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I. INTRODUCTION

Can the Supreme Court be expected to preserve marriage as a union between a man and a woman? If preserving the traditional concept of marriage means constitutionally outlawing same-sex marriage, the simple answer is "No." The United States Constitution has nothing specific to say about marriage, and the Court is unlikely to discover a constitutional guarantee that marriage must be limited to heterosexual unions. For the Constitution to limit marriage to heterosexual unions, it will have to be formally amended.[2]

The more pertinent question is whether the Court will find a right in the Constitution that allows same-sex marriage. This Constitutional right would override the Federal Defense of Marriage Act (DOMA)[3] and the many state statutes and constitutional provisions that limit marriage to a relation between a man and a woman. Obviously, this cannot be ruled out.[4] The Supreme Judicial Court of Massachusetts has led the way by discovering a right of same-sex marriage in the Massachusetts state constitution.[5] The United States Supreme Court would have no difficulty finding similar flexibility in the U.S. Constitution should it choose to do so.

So, will the Court move in that direction? This article will attempt to answer this controversial question through an analysis of recent Supreme Court decisions.

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1. Some portions of the analysis in this paper are taken from the author's recent book, CORRUPTED BY POWER: THE SUPREME COURT AND THE CONSTITUTION (2004).

2. Various proposed Federal Marriage Amendments have thus far failed to secure approval in either chamber of Congress. *See, e.g.*, H.R.J. Res. 56, 108th Cong. (2003); S.J. Res. 30, 108th Cong. (2004).

3. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

4. *But see* Mae Kuykendall, *The President, Gay Marriage and the Constitution: A Tangled Web*, 13 WIDENER L.J. 799, 807 (2004) (appearing to rule out such constitutional grounds as unsupportable "speculation").

5. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (2003).

II. SURVEY OF RELEVANT CASE LAW

A. Supreme Court Precedent

Recent precedents adjudicating constitutional claims involving homosexuals are relevant to the question, if not conclusive. Over the past half century the Court's treatment of such issues has undergone significant redirection. Illustrative of the earlier attitude is *Boutilier v. Immigration and Naturalization Service*,[6] a case asking whether homosexuals should be denied entry into the United States because they are "afflicted with psychopathic personality."[7] As a matter of statutory interpretation, and relying on the legislative history of the statute, the majority concluded that "Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts."[8] Justices Douglas, Fortas, and Brennan dissented, but there was no suggestion by the dissent that discrimination against homosexuals might be unconstitutional.

Nineteen years later the constitutional issue was confronted directly in *Bowers v. Hardwick*,[9] a challenge to Georgia's criminal sodomy law.[10] Five members of the Court upheld the Georgia statute, but not without an impassioned dissent from the other four justices. The clash of views on the Court was so strong that the majority and the dissenters could not even agree on the characterization of the issue. Justice Byron White, speaking for the Court, defined the issue as "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 very long time."[11] As recently as 1961 all states outlawed sodomy, and 24 states and the District of Columbia still did in 1986.[12] "Against this background," the Court said, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of

6. 387 U.S. 118 (1967).

7. 8 U.S.C. § 1182(a)(4) (2005), Immigration and Nationality Act of 1952 § 212(a)(4).

8. *Boutilier*, 387 U.S. at 122.

9. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

10. The Court had a brush with the sodomy issue in 1976 but chose not to hear argument on it. In *Doe v. Commonwealth's Attorney for City of Richmond*, 425 U.S. 501 (1976), the Court summarily affirmed a federal district court decision, upholding against constitutional attack a Virginia statute making sodomy a crime.

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

12. *Id.* at 193.

ordered liberty' is, at best, facetious."[13]

The four dissenters saw the issue in quite a different light. The case, they said, was not about "a fundamental right to engage in homosexual sodomy" but rather "about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[14] This statement referred to the constitutional right of privacy created earlier in *Griswold v. Connecticut*[15] and *Roe v. Wade*.[16] It did not mean people have an absolute right, vis-à-vis the government, "to be let alone"; otherwise no law would be constitutional. It meant only that people have the right to be let alone when the Court decides they have such a right.

In this instance, as the dissent saw it, the thing at stake was not just the right to commit sodomy in private, but "the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[17] The Georgia law in question proscribed only sodomy, however, and did not extend to other aspects of Mr. Hardwick's "intimate association" with his partner. In light of everything else said in the dissent, the "fundamental interest" in "controlling the nature of their intimate associations" meant people ought to be able to engage in any type of sexual conduct they wish, as long as it is consensual, with other adults, and not in public view. This is not a wholly unpopular point of view in American society today. The real question is whether such a view of things, unsuspected for nearly two hundred years, had at this late date become mandated by the Constitution. As of 1986, four members of the Court thought it had, while five believed it had not. Ten years later, dealing with a related issue in *Romer v. Evans*,[18] six of nine Justices on the Court appeared to believe that maybe private consensual relations should be protected.

In *Romer v. Evans*, a six-to-three decision, the criminality of homosexual conduct was not directly at issue. Rather, it was the viability of an amendment to the Constitution of Colorado, adopted by state-wide referendum, to forbid the granting of preferential or special protected status to homosexuals. The measure had been approved in 1992, primarily as a response to ordinances in various Colorado communities, including Boulder, Aspen, and the County of Denver, banning

13. *Id.* at 194.

14. *Id.* at 199 (Blackmun, J., dissenting) (quoting Justice Louis D. Brandeis in *Olmstead v. United States*, 277 U.S. 438, 478 (1928)).

15. 381 U.S. 479 (1965).

16. 410 U.S. 113 (1973).

17. *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting).

18. 517 U.S. 620 (1996).

petition government for a redress of grievances.[34]

The Court of Appeals saw it differently.[35] Just as the district court had accepted essentially every constitutional argument offered by plaintiffs for invalidating the amendment, the Court of Appeals expressly rejected those arguments: homosexuals do not constitute a quasi-suspect class;[36] there is no fundamental right of equal access to the political process;[37] the amendment violated no First Amendment rights or right of petition;[38] the amendment was rationally related to a number of legitimate government objectives;[39] and it was not unconstitutionally vague.[40]

This brief summation of conclusions by the district and appeals courts, respectively, does not do justice to the arguments presented. Suffice it to say the district court presented a strong, even compelling, exposition of the homosexuals' point of view, while the Court of Appeals—with at least equally compelling logic—systematically dismantled the district court's arguments.[41]

There was more to come. Taking the case on certiorari, the Supreme Court remanded it for reconsideration in light of *Romer*, giving the appeals court judges a second bite at the apple.[42] Admittedly bound by what the Supreme Court had said in *Romer*, the Court of Appeals signified its agreement with the principles propounded there, and then artfully distinguished the two cases on their facts.[43] In the process, the lower court salvaged every conclusion of constitutional law appearing in its initial opinion.

As Court of Appeals pointed out, *Romer* had applied a "rational relationship" standard which, in principle, could be satisfied if supported by a legitimate state interest.[44] The Colorado amendment failed to satisfy that standard because it imposed a wide range of disabilities statewide, preventing any local jurisdiction from making a different choice, and thus created an inescapable inference that the purpose was "a bare desire to harm homosexuals."[45] In contrast, the Cincinnati Charter Amendment,

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34. *Id.* at 429.
35. *Equality Found.*, 54 F. 3d 261.
36. *Id.* at 268.
37. *Id.* at 268-69.
38. *Id.* at 269-70.
39. *Id.* at 270-71.
40. *Id.* at 271.
41. A reading of both opinions is recommended: they are of current relevance.
42. Equality Found. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997).
43. *Id.* at 295-301.
44. *Id.* at 294.
45. *Equality Found.*, 128 F.3d at 300.

being "purely local" in scope, served a legitimate interest through the potential cost savings entailed by not having to "guarantee and enforce nondiscrimination against gays in local commercial transactions and social intercourse."[46]

Faced with the resolve and the logic of the appeals court, the Supreme Court denied the Equality Foundation's subsequent petition for certiorari.[47] Three members of the Court (Justice Stevens, joined by Justices Souter and Ginsburg), obviously dubious about the appeals court opinion, offered the observation that the Supreme Court's action "should not be interpreted . . . as an expression of its views about the underlying issues that the parties have debated at length."[48]

Two years later, in *Boy Scouts of America v. Dale*,[49] the Supreme Court confronted the thorny question of whether the Boy Scouts of America could expel an openly gay assistant scoutmaster, who was also a gay-rights activist, in the face of a New Jersey public accommodations law banning discrimination on the basis of sexual orientation. The highest New Jersey court ordered Mr. Dale's reinstatement,[50] but the Supreme Court, by a five to four margin, reversed, holding that application of the state law in this instance would be a violation of the Scout organization's right of expressive association under the First Amendment.[51] Justices Stevens, Souter, Ginsburg, and Breyer strongly dissented.[52] Once more the First Amendment trumped a state anti-discrimination statute, but this time by only a single vote.

The most recent Supreme Court decision affecting homosexual rights, *Lawrence v. Texas*,[53] illustrates both the growing acceptance of such rights and the Court's persisting tendency to take one step at a time. In *Lawrence*, the same six justices who set aside the verdict of Colorado voters in *Romer v. Evans* made it clear that private, consensual sodomy between adults is now constitutionally protected.[54]

Five members of the Court (Kennedy, Stevens, Souter, Ginsburg, and Breyer) found the right embedded in the liberty protected by the due process clause.[55] To reach that conclusion they had to deal with *Bowers v. Hardwick*, which seventeen years earlier, on a five to four vote, had

46. *Id.*
47. *Equality Found.*, 525 U.S. 943.
48. *Id.*
49. 530 U.S. 640 (2000).
50. Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999).
51. Boy Scouts of America v. Dale, 530 U.S. at 659.
52. *Id.* at 663.
53. 539 U.S. 558 (2003).
54. *Id.*
55. *Id.* at 562–79.

concluded that no such due process right existed. In *Romer* the Court relied on equal protection instead of due process, and the *Bowers* precedent was handled by ignoring it. In *Lawrence* the troublesome precedent had to be faced directly because the five chose to take a stand on substantive due process. That posed no real problem either. As this Court saw it, *Bowers* was simply wrong and was therefore overruled[56]—a standard practice when a precedent stands in the way of the Court majority's current vision of good social policy. The sixth Justice, Sandra Day O'Connor, finessed *Bowers* by resting her concurrence on equal protection.[57] (The Texas law criminalized sodomy when committed by persons of the same sex but not when practiced heterosexually.) This allowed her to avoid deciding whether due process liberty was offended by a law that made all sodomy criminal.

In reaching its conclusion, Anthony M. Kennedy's opinion for the majority of five followed very closely the reasoning of the dissent in *Bowers*. In particular, he reiterated the argument that the *Bowers* majority had been wrong in defining the issue in terms of the right to engage in sodomy. "[T]o be sure," he noted, these statutes,

> purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals . . . . When sexuality finds overt expression in intimate contact with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[58]

Presumably he was arguing that sodomy should be permitted because the relationship between sexual partners may involve much more than sex, which no one would deny. Indeed, the same argument with equal validity could be raised in favor of fornication, adultery, adult incest, bigamy and same-sex marriage. On the other hand, if the opinion implies that all homosexual contacts involve an enduring personal bond of friendship, companionship and affection between two men (or women), or that sex is somehow essential to such an enduring personal bond, the

56. *Id.* at 578.
57. *Id.* at 579–85.
58. *Id.* at 567.

point is demonstrably false. The hazard of carrying the proposition to any of these possible conclusions tends to explain the Court's decision to leave its statement of the issue somewhat fuzzy around the edges.[59]

Whatever specifics the Court had in mind, the protection of that (possibly) "enduring" relationship between two homosexuals appears as the policy reason for striking down the Texas law. But policy is not law, and the Court also needed a constitutional rationale for what it was doing. The Kennedy opinion was also able to provide this, and in so doing altered previous doctrines of substantive due process in important ways. Heretofore, the application of substantive due process had been reserved for rights deemed "fundamental" by one test or another, e.g., those "implicit in the concept of ordered liberty" or else found in the "traditions and collective conscience" of the American people.[60] Here the Court made no claim that the right at issue was "fundamental." Perhaps this was because the media and the general public thought this decision was about homosexual sodomy, however much the Court tried to obfuscate the issue, and the Court wasn't quite ready to say straight out that sodomy was fundamental to civil liberty in America. Perhaps, the Court also wanted to avoid undertaking the very strict scrutiny traditionally given to claims of fundamental right.

Whatever the motive, instead of going the "fundamental right" route as dictated by precedent, the Court announced that upholding public morals—the state's proffered justification for the sodomy law—was not a legitimate object of governmental action.[61] In the Court's words, quoting from Justice John Paul Stevens' dissent in *Bowers*, "'[T]he 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.'"[62] Justice Byron White's majority opinion in *Bowers* had summarily dismissed that point of view, observing that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[63] The *Lawrence* majority obviously had a much lower opinion of public morality as a basis for law.

In any event, with public morality no longer a proper object of

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59. Common sense might suggest Justice Kennedy was saying, simply, that the Constitution protected any form of consensual sex between two adults in a private setting. By insisting that the issue was not about the right to engage in sodomy, however, he cut the ground from beneath this most obvious explanation of what the Court was doing.

60. *See, e.g.*, *supra* note 13 and accompanying text.

61. Lawrence v. Texas, 539 U.S.558, 577 (2003).

62. *Id.* (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

63. *Bowers*, 478 U.S. 186, 196 (1986).

legislation, the Court majority had no difficulty concluding that the Texas sodomy law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[64] In one master stroke, the Court extended the reach of substantive due process to any claim of right, fundamental or not, and at the same time discounted public morals as a legitimate legislative basis for restricting any practice claimed to be a constitutional right. A ruling so contrary to previous understandings of the Constitution can only be viewed as a fundamental alteration of the Constitution, a constitutional amendment that placed off limits vast areas previously thought to be subject to regulation by democratically elected majorities.

In a disingenuous, if not totally mendacious, characterization of its role in declaring the law of the Constitution, Justice Kennedy relied on a precept from an abortion case decided eleven years earlier, pontificating that the Court's "obligation is to define the liberty of all, not to mandate [its] own moral code."[65] Surely he must have recognized that his Court majority, by making traditional notions of sexual morality constitutionally insignificant, was thereby establishing the Court's own moral code of "anything goes"–except, presumably, for sex involving children, or without consent.[66] The moral judgments implicit in those exceptions only underscore the undeniable fact that the Court was indeed establishing its own moral code and cementing it into the Constitution.

Justice Kennedy offered a justification for implanting this new morality into the Constitution in terms much more specific than his discussion of the relationship between sodomy and enduring personal bonds. As he correctly pointed out, our society has become much more permissive in sexual matters during the past half century and, in his opinion, these recent laws and traditions have greater relevance than earlier history in determining what liberties the Constitution should now protect.[67] For good measure he cited an act of the British Parliament[68] and a decision of the European Court of Human Rights legitimizing homosexual conduct—not exactly binding precedents, but useful to Justices willing to take support wherever they can find it. This is the familiar "times are changing" argument, with an added international twist. In striking down the Texas sodomy law, the Court was simply exercising its now-accepted prerogative of keeping the Constitution up-

64. *Lawrence*, 539 U.S. at 578.

65. *Id.* at 559 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

66. See, for example, Justice Kennedy's comment. *Id.*

67. *Id.*

68. Sexual Offences Act, 1967, c. 60, § 1.

to-date.

Justice Kennedy, indeed, achieved a touch of eloquence as he explained the rationale for permitting the modern Court to revise the Constitution whenever the spirit moves them. He said,

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[69]

But, he neglected to add, only if at least five members of the Court agree with the people who want change.

B. Decisions in State and Lower Federal Courts

Previous Supreme Court encounters with issues of homosexuals' rights are undoubtedly relevant to predicting the outcome of a prospective future decision on same-sex marriage. The recent trend toward gay-friendly outcomes suggests that the Court might well discover a right to same-sex marriage somewhere in the U.S. Constitution. Precedent does not dictate that outcome but certainly leaves room for it. Before probing the likely effect of precedent in greater detail, however, this paper will seek additional perspective from a brief sampling of recent state and lower federal court decisions touching on same-sex unions. Such decisions do not constitute precedent for the Supreme Court, but they give an indication of the direction in which the judiciary as a whole is heading.

The number of lower court judicial decisions dealing with claims by same-sex partners has increased markedly in recent years. A tabulation of cases reported by Westlaw (as of September, 2005) in which the expression "same-sex marriage" appears shows a total of 45 in federal courts and 132 in state courts. Most did not deal directly with the validity of same-sex marriage, and some opinions made only incidental reference to it. Many, however, involved the claimed rights of gay and lesbian partners in such matters as health care benefits, tax status, bankruptcy, adoption and child custody. Whatever the substance of the cases, the

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69. *Lawrence*, 539 U.S. at 578-79.

number making reference to "same sex marriage" has of late dramatically increased, as the following table shows:

Judicial Opinions in State and Lower Federal Courts
Referring to "Same-Sex Marriage"

Year	Federal Court Cases	State Court Cases
1971–1990	4	5
1991–1995	6	6
1996–2000	12	33
2001	1	6
2002	3	12
2003	3	11
2004	7	21
2005	9	26

The table begins with the period 1971–1990 because the Westlaw search revealed no reference to "same-sex marriage" in any opinion published before 1971.[70] The trend toward increased usage of the term began in the early 1990s when, during a five year period, the number slightly exceeded all cases—both state and federal—for the preceding thirty years. This corresponds with a period when gays and lesbians were becoming increasingly assertive in a nation-wide campaign for public acceptance and legitimization of their lifestyle—ushering in a "Gay Nineties" somewhat different from that of a century earlier. Another substantial upturn, as shown in the table, occurred after 1995. This appears coincident with decisions by the Colorado Supreme Court (1994) and the United States Supreme Court (1996) that invalidated Colorado's constitutional amendment relating to homosexuals. Another upturn in 2004 and 2005 presumably reflects the decision of the U.S. Supreme Court in *Lawrence v. Texas*, which gave constitutional protection to sodomy and, by implication, suggested that homosexual rights might extend much further.[71]

As recently as 1995, a federal Appeals Court observed, "[a]lmost unanimously American cases have held that same-sex couples are not

70. This is not because of the ascendance over time of the term "same sex" over previous labels. In federal cases "gay marriage" appears just fifteen times, the earliest in 1999. "Homosexual marriage" appears twenty-one times, the earliest in 1989. These cases substantially overlap with the "same-sex marriage" cases.

71. DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW (2003) (presenting an exhaustive list of federal and state appellate cases adjudicating lesbian and gay rights claims during the period 1981–2000). Appendix 1.2 includes 108 federal cases and 362 state cases. Of these, 134 (28.5%) were adjudicated 1981–1990, while 336 (71.5%) were decided 1991–2000. *Id.* at 167-85.

constitutionally entitled to attain the legal and civil status of marriage by obtaining a marriage license and complying with other requirements of the law of the jurisdiction."[72] The one notable exception cited by the court was *Baehr v. Lewin*,[73] in which the Supreme Court of Hawaii applied strict scrutiny, under the equal protection guarantee of the state constitution, to a statute restricting marriage to heterosexual partners. According to the Hawaii court (plurality opinion), this was a sex-based classification.[74] Hawaii voters later amended the state constitution to nullify the effect of the judicial decision.[75]

What the federal court said in 1995 is less true today. The judicial climate has become more receptive to claims of gay rights, as has popular opinion.[76] On the specific issue of same-sex marriage, however, favorable opinion is still the minority. Although some segments of the public have grown more tolerant of the concept, opinion polls and voter support for "marriage" initiatives in numerous states testify that a majority of Americans are not yet ready to equate homosexual unions with traditional marriage.[77] In recent years, a majority of states have

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72. Shahar v. Bowers, 70 F.3d 1218, 1222 (11th Cir. 1995), *vacated, reh'g granted*, 78 F.3d 499 (11th Cir. 1996), *aff'd*, 114 F.3d 1097 (11th Cir. 1997), *amended by* 120 F.3d 211 (11th Cir. 1997).

73. 852 P.2d 44 (1993).

74. *Id.* at 67.

75. HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

76. The change in the judicial climate is discussed *infra*, text accompanying notes 80–106. With regard to public opinion, responses to surveys carried out by the Princeton Survey Research Association during the spring and summer of 2000 showed majority approval for a number of rights sought by gays (but not gay marriage), as follows:

	Favor	Oppose
Allow gays and lesbians to serve openly in the military	56%	38%
Allow health insurance and other benefits for gay and lesbian partners	70%	24%
Allow social security benefits for gay and lesbian domestic partners	68%	27%
Allow adoption rights for gay and lesbian couples	46%	47%
Laws to protect gays and lesbians from discrimination in housing	74%	23%
Laws to protect gays and lesbians from discrimination in job opportunities	76%	20%
Legally sanctioned gay and lesbian partnerships	47%	42%
Legally sanctioned gay and lesbian marriages	39%	55%

Source: Roper Center for Public Opinion Research, University of Connecticut, Public Opinion Online, available at Westlaw, Public Opinion Online Database, Items 22–30, using search term "gay rights."

A Los Angeles Times poll taken in March 2004 showed public opinion remaining quite stable, seventy-four percent favoring laws against housing discrimination and seventy-two percent favoring laws against job discrimination. *Id.* Items 1–2, using search terms "gays & discrimination."

77. For example, in polls conducted by CNN/USAToday/Gallup, running from October 1996, to May 2005, respondents in favor of legalizing same-sex marriage have remained in the

enacted statutes or constitutional amendments, or both, limiting marriage to persons of opposite sex.[78]

Early in the developing controversy (1996), Congress weighed in with a federal Defense of Marriage Act (DOMA),[79] which had two substantive provisions. The first defined "marriage" for all federal government purposes as meaning "only a legal union between one man and one woman as husband and wife," and "spouse" as referring "only to a person of the opposite sex who is a husband or a wife."[80] The second substantive paragraph provided that no state should be required to give full faith and credit to an act of another state recognizing same-sex marriage.[81]

The federal DOMA thus far has survived the few direct attempts to overturn it. In two recent cases, *Smelt v. County of Orange*[82] and *Wilson v. Ake*,[83] federal district courts rejected challenges based on due process, equal protection, and (in *Wilson*) the full faith and credit clause.

In other courts, on a broad range of issues, supporters of gay rights have been more successful. As early as 1996, an Oregon trial court held that "committed partners" were entitled to the same fringe benefits as married couples when employed by the state. As viewed by the court, denying benefits to the partners was unlawful under state employment discrimination statutes and a violation of the state constitution mandate of "equality of privileges and immunities."[84] In 1998, the decision was upheld on appeal.[85]

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minority—in October 1996: 27% favored, with 68% opposed; January, 2000: 34% favored, 62% opposed; December 2003: 31% favored, 65% opposed; February–March, 2004: 32% favored, 64% opposed; March 2005: 28% favored , 68% opposed; April–May 2005: 39% favored, 56% opposed. Polling Report *at* http://pollingreport.com/civil.htm (last visited March 8, 2006). Other polls found in http://pollingreport.com/civil.htm show similar variations.

78. As of March 7, 2006, 44 states had adopted Defense of Marriage laws defining marriage as a heterosexual union. Most are modeled on the federal Defense of Marriage Act (DOMA) enacted in 1996. *See* text accompanying note 3, *supra*. Nineteen of these states have also amended their constitutions to include prohibitions on gay marriage, as a hedge against judges (like those in Massachusetts) finding a right of same-sex marriage in the state constitution. Seven other states are scheduled to vote on similar constitutional amendments in 2006. *See* Kavan Peterson, "Washington Gay Marriage Ruling Looms," at http://stateline.org (last visited Mar. 7, 2006).

79. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

80. 1 U.S.C. § 7 (2000).

81. 28 U.S.C. § 1739(c) (2000).

82. 374 F.Supp. 2d 861 (C.D. Cal. 2005).

83. 354 F.Supp. 2d 1298 (M.D. Fla. 2005).

84. Tanner v. Or. Health Sci. Univ., 1996 WL 585547 (Or. Cir. Ct. Aug. 8, 1996), (citing Art. I, sec. 20 of the Oregon Constitution, entitled "Equality of Privileges and Immunities.").

85. 971 P.2d 435 (Or. Ct. App. 1998). Somewhat similar lawsuits brought in New Jersey and Texas during the late 1990s were more in tune with the earlier decisions. Courts in both states found no statutory or constitutional impediment to denying various fringe benefits to same-sex partners employed by state agencies. Rutgers Council of AAUP Chapters v. Rutgers State Univ., 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997); Bailey v. City of Austin, 972 S.W.2d 180 (Tex. App. 1998).

Just a year later, a truly watershed decision in the movement toward equality of rights for same-sex partners was announced by the Vermont Supreme Court in *Baker v. State*.[86] The issue was not employment benefits but the refusal of public authorities to issue marriage licenses to same-sex couples.[87] The court refrained from ordering the state to issue the requested marriage licenses but, citing the "common benefits" clause of the state constitution, it declared that same-sex couples could not be excluded by law from the benefits and obligations incident to marriage.[88] Having elaborated the controlling principles, the court then mandated the state legislature, within a "reasonable period of time," to enact a statute providing parallel benefits and protections for same-sex unions.[89] The legislature responded by creating a civil union equal to marriage before the law in every respect but one—the exception being the right to have the union designated a "marriage."[90]

Not every state or lower federal court decision since *Baker* has been as supportive of gay rights claims, but an increasing number of courts have considered them favorably. In *Langan v. St. Vincent's Hosp. of N.Y.*,[91] the Nassau County Supreme Court permitted the surviving partner of a Vermont same-sex civil union to bring a wrongful death claim after his partner died.[92] In 2004, two Washington lower courts declared a state law limiting marriage to a man and a woman was in violation of the state constitutional guarantee of equal privileges or immunities.[93] The Supreme Court of Montana, in a decision the same year, also upheld a claim of gay rights, holding that the state university's policy against providing dependent health care coverage to same-sex partners was a violation of the state constitution's equal protection guarantee.[94]

The Supreme Judicial Court of Massachusetts, in November, 2003, produced the most spectacular success yet for gay rights activists. In *Goodridge v. Department of Public Health*, a four to three decision, the

86. 744 A.2d 864 (Vt. 1999).

87. *Id.* at 867.

88. *Id.* at 886.

89. *Id.* at 886–87.

90. VT. STAT. ANN. tit. 15 § 1204 (2003). The statute provides that partners in a Vermont civil union shall have "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." *Id.* at § 1204(a).

91. 765 N.Y.S.2d 411 (Sup. Ct. 2003), *rev'd in part, dismissed in part*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

92. *See also* Armijo v. Miles, 26 Cal. Rptr. 3d 623 (Cal. Ct. App. 2005) (reaching a similar conclusion).

93. Castle v. State, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004); Anderson v. King County, No. 04-2--4964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004). These decisions are on appeal to the Washington Supreme Court.

94. Snetzinger v. Mont. Univ. Sys., 104 P.3d 445 (Mont. 2004).

highest court in the state declared that denial of marriage benefits and obligations to same-sex couples lacked any rational basis and thus violated equal protection principles in the state constitution.[95] A federal Court of Appeals subsequently rejected an attempt by a group of Massachusetts citizens to have *Goodridge* set aside as a violation of the federal constitutional guarantee of a republican form of government.[96] The plaintiffs in the latter action proceeded on the theory that the Supreme Judicial Court, by redefining marriage to include same-sex couples, had encroached upon legislative prerogatives under the state constitution, and thereby breached the republican form of government guarantee.[97] The Appeals Court saw no merit in the argument.

A gay plaintiffs group, in *Citizens for Equal Protection, Inc. v. Bruning*,[98] also scored a significant, if not yet conclusive, victory in federal district court by successfully challenging a marriage amendment to the Nebraska Constitution Bill of Rights,[99] adopted by initiative in 2000.[100] The amendment differed from most other state "marriage amendments" by explicitly barring legal recognition of any same-sex relationship.[101] The district court thought the measure was "indistinguishable from the Colorado constitutional amendment at issue" in *Romer v. Evans* and declared it a denial of equal protection under the Fourteenth Amendment.[102] Alternatively, the court concluded that the measure amounted to a "punishment" inflicted upon a particular class of people and was therefore invalid as a bill of attainder.[103] The issue is currently before the Eighth Circuit Court of Appeals.[104]

On the other hand, courts in Arizona, New Jersey and Indiana have recently held that restricting marriage to heterosexual couples does not violate equal protection, due process or privacy rights under their state constitutions.[105] In 2005, the Oregon Supreme Court, relying on statute and a marriage amendment adopted by statewide initiative, determined that marriage in Oregon is limited to opposite sex couples.[106]

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95. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

96. Largess v. Supreme Judicial Court, 373 F.3d 219 (1st Cir. 2004).

97. *Id.* at 226.

98. 368 F. Supp. 2d 980 (D. Neb. 2005).

99. NEB. CONST. art. I § 29.

100. Measure 416, 2000 Nebraska General Election ballot.

101. *Bruning*, at 1003.

102. *Id* at 1003–05.

103. *Id.* 1005–08.

104. *Id.*, at 1008.

105. *See* Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Stanhardt v. County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003).

106. Li v. State, 110 P.3d 91, 102 (Or. 2005). An intermediate appellate court in Arizona

The right of same-sex marriage has been addressed directly at least four times in recent New York state court cases, with mixed results. Two lower courts have held, under the state constitution, that marriage may not be denied to same-sex couples,[107] while two others have reached a contrary conclusion.[108] The issue will likely be resolved when it reaches the New York Court of Appeals, the state's court of last resort.

The foregoing is by no means a complete coverage of relevant judicial decisions, but it should be sufficient to demonstrate that the country's judicial climate has in recent years become more favorable to claims of same-sex partners, even including claims that their relationship deserves the same legal status as marriage.

III. PROGNOSIS

A. Precedent as a Basis for Predicting Supreme Court Behavior

As a guide to exploring what these judicial trends might tell us about the prospects for same-sex marriage, if and when the Supreme Court decides to entertain the question, two brief propositions relating to the predictive role of precedent may be helpful. First, and most obvious, precedent is useful as a predictor of Supreme Court behavior when viewed as an indicator of how members of the Court who supported that decision may be inclined to vote when a similar issue arises.[109]

A second proposition, namely that precedent is not a very useful predictor when regarded as a restraint upon what the Court may do, requires further elaboration. Lower courts usually feel constrained to follow Supreme Court precedent because contrary decisions may be overturned on appeal. However, there remains considerable wiggle room for lower courts because not all decisions are appealed and, realistically, the Supreme Court is limited in the number of cases it can agree to hear. In addition, Supreme Court decisions are often fuzzy enough to allow latitude in their interpretation. Nevertheless, precedent is usually followed by lower courts.

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reached essentially the same conclusion on statutory grounds. The court, finding no fundamental right of two men to marry, upheld the statute on rational basis analysis. *See* Stanhardt, 77 P.3d at 461–64.

107. Hernandez v. Robles, 794 N.Y.S.2d 579 (Sup. Ct. 2005) *rev'd, vacated in part*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005); People v. West, 780 N.Y.S.2d 723 (Justice Ct. N.Y. 2004).

108. Seymour v. Holcomb, 790 N.Y.S.2d 858 (Sup. Ct. 2005); Shields v. Madigan, 783 N.Y.S.2d 270 (Sup. Ct. 2004).

109. Evidence in support of this proposition, if any is needed, is offered in abundance by HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999).

The Supreme Court is not under the same constraints. Although Supreme Court opinions are liberally sprinkled with references to past precedents, the Court, in practice, follows only the ones that lead where it wants to go.

The rule of precedent is often designated by the Latin term *stare decisis*, meaning "to stand by decided matters," or, as it is sometimes said, only partially in jest, "we stand by our past mistakes." As applied to the Supreme Court, neither expression is totally accurate. The Court does indeed follow precedent when precedent points in the desired direction. When available precedent will not serve the Court majority's purposes, however, the Court is perfectly willing to abandon constitutional doctrines that no longer serve its current vision of the good polity.

In *Webster v. Reproductive Health Services* the Court offered a justification for some of its departures from past precedent:

> *Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice."[110]

More than a half century earlier, Louis D. Brandeis, in a dissenting opinion, had expressed much the same idea in *Burnet v. Coronado Oil & Gas Company*:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.[111]

Central to both statements is the principle that past precedent may be disregarded when a previous decision has left legislatures unnecessarily handicapped in carrying out their governmental functions. *Webster* modified a previous abortion ruling to give states a bit more leeway in regulating abortions, and the Brandeis opinion was a dissent from the

110. Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (citations omitted) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

111. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (citations omitted).

Court's refusal to overrule an earlier decision restricting the taxing power of the federal government.

The *Webster*-Brandeis principle is totally inapposite, however, when the Court abandons *stare decisis* by placing additional restrictions upon legislatures. If an existing rule of constitutional law permits a legislature, state or federal, to do something the Court thinks is "unsound in principle and unworkable in practice," the error can be corrected by subsequent legislation when the legislature discovers the error. In such cases, *stare decisis*, that "cornerstone of our legal system," presumably should govern. In practice, however, the underlying logic of previous decisions never deters a Court majority from embodying its current notions of what is sound and workable in new constitutional rules. As one might expect, the Court does not cite the *Webster*-Brandeis rationale when it is placing new constitutional restrictions upon legislatures in derogation of past Court decisions. The inconvenient logic is ignored, and the Court devises other reasons for assigning to the junk heap a precedent that conflicts with what the majority now believes the Constitution ought to say.[112]

Lawrence v. Texas illustrates the point perfectly. If the *Webster*-Brandeis logic had been followed, the Court would have declared the Texas sodomy law constitutional on the authority of *Bowers v. Hardwick*. The Supreme Court was not, in the words of the *Webster* majority, "the only body able to make needed changes." Correction of the error, if there were one, could be "had by legislation," the condition Justice Brandeis had laid down for following even a bad precedent. As a practical matter, most states in the years preceding *Lawrence* had already de-criminalized sodomy. But the *Webster*-Brandeis rule, in the eyes of the Court, is really no rule at all – just a rationalization to be used when it fits and easily ignored when it does not.

Whatever may have been true of Supreme Court Justices in times past, their conduct today suggests that they feel free to abandon any precedent with which they disagree. Time after time Court majorities overrule or simply pass over precedents that conflict with a rule the Court wishes to engraft upon the Constitution, while dissenters would repudiate or discount the precedents upon which the majority Justices rely. *Romer v. Evans* and *Lawrence v. Texas* are merely the prominent examples of the majority's handling of disfavored precedents.

This is not to say that precedent is wholly unimportant in deciding constitutional issues. Indeed, most opinions are liberally sprinkled with references to precedent, but the precedents relied on are limited to those supporting the desired outcome. The Justices cite friendly precedents

112. *See generally*, RIGGS, *supra* note 1 (covering this topic extensively).

when available, but they also do not hesitant to quote prior dissenting opinions, concurring opinions , or even decisions of foreign courts if those opinions provide better support. In the end, when a closely divided Court breaks new ground in constitutional law, the primary function of precedent is to justify the conclusions reached.

A recent statistical analysis of Supreme Court decisions demonstrates quite convincingly that members of the Court have little hesitation abandoning precedents with which they disagree.[113] The authors of this statistical analysis found, in a broad sample of cases, that individual Justices seldom changed their positions on an issue to conform with a previous decision of the Court. If a Justice dissented from a constitutional rule the first time it was propounded, that Justice generally continued to object to its application in future cases, despite the existence of the precedent. In the words of the authors of the study, "[w]e have found that precedent rarely influences United States Supreme Court Justices."[114]

The preceding comments have been addressed to the concept of precedent as restraint, principally to show that precedent imposes very little restraint upon Justices who believe the Constitution ought to be read otherwise. With respect to same-sex marriage, there is not even a direct precedent that would need to be overruled. Until recently, the notion that such a right might exist was so absurd that no one seriously considered bringing it before the Supreme Court. Thus the Court never had to say the obvious: that marriage involved two persons of opposite sex.[115] There is, of course, ample case precedent, but only the precedent of common understanding that marriage—when the Court spoke of it—referred to a relationship between a man and a woman. That understanding was clearly implicit in all of the Court's decisions affecting marriage until, perhaps, *Lawrence v. Texas*, in which the Court, without actually endorsing gay marriage, appeared to place "intimate"

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113. SPAETH & SEGAL, *supra* note 109, at 287.

114. SPAETH & SEGAL, *supra* note 109, at 287. *But see* CHARLES FRIED, SAYING WHAT THE LAW IS (2004) (concluding from his experience as Solicitor-General, advocate, and legal scholar that constitutional doctrine is firmly constrained by precedent). Professor Fried's conclusion is in some sense supportable. If one focuses on the whole body of constitutional jurisprudence, there is a good deal of continuity. Most decisions on constitutional questions affirm rather than overrule previous precedents. Presumably, however, the continuity follows from agreement with what has gone before, not from any belief that precedent is sacrosanct. The numerous deviations from past rulings are clear evidence that Court majorities, even in the face of three or four dissents, are quite prepared to change the meaning of the Constitution as necessary to keep it in tune with the times.

115. Well over a century ago, however, the Court upheld a federal statute prohibiting a man from having more than one wife (simultaneously), despite First Amendment objections by George Reynolds, a Mormon, who claimed that plural marriage was a principle of his religion. *See* Reynolds v. United States, 98 U.S.145 (1878).

relationships among gay partners in constitutional parity with intimate relationships between heterosexuals.[116]

B. How Much will the Words of the Constitution Matter When Decision Time Comes?

The short answer is, "not much."

The Constitution has nothing to say about marriage. But every decision on a constitutional issue must be tied to some provision in the text of the Constitution, and to that extent what the document says will matter. The reason the text will not matter much is that the relevant words are "equal protection," "due process," and "privacy," terms broad and flexible enough to absorb whatever content the inventive minds of a Court majority may choose to read into them. The Constitution does not actually mention a right of "privacy," but the *Griswold* Court, in striking down Connecticut's law against using artificial means of birth control, perceived that it existed in the "penumbras" of several Bill of Rights guarantees.[117]

The equal protection clause of the Fourteenth Amendment was originally believed by the Court to be a guarantee of racial equality before the law. In the words of the Slaughter-House Cases (1873), the first to interpret the equal protection clause, the "pervading purpose" of all the post-Civil War amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who

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116. Indeed, with respect to sexual activity, same-sex partners now occupy a constitutional status technically superior to that of unmarried heterosexuals. In numerous decisions the Court has tacitly approved state fornication statutes. In *Griswold v. Connecticut*, for example, the Court explicitly stated: "The State of Connecticut [has] statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication." Griswold v. Connecticut 381 U.S. 479, 498 (1965). To my knowledge the Court has never explicitly repudiated this position, which makes it—so to speak—the law of the land. There is, of course, no doubt that the Court would now find fornication constitutionally protected if the issue were to arise, consistent with the Court's current practice of reading its own morality into the Constitution.

For pre-*Lawrence* decisions based on the assumption that marriage is a relationship between a man and a woman, see, for example, Turner v. Safley, 482 U.S. 78 (1987) (addressing marriage by prisoners); Zablocki v. Redhail, 434 U.S. 374 (1978) (addressing marriage by persons under child support obligation); Loving v. Virginia, 388 U.S. 1 (1967) (addressing interracial marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (addressing birth control by married persons); Skinner v. Oklahoma, 316 U.S. 535 (1942) (addressing Habitual Criminal Sterilization Act).

117. *Griswold*, 381 U.S. at 484–85. As Justice Douglas said, speaking for the Court, "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and several of those guarantees "create zones of privacy." *Id.* at 484. With that kind of creativity, the text of the Constitution can be molded to fit whatever the Court might choose to do.

had formerly exercised unlimited dominion over him."[118] The same rationale was given more than two decades later in *Plessy v. Ferguson*: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law."[119] Unfortunately, the *Plessy* Court was also of the opinion that separate facilities could nevertheless be equal.[120]

Since then, "equal protection" has been vastly expanded to prohibit any type of legislative classification the Court does not like, with the test ranging from a mere rational relationship between legislative ends and means to the strict scrutiny of "suspect" classes. With the concept of equal protection now broad and amorphous enough to embrace almost anything, the constitutional words "equal protection" can be manipulated to cover any point a judge wishes to make. The point is well-illustrated as applied to same-sex marriage in the various majority, concurring, and dissenting opinions of the Massachusetts Supreme Judicial Court produced by the *Goodridge* case.[121] The lengthy opinion of the four judges in the majority presents an entirely reasonable argument (reasonable, at least, if you don't question their assumptions) why the state's equal protection guarantee includes the right of same-sex couples to marry. The three dissenters offered equally reasonable arguments why no such right should be inferred. If Massachusetts judges can look into a constitutional crystal ball and find a version of "equal protection" that fits their contradictory assumptions, or preconceptions, or both, we can be sure that Justices of the United States Supreme Court will be no less capable.

Essentially the same can be said of "privacy" and "due process," the other constitutional hooks on which a decision about same-sex marriage might hang. In reality, privacy - a word not found in the constitutional text - is simply a spin-off of due process, and the two can be treated together. The full operative expression is "substantive due process." The word "substantive" does not appear in the text of the Constitution either, but it is a convenient label for this vast, not yet fully plumbed, source of previously unsuspected rights. Calling them *substantive* helps avoid confusion with the procedural rights that most people once thought were the essence of due process.

As all students of U.S. constitutional history are aware, substantive due process received its first major incarnation at the turn of the nineteenth century in a spate of decisions placing limits upon state

118. Slaughter-House Cases, 83 U.S. 36, 71 (1873).

119. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

120. *See id.* at 548–52.

121. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

regulation of economic affairs.[122] The previous due process focus on procedural matters was supplemented by increased judicial concern for the substantive reasonableness of legislation, which, incidentally, had the effect of amending the Constitution as previously understood. The Court's sympathy for property rights, liberty of contract and *laissez faire* was the hallmark of these decisions, epitomized by *Lochner v. New York*[123] from which the period sometimes takes its name.

This older, now discredited, substantive due process was largely demolished by its collision with Franklin Roosevelt's New Deal and the threat of court packing. A temporarily chastened Court repealed the constitutional amendments it had imposed on the country during the previous four decades. But a principle so adapted to the expansion of judicial power could not forever remain submerged. The genie peered out of the bottle once more in *Griswold v. Connecticut* and emerged in earnest in *Roe v. Wade*.[124] It has ever since been working its magic on the Constitution at the behest of a Court majority.

This analysis will linger on *Roe* because it illustrates the marvelous scope and elasticity of the new substantive due process. Justice Blackmun's opinion for the majority talked about privacy, but heavy reliance was placed on due process liberty as the source of the newly-minted privacy right. To be sure, the right extended only to "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'"[125] but the Court was certain that it was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[126]

Significantly, the Court defined the category of fundamental rights as those "implicit in the concept of ordered liberty,"[127] rather than looking to the "traditions and collective conscience of our people," as the *Griswold* Court had done.[128] With anti-abortion laws still in force in most

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122. The application of "due process" and its "law of the land" analog to substantive matters has historical roots in England and colonial American legal practice that antedate the adoption of the Fifth Amendment. That early concept, however,

did not embrace substantive due process as practiced during the *Lochner* era or as we know it today. There is no evidence that due process was regarded as a warrant for courts to strike down any economic regulation found to be "unreasonable," and certainly there existed no constitutional theory of privacy to protect against legislative restrictions on abortion and contraception. Moreover, judicial review was still in its incipient stages and controversial.

See Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 1004 (1990).

123. 198 U.S. 45 (1905) (voiding a New York law prohibiting bakers from working more than 60 hours a week or ten hours a day).

124. 410 U.S. 113 (1973).

125. *Id.* at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

126. *Id.* at 153.

127. *Id.* at 152.

128. *See* Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (citing Snyder v. Massachusetts,

states in 1973, and most of them dating back a hundred years or more,[129] tradition and collective conscience seemed to point in quite the opposite direction.

Despite the majority's certainty that the Texas law was invalid, the Court conceded that the state had a legitimate interest "in safeguarding health, in maintaining medical standards, and in protecting potential life."[130] The problem of the "potential life" was the thorniest. The Fourteenth Amendment prohibited states from depriving any person of life, liberty or property without due process of law. The very due process "liberty" said by the Court to grant the right to abortion would, inconveniently, deprive the fetus of life. Technically, the deprivation would occur at the initiative of the mother in cooperation with her physician, not the state, but the Supreme Court would nevertheless feel quite awkward in authorizing one person to take the life of another. The resolution of this dilemma required only a modicum of creativity. The fetus, said the Court, is not a "person" within the meaning of the Fourteenth Amendment.[131] Thus, no problem, since only "persons" are protected by the Fourteenth Amendment.

Despite having designated the fetus a non-person, the Court still felt a need to consider the wisdom, need, and propriety of abortion laws in view of the state interests it had recognized. At this point in the Court's history, its members evidenced little embarrassment in making these characteristically legislative decisions. It was necessary in any event because the Court was sure it knew at least as well as the legislature which interests were important and which were not. Even more to the point, the Court knew much better than the legislature the constitutional limits on what states might do, following naturally from the fact that the Court decides what the limits should be.

So, the applied constitutional law of the case came out, in brief, as follows: 1) A woman has a right to abortion, beginning with conception. 2) When the pregnancy reaches the end of the first trimester, the state—in the interest of the woman's health—may regulate medical matters, such as the attending physician's qualifications and the facility in which an abortion is performed. 3) At the end of the second trimester when, in the Court's opinion, the fetus becomes viable outside the mother's womb, the state may proscribe all abortion except to "preserve the life or health of the mother."[132] The uninitiated can only marvel at the precise

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291 U.S. 97, 105 (1934)) (The word "collective" was added in parentheses by the *Griswold* Court.).

129. Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

130. *Id.* at 154.

131. *Id.* at 158.

132. *Id.* at 163–64.

constitutional detail the Court can read into an innocent expression like "due process of law"! Sixteen years later, while still upholding the central principle of *Roe*, the Court abandoned the trimester framework as unsound and unworkable,[133] but that fact only underscores the Court's practice of revising the meaning of the Constitution whenever a majority believes the old meaning does not fit anymore.

Our earlier discussion of *Lawrence v. Texas*, decided thirty years after *Roe*, demonstrates the continuing accommodation of substantive due process to changing needs of Court majorities. As of *Lawrence*, the rights protected by this expansive concept need no longer be deemed "fundamental" and, in assessing state interests that might justify abridging these new rights, public morality no longer counts. The latter may be the more important innovation. By rejecting that concept, the *Lawrence* majority has steered the Court toward the murky and uncertain waters of law divorced from public morality, where neither the text of the Constitution nor the "traditions and collective conscience of our people" can provide much guidance. This leaves the Court free to follow its own evolving notions of right and wrong.

C. If Precedent Provides No Restraint and Constitutional Text No Guidance, What Matters?

1. Precedent still matters

Although the Court feels no compulsion to follow the holding of a precedent with which the majority no longer agrees, relevant precedent is part of the essential background to any decision. If arguments in support of the holding are persuasive, the Court will adapt them to the question at hand. If the arguments are not persuasive, they may still be taken into account in the drafting of a contrary opinion. For Justices who have no strong policy preference with respect to the issue at hand, precedent is presumably the best guide. Past opinions are necessarily the grist of constitutional law. Precedent will be treated that way by the parties before the Court, and the Court will speak the same language.[134]

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133. *Webster*, 492 U.S. at 518.

134. For a thoughtful argument that precedent matters less than legal scholars generally assume, but more than most social scientists recognize, see Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903 (2005). The article

posits that precedent exerts more path dependency in constitutional law than social scientists acknowledge, but less path dependency than legal scholars presume. It identifies a number of factors that ensure that precedent generally has a limited, rather than a completely absent or robust, degree of path dependency in constitutional adjudication. Moreover, this Article maintains that social scientists generally have ignored the numerous functions performed by precedent in constitutional law that go beyond merely constraining subsequent adjudication.

In the absence of any direct Supreme Court precedent on same-sex marriage, members of the Court may well look to cases in other jurisdictions that have decided the issue. Since equal protection is certain to be a central issue when the case arises, it would be surprising indeed if the Massachusetts decision in *Goodridge v. Department of Public Health* were not taken into account by all nine Justices. Cases arising under the Massachusetts constitution are in no way controlling for U.S. constitutional law, but arguments are interchangeable and *Goodridge* produced good arguments on both sides of the question. The point is, each Justice must have a rationale for his own conclusions. That can be drawn from any persuasive source, but previous judicial opinions are likely to be the most important source.[135]

2. Judicial ideology

Each member of the Court is faced with the same set of precedents when an issue arises, but in cases decided by the Court, split votes are far more common than unanimity. Obviously precedents do not point everyone in the same direction. The differences, presumably, may be explained by attitudinal variables. That general principle is easy enough to state, and in some sense is self-evident, but identifying the relevant variables and determining how they will predispose a Justice to act in a particular case may be a challenge. Some scholars, primarily political scientists, have had considerable success explaining judicial votes after the fact by reference to an attitudinal model. The central proposition flowing from this model "is that the votes of the Justices are ideologically driven."[136] Or, as two leading proponents of the attitudinal model summarized the approach, "Simply put, Rehnquist vote[d] the way he [did] because he [was] extremely conservative; Marshall voted

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Id. at 905–06.

135. The notion that reasoning in a judicial opinion can be persuasive to judges in subsequent cases is essentially a truism to legal professionals. Two political scientists, whose discipline looks more to politics than to precedent in explaining judicial behavior, set out to test this empirically and discovered that it indeed was true. The findings were thought significant enough to be published in the discipline's leading journal. *See* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002). The essence of their argument is captured in the following comment:

Leaving jurisprudence out of the analytic framework fails to recognize both the distinctive nature of courts and the theoretical point that ideas and institutions matter. Ideas can take on a life of their own and become institutionalized because they serve to frame how people think about political issues, how they evaluate the actions of others, and how they try to persuade others to their own perspective.

Id. at 306.

136. Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. REV. 1323, 1328 (2005).

the way he did because he was extremely liberal."[137]

In addition to the indications from sophisticated statistical techniques commonly used to demonstrate the connection between liberal or conservative attitudes of Justices and their voting on issues, the media and the general public also tend to interpret Supreme Court decisions this way. This is epitomized by the publicity surrounding the confirmation of Judge John Roberts and Judge Samuel Alito to fill the Supreme Court vacancies created by the death of Chief Justice William H. Rehnquist and the retirement of Justice Sandra Day O'Connor. Their personal qualifications in terms of intellect, experience and character appeared to be universally admired, but the focus of public attention rested squarely on how conservative they might prove to be as members of the Court. Everyone (except the candidates) seemed to accept the proposition that members of the Court, once settled in lifetime appointments, may decide issues as they wish, regardless of precedent. The realist view that the Court is a political body has carried the day.

3. Attitudes toward the rule of law

Ascribing votes on an issue to each Justice's liberal or conservative leanings undoubtedly has a good deal of explanatory power. But this is not the whole story. Brett H. McDonnell, for example, has recently argued,

> Direct policy preferences are not the only relevant preferences of the justices. They also have preferences as to how they carry out their jobs. One part of being a good judge is following the rule of law, and most judges believe that showing restraint in imposing their own values on society is a part of that function.[138]

The insight that "direct policy preferences" are not the only preferences that matter is important, and Supreme Court Justices undoubtedly see themselves as following the rule of law. But with constitutional questions, what is the law? Whatever precedent might dictate, the modern Court has followed the rule that the law is whatever the Court says it is now. As set forth in a unanimous opinion nearly a half century ago, "the federal judiciary is supreme in the exposition of the law of the Constitution," and its decisions *are* the "supreme law of

137. HAROLD J. SPAETH & JEFFREY A. SEGAL, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002).

138. Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 355 (2004).

the land."[139]

In the past several decades the Court has become the "supreme reviser" of the Constitution as well, repeatedly changing its meaning to achieve outcomes inconsistent with previous understandings. Occasionally, the Court even admits what it is doing. In 1958, feeling unduly limited by Eighth Amendment precedents, Chief Justice Earl Warren proclaimed that henceforth the Amendment would "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[140] The Court, of course, was the body to decide what the "evolving standards" might require.[141]

Justice Kennedy, in *Lawrence v. Texas*, propounded a more recent version of the same theme as applied to the due process clause. In overturning *Bowers v. Hardwick*, he appealed to the changeable Constitution whose principles can be molded to create new rights that earlier generations never imagined were embraced within that venerable document. He spoke broadly of "persons in every generation" invoking "its principles in their own search for greater freedom,"[142] in terms that left no doubt which "persons in every generation" would have the final say, that is, the Supreme Court majority. When the Court can revise the rules of the Constitution at will, any general concern about following the rule of law in constitutional cases is likely to impose minimal restraint.

Of course, members of the Court sometimes do vote contrary to their personal policy preferences as to the law being adjudicated. In *Griswold*, for example, the two dissenters apologized for dissenting. Justice Hugo Black affirmed that the Connecticut birth control law at issue was "every bit as offensive" to him as to his brethren of the majority,[143] while Justice

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139. Cooper v. Aaron, 358 U.S. 1, 18 (1958). Cooper v. Aaron said the Court's decisions were binding on the *states* as the supreme law of the land, but the Court has also asserted its prerogative as "ultimate interpreter of the Constitution" in reviewing the actions of Congress and the federal executive. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 211 (1962); U.S. v. Nixon, 418 U.S. 683, 704 (1974).

In contrast, lower courts generally (if not always) feel obligated to follow Supreme Court precedent because, unlike the Supreme Court, they do not have the final word on what the Constitution means. For them the "rule of law" in constitutional questions does mean following Supreme Court precedent.

140. Trop v. Dulles, 356 U.S. 86, 100–01 (1958). Chief Justice Warren's interpretation of the evolving nature of the Eighth Amendment had a precedent. *Weems v. United States*, in which the Court declared that the Eighth Amendment was "progressive" and might "acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S. 349, 378 (1910). Although *Weems* was cited a few times in the ensuing forty-eight years, its "progressive" concept of cruel and unusual punishment as a changeable thing did not take root in the law until *Trop v. Dulles*.

141. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597, 603 (1977).

142. Lawrence v. Texas, 539 U.S. 558 (2003).

143. *Griswold*, 381 U.S. at 507 (Black, J., dissenting).

Potter Stewart called it "an uncommonly silly law."[144] Nevertheless they found no warrant in the Constitution for striking down silly, offensive laws. In Justice Black's words,

> There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.[145]

More recently, Justice Thomas, in dissent from the *Lawrence* decision, chose to quote Justice Potter Stewart in calling the Texas sodomy statute "uncommonly silly."[146] Such statements reflect the fact that not all policy preferences are equally compelling, and some Justices are less inclined than others to transform their personal preferences into rules of constitutional law.

4. The Supreme Court as guardian of individual rights

An attitudinal dimension meriting serious consideration is the commonly held view of the Supreme Court as the guardian of individual rights. This view seems to be accepted by the general public, by the legal profession, and by the Court itself.[147]

Historically, however, such a role for the Supreme Court is a relatively recent development. During the first century under the

144. *Id.* at 527 (Stewart, J., dissenting).

145. *Id.* at 507 (Black, J., dissenting).

146. *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting) (quoting *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting)).

147. *See, e.g.*, SANDRA DAY O'CONNOR, THE LIFE OF THE LAW: PRINCIPLES OF LOGIC AND EXPERIENCE FROM THE UNITED STATES 18–21 (1996); DAVID G. SAVAGE, THE SUPREME COURT AND INDIVIDUAL RIGHTS 1 (4th ed. 2004) ("To a significant degree the Supreme Court has transformed itself into the guardian of individual rights in the U.S. system of government."); Louis Fisher, *Constitutional Law Writ Large*, 49 ST. LOUIS U. L.J. 633, 645 (2005); ("Students are taught that courts are uniquely reliable guardians of individuals rights."); *ABA's Amicus Brief in Tennessee v. Lane*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 835, 835 (2003), ("The courts—as guardians of individual rights—have a special responsibility."); James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1509 (1998) ("[I]t is important to review the process by which the U.S. Supreme Court became the nation's premier guardian of individual rights."); David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 75 (1997) ("The [Supreme] Court is the best guardian of individual rights.").

> constraints . . . . Simply put, Supreme Court Justices do not decide cases on their own, uninfluenced by other forces. Rather, they act in a complicated milieu, in which the preferences of many other actors will have some bearing on how cases are decided.[154]

Principal elements in that milieu, as Friedman sees it, are the collegial nature of the Court itself, the need of the Court to take into account the possible reaction of the other branches of government, and public opinion.[155]

There is no way to measure these variables precisely, but it is reasonable to believe they can – and do – affect the Justices' thinking about issues brought before them. Since no two think exactly alike, individual preferences must be modified to the extent necessary to reach the minimum agreement of five. The views of Congress and the Executive may also have some tangential influence on the Court. The possibility of impeachment, withdrawal of jurisdiction, or budget cuts exist in theory, if not much in practice of late. The members of the Court are at least aware of these possibilities. In Friedman's words, "The claim here simply is that the Court's dependence on the other branches to enforce decrees and to refrain from attacking the institution of judicial review necessarily acts as a moderating force."[156]

Nearly every recent discussion of political restraints on Supreme Court behavior focuses at some point on the opinion of the public generally. Friedman calls it "the mightiest force of them all."[157] Whether this is true or not, public opinion polls have been an omnipresent element of the American political scene for decades, and proponents of the attitudinal model have diligently attempted to measure the relationship between public opinion as thus determined and judicial behavior. As Lawrence Baum has reported, after a survey of the literature, "[m]ost of these studies found some evidence of covariation between the public's ideological position and Court policy," but the evidence in support of the relationship varied "in its clarity and strength."[158]

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154. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1273 (2004) (citing LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 17 (1998) ("[W]e cannot fully understand the choices justices make unless we also consider the institutional context in which they operate.")).

155. Friedman, *supra* note 154, at 1274–79.

156. Friedman, *supra* note 154, at 1278.

157. Friedman, *supra* note 154, at 1279. He adds, "Public opinion serves as an important check, both on the Supreme Court and on those who would attack or defy it. This is a huge subject, and one on which the empirical evidence is not yet strongly developed." *Id.*

158. Lawrence Baum, *Popular Justice: Presidential Prestige and Executive Success in the Supreme Court*, 45 JURIMETRICS J. 367, 370 (2005) (book review) (citing Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American*

The relationship between public opinion and the ideological direction of Supreme Court decisions is complex. Even when covariation is indicated, the question remains whether the causality arises from the political influence of the public, factors in the social environment that simultaneously affect the attitudes of the Court and the public, or even the effect of "presidential appointments that bring the Court in line with the trends in public attitudes [as] expressed in presidential votes."[159]

Influence probably runs in all of these directions. Members of the Court no doubt share certain values with the general public but also have views in common with the elite groups of which they are members, or simply their own individual views, which put them odds with the general public. On the other hand, as is often suggested, the Court may conserve its legitimacy by not going too far beyond the area of public acceptance. Such an interpretation fits the statistical findings of some covariation – but not complete similarity – between Court policy and public opinion.

6. The Court says public opinion matters

Opinions of Court majorities in recent years have acknowledged the influence of public opinion upon their decisions, typically citing it as a justification for a current change in the meaning of the Constitution. As with the attitudinal studies showing a relationship between public policy moods and the Court's ideological orientation, the Court's citation of public opinion is susceptible to more than one explanation. The Court may in fact be influenced by changes in the public mood. Or, just as plausibly, the Court majority uses evidence of public opinion to bolster the argument for a position it desires to adopt. Or, perhaps, both.

Shifting constitutional limits on the death penalty provide a classic illustration of constitutional change justified by reference to various indicators of public opinion. As noted above, the Eighth Amendment, since the 1958 *Trop v. Dulles* decision,[160] has been subject to the

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Policy Moods, 41 AM. J. POL. SCI. 468 (1997); Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 POL. RES. Q. 61 (1995); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993); Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994)). Baum's book review, in its introductory pages, provides an excellent, brief summary of thinking by political scientists about hypothesized relationships between the Supreme Court and its political environment.

159. Baum, *supra* note 158, at 370 n.16.

160. Trop v. Dulles, 356 U.S. 86 (1958).

"evolving standards of decency that mark the progress of a maturing society." Chief Justice Warren did not use the expression "public opinion" in his plurality opinion, but the implication was clear enough. The role of public opinion became explicit some fourteen years later in *Furman v. Georgia* when the Court, in the process of discovering another evolving standard, observed that "cruel and unusual punishment" may acquire new meaning "as public opinion becomes enlightened by a humane justice."[161]

For two decades after *Furman* the Court tried to convince itself and the country that its reading of public opinion in death penalty cases rested primarily on objective criteria. As Justice White said in *Coker v. Georgia*, Eighth Amendment judgments "should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent."[162] The "objective factors" he identified were trends in legislative enactments regarding capital punishment and jury sentencing decisions in capital cases.[163] In all candor, however, he admitted the obvious, that objective evidence could not "wholly determine" the issue because "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[164]

By the beginning of a new century the Court majority was ready to broaden its outlook on the kind of indicia that might be taken into account. In *Atkins v. Virginia* the Court emphasized *Coker*'s reference to "our own judgment" as the decisive factor,[165] and considered not only legislation and jury decisions but also statements of professional and religious organizations, decisions of foreign courts and – yes – public opinion polls as evidence of evolving standards under the Eighth Amendment. All this "objective evidence" convinced the Court that capital punishment for killers said to be mentally retarded was now unconstitutional. Dissenters in the case did not value that evidence very highly and suggested that the newly created standard fell a bit short of

161. Furman v. Georgia, 408 U.S. 238, 242 (1972) (quoting *Weems*, 217 U.S. at 378). The Court in *Trop v. Dulles* had also cited *Weems* but did not quote the reference to "public opinion."

162. Coker v. Georgia, 433 U.S. at 592. *See also* Stanford v. Connecticut, 433 U.S. 584, 592 (1977) (emphasizing the Court's concern about "objective indicia."). As praiseworthy as objectivity may be, if the relevant facts were not already in the record, any reaching out by the Court to find "objective indicia" to support its opinion looks a lot like appellate fact-finding.

163. *Coker*, 433 U.S. at 592. *Woodson v. North Carolina*, decided a year earlier, had mentioned these same criteria. Woodson v. North Carolina, 428 U.S. 280, 293 (1976). *Gregg v. Georgia* had called for "objective indicia that reflect the public attitude toward a given sanction." Gregg v. Georgia, 428 U.S. 153, 173 (1976).

164. *Coker*, 433 U.S. at 597.

165. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting *Coker*, 433 U.S. at 597).

general consensus when the majority of states that still permitted capital punishment also allowed it for mentally retarded defendants. Not to worry – as *Coker* said, and *Atkins* repeated, the crucial factor in deciding these questions is not objective evidence but the judgment of the majority.[166]

The *Lawrence* majority likewise appealed to various indicators of public opinion, or segments of it. As one justification for overturning *Bowers v. Hardwick*, the Court cited "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex," as revealed by history and tradition of the past half century.[167] In a somewhat selective recounting of that tradition, the Court referred to the *Model Penal Code* of the American Law Institute, promulgated in 1955, that recommended against "criminal penalties for consensual sexual relations conducted in private."[168] The Court also observed that existing laws prohibiting sodomy were often ignored, and that many states had in recent years repealed laws against sodomy.[169] Apparently international opinion was found relevant as well. As the Court commonly does these days, Justice Kennedy briefly surveyed laws and court decisions in European countries that revealed growing acceptance of homosexual conduct.[170] While all that seemed significant to the Court, one species of public opinion – as discussed earlier in this paper – was specifically branded as irrelevant: the opinion of the American people about what is morally right or wrong.[171]

However selective the Court may be in the public opinion it chooses to follow, Sandra Day O'Connor, recently retired Justice-in-the-middle, has assured us that the influence is real. As she said in a lecture, published in 2003, "[r]eal change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory – in court or legislature – that is not a careful by-product of an emerging social consensus. Courts, in particular, are mainly reactive institutions."[172]

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166. *Roper v. Simmons* categorically eliminated the death penalty for youths who commit a crime before reaching the age of 18. Roper v. Simmons, 543 U.S. 551 (2005). That opinion used reasoning similar to *Atkins*, with somewhat heavier emphasis on the practice of other nations and views of the international community.

167. Lawrence v. Texas, 539 U.S. 558, 771–72 (2003).

168. *Id.* at 572 (quoting MODEL PENAL CODE § 213.2 cmt. 2 (1980)).

169. *Id.*, at 572–73.

170. *Id.*

171. *Id.* at 577.

172. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 166 (2003).

Without doubt it has become fashionable for the Supreme Court to justify judicial amendments of the Constitution by reference to a "social consensus" that the majority perceives to be emerging. It is of more than passing interest, however, that dissenting members of the Court tend to deny the existence of any real consensus and, in any event, to refuse to cement it into the Constitution. Perhaps the statement would be slightly more accurate if it simply said that "real change comes when a Court majority perceives an 'emerging consensus' of which it approves."

D. Will Same-Sex Marriage Find Shelter in the Constitution?

At last we face the question directly. When the issue reaches the Supreme Court, will five or more Justices discover a rule requiring states to permit same-sex marriage? The preceding discussion has attempted to identify a number of variables that may affect judicial behavior. This concluding section will briefly examine how each of them might bear on the question at hand.

1. Supreme Court precedent

Recent precedents, particularly *Romer v. Evans* and *Lawrence v. Texas*, are unmistakable in their sympathy for the claimed rights of homosexuals. The logic of both opinions, while not leading inexorably to constitutionalizing a right of same-sex marriage, is clearly compatible with finding such a right. The Massachusetts court in *Goodridge v. Department of Public Health* certainly thought so and cited both opinions in creating a right of same-sex marriage under the Massachusetts Constitution.

Such precedent is not important because of any binding quality it might be thought to possess. The record of the Court in recent decades testifies that past precedent can be overturned or ignored whenever five or more Justices believe the Constitution ought to say something else. It is significant, however, as an indicator of Court thinking and a source of principles – or arguments – that may appeal to members of the present Court. With no existing precedent mandating marriage as a relationship between one man and one woman, the Court is free to proceed without overruling any previous decision.

Moreover, all the essential rights-based arguments are in place. Enough is said in *Romer* and *Lawrence* to provide a very respectable logic in support of same-sex marriage, and one of the principal objections to homosexual behavior – public morality – has been made totally and emphatically irrelevant. If more is needed, a Court majority

can borrow something from the reasoning of *Goodridge*. There are, of course, acceptable contrary arguments in the dissents from each of these decisions, which could provide convincing reasons for rejecting a right of same-sex marriage. The Court majority is free to choose, but the recent record suggests the choice will be for rather than against.

2. Decisions in state and lower federal courts

Decisions in state and lower federal courts are more of a mixed bag, but viewed as a trend over the past three decades, the treatment of homosexuals has become distinctly more favorable in both state and lower federal courts. The Vermont decision in *Baker v. State*, mandating domestic partnerships, with every right of married couples except the right to call their relationship a marriage, and *Goodridge*, granting it all to same-sex couples, represent genuine breakthroughs for gay rights. The *Bruning* case decided in a Nebraska federal district court could give a comparable boost to gay rights if the decision striking down Nebraska's "marriage amendment," adopted by statewide initiative, is upheld on appeal. Such decisions are not in any way authoritative for the Supreme Court, but they could affect majority reasoning or serve as harbingers of an "emerging social consensus."

3. The wording of the Constitution

The written Constitution will provide no guidance at all, since the Constitution makes no reference to marriage. The Court must use something in the Constitution to justify whatever decision is made, but the relevant terms – "equal protection," "privacy," and "due process" - are flexible enough to be molded into any desired shape.

4. Judicial ideology

Judicial ideology will make a big difference. Among present members of the Court, Justices Scalia and Thomas are unlikely ever to read a right to same-sex marriage into the Constitution. Justice Roberts and Justice Alito are not yet as predictable but would in the near future, at least, probably take the conservative side of the issue. The other five members of the Court are, in my opinion, persuadable. They all supported the outcome and the rationale in *Romer* and *Lawrence*, and it is not a large logical jump from there to same-sex marriage. The political distance, however, might present a more daunting leap.

5. Attitudes toward the "rule of law"

Justices' attitudes toward the rule of law will have no significant influence on the outcome. First, there is no established constitutional law on the precise point at issue, and, second, whatever the outcome of a controversy, a well-crafted opinion will make it appear to reflect the rule of law. In any event, when the law is whatever the Court says it is, the rule of law by definition is always being followed.

6. The Supreme Court as guardian of individual rights

The twentieth century mind-set that has transformed the Constitution from a design of government into a Charter of Rights predisposes the Court to give demands for new rights a serious hearing. In an earlier century, Justices less dominated by the mystique of "rights," and without benefit of twentieth century interpretations of the Fourteenth Amendment, might have insisted that marriage was within the domain of states, and had nothing to do with the United States Constitution. Today that concept must seem quaint, even to more conservative members of the Court. All of us have now been conditioned to believe that the Constitution is about little else but "rights," and that the Supreme Court exists primarily to protect the rights of the minority against the tyranny of the majority. Within the country and the Court itself there are divergent views of what rights should be protected, but hardly anyone doubts that the Court in its wisdom, majesty, and power is the definer and guardian of the people's rights.

7. Public opinion

Public opinion, defined broadly, will take its place alongside judicial ideology as an influence most likely to affect the outcome. On the strength of ideology alone, one might predict that the five Justices who made up the majorities in *Romer* and *Lawrence* would also be willing to endorse same-sex marriage. If they believe the "intimate association" of two men or two women for sexual and, presumably, other purposes is worthy of constitutional protection, why would they deny the existence of a right to call their relationship a marriage?

Public opinion, however, currently points in a different direction. At the time of the *Lawrence* decision, numerous states had already repealed laws criminalizing sodomy, and public opinion polls reflected a majority in favor of what the states were doing. With respect to same-sex marriage, public attitudes have not yet reached a favorable tipping point.

The majority of states have enacted statutes or constitutional amendments, or both, limiting marriage to one man and one woman; and national polls consistently show a majority opposed to same-sex marriage.

The Court says its pays attention to these things.[173] The trend of jury decisions and state legislation has been given as a basis for limiting the death penalty, and the repeal or non-application of state statutes criminalizing sodomy helped the Court to conclude that it could safely make the remaining laws unconstitutional. To some extent, the Court majority in those cases was probably using the best evidence it could find to support its own preference for undercutting capital punishment and de-criminalizing sodomy. Nevertheless, studies of judicial behavior suggest that without such support in the country at large the Court might have hesitated to change the law as it did, when it did.[174]

Besides the general public, the Court must take into account the probable reaction of Congress to a decision legitimizing same-sex marriage throughout the country. A Court endorsement of gay marriage would surely trigger an uproar on Capitol Hill. The Marriage Amendment now languishing in Congress would be pressed with new urgency. It might even receive the necessary two-thirds approval in the House and the Senate. Short of that, a decision for same-sex marriage could well encourage states to petition Congress for a constitutional revision convention. The resulting uproar could also lead to broader proposals to curb the Court. Court-packing would probably not be revived, but fertile congressional minds, prodded by outraged elements of public opinion, would undoubtedly produce some creative alternatives. It is quite possible that Congress, anticipating an unfavorable decision, might divest the federal judiciary of jurisdiction to hear same-sex marriage issues, an available if seldom-used expedient.[175] In prudence, the Court itself might decide to pass on the issue and let any lower court decision stand.

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173. *See* text accompanying notes 156–168, *supra*.

174. *See* studies cited at n. 154, *supra*.

175. The one clear precedent is now practically ancient history. In the course of Civil War Reconstruction a Mississippi newspaper editor was taken into military custody on charges of publishing "incendiary and libelous articles." When the Federal Circuit Court denied his petition for a writ of *habeas corpus*, he appealed to the Supreme Court as previously authorized by Congress. The Court accepted jurisdiction, but before a decision was reached Congress repealed the law permitting the editor to appeal. Thereupon the Court dismissed the case for want of jurisdiction. *See Ex Parte McCardle*, 74 U.S. 506 (1869).

The *McCardle* opinion on its face was unequivocal, but the case was decided many years ago and the few relevant precedents since then have waffled. More recently, in *Felker v. Turpin*, 518 U.S. 651 (1996), and *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court has found ways to get around what arguably might have been congressional exceptions to its jurisdiction to review *habeas corpus* petitions.

In the near term, given these political constraints, the Court is unlikely to endorse same-sex marriage as a constitutional right. In the longer term, perhaps a decade or so, the societal trend toward greater permissiveness in personal relationships and sexual morality will probably create a political climate more favorable to the discovery of such a right. Much will depend on the ideology of judicial appointees, but trends over the past half century support a guess that a Supreme Court majority will remain more liberal than the general public in that regard.

Can the Court be expected to find in the Constitution a right of same-sex marriage? The answer remains somewhat equivocal: Probably, but not until changes within the states – as with capital punishment and sodomy – reduce the political costs to the Court.

IV. CONCLUSION

My conclusion about the issue of same-sex marriage leads to a final comment on the Supreme Court itself. The Court has become an institution subject to all the forces of American politics except direct election. It is not subject to lobbying in quite the same way as Congress or state legislatures, but legal briefs filed with the court by a wide range of interested parties – and perhaps even public agitation – serve the same purpose. The appearance of counsel before the Court constitutes a form of direct, if highly formalized, lobbying on behalf of the interests employing counsel.

With the text of the Constitution and past precedent posing no significant restraints other than the force of the Court's past reasoning, the Justices have been reduced to legislators on important matters of public policy. On constitutional issues the principal restraints are the internal compromises needed to reach a majority decision and the perceived limitations posed by the external political environment. Within those limits any five Justices are free to choose what they think is best for the country.

Most surprising is the widespread public acceptance of vast legislative power exercised by a committee of nine unelected lawyers. It is not as though no one has recognized it; everybody has. To repeat a cogent example used earlier in this paper, the recent political stir over the nomination and subsequent confirmation of John Roberts as Chief Justice and Samuel Alito as Associate Justice of the Supreme Court makes the point clear beyond denial. No one challenged their qualifications in terms of intellect, experience or character; in all these areas they appeared superbly qualified. The primary concern of their

critics, as reflected in comments and questions, was their attitude toward issues they might be required to decide as members of the Court. Such questioning was once thought to be out of bounds. While legislative candidates might properly be asked to state their position on current issues, judicial nominees in propriety were barred from expressing views on questions that might later come before them. Recognizing the role now played by the Court, the senatorial inquisitors, or some of them, undoubtedly felt the need to find out how the nominees might legislate after they were confirmed.

In light of the constraints – or lack of them – on Supreme Court behavior, the important question should be not how the Court might vote on same-sex marriage, but whether nine lawyers appointed for life should be able, by a simple majority, to decide such a question at all. In *The Federalist No. 78* Alexander Hamilton appeared to distinguish between political will and legal judgment, arguing that the Supreme Court was "least dangerous to the political rights of the Constitution" because it had "neither *force* nor *will*, but merely judgment."[176] The Court still exercises legal judgment from time to time, but its constitutional decisions now reflect a large measure of political will. The public knows it. The United States Senate knows it. No one can effectively deny it. And the democratic character of our government has declined because of it.

So also, the character of our Constitution as a charter of limited government has waned. The Tenth Amendment, the last enumerated rule in the Bill of Rights, declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." With the Court's expansive interpretation of its own authority, prohibitions upon state powers have multiplied, and powers reserved to the states or the people have diminished.[177] Abraham Lincoln, in his First Inaugural Address, posed

176. THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (E. H. Scott ed., 2002).

177. Some have suggested, in view of the changed character of the Court, that we ought to recognize its political function and subject its members to some form of election. *See, e.g.*, RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS (2005); Michael R. Dimino, Sr., *The Worst Way of Selecting Judges - Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267 (2005).That might provide a semblance of political accountability, but it still leaves the problem of nine lawyers empowered to decide important social and political issues by majority vote. Democracy is not well served when five people can legislate for the entire country. A shift to an elected Court would simply provide formal recognition of its current political role and confirm that it is "O.K."

It is not "O.K." The design of the original Constitution did not contemplate a Supreme Court exercising political will. With the Court now behaving that way, the system of checks and balances has ceased to function as intended. Any proposed constitutional amendment should not divert attention to peripheral issues—such as same-sex marriage, flag desecration or even abortion. If an amendment is needed it should go to the heart of the problem—putting the tripartite system of our

the issue as clearly as anyone. "[T]he candid citizen," he said,

> must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[178]

What Lincoln feared has come to pass.

Some have suggested, in view of the changed character of the Court, that we ought to recognize its political function and subject its members to some form of election.[179] That might provide a semblance of political accountability, but it still leaves the problem of nine lawyers empowered to decide important social and political issues by majority vote. Democracy is not well served when five people can legislate for the entire country. A shift to an elected Court would simply provide formal recognition of its current political role and confirm that it is "O.K."

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federal government back in balance by effectively curbing the Court – but that is a subject for another paper. For further discussion of the subject, see RIGGS, *supra* note 1, at 262-286; Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171 (2002); Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397 (1999).

178. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

179. *See, e.g.*, RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS (2005); Michael R. Dimino, Sr., *The Worst Way of Selecting Judges - Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267 (2005).

180. For further discussion of the subject, see RIGGS, *supra* note 1, at 262–86; Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171 (2002); Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397 (1999).