gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Viewed in this larger context, Garrow argues, *Lawrence* was "wholly unsurprising." Garrow also suggests that *Lawrence* should be understood as part of an increasingly "insistent judicial assertiveness the Rehnquist Court has manifested in widely different areas of the law and with wildly different political and ideological overtones."

For Garrow, the most dramatic and immediate impact of *Lawrence* will be in the context of same-sex marriage. Indeed, within five months of the *Lawrence* decision, the Supreme Judicial Court of Massachusetts held that a ban on same-sex marriage violated the state constitution. Although the court did not expressly rely on *Lawrence* in reaching its decision, its discussion of the "individual's liberty and due process rights" reflected the influence of *Lawrence*.

The early reactions to *Lawrence* focused almost exclusively on the decision's impact on gay rights, but for Garrow, *Lawrence* does more than simply open the door to greater constitutional protections for gays and lesbians. In Garrow's view, *Lawrence* has "significantly magnified . . . the vitality" of the Court's abortion rights decision in *Planned Parenthood v. Casey* (1992) and thus further solidified the constitutional protection for a woman's choice to have an abortion. The broad language in *Lawrence* has also opened the door to other liberty-based constitutional claims. Garrow argues, for example, that the liberty analysis in *Lawrence* has "significantly undercut" the Court's decision in *Washington v. Glucksberg* (1997), in which it found no constitutional protection for a terminally ill person's desire to hasten his or her own death.

The *Lawrence* decision's expansive discussion of liberty will have considerable ramifications for both homosexuals and other Americans, leading Garrow to conclude that 2003 was "the most historic year for landmark civil liberties victories" in thirty years.—THE EDITORS

A Revolutionary Year: Judicial Assertiveness and Gay Rights

DAVID J. GARROW

EVEN IN A YEAR that featured *Grutter v. Bollinger*,[1] few Supreme Court observers would deny that *Lawrence v. Texas*[2] was as important a decision as any that the Court has rendered in more than a decade. Writing in the *New York Times*, Linda Greenhouse characterized *Lawrence* as a "stunning" "constitutional watershed," and other commentators called it both "momentous" and "revolutionary."[3]

Lawrence represented the greatest legal victory that gay Americans have ever won. The Court's explicit overruling of its notoriously homophobic decision in *Bowers v. Hardwick* (1986)[4] surprised many Court watchers who had anticipated a less bold and sweeping resolution, even though the ultimate voiding of Texas's statute prohibiting gay sodomy was never much in doubt once the justices agreed to hear the case. But *Lawrence* represented more than just a historic gay rights triumph. Justice Anthony M. Kennedy's opinion on behalf of a five-member majority (Justice Sandra Day O'Connor concurred separately) contained three constitutionally important elements in addition to voiding the thirteen remaining state anti-sodomy laws. Kennedy's pointedly explicit reliance on the controlling opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)[5] gave further constitutional heft to the holding in *Casey* that the core of the *Roe v. Wade* (1973)[6] protection of a woman's right to choose abortion would remain inviolable. Kennedy's repeated invocation of the *Casey* due process clause liberty analysis also called into further question the far narrower and more exclusive approach to

substantive due process liberty that Chief Justice William H. Rehnquist had offered in 1997 on behalf of a barely cobbled-together majority in *Washington v. Glucksberg*.[7] And most notably, Kennedy's opinion expressly declined to spurn the question of whether constitutional protection might extend to gay Americans' right to marry. Indeed, in at least two passages, the Kennedy majority manifestly left the constitutional door wide open for just such an argument.

One of this country's all-time finest appellate jurists, the late Judge Irving L. Goldberg of the U.S. Court of Appeals for the Fifth Circuit, once asserted, "If the subject matter permits it, then I think an opinion should be a crusading force." In a memorable phrase, Goldberg opined that "an opinion should have not only a beginning and an end, but a future."[8] Kennedy's opinion in *Lawrence*, like his portions of the controlling opinion in *Casey*, certainly corresponds to Judge Goldberg's precept, as commentators immediately realized. Asked whether *Lawrence* could indeed open the door to same-sex matrimony, Laurence H. Tribe of Harvard Law School replied, "I think it's only a matter of time, but it might be a good amount of time."[9]

But then, just five months later, came the bookend case that outstripped even *Lawrence*, the decisively more revolutionary assertion by the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health* of state constitutional protection for same-sex marriage.[10] Without *Lawrence*, *Goodridge* would have been far more difficult to envision,[11] but given *Lawrence*, most observers expressed relatively little astonishment about the advent of *Goodridge*.

Within the larger context of the overall work of the U.S. Supreme Court, *Lawrence v. Texas* should be understood from two distinct yet related perspectives. The first and most obvious requires us to understand *Lawrence* as a natural and in the long run inevitable extension of the doctrinal series of opinions that began with Justice John Marshall Harlan's hugely influential dissent in *Poe v. Ullman* (1961),[12] came to first fruition in *Griswold v. Connecticut* (1965),[13] overturning the Connecticut anti-contraception statute that had been unsuccessfully challenged in *Poe*, and reached full flower in *Roe v. Wade* and *Doe v. Bolton*[14] in 1973. Other less famous cases such as *Eisenstadt v. Baird* (1972)[15] and *Carey v. Population Services International* (1977)[16] can be cited as smaller parts of this evolving doctrine. *Bowers v. Hardwick* in 1986 brought this evolution to a screeching and painful stop, but even beforehand careful observers had realized that the Burger Court of the mid-1980s had no appetite whatsoever for extending to the realm of recreational sex the tradition of constitutional protection for reproductive choice embodied in *Griswold* and *Roe*.[17]

The ominous shadows created by the Court's decision in *Webster v. Reproductive Health Services* (1989)[18] were surprisingly pushed aside and reversed by the astonishing controlling opinion in *Planned Parenthood v. Casey* (1992). Four years after *Casey*, Justice Kennedy's rhetorically heartfelt majority opinion in *Romer v. Evans*[19] appeared to signal that a majority of the Rehnquist Court was no longer fundamentally comfortable with the homophobic precedent of *Bowers*. Granted, the *Romer* majority for some unstated reason subsequently declined to address a decision by the U.S. Court of Appeals for the Sixth Circuit, *Equality Foundation of Greater Cincinnati v. City of Cincinnati*,[20] that all but explicitly contradicted the high court's holding in *Romer*. However, the Kennedy majority's statements in *Romer*, particularly its conclusion that the Colorado provision at issue "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else,"[21] signified a fundamentally different judicial attitude from what had prevailed just a decade earlier in *Bowers*.

Within this doctrinal context, *Lawrence* represented a natural and unsurprising progression. *Griswold* and *Roe* had spoken of the fundamental constitutional right at issue as one of "privacy," but when *Casey* without explanation jettisoned any mention of privacy and replaced it with explicit and repeated invocation of the "liberty" guaranteed by the due process clauses of the Fourteenth and Fifth Amendments, constitutional commentators such as Professor Tribe correctly observed that the change was all for the good.[22] *Romer* offered the *Lawrence* court a clear opportunity to strike down Texas's anti-sodomy statute under equal protection, a path that Justice O'Connor alone did advocate, rather than as a violation of substantive due process liberty, but the *Lawrence* majority's invocation and application of the vision of constitutional liberty expressed in *Casey* represented judicial decision making at its boldest.

The second perspective from which *Lawrence* must be viewed is that of the insistent judicial assertiveness that the Rehnquist Court has manifested in widely different areas of the law and with wildly different political and ideological overtones. Depending upon one's tastes, the beginnings of the Rehnquist Court's pronounced assertiveness, or what Jeffrey Rosen criticizes as "haughty declarations of judicial supremacy,"[23] can be traced to *Texas v. Johnson* (1989),[24] *New York v. United States* (1992),[25] or *Planned Parenthood v. Casey* (1992). The invocation in *Casey* of the Court's power of judicial review, reaching all the way back to *Marbury v. Madison* (1803),[26] was in several crucial respects a direct mirroring of *Cooper v. Aaron* (1958),[27] the most important immediate progeny of *Brown v. Board of Education* (1954),[28] but even *Cooper*, never mind

Casey, is too forceful a declaration of the Court's supremacy over issues of constitutional interpretation for some conservative critics.[29]

Most of the attention paid to the Rehnquist Court's "judicial supremacy" proclivity, and most of the criticism, has focused on its federalism cases, beginning with *New York v. United States* or, more commonly, *United States v. Lopez* (1995).[30] Even a brief comprehensive survey of those cases falls well outside the scope of this chapter, but in virtually every instance, from *Lopez* through *Seminole Tribe of Florida v. Florida* (1996)[31] to the most recent manifestation of this now-mature trend, *Board of Trustees v. Garrett* (2001),[32] the Court's muscular activism has come from a five-vote majority composed of the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas. Initially many commentators looked at this developing trend primarily through a federalism lens in which the interpretive emphasis was placed on the so-called "states' rights" effects of these rulings, but in more recent years a widespread consensus has developed that the Court's assertion of its own constitutional superiority, particularly vis-à-vis the now judicially diminished legislative prerogatives of the Congress, is the defining ingredient in all these federalism, Eleventh Amendment, and commerce power cases.

But it is important to emphasize, no matter how critical one might be of the Rehnquist Court's growing assertions of authority over and against the legislative powers of Congress, that there is a second and vastly different set of post-1988 Rehnquist Court cases that can also be included under the judicial assertiveness or supremacy rubric. Here *Casey* rather than *Lopez* is the widely acknowledged starting point, with *Romer* (and now *Lawrence*) also standing in the front rank. But this second line of cases also includes *United States v. Virginia* (1996),[33] in which the males-only admissions policies of the Virginia Military Institute were struck down on equal protection grounds, plus arguably *Dickerson v. United States* (2000),[34] in which a widely heralded challenge to the historic precedent of *Miranda v. Arizona* (1966)[35] was forcefully turned aside in an opinion written by a one-time outspoken critic of *Miranda*, Chief Justice Rehnquist.

Casey, *Virginia*, *Romer*, and *Dickerson*, along with *Stenberg v. Carhart* (2000),[36] which reiterated the liberty-based protection of a woman's right to obtain an abortion set forth in *Casey*, notwithstanding state efforts to outlaw so-called partial birth abortions, are all sometimes cited to highlight what observers justifiably argue is the Rehnquist Court's underpublicized and perhaps surprisingly "liberal" record in many of its most politically controversial cases. *Lee v. Weisman* (1992),[37] a religion case, and now *Grutter v. Bollinger* (2003) can easily be added to this list, as can *Texas v. Johnson* (1989), the ruling extending constitutional protection to

the purposeful burning of the flag. But perhaps the most defining aspect of these rulings, as with *Lawrence*, is not their perceptible "liberalism" but how they too, at least as much as *Lopez*, *Seminole Tribe of Florida*, and *Garrett*, can be seen as the handiwork of a highly self-assured and assertive bench.

In almost every instance, the judicial overlap between the majorities in the *Lopez* line of cases and those in the *Casey* line consists of Anthony M. Kennedy and occasionally, as in *Casey* and *Romer*, Sandra Day O'Connor.[38] And with *Lawrence*, as with *Romer* before it, Justice Kennedy's judicial voice aspired to give the Court's ruling a rhetorical loftiness that few Supreme Court opinions of the last quarter-century, aside from *Casey*, have sought or attained.

The subsequent ruling by the Supreme Judicial Court of Massachusetts in *Goodridge* dramatically highlighted how the import and influence of *Lawrence* were cultural as well as substantive. In terms of direct legal impact, its grounding in the due process clause resulted in the immediate voiding of all thirteen remaining state anti-sodomy statutes, rather than just the four "gay-only" ones, including that of Texas, that a more modest equal protection ruling would have addressed. But Justice Kennedy's opinion was notable, and highly unusual, not simply for the vigor with which it amplified and applied a doctrine of individual liberty grounded in *Casey* but even more for the harshly dismissive manner in which it expressly overruled *Bowers v. Hardwick*.

"Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," Kennedy wrote for the *Lawrence* majority.[39] Yet that conclusion was not a novel one for Kennedy; twenty-three years earlier, when he was a little-known judge on the U.S. Court of Appeals for the Ninth Circuit, Kennedy had stated in an opinion upholding the U.S. Navy's discharge of a gay man, "We recognize . . . that there is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right of privacy."[40]

The *Lawrence* majority acknowledged that *Griswold* was "the most pertinent beginning point" for its liberty analysis, and after also acknowledging *Eisenstadt*, *Roe*, and *Carey*, it moved rapidly to a blunt reconsideration of *Bowers*. That opinion, Kennedy wrote, revealed the majority's "failure to appreciate the extent of the liberty at stake" in gay sexuality. A gay relationship, Kennedy wrote, is "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."[41]

Kennedy directly attacked the assertion in *Bowers* that century upon century of human law had consistently criminalized homosexuality. On the contrary, "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter"; instead what a more thoughtful historical inquiry revealed was "a general condemnation of nonprocreative sex" irrespective of sexual orientation. In other words, "far from possessing 'ancient roots,'" as *Bowers* had claimed, "American laws targeting same-sex couples did not develop until the last third of the 20th century."[42] Only in the 1970s did laws go onto the books in nine states expressly criminalizing gay sex.

In stark contrast to those enactments, Kennedy wrote, was the "emerging awareness" visible over the past five decades of American life "that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." He pointedly stated that "this emerging recognition should have been apparent when *Bowers* was decided," and he cited as evidence a decision by the European Court of Human Rights, *Dudgeon v. United Kingdom* (1981),[43] that had struck down a similar criminal prohibition in Northern Ireland. Kennedy went on to note that *Bowers* had suffered "serious erosion" in first *Casey* and then *Romer*, and then observed that "precedents both before and after its issuance contradict its central holding." Therefore, the *Lawrence* majority concluded, "*Bowers* was not correct when it was decided, and it is not correct today." Thus, it "should be and now is overruled."[44]

Kennedy at one point in *Lawrence* noted how *Casey* had reaffirmed that "our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Then Kennedy quoted a well-known passage from *Casey*, a passage that some Court critics have derided, in which he had written that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Immediately after that quotation, Kennedy stated that "persons in a homosexual relationship may seek autonomy for these purposes"—the types of decisions spelled out right before the quotation—"just as heterosexual persons do."[45]

Toward the end of their opinion, the majority noted that *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." However, "their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." Thus while the majority's earlier reference to gay relationships ("whether or not entitled to formal recognition in the law") bespoke a studied silence

concerning any future claim to constitutional protection for gay marriage, the reference to homosexuals' having rights "just as heterosexual persons do" could be read as far more pregnant with meaning.[46]

In their concluding paragraph, the *Lawrence* majority pointedly remarked that "later generations can see that laws once thought necessary and proper in fact serve only to oppress."[47] Justice O'Connor voiced a similar observation in her separate concurrence, declaring that "moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause." In distinct contrast to the Kennedy majority, however, O'Connor passingly volunteered that "preserving the traditional institution of marriage" did indeed qualify as a "legitimate state interest."[48]

The degree to which the *Lawrence* majority implicitly opened the constitutional door to same-sex marriage was illuminated most glaringly by an angry Justice Antonin Scalia, joined in dissent by Chief Justice Rehnquist and Justice Clarence Thomas. Emotional fervor and stark portents about malignant dangers have characterized a large number of Justice Scalia's dissenting opinions over the past fifteen years, but his dissent in *Lawrence* was perhaps less deserving of the "Chicken Little" and "boy who cried wolf" jests than some of his other impassioned retorts. Scalia accurately asserted that the manner in which Texas's sodomy statute criminalized certain sexual acts only if performed with a person of the same gender was "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." Given the majority's analysis, laws delimiting marriage exclusively to heterosexual couples were now on "pretty shaky grounds," for the *Lawrence* opinion "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."[49]

Knowledgeable commentators reacted to the *Lawrence* ruling with surprising agreement about its likely effects, given the otherwise radical disparity in their professional regard for the majority holding. Jeffrey Rosen opined in the *New Republic* that "as a constitutional matter, *Lawrence* is worse than *Roe*," a decision that his magazine has repeatedly disparaged for more than thirty years. Rosen expressed amazement that "a majority of the Rehnquist Court does in fact mean to read the 'sweet mystery' passage [from *Casey*] for all it's worth" and criticized how *Lawrence* had "embraced and extended a sweeping and amorphous right to sexual liberty."[50]

Rosen nonetheless found it "hard to think of a reason for courts to avoid

extending the Court's new right to 'define the meaning' of intimate relations to include a right of all people to marry, regardless of their sex." He warned that any judicial recognition of gay marriage would create so great a popular backlash that such a court decision actually "would set back the cause of gay and lesbian equality rather than advancing it." However, Rosen's prediction that such a ruling was likely or even inevitable was directly echoed even in so resolutely conservative a journal as the *National Review*.[51]

Yet Rosen's expectations concerning the import and impact of *Lawrence* were directly matched by those who fervently embraced and endorsed the ruling. The editors of the *Harvard Law Review*, writing in their authoritative annual survey of the Supreme Court's leading cases, welcomed *Lawrence* with the same description that Linda Greenhouse had used in the *New York Times* five months earlier: "a watershed." Calling the Kennedy opinion "sweeping in scope," the editors stated that *Lawrence* "stands for the proposition that sexual orientation is no longer a permissible ground for discrimination." Given "the sheer breadth of the right embraced by the Court," the *Lawrence* opinion "suggests that remaining forms of government-sanctioned anti-gay discrimination—including laws barring same-sex marriage . . . must either be narrowly tailored to further a compelling government purpose or be invalidated."[52] Since "no state interest other than moral disapprobation justifies denying the benefits of marriage to same-sex couples," and since both *Lawrence* and *Romer* before it expressly rejected moral disapproval as a legitimate governmental purpose, *Lawrence* indeed opened the door to same-sex marriage. "The *Lawrence* majority could hardly have been clearer in suggesting that its holding should be read as doing far more than simply overruling *Bowers*," and indeed, the editors concluded, *Lawrence* "embraces the notion of a fundamental right to be gay."[53]

It was wholly unsurprising that the first few months' worth of reactions to *Lawrence* focused almost exclusively on its further gay rights implications and all but omitted any discussion of what the majority opinion might mean for Fourteenth Amendment substantive due process liberty analysis in other areas of the law. However, the added support that *Lawrence* provided for the protection of a woman's right to abortion was extensive and undeniable, and placed *Casey* in an even more robust posture than had its reiteration in *Stenberg* in 2000. Even before *Lawrence*, *Casey* had seemed constitutionally unassailable to anyone who might fairly consider the remarkable manner in which its controlling opinion bound the Court's institutional reputation and legitimacy to its reaffirmation of the core of *Roe v. Wade*, but the dramatic "portability" of the liberty analysis

in *Casey* to a constitutional question other than abortion greatly magnified the ruling's precedential scope and vitality.

What was less obvious, if not less certain, was that the way *Lawrence* adopted and applied the due process clause liberty analysis of *Casey* in such muscular fashion significantly undercut Chief Justice Rehnquist's dramatically narrower explication of the Fourteenth Amendment's liberty guarantee in his shaky majority opinion in *Washington v. Glucksberg* (1997). Then again, that approach had been undercut on the very day it came down: in *Glucksberg*, Rehnquist rejected any constitutional liberty interest protection for a terminally ill citizen's desire to hasten his or her own death. But Justice O'Connor, whose support gave the Chief Justice's opinion its decisive fifth vote, voiced almost explicitly contradictory remarks in her concurring opinion. Rehnquist's constricted explication of due process liberty was in significant tension with the far more sweeping articulation that O'Connor and Kennedy (who also joined Rehnquist's opinion in *Glucksberg*) had, along with Justice David Souter, penned in *Casey*. Thus Justice Kennedy's manifesto in *Lawrence* about the strength and breadth of constitutional liberty not only reaffirmed the *Casey* analysis but measurably intensified and extended it.

Yet the initial impact of *Lawrence* was felt almost wholly within a gay rights ambit. Two days after the decision, the Supreme Court vacated a seventeen-year prison sentence that Kansas had imposed upon an eighteen-year-old resident of a state institution for performing consensual oral sex with a fourteen-year-old male.[54] Had the young man's partner been female rather than male, the maximum possible sentence would have been fifteen months. Two months later the U.S. Court of Appeals for the Eleventh Circuit confirmed the position of Alabama's attorney general that his state's sodomy statute was now null and void because of *Lawrence*,[55] and a month after that the U.S. Court of Appeals for the Armed Forces heard argument in a case that challenged the continuing validity of the military's criminal sodomy provision in light of *Lawrence*.[56]

The resonance of *Lawrence* with regard to gay marriage was greatly amplified when the Canadian government announced in mid-July that it would embrace, rather than appeal to the Supreme Court of Canada, two rulings by top provincial courts, one in British Columbia and the other in Ontario, that the Canadian Charter of Rights and Freedoms prohibited the discriminatory restriction of marriage to opposite-sex couples only.[57] But two Arizona men who had applied unsuccessfully for a marriage license three days after *Lawrence* had their resulting constitutional challenge rejected by an intermediate state appeals court. Following the lead of Chief Justice Rehnquist's narrow-gauge analysis in *Glucksberg* (1997), the

Arizona court concluded that "same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." Hence "the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process."[58]

The marriage decision that knowledgeable observers were all eagerly awaiting was that of the Supreme Judicial Court of Massachusetts, which had heard argument in *Goodridge v. Department of Public Health* in early March 2003.[59] Given the court's non-binding rule of deciding most of its cases within 130 days of argument, journalists kept up a close watch throughout early July,[60] but in mid-month the court announced that it would not abide by its deadline.[61] Speculation was rampant that the announcement of *Lawrence* on 26 June might have caused the Massachusetts jurists to revise opinions that were already in preparation, and four more months passed without a ruling.[62]

Then at 10:00 A.M. on Tuesday, 18 November, the Supreme Judicial Court announced its decision in a 4–3 opinion written by Chief Justice Margaret Marshall. The holding that extended state constitutional protection to same-sex marriage was expressed in the opinion's very first paragraph; in the second Marshall quoted the *Lawrence* majority's reiteration of a sentiment that the high court had first voiced in *Casey*: "Our obligation is to define the liberty of all, not to mandate our own moral code." Noting that *Lawrence* "left open" the question of same-sex marriage as a question of federal law, the Massachusetts majority expressed an observation that closely echoed Justice Kennedy in *Lawrence*: "whether and whom to marry, how to express intimacy, and whether and how to establish a family—these are among the most basic of every individual's liberty and due process rights."[63]

In pointed contrast to the Arizona ruling a month earlier, Chief Justice Marshall stated that "history cannot and does not foreclose the constitutional question" concerning same-sex marriage and that indeed "history must yield to a more fully developed understanding of the invidious quality of the discrimination" that the exclusion of gay people from wedlock perpetrates. Marriage, Marshall noted, "bestows enormous private and social advantages on those who choose to marry," above and beyond "the wide range of public benefits reserved only for married couples." Many state laws, she emphasized, continue to impose distinctions between marital and non-marital children, and "it cannot be rational under our laws . . . to penalize children by depriving them of state benefits because the state disapproves of their parents' sexual orientation." In short, "without the right to marry—or more properly, the right to choose to marry—

one is excluded from the full range of human experience and denied full protection of the laws."[64]

The state's three rationales for its law—encouraging procreation, fostering optimal child-rearing, and conserving public funds—all failed to meet even the judiciary's least demanding standard of constitutional review, the rational basis test. "Fertility is not a condition of marriage," Marshall commented; "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." There likewise was no rational relationship between heterosexually exclusive marriage and ideal child-rearing or the expenditure of public funds. "The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason." The real basis for the state's policy, Marshall suggested, is that "the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual."[65]

Most persuasively, Chief Justice Marshall's opinion emphasized the parallels between a prohibition of same-sex marriages and the anti-miscegenation laws that had banned interracial unions, at one time in a majority of American states, before the U.S. Supreme Court struck down the dozen or so remaining statutes in 1967 in the aptly named case of *Loving v. Virginia*.[66] "Recognizing the right of an individual to marry a person of the same sex," Marshall declared, "will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race."[67]

The *Goodridge* majority tellingly quoted from the U.S. Supreme Court's ruling in *United States v. Virginia* (1996) to note that "the history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded.' "[68] In an additional concurring opinion, Marshall's colleague Justice John Greaney stressed that "the right to marry is not a privilege conferred by the state, but a fundamental right that is protected against unwarranted state interference." And Greaney too, like Marshall, reiterated that historical practice does not limit the reach or definition of constitutional rights: "neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families."[69]

Each of the three justices in the minority penned a dissent, yet two of the three opinions struck an almost abashed or apologetic tone. Justice Martha Susman wrote that under the majority's ruling the state must

"provide the benefits of civil marriage to same-sex couples just as it does to opposite-sex couples," and she volunteered that "as a matter of social history, today's opinion may represent a great turning point that many will hail as a tremendous step toward a more just society." Sounding as if she regretted her inability to join Chief Justice Marshall's ruling, Susman added, "I fully appreciate the strength of the temptation to find this particular law unconstitutional—there is much to be said for the argument that excluding gay and lesbian couples from the benefits of civil marriage is cruelly unfair and hopelessly outdated."[70]

Susman's colleague Justice Robert Cordy uttered similar remarks, writing that "although it may be desirable for many reasons to extend to same-sex couples the benefits and burdens of civil marriage (and the plaintiffs have made a powerfully reasoned case for that extension), that decision must be made by the legislature, not the court." All three dissenters rested their disagreement on that theme of judicial deference, but Justice Cordy's final sentence again almost apologized for his dissent: "While the courageous efforts of many have resulted in increased dignity, rights and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action."[71]

The *Goodridge* decision generated page-one headlines all across the United States. Constitutional commentators praised Marshall's majority opinion, with Laurence Tribe commending it as "an extremely careful, thoughtful, elaborate, eloquent refutation of the . . . arguments of those who think marriage will be in some way threatened by extending its benefits to people of the same sex." Tribe noted that if other states attempted to disregard a marriage license granted to a same-sex couple in Massachusetts, "that will create a federal constitutional issue, namely is it consistent with equal protection of the laws to make homosexuals who seek to marry into second-class citizens?" And, should that question indeed come before the U.S. Supreme Court, Tribe predicted that "the opinion this Supreme Court rendered in *Lawrence v. Texas* about equal dignity and respect for homosexuals suggests that after a sufficient breathing space . . . it would be prepared to uphold a decision rather like this and to reach a similar conclusion."[72]

Editorial endorsement of the Massachusetts ruling came from both likely and highly unlikely sources. The *New York Times* praised the decision as "persuasive,"[73] and even the *New Republic*, which had harshly castigated both *Lawrence* and *Casey*, welcomed *Goodridge* as a "landmark" that reached a conclusion whose correctness the magazine called "obvious." "The arguments against equal marriage rights are so weak,"

the editors declared, that the state's defense of its policy "collapses upon the most casual inspection."[74] Some commentators suggested that the court's 180-day stay of its judgment, during which it invited the legislature "to take such action as it may deem appropriate in light of this opinion," could allow the legislature to somehow block the actual issuance of marriage licenses to same-sex couples. Laurence Tribe insisted that the 180-day period was simply "a courtesy" so that the legislature could amend state statutes to comply with the decision. "It is not a substantive task that has been delegated," he emphasized,[75] and within three days the Massachusetts Bar Association, the Boston Bar Association, and the Women's Bar Association of Massachusetts all concurred, stating that *Goodridge* clearly mandated same-sex marriage and did not offer the legislature any opportunity to craft some substitute provision such as the "civil unions" which Vermont's legislature created in response to the Vermont Supreme Court's expressly delegatory ruling in *Baker v. State* (1999).[76] Three months later, in early 2004, the *Goodridge* majority told the state legislature that "civil unions" would unconstitutionally assign same-sex couples to "second-class status" and stated that the stay was solely to give the legislature "an opportunity to conform the existing statutes" to the *Goodridge* constitutional holding.[77]

Ironically, the Supreme Judicial Court's 180-day stay of its ruling handed down on 18 November created a timetable that would lead to the issuance of the first same-sex marriage licenses in American history on 17 May 2004—the fiftieth anniversary of the Supreme Court's historic desegregation ruling in *Brown v. Board of Education*.[78] And clearly the Marshall opinion's persuasive articulation of the court's equality-for-all ruling struck a far more appealing and attractive chord with most Massachusetts citizens than many journalists and interest groups expected. Five days after the decision, both the *Boston Globe* and the *Boston Herald* reported the results of separate statewide polls in which respondents were asked about their reactions to *Goodridge*. The *Globe* reported that a full 50 percent of those polled supported the court's decision and only 38 percent opposed it. An even larger majority of 53 percent opposed any legislative effort to amend the Massachusetts Constitution or otherwise attempt to reverse the *Goodridge* ruling.[79] The poll reported by the *Herald* generated almost identical numbers: 49 percent of respondents agreed with *Goodridge* and 38 percent disagreed.[80]

The combination of *Goodridge* and *Lawrence*, and the far-reaching manner in which *Goodridge* built and enlarged upon *Lawrence*, made 2003 the most historic year for landmark civil liberties victories since the Supreme Court decided *Roe v. Wade* three decades earlier. The voiding in

Lawrence of Texas's anti-gay sodomy statute was no Supreme Court surprise, but the manner in which the majority invoked and expanded the due process liberty analysis of *Casey* represented a striking doctrinal development and one that almost certainly will have important long-term consequences for the Court's Fourteenth Amendment jurisprudence wholly apart from questions of gay rights.

Lawrence v. Texas thus represented as momentous an example of the Rehnquist Court's judicial self-confidence as *Planned Parenthood v. Casey* and all the Court's federalism rulings in the *Lopez* line of cases put together. Only in time will historians learn for certain to what extent *Lawrence* affected the decision making of the Supreme Judicial Court of Massachusetts in *Goodridge*, yet in opening the door for America's first same-sex marriages *Goodridge* almost certainly ensures that the U.S. Supreme Court will have more gay-equality cases on its docket in the years ahead than it would otherwise have had. Some states no doubt will refuse to acknowledge the validity of Massachusetts marriage licenses issued to same-sex couples, and those couples will then challenge those refusals in the courts. As discriminatory state action against married same-sex couples begins to be scrutinized in the federal courts, *Lawrence* will be the most relevant and potent U.S. Supreme Court precedent to be invoked.

Goodridge and *Lawrence* therefore insure that gay equality cases will within several years' time return to the chambers of the U.S. Supreme Court. And when they do, it is almost certain, as Laurence Tribe shrewdly predicted on the day that *Goodridge* was decided, that the judicial assertiveness of this Supreme Court, in tandem with the doctrinal innovations it has deployed in *Lawrence*, *Casey*, and *Romer*, will again lead it to forcefully and self-confidently declare that "a state cannot so deem a class of persons a stranger to its laws."[81]

CHAPTER FOUR

ALTHOUGH THE Supreme Court with its life tenure appointments and its aversion to television cameras seems at first blush far removed from the political process, that superficial image of the Court is misleading. Many of the Court's decisions provoke profound political reactions—from efforts to amend the U.S. Constitution to political campaigns to elect politicians who will undo the "damage" caused by the Court. For example, the Court's abortion rights decision in *Roe v. Wade* in 1973 unleashed a political firestorm that likely contributed to the election of Ronald Reagan in 1980 and helped shape national politics for more than two decades. Court decisions that attempt to resolve contentious cultural debates by constitutional fiat are particularly at risk for political backlash.

No Supreme Court decision of the past few years bears greater potential for provoking such a political reaction than the decision this term in *Lawrence v. Texas*. Yes, the Court's decisions in the University of Michigan affirmative action cases also drew enormous attention, but those decisions declined to settle that contentious issue by constitutional decision, leaving it to the states to decide for themselves whether they wish to retain racial preferences. *Lawrence*, on the other hand, overturned several state laws banning homosexual sodomy and, more importantly, bore the seeds of an eventual constitutional attack on the exclusion of homosexuals from the privilege of marriage.

Jeffrey Rosen, legal affairs editor of the *New Republic* and a law professor at George Washington University Law School, probes in this chap-

1 123 S. Ct. 2325 (2003).
2 123 S. Ct. 2472 (2003).
3 Linda Greenhouse, "In a Momentous Term, Justices Remake the Law, and the Court," *New York Times*, 1 July 2003, § A, p. 1; David J. Garrow, "Sodomy Case Has Far-Reaching Importance," *Chicago Tribune*, 27 June 2003, 27. See also Vincent G. Samar, "A Closer Look at Lawrence v. Texas," *In These Times*, 1 July 2003, 17 (also calling the decision "stunning"); Chris Bull, "Justice Served," *Advocate*, 19 August 2003, 35.
4 478 U.S. 186 (1986).
5 505 U.S. 833 (1992).
6 410 U.S. 113 (1973).
7 521 U.S. 702 (1997).
8 Lawrence J. Vilardo and Howard W. Gutman, "With Justice from One: An Interview with Hon. Irving L. Goldberg," 17 *Litigation* 16, 22 (1991).
9 Joan Biskupic, "Decision Represents an Enormous Turn in the Law," *USA Today*, 27 June 2003, § A, p. 5.
10 798 N.E.2d 941 (Mass. 2003).
11 As Professor Tribe expressed it on the day that *Goodridge* was announced, absent *Lawrence* "the odds that this cautious, basically conservative state court would have decided the case this way would have been considerably less." Linda Greenhouse, "Supreme Court Paved Way for Marriage Ruling with Sodomy Law Decision," *New York Times*, 19 November 2003, § A, p. 19. See also Matthew Kelly, "Journalist: High Court May Head to Center," *Dartmouth*, 21 November 2003, 1 (quoting Greenhouse herself as stating that *Lawrence* "gave the [Massachusetts] state [court] courage and cover"); David von Drehle, "Same Sex Unions Move Center Stage," *Washington Post*, 23 November 2003, § A, p. 1.
12 367 U.S. 497 (1961).
13 381 U.S. 479 (1965).
14 410 U.S. 179 (1973).
15 405 U.S. 438 (1972).
16 431 U.S. 678 (1977).
17 David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, rev. ed. (Berkeley: University of California Press, 1998), 644–50.
18 492 U.S. 490 (1989).
19 517 U.S. 620 (1996).
20 128 F.3d 289 (6th Cir. 1997), rehearing en banc denied, 1998 WL 101701, cert. denied, 525 U.S. 943 (1998).
21 517 U.S. at 635.
22 Linda Greenhouse, "A Telling Court Opinion," *New York Times*, 1 July 1992, § A, p. 1 (quoting Tribe as saying that the opinion in *Casey* by the "trio" of O'Connor, Kennedy, and Souter "puts the right to abortion on a firmer jurisprudential foundation than ever before").
23 Jeffrey Rosen, "Pride and Prejudice," *New Republic*, 10–17 July 2000, 16.
24 491 U.S. 397 (1989).
25 505 U.S. 144 (1992).
26 5 U.S. 137 (1803).
27 358 U.S. 1 (1958).

28 347 U.S. 483 (1954).
29 Eugene W. Hickok and Gary L. McDowell, *Justice vs. Law* (New York: Free Press, 1993), 165–68.
30 514 U.S. 549 (1995).
31 517 U.S. 44 (1996).
32 531 U.S. 356 (2001).
33 518 U.S. 515 (1996).
34 530 U.S. 428 (2000).
35 384 U.S. 436 (1966).
36 530 U.S. 914 (2000).
37 505 U.S. 577 (1992).
38 *Stenberg* is an exception, for Justice Kennedy joined Rehnquist, Scalia, and Thomas in dissent, while Justice O'Connor supplied the decisive fifth vote for Justice Stephen Breyer's majority opinion.
39 123 S. Ct. at 2476.
40 Beller v. Middendorf, 632 F.2d 788, 809 (9th Cir. 1980).
41 123 S. Ct. at 2478.
42 *Id.* at 2479.
43 45 Eur. Ct. H.R. (1981) 52.
44 123 S. Ct. at 2484.
45 *Id.* at 2481–82.
46 *Id.* at 2482–84.
47 *Id.* at 2484.
48 *Id.* at 2486, 2488 (O'Connor, J., concurring).
49 *Id.* at 2495–98 (Scalia, J., dissenting).
50 Jeffrey Rosen, "Kennedy Curse," *New Republic*, 21 July 2003, 15. In his chapter in this book, Rosen describes Justice Kennedy's passage on the "mystery of human life" as "inflammatory."
51 See Ramesh Ponnuru, "Coming Out Ahead: Why Gay Marriage Is on the Way," *National Review*, 28 July 2003, 24.
52 "The Supreme Court, 2002 Term: Leading Cases: Constitutional Law," 117 *Harvard Law Review* 297, 298 (2003).
53 *Id.* at 303, 304, 306.
54 123 S. Ct. 2638 (2003). But see State v. Limon, 83 P.3d 229 (Kan. Ct. App. 2004).
55 Doe v. Pryor, 344 F.3d 1282 (11th Cir. 2003). But see Lofton v. Secretary of Department of Children and Family Services, 358 F.3d 804 (11th Cir., 2004). See also Tony Mauro, "Rocky Path for Gay Rights Cases despite Lawrence," *Legal Times*, 9 February 2004, 1.
56 Marcia Coyle, "Gay Rights Ruling Gets Test in Military," *National Law Journal*, 13 October 2003, 1 (reporting on United States v. Marcum, No. 02-0944/AF).
57 Tom Cohen, "Canada Aims to Legalize Gay Marriage," *Chicago Tribune*, 18 July 2003, § 1, p. 6. See Halpern v. Toronto, 172 O.A.C. 276 (2003); EGALE Canada, Inc. v. Canada, 13 B.C.L.R. 4th 1 (2003), and 15 B.C.L.R. 4th 226 (2003).
58 Standhardt v. Superior Court, 77 P.3d 451, 459, 460 (Ariz. Ct. App. 2003).
59 Kathleen Burge, "SJC Peppers Lawyers on Same-Sex Marriage," *Boston Globe*, 5 March 2003, § A, p. 1.
60 See, e.g., Shelley Emling, "Court to Decide on Gay Marriage," *Atlanta Journal-Constitution*, 9 July 2003, § A, p. 3.

61 Kathleen Burge, "SJC Puts Off a Decision on Gay Marriage," *Boston Globe*, 15 July 2003, § A, p. 1.
62 Yvonne Abraham, "10 Years' Work Led to Historic Win in Court," *Boston Globe*, 23 November 2003, § A, p. 1.
63 798 N.E.2d at 959.
64 *Id.* at 953, 958, 954, 963, 964, 957.
65 *Id.* at 961, 968.
66 388 U.S. 1 (1967).
67 798 N.E.2d at 965.
68 *Id.* at 966.
69 *Id.* at 970, 973 (Greaney, J., concurring).
70 *Id.* at 979, 892 (Susman, J., dissenting).
71 *Id.* at 983, 1005 (Cordy, J., dissenting).
72 Laurence Tribe on "Morning Edition," National Public Radio, 18 November 2003.
73 "A Victory for Gay Marriage," *New York Times*, 20 November 2003, § A, p. 32.
74 "Mass Appeal," *New Republic*, 1–8 December 2003, 9. But see Jeffrey Rosen, "Immodest Proposal: Massachusetts Gets It Wrong on Gay Marriage," *New Republic*, 22 December 2003, 19 (criticizing *Goodridge* as both "constitutionally unconvincing" and "politically naive").
75 Laurence Tribe on "Morning Edition," National Public Radio, 18 November 2003.
76 Raphael Lewis, "Romney, AG Take Heat on Marriage Issue; Gay Rights Ruling Is Clear, Law Groups Say," *Boston Globe*, 22 November 2003, § B, p. 1; Baker v. State, 744 A.2d 864 (1999).
77 *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 568, 570 (3 February 2004).
78 David J. Garrow, "First Blacks, Now Gays, Gain Rights," *Newsday*, 21 November 2003, § A, p. 41.
79 Frank Phillips and Rick Klein, "50% in Poll Back SJC Ruling on Gay Marriage," *Boston Globe*, 23 November 2003, § A, p. 1.
80 David R. Guarino, "Poll Finds Massive Backing for Gay Unions," *Boston Herald*, 23 November 2003, 7.
81 Romer v. Evans, 517 U.S. 620, 635 (1996).

The Next Culture War

1 123 S. Ct. 2472 (2003).
2 410 U.S. 113 (1973).
3 Stone v. Graham, 449 U.S. 39 (1980).
4 Paul Weyrich, "Did Conservatives Lose the Culture War?" *Milwaukee Journal Sentinel*, 28 February 1999, 1.
5 "Evangelist Calls for New Court," *New York Times*, 16 July 2003, § A, p. 12.
6 Jeffrey M. Jones, "Nearly 6 in 10 Approve of Supreme Court," Gallup Poll News Service, 17 July 2003.
7 Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) (O'Connor, J., concurring).
8 *Id.* at 2475.
9 *Id.* at 2489.
10 505 U.S. 833 (1992).
11 123 S. Ct. at 2481 (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

12 *Id.* at 2475.
13 *Id.* at 2497.
14 *Id.* at 2484.
15 See Robert C. Post, "The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law," 117 *Harvard Law Review* 4, 98 (2003).
16 Lawrence v. Texas, 123 S. Ct. at 2484.
17 Goodridge v. Department of Public Health, 798 N.E.2d 941 (2003).
18 388 U.S. 1 (1967).
19 517 U.S. 620 (1996).
20 Susan Page, "Poll Shows Backlash on Gay Issues," *USA Today*, 28 July 2003.
21 Richard Morin and Alan Cooperman, "Majority against Blessing Gay Unions: 60% in Poll Oppose Episcopal Decision," *Washington Post*, 14 August 2003, § A, p. 1.
22 Page, "Poll Shows Backlash on Gay Issues."
23 347 U.S. 483 (1954).
24 See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), 42–71.
25 Lucas A. Powe Jr., *The Warren Court and American Politics* (Cambridge: Belknap, 2000), 361–62.
26 Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* (Chicago: University of Chicago Press, 2002), 151.
27 James Davison Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991).
28 See generally Alan Wolfe, *Moral Freedom: The Impossible Idea That Defines the Way We Live Now* (New York: W. W. Norton, 2001).
29 Hunter, *Culture Wars*, 305.
30 *Id.* at 306.
31 410 U.S. at 163.
32 John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 *Yale Law Journal* 920, 947 (1973).
33 See Ruth Bader Ginsburg, "Speaking in a Judicial Voice," 67 *NYU Law Review* 1185 (1992).
34 See Rosenberg, *The Hollow Hope*, 185–89.
35 Everett Carll Ladd and Karlyn H. Bowman, *Public Opinion about Abortion: Twenty-five Years after Roe v. Wade* (Washington: AEI Press, 1997), 33.
36 John Derbyshire, "Confessions of a Metropolitan Conservative," National Review Online, 8 May 2003.
37 478 U.S. 186 (1986).
38 Page, "Poll Shows Backlash on Gay Issues."
39 Koppelman, *The Gay Rights Question in Contemporary American Law*, 149–50.

The Affirmative Action Decisions

1 123 S. Ct. 2325 (2003).
2 123 S. Ct. 2411 (2003).
3 This chapter will generally speak of "racial preferences," which identifies with precision the programs at issue here, instead of the pejorative "quotas" or the benign-sounding "affirmative action." While the latter phrase is more widely used, it is ambiguous and misleading, as is explained on page 95.
4 123 S. Ct. at 2346 (quoting Nathanson and Bartnik, "The Constitutionality of Preferential