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“Don’t Ask, Don’t Tell,” the Supreme Court, and *Lawrence* the “Laggard”

AUDREY K. HAGEDORN*

“If you’re a homophobe, we won’t ask and you don’t tell.”
– John K. Jacobs, Letter to the Editor, N.Y. Times, December 20, 2010

INTRODUCTION

September 20, 2011, officially marked the end of “Don’t Ask, Don’t Tell” (DADT),¹ the longstanding ban on gays and lesbians serving openly in the military.² Congress and President Obama had successfully pushed through a last-minute repeal effort in the final hours of the 2010 congressional session,³ and nearly nine months later, the repeal formally went into effect.⁴

After a quiet beginning, President Obama finally made good on one of the many promises he made in an open letter to gay Americans written during his 2008 presidential campaign.⁵ For the first time in U.S. military history since World War II, the military would no longer be able to actively exclude openly gay and lesbian service members.⁶ The President, congressional Democrats, and gay rights activists heralded the repeal of DADT as a “victory,” and as activists celebrated outside the Capitol Building, it was clear that the end of DADT marked an important step in the gay rights movement.⁷ Open access to the military was one of the last

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1. Ed O’Keefe, *‘Don’t Ask, Don’t Tell’ Ends in Quiet, Personal Ways*, WASH. POST, Sept. 20, 2011, http://www.washingtonpost.com/politics/dont-ask-dont-tell-ends-in-quiet-personal-ways/2011/09/20/gIQA69uiK_story.html.

2. 10 U.S.C. § 654 (2006).

3. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; see also Carl Hulse, *Senate Ends Military Ban on Gays Serving Openly*, N.Y. TIMES, Dec. 19, 2010, at A1; Sheryl Gay Stolberg, *Obama Signs Away ‘Don’t Ask, Don’t Tell,’* N.Y. TIMES, Dec. 23, 2010, <http://www.nytimes.com/2010/12/23/us/politics/23military.html>.

4. Under section 2, the Repeal Act did not immediately take effect until sixty days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certified that the military was ready for the change to occur. 124 Stat. at 3515–16. That certification did not take place until July 22, 2011, marking September 20, 2011, as the official end date to DADT. Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES, July 23, 2011, at A13.

5. *Barack Obama’s Letter to the Gay, Lesbian, Bisexual and Transgender Community*, GAY RIGHTS WATCH (Feb. 28, 2008, 11:44 PM) [hereinafter *Open Letter*], <http://www.gayrightswatch.com/2008/02/barack-obamas-letter-to-gay-lesbian.html>.

6. George Chauncey, Op-Ed., *Last Ban Standing*, N.Y. TIMES, Dec. 21, 2010, at A35 (describing the ban on open service in the military as “a crucial issue for the gay movement for 65 years” following the end of World War II).

7. Hulse, *supra* note 3, at A1.

remaining areas of American life that was legally off-limits to gay Americans.⁸ Now gay and lesbian service members could serve openly and proudly. Massachusetts House Representative Barney Frank summed up the momentous occasion: “If you can fight for your country, you can do anything.”⁹

To the less scrutinizing eye, the legislative repeal of DADT represents a successful end to a very long struggle. But, in reality, the fall of DADT stands for relatively limited progress in the gay rights arena. That progress is narrow because DADT was the subject of criticism from the moment Congress enacted it nearly eighteen years ago during the Clinton administration.¹⁰ Purporting to be a “live-and-let-live” policy, DADT supposedly “distinguished between ‘being gay’ and ‘acting on being gay.’”¹¹ In practice, however, DADT was merely a codification of the existing military policy—a “*de facto ban*” on gays in the military¹²—and gay rights activists quickly challenged the law.¹³ Despite the immediate opposition, over seventeen years elapsed before any judicial challenge culminated in a decision striking down DADT.¹⁴ These challenges came in the fall of 2010.

In *Witt v. Department of the Air Force*¹⁵ and *Log Cabin Republicans v. United States*,¹⁶ District Judges Ronald Leighton and Virginia Phillips, respectively, ruled DADT unconstitutional on substantive due process grounds. Notably, *Witt* and *Log Cabin Republicans* came just over a year after the Supreme Court declined the chance to hear a constitutional challenge to DADT in *Cook v. Gates*.¹⁷ While *Witt*

8. David A. Fahrenthold, *For Gay Rights, Is Repeal of ‘Don’t Ask’ Military Ban the End or the Beginning?*, WASH. POST, Dec. 20, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/19/AR2010121903719.html>.

9. Stolberg, *supra* note 3.

10. See Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of “Don’t Ask, Don’t Tell,”* 21 HOFSTRA LAB. & EMP. L.J. 403, 408–10 (2004) (“The public understood [DADT] to be a ‘live-and-let-live’ rule, and in the minds of many involved . . . that was indeed the intent of the law. However, in practice the new policy turned out to be anything but a *laissez-faire* approach to sexual orientation in the military.” (emphasis in original)); see also Emily B. Hecht, *Debating the Ban: The Past, Present and Future of Don’t Ask, Don’t Tell*, N.J. LAW, June 2007, at 46 (“In practice, . . . what was supposed to be a kinder, gentler policy toward gays in the military has proven to be no different than prior regulations . . .”).

11. Alexander, *supra* note 10, at 410.

12. Robert I. Correales, *Don’t Ask, Don’t Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 414 (2008).

13. See, e.g., *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); *Abel v. United States*, 88 F.3d 1280 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996).

14. See *Witt v. Dep’t of the Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010).

15. *Witt*, 739 F. Supp. 2d 1308, *on remand from* 527 F.3d 806 (9th Cir. 2008). Judge Leighton’s decision invalidating DADT utilized a three-part test announced by the Ninth Circuit in 2008. See *infra* notes 115–26 and accompanying text.

16. *Log Cabin Republicans*, 716 F. Supp. 2d 884.

17. 528 F.3d 42 (1st Cir. 2008), *cert. denied sub nom. Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009); see also William Branigin, *Supreme Court Turns Down ‘Don’t Ask’ Challenge*, WASH. POST, June 8, 2009, <http://www.washingtonpost.com/wp-dyn/content/>

and *Log Cabin Republicans* generated the congressional, presidential, military, and public discourse that ultimately lead to the legislative repeal of DADT in late 2010, the issues raised and the questions asked in 2010 were no different from those raised and asked in *Cook v. Gates* in 2009.

In fact, *Lawrence v. Texas*, the landmark Supreme Court decision invalidating a Texas law criminalizing sodomy,¹⁸ opened the door to DADT's repeal as early as 2004. Interestingly, however, the Supreme Court denied certiorari to the only DADT challenge presented to it after 2004.¹⁹ Indeed, the Court has refused to utter a single word regarding *Lawrence's* reach in any context since 2003. This silence has not been for want of opportunities; rather, the Court has had several chances to clarify *Lawrence's* reach.²⁰ It has not done so. The Court's silence has been particularly frustrating for proponents of gay rights because *Lawrence* potentially holds the key to full constitutional respect for gay Americans and equal protection under the law.²¹ This respect and equality arguably includes same-sex marriage. Without knowing what *Lawrence* protects, it becomes difficult for the gay rights movement to gain momentum through the judicial branch.

In 2009, the stage was set for an answer to the central questions surrounding *Lawrence*. *Cook v. Gates* gave the Supreme Court a second chance to strike down DADT once and for all, and more importantly, give gay rights activists a significant tool to push onward with judicial challenges to prohibitions on same-sex marriage. Instead, the Supreme Court decided *not* to decide.

This Note uses the story of DADT to argue that the Supreme Court has been strategically side-stepping *Lawrence v. Texas* since 2003. Specifically, this Note argues that the Supreme Court's decision to deny certiorari to *Cook v. Gates* in 2009 was based in part on strategic considerations. The Court, conservative at the time, did not want to vote its sincere policy preferences. More importantly, however, the Court did not want to revisit *Lawrence v. Texas* so soon or move forward with its substantive due process jurisprudence in the context of gay rights. Unfortunately for gay rights activists, the Court's decision has kept lower courts in the dark. In 2009, the Supreme Court took one look at the surrounding political climate and passed on DADT. This Note attempts to explain why. By understanding the Court's decision to deny certiorari to *Cook* as a strategic choice, this Note offers a different perspective on the fall of DADT, *Lawrence v. Texas*, and the future of the gay rights movement in the judiciary.

article/2009/06/08/AR2009060801368.html.

18. 539 U.S. 558 (2003).

19. See *Cook*, 528 F.3d 42, cert. denied sub nom. *Pietrangelo*, 129 S. Ct. 2763.

20. See, e.g., *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir.) (applying *Lawrence* to a Wisconsin statute criminalizing incest), cert. denied, 546 U.S. 988 (2005); *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1236–38 (11th Cir. 2004) (applying *Lawrence* to Alabama statute prohibiting commercial distribution of sex toys), cert. denied, 543 U.S. 1152 (2005); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (applying *Lawrence* to a Florida law prohibiting gay adoption), cert. denied, 543 U.S. 1081 (2005).

21. See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1945–51 (2004) (arguing that "the underlying theory and most important passages of *Lawrence* suggest ready . . . applicability of the holding to same-sex marriage").

The argument proceeds in three steps. Part I chronicles the history of the Court's substantive due process analysis in the context of gay rights and includes an in-depth discussion of the landmark decision *Lawrence v. Texas*. Part II discusses the strategies employed by the Supreme Court to avoid controversial issues and applies this explanation of judicial behavior to DADT. Part III concludes by considering the consequences of the Court's behavior and what the legislative repeal of DADT may mean for the future success of the gay rights movement in the judiciary.

I. *LAWRENCE V. TEXAS* AND ONE PATH TO SAME-SEX MARRIAGE

This Part details the history of the Court's substantive due process analysis in the context of gay rights, focusing on the Supreme Court's landmark decision *Lawrence v. Texas* and its aftermath. After reviewing the Supreme Court's substantive due process approach to cases dealing with gay rights prior to *Lawrence*, the discussion turns to the Court's decision in *Lawrence* and offers an explanation of the majority opinion. The final two sections in this Part pay significant attention to the response to *Lawrence*—from both the outside legal community and from within the appellate courts system.

A. *Pre-Lawrence Substantive Due Process*

The idea of substantive due process, or “what it means for the state to deprive someone of ‘liberty’ without ‘due process of law’ in the substantive sense,”²² has been debated by courts since its inception.²³ Adopted to protect the rights of freed slaves,²⁴ today the Fourteenth Amendment's Due Process Clause has grown to embody a fundamental right to autonomy. This autonomy includes such rights as the right to contraception,²⁵ the right to procreate,²⁶ and the right to abortion.²⁷ The basic idea is that substantive due process protects those “fundamental rights” which are “implicit in the concept of ordered liberty”²⁸ or “deeply rooted in this Nation's history and tradition.”²⁹ Courts strive to protect these fundamental rights. Any law

22. *Id.* at 1897.

23. Jason A. Crook, *Exposing the Contradiction: An Originalist's Approach to Understanding Why Substantive Due Process Is a Constitutional Misinterpretation*, 10 NEV. L.J. 1, 1–2 (2009) (“Few phrases in American jurisprudence have created more of a stir or inspired greater controversy than the seventeen words that comprise the due process clause of the Fourteenth Amendment. . . . In light of its linguistic incongruity and the versatility of its judicial precedents, one could fairly state that the meaning of the Fourteenth Amendment's due process clause has been the subject of passionate debate and varying interpretation ever since its ratification in 1868.”).

24. *Id.* at 2.

25. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

26. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

27. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

28. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

29. *Id.* at 721 (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

that infringes upon a fundamental right is subject to strict scrutiny, which requires the government to put forth “an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right.”³⁰ If a law does not implicate strict scrutiny, courts may apply either rational basis review³¹ or intermediate scrutiny.³² Under rational basis review, a challenged law must only further some legitimate goal in order to pass judicial review.³³ Intermediate scrutiny lies somewhere between rational basis review and strict scrutiny.³⁴

The Court’s substantive due process jurisprudence in the context of gay rights has been limited. Prior to *Lawrence*, the Supreme Court engaged in a long pattern of avoiding cases dealing with gay rights.³⁵ Most of the time the Court would simply deny certiorari to any case dealing with gay rights.³⁶ H. W. Perry’s study of the Court’s agenda setting lends credence to this point.³⁷ His findings indicate that gay rights jurisprudence was one area of law that the Court consistently avoided.³⁸ In fact, from 1967 to 1984, the Court did not hear oral arguments in any case dealing with gay rights.³⁹ When the Court did hear a case, it usually chose to affirm a harsh lower court decision.⁴⁰ According to Professor Christopher Leslie, the Court’s behavior was illustrative of a “collective decision to avoid the controversial issue of gay rights.”⁴¹ *Bowers v. Hardwick*,⁴² the crucial substantive due process case in the context of gay rights prior to *Lawrence*, was an anomaly.

In *Bowers*, the Court considered the constitutionality of a Georgia law criminalizing sodomy between two consenting adults.⁴³ Justice White took considerable pains to frame the legal issue at stake narrowly. Instead of looking at

30. *Id.* at 766–67 (Souter, J., concurring) (citing *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting)).

31. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

32. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531–34 (1996).

33. *See, e.g.*, *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487–88 (1955) (holding that a law need not even be “logically consistent with its aims to be constitutional”).

34. *See, e.g.*, *Virginia*, 518 U.S. at 531–34.

35. *See* Christopher R. Leslie, *The Importance of Lawrence in the Context of the Supreme Court’s Historical Treatment of Gay Litigants*, 11 WIDENER L. REV. 189, 191 (2005) (“Before *Lawrence*, gay victims of legal injustice generally did not receive relief in the Supreme Court. . . . The Court was a place where advocates of gay rights would seek relief but be denied . . .”).

36. *See id.* at 207–14.

37. H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 254–59 (1991).

38. *See id.*

39. Leslie, *supra* note 35, at 210.

40. *See, e.g.*, *Boutilier v. INS*, 363 F.2d 488, 495–96 (2d Cir. 1966), *aff’d*, 387 U.S. 118, 120–24 (1967) (holding alien’s admission of homosexual activities prior to entry into the United States was sufficient evidence of “psychopathic personality” to justify deportation); *Doe v. Commonwealth’s Att’y for City of Richmond*, 403 F. Supp. 1199, 1200 (E.D. Va. 1975) (holding that Virginia’s sodomy law did not violate any constitutional right to privacy), *aff’d*, 425 U.S. 901 (1976).

41. Leslie, *supra* note 35, at 209.

42. 478 U.S. 186 (1986).

43. *Id.* at 186.

the broader issue of whether a fundamental right to private sexual intimacy exists, White “callously mischaracterized”⁴⁴ the issue as whether a fundamental right existed for “homosexuals to engage in sodomy.”⁴⁵ White and the Court answered in the negative, holding that “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”⁴⁶ The Court then applied rational basis review and upheld the Georgia law.⁴⁷ Given the Court’s use of rational basis in *Bowers*, any law regulating private conduct between same-sex couples was likely to be upheld.⁴⁸ This was certainly the case for DADT.

Following *Bowers*, lower courts repeatedly upheld the constitutionality of DADT in a string of cases that arose after its enactment in 1993.⁴⁹ For example, in *Richenberg v. Perry*, the Eighth Circuit dismissed a substantive due process challenge to DADT after determining that DADT rationally addressed the military’s purpose of reducing “sexual tensions” that might “jeopardize unit cohesion.”⁵⁰ In addition to the general deference that rational basis review requires,⁵¹ the majority of these courts were especially deferential to the military and its argument that the presence of gays in the military harmed its ability to provide national defense.⁵² The Eighth Circuit reasoned that it was “difficult to conceive of an area of governmental activity in which the courts [had] less competence.”⁵³ Indeed, the Supreme Court had long granted deference to the military,⁵⁴ which is presumably why the Court declined to grant certiorari to any of

44. Correales, *supra* note 12, at 434. By framing the issue this way, the *Bowers* majority effectively evaded the issue of “decisional privacy” and simultaneously cast a shadow of immorality upon homosexuality in general. *Id.* at 434–36 (“The majority’s negative characterization of the issue before the Court and its aggressive moral condemnation of gay relationships created an ever-widening shadow from which it became nearly impossible to escape.”).

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

46. *Id.* at 194.

47. *Id.* at 196.

48. Rational basis review is highly deferential; legislation must only be “rationally related” to some legitimate state interest in order to pass judicial scrutiny. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”); *see also supra* text accompanying note 33.

49. *See, e.g.*, *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 934 (4th Cir. 1996).

50. 97 F.3d at 262.

51. *See supra* note 48.

52. *See Correales, supra* note 12, at 414 (arguing that the most successful argument cited in favor of DADT was the belief of a few military leaders that DADT protected the “sensibilities of a small group of heterosexuals” who felt threatened by gays and lesbians serving openly in the military).

53. *Richenberg*, 97 F.3d at 261 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

54. *See e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (“[T]he Constitution contemplate[s] that the Legislative Branch have plenary control over rights, duties, and

these early cases. The 2003 decision in *Lawrence v. Texas*, however, seemed to change everything.

B. *Lawrence v. Texas*

In *Lawrence v. Texas*, the Supreme Court invalidated a Texas law that criminalized sodomy, overruling *Bowers v. Hardwick*.⁵⁵ Criticizing “the Court’s failure to appreciate the extent of the liberty at stake” in *Bowers*,⁵⁶ Justice Kennedy reframed the issue before the Court as whether two consenting gay adults had the liberty to engage in private sexual conduct under the Due Process Clause.⁵⁷ Justice Kennedy, joined by Justices O’Connor, Stevens, Souter, Ginsburg, and Breyer, held that they did. The Court reasoned that “[homosexuals’] right to liberty under the Due Process Clause gives them the full right to engage in [homosexual] conduct without intervention of the government” and that Texas’s law “furthered no legitimate state interest which could justify its intrusion into the personal and private life of the individual.”⁵⁸ Further, the Court rejected morality as a legitimate state interest: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”⁵⁹ In his dissent Justice Scalia criticized the majority for not adhering to *stare decisis*, pointing out that “nowhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause.”⁶⁰

Perhaps Justice Scalia was right to point out the Court’s omission. The Court was curiously silent about the level of scrutiny it was applying.⁶¹ The words “fundamental right” did not appear in the opinion,⁶² and the Court did not employ the traditional approach to substantive due process questions implicating fundamental rights.⁶³ This approach first defines a right as fundamental and then

responsibilities in the framework of the Military Establishment”); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (“[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”).

55. 539 U.S. 558 (2003).

56. *Id.* at 567. In reframing the issue, Justice Kennedy broadened the liberty at stake to encompass not only a particular kind of sexual conduct but all sexual behavior in the home. *Id.* (“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.”).

57. *Id.* at 564.

58. *Id.* at 578.

59. *Id.* at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Stevens, J., dissenting)).

60. *Id.* at 586 (Scalia, J., dissenting).

61. See Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1116 (2004).

62. See *Lawrence*, 339 U.S. at 586 (Scalia, J., dissenting).

63. See Hunter, *supra* note 61, at 1116 (“By asking the question of whether the

considers whether the government's interest is compelling enough to override that right.⁶⁴ Rather, the Court held that Texas's law was an impermissible intrusion on an individual's autonomy absent a more legitimate reason than promoting morality.⁶⁵ Was the Court applying rational basis to strike down the law prohibiting sodomy or was it using a form of heightened scrutiny to protect some "private sexual intimacy" for conduct between same-sex couples?

While Justice Scalia characterized the decision as "an unheard-of form of rational-basis review that will have far-reaching implications,"⁶⁶ it is unlikely that the Court used rational basis review in *Lawrence*. Rather, the majority's standard of review most likely took some form of heightened scrutiny. First, the Supreme Court overruled the Texas statute. This fact alone is significant because rational basis review "will almost never lead to the invalidation of a state law."⁶⁷ Admittedly, the Court never explicitly recognized the standard of review it was using to strike down the Texas law. However, the outcome in a case can be more indicative than what the words in the opinion say. The process of announcing a standard of review "is often more conclusory than informative" and is actually only an "occasional practice" that is used by the Court.⁶⁸ Importantly, Professor Laurence Tribe suggests that characterizing the test in *Lawrence* as rational basis "requires overlooking passage after passage in which the Court's opinion indeed invoked the talismanic verbal formula of substantive due process."⁶⁹ Indeed, the Court looked to all the precedents which comprise the heart of the substantive due process right to make autonomous decisions—*Griswold*,⁷⁰ *Roe*,⁷¹ and *Casey*.⁷² If *Lawrence* was analogous to these seminal decisions, the protected liberty interest was at least related to individual autonomy in some way.

In sum, the Court's approach in *Lawrence* arguably added the fundamental right to private sexual intimacy to the list of protected substantive due process rights by recognizing that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."⁷³ If true, the decision in *Lawrence*

governmental action had a legitimate basis first, and concluding that it did not, the Court did not need to then ask whether the individual was seeking to exercise a fundamental right . . .").

64. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) ("Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." (citations omitted)).

65. *Lawrence*, 539 U.S. at 577–79.

66. *Id.* at 586 (Scalia, J., dissenting).

67. Hunter, *supra* note 61, at 1113. See generally *supra* text accompanying note 33.

68. Tribe, *supra* note 21, at 1916–17.

69. *Id.* at 1917.

70. *Lawrence*, 539 U.S. at 564–65 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

71. *Id.* at 565 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

72. *Id.* at 573–74 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

73. *Id.* at 565.

invalidated any statute that interferes with private consensual sexual conduct between anyone—gay or straight. DADT, which explicitly banned homosexual conduct in the military,⁷⁴ fell squarely into this category. There is no question that *Lawrence* demanded more than *Bowers*. But would *Lawrence* have “far-reaching implications” in the larger fight for gay rights?

C. *The Brown v. Board of Education of the Gay Rights Movement?*

Professor Laurence Tribe, the losing attorney in *Bowers*,⁷⁵ suggested that “*Lawrence* may well be remembered as the *Brown v. Board of Education* of gay and lesbian America.”⁷⁶ Given that *Brown v. Board of Education*⁷⁷ is arguably the most celebrated decision in Supreme Court history, Professor Tribe paid *Lawrence* no small compliment. Like *Brown*, some Americans hoped that the “sweeping” language of *Lawrence* would stand for “constitutional liberty for gay men and lesbians.”⁷⁸ Professor Christopher Leslie hailed the Supreme Court as “an institution where gay Americans can seek justice,”⁷⁹ noting that the decision had “change[d] the entire relationship between gay Americans and their Supreme Court.”⁸⁰ With *Lawrence*, many scholars believed that the Court had removed from states the ability to discriminate against gay Americans in a variety of contexts—“including employment, child custody, and immigration.”⁸¹ Most significantly, the decision in *Lawrence* was both celebrated by gay rights activists and feared by social conservatives to be a powerful weapon in the battle to legalize same-sex marriage.⁸²

Professor Lisa Parshall argued, however, that Justice Kennedy’s opinion “undercut *Lawrence* as a foundation for gay marriage by indicating that the ruling did not require formal recognition of homosexual relations by the state.”⁸³ It is true

74. See 10 U.S.C. § 654(b)(1) (2006) (providing that a member of the armed forces can be separated if there is a finding that “the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts”).

75. See Martin A. Schwartz, *Lawrence v. Texas: The Decision and Its Implications for the Future*, 20 *TOURO L. REV.* 221, 232 (2004).

76. Tribe, *supra* note 21, at 1895.

77. 347 U.S. 483 (1954).

78. Linda Greenhouse, *The Supreme Court: Homosexual Rights; Justices, 6–3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court’s ’86 Ruling*, *N.Y. TIMES*, June 27, 2003, at A1.

79. Leslie, *supra* note 35, at 219.

80. *Id.*

81. *Id.* at 189; see also Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 *HARV. C.R.-C.L. L. REV.* 103 (2000) (arguing that the existence of state sodomy laws branded gay men and lesbians as criminals in other contexts, such as gay adoption, and limited their rights and defenses in those areas).

82. See, e.g., Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, *N.Y. TIMES*, July 6, 2003, <http://www.nytimes.com/2003/07/06/us/adversaries-on-gay-rights-vow-state-by-state-fight.html?src=pm>. For a good discussion of both the liberal and conservative response to *Lawrence*, see Michael J. Klarman, *Brown and Lawrence (And Goodridge)*, 104 *MICH. L. REV.* 431, 459–73 (2005).

83. Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy*

that the Court shied away from ruling on the alternate Equal Protection challenge in *Lawrence*.⁸⁴ Justice Kennedy directly stated that *Lawrence* did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁸⁵ But Parshall concedes that “[i]n some ways, Justice Kennedy has carefully laid the foundation for the recognition of gay marriage by granting protection to homosexual conduct and rejecting moral opprobrium as a legitimate basis for the disparate treatment of lesbians and gays.”⁸⁶ By renouncing morality as a legitimate state interest and adopting Justice Stevens’s dissent in *Bowers*,⁸⁷ Justice Kennedy had dealt a heavy blow to the morality argument against same-sex marriage.⁸⁸

In fact, just five months after *Lawrence* the Massachusetts Supreme Court handed down *Goodridge v. Department of Public Health*,⁸⁹ making Massachusetts the first state to legalize same-sex marriage.⁹⁰ The Massachusetts court wrote:

[In *Lawrence*], the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one’s choice of an intimate partner. . . .

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.⁹¹

Confirming both liberal and conservative predictions,⁹² the language in *Goodridge* echoed the broad liberty interest described in *Lawrence*. The Massachusetts Supreme Court would not be the only state court to use *Lawrence* as a tool to

and the Concept of Emergent Rights, 69 ALB. L. REV. 237, 263 (2005).

84. See Arthur S. Leonard, *Exorcising the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 CHI.-KENT L. REV. 519, 524 (2009). Although it declined to consider the Equal Protection argument, the Court admitted that the argument was “tenable.” *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003). Justice O’Connor’s concurrence, in fact, made that argument. *Id.* at 579–85 (O’Connor, J., concurring); see also Leonard, *supra*.

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

86. Parshall, *supra* note 83, at 263–64.

87. See *supra* text accompanying note 59.

88. See Leonard, *supra* note 84, at 545–46.

89. 798 N.E.2d 941 (Mass. 2003). Interestingly, Massachusetts was both the first state to legalize same-sex marriage and the state with the lowest divorce rate in the country. This fact remained unchanged even after five years of permitting same-sex marriage. Bruce Wilson, *After 5 Years of Legal Gay Marriage, Massachusetts Still Has the Lowest State Divorce Rate and Western Civilization Is Intact*, ALTERNET BLOG (Aug. 24, 2009, 6:18 AM), <http://www.alternet.org/blogs/>.

90. Pam Belluck, *Same-Sex Marriage: The Overview; Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. TIMES, May 18, 2004, at A1.

91. *Goodridge*, 798 N.E.2d at 948–49.

92. See text accompanying note 82.

legalize same-sex marriage. The highest courts in California,⁹³ Connecticut,⁹⁴ and Iowa⁹⁵ subsequently followed suit, each citing to *Lawrence* in opinions legalizing same-sex marriages.

The decision in *Lawrence* also renewed efforts to end DADT. Immediately after the Court announced *Lawrence* in 2003, gay rights activists believed that the judicial repeal of DADT was within reach.⁹⁶ As early as the spring of 2004, the elimination of DADT was not a question of if, but rather, a question of when and how.⁹⁷ However, critics soon characterized the opinion as “heavier on rhetoric than on clarity,”⁹⁸ and some scholars hesitated to agree that *Lawrence* protected a fundamental right to private sexual intimacy.⁹⁹ Others, like Professor Nan Hunter, argued that *Lawrence* was intentionally vague—both broad and flexible—and meant to allow lower courts to determine its future.¹⁰⁰ It turns out that Hunter’s argument was not far off: interpreting *Lawrence* is exactly what lower courts have been struggling with for the past eight years.

D. The Circuits Respond to Lawrence

Because of the Court’s muddled analysis, lower courts have hesitated to embrace the heightened protection provided by *Lawrence*.¹⁰¹ Generally courts have erred on the conservative side and held that *Lawrence* does not recognize a fundamental right to private sexual intimacy.¹⁰² This conservative approach has, to

93. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). *In re Marriage Cases* was superseded by California constitutional amendment. *See* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

94. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

95. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). For further discussion of state court decisions on the issue of same-sex marriage, see generally Chase D. Anderson, Note, *A Quest for Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage Review After Perry*, 60 DUKE L.J. 1413 (2011) (arguing that the Supreme Court has approached cases dealing with sexual orientation using a “principle of neutrality”).

96. *See, e.g., Gay Man, Citing Supreme Court Ruling, Fights '97 Army Discharge*, N.Y. TIMES, July 9, 2003, at A14. On July 8, 2003, just twelve days after the Supreme Court handed down *Lawrence*, a man filed a court challenge to DADT. *Id.*

97. *See* Alexander, *supra* note 10, at 434.

98. Hunter, *supra* note 61, at 1103.

99. *See, e.g.,* Schwartz, *supra* note 75, at 227.

100. Hunter, *supra* note 61, at 1139 (“Perhaps the most significant point to bear in mind is that the function of lower federal courts, scholars, and practitioners now will be not so much to find the meaning of *Lawrence* as to create it.”).

101. *See, e.g.,* *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 816 (11th Cir. 2004) (“We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis.”).

102. *See, e.g.,* *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (“*Lawrence* . . . did not announce . . . a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct”); *Lofton*, 358 F.3d at 817; *see also* Stephanie Francis Ward, *Avoiding Lawrence: Courts Considering Last Year’s Major Gay Rights Ruling Are Treading Carefully*, 90 A.B.A. J. 16, 16 (2004).

a certain extent, minimized the holding in *Lawrence*.¹⁰³ Moreover, the Supreme Court has remained noticeably absent from *Lawrence*'s progeny. As a result, lower courts have slowly been able to reduce *Lawrence*'s impact. Two cases coming from the Eleventh Circuit serve as good examples.

In *Lofton v. Secretary of the Department of Children and Family Services*, the Eleventh Circuit considered a Florida statute that prohibited gay adoption.¹⁰⁴ The statute applied to "homosexual[s]," which the court described as "applicants who are known to engage in current, voluntary homosexual activity."¹⁰⁵ The plaintiffs alleged that the statute, which regulated conduct, burdened the fundamental right recognized by the Court in *Lawrence*.¹⁰⁶ The Eleventh Circuit, specifically focusing on the Supreme Court's lack of a formal analysis in *Lawrence*, concluded that "it [was] a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right" and upheld the Florida statute after applying rational basis review.¹⁰⁷ Shortly after *Lofton*, in *Williams v. Attorney General of Alabama*,¹⁰⁸ the Eleventh Circuit faced another *Lawrence* question. *Williams* dealt with an Alabama statute that prohibited the sale of "sex toys."¹⁰⁹ Again, the Eleventh Circuit concluded that *Lawrence* did not recognize a fundamental right to sexual privacy and upheld the Alabama law.¹¹⁰

The plaintiffs in both *Lofton* and *Williams* petitioned the Supreme Court for review; it promptly denied certiorari to both in 2005.¹¹¹ Although a Florida appellate court recently declared the adoption statute in *Lofton* unconstitutional and the issue is now moot,¹¹² the Supreme Court's decision to avoid the issue of gay adoption in 2005 implicitly indicated that the Court was not willing to return to *Lawrence* so quickly. The same seemed true for the evaded sex toy issue in *Williams*. Perhaps the Eleventh Circuit was correct to interpret *Lawrence* as a narrow decision. This interpretation seems unlikely given the powerful language in Justice Kennedy's opinion.¹¹³ However, because the Supreme Court refused to

103. See, e.g., Ward, *supra* note 102, at 16 (reporting that many plaintiffs' lawyers feared that courts were "backing away from *Lawrence* too quickly").

104. 358 F.3d at 806-07.

105. *Id.* at 807 (quoting Fla. Dep't of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210, 1215 (Fla. Dist. Ct. App. 1993)).

106. *Id.* at 815.

107. *Id.* at 817.

108. 378 F.3d 1232 (11th Cir. 2004).

109. *Id.* at 1233. The Alabama statute, technically still in effect, disallows "any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for anything of pecuniary value." ALA. CODE § 13A-12-200.2(a)(1) (LexisNexis 2005). First-time offenders face a \$10,000 fine and prison time. *Id.*

110. *Williams*, 378 F.3d at 1250 ("[W]e reject the ACLU's request that we redefine the constitutional right to privacy to cover the commercial distribution of sex toys.").

111. *Lofton*, 358 F.3d 804, *cert. denied*, 543 U.S. 1081 (2005); *Williams*, 378 F.3d 1232, *cert. denied*, 543 U.S. 1152 (2005).

112. See *In re Matter of Adoption of X.X.G. and N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); see also Editorial, *Victory for Families*, N.Y. TIMES, Sept. 27, 2010, at A22.

113. See *supra* text accompanying notes 57-60.

affirm whether the Eleventh Circuit correctly interpreted the meaning of *Lawrence*, lower courts still could not be sure of the nature and extent of its reach.

After the Eleventh Circuit's failure to vigorously apply *Lawrence*, challenges to DADT provided appellate courts with another opportunity to consider *Lawrence*. This time, courts were less conservative in their approach, and their opinions truly challenged the Court on *Lawrence* for the first time.¹¹⁴

In 2008, the Ninth Circuit became the first federal appellate court to hand down a post-*Lawrence* decision relating to DADT. In *Witt v. Department of the Air Force*, the Ninth Circuit considered the due process claim of Major Margaret Witt, an Air Force combat flight nurse who was discharged after the military accused her of living with a woman.¹¹⁵ Major Witt argued that *Lawrence* "establish[ed] a fundamental right to engage in adult consensual sexual acts."¹¹⁶ The Ninth Circuit was less inclined than previous courts to apply the rubber stamp of rational basis to Witt's claim; instead, it concluded that "*Lawrence* requires something more than traditional rational basis review"¹¹⁷

The Ninth Circuit determined that neither rational basis review nor strict scrutiny was consistent with *Lawrence*.¹¹⁸ Instead, the court looked to *Sell v. United States*¹¹⁹ for guidance. *Sell* was a Supreme Court case from 2003 in which the Court applied a heightened level of scrutiny.¹²⁰ *Sell* was, in the Ninth Circuit's opinion, an expansion of *Lawrence*.¹²¹ In *Sell*, the Supreme Court considered whether the government can forcibly administer anti-psychotic drugs to a mentally-ill defendant in order to render that defendant competent to stand trial.¹²² The Court held that the government is permitted to do so, but only if (1) there were important governmental interests at stake; (2) the involuntary medication would significantly further those interests; (3) the involuntary medication was actually necessary to further those interests; and (4) the administration of the drugs is medically appropriate.¹²³

The Ninth Circuit adapted the first three prongs of the *Sell* test into a "heightened scrutiny balancing analysis":

[W]hen the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important

114. See *Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008) ("[W]e are persuaded that *Lawrence* did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy"); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 816 (9th Cir. 2008) ("We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review.").

115. 527 F.3d at 810.

116. *Id.* at 813.

117. *Id.*

118. *Id.* at 816–18.

119. 539 U.S. 166 (2003).

120. See *id.* at 179–83.

121. See *Witt*, 527 F.3d at 818.

122. *Sell*, 539 U.S. at 177.

123. *Id.* at 179–81.

governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest.¹²⁴

The Ninth Circuit remanded the case to the trial court for factual determinations.¹²⁵ Unfortunately, *Witt* was not at a point procedurally where the Supreme Court could easily accept review in 2009.¹²⁶

Shortly after the decision in *Witt*, however, the First Circuit handed down a decision upholding the constitutionality of DADT in *Cook v. Gates*.¹²⁷ Like the plaintiff in *Witt*, twelve former military members claimed that DADT violated their constitutional right to due process under *Lawrence*.¹²⁸ The First Circuit agreed with the Ninth Circuit that *Lawrence* required some level of intermediate scrutiny protection to engage in private sexual intimacy.¹²⁹ The court gave four reasons: (1) *Lawrence* relied on due process cases related to sexual intimacy; (2) the language in *Lawrence* suggested a protected liberty interest; (3) *Lawrence* relied on Justice Stevens's dissent in *Bowers*; and (4) if *Lawrence* had employed rational basis, the Court would not have struck down the Texas statute.¹³⁰

However, the First Circuit disagreed with the Ninth Circuit's adaptation of the *Sell* decision.¹³¹ According to the First Circuit, the *Sell* Court merely "applied a standard of review less demanding than strict scrutiny" by asking if administering the drugs was necessary to further important governmental interests.¹³² The First Circuit saw *Lawrence* as employing a similar standard of review—one that balanced the government's interest in preventing the perceived immoral conduct

124. *Witt*, 527 F.3d at 819.

125. *Id.* at 821–22.

126. On remand and just prior to DADT's legislative repeal, District Judge Ronald Leighton ruled DADT unconstitutional by applying the Ninth Circuit's test. *See Witt v. Dep't of the Air Force*, 739 F. Supp. 2d 1308, 1316 (W.D. Wash. 2010), *on remand from* 527 F.3d 806 (9th Cir. 2008). In *Log Cabin Republicans v. United States*, District Judge Virginia Phillips also found DADT unconstitutional using the Ninth Circuit's test. 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010). Earlier this year, *Witt* ended in settlement; the Air Force agreed not to appeal the case, and Major Witt was reinstated. *See Levi Pulkkinen, Pentagon Settles with McChord Major Fired for Being Lesbian*, SEATTLE POST INTELLIGENCER, May 10, 2011, <http://www.seattlepi.com/local/article/Pentagon-settles-with-McChord-major-fired-for-1373728.php>. Conversely, *Log Cabin Republicans* pushed onward. On October 12, 2010, Judge Phillips issued a permanent injunction barring DADT's enforcement worldwide. *Log Cabin Republicans*, 716 F. Supp. 2d at 929. The Ninth Circuit stayed Phillips's injunction on October 20, 2010, however, pending an appeal by the Department of Justice. *Log Cabin Republicans v. United States*, No. 10-56634, 2010 WL 4136210 (9th Cir. Oct. 20, 2010). *Log Cabin Republicans* appealed the Ninth Circuit's decision to the Supreme Court, but the Court declined to intervene. 131 S. Ct. 589 (2010). The Ninth Circuit ended up reinstating Phillips's order barring DADT's enforcement on July 6, 2011, *Log Cabin Republicans v. United States*, No. 10-56813, 2011 WL 2982102 (9th Cir. July 15, 2011), until DADT officially expired on September 20, 2011. *See O'Keefe, supra* note 1.

127. 528 F.3d 42 (1st Cir. 2008).

128. *Id.* at 47.

129. *Id.* at 52–53.

130. *Id.*; *see also supra* text accompanying notes 67–73.

131. *Cook*, 528 F.3d at 60 n.10.

132. *Id.* at 55.

and the degree of intrusion against an individual's private sexual life.¹³³ Unlike the Ninth Circuit, the First Circuit afforded significant deference to Congress in military affairs.¹³⁴ After an extensive discussion of the Supreme Court's deferential history with Congress on military affairs, the First Circuit ultimately found Congress's finding that DADT "preserv[es] 'high standards of morale, good order and discipline, and unit cohesion' in the military" to be conclusive.¹³⁵

Witt and *Cook* were the first two Courts of Appeals to interpret *Lawrence*, the liberty interest it recognized, and the standard of review it employed in the context of DADT. However, the circuits were split in their approach.¹³⁶ While the First Circuit's balancing approach to DADT recognized that *Lawrence* required something more than heightened scrutiny, its application, like the Eleventh Circuit's, had minimized the liberty interest in *Lawrence*. Conversely, the Ninth Circuit's three-prong adaptation of *Sell* represented a direct challenge to the Supreme Court on *Lawrence*. Because of this split, many believed the Court would accept the case for review.¹³⁷ On December 23, 2008, one of the plaintiffs in *Cook*, James Pietrangelo, petitioned the Court for a writ of certiorari. A little over six months later, on June 8, 2009, the Supreme Court issued a memorandum decision denying his request.¹³⁸

In the summer of 2009, the stage was set for a Supreme Court decision on DADT. In light of the sweeping language in *Lawrence* and the parallels between Texas's law prohibiting sodomy and DADT,¹³⁹ the Supreme Court presumably would not ignore the issue much longer. The American public finally seemed ready to end the longstanding prohibition on homosexuals serving openly in the military.¹⁴⁰ Even military officials were receptive to seeing the end of the

133. *Id.* at 56.

134. *Id.* at 57 ("It is unquestionable that judicial deference to congressional decision-making in the area of military affairs heavily influences the analysis and resolution of constitutional challenges that arise in this context.")

135. *Id.* at 59.

136. *See, e.g.,* Cecily Walters, *Circuits Split over Military's 'Don't Ask, Don't Tell' Policy*, TRIAL MAG., No. 44, Aug. 2008, at 65.

137. *See id.*

138. *Cook*, 528 F.3d 42 (1st Cir. 2008), *cert. denied sub nom. Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009).

139. Both the Texas law struck down in *Lawrence* and DADT focused on a particular type of conduct. Specifically, Texas's statute criminalized "deviate sexual intercourse," TEX. PENAL CODE ANN. § 21.06(a) (West 2011), *invalidated by Lawrence v. Texas*, 539 U.S. 558 (2003), which the Texas Penal code defined as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01(1). Similarly, DADT prohibited members from "engag[ing] in, attempt[ing] to engage in, or solicit[ing] another to engage in a homosexual act." 10 U.S.C. § 654(b)(1) (2006). DADT defined homosexual acts as "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in [a homosexual act]." *Id.* § 654(f)(3)(A)–(B).

140. *See* Elisabeth Bumiller, *In Military, New Debate Over Policy Toward Gays*, N.Y. TIMES, May 1, 2009, at A14.

discriminating policy.¹⁴¹ However, ignoring the issue is precisely the action the Court chose to take. Why did the Court choose not to decide? Still the better question is how could it *not* decide? When considered as a strategic choice, the Supreme Court's decision to pass on the DADT question in *Cook* in 2009 becomes less overwhelming (and perhaps a little underwhelming).

II. A STRATEGIC COURT

Like all political actors, the Supreme Court acts strategically. The Court acts and makes decisions based on the goals and likely actions of the other main branches.¹⁴² The denial of certiorari in *Cook* happened not long after a Democratic President took office for the first time in eight years.¹⁴³ Joined by a comfortable Democratic majority in Congress,¹⁴⁴ President Obama had already announced that abolishing DADT was a priority.¹⁴⁵ With a Democratic President and majority in Congress, the Supreme Court faced three options: (1) grant certiorari in *Cook*, affirm the First Circuit's holding, and send a strong message of defiance to the new administration and Congress; (2) grant certiorari in *Cook*, reverse the First Circuit's holding, and expand the holding in *Lawrence*; or (3) choose to send a different message—silence.¹⁴⁶

This Part first turns to an explanation of Professors Lee Epstein, Jack Knight, and Andrew Martin's strategic model of judicial behavior and then considers the choice the Justices made regarding DADT.

141. A 2006 military study by Zogby International indicated that 73% of currently serving military members were "comfortable" with gays and lesbians serving openly alongside them. SAM RODGERS, ZOGBY INT'L, OPINIONS OF MILITARY PERSONNEL ON SEXUAL MINORITIES IN THE MILITARY 20 (2006), available at <http://www.palmcenter.org/files/active/0/ZogbyReport.pdf>.

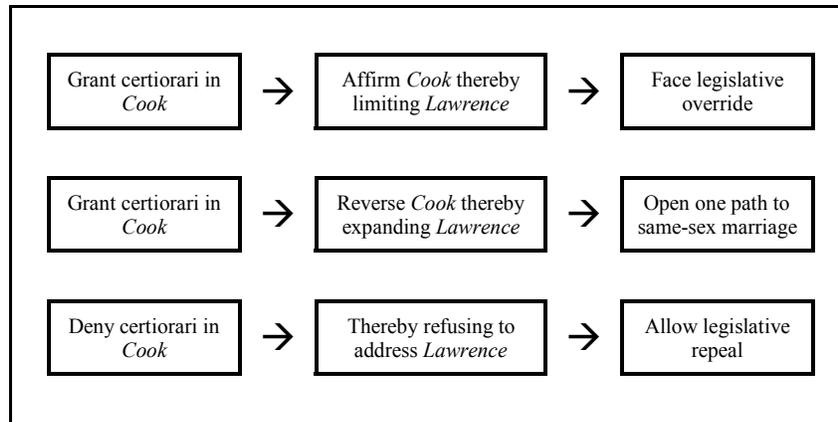
142. See Lee Epstein, Jack Knight, & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 585 (2001).

143. See Adam Nagourney, *Obama: Racial Barrier Falls in Decisive Victory*, N.Y. TIMES, Nov. 5, 2008, at A1.

144. See *id.*

145. See *Open Letter*, *supra* note 5.

146. See *infra* Figure 1 outlining these three options.

Figure 1: The Court's Options in Cook*A. The Judicial Review Game*

Over two hundred years ago, the Supreme Court solidified its power within the system of checks and balances in a single decision, *Marbury v. Madison*.¹⁴⁷ *Marbury* announced the Court's power of judicial review and gave the Court the ability to void any congressional law it deemed unconstitutional.¹⁴⁸ While the power of judicial review is an impressive tool, it reflects a strange situation. How can an unelected Supreme Court have the ability to overrule the decisions of the elected officials in Congress? This situation, labeled the "counter-majoritarian Difficulty" by Alexander Bickel,¹⁴⁹ has been the source of much academic debate over the years.¹⁵⁰

However, according to Epstein, Knight, and Martin, the American people need not worry about the counter-majoritarian difficulty too much.¹⁵¹ Despite the fact that Justices are primarily "single-minded seekers of legal policy,"¹⁵² the separation

147. 5 U.S. 137 (1803).

148. *See id.*

149. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962). Bickel used the phrase "counter-majoritarian difficulty" to describe the contention that judicial review is improper because unelected judges have the power to overrule elected representatives, which, by its nature, is counter to majority will. *See id.*

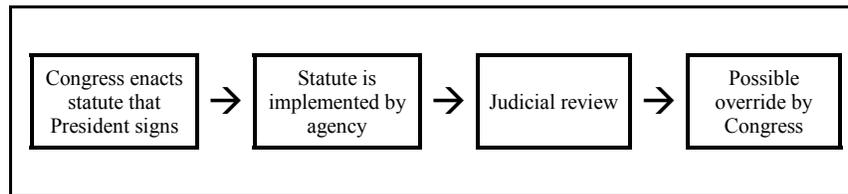
150. *See, e.g.,* Steven G. Calabresi, *Textualism and the Counter-majoritarian Difficulty*, 66 *GEO. WASH. L. REV.* 1373 (1998); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 *N.Y.U. L. REV.* 333 (1998); Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *IOWA L. REV.* 1287 (2004).

151. Epstein et al., *supra* note 142, at 584–85.

152. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10 (1998) (internal citations omitted).

of powers system mandated by the Constitution limits the Court's ability to blindly pursue individual policy and institutional goals.¹⁵³ Instead, the Court has a strategic incentive to anticipate the preferences of elected officials and the American public and to react in a way that best ensures a "long-term effect on the nature and content of the law."¹⁵⁴ The idea is simple. Although the Court interprets the law and has the power to strike down any law Congress may pass, Congress will always have the ability to pass new legislation, which the President can either sign or veto.¹⁵⁵ Professor William Eskridge has named this interplay between the three branches the "Judicial Review Game."¹⁵⁶ Specifically, Article I, Section 7 requires bicameral approval and presentment to the President before a bill becomes law; Article II prohibits Congress from having a role in the law's enforcement; and Article III creates an independent judiciary, the Supreme Court, "to mitigate unjust and partial lawmaking."¹⁵⁷

Figure 2: The Judicial Review Game



Consequently, strategic Supreme Court justices are not likely to vote their sincere preferences on an issue if those preferences are not in line with Congress or the President.¹⁵⁸ Rather, the Court would see not only that Congress and the President could override its position but most likely would if given the opportunity.¹⁵⁹ Instead, the Court rationally chooses to stay at what Epstein, Knight, and Martin call the "indifference point"—the closest point to the Court's ideal policy position without risking congressional reaction.¹⁶⁰ Eskridge contends

153. Epstein et al., *supra* note 142, at 585.

154. *Id.* at 585.

155. *Id.* at 592.

156. William N. Eskridge, Jr., *The Judicial Review Game*, 88 NW. U. L. REV. 382, 384 (1993).

157. *Id.*; see also *infra* Figure 2. Figure 2 was adapted from Eskridge's own figure and illustrates the basic idea of the "judicial review game." Eskridge, *supra* note 156, at 385.

158. See EPSTEIN & KNIGHT, *supra* note 152, at 12–17.

159. Epstein et al., *supra* note 142, at 594.

160. *Id.* Note that "congressional reaction" can refer to two different situations. Congress always has the ability to pass new legislation to bypass a Court decision declaring old legislation unconstitutional. See U.S. CONST. art. I, § 8. Congress also has the ability to override the Court through constitutional amendment, see U.S. CONST. art. V, which is much more difficult. This Note suggests that the Supreme Court would have affirmed *Cook* had it accepted review. By choosing not to review *Cook* at all, the Court essentially allowed DADT to remain in place for an additional year and a half. Assuming, *arguendo*, that the Court would have affirmed *Cook*, Congress might have moved to repeal DADT much sooner.

that this choice is the obvious consequence of the judicial review game.¹⁶¹ What is not an obvious consequence of the judicial review game is that a rational Court can and will employ a variety of tools to pursue its policy preferences.¹⁶² One such tool is the decision to grant or deny certiorari in the first place.

Since the Judiciary Act of 1925, the Supreme Court has been the “master of its domain” and has had sole discretion over its docket.¹⁶³ In a typical year, the Court receives thousands of petitions for review; however, it decides to hear fewer than 5%.¹⁶⁴ The Court’s power to set its own agenda should not be understated. The certiorari process is more than a tool to limit the Court’s caseload to a reasonable number. Rather, the ability to grant review to a case or not gives the Court the ability to “bypass” any given controversy,¹⁶⁵ raise the salience of a political issue,¹⁶⁶ or even lower it.¹⁶⁷ Arguably, deciding not to decide is “among the most important things done by the Supreme Court.”¹⁶⁸

The Court’s agenda-setting power is only getting bigger. In what scholars have dubbed the “incredible shrinking docket,”¹⁶⁹ the Court is taking on fewer cases than ever before. From 1985 to 2004, the number of opinions issued by the Supreme Court shrunk from 161 to 85.¹⁷⁰ The result, according to former D.C. Circuit judge, Kenneth Starr, is less clarity in the law.¹⁷¹ Unlike the Warren Court, whose decision in *Brown v. Board of Education*, for example, “reshap[ed] society’s institutions,”¹⁷² the modern Supreme Court prefers to wait on public opinion and have the “last word” on divisive issues.¹⁷³ This measured and reflective approach, Starr suggests, embodies a “flexible, case-by-case approach to constitutional interpretation” that is completely unpredictable.¹⁷⁴ In 2009, the Court heard arguments in a mere ninety-two cases.¹⁷⁵ *Cook v. Gates* was not one of them.¹⁷⁶ Although not instantly

161. Eskridge, *supra* note 156, at 387.

162. *See id.*

163. Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1364 (2006); *see also* Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 392 (2004).

164. *See* PERRY, *supra* note 37, at 235.

165. Cordray & Cordray, *supra* note 163, at 389.

166. *See id.* at 452.

167. *See id.*

168. *Id.* at 390 (internal citations omitted).

169. Erwin Chemerinsky, *The Incredible Shrinking Docket*, TRIAL MAG., No. 43, Mar. 2007, at 64; *see also* Adam Liptak, *Justices Opt for Fewer Cases, and Professors and Lawyers Ponder Why*, N.Y. TIMES, Sept. 29, 2009, at A18.

170. *See* Starr, *supra* note 163, at 1369.

171. *Id.* at 1378–82.

172. *Id.* at 1379.

173. *Id.* at 1378.

174. *Id.* at 1382.

175. *2009 Term Opinions of the Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=09>. Compare 2009 with 1926, the year following the Judiciary Act of 1925, when the Court issued 223 opinions. Starr, *supra* note 163, at 1369.

176. *See 2009 Term Opinions of the Court*, *supra* note 175.

obvious, Starr's argument fits in nicely with the story of DADT and the Court's strategic decision.

B. The DADT Game

1. The Inevitable Repeal of DADT

By 2009, the repeal of DADT was unavoidable. Former President Clinton's promise of a "live-and-let-live" policy¹⁷⁷ was, in fact, misleading.¹⁷⁸ DADT was the only federal law that permitted the outright firing of U.S. citizens on the basis of sexual orientation.¹⁷⁹ The policy had led to the discharge of more than 13,000 men and women since 1993,¹⁸⁰ sending home valuable, much-needed military personnel in times of war. Moreover, discharge under DADT resulted in devastating personal and professional consequences¹⁸¹ and, from an economic perspective, cost the government *a lot* of money: the average annual cost from 1994–2003 just to recruit replacements for those discharged under DADT was \$95 million a year.¹⁸² Perhaps the strongest argument in favor of abolishing DADT, however, was the time of war paradox. If gay and lesbian soldiers were supposedly weak, untrustworthy, and a detriment to unit cohesion, why did the military retain them at higher rates during times of war?¹⁸³

The presidential election in 2008 brought DADT to the forefront of the public's eye once again. By that time, both the American public¹⁸⁴ and military officials¹⁸⁵ had warmed to the idea of ending the discriminatory policy. The candidates were split along party lines—Republican John McCain adamantly opposed repeal, while Democrat Barack Obama was strongly in favor.¹⁸⁶ With Obama's decisive victory in November 2008,¹⁸⁷ the legislative repeal of DADT became inevitable.

177. Alexander, *supra* note 10, at 410.

178. Correales, *supra* note 12, at 423.

179. Hecht, *supra* note 10, at 46.

180. Bryan Bender, *Continued Discharges Anger 'Don't Ask, Don't Tell' Critics: Gay-Rights Groups Urge Reversal Now*, BOS. GLOBE, May 20, 2009, http://www.boston.com/news/nation/washington/articles/2009/05/20/continued_discharges_anger_dont_ask_dont_tell_critics/.

181. See Correales, *supra* note 12, at 415 ("For many gay service members, the price of serving in the military imposed by the policy is a life of deception, where the only way to survive is by passing as heterosexual twenty-four hours a day, seven days a week, whether on or off military bases.").

182. *Id.* at 431.

183. Gustavo Oliveira, Note, *Cook v. Gates and Witt v. Department of the Air Force: Judicial Deference and the Future of Don't Ask, Don't Tell*, 64 U. MIAMI L. REV. 397, 398 (2009).

184. See Bumiller, *supra* note 140, at A14.

185. See RODGERS, *supra* note 141, at 20.

186. See Robin Toner, *For 'Don't Ask, Don't Tell,' Split on Party Lines*, N.Y. TIMES, June 8, 2007, at A1. Like other Republicans, one of McCain's primary arguments against repealing DADT in 2008 was the War in Iraq. See *id.* (indicating that not one of the Republican candidates in 2008 supported gays and lesbians serving openly in the military).

187. See Nagourney, *supra* note 143, at A1.

2. The Court's Strategic Decision

By the time the petition for certiorari in *Cook v. Gates* reached the Court in 2009, the Court was in a unique position. Clearly the legislative repeal of DADT was just a matter of time.¹⁸⁸ However, the central issue raised in *Cook*—whether *Lawrence* recognized a fundamental right to private sexual intimacy¹⁸⁹—was still a highly controversial issue.¹⁹⁰ The Court had already demonstrated its unwillingness to revisit *Lawrence v. Texas* in 2005 when it refused to consider Florida's gay adoption statute and Alabama's sex toy ban.¹⁹¹ By denying certiorari in *Cook* over four years later,¹⁹² the Court seemed to indicate that not much had changed.

A brief look at the composition of the Supreme Court in 2009 may be one explanation about why the Court passed on *Cook*. Recall Epstein and Knight's argument that Justices are "single-minded seekers of legal policy."¹⁹³ On this view, the decision a Justice makes in a single case should reflect his or her most preferred policy goal.¹⁹⁴ In June 2009, five of the six Justices in the *Lawrence* majority remained on the Court—Kennedy, Souter, Ginsburg, Breyer, and Stevens.¹⁹⁵ While Souter, Ginsburg, Breyer, and Stevens presumably would have voted in favor of extending *Lawrence* and repealing DADT, Justice Kennedy had gone to great lengths to limit the scope of *Lawrence*.¹⁹⁶ A decision on DADT could not occur without either limiting or expanding the central holding in *Lawrence*,¹⁹⁷ and Justice Kennedy's opinion had suggested that expansion was not an option. Moreover, in the years following *Lawrence*, two strong conservative voices came to the Court. Chief Justice Roberts and Justice Alito joined the Supreme Court in 2005 and 2006, respectively.¹⁹⁸ With their presence, the Court moved sharply to the right, reaching

188. See *supra* Part II.B.1.

189. 528 F.3d 42, 52–53, 56 (1st Cir. 2008).

190. See *supra* text accompanying notes 61–74, 96–100.

191. See *supra* text accompanying notes 104–113.

192. *Cook*, 528 F.3d 42, cert. denied sub nom. Pietrangelo v. Gates, 129 S. Ct. 2763 (2009).

193. EPSTEIN & KNIGHT, *supra* note 152, at 10 (internal citations omitted).

194. See text accompanying notes 158–62.

195. See *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx>.

196. See *supra* text accompanying notes 83–88; see also Klarman, *supra* note 82, at 450. The sixth vote, Justice O'Connor, retired from the Court in 2006. See *Members of the Supreme Court of the United States*, *supra* note 195. Like Justice Kennedy, Justice O'Connor's concurrence made it quite clear that she was reluctant to expand the scope of *Lawrence*. See *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (indicating that "national security" and "preserving the traditional institution of marriage" were legitimate state interests and that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group").

197. See *supra* text accompanying notes 115–38.

198. See *Members of the Supreme Court of the United States*, *supra* note 195.

conservative decisions nearly 71% of the time,¹⁹⁹ and the 2008 presidential election made it clear how conservatives viewed the DADT policy.²⁰⁰

Still, composition alone cannot explain the Court's decision to side-step the *Lawrence* question. Like Epstein and Knight suggest, the Court is constrained by other factors, including Congress, the President, and the American public.²⁰¹ Another constraint stems from the concept of institutional legitimacy.²⁰² Scholars have long recognized that the "erosion of public support and institutional legitimacy has negative consequences for the Court's power and institutional integrity."²⁰³ Prior to her nomination to the Court, Justice Ginsburg discussed institutional legitimacy during a famous lecture criticizing *Roe v. Wade*: "[J]udges play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . participate in a dialogue with other organs of government, and with the people as well."²⁰⁴ In a lecture to the D.C. Circuit in 2000, former Chief Justice Rehnquist seconded Justice Ginsburg's point, declaring that the Court's integrity is "dependent upon the public's respect for the judiciary."²⁰⁵ Indeed, the Court has a strong incentive to be aware of public opinion on controversial issues,²⁰⁶ which invariably include gay rights.

What happened in the 2010 Iowa election provides a good illustration of what can happen when a court fails to move cautiously in the area of gay rights. In 2009, the Iowa Supreme Court unanimously voted in *Varnum v. Brien* to legalize same-sex marriage in Iowa.²⁰⁷ But *Varnum* was not in line with Iowa public opinion; only 44% of the Iowa population supported gay marriage in 2010.²⁰⁸ On November 2,

199. See *Measuring the Conservatism of the Roberts Court*, N.Y. TIMES, July 24, 2010, <http://www.nytimes.com/interactive/2010/07/25/us/20100725-roberts-graphic.html>.

200. See *supra* text accompanying notes 184–87.

201. See *supra* text accompanying notes 158–62.

202. See, e.g., Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973 (2009).

203. See *id.* (finding that as public support for the Supreme Court declines, the Court strikes down fewer laws).

204. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992). Justice Ginsburg's main critique of *Roe v. Wade* was the fact that the Court "invited no dialogue with legislators" and that because of this, *Roe* "prolonged divisiveness and deferred stable settlement of the issue" until *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), was announced nearly twenty years later. Ginsburg, *supra*, at 1205–08.

205. Chief Justice William Rehnquist, Remarks of the Chief Justice at the D.C. Circuit Judicial Conference: Reflection on the History and Future of the Supreme Court of the United States (June 16, 2000).

206. See Clark, *supra* note 202, at 973 (indicating that the Court recognizes its limits and will sometimes exercise "self-restraint for fear of acting without public support"); see also THE FEDERALIST NO. 78 (Alexander Hamilton) (where Hamilton called the Court the "least dangerous branch" and discussed how the Court's dependence upon the other two branches of government made it less powerful).

207. 763 N.W.2d 862 (Iowa 2009).

208. Andrew Gelman, Jeffrey Lax & Justin Phillips, *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 22, 2010, at WK3 ("Among the five states that currently allow same-sex marriage, Iowa is the outlier. It is the only one of those states where support falls below half, at 44 percent.").

2010, Iowa residents voted to remove three of the Iowa Supreme Court justices who took part in *Varnum* in a judicial retention election.²⁰⁹ Public dissatisfaction with the *Varnum* decision was clear when supporters of the campaign celebrated with signs declaring “No Activist Judges.”²¹⁰ The Iowa Supreme Court was publicly rebuked because it ruled in favor of same-sex marriage before a majority of Iowa residents were ready. Such a public rebuke suggests that the Iowa court seriously miscalculated Iowa public opinion in 2009 and took a misguided step in the wrong direction. As a result, three justices lost their jobs and *Varnum* was left seriously weakened.²¹¹

Iowa public opinion on same-sex marriage was reflective of the entire country in May 2009. While a May 2009 poll indicated that nearly 70% of Americans fully supported the repeal of DADT,²¹² only 40% of Americans supported same-sex marriage at that time.²¹³ 57% remained opposed.²¹⁴ Unlike *Varnum*, the holding in *Cook* had nothing to do with same-sex marriage. However, the First Circuit had directly interpreted *Lawrence*, the liberty interest it recognized, and the standard of review that should apply.²¹⁵ If the Court had granted certiorari in *Cook*, it would have been difficult to avoid *Lawrence*. *Lawrence* had already been used by many state courts as a stepping stone to same-sex marriage.²¹⁶ Consider again the holding in *Goodridge*: “[In *Lawrence*], the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment . . . precludes government intrusion into the deeply personal realms of consensual adult expression of intimacy and one’s choice of an intimate partner.”²¹⁷ Was the Supreme Court willing to return to *Lawrence* and open up such a broad liberty? Was the Court willing to reject it? Return for a moment to Starr’s argument.²¹⁸ If the modern Court prefers to have the last word on the major issues that divide the nation, the judicial repeal of DADT had to wait. It is true that the Court does not need to worry about judicial retention elections; Supreme Court Justices have life tenure. However, the Court is concerned with something bigger: its institutional legitimacy and integrity.²¹⁹ The surrounding political climate regarding gay rights was

209. See A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

210. A. G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/03/us/politics/03judges.html>.

211. See Sulzberger, *supra* note 209, at A1.

212. See Lymari Morales, *Conservatives Shift in Favor of Openly Gay Service Members*, GALLUP (June 5, 2009), <http://www.gallup.com/poll/120764/Conservatives-Shift-Favor-Openly-Gay-Service-Members.aspx>. According to the poll, 64% of men favored repeal in 2009 compared to 73% of women. *Id.*

213. See Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP (May 27, 2009), <http://www.gallup.com/poll/118378/Majority-Americans-Continue-Oppose-Gay-Marriage.aspx>.

214. See *id.*

215. See Walters, *supra* note 136, at 65.

216. See *supra* notes 89–95 and accompanying text.

217. *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003).

218. See *supra* text accompanying notes 171–74.

219. See *supra* text accompanying notes 202–06.

anything but settled in 2009, and unlike the Iowa Supreme Court, the Supreme Court would not move without the support of the American public.

In 2005, Professor Michael Klarman wrote an essay comparing the *Lawrence* decision to the Supreme Court's landmark decision in *Brown v. Board of Education*.²²⁰ Klarman argued that the decision in *Lawrence*, like *Brown*, was merely a reflection of the current social attitude toward criminal prosecution for private sexual acts and not a "vanguard of a social reform movement."²²¹ Klarman pointed out that *Brown*, intentionally narrow and limited to education, only came after opinion polls showed that a majority of Americans supported an end to segregation in schools.²²² In fact, when the Court had the post-*Brown* opportunity to extend its holding and invalidate antimiscegenation laws as early as 1955, the Court balked.²²³ The case was *Naim v. Naim*.²²⁴

After *Brown*, a Chinese man who was married to a white woman in another state challenged a Virginia antimiscegenation law as unconstitutional under the Due Process and Equal Protection Clauses.²²⁵ Klarman maintains that *Naim* "was the last case the Justices wished to see on their docket in 1955," but the case fell within the Court's mandatory jurisdiction at the time.²²⁶ The Court decided to simply remand *Naim* to the Virginia appellate court, leaving instructions to further remand the case to the trial court for further factual determinations.²²⁷ When the Virginia court refused to comply with the Court's instructions, the petitioner again appealed to the Supreme Court.²²⁸ This time, the Court dismissed the case for lacking a "properly presented federal question."²²⁹ Klarman contends that the Court preferred "being humiliated" to "further stroking the fires of racial controversy ignited by *Brown*."²³⁰ Not until thirteen years after *Brown*, in *Loving v. Virginia*,²³¹ would the Court move to strike down an antimiscegenation law.

The repeal of DADT was inevitable regardless of the Court's decision to grant review in *Cook* or not, but the decision to move forward with *Lawrence* was not. By avoiding *Cook* in 2009, the Court strategically postponed any further judicial discussion about *Lawrence* and effectively delayed one possible route to the judicial recognition of same-sex marriage. Part III considers the consequences of the Court's behavior and what the legislative repeal of DADT may mean for the future of the gay rights movement's success in the judiciary.

220. See Klarman, *supra* note 82.

221. *Id.* at 444–45.

222. *Id.* at 445–46.

223. *Id.* at 447.

224. 87 S.E.2d 749 (Va. 1955), *vacated*, 350 U.S. 891 (1955).

225. *Id.* at 751.

226. Klarman, *supra* note 82, at 447.

227. *Naim*, 350 U.S. 891.

228. See Klarman, *supra* note 82, at 449.

229. *Naim v. Naim*, 350 U.S. 985, 985 (1956).

230. Klarman, *supra* note 82, at 449.

231. 388 U.S. 1 (1967).

III. THE FUTURE OF GAY RIGHTS IN THE JUDICIARY

Despite the legislative repeal of DADT in late 2010, the Supreme Court's decision to circumvent the issues raised by a challenge to DADT in 2009 remains significant for several reasons. First, DADT's days were limited. By the time the debate on DADT resurfaced in 2010, DADT had become "a near-perfect issue" for the gay rights movement.²³² Many of DADT's opponents were gays and lesbians who had served "valiantly" themselves,²³³ and the American public was fully behind an end to the discriminating ban. In fact, a May 2010 Gallup Poll showed that nearly 70% of Americans supported repeal.²³⁴ By December, that percentage had grown to nearly 77%.²³⁵ Moreover, unlike same-sex marriage or anti-discrimination laws, the legislative repeal of DADT did not embody an official government endorsement of homosexuality. Rather, repeal merely symbolized the government's indifference to homosexuality within the relatively small military community.²³⁶ Lastly, the legislative repeal of DADT took seventeen years to materialize despite strong and continuous public opposition to DADT throughout its existence.²³⁷ Such a long period of time, according to Professor George Chauncey, is "not a sign of gay political power but of continuing gay political weakness."²³⁸

When one looks at the bigger picture, the fall of DADT stands for limited progress. The biggest issue for gay Americans remains same-sex marriage and all the federal benefits that come with it, such as Social Security, adoption rights, and tax benefits.²³⁹ In the United States, only six states and the District of Columbia recognize same-sex marriage.²⁴⁰ Even within these jurisdictions, the federal Defense of Marriage Act (DOMA), which defines marriage as that between one man and one woman when "determining the meaning of any Act of Congress,"²⁴¹ still prevents married same-sex couples from receiving certain federal benefits.²⁴²

232. Fahrenthold, *supra* note 8.

233. *See id.*

234. *See* Lymari Morales, *In U.S., Broad, Steady Support for Openly Gay Service Members*, GALLUP (May 10, 2010), <http://www.gallup.com/poll/127904/Broad-Steady-Support-Openly-Gay-Service-Members.aspx>.

235. *See* Ed O'Keefe & Jon Cohen, *Most Back Repealing 'Don't Ask, Don't Tell,' Poll Says*, WASH. POST, Dec. 15, 2010, http://voices.washingtonpost.com/federal-eye/2010/12/most_back_repealing_dont_ask_d.html.

236. *See* Fahrenthold, *supra* note 8.

237. *See id.*

238. *Id.*

239. Sheryl Gay Stolberg, *One Battle Finished, Gay Rights Activists Shift Sights*, N.Y. TIMES, Dec. 20, 2010, at A16.

240. Nicholas Confessore, *Beyond New York, Gay Marriage Faces Hurdles*, N.Y. TIMES, June 27, 2011, at A1. Same-sex marriage is now recognized in the District of Columbia and Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont. *See id.*

241. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (codified in scattered sections of 1 and 28 U.S.C.).

242. For example, married persons can obtain considerable tax savings by filing jointly under section 1 of the Internal Revenue Code, *see* I.R.S. Publication 17, at 20 (Dec. 8, 2010) ("You will generally pay more combined tax on separate returns than you would on a joint

Furthermore, twenty-nine states have enacted some type of constitutional restriction or ban on same-sex marriage.²⁴³ Other states are still considering adding one. The Indiana Senate, for example, passed a proposed amendment as recently as last March, which would amend the state's constitution to ban same-sex marriage.²⁴⁴ Another twelve states have enacted some type of statutory restriction or ban on same-sex marriage.²⁴⁵ A recent development in the Justice Department has given gay rights activists a new reason to hope for change. Just two months after announcing that his position on same-sex marriage was "evolving,"²⁴⁶ President Obama instructed the Justice Department to stop defending DOMA.²⁴⁷ The President's decision came after his administration had spent two years defending the bill.²⁴⁸ The Department of Justice will continue to enforce DOMA, however, until a final court decision is made on its constitutionality,²⁴⁹ and congressional Republicans have pledged to continue to defend DOMA.²⁵⁰ Most significantly, President Obama faces a difficult congressional climate in the coming 2012 presidential election.

Despite these setbacks, federal courts have continued to apply *Lawrence* in favorable decisions for the gay rights movement. In 2010, two decisions were particularly significant. In *Perry v. Schwarzenegger*, Judge Vaughn Walker struck down Proposition 8—a voter-approved ban on same-sex marriages in California—on substantive due process and equal protection grounds.²⁵¹ Broadly defining the substantive fundamental right at stake as the "right to marry,"²⁵² Walker's memorandum decision included a heading that directly baited the Supreme Court and Justice Kennedy on *Lawrence*: "Proposition 8 is unconstitutional because it denies plaintiffs a fundamental right without a legitimate (much less compelling) reason."²⁵³ The Ninth Circuit heard oral arguments in *Perry* last December.²⁵⁴ But when former California Governor Schwarzenegger and current Governor Jerry Brown refused to continue to defend Proposition 8, the Ninth Circuit asked the California Supreme Court to determine whether conservative legal groups fighting

return"); however, under DOMA, married same-sex couples are unable to take advantage of these potential savings. See Stolberg, *supra* note 239, at A16.

243. Confessore, *supra* note 240, at A1.

244. See *Indiana Senate Approves Gay Marriage Amendment*, THEINDYCHANNEL (Mar. 29, 2011), <http://www.theindychannel.com/politics/27360302/detail.html>.

245. Confessore, *supra* note 240, at A1.

246. Perry Bacon Jr., *Obama Says His Views on Same-Sex Marriage Are 'Evolving,'* WASH. POST, Dec. 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/23/AR2010122301859.html>.

247. See Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1.

248. See *id.*

249. See John Schwartz, *After New York, New Look at Defense of Marriage Act*, N.Y. TIMES, June 28, 2011, at A12.

250. See Jennifer Steinhauer, *House Republicans Step in to Defend Marriage Act and Dodge a Party Debate*, N.Y. TIMES, Mar. 5, 2011, at A16.

251. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

252. See *id.* at 991.

253. *Id.* at 994.

254. Jesse McKinley, *Panel Hears Same-Sex Marriage Debate*, N.Y. TIMES, Dec. 7, 2010, at A19.

Perry had standing to continue on.²⁵⁵ The California Supreme Court heard arguments on the standing issue on September 6, 2011²⁵⁶ and will soon weigh in on the issue. Still, many expect that the Supreme Court will ultimately resolve the case.²⁵⁷ In the second decision, *Gill v. Office of Personnel Management*, handed down on July 8, 2010, Judge Joseph Tauro struck down section 3 of DOMA as a violation of the Equal Protection Clause.²⁵⁸ The First Circuit should hear arguments in the case this year.²⁵⁹

With *Perry* and *Gill*, the Supreme Court will have another opportunity to revisit its decision in *Lawrence*. In *Cook*, the Court was not willing to go there, and the progression of gay rights in the judiciary seemed poised to return to the state of the *Bowers* era.²⁶⁰ Perhaps in *Perry* or *Gill* the Court will try to reclaim the title of “an institution where gay Americans can seek justice.”²⁶¹

CONCLUSION

Like the opinion in *Brown v. Board of Education*, *Lawrence v. Texas* was consciously written to avoid a controversial issue,²⁶² same-sex marriage. The Supreme Court has been strategically side-stepping that issue ever since. The story of DADT and the Supreme Court’s decision to deny certiorari to *Cook v. Gates* in 2009 provide an especially telling illustration of the Court’s strategic behavior. In 2005, Professor Klarman remarked:

Five members of this Court are not about to strike down any time soon bans on same-sex marriage—not when public opinion strongly supports such laws. Figuring out how the Court in such a case would distinguish *Lawrence* is an interesting question. Perhaps the Court would simply refuse to take such a case²⁶³

Five years later, it is remarkable just how right Klarman was. While the Supreme Court’s decision to pass on DADT in *Cook v. Gates* was not about same-sex marriage, the issue was lurking below the surface. The American public

255. *Perry v. Schwarzenegger*, 630 F.3d 898 (9th Cir. 2011); see also Jesse McKinley, *California: Judges as for Clarity on Same-Sex Marriage Measure*, N.Y. TIMES, Jan. 5, 2011, at A13.

256. *California Supreme Court to Hear Proposition 8 Case Sept. 6*, L.A. TIMES, July 28, 2011, <http://latimesblogs.latimes.com/lanow/2011/07/proposition-8-legal-battle-standing-california-supreme-court.html>.

257. See McKinley, *supra* note 254, at A19.

258. 669 F. Supp. 2d 374 (D. Mass. 2010).

259. On February 24, 2011, the Obama administration notified the First Circuit of its decision not to defend DOMA. See Letter of Tony West, Assistant Attorney General, to United States Court of Appeals for the First Circuit (Feb. 24, 2011), available at <http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/doj-letter-re-ma-doma-cases-02-2011.pdf>.

260. See *supra* text accompanying notes 35–54.

261. Leslie, *supra* note 35, at 219.

262. See Klarman, *supra* note 82, at 450.

263. *Id.* at 452 (emphasis omitted) (footnotes omitted).

was not ready for the Court to take the next step in its substantive due process protections for gay rights in 2009. Three Iowa justices learned this lesson the hard way. It took the Supreme Court thirteen years to extend *Brown* to antimiscegenation laws.²⁶⁴ So far only eight years have passed since *Lawrence*. Professor Tribe was right to call *Lawrence* the *Brown v. Board of Education* of the gay rights movement, but perhaps for the wrong reason. *Lawrence*, like *Brown*, was not a “vanguard of social reform” but a “laggard” waiting complacently on public opinion.²⁶⁵ The unfortunate consequence of the Court’s idleness is that full constitutional respect and equal protection under the law for gay Americans must wait.

264. Notably, although Justice Ginsburg rejected the idea that courts should shape policy alone, *see supra* text accompanying note 204, she conceded that *Brown v. Board of Education* is one example where the Supreme Court was right to step ahead of other political branches. *See* Ginsburg, *supra* note 204, at 1206. In fairness, Justice Ginsburg quickly pointed out the holding in *Brown* was quite limited. *See id.* at 1207.

265. Klarman, *supra* note 82, at 440–45.