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CASE COMMENT

SUBSTANTIVE DUE PROCESS: SEX TOYS AFTER *LAWRENCE*

Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007)

Michael J. Hooi*

Appellants filed suit in the U.S. District Court for the Northern District of Alabama to enjoin the enforcement of an Alabama statute that prohibits the commercial distribution of sex toys.¹ Appellants claimed that the statute unconstitutionally burdened their rights to privacy and personal autonomy.² The district court upheld the statute,³ applying a previous holding of the Eleventh Circuit that the U.S. Constitution did not recognize a fundamental right to sexual privacy.⁴ The district court concluded that

* J.D. expected May 2008, University of Florida Levin College of Law. I'm very grateful to the folks at the Florida Law Review for the opportunity to publish and for helping to make this Comment publishable. This Comment is for my family: to Dad, whose memory continues to inspire me; to Mom, whose loving guidance continues to sustain me; to my brother Jeff, whose wit continues to keep me on my toes; and to my stepdad Bruce, whose remedies continue to amaze and save me money.

1. *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1318 (11th Cir. 2007). The statute, as amended in 1998, reads in pertinent part: "It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." ALA. CODE § 13A-12-200.2(a)(1) (2007).

2. *Williams VI*, 478 F.3d at 1318.

3. *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224, 1254 (N.D. Ala. 2006), *aff'd sub nom. Williams VI*, 478 F.3d 1316.

4. *Id.* at 1244–45 (citing *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232 (11th Cir. 2004)). *Williams v. Morgan (Williams VI)* is the Eleventh Circuit's third decision in Appellants' cause. *Williams VI*, 478 F.3d at 1318. Initially, Appellants facially challenged the statute, inviting the district court to recognize a fundamental right to use sexual devices. *Williams v. Pryor (Williams I)*, 41 F. Supp. 2d 1257, 1260 (N.D. Ala. 1999), *rev'd*, 240 F.3d 944 (11th Cir. 2001). The district court declined to find such a right, *id.* at 1282–84, and thus applied rational-basis review. *Id.* at 1284–93. The district court found that the statute lacked a rational basis and enjoined the enforcement of the statute. *Id.* at 1293.

On appeal, the Eleventh Circuit affirmed the district court's rejection of the facial fundamental-rights challenge but reversed the district court's finding that the statute lacked a rational basis. *Williams v. Pryor (Williams II)*, 240 F.3d 944, 952–53 (11th Cir. 2001). The Eleventh Circuit suggested that criminalizing the commercial distribution of sexual devices is rationally related to Alabama's interest in public morality. *See id.* at 952. The Eleventh Circuit remanded the cause for further consideration of Appellants' "as-applied fundamental rights challenges." *Id.* at 955.

The district court invalidated the statute on remand, this time finding that the statute unconstitutionally burdened the right of consenting adults privately to use sexual devices. *See Williams v. Pryor (Williams III)*, 220 F. Supp. 2d 1257, 1307 (N.D. Ala. 2002), *rev'd sub nom. Williams IV*, 378 F.3d 1232. The Eleventh Circuit again reversed and remanded the cause, rejecting

the statute was based on “concerns over public morality”⁵ and that those concerns were rationally related to Alabama’s commercial ban.⁶ On appeal, the Eleventh Circuit affirmed and held that public morality supplied a legitimate rational basis for the statute.⁷

The Fourteenth Amendment of the U.S. Constitution prohibits the states from “depriv[ing] any person of life, liberty, or property, without due process of law.”⁸ The Due Process Clause guarantees not only fair procedures but also substantively fair, reasonable legislation that promotes legitimate governmental objectives.⁹ Accordingly, a court will usually uphold legislation that is rationally related to a legitimate governmental objective but will heighten its scrutiny of legislation that appears to infringe on certain fundamental rights or liberty interests.¹⁰

To determine whether an asserted right or liberty interest is fundamental,¹¹ a court applies the two-step analysis articulated in *Washington v. Glucksberg*.¹² The court begins by looking at a “careful description” of the asserted fundamental interest.¹³ Then the court examines whether that interest is “deeply rooted” in the American legal tradition.¹⁴

the district court’s holding that a fundamental right to sexual privacy existed to trigger strict scrutiny of the statute. *Williams IV*, 378 F.3d at 1238, 1250.

5. *Williams V*, 420 F. Supp. 2d at 1250.

6. *Id.* at 1254 (finding that *Williams II* remains “good law”). The district court wrote, “To hold that public morality can *never* serve as a rational basis for legislation . . . would cause a ‘massive disruption of the current social order,’ one this court is not willing to set into motion.” *Id.* at 1249–50 (quoting *Lawrence v. Texas*, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting)).

7. *Williams VI*, 478 F.3d at 1318.

8. U.S. CONST. amend. XIV, § 1.

9. This Comment focuses on substantive, not procedural, due process. *See, e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (observing that substantive due process “protects individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them’” (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986))).

10. *See, e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”); *see also* The Honorable Rosemary Barkett, U.S. Circuit Judge, Dunwoody Distinguished Lecture in Law: Judicial Discretion and Judicious Deliberation (Mar. 23, 2007), in 59 FLA. L. REV. 905, 909–11 (2007) (suggesting that judges are rights-protectors).

11. The U.S. Supreme Court has identified the following as some of the rights protected by the Due Process Clause: marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); directing the education and upbringing of one’s children, *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923); marital privacy to use contraception, *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); bodily integrity, *Rochin v. California*, 342 U.S. 165, 172–73 (1952); and access to abortion, *Roe v. Wade*, 410 U.S. 113, 152–54 (1973).

12. 521 U.S. 702 (1997).

13. *Id.* at 721; *see also id.* at 722–23 (applying the “careful description” step to the asserted interest).

14. *Id.* at 721; *see also id.* at 723–28 (applying the “deeply rooted” step to the asserted interest).

In *Glucksberg*, the petitioners claimed that Washington State's assisted-suicide ban¹⁵ violated the "liberty to choose how to die."¹⁶ The *Glucksberg* Court noted that criminalizing assisted suicide was the norm not only in the common law, as adopted by the early American colonies,¹⁷ but also today among the states and Western democracies.¹⁸ Thus, the Court found that substantive due process did not protect the petitioners' asserted interest.¹⁹ In so doing, the Court established that the proponents of a newly asserted substantive due process interest must present a strong case to overcome the traditional presumption against recognizing that newly asserted interest.²⁰

But just because an asserted right or liberty interest is not deeply rooted in the tradition does not mean that a court will necessarily uphold a law that burdens the exercise of that interest. Sometimes a court will invalidate

15. The statute provides, "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." WASH. REV. CODE § 9A.36.060(1) (2006). "Promoting a suicide attempt" is a felony, *id.* § 9A.36.060(2), punishable by up to five years' imprisonment and up to a \$10,000 fine, *id.* § 9A.20.021(1)(c).

16. *Glucksberg*, 521 U.S. at 722 (quoting Brief of Respondents at 7, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 708925). The asserted liberty interest was also described as follows: "whether there is a liberty interest in determining the time and manner of one's death," or . . . "[i]s there a right to die?," *id.* (alteration in original) (quoting *Compassion in Dying v. Washington*, 79 F.3d 790, 798-99 (9th Cir. 1996), *rev'd sub nom. Glucksberg*, 521 U.S. at 702); whether there is "a right to 'control of one's final days,' and . . . 'the liberty to shape death,'" *id.* (quoting Brief of Respondents, *supra*, at 7, 18).

17. *Id.* at 711-16.

18. *Id.* at 711 n.8 ("In total, forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide." (quoting *Compassion in Dying*, 79 F.3d at 847 (Beezer, J., dissenting)); *id.* ("[A] blanket prohibition on assisted suicide . . . is the norm among western democracies." (alterations in original) (quoting *Rodriguez v. British Columbia (Attorney Gen.)*, [1993] S.C.R. 519, ¶ 52)).

19. *Id.* at 735. The Court has acknowledged, however, that "a competent person has a right to refuse *unwanted medical treatment*." O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 FLA. L. REV. 53, 71 (2005) (emphasis added) (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 & n.7 (1990)). The *Cruzan* Court explicitly grounded the right to refuse unwanted medical treatment in the "liberty interest" under the Due Process Clause" and not in "a generalized constitutional right of privacy." *Cruzan*, 497 U.S. at 279 & n.7; *cf. Glucksberg*, 521 U.S. at 725 ("The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.").

20. See *Glucksberg*, 521 U.S. at 723 ("The mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it." (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993))).

a law that is inconsistent with prevailing moral standards.²¹ The U.S. Supreme Court did just that in *Lawrence v. Texas*.²²

In *Lawrence*, police caught the petitioners, two homosexual men, engaging in sodomy in their apartment.²³ The petitioners were convicted of violating Texas's ban on homosexual sodomy.²⁴ They argued on appeal that their "convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment."²⁵

After a Texas appellate court rejected the petitioners' arguments, the U.S. Supreme Court granted certiorari and invalidated the statute.²⁶ The Court recognized the increasing support among the states for the public policy that "liberty" extends to decision-making by adults about their private sex lives.²⁷ To that end, the Court documented the reduction over the latter half of the twentieth century in the number of states that maintained or enforced anti-sodomy statutes.²⁸

21. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 110–15 (1977) (contrasting a law's enactment force, i.e., the formal rule itself, and a law's gravitational force, i.e., the law's persuasiveness to influence future decisions). For more on Dworkin's distinction between enactment force and gravitational force, see Robert C.L. Moffat, *The Perils of Positivism or Lon Fuller's Lesson on Looking at Law: Neither Science nor Mystery—Merely Method*, 10 HARV. J.L. & PUB. POL'Y 295, 325–29 (1987) (discussing the U.S. Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

22. 539 U.S. 558 (2003).

23. *Id.* at 562–63. Police were responding "to a reported weapons disturbance The right of the police to enter does not seem to have been questioned." *Id.*

24. *Id.* at 563. The statute provided: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003), *invalidated by Lawrence*, 539 U.S. at 558. The statute defines "[d]eviate sexual intercourse" as follows: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01(1).

25. *Lawrence*, 539 U.S. at 564. The Court also granted certiorari to consider two additional questions: (1) "Whether petitioners' criminal convictions under the Texas 'Homosexual Conduct' law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws" and (2) whether to overrule *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), which declined to find a fundamental right to engage in sodomy. *Lawrence*, 539 U.S. at 564.

26. *Lawrence*, 539 U.S. at 563–64, 578–79.

27. *Id.* at 571–72 ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (alteration in original) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))). The *Lawrence* Court further noted that "[t]he foundations of *Bowers* have sustained serious erosion from our recent decisions." *Id.* at 576; accord Christopher Wolfe, *Moving Beyond Rhetoric*, 57 FLA. L. REV. 1065, 1091–92 (2005) (identifying factors that contribute to homosexuality's emergence as a "new theme of sexual liberation," and recognizing that "[p]ublic opinion generally has moved in the direction of supporting the elimination of legal prohibitions on homosexual activity per se").

28. See *Lawrence*, 539 U.S. at 572–73.

In light of the waning support for anti-sodomy laws, the *Lawrence* Court determined that statutes like Texas's demeaned homosexuals.²⁹ The Court found no legitimate state interest that could justify intruding into an individual's private life.³⁰ Therefore, the Court concluded that the Due Process Clause's protection of liberty extended to the petitioners' right to participate in consensual sexual conduct in the privacy of their home.³¹

Lawrence's scope remains debated because the Court justified its holding on the broad notion of liberty protected by the Fourteenth Amendment and did not apply *Glucksberg*'s fundamental-rights analysis.³² Consequently, some read *Lawrence* broadly, interpreting it as extending beyond the sodomy context and representing a paradigm shift³³ in constitutional law.³⁴ Others, including the Eleventh Circuit, read *Lawrence* narrowly, as *Lofton v. Secretary of the Department of Children and Family Services*³⁵ illustrates.³⁶

In *Lofton*, the appellants challenged a Florida statute that prohibited adoption by practicing homosexuals.³⁷ The appellants claimed that the statute violated their Fourteenth Amendment due process rights to familial privacy, intimacy, and integrity.³⁸ They further claimed that because

29. *Id.* at 575.

30. *Id.* at 578.

31. *Id.* at 567.

32. See, e.g., William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1012 (2005) (“[F]ew constitutional scholars think the narrowest or the broadest reading of *Lawrence* is correct.”); Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1531–32, 1534–35 (2004); Lawrence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1921–25 (2004).

33. See Robert C.L. Moffat, *Judicial Decision as Paradigm: Case Studies of Morality and Law in Interaction*, 37 FLA. L. REV. 297, 324–35 (1985) (discussing paradigm theory in judicial decision-making).

34. See Eskridge, *supra* note 32, at 1012 (citing *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting)). Justice Scalia stated that “[t]oday’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.” *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

35. 358 F.3d 804 (11th Cir. 2004).

36. Eskridge, *supra* note 32, at 1012 (citing *Lofton*, 358 F.3d at 817).

37. *Lofton*, 358 F.3d at 806–07. The statute provides: “No person eligible to adopt under this statute may adopt if that person is a homosexual.” FLA. STAT. § 63.042(3) (2007). The *Lofton* court noted that the “Florida courts have defined the term ‘homosexual’ as being ‘limited to applicants who are known to engage in current, voluntary homosexual activity,’ thus drawing ‘a distinction between homosexual orientation and homosexual activity.’” *Lofton*, 358 F.3d at 807 (quoting State Dep’t of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210, 1215 (Fla. 2d DCA 1993), *aff’d in relevant part, quashed in part*, 656 So. 2d 902, 903 (Fla. 1995)).

38. *Lofton*, 358 F.3d at 809. The appellants also claimed that the Fourteenth Amendment’s Equal Protection Clause prohibits Florida from “categorically prohibiting only homosexual persons from adopting children.” *Id.* The court rejected this claim because the appellants failed to identify

Lawrence recognized private sexual intimacy as a fundamental right, the Florida statute impermissibly burdened their exercise of that right.³⁹

Although recognizing that parents have the fundamental right to make decisions about “the care, custody, and control of their children,”⁴⁰ the *Lofton* court rejected the appellants’ claims.⁴¹ The court noted that, unlike the natural family, the foster family is a relationship based in state law, and the privileges associated with that relationship are necessarily limited by state law.⁴² Because the appellants had established a foster family, the court concluded that the statute did not violate the appellants’ asserted fundamental rights.⁴³

In so concluding, the *Lofton* court read *Lawrence* narrowly.⁴⁴ To support its narrow reading, the court noted that *Glucksberg*’s two-step fundamental-rights analysis was missing in *Lawrence*.⁴⁵ The *Lofton* court read *Lawrence* as suggesting that the right to engage in private sexual conduct comes from the Due Process Clause’s *broad concept* of liberty and from various fundamental rights “closely related to sexual intimacy.”⁴⁶ The court also suggested that *Lawrence* was decided under rational-basis review because the *Lawrence* Court found that the Texas statute “furthers no legitimate state interest [that] can justify its intrusion into the personal and private life of the individual.”⁴⁷ Accordingly, the *Lofton* court concluded that Florida’s ban on adoption by homosexuals could not burden the appellants’ asserted right to private sexual intimacy because that asserted right did not exist.⁴⁸

a fundamental right disturbed by the statute. *Id.* at 818 (“Unless the challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest. As we have explained, Florida’s statute burdens no fundamental rights.” (citation omitted)).

39. *Id.* at 809.

40. *Id.* at 812 (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

41. *See id.* at 817 (“Hence, we conclude that the *Lawrence* decision cannot be extrapolated to create a right to adopt for homosexual persons.”).

42. *Id.* at 813–14.

43. *Id.* (“The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very laws [that] create it.” (quoting *Drummond v. Fulton County Dep’t of Family & Children’s Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977))).

44. *Id.* at 815–16 (“The effect of [*Lawrence*] was to establish a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct. Nowhere, however, did the Court characterize this right as ‘fundamental.’” (citation omitted)).

45. *Id.* at 816–17.

46. *Id.* at 816 n.13.

47. *Id.* at 817 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)) (emphasis added).

48. *See id.* at 815–17.

The *Lofton* court then scrutinized the statute under rational-basis review.⁴⁹ It found a sufficient rational basis in Florida's interest in encouraging married couples to adopt.⁵⁰ In so doing, the court did not reach the question whether public morality could supply a rational basis for the statute.⁵¹ Nevertheless, the *Lofton* court suggested through dicta that public morality could provide a legitimate rational basis even after *Lawrence*.⁵²

Applying *Lofton*'s narrow reading of *Lawrence*,⁵³ the Eleventh Circuit limited *Lawrence*'s potential impact in *Williams v. Morgan*.⁵⁴ Appellants argued that Alabama's ban on the commercial distribution of sex toys, like the invalidated Texas statute, impermissibly intruded on individual decision-making about sexuality.⁵⁵ Appellants further argued that their cause could not be distinguished from *Lawrence* and, therefore, public morality could not supply a rational basis for the Alabama statute.⁵⁶

The Eleventh Circuit disagreed with Appellants and distinguished the two cases.⁵⁷ The Texas statute in *Lawrence* criminalized private sexual activity,⁵⁸ while the Alabama statute prohibited public, commercial activity.⁵⁹ The Alabama statute specifically banned only the sale,⁶⁰ not the "use" or "the gratuitous distribution of," sex toys.⁶¹

49. *See id.* at 817–19.

50. *Id.* at 819 n.17.

51. *Id.* Indeed, the appellees argued that the statute was rationally related to the state's legitimate "interest in promoting public morality both in the context of child rearing and in the context of determining which types of households should be accorded legal recognition as families. The appellants respond[ed] that public morality cannot serve as a legitimate state interest." *Id.*

52. *Id.*

53. Eskridge suggests that one could "logically and responsibly argue[] from the majority and concurring opinions" that "*Lawrence* entail[ed] a massive shift . . . [in] protecting any and all private sexual activities." Eskridge, *supra* note 32, at 1012.

54. *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1323 (11th Cir. 2007).

55. *Id.* at 1322.

56. *Id.*

57. *Id.* at 1322–23.

58. *Id.* at 1322 ("The present case . . . does not involve public conduct" (emphasis omitted) (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003))).

59. *Id.* ("As the majority in *Williams IV* so colorfully put it: 'There is nothing "private" or "consensual" about the advertising and sale of a dildo.'" (quoting *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1237 n.8 (11th Cir. 2004))).

60. The statute specifically prohibits the distribution "for any thing of pecuniary value." ALA. CODE § 13A-12-200.2(a)(1) (2007) (emphasis added).

61. *Williams VI*, 478 F.3d at 1322. The court would have been more likely to invalidate the statute if the statute prohibited people from simply using sex toys. *See Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

After distinguishing *Lawrence*, the Eleventh Circuit affirmed⁶² that public morality remained a legitimate rational basis for the Alabama statute.⁶³ The court declined to read *Lawrence* as completely eliminating public morality as a legitimate government interest.⁶⁴ As the court implicitly recognized, *Lawrence* might have, to some extent, eroded public morality as a legitimate interest but only for laws that prohibit “both private and non-commercial” sexual conduct.⁶⁵ Because the Alabama statute did not prohibit the private, non-commercial use of sex toys, the court concluded that no constitutional basis existed to invalidate the statute.⁶⁶

The Eleventh Circuit’s conclusion is, perhaps, unsurprising. The court’s own precedent established the legal basis for the conclusion.⁶⁷ The case presented the court with an opportunity to apply the dicta from *Lofton* stating that *Lawrence* did not eliminate public morality from supplying a legitimate rational basis.⁶⁸ Because the *Lofton* court refused to find that *Lawrence* created a fundamental right to sexual privacy,⁶⁹ the Eleventh Circuit did not have to determine whether the Alabama statute unconstitutionally burdened sex toy users in exercising that asserted interest.⁷⁰

62. *Williams VI* likely would not have been before the Eleventh Circuit if the U.S. Supreme Court had not decided *Lawrence* in 2003. In 2001, the Eleventh Circuit held in *Williams II* that “[a] statute banning the commercial distribution of sexual devices is rationally related to” the state’s interest in safeguarding public morality. *Williams v. Pryor (Williams II)*, 240 F.3d 944, 949 (11th Cir. 2001). The law-of-the-case doctrine binds appellate courts to “the findings of fact and conclusions of law . . . in all subsequent proceedings in the same case in the trial court or on a later appeal.” *This That & The Other Gift & Tobacco, Inc. v. Cobb County*, 439 F.3d 1275, 1283 (11th Cir. 2006) (per curiam). Judge Barkett found the law-of-the-case doctrine inapplicable to *Williams II* because “*Williams II* . . . rel[ie]d on the now defunct *Bowers* [decision] to conclude that public morality provides a legitimate state interest Obviously now that *Bowers* has been overruled [by *Lawrence*], this proposition is no longer good law and we must, accordingly, revisit our holding in *Williams II*.” *Williams IV*, 378 F.3d at 1259 (Barkett, J., dissenting).

63. *Williams VI*, 478 F.3d at 1323.

64. *See id.* at 1322–23.

65. *Id.* at 1322 (emphasis in original).

66. *Id.* at 1324 (“This Court does not invalidate bad or foolish policies, only unconstitutional ones”) (quoting *Williams II*, 240 F.3d at 952).

67. *See Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 819 n.17 (11th Cir. 2004).

68. *See Williams VI*, 478 F.3d at 1323.

69. *Id.*; *see also Lofton*, 358 F.3d at 815–17 (“We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.”).

70. *See Williams VI*, 478 F.3d at 1322 (“This statute targets *commerce* in sexual devices, an inherently public activity, whether it occurs on a street corner, in a shopping mall, or in a living room. . . . [P]laintiffs here continue to possess and use such devices.”).

In applying the dicta from *Lofton*, the Eleventh Circuit scrutinized the statute under rational-basis review.⁷¹ Specifically, the court applied to its holding the dicta in *Lofton* that identified U.S. Supreme Court precedent that maintains public morality as a legitimate rational basis for laws impacting *public* conduct.⁷² But even if the Eleventh Circuit analyzed the statute under *Glucksberg*'s two-step analysis, as had been done in a previous stage of the litigation,⁷³ the court would still likely have found that *Lawrence* did not render the Alabama statute unconstitutional.

Carefully described,⁷⁴ the Alabama statute prohibits the “commercial” distribution of sex toys.⁷⁵ Thus, the statute merely makes it more inconvenient to access sex toys. Although restrictions on access to sex toys arguably amount “to restrictions on [private] use,”⁷⁶ the *Glucksberg* analysis would still fail⁷⁷ because the states have traditionally had the authority to regulate public (commercial) activity perceived as harmful.⁷⁸ The Eleventh Circuit preserved that traditional state authority by declining to apply *Lawrence*'s rationale to public activity.⁷⁹

Ultimately, the Eleventh Circuit acted cautiously. Although signaling its own disapproval of the statute⁸⁰ and recognizing that *Lawrence* embodied a “live and let be” rationale for sexual privacy,⁸¹ the court avoided a paradigm shift for which our society appears not yet prepared.⁸²

71. *Id.* at 1322–23.

72. *Id.* at 1323; *see also Lofton*, 358 F.3d at 819 n.17 (“We do note, however, the Supreme Court’s conclusion that there is not only a legitimate interest, but ‘a substantial government interest in protecting order and morality,’ and its observations that ‘[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.’” (alteration in original) (citation omitted) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991), and *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion))).

73. *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1239–44 (11th Cir. 2004).

74. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (“[W]e have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.”).

75. *Williams VI*, 478 F.3d at 1322.

76. *Id.* at 1322 n.6 (quoting *Williams IV*, 378 F.3d at 1242). The Eleventh Circuit “connected the sale of sexual devices with their use [in *Williams IV*] only in the limited context of framing the scope of the liberty interest at stake under the fundamental rights analysis of . . . *Glucksberg*.” *Id.* (citing *Williams IV*, 378 F.3d at 1242).

77. *Glucksberg*, 521 U.S. at 720–21 (“[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’” (quoting *Moore v. City of E. Cleveland*, 531 U.S. 494, 503 (1977) (plurality opinion))).

78. *Williams VI*, 478 F.3d at 1322 (“[T]he State does not lose its power to regulate commercial activity deemed harmful to the public” (alteration in original) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978))).

79. *Id.* at 1322–23.

80. *Id.* at 1323 (“By upholding the statute, we do not endorse the judgment of the Alabama legislature.”).

81. *See id.* at 1321–23.

82. Robert C.L. Moffat, “*Not the Law’s Business: The Politics of Tolerance and the*

It would have been anomalous for the court to find that public morality could no longer serve as a legitimate rational basis for regulating commerce, an inherently non-private activity.⁸³ By declining to heighten its scrutiny of the Alabama statute, the Eleventh Circuit has sustained the role of the people of Alabama⁸⁴ to decide whether their state law is “uncommonly silly.”⁸⁵

EPILOGUE

The U.S. Supreme Court denied the petition for a writ of certiorari in *Williams v. Morgan*.⁸⁶ Nonetheless, the Court may soon be asked to review another sex toy statute. The Fifth Circuit recently invalidated, in a 2–1 decision, a Texas statute similar to Alabama’s.⁸⁷ Like the Alabama statute, the Texas statute outlawed the commercial distribution of sex toys.⁸⁸ But unlike the Alabama statute, the Texas statute also prohibited individuals from lending or giving away sex toys to others.⁸⁹

In invalidating the Texas statute, the Fifth Circuit explicitly rejected the Eleventh Circuit’s interpretation of *Lawrence*.⁹⁰ Without articulating a position in the debate about whether *Lawrence* requires heightened scrutiny of the statute,⁹¹ the Fifth Circuit noted that the *Lawrence* Court

Enforcement of Morality, 57 FLA. L. REV. 1097, 1128–29 (2005) (suggesting that the outcome in *Lawrence* was unsurprising but that the “paradigm shift [to the legal recognition of gay marriage] has not yet been put in place”).

83. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

84. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 134 (2005) (“[The Constitution] is a document that trusts people to solve [the problems of a community for] themselves. And it creates a *framework* for a government that will help them do so. That framework foresees democratically determined solutions, protective of the individual’s basic liberties.”).

85. See *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

86. *Williams v. King*, 128 S. Ct. 77 (2007).

87. *Reliable Consultants, Inc. v. Earle*, No. 06-51067, 2008 WL 383034, at *6 (5th Cir. Feb. 12, 2008).

88. *Id.* at *1. Under the statute, “[a] person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.” TEX. PENAL CODE ANN. § 43.23(a) (Vernon 2003), *invalidated by Reliable Consultants*, 2008 WL 383034, at *6. “‘Wholesale promote’ means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same for purpose of resale.” *Id.* § 43.21(a)(6). The statute classified sex toys as “obscene device[s].” *Id.* § 43.21(a)(7).

89. *Reliable Consultants*, 2008 WL 383034, at *1. A person commits a misdemeanor if he knowingly “promotes or possesses with intent to promote any obscene material or obscene device.” § 43.23(c)(1). “‘Promote’ means to manufacture, issue, sell, *give*, provide, *lend*, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.” *Id.* § 43.21(a)(5) (emphasis added).

90. *Reliable Consultants*, 2008 WL 383034, at *4–5 & n.33.

91. *Id.* at *4.

recognized “a right to be free from governmental intrusion regarding ‘the most private human conduct, sexual behavior.’”⁹² The Fifth Circuit found that the Texas statute impermissibly burdened that right because the statute prohibited individuals from buying, lending, or giving away sex toys for their own private use.⁹³

The Fifth Circuit also concluded, contrary to the Eleventh Circuit, that public morality could not serve as a rational basis for the sex toy statute after *Lawrence*.⁹⁴ According to the Fifth Circuit, if public morality is an insufficient basis for regulating private sexual conduct, then public morality is similarly not a rational basis for a ban on promoting sex toys, “which also regulates private sexual intimacy.”⁹⁵ The court determined that the ban on promoting sex toys was like the invalidated statute in *Lawrence* to the extent that Texas tried in both cases to regulate certain forms of private sexual conduct simply because it was morally opposed to those forms of conduct.⁹⁶

The recent circuit split about the extent to which the states may regulate the distribution of sex toys confirms that, without clarification from the U.S. Supreme Court, *Lawrence* will likely continue to yield inconsistent outcomes.⁹⁷ As these sex toy cases show, *Lawrence* will also likely continue to be applied to controversies beyond homosexual sodomy.⁹⁸ The Fifth Circuit’s recent decision provides the U.S. Supreme Court an opportunity to resolve the ongoing debate about *Lawrence*’s scope.⁹⁹ Perhaps the case for reviewing the decision is “compelling”¹⁰⁰

92. *Id.* at *3 (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

93. *Id.* at *4. The statute did not prohibit the use or possession of sex toys. *Id.* at *1. As the Fifth Circuit noted, the restriction against lending or giving away sex toys undercut Texas’s argument that the statute affected only public conduct. *Id.* at *4.

94. *Id.* at *5 & n.33.

95. *Id.* at *5. The court emphasized that its holding does not “impl[y] that public morality can never be a constitutional justification for a law.” *Id.* at *5 n.36.

96. *Id.* at *5.

97. See Eskridge, *supra* note 32, at 1012.

98. *Id.*

99. The U.S. Supreme Court considers “every subsidiary question fairly included” in the questions expressly articulated in petitions for writ of certiorari. SUP. CT. R. 14(1)(a). Reviewing the Fifth Circuit’s decision would also provide an opportunity for the Court to clarify when a state regulation is unconstitutional because it “substantially limit[s] access to the means of effectuating” constitutionally protected individual decision-making. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 688 (1977) (emphasis added). As the *Carey* Court noted:

A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception.

Id. at 687–88. The *Carey* Court did not, however, “definitively answer[] the difficult question

because two circuits are now “in conflict”¹⁰¹ over how *Lawrence*, an important precedent, should be applied.¹⁰² Whatever becomes of the circuit split on the distribution of sex toys, the U.S. Supreme Court should take an opportunity in the near future to promote uniformity by clarifying *Lawrence*.

whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) behavior among adults.” *Id.* at 689 n.5. Although the Fifth Circuit noted that the Texas statute, unlike the Alabama statute, prohibited the gratuitous transfer of sex toys, *Reliable Consultants*, 2008 WL 383034, at *4, the court did not, and arguably could not, address whether that restriction “substantially limit[ed]” a constitutionally protected subject of individual decision-making. *See Carey*, 431 U.S. at 688. An answer to that question seems to turn on whether *Lawrence* established a fundamental right.

100. “A petition for a writ of certiorari will be granted only for compelling reasons.” SUP. CT. R. 10.

101. The U.S. Supreme Court may grant a writ of certiorari when “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” SUP. CT. R. 10(a).

102. *Reliable Consultants*, 2008 WL 383034, at *4–5 & n.33.