

SAME-SEX MARRIAGE: AN ISSUE OF CONSTITUTIONAL RIGHTS NOT MORAL OPINIONS

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I. INTRODUCTION

In November 2003 and February 2004 the Supreme Judicial Court of Massachusetts established that same-sex couples have the constitutional right to marry and that anything less, such as civil unions, would confer impermissible second-class status.¹ The revolutionary case, *Goodridge v. Department of Public Health*, marks an undeniable advance for the constitutional rights of lesbian and gay citizens, and we must preserve this overdue recognition as it is challenged by state and federal constitutional amendments banning same-sex marriage. This contentious issue will certainly reach the U.S. Supreme Court, as it is unlikely that the federal courts of appeal will reach a consensus.² Until the Supreme Court affirms the right of same-sex couples to marry, lesbian women and gay men will continue to be singled out as not only a politically unpopular group but also a constitutionally unprotected one.³ What might the Supreme Court's ruling be in such a case? On what grounds will it reach its holding? What role, if any, will the Justices' concepts of morality and, worse, religion play in their decision?

In 1973, the Supreme Court in *Roe v. Wade* enunciated a right to privacy, founded in the Fourteenth Amendment's guarantee of personal lib-

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¹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

² Further, if a constitutional amendment is passed in Massachusetts in 2006, the state will face the difficult question of what to do about same-sex marriages already performed there. Would such marriages be annulled, or will same-sex couples be forced to divorce? What if children are involved and believe that they have married parents of equal stature to other children's parents?

³ In the meantime, however, I enjoy the thought of same-sex couples from all over the country flocking to Massachusetts and most recently San Francisco, getting married, and returning home to insist that their own states recognize their marriages.

erty, that would allow women to terminate unwanted pregnancies.⁴ Almost twenty years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵ the Court reaffirmed the constitutional protection of personal decisions relating to marriage, procreation, and a person's right to be free from unwarranted governmental intrusion into matters fundamentally affecting that person.⁶ Over a decade later, the Court reaffirmed the notion of liberty, this time in *Lawrence v. Texas*,⁷ declaring that homosexuals have the right to engage in consensual sex however they choose without the state's interference. This right of privacy, now embedded in our recent constitutional history, will hopefully soon encompass the right of same-sex marriage.

Even if the Supreme Court deems that the right to privacy does not extend to same-sex marriages, however, the Fourteenth Amendment's Equal Protection Clause may form a basis for a decision affirming same-sex marriages. For example, in her concurring opinion in *Lawrence*, Justice O'Connor relied on an equal protection guarantee: if heterosexuals can engage in what has been called sodomy, homosexuals should also be allowed to engage in the same behavior. The Supreme Judicial Court of Massachusetts similarly employed an equal protection analysis in *Goodridge*.⁸

In this Article, I argue that either the privacy/liberty or the equal protection approach in recent cases provides a valid constitutional ground for the U.S. Supreme Court to afford same-sex couples the right to marry. However, regardless of the basis on which the Court decides this issue, prior relevant cases indicate that the morality of same-sex marriage may play an explicit, or at least implicit, role in its opinion. All judicial decisions, particularly when affecting the private lives of so many Americans, must be predicated on constitutional rights rather than the public's or the Justices' own views of morality.

Part II of this Article discusses how, with the *Lawrence* ruling and its Supreme Court predecessors, there emerges the established freedom for individuals to engage in sex as they choose, which includes accompanying rights such as the right to marry. In Part III, I use the *Lawrence* decision to examine the possibility of morality playing a role in the reasoning of a decision based on the right to liberty and privacy. Part IV focuses on equal protection grounds for holding that same-sex couples may marry on an equal basis with heterosexuals, as suggested by Justice O'Connor's concurrence in *Lawrence* and the Massachusetts *Goodridge* case. Part V examines whether some Justices, while using the equal protection approach, might reject the right of same-sex marriage by invoking

⁴ 410 U.S. 113 (1973).

⁵ 505 U.S. 833 (1992).

⁶ *Id.* at 851.

⁷ 123 S. Ct. 2472 (2003).

⁸ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

moral arguments. I conclude by exhorting our elected and judicial officials to lead the American public to a more open, accepting, and progressive society.

II. PRIVACY AND LIBERTY AS GROUNDS FOR THE RIGHT TO SAME-SEX MARRIAGE

In *Roe v. Wade*, the U.S. Supreme Court enunciated a right to privacy.⁹ In addition to guaranteeing a woman's right to choose abortion under many circumstances, *Roe* has proved to be key to subsequent decisions not limited to reproductive rights.¹⁰

The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* viewed marriage and procreation in the same light as *Roe*—as so fundamentally personal that the state should not intrude¹¹ and so key to a person's liberty and privacy that any such intrusion must place no undue burden on individuals choosing to exercise their guaranteed rights and fully enjoy their liberty.¹² This decision again confirmed that our laws and

⁹ 410 U.S. 113 (1973). As important as this guarantee has been, this right is a small step away from what might have been a better equal protection justification for giving women the right to terminate pregnancies. Women's freedom to make decisions concerning their bodies, their health, and their reproduction must not be impeded any more than men's. Indeed, the Court's first suggestion of a gender equality perspective appeared in Justice Blackmun's *Roe* decision, BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY 1004 (2d ed. 1996), which established that "the promise [of liberty] extends to women as well as to men Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (describing the holding of *Roe v. Wade*, 410 U.S. 113 (1973)). Regardless of which constitutional prism is used to view a woman's right to choose, it is her fundamental right.

¹⁰ Writing for the *Roe* majority, Justice Blackmun stated that the "right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," 410 U.S. at 153 (emphasis added), implying that the right is not limited to such reproductive decisions. In 1984, my good friend (and now Justice) Ruth Bader Ginsburg articulated her theory that abortion restrictions are a form of sex discrimination. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, William T. Joyner Lecture on Constitutional Law at the University of North Carolina School of Law (Apr. 6, 1984), in 63 N.C. L. REV. 375 (1985). It took until Ruth's Supreme Court confirmation hearings two decades later for me to realize how much she would have preferred that the Court in *Roe* had relied on a Fourteenth Amendment right to equal protection instead of the much more slippery constitutional right to privacy Justice Blackmun enunciated.

¹¹ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (asserting that the Court's decisions "have respected the private realm of family life which the state cannot enter" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)), and have recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

¹² Although some scholars claim that the joint opinion by Justices Souter, Kennedy, and O'Connor in *Casey* reformulated a diminished right to choose abortion, see BABCOCK ET AL., *supra* note 9 at 985, to me there was a significant advance in the articulation of the concept of liberty in connection with personal issues, not just those limited to abortion.

traditions “afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,”¹³ paving the way for the privacy right protected in *Lawrence v. Texas*. Thus in *Casey*, the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause that was articulated in *Roe*. The notion that women should be free to make decisions regarding their own bodies and reproduction flows logically into the liberty or freedom for people to do what they will in their own bedrooms.

Six years before *Casey*, a bare majority of the Court held in *Bowers v. Hardwick* that the constitutional right of privacy, established previously in cases such as *Roe*, did not protect same-sex sexual activity from criminal sanctions.¹⁴ This decision was, to say the least, ill-informed, particularly at a time when the gay and lesbian movement was picking up steam. By 2003, it had become clear to the Court that *Bowers* could no longer withstand constitutional scrutiny. The Court admitted as much in *Lawrence*, in which personal liberty took front and center stage. The *Lawrence* Court interpreted the holding in *Roe* (and, by extension, *Casey*) to establish a fundamental right both to liberty and privacy.¹⁵ The Court further asserted that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.”¹⁶ Drawing on *Casey*'s focus on individuals' most intimate and personal choices, including the right to create one's own concept of existence and personhood, the *Lawrence* majority reached the crucial conclusion that “persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”¹⁷

The majority opinion in *Lawrence* made clear that legislators are, in general, not entitled to intrude on or control personal relationships, particularly if such intrusion results in criminal penalty.¹⁸ Now that the Court has mandated the legality of same-sex sexual acts in *Lawrence*, same-sex marriage *may* be an institution that the Court will decide the law protects. It would be narrow-minded of the Justices to sanction same-sex sex while disallowing a formal same-sex union based on love and commitment. Per-

¹³ *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (citing *Casey*, 505 U.S. at 851).

¹⁴ 478 U.S. 186, 190–91 (1986).

¹⁵ 123 S. Ct. at 2477 (characterizing *Roe* as recognizing “the right of a woman to make certain fundamental decisions affecting her destiny and confirm[ing] once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person”).

¹⁶ *Id.* at 2475.

¹⁷ *Id.* at 2482.

¹⁸ *Id.* at 2478 (stating that the sodomy statute seeks “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. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”).

haps foreshadowing the Court's trajectory on this issue, Justice Kennedy notes:

When sexuality finds overt expression in intimate conduct 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.¹⁹

Since intimate conduct is, indeed, but one element in an enduring personal bond, it certainly seems as though the state's sanctioning that bond through marriage would be a next step, as was taken in *Goodridge*.²⁰

III. THE PROBLEMATIC PROSPECT OF MORAL REASONING IN THE COURT'S PRIVACY ANALYSIS

The Constitution is a guarantee of the protection of the rights of the minority despite any objections, be they described as religious or moral, of the majority. If the Supreme Court decides the same-sex marriage issue on privacy grounds, it will hopefully draw on its language in *Lawrence v. Texas* and its predecessors, which arguably reject the use of morality in reaching their conclusions. Quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court in *Lawrence* asserted: "Our obligation is to define the liberty of all, not to mandate our own moral code."²¹ The *Lawrence* majority further stated that "religious beliefs, conceptions of right and acceptable behavior, . . . respect for the traditional family . . . [and] profound and deep convictions accepted as ethical and moral principles" may not be used by the majority through "the power of the State to enforce its views on the whole society through operation of the criminal law."²²

Even the *Lawrence* majority's support of homosexual rights, however, may be dangerously predicated on moral views. Professor Chai Feldblum of Georgetown University Law Center, who filed an amicus brief in the *Lawrence* case, writes that the fact that the majority in *Lawrence* "mirrored current public moral views" is also the reason that gay advocates cannot be "complacent that this decision will inevitably herald entry into *marriage* or *the military*."²³ Professor Feldblum argues that "the [C]ourt wants to leave itself the leeway to announce, at some later date,

¹⁹ *Id.*

²⁰ 798 N.E.2d at 973–74.

²¹ *Lawrence*, 123 S. Ct. at 2480 (quoting *Casey*, 505 U.S. at 850).

²² *Id.*

²³ Chai R. Feldblum, *The Gay Agenda*, July 11, 2003, available at <http://www.planetout.com/pno/news/feature.html?sernum=604>.

that the institutions of marriage or the military could not withstand the influx of openly gay couples or individuals."²⁴

The use of morality in Justice Scalia's *Lawrence* dissent, however, poses an undeniably greater threat for same-sex marriage advocates. In fighting to uphold Texas's ability to criminalize the sexual lives of homosexuals, Justice Scalia castigates the majority for flying in the face of "accepted morality." He asserts that while the Court claims the Texas statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,"²⁵ the Court is instead embracing "Justice Stevens' declaration in his *Bowers* dissent, that 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"²⁶

Justice Scalia proceeds to make a sweeping pronouncement:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.²⁷

Justice Scalia claims that *Lawrence* "effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review."²⁸ As insulting as it is to read that Justice Scalia groups same-sex marriage with bestiality and incest, it is nonetheless arguably true that legal prohibition of these acts is based on moral values and that moral values condemning sodomy are closely aligned with those condemning same-sex marriage.

Justice Scalia then delves into a wistful-sounding analysis of cases that used *Bowers* to uphold laws and regulations that never should have been passed in the first place. For example, he cites *Holmes v. California Army National Guard*, which relied on *Bowers* to uphold federal statutes and regulations banning persons who engage in homosexual conduct from military services.²⁹

²⁴ *Id.*

²⁵ *Lawrence*, 123 S. Ct. at 2484.

²⁶ *Id.* at 2494 (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

²⁷ *Id.* at 2490 (Scalia, J., dissenting).

²⁸ *Id.* at 2495 (Scalia, J., dissenting).

²⁹ 124 F.3d 1126, 1136 (9th Cir. 1997).

In engaging in this type of analysis, which poses a terrifying threat to all of our constitutional protections, Justice Scalia seems to ignore not only that “morals” legislation is suspect constitutionally but also that the public has consistently shown itself to be put off by such legislation.³⁰ Even people who feel comfortable with their own homophobia oftentimes shy away from converting their condemnation into legislation. The point is that a minority of people (gays and lesbians) should not be told *by the legal system* that their sexuality is inherently morally abhorrent simply because it may be to some or even the majority of citizens.

IV. EQUAL PROTECTION AS A GROUND FOR THE RIGHT OF SAME-SEX MARRIAGE

Because the Court in *Roe v. Wade*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and *Lawrence v. Texas* based its constitutional analysis on the right to privacy, it is unclear how the Court might determine the related issue of same-sex marriage on equal protection grounds. However, any such analysis would undoubtedly rely in part on the influential case of *Romer v. Evans*.³¹ This decision was remarkable in that, for the first time, classifications based on sexual orientation, although still purportedly subjected only to rational basis review, were not pro forma upheld.³² It was the beginning of real scrutiny given to those classifications, and in that sense, the prelude to *Lawrence*.

Justice O'Connor's concurrence in *Lawrence* also provides encouraging indication of how the Supreme Court may use equal protection analysis to sanction same-sex marriage. She expresses disapproval of laws that sanction worse treatment of lesbians and gay men than heterosexuals. She reasoned that *Romer* established that “[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”³³ This is a big step forward in terms of securing protected class status for gays and lesbians, even though it remains unclear what level of scrutiny would apply to discrimination based on sexual orientation.³⁴ In adopting a more rigorous rational basis scrutiny in

³⁰ This has been my observation through my work in women's rights and other political issues.

³¹ 517 U.S. 620 (1996) (striking down a class-based state constitutional amendment directed at homosexuals as a violation of equal protection). The majority in *Lawrence* characterized the *Romer* decision as concluding “that the provision was ‘born of animosity toward the class of persons affected’ and further that it had no rational relation to a legitimate governmental purpose.” *Lawrence*, 123 S. Ct. at 2482 (citing *Romer*, 517 U.S. at 634).

³² See *Romer*, 517 U.S. at 635–36.

³³ *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).

³⁴ This analysis, however, is somewhat troubling because it fails to use the right of privacy to prevent government intrusion into the sexual lives of both homosexual and heterosexual citizens.

Lawrence, Justice O'Connor quotes from one of Justice Jackson's most important statements that, to me, supports same-sex couples' right to marry:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.³⁵

Although Justice O'Connor initially provides promising equal protection language from which it is possible to infer a future sanction of same-sex marriage, she later seems to go out of her way to rationalize prohibiting such marriages. She argues:

Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage [as it now is] beyond mere moral disapproval of an excluded group.³⁶

It is possible, though perhaps too hopeful, that she is simply covering herself so that her words will not be read as a premature sanction of same-sex marriage. None of the Justices in *Lawrence* seemed ready to take on same-sex marriage, an issue that was not before the Court.³⁷

In addition to part of Justice O'Connor's opinion, the idea that an equal protection analysis might be used to strike down laws that prohibit same-sex marriage finds support in the recent and important Massachusetts Supreme Judicial Court decision *Goodridge v. Department of Public Health*.³⁸ In this case, the highest court in Massachusetts, relying in part on *Roe*, *Casey*, and *Lawrence*, ruled that two people of the same sex may not be denied the right to marry.³⁹ Despite using the words "liberty" and

³⁵ *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring) (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)).

³⁶ *Id.* at 2487–88 (O'Connor, J., concurring).

³⁷ *Id.* at 2484. (O'Connor, J., concurring) (noting that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

³⁸ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003).

³⁹ *Id.* at 948.

“due process,”⁴⁰ the *Goodridge* Court determined the case on equal protection grounds, arguing that the Massachusetts constitution requires that every individual must be free to enter into a civil marriage with another person of either sex.⁴¹ The Massachusetts court declared: “Central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations.”⁴² That court recognized the logical impossibility of justifying only certain persons’ having the freedom to marry.

When asked for clarification by the Massachusetts legislature that was ordered to implement the ruling, the court explained that any civil unions, like those adopted in Vermont, fall short of marriage and establish an “unconstitutional, inferior, and discriminatory status for same-sex couples”⁴³ that would not meet the state’s constitutional standards.⁴⁴ Although the Massachusetts court emphasized its reliance on a state constitution that provided greater equal protection guarantees than does the federal Constitution,⁴⁵ Massachusetts’ bold step in establishing same-sex marriages will, I hope, persuade the Supreme Court that to provide fully the protections found in the federal Equal Protection Clause, the right of same-sex marriage must be recognized.

IV. THE ROLE OF MORAL VIEWS IN AN EQUAL PROTECTION ANALYSIS

Justice O’Connor, in her *Lawrence v. Texas* concurrence, also offers language for a possible same-sex marriage decision not based on moral grounds. She examines whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify, by itself, a statute that bans homosexual sodomy but not heterosexual sodomy. In holding that it is not, she asserts that “like a bare desire to harm [a] group,” moral disapproval “is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”⁴⁶ O’Connor then declares that the Court has “never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”⁴⁷

⁴⁰ *Id.* at 959 (“The individual liberty and equality safeguards of the Massachusetts constitution protect both “freedom from” unwarranted government intrusion into protected spheres of life and “freedom to” partake in benefits created by the State for the common good. Both freedoms are involved here. Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual’s liberty and due process rights.”) (citations omitted).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004).

⁴⁴ *Id.*

⁴⁵ *Goodridge*, 798 N.E.2d at 948 (stating that “[t]he Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution”).

⁴⁶ *Lawrence v. Texas*, 123 S. Ct. 2472, 2486 (2003) (O’Connor, J., concurring).

⁴⁷ *Id.* (O’Connor, J., concurring).

In contrast, in his *Lawrence* dissent, Justice Scalia refuses to accept that moral disapproval is not sufficient to justify a discriminatory law. He instead offers a weak equal protection argument for maintaining the constitutionality of the Texas antisodomy law based on the notion that *all* people, "heterosexuals and homosexuals, are . . . subject to its prohibition of deviate sexual intercourse with someone of the same sex."⁴⁸ While he admits that the ordinance "distinguish[es] between the sexes insofar as concerns the partner with whom the sexual acts are performed," he concludes that "this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex."⁴⁹ This argument is circular in its reasoning that a state law does not violate equal protection because other state laws exist that are similar (though admittedly more accepted). Such an argument presumes that the other state laws, by virtue of their existence, are constitutional, and does not delve into any equal protection analysis of either the Texas antisodomy law or the related marriage laws. Nevertheless, because of his own moral views, Justice Scalia will undoubtedly continue to oppose granting gay men and lesbians fundamental constitutional rights.

V. CONCLUSION

Maybe I am too optimistic for my time, but I remain positive that sooner rather than later same-sex marriage will be accepted in the United States. Professor Feldblum writes that while she believes that the Supreme Court will ultimately rule that marriage cannot be foreclosed to gay couples,

[a]ccording to the latest Gallup poll, a bare majority (54%) of the population believes homosexuality is an "acceptable" lifestyle. That number needs to increase to equal the substantial majority (63%) that currently believes homosexual sex should not be criminalized.⁵⁰

Although many Americans are opposed to same-sex marriage, I do not think the U.S. Supreme Court will wait until the majority of citizens accept same-sex marriage. It has never been acceptable for the majority to dictate the rights of the minority, especially by way of curtailing rights that they, the majority, have. This principle was most notably invoked in

⁴⁸ *Id.* at 2495 (Scalia, J., dissenting).

⁴⁹ *Id.*

⁵⁰ Feldblum, *supra* note 23, available at <http://www.planetout.com/pno/news/feature.html?sernum=604>.

Brown v. Board of Education.⁵¹ I am confident that even this Court will take an active, leading role in resolving the debate over same-sex marriage, in part to remain consistent with its holding in *Lawrence*.

However, I am still concerned about the use of morality to condemn same-sex marriage and other liberal institutions. Before *Bush v. Gore*,⁵² I believed that the conservative Justices cared about individual liberty (such as freedom of speech) and that their real bugaboo was big government intruding into the lives of the people. Of course, this reasoning would have made even more sense before the radical right took over the Republican party, attempting to impose its “Christian” morality on the rest of us. It is that same “morality” that has me worried that even Democrats like Bill Clinton, responsible for signing the Defense of Marriage Act into law, bend to the whims of current public opinion.⁵³ Had they been politicians in the days of *Loving v. Virginia*,⁵⁴ might they have supported preventing intermarriages between whites and blacks because their constituents considered them immoral? I doubt it.

Certainly by the time that the majority of voters in the United States assert that homosexuals should have the same rights as heterosexuals, politicians who hope to get elected or re-elected will call for those rights. To me, however, the role of a politician is to lead his or her constituency to a more informed, even more accepting, place. And judges, who are not slated with the task of acting based on public opinion, have no right to consider society’s or their own moral views. The majority in *Lawrence* concluded that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”⁵⁵ For such a possibility to actually exist, however, the Justices must act to protect minority rights instead of majority intolerance.

⁵¹ 347 U.S. 483, 495 (1954) (in which the Supreme Court invalidated a state law permitting racial segregation in schools on equal protection grounds, noting famously that “[s]eparate . . . [is] inherently unequal”).

⁵² 531 U.S. 98 (2000).

⁵³ For example, Barbara Boxer and Dianne Feinstein, California’s two liberal senators, have opposed an order by Gavin Newsom, the mayor of San Francisco, that San Francisco officials wed gay and lesbian couples despite state prohibitions. Julie Tamaki, *Boxer Walks a Tightrope*, L.A. TIMES, Feb. 20, 2004, at B1.

⁵⁴ 388 U.S. 1 (1967).

⁵⁵ *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).