

2005

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### Recommended Citation

Neil Margolies, *THE UNBEARABLE “LITE”NESS OF HISTORY: AMERICAN SODOMY LAWS FROM BOWERS TO LAWRENCE AND THE RAMIFICATIONS OF ANNOUNCING A NEW PAST*, 32 Fordham Urb. L.J. 355 (2005).

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# THE UNBEARABLE “LITE”NESS OF HISTORY: AMERICAN SODOMY LAWS FROM BOWERS TO LAWRENCE AND THE RAMIFICATIONS OF ANNOUNCING A NEW PAST

## **Cover Page Footnote**

Associate Schulte Roth & Zabel, J.D. 2004, Fordham University School of Law; B.A. Philosophy, University of Maryland at College Park, 2001. I would like to thank Martin Flaherty for his guidance early on, and Sonia Katyal and Charles Kelbley for reading various drafts and attempting to steer me in the right direction. Also I would like to thank Sue Margolies, Nancy and Dan Ginsberg, and my father and best editor, Dr. Ronald Margolies.

**THE UNBEARABLE “LITE”NESS OF HISTORY:  
AMERICAN SODOMY LAWS FROM *BOWERS* TO  
*LAWRENCE* AND THE RAMIFICATIONS OF  
ANNOUNCING A NEW PAST**

*Neil Margolies\**

*“On the surface, an intelligible lie; underneath, the unintelligible truth”<sup>1</sup>*

Contrary to the most powerful claims of originalist scholars, history is not equipped to protect the Constitution from politically motivated interpretations.<sup>2</sup> This belief, grounded to varying degrees in the idea of an ascertainable and objective past, cultivated inside the vacuum of a legal community largely unencumbered by the methodological and epistemological questions dominant in philosophy and historiography.<sup>3</sup> Martin S. Flaherty’s *History “Lite” in Modern American Constitutionalism* (“*History ‘Lite’*”)<sup>4</sup> partially changed this by introducing methodological checks to the anarchistic world of legal history;<sup>5</sup> but Flaherty’s important work only dealt with half of the problem, acknowledging but not addressing history’s implicit epistemological uncertainty.<sup>6</sup> This Comment

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\* Associate Schulte Roth & Zabel. J.D. 2004, Fordham University School of Law; B.A. Philosophy, University of Maryland at College Park, 2001. I would like to thank Martin Flaherty for his guidance early on, and Sonia Katyal and Charles Kelbley for reading various drafts and attempting to steer me in the right direction. Also I would like to thank Sue Margolies, Nancy and Dan Ginsberg, and my father and best editor, Dr. Ronald Margolies.

1. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* 63 (1984).

2. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”).

3. Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 552-57 (1995).

4. *Id.* at 523.

5. *See infra* Part I.

6. Flaherty, *supra* note 3, at 551 n.122 (“Whether a matter can be deemed historically ‘true’ in an objective sense need not be resolved to assert the utility of historical standards.”); *see id.* at 551 (“[H]istorians [do not so much] determine what is historically

explores this uncertainty and its ramifications through chronicling and analyzing the evolution of the legal debate over the meaning of America's sodomy laws over the last seventeen years from *Bowers v. Hardwick*<sup>7</sup> through *Lawrence v. Texas*.<sup>8</sup> Tracking the arc of this legal-historical debate reveals history's malleability. As seen in majority and dissenting opinions, oppositional historical accounts are grounded in the same set of facts.<sup>9</sup> The splintering of this one set of facts into two diverging factually supported historical accounts exposes legal history's capacity to shroud an agenda in facts. The different accounts replace the myth of history as an objective decisive entity with the reality that history is capable of disguising subjective, biased decisions. Accordingly, this Comment suggests an honest and realistic view of history that can immunize our courts from its dangers while preserving its unique utility.

As this Comment explains and defines history through the evolving legal debate over the scope and purpose of America's sodomy laws, it scrutinizes and explains this evolution through major works in the field of historiography, namely the writings of Martin Flaherty, Raymond Martin, Peter Novick, and Hayden White. As Flaherty explains in *History "Lite"* and I explore in Part II of this Comment, history's malleability can be attributed to the historian. Accordingly, with the aim of exposing this malleability, analysis here is both methodological and epistemological. Methodological scrutiny in the manner of *History "Lite"* is mostly relegated to Part I, whereas Parts II and III are concerned with reducing history to its essential components—brute facts and the more illusive meaning afforded to a set of facts. Recognition of history's true composition exposes its inherent manipulability.

Part I, "An Intelligible Lie: The (A)historical Methodology of *Bowers v. Hardwick*," serves the twofold purpose of introducing the legal debate over the history of American sodomy laws, as well as demonstrating history's susceptibility to methodological manipulation by viewing *Bowers* in the context of *History "Lite."* Scrutiny of *Bowers* through *History "Lite"* reveals a majority opinion supported by a selective reading of the past. This section argues that historical manipulations, such as those in *Bowers*, whether intentional or not, in the context of a history-reliant judiciary, misinform us about the past and in doing so steer us towards an unintended future. As *History "Lite"* instructs, however, these errors by historians are

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true, but . . . they commonly resolve what is historically convincing.").

7. 478 U.S. 186 (1986).

8. 539 U.S. 558 (2003).

9. See *infra* Parts II-III.

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correctable.<sup>10</sup>

The same cannot be said for the problems arising from history’s inherent fact problem. Part II, “The Unintelligible Truth: Postmodernism and the *Lawrence* Briefs,” addresses the major historical briefs offered to the Court in *Lawrence* as practical examples of Peter Novick’s<sup>11</sup> and Hayden White’s<sup>12</sup> claim that one set of historical “facts” can tell many different “truthful” stories.<sup>13</sup> Novick’s postmodernist position relies on what Judith Lichtenberg describes as “the distinction between a realm of facts (perhaps we should say ‘brute-facts’) and a realm of interpretation, which encompasses theories, narratives, stories, and generally the larger accounts that the historians (or other interpreter of events) set out to tell.”<sup>14</sup> Novick contends that one set of facts can at a minimum, take on two different meanings.<sup>15</sup> Hayden White’s *The Historical Text as Literary Artifact* explains precisely how Novick’s ideal manifests itself in historical debates, and the *Lawrence* briefs actualize the ramifications of these abstract theories in our courts, revealing two contrasting stories grounded in only one set of facts.<sup>16</sup> The verification of Novick and White’s abstract theory exemplified in the *Lawrence* briefs plunges legal history into the postmodernist abyss, revealing the notion of guidance from an objective past as an elusive fiction into factually supported subjective historical choices as the reality.

Part III, “Remains of the Past: The *Lawrence* Decision’s Impact on History and Historiography” reveals *Lawrence* majority and dissenting opinions’ darker ramifications on legal historical fact, before eventually attempting to purge legal history from the abyss by discussing the decision in the context of Raymond Martin’s *Progress in Historical Studies*.<sup>17</sup> Marking the death of history as a reliable, objectively decisive entity, the historical interpretations of the majority and dissenting opinions offer examples of diverging historical opinions grounded in fact held by our

10. See *infra* Part I.

11. Peter Novick, *The Future of Fact: (The Death of) the Ethics of Historical Practice (and Why I Am Not in Mourning)*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 28, 39 (1998) [hereinafter Novick, *The Future of Fact*].

12. Hayden White, *The Historical Text as Literary Artifact*, in HISTORY & THEORY CONTEMPORARY READINGS 1, 15-33 (1998).

13. See *infra* Part II.

14. Judith Lichtenberg, *The Future of Fact*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 43 (1998).

15. See generally Novick, *The Future of Fact*, *supra* note 11.

16. See White, *supra* note 12, at 15.

17. See *infra* Part III.

highest court. While the ideal of a certain knowable past slips away, this section advocates recognition of progress in historical interpretations, as well as suggesting a manner in which this recognition can be made. While I consistently argue that history is capable of shrouding an agenda in facts, ultimately the argument is not against the usage of history in judicial decision making, but instead in support of an honest reappraisal of its decisional value; one that maximizes its uniquely illuminating aspects, while acknowledging its inherent shortcomings. In short, ideas about the past, by virtue of their malleable nature, are ill-equipped to dictate objective decisions, yet they remain uniquely equipped to aid courts in reaching just decisions in a manner similar to other subjective entities. The goal here is an honest and realistic examination of what history can, and cannot, tell us.

**I. AN INTELLIGIBLE LIE: THE (A)HISTORICAL METHODOLOGY OF  
*BOWERS V. HARDWICK***

When, in 1984, Michael Hardwick challenged the constitutionality of his Georgia state law conviction for engaging in sodomy,<sup>18</sup> the Supreme Court announced that the question turned on “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a long time.”<sup>19</sup> Since fundamental rights are decided under a history and tradition analysis,<sup>20</sup> this question seemingly supplied its own answer with the nebulously phrased conclusion that States have enforced these laws “for a long time.”<sup>21</sup> Under a history and tradition analysis, however, a law that exists “for a long time” can be defeated if it no longer carries the meaning it did in the past.<sup>22</sup> Whether the sodomy laws of yesterday meant the same as the law enforced against Bowers should have been the essential question in this landmark sodomy case. It was not.

Instead, the Court selectively read laws against sodomy in general as laws against homosexual sodomy specifically, deeming them constitutional

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18. *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985).

19. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

20. See Oliver G. Hahn, *Constitutional and Family Law-Grandparent Visitation in the Face of the Fourteenth Amendment Due Process Clause: Parental or Grandparental Rights*, 24 U. ARK. LITTLE ROCK L. REV. 199, 210 (2001). The history and tradition analysis is a prong of the fundamental rights test. See *id.* at 211.

21. *Bowers*, 478 U.S. at 190.

22. Emil A. Kleinhaus, Note, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121, 123. (2000).

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for no greater reason than their existence alone.<sup>23</sup> The first part of this section highlights the Court’s flawed methodology in the context of *History “Lite”*’s appraisal of Steven G. Calabresi and Saikrishna B. Prakash’s *The Presidents Power to Execute the Law*.<sup>24</sup> The second part begins the deconstruction of history itself, addressing Chief Justice Burger’s concurrence as a means to afford meaning to these laws through context.

**A. *Bowers* “Lite”: How Bad History Became Bad Law and Formed the Legal Foundation of the Historical Homosexual Debate**

The *Bowers* Court decided that the right to engage in homosexual sodomy was not “‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if . . . [it] were sacrificed,’” and that it is not “‘deeply rooted in this Nation’s history and tradition.’”<sup>25</sup> The Court upheld the Georgia statute prohibiting sodomy in general, ruling that there is no fundamental right to engage in homosexual sodomy specifically.<sup>26</sup> As a history and tradition-based decision, *Bowers* announced the factual legal history of homosexual sodomy laws as it stood in 1986, and would stand until *Lawrence* was decided in 2003. As such the *Bowers* decision provides the first judicially relevant history of American sodomy laws.

As will become evident, the backbone of the *Bowers* decision consisted of the same basic brute-facts as the diverging historical accounts in the *Lawrence* briefs; the Court stated that: 1) sodomy was “a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights,”<sup>27</sup> 2) Thirty-two of the thirty-seven States had sodomy laws “when the Fourteenth Amendment was ratified,” and 3) “until 1961, all fifty states outlawed sodomy, and today [1986], twenty-four States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.”<sup>28</sup> Based on these historical condemnations of sodomy generally, the Court concluded that there is no fundamental right to engage in homosexual sodomy.<sup>29</sup> The Court did not explain these laws or place them

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23. See *infra* notes 27-29 and accompanying text.

24. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Law*, 104 YALE L.J. 541 (1994).

25. *Bowers*, 478 U.S. at 191-92 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

26. *Id.*

27. *Id.*

28. *Id.* at 193.

29. *Id.*

in any context despite framing the question as to whether a fundamental right to engage in homosexual sodomy existed; it seemingly felt that listing these laws qualified as a thorough enough historical analysis on which to base its decision. Evidently aware of criticism that would follow, the Court attempted to place all blame squarely on the shoulders of history itself early in the decision in writing that “[t]his case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable.”<sup>30</sup> In the majority’s view, history made this decision, not the Court. But if history is responsible for this decision, then the majority justices are responsible for announcing it, just as any historian ultimately must take responsibility for the version of the past they endorse.

With this notion in mind, *History “Lite”* exposes and attempts to reign in the leeway afforded to lawyers and judges working within the anarchistic world of legal history.<sup>31</sup> In it, Flaherty asserts, “habits of poorly supported generalization—which at times fall below even the standards of undergraduate history writing—pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution.”<sup>32</sup> Pointing to an example of a work plagued by such habits, Flaherty criticizes the historical conclusions in Steven G. Calabresi and Saikrishna B. Prakash’s *The Presidents Power to Execute the Law*.<sup>33</sup>

Supported by historical research, Calabresi and Prakash announced that the executive branch alone had the power to administrate federal laws.<sup>34</sup> They quote the separation of powers clauses of the Virginia Constitution of 1776 and the Massachusetts Constitution of 1780 to conclude that “the Executive alone was empowered to execute all laws.”<sup>35</sup> This conclusion rests on historical assertions based on these isolated primary sources, yet Flaherty’s arguably more thorough analysis of these same sources proves the opposite. Minimally, Flaherty’s work exposes a truth that is as mundane to the historian as it is cataclysmic to the novice originalist: that two respected scholars can offer different answers to the same historical question. Flaherty’s work, however, is important as more than just unintended postmodernist fodder. It highlights a specific way in which lawyers and judges get history *wrong*.

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30. *Id.* at 190.

31. See Flaherty, *supra* note 3.

32. *Id.* at 526 (discussing Calabresi & Prakash, *supra* note 24, at 607).

33. *Id.*

34. *Id.*

35. *Id.* (quoting Calabresi & Prakash, *supra* note 24, at 607).



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In an initial blow to the scholars claim, Flaherty cites Gordon S. Wood’s work in differentiating between rhetorical approvals of executive supremacy and actualized legislative supremacy, specifically in Virginia.<sup>36</sup> Flaherty writes “the very constitutions [Calabresi and Prakash] single out dramatically undercut their claim.”<sup>37</sup> Supporting this is the Massachusetts Constitution provision “for a ‘council, for advising the governor in the executive part of the government.’”<sup>38</sup> This advising council made the appointments now normally considered within the scope of the executive branch.<sup>39</sup> In name, the Massachusetts and Virginia supremacy clauses seemed to reveal Calabresi and Prakash’s historical understanding of the supremacy clause, but consistency in meaning cannot be assumed, and in failing to take into account the “wealth of historical scholarship demonstrating that most of the state constitutions framed in 1776 and 1777 gave rhetorical support to the formalistic conception of separation of powers . . . but in fact established governments that approached legislative supremacy largely at the expense of executive authority,” Calabresi and Prakash offered an identifiably incomplete historical account.<sup>40</sup> Knowing of a law’s existence is a far cry from knowing what the law meant.

For the same reasons, the laws the *Bowers* majority cited to deny the existence of a fundamental right to engage in homosexual sodomy fall short of supporting their interpretation. While it might be unfair to hold the *Bowers* Court to the standard of today’s historical understandings, it is not unreasonable to expect it to be honest to the full breadth of the historical debate ongoing at the time. While the majority exclusively wrote on homosexual sodomy, Justice Stevens, in his dissenting opinion, pointed out that both the Georgia statute<sup>41</sup> and several of the laws used to support the majority’s historical claim<sup>42</sup> pertained to homosexual and heterosexual sodomy alike.<sup>43</sup> Since the majority ignored the fact that “the Georgia statute expresses the traditional view that sodomy is an immoral kind of

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36. *Id.* at 525 n.14 (citing GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 153-54 (1969)).

37. *Id.* at 525.

38. *Id.* (quoting MASS. CONST. of 1780, ch. II, sec. 3, arts. I – VII).

39. *Id.*

40. *Id.*

41. *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986) (Stevens, J., dissenting) (citing GA. CODE ANN. § 4251 (1861)).

42. *Id.* at 215-16. “The history of the statutes cited by the majority as proof for the proposition that sodomy is not constitutionally protected . . . reveals a prohibition on heterosexual, as well as homosexual, sodomy.” *Id.*

43. *Id.* at 214-16.

conduct regardless of the identity of the persons who engage in it,” the Court did not have to ask whether the state may prohibit such conduct, and if not, whether the state can save the statute by only prohibiting homosexuals from engaging in the conduct.<sup>44</sup> Here, an incomplete appraisal of the past led to the Court’s loaded legal question.

Structurally, Calabresi and Pakrash’s omission mirrors that of the *Bowers* Court. Both presented incomplete pictures of the past by representing only part of the doctrine they were relying on. But, while the scholars’ misapprehension led to a continuing scholarly debate, the Court’s error resulted in a misleading constitutional question and analysis. *Bowers* proved that not only theorists, but also Supreme Court justices, are guilty of passing poorly supported generalizations off as historical fact. But why did the Court choose to read these laws selectively, consequently raising the question of the fundamental right to engage in homosexual sodomy? The key to this might be found in Justice Blackmun’s dissent, which is flooded with skepticism of the majority’s motivation:

In its haste to reverse the Court of Appeals and hold that the Constitution does not “[confer] a fundamental right upon homosexuals to engage in sodomy,” the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.<sup>45</sup>

In writing that the Court “distorted the question,”<sup>46</sup> Justice Blackmun acknowledged that the law in Georgia regulated both heterosexual and homosexual sodomy and as such “the Court’s almost obsessive focus on homosexual sodomy activity is particularly hard to justify.”<sup>47</sup> Blackmun condemned the Court for its focus on only half of the statute in question and for painting a deceptively incomplete picture of the past.

Blackmun’s dissent categorizes the majority’s decision as prejudiced and questions their motivation in writing that only “willful blindness could obscure the fact that sexual intimacy is ‘a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality . . . .’”<sup>48</sup> He adds, “[n]o matter how uncomfortable a certain group may make the majority of this Court, we have held that [mere] public intolerance or animosity cannot

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44. *Id.* at 216.

45. *Id.* at 200 (Blackmun, J., dissenting) (quoting Justice White’s majority opinion).

46. *Id.*

47. *Id.*

48. *Id.* at 205 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)).

constitutionally justify the deprivation of a person’s physical liberty.”<sup>49</sup>

In no uncertain terms, Blackmun accused the majority of misrepresenting the question at the heart of this case and its historical underpinnings. It is hard to disagree with him.

### **B. Burger’s Bizarre Attempt to Contextualize: An Introduction to History’s Brute-Fact Narrative Dichotomy**

In an attempt to explain early sodomy laws further than the majority’s string-cite fashion, Chief Justice Burger’s concurrence places them in a historical context by defining the “ancient roots” of sodomy laws. This analysis begins with the blanket statement that “[c]ondemnation of [homosexual sodomy] . . . is firmly rooted in Judaeo-Christian moral and ethical standards.”<sup>50</sup> This declaration is not cited. After this he declares that “[h]omosexual sodomy was a capital crime under Roman law,”<sup>51</sup> outlawed during the English Reformation, the common law of England, and ultimately adopted by the thirteen colonies.<sup>52</sup> Burger finally concludes that “[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”<sup>53</sup> Burger’s curious turn to moral history may have prompted him to add that, “[t]his is essentially not a question of personal ‘preferences’ but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.”<sup>54</sup>

Whether moral history is relevant at all is a separate question entirely, yet it is one that speaks to motivation of the justices, while simultaneously revealing the troubling composition of history. Clearly, Justice Stevens disagrees with its invocation and states that “the fact that the governing majority in a State has traditionally viewed a particular practice as *immoral* is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”<sup>55</sup> Blackmun added, “[t]he legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine.”<sup>56</sup>

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49. *Id.* at 212 (citing *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975)).

50. *Id.* at 196 (1986) (Burger, C.J., concurring).

51. *Id.* (citations omitted).

52. *Id.* at 197.

53. *Id.*

54. *Id.*

55. *Id.* at 216 (Stevens, J., dissenting) (emphasis added).

56. *Id.* at 211 (Blackmun, J., dissenting).

Perhaps precedent was not Burger's rationale for citing moral and religious history but instead to explain the meanings of these laws in a comprehensible context. In this light, Burger's concurrence might be more sophisticated than it first seems.

Placing the *Bowers* majority's list of laws in the context of Burger's model of moral and religious history seemingly paints a fuller picture of the past. In fact, it seems as if the sodomy laws prove Burger's claim of historical condemnation of homosexuals, while simultaneously proving the majority's cited laws purpose to condemn homosexual activity. When read together they begin to form history in the way we are most familiar: a list of events given meaning through context.

### C. *Bowers* Concluded

To this day *Bowers* is the only Supreme Court case to rely solely on history in deciding the constitutionality of sodomy laws. As such, it serves as the necessary starting point in analyzing the legal debate over these laws. Structurally not much has changed since Burger's concurrence, and the *Lawrence* briefs and decision all discuss, contextualize, and ultimately spin the most basic laws first announced in this case.

*Bowers* offers an example of history dissected into its two essential components: the brute-facts of the past, in this case the isolated laws, and the context in which these facts are placed and consequently afforded meaning. Here, Burger's concurrence seemingly fleshes out the intent of these laws, but in doing so he exposes the brute-fact narrativity distinction—the distinction that undermines the ideal of the historical fact, and paves the way for the diverging historical accounts dominant in *Lawrence*.

## II. THE UNINTELLIGIBLE TRUTH: POSTMODERNISM AND THE *LAWRENCE* BRIEFS

When *History "Lite"* takes legal historians to task for invoking incomplete<sup>57</sup> or deceptive<sup>58</sup> history to support their interpretations of the

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57. See, e.g., Flaherty *supra* note 3, at 562-63.

Nowhere is . . . [Epstein's overbroad] approach more problematic than in *Takings*. To support his sweeping claim about the "dominant . . . Lockean system" of 1787, Epstein makes two evidentiary assertions. First, he argues that Locke's "theory of state"—which presumably includes the philosopher's thinking about just compensation—was "adopted in Blackstone's *Commentaries*." Yet Epstein has nothing to say about how Blackstone did so, where the *Commentaries* makes this

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law, Flaherty raises the bar for acceptability in legal historical scholarship, conjuring history’s most valuable implicit component, the scholarly monitor. This monitor is the key to proper historical growth because it ensures the evolution of ideas in a forum that is self-policed.<sup>59</sup> Under this framework historians double as internal affairs agents, weeding out unsupported or poorly founded claims in favor of more compelling arguments.<sup>60</sup> In this respect, history follows a Darwinist evolution and the best available information rises to the forefront.

But, as even Flaherty recognizes, the discussion does not end here. Well-policed history forces the best available information to the forefront, but the best available information is something very different from the truth. This differentiation prompts Flaherty to note that, “historians [do not so much] determine what is historically true, but . . . they commonly resolve what is historically convincing.”<sup>61</sup> In a footnote he adds that, “[w]hether a matter can be deemed historically ‘true’ in an objective sense need not be resolved to assert the utility of historical standards.”<sup>62</sup> But why does he, and scholars such as Raymond Martin, argue passionately on behalf of progress in historical understanding while carefully avoiding a declaration that history offers airtight empirical facts? The simple answer is that progress in history has not extinguished factually supported interpretive divergences. Additionally, divergent historical interpretations have in part led some, most notably Peter Novick, to take the position that progress in historical studies has not been made at all; that we have come

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adoption clear, or how the commentaries relate to American constitutional thought in the 1760’s. In fact *Commentaries*’ reliance on Locke, the work’s position on takings, and its influence on American constitutionalism are all complex matters that fall far short of affording Epstein the simple support he seeks.

*Id.* (quoting Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 16 (1985)).

58. *Id.* at 558 n.152 (“[O]ne cannot resist the feeling that both Epstein and Dworkin eschew undertaking ‘conceptual’ history not only for their stated theoretical reasons, but because they assume that history on this level simply will not support their larger projects.”).

59. *Id.* at 551.

60. See, e.g., James Lindgren, *Falling From Grace: Arming America and the Bellesiles Scandal*, 111 *YALE L.J.* 2195 (2002) (alleging various historical inaccuracies in MICHAEL BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2001)).

61. See Flaherty, *supra* note 3, at 551 (concluding that legal history is relevant despite the elusive aspects of truth).

62. See *id.* at 551 n.122. For a discussion of this Flaherty instructs us to look to PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* (1988) [hereinafter NOVICK, *THAT NOBLE DREAM*], as well as Thomas L. Haskell’s response in *Objectivity Is Not Neutrality: Rhetoric vs. Practice in Peter Novick’s That Noble Dream*, 29 *HIST. & THEORY* 129, 130 (1990).

no closer to knowing what *truly* happened in the past.<sup>63</sup> When Flaherty and Martin argue that histories can become *better* through the refinement of the scholarly monitor discussed above, and that “better” should be understood as more than just being in line with the accepted historical practices of the time, but as the next step in a logical progression of understanding, they concede that progress does not elevate history to a level of epistemological certainty. Flaherty and Martin accept the inapplicability of conventional notions of objective truthfulness or factuality to historical accounts. Despite this established uncertainty, originalist judges routinely invoke historical interpretations in deciding constitutional issues.<sup>64</sup>

In *Lawrence*, certiorari was granted in part to once again answer whether criminal convictions for consensual sodomy violate the Due Process Clause of the Constitution, as well as “whether *Bowers v. Hardwick* should be overruled[.]”<sup>65</sup> Under the backdrop of *Bowers*, amici for both sides filed briefs necessarily presenting historical accounts supporting their claim, splintering one set of brute-facts into two divergent interpretations. In finding oppositional historical meanings grounding the same set of facts, these briefs exposed the unsettling reality at the heart of all legal history. As exhibited in *Bowers*, methodological improprieties might be exposed to derail an otherwise reliable history. The malleability exhibited in the *Lawrence* briefs force questions of whether history is an objective tool for answering judicial questions or just a facade disguising biased decisions.

This section begins with a brief examination of the macroscopic questions raised when new historical interpretations disprove preexisting precedent, as well as the epistemological implications arising when we learn *more* about the past. Encapsulated within this is an introduction to postmodernist historical theory through the writings of Peter Novick. Following this, the brute-facts are presented as agreed upon by both sides of the debate. These brute-facts are then structured in the literary forms offered by opposing amici, both transferring the past from a list into the story form that we normally associate with historical accounts. The arguments by opposing amici comprise nearly identical fact-based historical accounts that tell directly opposing stories of the past; naturally

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63. A staunch postmodernist would contend that we never truly know what happened. Deeper with this is the epistemological idea that we can never truly know anything. Problems also arise concerning the role of objectivity in history. For this discussion see NOVICK, THAT NOBLE DREAM, *supra* note 62. Novick himself claims that he is not concerned with whether or not there is truth in history, saying he will leave that question to the philosophers. *Id.* at 4; *see also* Haskell, *supra* note 62.

64. Flaherty, *supra* note 3, at 524.

65. *Lawrence v. Texas*, 539 U.S. 558, 662 (2003).

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one side fully supports the petitioners and the other works in favor of the respondents. Hayden White's theory of "emplotment" explains how history's brute-fact narrativity distinction facilitates diverging factually based historical accounts, bridging Novick's theory with the historical accounts offered to the Court in the form of the *Lawrence* briefs.<sup>66</sup> Here, the briefs dual purpose is grounding the relevance of White's theory as well as establishing the foundation from which the Justices ultimately could have declared the past.

**A. *Lawrence* and the Ramifications of Readdressing a History-Based Judicial Decision**

In their brief on behalf of the Petitioners, Roy T. Englert, Alan Untereiner, and Sherri Lynn Wolson asked the *Lawrence* Court to "construe . . . the Due Process Clause with a thorough and nuanced history of the subject in mind."<sup>67</sup> This request, arising at least partially from the inevitable influx of historical writings appearing in the seventeen years subsequent to the Court's ruling in *Bowers*, assumes one of two potentially overlapping propositions. Either the Court's decision relied upon an incomplete history, or that the history relied upon in *Bowers* was just wrong, or minimally, was placed in a context that afforded the history a misguided meaning.

Epistemologically, this demand exposes judicially declared historical "facts" as relativistic empowered markers of currently prevailing historical understanding. This assertion is incontrovertible, for as time passes, often distance can grow between the power of established precedent and the value of its historical underpinnings.<sup>68</sup> Overtly, the Court takes a pragmatic approach in dealing with this and considers new historical accounts. This is contingent, however, on the Court agreeing to rehear an issue as "[n]ew historical evidence matters to originalist judges only to the extent that they are willing to overturn precedent."<sup>69</sup>

New historical evidence itself implicitly guarantees uncertainty. The history of history demonstrates that interpretations of the past are

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66. White, *supra* note 12.

67. Brief of Professors of History George Chauncey, Nancy F. Cott, John D'Emilio, Estelle B. Freedman, Thomas C. Holt, John Howard, Lynn Hunt, Mark D. Jordan, Elizabeth Lapovsky Kennedy, and Linda P. Kerber as Amici Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter *Historians*].

68. See Kleinhaus, *supra* note 22, at 124 (writing on "the post-originalist problem, or the problem of how Justices committed to an originalist approach deal with historical analysis that challenges the historical narrative created in earlier decisions").

69. *Id.* at 127.

constantly replaced with new “better” ones,<sup>70</sup> forcing the idea of a historically “true” account into doubt; the more we learn about the past the more we must admit that we were wrong, simultaneously strengthening our belief in the understanding of one historical event while casting greater doubt on the idea of knowledge in history overall. Ultimately, corrective historical accounts serve as evidence of a “truth” problem with roots that can be traced back to the very nature of historical “facts” and the composition of historical accounts.

Richard Posner writes that there is little problem with “the truth of facts that compose a simple narrative or chronology, or even statistical inference from historical data, but *the truth of causal and evaluative assertions about history* [are elusive].”<sup>71</sup> But those who recognize this dichotomy generally do not directly confront history’s “truth” problem. For instance, Flaherty’s assertion presented earlier that “[w]hether a matter can be deemed historically ‘true’ in an objective sense need not be resolved to assert the utility of historical standards,”<sup>72</sup> demonstrates the peculiar regard in which “truth” is held concerning historical accounts. It is the epistemological third-rail of legal historical scholarship.

In *The Future of Fact: (The Death of) the Ethics of Historical Practice (and Why I Am Not in Mourning)* and *That Noble Dream*, Peter Novick argues that “ideals of truth and objectivity[] among professional historians” are in decline.<sup>73</sup> Whereas, “[i]n earlier times a consensus existed among professional historians that the aim of history was ‘to discover and record the objective truth about the past’ with the ultimate goal of painting ‘a true and complete picture of it . . . .’”<sup>74</sup> the “new ways of thinking about history . . . [endorse] the inapplicability of the word ‘truth’ to historical accounts, the thoroughgoingly and irredeemably ideological nature of scholarship, or the impossibility of algorithmic resolutions to conflicts between scholarly and other loyalties.”<sup>75</sup>

Because he argues that recently “[a]ll historical scholarship, save perhaps that small portion devoted to addressing straightforward factual matters . . . came to be seen as inherently, thoroughgoingly ideological,”<sup>76</sup>

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70. See *infra* notes 204-06 and accompanying text.

71. Richard Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 594 (2000).

72. Flaherty, *supra* note 3, at 551 n.122.

73. Novick, *The Future of Fact*, *supra* note 11; see NOVICK, *THAT NOBLE DREAM*, *supra* note 62.

74. Novick, *The Future of Fact*, *supra* note 11, at 37-38).

75. Novick, *The Future of Fact*, *supra* note 11, at 39.

76. *Id.* at 37-38.



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and because, as the ongoing debate demonstrates, the historical treatment of homosexuals is far from a straightforward factual matter, under Novick's framework the conjunctive historical accounts of the historical treatment of homosexuals can be seen as inherently ideological. But what does it mean for a history to be ideological? The answer to this falls back on the connection between the history and the historian, and is best explored through analysis of the *Lawrence* briefs through the writings of Hayden White offered below.

As the successor to *Bowers*, *Lawrence v. Texas* presented the Court with seventeen years worth of new historical studies. While progress made over these seventeen years afforded the Court with a more complete picture of America's historical treatment of homosexual sodomy, it did not transcend history's inherent limitations, namely, it did not solve the "fact" problem and eradicate the presence of interpretative divergence. Further, originalism's presence within the adversarial process highlighted this problem, necessitating *Lawrence's* refinement of these diverging interpretations into two historical tracts:<sup>77</sup> the petitioner's history<sup>78</sup> and the respondent's history.<sup>79</sup>

### B. Diverging Histories and the *Lawrence* Briefs

The *Lawrence* briefs provide an accessible illustration of the malleability of history while simultaneously introducing current arguments concerning the historical scope of America's sodomy laws. To highlight the brute-fact narrativity dichotomy, the agreed upon brute-facts consistent on both sides of the debate appear here first. These facts are then separately presented in the manner offered to the Court to support the Petitioner and Respondent, respectively, actualizing Peter Novick's claim that one set of historical facts can tell at least two very different stories. In conclusion, Hayden White's *The Historical Text as Literary Artifact* explains the existence of these divergent interpretations in detailing how history's inherent brute-fact

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77. Because the adversarial system necessitates that two sides are presented for every argument, an originalist judicial approach demands that lawyers support their arguments with history.

78. Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558(2003) (No. 02-102) [hereinafter Cato]; see Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Texas Supporting Petitioner, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter ACLU]; see also *Historians*, *supra* note 67.

79. Brief Amicus Curiae for Respondent of The Center for the Original Intent of the Constitution in Support of Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Original Intent].

narrativity distinction seemingly guarantees conflicting accounts.<sup>80</sup>

*1. The Brute-Facts of Lawrence v. Texas*

The agreed upon facts serve as only the beginning of the discussion of the historical legal treatment of homosexuals and homosexual sodomy. Uncontested, these facts are the foundation of briefs and court opinions both for and against the constitutionality of the Texas Sodomy Law.

American prohibitions of sodomy in general date as far back as colonial times<sup>81</sup> where these early laws were “derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533.”<sup>82</sup> In 1868, the year of the Fourteenth Amendment’s passage, several states prohibited some form of same sex intimacy.<sup>83</sup> And these prohibitions were not toothless, as it is certain that between 1880 and 1995 homosexuals were prosecuted for engaging in sodomy.<sup>84</sup> Also during this time, however, several states began to eliminate their anti-sodomy laws.<sup>85</sup> In 1986, when *Bowers* was decided, twenty-five states had anti-sodomy laws.<sup>86</sup> At the time of the *Lawrence* decision that number had been “reduced . . . to 13, of

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80. White, *supra* note 12, at 15. In this section I present only the foundation of White’s argument, as it is most germane to the overall topic of this paper. At no point in his writing does he deviate from the points outlined above. *See generally id.* Throughout his essay and his more expansive works he explains that we should apply a more literary minded analysis when apprising historical works. *Id.* He believes that divergent histories and histories constructed from different perspectives combine to give us a greater overall knowledge of the past, albeit one that increases the difficulty of generalizing about what we learn. *Id.*

81. *See* ACLU, *supra* note 78, at 16 (citing CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW AND SOCIETY IN CONNECTICUT 1639-1789* (1995) (“Colonial law in both New England and the Chesapeake outlawed fornication, adultery, and sodomy sometimes with the penalty of death.”), JOHN D. EMILIO & ESTELLA B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY OF AMERICA* 30 (1988), and William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 644-45 (1999)).

82. *Lawrence v. Texas*, 538 U.S. 558, 567 (2003).

83. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (noting that in 1868 all but five of the thirty-seven states had criminal sodomy laws); Cato, *supra* note 78, at 9 (citing JOSEPH CHITTY, *A PRACTICAL TREATISE ON CRIMINAL LAW* 49 (1847), ROBERT DESTY, *A COMPENDIUM OF AMERICAN CRIMINAL LAW* 143 (1887), and JOHN MAY, *THE LAW OF CRIMES* §§ 210, 223 (1881) (“In 1868 most state penal codes included the ‘crime against nature, committed with mankind or with beast.’ . . . American courts and commentators followed the English decisions defining the crime as involving penetration by a male penis inside the rectum of an animal, a woman or girl, or another man or boy.”)).

84. *Lawrence*, 539 U.S. at 569.

85. Original Intent, *supra* note 79, at 25.

86. *Lawrence*, 539 U.S. at 573.

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which 4 enforce[d] their laws only against homosexual conduct.”<sup>87</sup>

### 2. The Petitioner’s History

In anticipation of the Court offering an analysis different from *Bowers*, the ACLU imagines and addresses a history and tradition test with concern to “a fundamental right to be free from government regulation of consensual sexual conduct in the home.”<sup>88</sup> The brief from the Cato Institute addresses the questions presented in *Bowers*.<sup>89</sup> The Historian’s brief does not offer a legal argument, but instead proposes two historical assertions: “[that] (1) no consistent historical practice singles out same-sex behavior as ‘sodomy’ subject to proscription, and [that] (2) the government policy of classifying and discriminating against certain citizens on the basis of their homosexual status is an unprecedented project of the twentieth century, which is already being dismantled.”<sup>90</sup> All three of these briefs can be combined to form the historical argument against viewing American sodomy laws as specifically aimed at homosexual activity and consequently indicia of a consistent societal disapproval of homosexual activity.

The Cato Institute offers that the 1868 laws discussed in *Bowers* did not use the term sodomy but instead outlawed “crimes against nature.”<sup>91</sup> Under common law the English definition of “crimes against nature” was “penetration by a male penis inside the rectum of an animal, a woman or girl, or another man or boy.”<sup>92</sup> While these laws did outlaw some form of homosexual as well as heterosexual activity (even between married couples),<sup>93</sup> they did not make homosexual or heterosexual oral sex a crime.<sup>94</sup> For that matter, no “law before the twentieth century” made homosexual sodomy a crime.<sup>95</sup> The word “homosexual” did not appear in the American lexicon until 1892.<sup>96</sup> From all of this, the Cato Institute concluded that the “regulation of ‘*homosexual* conduct’ was not the object

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87. *Id.*

88. ACLU, *supra* note 78, at 11.

89. *See generally* Cato, *supra* note 78.

90. Historians, *supra* note 78, at 1-2.

91. Cato, *supra* note 78, at 9.

92. *Id.* (citing CHITTY, *supra* note 83, at 49; DESTY, *supra* note 83, at 143; MAY, *supra* note 83, at 223).

93. *Id.* at 10.

94. *Id.* at 9-10.

95. *Id.*

96. Historians, *supra* note 78, at 11 (citing JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 10 (1995)).

of nineteenth century sodomy laws . . . .”<sup>97</sup> Instead they postulate that these laws existed primarily for the “protection of children, women, and weaker men against sexual assault,”<sup>98</sup> and also for the “protection of the community against public indecency.”<sup>99</sup> To support this, the Institute cites a long list of appellate cases in which the defendants were predominantly accused of nonconsensual activities.<sup>100</sup>

Concerning sexual assault, sodomy laws were considered “crimes against the person,”<sup>101</sup> and, as such, filled the nonconsensual sexual activity “regulatory gap” existent short or rape in 1868.<sup>102</sup> Proof offered to support that sodomy laws served the primary purpose of regulating nonconsensual sexual activity is embodied in the notion that “a man could not be convicted of sodomy based upon the testimony of a sexual partner who was his ‘accomplice’; conversely, the partner’s testimony was admissible if she or he were an unwilling participant or a minor (incapable of giving consent).”<sup>103</sup> The Cato Institute is so certain of this proposition that they write, “[t]his well-established proof requirement created immunity for sodomy within the home between consenting adults.”<sup>104</sup> Contrary to the *Bowers* findings, in the plainest possible language these historians offer that the 1868 sodomy laws had no effect on consensual homosexual sodomy.

With regard to the “protection of the community against public indecency,” the 1868 sodomy laws “were typically listed with crimes against ‘public morals and decency’—including bigamy and ‘open and notorious adultery’; printing or distributing obscene literature; public indecency; ‘lewd and vicious cohabitation’ or fornication; blasphemy or cursing in public places; and incest.”<sup>105</sup> This combined with the idea that consensual sodomy within the home was not regulated, must have led the Cato Institute to conclude that these laws were only concerned with nonconsensual sexual acts and acts done in public.

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97. Cato, *supra* note 78, at 10.

98. *Id.* at 11.

99. *Id.* at 10.

100. *Id.* at 11.

101. *Id.*

102. *Id.* at 11.

103. *Id.* (citing FRANCIS WHARTON, TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 443 (2d ed. 1852); FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW 512 (8th ed. 1880)).

104. *Id.* at 11.

105. *Id.* (quoting Ronald Hamowy, *Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America*, in ASSESSING THE CRIMINAL 39-41 (Randy Barnett & John Hagel III eds., 1977)).

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Between 1879 and 1969 sodomy laws changed. Whereas “[i]n 1880, sixty-three prisoners were incarcerated for sodomy in the United States, almost all of them people of color and immigrants,”<sup>106</sup> “[b]y 1921, hundreds of men were being arrested and imprisoned for the crime each year,”<sup>107</sup> “with a quarter of published sodomy decisions between 1880 and 1925 involving apparently consensual activities between men, but usually in quasi-public places such as restrooms, parks, and bars.”<sup>108</sup> In roughly this same period the number of states considering oral sex as sodomy grew from zero to thirty-one.<sup>109</sup> The Cato Institute attributes this change in law to several factors, including public displays of indecency by “fairies,” preventing molestation, and an overall condemnation of a “‘degenerate’ class of people.”<sup>110</sup> The change in the laws illustrates the changing regard in which homosexuals were held during this period and beyond.

During the McCarthy era “[s]tate and national governments invested significant resources in episodic witch hunts to identify ‘homosexuals’ so that they could be arrested and imprisoned, deported or debarred from entering the country, discharged from public employment, expelled from the armed services, and exposed by that state as ‘sex perverts’ . . . .”<sup>111</sup> Additionally, “[i]n 1953, President Eisenhower issued an executive order requiring the discharge of homosexual employees from federal employment, civilian or military.”<sup>112</sup>

But, the diminishing legal standing of homosexuals began to reverse in 1969, when:

“gay people engaged in political activism to remove legal discriminations against them[] . . . found allies in the legal profession, including the ABA, and the medical profession, which in 1973 resolved that homosexuality is not a mental or psychological defect and therefore was no basis for unequal treatment.”<sup>113</sup>

This reversal materialized when, “[b]etween 1969 and 1976, eighteen states

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106. *Id.*, at 12 (citing JONATHAN NED KATZ, *GAY AMERICAN HISTORY* 57 (1976)).

107. *Id.* at 12.

108. *Id.* at 13.

109. *Id.* at 12 (citing William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 *IOWA L. REV.* 1007, 1016-32 (1997) (covering, in actuality, the years between 1879 and 1923)).

110. *Id.* at 13.

111. *Id.* at 14-15.

112. Historians, *supra* note 78, at 16 (citing JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 44 (1983)).

113. Cato, *supra* note 78, at 16.

decriminalized consensual sodomy, consistent with the ALI's Model Penal Code . . . ."<sup>114</sup> Immediately preceding the *Lawrence* decision, only three states outlawed same-sex consensual sodomy.<sup>115</sup> The disappearance of these laws coincided with a growing recognition of their original intent, the now antiquated disapproval of certain sexual acts regardless of the sex of the actor's partner, and not the disapproval of homosexual acts per se. As such, there is no historical foundation for the approbation of same-sex sexual activity.

### 3. *The Respondent's History*

The Petitioner's historical account is in direct conflict with the one offered in the amici brief filed by the Center for The Original Intent of the Constitution ("The Center").<sup>116</sup> The Center offers that, "[a]t the time of the Fourteenth Amendment's ratification, eight states specifically prohibited same-sex sodomy, including five of the original states which retained their earlier sodomy laws."<sup>117</sup> And, "[a]t least two more state courts explicitly applied the same-sex definition of common law sodomy."<sup>118</sup> But, of the combined thirty-one states that prohibited sodomy at that time, all implicitly prohibited same-sex sodomy.<sup>119</sup> The real differentiation comes in the interpretation of these laws.

Whereas the petitioner's historians contend that these laws largely did not reach into consensual homosexual sodomy, The Center states that the history of these sodomy laws do not support the proposition that states did not prosecute or condemn same-sex sodomy.<sup>120</sup> They support this claim with three propositions: 1) the petitioner's historians relied on appellate law for their conclusions and this is not the most accurate portrayal of history, mainly because "many convictions are not appealed,"<sup>121</sup> 2) "the amici making this argument, particularly the ACLU, concede that a great majority of the reported cases contain factual situations that they deem 'unclear,'"<sup>122</sup> and 3) "amici's assertion that societal approbation for

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114. *Id.*

115. Cato, *supra* note 78, at 17.

116. Original Intent, *supra* note 79.

117. *Id.* at 12, 13 n.19.

118. *Id.* at 13 (citing *Coburn v. Harvey*, 18 Wis. 147 (1864); *Ausman v. Veal*, 10 Ind. 355 (1858)).

119. *Id.* at 14.

120. *Id.*

121. *Id.*

122. *Id.* at 14-15.

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consensual acts of same-sex sodomy can be found in the silence of the appellate records is simply not true."<sup>123</sup>

Concerning the second proposition, The Center writes about the ACLU's conclusion that consensual sodomy was not outlawed because it was largely not specifically mentioned in published decisions. This assertion does not acknowledge that acts of sodomy, consensual and private or otherwise, were often not described by the Court. The Center quotes a 1921 sodomy decision that reads, "The evidence is revolting in detail, and it could therefore serve no good purpose to set forth,"<sup>124</sup> and an 1881 one writing, "Every person of ordinary intelligence understands what the crime against nature with a human being is."<sup>125</sup> Beyond this, The Center cites three courts that overtly stated privacy was not a factor to be considered.<sup>126</sup> Ultimately, it is The Center's conclusion that privacy *was not* a factor considered in these cases.<sup>127</sup>

In regard to the third proposition, The Center states that "[c]onsent provided no immunity in a sodomy prosecution."<sup>128</sup> This proposition is overtly supported by court of appeals cases in Texas<sup>129</sup> and California,<sup>130</sup> and a case in Iowa.<sup>131</sup> The claim that a consenting partner was unable to testify in sodomy cases is rebuked by an 1897 Illinois case.<sup>132</sup>

Directing itself to the Cato Institute Brief, The Center further discusses the implications of immunity for adults privately engaging in consensual sodomy.<sup>133</sup> The primary argument here is that rules of evidence concerning the uncorroborated testimony of an accomplice bare little significance in a discussion of sodomy laws.<sup>134</sup> Since these rules spread further than to just sodomy cases, "the principle that any action between consenting adults within the home was immune from prosecution merely because the testimony of one partner was insufficient evidence [is illogical]."<sup>135</sup> The

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123. *Id.* at 16.

124. *Id.* at 15 (citing *Smith v. State*, 234 S.W. 32, 33 (Ark. 1921)).

125. *Id.* (citing *People v. Williams*, 59 Cal. 397, 398 (1881)).

126. *Id.* at 15 (citing *State v. Gage*, 116 N.W. 596 (Iowa 1908); *Sweenie v. Nebraska*, 80 N.W. 815 (Neb. 1899); *Hutchinson v. State*, 24 Tenn. 142 (1844)).

127. *Id.*

128. *Id.* at 15-16.

129. *See id.* (discussing *Medis v. State*, 11 S.W. 112 (Tex. Ct. App. 1889)).

130. *See id.* (discussing *People v. Hickey*, 41 P. 1027 (Cal. 1895)).

131. *See id.* at 18 (discussing *State v. Gage*, 116 N.W. 596 (Iowa 1908)).

132. *See id.* at 17-18 (discussing *Honselman v. People*, 48 N.E. 304 (Ill. 1897)).

133. *Id.* at 19.

134. *Id.*

135. *Id.*

Center accused the Cato Institute of confusing an evidentiary rule with a constitutional right.<sup>136</sup> This right would have been better proven if any of the cases allowed for consent to be used as an affirmative defense or a mitigating factor, but none did.<sup>137</sup>

From this, The Center concludes that, contrary to the views expressed by the petitioner's historians, the sodomy and crimes against nature laws of, or shortly after, 1868 did not allow for consensual and private same-sex sodomy.<sup>138</sup> Instead, consensual private sodomy was one of the many acts directly and clearly prohibited by these laws.

4. *What We Talk About When We Talk About History: The Lawrence Briefs and Hayden White's Theory of "Emplotment"*

Hayden White explains the existence of these divergent factually grounded accounts through his broader argument that one set of historical facts can support numerous factually sound stories, demolishing the notion of one true historical account.<sup>139</sup> This "fact problem," he argues, is one inherent in the literary nature of history.<sup>140</sup> White adds nuance to our commonsensical ideal of "fact," differentiating between the type of facts we are accustomed to, scientific facts and historical facts, which by virtue of their literary grounding, prove more nebulous.<sup>141</sup>

White addresses history as consisting of the dual components earlier addressed in this Comment: the historical event,<sup>142</sup> and the more illusive meaning afforded to a historical event or sequence of events.<sup>143</sup> Considering different modes of understanding, White sets out that one way,

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136. *Id.*

137. *Id.* at 20 (citing *Foster v. State*, 1 Ohio C.C. 261 (Cir. Ct. 1886)).

138. *Id.*

139. See generally White, *supra* note 12.

140. *Id.*

141. *Id.*

142. White, *supra* note 12, at 22; see also Novick, *The Future of Fact*, *supra* note 11, at 37 (for what he similarly categorizes as "brute-facts").

143. White, *supra* note 12, at 22; see Novick, *The Future of Fact*, *supra* note 11, at 37 ("[T]he words 'true' and 'truthful' . . . [are] meaningful only when applied to rather narrowly defined 'brute-factual' statements, singular or statistical. The words . . . [are] adjudged quite meaningless when applied to synthetic historical accounts, whose thoroughly constructed, narrativized, emplotted, and, above all, radically selective and perspectival character was increasingly emphasized."); see also Lichtenberg, *supra* note 14, at 46. ("Novick's account relies . . . [on] the distinction between a realm of facts (perhaps we should say 'brute facts') and a realm of interpretation, which encompasses theories, narratives, stories, and generally the larger accounts that the historian (or other interpreter of events) sets out to tell.").



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the scientific way, that “make[ing] sense of sets of events”<sup>144</sup> is “to subsume the events under the causal laws which may have governed their concatenation in order to produce the particular configuration that the events appear to assume when considered as ‘effects’ of mechanical forces.”<sup>145</sup> But this style of understanding entails mainly hypothesizing on assumptions, as the Court did in *Bowers*, and Calabresi and Pakrash did in *The Presidents Power to Execute the Law*.<sup>146</sup> In the quest for historical truth this idea has already been exposed as fallible, but more importantly, it begs the question. Instead, White offers that historian’s often place the historical event in “culturally-provided categories, such as metaphysical concepts, religious beliefs or story forms.”<sup>147</sup> The latter is prevalent here, where juxtaposed with brute-fact listings in *Bowers*, the *Lawrence* brief’s placements of abstract historical events into a story form “familiarize[ed] the unfamiliar,”<sup>148</sup> or imported meaning where meaning was unclear.

This analysis results from the basic idea that “[w]e do not *live* stories,”<sup>149</sup> yet the history of our collective lives is often told in story form. Imbedded within this is the fact that “[n]o given set of casually recorded historical events can in itself constitute a story; the most it might offer to the historian are story *elements*.”<sup>150</sup> An example of this is, again, the string cite style used by the *Bowers* majority. In and of themselves the laws cited by the *Bowers* Court merely prove their own existence; but, without understanding what the laws meant in context, they tell us close to nothing of the historical treatment of homosexual behavior.<sup>151</sup> For this reason, histories are often presented in story form like fictions.

Historical events only become components of a comprehensible history

144. White, *supra* note 12, at 19.

145. *Id.* at 19-20.

146. *Bowers v. Hardwick*, 478 U.S. 186 (1986); Calabresi, *supra* note 24.

147. White, *supra* note 12, at 20.

148. *Id.*

149. *Id.* at 24 (“We do not *live* stories; even if we give our lives meaning by retrospectively casting them in the form of stories. And so too with nations or whole cultures . . .”) (emphasis in original). *But cf.* Noel Carroll, *Interpretation, History, and Narrative*, in *HIST. & THEORY: CONTEMPORARY READINGS*, 35, 40 (Brian Fay ed., 1998) (“This [argument] is not compelling comprehensively. For it is often the case that we plan—if not out entire lives, at least important episodes therein—by means of telling or visualizing stories to ourselves, and, then, we go about enacting them . . .”).

150. White, *supra* note 12, at 18.

151. The danger exists of superimposing our own current beliefs and understandings in interpreting the past. It is uncertain what the term sodomy itself specifically entailed at this time, and it should be noted that the term homosexual was not part of the English language at the time that these laws came into existence. *See* WILLIAM N. ESKRIDGE JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 160 (1999).

through what White calls “emplotment,” or “the encodation of the facts contained in the chronicle as components of specific *kinds* of plot structures, in precisely the way . . . that is the case with ‘fictions’ in general.”<sup>152</sup> Put more simply, “emplotment” is the “contextualization” of historical events in a literary framework; the addition of a plot to a series of events. It is only when historical events are “emplotted” that they begin to form histories in the literary and comprehensible form; we only begin to understand the past when we convert a list of events into a story of and about those events. This is exemplified by the *Lawrence* briefs, where the Petitioners provided meaning to their brute-facts through placement in the story of policy concerns signaling the dormant then rising animus towards homosexuals and its eventual retreat. The Respondents, on the other hand, told the story of a consistent disapproval of homosexuality. In both instances, roughly the same set of brute-facts were “emplotted” to explain the scope and aim of these laws. Each brief thus comprises a historical account of America’s treatment of homosexual activity in a manner more intelligible and comprehensive than the Court had seen before. Of course, this also meant that the idea of one true past slipped further away.

Under White’s understanding, historical events are value-neutral<sup>153</sup> and only become “tragic, comic, romantic or ironic . . . upon the historian’s decision to *configure* them according to the imperatives of one plot structure or mythos rather than another.”<sup>154</sup> But also under this understanding, historical events—or brute-facts—can be manipulated to tell any story, or minimally two stories, such as the two divergent stories presented to the Court. As Peter Novick explains, “with minimal ingenuity you can construct a narrative of almost any imaginable shape, drawing whatever moral you wish, without getting facts wrong.”<sup>155</sup> The

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152. White, *supra* note 12, at 17.

153. White, *supra* note 12, at 18. White chooses his words carefully in concern to emplotments that seem counterintuitive. He calls “the emplotment of the life of President Kennedy as comedy,”—which no one would accept—as a “misfire,” as opposed to being flat-out wrong. *Id.* Here again, it is the scholarly monitor’s role to police internally. Beyond recognizing this “misfire,” historians are free to choose among emplotting President Kennedy’s life either “romantically, tragically, or satirically,” with little complaint.

154. *Id.*

155. Novick, *The Future of Fact*, *supra* note 11, at 40. *But cf.* Lichtenberg, *supra* note 14, at 47 (“[N]ot every interpretation is compatible with every set of facts, and some interpretations better fit a given set of facts than others.”). Lichtenberg rebuts the notion of “the historian’s *decision* to *configure*” historical events in a specific story form, potentially rebutting the notion of a Justices’ choice to adopt a favorable historical interpretation. *Id.* Even if she is correct, then the decision to accept the “better” history will remain in the hands of the Court. This choice puts ill-equipped Justices into the position of ultimate

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implications of this are potentially damning for judges relying on the past, particularly originalists. If historical events lend themselves to any story, then within the confines of the judicial system both sides of a constitutional debate will always ground their opinions in historical facts, and history-based decisions will be no less reliant on the subjective choice of judges as the feared living constitution. It is clear that the *Lawrence* Court at least had the option of accepting either of these histories and announcing the law it supports under the facade of objectivity.

“The important point is that most historical sequences can be emplotted in a number of different ways, so as to provide different interpretations of those events and to endow them with different meanings.”<sup>156</sup> White makes it clear that narrativity reaches beyond the mode of storytelling and into the meaning of the story that is told. This idea, based on the distinction between a historical event and its more illusive meaning, is exposed in the *Lawrence* briefs, where the same set of facts simultaneously supported two directly contrasting conclusions.

#### 5. *Lawrence Briefs Concluded*

While *Lawrence*'s brute-facts tell us little more than that sodomy laws existed in our past and, prior to its ruling, in our present, they do not tell us at whom these laws were aimed and how they were enforced, and as such they do not fully comprise a history applicable for judicial decision making; brute-facts necessarily only represent half of a historical account. It is only when these facts become fleshed-out, contextually placed, and ultimately “emplotted” that they begin to take the form of legally applicable history. But it is also in this process when incompleteness, omissions, errors, and subjective bias inescapably find their way into historical accounts. Here, the disparity in the historical conclusions arrived at under this one set of agreed upon facts concerning the aim and scope of early sodomy laws, can be partially attributed to the more specific sources cited by the separate sides in this debate. But this becomes a “chicken or the egg” problem with regards to the opinions these historians had *before* they began constructing their histories.

The adversarial system necessitates that two sides are taken in *every* case that potentially relies on history; objectivity is not expected. It is ultimately

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historian, requiring a level of objectivity that history might not afford. As Posner has written, “[l]egal professionals are not competent to umpire historical disputes.” Posner, *supra* note 71, at 595. Even if events lend themselves to specific emplotments, it will still not diminish history's possibility of grounding a subjective decision in reliance on the past.

156. White, *supra* note 12, at 18.

the court's decision whether to accept a set of brute-facts and then combine them with an offered "emplotment" at a level of certainty deserving of the title "historical fact" and incontrovertible enough to dictate constitutional jurisprudence—in effect announcing the factual past as the historian of record. Of course, this role of historian-mediator requires objectivity. On the meta-level Peter Novick should once again be considered in deciding whether a judge serving as the ultimate historian can be objective—it is clear he feels that a judge, or anyone for that matter, cannot.<sup>157</sup> But he is not alone in doubting the rule of judge as historical arbiter. Richard Posner proposes that "when there is not . . . [consensus among professional historians,] the judges must find a method other than history of resolving whatever legal dispute the history has been brought to bear upon."<sup>158</sup> Posner's perspective exemplifies the growing recognition among legal scholars of the impact of Novick and White, for "[t]he return of literature plunged historical studies into an extended epistemological crises,"<sup>159</sup> and this crisis has not escaped our courts.

### III. REMAINS OF THE PAST: THE LAWRENCE DECISION'S IMPACT ON HISTORY AND HISTORIOGRAPHY

*"To ignore the truth inside the lie is to sin against the craft . . ."*<sup>160</sup>

White and Novick define history with a level of malleability rendering it nearly inapplicable for legal decision-making. For if it is true "that most historical sequences can be emplotted in a number of different ways, so as to provide different interpretations of those events and to endow them with different meanings,"<sup>161</sup> then how can a court discern *one* correct understanding of the past? The *Lawrence* Court came close to announcing one of their own, and while falling short of solely basing its decision on history, it made historical assertions changing the current legal conception of the historical treatment of homosexuality. Concurrently, in a dissenting opinion authored by Justice Scalia, historical assertions similar to those first proposed in *Bowers* were also embraced by justices of the Court.

In an effort to purge legal history from the postmodernist wasteland, and delineate its benefits along with its shortcomings, both of these historical

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157. See generally NOVICK, *THAT NOBLE DREAM*, *supra* note 62.

158. Posner, *supra* note 71, at 595.

159. DAVID HARLAN, *THE DEGRADATION OF AMERICAN HISTORY* 3 (1997).

160. Stephen King, Acceptance Speech at the 2003 National Book Awards, *available at* [http://www.nationalbook.org/nbaacceptspeech\\_sking.html](http://www.nationalbook.org/nbaacceptspeech_sking.html). There is some scholarly slight-of-hand here, as this statement was made in regard to fiction writing.

161. White, *supra* note 12, at 18.

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accounts are presented and then analyzed under Raymond Martin’s *Progress in Historical Studies*,<sup>162</sup> which argues for recognizing progress in historical understanding despite the illusiveness of a factual past. Martin’s theoretical argument, matched with the dueling histories of *Lawrence*, expose the unique benefit of historical studies as experienced by the historian, but ultimately fall short of supplying a justification for legal invocations of historical accounts as solely decisive entities. Instead, in conclusion, this Comment proposes history’s rightful application is an aid towards achieving justice, and not as an empowered disguise used to circumvent it.

### A. The *Lawrence* Decision

Where the *Bowers* Court framed the question on the existence of a fundamental right to engage in homosexual sodomy, the *Lawrence* Court concluded that the case “should be resolved by determining whether the petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”<sup>163</sup> To this end the Court deemed it necessary to “reconsider the Court’s holding in *Bowers*.”<sup>164</sup>

The Court invoked *Griswold v. Connecticut*,<sup>165</sup> which protected a married couple’s “right to make certain decisions regarding sexual conduct” as a privacy issue under the Due Process Clause, and its progeny to outline the Fourteenth Amendment’s privacy protection as covering consensual sodomy.<sup>166</sup> *Eisenstadt v. Baird*<sup>167</sup> affirmed the unmarried individual’s similar right to privacy,<sup>168</sup> and *Roe v. Wade*<sup>169</sup> and *Carey v. Population Services International*<sup>170</sup> supported this affirmation.<sup>171</sup> Because the right examined in *Lawrence* was much more general than that of *Bowers*, the case did not turn on a reexamination of the *Bowers* history, but instead on the scope of the ahistorical right to privacy. Still, in perhaps a forward thinking move, the history proposed in *Bowers* was refuted by the

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162. Raymond Martin, *Progress in Historical Studies*, 37 HIST. & THEORY 14 (1998) [hereinafter Martin, *Progress in Historical Studies*].

163. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

164. *Id.*

165. *Id.*

166. *Id.* at 2477.

167. 405 U.S. 438 (1972).

168. *Lawrence*, 539 U.S. at 565 (citing *Eisenstadt*, 405 U.S. at 453).

169. 410 U.S. 113 (1973).

170. 431 U.S. 678 (1977).

171. *Lawrence*, 539 U.S. at 565.

majority and supported by the dissenting justices.

*1. The Majority's History*

The *Lawrence* Court ultimately framed the question as to “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”<sup>172</sup> While the decision withdrew support for the historical facts declared in *Bowers*,<sup>173</sup> the Court stopped short of declaring a new judicially binding history of American sodomy laws. The majority noted that it “need not enter this debate in the attempt to reach a definitive historical judgment.”<sup>174</sup> Still, the Court offered its disapproval of the history presented in *Bowers* and embraced several of the Petitioner’s historical assertions in its dicta.

As an initial matter, the Court wrote, “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”<sup>175</sup> The Court notes, rather weakly, that this “may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late nineteenth century.”<sup>176</sup> Relying on nineteenth-century commentators, and in full agreement with both sides of this debate, the Court embraced the idea that American sodomy laws punished sodomy between men and men and between men and women.<sup>177</sup> The Court then adopted the petitioners historical interpretation that, “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.”<sup>178</sup> Note that the Court chose to include the word “seem,” implicitly admitting the difficulty in declaring historical fact by carefully wording this statement as a disavowal of a previously accepted historical fact, and not a declaration of a new belief. To support the notion of non-prosecution of consensual acts, the Court relies on the petitioner’s idea that “one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the

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172. *Id.* at 563.

173. *Id.* at 567 (“[T]he following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.”).

174. *Id.*

175. *Id.*

176. *Id.* at 567-68.

177. *Id.*

178. *Id.* at 569.

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criminal law.”<sup>179</sup> From this they offer that sodomy prosecutions typically were brought against adults either using force or engaging in relations with minors and not against adults engaging in consensual sodomy.<sup>180</sup>

The Court then addresses the idea that “[u]nder then-prevailing standards a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice,”<sup>181</sup> offering only that this proves the infrequency of prosecutions. The Court acknowledges that early legal literature might not have included descriptions of homosexual behavior because of the private nature of the acts.<sup>182</sup> The Court gives in to the notion that “there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices.”<sup>183</sup> But this, it contends, did not arise until “the last third of the twentieth century,”<sup>184</sup> as “[i]t was not until the 1970’s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.”<sup>185</sup>

## 2. *The Dissenters’ History*

While the majority mostly adopted the historical account presented in the briefs on behalf of the petitioners, Justice’s Scalia, Rehnquist, and Thomas (“Dissenters”) unsurprisingly adopted a historical account closer to that proposed by the respondents, nearly mirroring the *Bowers* decision both substantively and rhetorically. Where the majority relied on the assertion that “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter”<sup>186</sup> to support their historical reconstruction, the Dissenters claim this fact only reaffirms their revisionist interpretation of the basis of *Bowers* decision: “that our Nation has a longstanding history of laws prohibiting *sodomy* in general—regardless of whether it was performed by same-sex or opposite-sex couples . . . .”<sup>187</sup>

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 595 (Scalia, J., dissenting).

187. *Id.* at 595. This might be a generous reading of *Bowers*, where the majority’s decision was actually criticized by dissenting justices for *not* considering these laws as prohibitions of sodomy generally, but instead reading them only for their prohibitions of

The Dissenters then dispute the validity and weight of the majority's notion that "laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private."<sup>188</sup> First noting that this proposition is offered without citation,<sup>189</sup> the dissent then questions the meaning of the statement. Scalia, writing for the dissent, notes:

I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by.<sup>190</sup>

Contrasting the majority's claim that early laws were not targeted at consensual same-sex partners, the Dissenters cite the "203 prosecutions for consensual, adult homosexual sodomy reported in the West reporting system and official state reporters from the years 1880-1995,"<sup>191</sup> as well as "records of 20 sodomy prosecutions and 4 executions during the colonial period."<sup>192</sup> Concerning "the past half of the century[,] . . . there have been 134 reported cases involving prosecutions for consensual, adult homosexual sodomy."<sup>193</sup> And, concerning the American Law Institute's 1955 recommendation not to criminalize "consensual sexual relations conducted in private," the Dissenters point out that "the Court ignores the fact that this recommendation was 'a point of resistance in most of the states that considered adopting the Model Penal Code.'"<sup>194</sup>

Scalia considers the majority decision as "the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."<sup>195</sup> Further channeling *Bowers* rhetoric, he adds, "Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means."<sup>196</sup> Thomas, appearing more overtly

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same-sex sodomy.

188. *Id.* at 596.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* (internal quotation omitted).

194. *Id.*

195. *Id.* at 601.

196. *Id.* at 602.



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diplomatic, adds that the law in question is “uncommonly silly,”<sup>197</sup> and that “[i]f I were a member of the Texas Legislature, I would vote to repeal it.”<sup>198</sup>

### 3. *Lawrence Concluded*

The histories presented in *Lawrence* continued the discussion that began in *Bowers* seventeen years prior, beginning with contentions over the relevancy of the scope of early sodomy laws. Taking a cue from the *Bowers* dissenters, the *Lawrence* majority denied the historical foundation of laws directly aimed at homosexual sodomy.<sup>199</sup> In *Bowers*, as outlined earlier, a long list of early sodomy laws supported the notion of a historical condemnation of homosexual sodomy.<sup>200</sup> The *Bowers* majority simply never mentioned that these laws forbid sodomy generally.<sup>201</sup> Yet, interestingly the Dissenters in *Lawrence* speak about the “longstanding history of laws prohibiting sodomy in general” as the basis of the majority decision in *Bowers*,<sup>202</sup> and consequently encompassing the more specific condemnation of same-sex sodomy at issue. This argument, while persuasive on the surface, is clearly a revisionist look at *Bowers* through a more modern historical and sociological lens; *Bowers* only overtly focused the historical treatment of same-sex sodomy. In the seventeen intervening years, the desire to view these laws in totality has shifted; where they originally were invoked to expose the selectivity of the *Bowers* majority, now they were being used to *hide* the selectivity of the *Bowers* majority.

The *Lawrence* Dissenters sought to repudiate some of the majority’s new historical claims. Where the majority adopts the petitioner’s syllogism and eventual inference that consensual same-sex sodomy was left largely unregulated,<sup>203</sup> the Dissenters cite a string of convictions to support the contrary.<sup>204</sup> These convictions do not appear in the majority’s historical analysis.

Overall, neither account, taken on its own, tells the full story of these sodomy laws and their enforcement. Both have their flaws, most notably

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197. *Id.* at 605 (Thomas, J., dissenting) (quoting *Griswald v. Connecticut*, 381 U.S. 479, 527 (1965)).

198. *Id.*

199. *Id.*

200. *See Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

201. *See id.*

202. *Lawrence*, 539 U.S. at 596.

203. *Id.* at 568.

204. *See supra* notes 186-98 and accompanying text.

that they cannot simultaneously be true. Yet, together and also combined with the differing briefs, they take on the rough form of an understanding of the past that is more thorough, complete, inclusive, and factual than any history of this sort that courts have seen before. Somehow, *Lawrence* has made it harder to say what we specifically now know about the history of these sodomy laws, while simultaneously fostering the belief that today we somehow know *more* about these laws in general. This dualistic recognition illuminates the true value of constructing histories, but it also highlights their indirect applicability for our courts.

### **B. Shifting the Paradigm: New Ways to Appraise and Apply Our Past**

The uncertainty of historical assertions has not been lost on legal scholars. In concern to originalism and constitutional history, Jack N. Rakove writes that “the ideal of ‘unbiased’ history remains an elusive goal, while the notion that the Constitution had some fixed and well-known meaning at the moment of its adoption dissolves into a mirage.”<sup>205</sup> But he adds that, “in the end, what is most remarkable about our knowledge of the adoption of the Constitution is not how little we understand but how much.”<sup>206</sup> In acknowledging the valid questions raised by epistemologists<sup>207</sup> while continuing to construct histories as a historian, not a lawyer,<sup>208</sup> Rakove proves that recognizing the myth of historical fact does not mark the death of the legal historian. In fact, it liberates the historian to pursue the past both honestly *and* subjectively.

Just as recognizing history’s limitations does not prevent the historian from constructing histories, it similarly should not defeat history’s relevance in judicial decision making. Instead, acknowledgment of history’s malleability should only supply courts with a new set of guidelines and obligations, both in the form of a new framework in which to view history and historical progress, and a new manner in which it

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205. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996).

206. *Id.* at 6-7.

207. *Id.* at 158 (“Set against the epistemological writings of Locke, Berkeley, Hume, or Kant, Madison’s brief reflections are hardly noteworthy; their significance instead rests in the contrast they reveal between his understanding of the problem of constitutional interpretation and the more rigid mode of political thinking he imputed to the Anti-Federalists.”).

208. *Id.* at 10.

should be applied.

### *1. Appraising the Past*

In *Progress*, an answer to Peter Novick, Martin looks to answer two questions: 1) “What would it take for us now to have more understanding of the past,”<sup>209</sup> and 2) “whether there has been progress in historical studies.”<sup>210</sup> He explains progress as the idea “that we now understand the past better.”<sup>211</sup> Martin, like Rakove, does not fight the postmodernists at their own battle<sup>212</sup>—he does not look to prove that we can find historical *facts*—but instead he salvages history’s worth through delineating the guidelines for recognizing progress in a historical debate. This notion of progress serves as a surrogate for the previously desired ideal of truth in history. Progress in historical understanding is the best we can ask for as we constantly work towards a better understanding of the past, and recognizing this can be of value to our courts.

Contrary to Novick, Martin says that, “in virtually every major, long-standing, interpretational controversy in historical studies there has been significant progress: we not only know more now, we understand better.”<sup>213</sup> He outlines this argument through a historiography of the American Revolution, pointing out that the Imperialist histories were improvements upon the previous Whig interpretations.<sup>214</sup> In comparing the two, Martin notes that the primary advancements propagated by the Imperialists were that

they were based on a more sophisticated evaluation of evidence; they counterbalanced Whig overemphasis on ideology and diplomatic developments by calling attention to underlying social and economic realities; they were less metaphysically speculative; they were more impartial; and—the clincher—they afforded students of the Revolution an opportunity to view it not only from the perspective of the Revolutionaries but also from that of British administrators.<sup>215</sup>

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209. Martin, *Progress in Historical Studies*, *supra* note 162, at 14.

210. *Id.* at 15.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 17.

215. *Id.* at 19. This analysis, followed by the introduction of the Progressives, Neo-Whigs, and Neo-Progressives outlines Darwinist history through self-policing. It also demonstrates an underlying theme of consistencies that later becomes important for Martin’s argument.

Martin adds to this the contributions by the Progressives,<sup>216</sup> the Neo-Whigs<sup>217</sup> and Neo-Progressives,<sup>218</sup> and social historians.<sup>219</sup> Through these competing interpretations he concludes that the history of the Revolution “has become more accurate, more comprehensive, better balanced, and better justified . . . .”<sup>220</sup> In totality the same can be said for the history of American sodomy laws. Applying Martin’s analysis to that history solidifies the nebulous feeling of “knowing more” addressed earlier, and outlines an appreciation for history that exists independent of questions about its ability to tell the truth.

*a. Marking Historical Accuracy, Comprehensiveness, and Balance.*

By Martin’s account histories become more accurate when:

many factual and explanatory mistakes in previous interpretations have been corrected and the corrections tend[] to be cumulative; more comprehensive and better balanced because more sorts of causal influences have been taken into account, more sorts of subjective perspectives of the people whose history is being more interpreted have been portrayed, interpretive structures have become more accommodating

216. *Id.* at 21. Martin writes:

Did the Progressive interpretations contribute to progress? Surely they did, for at least three reasons: first, in important respects the Progressives took a more discriminating view of colonial life than had earlier historians and thus corrected for a number of imbalances and oversights; second, they highlighted the importance of considering self interest as a motivating force; and, third, they introduced the illuminating idea that even apart from considerations of self-interest, reasons should not simply be taken at face value since they may express a more explanatory underlying reality.

*Id.* He adds that, “the progressives went astray by modeling their interpretations of the American Revolution too closely on then extant interpretations of the French Revolution.” *Id.*

217. *Id.* at 22 (“Neo-Whigs, including Robert Brown, Forrest McDonald, and Daniel Boorstin, had become dissatisfied with the ‘deterministic interpretations’ of the Progressives, claiming that the progressives had exaggerated the rigidity of class divisions in colonial America and also the oppression and exclusion from politics of the lower classes.”).

218. *Id.* at 26 (“[W]hereas [Bernard] Bailyn and [Edmund] Morgan had suggested that among free whites, poverty was unknown in colonial America and hence that ‘social strains’ generated by poverty were not among the causes of the Revolution, Gary Nash claimed to have found in tax, poor relief and probate records, abundant evidence of poverty in colonial times.”). Martin feels that the label of “Neo-Progressives” might be misleading. *Id.*

219. *Id.* at 25 (“Not a school of interpretation but a social science-oriented approach to previously ignored data, social history has dislocated much of what historians . . . have produced, much of it about people—the poor, woman, slaves and natives—whom historians previously had neglected.”).

220. *Id.* at 27.

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and inclusive; and interpretations have tended to become less partisan . . . .<sup>221</sup>

Because the *Bowers* Court was only concerned with whether the laws of and around 1868 prohibited homosexual sodomy (this specific inquiry is attributable to the specific question the Court asked), it was not forced to comprehend these laws in their entirety. Whereas Burger explicated the purpose of these laws through insinuatingly contextualizing their existence with historical, moral, and religious condemnation of homosexuality, the briefs on behalf of the Petitioner as well as the *Lawrence* majority offer a more pragmatic grounding in the form of preventing forms of nonconsensual sexual abuse not then defined as rape,<sup>222</sup> as well as preventing public crimes against "morals and decency."<sup>223</sup> It is argued, that the laws were not concerned with private acts. Whether this is a correction is not entirely clear. Burger more insinuated than asserted the intent of these laws, and while the Petitioners offer a fuller picture of their roots, they do not (nor have they set out to) entirely undermine the assertion that these laws have some religious grounding.

When Martin writes of improved accuracy, he is speaking more directly to the replacement of brute-facts. That has not been done in the seventeen intervening years between *Bowers* and *Lawrence*. The Petitioner's pragmatic argument, however, certainly improves our understanding by affording a more comprehensive look at the past, as well as offering a different perspective. This is further explicated in the Neitzchian-style analysis found below.

*b. Justified History*

History becomes "better justified because the sheer quantity of evidence on which interpretations are based has grown enormously, and more careful and sophisticated methods for assessing evidence have been introduced."<sup>224</sup>

Comparisons of the histories discussed in *Bowers* and eventually in *Lawrence* expose much growth in interpretational evidence. While *Bowers* and *Lawrence* concern the same issue—the sophistication and content of the historical accounts offered to the Court in *Lawrence* greatly surpass the *Bowers* interpretation—admittedly most of the changes can be found in the petitioner's accounts. The advances made by the petitioner's force a

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221. *Id.* at 27-28.

222. *See supra* note 101 and accompanying text.

223. *See supra* note 105 and accompanying text.

224. Martin, *Progress in Historical Studies*, *supra* note 162, at 28.

reexamination of what we thought we knew. One need not adopt any of the petitioner's conclusions to acknowledge that they have minimally offered factually grounded advancements forever changing the scope and focus of the debate. This becomes further apparent as the respondent's history reads just as much as a reaction to that of the petitioner's as it does a comprehensive telling of the past. Interestingly, the scope of primary brute-facts open for interpretation has barely changed at all; now we are simply learning more about them.

The "more careful and sophisticated methods for assessing evidence" can best be tied to the methodological assertions made by Flaherty and the more general idea of the scholarly monitor. It is the obligation of historians on opposing sides of this debate to catch their opponent's deceptive or incomplete histories, but these are not always easy to find. If Flaherty's assertions in *History "Lite"* are correct, then the legal world still needs quite a bit of refinement in this category. Still, scholarly scrutiny of *Bowers* has led to criticism and disapproval of the history the Court first supported. Now, the *Lawrence* case and briefs read together should form a series of responses in a debate, and not two concurrent truthful historical tracts. They work off of each other to support or destroy claims and ultimately for a more complete picture of our past.

*c. Accuracy, Comprehensiveness and Balance, and Justification as  
Enhanced Historical Understanding*

Ultimately, Martin says that "it is reasonable to believe that the introduction of interpretations that are more accurate, more comprehensive, better balanced, and more justified has enhanced historical understanding."<sup>225</sup> All of these individual aspects form to support the more nebulous, yet fundamentally undeniable, proposition that we now know more about these sodomy laws than we did at the time of *Bowers*. This can be seen (or what ultimately seems like felt) without necessarily adopting one of the two tracks of history presented in this Comment. And, because the work of historians on both sides of this debate have shaped a foundation that tells us more about the past than we knew before, then Novick and White cannot be entirely right; historical accounts must mean more than works of fiction. Martin proves that something exists between the postmodernist wasteland and blind-faith in historical validity.

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225. *Id.*

*d. Components of Historical Progress*

When Martin pulls history from the depths of the meaningless, he falls short of affording it the ability to declare absolute empirical facts. He does this because, for Martin, interpretational divergence as well as a lack of objectivity actually increases understanding for the Historian.<sup>226</sup> This idea can be traced at least as far as back as Nietzsche, who said:

There is *only* a perspective seeing, *only* a perspective “knowing”; and the *more* affects we are allowed to speak about one thing, the *more* eyes, different eyes, we can use to observe one thing, the more complete will our “concept” of this thing be. But to eliminate the will altogether, to suspend each and every affect, supposing we were capable of this—what would that mean but to *castrate* the intellect?<sup>227</sup>

This idea can make sense in the context of what we are looking at, or for. History, as opposed to science,<sup>228</sup> will not afford us a forum to test our hypothesis. When one constructs a history, she cannot go back in time and ensure that she has everything correct. But, further distinguishing this difference is the idea that history, especially concerning a movement, is a matter that might never be fully settled; causal connections are a lot more elusive in history than they are in science. Where science can often be boiled down to a logical proof (i.e. an if-then statement), history’s causalities do not exist in a vacuum; the strictly if-then ideal cannot be evoked because the “ifs” in history are never mutually exclusive. In short, something is usually caused by a multitude of factors revealed to us slowly over time.

When Martin proposes that viewing subsequent histories as divergent is not entirely on the mark,<sup>229</sup> he conjures Nietzsche’s basic proposition that we learn more through different perspectives. With concern to the historical debate over the right to engage in consensual same-sex sodomy, subsequent histories have formed *interpretive polarities*,<sup>230</sup> or “traditions of interpretation in which, at any given time, the main competition is between two schools, or traditions, of interpretation that share the common phenomenon.”<sup>231</sup> When history evolves to a point of well-policed competing ideas, progress has been made. Indeed “within the context of

226. *Id.* at 31.

227. FRIEDRICH NIETZSCHE, ON GENEALOGY OF MORALS 119 (1887).

228. See generally Raymond Martin, *The Essential Difference Between History and Science*, 36 HIST. & THEORY 1 (1997).

229. Martin, *Progress in Historical Studies*, *supra* note 162, at 28-29.

230. *Id.* at 28.

231. *Id.*

controversy among interpretations with the same interpretational focus, there can be progress in historical understanding when we achieve greater representation and more balance in our understanding of different yet relevant, *subjective* perspectives and agencies, even when this fosters interpretational divergence.”<sup>232</sup>

But “greater representation and more balance” is not all we get with interpretive polarities. Well-developed history gets us as close to historical facts as we can be in the form of *agreed-upon facts*.<sup>233</sup> “[A]t any given time, historians who are engaged in an interpretational debate always accept a large body of agreed-upon facts, and that at *that* particular time, in *that* particular context of debate, such agreed-upon facts serve *as if* they were external checks on interpretations.”<sup>234</sup> These agreed-upon facts contribute to the self-policing that controls and facilitates the growth of historical information.

The histories advocated in *Lawrence* match up nearly perfectly with Martin’s requirements for progress in historical understanding: we now have a clearly delineated set of agreed-upon facts; we have two clearly defined interpretative polarities; every side of this debate is represented; poor and unsupported claims have been questioned and weeded out. For the philosopher or the historian this is a model of how a historical study should advance, but for the judiciary looking for the past to dictate an objective decision this same model renders history nearly inapplicable.

## 2. Applying the Past

When Cass R. Sunstein argues that “the function of the constitutional lawyer, even if historically inclined, is properly and unembarrassingly distinctive [from that of the historian],”<sup>235</sup> he is clearly correct, but, contrary to his position, the distinctiveness of this function arises as a result of the very thing that he claims lawyers and the judiciary need not be concerned with: certainty in historical understanding.<sup>236</sup> With a sophisticated and clear understanding of the limitation of history, Sunstein

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232. *Id.* at 31.

233. *Id.* at 36.

234. *Id.* (emphasis in original).

235. Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995).

236. *Id.* at 603. Sunstein argues that the distinction arises in the constitutional lawyers purpose of searching for a useable past—“elements in history that can be brought fruitfully to bear on current problems”—as opposed to the historian’s goal of “reveal[ing] the closest thing to full picture of the past, or to stress the worst aspects of a culture’s legal tradition.” *Id.* Under Sunstein’s approach the “useable past” does not require “factual” grounding as its emphasis is placed on its interpretational effect. *Id.* at 602.



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gets the demands of the historian and the judiciary backwards. Comparing the role of the historian and the lawyer, Rakove writes,

It may be necessary fiction for lawyers and jurists to believe in a “correct” or “true” interpretation of the Constitution, in order to carry on their business. Gordon Wood has observed, “but we historian’s have different obligations and aims.” The foremost of these tasks is to explain why “contrasting meanings” were attached to the Constitution from its inception. And, if anything, this is a task that recent controversies over the feasibility of a “jurisprudence of original intention” have inspired historians to pursue with relish.<sup>237</sup>

If the goal is an explication of contrasting meanings then Martin’s framework encourages writing histories without getting bogged down in epistemological riddles. Within the legal framework, however, the elusive ideals of “truth” and “correctness” are mandatory. In the absence of a clearly true reliable account, well-developed histories will not give answers, but instead supply diverging choices. Concerning originalist matters, it is history that supposedly informs judges on how the law was originally understood, and in turn dictates rulings.<sup>238</sup> Under this framework there is no room for error; the adopted conception of the past becomes the law of the present. Accordingly, it is not unreasonable to demand that the past be true.

The intellectual and emotional appeal of announcing the past to dictate the present is obvious but misguided. As Richard Posner fears, “judges fool themselves into thinking that history delivers the solutions to even the most difficult and consequential legal issues and thus allows them to duck the really difficult question—the soundness of the solutions as a matter of

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237. RAKOVE, *supra* note 205, at 10.

238. *Id.* at 9. Rakove writes:

For the argument that the original meaning, once recovered should be binding presents not only a strategy of interpretation but a rule of law. It insists that original meaning should prevail—regardless of intervening revisions, deviations, and the judicial doctrine of *stare decisis*—because the authority of the Constitution as supreme law rests on its ratification by the special, popularly elected conventions of 1787-88. The Constitution derives its supremacy; in other words, from a direct expression of popular sovereignty, superior in authority to all subsequent legal acts resting only on the weaker foundation of representation. If this becomes the premise of interpretation, it follows that the understanding of the ratifiers is the preeminent and arguably sole source for reconstructing original meaning. The prior editorial decisions and revisions of the Convention recede to the status of mere proposals, while actions taken by any branch of government *after* the constitution took effect themselves become mere interpretations.

*Id.*

public policy.”<sup>239</sup> Still, when we acknowledge what history cannot give us, we should not overlook what it can; for while it is not equipped to answer a question alone, history is an invaluable tool in guiding judges through the more difficult process of finding a just decision.<sup>240</sup> Our past is inextricably combined with our present. The notions of justice and fairness we hold as a society evolve on a continuum connecting the past and the future. Just as it would be ridiculous to stunt progress because of our (mis)conceptions of the rules of yesterday, it would be equally foolish to deny the lessons we have learned. The past will not answer every specific question, but it can supply us with a means towards finding the answers. History should not replace our sense of justice, it should inform it.

Since the past is important, and because historical constructions inform us about the past, albeit amorously, history’s importance remains absent the esteem as the sole decisive factor in legal decisions. But if we allow our courts to be informed by history, then they should be obliged to look at the past realistically. As Nietzsche proposed long ago, “the *more* eyes, different eyes, we can use to observe one thing, the more complete will our concept of this thing be.”<sup>241</sup> Here we are viewing the history of American sodomy laws from two unabashedly subjective perspectives. And under this model this should tell us more about the past in the most general sense. For the philosophers and historians this might be enough, but in our courts more eyes only means more choices shrouded in facts.

I am certain that many readers will believe one of the perspectives offered here is more truthful than the other, but in many cases this belief will have little to do with history, but instead with an inner sense of right and wrong. Simply put, it is nearly impossible to adopt as fact one of two conflicting versions of the past when they are both grounded in truth. Should we allow Justices to hide their subjective decisions behind this choice in announcing or denying constitutional rights? I argue no. We must acknowledge the tiebreaker that exists already; our sense of justice.

History is persuasive and uniquely illuminating. Through self-policing in the manner Flaherty proposes, better or more important works will have more impact than less qualified ones, and progress will continue in all of our ongoing historical debates. But, if our only goal is to flesh out ideas, then history can carry no more weight than new and insightful philosophical perspectives, and what is considered a good historical account might depend more on the idea it presents, than how it supports it.

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239. Posner, *supra* note 71, at 583.

240. *Id.* at 589.

241. NIETZSCHE, *supra* note 227, at 119.

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Maybe this is all history is really equipped to give us. Maybe it should not carry any more weight than persuasive philosophies. But this idea seems to shortchange the unique value inherent in gaining a better understanding of our past. Still, at the end of the day, after the Supreme Court exhibited a willingness to manipulate history in *Bowers*, it is hard to decide where history should stand. Intuitively, it seems to offer more than other interpretive and/or rhetorical tools, but it also undeniably allows our courts to disguise an agenda in “facts.” Perhaps in taking advantage of this, the Court has manipulated the value out of our greatest natural resource—our own past.

### CONCLUSION

In subsuming consensual same-sex sodomy under the Fourteenth Amendment’s Right to Privacy, the *Lawrence* Court’s decision did not rely on history, but instead, ultimately, on the Court’s notion of justice. Although it is easy to see what history the majority would have adopted, it is hard to say what decision history actually dictated. It is uncomfortable for a lot of people, myself included, to rely on the Court’s notion of justice to dictate our fundamental rights. Yet, an honest look at the composition of history acknowledges that in history-based legal decisions this is precisely what we do.

It is my hope that ongoing debates about this case center on whether a just decision was reached—not an historically sound one—because ultimately this is the only question that matters. In conclusion, Scalia’s words on original understanding bare significance on the more general application of legal history. He says that

the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*, that the very act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to that change is unknown and unknowable.<sup>242</sup>

In this Comment I have attempted to show how reliance on history as a legally decisive entity allows for an agenda to be shrouded in facts. This risk is far graver than the “difficulties and uncertainties” of a living Constitution, where subjective agendas will certainly play a role, but at least then the risk will be a transparent one.

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242. ANTONIN SCALIA, A MATTER OF INTERPRETATION 45-46 (1998) (emphasis added).

