We are the World?
What United States Courts Can and Should Learn from the Law and Politics of Other Western Nations

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I A PERCEPTION OF CHANGE

The United States is often perceived as a nation that prefers not only to go its own way, but also to take almost a perverse pride in ignorance of foreign ways and indifference to the opinion of our international peers. Until recently, this perception has certainly extended to America's most powerful court, the Supreme Court of the United States of America. In 2003, for example, an article in *The Legal Times*, referred to the Court as an 'ostrich' that had only just begun to take its head out of the sand.[1] This perception, however, is likely to change over the next several years. In a single seven-day period in 2003, the United States Supreme Court cited international sources, such as foreign laws and documents, in three high-profile cases in which it interpreted the American constitution.

In *Atkins v. Virginia*,[2] the Court cited the brief of the European Union in its decision curtailing American use of the death penalty: 'Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.' A few days later, in a concurring opinion, Ginsburg J referred to the *International Convention on the Elimination of All Forms of Racial Discrimination,* in her concurring opinion in a case deciding the limits of university affirmative action policies: 'The Court's observation that race-conscious programs "must have a logical end point," … accords with the international understanding of the office of affirmative action.'[3]

In what has probably been the most widely remarked upon of the three cases, the Court cited a decision of the European Court of Human Rights (ECHR) when it struck down Texas' law against homosexual sodomy:

> 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

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1 Tony Mauro, 'Supreme Court Opening up to World Opinion' *The Legal Times* (7 July 2003) 1 at 8.

2 536 U.S. 304 at 316 n. 21 (2002) [*Atkins*].

3 *Grutter v. Bollinger*, 539 U.S. 306 at 344 (2003) [*Grutter*].

> desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. 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) P 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.[4]

In the same decision, the *Lawrence v. Texas* Court also cited other cases of the ECHR, as well as the practices of other nations:

> 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, P 56 (Eur. Ct. H. R., 25 September 2001); *Modinos* v *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v *Ireland*, 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11-12. 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.[5]

Furthermore, recent remarks by Ginsburg and Breyer JJ, have indicated that the United States Supreme Court will be more attentive to what other nations have to say about legal and policy issues. During oral argument of the affirmative action cases, Ginsburg J asked (presumably rhetorically),

> We're part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the

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4 *Lawrence v. Texas*, 539 U.S. 558 at 573 (2003) [*Lawrence*].

5 *Ibid.* at 576.

> north, Canada, has, the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination. … [T]hey have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?[6]

These sorts of remarks have not been confined to the courtroom or to legal opinions. In his 2003 keynote address to the American Society of International Law, Breyer J averred that 'comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.'[7]

II CRITICISMS OF THE COURT'S USE OF INTERNATIONAL LAW AND NORMS

Thus, a new age of attentiveness to the wider world may be dawning upon the United States, or at least upon its federal courts. Some prominent conservatives have reacted to this possibility with a shrillness bordering on hysteria. Former United States Supreme Court nominee Robert Bork calls the Court's recent references to international sources an 'absurd turn in our jurisprudence'[8] and the opening salvos in 'the transnational culture war.'[9] United States Supreme Court Justice Antonin Scalia expressed similar disgust, calling the Court's discussion of 'these foreign views' meaningless, yet dangerous.[10] For good measure Scalia J quoted his brethren Thomas J's admonition that 'this Court ... should not impose foreign moods, fads, or fashions on Americans.'[11]

Some legal scholars have also criticized the Court's use of international legal sources, albeit with less hyperbole than Bork and Scalia J. Roger Alford warns of several drawbacks to this practice. For one thing, the Court is likely to be highly selective and/or haphazard in

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6 *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (transcript of oral argument, available in 2003 U.S. Trans Lexis 27 at 24 (Lexis)).

7 Stephen Breyer, 'Keynote Address' (2003) 97 Am. Soc'y. Int'l. L. Proc. 265 at 265, quoting Ruth Bader Ginsburg & Deborah Jones Merritt, 'Affirmative Action: An International Human Rights Dialogue' (1999) 21 Cardozo L. Rev. 253 at 282.

8 Robert H. Bork, 'Whose Constitution Is It, Anyway?' *National Revue* 55:23 (8 December 2003) 37.

9 Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Washington, DC: AEI Press, 2003) at 11.

10 *Supra* note 4 at 598.

11 *Ibid.*, quoting *Foster v. Florida,* 537 U.S. 990 (2002), Thomas J concurring in denial of *certiori*.

its use of such sources.[12] For example, Alford notes that while the *Lawrence* Court referred to the law and practices of nations that have progressive policies on legal equality for gay men and lesbians, it ignored the 2002 *World Report* of Human Rights Watch, which noted that '[i]n virtually every country in the world people suffered from *de jure* and *de facto* discrimination based upon their actual or perceived sexual orientation.'[13] Indeed, as Alford points out, the legal picture for gay men and lesbians in much of the world, including many former British colonies, is quite bleak, making it quite difficult to make clear judgments about how the policies of the United States compare to others around the world.[14]

Furthermore, Alford points out that the Court has not articulated a clear theory about why world opinion should not be outweighed by domestic opinion. If Americans or Texans for that matter believe that homosexuality is a sin, then why should it matter if our NATO allies believe differently? Finally, Alford warns that supporters of the Court's engagement with international legal sources best be prepared to take the bitter with the sweet. After all, many other nations are far less protective of such rights as abortion and free speech than are American courts.[15]

Other legal scholars have also warned against reliance by the United States on the judgments of foreign courts. Michael Ramsey argues that 'there is no obvious connection between the U.S. Constitution and foreign court opinions, which address the interpretation of different documents, written in different times and

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12 Roger Alford, Misusing Sources to Interpret the Constitution' (2004) 98 Am. J. Int'l L. 57 at 64 *et seq*.

13 *Ibid*. at 65.

14 See *Ibid*. at 65-6: 'Amnesty International reports that "[i]individuals in all continents and cultures are at risk" of discrimination based on sexual orientation and "many governments at the U.N. have vigorously contested any attempts to address the human rights of lesbian, gay, bisexual and transgender people." One definitive source not cited in any amicus brief paints a bleak picture, indicating that there is "hardly any support for gay and lesbian rights" among the population in 144 countries, that the treatment of homosexuals is far worse in the former British colonies than elsewhere, that a majority in only eleven countries favors equal rights for homosexuals, that only six countries legally protect gays and lesbians against discrimination, and that 74 of the 172 countries surveyed outlaw homosexuality. In short, while the Court is no doubt correct that *Bowers* has been rejected elsewhere in the world, these and similar reports also make clear that the reasoning and holding in *Bowers* has *not* been rejected in much of the civilized world' [citations omitted].

15 *Ibid*. at 67-8.

different countries (and sometimes different languages).'[16] Even before the current heightened attention to this issue, the eminent law professor Frederick Shauer declared that '[o]ne need not slide into unacceptable relativism to acknowledge that perhaps American constitutionalists can perform a great service by helping other countries to understand that constitutional constraints rest on culturally contingent categories.'[17]

These are some serious objections and they should give any thoughtful person, no matter how enthusiastic he or she may be for the results in *Atkins, Grutter,* and *Lawrence*, a pause. All of these objections have some merit. The possible sources of international and comparative legal authority are vast, and the danger that American courts will use such sources haphazardly, selectively, or merely to justify a politically desired result is certainly real. It is probably not a coincidence that Bork and Scalia J, both conservatives, are attacking the use of international sources in three decisions that produced liberal results. It remains to be seen if Ginsburg and Breyer JJ, both liberals, will be open to paring back, for example, American abortion rights based upon international norms. Further, the question of when and how it is appropriate to use international rules and norms to constrain the options of democratic majorities in the United States is, to say the least, under-theorized. Much groundwork would have to be done to begin producing consistent, defensible answers to this question.

III ANSWERING THE CRITICS

So has the United States Supreme Court taken a wrong or even a dangerous turn? Certainly not. Caution is clearly merited, but, in fact, the Court has indeed been quite cautious in dipping its toe into international waters. For one thing, the Court's referencing of international sources is hardly as novel as the current waive of criticism might lead some people to think. Contrary to the stereotype of American ignorance of international practice, the Court actually has a long history of looking to foreign practices when it interprets the Constitution. Long before there was a debate over same-sex marriage, the Supreme Court relied largely upon European norms and laws in rejecting arguments for allowing polygamous marriages (although the comparison was tainted by the racism endemic to the era): 'Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African

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16 Michael D. Ramsey, 'International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence'* (2004) 98 Am. J. Int'l L. 69 at 73.

17 Frederick Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (1993) 14 Cardozo L. Rev. 865 at 880.

people.'[18] In 1897, the Court relied upon both historical and contemporary international practice to help construe the 13th Amendment of the United States Constitution, and, in 1923, the Court cited international law in support of its interpretation of the Constitution's 18th Amendment banning the manufacture, sale or transportation of 'intoxicating liquors.'[19] More recently, the Court has cited international law and practices in order to help illuminate the murky waters of 'substantive due process.' For example, in *Washington v. Glucksberg*, the Court rejected the argument that substantive due process protects the right of mentally competent people to commit physician-assisted suicide, noting that 'in almost every western democracy it is a crime to assist a suicide.'[20]

Of course, just because the Court has been citing international law and norms for a long time does not mean that doing so is a good idea. What about all the objections to this practice set out above? This article argues that these objections, although serious in nature, are reason for care and caution, not for avoiding international sources altogether. Indeed, this article argues that in the case of *Lawrence v. Texas*, international laws and norms played a crucial and entirely appropriate role. They served two vital functions: (*a*) they helped sweep aside the powerful intuition that condemnation of homosexuality represents a consensus of western values; and (*b*) they helped allay fears of a slippery slope from legalization of homosexual sodomy to legalizing such bugaboos as bestiality, incest and underage sex. To explicate how crucial these two functions are to the equal rights of gay men and lesbians, this article will turn to the legal and political debate currently raging in the United States over same-sex marriage.

IV THE DEBATE OVER SAME-SEX MARRIAGE IN THE UNITED STATES

One of the striking aspects of the debate over same-sex marriage in the United States is that, despite the emotional intensity of many opponents of same-sex unions, the arguments against such marriages are remarkably ill-thought-out. Indeed, I argue elsewhere that they may not even be coherent enough to withstand the Supreme Court's lowest level of constitutional scrutiny, which demands merely that a law be rationally related to a legitimate governmental interest.[21] While space

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18 *Reynolds v. United States*, 98 U.S. 145 at 164 (1878).

19 *Robertson v. Baldwin,* 165 U.S. 275 at 283-6 (1897) at 283-86, and *Cunard S.S. v. Mellon*, 262 U.S. 100 at 122-24 (1923), respectively (both cited in Gerald L. Neuman, 'The Uses of International Law in Constitutional Interpretation' (2004) 98 Am. J. Int'l L. 82 at 84.)

20 521 U.S. 702 at 710 (1997).

21 Evan Gerstmann, *Same-Sex Marriage and The Constitution* (New York: Cambridge University Press, 2004) at 13-40.

concerns do not allow for a discussion of all of the anti-same-sex marriage arguments, this article will address some of the most commonly made arguments: definition, tradition, and religion.

Arguments based on the definition of marriage, tradition, and religion fit in the same general category because each is basically self-contained: marriage should remain exclusively heterosexual because that simply is what marriage is, because that is what marriage has always been, or because the major religious traditions have always understood marriage to be between a man and a woman. These are not consequentialist arguments about what will happen if gays and lesbians are allowed to marry; they are rooted in a particular understanding of how things have always been and how things are.

The argument from definition has been impregnable with the courts ever since same-sex marriage cases began reaching state high courts in the early 1970s. In 1971, the first to hear such a case, the Minnesota Supreme Court, relied upon dictionary definitions. Two years later, in *Jones v. Hallahan*, the Kentucky Supreme Court cited three different dictionary definitions of marriage to show that it has always been understood as a union of man and woman. In 1974, the Court of Appeals of Washington held that the one man, one woman nature of marriage is too obvious to even bother looking at the dictionary:

> Although it appears that the appellate courts of this state until now have not been required to define specifically what constitutes a marriage, it is apparent from a review of cases dealing with legal questions arising out of the marital relationship that the definition of marriage as the legal union of one man and one woman who are otherwise qualified to enter into such a relationship not only is clearly implied from such cases, but also was deemed by the court in each case to be so obvious as not to require recitation.[22]

The Court added, '[w]e need not resort to the quotation of dictionary definitions to establish that "marriage" in the usual and ordinary sense refers to the legal union of one man and one woman.'[23] Legal commentators opposing gay marriage have also emphasized this argument. According to Richard F. Duncan, 'homosexual marriage is an oxymoron. It simply does not exist, because the legal definition of marriage "is that it is a union of a man and woman."'[24]

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22 *Singer v. Hara,* 522 P.2d 1187 at 1191-92 (1974).

23 *Ibid.* at 1192 n. 6.

24 Richard F. Duncan, 'Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?' (1996) 10 Notre Dame J.L. Ethics & Pub. Pol'y 587 at 589.

This is an argument that simply cannot hold water. The definitional argument fails by the very definition of 'definition': definitions are arbitrary. Suppose a mountain is defined as any hill whose peak is at least one thousand feet above sea level. If some geographers were to suggest that we start calling hills over nine hundred feet mountains because hills of this size have more in common geologically with mountains than with smaller hills, we would be surprised if a geographer responded, 'But we can't do that; by definition, a mountain must be over one thousand feet.' Such a response would be seen as irrational. Regarding the argument that marriage is opposite-sex by definition, James Trosino nicely summarizes the problem: it 'amounts to an intellectually unsatisfactory response: marriage is the union of a man and a woman because marriage is the union of a man and a woman.'[25] This is not to say that all definitions are irrational or that the choice of one definition over another is purely a matter of fancy. Clearly, some definitions have greater utility than others for purposes such as ease and clarity of communication, facilitation of scientific research, or because we wish to convey certain values by the way we define words. Nonetheless, arguing that marriage must be heterosexual simply because it is currently defined that way is not a strong argument.

Closely related is the argument about tradition and religion. The belief that exclusively heterosexual marriage is firmly rooted in tradition and religion seems to resonate powerfully with the majority of the American public. Even the generally liberal, pro-gay rights Senator Hillary Rodham Clinton has publicly bowed to this sentiment. In January 2000, she said, '[m]arriage has got historic, religious, and moral content that goes back to the beginning of time, and I think a marriage is as a marriage has always been: between a man and a woman.'[26]

This sort of reliance on tradition and religion is also misplaced. Responding to Senator Clinton's statement that 'marriage has historic, moral and religious content that goes back to the beginning of time', Andrew Sullivan writes,

> [E]ven a cursory historical review reveals this to be fragile. The institution of civil marriage, like most human institutions, has undergone vast changes over the last two millennia. If marriage were the same today as it has been for 2,000 years, it would be possible to marry a twelve-year-old you had never met, to own a wife as property and dispose of her at will, or to

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[25] James Trosino, 'American Wedding: Same-Sex Marriage and the Miscegenation Analogy' (1993) 73 B.U. L. Rev. 93 at 116.

[26] Quoted in Andrew Sullivan, 'State of the Union—Why "Civil Union" Isn't Marriage' *The New Republic* 222 (8 May 2000) 18 at 20.

> imprison a person who married someone of a different race. And it would be impossible to get a divorce.[27]

Indeed, fundamental understandings of the definition of marriage have careened from one extreme to another and everywhere in between in Western culture. At one time, the dominant view of marriage vows in Catholic countries was that 'any private promise (no witnesses needed) was an unbreakable sacrament.'[28] Far from a Western consensus on the meaning of marriage, Protestants and Catholics battled throughout the millennia over the proper definition and status of marriage.[29] To make matters even more complicated, the United States was quite willing to split from its European roots and, in the nineteenth century, to create its own form of marriage: common-law marriage.[30]

As Oliver Wendell Holmes declared in 1897, it is 'revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'[31] And as Sullivan points out, the institution of marriage has changed enormously over time, mostly in ways that we would consider for the better in terms of equality between the genders. Indeed, one reason the West has assumed that marriage is dual-gendered is that it has traditionally granted men and women such different, and unequal, legal rights within marriage. These differences have been entirely eliminated in almost all the Western world.[32] If the sexist laws that required a woman to occupy the legally inferior role have been eliminated, perhaps the need for exclusively dual-gender marriage has evaporated with it. Western law has always recognized the edict *cessante ratione legis*, *cessat et ipsa lex*: when the reason for a law disappears, so must the law itself.[33] When gays and lesbians plead that the marriage ban is harming them legally, economically and emotionally, society is obligated to explain why this particular aspect of marriage, compulsory heterosexuality, should remain unchanged when so much of marriage has changed drastically.

Nor can religion be a rational basis for the same-sex marriage ban. First of all, not all religions oppose same-sex marriage. Many

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27 *Ibid*.

28 E.J. Graff, 'Marriage *a la mode*' *Boston Globe Magazine* (13 June 1999) 11 at 11.

29 *Ibid*.

30 *Ibid*.

31 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv. L. Rev. 457 at 469. Justice Harry Blackmun quoted this passage in his dissent in *Bowers v. Hardwick,* 478 U.S. 186 (1986) at 199.

32 See Gerstmann, *supra* note 21 at c. 3.

33 Cited and translated in Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (Chicago: University of Chicago Press, 1987) at 30.

religious groups support it,[34] including the Universal Fellowship of Metropolitan Community Churches, which performs over two thousand same-sex marriage ceremonies a year.[35] If the separation of church and state means anything, it surely means that the state cannot prefer the views of, say, Catholics and Baptists over those of Unitarians and Reform Jews because the former outnumber the latter. Moreover, as Andrew Sullivan points out, '[n]o one is proposing that faith communities be required to change their definitions of marriage … [t]he question at hand is civil marriage and only civil marriage. In a country where church and state are separate, this is no small distinction. Many churches, for example, forbid divorce. But civil divorce is still legal.'[36]

V THE REAL CONCERNS OF OPPONENTS OF SAME-SEX MARRIAGE

As noted above, space does not allow for a discussion of some of the other anti-same-sex marriage arguments, such as concern for how children are raised, but as I demonstrate elsewhere, all of these arguments are surprisingly weak and are often self-contradictory or demonstrably illogical.[37] Why then do the American courts and public find same-sex marriage so objectionable if the most common arguments against such unions are so flawed? I suspect that a major stumbling block for judges, politicians, and the general public is the perception that marriage is *obviously* something that only happens between a man and a woman and anything else is just lawyers' tricks. For heterosexuals who look around and see that only their heterosexual friends are married, what could be easier than the assumption that this is the way that nature intended it? '[W]as there ever any domination which did not appear natural to those who possessed it?' asked the great political thinker John Stuart Mill.[38]

Another major concern for opponents of same-sex marriage is the slippery slope. If gay men and lesbians can get married then why not polygamists and those in incestuous relationships? This potential was very much on Powell J's mind when he declined to join the Supreme Court majority when it held that there was a fundamental right to marry that was violated by laws restricting men from getting married unless they could demonstrate that they were supporting, and would continue to support, the children they already had.[39] He warned that the Court's

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34 See William N. Eskridge, *The Case for Same-Sex Marriage* (New York: Free Press, 1996) at 46-7, appendix.

35 *Ibid*.

36 *Supra* note 26.

37 See Gerstmann, *supra* note 21 at 13-40, 85-111.

38 John Stuart Mill, 'The Subjection of Women' in Alice S. Rossi, ed., *Essays on Sex Equality* (Chicago: University of Chicago Press, 1970) 125 at 137.

39 *Zablocki v. Redhail*, 434 U.S. 374 (1978).

support for a fundamental right to marry could open the door to all three forms of prohibited marriage: 'A "compelling state purpose" inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.'[40]

Mr Justice Powell was not alone in these fears. Many opponents of same-sex marriage have expressed concern that if society allows same-sex marriage, it would have to allow polygamy. Numerous Republican congressmen, in addition to noted political commentators William Bennett, George Will, Robert Bork, and William Safire, have made similar arguments.[41] Also, during congressional hearings on the *Defense of Marriage Act*, the analogy between polygamy and same-sex marriage was a dominant theme.[42]

VI THE USE OF INTERNATIONAL LAW AND NORMS IN *LAWRENCE V. TEXAS*

Given the importance of these concerns in the American debate then, we see that the United States Supreme Court's use of international sources in *Lawrence* was a modest and successful corrective that, in and of itself, poses none of the dangers discussed earlier in this article. Explicitly, the use of international laws and norms by the *Lawrence* Court is a powerful rebuttal to the deeply felt intuition of so many Americans that marriage simply must be heterosexual because *everybody* knows it is. The Court did not in any way suggest that the European Court of Human Rights is a source of binding legal authority. The *Lawrence* Court merely pointed out that quite a few nations with whom we share a great deal of history, as well as many legal, religious, and cultural traditions, do not in fact believe that marriage must be heterosexual. Further, the *Lawrence* Court's discussion of the laws and practices of European nations implicitly addresses the slippery slope concerns of so many Americans. If homosexual sodomy is protected in many other countries, none of whom have slid down the slope to legalized bestiality, incest and so forth, then that slope is probably not quite so slick after all.

For gays and lesbians, these two issues—intuitions that heterosexuality is natural and universal, and fears that legal tolerance of homosexuality will inevitably lead to legal tolerance of harmful sexual practices and other harms to society—are the biggest stumbling block to gaining equal rights both politically and legally. Greater awareness of

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40 *Ibid.* at 399.

41 Andrew Sullivan, 'Three's a Crowd: the Polygamy Diversion' *The New Republic* 214:25 (17 June 1996) 10; David L. Chambers, 'Polygamy and Same Sex Marriage' (1997) 26 Hofstra L. Rev. 53.

42 *Ibid*.

international experience can help salve both these concerns. Courts are likely to lead the way for Americans in fostering this awareness for several reasons. First, federal judges are considerably more educated than the average person. Also, a number of justices, including Breyer and Ginsburg, are explicitly interested in the subject. Finally, attention to international practices, for all the dangers discussed earlier in this article, helps the Court engage the very issues just discussed: questions of universality and naturalness, and slippery slope or 'inevitable consequences' issues. As legal scholar Michael Ramsey points out,

> Abstract claims about what 'all' societies do can be tested against evidence of what societies *actually* do; whether societies we otherwise think reflect 'ordered liberty' recognize certain rights may indicate whether those rights are 'implicit' in 'ordered liberty.' Claims of inevitable consequences can be tested against what has actually happened elsewhere: if other societies permit speech or forbid inequalities without grave practical consequences, perhaps the need for regulation is not 'compelling.'[43]

What we see then, is that attention to international law and international experience is ideally suited to help gay men and lesbians confront some of the issues that have had the greatest negative impact upon them, both legally and politically. Reference to the experiences of Europe and the Commonwealth can tell Americans much, for example, about whether marriage is 'obviously' heterosexual or whether allowing gay men and lesbians into the armed forces will inevitably lead to serious moral and recruitment problems.

While the courts are likely to be the first to pay attention to what goes on across oceans and borders, the potential political consequences are enormous as well. As I discuss elsewhere, the legal decisions of federal courts have an important impact upon the political debate over equal rights for gay men and lesbians.[44] So far, that impact has been mostly negative, with the Supreme Court feeding public notions that gay men and lesbians are seeking 'special rights' rather than equal rights.[45] The Court's recent willingness to bring the experience and practices of our sister nations into its jurisprudence has serious potential to broaden the political debate as well. At the time that America's highest elected officials are often openly dismissive of the views and experiences of even our closest allies, the Supreme Court's

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43 Ramsey, *supra* note 16 at 75.

44 Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians and the Failure of Class-Based Equal Protection* (Chicago: University of Chicago Press, 1999).

45 *Ibid*.

increasing openness to the outside world can be a much-needed and politically influential force.