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Gay Rights, Dangerous Foreign Law, and American Civil Procedure

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I. INTRODUCTION

In *Lawrence v. Texas*,[1] the United States Supreme Court extended constitutional protections to gays in the United States. In writing the majority opinion for the Court,[2] not only did Justice Kennedy passionately extol the virtues of constitutional privacy as a protection for personal autonomy,[3] but he also utilized foreign law to support his argument that American constitutional law needed to modernize.[4] In his dissent,[5] Justice Scalia reacted negatively to Justice Kennedy's invocation of foreign law as a policy basis for fashioning American constitutional law.[6] Justices Kennedy and Scalia implicitly sparred over the role that foreign law should play in American constitutionalism. One Justice viewed foreign law as a valid guidepost for American constitutional jurisprudence, while the other Justice conceived of foreign law as beyond not only American borders but also beyond the pale.

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1. 539 U.S. 558 (2003).
2. *Id.* at 562-85.
3. *Id.* at 576-79.
4. *Id.* at 573, 576-77.
5. *Id.* at 586-605 (Scalia, J., dissenting).
6. *Id.* at 598 (Scalia, J., dissenting).

This article examines what role foreign law should play in the narrow confines of the constitutional protection of sexual freedom, specifically for gay Americans but also with implications for heterosexual Americans. First, the article reviews the background and doctrine of *Lawrence*.[7] Then, the article reviews how *Bowers v. Hardwick*[8] created high and rough obstacles for Justice Kennedy as he sought to be sexually inclusive.[9] Next, the article examines how Justice Kennedy utilized foreign law as a device for overcoming the obstacles created by *Bowers* and how Justice Scalia reacted negatively to Justice Kennedy's use of foreign legal sources.[10] Finally, this article examines the merits of both views by reviewing two civil procedure cases where foreign law played a role in the genesis of civil procedure doctrine.[11]

II. *LAWRENCE*: BACKGROUND AND DOCTRINE

Both *Lawrence* and *Bowers* began in the same fashion. In *Lawrence*, John Geddes Lawrence and Tyrone Garner were engaged in sodomy in Lawrence's apartment.[12] In *Bowers*, a Mr. Hardwick was engaged in sodomy with another adult male in the bedroom of Mr. Hardwick's home.[13] In *Lawrence*, the police entered the residence in response to a reported weapons disturbance.[14] In *Bowers*, the police somehow gained access to Mr. Hardwick's bedroom in order to discover the commission of the act of sodomy.[15] After police involvement, both cases differed procedurally. In *Lawrence*, the State of Texas pursued a prosecution in Texas Courts[16] for violation of a Texas statute that prohibited homosexual intercourse.[17] In *Bowers*, though the men ran afoul of a Georgia statute that prohibited sodomy,[18] the State of Georgia failed to prosecute a criminal case.[19]

John Geddes Lawrence and Tyrone Garner stood convicted before a Texas Justice of the Peace. They requested and received a trial *de novo* in Texas county criminal court, unsuccessfully challenging the Texas homosexual anti-sodomy statute[20] as violating the Equal Protection and Due Process Protection Clauses of the United States

7. *See infra* Part II.
8. 478 U.S. 186 (1986).
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part V.
12. Lawrence v. Texas, 539 U.S. 558, 562-63 (2003).
13. Bowers v. Hardwick, 478 U.S. 186, 187-88 (1986).
14. 539 U.S. at 562-63.
15. 478 U.S. at 187-88.
16. 539 U.S. at 563.
17. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).
18. GA. CODE ANN. § 16-6-2 (2003).
19. 478 U.S. at 188.
20. *Lawerence*, 539 U.S. at 563.

Constitution[21] and the Equal Protection Clause of the Texas Constitution.[22] After pleading *nolo contendere*, each was fined.[23] They appealed unsuccessfully to the Texas District Court of Appeals.[24] The United States Supreme Court granted *certiorari* in *Lawrence*[25] to consider whether Mr. Lawrence and Mr. Geddes' Due Process privacy rights had been violated and whether *Bowers* should be overruled.[26]

Justice Kennedy, writing for the *Lawrence* Court,[27] overruled *Bowers*.[28] Justice Kennedy utilized substantive due process privacy doctrine under the Fourteenth Amendment to overrule *Bowers* and fashioned constitutional doctrine protective of gay sexual liberty.[29] Justice Kennedy opened his majority opinion with a discussion about privacy. He noted that in American constitutional tradition the government fails to be omnipresent in the home and outside the home. Privacy extended beyond spatial boundaries. He viewed *Lawrence* as involving "liberty of the person both in its spatial and more transcendent dimensions."[30]

Justice Kennedy based his doctrinal analysis of gay sexual privacy and liberty on a line of cases involving birth control.[31] Though he mentioned *Pierce v. Society of Sisters*[32] and *Meyer v. Nebraska*[33] as creating a broad basis for substantive due process privacy protection,[34] Justice Kennedy relied directly on *Griswold v. Connecticut*,[35] *Eisenstadt v. Baird*,[36] *Roe v. Wade*,[37] *Carey v. Population Services International*,[38] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[39] Justice Kennedy traced the progressive broadening of privacy rights implicating personal family decisions from married couples to unmarried individuals.[40] For him, *Bowers* stood out as an anomaly in the privacy line of cases. He identified how the *Bowers* Court failed to recognize *Bowers* as part of a logical progression of expanding privacy rights protecting personal relationships.[41]

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21. U.S. CONST. amend. XIV, § 1.
22. TEXAS CONST. art. I, § 3a.
23. *Lawrence*, 539 U.S. at 563.
24. Lawrence v. State, 41 S.W.3d 349 (Tex. Ct. App. 2001).
25. 537 U.S. 1044 (2002).
26. *Lawrence*, 539 U.S. at 563.
27. *Id.* at 562.
28. *Id.* at 578.
29. *Id.* at 564.
30. *Id.* at 562.
31. *Id.* at 564-66.
32. 268 U.S. 510 (1925).
33. 262 U.S. 390 (1923).
34. *Lawrence*, 539 U.S. at 564.
35. 381 U.S. 479 (1965).
36. 405 U.S. 438 (1972).
37. 410 U.S. 113 (1973).
38. 431 U.S. 678 (1977).
39. 505 U.S. 833 (1992).
40. *Lawrence*, 539 U.S. at 564-67.
41. *Id.* at 564-66.

According to Justice Kennedy, the *Bowers* Court went wrong when the Court failed to identify the constitutional issue properly. Kennedy wrote, "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward. . . ."[42] The *Bowers* Court failed to understand how anti-sodomy statutes stigmatized homosexuals.[43] Kennedy conceived of anti-sodomy statutes as doing far more than regulating sexual conduct when he wrote, "[t]he statutes do seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[44] For Kennedy, privacy involved the constitutional protection, not of sexual acts, but of personal decisions involving family relationships. Gays possessed the same autonomy to enter into such relationships as heterosexuals.[45] Anti-sodomy laws, especially homosexual anti-sodomy laws, impaired the right to freely enter a homosexual relationship. To protect the right to choose a homosexual relationship, Justice Kennedy held that consenting adults not engaging in a public act such as prostitution possess the substantive due process right to engage in sexual practices, including sodomy, common to a homosexual lifestyle without government interference.[46]

III. THE MOUNTAIN FACING JUSTICE KENNEDY

In overruling *Bowers* and holding that gays possessed the constitutional right to enter adult, consensual sexual relations without government interference, Justice Kennedy had to overcome some tall doctrinal obstacles created by the *Bowers* Court. First, the *Bowers* Court showed a strong sensitivity to the role of the United States Supreme Court in developing constitutional principles. The *Bowers* majority noted that the case "calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate."[47] Justice White, writing for the majority in *Bowers*,[48] worried that the Supreme Court easily could overstep its bounds when developing substantive due process privacy because substantive due process privacy cases lack textual support from the Constitution. Justice White warned, "[s]triving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and Federal Government. . . ."[49] Justice White opened the majority opinion by noting that this case failed to require a judgment on whether sodomy laws were wise or desirable.[50]

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42. *Id.* 567.
43. *Id.* at 574-75.
44. *Id.* at 567.
45. *Id.* at 573-74.
46. *Id.* at 578.
47. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).
48. *Id.* at 187.
49. *Id.* at 191.
50. *Id.* at 190.

Justice White feared that the Supreme Court risked its legitimacy when the Court could be viewed as determining whether democratically created law was wise or desirable. White wanted to avoid placing the Supreme Court in a conflict with the democratic branches of American government.[51] He wanted to avoid a repeat of the conflict created in the 1930's by the United States Supreme Court in utilizing substantive due process to strike down New Deal legislation.[52] Justice White believed that the Supreme Court's conflict with President Franklin Roosevelt resulted in a repudiation of much of the substantive due process doctrine.[53] White sought to remain faithful to the words of the Constitution in order to prevent the Judiciary from assuming authority to govern the United States without express constitutional permission.[54]

To prevent substantive due process from becoming a vague and elastic basis for the Supreme Court to create constitutional law, Justice White demanded in *Bowers* that substantive due process have an explicit and understandable doctrinal basis. Relying on past Supreme Court cases, Justice White found that substantive due process rights included those fundamental liberties implicit in the concept of ordered liberty.[55] White defined fundamental liberties as those liberties that became deeply rooted in American history and tradition.[56] He conceived of the fundamental right being asserted in *Bowers* as the right of homosexuals to engage in sodomy,[57] and Justice White found that such a right possessed no deep roots not only in American history and tradition but in Western history and tradition as well.[58] Regarding American history, Justice White carefully catalogued the long history of state laws criminalizing sodomy,[59] reviewing four different periods in American history. First, all thirteen original states had criminal sodomy laws.[60] Second, in 1868, at the ratification of the Fourteenth Amendment, thirty-two states had criminal sodomy statutes in effect.[61] Third, until 1960, all states outlawed sodomy.[62] Finally, by 1986, twenty-four states provided criminal sanctions for sodomy.[63]

A due process privacy right of homosexual sexual liberty could never exist according to Justice White because such a liberty failed to be rooted in American

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51. *Id.* at 194-95.

52. *See generally* LEONARD BAKER: BACK TO BACK, THE DUEL BETWEEN FDR AND THE SUPREME COURT (1967); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995); MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 (2002) .

53. *Bowers*, 478 U.S. at 194-95.

54. *Id.* at 195.

55. *Id.* at 191.

56. *Id.* at 192.

57. *Id.* at 190.

58. *Id.* at 192-94.

59. *Id.* at 192-93

60. *Id.* at 192, n.5.

61. *Id.* at 192-93, n.6.

62. *Id.* at 193.

63. *Id.* at 193-94.

history as evidenced by the longstanding and widespread criminal prohibition against sodomy in the United States. However, Justice White did not stop his analysis of American sexual legal tradition with American law. Justice White joined with Chief Justice Burger in connecting American sexual legal tradition with broader Western Civilization sexual tradition. White observed that proscriptions against homosexual consensual sodomy possessed "ancient roots."[64] Though Justice White failed to describe what he meant by that statement, he did provide a citation to a law review article about the constitutional right to privacy for homosexual activity.[65]

The article on which Justice White relied provided a short history of arguments favoring the outlawing of homosexual sodomy. This short history covered the breadth of Western Civilization from Plato to the Old Testament to Mosaic Law through the Middle Ages to Blackstone.[66] The survey connected the history of anti-sodomy prohibition to American law by way of Blackstone, noting that "Blackstone's characterization of sodomy, 'as a crime against nature,' would serve as the basis for most American sodomy laws."[67] Chief Justice Burger, in a concurring opinion,[68] connected with Justice White's implicit history of anti-sodomy prohibitions in Western Civilization. Chief Justice Burger wrote, "[a]s the Court notes . . . the proscriptions against sodomy have very 'ancient roots.'"[69] While Justice White remained implicit in his historical argument relying on a citation to a law review article, Chief Justice Burger was explicit. He wrote, "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[70] For Chief Justice Burger, condemnation of homosexual sexual practices remained firmly rooted in Judaeo-Christian moral and ethical standards.[71]

Justice Kennedy in *Lawrence* faced major obstacles that were created by Justice White and Chief Justice Burger in *Bowers*. In light of *Bowers*, Justice Kennedy could be accused of making up law in order to bring about a socio-legal result, legitimizing legal behavior where the United States Constitution fails to explicitly protect that behavior. To overrule *Bowers*, Justice Kennedy would have to defy not only American history but millennia of Western tradition implicitly referenced by Justice White and explicitly outlined by Chief Justice Burger. Justice Kennedy had to seek a way around these obstacles.

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64. *Id.* at 192.

65. Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy In the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986).

66. *Id.* at 525-26.

67. *Id.* at 526.

68. *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).

69. *Id.* at 196 (Burger, C.J., concurring).

70. *Id.* at 197 (Burger, C.J., concurring).

71. *Id.* at 196 (Burger, C.J., concurring).

IV. JUSTICE KENNEDY'S FOREIGN LAW STRATEGY AND JUSTICE SCALIA'S CRITIQUE

In *Lawrence*, Justice Kennedy faced the *Bowers* Court's view of history in which homosexual sodomy remained condemned from ancient times and throughout American history. Justice Kennedy needed to counter the *Bowers* rationale that constitutional protection of homosexual sexuality would be a revolutionary step that defied Western and American moral tradition. Kennedy did indeed develop some strategies to counter the moral and historical imperatives of the *Bowers* majority and Chief Justice Burger's concurring opinion.

A. A Foreign Law Strategy

Justice Kennedy refused to directly debate the historical views of anti-sodomy prohibitions advanced by the *Bowers* Court.[72] However, Justice Kennedy floated in *Lawrence* some historical considerations about anti-homosexual legal prohibitions.[73] Overall, he argued that anti-homosexual prohibitions emerged only belatedly in American history, noting "the concept of the homosexual as a distinct category of person did not emerge until the late 19th century."[74] He found that no American state singled out homosexual sexual relations for criminal prosecution until the 1970's.[75] At best, Justice Kennedy blurred the historical bases of *Bowers*, writing "the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate."[76] In addition to blurring the historical story told by the *Bowers* Court, Justice Kennedy performed the fundamental analytical skill, familiar to lawyers, of identifying an analysis or argument in a different dimension.[77] He refocused the historical analysis from early American history to the status of the law during the second half of the Twentieth Century. By focusing on the last fifty years, Justice Kennedy identified "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[78]

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72. Lawrence v. Texas, 539 U.S. 558, 566-67 (2003).

73. *Id.* at 567-72.

74. *Id.* at 568.

75. *Id.* at 570.

76. *Id.* at 571.

77. *See Legal Education and Professional Development—An Educational Continuum, Report on the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. 153 (discussing elaborating legal theory as a mode of legal analysis and reasoning).

78. *Lawrence*, 539 U.S. at 572.

Justice Kennedy's efforts to counter the strong anti-gay historical story of *Bowers* by blurring historical visions and reframing the debate toward more recent history could take Justice Kennedy only so far in overcoming the historical imperatives of *Bowers*. He still had to counter the argument that American constitutional protection of homosexual rights would constitute a deep aberration from Western history and jurisprudence. Justice Kennedy still needed to assure law abiding Americans that he was not involved in "the imposition of the Justices' own choice of values on the States and the Federal Government."[79] Kennedy sought a way to counter the view that he had signed onto a homosexual political agenda that placed the Supreme Court outside the American mainstream and, by implication, placed America outside the Western jurisprudential and moral mainstream.[80]

To counter Justice White and Chief Justice Burger's references to the fact that American homosexual sexual legal prohibitions grew out of proscriptions against sodomy that possessed ancient roots in Western Civilization, Justice Kennedy in *Lawrence* relied on foreign law to demonstrate that the United States would not position itself outside international legal and moral norms by constitutionally protecting the right of gays to engage in sexual relations.[81] In fact, Justice Kennedy went further by noting that, "[t]o 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."[82] Justice Kennedy supported his assertion that American anti-gay law served as the aberration to Western jurisprudence and not vice-versa by referring to British law,[83] decisions of the European Court of Human Rights involving the United Kingdom[84] and other countries.[85] In addition, he turned to laws of other nations by relying on an *amicus* brief filed for international and American human rights advocates.[86]

In his struggle to overcome the *Bowers* Court's implicit assertion that homosexual anti-sodomy criminalization found support as a historical imperative, Justice Kennedy in *Lawrence* tapped into a treasure trove by using the *amicus* brief filed by Mary Robinson and other international human rights advocates. In a direct sense, the *amicus* brief supported Justice Kennedy's assertion that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in

79. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

80. *Lawrence*, 539 U.S. at 602-03 (Scalia, J., dissenting) (discussing this alleged homosexual agenda).

81. *Id.* at 573, 576-77.

82. *Id.* at 576.

83. Sexual Offences Act, 1967, c.60, § 1 (Eng.); HOMOSEXUAL OFFENCES AND PROSTITUTION COMMITTEE, REPORT, 1957, Cmnd. 247.

84. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981); P.G. & J.H. v. United Kingdom, App. No. 00044787/98, Eur. Ct. H.R. (2001).

85. Modinos v. Cyprus, 259 Eur. Ct. H.R. (1993); Norris v. Ireland, 142 Eur. Ct. H.R. (1988).

86. Brief Amici Curiae of Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interights, the Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights in Support of Petitioners, *Lawrence* (No. 02-102) [hereinafter Amicus Brief].

intimate, consensual conduct."[87] The *amicus* brief urged the United States Supreme Court to "pay decent respect to these opinions of humankind."[88] The opinions of mankind forbade the punishment of people for choosing to love another[89] and barred the criminalization of sodomy between consenting adults.[90]

The *amicus* brief went on to describe cases from a variety of national courts and international tribunals, national legislation, and treaty law that protected gays in their choice of private, consensual sexual behavior. The brief pointed for support to case law from the European Court of Human Rights,[91] United Nations Human Rights Committee,[92] Constitutional Court of South Africa,[93] Constitutional Court of Colombia,[94] British House of Lords,[95] Canadian Supreme Court,[96] Supreme Court of Israel,[97] and the Constitutional Court of Ecuador.[98] In addition, the brief referred to national statutory law in Canada, Australia, Israel, New Zealand, South Africa, Costa Rica, and Namibia,[99] and constitutions in South Africa, Fiji, Ecuador, and Switzerland.[100] The brief relied not only on the European Convention on Human Rights,[101] but also on the International Covenant on Economic, Social and Cultural Rights, Convention for the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child,[102] and the Universal Declaration of Human Rights.[103]

In addition to providing Justice Kennedy in *Lawrence* with broad transnational and international case, statutory, and treaty law that protected gays, the *amicus* brief also analyzed privacy rights through three discrete analytical methodologies in international and transnational contexts. The *amicus* brief utilized decisional,[104] relational,[105] and zonal[106] privacy analyses. Decisional privacy protects intimate personal choices,[107]

87. *Lawrence*, 539 U.S. at 576.

88. Amicus Brief, *supra* note 86, at 2.

89. *Id.* at 29.

90. *Id.* at 2.

91. *Id.* at 10 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981)).

92. *Id.* at 11 (citing U.N. GAOR, Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994) (Toonen v. Australia)).

93. *Id.* at 12-13 (citing Nat'l Coalition for Gay & Lesbian Equal. v. Minister of Justice, 1998 (12) BCLR 1517 (CC)).

94. *Id.* at 13 (citing Sentencia No. C-098/96 (Corte Constitucional 1996)).

95. *Id.* at 14-15 (citing Fitzpatrick v. Sterling Hous. Ass'n Ltd., 3 W.L.R. 1113 (H.L. 1999)).

96. *Id.* at 15 (Chamberlain v. Surrey Sch. Dist. No. 36, [2002] S.C.R. 86).

97. *Id.* (citing El-Al Israel Airlines v. Danilowitz, 48(5) P.D. 749 (S. Ct. 1994)).

98. *Id.* at 23 (citing Sentencia No. 111-97-TC, Registro Oficial, Supp. No. 203 (1997)).

99. *Id.* at 29.

100. *Id.* at 28.

101. *Id.* at 23.

102. *Id.* at 25.

103. *Id.* at 26.

104. *Id.* at 9-13.

105. *Id.* at 14-15.

106. *Id.* at 15-18.

107. *Id.* at 9.

while relational privacy connects homosexual sexual partnerships with other familial connections including family, marriage, and procreation[108] and zonal privacy protects activities that occur within a home.[109] This internationalized multi-dimensional analysis seemed to influence Justice Kennedy's analysis in *Lawrence*.

While discussing international and transnational law sources, Justice Kennedy conceived of comparative law sources as protecting intimate, consensual conduct that is an integral part of human freedom.[110] Intimacy and freedom seemed interconnected. Though Justice Kennedy recognized the Texas homosexual anti-sodomy statute as touching on private conduct in the most private place, the home,[111] he rejected a spatial analysis when he wrote, "[f]reedom extends beyond spatial bounds . . . [t]he instant case involves liberty of the person both in its spatial and more transcendent dimensions."[112] Kennedy appeared to be discussing relational privacy when he referred to intimate consensual conduct that constitutes an integral part of freedom, as he noted that the Texas statute sought to control personal relationships and that liberty, or freedom, counseled "against attempts by the State . . . to define the meaning of the relationship. . . ."[113]

B. Justice Scalia's Critique

Justice Scalia in his *Lawrence* dissent,[114] responded negatively not only to Justice Kennedy's use of substantive due process privacy law to protect constitutionally homosexual sodomy,[115] but more pointedly Justice Scalia objected strongly to Justice Kennedy's utilization of foreign law as a basis for fundamental rights under American constitutional law.[116] Justice Scalia found that American constitutional entitlements fail to spring into existence because foreign nations decriminalize certain types of behavior. To support his stand against allowing foreign law to inform American constitutional law, Scalia utilized a concurring opinion written by Justice Thomas in *Foster v. Florida*[117] where Thomas asserted "this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."[118] Justice Thomas wrote his condemnation of foreign law as an imposition on the American people in response to Justice Breyer's dissent in *Foster*.[119] *Foster* involved a denial of a petition for *writ of*

108. *Id.* at 14.
109. *Id.* at 15.
110. *See* Lawrence v. Texas, 539 U.S. 558, 576-77 (2003).
111. *Id.* at 567.
112. *Id.* at 562.
113. *Id.* at 567.
114. *Id.* at 586-605 (Scalia, J., dissenting).
115. *Id.* at 593-98 (Scalia, J., dissenting).
116. *Id.* at 598 (Scalia, J., dissenting).
117. 537 U.S. 990 (2002) (cert. denied).
118. *Id.* at 990, n* (Thomas, J., dissenting).
119. *Id.* at 991-93 (Breyer, J., dissenting).

certiorari from the Supreme Court of Florida.[120] The constitutional issue involved a claim of cruel and unusual punishment by a death row inmate because more than twenty-seven years had elapsed since the initial sentence of death.[121]

Justice Breyer asserted that the extraordinary length of confinement under a sentence of death resulted at least in part from the State of Florida's repeated procedural errors,[122] and that "27 years awaiting execution is unusual by any standard. . . ."[123] Justice Breyer supported his assertion about the unusual nature of delayed execution by referring to foreign law, specifically British,[124] European Human Rights,[125] and Canadian cases.[126] Justice Thomas responded to Justice Breyer's reference to foreign law by indicating that the American judiciary fails to possess the competency to apply foreign law, while Congress, on the other hand, could consider foreign law in its law making efforts.[127] Justice Scalia in his *Lawrence* dissent went even further than Justice Thomas in his concurring opinion in *Foster*. Justice Thomas had characterized foreign law as faddish, while Justice Scalia in *Lawrence* characterized its use by Justice Kennedy in his majority opinion as meaningless and dangerous dicta.[128]

V. NOT SO DANGEROUS FOREIGN LAW

Lawrence evidenced a rift between Justice Kennedy and Justice Scalia concerning whether foreign law served as a valid source for American constitutional law. Justice Kennedy respected and utilized foreign law, while Justice Scalia, found foreign law to be meaningless and dangerous. Justice Scalia, in his criticisms of the *Lawrence* majority's use of foreign law, implied that Justice Kennedy's use of foreign law to overcome long standing homophobic legal tradition represented a revolutionary step in American jurisprudence, especially constitutional jurisprudence. Justice Scalia implied that Justice Kennedy was doing something out of the ordinary and very new. Justice Scalia also implied that Justice Kennedy was wrong in utilizing international and transnational law[129] because such law possessed no relevance to American law and challenged American constitutional and jurisprudential sovereignty.

Justice Scalia's assertions about the irrelevance of foreign law to American law, especially constitutional law, lack a basis in United States Supreme Court decision making. The Supreme Court has long relied on foreign law to decide

120. *Id.* at 990.
121. *Id.* at 991-92 (Breyer, J., dissenting).
122. *Id.* (Breyer, J., dissenting).
123. *Id.* at 992 (Breyer, J., dissenting).
124. Pratt v. Attorney Gen. for Jamaica, [1994] 2 A.C. 1 (P.C. 1993).
125. Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) 439 (1989).
126. United States v. Burns, [2001] 1 S.C.R. 238.
127. *Foster*, 537 U.S. at 990, n*.
128. Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).
129. *Id.* at 573.

constitutional and individual rights issues. The *amicus* brief, which Justice Kennedy relied on to support his contention that many other nations protected the rights of homosexuals,[130] cited a large number of Supreme Court cases that made references to foreign law. The *amicus* brief argued that the United States Supreme Court traditionally utilized international and foreign law to aid in constitutional interpretation.[131] The brief cited to remarks made by current Justices suggesting that foreign law should serve as a legitimate source of authority for American courts.[132] The brief also cited to a large number of majority, concurring, and dissenting opinions that referred to foreign law.[133] Most striking, the *amicus* brief provided as an example of Supreme Court reliance on foreign law a dissent by Justice Scalia in *McIntyre v. Ohio Elections Commission*[134] in which Justice Scalia cited to Australian, Canadian, and English statutory law.[135]

What is especially surprising about Justice Scalia's assertions in *Lawrence* about the meaningless and dangerous nature of foreign law as an analytical tool in developing American constitutional and human rights law is that Justice Scalia overlooked basic American civil procedure law. *Pennoyer v. Neff*[136] and *Sibbach v. Wilson & Co.*[137] both include important foreign and international law components. In *Pennoyer*, both the plaintiff sought to enforce a default judgment obtained against the defendant who had been served only by constructive notice.[138] Utilizing the Due Process Clause,[139] the *Pennoyer* Court held that a state court could not obtain jurisdiction over a non-resident for the purpose of rendering a personal judgment against the non-resident.[140]

Justice Field wrote the majority opinion in *Pennoyer*.[141] He developed a conceptual model of state power to serve as the foundation for the substantive due process doctrine of personal jurisdiction. The substantive nature of due process grew out of the basic due process need for "a tribunal competent by its constitution–that is, by the law of its creation–to pass upon the subject-matter of

130. *Id.* at 576-77.

131. *See* Amicus Brief, *supra* note 86, at 3-8.

132. Sandra Day O'Connor, *Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348 (2002); William H. Rehnquist, *Constitutional Courts-Comparative Remarks*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE: A GERMAN-AMERICAN SYMPOSIUM (1993).

133. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 710, 718 n.16 (1997); Holder v. Hall, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring); Planned Parenthood v. Casey, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring and dissenting); Thompson v. Oklahoma, 487 U.S. 815, 830 (1988); United States v. Stanley, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring and dissenting); Miranda v. Arizona, 384 U.S. 436, 488 n.59 (1966); Poe v. Ullman, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

134. 514 U.S. 334 (1995).

135. *Id.* at 381 (Scalia, J., dissenting).

136. 95 U.S. 714 (1877).

137. 312 U.S. 1 (1940).

138. 95 U.S. at 719-20.

139. *Id.* at 733.

140. *Id.* at 734.

141. *Id.* at 719.

the suit. . . ."[142] According to Justice Field, due process involved the existence of legitimate power. If no such power existed, any putative use of non-existent power constituted a violation of due process. Justice Field found that the power of the American state governments, including their courts, were restricted when he wrote, "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed . . . an illegitimate assumption of power."[143]

Justice Field restricted state power to territorial limits. His bases for this model were what he characterized as public law principles. Field analogized American states to independent states, though he noted that American states were not in every respect independent states because the United States Constitution limited their powers. However, Justice Field still applied basic principles of public law to American states. First, sovereign states possessed exclusive power over people and property within the territory of the state. Second, no state possessed the authority to exercise power over persons and property outside its territorial limits.[144] Justice Field applied basic principles of international law to develop the conceptual model underlying substantive due process personal jurisdiction principles. In fact, Field utilized an international law treatise written by Henry Wheaton.[145]

In addition to the international law treatise, Justice Field also relied on *D'Arcy v. Ketchum*[146] for conceptual support.[147] Field noted that courts failed to accord credit to a judgment rendered where the defendant had not been served personally and had a day in court. The *D'Arcy* Court looked to foreign law as support for the proposition that national comity never existed in such a circumstance, because such a proceeding with the defendant not provided service of process was considered an illegitimate assumption of power. Justice Field in *Pennoyer*, referring to *D'Arcy*, noted that, "'[t]he international law . . . as it existed among the States in 1790, was that a judgment rendered in one State . . . was void within the foreign State, when the defendant had not been served with process . . .'"[148]

Justice Scalia, in his dissent in *Lawrence*, disregarded *Pennoyer* and Justice Field's use of international law as a basis for personal jurisdiction doctrine. What Justice Scalia forgot was not only basic civil procedure doctrine but, more importantly, basic substantive due process doctrine. Justice Scalia analyzed substantive due process doctrine when he sought to limit substantive due process rights to fundamental liberty interests.[149] What Justice Scalia forgot was that the

142. *Id.* at 733.

143. *Id.* at 720.

144. *Id.* at 722.

145. *Id.* at 722 (citing 2 COLEMAN PHILLIPS, WHEATON'S ELEMENTS OF INTERNATIONAL LAW, 131-32 (5th ed. 1919)).

146. 52 U.S. (11 How.) 165 (1850).

147. *Pennoyer*, 95 U.S. at 720.

148. *Id.* at 730.

149. Lawrence v. Texas, 539 U.S. 558, 592-94 (2003) (Scalia, J., dissenting).

early basis for substantive due process was international law. Justice Scalia wrote approvingly about the *Bowers* majority opinion.[150] Justice Scalia forgot that the *Bowers* Court referred to the ratification of the Fourteenth Amendment in 1868,[151] and that *Pennoyer* was decided in 1877,[152] less than a decade after the ratification of the Fourteenth Amendment. This early Fourteenth Amendment case law based early substantive due process doctrine on international and foreign law. Justice Scalia's disdain for foreign law as a basis for due process rights seems misplaced. Foreign and international law not only influenced Fourteenth Amendment substantive due process law but more directly served as the conceptual early bases for that doctrine.

Justice Scalia also forgot another fundamental civil procedure case that implicated basic human rights. In *Sibbach v. Wilson & Co.*,[153] an injured party brought a diversity action for bodily injuries. The defendant moved for an order requiring the injured party to submit to a physical examination by physicians appointed by the court, and the injured party refused to undergo a physical examination.[154] The district court judge held the injured party in contempt.[155] Consequently, the injured party argued that the Federal Rules of Civil Procedure requirement that she submit to a physical examination[156] violated the terms of the Rules Enabling Act which provided that the Federal Rules of Civil Procedure shall not abridge, enlarge or modify litigants' substantive rights.[157] The injured party argued that she possessed a substantive right to refuse to be examined by a physician not of her choosing. In her argument, she translated the word substantive into substantial, and therefore, argued that her right to refuse a physical examination constituted a substantial right protected by the Rules Enabling Act.[158] The injured party presented the Supreme Court with the question of whether the rule's requirement mandating physical exams undermined a substantial right protected by the Rules Enabling Act.

In *Sibbach*, the Supreme Court found that the choice of taking or not taking physical exams failed to constitute a substantial right. The majority questioned the criteria for determining what constituted a substantial right.[159] Much like the *Bowers* Court did in determining whether homosexual sexuality implicated a fundamental liberty under the Fourteenth Amendment Due Process Clause,[160] the *Sibbach* majority looked to legal practice in the states and foreign countries to

150. *Id.* at 586-90 (Scalia, J., dissenting).
151. Bowers v. Hardwick, 478 U.S. 186, 192-93 (1986).
152. *Pennoyer*, 93 U.S. at 715.
153. 312 U.S. 1 (1940).
154. *Id.* at 6.
155. *Id.* at 7.
156. FED. R. CIV. P. 35.
157. 28 U.S.C. § 723(b)-(c) (1934) (current version at 28 U.S.C.A. § 2072 (West 1994)).
158. *Sibbach*, 312 U.S. at 11.
159. *Id.* at 13.
160. Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986).

determine what served as a substantial right. The *Sibbach* Court noted that the Federal Rule of Civil Procedure requiring physical exams accords "with the procedure now in force in Canada and England."[161] The *Sibbach* Court cited to foreign law for support.[162]

Justice Scalia, in his criticisms of Justice Kennedy's reliance on foreign law to justify a due process privacy right protecting homosexual sexuality, overlooked the influence of Foreign law on federal civil procedure rule interpretation. In his dissent in *Sibbach*, Justice Frankfurter implied that physical exams implicated the inviolability of the person, interference with the person of a free citizen, and prejudices as to privacy.[163] He wrote, "[t]hat disobedience of an order under Rule 35 cannot be visited with punishment as for contempt does not mitigate its intrusion into an historic immunity of the privacy of the person."[164] *Sibbach* involved a basic human right, the choice of submitting to a medical examination. Justice Scalia forgot the English and Canadian legal contributions in *Sibbach* that contributed to the reformulation of this traditional privacy right by the Federal Rules of Civil Procedure.

VI. CONCLUSION

Justice Scalia, in his *Lawrence* dissent, accused Justice Kennedy and the *Lawrence* majority of taking sides in what he characterized as the culture war. He also accused the *Lawrence* majority of departing from the Supreme Court's traditional role of neutral observer protecting democracy.[165] In addition, he accused his colleagues on the Supreme Court of furthering a homosexual agenda being championed by the American legal profession.[166] Justice Scalia, in his protestations, implied that he was serving in *Lawrence* as the neutral proponent of traditional American constitutional jurisprudence. His implicit characterization of himself runs afoul of his own selective perception of American constitutional history. His characterization of the *Lawrence* majority's use of foreign law as meaningless and dangerous imposing foreign moods, fads, or fashions on Americans,[167] flew in the face of longstanding Supreme Court practice.

161. *Sibbach*, 312 U.S. at 14.
162. *Id.* at 14, n.16.
163. *Id.* at 16-18 (Frankfurter, J., dissenting).
164. *Id.* at 18 (Frankfurter, J., dissenting).
165. Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).
166. *Id.* at 602 (Scalia, J., dissenting).
167. *Id.* at 598 (Scalia, J., dissenting).

The very foundation of Fourteenth Amendment substantive due process relied on international and foreign law.[168] Even the federal procedural aspects of privacy law included foreign law influences.[169] Justice Kennedy in his use of foreign and international law[170] stood on firm ground. Justice Scalia, in his *Lawrence* dissent, warned that the United States Supreme Court risked judicially imposing homosexual marriage on the United States.[171] Justice Scalia once again referred to dreaded and dangerous foreign law as support for his warning. Specifically, he pointed to Canadian case law.[172] Hopefully, the United States Supreme Court will continue to heed foreign precedent and will take such Canadian case law seriously if the constitutionality of prohibiting homosexual marriage is ever considered by the Supreme Court. Hopefully, Justice Kennedy and a majority of the Supreme Court will consider homosexual marital rights as "accepted as an integral part of human freedom in . . . other countries."[173]

168. *See* discussion *supra* text accompanying notes 136-52.

169. *See* discussion *supra* text accompanying notes 153-64.

170. *Lawrence*, 539 U.S. at 573, 576-77.

171. *Id.* at 603-604 (Scalia, J., dissenting).

172. Halpern v. Toronto, [2003] 65 O.R.3d 161.

173. *Lawrence*, 539 U.S. at 577.