Canada is a Blue State: Global Jurisprudence and Domestic Consciousness in American Gay Rights Discourse

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> Over the past century we have seen many changes in American culture. We have witnessed an explosion of new travel opportunities, access to information and advances in medicine. Certainly social norms have shifted. We have made progress, in the truest sense, such as recognizing the fundamental human rights of all people no matter their color or creed. And we have also made egregious regressions such as legalizing the aborting of unborn children. Even in this advanced age, we must continue to wage battles against injustices. … If we do nothing and allow the courts to re-define marriage, State and Federal governments will soon have little or no authority to ultimately restrain any imaginable form of marital contract between couples and groups of people and even animals.[1]

For conservatives like Rep. Todd Tiahrt of Kansas, the embrace of human rights as a beneficial product of global exchange is endangered by its own siren-like appeal, necessitating a restriction of the international flow of legal ideas. Despite this alarm, American courts and legal culture have often been strict gatekeepers in an emerging scheme of global jurisprudence.[2] On the one hand, American civil rights

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1 U.S., *Cong. Rec.*, vol. 150, at E1858 (30 September 2004) (Rep. Todd Tiahrt, Kansas).

2 I use global jurisprudence in this article to differentiate my focus from what Anne-Marie Slaughter (see Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harv. Int'l L.J. 191 at 192) and others have called an emerging, self-conscious 'global community of courts'. The idea of a global community is frequently used to distinguish the exchange of legal ideas from the imperial and colonial integration of jurisprudence, a shift from colonial and imperial monologue to a dialogic community of equal participants in the application of human rights law and 'constitutional cross-fertilization' (the term is Slaughter's). While for some this is a shift in kind from earlier forms of international and global domination, I understand the potential for a continuation of power in other forms, and even a renewed need, in Hannah Buxbaum's words, to 'conform to a standard imposed by the leading powers. In this sense, … courts in some countries might view their task not as joining in the creation of a global community, but rather as obtaining the approval of the states that lead the global community' (Hannah L. Buxbaum, 'From Empire to Globalization ... and Back? A Post-Colonial View of Transjudicialism' (2004) 11 Ind. J.

law and the social movements that have embraced it have been emulated abroad in areas such as disability policy[3] and gay rights, setting the framework for an international human rights law. For example, the legal acknowledgement of same-sex marriage that emerged in Hawaii in 1993[4] was followed avidly by gay rights groups in Taiwan, Europe, Canada and elsewhere, and the first American jurisdiction to permit same-sex marriage (Massachusetts in 2003)[5] was cited as precedent recently by South Africa's Supreme Court of Appeal in its judgment that 'the common law concept of marriage [be] developed to embrace same-sex partners.'[6] Although likely diminishing in international influence due to a conservative infatuation with originalism, a shrinking docket, and a jurisprudential move away from the recognition of group rights,[7] the United States Supreme Court continues to inspire a 'vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law.'[8] At home, one American gay rights organization calls itself the Human Rights Campaign in recognition of this broad appeal to a global form of citizenship.

Global Legal Stud. 183 at 185). In short, global jurisprudence attempts to bring back into the discussion of human rights law a moment of disciplinary power that normalizes identity in addition to the more common attention to a juridical moment of enforcing norms of behavior. In this respect, Cindy Patton has speculated that the interest in promoting gay rights that has infused the DPP in Taiwan should be seen less as progressive and more as a conservative attempt to discipline sexuality, as well as encourage the global flow of money and respect on which Taiwan's precarious sovereignty depends (Cindy Patton, 'Stealth Bombers of Desire: the Globalization of "Alterity" in Emerging Democracies' in Arnaldo Cruz-Malavé & Martin F. Manalansan IV, eds., *Queer Globalizations: Citizenship and the Afterlife of Colonialism* (New York: New York University Press, 2002) at 195). In this article, I draw attention to the ways this conformity associated with the discourse of sovereignty also operates within domestic spheres.

3 Katharina C. Heyer, 'The ADA on the Road: Disability Rights in Germany' (2002) 27 Law & Soc. Inquiry 723.

4 *Baehr v. Lewin,*74 Haw. 530, 852 P.2d 44 (1993).

5 *Goodridge v. Department of Public Health of Massachusetts,* 440 Mass. 309, 798 N.E.2d 941 (2003) [*Goodridge*].

6 *Fourie and Another v. Minister of Home Affairs and Others*,[2004] JOL 13275 at para. 49 (S.C.A.).

7 For a discussion of these and other reasons, see Claire L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 Tulsa L.J. 15.

8 Anthony Lester, 'The Overseas Trade in the American Bill of Rights' (1988) 88 Colum. L. Rev. 537 at 541. See also Helen Stacy, 'Relational Sovereignty' (2003) 55 Stan. L. Rev. 2029 at 2051ff for a discussion of the ethical obligations attendant upon this influence.

On the other hand, with several notable exceptions (especially in the area of gay rights that I address in this article),[9] American judges 'have proven themselves largely resistant to arguments based on international human rights law.'[10] With a twentieth century domination of international relations as context, American judges frequently have taken the nation as sovereign, and law as a very sign of its sovereignty. For example, the death penalty has quickly lost international favour, and treaties among nations, declarations of the United Nations, and international attempts to avoid extradition to the United States in capital cases isolate the anomaly of American capital punishment jurisprudence.[11] Yet as Austin Sarat suggests, popular and judicial attachments to capital punishment are, possibly, 'the ultimate measure of sovereignty,' and state killing 'necessary to demonstrate that sovereignty can reside in the people.'[12]

In this article I look to similar constructions of popular sovereignty that surround gay rights, and same-sex marriage in particular, in an effort to restrain the flows and harness the political potential of global jurisprudence. As Tiahrt's remarks make clear, what is distinct in these legal and political arenas from that of capital punishment is that this sovereignty is being constructed through an overt

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9 e.g. *Lawrence v. Texas,* 123 S.Ct. 2472 at 2483, 539 U.S. 558 (2003), Kennedy J [*Lawrence*]: 'Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. ... The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries;' *Goodridge*, *supra* note 5 at 313 n. 3 citing *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, and *EGALE Canada, Inc. v. Canada (A.G.)* (2003), 13 B.C.L.R. (4th) 1 (C.A.).

10 Reem Bahdi, 'Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts' (2002) 34 Geo. Wash. Int'l L. Rev. 555 at 556. See also L'Heureux-Dubé, *supra* note 7.

11 John Quigley, 'Pressure from Abroad Against Use of Capital Punishment in the United States' (2001) 8 ILSA J. Int'l & Comp. Law 169. Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the American Agenda* (Cambridge: Cambridge University Press, 1986). See also former United States Supreme Court Justice William Brennan's acknowledgement of this international pressure in his dissent in *Stanford v. Kentucky,* 492 U.S. 361at 384 (1989): 'the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society.'

12 Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton, NJ: Princeton University Press, 2001) at 17; Austin Sarat & Nasser Hussain, 'On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life' (2004) 56 Stan. L. Rev. 1307 at 1313ff. See also Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998).

opposition to judicial authority, a suspicion of prevailing legal reasoning, and a renovation of the proper role for rights. While many of these political narratives are propelled by a fear of global jurisprudence and caution about the human rights language that infuses it, I argue here that the structure of global jurisprudence continues to haunt this new sovereignty language in complex and productive ways, making this area of policy ripe for analysis. What this sovereign framework can tell us about the role of human rights and global jurisprudence for governance of sexuality, the family, and other emergent areas of legal attention is the motivating question for this article.

I SEXUAL GOVERNANCE AND GLOBAL JURISPRUDENCE

In *Bowers v. Hardwick*, decided in 1986, the United States Supreme Court's acceptance of the rights of states to criminalize same-sex sodomy was reinforced by what Burger CJ noted to be the 'ancient roots' of these proscriptions anchored to the bedrock of Western civilization, Judeo-Christian moral and ethical standards, and the inherited common law.[13] This foundation provided authority for a constitutional sovereignty over the regulation of moral behaviour.[14] In 2003, the Court's repudiation of this doctrine in *Lawrence v. Texas* took explicit note of how temporally and spatially limited its earlier reasoning had been. The earlier opinion had overlooked a recent history of liberalization of sodomy laws in England and in the European Court of Human Rights that together challenged the monolithic view of Western civilization that Burger CJ had cited. The Court also cited approvingly an amicus brief from the former United Nations High Commissioner for Human Rights, Mary Robinson, and several allied human rights organizations that urged the Court to 'pay decent respect to these opinions of humankind'[15] and numerous other legal reforms explicitly rejecting the logic of *Bowers*[16] that had been subsequently enacted in countries with commensurable legal traditions. Temporally, the Court's opinion acknowledged that 'American laws targeting same-sex couples did not develop until the last third of the 20th century,'[17] a period that historians and one cited amicus brief noted to be dominated by the domestic reflection of Cold War internationalism that had made gays criminally suspect as threats to national security.[18]

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13 478 U.S. 186 at 192 (1986), Burger CJ, concurrence [*Bowers*].

14 See Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, N.J.: Princeton University Press, 2002) at 175-6.

15 Mary Robinson *et al.*, brief submitted in *Lawrence*, *supra* note 9, at 2.

16 The brief cited twenty-four non-American cases, nine treaties, and five constitutions that bolstered this argument.

17 *Lawrence*, *supra* note 9 at 2479, Kennedy J.

18 Professors of History *et al.*, brief cited *ibid.* at 2478. Stacy Braukman,

This legal reasoning suggests that the imagination of legal sovereignty over some aspects of adult sexuality was already global by the time of *Bowers*: first, 'civilized' nations could be seen to hold divergent opinions on these matters, and, second, the construction of a domestic 'tradition' for regulating these matters had been thoroughly saturated by international events such as the Cold War. This awareness exemplifies the ability of globalization to 'radically [reconfigure] relations among nations, undoing the old center-periphery understanding of world relations'[19] and in so doing melt away or modify the spaces, places, and temporalities through which 'the path of the law'[20] can be seen to unwind.

By calling into question the spatial locations of civilization (seen in some variants of human rights discourse as 'The West against The Rest') that is often taken to presume cultural integrity at the level of the nation state, this jurisprudence of sexual liberty also upsets common assumptions about the homogeneity of culture.[21] As a product of complex global forces, culture is understood to be more dependent upon human choice and political relation, a hybrid of domestic cultural differences based on migration, religious diversity, and international institutions rather than an opaque and tightly bounded 'tradition'. Thus, the *Lawrence* Court acknowledges the broad condemnation of sodomy 'shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.'[22] However, its assumption of cultural diversity implies that these sources of authority

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'"Nothing Else Matters But Sex": Cold War Narratives of Deviance and the Search for Lesbian Teachers in Florida' (2001) 27 Feminist Studies 553; Robert D. Dean, *Imperial Brotherhood: Gender and the Making of Cold War Foreign Policy* (Amherst: University of Massachusetts Press, 2001); John D'Emilio, 'The Homosexual Menace: The Politics of Sexuality in Cold War America' in Kathy Lee Peiss *et al.*, eds., *Passion and Power: Sexuality in History* (Philadelphia: Temple University Press, 1989) 226; David K. Johnson, *The Lavender Scare: the Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004). All but Johnson are cited in the brief.

19 Austin Sarat & Thomas R. Kearns, *Human Rights: Concepts, Contests, Contingencies* (Ann Arbor: University of Michigan Press, 2001) at 13.

20 The term is from Mr Justice Benjamin Cardozo who famously saw the fourth dimensional 'path of the law' as a temporal flow in which 'history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future'(Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1971) at 53).

21 *Supra* note 19 at 15 ff. See also Rosemary Coombe, 'Contingent Articulations' in Austin Sarat & Thomas R. Kearns, eds., *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 1998) 21; Sally Merry, 'Legal Pluralism' (1988) 22 Law & Soc'y Rev. 869.

22 *Lawrence, supra* note 9 at 2480, Kennedy J.

are binding only on individuals and do not inform majority obligations: 'For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.'[23]

The loss of criminal sanction, and with it the potential criminalization of gay desire, is not trivial and serves as a profound limitation on political and legal power.[24] Following Foucault and others,[25] these separated powers reveal a common composition of both juridical and disciplinary elements. As Wayne Morgan explains,

> *Juridical* power refers to the enforcement of norms of behaviour and *disciplinary* power refers to the normalizing, production and colonization of forms of identity. As Foucault discussed, legal institutions are often taken to be the paradigm of juridical power: the location of prescription and enforcement. But, increasingly, legal institutions adopt mechanisms of disciplinary power to better *know* and regulate the subject.[26]

By cloaking the body within a veil of privacy, it becomes more difficult to know and regulate homosexual and heterosexual difference through the law. For example, it puts an end to the Cold War mechanism by which some domestic security threats were named and regulated

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23 *Ibid*.

24 Janet Halley has argued that proscriptions against sodomy have reached far into the symbolic and cultural disadvantage that lesbians, gays and queers have been made to suffer. 'The criminalization of sodomy is crucial to the ordering of sexual-orientation identities, particularly to the subordination of homosexual identity and the superordination of heterosexual identity.' Janet E. Halley, 'Reasoning about Sodomy: Act and Identity in and after *Bowers v. Hardwick*' (1993) 79 Va. L. Rev. 1721 at 1731.

25 Michel Foucault, *Discipline and Punish: the Birth of the Prison*, 1st American ed. (New York: Pantheon Books, 1977); Michel Foucault, *The History of Sexuality: An Introduction*, vol. 1 (New York: Vintage Books, 1980). See also Marianne Constable, 'Sovereignty and Governmentality in Modern American Immigration Law' (1993) 13 Studies in Law, Politics and Society 249; Michael Dillon, 'Sovereignty and Governmentality: From the Problematics of the "New World Order" to the Ethical Problematic of the World Order' (1995) 20 Alternatives 323.

26 Wayne Morgan, 'Queering International Human Rights Law' in Carl Stychin & Didi Herman, eds., *Sexuality in the Legal Arena* (London: Athlone Press, 2000) 208 at 212.

through the policing of vice and the proof of criminal conviction.[27] And, to the extent that this domestic limitation of governance is justified by an international human rights regime, it demonstrates the ways in which national boundaries are made more porous through the restriction of disciplinary mechanisms.

However, disciplinary power over the gay subject is not completely eliminated by global jurisprudence as the concurrent controversy over same-sex marriage suggests. Within gay, lesbian and queer social movements there has been a brisk debate over the value of marriage as a political goal, with some eyeing it as a prelude to, or realization of, complete citizenship for sexual minorities[28] and others questioning the heteronormative disciplinary matrix of marriage as well as the forces of conformity that devolve from citizenship itself.[29] While these pressures of conventionality hold a potentially global character, especially where same-sex spousal recognition facilitates the privatization of social insurance and other costs to the benefit of international competitiveness,[30] it has been those conservatives alarmed at the growing prospect of same-sex marriage who have made this linkage to internationalism overt.

The conservative fear of global jurisprudence is linked to the anti-sodomy decision in direct and oblique ways that have magnified the importance of same-sex marriage. Although same-sex marriage is not explicitly invoked in the *Lawrence* Court's refusal to consider majority morality as constitutionally relevant to liberty rights, Scalia J's dissent does intimate a direct relationship, and the Massachusetts High Court cited *Lawrence* nine times in its equal protection argument for same-sex marriage.[31] Political opposition to same-sex marriage predated *Lawrence* and often eclipsed the concern over sodomy;[32] while states were

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27 Johnson, *supra* note 18.

28 Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality*, 1st Vintage Books ed., (New York: Vintage Books, 1996); Evan Wolfson, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry* (New York: Simon & Schuster, 2004).

29 Valerie Lehr, *Queer Family Values: Debunking the Myth of the Nuclear Family* (Philadelphia: Temple University Press, 1999); Michael Warner, *The Trouble With Normal: Sex, Politics and the Ethics of Queer Life* (New York: Free Press, 1999).

30 Susan B. Boyd & Claire F.L. Young, '"From Same-Sex to No Sex"?: Trends Towards Recognition of (Same-Sex) Relationships in Canada' (2003) 1 Seattle J. Soc. Just. 757.

31 Madame Justice O'Connor's concurrence suggests same-sex marriage may not be necessarily implicated in the Court's holding (*Lawrence*, *supra* note 9 at 2488). Mr Justice Scalia in his dissent does make this argument (*Lawrence, supra* note 9 at 2498). See also *Goodridge, supra* note 5.

32 Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the*

actively repealing their sodomy statutes prior to *Lawrence*, many states and the federal government were busy enacting barriers to same-sex marriage. Nonetheless, Scalia J's dissent and the Massachusetts decision became urtexts for a renewed opposition to human rights and global jurisprudence, which are now implicated in an American understanding of gay rights.[33]

In what follows, I examine several aspects of this renewed conservative opposition to same-sex marriage and gay rights in recent debates of the American Congress.[34] My goal is to explore the ways in which conservative opposition to internationalism attempts to recreate a popular sovereignty dedicated to the preservation of heterosexual entitlements. Since *Lawrence,* these politics have involved a ventured federal constitutional amendment against same-sex marriage championed by President George W. Bush, as well as the enactment of numerous state-wide barriers. The theoretical importance of this conservative sovereign construction reaches to the ways in which it attempts to exploit and resolve a predicament inherent within liberal democracies. As the political philosopher Seyla Benhabib frames this dilemma,

> [M]odern liberal democracies are self-limiting collectivities that at one and the same time constitute the nation as sovereign while proclaiming that sovereignty derives its legitimacy from the nation's adherence to fundamental human rights principles. 'We, the people,' is an inherently conflictual formula, containing in its very articulation the constitutive dilemmas of universal respect for human rights and particularistic sovereignty claims.[35]

Politics of Civil Rights (Ann Arbor: University of Michigan Press, 2002).

33 See the federal *Defense of Marriage Act* [DOMA] Pub. L. 104-199, 110 Stat. 2419. Since Massachusetts approved same-sex marriage, thirteen states have modified their constitutions to prevent similar developments. Presently, forty-two states have statutory language defining marriage and seventeen states have similar constitutional language. Only seven states have no policy response to same-sex marriage.

34 I rely upon debates over the *Marriage Protection Amendment* that took place in 2004 for many of the examples that follow. These debates are useful sources for this new oppositional discourse even though the Amendment failed, and was certain of failure at the time of the debates. Because this issue was highly politicized by the support of the President on behalf of his campaign, and because it coincided with eleven state-wide constitutional amendments in states critical to the President's victory, the debates remain a good source for analyzing the central currents and fault-lines in this politics.

35 *Supra* note 14 at 177. See also Bruce A. Ackerman, *We the People*

What makes this dilemma more problematic in the case of sexual rights is both the conservative necessity to isolate the impact of legal precedent that has supported gay rights on the basis of human rights, and the need to rebuild sovereignty without the disciplinary mechanisms now inhibited by an expanded private sphere. Both the juridical and the disciplinary power of law are thus limited in their utility to these politics.

This formulation of public sovereignty is, therefore, unlike that which emerges around capital punishment that inherently valorizes law and its deployment of the ultimate violence of the state.[36] The lack of this state power invites religious authority, 'traditionalism' of various kinds, and other social languages to step into the breach. I suggest below that it also permits a modification and a valorization of civil and human rights that disciplines the global flow of legal culture.

II A SOVEREIGN INTERNATIONALISM

In April 2004, Rep. Ron Paul of Texas cited the *Lawrence* decision as he introduced in Congress the *American Justice for American Citizens Act* in an effort to curb 'transjudicialism'. This was

> a new legal theory that encourages judges to disregard American law, including the United States Constitution, and base their decisions on foreign law. ... The Constitution was ordained and ratified by the people of the United States to provide a charter of governance in accord with fixed and enduring principles, not to empower federal judges to impose the transnational legal elites' latest theories on the American people. ... [T]he drafters of the Constitution gave Congress the power to regulate the jurisdiction of federal courts precisely so we could intervene when the federal judiciary betrays its responsibility to uphold the Constitution and American law.[37]

Although the Act did not gain significant support, the charge that judicial elites have violated the proper boundaries of American popular

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(Cambridge, Mass.: Belknap Press of Harvard University Press, 1991).

36 Foucault writes, 'For a long time, one of the characteristic privileges of sovereign power was the right to decide life and death. … The right … was in reality the right to *take* life or *let* live. Its symbol, after all, was the sword.' Michel Foucault, *The History of Sexuality: An Introduction*, *supra* note 25 at 135-6.

37 U.S., *Cong. Rec.*, vol. 150, at E512 (2004). Rep. Paul may have been referring to scholarship whose genealogy can be found in Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 U. Rich. L. Rev. 99. See also Bahdi, *supra* note 10.

sovereignty has resonated throughout conservative attempts to limit gay rights.[38]

As the quotation above suggests, these conservative arguments against global jurisprudence engage an ambivalent comprehension of legal and political culture. On the one hand, culture is understood to be pluralist whether projected into an international set of spaces, or domestically where elite judicial culture can be seen to diverge from that of 'the American people'. In its more progressive version, legal pluralism adheres to the notion that civil and human rights are immaterial and flexible; the protection of cultural difference for one group does not unduly impinge on the democratic rights enjoyed by others.[39] Supporters of same-sex marriage have relied upon this understanding of legal pluralism when they voice their incredulity that their right to marry has significant consequence for others.[40]

Mr Justice Scalia's dissent in *Lawrence* gestures towards a very different construction of political and legal culture when he claims that the Court majority has intruded into a 'culture war'[41] over attitudes towards the appropriate public and private norms of sexuality, a sign 'that [it] is impatient of democratic change.'[42] The metaphor of war sharpens the significance of pluralist difference, and the related idea that jurists play a role antagonistic to democracy insinuates that they contribute to this unrest, perhaps as proxies for subversive elites. For this reason, it is common within conservative discourse to hear concern about 'judicial tyranny': 'The question of the future of marriage in

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38 While the Christian right has contributed to this critique of transjudicialism, some have also been quite involved internationally in restricting human and civil rights. See Doris Buss & Didi Herman, *Globalizing Family Values: the Christian Right in International Politics* (Minneapolis: University of Minnesota Press, 2003).

39 See Jonathan Goldberg-Hiller & Neal Milner, 'Rights as Excess: Understanding the Politics of Special Rights' (2003) 28 Law & Soc. Inquiry 1075; Cindy Patton, 'Queer Space/God's Space: Counting Down to the Apocalypse' (1997) 9(2) Rethinking Marxism 1 at 7ff.

40 In a slightly humorous vein, Rep. Barney Frank of Massachusetts responded to a colleague's argument that gay rights threatened 'traditional marriage' by saying, 'I am a gay man and I have presided over the dissolution of none. So I guess I do not feel quite as guilty about assaulting marriage as some of you would like me to feel. I am sorry Rush Limbaugh has been divorced three times, but it ain't my fault; and it is not the fault of any of my friends. That is the issue' (U.S., *Cong. Rec.*, vol. 150, at H7908 (2004)).

41 Mr Justice Scalia had called this a *Kulturkampf* in his dissent in *Romer v. Evans,* 517 U.S. 620 at 636 (1996).

42 *Lawrence, supra* note 9 at 2497.

America has been forced upon us by activist judges …;'[43] 'unelected judges … want to reshape our country, even if they destroy democracy in the process. ... They are attacking the principles of democracy and undermining our republican form of government.'[44] The idea that political majorities are vulnerable, that they are the actual and authentic victims of a gay rights agenda, rhetorically depicts the majority mistreated as the true minority, inverting the rights-based notion of injury and the duty of protection. The accusation that rights claimants are the true oppressor materializes rights while it loosely sutures a plural culture into a more common set of norms reinforced by the rhetoric and activities (such as voting for amendments) of popular sovereignty.[45]

If culture is pluralist in one accounting, it is perhaps contradictorily imagined as unitary through the play of international actors commonly striving for national security. Where global jurisprudence renders national boundaries more fluid and explains this fluidity through the cultural cosmopolitanism of governmental and legal elites, conservative discourse frequently identifies a limited legality as a bulwark of national security. Rejecting same-sex marriage will generate national strength: 'strong families foster strong morals and a strong Nation to go with it,'[46] while giving in to those demanding rights to marry will weaken the union: 'if you destroy marriage as the definition of one man and one woman creating children so that we can transfer our values to those children and they can be raised in an ideal home, this country will go down.'[47] The threat of gay rights provides the context for the claims of national defence that displaces judicial with legislative control of the issue (for example, '*Defense* of Marriage Act', 'Marriage *Protection* Amendment').

This contemporary conservative discourse also has an external side, reimagining rights advances elsewhere as signals warning against the path of national decline. One recent element of this debate in the United States Congress has been a sociological war on Scandinavia and Europe who have enacted same-sex marriage and civil unions. '[T]he experience of our neighbours in Europe has been that when we change the definition of marriage, we begin the decline and ultimately the abolition of marriage as we know it;' '[m]arriage in Scandinavia and in

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43 U.S., *Cong. Rec.*, vol. 150, at H7890 (2004) (Rep. Tom Delay of Texas).

44 U.S., *Cong. Rec.*, vol. 150, at H7915 (2004) (Rep. Ernest Istook of Oklahoma).

45 I have addressed this issue of materialization at further length in *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights*, *supra* note 32; Goldberg-Hiller & Milner, 'Rights as Excess: Understanding the Politics of Special Rights', *supra* note 39.

46 U.S., *Cong. Rec.*, vol. 150, at H903 (2004) (Rep. Kevin Brady of Texas).

47 U.S., *Cong. Rec.*, vol. 150, at H7924 (2004) (Rep. Delay).

Holland is dying since the advent of same-sex marriage ….'[48] In these and similar comments, the defence of marriage through the opposition to rights and their return through a global jurisprudence eliminates social obstacles to important national projects presumed to follow the sagging statistical curve of marriage rates.

The rhetorical reduction of social change to national identities has several consequences. For one, it contributes to the argument that progressive rights-based social movements and their judicial champions are simply wrong. But it also attempts to make up for this deficit of truth with a realist model of international relations. Here, as Richard Ashley has argued, national sovereignty serves as an epistemological ground:

> The sign of 'sovereignty' betokens a rational identity: a homogeneous and continuous presence that is hierarchically ordered, that has a unique centre of decision presiding over a coherent 'self,' and that is demarcated from, and in opposition to, an external domain of difference and change that resists assimilation to its identical being … [Sovereignty is invoked] as an originary voice, a foundational source of truth and meaning … that makes it possible to discipline the understanding of ambiguous events and impose a distinction … between what can be represented as rational and meaningful (because it can be assimilated to a sovereign principle of interpretation) and what must count as external, dangerous, and anarchic.[49]

'Common sense' reinforces a rational and meaningful national order, and judicial meddling with sexual rights can be opposed on the tautological basis that 'marriage is … what it is;'[50] 'the definition of marriage seems to … the vast majority of the American people, as a matter of common sense and social reality.'[51] This self-evident production of truth also reinforces the ahistorical idea that civilized marriage has always been as it is now. Together, these arguments set the stage for a reformulation of cultural pluralism as an accounting of differences that must be rejected as dangerous and anarchic, or

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48 U.S., *Cong. Rec.*, vol. 150, at H7919, H7912 (2004) (Rep. Mike Pence of Indiana). See also extension of remarks by Rep. Marilyn Musgrave of Colorado, U.S., *Cong. Rec.*, vol. 150, at E1912 (2004).

49 Richard Ashley, 'Untying the Sovereign State: A Double Reading of the Anarchy Problematique' (1988) 17:2 Millennium: Journal of International Studies 227 at 230.

50 U.S., *Cong. Rec.*, vol. 150, at S7871 (2004) (Sen. Wayne Allard of Colorado).

51 U.S., *Cong. Rec.*, vol. 150, at H7890 (2004) (Rep. Delay).

subsumed under the timeless and contour-free truth that 'we are a Christian Nation.'[52] The older notion of *gays* embodying danger and social anarchy is thereby reinforced with a contemporary belief that *gay rights* pose a palpable threat to the nation.

The conservative reformulation of global governance from an emerging model of relational sovereignty in which communicative norms encourage mutual accommodation through jurisprudence[53] to one of realist sovereignty where truth emerges as the expression of national communities guarded by security-minded states helps to deflect judicial authority and the impact of human rights language, but it paradoxically remains cognizant of internationalism in its insistence on popular sovereignty against the infiltrating threat of gay rights. This irony is most visible in the new cartographies that such realism reinvents to explain away internal cultural opposition. If there is a global cold war against alien values externally, so has there become a cold war within.

Federalism is one idiom for advancing this perspective, framing states' traditional authority over marriage as judicial acts of aggression and hostility to the collective when they act for same-sex marriage: 'State court challenges in Massachusetts or Vermont or Maryland may seem well and good to those concerned with the rights of States to determine most matters ... [t]hese challenges, however, have spawned greater disrespect, even contempt, for the will of States than any of us could have predicted.'[54] Even though marriage has been 'federalized' by the *Defense of Marriage Act*, the fear of judicial tyranny impels the need for state-by-state vigilance in the form of state-wide constitutional amendments, as well as a commitment to renewed federal protection. As President Bush framed the need for a federal amendment against same-sex marriage, 'there is no assurance that the Defense of Marriage Act will not itself be struck down by activist courts. ... Furthermore, even if the Defense of Marriage Act is upheld, the law does not protect marriage within any state or city.'[55] The cultural and judicial war between the states is expanded beyond state judiciaries through a popular cartography of more urban, progressive and non-religious 'blue' states opposed to the more spacious rural and God-fearing heartland of

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52 U.S., *Cong. Rec.*, vol. 150, at H7894 (2004) (Rep. Roscoe Bartlett of Maryland).

53 Helen Stacy, 'Relational Sovereignty' (2003) 55 Stan. L. Rev. 2029. See also Iris Marion Young, 'Two Concepts of Self-Determination' in Sarat & Kearns, *supra* note 19.

54 U.S., *Cong. Rec.*, vol. 150, at S7872 (2004) (Sen. Allard).

55 The White House, News Release, 'President Calls for Constitutional Amendment Protecting Marriage' (24 February 2004), online: The White House <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.

'red' states.[56] Here, blue areas contain a minority of cosmopolitan elites more aligned with international values. One popular cartoon following the election of 2004 made this stark by mapping blue states into 'The United States of Canada' and red states as 'Jesusland', poking fun at the foreign character of progressive gay rights as well as the religious provincialism of their opponents. A recent *New York Times* headline, 'The Blue-State Nation to the North',[57] says it all: Canada, with its progressive legal culture, is a relevant national aspiration for blue states.

The construct of popular sovereignty entangles opposition to marriage rights for gays and lesbians within this same contradictory consciousness about the sanctity of national integrity (with nation writ as small as necessary) and a global engagement with a rights culture inspired by American developments. The metaphors of cold war—internationally and domestically—deepen the meaning and materialize pluralist division while they raise the spectre of authentic American identities able to resist this international reflection. It is what Thomas Frank has recently called 'the glamour of authenticity, combined with the narcissism of victimhood,'[58] a sense of vulnerable security challenged by a rights culture imagined as foreign and aggressive, that gives these identities their power to cement a new sovereignty. Although this sovereignty is opposed to perceived judicial excess, the narcissism of victimhood also produces a keen sense that rights culture should not be flushed entirely, as rights talk provides one of the most familiar languages of self-recognition. I have argued elsewhere that civil rights provides a set of legal images for legitimating the claim of authentic victimhood by majorities opposed to the rights claims of gays and others.[59] But it is also apparent from the recent debates that human

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[56] This distinction between territorially smaller blue states and the larger red states who voted for George W. Bush in 2000 was likely popularized as a way of legitimating Bush's installation as President without an electoral majority. Popular cartographic images from his 2004 reelection include county by county coding for Presidential vote, demonstrating the small territory of urban areas with progressive inclinations. Progressive attempts to defeat this cartography have suggested the possibility of a singular purple nation. See Jonathan Alter & Andrew Romano, 'The Audacity of Hope' *Newsweek* 145:1 (3 January 2005) 75.

[57] Clifford Krauss, 'The Blue-State Nation to the North' *The New York Times* (13 June 2004) s. 4, 4.

[58] Thomas Frank, *What's the Matter with Kansas?: How Conservatives Won the Heart of America*, 1st ed. (New York: Metropolitan Books, 2004) at 157.

[59] *Supra* note 32; Jonathan Goldberg-Hiller, '"Subjectivity is a Citizen": Representation, Recognition, and the Deconstruction of Civil Rights' (2003) 28 Studies in Law, Politics and Society 139. See also Cindy Patton, 'Tremble, Hetero Swine!' in Michael Warner, ed., *Fear of a Queer Planet: Queer Politics and Social Theory* (Minneapolis: University of Minnesota Press, 1993) at 143.

rights does something similar. As the epigraph to this article reveals, the conservative public commitment to human rights engages a limited universalism while preserving a sense that some forms that these rights take (such as rights to abortion or to same-sex marriage) are excessive and antithetical to the same regime of civilization that has spawned them. This argument raises an important paradox not easy to settle within a growing global jurisprudence: human rights must ultimately preserve self-determination, and that is exactly what is imagined to be at stake for these conservative majorities opposed to gay rights.

III CONSEQUENCES

The American political and social struggles allied against the authority of global jurisprudence are being ironically fought today with a continued global imagination. This imagination rejects the precepts of international and intercultural learning but sustains a nominal commitment to human rights compatible with concerns over the cultural dynamics of national security, the political appeal of popular sovereignty, and an ahistorical concept of international civilization. Sexuality and the family operate as vital mediums for these struggles. As issues that engage gay, lesbian, and queer social movements as well as the aspirations of many middle class women domestically and around the world, they have provided an acceptable site for American judges to acknowledge these broad international pressures and to reaffirm an American-inspired civil rights tradition. As issues that also mobilize a growing conservative base, they provide an opportunity for judicial control of the pace of change (especially in the arena of same-sex marriage), and for a conservative reaction that seeks to isolate judicial authority and choke off progressive legal mobilization.

An emerging popular sovereignty—evident in conservative discourse as well as the politics of anti-rights referenda[60]—that replaces, reforms, or resists the perceived activism of judges has important consequences for the social and political identities around which the disciplinary and juridical components of governmental power can cohere. This conservative discourse seeks to rematerialize rights in order to create new understandings of how rights must 'pay off' to keep the nation strong and competitive, and how industrious and restrained citizens must keep public demands in the forms of new rights or entitlements to a bare minimum. This is a more conservative expression

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[60] According to Barbara Gamble more than twice as many popular referenda were held on gay rights issues (forty-three,1977–93) than on school desegregation and housing during the civil rights movement (eighteen, 1959–89), with the public rejecting rights claims about eighty per cent of the time. Barbara Gamble, 'Putting Civil Rights to a Popular Vote' (1997) 41:1 American Journal of Political Science 245.

of global jurisprudence, one that contrasts itself to a communicative pluralism projected to threaten the viability of national communities, and the heterosexual families that undergird them, through a pervasive attention to individual rights.[61]

The contemporary efforts of conservatives to imagine their own political efforts in contrast with a global commitment to expand individual liberty—however excessive they understand this liberty to be—should inform but not frame either legal analysis of global jurisprudence or progressive human rights politics. Conservatives are wrong when they argue that the judicial cognizance of human rights signals or creates non-governmental liberties; global jurisprudence does not serve as an alternative to national governance as their very own rights talk reveals. Analysis of conservative attempts to create a new meaning for sovereignty underscores the frequently unacknowledged reincorporation of civil and human rights into arguments protecting an authentic American community from the threats of sexual licence. Perhaps unwittingly, conservatives are right that rights are not always a bulwark of protection from state excess as many liberals have claimed,[62] but may serve to channel and reaffirm disciplinary and juridical power.

The point is that human rights discourse can 'assimilate and colonize'[63] as much as it can establish progress and enhance privacy. As a caution for progressives, in 'law's complicity in the policing of desire'[64] it is possible to identify the ways in which human rights law remains somewhat hetero-orthodox. While American courts prevaricate on the issue of same-sex marriage, human rights regimes may

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61 Rep. Musgrave makes this circuitous point in her indictment of the Netherlands, 'America's already significant family vulnerabilities would be pushed beyond the breaking point if Scandinavian-style parental cohabitation spread here. ... [T]he meaning of traditional marriage was transformed every bit as much by the decade-long national movement for gay marriage in Holland as by eventual legal success. That's why the impact of gay marriage on declining Dutch marriage rates and rising out-of-wedlock birthrates begins well before the actual legal changes were instituted. ... [C]ontinued marital decline in Scandinavia and the Netherlands has already provided us with enough evidence to call the wisdom of same-sex marriage into serious doubt' (U.S., *Cong. Rec.*, vol. 150, at E1913-14 (2004)).

62 Philosophically, this liberalism is nicely summed up by Ronald Dworkin's ludic metaphor that 'rights are trumps' protecting individual autonomy from government zeal, though not completely from conceptions of the general and collective good. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977); Jeremy Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) 29 J. Legal Stud. 301.

63 *Supra* note 26 at 208.

64 *Ibid.*

increasingly look more like recent legal efforts in New Zealand to resolve equal rights claims with a European and American version of civil unions for same-sex couples[65] that placates conservatives by preserving the status of marriage. In the circulation of legal meaning, global jurisprudence may draw upon these developments as precedent for American constitutional interpretations of the marriage question. Whether human rights could ever provide the impetus for rethinking the very terms of debate to include such questions as the role of marriage and family in the creation of political authority is as much a matter of political will as it is of legal meaning.

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[65] *Civil Union Bill* 2004; this law is slated to take effect on 26 April 2005 following the passage of enabling legislation in the Parliament. The text of the bill addresses 'international trends' in Scandinavia, France, Canada, Germany, Belgium, Croatia, United Kingdom, Italy, Switzerland, Spain, and the United States, noting in particular Vermont's civil union law.