The Constitutional Dimensions of the Same-Sex Marriage Debate: 2008

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On Nov. 4, 2008, California voters passed Proposition 8, amending the state's constitution to prohibit same-sex marriage. The vote, which was significant enough to make national headlines on a historic Election Day, was the latest round in a long battle involving the California legislature, judiciary and voters.

Officially, this battle began in 1999 when the state legislature passed a statute that granted domestic partnership rights to same-sex couples. It reached what many at the time thought was the climax in May 2008 when the California Supreme Court invalidated the state's laws prohibiting same-sex marriage. But less than six months after the court's ruling, the approval of Proposition 8 has thrown into question the court's decision and all same-sex marriages performed in the state as a result of the decision. Furthermore, Proposition 8 itself has become the subject of a lawsuit alleging that the May 2008 California Supreme Court ruling legalizing same-sex marriage trumps the voter referendum banning it.

While the gay marriage controversy has many elements, including disagreements over religious and social norms, at its heart the debate is a legal one, as the history of the issue in California demonstrates. So far, court cases around the country have been based on state, rather than federal, constitutional provisions and thus have not been subject to review by the U.S. Supreme Court. However, the high court would have jurisdiction in a case testing whether the U.S. Constitution guarantees the right of gay and lesbian couples to wed. If the court takes such a case, its decision will likely stem, at least in part, from its prior rulings on privacy and related issues.

The Right to Privacy and the Griswold Revolution

Although the legal battle over same-sex marriage is rooted in the question of privacy, and the extent to which state and federal constitutions protect privacy, the word itself never actually appears in the U.S. Constitution. However, the document does include several rights relating to privacy. For example, the Fourth Amendment recognizes the importance of privacy interests when it stipulates that because citizens need to feel "secure in their persons, houses, papers and effects," the government may not carry out "unreasonable searches and seizures." In addition, the Ninth Amendment leaves open the possibility of a broader privacy right when it declares that there are rights "reserved to the people" that do not expressly appear in the Bill of Rights.

The Supreme Court first laid the foundation for an expanded right to privacy early in the 20th century in <strong>Lochner v. New York</strong> (1905). In this case, the court relied on the reference to "liberty" in the 14th Amendment's Due Process Clause to justify striking down a New York state law limiting the number of hours bakers could work each week. According to the majority, the Due Process Clause implicitly guarantees each citizen the "fundamental" right, free from state intrusion, to enter into employment arrangements.

The court's reasoning in <strong>Lochner</strong> animated many subsequent decisions that form the foundation of what today is known as the constitutional right to privacy. In one such decision, <strong>Pierce v. Society of Sisters</strong> (1925), the court ruled that an Oregon law banning all private education violated the Due Process Clause because it directed how parents may educate their children, infringing upon parents' fundamental right to rear their children as they see fit. In his majority opinion, Justice James Clark McReynolds went on to list other rights guaranteed by the Due Process Clause, including "the right of the individual ... to marry, establish a home and bring up children ... and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Four decades later, in <strong>Griswold v. Connecticut</strong> (1965), the Supreme Court again turned its attention to whether the Constitution implicitly contains fundamental privacy guarantees. In this case, the court held by a vote of 7-2 that a Connecticut law prohibiting the sale and use of contraception could not apply to a married couple because the U.S. Constitution generally guarantees a right to marital privacy.

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### Same-Sex Marriage: Major Court Decisions

**Griswold v. Connecticut** (1965)
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**Loving v. Virginia** (1967)
The U.S. Supreme Court invalidated a Virginia law banning interracial marriage, partly on the ground that the 14th Amendment's Due Process Clause guarantees a fundamental right to marry.
jurisprudence, particularly as articulated in conservative circles, it also won over some liberals and moderates who feared a significant expansion of rights that were never envisioned in the Constitution. Although this critique was most popular in that the "right of privacy ... founded in the 14th Amendment's concept of personal liberty and restrictions upon state action is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The court thus returned to locating the right to privacy in the Due Process Clause.

In Eisenstadt v. Baird (1972), the court broadened the right to privacy enunciated in Griswold to include unmarried people. This case involved a Massachusetts law prohibiting the distribution of birth control to single people. By a vote of 6-1 (there were two vacancies on the court at the time), the court struck down the law. "If the right of privacy means anything," Justice William Brennan wrote, "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

The following year the court extended privacy rights even further when, in Roe v. Wade (1973), it established a constitutional right to abortion. Writing for the majority, Justice Harry Blackmun explained that the "right of privacy ... founded in the 14th Amendment's concept of personal liberty and restrictions upon state action is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The court thus returned to locating the right to privacy in the Due Process Clause.

Starting in the 1970s, many politicians and legal thinkers began arguing that the court's privacy jurisprudence, particularly as articulated in Griswold and Roe, amounted to judicial activism by creating rights that were never envisioned in the Constitution. Although this critique was most popular in conservative circles, it also won over some liberals and moderates who feared a significant expansion of the Supreme Court's power. In response to this criticism, some legal scholars countered that the Griswold and Roe decisions were logical outgrowths of a long line of the court's decisions and were therefore perfectly harmonious with the court's tradition of enforcing fundamental rights that are not directly specified in the Constitution.

The Road to Lawrence

During the 1970s, a gay rights movement, patterned in many ways after the civil rights and women's rights movements, developed momentum as the sexual revolution spurred new social and sexual mores, which in turn prompted legislatures to repeal many state laws regulating sexuality. For instance, some 20 states, including California and Ohio, struck from the books their anti-sodomy laws. Still, by the mid-1980s, laws that prohibited certain acts between people of the same sex, and in some cases between those of the opposite sex, remained in force in 25 states.

One of these state laws, a Georgia anti-sodomy statute, became the subject of a landmark high court ruling. The case, Bowers v. Hardwick (1986), arose after Atlanta police arrested Michael Hardwick for having consensual sex in his own bedroom with another man. Georgia, like most states, rarely enforced its anti-sodomy law and, indeed, the state eventually dropped its charges against Hardwick. Nevertheless, Hardwick sued the state, alleging that the criminalization of private and consensual sex between people of the same gender violated his constitutional right to privacy.

In a 5-4 ruling, a bitterly divided Supreme Court ruled that the constitutional right to privacy did not protect the right to have private, consensual sex with a person of the same gender. Writing for the majority, Justice Byron White declared that the earlier privacy cases, like Griswold and Loving, concerned "family, marriage or procreation." It would be an untenable stretch, White reasoned, to extend privacy rights to "any kind of private sexual conduct between consenting adults." Furthermore, he wrote, while existing privacy protections concerning marriage or child rearing "are deeply rooted in this nation's history and tradition," the opposite was true of sodomy, which all states had at one time banned and which half of the states still banned at the time of the decision.

In a strongly worded dissent, Justice Blackmun dismissed the majority's contention that the case ultimately involved a "fundamental right to engage in homosexual sodomy." Indeed, he accused the majority of "distort[ing]" the ultimate question before the court by ignoring the fact that the Georgia statute outlawed sodomy between heterosexuals as well as homosexuals. What the case actually concerned, Justice Blackmun wrote, was "the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone." More specifically, he argued, the Constitution guarantees each person, regardless of sexual orientation, the liberty to have consensual intimate relations in his or her own home.

Many conservatives hailed the Bowers decision as a much-needed restraint on a court that they said had become untethered from its constitutional mandate. But a hint of change in course came just four years after the ruling, when Justice Lewis Powell, who had provided the crucial fifth vote for the Bowers majority, stated publicly that he subsequently regretted his decision. "I think I probably made a mistake," he admitted, three years after retiring from the bench.
Meanwhile, in 1996 the high court decided Romer v. Evans, an important gay rights ruling that, while addressing a different question than the Bowers case, ultimately proved to be a strong indicator of how the court might rule if it revisited the sodomy question. In the Romer case, the court considered a challenge to an amendment to the Colorado Constitution (approved by the state's voters in 1992) that nullified local anti-discrimination protections for homosexuals and prohibited passage of any such anti-discrimination laws in the future. By a 6-3 vote, the court held that the Colorado amendment violated the 14th Amendment guarantee of equal protection. "A state cannot so deem a class of persons a stranger to its laws," wrote Justice Anthony Kennedy in the majority opinion. In particular, he found, "the [Colorado] amendment imposes a special disability upon [homosexuals]," who are "forbidden the safeguards that others enjoy or may seek without restraint."

While Justice Kennedy did not specifically mention Bowers, Justice Antonin Scalia, in a forceful dissent, reasoned that the Bowers decision should have led the court to uphold the Colorado law. "If it is rational to criminalize the conduct," he wrote, referring to the Georgia sodomy statute upheld in Bowers, "surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct."

**The Lawrence Case and Scalia's Dissent**

As if in response to Justice Scalia's dissent in Romer, the court revisited the issue it had decided in Bowers, taking up another challenge to a sodomy statute, this one from Texas. The case, Lawrence v. Texas (2003), is remarkably similar to Bowers in many of its facts. Once again, police discovered two men having consensual sex in a private residence and arrested them under a state anti-sodomy law. And, once again, the defendants challenged the sodomy statute's constitutionality, taking the case all the way to the Supreme Court.

Despite these factual similarities, the court in Lawrence overruled its earlier decision in Bowers, thereby invalidating not only the Texas statute but all anti-sodomy laws. Writing for the majority, Justice Kennedy stated that the court in Bowers had been mistaken in concluding that the government had historically restricted private and consensual intimate relations between people of the same sex. Moreover, Kennedy explained, sexual mores had changed since Bowers, as evidenced by the fact that in the 17 years between the Bowers and Lawrence cases, 12 states had repealed their anti-sodomy statutes and nine stopped enforcing these laws, leaving only four states that continued to enforce them.

Finally, Kennedy wrote, gay people have a "liberty under the Due Process Clause [that] gives them the full right to engage in [intimate] conduct without intervention of the government." No matter how unpopular a group's sexual norms, he explained, the government may not "demean their existence or control their destiny by making their private sexual conduct a crime." In making this claim, though, Kennedy was quick to note the limited breadth of the decision. This case, he assured, did not address the regulation of prostitution or other public sexual acts, nor did it require the government to extend marriage or civil unions to same-sex couples (see "What is the difference between civil unions, domestic partnerships and marriage?").

Just as he did in Romer, Justice Scalia dissented in Lawrence, arguing once again that the majority's reassurances did not agree with their logic. Scalia asserted that by rejecting moral-based legislation, Kennedy and the other justices on the majority were paving the way for a future ruling requiring states to recognize same-sex unions.

**The Goodridge Case and Massachusetts' Reaction**

Ironically, Justice Scalia's interpretation of the Lawrence majority opinion would prove to have a profound effect on the gay rights movement, as many lawyers arguing for a right to same-sex marriage would point to Scalia's dissent as authority that the Lawrence opinion generated a constitutional right to marriage for people of the same gender.

Previously, in the 1990s, Supreme Courts in Hawaii and Vermont interpreted their respective state constitutions to require that their state governments offer same-sex couples the same rights and benefits of marriage afforded to opposite-sex couples, even if the state chose not to call it marriage. In response, many states, fearing that their courts would issue similar decisions, passed Defense of Marriage Acts (DOMAs), which specifically limit marriage to opposite-sex couples. In addition, several states amended their constitutions to prohibit same-sex marriage, hoping that such an explicit ban would prevent their courts from reading other constitutional provisions so broadly as to guarantee same-sex couples the right to marry.

Despite the DOMAs and other state legislative actions preceding Lawrence, there is no doubt that the Lawrence decision dramatically changed the same-sex marriage landscape by articulating a constitutional framework that could provide robust rights for gay and lesbian couples. Indeed, echoes of Lawrence could be heard in Goodridge v. Department of Public Health (2003), a decision by the highest court in Massachusetts that ignited a national debate on the meaning of marriage.

In Goodridge, the Massachusetts Supreme Judicial Court held by a vote of 4-3 that the state's constitution requires the government to offer "the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." The case arose after Julie and Hillary Goodridge, a lesbian couple, sought a marriage license from the Massachusetts Department of Health. The department denied the request, claiming that Massachusetts did not recognize same-sex marriage. The Goodridges then sued the department, alleging that this denial violated their right to individual liberty and legal equality as guaranteed by the Massachusetts Constitution.

Writing for the majority, Chief Justice Margaret Marshall held that denying marriage benefits to same-sex couples violated the Massachusetts Constitution because it did not accomplish a legitimate government goal. Indeed, the court explained, the reasons the government offered for banning same-sex marriage - promoting procreation, ensuring a good child-rearing environment and preserving state financial resources - would not be promoted by prohibiting same-sex couples from marrying. Thus, according to the court, the only basis for the state's decision to exclude same-sex couples from the institution of marriage was a disapproval of their lifestyle. Because the court concluded that condemning a lifestyle is not a "constitutionally adequate reason" for denying marriage benefits, it held that the state must permit same-sex couples to marry.

In contrast, the three dissenting judges in Goodridge argued that they would not have required the state to recognize such unions because the legislature enjoys broad discretion when regulating nonfundamental rights, such as the right to same-sex marriage. Given this discretion, the dissenting judges argued, the court should be very deferential in determining whether there is a connection between the ban
on same-sex marriage and the legislature's asserted interests. Applying this level of deference, the dissenting judges concluded that the legislature had a rational basis for two of its three stated purposes in banning same-sex marriage: to communicate to its citizens the view that marriage is about procreation and to promote the optimal setting for rearing children.

Then-governor of Massachusetts, Mitt Romney, responded to the Goodridge decision by proposing to amend the Massachusetts Constitution to define marriage as including only one man and one woman. Under Massachusetts law, the legislature must approve a constitutional amendment in two consecutive sessions before the people can vote on it. After fighting a long and contentious battle over Romney's proposal, the legislature approved a compromise amendment in 2004 that prohibited gay marriage but created civil unions for same-sex couples. In the following session, however, the legislature changed course and rejected this proposed amendment, thus denying voters the opportunity to consider it.

**The Growing Battle Over Same-Sex Marriage in the States**

Meanwhile, a debate on same-sex marriage was heating up at both the federal and state levels. Many states became concerned that because the Full Faith and Credit Clause in the U.S. Constitution generally required states to enforce judicial decisions issued in other states, each state would have to recognize a marriage between same-sex partners that took place in Massachusetts. Many scholars have noted that this is probably an unfounded concern since the Supreme Court held many years ago that states need not violate their own policy interests in enforcing other states' rulings. Nevertheless, in 2003, 2004 and 2006, opponents of gay marriage in the U.S. Congress found this concern serious enough to declare it as the principal basis for proposing a federal constitutional amendment banning same-sex marriage in every state. This effort, however, failed to receive the two-thirds majority of both houses required to send a proposed amendment to the U.S. Constitution to the states for ratification.

At the state level, the success of the plaintiffs in Goodridge inspired other gay and lesbian couples to file similar claims around the country. Until May 2008, however, only one of these cases, Lewis v. Harris (2006), was even partly successful. In that case, the New Jersey Supreme Court found that the state constitutional guarantee of legal equality required the legislature to grant same-sex couples the same rights and benefits of marriage that opposite-sex couples have traditionally enjoyed. Although important, the Lewis decision did not match the breadth of Goodridge because the court permitted the state lawmakers to decide how to grant these rights - either by marriage or civil union. Soon after the ruling, the New Jersey state legislature passed a measure allowing gay and lesbian couples to enter into civil unions but not to marry.

Besides the New Jersey decision, all of the suits on this subject at the state Supreme Court level were unsuccessful until May 2008. Indeed, in 2006 and 2007, the highest courts in New York, Washington state and Maryland found that their state constitutions do not guarantee same-sex couples the right to marry. Each of these decisions held that recognizing same-sex marriage is a policy matter, not a constitutional matter, and that the decision must therefore rest with the people's representatives in the legislative and executive branches.

But in May 2008, the California Supreme Court held, 4-3, that state laws limiting marriage to opposite-sex couples violated the state constitution. The California decision, which consolidated six individual cases, is much like the Goodridge decision in that it found that same-sex couples are constitutionally entitled to the identical marital rights and privileges as opposite-sex couples. The reasoning in the Goodridge and California decisions, however, differed in one fundamental respect: Whereas the Massachusetts court in Goodridge found a right to same-sex marriage on the ground that there is no rational basis for denying marital rights to same-sex couples, the California court went significantly further, elevating gays and lesbians to have the same protected legal status as racial minorities and women. A law that discriminates against one of these protected groups is constitutional only if it meets a compelling government need. So the upshot of this ruling is that the California Constitution generally forbids any distinction whatsoever between same-sex and opposite-sex unions, whether in benefits or merely in name.

Seeking to overrule this decision, same-sex marriage opponents placed Proposition 8, a measure to alter the California Constitution to ban gay marriage, on the November 2008 state ballot. Following expensive and contentious political campaigns waged by both supporters and opponents of the initiative, California voters passed the proposition by a narrow margin - effectively outlawing gay marriage in California.

But just one day after the passage of the initiative, same-sex marriage advocates filed a lawsuit in the California Supreme Court claiming that Proposition 8 may not trump the California high court's earlier ruling that the state recognizes the right to same-sex marriage. The legal basis for the lawsuit is that California law provides for two types of changes to the state constitution: revisions and amendments. A revision is a "substantial" change to the constitution; it requires a vote by at least two-thirds of both houses of the California Legislature to submit the proposed revision to a popular vote or to a constitutional convention. An amendment is a less substantial change to the constitution that only requires voters to place the proposed amendment on a state ballot and win a majority vote, as Californians did with Proposition 8. Gay-rights advocates argue that because same-sex marriage is a fundamental right, banning the practice requires a constitutional revision, not just an amendment. Therefore, these advocates conclude, Proposition 8 is invalid. On Nov. 19, 2008, the California Supreme Court agreed to hear this case. The parties will submit their briefs by the end of 2008, but the court is not expected to issue its ruling on the matter for several months.

If the challenges to Proposition 8 are not successful and the constitutional amendment stands, it will only abrogate the part of the California Supreme Court decision that granted same-sex couples the right to marry. The other major piece of the decision - making gays and lesbians a protected class in future discrimination cases - will stand regardless of what happens in the battle over Proposition 8.

While gay marriage proponents suffered a defeat at the hands of California voters, they scored a victory a few weeks earlier in the Connecticut Supreme Court. In Kerrigan v. Connecticut Department of Health (2008), the Connecticut high court ruled by a vote of 4-3 that a state law banning same-sex marriage violated the state constitution's guarantee of equal protection under the law. The ruling overturned an earlier decision by a Connecticut trial court that had found no violation of the state's Equal Protection Clause because the state had enacted a civil union law giving gay and lesbian couples the same legal rights as married couples. In this earlier decision, the trial court judge had written that the state constitution requires equal protection under the law but "not that there be equivalent nomenclature for such protection."

But the majority of the Connecticut Supreme Court disagreed, ruling that offering homosexual couples civil unions in lieu of marriage amounts to unequal treatment "because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody." In addition, the Connecticut Supreme Court elevated the legal status of gays and lesbians, giving them greater protection against discrimination than was granted in the Massachusetts decision, but not the highest level of protection
that was established in the California ruling. In *Kerrigan*, the Connecticut high court ruled that laws that discriminate against gays and lesbians must be subjected to what is known as "intermediate strict scrutiny." This means that a law that discriminates against homosexuals will be struck down unless the state can show that it substantially furthers an important government interest.

**Looking ahead**

Gay rights advocates will almost certainly continue to file lawsuits at the state level. It remains to be seen, however, if this legal battle will migrate to the federal courts, where the issue would be whether the U.S. Constitution guarantees gay and lesbian couples the right to wed. Filing such a claim at the federal level entails great risk for the gay marriage movement, since it would give the U.S. Supreme Court the ultimate say on the issue. An unfavorable outcome in the high court would prevent gay couples from arguing for a right to same-sex marriage under the U.S. Constitution, leaving only state constitutions, and thus state courts, as the only means by which same-sex couples could secure a constitutional right to same-sex marriage.

Although it is impossible to predict how the high court would rule on a same-sex marriage claim, there are clues. Given their dissenting opinions in *Lawrence*, it seems likely that Justices Scalia and Clarence Thomas would vote against a constitutional right to same-sex marriage. Based on their generally conservative views, the two most recently appointed justices, Chief Justice John Roberts and Justice Samuel Alito, also appear likely to vote against such a right. But Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter and John Paul Stevens, who have voted in favor of gay rights claimants in every gay rights case they have considered, may be more likely to vote for the right to same-sex marriage.

Such a case may be likely to turn, then, on Justice Kennedy, whose vote is difficult to predict. On the one hand, he showed some sympathy with the gay rights movement in *Lawrence*. On the other hand, he emphasized in *Lawrence* that the right of gay and lesbian couples to engage in intimate conduct is a far cry, as a constitutional matter, from a right to same-sex marriage.

It is impossible to predict whether or when the Supreme Court will consider the constitutionality of gay marriage - or whether a change in the composition of the court in the coming years might influence the decision to take such a case. In the meantime, it is nearly certain that state courts will continue to wrestle with this question.

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