

Judicial Minimalism and Formal Justice

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I.

This paper concerns four interrelated tenets of modern jurisprudence. Each of these reflects a dimension of formal justice. The first tenet is *affirmative candor*, according to which courts have reasons to do the following: to articulate the legal basis for their decisions; to explain the extent to which their decisions are consistent or inconsistent with the previous state of the law; to address the implications of their decisions for future cases.¹ The strictest conception of affirmative candor characterizes these reasons as judicial duties that cannot be overridden. Less demanding conceptions allow these judicial ideals to be overridden, with justification.

In constitutional cases, affirmative candor entails that a court has reason to announce if its interpretation of the Constitution in a certain case renders unconstitutional statutes that were previously believed or held to be constitutional. At a minimum, if a court's interpretation of the Constitution does, in fact, invalidate a statute not challenged in the case at bar, the court has reason not to state otherwise. A court violates candor when it misleads or fails to notify us regarding the implications of its decision. It acts unjustly to that extent.

The second jurisprudential tenet for examination is the *deontological conception of adjudication*. The deontological conception holds that legally irrelevant factors never justify a court in overriding reasons of formal justice, such as the reasons of affirmative candor.

The third jurisprudential tenet is the *legal irrelevance of unregulated facts*.² Unregulated facts are roughly those which fall outside the so-called "fact pattern" of the case at bar.³ For

¹See, e.g., Scott Altman, "Beyond Candor," *Michigan Law Review* 89 (1990): 296-97; Paul Gewirtz, "Remedies and Resistance," *Yale Law Journal* 92 (1983): 585, pp. 666-68 ("Candor has a distinctive normative status in law."); Robert A. Leflar, "Honest Judicial Opinions," *Northwestern University Law Review* 74 (1979): 721, 723, 740-41 (1979); David L. Shapiro, "In Defense of Judicial Candor," *Harvard Law Review* 100 (1987): 731, 736-38. See David Lyons, "On Formal Justice"; "Formal Justice and Judicial Precedent"; "Derivability, Defensibility, and the Justification of Judicial Decisions" all collected in his *Moral Aspects of Legal Theory* (Cambridge: Cambridge University Press, 1993), pp. 13-40, 102-18, 119-40.

²See Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), p. 181.

³"Fact patterns" in constitutional cases obviously include certain facts about the challenged law itself.

example, the fact that a statute is unpopular with the general public, or with a certain interest group, does not constitute part of the fact pattern in a case challenging that statute on constitutional grounds. The statute's unpopularity is an unregulated fact.

Consider a pair of cases with fact patterns sufficiently similar as to be legally indistinguishable. The court has recently ruled in the first case. The second is pending. The norm of *stare decisis* gives the court some reason to issue the same ruling in the second case. If the court does so, however, then it increases the *density* of such rulings – the number of such rulings issued in the same jurisdiction during a given period of time.

Might the fact that the first ruling was issued recently give the court a legal reason to issue a different ruling in the second case? In other words, might considerations of *density control* have legal relevance?

Norms of constitutional law do not mention density control. Under these norms density control factors constitute unregulated facts. Formalists accept the legal irrelevance of unregulated facts. Therefore, formalists should accept a fourth tenet, the *legal irrelevance of density control*, as a corollary of the third tenet.

These four tenets are implicit in most jurisprudence (though this cannot be demonstrated here), especially so in the conservative formalist jurisprudence of Justice Antonin Scalia.⁴ Cass Sunstein attempts to undermine Scalia's jurisprudence by attacking the first tenet – affirmative

⁴Scalia is Associate Justice of the U.S. Supreme Court. See, e.g., Antonin Scalia, "The Rule of Law as a Rule of Rules," *University of Chicago Law Review* 56 (1989): 1175-1188; *A Matter of Interpretation: Federal Courts and the Law*, Amy Gutmann, ed. (Princeton: Princeton University Press, 1997); *Lawrence v. Texas*, 123 S. Ct. 2472, 2488 (2003) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J. dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (Scalia, J., dissenting in part).

For commentary see David O. Brink, Book Review, *Ethics* 109 (1999): 673-675 (reviewing Scalia, *A Matter of Interpretation*); Cass R. Sunstein, "Justice Scalia's Democratic Formalism," *Yale Law Journal* 107 (1997): 529-67 (same); Daniel Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (ch. 3, "The Formalist Crusade of Antonin Scalia").

candor – without directly challenging the second, third, or fourth.⁵ This paper argues that Sunstein’s critique is weak as it stands, but could be strengthened by abandoning the second and/or third and fourth tenets, as well. This makes for a position more revisionist than Sunstein’s, and perhaps less plausible than his to that extent. But the position suggested here is more adequate as an account of some recent Supreme Court cases and more coherent as a response to conservative formalism.

II.

Two recent cases provide our starting point. Last summer brought a landmark victory for lesbians and gay men in the U.S. Supreme Court, the second in the past decade. In *Lawrence v. Texas* a 5-4 majority held that Texas’ criminal prohibition on same-sex sodomy, along with most state sodomy laws, violated the Due Process Clause of the Fourteenth Amendment.⁶ *Lawrence* referenced *Romer v. Evans* (though no majority in *Lawrence* relied upon *Romer*), a 1996 case in which a 6-3 majority used the Equal Protection Clause of the Fourteen Amendment to strike down a provision of the Colorado Constitution that permanently banned legislation making sexual orientation a civil rights classification.

Justice Scalia dissented vigorously in both cases, offering several arguments. Those of us who favor greater legal rights for lesbians, gays, and bisexuals may be tempted to dismiss the Justice’s arguments as vitriol. Given Scalia’s political power and intellect, however, progressives ignore him at their peril. Furthermore, at least one of his arguments demands serious attention because it speaks to fundamental issues in legal philosophy. This argument, used in both dissents, entails that *Romer* and *Lawrence* are legally flawed even if, for the sake of

⁵Sunstein, “Justice Scalia’s Democratic Formalism,” *Yale Law Journal* 107 (1997): 529; *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University press 1999).

⁶*Lawrence v. Texas*, 123 S. Ct. 2472, 2475 (2003) (explicitly overruling *Bowers v. Hardwick*, 478 U.S. 186 [1986]).

argument, we *accept* the constitutional principles upon which the majorities rely. In his

Lawrence dissent, Scalia argues as follows:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. . . . The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge.⁷

In *Romer*, Scalia waxes sarcastic:

The constitutions of [five States] *to this day* contain provisions stating that polygamy is "forever prohibited." . . . Polygamists, and those who have a polygamous "orientation," have been "singled out" by these provisions for much more severe treatment than merely denial of favored status The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States . . . unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.⁸

We can reconstruct Scalia's argument in these dissents as the following *reductio ad absurdum*:

1. If the Constitution contains principles broad enough to invalidate anti-gay laws (e.g., on Equal Protection or Due Process grounds) then at least some other morals laws are unconstitutional.⁹
2. *Romer* and *Lawrence* hold that the Constitution contains principles broad enough to invalidate anti-gay laws.
3. If *Romer* and *Lawrence* were decided correctly then *Romer* and *Lawrence* entail that at least some other morals laws are unconstitutional. (1, 2)
4. *Romer* and *Lawrence* were correctly decided.
5. Therefore, *Romer* and *Lawrence* entail that at least some other morals laws are unconstitutional. (3, 4)

⁷*Lawrence v. Texas* at 2490 (Scalia, J. dissenting).

⁸*Romer v. Evans* at 648 (Scalia, J. dissenting).

⁹"Morals laws" encompasses, *inter alia*, state laws against bigamy, same-sex marriage, consensual adult incest, prostitution, adultery, fornication, bestiality, and obscenity.

6. If a court opinion invalidates, by implication, a law (challenged or unchallenged) which is widely believed to be constitutional, then the court has reason to announce this fact. (affirmative candor)

7. At least some of the morals laws invalidated by *Romer* and *Lawrence* are widely believed to be constitutional.

8. Therefore, the Supreme Court has reason to announce that at least some other morals laws are unconstitutional. (6, 7)

Scalia intends this argument as a *reductio* of premise 4.¹⁰ He treats 8 as an “absurdity” – a conclusion that courts do not and should not accept. The majorities draft their opinions in ways that suggest agreement with Scalia on this point. They do not mention other morals laws, nor do they mention, much less reverse, any precedents upholding these laws. Nor do they attempt to distinguish the invalidated anti-gay laws from any of the other morals laws that Scalia suggests are threatened by the Court’s recent rulings.

III.

Nevertheless, many progressive lawyers will challenge premise 1 of Scalia’s *reductio*. They will attempt to offer constitutionally relevant distinctions, arguing that homosexual conduct differs from other morals offenses.¹¹ Perhaps polygamy and prostitution, for example, oppress women¹² and encourage other socially undesirable behavior, while adult incest adversely impacts

¹⁰This argument should not be confused with Scalia’s more familiar opposition to non-originalist modes of constitutional deliberation and the notion of a “living constitution.” Cf. Antonin Scalia, “Originalism: The Lesser Evil,” *University of Cincinnati Law Review* 57 (1989): 849-65.

¹¹Writing before *Lawrence* was decided, Sunstein tries to distinguish between Amendment 2 and anti-polygamy laws by emphasizing the fact that Amendment 2 is based on status, not conduct. Cass R. Sunstein, “The Supreme Court 1995 Term: Foreword: Leaving Things Undecided,” *Harvard Law Review* 110 (1996): 6-101, p. 63.

But “being polygamous” is no less a status than is “being gay.” In any case, Sunstein’s distinction is useless in *Lawrence*, where the challenged statute proscribes conduct and makes no reference to status.

¹²See *Reynolds v. United States*, 98 U.S. 145, 166 (1879) (“polygamy leads to the patriarchal principle, and . . . fetters the people in stationary despotism”); Debra Satz, “Markets in Women’s Sexual Labor,” *Ethics* 106 (1995): 63-85.

the participants' mental health. Social science assures us that homosexuality has no such effects.¹³

It is impossible to anticipate all such arguments. One may yet prevail. But Scalia makes the important point that the *Lawrence* and *Romer* majorities do not even attempt to draw such distinctions.¹⁴ This should make one suspicious. At the same time, these majorities do not even suggest that they consider other morals laws to be unconstitutional or that prior cases upholding such laws are inconsistent with the new holdings.¹⁵

Perhaps the *Lawrence* and *Romer* majorities can be excused for not trying to differentiate anti-gay laws from other morals laws. Such distinctions are probably impossible to articulate in terms that satisfy the special strictures of constitutional argument. Most morals laws have archaic religious rationales, not modern secular ones. It is doubtful, for example, that data on the negative personal and social effects of fornication or polygamy or adult incest are really so much more robust than data on the effects of homosexual conduct (or marital intercourse, for that matter) as to support selective invalidation of morals laws under the applicable legal standard – a rational basis test. The majorities were probably wise not even to try to draw these distinctions publicly.

¹³See, e.g., John C. Gonsiorek and James D. Weinrich, eds., *Homosexuality: Research Implications for Public Policy* (Newbury Park, CA: Sage Publications, 1991).

¹⁴*Lawrence v. Texas*, 123 S. Ct. 2472, 2490 (Scalia, J. dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J. dissenting).

¹⁵For comparison, imagine Illinois passes the following two laws: one bans White Sox fans from riding public buses, the other bans Cubs fans from riding public subways. White Sox fans challenge the law targeting them. The Supreme Court upholds it. Subsequently, Cubs fans challenge the law targeting them. The Court upholds it, citing the previous ruling. Fifteen years later, the Cubs fans challenge the law again. This time the Court invalidates the law, reversing the decision on the Cubs law, but without mentioning, invalidating, or distinguishing the White Sox law previously upheld.

Of course, it's possible that there's a legally relevant distinction between these laws, but the Court's very silence would imply otherwise. At least, it would imply that the Court had no idea how to draw such a distinction. Its silence would also raise a strong and disturbing presumption that the Court now favored the Cubs over the White Sox.

Let us suppose, therefore, that Scalia is correct to endorse premise 1. There is no legally relevant distinction between anti-gay laws and certain other morals laws that are widely seen as constitutional.¹⁶ But let us also assume that premise 4 is true: anti-gay laws, and many other morals laws, are unconstitutional under the best interpretation of the U.S. Constitution. One might still wish to challenge affirmative candor (premise 6), which states that, if a court opinion invalidates, by implication, a law which is widely believed to be constitutional, then the court has reason to announce this fact.

IV.

Legal theorists have long debated whether judges are obligated to apply unjust legal norms.¹⁷ But the question here is whether judges are ever permitted to contradict, or at least *not* to announce or apply, a presumably *just* legal norm, such as the due process principle protecting liberty of intimate association upon which the *Lawrence* majority relied.

Sunstein answers this question affirmatively, challenging affirmative candor (and with it formal justice). He argues that, in many cases, the Supreme Court ought to render *minimalist* decisions – decisions that are “narrow and shallow,” rather than “wide and deep.”¹⁸ Minimalism is proper, he claims, if a majority can agree on a holding, but not on a rationale, or if the justices have confidence in the holding, but insufficient confidence in any rationale. In such cases, Sunstein contends, they should write an opinion that offers just enough reasoning to support their holding in that case, no more. They need not offer deep normative rationales for their decision, nor explain how they would distinguish the case at bar from similar ones.¹⁹

¹⁶Sexual libertarians will approve of the equation. See, e.g., David A.J. Richards, *Sex, Drugs, Death, and the Law* (Totowa, NJ: Rowman & Littlefield, 1982); “Rights and Autonomy,” *Ethics* 92 (1981): 3-20.

¹⁷See, e.g., H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), ch. 9.

¹⁸Sunstein, *One Case at a Time*, pp. 10-14.

¹⁹Sunstein, *One Case at a Time*, chs. 1-4.

Sunstein presents two basic arguments for minimalism. His first is that the Court cannot have great confidence in its own moral insights, especially in difficult cases that raise novel issues. An ambitious opinion that offers wide and deep reasoning can do great good, or great harm as legal precedent. A less ambitious opinion affords a greater margin for error and revision in future generations.²⁰

Sunstein suggests that the *Romer* majority declined to articulate the differences between Amendment 2 and other morals legislation (such as the entrenched anti-polygamy provisions of several state constitutions) because, although they agreed that relevant differences existed between the laws, they could not agree on what those differences were.²¹ Sunstein could explain *Lawrence* in the same way.²²

However, this explanation would not satisfy Scalia and it should not satisfy anyone. The justices could have authored separate opinions, each explaining how he or she distinguishes between anti-gay laws and other morals laws. They declined. So we can still understand the justices as having raised a presumption that there is no constitutionally relevant difference to be found.

Sunstein's second argument in favor of minimalism is that it promotes deliberative democracy, encouraging the political branches and society at large to debate the underlying issues and arrive at a more broad-based resolution.²³

However, if the majorities were concerned to foster democratic deliberation, above all, they could achieve this end by upholding the laws, as Scalia advises. Promoting public deliberation about morals laws does not entail invalidating them. Of course, Supreme Court

²⁰Sunstein, *One Case at a Time*, ch. 3.

²¹Sunstein, *One Case at a Time*, ch. 7.

²²But see §VIII, *infra*.

²³Sunstein, *One Case at a Time*, ch. 2.

decisions about civil rights often provoke public debate, but a decision upholding anti-gay laws might accomplish this as effectively, or more so, and it would leave the public with something to *do* after deliberating. *Bowers v. Hardwick* provoked tremendous and valuable political debate about homosexuality.²⁴ Appealing to the value of democratic deliberation would seem to support not minimalism, but judicial restraint.²⁵

V.

So Sunstein moves in the right direction, but his minimalism does not support selective, under-theorized rulings such as *Lawrence* and *Romer* as well as progressives should want, or as Sunstein seems to believe. Let us now consider an alternative rationale for selectivity. This approach qualifies formal justice to a greater degree than does Sunstein's minimalism. But this approach is more consistent with decisions such as *Lawrence* and *Romer*.

Suppose, as we are assuming with Scalia, that the constitutional principles relied upon in *Romer* and/or *Lawrence* reach other morals laws. As a matter of doctrinal consistency, these principles entail invalidating other morals laws along with anti-gay laws.

As a sociological matter, however, our society probably has finite capacity to absorb and accommodate judicially-imposed revisions of social norms and mores over a given period of time. Try to change too much too quickly and you risk backlash and damage to systemic values, such as stability, reliance, and the rule of law.²⁶ We can imagine a court privately deliberating as follows:

²⁴*Bowers v. Hardwick*, 478 U.S. 186 (1986). This case has been cited in thousands of law review articles.

²⁵Sunstein emphasizes that he does not equate minimalism with judicial restraint in *One Case at a Time*, pp. 28-32.

²⁶See, e.g., Emily Sherwin, "Legal Rules and Social Reform," *San Diego Law Review* 36 (1999): 455, 487 (1999); Frederick Hayek, *Law, Legislation, and Liberty* (Chicago: University of Chicago Press, 1973); Gerald Dworkin, "Devlin was Right: Law and the Enforcement of Morality," *William and Mary Law Review* 40 (1999): 927-46; Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

This morals law (e.g., adultery statute) is just as unconstitutional as those we've invalidated in previous cases (e.g., sodomy statute), but we've invalidated several morals laws already this decade. These decisions were correct, but if we invalidate more morals laws this decade, it will have a needlessly disruptive effect, weakening the rule of law and inciting backlash. The headlines will read "High Court Legalizes Adultery" and we really don't need another headline like that so soon. Therefore, let's not invalidate any more morals laws for some period of time.

A court that deliberates in this way treats density control as a legally relevant factor.

Many will object, however, that basic principles of formal justice imply the legal irrelevance of density control. To treat density control as legally relevant is to admit, for example, that the adulterer has a constitutional right to commit adultery, while refusing to protect that right from state infringement for reasons having nothing to do with either the content of the Constitution, the nature of adultery, or the effects of adultery. Many would condemn such reasoning as unjust. Many will also argue that treating density control as legally relevant generates synchronic doctrinal inconsistency. Doctrinal inconsistency within a legal system at a given point in time is undesirable, *ceteris paribus*.²⁷

It is also significant, though typical, that the *Lawrence* and *Romer* courts never mention density control. If they did, in fact, rely upon considerations of density control in crafting their opinions then they were less than candid. The conventions of our legal system, of course, make it very unlikely that a court would confess to having relied upon considerations of density control. It is hard to imagine a court inserting into an opinion the kind of reasoning found in the fictional quotation above.

If this analysis is correct then the *Lawrence* and *Romer* courts committed not one but two *pro tanto* infringements of the norms of formal justice. First, they implicitly relied upon unregulated facts concerning density control. Secondly, by not admitting their reliance upon

²⁷Sunstein admits that "[m]inimalism might be threatening to the rule of law insofar as it does not ensure that decisions are announced in advance." *One Case at a Time*, p. 55.

density control they failed to be candid. Yet there is reason to doubt that the *Lawrence* and *Romer* opinions are defensible without reliance upon density control factors. So, these opinions are either indefensible or they constitute *pro tanto* infringements of the norms of formal justice.

Unless there are countervailing reasons to justify these *pro tanto* infringements of formal justice, we must conclude that the Court should have upheld the anti-gay laws and waited until society was “ready” for consistent invalidation of all constitutionally indistinguishable morals laws. If progressives favor immediate invalidation of anti-gay laws, but not other morals laws, they need to offer countervailing reasons.

VII.

Such reasons may exist. Refusing to derive conclusions from a legal norm in one case may enable judges to derive a more important conclusion from that norm in another case.

Undesirable as doctrinal inconsistency and lack of candor may be in themselves, they could serve as means to more important ends. Suppose the Court can invalidate no more than one of several, equally unconstitutional laws in the short term, without unduly compromising other political values. In that case, it might make more sense to invalidate only one, rather than none or all of them. Sometimes the court can implement a principle more effectively if it doesn’t articulate it or apply it so broadly. For this reason one could argue that courts should choose their battles and commit the “lesser evil,” when necessary.

Reasoning thus, however, requires the Court to repudiate the deontological conception of adjudication. That conception specifically forbids committing a lesser injustice for the sake of a greater justice. Suppose, as we have assumed, that issuing selective rulings for reasons of density control, and failing to be candid about it, constitute *pro tanto* violations of formal justice. According to the deontological conception, the Court may not, in that case, underenforce a

constitutional norm so as to make more publicly acceptable the application of that norm in more cases that are more important or that affect more individuals. Nor, on the deontological conception, may the Court decline to announce the ground for its decision. But that is precisely what a judge does when she declines to apply a constitutional norm to a certain law so as to facilitate the application of that norm in a more important case. That is what the majorities in *Romer* and *Lawrence* did if, as one might surmise, they declined to invalidate other morals laws so as to make their invalidation of anti-gay laws more palatable to the general public in the short term. It is surprising that commentators do not characterize such choices in terms of deontological prohibitions on trade-offs, given the vast and sophisticated literature in normative ethics on these topics.²⁸

This discussion so far has suggested that repudiating the legal irrelevance of unregulated facts and the deontological conception of adjudication, along with affirmative candor, provide a basis on which to defend the selectivity of the *Lawrence* and *Romer* Courts. How does this more revisionist approach compare to Sunstein's own approach, which abandons only affirmative candor without explicitly repudiating the other two tenets?

VIII.

Consider Sunstein's recent discussion of *Lawrence*.²⁹ Sunstein first emphasizes that he would have preferred the majority to use the Equal Protection rationale upon which Justice O'Connor relies in her concurrence. This rationale avoids disturbing *Bowers*, instead invalidating the Texas statute for singling out same-sex sodomy.

²⁸See, e.g., F.M. Kamm, *Morality, Mortality*, Vol II (Oxford: Oxford University Press, 1996).

²⁹Cass R. Sunstein, "What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage," *Supreme Court Review* (in press, page references to manuscript). The first draft of Sunstein's manuscript circulated after the first draft of this paper was written.

The most Sunstein offers in support of the actual *Lawrence* opinion is an argument from “American-style desuetude.” Texas rarely enforced its sodomy statute, a pattern which Sunstein attributes to “a widespread belief that the prohibition . . . is outmoded.”³⁰ This infrequent enforcement, in turn, raises *procedural* due process concerns due to “lack of fair notice and . . . randomness” where important interests are threatened.³¹

Sunstein’s desuetude argument has some merit, but it begs our question. His argument applies to statutes that infringe important interests and rarely receive enforcement, yet which have not become so unpopular with voters as to persuade legislators to repeal them. Sunstein’s desuetude doctrine permits courts to invalidate such statutes. But our question is: what authorizes a court to invalidate one such statute while declining to invalidate all such statutes as it cannot honestly distinguish in constitutional terms? By granting certiorari in *Lawrence*, invalidating the statute, and refusing so much as to distinguish other morals laws, the Court reveals itself to be selective in its choices concerning which morals laws to invalidate and the chronological order in which to do so. There is reason to believe that the justices silently appeal to unregulated facts, such as density control factors, in making these decisions, though they decline to explain themselves in these terms.

How might the Court defend its choice to invalidate anti-gay statutes before other morals laws? This will prove difficult if the Court confines itself to regulated facts, such as the degree to which the statute in question compromises an individual’s associational liberty. Does an anti-gay statute compromise the liberty of the average (or the most disadvantaged) gay individual to a greater extent than an anti-adultery statute compromises that of the average (or most disadvantaged) adulterer? It is very hard to say. To this extent, there is no clear reason, based on

³⁰Sunstein, “What Did *Lawrence* Hold?,” p. 24.

³¹*Ibid.*

legally regulated facts, for the Court to invalidate anti-gay laws before other morals laws. But neither is there any clear legal reason for them to follow some other chronological sequence.

Suppose we permit the Court to appeal also to unregulated facts in justifying its selectivity. Consider, for example, the *aggregate* impact of a statute on the liberty interests of a particular discrete population. This is, we can assume, an unregulated fact. Perhaps the aggregate impact of anti-gay laws on the gay population, for example, exceeds the aggregate impact of any other single morals law on its respective targeted population. To that extent, invalidating an anti-gay law increases the aggregate degree of associational liberty enjoyed by Americans more than would the invalidation of any other *single* morals law (holding constant other effects). Given an interest in density control, the Court might well choose to invalidate the anti-gay law well before turning to other morals laws.

Consider another unregulated fact: the local popularity of a statute. Anti-gay laws may be less popular in their respective jurisdictions than is any other single morals law in those same jurisdictions. To that extent, invalidating anti-gay laws causes less social disruption, opposition, and frustrated reliance than would the invalidation of any other single morals law. Perhaps the justices of the *Lawrence* and *Romer* majorities privately intend to invalidate gradually all constitutionally indistinguishable morals laws, but believe they have systemic reasons not to invalidate all such laws, all at once. Presented with the opportunity to invalidate anti-gay laws, the Court need not refrain from doing so just because it is unprepared at that moment to invalidate other morals laws.

A theory that appeals to unregulated facts, as this one does, has some surprising counterfactual ramifications. Imagine an alternate reality in which polygamists were as numerous, organized, and vocal as are gays in our world, while gays constituted a miniscule,

silent minority (much as do polygamists in our world). In that fictional world, the theory presented here might give courts reason first to invalidate anti-polygamy laws without invalidating or distinguishing anti-gay laws. Only much later, perhaps, would courts want to address anti-gay laws, in this alternate reality.

This is a strange implication of the view presented here and many will find it counterintuitive. But perhaps this reaction results from the fact that we are unaccustomed to thinking of polygamists (to say nothing of those who commit consensual adult incest) as “oppressed minorities.” To counteract this tendency, one must imagine vividly a world in which gays constitute a miniscule, silent minority, while ten percent of one’s friends and colleagues, along with respected public figures such as Colin Powell, Diane Sawyer, and Tom Hanks, openly engage in polygamy or consensual adult incest and insist, sincerely, that these practices are central to their ways of life. If we found ourselves in this alternate reality, many of us would soon come to give the same degree of political priority that we currently give to gay rights to the rights of polygamists and adults who commit consensual incest with other adults.³²

In practice, however, it may be impossible for the Court to determine with any confidence that the aggregate loss of liberty to homosexuals, as a group, under the anti-gay laws is greater than the aggregate loss of liberty to adulterers, as a group, under the adultery laws. For all the Court can tell, these two laws may appear to compromise liberty to an equal degree, in the aggregate. Suppose the Court cannot determine which of two morals laws causes greater aggregate loss of liberty, or identify any other fact, regulated or unregulated, on the basis of which to give temporal priority to invalidating one of the laws over the other. In that case the Court might have a reason to “flip a coin” in order to decide which law to invalidate first. Our

³²This is not to suggest that polygamy and incest would ever be as widespread as homosexuality, even if they were legalized and socially approved practices.

jurisprudence, however, discourages the Court from doing so candidly. More realistically, faced with a set of equally unconstitutional laws, the Court might decide to invalidate first the one that has attracted the most articulate and politically influential opposition. This, too, is an unregulated fact. Again, we can explain the Court's behavior if we assume the justices to accept the legal relevance of various unregulated facts.

Whether or not the Court can make these comparative determinations about different morals laws, it still has reason to invalidate morals laws gradually, rather than all at once. In effect, the Court's choice to invalidate a certain morals law during a certain term immediately becomes a reason for it to wait (several years, perhaps) before invalidating any other such laws. This is again to propose that unregulated facts such as those concerning density control might not be legally irrelevant to the Court.

Sunstein himself offers some arguments distinguishing anti-gay laws from other morals laws, but the Court does not even attempt to mount such arguments.³³ For all Sunstein's genius, there is no reason to believe that the Court and its clerks are less resourceful than he in this regard. More likely, the justices of the *Lawrence* majority do not believe that distinctions Sunstein identifies can bear the legal weight he would place upon them. Rather, the justices simply understand the importance of not trying to change too much too quickly. They are even more minimalist than Sunstein wants them to be.

IX.

The theory presented in this paper shares Sunstein's rejection of formal justice, but goes further. Sunstein defends minimalism by imputing to the Court an awareness of the fallibility of its own moral judgment and an interest in promoting democratic deliberation. This paper offers an alternative explanation and a partial defense of *Romer* and *Lawrence*. It suggests that the

³³Sunstein, "What Did *Lawrence* Hold?," pp. 25-29.

majority justices share a tentative belief in broad constitutional principles protecting liberty of intimate association, non-discrimination against sexual minorities, and so forth. However, they recognize substantial public hostility, at the state level, to broad application of these principles. This leads them severely to understate their commitment to these principles. In addition, it is possible that the majorities tacitly reject the deontological conception of adjudication and consider unregulated facts, such as density control factors, to be legally relevant. Finally, the majorities may believe that they can implement the pertinent constitutional principles more effectively in the long term by applying them narrowly in the short term, rather than by immediately applying these principles to every law that actually infringes them. The majorities issue minimalist holdings in the hope of maximizing the longer-term impact of the constitutional principles in question.

Sunstein, by contrast, writes as though the majorities favor minimalism because they are not yet confident just what principle to endorse and hope to promote public deliberation. He is probably correct that the justices remain somewhat uncertain how they wish to characterize the controlling constitutional principles. But Sunstein's theory fails to explain adequately the majority opinions in *Romer* and *Lawrence*. This paper offers a more satisfactory account. It is not, as Sunstein suggests, that the justices do not know what constitutional principle to endorse or how to extend it to other morals laws. It is fairly clear how to extend the *Lawrence* principle to laws criminalizing adultery, fornication, and (perhaps) consensual adult incest. It is rather that the justices do not see the practical *point* of extending the principle to other morals laws, at this time. It is not yet worth the political capital, the systemic risks, and the damage to the Court's perceived legitimacy with the general public.

To abandon the legal irrelevance of unregulated facts and the deontological conception of adjudication is to contest much of mainstream jurisprudence. Some readers will agree with the reasoning in this paper but conclude that, if that is the price of defending *Romer* and *Lawrence*, perhaps the holdings themselves are indefensible. Others will want to pursue less revisionist methods to justify these holdings against Scalia's *reductio*. This paper has offered some reasons for skepticism about such efforts.