# Guest Comment
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## The Death of Morality?

Second-guessing democracy.

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Our Founding Fathers did not fight the Revolutionary War over a right to homosexual sodomy. And it should be obvious that the Constitution they drafted a few years later did not create one. Rightly or wrongly, as evidenced by the anti-sodomy laws they left intact, our Founding Fathers simply did not share the gay-rights conclusions of today's legal intelligentsia.

Likewise, the Fourteenth Amendment — the alleged source of many of our recently discovered "constitutional" rights — did not establish a sodomy right. It is silent on the subject, and thus had no effect on the criminal sodomy laws that 32 of 37 states had at the time of ratification in 1868 and that all 50 states adopted by 1961. Indeed, it was not until last week in *Lawrence* v. *Texas* that six Supreme Court justices found a constitutional right to gay sex. In so doing, these six appointees did not even pretend to find a basis for their ruling in either the text or history of the Constitution. They effectively admitted that none existed.

To many, the most troubling aspect of the Supreme Court's decision is the conclusion that public morality is an insufficient basis to sustain a law. Texas had argued that preserving the majority's sense of morality was a legitimate state interest, but the Court disagreed. According to the dissent, the consequence of this holding is "the end of all morals legislation."

At least at first blush, there appears to be something to this concern. Criminal statutes prohibiting bestiality, adult incest, and polygamy have been enacted for no reason other than to promote the majority's moral views. If morality is an insufficient reason to sustain a law, then the constitutionality of these statutes has been called into question.

Moreover, the Court attempt to distinguish such laws by suggesting that they prohibit behavior for which "consent might not be easily refused" should convince no one. These laws have nothing to do with consent. Take the prohibition on bestiality, for example. Society does not care about animals' consent. If it did, we would all be forced to be vegetarians because, presumably, animals do not consent to being killed and eaten. In any event, what is the reason to uphold a law protecting consent, if not to preserve public morality? We value consent not because it has been etched in stone tablets and delivered to us from above, but simply because we have made a collective moral judgment that consent is desirable.

Nonetheless, the dissent is ultimately incorrect in its conclusion that the Court's decision means the end of morals legislation. Paradoxically enough, the decision *confirms* that morality is a viable basis for law. The Court's decision was all about morality, the *justices'* morality. There is no other way to explain the result. As noted above, the Constitution's text and this country's history and traditions do not recognize a right to homosexual sodomy. And Supreme Court precedent is equally unsupportive, as less than 20 years ago the Court reached the opposite conclusion to the one it formed last week. Finding no basis for its decision in the Constitution, history, or precedent, the Court majority had no choice but to rely on its own collective moral judgment.

Hence the great irony of the Supreme Court's decision: Morality was the only reason for holding that public morality is irrelevant to the constitutionality of a law. In effect, what the Court held was not that morality has no place in constitutional jurisprudence, but only that

*public* morality is irrelevant. The justices' *own* morality is decisive. Morals laws — such as prohibitions on bestiality, adult incest, polygamy, and, yes, gay marriage — pass constitutional muster if, and only if, five Supreme Court justices say so. The Court's holding does not signal the end of morality, but merely the transfer of decision-making power. Instead of permitting the public to enforce its moral views — as it should in a democracy — the Court (or, more aptly put, six members of it) surmised that it was the final moral arbiter. Because the law was "silly" (as Justice Thomas accurately described it in his dissent), the Court struck it down.

The bell thus tolls, not for morality, but for government by the people, an outcome that is neither "liberal" nor "conservative." Judicial fiat can be — and has been — used to serve the goals of both sides of the ideological spectrum. At the beginning of the last century, for example, the Supreme Court invalidated worker-welfare laws to benefit industry. The constitutional provision ostensibly relied on to reach that conclusion, the Due Process clause, is precisely the one used by today's Court to create a right to gay sex. And the next invocation of "Due Process" (depending on what alleged rights become acceptable to the legal elites in future years) may very well be equally "conservative" — perhaps at the expense of environmental programs or other social-welfare legislation. Alternatively, "Due Process" could be used for ends that are neither liberal nor conservative, but just plain-old wrong. For example, in *Dred Scott*, the decision that sparked the Civil War, the Supreme Court imposed its view of morality in finding a constitutional right to own slaves as property, immune from federal government interference.

Judicial activism can thus work in many directions, so until the high Court refrains from second guessing the moral choices of the democracy, the loser is not the Right or the Left, but the American people at large.

*— Jonathan F. Cohn is an appellate lawyer in D.C. who formerly clerked for Justice Clarence Thomas.*

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