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SAME-SEX MARRIAGE: ANALYZING THE ROLE OF COURTS WITH REGARD TO  
GRANTING LEGAL RIGHTS AND EFFECTUATING CHANGE THAT AIMS TO BE  
PERMANENT AND NON-CONTROVERSIAL

by  
Scott Gordon

Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
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## INTRODUCTION

Historically, minorities have often looked to federal and state courts as a source of protection and for recognizing their equal rights. Within the last few years, legal questions regarding the treatment of same-sex couples and whether to bring such couples within the ambit of civil marriage have been addressed in these courts, as well as in various state legislatures, voting booths and, the nation's popular discourse. The trajectory of public opinion on this subject has largely moved toward support throughout this time, and yet governmental steps toward recognizing same-sex couples have often been met with political backlash and popular outrage. In examining the chronology of certain relevant judicial decisions and their effects, this Note will propose state courts as the most appropriate way forward for advocates of marriage equality.

Part I will discuss various court decisions that affected the rights of gays and lesbians over the course of the last decade, with an emphasis on public and political responses to those decisions. Part II will discuss a theoretical framework for granting broader inclusion and greater protection of minority groups, generally, and gays and lesbians, specifically. Part III will propose state courts as the best way forward for achieving change that aims to be permanent and non-controversial in this context.

### I. COURT DECISIONS AFFECTING THE RIGHTS OF GAYS AND LESBIANS

Recognizing marriage equality and other forms of protection and inclusion for gays and lesbians has taken many forms over the past decade, with judicial decisions often at the center of providing such rights. Accordingly, this Part will examine an illustrative group of judicial opinions at both the federal and state level throughout that period, with an emphasis on public and political reaction to those opinions.

## A. Vermont's Legislative Remand

In 1999's *Baker v. State*, the Vermont Supreme Court struck down the state's then-existing marriage statute on grounds that, in denying gay couples the "common benefits and protections that flow from marriage under Vermont law," excluding those couples from matters such as health-insurance benefits and inheritance rights violated the state's constitution.<sup>1</sup> Meanwhile, the court ultimately deferred to the state legislature in deciding how the law should be revised in compliance with its constitutional mandate.<sup>2</sup> In so doing, the court acknowledged the possibility of granting same-sex couples an "alternative legal status" to traditional marriage by way of a domestic-partnership act, and noted the potentially "disruptive and unforeseen consequences" that a sudden change in marriage laws could have.<sup>3</sup>

The Vermont Supreme Court went on to offer several reasons in support of its legislative remand. First, on separation-of-powers grounds, the court considered crafting a remedy for the unconstitutional marriage statute a legislative prerogative.<sup>4</sup> Next, the court recognized that, without legislative guidelines in place regarding the rights or status of gay couples, more explicit judicial action taken by the court—e.g., granting marriage rights—could lead to "uncertainty and confusion."<sup>5</sup> Last, the court acknowledged the political consequences that such judicial action would entail, and hesitated to place the court within the "political cauldron" of public debate.<sup>6</sup>

Regardless of the *Baker* court's apparent concern over constitutional roles, practical confusion, and political fallout, the legislative remand seemingly sparked—or at the very least,

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<sup>1</sup> *Baker v. State*, 744 A.2d 864, 867 (Vt. Sup. Ct. 1999); see V.T. CONST. ch. I, art. 7 ("That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.").

<sup>2</sup> *Baker*, 744 A.2d at 886.

<sup>3</sup> *Id.* at 887.

<sup>4</sup> *Id.* at 886.

<sup>5</sup> *Id.* at 887.

<sup>6</sup> *Id.* at 888.

illuminated—the vocal, polarized nature of the gay-marriage debate as Vermont’s legislature subsequently deliberated over reworking the marriage statute.<sup>7</sup> Indeed, polling at the time found that 38% of Vermont’s citizens agreed with the court’s ruling, while 52% disagreed and 10% were uncertain.<sup>8</sup> Opponents of *Baker* saw the decision as the outgrowth of judicial activism, which is ironic in light of the court’s apprehension regarding the so-called cauldron of public debate and the court’s corresponding deference to the state legislature.<sup>9</sup>

Subsequently, and in a possible attempt to accommodate split public opinion regarding homosexuals’ rights,<sup>10</sup> Vermont’s legislature became the first state to pass a bill offering gay couples a “civil union” status.<sup>11</sup> The law went into effect on July 1, 2000, and, while falling short of expanding the state’s definition of marriage to cover gay couples,<sup>12</sup> the civil union afforded such couples the legal rights and responsibilities associated with traditional marriage.<sup>13</sup>

In sum, Vermont’s decade-old grapple that led to its recognition of civil unions was defined largely by measures aimed at compromise, with an implicit goal of avoiding controversy: first through the *Baker* court’s deference to the state legislature, and then through the

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<sup>7</sup> Carey Goldberg, *Forced Into Action on Gay Marriage, Vermont Finds Itself Deeply Split*, N.Y. TIMES, Feb. 3, 2000, at A16. By way of example, in spite of the state’s relatively meager 600,000-person population, over a thousand people came to subsequent public hearings at the state House, with a similar number protesting at nearby rallies. Similarly, Governor Howard Dean’s office fielded an “unheard-of” 13,000 phone calls regarding the potential aftermath of *Baker*. *Id.*

<sup>8</sup> *Id.*; see also *id.* (noting that 49% favored overturning *Baker* via constitutional amendment while 44% opposed such an amendment).

<sup>9</sup> See, e.g., Joseph A. Reinert, *The Myth of Judicial Activism*, 29 VT. B.J. & L. DIG. 35 (2004) (discussing criticism of *Baker* as “judicial activism”); David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61 (2000).

<sup>10</sup> See Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 123-37 (2000) (arguing that Vermont’s “politically-expedient compromise” reinforces societal notions of heterosexual supremacy).

<sup>11</sup> An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, §§ 1201-07 (Supp. 2000).

<sup>12</sup> Vermont did subsequently grant full marital rights to same-sex couples, ultimately through a legislative override of the state governor’s veto. See *infra* note 15-17 and accompanying text.

<sup>13</sup> *Id.* at § 1204(a); see also *id.* at § 1204(e)(1) (providing a “nonexclusive list of legal benefits, protections and responsibilities” that would extend to couples in state-recognized civil unions, including laws relating to title, intestate succession or other incidents of the acquisition, ownership, or transfer of real or personal property; causes of action dependent on spousal status; probate law; adoption law; group insurance for state employees; spousal abuse programs; prohibitions against discrimination based on marital status; victims’ and workers’ compensation benefits; medical and terminal care; and family leave and public assistance benefits).

legislature's creation of a statutory label that offered the substance of state-recognized marriage without the title that would otherwise accompany it. And yet, the relatively novel introduction of a legal status for gays and lesbians nevertheless led to political backlash and public outcry with each step in the process.

Moreover, the ensuing backlash and outcry was not exclusive to Vermont itself: at the national level, two states enacted constitutional bans and seven state legislatures passed statutory restrictions on same-sex marriage in the four years following *Baker*.<sup>14</sup> For Vermont, though, the initial "political cauldron" that the state's high court reluctantly entered into in deciding *Baker* ultimately subsided. Vermont recognized same-sex marriage on September 1, 2009, after the legislature overrode the governor's veto of a marriage bill that was introduced in the state House on February 9, 2007.<sup>15</sup> That measure marked the first time in nineteen years that Vermont's legislature had overridden a governor's veto.<sup>16</sup> So, with the passage of time, the politically accountable legislators of Vermont ultimately decided overwhelmingly in favor of same-sex marriage, with the bill ultimately enacted by a vote of 23-5 in the state Senate and 100-49 in the state House.<sup>17</sup>

Along with Vermont, whose ten-year process of judicial decisions and various legislative measures eventually ended in a grant of equal marriage rights for gays and lesbians, many states and localities have enacted laws pertaining to same-sex marriage and other gay rights over that

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<sup>14</sup> Nebraska and Nevada passed constitutional bans; California, Colorado, Connecticut, Missouri, South Dakota, West Virginia, and Texas all banned same-sex marriage statutorily. See Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 173 (2009).

<sup>15</sup> VT. STAT. ANN. tit. 1, § 8. The new law changed the state's definition of marriage from "one man and one woman" to "two people," and stated that all terms "relating to the marital relationship or familial relationships shall be construed consistently with this section for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law, or any other source of civil law."

<sup>16</sup> See Kirstin Carlson, *Governor Vetoes Same-Sex Marriage Bill*, WCAX.com, Apr. 6, 2009, available at <http://www.wcax.com/Global/story.asp?S=10139384> (last visited Apr. 1, 2010).

<sup>17</sup> See Jason Szep, *Vermont Becomes 4th State to Allow Gay Marriage*, REUTERS, Apr. 7, 2009, available at <http://www.reuters.com/article/idUSN0745825320090408> (last visited Apr. 1, 2010).

same period.<sup>18</sup> Those decisions have often been spurred by court opinions, whether directly through a state legislature’s reaction to a binding court decision regarding gay rights, or indirectly via the heightened awareness and legislative interest in addressing gay rights that came with the general rise in litigation over same-sex issues.<sup>19</sup>

## B. *Lawrence v. Texas*

Within the federal sphere, courts have closely adhered to the status quo of a 1972 U.S. Supreme Court decision that dismissed a claim regarding same-sex marriage “for want of a substantial federal question.”<sup>20</sup> Irrespective of this reluctance and restraint, the Court addressed and struck down a state’s sodomy law that uniquely criminalized gays in 2003’s *Lawrence v. Texas*.<sup>21</sup> The federal decision, issued at a time in which many states were responding to calls for the recognition of civil unions and the legalization of same-sex marriage, appears somewhat anachronistic by comparison. Nevertheless, the varying opinions of the Court irrevocably brought same-sex issues and the ultimate question of marriage equality into the nation’s collective consciousness, causing an ensuing polarization of public opinion and a significant drop in support for gay rights.

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<sup>18</sup> See Keck, *supra* note 14, at 173, tbl. 5.

<sup>19</sup> See Keck, *supra* note 14, at 161, tbl. 1 (giving a timeline of the electoral aftermath of judicial victories for advocates of gay rights).

<sup>20</sup> *Baker v. Nelson*, 409 U.S. 810, 810 (1972); see, e.g., *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006) (overturning a U.S. District Court decision that held Nebraska’s state constitutional amendment banning same-sex marriage to be unconstitutional as a bill of attainder and as a violation of the First and Fourteenth Amendments). To wit:

In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution. Indeed, in *Baker v. Nelson*, when faced with a Fourteenth Amendment challenge to a decision by the Supreme Court of Minnesota denying a marriage license to a same-sex couple, the United States Supreme Court dismissed “for want of a *substantial* federal question.” There is good reason for this restraint.

*Id.* at 870-71 (internal citation omitted).

<sup>21</sup> 539 U.S. 558 (2003).

## 1. The Court's Opinions

In *Lawrence*, the United States Supreme Court examined a Texas statute that criminalized consensual sexual intimacy when such conduct was between adults of the same sex.<sup>22</sup> Writing for the five-justice majority, Justice Kennedy wrote that “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places [and] presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>23</sup> In so stating, the Court overruled *Bowers v. Hardwick*,<sup>24</sup> its 1986 decision that denied the existence of a “fundamental right to engage in homosexual sodomy.”<sup>25</sup> That is, based on the right to liberty granted by the Constitution’s Due Process Clause,<sup>26</sup> the Court declared that gays and lesbians were entitled to respect for their private lives, and that Texas could not “demean their existence” or “control their destiny” by criminalizing their private consensual conduct.<sup>27</sup>

The *Lawrence* majority also addressed an argument that the sodomy statute’s apparent discrimination based on sexual orientation was invalid under the Equal Protection Clause.<sup>28</sup> While “a tenable argument,” the Court was concerned that rejecting the statute on equal protection grounds would necessarily leave open the question of “whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex

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<sup>22</sup> *Id.* at 564.

<sup>23</sup> *Id.* at 562.

<sup>24</sup> 478 U.S. 186 (1986).

<sup>25</sup> *Id.* at 191.

<sup>26</sup> See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>27</sup> *Lawrence*, 539 U.S. at 578; see also *id.* at 574:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>28</sup> *Id.* at 574; see U.S. CONST. amend. XIV, § 1.



participants.”<sup>29</sup> The Court was unwilling to leave the state free to rewrite its law with such an end, and the aforementioned right to liberty under the Due Process Clause therefore provided the sole basis for the majority’s decision to strike down the statute.<sup>30</sup>

Notably, the Court avoided discussing the merits of legalizing same-sex marriage, in spite of the concurrent governmental efforts toward dealing with the issue at various state and local levels<sup>31</sup> and the strong implications for that subject that the *Lawrence* opinion at least arguably held.<sup>32</sup> Justice O’Connor, however, at least broached the subject in a concurring opinion.<sup>33</sup> Examining the equal protection argument raised by the plaintiffs, Justice O’Connor’s concurring opinion was premised on the principle that a legislative “desire to harm a politically unpopular group” cannot form a legitimate governmental interest.<sup>34</sup> Within that framework, that the statute “treat[ed] the same conduct differently based solely on the participants” was enough for Justice O’Connor to find the anti-gay animus necessary to strike down the sodomy statute based on her understanding of equal protection.<sup>35</sup> Nevertheless, in apparently addressing her opinion’s implications for gay marriage, Justice O’Connor insisted that, beyond “mere moral disapproval” of gays, reasons including “preserving the traditional institution of marriage” would still support statutory distinctions on the basis of sexual identity.<sup>36</sup>

In a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia was unconvinced by Justice O’Connor’s regard for the traditional definition of marriage.

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<sup>29</sup> *Lawrence*, 539 U.S. at 574-75; but see *id.* at 579-85 (O’Connor, J., concurring).

<sup>30</sup> See *supra*, notes 23-27 and accompanying text.

<sup>31</sup> See *infra* Section I.A and *supra* Sections I.C and I.D. Curiously, the majority did note that American “laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,” but did not distinguish marriage in this sense from the same-sex context addressed in Justice Scalia’s dissent. *Lawrence*, 539 U.S. at 574 (emphasis added).

<sup>32</sup> See *Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting).

<sup>33</sup> *Id.* at 585 (O’Connor, J., concurring).

<sup>34</sup> *Id.* at 580; see, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (all supporting Justice O’Connor’s rationale for striking down the Texas statute on equal protection grounds).

<sup>35</sup> *Lawrence*, 539 U.S. at 581.

<sup>36</sup> *Id.* at 585.

Justice Scalia claimed that O'Connor's acknowledgment of preserving the traditional institution of marriage was a mere euphemism for moral disapproval, and that, in any instance, distinguishing between laws seeking to preserve traditional sexual mores and those that express moral disapproval would prove unworkable.<sup>37</sup> Emphasizing the Court's responsibility to carry principles to their logical conclusion, Justice Scalia asked:

If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct,<sup>38</sup> and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen 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,”<sup>39</sup> what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution?”<sup>40</sup>

In concluding, Justice Scalia warned that, inasmuch as the Court's work depends on principle and logic, its opinion in *Lawrence* had significant implications for gay marriage.<sup>41</sup>

## 2. *Lawrence*'s Effect on Public Discourse and Opinion

Justice Scalia's assertion that *Lawrence* placed the Court's jurisprudence on a slippery slope toward legalizing same-sex marriage did in some sense prove to be accurate: though the *Lawrence* majority's decision avoided discussion of marriage equality, the opinion nevertheless sparked widespread discussion of the topic and seemingly moved public opinion toward opposition. Indeed, press coverage following *Lawrence* focused overwhelmingly on the issue of gay marriage, with the issue becoming the focal point of popular understandings of the Court's opinion. The day after *Lawrence* was decided, for example, over fifty stories about gay marriage ran in major U.S. newspapers.<sup>42</sup> And as Figure 1 illustrates, the press' treatment of the subject

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<sup>37</sup> *Id.* at 602-03 (Scalia, J., dissenting).

<sup>38</sup> *Id.* at 578 (majority opinion).

<sup>39</sup> *Id.* at 567.

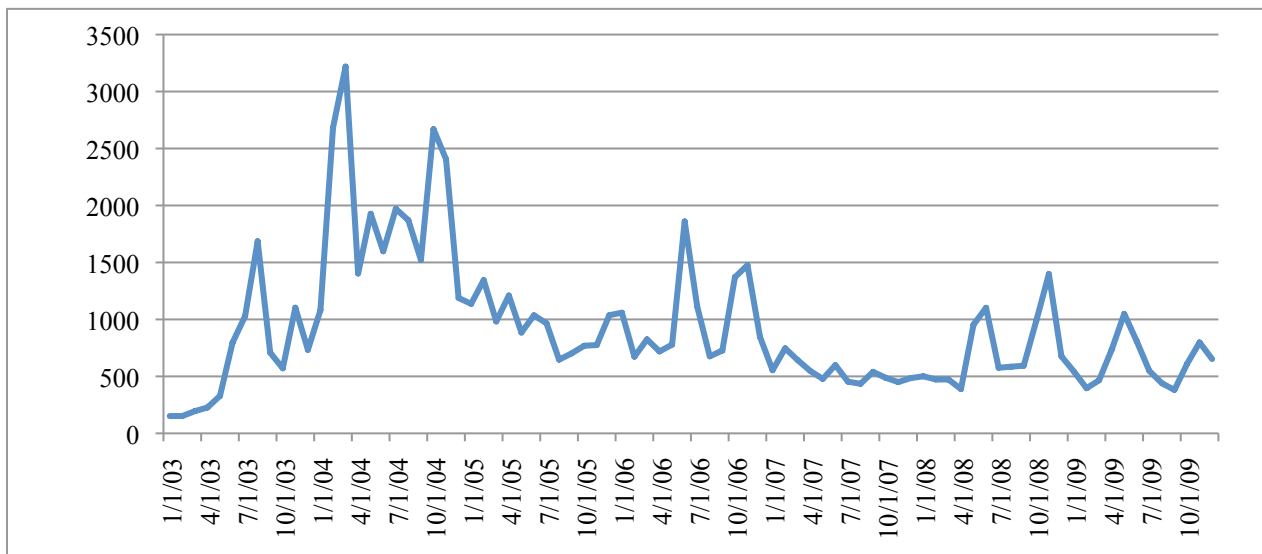
<sup>40</sup> *Id.* at 604-05 (Scalia, J., dissenting) (quoting *id.* at 567 (majority opinion)).

<sup>41</sup> *Lawrence*, 539 U.S. at 605.

<sup>42</sup> LexisNexis, “Major Papers” archive. *See infra* note 44 (explaining the “Major Papers” archive).

continued beyond these day-after reports of the decision itself and initially peaked the month after *Lawrence* was issued, with over 1500 newspaper stories about marriage equality appearing nationally in August, 2003.<sup>43</sup> Furthermore, the decision appeared to irrevocably place the issue in the national spotlight; while major newspapers mentioned same-sex marriage just over 300 times between January and March, 2003, the subject apparently rose in prominence and gained a foothold within the nation’s discourse because of *Lawrence*. That is, the Court’s decision transformed the subject into a staple for reporters and columnists: even currently, it is rare for a month to pass with less than 500 national headlines devoted to the issue of marriage equality.

Figure 1: Number of Articles in Major Newspapers that Mention Same-Sex Marriage in Each Month<sup>44</sup>



Moreover, it appears that *Lawrence* was but the first event and a possible catalyst for a series of events brought extensive coverage and interest to the issue of gay marriage. Subsequent

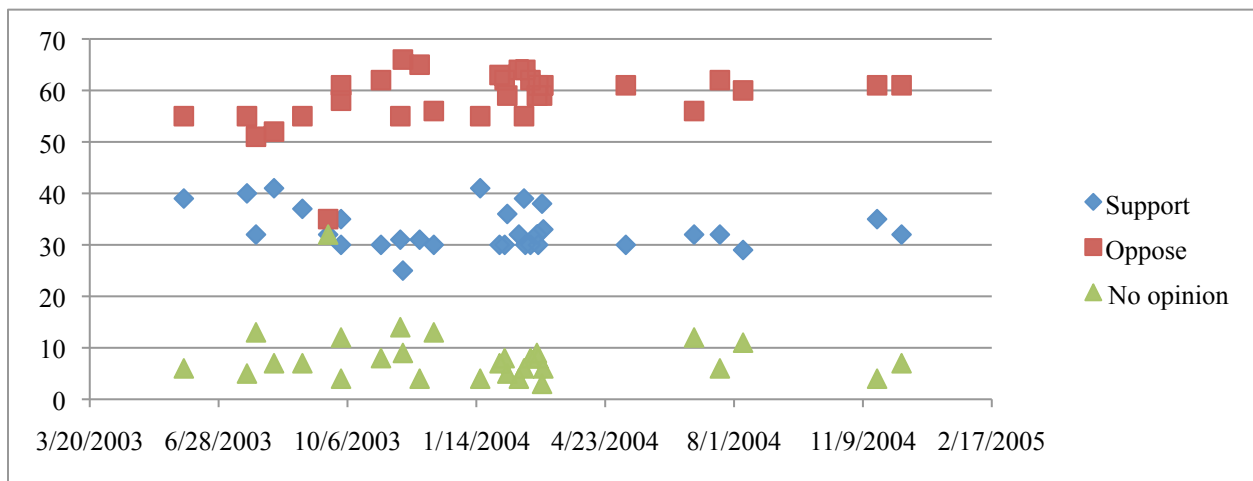
<sup>43</sup> See *infra* fig. 1.

<sup>44</sup> This data is derived from LexisNexis’s “Major Papers” archive. The sources included in that archive are U.S. papers listed in the top fifty by circulation in Editor & Publisher Year Book and newspapers published outside the U.S. that are written in English and either listed as national newspapers in Benn’s World Media Directory or one of the top 5% in circulation for the country. See LexisNexis, Major Papers, <http://web.lexis.com/xchange/ccsubs/viewfullMajorPapers.asp> (last visited Apr. 1, 2010). I conducted searches of that archive for each month from January, 2003, to December, 2009. The terms used were “homosexual! gay! same-sex /10 marriage!,” which gathered results for each article that used the terms homosexual (or homosexuals), gay (or gays) or same-sex within ten words of the term marriage (or marriages).

events, each of which brought a smaller spike in newspaper coverage for the issue,<sup>45</sup> included the Vatican’s condemnation of same-sex marriage in August, 2003;<sup>46</sup> the Supreme Court of Connecticut’s *Goodridge* opinions in November, 2003, and February, 2004;<sup>47</sup> the city of San Francisco’s decision to issue marriage licenses to same-sex couples on February 12, 2004;<sup>48</sup> President Bush’s announcement of his support for a constitutional amendment banning gay marriage on February 23, 2004;<sup>49</sup> and the defeat of that amendment in the United States Senate on July 14, 2004.<sup>50</sup>

Throughout this period of intense public debate and heightened scrutiny from the media, public support for gay marriage declined considerably, as illustrated by Figure 3.<sup>51</sup> Opposition

Figure 2: Public Opinion Polling on the Question of Legalizing Same-Sex Marriage, 2003-05<sup>52</sup>



<sup>45</sup> See *supra* fig. 2.

<sup>46</sup> See, e.g., Frank Bruni, *Vatican Exhorts Legislators to Reject Same-Sex Unions*, N.Y. TIMES, Aug. 1, 2003, at A16.

<sup>47</sup> See *infra* Section \_\_\_\_.

<sup>48</sup> See, e.g., Rachel Gordon, *Uncharted Territory: Bush’s Stance Led Newsom to Take Action*, S.F. CHRON., Feb. 15, 2004, available at [http://articles.sfgate.com/2004-02-15/news/17411152\\_1\\_lesbian-couples-same-sex-marriage-gay-rights](http://articles.sfgate.com/2004-02-15/news/17411152_1_lesbian-couples-same-sex-marriage-gay-rights).

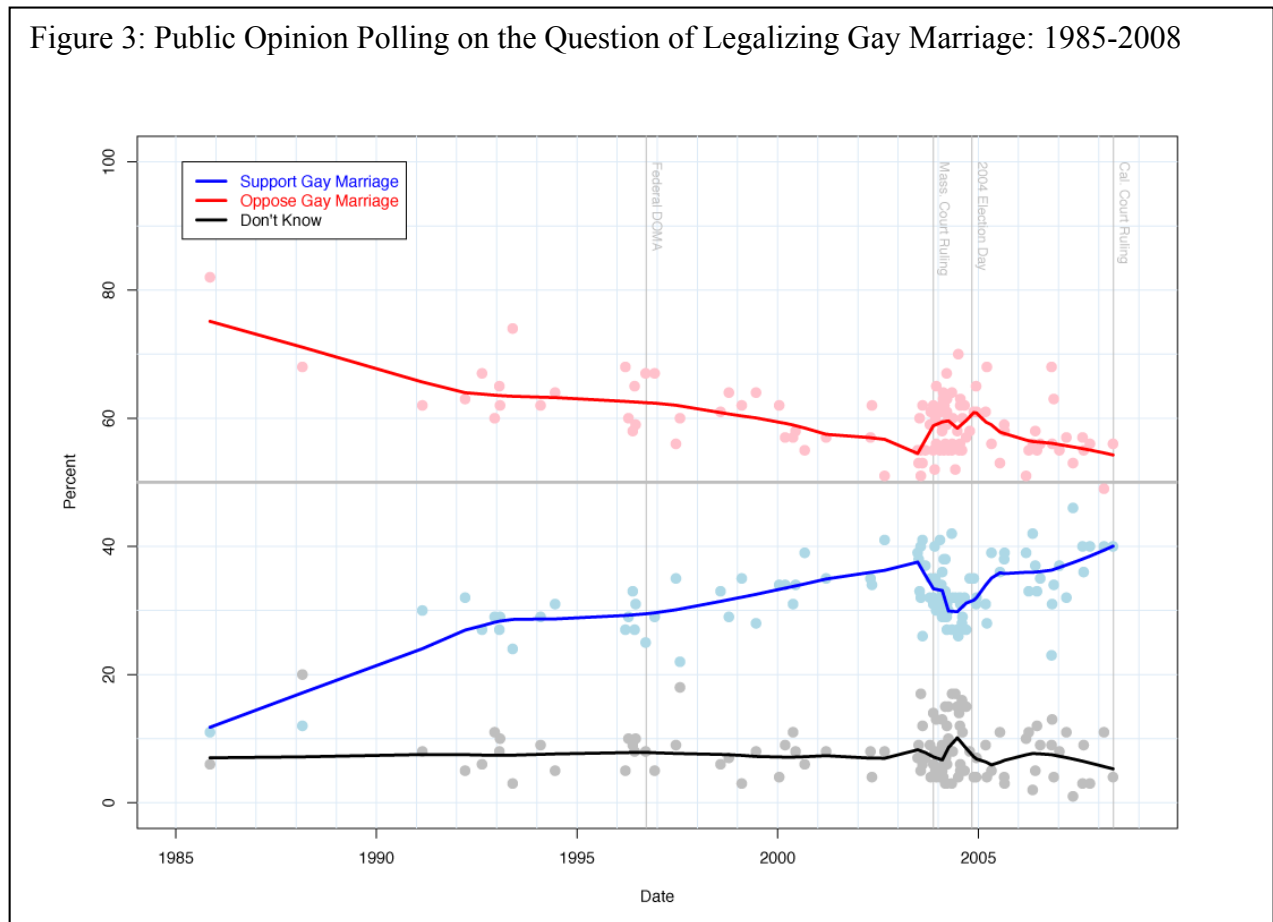
<sup>49</sup> See, e.g., David Stout, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 24, 2004, at A1.

<sup>50</sup> See, e.g., Helen Dewar & Alan Cooperman, *Senate Scuttles Amendment Banning Same-Sex Marriage*, WASH. POST, July 14, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A49537-2004Jul14.html> (last visited Apr. 1, 2010).

<sup>51</sup> See *infra* fig. 3.

<sup>52</sup> This graph represents most polls on this question collected by PollingReport.com. See PollingReport.com, Same-Sex Marriage, Gay Rights, <http://pollingreport.com/civil.htm> (last visited Apr. 1, 2010). I have omitted polls in which the gay-marriage question was presented alongside a civil-union option.

rose significantly in the wake of *Lawrence*, and was unrelenting throughout 2004. Beyond a mere numerical crest on the side of keeping gay marriage illegal, polling around the time of the 2004 elections revealed the highly polarized nature of that opposition. Over half of those against gay marriage would not support a candidate with which they disagreed on that issue, while less than 25% of gay-marriage proponents felt that same way.<sup>53</sup> Meanwhile, and perhaps surprisingly, the percentage of the public without an opinion on the subject remained somewhat steady throughout this time.<sup>54</sup> Figure 3 further illustrates the uniqueness of the 2004-2005 period within the historical scope of public opinion regarding gay marriage.<sup>55</sup>



<sup>53</sup> Pew Research Center, *Gay Marriage a Voting Issue, But Mostly For Opponents*, Feb. 27, 2004, available at <http://people-press.org/reports/pdf/204.pdf> (last visited Apr. 1, 2010).

<sup>54</sup> See *supra* fig. 3.

<sup>55</sup> See *infra* fig. 4, Charles Franklin, *Gay Marriage Support and Opposition*, Pollster.com, May 21, 2008, available at [http://www.pollster.com/blogs/gay\\_marriage\\_support\\_and\\_oppos.php](http://www.pollster.com/blogs/gay_marriage_support_and_oppos.php) (last visited Apr. 1, 2010).

Perhaps inadvertently, the Supreme Court’s decision in *Lawrence* permanently brought the subject of gay marriage into the public discourse. And, while its aftermath sparked a polarization of popular opinion and an arguable political backlash, those effects were short-lived, and in some ways overcome. Nevertheless, *Lawrence* and its aftermath shows the potential effects that a sweeping Supreme Court decision can have on public opinion.

### C. Judicial Recognition of Same-Sex Marriage in Massachusetts

On November 18, 2003, less than four months after the Supreme Court’s *Lawrence* opinion was announced, the Supreme Judicial Court of Massachusetts legalized same-sex marriage in the state through its opinion in *Goodridge v. Department of Public Health*.<sup>56</sup> There, the state’s high court found no rational basis for denying civil marriage to same-sex couples in the face of a state constitution that purports to “affirm[] the dignity and equality of all individuals” and “forbid[] the creation of second-class citizens.”<sup>57</sup> That is, “[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples” was an affront to the Massachusetts Constitution’s protections of individual liberty and equality, and had left same-sex couples “excluded from the full range of human experience.”<sup>58</sup> The court therefore preserved the state’s marriage-licensing statute and refined the common-law definition of civil marriage to mean “the voluntary union of two persons as spouses, to the exclusion of all others.”<sup>59</sup> It stayed its entry of judgment for 180 days to allow the legislature to amend existing statutes to the constitutional protections discussed in *Goodridge*.<sup>60</sup>

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<sup>56</sup> 798 N.E.2d 941, 948 (2003).

<sup>57</sup> *Id.* at 948.

<sup>58</sup> *Id.* at 957, 968. The court listed some of the benefits that flow from civil marriage, including tangible rights in property, probate, tax, and evidence law, as well as the intangible private and social advantages that flow from marriage, which the court placed “among life’s momentous acts of self-definition.” *Id.* at 955-57.

<sup>59</sup> *Id.* at 969.

<sup>60</sup> *Id.* at 970.

During that 180-day period, the Massachusetts Senate introduced a bill that would have offered same-sex couples a civil-union status in lieu of full marriage rights.<sup>61</sup> The Senate subsequently petitioned the state’s high court for an advisory opinion regarding that bill, which the court then rejected as maintaining an “unconstitutional, inferior, and discriminatory status for same-sex couples.”<sup>62</sup> As an apparent attempt at a Vermont-style compromise regarding gay rights, the rejected bill would have put the issue in the hands of the legislature. Such a measure would have been consistent with public opinion within the state: after *Goodridge*, polling showed that 52% of Massachusetts’ citizens thought the issue should be decided by the legislature, while only 29% favored judicial decisionmaking in the context of same-sex marriage.<sup>63</sup> Accordingly, the state legislature subsequently proposed a constitutional amendment that would have defined marriage as exclusively between a man and a woman.<sup>64</sup> That amendment—which, under state law, would have required fifty of two-hundred legislators’ votes to be submitted to the public in a subsequent election—was defeated by a vote of 151 to 45 on June 14, 2007, which allowed *Goodridge* to endure as the state’s ongoing posture with regard to same-sex marriage.<sup>65</sup>

Meanwhile, public opinion regarding the proper venue for deciding this issue cannot easily be distinguished from individual views on the merits of the issue itself and the presumed corresponding views of the relevant government branches. In other words, a stance against a court opinion endorsing same-sex marriage may be a proxy for a stance against same-sex

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<sup>61</sup> *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 566 (2004)

<sup>62</sup> *Id.* at 566, 572.

<sup>63</sup> Scott S. Greenberger, *One Year Later, Nation Divided on Gay Marriage*, BOSTON GLOBE, May 15, 2005, available at [http://www.boston.com/news/specials/gay\\_marriage/articles/2005/05/15/one\\_year\\_later\\_nation\\_divided\\_on\\_gay\\_marriage](http://www.boston.com/news/specials/gay_marriage/articles/2005/05/15/one_year_later_nation_divided_on_gay_marriage).

<sup>64</sup> Pam Belluck, *Massachusetts Gay Marriage to Remain Legal*, N.Y. TIMES, June 14, 2007, available at <http://www.nytimes.com/2007/06/15/us/15gay.html>.

<sup>65</sup> *Id.*

marriage itself. In February, 2004, for example, 42% of Massachusetts' citizens favored the state's recognition of same-sex marriage, while 44% opposed it,<sup>66</sup> which closely mirrors the narrow majority that opposed theoretical judicial action on same-sex marriage at the time.

The evenly divided state of public opinion in Massachusetts just after *Goodridge* is consistent with such sentiments at the national level. In comparison to the February, 2004, Massachusetts poll that found 42% in favor of same-sex marriage, seven national polls conducted in that same month indicated favorability levels of somewhere between 30% and 39%.<sup>67</sup> So, while a larger minority of Massachusetts' citizens approved same-sex marriage than in the nation as a whole at the time, that strong minority was still unable to avoid some political backlash<sup>68</sup> and the specter of a constitutional amendment that would have reversed the Supreme Judicial Court's *Goodridge* opinion.<sup>69</sup> And, beyond these effects within Massachusetts, twenty-three states enacted constitutional bans on same-sex marriage in the four years following *Goodridge*.<sup>70</sup>

Nevertheless, a long-term view of the practical effects of *Goodridge* within Massachusetts shows that the decision produced a strong trend toward support of same-sex marriage. Polling conducted in August, 2008, showed that 59% favored and 32% opposed marriage equality, an increase of 17% in favorability from four years before.<sup>71</sup> This increase has greatly outweighed the trend in support at the national level; nationally, polling in July and August, 2008, revealed an average level of support around 40%, an increase of about 5% over

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<sup>66</sup> David Filipov, *Five Years Later, Views Shift Subtly on Gay Marriage*, BOSTON GLOBE, Nov. 17, 2008, available at [http://www.boston.com/news/local/massachusetts/articles/2008/11/17/5\\_years\\_later\\_views\\_shift\\_subtly\\_on\\_gay\\_marriage](http://www.boston.com/news/local/massachusetts/articles/2008/11/17/5_years_later_views_shift_subtly_on_gay_marriage).

<sup>67</sup> See PollingReport.com, *supra* note 52.

<sup>68</sup> See Keck, *supra* note 14, at 162 (noting that seven legislators that favored same-sex marriage faced primary challenges in the wake of *Goodridge*).

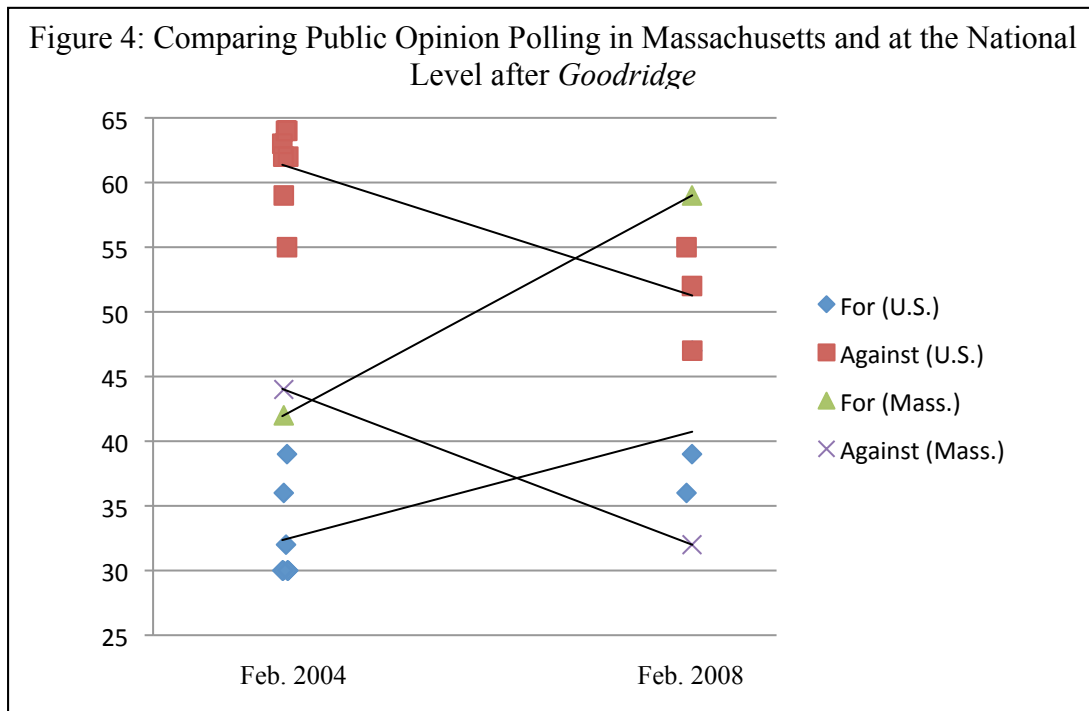
<sup>69</sup> See Belluck, *supra* note 64.

<sup>70</sup> See Keck, *supra* note 14, at 173.

<sup>71</sup> See Filipov, *supra* note 66.



the prior four years.<sup>72</sup> Furthermore, Massachusetts’ legalization of gay marriage may have had the long-term effect of solidifying public opinion, with 9% of the state’s citizens remaining undecided on the issue in 2008 as compared with 14% in 2004.<sup>73</sup>



#### D. Iowa’s Recent Decision in Favor of Marriage Equality

On April 3, 2009, the Supreme Court of Iowa issued its opinion in *Varnum v. Brien*,<sup>74</sup> which examined and ultimately struck down a 1998 state statute that declared that “[o]nly a marriage between a male and female is valid.”<sup>75</sup> Upon determining that gays and lesbians were at least a quasi-suspect class under Iowa’s equal protection law, the court subjected the marriage statute to intermediate scrutiny.<sup>76</sup> Accordingly, the court examined the alleged justifications for

<sup>72</sup> See *infra* Fig. 4; PollingReport.com, *supra* note 52.

<sup>73</sup> See Filipov, *supra* note 66; *cf. supra* note 54 and accompanying text (noting that the number of citizens undecided on the issue of same-sex marriage remained fairly constant at the national level in the years immediately following the Supreme Court’s *Lawrence* opinion).

<sup>74</sup> 763 N.W.2d 862 (2009).

<sup>75</sup> IOWA CODE § 595.2(1) (2009).

<sup>76</sup> *Varnum*, 763 N.W.2d at 896. “To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. . . . To this end, courts evaluate whether the proffered governmental

the statute in question, which included protecting traditional definitions of marriage, providing an optimal environment to raise children, promoting procreation and stability for opposite-sex couples, and conserving state resources exclusively allocated for the benefit of married couples.<sup>77</sup>

The court went on, stating:

Having examined each proffered governmental objective through the appropriate lens of intermediate scrutiny, we conclude the sexual-orientation-based classification under the marriage statute does not substantially further any of the objectives. While the objectives asserted may be important (and many undoubtedly are important), none are furthered in a substantial way by the exclusion of same-sex couples from civil marriage. Our equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the statute.<sup>78</sup>

Based on its analysis, Iowa's high court held that creating a parallel civil institution for same-sex couples—i.e., a civil union or domestic partnership—would be insufficient for equal protection purposes, and that the state would henceforth allow gays and lesbians “full access to the institution of civil marriage.”<sup>79</sup>

At the time *Varnum* was issued, only 36% of Iowa's citizens were in favor of extending marriage rights to same-sex couples.<sup>80</sup> This view lagged national support levels considerably, with four nationwide polls conducted in that same month showing respective support levels of 35%, 38%, 44%, and 49%.<sup>81</sup> Furthermore, Iowa became the third state to offer same-sex marriage while it remained illegal in forty-seven other states; among those states, polling reveals

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objectives are important and whether the statutory classification is substantially related to the achievement of those objectives.” *Id.* at 896-97 (internal citations and quotations omitted). *See also* IOWA CONST. art I, § 6 (granting equal protection to all citizens within the state).

<sup>77</sup> *Varnum*, 763 N.W.2d at 898-904.

<sup>78</sup> *Id.* at 904.

<sup>79</sup> *Id.* at 907; *see id.* at 906-07.

<sup>80</sup> *See* Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. (forthcoming 2010), available at [http://www.columbia.edu/~jrl2124/Lax\\_Phillips\\_Gay\\_Policy\\_Responsiveness\\_2009.pdf](http://www.columbia.edu/~jrl2124/Lax_Phillips_Gay_Policy_Responsiveness_2009.pdf) (last visited Apr. 1, 2010).

<sup>81</sup> *See* PollingReport.com, *supra* note 52.

that twenty-five showed stronger levels of support for same-sex marriage than Iowa did at the time *Varnum* was decided.<sup>82</sup>

In spite of the state of Iowa's status as a relative outlier in recognizing marriage equality, the issue has largely proved uncontroversial. While initial post-*Varnum* polling showed that Iowans were split 41%-40% on whether they would vote for a constitutional amendment banning same-sex marriage, 92% of the state's citizens said that marriage equality had brought "no real change to their lives."<sup>83</sup> Perhaps accordingly, polling in February, 2010, showed that 62% of Iowans thought same-sex marriage unworthy of the state legislature's attention, with only 14% stating that they considered the issue one of the top three priorities facing the state.<sup>84</sup> In sum, Iowa's recent history with this issue shows that, even in the face of a population's serious hesitation about recognizing marriage equality, a judicial opinion will not necessarily suffer political backlash or legislative setbacks at the present time.

## II. A THEORETICAL FRAMEWORK FOR GRANTING BROADER INCLUSION AND GREATER PROTECTION TO MINORITY GROUPS

### A. Same-Sex Marriage and Sequential Incrementalism

At both the state and federal level, it is axiomatic that policymaking often correlates with trends in public opinion.<sup>85</sup> Meanwhile, over the past thirty years, public opinion regarding gay

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<sup>82</sup> See Lax & Phillips, *supra* note 80.

<sup>83</sup> Jason Clayworth & Thomas Beaumont, *Iowa Poll: Iowans Evenly Divided on Gay Marriage Ban*, DES MOINES REG., Sept. 21, 2009, at A3, available at <http://www.desmoinesregister.com/article/20090921/NEWS10/909210321/Iowa-Poll--Iowans-evenly-divided-on-gay-marriage-ban> (last visited Apr. 1, 2010).

<sup>84</sup> Thomas Beaumont, *Iowans Rate Drivers Texting as More Urgent than Gay Marriage*, DES MOINES REG., Feb. 8, 2010, at A7, available at <http://www.desmoinesregister.com/article/20100208/NEWS10/2080322/Iowans-rate-drivers-texting-as-more-urgent-than-gay-marriage> (last visited Apr. 1, 2010).

<sup>85</sup> See, e.g., James A. Stimson, Michael B. MacKuen & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543 (1995) (discussing such a correlation at the national level); Paul Burstein, *The Impact of Public Opinion on Policy: A Review of an Agenda*, 56 POL. RES. Q. 29, 38-39 (2003) (discussing such a correlation at the state level).

rights has “moved unambiguously toward acceptance and tolerance.”<sup>86</sup> Through various means, including judicial opinion, legislative proclamation, and the will of the electorate within the states and at the federal level, a series of legal changes have accompanied the popular trajectory of acceptance and tolerance. Generally, such changes have brought broader inclusion of gays and lesbians in the public sphere and greater protection for the rights of this minority, as illustrated by court decisions like Vermont’s *Baker v. State*, Massachusetts’ *Goodridge v. Department of Public Health*, Iowa’s *Varnum v. Brien*, and the U.S. Supreme Court’s *Lawrence v. Texas*.<sup>87</sup> For advocates of change, at the center of this movement is the objective of ending all governmental discrimination and offering every right and responsibility that heterosexuals enjoy as public citizens to gays and lesbians.<sup>88</sup> Within that framework, equal access to civil marriage is the ultimate goal.<sup>89</sup> Civil marriage, here, is both the centerpiece of equality in the public sphere<sup>90</sup> and the sole entryway to the “allocation of a host of public and private benefits.”<sup>91</sup>

With regard to achieving equal access to civil marriage, recent history and an examination of international approaches to legal inclusion and protection for gays and lesbians

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<sup>86</sup> Patrick J. Egan, Nathaniel Persily, & Kevin Wallsten, *Gay Rights*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 234, 235 (Nathaniel Persily, Jack Citrin, & Patrick J. Egan ed., 2008).

<sup>87</sup> What I term “inclusion” would include same-sex marriage, which will be the primary focus here. *See, e.g.*, *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (Mass. 2003) (discussed *infra* Section I.C). “Protection” would include laws against discrimination. *See, e.g.*, N.J. STAT. ANN. § 10:5-12 (West 1993) (prohibiting discrimination in employment, housing, credit, or public accommodation); MASS. GEN. LAWS ch. 151B, § 4 (1998) (prohibiting discrimination in employment, housing, and credit). *See generally supra* Part I (discussing *Baker*, *Lawrence*, *Goodridge*, and *Varnum*.)

<sup>88</sup> *See, e.g.*, ANDREW SULLIVAN, VIRTUALLY NORMAL 171 (1996).

<sup>89</sup> *Id.* at 178.

<sup>90</sup> *See, e.g., id.* at 179 (“Marriage is not simply a private contract; it is a social and public recognition of a private commitment. As such, it is the highest public recognition of personal integrity. Denying it to homosexuals is the most public affront possible to their public equality.”).

<sup>91</sup> GEORGE CHAUNCEY, WHY MARRIAGE: THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY 71 (2004); *see* Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 5 (2005) (noting that “several hundred state laws and 1138 federal laws . . . use marital status as a factor”).

reveal a pattern of sequential incrementalism.<sup>92</sup> That is, almost without exception, governmental recognition of same-sex marriage comes at the tail end of a step-by-step process. To wit:

Registered partnership laws, just short of same-sex marriage, have not been adopted until a particular country has first decriminalized consensual sodomy and equalized the age of consent for homosexual and heterosexual intercourse, then has adopted laws prohibiting employment and other kinds of discrimination against gay people, and finally has provided other kinds of more limited state recognition for same-sex relationships, such as the giving of legal benefits to or the enforcing of legal obligations on cohabiting same-sex couples.<sup>93</sup>

The lessons of this process are that the next “step” in the sequence appears to only be achievable after completing the prior one, and that each step apparently operates as a “stimulating factor” for the next one.<sup>94</sup> While the former principle may be a logical necessity to the path toward broader inclusion and protection,<sup>95</sup> the latter has important implications for considering how social change should be pursued in this context.

Commentator Kees Waaldijk has termed this pattern of sequential incrementalism the “law of small change.”<sup>96</sup> Indeed, the so-called “law of small change” has been illustrated by the legal inclusion and protection of gays and lesbians in a variety of countries, including the United Kingdom, Romania, Spain, Austria, and the Netherlands.<sup>97</sup> Irrespective of the controversy that

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<sup>92</sup> William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-By-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 647-48.

<sup>93</sup> *Id.* at 648.

<sup>94</sup> Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 437, 440 (Robert Wintemute & Mads Andenaes eds., 2001); *see also* Eskridge, *supra* note 92, at 648:

[L]aw cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law. For gay rights, the impasse suggested by this paradox can be ameliorated or broken if the proponents of reform move step-by-step along a continuum of little reforms. There are a number of pragmatic reasons why such a step-by-step process can break the impasse over a period of time. Step-by-step change permits gradual adjustment of anti-gay mindsets, slowly empowers gay rights advocates, and can discredit anti-gay arguments.

<sup>95</sup> In other words, it is not surprising that, for example, a government will ordinarily decriminalize sexual intimacy among gays and lesbians before granting benefits or officially acknowledging relationships for which such intimacy is an important facet.

<sup>96</sup> Waaldijk, *supra* note 94, at 440.

<sup>97</sup> *Id.* at 440-41.

occasionally comes with referencing foreign law in this context,<sup>98</sup> these comparative examples and the recurring pattern of change provides a basis for understanding the trajectory of same-sex marriage in the United States.

## B. The Role of the Courts in Granting Equal Rights

A popular understanding of the role of the courts suggests that the judiciary provides a countermajoritarian weight upon the balance struck within our democratic society. Justice Black, for example, has described courts as “havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are the non-conforming victims of prejudice and public excitement.”<sup>99</sup> Similarly, to Justice Brandeis, judicial review should act as a guard against the “occasional tyrannies of governing majorities.”<sup>100</sup> In the context of granting equal rights to minorities, the countermajoritarian theory may provide hope for individuals and promote the potential for peaceable change.<sup>101</sup>

Meanwhile, at a practical level, there is some skepticism over whether courts have the ability or desire to play a countermajoritarian role in this context.<sup>102</sup> Alternatively, judicial review has been described as a necessary component to an ongoing conversation between the

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<sup>98</sup> See, e.g., *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (labeling the majority’s reference to foreign decriminalization of sodomy “meaningless” and “[d]angerous dicta”); see also Jeffrey Rosen, *Immodest Proposal: Massachusetts Gets It Wrong on Gay Marriage*, NEW REPUBLIC, Dec. 22, 2003, at 19, 21 (arguing that the *Lawrence* Court’s reference to foreign law served to confirm social conservatives’ fear regarding the internationalization of domestic law).

<sup>99</sup> *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

<sup>100</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>101</sup> See, e.g., JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 282 (1983); Alpheus Thomas Mason, *The Warren Court and the Bill of Rights*, 56 YALE L.J. 197, 210 (1967).

<sup>102</sup> See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 2 (1996) (citing examples of such skepticism); see also Richard Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578 (1987).

When judges are asked to recognize a new constitutional right, . . . text and precedent are not going to dictate the judges’ conclusion. They will have to go beyond the technical legal materials of decision and consider moral, political, empirical, prudential, and institutional issues, including the public acceptability of a decision recognizing the new right. Reasonable considerations also include the feasibility and desirability of allowing the matter to simmer for a while before the heavy artillery of constitutional rightsmaking is trundled out.

*Id.* at 1585. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009).

judicial and legislative branches about “what the Constitution should mean.”<sup>103</sup> Such a conversation would presumably exist without inherent countermajoritarian leanings.<sup>104</sup> Similarly, Professor Jack Balkin has argued that courts only protect minorities when doing so coincides with some form of majoritarian self-interest.<sup>105</sup> The recent history of Supreme Court decisions that dealt with controversial issues supports such an argument. As Judge Posner has noted:

When the Supreme Court moved against public school segregation, it was bucking a regional majority but a national minority (white southerners). When it outlawed the laws forbidding racially mixed marriages, only a minority of states had such laws on their books. Only when all but two states had repealed their laws forbidding the use of contraceptives even by married couples did the Supreme Court invalidate the remaining laws. It created a right of abortion against a background of a rapid increase in the number of lawful abortions.<sup>106</sup>

Indeed, rather than mere countermajoritarian protection of the minority, the Court’s rulings in these cases suggests a convergence of interests between the minorities’ desired outcome, the majorities’ interest in acquiescence, and the trajectory of public opinion.<sup>107</sup>

The Supreme Court’s decision in *Lawrence v. Texas*<sup>108</sup> shows a further example where converging interests resulted in a victory for a minority. In 1961, all fifty states had laws against sodomy.<sup>109</sup> Less than three decades later, however, a narrow majority of states had legalized

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<sup>103</sup> Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1259 (2004).

<sup>104</sup> *See id.*

<sup>105</sup> Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1551-53 (2004) [hereinafter Balkin, *Constitutional Theory*]; *see also* Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2340-41 (1997) (“[G]roups that are truly politically powerless usually do not even appear on the radar screen of legal decisionmakers—including courts—because the status hierarchy is so robust that few in power even notice that there is a problem.”).

<sup>106</sup> Posner, *supra* note 102, at 1586 (citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 179 (1991)).

<sup>107</sup> *See* Balkin, *Constitutional Theory*, *supra* note 105, at 1553; *see also* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522-28 (1980).

<sup>108</sup> 539 U.S. 558 (further discussed *supra* Section I.B).

<sup>109</sup> *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986).

such private conduct between consenting adults.<sup>110</sup> Similarly, public-opinion polling on the question of whether “homosexual relations between consensual adults should be legal” revealed that a then-high 59% of people favored legalization just before *Lawrence* was decided.<sup>111</sup> Indeed, beyond a mere countermajoritarian posture, it seems that a variety of factors—including the trajectory of public opinion and the law in other jurisdictions or at other levels—may play a role in courts’ decisions to grant new rights.<sup>112</sup> Nevertheless, the recent history of marriage equality and its practical outworking at the state and federal level demands a balance between finding a convergence of relevant interests and the ultimate objective of achieving change that is permanent and non-controversial.

### III. STATE COURTS AS A WAY FORWARD FOR RECOGNIZING MARRIAGE EQUALITY

The illustrative state-level examples of judicial recognition of same-sex relationships in Vermont, Massachusetts, and Iowa reveal a way forward for state courts as an appropriate venue for deciding issues related to marriage equality. Vermont’s high court, for example, sought to avoid uncertainty, confusion, and public backlash through allowing the state’s elected officials to remedy the incompatible nature of the state’s statutory definition of marriage and its constitutional commitment to equality in *Baker v. State*.<sup>113</sup> This 1999 decision, an early foray into legally recognizing the relationships of same-sex couples in America, was nonetheless highly controversial and politically problematic within the state. Furthermore, the novel decision produced certain negative externalities, with several states adopting measures to prevent marriage equality in the wake of *Baker*.<sup>114</sup>

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<sup>110</sup> *Id.* at 193-94.

<sup>111</sup> Frank Newport, *Six in 10 Americans Agree That Gay Sex Should Be Legal*, GALLUP, June 27, 2003, <http://www.gallup.com/poll/8722/Six-Americans-Agree-Gay-Sex-Should-Legal.aspx>.

<sup>112</sup> *See also supra* note 102.

<sup>113</sup> 744 A.2d 864; *see supra* Section I.A.

<sup>114</sup> *See supra* note 14.



On the other hand, a decade later, the Supreme Court of Iowa's unanimous opinion granting full marriage rights to same-sex couples, which came at a time in which a relatively small percentage of the state's citizens supported the grant of such rights, produced relatively little backlash, with any initial controversy proving to be short-lived.<sup>115</sup> So, while Vermont and Iowa had similar levels of support for marriage equality at the relative times *Baker* and *Varnum* were decided, those respective decisions produced widely disparate consequences. The former decision was mired in controversy that eventually resulted in full marriage rights for same-sex couples ten years later, through the unusual circumstance of a legislative override of the state governor's veto.<sup>116</sup> The latter decision, in spite of Iowa citizens' divided opinions, was met with a strong view that the decision should not be addressed by the legislature and an understanding that Iowa's high court had done little to alter the lives of most of the state's citizens.<sup>117</sup> Indeed, the ten years separating *Baker* and *Varnum* reveal a sea change in the public consciousness regarding same-sex couples and, accordingly, political reactions to the respective court's recognition of gay and lesbian rights.

In this way, Iowa's reaction to *Varnum* closely mirrors the long-term effects of the Supreme Judicial Court of Massachusetts' *Goodridge* opinion. Support for same-sex marriage improved considerably in the years that followed *Goodridge*, and less citizens in the state remained undecided about the issue; both of these effects of *Goodridge* are significantly stronger than such trends at the national level.<sup>118</sup> Together, the aftermath of *Varnum* and *Goodridge* demonstrate the practical outworking of the various arguments for and against marriage equality. That is, as a precursor to the recognition of marriage equality, most of the state of Iowa's alleged

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<sup>115</sup> See *supra* Section I.D.

<sup>116</sup> See *supra* Section I.A.

<sup>117</sup> See *supra* Section I.D.

<sup>118</sup> See *supra* note 71-73 and accompanying text.

justifications for excluding same-sex couples from marital rights—which included protecting traditional definitions of marriage, promoting procreation, and ensuring stability for opposite-sex couples and their children—are inherently speculative.<sup>119</sup> A judicial decision in favor of marriage equality, though, necessarily tests those justifications. And, as Massachusetts and Iowa have demonstrated, the public has shown stronger support for equality as a result.

Meanwhile, there is reason to believe that, in the near future, a U.S. Supreme Court decision recognizing same-sex marriage would not marshal such popular support or immediately quell the controversy inherent to this issue. *Lawrence v. Texas*, for example, unwittingly transformed same-sex marriage into a national headline and a mainstay within the country’s political discourse, and simultaneously ushered in an era of uncertainty and backlash regarding same-sex marriage.<sup>120</sup> Though its holding was about decriminalizing sodomy at a time when that practice was scarcely punishable and even more rarely punished, *Lawrence* shows the Supreme Court’s potential to polarize public opinion and even garner opposition to the grant of minorities’ rights. Perhaps in uniformity with the so-called “law of small change,”<sup>121</sup> a sweeping Supreme Court opinion about same-sex marriage could ultimately undermine confidence in the Court and be a setback for public support of marriage equality. For advocates of equal rights, such a reaction would also serve to undermine the objective of achieving the “social and public recognition of a private commitment” that is unique to civil marriage.<sup>122</sup> That is, without public support, the jointly private and public legitimacy of same-sex relationships cannot fully be realized.

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<sup>119</sup> See *supra* note 77 and accompanying text.

<sup>120</sup> See *supra* Subsection I.B.2.

<sup>121</sup> See *supra* note 94-96 and accompanying text.

<sup>122</sup> SULLIVAN, *supra* note 88, at 179.

Therefore, it is state courts that currently provide the most appropriate avenue for deciding the marriage rights of gays and lesbians. Allowing the arguments for and against marriage equality to play out quasi-experimentally at the state level should have the effect of gaining broader support and understanding for this minority through abating the controversy inherent in speculative arguments against marriage equality. Also, state courts are often more politically accountable than their federal counterparts, which reduces the likelihood of popular outrage against decisions that may otherwise be attributed to judicial activism or a lack of consideration for the will of the electorate. In sum, as the trajectory of support for gay rights continues to broadly move in the direction of support, state courts should be able to recognize same-sex marriages with increasing regularity and long-term effects that include greater public support and confidence in the courts as a source for proclaiming marriage equality.