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2014

### Observations on MacDonald v. Moose

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OBSERVATIONS ON *MACDONALD V. MOOSE*

Kevin C. Walsh \*

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I. INTRODUCTION

In *MacDonald v. Moose*,<sup>1</sup> a split panel of the U.S. Court of Appeals for the Fourth Circuit granted a petition for a writ of habeas corpus to undo the state criminal conviction of an adult for soliciting oral sex from a minor.<sup>2</sup> Based on *Lawrence v. Texas*,<sup>3</sup> the court held a longstanding Virginia prohibition of bestiality and sodomy to be partially facially unconstitutional.<sup>4</sup> Its decision left the bestiality prohibition untouched while holding the sodomy prohibition completely unenforceable, even as applied in cases involving minors.<sup>5</sup>

The panel majority misapplied the deferential standard of review required by Congress for federal habeas review of state court convictions.<sup>6</sup> And the court’s analysis further muddled the already confused doctrine surrounding facial and as-applied challenges. More fundamentally, the panel majority’s concern about the supposed need to engage in a “drastic” “judicial reformation” of Virginia’s law to render it compatible with *Lawrence* was simply misplaced.<sup>7</sup> The court could have—and should have—easily applied Virginia’s law together with *Lawrence*, just as the Virginia courts did in the decade between *Lawrence* and *MacDonald*.

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1. 710 F.3d 154 (4th Cir. 2013).

2. *Id.* at 155–56.

3. 539 U.S. 558 (2003).

4. *See MacDonald*, 710 F.3d at 166.

5. *Id.* at 166–67.

6. 28 U.S.C. § 2254(d) (2012) (providing that a writ of habeas corpus shall not be granted unless the state decision was “contrary to, or involved an unreasonable application of, clearly established Federal law,” or “was based on an unreasonable determination of the facts in light of the evidence presented”).

7. *See MacDonald*, 710 F.3d at 165–66 (citing *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 323 (2006)).

## II. BACKGROUND

*MacDonald v. Moose* addressed the effect of *Lawrence v. Texas* on a Virginia statute criminalizing bestiality and sodomy.<sup>8</sup> William MacDonald was convicted in the Circuit Court of the City of Colonial Heights of soliciting a minor to violate Virginia's sodomy prohibition and contributing to the delinquency of a minor.<sup>9</sup> At the time of the events giving rise to his prosecution (September of 2004), MacDonald was a forty-seven-year-old male and the minor was a seventeen-year-old female.<sup>10</sup> Putting aside the age difference for a moment and focusing just on the solicited act, MacDonald did not solicit what many people think of as a felony. He did not ask for help with robbing a bank or assaulting an enemy, but rather to perform oral sex.<sup>11</sup> Moreover, the minor said "no" and they did not then engage in oral sex.<sup>12</sup> It was only a few months later that MacDonald came to law enforcement's attention through an unusual combination of circumstances, and he was ultimately charged with and convicted of solicitation.<sup>13</sup>

MacDonald's solicitation conviction was based on two Virginia laws: (1) the law prohibiting solicitation of a minor to commit a predicate felony<sup>14</sup> and (2) the law defining the predicate felony.<sup>15</sup> In MacDonald's case, the predicate felony was sodomy in violation of Virginia Code section 18.2-361(A): "If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony . . . ."<sup>16</sup>

Section 18.2-361(A)'s blanket prohibition of bestiality and sodomy was obviously unconstitutional in many of its potential applications after *Lawrence*.<sup>17</sup> In *Lawrence*, the U.S. Supreme Court reversed the convictions of two adult men under a Texas law that prohibited sodomy between individuals of the same sex.<sup>18</sup>

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8. *Id.* at 156, 160.

9. *Id.* at 157-58.

10. *Id.* at 156-57.

11. *Id.* at 157 (citation omitted). MacDonald said he never asked the minor to perform fellatio on him, but a judge found otherwise in a non-jury trial. *See id.* at 157 & n.4. MacDonald's sufficiency of the evidence arguments failed, and they were not at issue by the time his federal habeas petition reached the Fourth Circuit. *See MacDonald v. Holder*, No. 1:09cv1047(GBL/TRJ), 2011 WL 4498973, at \*7 (E.D. Va. Sept. 26, 2011), *rev'd sub nom. MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013).

12. *MacDonald*, 710 F.3d at 157.

13. *Id.* at 157, 158. One of these unusual circumstances was MacDonald's filing of a police report complaining that the minor had forcibly abducted him and sexually assaulted him. *Id.* at 157. Police interviewed her and credited her version of events over his. *Id.* MacDonald was also charged with filing a false police report. *Id.*

14. *Id.* at 155 (quoting VA. CODE ANN. § 18.2-29 (2009)).

15. *Id.* at 156 (citing VA. CODE ANN. § 18.2-361 (2009)).

16. VA. CODE ANN. § 18.2-361(A).

17. *See* 539 U.S. 558, 578 (2003) (holding unconstitutional convictions for adult, consensual, private, noncommercial conduct violating a statutory prohibition of sodomy).

18. *Id.* at 562-63, 579.

The Court concluded that enforcement of the Texas law unconstitutionally invaded the protected liberty interests of adults engaged in private, consensual, noncommercial sexual behavior.<sup>19</sup> The Court in *Lawrence* asked “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”<sup>20</sup> And the Court answered that the state cannot criminally punish “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”<sup>21</sup>

*Lawrence* did not guarantee constitutional protection for every sexual activity that comes within the sweep of Virginia Code section 18.2-361(A). It would require a creative extension of *Lawrence*, for example, to find in that decision constitutional protection for someone who “carnally knows . . . [a] brute animal.”<sup>22</sup> And the opinion for the Court explicitly limited its recognition of the constitutionally protected liberty interests at issue to adult, consensual, private, noncommercial sexual conduct: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”<sup>23</sup>

After *Lawrence*, then, an important question that arose for laws like section 18.2-361(A) of the Virginia Code was whether such laws could constitutionally be enforced in circumstances that would not trespass on the personal liberty interests recognized in *Lawrence*. Virginia’s courts said “yes” in MacDonald’s case and others.

In the state appellate court decision at issue in MacDonald’s federal habeas petition, the Virginia Court of Appeals analyzed MacDonald’s unconstitutionality-based defense as presenting both a facial and an as-applied challenge.<sup>24</sup> The court rejected both. It grounded its reasoning on an earlier appellate opinion that affirmed MacDonald’s convictions for four counts of sodomy arising out of a different prosecution in a different jurisdiction.<sup>25</sup>

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19. *Id.* at 578.

20. *Id.* at 564.

21. *Id.* at 578.

22. VA. CODE ANN. § 18.2-361(A). For a somewhat whimsical overview of how such an argument might proceed, see Eugene Kontorovich, *The Bestiality Brief*, VOLOKH CONSPIRACY (Dec. 5, 2012, 4:20 PM), <http://www.volokh.com/2012/12/05/zoophilia-sex-toys-and-the-constitutional-protection-of-autonomous-sex/>.

23. *Lawrence*, 539 U.S. at 578.

24. *MacDonald v. Commonwealth*, Rec. No. 1939-05-02, 2007 WL 43635, at \*1 (Va. Ct. App. Jan. 9, 2007).

25. *Id.*; see also *McDonald v. Commonwealth*, 630 S.E.2d 754, 755–56 (Va. Ct. App. 2006). The sodomy prosecution was in Prince George County, while the solicitation prosecution was in the City of Colonial Heights. *MacDonald*, 2007 WL 43635; *McDonald*, 630 S.E.2d 754. The sodomy prosecution was based on four incidents between December 2002 and August 2004. *McDonald*, 630 S.E.2d at 755. Two of the incidents involved the same seventeen-year-old female whose

In that earlier opinion, the Virginia Court of Appeals first rejected MacDonald's facial challenge on the ground that "a party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights."<sup>26</sup> The court then rejected MacDonald's as-applied challenge on the ground that "*Lawrence* made quite clear that its ruling did not apply to sexual acts involving children."<sup>27</sup>

In holding that *Lawrence* provides no constitutional protection for sodomy involving an adult and a minor, the Virginia Court of Appeals explained that *Lawrence*'s inapplicability to "acts involving minors" was one of four exceptions to the *Lawrence* Court's holding: "The Supreme Court found that acts involving minors along with non-consensual acts, public conduct, and prostitution do not merit due process protection."<sup>28</sup> And the court relied on *Martin v. Zihel*<sup>29</sup>—a post-*Lawrence* decision of the Supreme Court of Virginia that held Virginia's fornication statute unconstitutional—while also noting that "this case does not involve minors, non-consensual activity, prostitution or public activity . . . . [S]tate regulation of that type of activity might support a different result."<sup>30</sup> The court further noted its own prior use of "the exceptions noted in *Lawrence* to uphold the constitutionality of Code [section] 18.2-361(A) in other settings," namely "in affirming the conviction of a man accused of *public* sodomy based on the public acts exception in *Lawrence*."<sup>31</sup> Finally, the court observed that "[o]ther jurisdictions have found these stated exceptions to be situations where the behavior is not a protected liberty interest."<sup>32</sup>

After exhausting available appellate and post-conviction review in state court, MacDonald petitioned for a writ of habeas corpus in the U.S. District

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interactions with MacDonald formed the basis of the solicitation prosecution. *MacDonald*, 2007 WL 43635, at \*1; *McDonald*, 630 S.E.2d at 755. The other two incidents involved a different minor female, who was sixteen years old. *McDonald*, 630 S.E.2d at 755. MacDonald was forty-five at the time of the first incident with this sixteen year-old and forty-six at the time of the second. *Id.*

26. *McDonald*, 630 S.E.2d at 756 (quoting *Ulster Cnty. Court v. Allen*, 442 U.S. 140, 154–55 (1979)) (internal quotation marks omitted).

27. *Id.* at 757 (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

28. *Id.* (citing *Lawrence*, 539 U.S. at 578).

29. 607 S.E.2d 367 (Va. 2005).

30. *McDonald*, 630 S.E.2d at 757–58 (quoting *Martin*, 607 S.E.2d at 371) (internal quotation marks omitted); see also *Martin*, 607 S.E.2d at 371 ("[A]pplying the reasoning of *Lawrence* . . . leads us to conclude that [the fornication statute] is unconstitutional because by subjecting certain private sexual conduct between two consenting adults to criminal penalties it infringes on the rights of adults to 'engage in . . . the exercise of their liberty under the Due Process Clause . . .'" (quoting *Lawrence*, 539 U.S. at 564)).

31. *Id.* at 758 (citing *Singson v. Commonwealth*, 621 S.E.2d 682, 688 (Va. Ct. App. 2005)).

32. *Id.* (citing decisions from appellate courts in North Carolina, Ohio, and Washington); see also *id.* at 757 (citing *United States v. Bach*, 400 F.3d 622, 629 (8th Cir. 2005) (holding that child pornography was not protected under *Lawrence*); *United States v. Sherr*, 400 F. Supp. 2d 843, 850 (D. Md. 2005) (adopting the Eighth Circuit's reasoning in *Bach*); *State v. Senters*, 699 N.W.2d 810, 817 (Neb. 2005) (holding that *Lawrence* does not apply to children and that states may define the age of majority)).

Court for the Eastern District of Virginia.<sup>33</sup> As construed by the district court—and as relevant to the ultimate disposition of the petition by the Fourth Circuit—MacDonald claimed in his petition that section 18.2-361(A) of the Virginia Code was unconstitutional on its face and as applied in his prosecution.<sup>34</sup> The district court disposed of the facial claim first.<sup>35</sup> The court reasoned that the state court’s holding that MacDonald “lacked standing to challenge the facial constitutionality of . . . [section] 18.2-361(A)” was not contrary to federal law because “the principle relied upon was drawn directly from a United States Supreme Court case.”<sup>36</sup> The district court next disposed of the as-applied claim,<sup>37</sup> stating that because “Virginia considers persons aged sixteen and seventeen to be children, and the Supreme Court in *Lawrence* explicitly stated that the ruling did not apply to sexual acts involving children,” the state court holding was not contrary to or an unreasonable application of federal law.<sup>38</sup>

### III. THE FOURTH CIRCUIT’S DECISION

On appeal, a split panel of the Fourth Circuit vacated and remanded the case “for an award of habeas corpus relief on the ground that the anti-sodomy provision facially violates the Due Process Clause of the Fourteenth Amendment.”<sup>39</sup> Judge King wrote the opinion for the court, in which Judge Motz joined.<sup>40</sup> Judge Diaz authored a dissent.<sup>41</sup>

The panel majority first rejected the state court’s reliance on the principle that a party has standing to challenge the constitutionality of a statute only insofar as it affects the party’s own rights.<sup>42</sup> The court reasoned that this principle was inapplicable because the statute’s facial unconstitutionality entailed its as-applied unconstitutionality.<sup>43</sup>

The Fourth Circuit majority described *Lawrence v. Texas* as holding that “statutes criminalizing private acts of consensual sodomy between adults are

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33. *MacDonald v. Holder*, No. 1:09cv1047(GBL/TRJ), 2011 WL 4498973, at \*1 (E.D. Va. Sept. 26, 2011), *rev’d sub nom.* *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013).

34. *Id.* at \*2. MacDonald also advanced an ex post facto claim and an insufficiency of the evidence claim. *Id.*

35. *Id.* at \*4.

36. *Id.* at \*5 (citing *Ulster Cnty. Court v. Allen*, 442 U.S. 140, 154–55 (1979)). The Supreme Court stated that “a party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights.” *Ulster Cnty. Court*, 442 U.S. at 154–55.

37. *MacDonald*, 2011 WL 4498973, at \*5.

38. *Id.* In evaluating the state court’s ruling, the federal court applied the standard prescribed in 28 U.S.C. § 2254(d) (2102). *Id.* at \*2.

39. *MacDonald v. Moose*, 710 F.3d 154, 156 (4th Cir. 2013).

40. *Id.* at 155.

41. *Id.* at 167 (Diaz, J., dissenting).

42. *See id.* at 161–62 (majority opinion) (citations omitted).

43. *Id.* at 162 (“Because . . . the anti-sodomy provision is unconstitutional when applied to any person, the state court of appeals and the district court were incorrect in deeming the anti-sodomy provision to be constitutional as applied to MacDonald.”).

inconsistent with the protections of liberty assured by the Due Process Clause of the Fourteenth Amendment.”<sup>44</sup> The core of the panel majority’s reasoning regarding the effect of *Lawrence* on Virginia Code section 18.2-361(A) rested on its understanding of the Supreme Court’s overruling of its earlier decision in *Bowers v. Hardwick*.<sup>45</sup> The panel majority explained *Bowers* as a failed facial challenge to a Georgia statute virtually identical to Virginia’s;<sup>46</sup> in concluding that “*Bowers* was not correct when it was decided, and it is not correct today,” the *Lawrence* Court “recognized that the facial due process challenge in *Bowers* was wrongly decided.”<sup>47</sup> According to the majority, the similarities between the Georgia statute incorrectly upheld in *Bowers* and the Virginia statute underlying MacDonald’s conviction required a holding of facial unconstitutionality in MacDonald’s case: “Because the invalid Georgia statute in *Bowers* is materially indistinguishable from the anti-sodomy provision being challenged here, the latter provision likewise does not survive the *Lawrence* decision.”<sup>48</sup>

The court also reasoned that judicial narrowing of the sodomy prohibition to apply only to minors would require forbidden judicial rewriting of the statutes.<sup>49</sup> The majority acknowledged that a more narrowly drawn sodomy prohibition might be constitutional, but stated that the task of narrowing in these circumstances was for the state legislature, not a federal court.<sup>50</sup> Although the Supreme Court has stated that the preferred remedy is “to enjoin only the unconstitutional applications of a statute while leaving other applications in force,” this sort of remedy has a limit: courts should not rewrite state law even as they attempt to salvage it.<sup>51</sup> The panel majority reasoned that “a judicial reformation of the anti-sodomy provision to criminalize MacDonald’s conduct in this case, and to do so in harmony with *Lawrence*, requires a drastic action that runs afoul” of this principle.<sup>52</sup>

Judge Diaz’s dissent emphasized the deferential standard of review that a federal court must apply in reviewing a petition for a writ of habeas corpus under 28 U.S.C. § 2254(d).<sup>53</sup> The dissent opened with Judge Diaz’s assessment that the state court’s determination that *Lawrence* “invalidated sodomy laws only as applied to private consenting adults” was not “so lacking in justification that

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44. *Id.* at 163 (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

45. *Id.* (citing *Lawrence*, 539 U.S. at 571, 574–75, 577–78; *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence*, 539 U.S. 558 (2003)).

46. *Id.*

47. *Id.* (quoting *Lawrence*, 539 U.S. at 578).

48. *Id.*

49. *Id.* at 165.

50. *Id.* (“The [*Lawrence*] Court’s ruminations concerning the circumstances under which a state might permissibly outlaw sodomy, however, no doubt contemplated deliberate action by the people’s representatives, rather than by the judiciary.”)

51. *Id.* at 166 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–30 (2006)) (internal quotation marks omitted).

52. *Id.* at 165–66 (citing *Ayotte*, 546 U.S. 320).

53. *See id.* at 167 (Diaz, J., dissenting) (citing 28 U.S.C. § 2254(d) (2012)).

there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”<sup>54</sup> The dissent next explained that the two grounds relied upon by the majority for rejecting an as-applied interpretation of *Lawrence* were unpersuasive.<sup>55</sup> The majority’s reliance on the overruling of *Bowers*, which the panel described as a failed facial challenge, was a “stretch.”<sup>56</sup> According to Judge Diaz, the court should not have assumed “that the Virginia General Assembly did not intend for its anti-sodomy provision to apply to the conduct that *Lawrence* arguably exempted from constitutional protection.”<sup>57</sup>

#### IV. ANALYSIS

Judge Diaz’s dissent was correct in its able elaboration of various ways in which the majority’s analysis failed to abide by the deferential standard of review for federal habeas review of state court convictions.<sup>58</sup> As he noted, the crux of the state court’s reasoning in MacDonald’s case was that “*Lawrence* did not facially invalidate all sodomy statutes, but rather only the application of such statutes to private, consensual sexual activity among adults.”<sup>59</sup> This reading of *Lawrence* is correct because the *Lawrence* Court’s discussion throughout is about the personal liberty interests of the adult petitioners in that case to engage in the private, consensual, noncommercial conduct at issue.<sup>60</sup> But the question before the Fourth Circuit in *MacDonald* was not even whether the state court

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54. *Id.* at 167 (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786–87 (2011)) (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)) (internal quotation marks omitted). While the majority did not explicitly acknowledge the dissent’s formulation of the standard, this formulation correctly states the Supreme Court’s binding doctrine interpreting the statutory standard of review. *See, e.g., Harrington*, 131 S. Ct. at 786–87 (“As a condition for obtaining habeas corpus relief from a federal court, a state prisoner must show that the state court’s ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”).

55. *See MacDonald*, 710 F.3d at 168 (Diaz, J., dissenting).

56. *Id.* at 169 (“If it is difficult to discern from the *Lawrence* opinion whether it invalidated all sodomy statutes, it is even more of a stretch to do so by negative inference from the case it overturned.”).

57. *Id.* at 171 (citing *Lawrence*, 539 U.S. at 569).

58. *See id.* at 167 (quoting *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir. 2012); *Harrington*, 131 S. Ct. at 786; *Wolfe v. Johnson*, 565 F.3d 140, 160 (4th Cir. 2009)).

59. *Id.* at 168 (footnote omitted).

60. *Lawrence*, 539 U.S. at 562 (noting that the “case involves liberty of the person both in its spatial and in its more transcendent dimensions”); *see id.* at 564 (“We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”); *see also id.* at 572 (observing that “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”); *id.* at 578 (stating that petitioners’ “right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government”).

reasoning was right, only whether it was reasonable.<sup>61</sup> The applicable statutory standard of review required an inquiry into whether the state court decision “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.”<sup>62</sup> Noting what he called “the opaque language of *Lawrence*,” Judge Diaz observed that “[r]easonable jurists could disagree on whether *Lawrence* represented a facial or an as-applied invalidation of the Texas sodomy statute.”<sup>63</sup> And Judge Diaz’s observation was plainly accurate.<sup>64</sup>

Although Judge Diaz did not analyze the majority’s discussion of facial versus as-applied invalidation in much depth, his principal observation on this point was devastating. Recall how the panel majority dealt with the Virginia court’s application of the unremarkable rule that a litigant generally cannot bring a facial challenge against a statute that is constitutional as applied to that litigant.<sup>65</sup> The panel majority said this was beside the point because the anti-sodomy provision was unconstitutional as applied to MacDonald—a conclusion that followed from the panel majority’s determination that the anti-sodomy provision was facially unconstitutional.<sup>66</sup> As Judge Diaz pointed out, “this analysis is circular.”<sup>67</sup>

Judge Diaz went on to say that the standing-to-raise-a-facial-challenge principle did not matter in this case because the issue boiled down to the question “whether *Lawrence* invalidated sodomy statutes on an as-applied or facial basis.”<sup>68</sup> Although Judge Diaz was right about the limited consequences of the panel majority’s circular reasoning for this particular case, that reasoning

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61. See *MacDonald*, 710 F.3d at 167 (Diaz, J., dissenting) (quoting *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir. 2012)).

62. 28 U.S.C. § 2254(d)(1) (2012).

63. *MacDonald*, 710 F.3d at 170 (Diaz, J., dissenting). Judge Diaz bolstered this observation by citing two circuit court decisions describing the *Lawrence* decision as a facial invalidation of the statute and two other circuit court decisions describing it as an as-applied invalidation of the statute. See *id.* (citing *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 8 n.4 (1st Cir. 2012); *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 812 (7th Cir. 2005); *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004)).

64. As this Author has explained elsewhere, the majority’s description of the Supreme Court’s decision in *Bowers v. Hardwick* as resolving a facial challenge is also incorrect. Kevin C. Walsh, *The Fourth Circuit’s Obviously (and Profoundly) Mistaken Habeas Grant Premised on the Alleged Facial Unconstitutionality of Virginia’s “Anti-sodomy Provision,”* WALSHSLAW (Mar. 13, 2013), <http://walshslaw.wordpress.com/2013/03/13/the-fourth-circuits-obviously-and-profoundly-mistaken-habeas-grant-premised-on-the-alleged-facial-unconstitutionality-of-virginias-anti-sodomy-provision/> (citing *Bowers v. Hardwick*, 478 U.S. 186, 188 n.2 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)).

65. See *MacDonald*, 710 F.3d at 161–62 (majority opinion) (citations omitted).

66. *Id.* at 162 & n.11.

67. *Id.* at 168 n.3 (Diaz, J., dissenting).

68. *Id.*

nevertheless has the potential to cause confusion in future cases through its muddling of facial challenge doctrine.<sup>69</sup>

To illustrate, consider the Fourth Circuit's decision in *Woollard v. Gallagher*,<sup>70</sup> decided less than two weeks after *MacDonald*. In *Woollard*, the Fourth Circuit addressed a Second Amendment challenge to a Maryland gun-permitting requirement that required an applicant to show a "good and substantial reason" to be able to carry a gun outside the applicant's home.<sup>71</sup> The district court in *Woollard* held that this good-and-substantial-reason requirement was facially unconstitutional.<sup>72</sup> But the Fourth Circuit approached it quite differently. In addition to rejecting *Woollard*'s claim that the permitting requirement was unconstitutional as applied to him, the court held that *Woollard* lacked standing to bring his facial challenge: "Because we conclude that the good-and-substantial-reason requirement is constitutional under the Second Amendment as applied to Appellee *Woollard*, we also must reject the Appellees' facial challenge."<sup>73</sup> According to the Fourth Circuit panel in *Woollard*, the Supreme Court has instructed that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."<sup>74</sup>

This principle is the same principle applied by the Virginia Court of Appeals in *MacDonald*'s case.<sup>75</sup> But the reasoning in the two Fourth Circuit cases is inconsistent.<sup>76</sup> And the inconsistency cannot be attributed to one panel's unfamiliarity with the other panel's reasoning as the two cases made their way through the decisional process. *Woollard* and *MacDonald* were argued before the Fourth Circuit on the same day,<sup>77</sup> and two out of the three judges presided in both cases: Judge King and Judge Diaz.<sup>78</sup> Most importantly, Judge King authored both opinions.<sup>79</sup>

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69. See *id.* (recognizing the majority's reasoning that because the law "is facially unconstitutional, it cannot be constitutional as applied to *MacDonald*").

70. 712 F.3d 865 (4th Cir. 2013).

71. *Id.* at 865, 868 (internal quotation marks omitted).

72. *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 476 (D. Md. 2013), *rev'd sub nom.* *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

73. *Woollard*, 712 F.3d at 882.

74. *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).

75. See *MacDonald v. Commonwealth*, Rec. No. 1939-05-2, 2007 WL 43635, \*1 (Va. Ct. App. Jan. 9, 2007); *McDonald v. Commonwealth*, 630 S.E.2d 754, 756 (Va. Ct. App. 2006) (quoting *Ulster Cnty. Court v. Allen*, 442 U.S. 140, 154-55 (1979)) (citing *Singson v. Commonwealth*, 621 S.E.2d 682, 686 (Va. Ct. App. 2005)).

76. Compare *Woollard*, 712 F.3d at 882 (rejecting the appellee's facial constitutionality challenge because the statute was constitutional as-applied to the appellee), with *MacDonald v. Moose*, 710 F.3d 154, 161 (4th Cir. 2013) (citations omitted) (rejecting the principle that a litigant may not challenge the facial constitutionality of a statute that is constitutional as applied to him because the statute was facially unconstitutional).

77. See *Woollard*, 712 F.3d 865; *MacDonald*, 710 F.3d 154.

78. See *Woollard*, 712 F.3d at 868; *MacDonald*, 710 F.3d at 155.

79. See *Woollard*, 712 F.3d at 868; *MacDonald*, 710 F.3d at 155.

It is far from clear why the appellees in *Woollard* could not have made the same move endorsed by Judge King's panel majority opinion in *MacDonald* to seek an initial determination of facial unconstitutionality.<sup>80</sup> That is, after all, the determination the district court made in *Woollard*.<sup>81</sup> Based on *MacDonald*, the appellees in *Woollard* could have simply argued that advancing a facial challenge was one of their grounds for seeking as-applied relief. To point out the availability of this move is not to endorse it, of course, but rather to show that it was a mistake for the panel majority to make the move available in *MacDonald*.

The *MacDonald* dissent's second principal criticism of the panel majority opinion—that the majority misapplied *Ayotte*—is also well-founded.<sup>82</sup> The dissent argued that a proper application of *Ayotte* would have permitted the continued enforceability of the anti-sodomy provision in circumstances not covered by *Lawrence*'s reasoning.<sup>83</sup>

Instead of treating section 18.2-361(A) of the Virginia Code as partially facially unconstitutional, the Fourth Circuit should have treated it as the Virginia courts did: unenforceable in those circumstances in which its enforcement would infringe on the personal liberty interests recognized in *Lawrence*, but otherwise enforceable.<sup>84</sup>

Apart from resting on its mistaken reading of *Lawrence*, the panel also reasoned that this “judicial reformation of the anti-sodomy provision” would be “a drastic action that runs afoul of the Supreme Court’s decision in *Ayotte*.”<sup>85</sup> In *Ayotte*, however, the Supreme Court directed that federal courts crafting remedies for partially unconstitutional statutes should generally try “to limit the solution to the problem,” such as by “enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in force.”<sup>86</sup> The Court did add that federal courts should not implement this general preference for limited relief when crafting such relief would require “making distinctions in a murky constitutional context, or where line-drawing is inherently complex.”<sup>87</sup> And this is the part of *Ayotte* that the majority in *MacDonald* thought that anything other than partial facial invalidation would run afoul of.<sup>88</sup> But the

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80. See *MacDonald*, 710 F.3d at 162 n.11.

81. See *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 464 (D. Md. 2012).

82. See *MacDonald*, 710 F.3d at 170–71 (Diaz, J., dissenting) (citing *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–32 (2006)).

83. *Id.* at 170–71 (citing *Ayotte*, 546 U.S. at 329–32; *Lawrence v. Texas*, 539 U.S. 558, 569 (2002)).

84. See *McDonald v. Commonwealth*, 630 S.E.2d 754, 757–58 (Va. Ct. App. 2006) (citations omitted) (recognizing that *Lawrence* affords protection to adult, consensual, private, noncommercial sexual behavior, but not to sexual acts involving adults and minors).

85. *MacDonald*, 710 F.3d. at 165–66 (citing *Ayotte*, 546 U.S. 320).

86. *Ayotte*, 546 U.S. at 328–29.

87. *Id.* at 330 (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 & n.26 (1995)).

88. See *MacDonald*, 710 F.3d at 166 (citing *Ayotte*, 546 U.S. at 328–30).

majority was wrong because *Lawrence* was clear about the limits of its holding.<sup>89</sup> Justice Kennedy's opinion for the Court identified four such limits: the protected conduct in *Lawrence* was (1) consensual, (2) noncommercial, (3) private, and (4) between two adults.<sup>90</sup> The Virginia courts easily identified these limits after *Lawrence*, as did many other courts.<sup>91</sup>

These are also precisely the limits contained in a failed legislative fix for *Lawrence* in Virginia—a fix that may have failed because the bill also would have reduced the seriousness of the offense.<sup>92</sup> Indeed, given *Lawrence*'s clear statements about what that case did not involve, the Virginia legislature could have accomplished the same amendment of section 18.2-361(A) by simply appending a different proviso: “Provided, however, that this statute may not be enforced with respect to conduct constitutionally protected under *Lawrence v. Texas*.” This shows at bottom what is wrong with *MacDonald v. Moose*. A proviso of this sort is already present by operation of law, even though the words do not appear in Virginia's statute books. When MacDonald was prosecuted, the applicable law included not only Virginia Code section 18.2-361(A) but also *Lawrence*.<sup>93</sup> The job of the court was not to figure out whether *Lawrence* required taking anything out of section 18.2-361(A), but rather, how to apply *both* that statute and *Lawrence*.

To recognize that the superior law of the Constitution as set forth in *Lawrence* would limit the application of Virginia Code section 18.2-361(A), it would not have been necessary for the judiciary to write words into the statute (actually or metaphorically). To see why, consider some other examples. A state statute does not have to recite that it is unenforceable in circumstances outside the state's legislative jurisdiction; the limits of legislative jurisdiction are background rules of legislation. A legislature does not have to rewrite its long-arm statute to specify that it does not apply to circumstances in which the exercise of personal jurisdiction under the statute would violate due process.

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89. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (stating that the case does not involve minors, acts of coercion, public conduct, or prostitution).

90. *Id.*

91. See, e.g., *McDonald v. Commonwealth*, 630 S.E.2d 754, 757 (Va. Ct. App. 2006) (“That [*Lawrence*'s] holding does not apply to minors is one of four exceptions to the Court's holding. The Supreme Court found that acts involving minors along with non-consensual acts, public conduct, and prostitution do not merit due process protection.” (citing *Lawrence*, 539 U.S. at 578)).

92. See S.B. 477, 2004 Gen. Assemb., Reg. Sess. (Va. 2004), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?041+ful+SB477S1> (providing that the sodomy prohibition “shall not apply where all persons are consenting adults who are not in a public place and who are not aiding, abetting, procuring, engaging in or performing any act in furtherance of prostitution”); see also Kevin C. Walsh, *A Closer Look at Virginia's 'Lawrence Fix' Shows Cuccinelli's Consistency and Fourth Circuit's Faulty Conclusion*, WALSHSLAW (Aug. 13, 2013), <http://walshslaw.wordpress.com/2013/08/13/a-closer-look-at-virginias-lawrence-fix-shows-cuccinellis-consistency-and-fourth-circuits-faulty-conclusion/>.

93. *Lawrence* was decided in 2003, prior to MacDonald's arrest and conviction. See *Lawrence*, 539 U.S. 558; *MacDonald*, 710 F.3d at 155.

And so on.<sup>94</sup> Similarly, the Virginia legislature did not have to write into its statute that it would be unenforceable in circumstances in which its enforcement would violate the Constitution. That is a background rule of our legal system that operates of its own force. The panel majority's concerns about judicial rewriting in *MacDonald v. Moose* were simply misplaced.

## V. CONCLUSION

Right or wrong, the panel majority's convictions about the partial facial unconstitutionality of Virginia Code section 18.2-361(A) carried the day. The Fourth Circuit denied rehearing en banc and the Supreme Court denied certiorari.<sup>95</sup> While this additional federal appellate consideration was taking place, discussions about *MacDonald v. Moose* spilled over into the 2013 Virginia gubernatorial campaign.<sup>96</sup> A case that began as a straightforward appeal from the denial of habeas relief turned into a political beach ball batted around by both campaigns and a source of late night humor.<sup>97</sup> With the campaign spectacles now but a memory, the principles of law formulated and applied in *MacDonald v. Moose* continue to govern in the Fourth Circuit. And that is why it remains worthwhile to subject the decision to careful criticism. The principles that matter the most, however, are not those specific to the interpretation and application of *Lawrence v. Texas* and Virginia Code section 18.2-361(A). The fate of this one statutory provision under that one case is much less important than the understanding of judicial review that erroneously led to its partial facial invalidation.

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94. See Edward A. Hartnett, *Facial and As-Applied Challenges to the Individual Mandate of the Patient Protection and Affordable Care Act*, 46 U. RICH. L. REV. 745, 758–59 (2012) (explaining how a displacement-based understanding of judicial review can “pull us away from insisting that an inferior law recite and include the provisions of higher law, as opposed to simply giving way to the extent higher law itself governs”); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 778–80 (2010) (describing a displacement-based approach to judicial review in contrast with the reigning excision-based approach).

95. *Moose v. MacDonald*, 134 S. Ct. 200 (2013) (denying petition for writ of certiorari).

96. Ben Pershing, *Cuccinelli Looks to Go on Offense over Sodomy Law*, WASH. POST, July 17, 2013, at B3.

97. See, e.g., *id.* (“When Virginia Attorney General Ken Cuccinelli II challenged a federal appeals court ruling that deemed the state’s anti-sodomy law unconstitutional, Democrats pounced, accusing the Republicans of pursuing an anti-gay agenda. Now Cuccinelli’s campaign for governor is looking to turn the tables . . . .”); see also *The Daily Show with Jon Stewart: Sodomy! Zygotes! Welfare!* (Comedy Central television broadcast Apr. 9, 2013), <http://www.thedailyshow.com/watch/tue-april-9-2013/sodomy—zygotes—welfare->.