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by
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Substantive due process strict scrutiny review, under which a court will uphold a law that impinges upon a fundamental right only if the law is necessary to serve a compelling governmental interest, has come under attack over the last two decades. Much of the criticism has focused on the way in which the Supreme Court has identified the existence of the fundamental rights whose burdening triggers the exacting test. Various critics, conjuring up images of the *Lochner*[1] era, have charged that the Court has been acting as a superlegislature, constructing new rights that have no real grounding, textual or otherwise, in the Constitution, which is, after all, the charter from which the Court derives its authority. As John Hart Ely said of *Roe v. Wade*,[2] which has come to symbolize modern substantive due process heightened scrutiny (and I am paraphrasing here), the decision is bad not so much because it is bad constitutional law, but because it simply is not constitutional law, and gives almost no sense of an obligation to try to be.[3]

Professor Sheppard tries to avoid that criticism by conditioning rigorous review under the Due Process Clause not on the nature of the liberty or property interest affected by a law, but rather on the nature of the government's reason for passing the law.[4] In other words, under Professor Sheppard's approach, a law may run afoul of

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1. *See* Lochner v. New York, 198 U.S. 45 (1905).

2. 410 U.S. 113 (1973).

3. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

4. Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 977, 978-94 (1994).

substantive due process not because of what is on the individual's side of the scale, but rather because of the perfectionist aim that may be on the government's side of the balance. Indeed, the perfectionist rationality review he proposes would not seem at all to depend upon the activity or conduct regulated by the statute at issue, except perhaps insofar as the regulation of certain activity is a sign of perfectionist motivation by the state, which motivation I shall discuss momentarily.

But first, I want to say a few words about rationality review as currently undertaken by the Supreme and lower courts, and the general way in which Professor Sheppard's explication of perfectionism relates to that rationality review. Modern garden-variety due process/equal protection rationality review, as practiced by the federal courts, is marked by at least two features. The first is a willingness on the part of the reviewing court to *hypothesize* a legitimate state interest that may justify the law.[5] Thus, courts generally do not ask why a law actually passed the legislature, but rather whether the law could legitimately have passed a rational legislature. The second noteworthy feature of traditional rationality review is the tolerance of a great deal of under- and overinclusiveness with respect to the statute's fit with the hypothesized or articulated legislative end. In this regard, the Supreme Court has observed repeatedly that "mathematical nicety" is not constitutionally required of legislative schemes,[6] and has admonished lower courts that the Fourteenth Amendment does not require a state to choose between attacking every aspect of a problem or not attacking the problem at all; instead, a state is free to attack a problem one step at a time.[7]

The gist of Professor Sheppard's argument is that some laws ought to fail rational basis scrutiny because the fit between the laws and the perfectionist aims on which they are based is too loose. The linchpin of this argument is the notion that for a perfectionist law to be effective at all, the citizens must understand the moral principle enshrined in the law. This is not true for paternalistic laws and utilitarian/harms-preventing laws. In both of those contexts, as Professor Sheppard recognizes,[8] a law advances its goal if people simply comply with the law and constrain their conduct, whether or not they understand *why* the law regulates their conduct. But for a perfectionist law to work, the people must understand why obedience to the law makes

5. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1443 (2d ed. 1988).
6. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
7. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).
8. *See, e.g.*, Sheppard, *supra* note 4, at 1010.

them better, so they may translate that moral lesson into other areas of their life in order to enrich all of society. As Professor Sheppard writes, "[P]erfectionism enshrines a view of morality that is *meant to be understood by the citizen as moral bases for action, not merely legal bases for action.*"[9]

If this is so—if citizens need to understand the moral edict enshrined in a perfectionist law for the law to be effective—then we can readily see why under- and overinclusiveness should not be permitted: They *confuse* the citizen to the point where the moral edict is not understood, and the law fails its purpose entirely. In short, the argument runs, any significant under- or overinclusiveness between a perfectionist law and the moral edict on which it is based makes the law "irrational," in the sense in which the courts have traditionally used that term, because the statute does not attack the problem—of a morally ignorant citizen—even in part; it leaves him just as ignorant as it found him.

Seeing how perfectionist rationality review fits analytically into the rational basis review framework the courts have already erected is, of course, only the first step in evaluating Professor Sheppard's argument. To assess any utility Professor Sheppard's perfectionist rationality review framework may have, we must see how, or even whether, the framework can be used to decide cases.

The first question that must be addressed in this regard is elementary but critical: How is a court to know if a law is based upon a perfectionist aim? Professor Sheppard acknowledges that a law might reflect multiple interests, many of which are not perfectionist at all.[10] For example, anti-murder statutes might be enacted under a utilitarian/harms-preventing rationale, a paternalistic rationale, and a perfectionist rationale.[11] Given that any of the three is possible, is a court reviewing such a statute to insist upon perfectionist coherency? If the answer is "no" (and Professor Sheppard does not suggest otherwise)[12]—that is, if such statutes would be subject only to traditional

9. *Id.* at 1015 (emphasis added).

10. *Id.* at 1011. It is worth noting that Professor Sheppard does not suggest that laws based on rationales other than perfectionist theory are constitutionally problematic in any way.

11. *See, e.g., id.* at 1012 n.153.

12. Professor Sheppard observes that it is for the "Court to determine whether . . . all, some, or just one justification need to be satisfactorily established by the state as within the dictates of due process." *Id.* at 1018.

If the possible presence of some nonperfectionist objectives in addition to possible perfectionist aims underlying a law does not take the law outside perfectionist rationality scrutiny, perfectionist rationality review would be a radical departure from current doc-

rational basis review because of their plausible paternalistic and/or harms prevention justifications—then I am not sure how many laws Professor Sheppard's perfectionist test would apply to at all. Laws that have traditionally been understood as based on morality—such as laws prohibiting sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy—are just as likely to have been premised on a paternalistic impulse as a perfectionist one. And even if one were to resort to legislative history, which is not ordinarily done under rationality review today, I doubt that such legislative history of these laws would give courts any guidance as to which of these two rather nuanced variants of moral justification held more sway in the legislature.

Moreover, these laws may often be justified by reference to a utilitarian/harms-avoidance justification. We can see this by looking at the two paradigm cases Professor Sheppard discusses, *Bowers* and *Barnes*.[13] In each of these cases, some of the Justices thought the statute at issue might be able to be justified because of the risk of physical harm the regulated activity created. In *Bowers*, Justice Blackmun was forced to discuss the public health justification for the Georgia statute advanced by the state, and in *Barnes* Justice Souter focused on the secondary effects—sexual assault and other violence—associated with nude dancing. These potential justifications, which would seem to be available in almost every case, are clearly outside the perfectionist realm.

Even where a court can know (because, *e.g.,* the legislature says so explicitly in the law itself) that a statute is based only on a perfectionism aim, Professor Sheppard's perfectionist rationality review is problematic. In *Bowers*, for example, Professor Sheppard says that the moral edict enshrined in the Georgia statute cannot be simply that homosexual sodomy is bad; it must be that all sodomy is bad *or* that homosexuality is bad. The reason for this, he says, is that all homosexual conduct is of "essentially similar moral dimension in the public

trine, which, as I said earlier, does not seem to be concerned with why a law was actually passed, so long as it could have been constitutionally passed. Thus, under current rationality review, the state need not show that a law is rationally related even to each of its asserted ends. In Bowers v. Hardwick, 478 U.S. 186 (1986), for example, when the majority concluded that Georgia's anti-sodomy statute was rationally related to one end (morality), it did not feel the need to discuss the law's relation to another asserted end (public health). In short, the possibility that a conceivably valid law might have been passed on account of flawed reasoning by the legislators is not under current doctrine a justification for striking down the law and in effect remanding it to the legislature.

13. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

understanding."[14] But why need this be so? Could not the legislature, or some swing-vote coalition therein, decide that homosexual sodomy worsens people and that other sodomy and other homosexual conduct[15] do not, and want to teach that lesson to people? Or at the very least, might not the perfectionist lesson be that homosexual sodomy is *worse* than other sodomy or other homosexual acts?

Professor Robert Nagel made this same point more generally twenty years ago when he observed that a law *always* serves its purpose perfectly if we define the purpose by reference to the law's scope, so that the *meaningful* issue becomes whether the purpose reflected in the law may run counter to some constitutional norm.[16] And the perfectionist rationality review approach does not purport to identify those norms, in *Bowers* or elsewhere; indeed, perfectionist rationality review's focus on the means-end relationship seems an almost self-conscious attempt to avoid the norm-based approach that has drawn fire in the *Roe* line of cases. As Professor Sheppard acknowledges, perfectionism embodies no substantive "agenda" and "does not entail any particular conception of . . . good and evil."[17] Rather, "[t]he method by which lawmakers accept one view of the good life as accurate . . . is central to understanding the doctrine: Lawmakers [simply] pick one."[18] I have difficulty seeing how this acknowledgment squares with the notion that judges, under perfectionist rationality review, must decide what conduct is of the same "moral dimension" or whether "moral changes [have occurred] that the legislature has ignored."[19] Such judicial efforts would seem to prompt the same kind of criticism to which *Roe* has been subject, discussed above, and perhaps even more.

And even if the Georgia legislature in *Bowers* told the Court that its goal was exclusively perfectionist, and that the legislative consensus was that all homosexual conduct worsens people equally, striking down the Georgia statute on perfectionist rationality grounds would

14. Sheppard, *supra* note 4, at 1024.

15. Indeed, even as he insists that no morally meaningful distinction can be drawn between homosexual acts that involve genitals and homosexual acts that do not, *see id.* at 1024, Professor Sheppard accepts, in his discussion of *Barnes*, the moral validity of distinctions that "relate[ ] to the human body and its biological functions," *id.* at 1025, and sees no problem with a law regulating the display of *genitals* in a public place, *id.*

16. Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128 (1972); *see also* Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. (forthcoming January 1995).

17. Sheppard, *supra* note 4, at 1014.

18. *Id.* at 1016.

19. *Id.* at 1021.

still be problematic. There are at least two reasons for this. First, the state might be trying to educate the morally ignorant citizen slowly. Education of moral norms, like their formation, is a complicated business. Who are judges to second-guess a legislative determination that education is accepted more readily and meaningfully if it is undertaken one step at a time, even if that leads to some interim confusion? Isn't that the premise of much of American law school curricular structure? Second, the state may have trouble enforcing a broad criminal prohibition on all homosexual conduct, because of limited detection and prosecutorial resources. Surely, a perfectionist-oriented state should be free to decide not to criminalize that which it cannot police; otherwise people will lose faith in the meaning of the law and not learn anything by it at all.[20] We need look back no further than the Zoë Baird episode to see the attitudinal problems that arise when laws on the books are not enforced. Even within a perfectionist framework, then, some underinclusiveness ought not to automatically doom a law.

None of this is to say that *Bowers* was necessarily correctly decided. At the very least, Justice White's opinion ignores serious equal protection issues that arise because the statute, as Justice White reads it, makes criminal liability turn on the gender of one's sexual partner, and might thus be troublesome in the same way and for the same reasons that all gender-based classifications are troublesome.[21] Incidentally, this equal protection analysis of *Bowers* explains, in a way that Justice Blackmun's substantive due process dissent does not, why a law prohibiting homosexual sodomy can be distinguished from laws prohibiting bestiality, polygamy, and adult incest, *i.e.,* incest between adult relatives. In any event, today I am suggesting only that before the perfectionist approach proposed by Professor Sheppard can be helpful, in *Bowers* and elsewhere, the questions I have posed need to be answered.

20. In Professor Nagel's terms, this would be an example of a multiple-purpose law. *See* Note, *supra* note 16, at 130-31. A refined statement of purpose would be something along the following lines: the education of a moral norm against homosexuality to the extent that such education does not interfere with people's confidence in the rule of law, which is essential to other moral education. The appropriate constitutional inquiry then becomes whether any of the multiple purposes embodied in the law violates a constitutional norm. As noted above, neither perfectionism nor perfectionist rationality review speaks to this question.

21. *See, e.g.,* Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).