Bridging the Divide between Justice Kennedy’s Progressivism and Justice Scalia’s Textualism: Introducing the Concept of Negative Originalism

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A NEW METHOD TO GUIDE CONSTITUTIONAL INTERPRETATION: INTRODUCING “NEGATIVE ORIGINALISM”

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*384 “Liberty Finds No Refuge in a Jurisprudence of Doubt” [FN1]

I. Introduction

In Lawrence v. Texas, [FN2] the conflicts between Justice Kennedy's majority opinion [FN3]-invalidating a state statute prohibiting sodomy between consenting adults-and Justice Scalia's dissent [FN4]-attacking the very foundation upon which the majority's reasoning was predicated-under-score the widely divergent methods of constitutional interpretation that both Justices embrace in “values based” adjudication. [FN5]

Conversely, Justice Scalia's scathing dissent in Lawrence reflects his traditional adherence to an “originalist” [FN13] philosophy of constitutional decision-making, which advances the proposition that fundamental constitutional rights exist only to the extent that such rights are “deeply rooted” in U.S. culture, history, and tradition. [FN14] Thus, in the context of values based adjudication, Justice Scalia's framework is to inquire whether and to what extent the asserted fundamental right has traditionally engendered support, protection, or recognition in the United States' historical cultural practice. [FN15] Such inquiry arguably involves an examination of both the founders' intent when drafting a particular constitutional provision and the early understandings of particular rights that were deemed fundamental or worthy of heightened constitutional protection. Under this view of values based adjudication, the notion of an “emerging” or “evolving” awareness of fundamental rights, whether from *386 foreign or domestic sources, would be largely irrelevant to the question of whether an asserted right warrants constitutional protection. [FN16]
This Article endeavors to bridge the divide between Justice Kennedy’s “progressive” approach and Justice Scalia’s “originalist” approach, by introducing the concept of “reverse” or negative originalism. As a threshold matter, “reverse originalism” recognizes that both Justice Kennedy’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 with Justice Kennedy’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 U.S. constitutional framework.

Importantly, however, progressivism is not without its limitations and, if applied exclusively, would threaten to undermine years of Supreme Court jurisprudence by eviscerating the stare decisis doctrine, 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 policymaking power that transgresses the boundaries of proper judicial review. Consequently, a significant check upon the limitations of progressivism lies in the aspect of originalism which reflects the principle that American 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 the country’s deeply-rooted cultural understandings regarding the concept of liberty, must all 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 result in constitutional decisions that contemporary perspectives would deem unfair and unjust. Such criticism is not without merit; while concepts of liberty necessarily 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 Kennedy’s progressivism embraces. Herein lies the problem, namely, what method can best recognize the emerging awareness that Justice Kennedy 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 Kennedy’s progressivism 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 rich historical U.S. tradition. As detailed in this Article, this approach will allow the U.S. Supreme Court to consider contemporary perspectives regarding fundamental fairness, liberty, and equality at the national and the international level, when deciding whether newly asserted rights or values warrant constitutional protection.

Furthermore, “negative originalism” will require the Court to lend significant weight to the intentions, purposes, and objectives that informed both the Constitution’s 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 specifically intended for a given constitutional provision, “negative originalism” proposes that the Court develop an understanding of the broader conception of fairness, liberty, and equality that inspired the Constitution’s substantive provisions. “Negative originalism” therefore ensures that our country’s rich history
and traditions remain relevant to values based cases while recognizing that contemporary perspectives concerning fairness and equality, both domestic and foreign, can be useful in fashioning solutions to problems that the Constitution's drafters never could have envisioned.

*388 Part II briefly discusses the Lawrence decision, specifically referencing the differing approaches utilized by Justices Kennedy and Scalia in reaching their conclusions. Part III examines a critical component of Justice Kennedy's progressivism, particularly that aspect which relied upon foreign law to support the Lawrence holding. Part III concludes that, while foreign sources of law should bear relevance to values based adjudication, courts should exercise substantial circumspection when relying upon them due to the cultural, political, social, and institutional nuances that underlie such laws. Part IV introduces “negative originalism” and argues that this tool will most effectively permit the Supreme Court to adopt a dynamic approach to constitutional interpretation.

II. Lawrence v. Texas: Highlighting the Divide Between Justice Kennedy'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 U.S. Constitution. [FN19] This issue was not without precedent, as the Court previously ruled in Bowers v. Hardwick [FN20] that a Georgia statute criminalizing sodomy between consenting adults did not violate these fundamental guarantees. [FN21]

Thus, Lawrence presented the Court with an opportunity to revisit the Bowers holding and reasoning. 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. [FN22] Justice Kennedy’s majority opinion not only signaled a sharp departure from Bowers, particularly through its expansive view of the Constitution's liberty interest, but also underscored the progressivism that increasingly defines his jurisprudence in values based adjudication. [FN23]

A. Justice Kennedy's Progressivism in Lawrence

At the outset, it is important to recognize that Justice Kennedy's majority decision was not premised solely upon a progressive or evolving view of the Constitution's liberty interest. For example, Justice Kennedy disagreed with Justice Scalia's view that homosexual sodomy has been widely circumscribed as a matter of historical tradition and practice. [FN24] In addition, Justice Kennedy 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. [FN25]

Justice Kennedy's progressivism played a crucial role in his conclusion that Bowers's foundation had been eroded by subsequent jurisprudence and that homosexual sodomy now fell within the purview of the Constitution's liberty interest. [FN26] First, Justice Kennedy's analysis focused upon the historical roots and practices pertaining to consensual sodomy; he disputed the extent to which laws were targeted at such conduct. [FN27] He stated, “we think that our laws and traditions in the past half century are of most relevance here.” [FN28] Indeed, Justice Kennedy 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. “History 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. [FN29]

Moreover, Justice Kennedy’s search for an “emerging awareness” led him to focus not primarily upon historical culture, practice, or tradition, but instead upon the modern Model Penal Code’s recommendation that private sexual conduct not be penalized. [FN30] Additionally, he examined several states’ failure to enforce anti-sodomy laws, for the proposition that homosexual conduct was includable within the Constitution’s liberty interest. [FN31]

Of far more import, however, was the portion of Justice Kennedy’s emerging awareness analysis relying upon foreign sources of law to support the Lawrence holding, such as the British Parliament’s 1957 recommendation that homosexual conduct not be punished. [FN32] Most importantly, however, and the focal point of this Article is Justice Kennedy’s substantial reliance upon 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. [FN33]

*391 Thus, in addition to relying upon domestic developments both prior and subsequent to Bowers, [FN34] Justice Kennedy ushered in a new jurisprudence that 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 followed not 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. [FN35]

Ultimately, therefore, Justice Kennedy’s majority opinion in Lawrence underscores his commitment to a progressive approach to constitutional interpretation in values based adjudication as well as a commitment to using foreign sources of law as a method by which to divine the “emerging awareness” [FN36] that characterizes such jurisprudence. Justice Kennedy’s use of foreign sources of law as an important aspect of his progressive jurisprudence will be analyzed in Part III.

B. Justice Scalia’s “Originalism” in Lawrence
In stark contrast to Justice Kennedy's progressivism was Justice Scalia's dissent, which reaffirmed his commitment to an originalist method of constitutional interpretation in values based adjudication. [FN37] 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.” [FN38] 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 . . . .” [FN39]

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 Kennedy's progressivism. To the extent that Justice Scalia is willing to recognize the existence of substantive rights under the Due Process Clause, he was careful to note in Lawrence 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.’” [FN40] 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 is “an interest traditionally protected by our society.” [FN41]

Accordingly, apart from “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,” [FN42] “[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.” [FN43] Applying this framework, Justice Scalia relied upon the traditions, customs and practices of the fifty states to arrive at the “definitive [historical] conclusion” [FN44] that “our Nation has a longstanding history of laws prohibiting sodomy in general—regardless of whether it was performed by same sex or opposite sex couples.” [FN45] On this basis alone, Justice Scalia would have found that a contemporary law prohibiting consensual sodomy was well within a state's constitutional prerogative.

More fundamentally, Justice Scalia's originalism entirely rejects the emerging awareness analysis that characterizes Justice Kennedy'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],’ as we have said ‘fundamental right’ status requires.” [FN46] 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.” [FN47] Perhaps most importantly, Justice Scalia rejects the use of foreign sources of law because they should have no place whatsoever in the Court's domestic values based constitutional analysis:

Much less do [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. [FN48]

Such reliance, moreover, is particularly deleterious because in Justice Scalia's view the Court should not impose fluid foreign culture upon Americans. This statement reflects a core originalist criticism that Justice Scalia espouses regarding “progressivism,” that “traditional democratic action . . . should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change.” [FN49]
Ultimately, the differences in approach advocated by Justices Kennedy 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 this Article introduces the concept of “reverse originalism.”

*394 III. Constitutional Interpretation in “Values Based” Adjudication: Justice Kennedy's “Progressivism” or Justice Scalia's “Originalism”?

The Lawrence decision underscores the significant divide between Justice Kennedy's and Justice Scalia's constitutional methodology in values based adjudication by raising the critical question of whether progressivism or originalism represents the more efficacious method for deciding the fundamental constitutional questions that such 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 while remaining 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 in Part IV.

A. Justice Kennedy's Progressivism-Reliance on Foreign Sources of Law to Divine an Emerging Awareness

Perhaps the most critical component of Justice Kennedy'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 emerging awareness implies that a court will look beyond a country's geographic borders to determine, as Justice Kennedy noted, whether the “values we share with a wider civilization” [FN50] evince a predilection or tendency to protect a newly asserted, constitutionally-cognizable right.

The critical inquiry, therefore, is whether reliance upon foreign sources of law is a viable method by which to adjudicate domestic values based constitutional controversies. An examination of this question reveals that Justice Kennedy’s reliance upon foreign sources of law raises several concerns.

*395 1. Justice Kennedy's Reliance Upon Jurisprudence From the European Court of Human Rights-Highlighting the Problems of Using Foreign Sources of Law in Domestic Constitutional Disputes

In Lawrence, Justice Kennedy relied upon decisions from the European Court of Human Rights (ECHR) that prohibited the criminalization of consensual homosexual sodomy. Specifically, in Dudgeon v. United Kingdom, [FN51] cited by Justice Kennedy in Lawrence, the ECHR held that consensual homosexual conduct was a protected “privacy” right pursuant to Article 8 of the European Convention on Human Rights. [FN52] Significantly, Justice Kennedy'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 of the “values we share with a wider civilization” existed in favor of prohibiting the criminalization of consensual homosexual conduct. [FN53] However, such reliance raises legitimate concerns that courts must address when using foreign sources of law to support domestic constitutional issues.
2. As a Human Rights Court, the ECHR Performs a Different Institutional Role in Interpreting International Law

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, organic text. [FN54] This distinction is significant because the ECHR's institutional role necessarily implicates different considerations both as a matter of philosophy and of interpretation as an arbiter of human rights, as opposed to domestic constitutional disputes. Also, 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) *396 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 constitutional provisions that are separate from, unrelated to, and not connected by an exclusive substantive purpose. As a result, unlike a domestic constitutional court, the ECHR's specifically defined institutional role creates a paramount value upon which its jurisprudence develops.

Furthermore, the narrower nature of the ECHR's institutional purpose is enhanced by the fact that, as an international court interpreting an international treaty, it is not bound by the traditional temporal and geographic limitations to which domestic constitutional courts are often bound. For example, as expressed by Justice Scalia in Lawrence, a domestic constitutional court may limit itself to analyzing the history, customs, traditions, and practices of its country while eschewing the consideration of sources from beyond its borders when interpreting a national constitution. [FN55] The significance of this concept is that a domestic constitutional court's jurisprudence is often constrained, resulting in jurisprudence uniquely personal to its territorial jurisdiction. In this way, the perspectives of a domestic constitutional court are likely 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 because 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 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 an Interpretive Methodology Distinct from 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 employ different interpretive methodologies. First, the ECHR interprets the provisions of international treaties in accordance with international law principles. [FN56] Indeed, in Golder v. United Kingdom, [FN57] the ECHR stated that *397 interpretation of the Convention's provisions would be guided by the interpretive methods established at the 1969 Vienna Convention on the Law of Treaties. [FN58] The international character of the ECHR's jurisprudence, therefore, only re-enforces the differing approaches to constitutional interpretation that the ECHR and U.S. Supreme Court apply. [FN59]

Of more consequence, however, is the dynamic or evolving method of interpretation that the ECHR has increasingly employed in its jurisprudence. Arising from Article 31(1) of the Vienna Convention, which states that the terms of a treaty should be interpreted in light of its object and purpose, [FN60] the ECHR has adopted a dy-
dynamic approach that views the Convention as “a living instrument which . . . must be interpreted in light of present-day conditions.” [FN61] Indeed, the ECHR's dynamic approach manifests itself through the “effectiveness principle,” in which the ECHR stresses that the Convention “is intended to guarantee ‘not rights that are theoretical or illusory but practical and effective’” [FN62]:

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. [FN63]

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 make its safeguards practical and effective *398 . . . any interpretation must be consistent with . . . the ideals and values of a democratic society.” [FN64]

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.” [FN65] For example, in Goodwin v. United Kingdom,” [FN66] the ECHR “looked outside of Europe and found an international ‘common ground’ granting full legal recognition of gender reassigned transsexuals . . . .” [FN67] In accordance with its evolving method of interpretation, the ECHR 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.” [FN68] Thus, Goodwin not only underscores the Court's expansive view of the Convention's provisions, but “by reaching beyond Europe [it] explicitly connects the Court's interpretation with evolving international human rights standards.” [FN69] Lastly, in certain areas, the ECHR's expansive jurisprudence has resulted in the imposition of “positive obligations” upon Member States, which is a requirement that a particular Member State undertake measures to ensure the effectuation of a particular right. [FN70]

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. [FN71] For example, in A.D.T. v. United Kingdom, [FN72] the Court *399 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. [FN73] Likewise, in Goodwin, the Court accorded full legal recognition to transsexuals, [FN74] and thereafter, in Van Kuck v. Germany, [FN75] expanded the rights of transsexuals, finding that the German courts violated Article 8 by failing to define gender reassignment surgery as a necessary medical treatment [FN76] and thus eligible for reimbursement by a private insurance company. [FN77] Likewise, in the area of “zonal” or “territorial” privacy, the Court, in Von Hannover v. Germany, [FN78] 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. [FN79] Additionally, in Peck v. United Kingdom, [FN80] the Court held that a British citizen, who was located by police attempting to commit suicide in a public place, suffered a violation of his privacy where a videotape of the event was televised by national and local media outlets. [FN81]

The Court's dicta in its Article 8 jurisprudence further underscores 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] [t]he stress and
alienation arising from a discordance between the [person's] position in society . . . cannot . . . be regarded as a minor inconvenience . . . .” [FN82] Likewise, in Van Kuck, the Court indicated *400 that the concept of private life is very broad and encompasses “an individual’s physical and social identity, . . . personal development, and the right to establish and develop relationships with other human beings and the outside world.” [FN83] Additionally, in Von Hannover, the Court stated that its notions of private life “ensure the development, without outside interference, of the personality of each individual in his relations with other human beings [in the public domain].” [FN84] The right to privacy, moreover, “includes a social dimension,” [FN85] that extends “into the ‘public context’” [FN86] and “may include activities of a professional or business nature.” [FN87]

The ECHR’s privacy jurisprudence highlights both its 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 committed to expanding the concept of privacy to the outer limits of what can be deemed an “emerging awareness” of values that are shared by a “wider civilization.” [FN88] Its view of Article 8 is primarily forward-looking and progressive. Its precedent places few, if any, strict limitations upon an individual’s right to private life. [FN89] Conversely, the U.S. Supreme Court’s approach informed by its responsibility to interpret a constitutional text, reflects the fact that the U.S. Constitution both grants and restricts the fundamental guarantees that it embodies. [FN90] Because these courts are interpreting very different documents, which not only have different purposes and objectives, but also derive from a different historical dynamic, these courts serve different institutional roles. This notion is at least partially responsible for the differing degrees of protection that privacy engenders in the European Union as opposed to the United States. Consequently, to the extent that judges such as Justice Kennedy rely upon foreign law to support a domestic constitutional decision, they must *401 consider not only 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 European Member States as is the U.S. Supreme Court to individual states. This is reflected in the ECHR’s tendency to de-emphasize the “margin of appreciation” [FN91] doctrine and, in some cases, impose positive obligations upon Member States to ensure realization of a particular right. The margin of appreciation is designed, in theory, to accord some measure of deference to Member States’ legislative enactments. [FN92] As a practical matter, however, particularly in morals or public welfare legislation, the ECHR has been reticent to apply this doctrine consistently. For example, in Norris v. Ireland, [FN93] the ECHR 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.” [FN94] 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.” [FN95] In fact, in Lustig-Prean and Beckett v. United Kingdom, [FN96] the ECHR held that serious reasons exist only where the legislation at issue “answers a pressing social need” [FN97] and is “proportionate” [FN98] to the asserted objective. However, as Bonat states, “[t]here is no hard and fast rule on the scope of the margin of appreciation . . . . It is a self-regulating doctrine for the Court, and as the Convention evolves, less and less deference is accorded to the parties.” [FN99] Thus, the uneven (and uncertain) degree to which its Court will apply the “margin of appreciation,” coupled with the application of “positive obligations” in some cases (discussed below), substantially eviscerate any meaningful deference to Member States where fundamental rights are implicated. [FN100]

*402 Pursuant to the related (although distinct), doctrine of “positive obligations,” the ECHR has held that
Article 8

does not merely compel the State to abstain from such [arbitrary] interference [with privacy] . . .

[T]here 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. [FN101]

To be fair, however, pursuant to the doctrine of “subsidiarity,” the Member States “are primarily responsible
for guaranteeing the rights and freedoms of the Convention, so it falls to the State in question how it is to com-
ply with the Court’s decision.” [FN102]

The ECHR’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 con-
stitutional structure and the legal framework adopted by particular courts. For example, the U.S. Constitution
creates a system of enumerated powers that vests in individual states the primary legislative authority in areas
such as health, welfare, and public safety. [FN103] Of course, while the debate continues regarding the degree
of deference courts should accord to legislatures [FN104] in a significant majority of cases involving values or
morality, courts ordinarily do not substitute their subjective policy predilections for those of a particular state
legislature. [FN105] 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. [FN106] To be sure, the ECHR’s activist role repres-
ents a logical outgrowth of its dynamic *403 interpretive method, which consistently strives to broaden the Con-
vention’s human rights guarantees despite the absence of a European consensus. [FN107] However, the ECHR’s
evolving judicial philosophy is incompatible with the American principle that courts should not invalidate legis-
lation that serves as a core product of the democratic process, federalism, and majority rule. [FN108] As one
commentator has noted, “European constitutional tradition contemplates ‘a constitutional order embodying uni-
versal principles that derive their authority from sources outside national democratic processes and that con-
strain national self-government.’” [FN109]

Ultimately, American courts and the ECHR afford states different degrees of deference when reviewing val-
ues based legislation. For this reason, instances will undoubtably arise where the ECHR would likely reach dif-
ferent results in cases involving similar facts. [FN110] This important distinction counsels against relying too
heavily upon foreign sources of law, at least without due regard to the unique institutional nuances that facilitate
particular decision-making processes.

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

Finally, foreign court decisions do not exist in isolation but are instead responsive to the unique historical,
cultural, social, and constitutional traditions that influence a court’s perspective. As law professor Kenneth An-
derson 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.” [FN111]

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.” [FN112] In this way, “[t]hose who interpret its constitutional text owe their allegiance to . . . [a] democratic, self-governing community.” [FN113]

The difficulty, therefore, in relying upon foreign sources of law, as Justice Kennedy did in Lawrence, is that one may not be sufficiently mindful of the vastly different historical, cultural, and constitutional perspectives that inform a particular decision. This problem is evident in a comparison of Western European and American constitutionalism, particularly the ECHR’s jurisprudence, which starkly contrasts with its dynamic framework from U.S. Supreme Court jurisprudence. In the United States, unlike in Western Europe, “[c]onstitutional interpretation is not merely a matter of ‘best policy,’ considered in a vacuum, but ‘best policy’ *405 as it has arisen through democratic processes—which may or may not have been successful in reaching the best policy.” [FN114] In other words, American constitutionalism represents “a vision of democratic constitutional self-government founded on democracy and popular sovereignty—everything that international constitutionalism and the European tradition most rejects.” [FN115]

Thus, the problems of “comparative constitutionalism” suggest that American courts should be hesitant to place substantial reliance upon foreign court decisions in the domestic constitutional context. The presence of widely divergent historical, political, 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 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 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. [FN116]

Of course, this does not mean that foreign sources cannot operate to support domestic decisions in some instances. [FN117] 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 cautiously and with particular sensitivity to the historical traditions of all nations involved. Critically, this claim substantially undermines Justice Kennedy’s progressivism, because a substantial component of that approach is to rely upon foreign sources of law to discern a rights based consensus.

These concerns ultimately do not necessarily mandate that Justice Kennedy’s progressivism be eliminated as a viable method to adjudicate values based disputes because any constitutional approach will invariably present problems of practical application. In fact, Justice Scalia’s *406 originalism implicates separate, and perhaps more troubling, concerns that render his approach to values based adjudication particularly dubious.

E. Justice Scalia’s Originalism—Problems With Exclusive Reliance Upon the American Constitutional Tradition

In Lawrence, Justice Scalia eschewed the majority’s reliance upon foreign jurisprudence, dismissing it as...
“meaningless dicta” that sought to “impose foreign moods, fads, or fashions on Americans.” [FN118] 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.” [FN119] To be sure, the asserted right must “be an interest traditionally protected by our society” [FN120] and “so rooted in the . . . conscience of our people as to be ranked as fundamental.” [FN121] 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. [FN122] 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.” [FN123]

Applying his originalist philosophy in Lawrence, Justice Scalia surveyed the historical landscape, particularly state legislative enactments and, rather than discerning an interest “traditionally protected by our society,” [FN124] he found that “our Nation has a longstanding history of laws prohibiting sodomy in general . . . .” [FN125] Accordingly, Justice Scalia would have upheld the State of Texas’s 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.” [FN126] It is therefore not surprising that, for Justice Scalia, the use of foreign law in this context was not only “meaningless dicta.” [FN127] but contrary to the requirement that fundamental rights be rooted in domestic tradition and practice. Thus, *407 Justice Scalia’s “originalist” philosophy in “values” based constitutional adjudication places no confidence whatsoever in relying upon foreign sources of law. [FN128]

However, the application of 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 an endeavor can prove elusive and, in some cases, lead to inconsistent views on precisely what this Nation’s historical practice communicates. The domestic historical record, whether it is 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 depend more upon how the inquiry is framed, rather than upon the existence of a traditional consensus. Accordingly, reliance upon history and tradition is capable of the same arbitrary and self-serving reliance that the use of foreign law potentially risks.

In Lawrence, for example, Justice Kennedy disputed Justice Scalia’s view that there existed a “long standing history in this country of laws” proscribing homosexual conduct. [FN129] 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 that court’s interpretation of historical practice. [FN130] In any event, the sheer volume of the historical traditions or practices of which Justice Scalia speaks are not likely to provide straightforward guidance in specific cases. [FN131]

Second, and more fundamentally, application of the originalist paradigm can result in unjust decisions that, based upon contemporary perspectives, are inconsistent with modern notions of liberty, equality, and fairness. [FN132] In fact, it can lead to harsh, even absurd, results. For example, *408 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 . . . . His 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 . . . on relatively uncontroversial issues like the right of married persons to buy birth control. And it would have a bizarre . . . impact on the law in areas relating to race and religion. . . . And there's pretty much no originalist support for the general idea that the Constitution protects women from discrimination by Congress or by state legislatures. . . . [O]riginalism tends to suggest that states can actually establish their own religions. . . . Sunstein asks: Does anybody really want to put on this ridiculous straightjacket? . . . When confronted with the parade of horribles that originalism might spawn. . . . [i]t leaves us looking for another constitutional approach. [FN133]

But what approach to constitutional interpretation can most effectively bridge the divide between Justice Kennedy's progressivism and Justice Scalia's originalism? This Article proposes a modest solution to this problem by introducing the concept of “reverse” or “negative” originalism.

IV. Introducing “Reverse” Originalism-A Progressive Jurisprudence that Remains Faithful to the U.S. Constitutional and Historical Traditions

The significant divide between Justice Kennedy'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 Kennedy's reliance upon the ECHR directly conflicts with Justice Scalia's belief that the only rights worthy of protection are those that are “deeply rooted in this Nation's” historical tradition. [FN134]

The more fundamental question, however, concerns the purposes underlying Justice Kennedy's reliance upon foreign sources of law and his position that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” [FN135] It would not be unduly speculative to assume that the Lawrence opinion reflected a Supreme Court trying to achieve the “best policy,” or the result that is most consistent with evolving perspectives of equality, liberty and fairness. Apart from the likelihood that such an approach will invite claims of “elitism,” judicial policymaking and arbitrariness, 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 the Court achieved that result is a matter for debate. What is fairly uncontroversial is that progressivism, in its most basic application, seeks to achieve the “right” outcome in a particular case, and the use of foreign material is an important component of that search. [FN136]

This approach could not be in greater conflict with Justice Scalia's “originalist” philosophy. Indeed, constitutional rights do not “spring into existence” simply because an evolving consensus supports their recognition. [FN137] On the contrary, policy change falls squarely within the purview of democratic processes as reflected through majority rule and subsequent legislative promulgation. [FN138] Scalia dissents, 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 change.” [FN139] In Justice Scalia's view, American constitutionalism does not rely upon the “values we share with a ‘wider civilization,’” [FN140] but instead finds expression through the values and policy predilections that historical domestic tradition reveals.

To begin with, both Justice Kennedy's progressivism and Justice Scalia's originalism have critically important components that are highly relevant to, and are a valuable aspect of, American constitutionalism. As a normative matter, judges should strive to achieve the “right” result-results that are consonant with principles of fair-
ness 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 history is replete with precedent where the Court has invalidated long-standing practices that time has shown to be inconsistent with equal treatment. [FN141] Although, 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 its desire to achieve equitable outcomes should have a role in American constitutionalism.

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 a court affects the “right” outcome at the expense of deference to a legislature's constitutional authority, its decision should be exposed as intolerable judicial activism. The venerable respect for the legislature's policymaking prerogative, both as an institution and expression of democratic processes, is “deeply rooted in this Nation's history and traditions.” [FN142] Additionally, courts refer to and rely upon our historical tradition when determining whether an asserted right warrants constitutional protection. [FN143] 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 a newly-asserted right has a cognizable basis in the constitutional text. Reliance upon domestic tradition ensures that our social, and cultural practices, as expressed through *411 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 “fundamental” right. 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 “negative” or “reverse” originalism represents a plausible method by which to remain faithful 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 of long-standing historical practice. Such an endeavor would likely entail distinct interpretive difficulties, be subject to contrary conclusions, and risk arbitrary and 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.

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.
Negative originalism would therefore require a court to discern the general or overriding principles that underlie a particular constitutional provision such as the Due Process Clause, or a particular historical practice such as 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.

Critically, the requirement that courts ascertain only the broad values or general intent upon which domestic tradition is based reflects the principle that concepts of liberty, fairness, and equality evolve over the course of time and through the trials of human experience. Indeed, whether it is the experience of the United States or foreign nations, concepts 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 disadvantaged groups, such as women, minorities, and homosexuals, through legislative action and policy reform. Furthermore, evolutions in the very principles that have formed our national constitutionalism have resulted in a society that is more fair, equal, and free. Indeed, the judiciary has played a vital role in eradicating, through landmark decisions, various oppressive practices that evolving concepts 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 have been contemplated by the drafters of our Constitution and early legislation nor resolved by reference to historical tradition. The broad text of the Constitution's provisions, such as the Equal Protection Clause, arguably serve 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 requires courts to only 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 whether, and to what extent, foreign sources of law should factor into a 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 'ever closer union' . . . with those of the rest of the world.”
Foreign sources of law should not be used to globalize the Supreme Court at the expense of our unique domestic tradition; they should be used to confirm that an expansion of our domestic practice to recognize a newly asserted right is supported by a national evolution that justifies incorporation with international consensus. 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. [FN148] The use of foreign materials in such a manner would be troubling because it would undermine the values of our national constitutionalism and slowly remove constitutional decision-making from the historical tradition upon which it rests.

These sentiments only serve as a brief introduction to negative originalism because its application will certainly engender practical difficulties. For instance, it can be argued that ascertaining merely the general intent underlying historical concepts 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 holds 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” they deem desirable. Similarly, while it may be possible to discern the general intent underlying specific constitutional provisions, such intent can never justify progressive jurisprudence that the Constitution’s drafters failed to contemplate.

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 Kennedy’s progressivism, or any interpretive paradigm that vests judges with substantial discretion. Negative originalism attempts 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 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. Courts must be sensitive to the historical record and responsive to evolving notions of justice 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” [FN149] reflected in values based adjudication warrants application of the principle that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” [FN150]

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[FN3]. See id. at 561.

[FN4]. See id. at 586 (Scalia, J., dissenting).

[FN5]. 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. These divisive cases often involve considerations regarding the moral basis of individual and 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, 505 U.S. at 846.

[FN6]. The “liberty” interest referred to in this Article arises under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. See Lawrence, 539 U.S. at 564.

[FN7]. Id. at 572.

[FN8]. This Article is narrowly confined to examining Justice Kennedy'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 U.S. Supreme Court.

[FN9]. Lawrence, 539 U.S. at 572.

[FN10]. See supra note 6.

[FN11]. See Lawrence, 539 U.S. at 573.

[FN12]. The utilization of foreign sources of law, to inform or otherwise support domestic constitutional decisions, is reflected in the relatively recent theory of “comparative constitutionalism,” which examines the prudence of relying upon or referring to such sources in the domestic constitutional context. This Article is confined to both discussing Justice Kennedy's use of foreign law in crafting the Lawrence opinion and whether the use of foreign law is workable and pragmatic in the context of domestic, “values based” decisionmaking. For a more complete discussion of “comparative constitutionalism,” see, e.g., Gary Jeffrey Jacobsohn, The Permeability of Constitutional Borders, 82 Tex. L. Rev. 1763 (2003).

[FN13]. The “originalist” approach to constitutional interpretation exists in many forms and is applicable to many contexts. See, e.g., Robert Bork, The Tempting of America 144 (1990). 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 U.S. Supreme Court.

[FN14]. Lawrence, 539 U.S. at 593 (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[FN15]. Id. at 593 (citing Reno v. Flores, 507 U.S. 292, 303 (1993) (holding that fundamental liberty interests must be “‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”)) (internal
[FN16]. 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 U.S. 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. Roper v. Simmons, 543 U.S. 551, 560-61 (2005).

[FN17]. See, e.g., Lawrence, 539 U.S. at 587-88 (Scalia, J., dissenting) (explaining that the doctrine of stare decisis 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’ counsels against overturning.”).

[FN18]. 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).

[FN19]. Lawrence, 539 U.S. at 562-63.


[FN21]. See id. at 191-96. 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 which Lawrence subsequently rejected involves a view of the Constitution’s liberty interest that is largely unaffected by this distinction.

[FN22]. See Lawrence, 539 U.S. at 577-78. 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. Id.

[FN23]. Id. at 567-78.

[FN24]. Id. at 568 (stating that “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”). In fact, Justice Kennedy went so far as to state that “the historical grounds relied upon in Bowers are more complex than the majority opinion . . . indicate[s]. [The] historical premises are not without doubt and, at the very least, are overstated”). Id. at 571.


[FN26]. A critical aspect of Justice Kennedy’s view that Bowers’s foundation was eroded by subsequent jurisprudence is reflected by his statement that Bowers “fail[ed] to appreciate the extent of the liberty at stake” and “misapprehended the claim of liberty there presented.” Lawrence, 539 U.S. at 567. In fact, Justice Kennedy’s classification of the Lawrence “liberty” interest arguably reflected the broader sentiment that circumstances in-
volving “private human conduct” and “sexual behavior” warrant protection under the Constitution’s liberty interest. Id. The right to engage in consensual sodomy, therefore, falls within these broader liberty interests. Id.

[FN27]. See id. at 568-72.

[FN28]. Id. at 571-72.

[FN29]. Id. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

[FN30]. Id. at 572-74.

[FN31]. Lawrence, 539 U.S. at 572-74.

[FN32]. Id. at 572-73.

[FN33]. Id. at 573 (emphasis added).

[FN34]. See id. at 572-74, 576.

[FN35]. Id. at 576-77 (emphasis added).

[FN36]. See Lawrence, 539 U.S. at 572.

[FN37]. As stated supra note 13, there exist many variations of the “originalist” philosophy that are advocated by scholars, commentators, and judges. It is beyond the scope of this Article to address the myriad components of originalism, and the various contexts to which it is applied. Rather, this Article strives to analyze Justice Scalia’s use of originalism in Lawrence, and as a method of constitutional interpretation in values based adjudication.

[FN38]. Lawrence, 539 U.S. at 592 (Scalia, J., dissenting).

[FN39]. Id.

[FN40]. Id. at 593 (emphasis added) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). 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.” Washington, 521 U.S. at 721 (alteration in original) (quoting Palko v. Conn., 302 U.S. 319, 325, 326 (1937)).


[FN42]. Lawrence, 539 U.S. at 593 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[FN43]. Id. (emphasis added).

[FN44]. Id. at 596 (alterations in original) (quoting majority opinion, id. at 568).

[FN45]. Id.
[FN46]. Id. at 598 (citations omitted).

[FN47]. Lawrence, 539 U.S. at 598.


[FN49]. Id. at 603.

[FN50]. Id. at 576.


[FN52]. Id. § 52.

[FN53]. Lawrence, 539 U.S. at 560.


[FN55]. See Lawrence, 539 U.S. at 598-99 (Scalia, J., dissenting).


[FN58]. Id. at 532; see Alexander Orakhelashvili, Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights, 14 Eur. J. Int'l L. 529, 533-38 (2003) (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).

[FN59]. 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 and contemporary perspectives. For example, in its death penalty jurisprudence, the Court has interpreted the Eighth Amendment, at least in part, based upon perspectives that have emerged in the international context. See Roper v. Simmons, 543 U.S. 551, 553-56 (2005).

[FN60]. E.g., Orakhelashvili, supra note 58, at 535.

[FN61]. Bonat, supra note 56, at 23.


[FN63]. Bonat, supra note 56, at 21-22.
[FN64]. Id. at 22 (emphasis omitted) (quoting Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A), § 87 (1989)).

[FN65]. See id. at 23.


[FN68]. Id. at 24-25 (emphasis added).

[FN69]. Id. at 24 (emphasis added).

[FN70]. See id. at 22.

[FN71]. Article 8 of the Convention For the Protection of Human Rights and Fundamental Freedoms 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 the rights and freedoms of others.

Vienna Convention art. 8. 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 Article, except to highlight the expansive interpretive method that the ECHR employs.


[FN73]. Id. § 37.


[FN76]. Id.

[FN77]. Id. These cases are but a sample of those that reflect the ECHR's expansive approach to matters involving basic rights such as privacy. Indeed, the expansiveness of the ECHR's jurisprudence, as compared to the U.S. Supreme Court, is reflected by the fact that the case relied upon by Justice Kennedy in Lawrence, Dudgeon v. United Kingdom, was decided over twenty-five years earlier.


[FN79]. Id. §§ 11, 13, 76-80.


[FN81]. Id. §§ 10, 86-87.
[FN82]. Goodwin v. United Kingdom, App. No. 28957/95, 2002-VI Eur. Ct. H.R., § 77 (emphasis added). The court also held that “the very essence of the Convention [being] respect for human dignity and human freedom . . . . protection is given to . . . . the right of transsexuals to personal development and to physical and moral security . . . .”). Id. § 90.


[FN85]. Id. § 69.

[FN86]. Id. § 50.


[FN91]. See, e.g., Bonat, supra note 56, at 25 (stating that, “as the Convention evolves, less and less deference is accorded to the parties.”).

[FN92]. Id.


[FN97]. Id. § 80.

[FN98]. Id.


[FN103]. See, e.g., U.S. Const. amend. X.
The debate over the proper degree of deference is often based 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. It is a position noted by Justice Scalia in his Lawrence dissent. See Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

See Waterman v. Farmer, 183 F.3d 208, 214 (3d Cir. 1999) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

See, e.g., Bonat, supra note 56, at 25; Von Hannover, App. No. 59320/00, § 57.

See Bonat, supra note 56, at 24 (discussing the Court's approach in Goodwin, where the Court states as follows: "[t]he Court [ECHR] . . . 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 favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals").

What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand new “constitutional right” by a Court that is impatient of democratic change . . . it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

Id. Of course, the structure of the European Union or, for that matter, the Member States, differs from the U.S. federal structure, rendering a strict comparison based on principles of majority rule and federalism somewhat dubious. However, substantial conceptual similarity exists between the ECHR's and American courts' invalidations of laws respectively passed pursuant to the legislative processes of Member States and individual U.S. states. In both instances, such laws are within the states' traditional sphere of authority and often are the product of majority predilection.


In contrast to this ECHR decision, the American courts, at least in the current judicial climate, would not recognize, much less require, a state legislature to recognize the rights of transsexuals.

Anderson, supra note 109 (emphasis added).

Id.

Id.

Id.

Id.


[FN120]. Id. at 593 (quoting Michael H. v. Gerald D., 491 U.S. 110, 122 (1989)).

[FN121]. Id. (quoting Reno v. Flores, 507 U.S. 292, 303 (1993)).

[FN122]. Id. (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[FN123]. Lawrence, 539 U.S. at 593.

[FN124]. Id. (quoting Michael H., 491 U.S. at 122).

[FN125]. Id. at 596.

[FN126]. Id.

[FN127]. Id. at 598.


[FN129]. Lawrence, 539 U.S. at 568 (Kennedy, J., majority opinion).

[FN130]. Id. at 596 (Scalia, J., dissenting).

[FN131]. Id. at 593-94, 598, 599, 603.

[FN132]. 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 would create in particular forms. 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.


[FN135]. Id. at 572 (Kennedy, J., majority opinion) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

[FN136]. See generally Anderson, supra note 109 (emphasis added).

[FN137]. Lawrence, 539 U.S. at 598 (Scalia, J., dissenting).

[FN138]. Indeed, this is reflected by the judiciary's reticence, as a general matter, to substitute their own policy predilections for those of a respective legislative body. See, e.g., Waterman v. Farmer, 183 F.3d 208, 214 (3d Cir. 1999).

[FN139]. Lawrence, 539 U.S. at 603 (Scalia, J., dissenting).

[FN140]. Id. at 576 (Kennedy, J., majority opinion).


[FN142]. See Lawrence, 539 U.S. at 598 (Scalia, J., dissenting) (quoting Bowers v. Hardwick, 478 U.S. 186, 193-94 (1986)).

[FN143]. Id. at 593 (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[FN144]. See id. at 572-74 (noting that the failure of states to enforce anti-sodomy laws underscores that such laws are inconsistent with the conception of rights that is emerging both domestically and abroad).

[FN145]. See, e.g., id.; see also Roper v. Simmons, 543 U.S. 551, 553-56 (2005).

[FN146]. See, e.g., U.S. Const. amend. XIV (setting forth the broad proposition that no State shall “deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).


[FN148]. This would be contrary to the courts' long-standing policy of not substituting their policy preferences for those of a particular legislative body, as expressed in statutory law. See Waterman v. Farmer, 183 F.3d 208, 214 (3d Cir. 1999).

[FN149]. Lawrence, 539 U.S. at 572 (Kennedy, J., majority opinion).

[FN150]. Id. (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).