WHAT INTERNATIONAL EXPERIENCE CAN TELL U.S. COURTS ABOUT SAME-SEX MARRIAGE

Anjuli Willis McReynolds*

In recent years a growing number of countries, including Canada and South Africa, have recognized a right to same-sex marriage. As voters in the United States pass state laws to ban same-sex marriage, international materials seem to offer a natural source of support for a contrary position. The Supreme Court's decision in Lawrence v. Texas, *which changed the legal landscape for same-sex marriage claims, could also offer precedent for the use of international comparisons in future cases. This Comment examines three common approaches to the judicial use of international materials in order to decide which approaches allow courts to benefit most from comparative analysis, while remaining consistent with precedent and minimizing the inherent dangers of this method. After discussing same-sex marriage developments in several countries, the Comment suggests how each of the three approaches to using comparative materials would apply in same-sex marriage cases, and concludes that the experiences of countries like the Netherlands, Belgium, South Africa, and Canada can provide evidence that same-sex marriage will not have catastrophic consequences for society.*

* Chief Articles Editor, UCLA Law Review, Volume 53. J.D. Candidate, UCLA School of Law, 2006; B.A., Trinity University, 2002. I am grateful to the *UCLA Law Review* board and staff, particularly Adam Goldberg, Elizabeth Oh, Michelle Comeau, and Pei Pei Tan for their insightful advice and admirable patience. I also thank my husband Kevin McReynolds for his support throughout this entire process.

INTRODUCTION

Many recent articles have debated the use of comparative analysis in constitutional decisionmaking.[1] The U.S. Supreme Court's decision in *Lawrence v. Texas*[2] is one of the major sources of this controversy. Though the Court has a long history of referencing international and foreign law,[3] *Lawrence* is the first opinion in which the Court has used international court decisions to interpret the U.S. Constitution's protection of individual liberties.[4] The Court also has referenced the international community in other recent decisions, however these cases did not cite to specific foreign or international court decisions. During the same term as it decided *Lawrence*, the Court also mentioned the world community's opinion of the execution of the mentally retarded in *Atkins v. Virginia*,[5] and Justice Ginsburg's concurrence in *Grutter*

1. *See, e.g.*, Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005) [hereinafter Alford, *Constitutional Comparativism*]; Roger P. Alford, Roper v. Simmons *and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1 (2005) [hereinafter Alford, *International Equipoise*]; John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006). Very recently, the *William Mitchell Law Review* published an issue titled *Foreign and International Law in Gay Rights Litigation*, with several articles addressing the same general topic as this Comment: when and how courts should consider comparative materials in deciding gay rights cases. *See, e.g.*, William D. Araiza, *Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, and Whose Law?*, 32 WM. MITCHELL L. REV. 455 (2006).

2. 539 U.S. 558 (2003).

3. See Brief Amici Curiae of Mary Robinson et al. in Support of Petitioners at 5 nn.4–6, 6 nn.7–8, Lawrence v. Texas, 539 U.S. 558 (No. 02-102) for lists of cases in which the U.S. Supreme Court considered international laws and practices.

4. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on* Lawrence v. Texas, 44 VA. J. INT'L L. 913, 915 (2004).

5. 536 U.S. 304, 316 n.21 (2002).

v. Bollinger[6] discussed the international understanding of affirmative action.[7] More recently, in *Roper v. Simmons*,[8] the Court reaffirmed its willingness to consider foreign materials in Eighth Amendment decisions.[9]

In *Lawrence*, the majority opinion cited to European Court of Human Rights cases to support its decision to strike down Texas's homosexual sodomy ban as unconstitutional.[10] The Court noted that when it decided *Bowers v. Hardwick*[11] in 1986, the case overruled by *Lawrence*, it did not take account of international changes in the treatment of sodomy.[12] In 1981, the European Court of Human Rights had held in *Dudgeon v. United Kingdom*[13] that the criminalization of sodomy violated the plaintiff's right to privacy under the European Convention on Human Rights. The *Lawrence* majority thus reasoned that "[t]here has been no showing that in [the United States] the governmental interest in circumscribing personal choice is somehow more legitimate or urgent" than the potential interests of countries that have decriminalized sodomy.[14]

Does the impact of *Lawrence* reach beyond the criminalization of sodomy? Commentators have suggested that *Lawrence* also alters the contours of constitutional challenges to same-sex marriage.[15] Besides undermining some of the moral arguments against same-sex marriage, the Court's use of comparative materials in *Lawrence* provides an additional resource for future same-sex marriage battles.[16] International sources could be very helpful to

---

6. 539 U.S. 306 (2003).

7. *Id.* at 344 (Ginsburg, J., concurring).

8. 543 U.S. 551 (2005).

9. *Id.* The majority in *Roper* stated that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Id.* at 578.

10. The Court also mentioned the Wolfenden Report to the British Parliament in 1957, which recommended the decriminalization of homosexual conduct. Lawrence v. Texas, 539 U.S. 558, 572–73 (2003). This Comment focuses on the Court's citation to European Court of Human Rights decisions, particularly *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), because these citations are far more controversial.

11. 478 U.S. 186 (1986).

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

13. 45 Eur. Ct. H.R. (ser. A) at 25 (1981).

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

15. *See, e.g.*, Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184 (2004).

16. In his dissent in *Lawrence*, Justice Scalia warned that "[t]oday's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition of marriage is concerned." *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting). Other commentators on both sides of the debate have agreed that the Court cannot justify the exclusion of same-sex couples from marriage in light of *Lawrence*. *See, e.g.*, Mark Strasser, Lawrence, *Same-Sex Marriage and the Constitution: What Is Protected and Why?*, 38 NEW ENG. L. REV. 667, 667 (2004); David M. Wagner, *Marriage: An Achievement of Centuries for the Protection of Women and Children*, 38 NEW ENG. L. REV. 683, 683 (2004).

same-sex marriage advocates since a growing number of foreign countries have legalized same-sex marriage. As voters in more states pass laws to ban same-sex marriage, international materials seem to offer a natural source of support for a contrary position.[17] Advocates are already using international examples in briefs arguing in favor of same-sex marriage, and they are citing to *Lawrence* in support of both their substantive claim and their use of comparative materials. As courts decide these cases, it will be necessary to determine what guidance the Supreme Court has given in *Lawrence* and in other cases for using these materials. Of course, in deciding same-sex marriage cases, courts first must decide whether comparative analysis should be used at all.

This Comment examines three common approaches to the judicial use of international materials in order to decide which approaches allow the greatest benefit from comparative analysis while remaining consistent with precedent and minimizing the inherent dangers of this method. Part I of this Comment briefly introduces these three approaches—doctrinal, empirical, and dialogic—considering the extent to which Supreme Court precedent supports each approach and focusing in detail on the example of *Lawrence v. Texas*. Part II surveys the recent changes to the legal status of same-sex couples in Europe and several other nations. Part III explains how this data is relevant to each of the three approaches, and considers which approach is most defensible for U.S. courts to use in the same-sex marriage context.

I. APPROACHES TO THE USE OF INTERNATIONAL MATERIALS

This part discusses three approaches—doctrinal, empirical, and dialogic—proposed by scholars and judges to describe how and why international materials could be used in constitutional decisions. It considers the potential benefits and dangers of the approaches, and concludes by examining *Lawrence*'s use of comparative materials in light of each. The rest of the Comment will apply the approaches to the same-sex marriage context.

A. Doctrinal Approach

The doctrinal approach to the use of international materials focuses on the existing rules and tests used to analyze constitutional provisions, attempting

17. These approaches can apply to court challenges based on state constitutions as well as the federal Constitution. State courts often interpret their own constitutions in light of Supreme Court decisions. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 64–66 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (1998). However, the opinions of Supreme Court justices about the role of international materials is likely to be persuasive.

to fit comparative analysis into that framework. From this perspective, international sources are useful in interpreting the Constitution if the constitutional text and surrounding jurisprudence (that is, the doctrine) make international experiences relevant. Many provisions of the Constitution and their judicial interpretations in case law are open-ended. For example, the Eighth Amendment bars punishments that violate "evolving standards of decency," and several Supreme Court decisions have interpreted this to include the evolving standards of democratic nations.[18] The Due Process Clause, in its open-ended ambiguity, provides another example of constitutional text that potentially could be clarified through comparison to international law.[19] This part focuses particularly on substantive due process because the Court in *Lawrence* used a due process analysis, and because advocates likely will use due process to argue in favor of a right to same-sex marriage.[20]

Substantive due process analysis first asks whether the right at issue is "'implicit in the concept of ordered liberty.'"[21] Advocates argue that same-sex marriage is such a right. Concepts like "ordered liberty" need not be limited to American experience.[22] Other countries' notions about liberty could inform constitutional analysis today, as they did in the drafting of the Constitution.[23] Further, the idea that the Constitution recognizes rights "implicit in the concept of ordered liberty" reflects the influence of natural law.[24] Natural law considers certain rights to be universal; other free nations' experiences would be relevant to determining which rights are so fundamental that they cannot

18. Atkins v. Virginia, 536 U.S. 304, 311–12 (2002); *see* Roper v. Simmons, 543 U.S. 551, 604 (2005).

19. Daniel Bodansky, *The Use of of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 428 (2004).

20. In fact, the plaintiffs in *Baehr v. Lewin*, 852 P.2d 44, raised a due process claim based on the Hawaiian constitution, although the court ultimately rejected this argument. Advocates of same-sex marriage are also likely to use an equal protection analysis. Equal protection jurisprudence does not have the same open-ended tests as due process, but it may be easier nonetheless to use international sources in an equal protection analysis. This is true both because of similarities between our equal protection jurisprudence and equality rights in other countries, and because of the doctrinal limitations of due process. *See infra* Part II.C.

21. Lawrence v. Texas, 539 U.S. 558, 593 n.3 (2003) (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). This language dates back to *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

22. The Supreme Court has cited other nations' practices in several cases in order to understand that which is implicit in ordered liberty, including *Washington v. Glucksberg*, 521 U.S. at 710 (noting that "[i]n almost every State—indeed, in almost every Western democracy—it is a crime to assist a suicide"), in addition to *Bowers* and *Lawrence*. Alford, *Constitutional Comparativism*, *supra* note 1, at 669 & n.171.

23. Bodansky, *supra* note 19, at 425–26.

24. *See* Alford, *Constitutional Comparativism*, *supra* note 1, at 659.

be infringed.[25] However, one arguably would need to show an international consensus (at least of free nations[26]) to find a same-sex marriage right implicit in the concept of ordered liberty.[27] This is a high standard to meet.

The doctrinal approach faces several difficulties. Many critics argue that using international sources to define evolving standards of decency or ordered liberty allows for judicial activism.[28] Some fear that judges will reference foreign materials to reach a desired result rather than as a legitimate source of legal reasoning.[29] Many scholars also argue that a nation's constitution, institutions, and laws fit only that particular nation and cannot be transplanted into another. Each culture's institutions must be viewed relatively, not absolutely or universally,[30] and the United States thus cannot determine what is implicit in the concept of ordered liberty by looking to other countries' views of liberty—since they may not fit our own.

However, current substantive due process doctrine itself poses an additional challenge to the doctrinal approach. Under the analysis enumerated in *Washington v. Glucksberg*,[31] a right implicit in the concept of ordered liberty

25. *See id.* at 659–60. Professor Alford acknowledges that natural law has been largely discredited as a constitutional theory, yet he argues that the natural law influences on substantive due process remain relevant today. Professor Alford cites to Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), as an example of the influence of natural law concepts: "[S]ubstantive due process 'embrace[s] those rights which are . . . *fundamental*, which belong . . . to the citizens of all free governments.'" *Id.* at 667 (quoting *Poe*, 367 U.S. at 541 (Harlan, J., dissenting) (internal quotations omitted)).

26. The question of which nations to consider in this analysis is controversial. *See infra* notes 50, 102–105 and accompanying text.

27. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 75–76 (2004). Ramsey also believes that an international consensus could suggest that a law has no rational basis. *Id.* at 80. He argues that the international materials alone, because they did not represent an international consensus, could not have been sufficient to render Texas's same-sex sodomy ban unconstitutional in *Lawrence*. *Id.*

28. Judges have enormous discretion to decide cases without the political accountability of elections. This problem of judicial discretion is often called the countermajoritarian difficulty because judges can overturn the popular will of the public without accountability. Justice Scalia stresses this concern in his *Lawrence* dissent in which he says that "this Court[ ] . . . should not impose foreign moods, fads, or fashions on Americans." Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring)).

29. *See* Ramsey, *supra* note 27, at 72–80.

30. This argument has been called legal particularism or expressivism. *See* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 830 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1270–71 (1999). Similarly, many critics of using international materials argue that the U.S. Constitution reflects our unique national character; thus, other nations, with their own norms, cannot inform the meaning of our Constitution. *See, e.g.*, Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640 (1999).

31. 521 U.S. 702 (1997).

must also be "deeply rooted" in the "history and tradition" of the United States.[32] The usefulness of comparative material encounters a major obstacle in this "deeply rooted" aspect of the substantive due process review. International sources or trends, standing alone, cannot satisfy this requirement of the *Glucksberg* test.[33] This suggests a serious limitation on the doctrinal justification for making use of international law and experience in the due process context.[34]

Finally, Justice Scalia's dissenting opinion in *Thompson v. Oklahoma*[35] offers an alternative but limited way for courts to use the doctrinal approach within a due process analysis. In *Thompson*, Justice Scalia wrote that international practices could be relevant to showing that a national consensus is implicit to American justice rather than merely a historical accident.[36]

---

32. *Id.* at 721 (internal citations omitted). The majority and dissent in *Lawrence* disagreed on what history or tradition is relevant. While the majority seems to favor an "emerging awareness" approach, *see Lawrence*, 539 U.S. at 571–72, the dissent clearly focuses on the longstanding practices of U.S. history, *see id.* at 597–98 (Scalia, J., dissenting). Thus, the disagreement between the majority and the dissent in *Lawrence* is likely a function of their differing theories of what materials are relevant to constitutional interpretation. Harold Koh notes that "two distinct approaches now uncomfortably coexist within our own Supreme Court's global jurisprudence." Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52 (2004). These disparate approaches reflect the divergent approaches to constitutional theory in the Court. *Id.* If the deeply rooted practices of U.S. history are the most relevant, recent developments in foreign countries will be the last thing the Court would consider. However, some have argued that an originalist perspective actually provides support for the consideration of international materials. *See infra* note 71 and accompanying text.

33. *Lawrence* might have shifted the focus of substantive due process analysis away from this methodology. *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004) (arguing that *Lawrence* undermines *Glucksberg*'s requirements of a named right and a deeply rooted history of that right). However, most scholars believe that *Glucksberg* still stands. *See* Alford, *supra* note 4, at 925–26.

34. The Eighth Amendment may offer a stronger doctrinal basis for considering international law. *See* Alford, *Constitutional Comparativism*, *supra* note 1, at 688. The Eighth Amendment must be interpreted based on "evolving standards of decency," which potentially suggests using international experience to decide what those standards are. *See id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). However, most cases consider national standards to be the most relevant factor in the analysis. *See id.* at 689. The Canadian Charter and the European Charter of Human Rights also have textual provisions that support using international materials in the analysis of the protection of individual liberties, and both texts use similar language to describe the protection of those rights. Rights protected under the Canadian charter may not be infringed upon unless it is "demonstrably justified in a free and democratic society." Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 19 (1998) (citations omitted). Similarly, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that the right to privacy shall not be infringed unless "necessary in a democratic society." Dudgeon v. United Kingdom, 45 Eur. Ct. HR (ser. A) at 17 (1981).

35. 487 U.S. 815 (1988).

36. *Id.* at 868 n.4 (Scalia, J., dissenting). Justice Scalia's argument in *Thompson* is mitigated by that fact that Eighth Amendment jurisprudence does not include a requirement that the right be "deeply rooted in history tradition." However, he might argue that substantive due

Thus, for example, if a national consensus exists on the issue of the decriminalization of sodomy, the concurrent existence of an international consensus on the issue shows that the freedom to engage privately in sodomy in fact is implicit in the concept of ordered liberty. This approach limits judicial discretion, since it requires both a national and an international consensus; thus, judges could look to international experiences only under narrow circumstances. At the same time, it also places serious limits on the usefulness of the reasoning and experiences behind the international consensus—because it does not look beyond the existence of the consensus itself.

B. Empirical Approach

International materials also can be used to show empirically how a rule works in practice.[37] Empirical evidence can reveal the likely consequences of a rule, or whether its means adequately fit its purported ends. Justice Breyer has stressed that the experiences of foreign countries may "cast an empirical light on the consequences of different solutions to a common problem." "Judicial decisions," notes Justice Breyer, "work best when they come last, after experience has made the consequences of legislation apparent."[38] Under the empirical approach, international experiences are relevant because they provide an additional source of knowledge about solutions to common problems.[39] Justice Breyer has argued that as international laws and legal bodies

process analysis precludes such a use of international materials to validate a contemporary domestic trend. The application of Justice Scalia's argument to due process analysis requires the approach used by the *Lawrence* majority, in which an emerging national awareness is relevant.

37. This is similar to a functionalist approach, which "treats comparative law as a technique of problem solving." Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2574 (2004) (reviewing COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (Norman Dorsen et al. eds., 2005)). The functionalist approach strives for "universal science, in which the existence of various constitutional systems is assumed and treated as amenable to comparative inquiry." *Id.* This approach "abstracts problems from their particular contexts to arrive at a constitutionalism hardly identifiable with politics or place," and glosses over individual differences in culture. *Id.* at 2577–78. Many of the same arguments can be made about an empirical approach.

38. Justice Stephen Breyer, Keynote Address to the 97th Annual Meeting of the American Society of International Law (April 4, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 266–68 (2003) (citations omitted). Justice Breyer made similar comments in his dissent to *Printz v. United States*. 521 U.S. 898, 976 (1997) (Breyer, J., dissenting). Justice Breyer said that "we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own . . . [b]ut their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem." *Id.* at 977.

39. *See* Koh, *supra* note 32, at 47.

adjudicate matters that coincide or overlap with domestic issues faced by our own courts, international experiences will be more useful to us.[40]

The Supreme Court has relied on international experiences to offer empirical evidence of the impact of particular laws in several cases. The Court sometimes uses these materials negatively, to contrast American practices with those of totalitarian regimes.[41] International materials also are used to provide empirical support when the Court chooses to allow the government to limit a right, rather than to support an individual's assertion of the right.[42] For example, the majority opinion in *Glucksberg* examined the Netherlands' experience with euthanasia to support the slippery slope argument against decriminalizing physician-assisted suicide.[43] Since the Netherlands experienced an increase in euthanasia without patient consent after that country decriminalized physician-assisted suicide, the Court determined that legalization of the procedure in the United States would have unacceptable consequences.[44]

Assuming that some international materials can provide useful empirical evidence, the question of which countries should be examined remains. Some have argued that judges choose the countries to examine based on a desired end result, rather than an interest in determining the best solution to a problem.[45] In this way, the empirical approach poses the danger of inviting too much judicial discretion.[46] Further, even if judges do have good intentions, they likely do not possess the expertise to accurately interpret events in other countries.[47]

A comparison to international practices will not always advance individual rights.[48] For example, most countries—even Western democracies—have far weaker protections of free speech than the United States.[49] However, unlike the doctrinal approach, an empirical use of international sources does

40. *See* Breyer, *supra* note 38, at 267.

41. Alford, *Constitutional Comparativism*, *supra* note 1, at 698–99 (citing as examples *Shaw v. Reno*, 509 U.S. 630 (1993), and *Elrod v. Burns*, 427 U.S. 347 (1976), among others).

42. *Id.* at 702.

43. 521 U.S. 702, 734 (1997).

44. *See id.*

45. *See* Ramsey, *supra* note 27, at 78–79.

46. Indeed, the same criticism may be made of the doctrinal and dialogic approaches because these methods also require the Court to choose which nations to consider.

47. Professor Alford argues that "[i]n the international legal arena, where the Court has little or no expertise, the Court is unduly susceptible to selective and incomplete presentations of the true state of international and foreign affairs." Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 64 (2004). For example, the *Lawrence* court ignored the many countries that outlaw sodomy. *Id.* at 65–66.

48. *Id.* at 67.

49. *See* Ramsey, *supra* note 27, at 76–77.

not require an international consensus to make the sources relevant. As seen in *Glucksberg*, the experience of just one country can provide useful evidence of the consequences of a proposed rule. While the experiences of other countries with a similar rule should not be ignored, the absence of the same practice elsewhere need not limit the relevance of a country's unique experiences.[50]

If an international consensus is unnecessary, then should some countries be considered more relevant than others? Some fear that narrowing the category of relevant nations based on democratic development would revive the concept of "civilized" versus "uncivilized" nations, a distinction that many scholars argue is not defensible today.[51] However, it may be possible for judges to decide in a principled and inoffensive way which nations' experiences to consider. Nations with similar values to ours will be more relevant than nondemocratic regimes.[52] Other factors, such as political and social climate, government structure, the protection of minority rights, and the existence of a constitution and judicial review also can distinguish the most relevant nations that judges should look to for empirical evidence.[53] For example, Justice Breyer looked to the experiences of Switzerland, Germany, and the European Union for empirical evidence in his dissent to *Printz v. United States*[54] because of their federal systems.[55]

---

50. Koh, *supra* note 32, at 56. A consistent practice among certain democratic nations could suggest that the United States should recognize a positive right because that right accords with the constitutional values shared with other democracies. Thus, it could be legitimate to favor the experiences and practices of particular nations over others, and to draw conclusions absent a clear worldwide consensus. While this may be appropriate for an empirical comparison, it still may not be an acceptable method for the doctrinal approach, which likely requires an international consensus for a right to be "implicit in the concept of ordered liberty." However, the empirical and dialogic approaches do not necessarily require a consensus. *See infra* Part I.B–I.C.

51. Ramsey, *supra* note 27, at 81.

52. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 198–201 (2003). L'Heureux-Dubé makes a similar point; she notes that judges in other countries look to particular decisions by U.S. courts because "they stand for a principle and an approach to constitutional interpretation taken by the court that rendered it." L'Heureux-Dubé, *supra* note 34, at 28.

53. *See* Breyer, *supra* note 38, at 267. Justice Breyer has said that international developments in law and legal bodies

> tend similarly to produce cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas.
>
> These growing institutional and substantive similarities [reveal similarities in values, including] respect for basic human liberty, thus help[ing] to make that liberty a reality.

Id. Such comments suggest that judges can indeed identify the countries with which we share the most values, and that it is these shared values that make the international sources useful.

54. 521 U.S. 898 (1997).

55. *See id.* at 976, 976–77 (Breyer, J., dissenting).

An empirical approach ultimately may have fewer interpretive problems than other uses of international materials because it does not rely on applying normative or expressive arguments from other countries to our own; rather, it focuses on the actual experiences of other nations.[56] Nevertheless, the danger exists that legal scholars and judges do not have the commitment or the expertise to get to the bottom of complex empirical issues.[57] Judges often do make such determinations, however, particularly when engaged in an analysis of the ends and means of a law.[58] The empirical approach thus seems to pose fewer concerns for judicial legitimacy overall and has greater viability for advocates arguing for the use of international materials than does the doctrinal approach.

C. Dialogic Approach

Finally, some proponents of comparative analysis argue that the strongest reason for a U.S. court to utilize international decisions is the ability to contribute to an ongoing, written dialogue with other nations. This "dialogic" approach does not view the judicial decision as a discrete unit. Rather, it forms part of a longer, continuing conversation in which courts critique and improve on each other's reasoning. According to this approach, a comparative perspective allows judges to understand their own legal system and constitution better by comparing other systems to their own.[59] Making use of comparative materials could allow judges to imagine different solutions to the same problem,[60] and indeed, some have argued that this form of communication allows U.S. courts to maintain or even improve relations with other countries.[61]

Many scholars believe that the United States' influence on other nations' constitutions and courts explains much of the similarity of constitutional

56. *See* Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 364 (2004).

57. *See id.* at 365.

58. For example, the slippery slope argument relies on an empirical claim that a legal step will result in particular undesirable consequences. The Court also engaged in an empirical analysis when it decided that the Violence Against Women Act had no substantial effect on interstate commerce in *United States v. Morrison*. *See* 529 U.S. 598 (2000).

59. *See* Choudhry, *supra* note 30, at 836–37.

60. *Id.* at 837–38.

61. *See* Koh, *supra* note 32, at 43–44; Sandra Day O'Connor, Remarks to the Southern Center for International Studies 2–3 (Oct. 28, 2003), *transcript available at* http://www.southerncenter.org/OConnor_transcript.pdf. Ramsey counters this argument with the observation that only the political branches of government should consider diplomatic issues, not the courts. Ramsey, *supra* note 27, at 74 n.30.

issues among various nations.[62] However, it seems outdated to focus only on the American constitutional influence as a reason to consider foreign courts; instead, comparativists argue that U.S. courts should consider international sources in order to take part in the global judicial dialogue that already is occurring in other nations.[63] Because of globalization and the development of complex judicial institutions in other countries, judges of courts of last resort throughout the world are engaging with one another in an international exchange of ideas and dialogue.[64] One commentator, Anne-Marie Slaughter, describes this as a "global community of courts" where judges come together, both literally and figuratively, and "cross-fertiliz[e]" constitutional approaches and reasoning.[65] Professor Slaughter, among others, argues that this cross-fertilization allows judges to conduct their analyses with greater insight and provides different perspectives from which to approach a problem.[66]

Some justices appear to have embraced this approach. Justice Breyer, for example, has extolled the benefits of looking to other nations' judicial decisions and practices in order to improve the reasoning of our domestic courts.[67] He emphasizes that there are an "increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. . . . Judges in different countries increasingly apply somewhat

62. For a discussion of the United States' exportation of judicial review, constitutionalism, and the Bill of Rights, see Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71 (2004). Sujit Choudhry notes that a common genealogy between constitutions can also justify the use of comparative sources. Choudhry, *supra* note 30, at 825. The influence of the United States on other nations' constitutions thus could make other nations' experiences and decisions relevant. In addition, Judge Calabresi argues that domestic courts would likely benefit from paying attention to these "constitutional offspring." United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995).

63. *See* L'Heureux-Dubé, *supra* note 34, at 16–17.

64. *See id.*; O'Connor, *supra* note 61, at 1 ("Globalization . . . represents a greater awareness of, and access to, peoples and places far different from our own. The fates of nations are more closely intertwined than ever before, and we are more acutely aware of the connections.").

65. *See* Slaughter, *supra* note 52, at 192–93. For example, the Supreme Court of Canada and the South African Constitutional Court often use foreign sources. Levinson, *supra* note 56, at 354–55.

66. In particular, Slaughter says:

> For these judges [who engage in dialogue with other world courts], looking abroad simply helps them do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. Foreign authority is persuasive because it teaches them something they did not know or helps them see an issue in a different and more tractable light.

Slaughter, *supra* note 52, at 201; *see also* Levinson, *supra* note 56, at 355 ("[T]here ought to be no country, most certainly including our own, that should regard its own instantiated commitment to social justice or human rights as absolutely pristine, in need of no wisdom that might be provided by external sources.").

67. *See* Breyer, *supra* note 38, at 267.

similar legal phrases to somewhat similar circumstances."[68] Justice Ginsburg also has stressed the importance of looking to comparative materials.[69]

Critics argue that the dialogic approach is irreconcilable with the interpretation of the Constitution as a text because the dialogic approach tends to overlook textual differences between our Constitution and others.[70] These critics privilege textualism because it minimizes judicial discretion; judges must follow the relatively objective meaning of the text rather than their personal views. However, proponents of comparative analysis counter that a comparative view need not be inconsistent with a textual approach. Open-ended constitutional provisions like the Due Process Clause do not have one precise interpretation; foreign experiences can help to clarify the textual meaning of our Constitution, rather than circumvent that meaning. Further, proponents argue that comparativism can operate simultaneously with other methods of reasoning that need not be mutually exclusive.[71] For example, the majority opinions in *Lawrence* and *Roper* did not rely solely on international experiences but merely cited comparative experience as one factor to support the decisions. Thus, comparativism

---

68. *Id.* at 266; *see also* L'Heureux-Dubé, *supra* note 34, at 23 (noting that judges are increasingly facing similar issues and similar debates).

69. *See* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 329 (2004) (arguing that "[w]e are the losers if we do not both share our experience with and learn from others"). Former Justice O'Connor also supports the use of comparative materials. She has remarked:

> [C]onclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts . . . .
>
> . . . .
>
> . . . While ultimately we must bear responsibility for interpreting our own laws, there is much to be learned from other distinguished jurists who have given thought to the difficult issues we face here.

O'Connor, *supra* note 61, at 1–2. Because concepts like "due process," "liberty," and "equal protection" all have global meanings, our Supreme Court could look to other countries with legal traditions and histories similar to ours to construe what those concepts mean. Koh, *supra* note 32, at 47. This argument is similar to the doctrinal approach, which makes use of open-ended constitutional concepts, but it does not specifically employ the full jurisprudence surrounding due process or equal protection. *See supra* note 22 and accompanying text.

70. One scholar argues that a broad commonality exists between constitutional courts only if one thinks these that courts are "deciding whether . . . laws are justifiable as a matter of moral and social policy," rather than interpreting texts. Ramsey, *supra* note 27, at 74.

71. Sujit Choudhry says that "the better view is that constitutional adjudication is based upon a plural conception of authoritative reasons—that is, that the tapestry of constitutional jurisprudence is woven out of a diverse set of values which often operate simultaneously in particular legal disputes." Choudhry, *supra* note 30, at 840. Professor Choudhry argues that the "very legitimacy of judicial institutions hinges on interpretive methodology." *Id.* at 824. The tendency for U.S. theorists and judges to rely on only domestic sources suggests that foreign sources are illegitimate, so courts must justify why comparative law should matter to its decision. *Id.* at 825.

could be a useful legal tool in addition to existing methods of interpretation, not an exclusive reason for making a legal decision.[72]

The fact remains, however, that the dialogic approach allows judges to choose not only which countries, but which particular cases, to look to for comparative material. Because all foreign sources are merely persuasive authority, any can be cited to the exclusion of others that have reached a different result. Therefore, the dialogic approach invites judicial activism much more openly than the other approaches.

D. *Lawrence* as Precedent for the Use of International Materials

Lawrence v. Texas clearly references international law—specifically, cases decided by the European Court of Human Rights. However, the Court's discussion was relatively brief and did not explicitly reference the approaches discussed above. This part thus explores how the doctrinal, empirical, and dialogic approaches may support the *Lawrence* majority's use of European Court of Human Rights cases decriminalizing sodomy. Further, it considers which interpretation of *Lawrence* will be most useful in the context of future same-sex marriage cases.[73] The Court's discussion of the European Court of Human Rights cases is quoted here, and this part will refer back to this language throughout:

> [A]lmost five years before *Bowers* was decided the European Court of Human Rights considered a case [*Dudgeon v. United Kingdom*] with parallels to *Bowers* and to today's case .... Authoritative in all countries that are members of the Council of Europe (twenty-one nations then, forty-five nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization .... 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*] .... 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.[74]

---

72. *Id.*

73. Professor Alford undertook a similar analysis of *Roper*'s use of international experiences earlier in this volume. *See* Alford, *International Equipoise*, *supra* note 1.

74. Lawrence v. Texas, 539 U.S. 558, 576–77 (2003).

Presumably, these paragraphs in the *Lawrence* opinion provide guidelines for the use of comparative materials in future cases. Unfortunately, those guidelines are not immediately apparent from the Court's language. Given this lack of clarity, a coherent interpretation of *Lawrence*'s use of *Dudgeon* and foreign experience is essential for same-sex marriage advocates hoping to use *Lawrence* as precedent for a similar analysis. This part attempts to interpret what guidelines the *Lawrence* opinion may offer, given the three approaches to using comparative materials discussed above.

1. Doctrinally

The doctrinal approach uses the constitutional text and jurisprudence itself to justify the use of comparative materials. As discussed above, substantive due process first asks whether a proposed right is "implicit in the concept of ordered liberty."[75] Arguably, the experiences of other nations, particularly an international consensus, can help explain what is implicit in the concept of ordered liberty. The requirement that the right be "deeply rooted" in American history and tradition, however, suggests that foreign experience is irrelevant, except perhaps to the extent that it confirms a national consensus on the issue.[76]

In the language quoted above, it is possible that the *Lawrence* majority cited to international sources in order to find that a right to engage in private, consensual sodomy is implicit in the concept of ordered liberty. The Court noted that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[77] The Court also stressed that the *Dudgeon* decision is binding on the forty-five nations of the Council of Europe, which supports the claim that the right is "an integral part of human freedom," or implicit in ordered liberty.[78] This suggests that the Court used the international decisions under a doctrinal approach, as a part of its substantive due process analysis. Ultimately, however, it is unclear whether the Court found a fundamental right to engage in consensual, private sodomy. The Court only applied rational basis review, not the strict scrutiny that a fundamental right would warrant.[79] This ambiguity makes it difficult to assess how the international sources functioned in this case.

75. *See supra* note 21 and accompanying text.
76. *See supra* note 32 and accompanying text.
77. *Lawrence*, 539 U.S. at 576–77.
78. *Id.* at 573.
79. In his dissent, Justice Scalia notes that the Court did not establish that homosexual sodomy is a right "deeply rooted" in American tradition, as fundamental right status would require. *Id.* at 598 (Scalia, J., dissenting).

The majority opinion mentions the European Court of Human Rights cases in the context of *Bowers v. Hardwick*,[80] the case that *Lawrence* overruled. The Court seemed to find these cases useful only "[t]o the extent *Bowers* relied on values we share with a wider civilization."[81] This could suggest that the majority's appeal to international decisions merely served to refute Chief Justice Burger's argument in *Bowers*, that sodomy prohibitions are universal.[82] The Court would only need to show some evidence of the decriminalization of sodomy in other nations to refute this universal claim; however, showing a practice to be implicit in the concept of ordered liberty arguably requires a near universal consensus of free nations.[83] Though many democratic nations had decriminalized sodomy by the time *Lawrence* was decided, the consensus among free nations was hardly universal by any means.[84]

Justice Kennedy's majority opinion also notes that there is an emerging national consensus on decriminalizing sodomy.[85] Thus, following Justice Scalia's version of the doctrinal approach in *Thompson*, the Court's citation to international materials perhaps merely worked to confirm that trend.[86] Indeed, one commentator has suggested that had the Court not been able to ground the analysis in domestic national experience and precedent, consideration of foreign materials would have been less appropriate.[87]

Thus, it is possible to argue, though perhaps doubtful, that the *Lawrence* Court cited to *Dudgeon* and other European Court cases using a version of the doctrinal approach: to show that a right to consensual sodomy is implicit in the concept of ordered liberty, to reject the contention in *Bowers* that sodomy prohibitions are universal, or to confirm an emerging national consensus on the issue. It will likely be difficult, however, to make similar arguments in same-sex marriage cases. First, it will be very difficult to prove an international

80. 478 U.S. 186 (1986).

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

82. Professor Levinson argues that Justice Kennedy's use of European Court of Human Rights cases served only to rebut Chief Justice Burger's concurrence in *Bowers*, because Justice White's majority opinion talked about American tradition, not the values of Judeo-Christian or Western civilization. Levinson, *supra* note 56, at 355.

83. Ramsey, *supra* note 27, at 75–76 and accompanying text.

84. Alford, *supra* note 47, at 65–66.

85. *Lawrence*, 539 U.S. at 570–71.

86. *See supra* note 36 and accompanying text.

87. Alford, *supra* note 4, at 927–28. Professor Alford is less persuaded by this reading than by an interpretation that views *Lawrence* as an anomalous rebuttal of Chief Justice Burger's concurrence in *Bowers*. Moreover, Professor Alford contends that *Lawrence*, like *Roe* and *Brown*, offers a rare example of the judiciary leading the country rather than strictly following history and tradition. *Id.* at 928. Professor Alford argues that the Supreme Court would be very unlikely to risk its legitimacy by making a habit of using international sources to find fundamental rights with no basis in U.S. history and tradition. *Id.* at 929.

consensus among democratic nations on the subject of same-sex marriage because only a minority of democratic countries have legalized it.[88] Further, under the doctrinal approach, an emerging national consensus may be required to make the international sources relevant, which again is a high standard to meet—especially when arguing in favor of same-sex marriage. Thus, the *Lawrence* majority's use of the doctrinal approach may be limited.

2. Empirically

According to the empirical approach, international experiences can provide empirical evidence of how a proposed rule works in practice. If the *Lawrence* Court did not employ the doctrinal approach discussed above, it might have used the European Court of Human Rights cases to provide empirical evidence of the consequences of decriminalizing sodomy. The majority opinion noted that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent" than the potential interests of the nations that had decriminalized sodomy.[89] With this sentence, the court seems to apply the rational basis test, finding that the criminalization of sodomy serves no legitimate interest. The comparison to other nations could provide empirical evidence showing that the governmental interests proposed by Texas are not pressing enough, in the experience of these other countries, to justify the law.

The *Lawrence* majority opinion does not engage in an extended analysis of the ends and means of the law against sodomy. However, Justice Scalia's dissent supports the reading that the majority may have used international sources as empirical evidence. Justice Scalia argued in his dissent that Texas's prohibition of sodomy should pass rational basis scrutiny, meaning that the prohibition of sodomy would have a legitimate end and a rational relation between the goal and the means for achieving it. Justice Scalia argued that striking down the Texas law would create a slippery slope, leading to the legalization of bigamy, bestiality, obscenity, incest, and other prohibited forms of sexuality.[90] Yet the aftermath of *Dudgeon*, a case decided twenty years before *Lawrence*, undermines the argument that the decriminalization of sodomy presents a slippery slope harmful to society. The European nations that decriminalized sodomy experienced no such trend toward harmful sexual

88. *See infra* Part II.

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

90. *See id.* at 590 ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices.").

behavior, and the majority opinion seems implicitly to use the experiences of these nations to show that Justice Scalia's slippery slope argument does not provide a rational basis for the Texas law.

Lawrence might serve as precedent for an empirical comparativism approach because the majority seems to consider the experiences of other countries in its analysis of Texas's legitimate interests. Comments made previously by Justice Breyer, both in a previous dissenting opinion and in outside commentary, generally support the use of an empirical approach as well.[91] Finally, the empirical approach is very easy to apply to future cases. The example of one or more nations similar to the United States can provide evidence of the consequences of a law. No international consensus is necessary, though similar experiences in several nations may strengthen the validity of empirical evidence. Courts may be hesitant, however, to draw broad conclusions based on these experiences when available information is limited.

3. Dialogically

Courts employing the dialogic approach to using comparative materials examine the judicial decisions of other nations' high courts for insight into legal problems with which those courts already have grappled. Given the similarities in reasoning between *Dudgeon* and *Lawrence*, it seems likely that *Lawrence* was at least influenced by the prior case. The use of religious morality to justify government regulation has lost favor in recent years in the international community,[92] and the *Dudgeon* opinion conforms to this trend, as does *Lawrence*. In 1982, the *Dudgeon* court held that morality concerns cannot provide a sufficient justification for a law that infringes on the right to engage in private conduct within the home.[93] Similarly, the *Lawrence* Court stated that enforcing a majoritarian view of morality is not a legitimate state interest.[94]

If the Court did apply the dialogic approach, it is troublesome that the *Lawrence* Court did not engage in any analysis of the *Dudgeon* court's

91. *See supra* note 38 and accompanying text.

92. Robert A. Ermanski, Note, *A Right to Privacy for Gay People Under International Human Rights Law*, 15 B.C. INT'L & COMP. L. REV. 141, 160 (1992).

93. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 23–24 (1981).

94. *Lawrence*, 539 U.S. at 577–78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

reasoning.[95] The dialogic approach gains legitimacy from its ability to improve courts' reasoning and strengthen international relations. Without a detailed, thoughtful analysis of the comparative materials, these justifications falter. The mere citation to foreign or international courts then adds very little to the reasoning of a case.

Lawrence is not the first time that the Supreme Court has considered international experiences or sources,[96] though the Court may have broken new ground when it cited to the European Court of Human Rights specifically to refute *Bowers*.[97] *Lawrence* thus may provide precedent for the use of international materials in general, and to some extent, for each of the three approaches discussed here. Several amicus curiae briefs to recent landmark cases have attempted to provide a framework for considering international laws and experiences,[98] but most have presented the foreign materials with little explanation of why courts should consider them. For example, one recent brief cited to *Lawrence* for the proposition that European Court of Human Rights cases are relevant,[99] but *Lawrence* can be extended to provide better support for comparative analysis. The very ambiguity that makes *Lawrence*'s use of international materials difficult to interpret also gives advocates some flexibility to argue in favor of their preferred approach to using comparative materials.

Same-sex marriage advocates should argue that *Lawrence* supports all three of these approaches. *Lawrence* provides fairly strong support for the

95. Levinson points out this lack of real analysis, and accuses the *Lawrence* majority of merely "tipping [their] hats" to international materials, in contrast to the rigorous analysis of international materials by courts like the Supreme Court of South Africa. Levinson, *supra* note 56, at 362–63. Ramsey believes that this lack of analysis reveals the majority's underlying political agenda; instead of evaluating the European sources for their "empirical power" or persuasive reasoning, the Court merely cites these decisions to reach their desired result. Ramsey, *supra* note 27, at 78–79.

96. *See* Brief Amici Curiae of Mary Robinson, *supra* note 3, at 5 n.5, 6 nn.7–8. *Glucksberg*, *Atkins*, and *Grutter* also include a discussion of international views and experiences. *See supra* Introduction.

97. *See* Alford, *supra* note 4, at 915 ("For the first time in history, a majority of the Supreme Court has relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution.").

98. Many of these briefs make similar arguments to those already discussed, but without an extensive explanation of why and how the international materials should fit into the existing analysis. *See, e.g.*, Brief Amici Curiae of Mary Robinson, *supra* note 3, at 30 (making empirical arguments based on international trends, and appealing to the need to maintain the U.S. influence as the "world's foremost protector of liberties"); Brief of Amici Curiae International Human Rights Organizations et al., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (SJC No. 08860).

99. *See* Brief of Amici Curiae International Human Rights Organizations and Law Professors, Request for an Advisory Opinion at 33 (A-107) (Mass. Jan. 12, 2004) (SJC No. 09163), *available at* http://www.hrw.org/pub/amicusbriefs/civil_marriarge.pdf (citing *Lawrence*, 539 U.S. 558, for evidence that European Court of Human Rights cases are particularly relevant); *see also id.* at 14 n.3.

empirical approach, though the Court did not name it explicitly. The doctrinal approach is harder to justify under *Lawrence*, and it will probably be the least useful for same-sex marriage advocates. The dialogic approach is probably the easiest to apply to the same-sex marriage context because it does not require a rigorous framework for its application, but it is also the most difficult approach to justify using *Lawrence* as precedent. The dialogic approach is also the most flexible approach of the three; while this flexibility makes it very useful for advocates, it also makes the approach less desirable to courts because it seems illegitimate. The dialogic approach is most susceptible to the label of judicial activism.[100] Thus, the lack of support in *Lawrence*, coupled with the concern of illegitimacy, suggest that courts should view this approach skeptically.

II. SAME-SEX MARRIAGES AND PARTNERSHIPS IN OTHER COUNTRIES

This part applies the approaches discussed above, extrapolating from *Lawrence* to make arguments based on international materials in favor of recognizing same-sex marriage in the United States.[101] This part will, for both theoretical and practical reasons, consider primarily Western democracies.[102] First, Western democracies tend to value individual rights in a manner similar to the United States, and their experiences, methods of reasoning, and legal systems are likely the most relevant to our own.[103] Second, Western democracies are almost alone in legally recognizing the partnerships of same-sex couples. In most European countries, same-sex couples have gained rights to partnership and marriage through legislative action. These countries will be considered first, followed by a discussion of major court decisions in Canada, South Africa,[104] and the European Court of Human Rights. As described below, the reasoning of these court decisions translates

100. *See infra* Part I.C.

101. This part is intended to cover roughly the arguments that could be made, based on the previous part's interpretation of *Lawrence* as precedent for considering international sources. A more detailed analysis of international laws and practices would be necessary to explore the arguments in favor of same-sex marriage fully.

102. An extensive discussion of what sources are most appropriate for comparative analysis in general is beyond the scope of this Comment. For one such discussion, see Rex D. Glensy, *Which Countries Count?:* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357 (2005).

103. *See supra* notes 51–55 and accompanying text.

104. I include South Africa as a Western democracy because it has a constitution and judicial review, similar to that of the United States. *See infra* Part II.B.2.

most readily into a dialogic approach. However, all of these laws and experiences will be relevant to a doctrinal or an empirical approach, too.[105]

A. Legislative Action

1. The Netherlands and Belgium

Same-sex couples gained the right to civil marriage and adoption in the Netherlands through four bills passed in 2000 and 2001.[106] Belgium opened marriage to same-sex couples in 2003.[107] All marriages are civil in the Netherlands and Belgium; religious officials cannot marry any couple.[108] The couple must first be married by a state official, and afterwards may choose to have a religious ceremony. In both countries, at least one spouse must be a citizen or resident of the country to be married, but any European Union citizen can be a Dutch or Belgian resident.[109]

Before the Dutch legislature opened marriage to same-sex couples, plaintiffs failed to gain the right through the courts. Two cases in the 1990s asked Dutch courts to allow same-sex couples to marry, but in both of these cases the courts rejected the plaintiffs' claims.[110] The Netherlands Supreme Court held that marriage is about difference in sex and procreation, and thus that same-sex couples could not by definition be married.[111] The court also held that the Dutch legislature should determine the definition of marriage, not the courts.[112] The failure of judicial attempts to open marriage in the Netherlands to same-sex couples suggests that a comparison to the United States is not helpful for same-sex marriage advocates. No state legislature in the United States (with the notable exception of Massachusetts after *Goodridge v.*

105. Following the doctrinal approach, any laws or practices of foreign nations may be relevant to showing whether a right is implicit in the concept of ordered liberty. Any foreign experiences may also be relevant to the empirical approach, but actual effects of legal changes within a foreign country are the most helpful to assess the likely consequences of a similar change within this country. For the dialogic approach, decisions of the highest courts in foreign nations, and decisions of international courts, are most important because they are the most influential courts in their respective countries and in the world community.

106. Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 573–74 (2004). Same-sex couples' rights to adoption are limited, however, because of the fear that foreign countries will not allow Dutch adoptions if adoptive same-sex couples could be the adoptive parents. *Id.* at 574.

107. *Id.* at 582.

108. *Id.* at 573, 581.

109. *Id.* at 577, 583.

110. *See* Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141, 142 (2001).

111. *See id.* at 147.

112. *See id.*

Department of Public Health[113]) has extended the right of marriage to same-sex couples. Thus, a comparison to the Netherlands could suggest that a U.S. court should leave the issue for legislative resolution.[114] However, it is possible that Dutch courts would decide differently today given subsequent decisions by the European Court of Human Rights.[115]

The existence of same-sex marriage for several years in the Netherlands and in Belgium, without adverse effects on society, could provide empirical evidence to undermine the argument that allowing same-sex marriage will destroy the institution of marriage. However, the Netherlands and Belgium historically have been much more tolerant of homosexuality than has the United States.[116] For example, the Netherlands decriminalized sodomy in 1811; Belgium did in 1792.[117] If these nations have a different conception of sexuality and marriage that views homosexuality as acceptable, then it is possible the recognition of same-sex marriage would not disrupt these societies as much as in the United States.

Commentators have pointed out, however, that same-sex couples in the Netherlands and Belgium have far fewer rights to adoption than do same-sex couples in the United States (depending on the state).[118] This suggests that these European societies remain concerned with the traditional family's role in the welfare of children and still must be convinced of the benefits of allowing same-sex couples to adopt.[119] Since many same-sex couples already have adoption rights under state laws in the United States, one could argue that it is also likely the recognition of same-sex marriage would not result in a disruption of society or a danger to the welfare of children in this country. One commentator also suggests that the superior

113. 798 N.E.2d 941 (Mass. 2003).

114. The comparison between U.S. and Dutch courts is somewhat difficult because Dutch courts do not have the power of judicial review; that is, they are unable to strike down acts of their legislature when the legislation is inconsistent with the country's constitution. *See* Maxwell, *supra* note 110, at 201. Thus, only the Dutch legislature could make such a major change. U.S. courts, however, have had the power of judicial review for most of their history. *See id.* (citation omitted).

115. Before the Dutch court decisions, the European Court of Human Rights had made decisions about transgender marriages that disfavored the recognition of same-sex marriage. *See id.* at 146. Because the Dutch courts can enforce the European Convention on Human Rights in their country, decisions of the European Court of Human Rights are important. *See id.* However, more recent decisions by the European Court give a different impression. *See infra* note 174 and accompanying text.

116. *See* Maxwell, *supra* note 110, at 202–03.

117. Waaldijk, *supra* note 106, at 578, 583.

118. *See* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 259–61 (2002) (arguing that different perceptions of child welfare and individual rights have led to the different approaches to same-sex marriage and adoption in Europe and the United States).

119. *See id.*

adoption rights of same-sex couples in the United States compared to European nations undermine the argument that only opposite-sex couples can fulfill the procreative purpose of marriage, since many states seem to value the ability of same-sex couples to form families.[120]

2. Other Countries

In Spain, legislative action has recently opened marriage to same-sex couples.[121] A bill to allow same-sex marriage passed the Spanish Parliament in June 2005, despite staunch opposition from Catholic leaders.[122] The law also allows same-sex couples to adopt children.[123]

Other European countries offer different forms of legal recognition of same-sex relationships. In the Nordic countries, including Sweden, Finland, Denmark, Iceland, and Norway, same-sex couples have the option to become registered partners.[124] These partnerships carry most of the same rights that married couples have in Belgium or the Netherlands.[125] Opposite-sex couples can be married by civil or religious officials in the Nordic countries, but same-sex couples can be registered only in a civil ceremony.[126]

Germany and France provide some rights to same-sex couples as well. Germany has allowed life partnerships since 2001.[127] In France, same-sex couples can enter a Pacte Civile de Solidarité, a civil solidarity pact, which is available to all couples.[128] Both types of partnership offer limited rights.[129] The United Kingdom recently passed the Civil Partnership Act, which took

120. *See Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2021 (2003) [hereinafter *Inching Down the Aisle*]. This article argues that the adoption rights given to same-sex couples in the United States could be an indirect route to same-sex marriage, though the process has occurred in the reverse in European countries. *Id.*

121. Jennifer Green, *Spain Legalizes Same-Sex Marriage*, WASH. POST, July 1, 2005, at A14, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/30/AR2005063000245.html.

122. *Id.*

123. *Id.*

124. Waaldijk, *supra* note 106, at 585.

125. *See id.* at 586–87.

126. *See id.* at 587.

127. *See id.*

128. *Id.* at 588.

129. The German life partnership gives limited rights, not including the "presumption of paternity, adoption, statutory survivor's pension, certain tax reductions, and inheritance tax." *Id.* at 587. Some rights excluded from the French partnership include, among other things, a "presumption of paternity, adoption, statutory survivor's pension, intestate inheritance, certain aspects of tax law, and citizenship." *Id.* at 588.

effect in December 2005.[130] Though the Act does not allow same-sex couples to marry, it does extend to them most of the rights and duties of marriage.[131] Thus, the Act provides for a civil union type of partnership. Same-sex couples may also enter civil unions of various forms in Switzerland and Portugal,[132] and locations outside of Europe that provide legal recognition of same-sex relationships include New Zealand and Argentina.[133]

B. Judicial Decisions

Particularly under the dialogic approach, decisions of foreign courts provide persuasive material for domestic courts to consider. A court may be hesitant to generalize from legislative action in foreign countries; however, another court's decision can provide easily comparable, persuasive authority because courts are already used to analyzing court decisions of other jurisdictions.[134]

1. Canada

As of July 2005, Canada legislatively recognized same-sex marriage through the Civil Marriage Act. Canadian courts had originally legalized same-sex marriage in 2003, holding that bans on same-sex marriage were unconstitutional.[135]

Canada may be the most relevant international parallel to the United States in the context of same-sex marriage.[136] Equality jurisprudence in Canada and America are similar, so a dialogic approach is especially appropriate here. Commentators note that Canadian courts have maintained their legitimacy after ruling in favor of same-sex marriage, and the elected

130. *'Gay Weddings' Become Law in U.K.*, BBC NEWS, Dec. 5, 2005, http://news.bbc.co.uk/1/hi/uk/4493094.stm.

131. *Id.*

132. Int'l Lesbian & Gay Ass'n—Europe, Same-sex Marriage and Partnership: Country-by-Country, http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country (last visited Mar. 7, 2006).

133. *Gay Marriage Around the Globe*, BBC NEWS, Dec. 22, 2005, http://news.bbc.co.uk/1/hi/world/americas/4081999.stm. The only Asian country to suggest that it may recognize same-sex marriage is Cambodia. In February 2004, the King-Father of Cambodia spoke in support of the legalization of same-sex marriage in that country. *See Cambodian King Backs Gay Marriage*, BBC NEWS, Feb. 20, 2004, http://news.bbc.co.uk/2/hi/asia-pacific/3505915.stm.

134. However, there is always the danger of misinterpretation, because most judges will not be fluent in the relevant foreign language.

135. These cases will be discussed below in this part.

136. *See* Brief of Amici Curiae International Human Rights Organizations and Law Professors, *supra* note 99, at 10, *see also* R. Douglas Elliott, *The Canadian Earthquake: Same-Sex Marriage in Canada*, 38 NEW ENG. L. REV. 591 (2004).

officials have acquiesced, contrary to fears in Canada that a judicial "imposition" of same-sex marriage would undermine representative democracy.[137]

The Ontario Court of Appeal's decision in *Halpern v. Canada*[138] was the first Canadian court decision immediately to change the definition of marriage and allow same-sex marriages to take place.[139] Most of the subsequent decisions from other provinces adopt reasoning similar to the *Halpern* court's. At their core, *Halpern* and the decisions that followed found the common law definition of marriage to be in violation of section 15 of the Canadian Charter, which states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[140] *Halpern* is a well-reasoned and thoughtful decision; thus, it is particularly suitable to a dialogic approach.

The *Halpern* court engaged in an extensive rebuttal of the definitional argument opposing same-sex marriage. According to this argument, same-sex couples cannot enter into marriages because, by definition, a marriage is a union between a man and a woman.[141] This argument proposes that the exclusion of same-sex couples from marriage is not discrimination and thus does not invoke the equality protections of section 15, or by analogy the Equal Protection Clause in the United States Constitution's Fourteenth Amendment.

The *Halpern* court offered four reasons to reject the definitional argument against same-sex marriage. First, the fact that a law merely reflects, rather than creates, a common distinction between people is irrelevant to whether that law is discriminatory under an equality analysis.[142] Second, the government provides rights and benefits to married couples that are denied to same-sex couples; when the government provides a benefit it must do so in a nondiscriminatory manner.[143] Third, the fact that a formal distinction between opposite-sex and same-sex couples is a part of the definition of

137. *See* Brief of Amici Curiae International Human Rights Organizations and Law Professors, *supra* note 99, at 31. Opponents of same-sex marriage in the United States have similar fears.

138. [2003] 65 O.R.3d 161 (Can.).

139. *EGALE Canada Inc. v. Canada* came before *Halpern*, but suspended its remedy for two years. EGALE Canada Inc. v. Canada (Attorney General), 225 D.L.R. (4th) 472 (2003). *EGALE* reflects many of the same arguments, but I discuss *Halpern* because it is the most thoroughly reasoned Canadian decision.

140. *Halpern*, [2003] 65 O.R. 3d ¶ 59, at 178–79.

141. *See id.* ¶ 66, at 180.

142. *See id.* ¶ 68, at 180–81.

143. *See id.* ¶ 69, at 181.

marriage itself does not mean there is no discrimination.[144] The court offered the example of the miscegenation statute in *Loving v. Virginia*:[145] If marriage were defined as a "union between two white persons" there would still be an impermissible racial distinction.[146] Fourth, the definitional argument relies on circular reasoning because it ignores the fact that the opposite-sex aspect of marriage is exactly the issue under scrutiny.[147] State courts in the United States, in cases such as *Baehr v. Lewin*[148] and *Goodridge v. Department of Public Health*,[149] have rejected the definitional argument for similar, though less extensive, reasons.[150] A dialogue with the Canadian courts on this issue provides another layer of well-reasoned support to rebut the definitional argument.

The *Halpern* court's analysis of the definitional argument is particularly helpful from a dialogic approach because it relies on general ideas of equal protection and nondiscrimination rather than specific textual provisions of Canadian law. However, the rest of the case may be harder to apply to U.S. courts. *Halpern* seems to rely on the fact that sexual orientation is a prohibited classification under Canadian case law,[151] and thus, *Halpern* applies the equivalent of strict scrutiny to the common law definition of marriage. Under the applicable level of Canadian judicial scrutiny, the objective of a challenged law must be "pressing and substantial," and the means used to further that objective must be "reasonable and demonstrably justifiable in a free and democratic society."[152] In contrast, the U.S. Supreme Court has held that sexual orientation is not a suspect classification and laws that discriminate on

144. *See id.* ¶ 70.

145. 388 U.S. 1 (1967).

146. *Id.* (quoting *Loving*, 388 U.S. 1).

147. *Halpern*, [2003] 65 O.R.3d ¶ 71, at 181.

148. 852 P.2d 44 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (1998).

149. 798 N.E. 2d 941 (Mass. 2003).

150. In both of these cases, U.S. state courts found that their state constitution guaranteed the right to same-sex marriage. The *Baehr* court reasoned that the definitional argument is circular, and pointed to *Loving* as an example of the fallacy of this argument. *See Baehr*, 852 P.2d at 61–63 (citing *Loving*, 388 U.S. at 2). Though the *Baehr* court based its decision on sex discrimination, rather than sexual orientation discrimination, its rejection of the definitional argument is analogous to *Halpern*. The *Goodridge* court noted: "[H]istory cannot and does not foreclose the constitutional question. . . . [H]istory must yield to a more fully developed understanding of the invidious quality of the discrimination." *Goodridge*, 798 N.E.2d at 958.

151. *See Halpern*, [2003] 65 O.R.3d ¶ 74, at 182 (quoting Egan v. Canada, 2 S.C.R. 513, 528 (1995)). The Supreme Court of Canada so held in *Egan v. Canada*, noting that sexual orientation is a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs." *Id.*

152. *Id.* ¶ 113, at 191.

that basis receive only rational basis scrutiny.[153] This difference in approach to sexual orientation discrimination does make it difficult to analogize to the reasoning of *Halpern*. However, the *Halpern* court's rejection of the common arguments against same-sex marriage could still be useful to a U.S. court, especially a state court whose constitution does protect against sexual orientation discrimination. Again, the dialogic approach allows the court to take into account such differences and decide whether they warrant an alternative outcome in the case at hand.

In its analysis of the ends and means of Canadian law, the *Halpern* court rejected arguments commonly raised in the United States against same-sex marriage, including two of the arguments most common in this country: that the purpose of marriage is to promote procreation and child-rearing, and that the exclusion of same-sex couples is necessary to protect marriage as a social institution.[154] The court agreed that encouraging the birth and rearing of children is a pressing and substantial goal; however, it found that promoting "natural" procreation in exclusively heterosexual marriages is not sufficiently pressing and substantial to justify the discrimination against same-sex couples.[155] The court noted that same-sex couples currently bear and raise children, both by "natural" and by other means such as adoption, surrogacy, and insemination.[156] The court found no evidence that allowing same-sex couples to marry would deter opposite-sex couples from bearing and raising children.[157] Further, it found no scientific evidence that same-sex couples are inferior parents; thus, the assumption that same-sex marriage is antithetical to child-rearing "is based on a stereotypical assumption that is not acceptable in a free and democratic society that prides itself on promoting equality and respect for all persons."[158]

The *Halpern* court asked not whether marriage itself benefits society, but whether maintaining marriage as an exclusively heterosexual union is necessary to protect the benefits that marriage provides to society.[159] Framing the argument in this way, the court concluded that marriage need not be heterosexual to benefit society: Same-sex couples seek only access to marriage, not the abolition of marriage.[160] The court therefore indicated that

153. *See* Romer v. Evans, 517 U.S. 620 (1996) (applying rational basis to a law discriminating on the basis of sexual orientation).
154. *See Halpern*, [2003] 65 O.R.3d ¶¶ 120–22, at 192–93.
155. *See id.*
156. *See id.* ¶¶ 121–22.
157. *See id.* ¶ 121.
158. *Id.* ¶ 123, at 193.
159. *Id.* ¶ 129, at 194.
160. *Id.*

the fear that including same-sex couples will destabilize the family and society is purely speculative and cannot justify the exclusion of same-sex couples and their children from the benefits of marriage.[161] The court also rejected adoption of civil unions as a "compromise," because no evidence suggested that allowing same-sex couples to marry would harm opposite-sex couples (thus, no compromise was required).[162] Finally, the court reformulated the definition of marriage as "the voluntary union for life of two persons to the exclusion of all others."[163]

2. South Africa

South Africa in 1993 was the first country in the world to prohibit discrimination by sexual orientation in their constitution.[164] In 2004, the Supreme Court of Appeal of South Africa found in *Fourie v. Minister of Home Affairs*[165] that the common law definition of marriage (as the union of one man and one woman) violated the South African Constitution.[166] In December 2005, South Africa's Constitutional Court, the highest court in the country, unanimously agreed and ordered the parliament to change the definition of marriage to a "union between two persons" within one year.[167]

As in *Halpern*, the South African Supreme Court of Appeal noted that same-sex couples are as capable of forming loving, enduring families as heterosexual couples.[168] The court firmly rejected the argument that gays and lesbians cannot procreate as a "mistaken stereotype."[169] Same-sex couples do not want to limit procreative, opposite-sex marriage; on the contrary, they wish to appreciate the same benefits that others enjoy.[170] The court acknowledged that many South Africans may disfavor the extension of marriage to same-sex couples, but it concluded that marriage must be extended to same-sex couples under the South African Constitution.[171]

The court decisions in South Africa and Canada lend support for the recognition of same-sex marriage in the United States by providing empirical

161. *See id.* ¶¶ 133–34, at 194–95.
162. *See id.* ¶ 137, at 195.
163. *Id.* ¶ 148, at 197 (quoting Lamer, C.J.C.).
164. Brief of Amici Curiae International Human Rights Organizations et al., *supra* note 98.
165. 2005 (3) BCLR 241 (SCA) (S. Afr.).
166. *Id.* ¶¶ 13–14.
167. *South Africa to Have Gay Weddings*, BBC NEWS, Dec. 1, 2005, http://news.bbc.co.uk/2/hi/africa/44877.56.stm.
168. *See Fourie*, 2005 (3) BCLR 241 (SCA) ¶ 13(g).
169. *Id.* ¶ 17.
170. *See id.* ¶ 18.
171. *See id.* ¶ 20.

evidence that the deciding court will retain its legitimacy. These international sources also stress that the exclusion of same-sex couples from marriage "undermines the values which underlie an open and democratic society based on freedom and equality."[172]

3. International Courts

The European Court of Human Rights may be particularly persuasive in same-sex marriage cases because it was cited in *Lawrence*.[173] Though the European Court of Human Rights has not found that the exclusion of same-sex couples from marriage violates article 12 of the European Convention on Human Rights, several cases support a favorable decision in that court. Probably the most important case on marriage in the European Court of Human Rights is *Goodwin v. United Kingdom*.[174]

Goodwin, decided in 2002, deals with a state restriction on the marriage of a male-to-female transsexual to a biological male.[175] The court held that this restriction violates Goodwin's rights under the European Convention. In doing so, the court recognized that "the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy" the right to marriage.[176] Because of the "major social changes in the institution of marriage" since 1950, "a test of congruent biological factors can no longer be decisive in denying" legal rights to a postoperative transsexual.[177] Though some argue that *Goodwin* leaves the requirement of heterosexuality intact because Goodwin, now a female, wished to marry a male,[178] it is also possible that the court's broad language generally undermines the sex-based definition of marriage. *Goodwin* could suggest that the

172. *Id.* ¶ 16 (quoting Tshepo L. Mosikatsana, *The Definitional Exclusion of Gays and Lesbians From Family Status*, 12 SAJHR 549, 566 (1996)).

173. An amicus brief in response to the Massachusetts Supreme Judicial Court's request for an advisory opinion on civil unions cited *Lawrence* for this proposition. Brief of International Human Rights Organizations and Law Professors, *supra* note 99, at 33.

174. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 3. The marriage restriction was one of many restrictions challenged in this case as placing restrictions on the plaintiff's ability to live as a woman.

175. *Id.*

176. *Id.* ¶ 98.

177. *Id.* ¶ 100.

178. *See* Bea Verschraegen, *The Right to Private Life and Family Life, the Right to Marry and to Found a Family, and the Prohibition of Discrimination*, *in* LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE 194, 210 (Katharina Boele-Woelki & Angelika Fuchs eds., 2003) (arguing that *Goodwin* did not change the requirement of heterosexuality in marriage, which makes the case unuseful for homosexual marriage advocates).

European Court of Human Rights may find in the future that marriage cannot be limited by sex-based characteristics or the ability to procreate.[179]

III. APPLYING THE APPROACHES TO SAME-SEX MARRIAGE

Lawyers arguing in favor of same-sex marriage will use international materials because they provide additional support for the legal recognition of same-sex marriage. The arguments an advocate could make based on the three approaches discussed in this Comment are similar to arguments based on U.S. court decisions and experiences alone. Advocates and judges that promote the consideration of international materials should focus on domestic sources, but international sources provide a useful, additional perspective when used correctly. The rest of this part will suggest how each of the three approaches would suggest using comparative materials in same-sex marriage cases.

A. Doctrinal Approach

It may be difficult to apply the doctrinal approach to a same-sex marriage challenge. There is no international consensus in the world community on the issue of same-sex marriage, though there seems to be a trend in that direction among democratic nations. A minority of the member countries of the United Nations extend legal recognition of any kind to same-sex couples: only 20 of 190 in 2003.[180] A much greater consensus existed on the decriminalization of sodomy, which was relevant to *Lawrence*. The *Dudgeon* case decided for all the members of the Council of Europe that laws prohibiting consensual sodomy violate the European Convention on Human Rights, but the European Court of Human Rights has not yet decided whether the ban on same-sex marriage in most European countries violates the Convention. If the court makes such a decision, the argument in favor of same-sex marriage, using *Lawrence* as precedent, will be much stronger.

Though an international consensus is not currently available, the growing number of countries that allow same-sex marriage refutes the argument that exclusively opposite-sex marriage is universal, much as the European

179. *See* Brief of Amici Curiae International Human Rights Organizations et al., *supra* note 98, at 42.

180. Hans Ytterberg, *All Human Beings Are Equal, But Some Are More Equal Than Others—Equality in Dignity Without Equality in Rights?*, *in* LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE, *supra* note 178, at 1, 6. However, one may be able to argue that an emerging consensus among European nations in favor of same-sex marriage provides some sort of legal recognition to same-sex couples. *See supra* Part II.A.

Court of Human Rights decisions cited in *Lawrence* refuted *Bowers*'s characterization of sodomy. The *Lawrence* Court seemed to rely on the emerging national consensus on sodomy and used the international examples to confirm that trend. A national consensus on same-sex marriage, however, is far less likely. The trend among the states is more in the direction of expressly excluding same-sex couples from marriage, and the doctrinal approach to comparativism is not likely to be useful for advocates of same-sex marriage in the near future. But potentially, the lessons learned by examining the international materials discussed above will open the door to more modest advances, such as registered partnerships or civil unions, where most if not all of the benefits of marriage are conferred onto same-sex couples.[181]

B. Empirical Approach

From an empirical perspective, the experiences of other countries that have legalized same-sex marriage show that the potential harm to society from changing marriage is minimal. The countries that have legalized same-sex marriage have not experienced an increase in the legalization of other sexual behaviors or types of marriage, such as polygamy. This empirical evidence also shows that judicial legitimacy has been maintained where court decisions required the recognition of same-sex marriages, such as in Canada. Since these court decisions are recent, it is possible that there is not yet enough data to make such a determination. One could also argue that South Africa and Canada are too different culturally or legally from the United States for their experiences to be relevant. But all three countries have experienced debate on the issue of same-sex marriage, with passionate arguments from all sides. Currently, the experiences of other nations with same-sex marriage, combined with the domestic evidence from Massachusetts, suggest that the slippery slope argument has little validity. Further, the examples of the Netherlands, Belgium, Canada, and South Africa reveal that the definition of marriage as a union of one man and one woman is neither universal nor necessary.[182]

181. Of course, the specter of "separate-but-equal" makes such a compromise unsavory. *See* Brief of International Human Rights Organizations and Law Professors, *supra* note 99, at 13–14.

182. *See Inching Down the Aisle*, *supra* note 120, at 2027; *see also* William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 660 (2000).

C. Dialogic Approach

Advocates of same-sex marriage can probably make the most detailed and useful arguments from a dialogic approach; but, as discussed before, this approach is the most problematic.[183] The reasoning of foreign courts, especially Canadian courts, refutes the definitional argument opposing same-sex marriage and provides rebuttals to the arguments that marriage is about procreation and child-rearing to the exclusion of same-sex coupling. Foreign courts also provide arguments generally in favor of recognizing sexual orientation as a suspect classification.[184] This approach is more useful for an equal protection analysis, since foreign courts have used equality jurisprudence similar to the United States Constitution's Equal Protection Clause to rule in favor of same-sex marriage. A potential problem with the application of the Canadian or South African courts' reasoning, however, is that sexual orientation is not a suspect classification under United States federal constitutional law. Yet this limitation need not preclude using the reasoning of these international courts more generally to refute common arguments used by opponents of same-sex marriage.[185]

The national trend against allowing same-sex marriage poses the greatest obstacle to a due process challenge because it suggests an emerging awareness in favor of limiting marriage to opposite-sex couples. International materials, on the other hand, might be more persuasive and helpful to an equal protection analysis because of the ease of applying the equality-based reasoning of foreign courts using the dialogic approach.

CONCLUSION

This Comment discusses three approaches to using international materials in U.S. constitutional decisions. The doctrinal approach looks to an international consensus when constitutional doctrine, such as the due process "implicit in the concept of ordered liberty" test, makes that consensus relevant. The empirical approach looks to foreign examples for evidence of how a rule works in practice. Finally, courts applying the

183. *See* Part.I.C. *supra.*

184. *See generally supra* Part II.B.

185. Of course, this limitation does not apply to state courts in states with constitutions that protect against sexual orientation discrimination. Advocates can also use international examples to argue in favor of recognizing sexual orientation as a suspect classification under the federal Constitution.

dialogic approach cite to foreign and international court decisions in order to engage in an international dialogue among high courts.

A doctrinal approach will not be very helpful because of the lack of international or national consensus on the issue. *Lawrence* provides fairly strong support for an empirical approach to using international materials: The experiences of countries like the Netherlands, Belgium, South Africa, and Canada provide evidence that same-sex marriage will not have any catastrophic social consequences in the United States. While the dialogic approach would probably result in the best arguments favoring the U.S. recognition of same-sex marriage, and thus would be most helpful for advocates, courts likely will be skeptical of this approach because it is highly susceptible to the label of judicial activism.

Justice Breyer has stressed that lawyers are very important to getting more comparative materials into domestic decisions, but "the lawyers will do so only if they believe the courts are receptive. By now, however, it should be clear that the chicken has broken out of the egg. The demand is there."[186] Advocates should take advantage of this growing demand for comparative materials; by doing so, lawyers will help to increase the demand for and relevance of international materials. In comparative materials, same-sex marriage advocates not only have an additional resource to use in support of their cases, but also a means to encourage a broader perspective on sexual orientation and marriage in the courtroom.

186. Breyer, *supra* note 38, at 267.

***