> [T]he Court … says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show *an emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*." Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. In relying, for evidence of an "emerging recognition," upon the American Law Institute's 1955 recommendation not to criminalize "'consensual sexual relations conducted in private,' " *ante*, at 11, the Court ignores the fact that this recommendation was "a point of resistance in most of the states that considered adopting the Model Penal Code."
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> The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," –the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual.," The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that "the fact that the 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." This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review. *Lawrence v. Texas* (Scalia, J., dissenting)

In his dissent to *Lawrence v. Texas* Justice Scalia bemoans not only the decline of constitutional principle in Supreme Court jurisprudence but the apparently inevitable decoupling of morals and law. Those who read the Constitution expansively, if not imaginatively, may disagree with Justice Scalia's view of constitutional decision making. But many of these same critics of his judicial philosophy probably would agree with his suggestion that the words "morals" and "legislation" will likely be seen together less and less frequently in current events, and wish that coupling good riddance. Should they, however? And what should conservatives think of such a development?

In fact, Justice Scalia's prediction of the end of morals legislation may be overly pessimistic – or, perhaps, overly optimistic. The difference does not only depend on whether the orientation of a political conservative on legal issues is traditional – like that of Justice Scalia – or of an "alternative" nature, i.e., libertarian. It depends as well on how one regards the progress of a culture war, discussed (famously, already) elsewhere in his dissent in *Lawrence*. For even a libertarian, distrusting a supposed legislation of morality, will be disappointed if Justice Scalia is right about the future of "morals" as a constitutional basis for legislation while "morality" continues its long reign. To understand why this is so, we must consider Justice Scalia's very specific choice of words.

Nothing could be more mundane than "morality." The fourth edition of the American Heritage Dictionary describes it primarily as "The quality of being in accord with standards of right or good conduct." But of course, the only moral principle of our time is, "Who are you to say?" Yet "morals," used as an adjective by Justice Scalia in the phrase "morals legislation," is something different. The closest dictionaries get to this sense of the word is in definitions such as this one, for the noun "morals" – "Rules or habits of conduct, especially of sexual conduct, with reference to standards of right and wrong: *a person of loose morals; a decline in the public morals.*" It seems that this usage of the word derives from the Latin *mores*, meaning a specific set of customary standards (and quite distinguishable from Roman morality, or the requirements of its pagan religious law). The adjective form, as used by Justice Scalia, is typically found only in two or three phrases: "morals charges" or its variant, "morals crimes", and their necessary opposite, "morals squad." Justice Scalia refers not to what each man considers moral or not, which like all things that includes everything thereby includes nothing, but rather the *mores* of a society as a whole.

The morals adjective is an old fashioned adjective for an old fashioned idea – the idea that public morals, and not merely the distance at which my fist brakes before approaching your face, are the appropriate subject of crime and punishment, or at least of social judgment; and that reasonable men can agree, with some petty variation, regarding the appropriate moral code to be enforced. This is how Justice Scalia means morals – a specific code of behavior, based on a shared moral consensus. It goes without saying that in a world with morals, that an act was "consensual" was a necessary, not a sufficient, criterion for evaluating its moral stature. Yet we seem today to doubt that we can ever again say much more than this.

The obvious error we can make at this juncture is to say, "Of course we cannot legislate and enforce morals today, because we do not share the moral consensus of former times, and pity to our benighted fathers for thinking it was ever consonant with liberty to try." This logical error is premised on the idea that the moral code in question must have been Christianity, or some particular form of it (either narrower – say, Puritanism, or Catholicism – or broader – "Judeo-Christian ethics"). In our multicultural times, when every creed must be reckoned as "peaceful" and when paganism itself is elevated to the status of a bona fide church, how can we make crimes of subjects such as "morals"?

It is true that religion was, until very recent times, the foundation of the conception of public morals. This did not begin with Constantine and his martial melding of Church and state nor even with the divided theocracies of the ancient Hebrews. And yet while we are frequently reminded that the Constitution was written by men with a wide variety of commitment to organized religion, no one seriously doubts that they all would have recognized a positive moral code that all reasonable men could and must acknowledge, and that this code, known as the Natural Law, was largely reflected in religious moral systems that they knew.

This consensual code was not Anglican, certainly not Catholic and arguably not even Christian, but rather Anglo-Saxon – which is not to say that it is not of great use to a Catholic intellect such as that of Justice Stevens. But it is no accident that this moral code is vague, evolutionary and lacks a Roman-style reduction to a central written document. Rather it follows the Anglo-Saxon model of the common law – evolutionary, yes; hewn in stone, not at all; but based on a shared set of "common sense" assumptions so widely shared that appeals to them by the likes of the irreligious Thomas Paine and to similar notions of "self evident" truths made perfect sense to all who encountered them. Today a similar set of shared values, an orthodoxy of sorts, is enunciated by the New York Times for many members of certain liberal elites. Unfortunately, however, this "consensus" encompasses something less than half of those engaged in the conversation.

There was not consensus on each and every detail of this code, and from time to time morals within this code seem to have moved fast enough to belie any concept of evolution for any but the most fundamentalist Stephen Jay Gould. The Anglo-Saxon moral code – morals – did not, however, break under the strain of dissent, and did not become irrelevant by virtue of its fluidity. Indeed, like the common law, it became stronger. Its cuttings were replanted in America; its less democratic tendencies – "gentlemen's agreements" and various arbitrary social restrictions – largely pruned, and too slowly for some. But its roots still bear the flower of a great society enjoying substantial liberty and creativity, and cultural conservatives such as Justice Scalia find its shade pleasing. Perhaps it is those bearing the axe rather than the pruning shears that Justice Thomas meant when he wrote, in his own dissent to *Lawrence*:

> If I were a member of the Texas Legislature, I would vote to repeal [this law]. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.
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> Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated.
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Under our present morals, all of us would say that it was wrong to consider slavery moral or to give women less than the full gamut of human rights. But earlier social or political judgments, however, particularly regarding slavery, were not seriously considered appropriate morals under our Anglo-Saxon rubric. And this is not merely because the Anglo-Saxons in England itself, unencumbered by the Holy Writ of 1789, had little difficulty employing their Anglo-Saxon morals to decide that slavery and the slave trade must end there.

In a recent article in the *The Atlantic*, for example, H.W. Brands samples some of the early 19th-century criticism of the Great Compromise. William Lloyd Garrison considered the Constitution, because of its accommodation to slavery, "a covenant with death and an agreement with Hell," and New York's Senator William Seward said that the law "higher … than the Constitution," namely the natural law of human liberty, required that slavery must ultimately be ended. Lincoln acknowledged the moral pragmatism of the slavery compromise, arguing that it was a short-term loss in return for a long-term gain, and he made good on the promise to collect the moral debt incurred by the Republic at the Founding, with interest accrued.

These moral judgments did not arise from the Bible, which does not obviously condemn the not-so-peculiar social institution of involuntary servitude. It was Scripture's

moral sanction for slavery upon which Southern apologists relied early and often. Did this defense of slavery ever merit serious consideration in Anglo-Saxon morals? Perhaps. But to acknowledge these moral misjudgments does not prove that we must despair of ever judging right, and that to have liberty we must retreat into libertarian-style atomism or the replacement of morals with supply and demand. In fact, we know that the critics of Justice Scalia's philosophy themselves do not believe this at all. They do not, however, speak of morals; they speak always of morality. It is "morality" that requires that animals be treated the same as children and fetuses the same as viruses; that dictators be given the same political deference as the leaders of democracies; that "diversity" is an absolute moral good; that all religions (besides Western ones) are noble by virtue of being religions. This is all moral sensibility and none at all, or, worse, it is morality by majority (or elite) rule – the very conception of the moral decried by Justice Stevens in his majority opinion.

Yet ironically the proponents of this same modern "morality" bristle at the call to morals from Justice Scalia, William Bennett or Robert Bork. These critics comfortably don the mantle of moral superiority in its most stylish genus, the moral superiority of moral nullity, and decry political conservatives as "Bible thumpers" and religious fundamentalists. More or less the same criticism may be found in pockets on the right, the libertarians, whose worship of the market as arbiter of all things, moral and otherwise, is never reckoned an establishment of religion. What all these critics miss is that the morals on which our society was built are not, strictly speaking, Christian morality or Old Testament morality – and for this reason they share their error with those on the religious right who might maintain that "America was founded as a Christian country." America was founded, in fact, as an Anglo-Saxon country, with an Anglo-Saxon sensibility of morality. This sensibility, it has been argued, was only strengthened by the contribution of America's second-largest ethnic stock, the Germans, whose own evangelical traditions exalted earthy, common-man values not so different from those of their English cousins. These traditions make serious reference to the teachings of religion but – unlike other social mentalities such as classical continental Catholicism or radical Islam – insist on individual conscience as the highest attribute, but only when placed within a cognizable (usually traditional) social context.

It is for this reason that among the folk heroes of Anglo-Saxon political culture few can match the great attorney St. Thomas More, and of course not in his role as the Vatican's enforcer of orthodoxy in England but as a martyr to conscience in the face of religious coercion. More's conscience was the product, not of personal navel-gazing or even spiritual self-discovery of the highest order, but of his commitment to morals – already reflected in the Magna Carta – which, at that particularly inauspicious and radical moment, were politically unsustainable in Tudor England. To give Catholicism its due here, More lived and died the teaching of St. Thomas Aquinas that *lex injusta, non est lex.* More's *mores* were Anglo-Saxon in the main – based on personal loyalty, communal commitment (in his case, the community of loyalists to Rome) and an underlying conservatism.

Ironically, this call to morals, whether by abolitionists or martyrs to faith, is what it means, then, to be a cultural conservative in our time. Cultural conservatives do not have a monopoly on this quality. They, and their allies in morals in pulpits and among lay people who cannot call themselves conservative, share with the premise that traditional morality (not this religious code or that one) is valid for a society, not because the majority rules but based on the premise that the good that we have inherited outweighs the bad, and that the burden of departing from traditional morals is on the one who would make such a change. It is to morals such as these which presumably a Catholic such as Justice Scalia can call to mind as a signal and, in fact, secular premise of our Constitution. This Anglo-Saxon code of morals is not the same as modern "morality" because it does not call on guilt or pity or other emotion for its moral force. Nor is it based on those moral wolves in sheep's clothing, egalitarianism or materialism, dialectical or otherwise. It despises relativism, which is its necessary opposite, but does not roll out Biblical chapter and verse to make secular law. It calls, rather, on common sense, which can only have meaning if there is common sensibility.

And for this reason perhaps there is reason to believe that Justice Scalia is, sadly, correct. Morals legislation may in fact have no future in our multi-culture. It is unfortunate that the bargain of the melting pot has become parodied as necessitating the abandonment of individuality or cultural connection in return for full membership in the American Enterprise. These may have been subsidiary effects of acculturation, but in fact they may not have been central to the more fundamental political and moral equation: Join us and join in our common sense, and you may benefit from it in full measure. This commonality of sensibility, relied on by Deists and Protestants in framing their original compact, permitted Catholics and Jews, not hewn of Anglo-Saxon rock, to maintain a uniquely American-style loyalty to a country that made no claim to connection with Divine Right. It separated their religious and their political energies while allowing them to draw on the former to nurture the latter. American common sense, American morals, prevailed (if sustaining the occasional bruise) in political life for centuries against attacks from the personally Divinely inspired, the moral solipsists and the radicals who would have replaced it with the alternative morals of Marxian belief.

Sociologists, historians and political philosophers will argue over how and why this changed. Could the infusion of Catholic and Jewish sensibility undermine Anglo-Saxon moral sensibility? This seems doubtful. More likely, the answer can be found in a reversal of field, understandable and predictable, that allowed political values to affect

religious values for Jews, Protestants and Catholics alike. Thus the American commonplace that the hierarchical leadership of this or that religion is "out of step" with its membership and that the doctors of religion should adjust their teaching accordingly. The supposed flock leads the alleged shepherd in matters spiritual. That Americans have always been free to start their own religions has obviously sped up the un-linking of morals and spiritual teaching; but this appears to be beside the point. Because morals and common sense were historically grounded, not in Biblical command or religious doctrine as such but in validation from religion, it seems more significant that mainstream religion in America has become the girl who can't say no. Variant traditionalist strains such as Opus Dei and some far-right Protestant movements, being reactive, cannot or will not contribute new sustenance to public morals because they (accurately) see the interplay of political morality and religion as inherently corrupting. Therefore they reject the melting pot, the appeal to commonality of sense, and despair of a return to public morals except under the strictest of sectarian guidelines, a political and Constitutional dead end. Needless to say, the recent introduction of religious traditions for which there are no "receptors" in Anglo-Saxon morals only complicates the situation. But it may be argued that if many mainstream religious leaders had not given up the fight for morals, and not just morality, in the public sphere, that the system would still be robust enough to either assimilate the contribution from these new contributors – or to reject them as not only foreign, but lacking in morals, as may be the case.

However good such a religious renewal might be for individuals or for societies, it will not reinvigorate the idea of morals as an appropriate basis for policy making, however. What must first be recovered is the understanding that there can ever be moral consensus, except of the basest kind, without theocracy. Our Anglo-Saxon history – ours regardless of ethnic or cultural heritage – shows that it can be done. The experience of outsiders to that tradition who have successfully appealed to it, such as Gandhi, demonstrates that morals can be shared across cultures.

The challenge of developing moral consensus in a multicultural world is daunting. Rejection of *mores* is taught as a virtue; believers, traditionalists and those who do not adopt the orthodoxy of the intellectual elites are denounced as "mean spirited," "fascist" and "fundamentalist," so that no real conversation seems possible. But if we frame the argument properly – as one seeking genuine moral consensus and a rebirth of morals, without recourse to theocracy – we can approach those who see a power-hungry Pope or a grits-eating Ayatollah behind every assertion of morals in public policy. Perhaps at the same time cultural conservatives, and others who value sincere dialogue in search of meaningful moral consensus, can recapture the "moral" high ground of libertarians and others who have embraced the seeming impossibility of moral consensus and morals in public policy, and made their avoidance a virtue. Our goal must be to coalesce in a consensus on morals attractive enough for a meaningful majority that again enables morals legislation, morals social policy, morals leadership – but, given the world we live in today, which does so without alienating a substantial segment of the population or leaving the other perpetually feeling aggrieved at the injustice of it all.

We must not join in abandonment of our own morals, which include our ancient belief that we are, indeed, responsible for the moral state of our brothers, as well as our American faith in reason, common sense and that, when in doubt, we should choose the liberty of the individual.

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