Although it quarreled with the Court's finding in *Bowers v. Hardwick* that the proscription against homosexual behavior had "ancient roots," *Lawrence* did not attempt to establish that such behavior was in fact historically condoned. This raises the question as to what limiting principles are available in evaluating future arguments based on personal autonomy. Although the Court seems to recognize that a state may have an interest in regulating personal relationships where there is a threat of "injury to a person or abuse of an institution the law protects,"[663] it also seems to reject reliance on historical notions of morality as guides to what personal relationships are to be protected.[664] Thus, the parameters for regulation of sexual conduct remain unclear.

For instance, the extent to which the government may regulate the sexual activities of minors has not been established.[665] Analysis of this questions is hampered, however, because the Court has still not explained what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty, and how indeed these factors vary significantly enough from other human relationships. The Court's observation in *Roe v. Wade* "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[666] provides little elucidation.[667]

Despite the Court's decision in *Lawrence*, there is a question as to whether the development of noneconomic substantive due process will proceed under an expansive right of "privacy" or under the more limited "liberty" set out in *Roe*. There still appears to be a tendency to designate a right or interest as a right of privacy when

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[663] 539 U.S. at 567.

[664] The Court noted with approval Justice Stevens' dissenting opinion in Bowers v. Hardwick, stating "that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 539 U.S. at 577–78, *citing* Bowers v. Hardwick, 478 U.S. at 216.

[665] The Court reserved this question in *Carey*, 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

[666] Roe v. Wade, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey*, 431 U.S. at 684–85.

[667] In the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests—"compelling" interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is not its social significance but is whether it is "explicitly or implicitly guaranteed by the Constitution." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). That this limitation has not been honored with respect to equal protection analysis or due process analysis can be easily discerned. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), *with* id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).