infra p.16.
95. Bowers, 478 U.S. at 196.
Fourteenth Amendment. The Court reconsidered *Bowers* and overturned it. Justice Kennedy, writing for the Court, held that same-sex sodomy was not a fundamental right. After this, however, Justice Kennedy addressed the moral issue by criticizing *Bowers*. He wrote:

> It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”

Justice Kennedy concluded by saying that the rationale of *Bowers* did not withstand careful analysis; rather, Justice Stevens's analysis in *Bowers* should have been controlling. Thus, the Court adopted Justice Stevens's analysis and overruled *Bowers*. Justice O'Connor concurred in the judgment, stating, “Moral disapproval of a group cannot be a legitimate government interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”

---

97. Id. at 563.
98. Id. at 578.
99. Id. at 566-67 (arguing that the issue in *Bowers* was not whether there was a fundamental right to engage in sodomy).
100. Id. at 571 (citations omitted).
102. *Lawrence*, 539 U.S. at 578.
103. Id.
104. Id. at 583 (O'Connor, J., concurring) (citations omitted). Thus, Justice O'Connor's concurrence was based on Equal Protection grounds, while Justice Kennedy's opinion was based on Due Process grounds.
In his dissent, Justice Scalia observed that the Court's standard of review was ambiguous, but that it most closely resembled a rational basis review. Under that standard of review, the Court must uphold the law if it is rationally related to a legitimate state interest. Because prohibiting same-sex sodomy is rationally related to the objective of upholding morality, and because the Court struck down the statute, Justice Scalia concluded that Lawrence removed morality from the category of legitimate state interests.

III. PROBLEM: THE ONLY STANDARD REMAINING FOR DETERMINING THE LEGITIMACY OF THE STATE'S INTERESTS IS JUDICIAL WILL

If Justice Scalia is correct, then Lawrence represents the final nail in the coffin for the law of nature. Since the law of nature was the standard to assess whether something was a legitimate state interest, then Lawrence presents the significant problem of determining how legitimate state interests are identified. Furthermore, who would decide whether something is a legitimate state interest? In a post-Lawrence world, one answer is that judges are able to read their own theories of government into a rational basis review, and whatever they say will be the new standard for determining what governments can and cannot do.

Fortunately, the federal circuit courts have interpreted Lawrence narrowly until this point. In 2010, however, the Northern District of California interpreted Lawrence much more broadly by declaring that morality is not a legitimate state interest and by redefining legitimate state interests according to the judge's own legal theory. If more courts interpret Lawrence this way, then the courts will open the door to allowing new legal theories to define what government can and cannot do.

105. Id. at 594 (Scalia, J., dissenting).
106. See MASSEY, supra note 1, at 46.
107. Lawrence, 539 U.S. at 599 (Scalia, J., dissenting) ("This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.").
108. See infra Part III.A.
109. See infra Part III.B.
110. See infra Part III.C.
A. Federal Circuit Courts Interpreting Lawrence

The federal circuit courts have interpreted Lawrence narrowly. The courts unanimously agree that Lawrence protects consensual, adult, homosexual intercourse. Nevertheless, the courts have had difficulty determining what standard of review Lawrence demands and what rule comes out of the case.

The First Circuit in Cook v. Gates concluded that Lawrence applied a heightened level of review between rational basis and intermediate scrutiny. The Cook Court interpreted Lawrence as holding that certain private sex within the home is a liberty interest. The First Circuit made clear, however, that the Supreme Court did not remove morality from the category of legitimate state interests but made a narrow holding regarding this protected liberty interest. This form of intermediate scrutiny was essentially a balancing test—balancing public morals against government intrusion.

The Ninth Circuit in Witt v. Department of the Air Force concluded that Lawrence applied a heightened scrutiny test. Interestingly, the Ninth Circuit suggested that Lawrence was intentionally silent about the level of scrutiny the Court applied. Therefore, the Ninth Circuit analyzed

111. In explaining Lawrence, some of the courts distinguished Lawrence from the similar moral-based statutes by holding that Lawrence only applied to adult homosexual conduct instead of discussing how Lawrence affected morals-based statutes. United States v. Clark, 582 F.3d 607, 613-15 (5th Cir. 2009) (distinguishing consensual homosexual activity from importing immigrants for “immoral purposes”); Muth v. Frank, 412 F.3d 808, 817-18 (7th Cir. 2005) (distinguishing homosexual sodomy from incest but establishing that Lawrence did not create any fundamental right); Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 868 n.3 (8th Cir. 2006) (distinguishing Lawrence’s holding under the Due Process Clause from the plaintiffs’ claim that denying homosexuals marriage violated the Equal Protection Clause).

112. See, e.g., Witt v. Dep’t of the Air Force, 527 F.3d 806, 814 (9th Cir. 2008) (suggesting that the Lawrence Court may have been intentionally ambiguous regarding what test should apply).

113. Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008).

114. Id. at 53.

115. Id. (“[Lawrence] can only be squared with the Supreme Court’s acknowledgment of morality as a rational basis by concluding that a protected liberty interest was at stake, and therefore a rational basis for the law was not sufficient.”).

116. Id. at 56.

117. Witt, 527 F.3d at 816.

118. Id. at 814.
Lawrence “by considering what the Court actually did rather than by dissecting isolated pieces of the text.” Nevertheless, the Ninth Circuit distinguished Lawrence from this case by noting that protecting consensual adult sodomy within the home was different than protecting it in the military, because the government had a stronger interest in regulating conduct in the military. Witt was the Ninth Circuit’s case that interpreted Lawrence until the Ninth Circuit decided Perry v. Brown, which is discussed infra Part III.B.

Finally, the Eleventh Circuit concluded in Lofton v. Secretary of the Department of Children and Family Services that Lawrence applied a rational basis test. This court found Lawrence’s “legitimate state interest” language controlling and also cited Justice Scalia’s dissent in support. Furthermore, the court found that Lawrence’s holding was limited to “private consensual homosexual conduct.” The court made clear that the state has a “substantial government interest in protecting order and morality.”

Thus, the courts that have attempted to explain Lawrence have grappled with whether Lawrence requires strict scrutiny, intermediate scrutiny, rational basis review, or something else altogether. Though they were not in full agreement, the federal circuit courts had this in common: they acknowledged that Lawrence protected adult, consensual homosexual sodomy, and none of them said that morality, under Lawrence, is not a legitimate state interest. Therefore, they interpreted Lawrence narrowly.

119. Id. at 816.
120. Id. at 821.
121. Lofton v. Sec’y of the Dep’t of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004).
122. Id. at 817. It is also worth noting that this court held that Lawrence did not establish a fundamental right to sexual privacy for two reasons: it lacked any inquiry regarding whether the asserted right was deeply rooted in our nation’s traditions, and instead of a careful description that typically accompanies fundamental liberty analysis, it provided only a “sweeping generality” regarding the asserted right. Id. at 816. The court considered whether Lawrence created a fundamental right and demanded strict scrutiny.
123. Id. at 815.
124. Id. at 819 n.17 (citations omitted).
125. Interestingly, Lofton noted that there are certain “unprovable assumptions” that can “nevertheless provide a legitimate basis for legislative action.” Id at 819-20 n.17 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 62-63 (1973)). This quote from the Supreme Court is evidence that judges must derive their standard for reviewing legitimate state interests from somewhere. In 1973, Erie and Everson were already grounded in case law, meaning that an unprovable assumption could not be legitimately proved either through
As demonstrated above, however, *Lawrence* has the capacity to be interpreted much more broadly, to the point where morality is not a legitimate state interest, and the presiding judge is free to decide whether something is a legitimate state interest. Indeed, in 2010, the Northern District of California interpreted *Lawrence* exactly that way.


In 2010, Chief Judge Vaughn Walker of the Federal District Court for the Northern District of California declared in *Perry v. Schwarzenegger* that a state constitutional amendment defining marriage as one man and one woman could not survive a rational basis test. In November 2008, California voters passed a state constitutional amendment known as Proposition 8, which defined marriage as between one man and one woman. In May 2009, two homosexual couples filed suit in federal court, claiming that Proposition 8 violated the Fourteenth Amendment of the United States Constitution. Specifically, the plaintiffs claimed that Proposition 8 violated their fundamental right to marry the person of one's choice under the Due Process Clause. Furthermore, the plaintiffs claimed that Proposition 8 violated their rights under the Equal Protection Clause because it discriminated against homosexuals. Chief Judge Walker agreed on both issues.

In addressing the due process issue, Chief Judge Walker found that there was a fundamental right to marry under the Due Process Clause.
Typically, the abridgement of a fundamental right requires a strict scrutiny review. Nevertheless, Chief Judge Walker decided to give Proposition 8 a rational basis examination. Under a rational basis examination, a statute survives a constitutional challenge if it is rationally related to a legitimate state interest. Chief Judge Walker, however, did not think that protecting traditional marriage was a legitimate state interest. In addressing this issue, the judge wrote:

Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest. One example of a legitimate state interest in not issuing marriage licenses to a particular group might be a scarcity of marriage licenses or county officials to issue them. But marriage licenses in California are not a limited commodity, and the existence of 18,000 same-sex married couples in California shows that the state has the resources to allow both same-sex and opposite-sex couples to wed.

Interestingly, Chief Judge Walker simply assumed that excluding same-sex couples from marriage was not a legitimate state interest, but managing limited commodities was. Nevertheless, the judge did not explain why one goal was legitimate and the other was not. One may reasonably wonder, then, how he came to his conclusion.

Chief Judge Walker is a law and economics theorist. Law and economics theorists believe that the law should do what makes the most

---

134. Id. at 994.
135. Id. at 997. Chief Judge Walker had also found homosexuals to be a suspect class under the Equal Protection Clause. See id. at 996-97. Typically, if either a fundamental right is being abridged or a suspect class is being targeted, strict scrutiny is invoked, which the court admitted. Id. at 994, 997. According to the judge, both violations were present here. Id. It is very odd that he then would engage in a rational basis review.
137. Perry, 704 F. Supp. 2d at 997.
138. Id.
139. Id.
economic sense. Because Chief Judge Walker was operating within this framework, it is understandable that he would conclude that courts should focus on commodities when considering government involvement with marriage. Law and economics theory, however, is not—and never has been—the standard for determining the legitimacy of state interests. The law of nature was. But since Lawrence closed the door to the law of nature, the judge was free to read his own theory of legitimate state interests into the rational basis review. Specifically regarding morality, Chief Judge Walker took the broader interpretation of Lawrence. At the end of his opinion, Chief Judge Walker analogized Perry with Lawrence, citing morality as the justification for the laws in both cases. Considering whether morality could constitute a legitimate state interest, the judge quoted Lawrence, saying, "'[M]oral disapproval, without any other asserted state interest,' has never been a rational basis for legislation."

The Ninth Circuit recently affirmed Perry on other, narrower grounds, using a different equal protection argument than the one raised at trial. The court, however, expressly declined to answer the due process and equal protection arguments that Chief Judge Walker raised in his opinion. Since the appellate court did not disavow Chief Judge Walker’s due process and equal protection arguments from the district court, Chief Judge Walker’s analysis still serves as a valid example of how a judge could take a broader view of Lawrence and judge the legitimacy of the state’s interests by his own theory—or will.

141. See, e.g., ANDREW ALTMAN, ARGUING ABOUT LAW 171 (2d ed. 2001) ("The evaluative thesis of law and economics is ... that economic efficiency provides a criterion for evaluating the law: other things being equal, inefficient legal rules should be replaced by efficient ones, and efficient ones should be maintained.").
142. See supra Part II.
143. See supra Part II.
144. Perry, 704 F. Supp. 2d at 1002.
145. Id. (quoting Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O’Connor, J., concurring)). It is worth noting that Justice O’Connor’s comment was in the context of disapproving of a group of people under an Equal Protection claim. Lawrence, 539 U.S. at 582 (O’Connor, J., concurring). Ironically, Justice O’Connor assumed that protecting traditional marriage was a legitimate state interest in that same concurrence. Id. at 585.
147. Id. at *12, *17.
148. It appears that the Ninth Circuit interpreted Lawrence broadly in Perry v. Brown, thus departing from its narrow Lawrence analysis in Witt, discussed supra Part III.A. Citing
C. The Future of Legitimate State Interests

Although the federal circuit courts have, to this point, interpreted Lawrence narrowly, Chief Judge Walker capitalized on the opportunity that Lawrence presented to push morality—and any law of nature jurisprudence—out of the legitimate state interest category. Additionally, he filled the gap with his own idea of what a legitimate state interest should be. If the courts adjust the standard for legitimate state interests, then the government will have permission to address issues that were formerly protected; conversely, issues the government could formerly address will no longer be considered legitimate state interests. The legitimacy of state interests will change depending on which jurisprudential theory is applied.

In Perry, Chief Judge Walker hints at how a law and economics paradigm would affect the legitimate state interest standard. Under a law and economics model, efficiency is the chief virtue for determining how the law should operate. The problem is that an efficiency standard has the ability to reduce the analysis to some kind of utilitarian calculus, which can destroy the rights of the minority. Furthermore, as Perry demonstrates, a law and economics standard has the potential to disregard what law of

Justice O'Connor's concurrence in Lawrence, the Ninth Circuit said, "[M]oral disapproval of a group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." Id. at *27 (quoting Lawrence, 539 U.S. at 582) (O'Connor, J., concurring in judgment)). It appears then that the Ninth Circuit interpreted Lawrence to mean that protecting morality is not a legitimate state interest when disapproving of a group, which is a broader interpretation of Lawrence than the Ninth Circuit's analysis in Witt, discussed supra Part III.A, but a narrower interpretation than Chief Judge Walker's analysis at the district court, which held that morality alone is not a legitimate state interest at all. Perry, 704 F. Supp. 2d at 1002. If this is true, then the Ninth Circuit's new line between the legitimate state interest of protecting morality and the illegitimate interest of moral disapproval of a group is not very clear. The lack of clarity is shown by both the district court and the Ninth Circuit citing to Justice O'Connor's concurrence in Lawrence to justify striking down a marriage law, while Justice O'Connor's concurrence itself stated that moral disapproval of a group is not a legitimate state interest but preserving traditional marriage is a legitimate state interest. Lawrence, 539 U.S. at 582, 585 (O'Connor, J., concurring in judgment).

149. See supra Part III.B.
150. See supra Part III.B.
151. See supra Part III.B. For an excellent discussion of law and economics theory, see ALTMAN, supra note 140, at 170-97.
152. ALTMAN, supra note 140, at 171.
153. Id. at 173.
nature theorists traditionally regarded as absolute values—such as the sanctity of marriage.

Another contender for the legitimate state interest standard is social constructionism, also referred to as postmodernism. 154 Professor Steven Gey summarizes social constructionism—and its philosophy of government—in this way:

Everyone in society is “constructed” by his or her society; antisocial individual behavior will occur as a direct result of the socialization that an individual experiences in his or her everyday life; such behavior cannot effectively be controlled solely through the application of disincentives or postbehavior punishments for illegal action; therefore, factors contributing to individual socialization must be subject to governmental control in order for the government adequately to protect every citizen’s full participation in the society’s social and political life. 155

Consequently, if the government takes action to prevent negative socialization, social constructionists consider that interest to be legitimate. Taken to the extreme, this view would legitimate government actions that have traditionally been prohibited by the First Amendment’s guarantee of free speech. 156

Whatever the reigning paradigm, the problem is the same. Prior to Lawrence, the law of nature was the standard for determining what constituted a legitimate state interest. Post-Lawrence, however, judges conducting a rational basis review have no guidance in determining whether something is a legitimate state interest. If a judge cannot look to the Scriptures, reason, or the conscience to determine what a legitimate state interest is, then ultimately the standard will be whatever seems right to the judge.


Lawrence creates a significant problem that demands a solution. Allowing judges to do whatever is right in their own eyes is incompatible

---

155. Id. at 198.
156. Id. at 194-95.
with the rule of law, since a republic, by definition, is "an Empire of Laws, and not of men." Therefore, there is only one solution: the law of nature must again be recognized as the standard for determining whether something is a legitimate state interest—notwithstanding any case law to the contrary.

A. Restoring the Law of Nature as the Standard for Determining the Legitimacy of State Interests

As established above, the law of nature can be known in three ways: observation of creation through reason, the conscience, and the Scriptures. Restoring the law of nature as the standard for determining legitimate state interests should begin by reversing Lawrence, which would allow the law of nature to be understood through the conscience. Reversing Lawrence would be the easiest way to begin restoring the law of nature standard because not much case law has developed from Lawrence, whereas substantial case law has developed from Erie and Everson. Reversing Lawrence would restore a Bowers analysis of conscience-based laws, meaning that protecting morality would be a legitimate state interest.

One may object here, asking whose conscience is being used to evaluate the law of nature: the judge's or the people's? Since the traditional view holds that the law of nature is infused by God into the heart of man, and since both judges and the people are man, the answer is both. The law of nature itself is the standard, not the law of nature as evaluated by the judge or the law of nature as evaluated by the people. Since it is vested in both the people and the judges, it can be used by either to evaluate whether

158. See supra Part II.A.
159. See supra Part II.D.
160. Hanna v. Plumer, 380 U.S. 460, 468 (1965) (holding that a federal district court must apply state law only when doing so likely results in forum-shopping based upon likelihood of different result and the balancing of the interests of administration of federal and state laws favors the state); Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding that, under Everson, a teacher-led prayer in a public school violates the Establishment Clause); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that, under Erie, federal district courts must apply the conflict of law rules of the state where the district court is sitting).
161. See supra Part II.D.
162. See supra Part II.A.
something is a legitimate state interest, the people in passing laws and judges in reviewing them.

One may object again because of the potential for abuse. The people, in the name of the conscience, may pass a law that abridges the rights of another simply because they do not like what the other is doing. This kind of legislation would be majoritarianism. Likewise, a judge, in the name of the conscience, may declare a legitimate state interest to be illegitimate, simply because he does not like it. That kind of judicial review would be judicial activism. In both cases, a potential for abuse exists in assessing the law of nature by means of the conscience alone. The question then is whether there is another means of assessing the law of nature to check the misuse of conscience-based laws.

Another means of assessing the law of nature, which can serve as a check on the misuse of conscience-based laws, is observing creation through reason. The Founders assessed the law of nature this way in describing the self-evident truths stated in the Declaration of Independence, and the early American courts assessed the law of nature this way in applying general principles of law to federal diversity cases. Reinstating this method of assessing the law of nature may require reversing Erie. One may object again at the potential for abuse. If the people and a judge read the law of nature differently, then who is right? As Blackstone observed,

And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other

---

163. See supra Part II.A-B.

164. See supra Part II.B. Note this does not mean that the Founders adopted the deistic natural law view that man comes to these conclusions by reason alone. The term “law of nature” used in the Declaration reflects the Anglo-American tradition as outlined in Part II, supra, whereas the term “natural law” reflects the view that man can reason rightly without Scripture. Cf. Tuomala, supra note 25, at 315 n.95. Since the Declaration recognizes the law of nature first before discussing self-evident truths, the reference to self-evident truths is put in perspective and is not a reflection of the deistic natural law tradition.

165. See supra Part II.C.

166. Cf. supra Part II.C. One may object that reversing Erie would present the problem of having two governing laws within one state and that the lack of uniformity would lead to forum shopping. This is a problem that cannot be solved within the scope of this Comment. For a discussion of that issue, see Tuomala, supra note 25, at 314-25. Rather, this Comment highlights the problems Erie presents for determining whether something is a legitimate state interest.
guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.\footnote{1}{William Blackstone, Commentaries *41.}

The question then is whether there is another way to assess the law of nature.

The third and epistemologically most superior way to assess the law of nature is through the Scriptures.\footnote{2}{See supra Part II.A-B.} Thus, if both the people in passing laws and judges in evaluating laws are striving to stay within the scope of legitimate state interests, then they ought to know the Scriptures.\footnote{3}{One may object that allowing judges to use the Scriptures for determining the legitimacy of state interests would mean that judges get to decide what the Scriptures mean. But that is not true. God is the final authority on what the Scriptures mean, and each of us is responsible for following them as they pertain to our respective spheres of authority. Another objection might be that judges have the potential for misinterpreting what Scriptures say. While that possibility exists, it also exists for everything else. Arguing that we should not have Scriptures because we might misinterpret them is like arguing that we should not have a written Constitution because we might misinterpret it; it is an invalid objection. Furthermore, the Scriptures are a transcendent standard. While judges may possibly misinterpret the Scriptures, the standard still exists at a level where the judges cannot alter its meaning. Additionally, since the Scriptures are accessible by the average person, a gross misinterpretation of Scripture can be discovered by a knowledgeable public, thus limiting the potential for abuse.}

One may object that using Scripture in making and evaluating law violates the wall of separation of church and state. The way that the wall of separation has been interpreted since Everson, however, is not the way that the First Amendment was originally meant to be understood. See Dreisbach, supra note 73. To the extent that the wall of separation doctrine is inconsistent with the original meaning of the Constitution, it should be overruled.

B. A Test for Determining Whether Something Is a Legitimate State Interest

The rational basis test requires that a law needs to be rationally related to a legitimate state interest to be upheld.\footnote{4}{Romer v. Evans, 517 U.S. 620, 631 (1996).} While the judiciary has a test to examine whether the means of achieving a legitimate state end is lawful—i.e., whether the statute in question can accomplish a legitimate state goal—the judiciary currently does not have a test to examine whether the end...
itself—i.e. the government interest—is lawful. A test for determining whether a purported state interest is legitimate must now be considered.

Typically, if a law neither burdens a fundamental right nor targets a suspect class, the law will be upheld so long as it is rationally related to a legitimate state interest.171 This standard of review is incredibly deferential, and the burden is on the challenger to prove that the statute is unconstitutional.172 Because the rational basis test gives such a strong presumption of validity to the law in question, it is logical to assume that the end—the state interest being challenged—should have a strong presumption of validity as well. Therefore, the court should place the burden of proving that a state interest that has traditionally been considered legitimate is illegitimate on the challenger.

The court should then analyze whether the government interest is legitimate. First, the court should determine whether the purported government interest is legitimate under the law of nature. If the law of nature permits a government to perform the action in question, then the analysis should continue; if not, then the statute should be struck down because its objective is illegitimate.

Next, just because the law of nature permits a government to take a certain action does not mean that the people have allowed their government to take that action. The Declaration of Independence states that governments derive their just powers from the consent of the governed.173 The implication, then, is that if the people have not surrendered a legitimate power to their government, then the government may not exercise that power. Thus, the next question is whether the relevant constitution permits the government to take that action.

If the statute in question is a state law, then the court must ask whether the state constitution allows the state government to take that action. If it does not, then the statute must be struck down as having an illegitimate objective. If it does, then the court must proceed to ask whether the statute violates the Federal Constitution. If it does, then the statute must be struck down as having an illegitimate objective. If it does not, then the government objective is legitimate, and the statute should be struck down only if it is not rationally related to a legitimate state interest.

If the statute in question is a federal law, then the court must ask whether the Federal Constitution allows the government to take that action, i.e.,

171. Id.
172. MASSEY, supra note 1, at 46.
173. THE DECLARATION OF INDEPENDENCE para 2. (U.S. 1776).
whether the federal government is acting pursuant to an enumerated power. If it is not acting pursuant to an enumerated power, then the statute should be struck down as having an illegitimate objective.\footnote{174} If it is acting pursuant to an enumerated power, then the government objective is legitimate, and the statute should be struck down only if it is not rationally related to a legitimate state interest.

C. Examples

The following examples reconsider two Supreme Court cases in which the legitimacy of a purported state interest was in question. These examples walk through the test and examine whether the outcome of these cases would have been different.

1. Preventing Hippie Communes—United States Department of Agriculture v. Moreno

In \textit{United States Department of Agriculture v. Moreno}, the Court held that a federal law excluding from a food stamp program any household containing an individual who was not related to the other members of the household violated the equal protection component of the Fifth Amendment’s Due Process Clause.\footnote{175} In \textit{Moreno}, Congress enacted a food stamp program to “alleviate hunger and malnutrition among the more needy segments of our society,”\footnote{176} but eligibility to participate in the program was determined “on a household rather than an individual basis.”\footnote{177} The statute defined “household” to include “only groups of related individuals,”\footnote{178} which consequently excluded households of non-related individuals.\footnote{179}

Justice Brennan, writing for the Court, thought the statute was intended to prevent hippies from participating in the program.\footnote{180} Justice Brennan found this purported government interest to be illegitimate, writing, “[I]f
the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.\textsuperscript{181} The government argued that it had a legitimate interest in preventing fraud and that disbursing food stamps among traditional households would only discourage people from living together for the sole purpose of qualifying for the program.\textsuperscript{182} Justice Brennan determined that there was not a rational relationship between the traditional household requirement and the objective of preventing fraud.\textsuperscript{183} Justice Rehnquist, joined by Chief Justice Burger, dissented, arguing that neither the end of preventing fraud nor the means of using traditional family households were irrational when viewed “in the light most favorable to sustaining the limitation.”\textsuperscript{184}

The case presents two issues for analysis under the proposed test: (1) whether a bare desire to harm a politically unpopular group is a legitimate state interest, and (2) whether the connection between the governmental interest in preventing fraud and the statute was rational enough to sustain it.

First, reason certainly suggests that the government cannot harm a group merely because the group is unpopular. The Declaration of Independence, for instance, says that it is a self-evident truth that we, are all created equal and endowed by our Creator with certain inalienable rights.\textsuperscript{185} If all men are created equal, then it is illogical to treat one group as inferior just because it is different. Second, the conscience confirms that the government cannot harm a group merely for being different. Surely the Nazis’ persecution of the Jews, just for being Jews, shocks everyone’s conscience enough to show that harming a group merely because it is unpopular is wrong. Finally, the Scriptures make clear that a government cannot harm a person or people group without cause. Romans 13:1-7 makes clear that governments are established by God\textsuperscript{186} for the purposes of punishing those who do evil\textsuperscript{187} and praising those who do good.\textsuperscript{188} Since governments exist to punish evil, the

\begin{itemize}
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id. at 535.
\item \textsuperscript{183} Id. at 535-37.
\item \textsuperscript{184} Id. at 546 (Rehnquist, J., dissenting).
\item \textsuperscript{185} THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
\item \textsuperscript{186} Romans 13:2 (New American Standard)
\item \textsuperscript{187} Romans 13:3, 5.
\item \textsuperscript{188} Romans 13:3-4.
\end{itemize}
inference is that if there is no evil, or actus reus, then there is no punishment. Thus, the government has no legitimate interest in harming anyone if he or she has done no wrong.\textsuperscript{189} In conclusion, then, Justice Brennan’s assertion that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”\textsuperscript{190} is correct.\textsuperscript{191}

The second issue is whether, as Justice Rehnquist asserted, the connection between the government interest in preventing fraud and the law’s traditional household requirement was sufficient to survive a rational basis review.\textsuperscript{192} Under the rational basis review, the law in question is supposed to be viewed “in the light most favorable to sustaining the

\begin{itemize}
  \item \textsuperscript{189} See 2 Samuel 21:1 (New American Standard) (recording God’s act of punishing Israel’s government for harming an innocent minority group).
  \item \textsuperscript{190} U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
  \item \textsuperscript{191} Note, however, that Justice Brennan is correct only because he says that harming a group solely because it is not liked cannot be a legitimate state interest. While his statement is correct, he ignores the fact that hippie communes may have been detrimental to the public health because of their living conditions. The law presumes that protecting the public health is a valid exercise of a state’s police powers. The federalism issue aside, in this case, Justice Brennan may have misunderstood Congress’s end.
  \item \textsuperscript{192} As a preliminary matter, the law-of-nature analysis calls into question the validity of the government’s involvement in welfare programs. Arguably, providing for the needy is the end sought to be achieved. Nevertheless, the Scriptures say that the purpose of government is to punish evil and to praise good. Romans 13:1-7 (New American Standard). On the other hand, the Scriptures place the responsibility of providing for one on oneself first. See, e.g., 2 Thessalonians 3:10 (New American Standard) (“If anyone is not willing to work, then he is not to eat, either.”). For the truly needy, however, the Scriptures place the responsibility of providing first on the family and then on the church. See, e.g., James 1:27 (New American Standard) (“Pure and undefiled religion in the sight of our God and Father is this: to visit orphans and widows in their distress . . . .”); 1 Timothy 5:3-16 (New American Standard) (instructing family members to take care of the needy in their own family so that the church can assist those who have nobody to assist them). Furthermore, even if the end is legitimate under a law-of-nature analysis, the legitimacy of federal welfare programs also depends on a broad interpretation of the General Welfare Clause of Article 1, Section 8 of the United States Constitution. This author holds to the Madisonian view that the “General Welfare” refers only to the enumerated powers listed in Article 1, Section 8. See United States v. Butler, 297 U.S. 1, 65 (1936) (discussing the differences between the Madisonian and Hamiltonian views). Tackling this behemoth-sized issue requires a thorough and careful law-of-nature analysis and an equally thorough and careful analysis of the General Welfare Clause and perhaps the Commerce Clause. This author thinks that the analysis would ultimately show that the end is not a legitimate government interest, but suggests that the topic be explored thoroughly in another law review article.
\end{itemize}
limitation."\textsuperscript{193} Under this standard, the Court could have reasonably concluded that the traditional household "provides a guarantee which is not provided by households containing unrelated individuals that the household exists for some purpose other than to collect federal food stamps."\textsuperscript{194} Thus, the statute should have been upheld.

In conclusion, although the statute should have been upheld, Justice Brennan's conclusion that a bare desire to harm a politically unpopular group is not a legitimate state interest was correct.

2. Fostering Good Morals—\textit{City of Erie v. Pap's A.M.}

In \textit{City of Erie v. Pap's A.M.}, the Court upheld a city ordinance banning public nudity as applied to a nude, erotic dancing establishment.\textsuperscript{195} In \textit{Pap's}, the City of Erie enacted an ordinance that made it an offense to "knowingly or intentionally appear in public in a 'state of nudity'."\textsuperscript{196} The ordinance forced nude dancing establishments to require their dancers to wear certain minimal clothing.\textsuperscript{197} \textit{Pap's}, a nude dancing establishment, challenged the ordinance as unconstitutional under the First and Fourteenth Amendments.\textsuperscript{198}

A plurality of four, led by Justice O'Connor, upheld the ordinance.\textsuperscript{199} The Court found that nude dancing was expressive conduct and thus was entitled to some constitutional protection.\textsuperscript{200} Nevertheless, the Court also found that the ordinance was not aimed at the suppression of free expression, but rather at the secondary effects of such expression, and thus was a content-neutral regulation.\textsuperscript{201} Accordingly, the Court applied the \textit{O'Brien} test\textsuperscript{202} and upheld the ordinance.\textsuperscript{203} Justice Scalia, joined by Justice

\textsuperscript{193} Morena, 413 U.S. at 546 (Rehnquist, J., dissenting).

\textsuperscript{194} Id.


\textsuperscript{196} Id. at 283 (citations omitted).

\textsuperscript{197} Id. at 284.

\textsuperscript{198} See id.

\textsuperscript{199} Id. at 283.

\textsuperscript{200} Id. at 289.

\textsuperscript{201} Id.


[\textit{A} government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged
Thomas, concurred in the judgment, arguing that since the ordinance was "a general law regulating conduct and not specifically directed at expression, it [was] not subject to First Amendment scrutiny at all."204 Justice Scalia believed that the First Amendment is violated when "the government prohibits conduct precisely because of its communicative attributes."205 Thus, Justice Scalia concurred neither because nude dancing communicated anything at all,206 nor because of secondary effects,207 but because "[t]he traditional power of government to foster good morals . . . and the acceptability of the traditional judgment . . . that nude public dancing itself is immoral, have not been repealed by the First Amendment."208

Although he did not explicitly say so, it appears that Justice Scalia thought fostering good morals was a legitimate state interest, and because the First Amendment did not require a higher standard of scrutiny, the Court should have given the ordinance a rational basis review. The first issue, then, is whether fostering good morals is a legitimate state interest, and the second is whether the First Amendment requires a higher level of scrutiny in reviewing the ordinance.

First, reason suggests that fostering good morals certainly is a legitimate state interest. On this point, Blackstone and the Founders reasoned that since the world runs God's way and that virtue is to do things God's way, then being virtuous is the most conducive means to man's happiness, which is the objective of government.209 If this is true, then the government certainly has a legitimate interest in fostering good morals. Second, the conscience also suggests that fostering good morals is a legitimate government interest. Justice Scalia observed this point in his Pap's concurrence when he talked about "the traditional judgment . . . that nude public dancing itself is immoral."210 The phrase "traditional judgment"
shows that over time, the American people have held certain things to be immoral and have called upon their governments to act on those convictions. Thus, the conscience suggests that fostering good morals is a legitimate state interest. Finally, the Scriptures say that the purpose of government is to punish evil and to praise good. If this is true, then it follows that fostering good morals is a legitimate state interest. Therefore, after considering evidence from reason, the conscience, and the Scriptures, the conclusion is that fostering good morals is a legitimate state interest.

The second issue is whether the First Amendment requires a higher degree of scrutiny. The plurality in Pap's heard that nude dancing is expressive conduct although it falls "only within the outer ambit of the First Amendment's protection." Justice Scalia, however, saw a distinction between conduct that the government prohibits precisely because of its communicative attributes and conduct that the government prohibits because it is inherently immoral. The question then is whether the drafters of the First Amendment intended to make that distinction.

In his Commentaries on the Constitution, Justice Story took the position that the purpose behind the First Amendment was not to protect licentiousness. In his commentaries on the Free Speech and Free Press Clauses, Justice Story repeatedly referred to freedom of the press specifically, but the text indicates that he intended to give the same analysis to freedom of speech. Thus, the reader can assume that the same rationale that applies to freedom of the press applies also to freedom of speech. Regarding the purpose of the First Amendment, Justice Story said,

   For rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise from the same; for it is a minister of God to you for good. But if you do what is evil, be afraid; for it does not bear the sword for nothing; for it is a minister of God, an avenger who brings wrath on the one who practices evil.

Id.; 1 Peter 2:14 (New American Standard) ("[Governors are] sent by [God] for the punishment of evildoers and the praise of those who do right.").

212. Pap's, 529 U.S. at 289 (plurality opinion) (citations omitted).

213. Id. at 310 (Scalia, J., concurring).


215. See id. §§ 1874-85.

216. See id. § 1874 ("The next clause of the amendment respects the liberty of the press. 'Congress shall make no law abridging the freedom of speech, or of the press.'").
It is plain, then, that the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever . . . so always, that he does not injure any other person in his rights, person, property, or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government. It is neither more nor less, than an expansion of the great doctrine . . . that every man shall be at liberty to publish what is true, with good motives and for justifiable ends.\textsuperscript{217}

Thus, it appears that the First Amendment attempted to protect expression of opinions, but that expression must have been in pursuit of the truth, with good motives, and for justifiable ends. Justice Story's position appears to support Justice Scalia's position. If any doubt remains that the First Amendment does not protect immorality, Justice Story, quoting Blackstone, also said, "[T]o censure the licentiousness, is to maintain the liberty of the press."\textsuperscript{218} Since Blackstone, whom our Founders revered,\textsuperscript{219} held that licentiousness was not protected, and since Justice Story, an early expert on constitutional matters, held that licentiousness was not protected, the conclusion is that the First Amendment was not intended to protect licentiousness, including nude dancing.

In conclusion, Justice Scalia's beliefs that protecting morality is a legitimate state interest and that the First Amendment does not require heightened scrutiny in discouraging nude dancing\textsuperscript{220} were correct. Thus, the only question is whether there was a rational relationship between protecting morality and banning public nudity. Because public nudity subverts public morals,\textsuperscript{221} a rational relationship existed, and the Supreme Court should have upheld the ordinance.

D. Anticipatory Rebuttals

At this point, one may still have objections to the proposed solution. Three common objections may be: (1) that the law of nature analysis would

\textsuperscript{217} Id. (footnotes omitted).
\textsuperscript{218} Id. § 1878 (footnote omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *152-53).
\textsuperscript{219} See supra note 26.
\textsuperscript{221} See id.
allow a judge to disregard the Constitution whenever he feels like it; (2) that the United States is no longer a Christian nation and thus the proposed solution is unsuitable; and (3) that giving a judge the ability to assess the law of nature is too much power for an independent judiciary to possess.

First, the law of nature does not give a judge extra-constitutional authority to exercise his power over whatever issue he pleases. The key question is one of jurisdiction—what authority has been granted to this particular judge? As argued supra, the Founders presumed that sovereignty flowed from God to the people to the government.\textsuperscript{222} Thus, the law of nature placed the duty on the people to obey it,\textsuperscript{223} and the people vested authority in their government to enforce it.\textsuperscript{224} Because the federal government is a government of enumerated powers,\textsuperscript{225} any power that the Constitution does not grant to the federal government is reserved to the states or to the people.\textsuperscript{226} Therefore, the law of nature analysis is only relevant to the powers that have been delegated to the respective government.

For example, if abortion is murder and thus violates the law of nature,\textsuperscript{227} then a federal judge does not have jurisdiction over this issue merely because it violates the law of nature. If abortion is murder, then the act is a murder by a private individual. The law of nature places the burden on the government to protect life.\textsuperscript{228} But since the power to prevent private murders has not been granted to the federal government, the responsibility of protecting unborn life remains with the states.\textsuperscript{229} Walking into a federal

\textsuperscript{222} See supra Part II.B.

\textsuperscript{223} See supra Part II.A-B.

\textsuperscript{224} See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that governments derive their just powers from the consent of the governed).

\textsuperscript{225} See supra note 172.

\textsuperscript{226} U.S. CONST. amend. X.

\textsuperscript{227} See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that governments exist to secure unalienable rights—one of which is life).

\textsuperscript{228} Id.

\textsuperscript{229} One could argue that the Fourteenth Amendment grants the federal government the ability to protect life. Looking at the text of the Fourteenth Amendment, the Privileges and Immunities Clause applies only to citizens, and both the Privileges and Immunities Clause and the Due Process Clause apply when state governments, not private parties, cross constitutional lines. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause, however, forbids a state from denying equal protection of the laws to any person in its jurisdiction. Id. Thus, one could argue that since every person in a state is protected against murder except the unborn and since the unborn are persons, there is an equal protection violation;
court expecting to find a remedy for any violation of the law of nature is like walking into a tax court expecting to find a remedy for intentional infliction of emotional distress. In both cases, the court does not have jurisdiction to grant the remedy sought. Thus, the mere fact that the law of nature exists and must be examined does not give a judge a blank check to do whatever he pleases.

Second, one may object based on popular opinion, which states that the United States is no longer a Christian nation, and thus the proposed solution is unsuitable. First, the judiciary’s role is not to gauge popular opinion, but rather to interpret and apply the law, regardless of popular opinion. In fact, the Constitution established the judiciary to be a check against popular opinion in case the majority faction passed a law inconsistent with the Constitution. Thus, the popular opinion argument is invalid. But even if it were valid, the vast majority of Americans still consider themselves Christians, which makes it hard to believe that they would reject a notion of God-given law.

Finally, one may object and hold that the federal judiciary already has too much power and the proposed solution would grant unchecked judges the power to declare whether a purported state interest is legitimate, which is more power than the judiciary should possess. A time may come when the people agree and pass a constitutional amendment significantly limiting judicial power or when the Court decides to restrain itself from determining whether something is a legitimate state interest. But until then, the rational basis test remains the same, and the judiciary needs a test to determine whether a purported state interest is legitimate. If the standard for measuring legitimacy is not the law of nature, it will be something else—

Congress has authority to remedy this violation under section five of the Fourteenth Amendment. U.S. Const. amend. XIV, § 5.

230. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

231. The Federalist No. 78 (Alexander Hamilton).


233. See, e.g., Mark R. Levin, Men in Black: How The Supreme Court Is Destroying America 202 (Regnery Publ’g, Inc. 2005) (arguing that the judiciary has usurped too much power and calling for a constitutional amendment allowing Congress to reverse Supreme Court decisions).

234. See supra Part IV.B.
whether law and economics,\textsuperscript{235} social constructionism,\textsuperscript{236} civil libertarianism,\textsuperscript{237} or just whatever the judge feels like it should be. A republic that is an empire of laws and not of men\textsuperscript{238} demands something better—a lawful, just, and coherent standard. Since the law of nature is the standard that the Constitution presupposes,\textsuperscript{239} and since it is also true, it must serve as the standard that guides the judiciary in assessing the legitimacy of state interests.

V. CONCLUSION

The Supreme Court requires a law to be rationally related to a legitimate state interest in a rational basis review, but the Court has never discussed the standard for determining whether something is a legitimate state interest. The law of nature was that standard. The legal giants of English common law presupposed it. The Founding Fathers appealed to it in declaring that the actions of the Crown were illegitimate. They were so confident about this that they went to war against the most powerful empire in the world in hopes that the Author of the law of nature would vindicate their cause.\textsuperscript{240}

But recent Court decisions have betrayed the standard that our Founders presupposed. 	extit{Erie} rejected reason; 	extit{Everson} rejected revelation; 	extit{Lawrence} rejected conviction. The rejection of these three means of knowing the law of nature has now left judges without standards for determining whether something is a legitimate state interest. While disciplined judges may stay within the strict confines of precedent in attempting to construct some kind of standard, others—such as the judge in 	extit{Perry}—may take this as an opportunity to reshape the standard for determining whether something is a legitimate state interest in their own image. The power to decide the legitimacy of purported state interests is so important that it cannot be left to \textit{ipse dixit}.\textsuperscript{241} Therefore, a legal standard that settles the matter must be recognized. That standard is—and always has been—the law of nature.

\textsuperscript{235} See supra Part III.C.  
\textsuperscript{236} See supra Part III.C.  
\textsuperscript{237} See supra Part II.D.  
\textsuperscript{238} See ADAMS, supra note 155 and accompanying text.  
\textsuperscript{239} See supra Part II.A-B.  
\textsuperscript{240} "We, therefore, the Representatives of the united States of America, in General Congress, Assembled, [appeal] to the Supreme Judge of the world for the rectitude of our intentions . . ." THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).  
\textsuperscript{241} See supra note 16 (explaining \textit{ipse dixit}).
EDITORIAL BOARD

Editor-in-Chief
Mark A. Hicks

Managing Editor
Daniel J. Schmid

Student Development Editor
Phillip E. Marbury

Notes and Comments Editor
Jennifer L. Gregorin

Submissions Editor
Martin Wishnatsky

Business Manager
Brett M. Bloom

Articles and Book Reviews Editor
Jeremy D. Lemon

Symposium Editor
Timothy K. Boone

Marketing Director
Matthew J. Clark

SENIOR STAFF

Paul M. Brodersen
Amy D. Stier
Madilyn E. Liddil

Jennifer L. Cervantes
Ian M. Frame
Jennifer K. Reed

Kristal R. Dahlager
Anna L. Higgins
John R. Toy

JUNIOR STAFF

Kevin W. Fritz
Catherine H. Hecker
Erik Krueger

Dustin Gaines
Rick Hecker
Yasha Renner

Brian R. Giaquinto
Charity Katze
Jonathan Sater

FACULTY ADVISORS

Judge Paul Spinden
Professor Tory Lucas
Dean Joseph Wiegand
PUBLICATION. The Liberty University Law Review (ISSN 1932-0809) is published three times a year by the students of Liberty University School of Law. The Law Review is printed by Western Newspaper Publishing Co., Inc. Copyright © 2012 by the Liberty University Law Review.

SUBMISSIONS. The Liberty University Law Review invites the submission of articles, essays, and book reviews that exhibit a commitment to excellence and promote the Christian intellectual tradition by drawing upon legal, historical, philosophical, and theological sources. Manuscripts should be formatted in Microsoft Word and submitted to lawreviewsubmissions@liberty.edu. Footnotes should conform to The Bluebook: A Uniform System of Citation (19th ed. 2010). The Law Review retains the right to determine the final form of each article published.

SUBSCRIPTIONS. The subscription price is $35.00 per volume domestically, and $45.00 per volume for foreign subscribers. All subscriptions are for one year unless otherwise requested. Subscriptions are renewed automatically unless the subscriber gives timely notice of termination. Single issues are available for $15.00 each domestically, and $25.00 for foreign purchasers. Past issues are available from:

William S. Hein & Co., Inc.
1285 Main Street
Buffalo, NY 14209-1987
(800) 828-7571

CITATION. All references to materials included in the Liberty University Law Review conform to The Bluebook: A Uniform System of Citation (19th ed. 2010).

CORRESPONDENCE. The Liberty University Law Review invites letters in response to scholarship appearing in the Law Review within the last year. All correspondence should be addressed to:

Editor-in-Chief
Liberty University Law Review
Liberty University School of Law
1971 University Boulevard
Lynchburg, VA 24502

INTERNET ADDRESS. The Liberty University Law Review home page can be found at http://law.liberty.edu/lawreview.
LIBERTY UNIVERSITY SCHOOL OF LAW

ADMINISTRATION

The Late Jerry L. Falwell Sr., Th.G. ...................................... Founder, Chancellor, President
Jerry L. Falwell Jr., B.A., J.D. ............................................ Chancellor, President
Ronald S. Godwin, B.A., M.S., Ph.D. .... Senior Vice President for Academic Affairs, Provost
Neil A. Askew, B.S., M.S. ..................................................... Executive Vice President
Mathew D. Staver, B.A., M.A., J.D. ................................... Vice President, Dean, Professor of Law,
                    Director of the Liberty Center for Law and Policy
Rena M. Lindevaldsen, B.A., J.D. ........................................ Associate Dean for Academic Affairs,
                    Associate Director of the Liberty Center for Law and Policy,
                    Professor of Law
Joseph M. Wiegand, B.A., M.A., J.D., LL.M. .......................... Associate Dean for Internal Affairs
                    and Online Programs,
                    Adjunct Assistant Professor of Law
J. Matthew Barber, B.S., M.A., J.D. ...................................... Associate Dean for Career and Professional
                    Development,
                    Adjunct Assistant Professor of Law
Suzanne Caruso, B.S., M.B.A., J.D. ........................................ Associate Dean for External Affairs,
                    Assistant Field Instructor

FACULTY

Shawn D. Akers, B.A., M.A., J.D. ........................................ Adjunct Assistant Professor of Law,
                    Dean, Helms School of Government
D. Gregory Baker, B.A., J.D. .............................................. Adjunct Assistant Professor of Law
Pamela Bell, B.A., J.D. ...................................................... Director of Trial Advocacy,
                    Associate Professor of Law
Honorable J. Kenneth Blackwell, B.S., M.A. ...................... Visiting Professor of Law
Rodney D. Chrisman, B.B.A., J.D. ........................................ Associate Professor of Law
James Creekmore, B.A., J.D. .............................................. Adjunct Assistant Professor of Law
Joshua Dalrymple, B.S., J.D. ................................................ Adjunct Assistant Professor of Law
Cynthia N. Dunbar, B.A., J.D. .............................................. Assistant Professor of Law
David E. Gilbert, B.A., J.D. ................................................ Assistant Professor of Law
Joel D. Hesch, B.S., J.D. ...................................................... Associate Professor of Law
Phillip D. Kline, B.S., J.D. ................................................. Visiting Assistant Professor of Law
Ken Klukowski, B.B.A., J.D. .................................................. Research Fellow
Robert “Cham” Light, B.A., J.D. .......................................... Adjunct Assistant Professor of Law
Tory Lucas, B.A., J.D., LL.M. ................................................ Associate Professor of Law
F. Philip Manns, Jr., B.S., J.D. ............................................. Professor of Law
Joseph Martins, B.A., J.D. ................................................... Assistant Professor of Law
Barbara R. Mouly, B.A., M.M., J.D......................................... Visiting Assistant Professor of Law
Sameer Patel, B.A., J.D.................................................. Adjunct Assistant Professor of Law
Sara L. Pope, B.A., J.D.................................................. Adjunct Assistant Professor of Law
Judith Reisman, M.A., Ph.D........................................ Visiting Professor of Law
Stephen M. Rice, B.A., J.D............................................ Associate Professor of Law
Grant M. Rost, B.A., J.D............................................... Associate Lawyering Skills Instructor
Michael M. Sandez, B.A., J.D........................................ Assistant Professor of Law
Timothy Spaulding, B.S., J.D....................................... Adjunct Assistant Professor of Law
Judge Paul M. Spinden, B.S., M.A., J.D., LL.M............... Associate Professor of Law
Basyle J. Tchividjian, B.A., J.D..................................... Assistant Professor of Law
Sharon Breckenridge Thomas, B.A., J.D.......................... Visiting Associate Professor of Law
Scott E. Thompson, B.A., M.A., J.D......................... Director of the Center for Lawyering Skills, Professor of Law
Cynthia E. Tompkins, B.A., J.D........................................ Associate Professor of Law
Jeffrey C. Tuomala, B.S., J.D., LL.M......................... Professor of Law
Edna Udobong, LL.B., B.L., LL.M, LL.M........................ Visiting Assistant Professor of Law
John Weber, III, B.A., J.D........................................... Adjunct Assistant Professor of Law

LAW LIBRARY FACULTY

Anthony C. Brown Ikwueme, M.B.A., LL.B., LL.M., M.L.I.S... Director of Ehrhorn Law Library, Administrative Faculty
Diane S. Garber, B.S., M.L.S........................................... Head of Technical Services
Eric W. Kistler, B.A., M.L.I.S.... Head of Access, Technology Services/Electronic Resources
Julie A. Stuckey, B.S., M.L.S., J.D..................................... Reference Librarian