BRIDGING THE DIVIDE BETWEEN JUSTICE BREYER'S PROGRESSIVISM AND JUSTICE SCALIA'S TEXTUALISM: INTRODUCING THE CONCEPT OF "NEGATIVE ORIGINALISM" TO GUIDE CONSTITUTIONAL INTERPRETATION IN "VALUES BASED" ADJUDICATION

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"Liberty Can Find No Refuge in a Jurisprudence of Doubt"[2]

INTRODUCTION

In *Lawrence v. Texas*[3], Justice Breyer's majority opinion[4], which invalidated a state statute prohibiting sodomy between consenting adults, and Justice Scalia's dissent[5], which attacked the very foundation upon which the majority's reasoning was predicated, underscored the widely divergent methods of constitutional interpretation that both Justices embrace in "values based" adjudication.[6]

Indeed, as set forth *infra*, in holding that the United State's Constitution's "liberty" interest[7] protected the right of two consenting adults to engage in sodomy, Justice Breyer's reasoning arguably reflected a "progressive", "dynamic", or "evolving"

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[3] *Lawrence, et al. v.* Texas, No. 02-102 (June 26, 2003) (Slip Op), official cite 539 U.S. 558 (2003) (formal citation forthcoming) .

[4] *See id.* at (Slip op. at 1).

[5] *See id.* (Scalia, J., dissenting).

[6] For purposes of clarity, the term "values based" adjudication refers to those cases in which the asserted constitutional "right" conflicts with or implicates matters that State legislatures have either circumscribed or prohibited based upon, *inter alia*, notions of conventional morality. By "conventional morality", the author implies that at least a portion of the reasoning underlying a legislature's policy predilections relates to notions of what is "right" or "wrong" in a religious or ethical context. In other words, these divisive cases often involve considerations regarding the moral basis of individual and/or collective conduct. Other cases, for example, that fall within the purview of this delineation are *Griswold v. Connecticut* 381 U.S. 479 (1965); Roe *v. Wade* 410 U.S. 113 (1973); and *Casey*, *supra* note 2.

[7] The "liberty" interest referred to in this Article arises under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

approach to constitutional interpretation, which views the Constitution as a "living" document whose meaning is based, at least in part, upon an "emerging awareness[8]" of contemporary customs, norms and perspectives.[9] Indeed, Justice Breyer's dynamic approach to "values based" constitutional decision-making is perhaps best underscored by the fact that, in striving to divine an "emerging awareness"[10] to inform his view of the Constitution's "liberty" interest[11], Justice Breyer resorted to, an relied upon, foreign sources of law, i.e., decisional law from the European Court of Human Rights[12], to support the *Lawrence* majority's holding.[13]

Conversely, Justice Scalia's scathing dissent in *Lawrence* reflects his traditional adherence to an "originalist"[14] philosophy of constitutional decision-making which, broadly construed, advances the proposition that fundamental constitutional rights exist

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[8] *Lawrence*, *supra* note 3, at 11 (majority opinion of Breyer, J).

[9] Of course, the notion of an "evolving", "progressive" or "dynamic" method of constitutional interpretation is an approach endorsed and expressed in various forms by scholars, judges and litigants. This Article is narrowly confined to examining Justice Breyer's "progressive" approach in the *Lawrence* decision, and to analyzing the implications of such methodology in "values based" cases that are likely to arise before the United States Supreme Court.

[10] *Lawrence*, *supra* note 3, at 11 (majority opinion of Breyer, J).

[11] *See supra* note 7.

[12] *See Lawrence*, *supra* note 3, at 12 (majority opinion of Breyer, J).

[13] The utilization of foreign sources of law, to inform or otherwise support domestic constitutional decisions, is reflected in the relative recent theory of "comparative constitutionalism", which examines, *inter alia*, the prudence of relying upon or referring to such sources in the domestic constitutional context This Article is confined to both discussing Justice Breyer's use of foreign law, particularly decisional law from the European Court of Human Rights, in crafting the *Lawrence* opinion, and whether the use of foreign law is workable and pragmatic in the context of domestic, "values based" decision-making. For a more complete discussion of "comparative constitutionalism", *see*, *e.g.,* Gary Jeffrey Jacobsohn, *"The Permeability of Constitutional Borders",* 82 Texas L. Rev. 1763 (2004).

[14] The "originalist" approach to constitutional interpretation exists in many forms and is applicable to many contexts. The purpose of this Article is to examine Justice Scalia's use of "originalism" in the *Lawrence* decision, and to assess the workability of this approach in future cases likely to arise before the United States Supreme Court.

only to the extent that such rights are "deeply rooted" in the *United State's* culture, history and tradition.[15] Thus, in the context of "values based" adjudication, Justice Scalia's framework is to inquire whether and, if so, to what extent, the asserted fundamental right has traditionally engendered support, protection or recognition in the United State's historical cultural practice.[16] Such inquiry arguably involves an examination of both the founders' intent when drafting a particular constitutional provision, as well as the early understandings of particular rights that were deemed fundamental or worthy of heightened constitutional protection. Under this view, in "values based" adjudication, the notion of an "emerging" or "evolving" awareness of fundamental rights, whether from foreign or domestic sources, would be largely irrelevant to the question of whether an asserted right warrants constitutional protection.[17]

This Article endeavors to bridge the divide between Justice Breyer's "progressive approach", and the "originalist" approach to which Justice Scalia adheres, by introducing the concept of "reverse" or "negative" originalism. As a threshold matter, "reverse originalism" recognizes that both Justice Breyer's progressivism and Justice Scalia's originalism contain valuable aspects that should remain relevant to "values based" constitutional adjudication. For example, "reverse originalism" proposes, in accordance

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[15] *Lawrence*, *supra* note 3, at 8 (Scalia, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

[16] *Id.* at 8-9 (citing *Reno v. Flores* (507 U.S. 292, 303 (1993)) ("fundamental liberty interests must be 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'"). (omitting internal quotation marks and citations).

[17] Importantly, for purposes of this Article, the notion that Justice Scalia would largely eschew reliance upon an "emerging" or "evolving" awareness of newly-asserted rights is limited to the context of "values based" adjudication. Indeed, in the area of Eighth Amendment (Cruel and Unusual Punishment) jurisprudence, the United States Supreme Court, including Justice Scalia, has endorsed a method that examines whether "evolving standards of decency" counsel in favor of determining that a specific practice is cruel or unusual.

with Justice Breyer's approach, that "evolving" or contemporary perspectives of fairness and due process should inform the search for a disposition, in "values based" adjudication, that is most consonant with basic notions of liberty. Indeed, the collective conscience of individuals, groups and institutions, over time, both domestic and international, can provide important insights into the very meaning of "liberty" that lies at the core of the United States' constitutional framework.

Importantly, however, progressivism is not without its limitations and, if applied exclusively, would threaten to undermine years of Supreme Court jurisprudence through evisceration of the *stare decisis* doctrine[18], risk uncertainty and unpredictability for future litigants, unduly compromise the core majoritarian premise of our democratic system, and potentially invest in judges a legislative or policy-making power that transgresses the boundaries of proper judicial review. Consequently, a significant check upon the limitations of "progressivism" lies in that aspect of "originalism" which reflects the principle that the United States' historical traditions, customs and practices should maintain an important role in determining the values that we believe are worthy of domestic constitutional protection. As such, the Constitution's text, the very meaning of "liberty" that emanates from its provisions, and our country's deeply-rooted cultural understandings regarding the concept of "liberty", must continue to inform current perspectives concerning those "values" that the United States will deem fundamental.

As with "progressivism", however, the application of "originalism" is not without its limitations. Most significantly, the exclusive application of "originalism" is likely to

[18] *See, e.g., Lawrence, supra* note 3, at 3 (Scalia, J., dissenting) (explaining that the doctrine of *stare decicis* supports the overruling of prior Supreme Court decisions only where: (1) its foundations have been "eroded"; (2) it has been subject to "substantial and continuing criticism", and (3) it has not induced "individual or societal reliance" that militates against overruling it).

result in constitutional decisions that contemporary perspectives would arguably deem unfair and unjust.[19] Indeed, such criticism is not without merit because, while conceptions of "liberty" involve reference to deeply-rooted historical practice and custom, such conceptions do not remain inert or immutable, but are instead receptive to the evolution in human thought that Justice Breyer's "progressivism" embraces. Herein lies the problem, namely, what method can best recognize the "emerging awareness" that Justice Breyer relies upon in *Lawrence*, yet remain faithful to the text, history and historical traditions that "originalism" strives to maintain.

This Article proposes that "negative originalism" can bridge this divide and effectuate the objectives of Justice Breyer's progressivism, i.e., just results based upon evolving standards of fairness, *and* Justice Scalia's "originalism", by re-framing the relevant constitutional inquiry in "values based" adjudication. Specifically, instead of asking precisely what the framers *intended* when drafting a particular constitutional provision, the relevant inquiry should assess *whether the recognition of a new fundamental right in our constitutional regime would offend, affront, or otherwise be incongruous with the* ***broad purposes*** *underlying both the Constitution's provisions and the United State's rich historical tradition.* As detailed *infra*, this approach will allow the Supreme Court to consider contemporary perspectives regarding fundamental fairness, liberty and equality, both at the national *and* international level, when deciding whether newly asserted rights or "values" warrant constitutional protection.

However, "negative originalism" will also require the Court to lend significant weight to the intentions, purposes and objectives that informed both the Constitution's

[19] *See generally* Cass Sunstein, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005) (arguing that originalism would lead to unjust results in many cases).

drafting and the nation's early understandings of liberty. However, instead of advocating that the Court endeavor to divine the precise meaning that the Constitution's drafters, or early legislatures, *specifically intended* for a given constitutional provision, "negative originalism" proposes that the Court develop an understanding of the broader conception of liberty, fairness and equality that inspired the Constitution's substantive provisions. In this way, "negative originalism" ensures that our country's rich history and tradition remains relevant in "values based" cases, but also recognizes that contemporary perspectives concerning fairness and equality, both domestic *and* foreign, can be useful in fashioning solutions to problems that the Constitution's drafters could never have envisaged.

Part II briefly discusses the *Lawrence* decision, specifically with reference to the differing approaches that Justices Breyer and Scalia utilized in reaching their respective conclusions. Part III examines a critical component of Justice Breyer's progressivism, namely, that aspect which relied upon foreign law, namely the European Court of Human Rights, to support the *Lawrence* holding. Part III concludes that, while resort to foreign sources of law should bear relevance in "values based" adjudication, courts should exercise substantial caution when relying upon foreign sources of law, due to the cultural and institutional nuances that underlie such laws. Part IV introduces "negative originalism", and argues that this method of constitutional interpretation will most effectively permit the Court to adopt a dynamic approach to constitutional interpretation, i.e., consideration of evolving perspectives of fairness, while also ensuring fidelity to the Constitution's text and history.

PART II

LAWRENCE V. TEXAS: HIGHLIGHTING THE DIVIDE BETWEEN JUSTICE BREYER'S "PROGRESSIVISM" AND JUSTICE SCALIA'S "ORIGINALISM"

In *Lawrence*, the Court was confronted with the question of whether a state statute, criminalizing sodomy between consenting adults, impermissibly violated the privacy, equal protection, and "liberty" interests under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[20] Significantly, this issue was not without precedent, as the Court, in *Bowers v. Hardwick*[21] previously ruled that a Georgia statute criminalizing sodomy between consenting adults did *not* violate these fundamental guarantees.[22]

Thus, *Lawrence* presented the Court with an opportunity both to revisit the *Bowers* holding and examine the reasoning upon which it was predicated. In so doing, the Court, per Justice Kennedy, overruled *Bowers*, and proceeded to recognize consensual sodomy as a protected right pursuant to the Constitution's "liberty" interest.[23] As stated above, Justice Kennedy's majority opinion not only signaled a sharp departure from *Bowers*, particularly through its expansive view of the Constitution's "liberty" interest,

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[20] *Lawrence*, *supra* note 3, at 3 (Breyer, J., majority opinion).

[21] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[22] *See id.* Arguably, the facts in *Bowers* differ from *Lawrence* to the extent that the Georgia statute in *Bowers* criminalized consensual sodomy regardless of whether the participants were of the same sex, whereas the Texas statute in *Lawrence* was directed exclusively at same-sex participants. Notwithstanding, the reasoning upon which *Bowers* rested, and *Lawrence* subsequently rejected, involve a view of the Constitution's "liberty" interest that is largely unaffected by this distinction.

[23] See Lawrence, supra note 3, at 17-18 (Breyer, J., majority opinion). It can be argued, however, that the Court did *not* hold that consensual sodomy was a fundamental right *per se*, but rather that matters of sexual intimacy, on a broader level, enjoy fundamental rights protection, under which consensual sodomy derivatively enjoys protection.

but also underscored the "progressivism" that increasingly defines his jurisprudence in "values based" adjudication.

A. JUSTICE KENNEDY'S PROGRESSIVISM IN *LAWRENCE*

At the outset, it is important to recognize that Justice Breyer's majority decision was not premised solely upon a "progressive" or "evolving" view of the Constitution's "liberty" interest. For example, Justice Breyer disagreed with Justice Scalia's view that homosexual sodomy has, as a matter of historical tradition and practice, been widely circumscribed.[24] In addition, Justice Breyer relied upon what he termed "broad statements of the substantive reach of liberty under the Due Process Clause" as reflected in the Court's earlier jurisprudence.[25]

Notwithstanding, Justice Breyer's "progressivism" played a crucial role both in his conclusion that *Bowers'* foundation had been eroded by subsequent jurisprudence, and that homosexual sodomy now fell within the purview of the Constitution's "liberty" interest. [26] First, Justice Breyer's analysis focused not only upon the historical roots and practices pertaining to consensual sodomy (although he did dispute the extent to which

[24] *Lawrence*, *supra* note 3, at 7 (Breyer, J., majority opinion) (stating that "there is no long-standing history in this country of laws directed at homosexual conduct as a distinct matter"). In fact, Justice Breyer went so far as to state that "the historical grounds relied upon in *Bowers* are more complex that the majority opinion … indicate. Their historical premises are not without doubt and, at the very least, are overstated"). *Id*. at 10.

[25] *Id*. at 3 (Breyer, J., majority opinion) (Justice Breyer relied, for example, upon *dicta* from *Pierce v. Society of Sisters* (268 U.S. 510 (1925); *Meyer v. Nebraska* (262 U.S. 390); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird* (405 U.S. 438 (1972); and *Roe v. Wade* 410 U.S. 113 (1973), for his view certain conduct enjoys "real and substantial protection as an exercise of liberty under the Due Process Clause"). *Id*. at 4.

[26] A critical aspect of Justice Breyer's view that *Bowers* foundation was eroded by subsequent jurisprudence is reflected by his statement that *Bowers* failed to "appreciate the extent of the liberty at stake" and "misapprehended the claim of liberty there presented …" *Lawrence*, *supra* note 3, at 6 (Breyer, J., majority opinion). In fact, Justice Breyer's classification of the "liberty" interest in *Lawrence* arguably reflected the *broader* sentiment, as expressed in previous decisions, that conceptions of "private human conduct" and "sexual behavior", warrant protection under the Constitution's "liberty" interest. *See, e.g.,* Griswold, 381 U.S. at 485. The right to engage in consensual sodomy, therefore, falls within these broader liberty interests.

laws were targeted at such conduct[27]), but instead stated that "we think that our laws and traditions *in the past half century* are of most relevance here."[28] Indeed, Justice Breyer utilized this framework in *Lawrence* to highlight a "progressive" or "evolving" method of constitutional interpretation:

> These references [recent precedent] 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. "[*H*]*istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry*." This *emerging recognition* should have been apparent when *Bowers* was decided.[29]

Moreover, Justice Kennedy's search for an "emerging awareness" led him to focus not upon historical culture, practice or tradition, but instead upon more recent domestic developments, i.e., the Model Penal Code's recommendation that private sexual conduct *not* be penalized, and several states' failure to *enforce* anti-sodomy laws, for the proposition that homosexual conduct was includable within the Constitution's liberty interest.[30]

Of far more import, however, was the fact that, as part of his "emerging awareness" analysis, Justice Breyer relied upon foreign sources of law to support the *Lawrence* holding. For example, Justice Breyer relied upon the British Parliament's 1957 recommendation that homosexual conduct not be punished.[31] More importantly, however, and in what is a focal point of this Article, Justice Breyer relied substantially upon

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[27] *See Lawrence*, *supra* note 3, at 7 (Breyer, J., majority opinion).

[28] *Id.* at 11 (Breyer, J., majority opinion).

[29] *Id*. at 11 (Breyer, J., majority opinion) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (emphasis added).

[30] *Id.* at 11-13 (Breyer, J., majority opinion).

[31] *Id.* at 12 (Breyer, J., majority opinion).

decisional law from the European Court of Human Rights, which supported his expansive view of the Constitution's "liberty" interest:

> Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right … The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) Par. 52. Authoritative in all countries that are members of the Council of Europe … the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in *our Western civilization.*[32]

Thus, in addition to relying upon domestic development both prior and subsequent to *Bowers*[33], Justice Kennedy ushered in a new jurisprudence utilized *foreign sources of law* to inform his "progressive" jurisprudence and, ultimately, domestic constitutional decision-making:

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has not followed *Bowers* but its own decision in *Dudgeon v. United Kingdom*. *See P.G. & J.H. v. United Kingdom*, App. No. 00044787/98, Par. 56 (Eur. Ct. H.R. Sept. 25, 2001) … Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct … The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. *There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent*.[34]

Ultimately, therefore, Justice Kennedy's majority opinion in *Lawrence* underscores his commitment to a "progressive" approach to constitutional interpretation in "values based" adjudication, *and* to using foreign sources of law as a method by which to divine

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[32] *Id*. at 12 (Breyer, J., majority opinion) (emphasis added).

[33] *Id*. at 13-14 (Breyer, J., majority opinion) (discussing *Bowers* subsequent erosion by in *Casey* and *Romer v. Evans*, 517 U.S. 620 (1996)).

[34] *Id*. at 16 (Breyer, J., majority opinion) (emphasis added).

the "emerging awareness"[35] that characterizes such jurisprudence. In other words, the use of foreign sources of law is an important aspect of Justice Breyer's progressive jurisprudence, and will be analyzed *infra* Part III.

B. JUSTICE SCALIA'S "ORIGINALISM" IN *LAWRENCE*

In stark contrast to Justice Breyer's "progressivism" was Justice Scalia's dissent, which re-affirmed his commitment to an "originalist" method of constitutional interpretation in "values based" adjudication.[36] In fact, arguably reflecting his commitment to interpreting the Constitution solely in accordance with historical perspectives, Justice Scalia went so far as to declare in *Lawrence* that "there is no right to 'liberty' under the Due Process Clause, though today's opinion repeatedly makes that claim."[37] Indeed, Justice Scalia believes that the Due Process Clause grants *procedural* rather than *substantive* protection, leading to his statement in *Lawrence* that "[t]he Fourteenth Amendment *expressly allows* States to deprive their citizens of "liberty", *so long as "due process of law" is provided* ..."[38]

Not surprisingly, Justice Scalia's threshold assumption that the Due Process Clause protects procedural, rather than substantive rights, reflects an "originalist" perspective that could not be more at odds with Justice Breyer's "progressivism". In any event, to the extent that Justice Scalia recognizes the existence of "substantive" rights

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[35] *Id*. at 11 (Breyer, J., majority opinion).

[36] As stated *supra* note 14, there exist many variations of the "originalist" philosophy that are advocated by scholars, commentators and judges. It is beyond the scope of this paper to address the myriad components of "originalism", and the various contexts to which it is applied. Rather, this paper strives to analyze Justice Scalia's use of originalism in *Lawrence*, and as a method of constitutional adjudication in "values based" adjudication.

[37] *Lawrence*, *supra* note 3, at 8 (Scalia, J., dissenting).

[38] *Id*. at 8 (Scalia, J., dissenting) (emphasis in original).

within the Due Process Clause, he is to careful to note that "w[e] have held repeatedly … that *only* fundamental rights qualify for this so-called "heightened scrutiny" protection—that is, rights which are "*deeply rooted in this Nation's history and tradition*."[39] Thus, for Justice Scalia, a right qualifies as fundamental under the Due Process Clause only if it is "so rooted in the traditions and conscience of our people … [and that it be] an interest *traditionally protected by our society*."[40] Accordingly, apart from "those privileges *long recognized at common law* as essential to the orderly pursuit of happiness by free men",[41] "[a]ll other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is *rationally related* to a legitimate state interest."[42] Applying this framework, Justice Scalia relied upon the traditions, customs and practices of the fifty states to arrive at the "definitive [historical] conclusion"[43] that "our Nation has a long history of laws prohibiting *sodomy in general*—regardless of whether it was performed by same sex or opposite sex couples."[44] On this basis alone, Justice Scalia would have found that a contemporary law prohibiting consensual sodomy was well within a State's constitutional prerogative.

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[39] *Id*. at 8 (Scalia, J., dissenting). (quoting *Washington v. Glucksberg*, 521 U.S. at 721) Justice Scalia also noted that a "fundamental liberty interest" must also be "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if [it] were sacrificed") (quoting *Washington*, 521 U.S. at 721).

[40] *Lawrence*, *supra* note 3, at 8-9 (Scalia, J., dissenting) (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993); *Michael H. v. Gerald D*., 491 U.S. 110, 122 (1989)) (emphasis added).

[41] *Lawrence*, *supra* note 3, at 9 (Scalia, J., dissenting) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

[42] *Lawrence*, *supra* note 3, at 9 (Scalia, J., dissenting) (emphasis added).

[43] *Id.* at 11 (Scalia, J., dissenting) (quoting majority opinion at 7 (brackets in original).

[44] *Id*. at 11 (Scalia, J., dissenting) (emphasis in original).

More fundamentally, Justice Scalia's "originalism" entirely rejects the "emerging awareness" analysis that characterizes Justice Breyer's "progressivism" and, in particular, the use of foreign sources of law to divine evolving notions of liberty. As he noted in *Lawrence*, "an 'emerging awareness' is by definition not 'deeply rooted in this Nation's history and tradition[s]'[45], as we have said "fundamental right" status requires."[46] In Justice Scalia's view, therefore, "[c]onstitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior."[47] Perhaps most importantly, according to Justice Scalia, the use of foreign sources of law is a particularly troubling and should have no place whatsoever in the Court's domestic, "values based" constitutional analysis:

> Much less do they [fundamental rights] spring into existence … because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization" … but rather rejected the claimed right to sodomy on the ground that such a right was not "deeply rooted in *this Nation's* history and tradition" … *Bowers* … holding is likewise devoid of any reliance on the views of a "wider civilization" … the Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy .. is therefore meaningless dicta.[48]

Such reliance, moreover, is particularly "dangerous" because "this Court … should not impose foreign moods, fads or fashions on Americans."[49] This statement reflects a core criticism that Justice Scalia espouses regarding "progressivism", namely, that "traditional

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[45] *Id*. at 14 (Scalia, J., dissenting) (citation omitted).

[46] *Id*. at 14 (Scalia, J., dissenting).

[47] *Id*. at 14 (Scalia, J., dissenting).

[48] *Id*. at 14 (Scalia, J., dissenting) (quoting *Bowers*, 478 U.S. at 193-194) (emphasis in original).

[49] *Id*. at 14 (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari).

democratic action should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change."[50]

Ultimately, the approaches advocated by Justices Breyer and Scalia raise the fundamental question of whether "progressivism" or "originalism" represents the best method by which to adjudicate "values based" disputes. The answer to this question first requires a brief analysis of each theory's benefits and limitations, after which the concept of "reverse originalism" is introduced.

PART III

CONSTITUTIONAL INTERPRETATION IN "VALUES BASED" ADJUDICATION: JUSTICE BREYER'S "PROGRESSIVISM" OR JUSTICE SCALIA'S "ORIGINALISM"?

The *Lawrence* decision underscores the significant divide between Justice Breyer's and Justice Scalia's constitutional methodology in "values-based" adjudication. Indeed, *Lawrence* raises the critical question of whether "progressivism" or "originalism" represents the more effective method by which to decide the fundamental constitutional questions that "values" based adjudication presents. As a threshold matter, this Article presupposes that the preferable approach is one that leads to results that are consonant with contemporary notions of fairness and equality, yet also remains faithful to the traditions and practices upon which our constitutional jurisprudence is predicated. Importantly, a brief examination of both approaches, including their benefits and limitations, reveals that a *combination* of these interpretive methods would most effectively yield a "values based" jurisprudence that responds to contemporary perspectives while respecting our Nation's historical underpinnings. Such a combination, termed "reverse" or "negative" originalism, is introduced *infra* Part IV.

[50] *Id*. at 19-20 (Scalia, J., dissenting).

A. JUSTICE BREYER'S "PROGRESSIVISM" – RELIANCE ON FOREIGN SOURCES OF LAW TO DIVINE AN "EMERGING AWARENESS"

Importantly, perhaps the most critical component of Justice Breyer's "progressive" analysis in *Lawrence* was his reliance upon foreign sources of law, particularly decisional law from the European Court of Human Rights, to inform his determination that there existed an "emerging awareness" in favor of protecting private consensual homosexual conduct. Indeed, the very concept of an "emerging awareness" arguably implies, although does not ensure, that a court will look beyond a country's geographic borders to determine, as Justice Breyer noted, whether the "wider civilization"[51] evinces a predilection or tendency to protect a newly asserted right.

In any event, *Justice Breyer's* use of "progressivism" expressly endorses, refers to and relies upon foreign sources of law to inform "values based" constitutional analysis. The critical inquiry, therefore, is whether reliance upon foreign sources of law is a viable method by which to adjudicate *domestic*, "values based" constitutional adjudication. An examination of this question reveals that Justice Breyer's reliance upon foreign sources of law, specifically decisional law from the European Court of Human Rights, raises several concerns that caution against relying too heavily upon the laws and decisions of foreign jurisdictions to resolve domestic constitutional disputes.

1. JUSTICE BREYER'S RELIANCE UPON JURISPRUDENCE FROM THE *EUROPEAN COURT OF HUMAN RIGHTS* – HIGHLIGHTING THE PROBLEMS OF USING FOREIGN SOURCES OF LAW IN DOMESTIC CONSTITUTIONAL DISPUTES.

As set forth above, in *Lawrence* Justice Breyer relied upon decisional law from the European Court of Human Rights ("ECHR"), that prohibited the criminalization of

[51] *Lawrence*, *supra* note 3, at 16 (Breyer, J., majority opinion).

consensual homosexual sodomy. Specifically, in *Dudgeon v. United Kingdom*[52], a case cited by Justice Breyer in his majority opinion, the ECHR held that consensual homosexual conduct was a protected "privacy" right pursuant to Article 8 of the European Convention on Human Rights.[53] Significantly, therefore, Justice Breyer's reliance upon the ECHR (and other sources of foreign law) was an important aspect of his "progressivism", namely, his belief that an "emerging awareness" existed in favor of prohibiting the criminalization of consensual homosexual conduct. Critically, however, such reliance raises legitimate concerns that courts must address when using *foreign* sources of law to support *domestic* constitutional decisions.

Indeed, as set forth below, Justice Breyer's reliance upon ECHR precedent raises implicates several problematic issues that caution against relying too heavily upon foreign sources of law to support constitutional decisions in the domestic context.

a. As a Human Rights Court, the ECHR Performs A Different Institutional Role In Interpreting An International Treaty

To begin with, as an institutional matter the ECHR is responsible for interpreting and applying the European Convention on Human Rights, which is viewed as an international treaty and not a domestic constitutional text.[54] This distinction is not without a difference, because the ECHR's institutional role arguably implicates different

[52] 45 Eur. Ct. H.R. (1981), Par. 52, *as cited in Lawrence*, *supra* note 3, at 12 (Breyer, J., majority opinion).

[53] *Id*.

[54] *See* Paul De Hert, "*Balancing security and liberty within the European human rights framework. A critical reading of the Court's case law in light of surveillance and criminal law enforcement strategies after 9/11*" http://www.ultrechtlawreview.org/ Volume, 1, Issue 1 at 71 (2005) (stating that "the Convention is not a Constitution but a Treaty. After ratification it does not automatically form part of the domestic legal orders of a Member State … Although the Court has referred to the Convention as "a constitutional instrument of European public order (*ordre public*)", it has accepted the treaty-like status of the Convention") (citation omitted).

considerations, both as a matter philosophy and interpretation, when adjudicating human rights (as opposed to domestic constitutional) disputes. As an initial matter, the ECHR is an international, rather than domestic court, and its overriding purpose is to effectuate, and arguably expand, the broad human rights guarantees of an international treaty. The ECHR's institutional role, therefore, is both more specific and far broader than that of a domestic constitutional court because its primary role is to interpret and provide substantive meaning to a document (the Convention) whose provisions are unified by an overriding human rights objective. Indeed, the specific objective of the ECHR's mission necessarily entails the use of interpretive methods that differ vastly from a domestic constitutional court, which often construes provisions within a constitution that are separate from, unrelated to and not connected by a single overriding purpose. As a result, unlike a domestic constitutional court, the ECHR's specifically defined institutional role creates a paramount value upon which its jurisprudence is developed.

The narrower nature of the ECHR's institutional purpose, however, is enhanced by the fact that, as an international court interpreting an international treaty, it is not bound by the traditional temporal and/or geographic limitations to which domestic constitutional courts often believe themselves to be bound. For example, as expressed by Justice Scalia in *Lawrence*, a domestic constitutional court, when interpreting a *national* constitution, may limit itself to analyzing the history, customs, traditions and/or practices of its country, while eschewing the consideration of sources from beyond its borders.[55] This significance of this concept is that a domestic constitutional court's jurisprudence often imposes constraints upon itself that results in jurisprudence uniquely personal to its territorial jurisdiction. In this way, the perspectives of a domestic

[55] *See Lawrence*, *supra* note 3, at 14 (Scalia, J., dissenting).

constitutional court are likely, although not certain, to differ substantially from those of an international human rights court, because the sources of decision-making are different. Stated simply, the legal dynamics between the ECHR and domestic constitutional courts are quite distinct, as the ECHR has at its disposal a significantly broader array of law, tradition and custom upon which to inform its human rights-based jurisprudence. This fact that is perhaps best underscored in the differing interpretive methodology that the ECHR employs in "values based" adjudication.

b. The ECHR's Status as an International Human Rights Court, Which Interprets an International Human Rights Treaty, Engenders a Distinct Interpretive Methodology than Those Employed by Many Domestic Constitutional Courts.

The concerns raised by incorporation of ECHR precedent in American constitutional law are underscored by the fact that both courts arguably employ different interpretive methodologies. First, because the Convention enjoys the status of an international treaty, the ECHR interprets its provisions, *inter alia*, in accordance with *international law principles*.[56] Indeed, in *Golder v. United Kingdom*[57], the Court stated that interpretation of the Convention's provisions would be guided by the interpretive methods established at the 1989 Vienna Convention on the Law of Treaties.[58] The

[56] *See* Christian Bonat, *The European Court of Human Rights*, *published by* The Federalist Society for Law and Public Policy Studies, at 19 [hardcopy available upon request].

[57] 1 E.H.H.R. 524 (1979-80), *as cited in* Bonat, *supra* note 56, at 19.

[58] *See* Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, *European Journal of International Law* (2003) at 533-538 (discussing relevant methods of treaty interpretation, including: (1) the plain meaning as understood in light of the object and purpose of a treaty; (2) subsequent practice; (3) relevant rules of international law; and (4) preparatory work.

international focus of the Court's jurisprudence, therefore, only re-enforces the differing approach to constitutional interpretation that the ECHR and U.S. Supreme Court apply.[59]

Of more consequence, however, is the "dynamic" or "evolving" method of interpretation that the ECHR has increasingly employed in its jurisprudence. Ostensibly arising from Article 31(1) the Vienna Convention, stating that the terms of a treaty should be interpreted in light of its object and purpose[60], the ECHR has adopted a "dynamic" approach that views the Convention as "a living instrument which … must be interpreted in light of present-day conditions."[61] Indeed, the ECHR's dynamic approach manifests itself through the "effectiveness principle", in which the Court stresses that the Convention "is intended to guarantee 'not rights that are theoretical or illusory but practical and effective'"[62]:

> Regarding the former, the Court will interpret the Convention's provisions in order to make them 'practical and effective' in servicing the broad objective it has adopted. Thus, if the treaty by its plain language is not 'effectively' protecting a particular right, the Court will see fit to make it so through expansive interpretation.[63]

In essence "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to

[59] This proposition is not without qualification, however, as the U.S. Supreme Court, in certain contexts, i.e., Eighth Amendment jurisprudence, looks beyond its borders to "evolving standards of decency" both domestically and abroad.

[60] *See, e.g.,* Orakhelashvili, *supra* note 58.

[61] *See* Bonat, *supra* note 56, at 21-23.

[62] Hert, *supra* note 54, at 74 (quoting *Airey v. Ireland*, Oct. 9, 1979 at Par. 24)

[63] Bonat, *supra* note 56, at 19-20.

make its safeguards practical and effective … any interpretation must be consistent with … the ideals and values of a democratic society."[64]

The Court's "living document" philosophy is also reflected in the "consensus doctrine," a method by which the Court "finds an internal European consensus, assumes this increase in rights was done in fealty to the Convention, and then imposes this new standard on the straggling state."[65] For example, in *Goodwin v. United Kingdom*,[66] the Court "looked outside of Europe and found an *international* 'common ground' granting full legal recognition of gender reassigned transsexuals…"[67] In accordance with its "evolving" method of interpretation, the Court stated that "while there had not been a statistical increase in States giving full legal recognition of gender re-assignment within Europe, information from *outside* Europe showed developments in that direction."[68] Thus, *Goodwin* not only underscores the Court's expansive view of the Convention's provisions, but "by reaching beyond Europe explicitly connects the Court's interpretation with *evolving international human rights* standards."[69] Lastly, in certain areas, the Court's expansive jurisprudence has resulted in the imposition of "positive obligations" upon member states, that is, a requirement that a particular member state undertake measures to ensure the effectuation of a particular right.[70]

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[64] *Id*. at 22 (quoting *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989), Par. 102)).

[65] *See* Bonat, *supra* note 56, at 23.

[66] 35 E.H.R.R. 18 (2002), Par. 85.

[67] *See* Bonat, *supra* note 56, at 24.

[68] *Id*. at 25 (emphasis added).

[69] *Id*. at 24 (emphasis added).

[70] *Id*. at 22.

Importantly, the ECHR's dynamic, "living document" philosophy has resulted in very expansive decisions that most American courts, particularly the U.S. Supreme Court, would be unlikely to countenance. This proposition is evident in the ECHR's "privacy" jurisprudence, particularly in the area of "relational" privacy, which arises under Article 8 of the convention.[71] For example, in *A.D.T. v. United Kingdom*[72], the Court held that the United Kingdom's "Sexual Offenses Act of 1967" violated Article 8 because, although it decriminalized homosexual conduct, it expressly prohibited such conduct where more than two individuals were present.[73] Likewise, in *Goodwin*, *supra*,[74] the Court accorded full legal recognition to transsexuals, and thereafter, in *Van Kuck v. Germany*,[75] expanded the rights of transsexuals, finding that German courts violated Article 8 when they failed to define gender reassignment surgery as "necessary medical treatment"[76] and thus eligible for reimbursement by a private insurance company.[77]

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[71] Article 8 of the Convention provides that " (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others." There exists a doctrinally rich body of law concerning the ECHR's interpretation of Article 8, particularly with respect to those acts by member states that are "in accordance with law"; "necessary in a democratic society"; and "in the interests of … health or morals". Such discussion is beyond the scope of this paper, except to highlight the expansive interpretive method that the ECHR employs.

[72] E.C.H.R. App. No. 35765/97 (July 21, 2000).

[73] *Id*. at Par. 37.

[74] 35 E.H.R.R. 18 (2002), Par. 85.

[75] E.C.H.R. App. No. 35968/97 (June 12, 2003) at Pars. 81, 82 and 85.

[76] *Id*.

[77] *Id*. These cases are but a sample of those that reflect the Court's expansive approach to matters involving basic rights such as privacy. Indeed, the expansiveness of the Court's jurisprudence, as compared to the U.S. Supreme Court, is reflected by the fact that the case relied upon by Justice Breyer in *Lawrence*, *Dudgeon v. United Kingdom*, was decided over 25 years earlier.

Likewise, in the area of "zonal" or "territorial" privacy, the Court, in *Von Hannover v. Germany*[78], held that Princess Carolina's right to privacy under Article 8 was violated when she was photographed by media officials while engaging in leisurely activities outside of her residence.[79] Additionally, in *Peck v. United Kingdom*,[80] the Court held that a British citizen, who was located by police attempting to commit suicide in a public place, and otherwise exhibiting erratic behavior, suffered a violation of his privacy where a videotape of the event was televised by national and local media outlets.[81]

Significantly, the evolving nature of the Court's Article 8 jurisprudence is further underscored by *dicta* in these (and other) decisions that delineate the expanding nature of privacy rights in Europe. For example, in *Goodwin* the Court stated that "serious interference with private life can arise where the state of *domestic* law conflicts with an important aspect of *personal identity* … [because] the stress and alienation arising from the discordance between the [person's] position in society … cannot … be regarded as a minor inconvenience …"[82] Likewise, in *Van Kuck*, the Court indicated that the concept of "private life" is very broad and "covers the physical and psychological integrity of the person," which encompasses "an individual's physical and social identity … personal development, and the right to establish and develop relationships with other human

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[78] App. No. 59320/00 (June 2004).

[79] *Id*. at Pars. 76-80.

[80] App. No. 44647/98 (January 28, 2003).

[81] *Id*. at Pars. 86 and 87.

[82] *Goodwin*, *supra* note 66, at Par. 77. (emphasis added) (the Court also held that "the very essence of the Convention being respect for human dignity and freedom, protection is given to the right of transsexuals to personal development and to physical and moral security") *Id.* at Par. 70.

beings and the outside world."[83] Additionally, in *Von Hannover*, the Court stated that notions of private life are designed to "ensure the development, without outside interference, of the *personality* of each individual in his relations with other human beings [in the public domain]."[84] The right to privacy, moreover, "includes a social dimension",[85] that extends "into the "public context"[86] and "may include activities of a professional or business nature."[87]

The Court's privacy jurisprudence is significant because it highlights both the courts differing institutional role, and jurisprudential focus, from that of the U.S. Supreme Court. First, its decisional law under Article 8 demonstrates that the ECHR is arguably committed to expanding the concept of privacy to the outer limits of what can be deemed an "international consensus." In other words, its view of Article 8 is primarily forward-looking and progressive, as its precedent shows few, if any, strict limitations upon an *individual's* right to private life. Conversely, the U.S. Supreme Court's approach, which is arguably informed by its responsibility to interpret a constitutional text, reflects the fact that the Constitution both grants *and* restricts the fundamental guarantees that it embodies. In this way, these respective Courts serve different *institutional* roles by virtue of the fact that they are interpreting very different documents, which not only have different purposes and objectives, but derive from a different historical dynamic. This notion, therefore, is at least partially responsible for the differing

[83] *Van Kuck*, *supra* note 71, at Par. 69.

[84] *Von Hannover*, *supra* note 73, at Par. 50 (emphasis added).

[85] *Id.* at Par. 69.

[86] *Id*. at Par. 50.

[87] *Peck*, *supra* note 80, at Par. 57.

degrees of protection that privacy engenders in the European Union as opposed to the United States. Consequently, to the extent that judges, i.e., Justice Breyer, rely upon foreign law to support a domestic constitutional decision, such reliance must consider not merely the judgments themselves, but also the institutions and doctrinal bases from which they emanate.

c. The ECHR is not as Committed to the Democratic Premise of Majoritarianism

Another substantial difference is that the ECHR, particularly in the area of "morals" legislation, is not nearly as deferential to Member States, and this is reflected in its tendency to de-emphasize the "margin of appreciation"[88] doctrine and, in some cases, impose positive obligations upon states to ensure realization of a particular right. As a threshold matter, the "margin of appreciation" is designed, in theory, to accord some measure of deference to Member States' legislative enactment.[89] As a practical matter, particularly in morals or public welfare legislation, the Court has been reticent to apply this doctrine with any degree of consistency. For example, in *Norris v. Ireland*[90], the Court stated that "not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation."[91] Thus, in cases implicating "a most intimate aspect of private life … there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate."[92]

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[88] *See, e.g.,* Bonat, *supra* note 56, at 25 (stating that, as the Convention *evolves*, less and less deference is accorded to the parties.") (emphasis in original).

[89] *Id*.

[90] App. No. 10581/83 (October 26, 1988).

[91] *Id*. at Par. 46 (quoting *Dudgeon* , *supra* note 52, at Par. 52).

[92] *Norris, supra* note 90, at Par. 46.

In fact, in *Lustig-Prean and Beckett v. United Kingdom*[93], the Court held that "serious reasons" exist only where the legislation at issue "answers a pressing social need"[94] and is "proportionate"[95] to the asserted objective. However, as Bonat states, "[t]here is no hard and fast rule on scope of the margin of appreciation … [i]t is a self-regulating doctrine for the Court, and as the Convention *evolves*, less and less deference is accorded to the parties."[96] Thus, the uneven (and uncertain) degree to which the Court will apply the "margin of appreciation", coupled with the application of "positive obligations" in some cases, substantially eviscerates any meaningful deference to Member States where fundamental rights are implicated.

Indeed, pursuant to the related (although distinct), doctrine of "positive obligations", the Court has held that Article 8 "does not merely compel the State to abstain from such [arbitrary] interference [with privacy] … there may be positive obligations inherent in an effective respect for private or family life … [which] may involve the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals between themselves*."[97] To be fair, however, pursuant to the doctrine of "subsidiarity", the Member States "are primarily responsible

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[93] App. Nos. 31417/96 and 32377/96 (September 27, 1999).

[94] *Id*. at Par. 80.

[95] *Id*.

[96] Bonat, *supra* note 56, at 25 (emphasis in original).

[97] *Von Hannover*, *supra* note 78, at Par. 57 (emphasis added).

for guaranteeing the rights and freedoms of the Convention, so it falls to the State in question how it is to comply with the Court's decision."[98]

Not insignificantly, the Court's activist approach differs substantially from the deference that American courts generally afford to state legislative enactments, particularly in the context of morals. Again, this is due both to the American *constitutional structure* as well as the legal framework adopted by particular courts. For example, the Constitution creates a system of enumerated powers that vests with individual states the primary legislative authority in areas such as health, welfare and public safety.[99] Of course, while there is an ongoing debate regarding the *degree* of deference to be accorded in particular cases[100], the fact remains that, in a significant majority of cases involving "values" or "morality", courts are ordinarily circumspect not to substitute their subjective policy predilections for those of a particular state legislature. Conversely, while recognizing this principle in *theory*, the ECHR's application of the "margin of appreciation", coupled with its imposition of positive obligations upon member states, suggest that it is, at least in certain areas, far more willing to invalidate legislation that arguably furthers legitimate objectives, and upon which reasonable minds could conceivably disagree. To be sure, the ECHR's activist role represents a logical outgrowth of its dynamic interpretive method, which consistently strives to broaden the Convention's human rights guarantees despite, in some cases, the *absence* of a European

[98] Bonat, *supra* note 56, at 14.

[99] *See* U.S. Constitution, Amendment X.

[100] The debate over the proper degree of deference is based often upon each judge's individual judicial philosophy , but the concept that State legislative enactments should not be invalidated based upon a court's subjective policy predilections is firmly embedded in American jurisprudence. The ongoing debate regarding the scope of such deference is beyond the scope of this Article.

consensus.[101] However, the Court's evolving judicial philosophy is incompatible with the recognition by most American jurists that legislative promulgations, as a core product of democratic processes, federalism and majority rule, should not be readily invalidated based upon a mere desire to expand or otherwise arrive at more desirable policy outcomes.[102] As one commentator has noted, "[e]uropean constitutional tradition contemplates 'a constitutional order embodying universal principles that derive their authority from sources *outside national democratic processes and that constrain national self-government*."[103]

Ultimately, therefore, because there is a considerable difference in the deference pursuant to which the American courts and ECHR will review "values" based legislation, there will undoubtedly be instances where the ECHR would likely reach a different results in cases involving similar facts.[104] Aside from the fact that this important distinction results largely from each courts' respective institutional role, and the documents from which they derive their respective authority, it counsels against relying

[101] *See* Bonat, *supra* note 56, at 24 (discussing the Court's approach in *Goodwin*, where it states as follows: "[t]e Court … attaches less importance to the lack of evidence of a common European approach … than to the clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals").

[102] Of course, the structure of the European Union or, for that matter, the Member States, differs from that of the United State's federal structure, rendering a strict comparison based upon principles of majority rule and federalism somewhat dubious. However, there is substantial conceptual similarity between the ECHR's and American court's invalidation of laws promulgated pursuant to the legislative processes of Member States, because in both instances such laws are within the State's traditional sphere of authority and often the product of majority predilection.

[103] Kenneth Anderson, *Foreign Law and the U.S. Constitution*, Hoover Institution Policy Review, at http://www.policyreview.org/jun05/anderson.html (2005) (emphasis added) .

[104] *See e.g.*, *Goodwin*, *supra* note 66. It is respectfully submitted that the American courts, at least in the current judicial climate, would not recognize, must less require, a state legislature to recognize the rights of transsexuals.

too heavily upon foreign sources of law, at least without due regard to the unique institutional nuances that facilitate particular decision-making processes.

d. Foreign Sources of Law Are the Product of Unique Cultural, Social, Economic and Political Dynamics

Finally, as alluded to above, foreign court decisions do not exist in isolation, but are instead responsive to the unique historical, cultural and constitutional traditions that influence a court's perspective. For example, as Kenneth Anderson explains, unlike the United States, Western European constitutionalism does not place emphasis upon the primacy of democratic self-governance and national majoritarian prerogatives:

> [F]ollowing the nationalist disasters of the interwar and Second World War period, much of Western Europe's constitutionalism was explicitly about reaching to any available source of constitutionalism *other* than national democratic self-government, which, equated with populism, was seen in no small part as a root evil of war and social strife. It is a tradition deeply fearful of democracy and above all hostile to the concept of popular sovereignty. Indeed, in international constitutionalism, 'interpretation by a body of international jurists is, in principle, not only satisfactory but *superior* to local interpretation, which invariably involves constitutional law in partisan and ideological political disputes'.[105]

Importantly, this approach differs dramatically from the American perspective, which "regards constitutional law as the embodiment of a particular nation's democratically self-given legal and political commitments … [American] constitutional law is emphatically not antidemocratic … [but] aims at democracy over time."[106] In this way, "those who interpret its constitutional text owe their allegiance to … [a] democratic, self-governing community."[107]

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[105] Anderson, *supra* note 103, at http://www.policyreview.org/jun05/anderson.html (emphasis in original).

[106] *Id*.

[107] *Id*.

The difficulty, therefore, in relying upon foreign sources of law, as Justice Breyer did in *Lawrence*, is that it may not be sufficiently mindful of the vastly different historical, cultural and constitutional perspectives that inform a particular decision. This problem is no more evident than when comparing Western European and American constitutionalism, particularly the ECHR's jurisprudence, because, in stark contrast to its dynamic framework, in the United States "[c]onstitutional interpretation is not merely a matter of 'best policy', considered in a vacuum, but 'best policy' as it has arisen through democratic processes—which may or may not have been successful in reaching the best policy."[108] In other words, American constitutionalism represents "a vision of democratic constitutional self-government founded upon democracy and popular sovereignty – everything that international constitutionalism and the European tradition most rejects."[109]

Thus, the problems that "comparative constitutionalism" engender militate against relying too heavily upon foreign court decisions in the domestic constitutional context. Indeed, the presence of widely divergent historical, cultural and constitutional traditions requires, at the very least, that judges comprehend the context within which a foreign decision was rendered, a task that may itself be impractical. Moreover, the sheer volume of foreign materials upon which a court may elect to rely can, conceivably, create the appearance of self-serving expedience or, far worse, render such reliance susceptible to claims of arbitrariness In addition, venturing outside of the domestic constitutional context risks engendering the claim that a particular judge (or court) is acting in an elitist

[108] *Id*.

[109] *Id*.

manner that is intended to further a subjective policy predilection not supported by domestic law and tradition. Such a claim would be particularly troubling in the American constitutional structure, because its tradition explicitly emphasizes national democratic self-government and respect for majority will. Thus, " comparative constitutionalism" raises substantial concerns that cannot be vitiated by claims that such reliance is merely for "informative" purposes.[110]

Of course, this does not mean that foreign sources should not serve to support domestic decision in some instances, but the manner and method by which such use is sanctioned is not certain. This Article does not claim that foreign sources of law should never be used, but rather that its use in "values" based adjudication should be done, if at all, cautiously and with particular sensitivity attention to the historical traditions of the *domestic* nation. Critically, though, this claim substantially undermines Justice Breyer's "progressivism", because a substantial component of that approach is to rely upon foreign sources of law to discern a *rights-based* consensus. However, the answer to this problem does not necessarily entail elimination of Justice Breyer's "progressivism" as a viable methodology in "values" based cases, nor, as discussed below, does it support the proposition that Justice Scalia's "originalism" should guide the Court's interpretive framework.

[110] *Id*.; *see also Roper v. Simmons*, 125 S.Ct. 1183 (March 1, 2005) (In *Roper*, as Anderson notes, Justice Breyer "endorsed the use of foreign and international law in U.S. constitutional adjudication"); *see also* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution*, Cato Supreme Court Review (2004) (hardcopy available upon request); Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 Texas Law. Rev. 1763 (2004).

B. JUSTICE SCALIA'S "ORIGINALISM" -- PROBLEMS WITH EXCLUSIVE RELIANCE UPON THE AMERICAN CONSTITUTIONAL TRADITION

As stated *supra*, in *Lawrence* Justice Scalia eschewed the majority's reliance upon foreign jurisprudence, dismissing such reliance as "meaningless dicta" that sought to "impose foreign moods, fads, or fashions on Americans."[111] For Justice Scalia, the *only* values, or rights, that are worthy of constitutional protection are those that are "deeply rooted in *this Nation's* history and tradition."[112] To be sure, the asserted right must "be an interest traditionally protected by our society"[113] and "so rooted … in the conscience of our people as to be ranked as fundamental."[114] Furthermore, Justice Scalia noted in *Lawrence* that, even if a right is designated as fundamental, it is not immune from restriction should an individual state proffer a compelling interest justifying its infringement.[115] Moreover, all other asserted "liberty" interests, "may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest."[116] Applying his "originalist" philosophy, Justice Scalia surveyed the historical landscape, particularly state legislative enactments and, far from discerning an interest "traditionally protected by our society"[117], found that "our Nation has a longstanding history of laws prohibiting *sodomy in general*…"[118] Accordingly,

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[111] *Lawrence*, *supra* note 3, at 14 (Scalia, J., dissenting).

[112] *Id*. (Scalia, J. dissenting) (quoting *Bowers*, 478 U.S. at 193-194) (emphasis in original).

[113] *Id*. at 8 (Scalia, J., dissenting) (quoting *Michael H. v. Gerald D.*, 491 at 122).

[114] *Id.* at 8-9 (Scalia, J., dissenting) (quoting *Reno v. Flores*, 507 U.S. at 303).

[115] *Id.* at 8 (Scalia, J., dissenting); (*citing Washington v. Glucksberg*, 521 U.S. at 721).

[116] *Id* at 9 (Scalia, J., dissenting).

[117] *Id*. at 9 (Scalia, J., dissenting) (quoting *Michael H. v. Gerald D.*, 491 at 122).

[118] *Id*. at 11 (Scalia, J., dissenting) (emphasis in original).

Justice Scalia would have upheld the State of Texas' prohibition upon consensual sodomy, even though it was directed at *same*-sex couples, because the historical tradition of prohibiting such conduct existed "regardless of whether it was performed by same-sex or opposite-sex couples."[119] Importantly, it is not surprising that, for Justice Scalia, the use of foreign law in this context was not only "meaningless dicta"[120], but contrary the requirement that fundamental rights be rooted in *domestic* tradition and practice. Thus, Justice Scalia's "originalist" philosophy in "values" based constitutional adjudication provides no basis whatsoever for relying upon foreign sources of law.[121]

However, Justice Scalia's "originalism" in this context is not without its conceptual and practical difficulties. First, despite the ease with which Justice Scalia apparently discerns domestic constitutional tradition relating to a particular issue, such endeavor can prove elusive and, in some case, lead to inconsistent, uncertain or contrary views on precisely what this Nation's historical practice communicates. The domestic historical record, whether it be law, custom, or practice, is not likely to provide a straightforward answer to questions regarding the specific rights that should be deemed fundamental. In fact, the record may be susceptible to varying degrees of interpretation that depends more upon how the *inquiry* is framed, rather than upon the existence of a traditional consensus. In other words, reliance upon history and tradition is capable of the same arbitrary and self-serving reliance that the use of foreign law potentially risks.

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[119] *Id*. at 11 (Scalia, J., dissenting).

[120] *Id*. at 14 (Scalia, J., dissenting).

[121] For further discussion of Justice Scalia's judicial philosophy, *see* John F. Manning, *Justice Scalia and the Legislative Process*, 62 Ann. Surv. Amer. Law 33 (2006); *see also* Paul Finkelman, *Thomas Jefferson, Original Intent, and the Shaping of American Law: Learning Constitutional Law from the Writing of Jefferson* (same).

In *Lawrence*, for example, Justice Breyer disputed Justice Scalia's view that there existed a "long-standing history in this country of laws" proscribing homosexual conduct.[122] Of course, Justice Scalia responded by asserting that traditional practice prohibited *sodomy in general*, underscoring that the method by which a court frames the relevant inquiry can have a direct impact upon such court's interpretation of historical practice. In any event, the sheer volume of the historical traditions or practices to which Justice Scalia speaks are not likely to provide straightforward guidance in specific cases.

Second, and more fundamentally, "originalism" can result in unjust decisions that, based upon contemporary perspectives, are inconsistent with modern notions of liberty and equality.[123] Stated simply, it can lead to harsh, even absurd, results. For example, in an article discussing Cass Sunstein's "*Radicals in Robes: Why Right-Wing Courts are Wrong For America*", Stephen Pomper discusses the implications of the "originalist" approach:

> Sunstein's main objections to originalism don't have to do with its theoretical vulnerabilities … [h]is principle objections are about the results that it would produce … If applied in its most literal sense, the theory would force the courts to peel away decades of constitutional law, and return the Constitution to the state it was in prior to the New Deal … A rigid application of originalism would, for example, gut the case law on reproductive freedom … [and] on relatively uncontroversial issues like the right of married persons to buy birth control … [a]nd it would have a bizarre impact on the law in areas relating to race and religion … originalism tends to suggest that states can actually establish their own religions … [a]nd there's pretty much no

[122] *Lawrence, supra* note 3, at 7 (Breyer, J., majority opinion).

[123] Of course, the debate concerning the implications of originalist philosophy, including the results that it would create, is the subject of extensive commentary which is beyond the scope of this Article. In addition, because originalist philosophy exists in numerous forms, and is advocated to varying degrees, there can be no certain conclusions regarding the results that its application in particular forms would create. However, the criticism that the originalist perspective would create unjust results is not without merit if, as Justice Scalia advocates, courts looked exclusively to domestic practice when analyzing whether protection of a particular right is warranted. A contrary result in *Lawrence*, for example, would have engendered precisely this criticism.

> originalist support for the general idea that the Constitution protects women from discrimination by Congress or by state legislatures … Sunstein asks: *Does anybody really want to put on this ridiculous straightjacket?*[124]

Consequently, "[w]hen confronted with the parade of horribles that originalism might spawn … [i]t leaves us looking for another constitutional approach."[125]

But what approach to constitutional interpretation can most effectively bridge the divide between the Justice Breyer's "progressivism (results consistent with modern notions of liberty), and Justice Scalia's "originalism" (fidelity to domestic historical tradition and democratic process)? This Article proposes a modest solution to this problem by introducing the concept of "reverse" originalism.

PART IV

INTRODUCING "REVERSE" ORIGINALISM – A PROGRESSIVE JURISPRUDENCE THAT REMAINS FAITHFUL TO THE UNITED STATES' CONSTITUTIONAL AND HISTORICAL TRADITIONS

The significant divide between Justice Breyer's "progressivism" and Justice Scalia's "originalism" suggests that reliance upon evolving notions of fairness and liberty, based upon domestic and foreign perspectives, cannot be reconciled with a court's duty to remain firmly committed to domestic history and tradition. In fact, Justice Breyer's reliance upon the European Court of Human Rights conflicts directly with Justice Scalia's belief that the *only* rights worthy of protection are those that are "deeply rooted in *this Nation's*"[126] historical tradition.

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[124] Stephen Pomper, *Judging the Judges*, in *Washington Monthly* (September 2005), *available at* http://www.washingtonmonthly.com/features/2005/0509.pomper.html (reviewing Cass Sunstein, "Radicals in Robes: Why Extreme Right Wing Courts Are Wrong For America", (Basic Books 2005).

[125] *Id.* In *Radicals in Robes*, Sunstein advocates a "minimalist" approach to constitutional interpretation which, broadly construed, "prefers that the law be changed through narrow rulings and small nudges rather than precedent-setting earthquakes").

[126] *Lawrence*, *supra* note 3, at (Scalia, J., dissenting) (quoting *Bowers*, 478 U.S. 193-194).

The more fundamental question, however, concerns the *purposes* underlying Justice's Breyer's reliance upon foreign sources f law, and stated position that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[127] It would not be unfair, or unduly speculative, to assume that the *Lawrence* opinion reflected a Supreme Court trying to achieve the "best policy," or result that is most consistent with evolving perspectives of equality, liberty and fairness. Apart from the fact that such approach is likely to invite claims of "elitism", judicial policymaking and arbitrariness, the fact remains that the *Lawrence* majority was, at its core, trying to achieve a just and equitable result for a group that has traditionally been underrepresented (and unprotected) in our society. Whether that result was achieved is a matter for debate; what is fairly uncontroversial is that "progressivism", in its most basic application, arguably seeks to do that which is "right" in a particular case, and the use of foreign material is an important component of that search.[128]

This approach could not be more in conflict with Justice Scalia's "originalist" philosophy. Indeed, *constitutional* rights do not "spring into existence"[129] simply because an evolving consensus supports their recognition. On the contrary, policy change falls squarely within the purview of democratic processes, as reflected through majority rule and subsequent legislative promulgation. For Justice Scalia, therefore, the *Lawrence* majority represented a circumvention of our constitutional structure "through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic

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[127] *Id*. at 11 (Breyer, J., majority opinion) (quoting *County of Sacramento*, 523 U.S. at 857).

[128] *See generally* Anderson, *supra* note 103, at 4-8.

[129] *Lawrence*, *supra* note 3, at 14 (Scalia, J., dissenting).

change."[130] In Justice Scalia's view, therefore, American constitutionalism does not rely upon the perspectives of a "wider civilization,"[131] but instead finds expression through the values and policy predilections that historical *domestic* tradition reveals.[132]

To begin with, there can be no doubt that both Justice Breyer's "progressivism" and Justice Scalia's "originalism" have critically important components that are highly relevant to, and a valuable aspect of, American constitutionalism. As a normative matter, judges should, at least to some extent, strive to achieve the "right" result, that is, results that are consonant with principles of fairness and equality, particularly where evolving notions have demonstrated an existing practice to be oppressive or unjust. The idea that courts will endeavor to prohibit State action that is inimical to basic due process guarantees is neither novel nor suspect in our domestic practice. In fact, the Supreme Court's rich doctrinal history is replete with precedent where the Court has invalidated long-standing practices that time has shown to be inconsistent with equal treatment.[133] Of course, while the line between proper judicial function and undesirable judicial activism is often unclear, it cannot be said that a court's scrupulous efforts to achieve the "right" outcome is *per se* objectionable. Stated simply, "progressivism" and, arguably, its desire to achieve equitable *outcomes*, should have a role in American constitutionalism.

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[130] *Id*. at 19-20 (Scalia, J., dissenting).

[131] *Id*. at 14 (Scalia, J., dissenting).

[132] In January 2005, Justices Breyer and Scalia held a "public conversation" at Washington College of Law, American University, in which their differing approaches were discusses in detail. For further discussion of their views, *see* Anderson, *supra* note 103.

[133] *See e.g.*, Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 Va. L. Rev. 1537 (2004) (discussing the impact of *Brown v. Board of Education* upon subsequent constitutional jurisprudence).

On the other hand, a court that strives to achieve "just" outcomes through substitution of its policy predilections cannot be said to be acting within permissible boundaries. Thus, to the extent that the "right" outcome is effectuated at the expense of deference to a legislature's constitutional authority, it should be exposed as intolerable judicial activism. In other words, if there was ever a practice that is "deeply rooted in *this Nation's* history and tradition"[134], is the venerable respect for the legislature's policymaking prerogative, both as an institution and expression of democratic processes. Additionally, there is in referring to, and relying upon, our historical tradition when determining whether an asserted "right" warrants constitutional protection. Indeed, domestic tradition can provide important insights regarding the intent, scope and purposes which underlie our most fundamental rights.

Moreover, knowledge of that history can inform a court's perspectives regarding the degree to which, as a *general* matter, the newly-asserted right has a cognizable basis in the constitutional text. Furthermore, reliance upon domestic tradition ensures that our social, political and cultural practices, as expressed through democratic processes and majority will, occupy a venerable place in constitutional decision-making. Thus, when confronted with "values" based adjudication, courts should be cognizant not only of their institutional limitations, but also of the long-standing history that informs our very notion of what it means to declare a newly-asserted right "fundamental". Put differently, the "originalist" position is an important aspect of American constitutional law.

The critical problem, for which this Article proposes a modest solution, is the failure to realize that both the "progressive" and "originalist" philosophies can be integrated into a unified method of constitutional interpretation. This Article posits that

[134] *See Lawrence*, *supra* note 3, at 14 (Scalia, J., dissenting) (quoting *Bowers,* 478 U.S. at 193-194).

"negative" or "reverse" originalism represents a plausible method by which to remain faith to historical tradition, while simultaneously achieving outcomes that are consistent with evolving notions of liberty. The concept of "negative" originalism is based upon the assumption that *domestic* tradition should be a core aspect of constitutional adjudication, because such tradition reflects the unique cultural, political and social character of national constitutionalism. However, "negative" originalism presupposes that the concept of "rights," particularly those worthy of constitutional protection, should not remain stagnant or fixed in history. Rather, rights-recognition should be responsive to the evolving perspectives of liberty that human experience generates.

Based upon these assumptions, the theory of "negative" originalism would require a court *not* to divine the precise meaning of broadly worded constitutional phrases, or divine the import of long-standing historical practice. Such an endeavor will likely entail distinct interpretive difficulties, be subject to contrary conclusions, and risk arbitrary and/or self-serving utilization. In some cases, moreover, the historical record will be invariably unclear and susceptible to varying interpretations, thus proving inadequate for constitutional decision-making processes. Furthermore, to the extent that domestic practice can answer modern questions of rights-protection, the result may be highly unjust or inequitable.

Thus, "negative originalism" would require a court to ascertain whether *protection of a newly-asserted right would be contrary to, inconsistent with or discountenanced by the salutary values that our domestic tradition embraces*. In other words, "negative" originalism would require a court to discern the *general* or *overriding* principles that underlie a particular constitutional provision, i.e., the Due Process Clause,

or particular historical practice, i.e., race-related legislation, and examine whether the newly-asserted right would contravene the *general intent* that has manifested itself through evolution of domestic law. In this way, "negative" originalism would still require a court, particularly in "values" based cases, to conduct a searching examination of the historical record, as expressed through constitutional and legislative history, to ensure that newly-recognized "rights" are supported by *domestic* tradition and not the result of judicial policy predilection. In other words, the broad values that our country has deemed sacrosanct, through democratic process and majoritarian rule, warrant special recognition as expressions of our most deeply-held notions of liberty. Moreover, an integral aspect of that recognition must be rooted in judicial decision-making that strives to continue the evolution in "rights recognition" that this country has unquestionably undergone, yet in a manner that is consistent with the broad values underlying that evolution rather than subjective policy preferences. The failure to appreciate this fact is a recipe for judicial usurpation of the democratic process.

Critically, however, the requirement that courts ascertain only the *broad values* or *general intent* upon which domestic tradition is based reflects the principle that conceptions of liberty, fairness and equality evolve over the course of time and through the trials of human experience. Indeed, whether it be the experience of the United States or foreign nations, conceptions of "rights protection" are undoubtedly informed by human events, cultural evolution, and social awareness. For example, evolving notions of discriminatory treatment have resulted in increasing protection for traditionally disadvantages groups, i.e., women, minorities and homosexuals, through legislative action and policy reform. Furthermore, evolutions in the very principles that formed our

national constitutionalism have resulted in a society that most would agree is more fair, equal, and free. Indeed, the judiciary has played a vital role in eradicating, through landmark decisional law, various oppressive practices that evolving conceptions would likely not tolerate. Stated simply, "negative" originalism recognizes that "values" based adjudication must allow for the benefits that modern notions of liberty and fairness will provide.

In addition, "negative" originalism reflects the fact that, in modern jurisprudence, difficult issues invariably arise that could neither be contemplated by the drafters of our Constitution nor resolved by reference to historical tradition. It is simply impossible to expect that the Constitution's drafters, or early legislative efforts, could have anticipated the many difficult issues that would arise in the context of rights-protection. The broad text of the Constitution's many provisions, i.e., the Equal Protection Clause, arguably serve, at least in part, as a testament to this notion. However, while various contemporary "values" disputes could not have been anticipated or foreseen, the Constitution does set forth broad provisions concerning liberty that can inform resolution of these disputes. It is precisely for this reason that the broad guarantees upon which, for example, the Due Process Clause is based, are relevant to answering the questions posed in "values" based adjudication. As such, "negative" originalism contemplates an active role for courts in discerning whether recognition of a newly-asserted right would contravene the salutary principles that influenced the evolution of domestic tradition and practice. Importantly, while "negative" originalism only requires courts to discern the *general* intent underlying a given constitutional provision or historical tradition, such inquiry should be neither confining nor superficial. For example, courts should focus upon the relevant

circumstances, *context* and expectations which lead to the historical evolution of "liberty" interests, to determine whether expansion of this interest warrants recognition of a newly-asserted right.

Of course, this proposition begs the question of whether and, if so, to what extent foreign sources of law should factor into the court's analysis. As a preliminary matter, "negative" originalism would allow the use of foreign sources of law, *but only to the extent that such sources are neither inconsistent with nor contrary to the domestic evolution of a particular constitutional value*. In other words, foreign sources of law should not be used to justify a court's subjective policy judgment, or unilateral desire to "draw American constitutional norms into 'even closer union' … with those of the rest of the world."[135] Foreign sources of law should not, therefore, be used to *globalize* the court at the expense of our unique domestic tradition; it should be used to confirm that an expansion of our domestic practice, to recognize a newly asserted right, *is supported by a* ***national*** *evolution which renders incorporation with international consensus justified.* Otherwise, the use of foreign materials will be susceptible to claims of arbitrariness, elitism and the desire by courts to substitute their policy predilections for those expressed through the democratic process. The use of foreign materials in such a manner could not be more pernicious, because it would undermine the values of our national constitutionalism, and slowly remove constitutional decision-making from the historical tradition upon which it rests.

Of course, these sentiments only serve as a brief introduction to "negative" originalism, as its application will certainly engender practical difficulties. For example, it can be argued that ascertaining merely the *general* intent underlying historical

[135] Anderson, *supra* note 103.

conceptions of liberty will allow courts to utilize undefined platitudes, that are nowhere justified in domestic tradition, to unilaterally recognize new constitutional rights. The concept of "liberty", for example, can mean whatever a court says it does, and can result in precisely the type of judicial policymaking that lies within the province of legislative action. In addition, with a modest amount of creative interpretation, courts will be able to selectively cite to domestic and foreign sources and justify whatever "rights expansion" it deems desirable. Similarly, while it may be possible to discern the general intent underlying specific constitutional provisions, such intent can never justify progressive jurisprudence that was never within the contemplations of the constitution's drafters.

These concerns are valid and merit significant debate. The problem, however, is that the same arguments can be advanced against Justice Scalia's originalism, Justice Breyer's progressivism, or any interpretive paradigm that vests judges with substantial discretion. "Negative" originalism constitutes an attempt to channel that discretion in such a manner that gives domestic practice primacy in constitutional decision-making, yet allows courts to recognize that history has limits concerning the objectives to which it strives and the situations to which it can be applied. The presence of a modern consensus that results from collective human experience does *not* mean that a progressive jurisprudence undermines domestic tradition. Moreover, by requiring courts to ensure that expansive rights-protection, based upon contemporary perspectives, does not undermine or offend our domestic tradition, "negative" originalism strives to ensure that courts exercise extreme care in recognizing newly asserted rights. Court must be sensitive to the historical record, *and* responsive to evolving notions of justice, if for no other reason than to provide meaningful contemporary understandings of the Constitution's

most basic guarantees. Ultimately, courts should be circumspect to recognize "new" rights, and even more careful to place undue reliance upon foreign sources of law. If there exists uncertainty or conflict in domestic practice, then progressive change is best left to the democratic process. However, the "emerging awareness"[136] reflected in "values" based adjudication warrants application of the principle that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[137]

[136] *Lawrence*, *supra* note 3, at 11 (Breyer, J., majority opinion).

[137] *Id.* (*quoting County of Sacramento*, 523 U.S. at 857 (Kennedy, J., concurring).