THEIR LOVE IS HERE TO STAY:[1] WHY THE SUPREME COURT CANNOT TURN BACK THE HANDS OF TIME

MARSHA B. FREEMAN*

INTRODUCTION

Throughout history, and certainly throughout the history of this nation, change has been a constant. Customs and mores have moved back and forth between liberal and conservative, freewheeling to draconian, with never-ending changes in between.[2] Political changes have concurrently ushered in administrations and legislatures who have idealized many of these societal mores.[3]

In the 1950s, amid widespread, systemic, and in many cases fiercely defended patterns of segregation in this nation, the Supreme Court of the United States told the country that the time had come for forced integration.[4] In 1973, the Court allowed legal access to abortion,[5] and in 2003, put an end to criminal sanctions for homosexuality,[6] which it had upheld only seventeen years earlier.[7]

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[1] The title of this article is a play on the song "Our Love is Here to Stay," by George Gershwin. The title refers to the highly contentious issue of same-sex relationships, including marriage, under discussion in the individual states today, as well as the subject of a proposed Constitutional Amendment entitled, "Federal Marriage Amendment" also known as the Marriage Protection Amendment. H.J. Res. 56 (The last vote on this Amendment was on July 6, 2006. It failed 236 to 187, 54 votes short of the 2/3 needed to pass).

* Professor of Law, Barry University School of Law. I would like to thank my research assistant, Jessica Thomas, for the invaluable effort she provided in researching this article.

[2] Recent history alone has seen this nation move from prohibition in the 1920s to "free love" in the 1970s.

[3] For example, under Presidencies of Coolidge and Hoover in the 1920s, Randall G. Holcombe, *The Growth of the Federal Government in the 1920s*, 16 THE CATO JOURNAL 175 (1993), and Carter in the 1970s, Andrew R. Flint & Joy Porter, *Jimmy Carter: The Re-emergence of Faith-Based Politics and the Abortion Rights Issues*, 35 PRESIDENTIAL STUDIES QUARTERLY 28 (2005).

[4] *See* Brown v. Board of Educ., 347 U.S. 483 (1954). History typically depicts the South as the most segregated part of the country. David R. Jansson, *'A Geography of Racism': Internal Orientalism and the Construction of American National Identity in the Film* Mississippi Burning. 7 NATIONAL IDENTITIES 265 (2005): 265-285. Nevertheless, *Brown* was filed in the Midwest, and segregation was well known as a way of life in even the most northern of cities, hence de facto segregation—as well as other areas of bigotry—in areas such as Roxbury, Massachusetts and Harlem, New York. Thomas F. Pettigrew, *Complexity and Change in American Racial Patterns: A Social Psychological View Thomas F. Pettigrew Daedalus*, 94 THE NEGRO AMERICAN 974 (1965).

[5] *See* Roe v. Wade, 410 U.S. 113 (1973).

[6] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[7] *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

Often times during the course of a semester I will ask my students to consider whether, in a case we are covering, the Supreme Court led the nation, possibly kicking and screaming,[8] into the next era in law, or, to the contrary, society pushed the Court to the only conclusion it could come to under the circumstances.[9] While great debate over how a nominee would change the outcome of future cases ensues each time a vacancy appears on the Court, in reality, it is naïve to think that every change in the status quo, especially in controversial areas, has been or could be accomplished only through a corresponding change in the political composition of the Court. This is especially so, since the political Court's makeup actually changes so infrequently.[10] In fact, in a number of instances, while the Court's composition has remained ideologically similar to what it was during the deliberations of an earlier, similar issue, the outcome of the newer case has been diametrically opposed to the previous holding.[11]

Recent changes on the Court, specifically the retirements of Justice Sandra Day O'Connor—long considered the "swing" vote on a fairly conservative Court[12]—and Justice John Paul Stevens—the *de facto* leader of the liberal bloc[13]—as well as the appointments of known conservatives Chief Justice John Roberts[14] and Associate Justice Samuel Alito,[15] have led to speculation on both sides of the

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[8] *See Brown*, 347 U.S. 483; J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society – Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968); Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 THE JOURNAL OF POLITICS 1114 (1997).

[9] *See Lawrence*, 539 U.S. 558; *Bowers*, 478 U.S. 186, for examples of societal changes dictating a change in the law.

[10] Since 1950 there have been twenty-three new justices. An average of four Justices were appointed every ten years. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1601 (2009).

[11] *See Bowers*, 478 U.S.186; Lawrence 539 U.S. 558. Both cases deal with state criminal statutes involving private sexual acts between consenting males, but have radically different outcomes. When *Bowers* was decided in 1986, the Court had just added Justices O'Connor, Kennedy, and Scalia. Seventeen years later, Justices Alito, and Roberts were added. However, the majority was still composed of the same Justices who made the previous decision and the makeup of the Court was still perceived to lean conservative. Looking at the ideological makeup of the Court during the time of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Educ.*, 347 U.S. 483 (1954), may not be as helpful since the makeup of society was also so different during that time span.

[12] Charles Lane, *In the Center, Hers Was the Vote that Counted*, WASHINGTON POST, July 2, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070101087.html; Tom Curry, *O'Connor Had Immense Power as a Swing Vote*, WASHINGTON POST, July 1, 2005, http://www.msnbc.msn.com/id/5304484/.

[13] Medha Gargeya, *Active Breyer: Making the Liberal Bloc Work*, HARVARD POLITICAL REVIEW, Oct. 10, 2010, *available at* http://hpronline.org/hprgument/active-breyer-making-the-liberal-bloc-work/.

[14] Official Oath Taken September 29, 2005, Chief Justice John Roberts was appointed by President G.W. Bush.

[15] Although former Chief Justice Rehnquist also died during this time, the appointment of John Roberts to replace him was not considered a change in the ideological makeup of the Court. The appointment of Alito, however, to replace retiring Justice O'Connor has led to far more concern among non-conservatives that Justice O'Connor's willingness to side with the more liberal side of the Court in a number of cases will be nullified. Justice Alito was sworn in on July 31, 2006 and appointed by President G.W. Bush. *See* Robert Sedler, *The Supreme Court Will Not Overrule* Roe v. Wade, 34 HOFSTRA L. REV. 1207 (2006) (discussing the belief that replacing O'Connor with Alito would give the

political spectrum that the Court is destined to change and/or overturn long-established law.[16] This, in turn, leads to quandaries by interested parties of whether and when to bring challenges on controversial issues.[17] Much of the discussion in this article focuses on contentious issues, such as abortion and same-sex relationships, including partner rights, adoption and other societal benefits. However, this article will also look at the history of major issues in controversy to determine how and why they were resolved and how history may give guidance to the likely resolution of future issues.

Part I will take a brief look at the Court as an institution, Presidential appointments and judicial perceptions. Part II will look at a brief history of some landmark cases and their surroundings, including the makeup of the Court at each of these times in history, as well as the societal influences that surrounded them. A major focus will be whether, in many of the precedential cases, it was the Court and/or societal changes that paved the way to the ultimate decisions. It will look at what role public opinion may have played in these holdings, including the kinds of violent confrontations and mass rallies preceding decisions such as *Brown v. Board of Education*[18] and *Roe v. Wade,*[19] and the continuing controversies surrounding such topics as new cases have arisen. It will address changes both in the makeup of the bench and in societal mores between the time of an earlier decision such as *Roe*[20] and later challenges to it, as in *Planned Parenthood v. Casey,*[21] to try to determine what might have been the predicted outcomes of each and whether those predictions held true. Much of the research is focused on family and privacy issues, looking to the string of "privacy cases" beginning with *Griswold v. Connecticut*[22]—as well as cases prior to this seminal case, and culminating, at least presently, in *Planned Parenthood v. Casey*[23] and *Ayotte v. Planned Parenthood.*[24]

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conservative movement a fairly reliable bloc on the Court).

16 Richard W. Stevenson & Linda Greenhouse, *O'Connor, First Woman on High Court, Resigns After 24 Years,* N.Y. TIMES, July 1, 2005, *available at* http://www.nytimes.com/2005/07/01/politics/01cnd court.html?_r=1&pagewanted=print.

17 Such controversial Acts as the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), have not been directly appealed since its passage in 1996, perhaps due to the inability on either side of the issue to have confidence in its outcome. One of the first challenges has been making its way up the court ladder. *See* Miller v. Jenkins, 129 U.S. 306 (2008).

18 *See* Brown v. Board of Educ., 347 U.S. 483 (1954); ACLU Marches for Women's Lives, Saying Reproductive Freedom Is a Core Civil Liberty, Apr. 21, 2004, http://www.aclu.org/reproductive-freedom/aclu-marches-womens-lives-saying-reproductive-freedom-core-civil-liberty?tab=misc; Sebastian Kitchen, *45 Years After Selma Civil Rights March, Some See Ways To Go,* USA TODAY, Mar. 3, 2010, http://www.usatoday.com/news/nation/2010-03-07-selma_N.htm. While this article is not focused on legislative action, it cannot help but also note the relation to acts such as the Civil Rights Act of 1964.

19 Roe v. Wade, 410 U.S. 113 (1973).

20 *Id.*

21 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

22 Griswold v. Connecticut, 381 U.S. 479 (1965).

23 *Casey,* 505 U.S. 833.

24 Ayotte v. Planned Parenthood, 546 U.S. 320 (2006).

Large parts of this paper are focused on family and privacy issues, but these will be compared and contrasted with excursions into other areas as well, including civil liberties. To this end, it will look at the recent case of *Rumsfeld v. Padilla,*[25] comparing it to the McCarthy-era string of cases starting with *Bailey v. Richardson.*[26] *Padilla* gives an opportunity to examine the Court's possible trend towards more collective, rather than individual, rights and determine whether such a trend can be reconciled with some of the family law decisions looming before the Court.[27]

In focusing on the types of predictors present during the deliberations of many of these cases, this article will attempt to dissect the composition of past Courts to determine the relevancy of the ideological makeup at the time to the outcome of specific cases. This article will also look at the history to try to determine whether individual courts have followed their perceived ideologies or forged different paths according to the needs and mores of the nation at any given time. It will look to a number of case revisions and even reversals to see why and when these occurred and whether they were related to or in spite of the political views on the Court at the time.

In addition to case law, this article will examine legislative enactments and anticipated challenges to them, including the Defense of Marriage Act,[28] and attempts to bring about state and federal constitutional amendments regarding same-sex marriage and civil unions.

Part III will look at whether individual courts have taken the lead in attempting to influence changes in law or merely reacted as those cases arose before them. The Court has frequently determined how laws will or will not change by the cases it accepts or rejects for review. The question now becomes whether and when the Court directly and/or indirectly influences which cases are brought through its own particular ideology. Part III will seek to analogize from this history how and why the present Court may vote on the controversial subjects presently or likely to come before it, with a spotlight on family and privacy issues, and the reason for such predictions, ranging from framing legislation with the end results in mind to helping citizens anticipate how the Court may affect their lives with its actions.

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[25] Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[26] Bailey v. Richardson, 341 U.S. 918 (1951). The Court affirmed by an equally divided court the D.C. circuit's refusal to find a due process violation in Bailey's loss of employment in a case involving national security concerns, which had specifically held she did not have the right to either know her accusers or confront them. Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950).

[27] This is not necessarily a troubling issue, as the Court has historically frequently viewed different areas of law as requiring different standards of interpretation. *See* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) *aff'd by an equally divided court*, Bailey v. Richardson, 341 U.S. 918 (1951); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[28] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

Part IV and the conclusion will determine predictors for upcoming issues before the Court, including abortion and same-sex relationships. One of the main questions to be answered is whether the Court will determine these issues based on its own ideological makeup, or whether it will accede to the changing mores and values of society as a whole.[29] Judicial ethics requires and perceives an impartial look at the issues before the Court, but reality has taught us that judges bring their own history and ideals with them, frequently inserting them into decisions.[30] The hope is that an exploration of the issues which have factored into such decisions in the past, as well as a look at the consequences of those decisions on society as a whole, will help to foster an understanding of the intense principles and beliefs that underlie such cases. Further, to show how both the Court and society have accepted and adapted to ever-changing mores, and will likely continue to do so, if for no other reason than necessity.

I. IS THE PANIC ALWAYS—OR EVER—JUSTIFIED?

Although one cannot authoritatively predict any specific action which the Court may take, it is both informative and useful to look at what decisions were made, and why. Government actors and individuals can react to past actions and use the information to both attempt to further their own causes and conversely, to accept the need for compromise in the interest of reaching a conclusion acceptable to the Court. Such an area is same-sex partnership rights. Many are calling for a Constitutional amendment banning same-sex marriage and/or benefits, while others who may be in favor of such actions acknowledge that society may not be willing to accept such absolute rejection. It may also prove useful in putting out some of the fires that emerge over the theory that a new or more focused ideology on the Court will automatically lead to specific results.

At a time in history, specifically the late nineteenth and early twentieth centuries, when the nation was seen as making great strides in social and legal justice reform, there was nevertheless great consternation over a perceived likelihood by the Supreme Court to overturn many of these gains.[31] Many called for a restructuring of the Court and even the Constitution, to prevent such blatant

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[29] Studies have consistently shown a majority preference for both abortion rights and benefits for same-sex relationships, and these studies have not always been followed by politicians seeking to promote their own ideologies and limit such rights. *See* Brad Sears & Alan Hirsch, *No Harm Done to Children of Gay Marriages: U.S. Studies Consistently Dispute Claims of Opponents*, EDMONTON JOURNAL (ALBERTA), Apr. 10, 2004, at A19, http://www.law.ucla.edu/williamsinstitute/press/noharm.html; HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, SAME-SEX: SAME ENTITLEMENTS (2007), http://www.hreoc.gov.au/human_rights/samesex/report/index.html; Herbert A. Sample, *Hawaii Governor Vetoes Same-Sex Civil Unions Bill*, THE DAILY CALLER, July 6, 2010, http://dailycaller.com/2010/07/06/hawaii-gov-to-decide-on-same-sex-civil-unions/; Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

[30] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[31] *See* Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294 (1913).

disregard for the people's wishes.[32] Yet a review of almost 600 cases from the era, arising under due process or equal protection and purporting to promote social justice, shows that only three cases were held unconstitutional by the Court.[33]

At first glance we could be looking at almost any point in the history of the nation and the Court, including much of the recent past, but this search speaks to the years 1887 to 1911. Indeed, in that time period—with a Court seen as legally and politically reactionary—laws upholding social and economic benefits to the citizens were regularly upheld, including numerous wage and hour guarantees, protection of employees' rights to sue for injuries, anti-trust regulation, food safety, and numerous regulatory legislation, including licensing of professionals and even carrying concealed weapons in Texas.[34] While certainly different factions argued the pros and cons of each of these Acts, the overall result is that a conservative Court recognized the forces of change and upheld their sweep.

While the Court clearly is an institution mandated to review and decide on legal, as well as other issues, which come before it, it has also been viewed as more: a political institution of its own, especially when it is determining controversial questions related to national policy.[35] In this sense the Court is seen as having a far greater role than merely choosing between opposing viewpoints based on strict standards of precedent and constitutional interpretation.[36] In fact, the Court may well be called on to decide a highly charged political/social issue with little to guide it in history.[37] Justice Frankfurter described this as basing decisions on constitutional clauses specifically designed to be imprecise, as well as on the views of those elected officials directly representing the people.[38] The Court is often called on to determine which of several opposing views is "right," when reasonable and intelligent minds may differ greatly, and often legitimately, in that assessment.[39] The problem for the Court in many of these cases is that it is not intended nor expected to be an actual political entity, but purely a legal one, thereby begging the question of whether the justices can put their own views aside and look

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[32] *See id.* at 294-95.

[33] *Id.* (citing Lochner v. New York 198 U.S. 45 (1905); Allgeyer v. Louisiana 165 U.S. 578 (1897); Connolly v. Union Sewer Pipe Co. 184 U.S. 540 (1902)).

[34] *See* Warren, *supra* note 31, at 296-300.

[35] Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,* 50 EMORY L. J. 563, 563 (2001). Professor Dahl's commentary on the Court is said to have lasting value for its insight and perception. Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 583, 583 (2001), citing to Robert A. Dahl, *Decision-Making in a Democracy*, 6 J. PUB. L. 279 (1957).

[36] Dahl, *supra* note 35, at 564.

[37] *See id.*

[38] *Id.* It must be noted that not all commentators, and certainly not all Supreme Court Justices, see the Constitution through a flexible lens, and find it far easier, from their point of view, to follow the letter rather than any perceived spirit of the document. Jeffery Rosen, *Can Bush Deliver a Conservative Court?*, N.Y. TIMES, Nov. 14 2004, *available at* http://www.nytimes.com/2004/11/14/weekinreview/14jeff.html?pagewanted=print&position=.

[39] Dahl, *supra* note 35, at 565.

only to the legal issues engendered. Moreover, whether that is all that the Court should be considering. And, when they do decide these issues, the Court clearly, whether intended or not, becomes not just a legal decision-maker, but a "national policy-maker."[40]

If the Court were designed, and the people expected it to use the members' own political views to determine law, that would not be a problem. But the reality is the exact opposite: the Court, far from using its members' own views for direction, is expected to seek guidance from its own collective precedent, as well as to give a current interpretation of the issues. The Court, moreover, is expected to use its judgment in ways designed to protect the citizens, and not their own individual political views.

Whenever a vacancy appears on the Court, great thought is given by both the political party in and out of power as to who should fill the void.[41] Great consternation ensues as to how any particular nominee would vote on specific issues.[42] To say that all have been surprised at various times would be an understatement. When John F. Kennedy appointed Byron White—a former campaign chair in Kennedy's quest to the White House—to the Court, he likely would never have believed the new Justice would become a conservative mainstay, dissenting on two major opinions, *Miranda v. Arizona*[43] and *Roe v. Wade*.[44] President Reagan was no doubt similarly surprised and disturbed by the seeming revolt of his appointee, Justice Kennedy, in *Romer*[45] and *Planned Parenthood of Southeastern Pernnsylvania v. Casey*.[46] Yet no one, least of all the president who appoints the new justice, should be shocked at such turns once on the Court. President Truman said "whenever you put a man on the Supreme Court he ceases to be your friend. I'm sure of that."[47] More seriously, former Chief Justice Earl Warren opined that he did not "see how a man could be on the Court and not change his views substantially over a period of years . . . for change you must if you are to do your duty on the Supreme Court."[48]

There are numerous examples of judges turning independent once on the bench. President Truman appointed four justices, with two voting against him on major issues.[49] Eisenhower was so infuriated by his appointee, Chief Justice

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[40] *Id.*

[41] David Levitan, *The Effect of the Appointment of a Supreme Court Justice,* 28 U. TOL. L. REV. 37, 88 (1996).

[42] *Id.*

[43] Miranda v. Arizona, 384 U.S. 436 (1966).

[44] Roe v. Wade, 410 U.S. 113 (1973).

[45] Romer v. Evans 517 U.S. 620 (1996).

[46] Levitan, *supra* note 41, at 89.

[47] *Id.* at 71.

[48] *Id.*

[49] Robert S. Barker, *I Do Solemnly Swear*, ISSUES OF DEMOCRACY, Apr. 2005, at 16, http://www.america.gov/media/pdf/ejs/0405.pdf.

Warren, that he declared his nomination the worst decision of his presidency.[50] Three of the four justices appointed by Nixon voted against him in the case that led to his resignation, while the fourth recused himself.[51] It is unlikely many presidents have chosen or would choose a candidate with a vote on only a specific issue in mind.[52] It is likely, however, that they care, and strongly, that the candidate be in agreement with the main thrust of their policies,[53] rather than assert such independence at politically inopportune times.

It is important to note, however, that the perceived independence of the Court is of great import not just to the judiciary, but to the citizenry. Franklin Roosevelt's attempts to rectify the effects of the Great Depression resulted in a number of Acts that were enacted in his first term being held unconstitutional by the Court.[54] After being overwhelmingly reelected to his second term, with his party similarly given large majorities in both Houses of Congress, he announced a plan to rectify the Court "problem" by seeking legislation that would permit him to appoint a number of new justices.[55] Even with the great majority of the electorate and the officials they had put in office favoring his policies, his plan to reorganize, or "pack" the Court with supporters, was greeted with tremendous hostility by both, and was eventually abandoned.[56] Despite the great support for his policies and frustration at the Court's actions, the independence of the Court turned out to be an issue of far more import to the people than the individual programs rejected.[57]

The Court itself, of course, has been caught up in the history of social change in the nation with the appointment of the first African-American, Justice Thurgood Marshall, and female, Justice Sandra Day O'Connor, to the Court. Yet today, there are seemingly few who would even question the likelihood of continuing appointments of persons representing diversity.

While changes in the makeup of the bench are likely to have some effect, it would be difficult to predict the impact from any specific change. Certainly the more justices a sitting president gets to appoint, the more likelihood of greater

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[50] *Id.*

[51] *Id.* (discussing United States v. Nixon, 418 U.S. 683 (1974)).

[52] *See* Levitan, *supra* note 41, at 47. Theodore Roosevelt discussed Oliver Wendell Holmes' appointment by acknowledging the more open agreement with his programs of rival candidate Horace Lurton, saying "the nominal politics of the man has nothing to do with his actions on the bench. His real politics are all important." *Id.*

[53] *See id.* at 48. Roosevelt described it as an "irreparable wrong to the nation if I should put in his place . . . any man who was not absolutely sane and sound on the great national policies for which we stand in public life." *Id.*

[54] *See id.* at 46.

[55] It is interesting to note that Roosevelt's beliefs about the Court sabotaging his programs were likely not without merit. Few cases involving a President's power of appointment, removal, or other constitutional issues were overturned by the Court until the 'New Deal' cases. *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Lionel V. Patenaude, *Garner, Summers, and Connally: The Defeat of the Roosevelt Court Bill in 1937*, 74 SOUTHWESTERN HISTORICAL QUARTERLY 1, 36 (1970).

[56] Patenaude, *supra* note 55.

[57] *Id.*

impact he or she is likely to see from the cumulative changes.[58] Presidents Franklin Roosevelt and Ronald Reagan famously tried to "pack" the Court, Roosevelt even advocated for a Constitutional amendment expanding the number of seats in order to do so.[59] That is why, especially when a number of the sitting justices approach ripening old age, presidential elections become much more focused on the kind of justices the future president would be likely to appoint.[60]

Even the justices themselves exhibit concern about who, ideologically, will replace them, either simply wanting to keep a perceived upper hand or out of real concern that the Court maintains political diversity.[61] And that concern is not without merit. Nominees have been rejected both for personal animosity towards them, as well as for political disagreement.[62] And when the Court has been perceived as having a distinct bias—as in the case of its explicit approval of slavery—it has taken long periods of time to repair the damage to its reputation.[63] Perhaps that is why so many justices throughout history have valued their independence ahead of their loyalty to those who appointed them.[64] The current Court, with five of its nine justices having been appointed by Republican presidents, has been perceived to have a very conservative bent, often validated by its rulings.[65] Nonetheless, and in what might come as a surprise to many, the

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[58] *See id.* at 37. On the other hand, considering that there have been only seventeen Chief Justices thus far, and that most serve an extensive number of years on the Court formulating a specific perception of his or her Court, it stands to reason that it is the associate justices who have an easier time shifting positions. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1601 (2009).

[59] Patenaude, *supra* note 55.

[60] *See* Christopher E. Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 KY. L.J. 317, 321, (1991) (noting that Reagan's increasingly conservative appointees in the 1980's brought far more media attention than earlier times, and therefore became far more of an issue re presidential selection than before); *See also* David M. Levitan, *The Effect of the Appointment of a Supreme Court Justice*, 28 U. TOL. L. REV. 37, 46 (1996) (discussing the fact that controversial nominations such as Robert Bork and Clarence Thomas had served to make the public much more aware of the significance of Supreme Court nominations). Although most presidents do not see that many vacancies during their terms, it appears that the exception may well be Barack Obama, who in his second year of his presidency, has nominated his second appointee. With the ages and health of a number of the remaining justices at issue, the usual state of concern regarding a president's choices may become much more a reality than normal.

[61] Joan Biskupic, *Justice Stevens Bemoans Changed Court*, ABCNEWS ONLINE, Jan. 23, 2010, http://abcnews.go.com/Politics/justice-stevens-bemoans-changed-court/story?id=9635321. In an unusual dissent, Justice Stevens reacted to the Court's decision to allow new corporate spending in elections by invoking the legacy of past justices and decisions, reminding listeners of the changes in moving the Court to the right since Justice Robert's appointment in 2005. *Id.*

[62] *See* Robert S. Barker, *"I Do Solemnly Swear": A Historical Perspective on the Nomination, Confirmation, and Appointment of Justices to the U.S. Supreme Court*, ISSUES OF DEMOCRACY: THE SUPREME COURT OF THE UNITED STATES, HIGHEST COURT IN THE LAND (U.S. Dept. of State) Apr. 2005 at 16 (discussing the appointments of Ebenezer Hoar in 1870 and Wheeler H. Peckham in 1894, John J. Parker in 1930, and the famous rejection of Reagan nominee Robert H. Bork in 1987).

[63] *See* Levitan, *supra* note 41, at 43-44.

[64] It is also a look at the wisdom of the Founders in making the appointment a life term. U.S. CONST. art. III, § 1.

[65] *See* CHARLES ROTHFELD, THE SUPREME COURT IN A TIME OF TRANSITION: A FRAGILE BALANCE AS ITS NEW TERM BEGINS CENTER FOR AMERICAN PROGRESS (2004), http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521 5D6FF2E06E03%7D/

justices have many times revised or ignored their own ideologies to split virtually in the middle on cases characterized as having a conservative/liberal bent.[66] In many instances, it has been the perceived liberal "underdog" side of the Bench that has been most cohesive, with the identified conservative side voting as a bloc only half of the time.[67]

Judges are indeed seen as making both law and policy, for which, despite protestations to the contrary, they undoubtedly rely on their personal political, social and moral views.[68] There have been attempts to quantify the perceived ideological bent of a future justice with the actual voting record once on the Court. One study spanning almost fifty years found that the perceptions of liberal views—as determined by newspaper editorials using a "scale" system—prior to confirmation, have been fairly reliable in predicting future votes.[69] On the other hand, a number of justices have clearly veered from what were preconceived outlooks of their political views. Justice Douglas, when appointed by President Roosevelt, had a pre-confirmation liberal score of under 50%, yet his votes show him to have been one of the most liberal of the justices in the history of the Court.[70] Just retired Justice John Paul Stevens was appointed in 1975 by President Ford as a moderate Republican, but became the leader of the liberal bloc on the Court,[71] perhaps not so coincidently while the Court itself was becoming more and more conservative.[72] Sandra Day O'Connor, appointed as a Republican by the stalwart conservative President Reagan, famously became the "swing vote" on a number of important issues, often voting with the liberal bloc.[73]

Research shows that earlier appointees appeared to follow their ideological bent to a greater degree than have their more recent counterparts.[74] Perhaps the newer justices see their increased independence as a necessary response to the more antagonistic political framework the country seems to have gravitated to in recent years.[75]

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[66] *See id.*

[67] *See id.*

[68] *See* Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV., 323-36 (1992).

[69] Jeffrey Segal, Lee Epstein, Charles M. Cameron & Harold Spaeth, *Ideological Values and the Votes of Justices Revisited,* 2-11 (1994), http://epstein.law.northwestern.edu/research/conferencepapers.1994MPSA.pdf.

[70] *See id.* at 6.

[71] *See* Joan Biskupic, *Stevens Ascends to His Final Day on Bench,* USA TODAY, Jun. 27, 2010, http://www.usatoday.com/news/washington/2010-06-27-Court_N.htm.

[72] *See* Rothfeld, *supra* note 65.

[73] Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated"*, 39 AKRON L. REV. 373 (2006); *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[74] *See* Segal, Epstein, Cameron & Spaeth, *supra* note 69, at 817.

[75] That is not to say that politics did not rear its ugly head rather viciously in years past. One only has to read the history of the Lincoln-Douglas debates or the history of the battles in the era of the New Deal to get a sense of how contentious such views have always been. *See* NANCY CHANG, SILENCING

II. LOOKING AT SPECIFICS

One of the hallmarks of the American legal system, and a rallying cry of conservatives in particular, is the concept of *stare decisis,* or, in layman's terms, following what has already been decided.[76] In a legal sense, this converts to a virtual mandate that "precedents ought always to be followed except when they should not."[77] Thus, a court should have an extremely good reason to reverse a previous holding on an issue. It is a legal concept that not only expresses the respect needed for previous decisions, but allows for consistency, stability and predictability in the law.[78] Justice Stewart espoused that changing the law based upon little but the Court's changing membership calls into question the independence and processes of the Court itself, and feeds into a public perception that the Court is no different from the two political branches of government.[79]

Conservatives in particular see this as a rationale to preserve what they perceive to be the original meaning of the Constitution, especially when dealing with controversial challenges to established law.[80] However, history has shown that justices, use the concept in the ways most advantageous in any specific issue. Thus, despite the enormous weightiness of *stare decisis* in the history of the Court, the four conservative justices on the Court deciding *Planned Parenthood v. Casey* indicated either explicitly or implicitly that they were prepared to overturn *Roe v. Wade*, despite the fact that at least *nine* intervening Supreme Court cases had affirmed the precedent of *Roe*.[81] Justice Souter had not yet joined the Court, and there was speculation that he would give them the majority to do just that.[82] Instead, he joined with Justices O'Connor and Kennedy—another "safe" conservative appointment who has, apparently willingly, inherited the title of

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POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES (2002); Allen C. Guelzo, *Past and Present: The Lincoln-Douglas Debates, 150 Years Later*, U.S. NEWS, Aug. 21, 2008, http://politics.usnews.com/opinion/articles/2008/08/21/past-and-present-the-lincoln-douglas-debates-150-years-later.html.

[76] *See* Christopher Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 KY. L.J. 317 (1991) (explaining that conservatives in general have been known to label liberal judges as "activist judges" for their perceived willingness to interpret the Constitution for approved social ends); Derek Wallbank, *Franken Pins 'Judicial Activism' Label on Roberts Court in Opening Statement*, Jun 28 2010, http://www.minnpost.com/derekwallbank/2010/06/28/19293/franken_pins_judicial_activism_label_on_roberts_court_in_opening_statement. *See also* Deborah Hellman, *The Importance of Appearing Principled,* 37 ARIZ. L. REV. 1108 (1995) (discussing the concept and use of *stare decisis*).

[77] Hellman, *supra* note 76, at 1110.

[78] *See id.*

[79] *See id.* at 1114 (citing Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)).

[80] *See id.* at 1115-16.

[81] *See id.* at 1116-18.

[82] *See id. See also* Robert J. McKeever, *Courting the Congress: President Bush and the Appointment of David H. Souter*, XI POLITICS 26 (1991). President Bush was thought to have nominated Souter in anticipation of just that result. Jeffery Rosen, *Can Bush Deliver a Conservative Court?*, N.Y. TIMES, Nov. 14 2004, *available at* http://www.nytimes.com/2004/11/14/weekinreview/14jeff.html?pagewanted=print&position=.

"swing vote" since Justice O'Connor's resignation—to co-author a comprehensive approach to precedent in the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[83] The plurality opinion in *Casey* held that the criteria used to justify overturning an earlier decision had to be "comprehensible" to the public, and not, instead, viewed as a victory of one ideology over another based on numbers on the Court.[84] The *Casey* plurality made clear that any deliberation must be justified not just in terms of legal precedent but also in terms of social change.[85]

Justice O'Connor, in particular, was known for valuing both legal precedent and social tradition, but clearly did not blindly follow either in her votes.[86] Perhaps these three justices are simply an example of Justices affirming their independence when faced with voting for politics over law.[87]

Along with *stare decisis* as a major factor in their decision making, justices, cannot help but take notice of major changes occurring in society. Those who might or might not have voted one way in a particular case may find themselves at a crossroads when viewing the same issue from a changing societal perspective. It is unlikely *Roe* would have been decided as it was if brought in the beginning of the twentieth century, yet after changes accruing from the Civil Rights movement, as well as the new and stronger feminist movement which followed it, the decision was not as extraordinary as it might have been earlier.

It is clear that a number of factors therefore go into a Justice's vote: his or her own long-held political views, the important concepts of precedent, and in many cases, the societal changes that have taken place. The last, in fact, may well be a determinant factor in many instances. When the Court agreed to hear the government's appeal of lower court rulings that had held Congress' ban on "partial birth" abortions unconstitutional, anti-choice[88] activists took it as encouragement that the newer members of the Court, Roberts and Alito, both appointed by President Bush, would use the opportunity to reverse, or severely limit, *Roe*.[89] There was, in fact, great anticipation, fueled by speculation that then Justice Stevens would retire during the Bush presidency, that Bush would be able to

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[83] *See* Huhn, *supra* note 73, at 373.

[84] *See* Hellman, *supra* note 76, at 1116.

[85] *See id.* This analysis could theoretically be used by either political side, with those favoring reversal of a precedential decision also citing changing social opinion on their side.

[86] *See* Huhn *supra* note 73, at 374.

[87] *See* Hellman, *supra* note 76, at 1116. The plurality opinion in *Casey* makes clear that the Court must take account of the effect a particular decision or reasoning of the Court will have on the public. On the other hand, it is a plurality opinion.

[88] For purposes of this article the terms "pro-choice" and "anti-choice" will be used, rather than the more generically popular but less accurate "pro-life" and "pro-abortion." I was unable to locate any evidence to demonstrate that those who favor a woman's right to choose for herself whether to have an abortion are any less in favor of life than those who do not, and it is certainly more than debatable whether anyone is actually pro-abortion, rather than merely the right to legal access to it.

[89] *See* Robert Sedler, *The Supreme Court Will Not Overrule* Roe v. Wade, 34 HOFSTRA L. REV. 1207, 1207 (2006).

ensure—at least theoretically—the reversal of *Roe* by appointing a fifth conservative to the Court.[90]

One of the most interesting areas of legal decisions is that of national security, which can of course consist of a large umbrella of law covering cases ranging from individual rights to broad administrative policy.[91] It is also historically one of the least likely areas for change in the Court's view, precisely because of the issues at stake. And when those views do change, when the Court itself may even acknowledge a mistake in a past decision, new holdings may broaden the field but seldom set aside past ones.

In 1951, the Court in *Bailey v. Richardson*, affirmed by an equally divided decision held that a government worker accused of being a communist, or at least a supporter, by an anonymous informant, had no right to know the name of her accuser, or to question the evidence, and very importantly, no right to maintain her position in light of the accusations.[92] The Court made clear that national security interests, which, in this case, involved a government clerk caught up in the feeding frenzy of Senator Joseph McCarthy's war on communism, were the paramount issue, and easily trumped the individual rights we as a nation had come to take for granted.[93]

Just one year later, as the full extent of the damage done by "McCarthyism" was just beginning to be seen and felt, the Court retreated from its strict view and reaffirmed many of those rights.[94] In a continuing string of cases over the next decade, the Court further eroded its own holding in the *Bailey*, but the remarkable aspect of these cases is that at no time did the Court overturn it, even well after acknowledging its own problems with the decision.[95]

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[90] *See id.* Not only did Stevens stay on, but there have been reports that he was determined to stay at least until after the 2007 elections in the hope a Democratic president would be able to appoint his successor, which of course happened. *See* Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement is Political Test for Obama*, N.Y. TIMES, Apr. 9, 2010, http://www.nytimes.com/2010/04/10/us/politics/10stevens.html.

[91] *See, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) (determining the lack of rights to a government position when labeled a communist); ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

[92] *See Bailey*, 182 F.2d 46.

[93] Senator McCarthy used the tensions of the Cold War era to make a name and career out of accusing people of being Communists, including threatening those who would not "name" others as obviously being one themselves. Until the furor died down, numerous lives and careers were destroyed on seriously flawed or totally lacking evidence. *See* Jonathan Karl, *Senate Releases McCarthy Transcripts*, CNN.COM, May 5, 2003, http://www.cnn.com/2003/ALLPOLITICS/05/05/mccarthy.hearings; Barbara Mack, *The Red Scare: McCarthyism: The McCarthy Era. The HUAC Hearings and Senator Joseph McCarthy Led to a General Distrust in the Government by the American People*, eSSORTMENT, http://www.essortment.com/all/mccarthyismred_rmfw.htm.

[94] *See* Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886 (1961).

[95] *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW, 401 n.9 (5th ed., West Publishing 2009).

Over the years, the Court has heard a number of cases falling under the umbrella of national security, including the recently decided *Rumsfeld v. Padilla*.[96] In this case, the Court bypassed the question of whether an American citizen, captured overseas fighting against the United States during a time of war, was entitled to the protections of the Constitution in being tried in a civilian court with appropriate representation.[97] The Court decided the case on a technical issue, leaving open the opportunity for *Padilla* to file again.[98] It likely says a lot about the caution of the Court in refusing outright to rule against the defendant.

Even after the 9/11 terrorist attacks, the Court has been careful to allow for constitutional protections in cases falling under national security.[99] Yet, in this area of law the Court has probably been more consistent in its willingness to stray from those protections in order to protect the nation than it has been in any other. Justice Rehnquist is said to have never seen a national security case he didn't like.[100] Other areas of law, however, have undergone far more change over the years, with both perceived liberal and conservative justices seemingly voting against their own ideological bent to find a basis for their decisions.

In 1896, the Court decided *Plessy v. Ferguson*—a case involving assigned railway car seating for separate races—and held that separate but equal facilities met constitutional muster.[101] The Court had earlier decided the series of *The Civil Rights Cases*, which affirmed the protections of equal protection to all races through the Fourteenth Amendment.[102] In explaining its decision in *Plessy*, the Court cited *Roberts v. City of Boston*, which dealt with the establishment of separate schools for non-Caucasian children, finding they did not violate these protections.[103] Important for purposes of this discussion, the *Plessy* Court held that being entitled to legal protections under the law did not require the State to equalize the races socially, and that any perception of inferiority arising from it was a private matter, not one for the State to address.[104] *Plessy* not only relied on legal precedent, but also on the social mores of the time. There was very little racial equality to be seen nationally, and the Court felt no requirement to become the impetus for such.

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[96] *See* Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[97] *See id.*

[98] *See id.*

[99] *See* Peter Bergen & Karen Greenberg, *Why the 9/11 Trial Belongs in New York*, CNN.COM, Feb. 4, 2010, http://edition.cnn.com/2010/OPINION/02/04/bergen.911.trial.nyc/index.html.

[100] *See* Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51 (2005).

[101] Plessy v. Ferguson, 163 U.S. 537 (1896). It is interesting, of course, that long before the Civil Rights movement in the twentieth century, citizens and legal minds alike were already setting out the battle to come.

[102] *See The Civil Rights Cases*, 109 U.S. 3 (1883), cited in *Plessy*, 163 U.S. at 546.

[103] *See* Roberts v. City of Boston, 59 Mass. 198 (1849), cited in *Plessy*, 163 U.S. at 544.

[104] *Plessy*, 163 U.S. at 551-52.

A half century later, *Brown v. Board of Education* was decided, with a virtually identical issue and totally opposite outcome.[105] The civil rights movement was looming; large numbers of the country were no longer content to blindly and quietly follow the status quo. The *Plessy* Court found there was no requirement that the State provide for anything but physically equal facilities and protection under the law.[106] The *Brown* Court, looking at substantial changes in how both races saw the issue of equality, found that separate educational facilities were in fact inherently unequal, since they created a two-class system, which itself created inequality.[107]

Brown is a classic case of how not only ideologies from the Bench, but also societal views influence the Court, in this case in one of the most important ways in the history of the nation. It is entirely reasonable that the Court's deliberations, no matter the individual concerns of its members, had no choice but to acknowledge the vast sea change in the Black community's refusal to accept the status quo, as it had during the time of *Plessy*. *Plessy* clearly was a wake-up call to the Court and the country that things would change, but it did not have the force of public opinion and political power behind it to push that change at that period in history. By the time of *Brown,* it was clear that change was coming, and sooner rather than later. Only a decade later, the Civil Rights Act of 1964, laid out sweeping changes in the rights to which everyone was entitled.[108]

The *Brown* Court consisted in part of Chief Justice Earl Warren, and Associate Justices Marshall Harlan and Horace Gray.[109] While the Warren Court would go on to a reputation as a liberal bench, it stands to reason that even the most conservative of the justices recognized that at some point there had to be a reality check, and mere political and/or ideological views would no longer hold the status quo with a nation in the midst of a profound movement of change. The *Brown* Court, in this instance, both recognized and acknowledged the social changes taking place, and simultaneously gave notice to the nation that there was no choice, whatever one's personal political views, but to deal with them.[110] In this instance, *stare decisis* gave way to the overwhelming social changes that had been taking place over the past half century, and bore forth a decision born of it.

Another issue that has had a recent and rapid turnaround in the Court is that of the death penalty, at least as applied to the mentally disabled and minors. The Court, overturning years of legal tradition, has held that those determined to be mentally disabled—including those whose I.Q. fell below normal standards—could

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[105] Brown v. Board of Educ., 347 U.S. 483 (1954). *Brown* was famously argued by Thurgood Marshall and Jack Greenberg.

[106] *See Plessy*, 163 U.S. at 551-52.

[107] *Brown*, 347 U.S. at 494.

[108] *See* 42 U.S.C. Ch. 21 (1964).

[109] Members of the Supreme Court of the United States, http://www.supremecourt.gov/about/members.aspx.

[110] *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

no longer be executed by the state for their crimes.[111] The conservative Court agreed that social mores required the leniency of a life sentence for those found inherently incapable of understanding the consequences of their crimes.[112] Similarly, the Court recently held that defendants who committed non-homicidal crimes while minors could no longer be sentenced to life in prison without parole.[113] Interestingly, to both the consternation of many conservatives and perhaps foretelling the deliberations, if not results, for some upcoming issues, the Court looked to international law as a guide, acknowledging that the United States needed to act in accordance with its place as part of the world community.[114]

Issues of major contention in this nation continue to focus on the concepts of family law. Like earlier civil rights changes, initial victories for protection of family units have lead to more challenges and greater controversy.

Early family law in this country allowed for little autonomy for the unit itself, let alone its individual members. Women did not have the right to contract for themselves either entering into or residing within marriage.[115] Until the 1970s, only men had the obligation to pay alimony.[116] Those outside of marriage had even fewer rights in areas relating to family. Unmarried fathers were presumptively unfit for custody of their children.[117] Even married couples could not determine for themselves appropriate methods of birth control.[118] When decided, *Griswold v. Connecticut* still addressed only married couples on the issue of contraception. The Court chose not to extend the right of privacy in procreation to unmarried couples until later on.[119] It wasn't until late in the twentieth century that marital rape laws were addressed, and that was only on a state-by-state basis.[120] States began to recognize something as fundamental as a woman being allowed to retain her own name after marriage.[121] While this may not have seemed like a momentous change at the time, it actually laid a foundation for many of the individual rights within the marriage.

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111 *See* Atkins v. Virginia 536 U.S. 304 (2002).

112 *See id.* at 321.

113 Graham v. Florida, 130 S. Ct. 2011 (2010).

114 *See id.* The *Lawrence* and *Romer* Courts likewise looked to foreign holdings as a guide in their decisions, since other nations, including Canada and the United Kingdom, have already legalized the issue. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

115 *See, e.g.*, Graham v. Graham, 33 F.Supp. 936 (E.D. Mich. 1940) (holding a woman could not contract with her husband outside of the required marriage laws).

116 *See* Orr v. Orr, 351 So. 2d 904 (Ala. Civ. App. 1977) (overturning state laws obligating men to pay alimony without regard to need on the part of the wife or ability on the part of the husband and leading to the consistent change in family law statutes requiring gender neutrality in virtually all areas, including not just child support, but custody).

117 *See* Stanley v. Illinois, 405 U.S. 645 (1972) (overturning the presumption that unmarried fathers were unfit for custody of their children).

118 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (overturning laws which held married couples did not have a right to determine the practice of contraception for themselves).

119 *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

120 *See* Oregon v. Rideout, No. 108,866 (Marion County Cir. Ct., 1978).

121 *See* Dunn v. Palermo, 522 S.W.2d 679 (Tenn. 1975).

It is difficult to quantify the effects that the civil rights movement and the subsequent renewed feminist movement had on the bastion of family law. Would *Loving v. Virginia*[122] have been decided as it was, in a vacuum, rather than in the shadow of the civil rights era? It is just as unlikely that a majority of the Court, no matter their personal views, would have felt the need to address the issue, let alone overturn centuries of tradition, if that tradition was simultaneously not being repeatedly and publicly attacked by the citizens. Just as *Plessy* upheld tradition when the citizenry was content to let it be,[123] and *Brown* turned it upside down when the public was vocally and loudly discontent,[124] so too was *Loving* decided not only on the law, but in the midst of social change—turmoil being a more accurate term.[125]

The changes in family law can be argued to have reached their historical pinnacle with the decision in *Roe v. Wade*.[126] Abortion has been and continues to be one of the most contentious areas of law, no matter how often the basic premise of *Roe* has been upheld.[127] Challenges abound year after year, with the Court using specific cases to affirm or narrow, sometimes doing both simultaneously.[128] Despite a myriad challenges to the basic precepts of *Roe*, the Court, notwithstanding efforts from both within and without has, albeit with some difficulty, refused to revisit that original holding.[129]

The very nature of the issue in *Roe* has kept it in the forefront of controversy over the almost forty years since its determination. Cases are brought regularly which seek to narrow the holding itself[130] or involve a peripheral issue deriving from it, such as the ability to picket medical clinics which provide abortions.[131] Despite the Court's refusal thus far to overturn or specifically narrow the basic premise of *Roe,* those steadfastly opposed to it persist in the effort, perhaps counting on the makeup of the Court to bring about such a change. Confirmation hearings for every potential Supreme Court justice include questions about the nominee's views on abortion personally as well as legally, focusing on the precedent of *Roe*.[132]

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[122] *See* Loving v. Virginia, 388 U.S. 1 (1967) (holding that state laws against miscegenation violated the Equal Protection Clause of the United States Constitution).

[123] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[124] *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

[125] *See Loving*, 388 U.S. 1.

[126] *See* Roe v. Wade, 410 U.S. 113 (1973).

[127] *See* Hellman, *supra* note 76, at 1011.

[128] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992) (upholding *Roe* while allowing some provisions narrowing the unfettered right to abortion).

[129] *See generally Casey*, 505 U.S. 833; Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (upholding the precedent of *Roe* while addressing remedies for statutes contrary to it). *See also* Hellman, *supra* note 76, at 1121 (discussing conservative members of the Court who show a willingness to overturn *Roe*).

[130] *See, e.g.*, *Casey*, 505 U.S. 833; *Ayotte*, 546 U.S. 320.

[131] *See, e.g.*, Hill v. Thomas, 973 P.2d 1246 (Colo. 1999).

[132] *See, e.g.*, David Kopel, *KOPEL: Sotomayor Targets Guns Now*, THE WASHINGTON TIMES, June

The controversy over abortion has never abated and seemingly never will. Anti-choice advocates ignore state laws which already limit, in some cases significantly,[133] the ability to get an abortion, and instead cite to parts of cases to prove, no matter how incorrectly, that anyone can get an abortion anywhere, at any time, thereby arguing for the necessity of additional limiting or eliminating legislation.[134] Pro-choice advocates likewise view every attempt, no matter the likely limited ramifications, to narrow the holding of *Roe* as a slippery slope toward reversal.[135]

As abortion has been a lightning-rod issue in family law for a number of decades before and since *Roe*, so too is the more recent hot-button topic of rights for same-sex relationships, up to and including the concept of same-sex marriage. Until fairly recently, those involved in same-sex relationships were of necessity more concerned with protection from criminal liability for their personal acts than the broader, more current issues involved.

In *Bowers v. Hardwick,* in a 5-4 decision, the Court upheld Georgia's sodomy laws, holding that the federal Constitution did not protect homosexuals' due process rights against criminal sanctions for their private, consensual behavior.[136] The Court found—years after *Griswold* and *Eisenstadt* had held that the government did not belong in people's bedrooms for the purpose of governing contraception[137]—that the government still held an interest in protecting the then-perceived moral views of the citizens.[138] Seventeen years later, the Court overruled *Bowers*, holding that the Fourteenth Amendment protects citizens in personal decisions relating to "marriage, procreation, contraception, family relationships, child rearing, and education."[139] The *Lawrence* Court very specifically looked at the changing social, legal, and political climate since *Bowers*,

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29, 2010, *available at* http://www.washingtontimes.com/news/2010/jun/29/sotomayor-targets-guns-now/?page=1.

133 *See generally* Webster v. Reproductive Health Serv., 492 U.S. 490 (1989); *Casey*, 505 U.S. 833.

134 *See, e.g.*, Frank Beckwith, Roe v. Wade*: Abortion on Demand*, http://www.roevwade.org/aod.html (citing to the trimester provisions in *Roe* and its companion case requiring a broad definition of the "health" of the mother for purposes of determining the right to an abortion if a state has limited that right). In fact, the Court clearly allows for the states to limit the rights both in the first trimester for licensing and procedural requirements, as well as later for other issues. *See* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 178 (1973) (defining the term "health" for purposes of later abortions).

135 *See* John McCormack, *Kagan Supported Daschle's Phony Late-Term Abortion Ban in '97:The Supreme Court Still Mandates Abortion-on-Demand Throughout All 9 Months of Pregnancy*, THE WEEKLY STANARD, May 11, 2010, http://www.weeklystandard.com/blogs/kagan-supported-daschles-phony-abortion-ban-97; Gonzales v. Carhart, 550 U.S. 124 (2007). Virtually all agree that late-term abortion is relatively rare, and legislation limiting it would not have a significant impact on the right of access in general. Rigel C. Oliveri, *Crossing the Line: The Political and Moral Battle Over Late-Term Abortion*, 10 YALE J.L. & FEMINISM 397 (1998). Nevertheless, fears of even further encroachment on *Roe* keep the fight alive. Stuart Taylor, Jr., *The Tipping Point*, 32 NAT'L J. 1810 (2000).

136 *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

137 Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

138 *See Bowers*, 478 U.S. at 196.

139 *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003).

noting that at the time of the earlier case, twenty-four states and the District of Columbia still had criminal sodomy laws on the books.[140] The Court pointed out also that even during the time of the *Bowers* case, the vast majority of these remaining states did not enforce the laws concerning consenting adults in their private spaces.[141]

The Court in *Lawrence* also looked at those cases decided after *Bowers* which dealt with similar issues of the constitutional protections of due process and equal protection. Speaking of *Casey*, the Court reaffirmed the constitutional protections involving marriage, procreation, and family issues.[142] The Court further cited *Romer v. Evans*,[143] which had struck down a Colorado constitutional amendment denying antidiscrimination protection specifically to homosexuals, lesbians, or bisexuals, and quoted the very telling statement by the *Romer* Court that the amendment was "born of animosity toward the class of persons affected."[144] While *Romer* may well have been decided on legal precedent, the Court clearly acknowledged the social issues at play and further acknowledged their influence in *Lawrence*.

Those social issues have only intensified since the time of *Bowers*, *Romer*, and *Lawrence*. Once the Court overturned the criminal statutes targeting homosexuals regarding their privacy and liberty interests, those factions could now turn their attention to the civil issues most important to them, including the right of marriage.

As many will acknowledge, legal marriage carries with it far more importance than the mere appearance of propriety.[145] The current issue is not new. As far back as the 1970s, or before, couples were contesting states' restrictions on same-sex marriage.[146] The general challenge to these statutes was based on a denial of federal constitutional protections, and up to the 1990s, all had failed with that premise.[147]

In 1999, Vermont became the first state to hold that its citizens were entitled to equal protection on the issue of same-sex marriage under its own constitution, despite the lack of protection under federal law.[148] The Vermont Supreme Court gave the Legislature the choice of how to provide for that, and they created the civil

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[140] *Id.* at 572. (Prior to 1961 all 50 states had such laws, although the *Bowers* Court apparently did not find the declining number significant enough at the time).

[141] *Id.*

[142] *Id.* at 573-74.

[143] *See* Romer v. Evans 517 U.S. 620 (1996).

[144] *Lawrence*, 539 U.S. at 574.

[145] One of the important but little thought of issue includes hospital visitation with non-spouse domestic partners, an issue that came to the forefront during the Aids epidemic of the 1980's, by which the gay community was hard-hit. Mark Strasser, *Marriage, Parental Rights, and Public Policy: On the FMA, Its Purported Justification, and Its Likely Effects on Families*, 2 ST. THOMAS L. REV. 118 (2004).

[146] Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).

[147] *See id.*

[148] *See* Baker v. State, 170 Vt. 194 (1999).

union with the same rights and benefits as marriage, but stopped short of calling it that.[149] While the concept of civil unions ameliorated some, if not all, of the legal issues at stake, it did not provide for what many in the gay community were calling for, which was the right to marry as their heterosexual brethren had. In 2004, Massachusetts became the first state in the nation to allow same-sex marriage.[150] States such as Connecticut and Vermont have followed, either through judicial or legislative means, although many others have declined to do so.[151] Moreover, the situation in California demonstrates the legal challenges that can easily arise when a state is confronted with stringent support on both sides of the debate.[152] To date, those states whose courts have found a right to same-sex marriage or civil unions have done so on the basis of their state constitutions, rather than the federal constitution.[153]

In 1996—four years before the creation of the first state-sanctioned civil union—Congress became proactive on the same-sex marriage front, passing the Defense of Marriage Act, or DOMA.[154] DOMA would have seemed right for an immediate constitutional challenge, since it authorized a concrete exception to the Full Faith and Credit Clause of the Constitution,[155] allowing states to refuse to recognize the "Acts, Records, and judicial Proceedings" of a sister state in relation to anything that purports to allow the benefits of marriage between the same sexes, and without having to show, as the Clause requires, good public cause to do so.[156]

Interestingly, no challenge has as yet reached the Supreme Court.[157] This may well have to do with the reluctance of those for or against to have confidence

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[149] *See id.* at 224-225.

[150] *See* Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003).

[151] *See* Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135 (2008); Baker v. State, 170 Vt. 194, (1999).

[152] This is exemplified by the most recent legal battle over Proposition 8, but also arose back in 2004 with *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055 (2004), when the Court held that San Francisco officials acted unlawfully when they decided to issue marriage licenses to same-sex couples, in violation of California statutes that limited marriage to a union between a man and a woman.

[153] *See, e.g.*, Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003).

[154] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

[155] U.S. CONST. art. IV, § 1.

[156] *Id.* The Court has upheld the Full Faith and Credit Clause in marriage cases as far back as *Barber v. Barber*, 62 U.S. 582, 584 (1859) (holding that a wife who had a divorce decree with an order of alimony in NY could enforce the order against the husband in federal court where he had moved to a new domicile, and that the new domicile could not summarily ignore the New York holding). DOMA is designed to allow just such an exception by a state based solely on the issue of same-sex marriage or its practical equivalent.

[157] The first case likely to do so on a direct appeal of the language will be *Miller v. Jenkins*, 661 S.E.2d 822 (Va. 2008), involving Virginia recognition of a Massachusetts marriage license between a lesbian couple. However, a federal judge in Boston declared the Defense of Marriage Act unconstitutional both because it requires states to deny federal benefits to its citizens who enter into a valid same-sex marriage under state law, and under the Equal Protection Clause of the Fourteenth Amendment. The Associated Press, *Judge Rules Gay Marriage Ban Unconstitutional*, CBSNEWS.COM, July 8, 2010, http://www.cbsnews.com/stories/2010/07/08/politics/main6659281.shtml?tag=mncol;lst;1. None of the opinion appeared to touch on the issue of changing the text of the Constitution specifically to allow states to reject recognition of same-sex relationships from other states. *Id.*

in what the Court may do. Although the Roberts Court is perceived to have a clear conservative leaning, the fact is that the language of DOMA apparently modifying the Full Faith and Credit clause for one issue only, as well as the Court's decisions in *Romer* and *Lawrence*, have likely made those hoping for a ratification of DOMA hesitant of the absolute certainty of that outcome. Similarly, those who believe even the staunchest conservatives on the Court might have difficulty upholding such a modification of the Constitution appear to have been, at least until now, unwilling to take that chance. The challenge to DOMA and state statutes denying same-sex marriage will rest heavily on the holdings of *Romer* and *Lawrence*, including the repudiation of the *Bowers* Court's reasoning and acceptance of the social changes which lead to the later cases.[158]

III. WHAT HAPPENS NOW?

The question has to be asked: what would happen if those so opposed to a Court decision—such as *Roe*—prevailed, and managed in fact to overturn it?[159] And it is a legitimate question: while *Roe* purported to settle the legal issue of access to abortion in 1973, numerous challenges to both the specific holding and tangential issues have continued unabated. It is obvious that the social issue of abortion—apart from its legal determination—has not subsided, and given the intense religious and moral fervor surrounding it, is unlikely to do so.[160] It is legitimate to question those who argue for reversing the law as to whether succeeding in doing so would accomplish any different result. Even more importantly, it is urgent to ask whether succeeding in such a quest would result in an end to abortions, the professed goal in seeking such reversal.

The decision in *Roe* itself points to the history of abortion in the nation and the world, acknowledging that it has always existed and been used by those in

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[158] *See* Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

[159] Chief Justice Roberts. in a concurring opinion in *Citizens United v. FCC*, 130 S.Ct. 876, 921 (2010), stated that the effects of *stare decisis* can be diminished when the precedent's validity is so hotly contested it cannot function as the basis for future cases, perhaps setting the stage for a serious attempt to overturn *Roe*, certainly one of the most consistently controversial holdings in history. One has to wonder if there would remain any point to *stare decisis* if a "controversial" decision can be "ignored" by those members of the Court who do not agree with it. It is, after all, the Court's responsibility to settle those controversies in the first place. It may be a convenient theory, but one clearly at odds with our history of legal procedure. It also is one that does not seem to have been widely noted as yet, or at least has had little comment thus far. As a side bar, it appears to give new meaning to the term "judicial activism." "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827, (1991). For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a "special justification." Arizona v. Rumsey, 467 U.S. 203, 212, (1984).

[160] Ralph Nader once noted that nothing would convince polygamists of the wrongness of their deeds, since theirs is a religious fervor, not a deliberated one. JUDITH AREEN & MILTON C. REGAN, JR, FAMILY LAW: CASES AND MATERIALS, (5th ed., Foundation Press 2006) (citing Ralph Nader, *The Law and Plural Marriages*, 31 HARV. L. REV. 10 (1960)).

need, even when illegal and at great risk from the procedure.[161] To pretend that a changed decision would similarly change the use of such procedures today is more than naive: it is illogical. The history of the use of abortion and the fight for access to it shows otherwise.[162] Just as those opposed to legalized abortion have not and likely will not drop their efforts to overturn *Roe*, not only would those who support the woman's right to choose the procedure simply become the challengers once again, but more to the point, the procedures themselves would not stop.[163] Women who could afford to do so would travel to those places where it remained legal, often fairly close by.[164] Those without resources would almost surely again resort to the "back-alley" butchers,[165] likely at great risk to their own health.[166] The point being that no matter how much those in favor of a particular ideological outcome want to believe otherwise, the legal determination quite simply will not change the factual results.

Griswold is frequently seen as the legal origin of the right to privacy, which eventually led to the holding in *Roe*: that might be a correct interpretation were one looking only at very modern case law.[167] It is from this "newfound" right to privacy read at least partially into the Ninth Amendment of the Constitution in *Griswold*[168] that the later "privacy" cases, as they have long been dubbed, expanded those rights to include abortion.[169] In fact, there was nothing particularly new about the constitutional right to privacy, having been determined well back in the nation's history in cases such as *Pierce v. Society of Sisters*,[170] dealing with the right to educate one's children where one sees fit, and *Meyer v. Nebraska*,[171] concerning the right to educate one's children in the language of one's choice.

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[161] *See* Roe v. Wade, 410 U.S. 113, 150 (1973). The Court pointed out that historically, abortion laws were created to protect the life and health of the mother, very much on par with its ultimate holding. *Id.* at 139.

[162] A good part of *Roe* was devoted to outlining and relying on the history of the Texas statute as well as other state statutes, showing that abortion has been in place from the beginning of this nation, and well before in other nations. *See Roe*, 410 U.S. at 117-18.

[163] There could, theoretically, be fewer abortions, though with the ease of travel and its costs today that is also debatable.

[164] Many would undoubtedly seek the procedure in Canada, where independence from the decisions of the U.S. Supreme Court is not only jurisdictional but ideological.

[165] Richard Fausset, *A History of Violence on the Antiabortion Fringe,* LOS ANGELES TIMES, June 1, 2009, http://articles.latimes.com/2009/jun/01/nation/na-abortion-violence1.

[166] This article will not delve into the rationale behind the decision in *Roe* or other cases. The point here is to determine whether and how specific ideologies and national social mores affect the Court's determinations.

[167] *See generally* Donald Batterson, *A Trend Ephemeral? Eternal? Neither?: A Durational Look At The New Judicial Federalism,* 42 EMORY L.J. 209, 211-212 (1993) (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

[168] *See* U.S. CONST. amend. IX (preserving to the people all rights not explicitly enumerated in the Constitution).

[169] *See generally* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[170] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[171] *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

While applying the invisible right to privacy of the Ninth Amendment to these types of cases did not develop fevered and continuing opposition, shifting that earlier reading to a new, and far more socially controversial, issue clearly did.

Neither the extent of controversy nor the perceived ideology of the Court, however, necessarily determines any result. In 2006, the Court was slated to hear its first major abortion case in six years, dealing with the constitutionality of a federal ban on a specific late-term, or what its critics refer to as "partial-birth," abortion procedure.[172] The key legal issue was whether the Act was unconstitutional because it did not, per *Roe,* provide for an exception involving the health of the mother.[173] The major social issue, on the other hand, was the change in the makeup of the Court with the appointment of Chief Justice Roberts and Samuel Alito.[174] While Roberts replaced another conservative Chief Justice, Rehnquist, Alito took the place of Justice O'Connor, long the swing vote upholding the basic right to abortion.[175] The question was whether the more conservative Alito would follow O'Connor's role or vote with the conservative side.[176]

Additionally, with O'Connor's resignation, speculation was rampant about whether Justice Kennedy, also appointed as a conservative, would indeed vote with the conservatives, thereby giving them a virtual lock on conservative/liberal issues, or in fact take O'Connor's place as the new "swing" vote, voting on the side of precedent, since in 2000 the Court had overturned a similar Nebraska law.[177] Much of the hopes or concerns, depending on the view, of the changed Court dealt with the appointment of Alito to replace O'Connor and the speculation of an appointment to replace Justice Stevens, were he to resign during a Republican administration.[178]

In this instance, Kennedy did in fact vote with the conservatives, writing the opinion upholding the constitutionality of the Act, notwithstanding the lack of a health exception for the mother.[179] Apparently, and despite the deep concerns of supporters of abortion rights, the Court considered this case a peripheral issue on the abortion front, and in fact, it has neither seemed to have much actual effect nor

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[172] *See* Bill Mears, *All Eyes on Roberts Court as It Takes on Abortion*, CNN.COM, Nov. 6, 2006, http://www.cnn.com/2006/LAW/11/06/scotus.abortion/index.html (discussing the Partial Birth Abortion Ban Act of 2003).

[173] *See id.*

[174] *See id.*

[175] *See id.* Interestingly, O'Connor early on led watchers to believe she would not have voted for the outcome in *Roe*, but supported the established right once on the bench.

[176] *See* Mears, *supra* note 172.

[177] *See id.* Interestingly, one of the government's arguments for the ban was that Congress found that the procedure is "never necessary to preserve a mother's health," begging the question of why it would be used at all, since there were other and less controversial methods available. *Id.* (quoting Solicitor General Clement's legal brief in the case).

[178] As noted earlier, Stevens himself expressed enough concern about this that he postponed retirement until after the 2008 elections, hoping a Democratic president would appoint his successor, which of course happened.

[179] *See* Gonzalez v. Carhart, 550 U.S. 124 (2007).

to affect predictions about future Court actions regarding abortion. In fact, the majority opinion noted that the case was decided, "under precedents we here assume to be controlling."[180] It is as though the Court itself did not want to give too much hope to the anti-*Roe* side regarding actual reversal, and wanted the *Roe* supporters to know that while it was not abandoning the basis of the holding there, it was willing to look at specific issues in and of themselves.

Another predictor of major change on the abortion front came from a proposed South Dakota ban on virtually all abortions, including in cases of rape and incest.[181] Conservatives felt they had a strong chance to pass the initiative, setting up a Supreme Court showdown on *Roe* with the new, presumably conservative, majority. Instead, the state's voters themselves rejected the law.[182]

Perhaps the other most controversial legal and social issue today, in addition to abortion, is that of rights of same-sex partners. While the Court has firmly rejected criminal sanctions for private sexual acts of same-sex couples,[183] those couples and millions supporting their rights to partner benefits and even marriage are pushing for laws that allow them.

Like abortion, same-sex marriage is a hot-button topic legally, politically, and socially. Unlike abortion, which despite the enormous emotions it entails, in reality it affects individuals and their private rights, same-sex rights, especially those allowing or mimicking state sanctioned marriage, have been described as akin to the civil rights era cases, in particular *Brown*, whose holding changed the course of a nation.[184] While some states are legalizing same-sex civil unions and even marriage, others states and the federal government, have promoted acts and/or constitutional amendments banning the recognition of anything resembling same-sex partner rights.[185]

The widespread support for, and opposition to, same-sex rights remind one of both the abortion and civil rights cases. Like abortion, this issue is frequently entwined with religious and moral beliefs, which are rarely changed by the legal rulings surrounding them. But as history has repeatedly shown, the legal issues will likely prevail on their own whether or not they change anyone's mind. But, as with civil rights and abortion, they will not be determined in a vacuum.

How this issue will eventually play out legally is still unknown. *Lawrence*[186] succinctly gave the Court's opinion on individual rights of gays; many are using the case to predict that the Court will further sanction the rights of gay couples in the

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[180] *Id.* at 161.

[181] *See South Dakota Rejects Strict Abortion Ban*, CBS NEWS, Nov. 7, 2006, http://cb3.com/national/state.measures.midterm.2.274333.html.

[182] *See id.*

[183] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[184] *See* Carlos Ball, *Legal Rights In Historical Perspective: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL OF RTS. J. 1493 (2006).

[185] *Id.* at 1493. *See also* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

[186] See *Lawrence*, 539 U.S. 558.

civil arena.[187] Critics will undoubtedly seek to limit the holding of *Lawrence* to its specific criminal issue. Others see a correlation between the ruling in *Brown* and the backlash on the part of many states, seeing lessons to be learned from *Lawrence* and the current state actions taking place limiting same-sex rights.[188]

One of the major questions, of course, will be how changes on the Court over the past few years will affect these legal issues. Will the more conservative factions of the Roberts Court halt the extension of *Lawrence* into the civil arena, or will the addition of two justices newly appointed by a Democratic president hasten it?[189] While both O'Connor and Kennedy joined the liberal wing of the Court in *Lawrence*, O'Connor concurred on narrower grounds than the majority, leaving open whether she would overturn other laws that limit the rights of gays and lesbians.[190] With O'Connor gone, Kennedy's vote becomes that much more important: will he side with the conservatives as he did in *Gonzalez*, or stay with the liberals as he did in *Lawrence*?[191] Will it be a matter of overall ideology or specific issues for Kennedy, or even, as with others before him, a determination to see an independent thinking Court? Had the Republican administration appointed Steven's replacement there might be a far different result than with the appointment of two justices by a Democratic president, but as history has shown, that is not a guarantee.

IV. WHAT NOW, AND WHEN?

While the structure of the Supreme Court provided by the Constitution may have been vague "not just in the makeup but in the scope" of the powers of the Court, there is a view that the Court has defined itself, perhaps even better than its co-branches, through its decisions, alternatively defending rights and promoting conflict,[192] or perhaps doing so simultaneously and likely unwillingly. Changes in individual membership on the Court as well as its overall ideology at any given time in history have certainly been instrumental in determining what cases will be heard and what decisions rendered. Just as important, perhaps more so in a number of cases, has been the social environment in which the Court sat: vast movements for and against civil rights, abortion, and same-sex protections, to name some of the most current and contentious. The Court has not had the luxury of ignoring the change. Rather, it has had to incorporate it into its schedule. Moreover, the Court

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[187] Another issue involving gays and leaning on *Lawrence* for support is that of adoption by gays, currently outlawed in some states for either gay individuals and/or couples. *See, e.g.*, FLA. STAT. § 39.621 (2006).

[188] *See* Ball, *supra* note 184, at 1493-94.

[189] *See* Rothfeld, *supra* note 65.

[190] *See id.*

[191] *See id.*

[192] Paul Hoogeveen, *The Supreme Court: From an Ill-Defined Body to a Policy-Shaping Powerhouse*, HISPANIC OUTLOOK IN HIGHER EDUCATION, Dec. 15, 2008, *available at* http://findarticles.com/p/articles/mi_hb3184/is_200812/ai_n32203135/pg_3/.

has always had the burden of determining not just the legal correctness of the issue, but having to do so amid the swirls of controversy in the nation.[193]

How the Court sees its role in these controversies does, of course, depend on its makeup. But the perceived ideology of the members is not necessarily enough to determine any outcome. President George W. Bush undoubtedly felt he had left his conservative legacy on the Court with the appointments of Roberts and Alito.[194] And he likely had good reason to think so. Alito's fifteen years as an appellate judge had earned him the reputation as one of the most conservative on the federal bench nationwide,[195] especially in areas such as criminal rights, immigration, and civil rights.[196] While having a more mainstream record in some areas, he came down on the side of the conservatives on most social issues, including abortion, where as a judge on the Third Circuit Court of Appeals he voted to restrict abortion rights in a case later overturned by the Supreme Court.[197] On the other hand, he voted to uphold those rights in yet another case.[198] Like many conservatives on the Court, and unlike his predecessor O'Connor—who showed a willingness to restrict the use of the death penalty—Alito's record shows him willing to uphold the death penalty on a broader scale.[199]

One of the interesting facets of Alito's Circuit career was his agreement with those trying to limit the boundaries between church and state, and expand religion into public life.[200] This religious view may play into Alito's votes on abortion issues, and may also come into play on the sure-to-be forthcoming same-sex protections cases, including same-sex marriage.

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[193] In an example of the enormous changes taking place regarding heterosexuality and same-sex rights, the Church of England just announced a profound turnaround on policy in supporting an openly gay bishop as head of one of its parishes. *See* The Associated Press, *A Gay Bishop for the Church of England?*, USA TODAY, July 7, 2010, http://www.usatoday.com/news/religion/2010-07-07-bishop06_ST_N.htm.

[194] *See* Jeffrey Toobin, *Commentary: Conservative Supreme Court is Bush's Legacy*, CNN.COM, Oct. 1, 2007, http://www.cnn.com/2007/US/law/10/01/Toobin.scotus/index.html. There is an interesting sidebar to the public face of politics: while President Bush was indeed the face of the conservative movement throughout his presidency, even his own family members were not necessarily in agreement. Laura Bush recently went public with her own support of both abortion rights and the legalization of gay marriage, opinions she had kept silent throughout her husband's terms of office. When Mrs. Bush was asked on national television if she believes same-sex marriage is forthcoming, she answered in the affirmative. *See* Russell Goldman, *Laura Bush Supports Gay Marriage, Abortion* ABCNEWS.COM, May 12, 2010, http://abcnews.go.com/Politics/laura-bush-supports-gay-marriage-abortion/story?id=10629213 (discussing Mrs. Bush's television appearance on "Larry King Live").

[195] *See* Amy Goldstein & Sarah Cohen, *Alito, in and out of the Mainstream: Nominees Record Defies Stereotyping,* WASHINGTON POST, Jan. 1, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/31/AR2005123100328.html.

[196] *See id.*

[197] *See id.*

[198] *See* Goldstein & Cohen, *supra* note 195.

[199] *See id.*

[200] *See id.* (discussing *American Civil Liberties Union of New Jersey ex. rel. Lander v. Schundler*, 168 F.3d 92 (3d Cir. 1997), where Alito wrote the majority opinion upholding the constitutionality of allowing religious displays on public property).

The other member of the Court who will undoubtedly try to sway the Court is Chief Justice Roberts. As one who was called the "nation's best appellate lawyer" by both the political right and left, there was a belief he would do much to try to redefine what is considered the "mainstream" in American constitutional law.[201] He has shown nothing so far to indicate otherwise, being a stalwart leader and vote on the conservative side.

With Roberts' and Alito's consistent and reliable conservative votes, the perception was surely that the Court would undoubtedly not just swing to the right but firmly plant itself there, perhaps enabling the Roberts Court to indeed change what the "mainstream" of constitutional law looks like.[202] When Justice Kennedy took over as the acknowledged swing vote after Justice O'Connor's retirement, the conservatives no doubt believed they now had the momentum, and necessary votes, to make sweeping changes, at least as long as Kennedy was true to his ideological roots and voted with them.[203] Kennedy's initial terms on the Court bore this out; he originally was found to be second only to Rehnquist in aligning with the conservative bloc.[204] Kennedy had supported Rehnquist's blunt opinion in *Webster*, which had criticized *Roe* and allowed states to regulate abortion.[205] It undoubtedly came as a shock then to the conservative bloc that Kennedy not only voted with, but agreed to co-author—with O'Connor and Souter—the majority opinion in *Casey* which explicitly refused to overturn *Roe*.[206] One Court observer termed the holding and opinion in *Casey* a case of the presumptive conservative Court "spectacularly" failing to overturn *Roe*.[207]

Kennedy's move to the center, if not the left, prevented the conservative bloc, including new additions Roberts and Alito, from claiming such victories as decimating The Clean Water Act[208] as it had been regulated for decades.[209] He likewise voted to uphold most of the controversial Texas redistricting plans, and very importantly rejected virtually all assertions of unilateral executive privilege claimed by the Bush White House concerning war crimes tribunals to be held outside of the protections of military justice.[210]

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[201] Michael Barone, *Roberts Will Redefine 'Mainstream'*, U.S. NEWS AND WORLD REPORT, June 6, 2006, http://politics.usnews.com/usnews/opinion/baroneweb/mb_050720.htm.

[202] *See id.*

[203] *See* Christopher Smith & Thomas Hensley, *Unfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALBANY L. REV. 1111, 1119 (1994).

[204] *See* Christopher Smith, *Supreme Court Surprise: Justice Anthony Kennedy's Move Toward Moderation*, 45 OKLA. L. REV. 459, 461 (1992).

[205] *See id.* at 467.

[206] *See id.* at 468.

[207] Kathleen Sullivan, *The Supreme Court, 1991 Term: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 24 (1992).

[208] 33 U.S.C. § 1251 (2010).

[209] *See* Nina Totenberg, *Supreme Court More Conservative, Fragmented*, NPR, July 5, 2006, http://www.npr.org/templates/story/story.php?storyId=5531678.

[210] *See id.*

With major decisions undoubtedly looming in the continuing controversy over abortion, as well as the more recent challenges over same-sex protections, including marriage, the question is: what will the Court do? Our legal system lends itself to the idea of precedent controlling: Justice Powell long ago issued a plea to respect the policy of *stare decisis* in abortion law, noting that nine Supreme Court decisions over an eight year period had upheld *Roe*.[211] While far scarcer in terms of precedent, the fight over same-sex rights will undoubtedly focus on the holding of *Lawrence v. Texas*, which although a criminal case, focused on individual rights under equal protection in its holding.[212]

Recent legal opinions show this is a fight that may well take place sooner rather than later, much to the surprise of many. The United States District Court for the Northern District of California recently overturned the voter-enacted state constitutional amendment known as Proposition 8.[213] This amendment had overturned the California Supreme Court's determination that same-sex marriage was legal in that state.[214] In its opinion, the court took 136 pages to carefully refute each of the defendant's arguments against same-sex marriage, debunking the defendant's experts,[215] and challenging each of their assertions in turn.[216] The court cites experts and studies to find that Proposition 8 is based on fallacious reasoning about gays in general and serves to deny them equal protection under the law.[217]

It is apparent from the opinion that the court was setting up a difficult holding to reverse, by being as specific as possible in its factual and legal findings. It has been noted that the judge chose a fairly lenient legal test, determining that there was no rational basis for the discrimination under Proposition 8, rather than a level of scrutiny that might have been more difficult for the appellate courts to uphold.[218]

Aside from the controversial issue itself, this is a case that confounded many legal experts as to how it has played out. The team of lawyers arguing to overturn Proposition 8 was led by the team of former conservative Solicitor General Theodore Olson, a conservative, and David Boies, a liberal.[219] While there was no

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211 *See* Smith, *The Supreme Court in Transition*, *supra* note 76, at 336.

212 *See* Lawrence v. Texas, 539 U.S. 558 (2003). A federal judge in Boston declared the Defense of Marriage Act unconstitutional both because it requires states to deny federal benefits to its citizens who enter into a valid same-sex marriage under state law, and under the Equal Protection clause of the 14th amendment. *See Judge Rules Gay Marriage Ban Unconstitutional*, *supra* note 157. None of the opinion appeared to touch on the issue of amending the Constitution to allow states to reject recognition of same-sex relationships from other states. *Id.*

213 Perry v. Schwarzenegger, 704 F. Supp.2d 921 (N.D. Cal. 2010).

214 *See id.*

215 *See id.* at 964-80.

216 *See id.*

217 *See id.*

218 *Perry*, 704 F. Supp.2d at 995 (N.D. Cal. 2010).

219 Joel Klein, *The 2010 Time 100: David Boies and Theodore Olson*, TIME, Apr. 29, 2010, http://www.time.com/time/specials/packages/article/0,28804,1984685_1984745_1985481,00.html#ixzz

doubt that the decision would be appealed, setting up a potential Supreme Court determination of same-sex marriage, there may in fact be a legal glitch in the ability to appeal. Both Republican Governor, Arnold Schwarzenegger, and Democrat Attorney General of California, Edmund G. "Jerry" Brown, who is currently running for Governor, who were the titular defendants in the court case, have declared their support for same-sex marriage and declined to appeal.[220] While others have filed an appeal with the Ninth Circuit, the legal issue now shifts from the Court's decision overturning Proposition 8 to whether anyone other than a mandated State representative even has standing to appeal.[221] The initial relief and/or anxiety that the Supreme Court might actually get the opportunity to decide the broader issue of gay marriage rights has now become a question of whether the Court will even hear an appeal if the state of California refuses to go forward with one. If there is no standing for others to appeal, the District Court's decision will stand in California, adding them to the other states which presently allow same-sex marriage, while not determining the issue nationally.[222]

In line with much of the gist of this article's attempt to discern judges' ideologies from their votes, much has been made of two facets of the life of the presiding judge in this case, Chief U.S. District Court Judge Vaughn Walker. Walker was, perhaps ironically, originally appointed by Reagan in 1987, and his appointment was actually held up for two years in large part by concerns of gay rights groups, who feared he was anti-gay in part because of litigation in which he had appeared.[223] On the opposite side of the spectrum are the rumors that Walker is himself gay, some declaring him open and others claiming he has never advertised his sexual orientation one way or the other.[224] What is most remarkable about all of these reports, given the nature of the case, is that both sides have asserted they will not use the judge's actual or rumored sexual orientation in any arguments on appeal, acknowledging it has no place in the issue.[225]

If Proposition 8 reaches the Supreme Court, it will provide a litmus test on both precedent—following decisions such as *Lawrence*—and social change,

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220 *See* The Associated Press, *Same-Sex Marriages Blocked During Appeal*, CBS NEWS, Aug. 16, 2010, http://cbsnews.com/stories/2010/08/16/politics/main6778728.shtml.

221 *See id.*

222 If this occurs, it is likely that the original assessment by many that the Defense of Marriage Act would be the Supreme Court test will once again prevail.

223 Walker was eventually appointed during the term of President George Hubert Bush. There have also been concerns about Walker from feminists and African-Americans, stemming from his membership in a "restricted" club. San Francisco Gate Chronicle, *Gay Judge has Proven Record of Impartiality*, SAN FRANCISCO CHRONICLE, Feb. 9, 2010, *available at* http://articles.sfgate.com/2010-02-09/opinion/17872020_1_anti-gay-san-francisco-gay-olympic-games.

224 *Id.*

225 Aliyah Shahid, *Judge Vaughn Walker's Sexual Orientation Sparks Ire over Fairness in Prop 8, Same-Sex Marriage Case*, NY DAILY NEWS, Aug. 6, 2010, *available at* http://www.nydailynews.com/news/national/2010/08/06/2010-08 06_judge_vaughn_walkers_sexual_orientation_sparks_ire_over_fairness_on_prop_8_sames.html?r=news/national.

building on changes dating back to the civil rights movement. Perhaps members of the Court may attempt to thwart both of these foundations.

Although Justice Roberts was using one justification for overruling precedent rather than announcing a supposed philosophy, his assertions in his concurrence in *Citizens United*[226] may set a disturbing standard of its own, theoretically or practically, abandoning *stare decisis* as the lynchpin of our justice system. It would frankly lead to the view espoused by the majority opinion of Kennedy, O'Connor, and Souter in *Casey* that a reversal of *Roe* would be "at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."[227]

CONCLUSION

We have seen numerous instances in history where society dictated change, from the restrictions of prohibition, to its repeal only a few years later[228]—both fueled in large part by the mores of the day and the officials elected to cater to them[229]—to the overturning of "separate but equal" in 1954, with regard to the segregation of public schools,[230] to the more recent but just as controversial issues of abortion and same-sex marriage. In each of these, and other related instances, the Supreme Court has stood as the arbiter of right and wrong, at least in the legal sense.

With every controversy, there exist different and divergent societal viewpoints that are voiced by the public in the hope that the Court will rule in the perceived "correct" way. In some instances, the political positions of the justices can be a fair indicator of the side on which the Court will fall.

The surprise, however, is when the Court has not ruled in the "expected" way, but in a way divergent from it. Presidents who have nominated justices, Senators who have confirmed them and the American people in general have been frequently shocked by the unexpected rulings from the Court, given its perceived ideological composition at the time of the decision. Both liberals and conservatives have found themselves surprised by what they may surely have considered abandonment by their political cohorts on the Court.[231]

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226 *See supra* text accompanying note 159.

227 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 869 (1992).

228 The era of Prohibition began in 1919 with the ratification of the Eighteenth Amendment, and ended in 1933 with its repeal under the Twenty-First Amendment. U.S. CONST. amend. XVIII; U.S. CONST. amend. XXI.

229 Eyewitness to History, *Prohibition, 1927*, (2007) http://www.eyewitnesstohistory.com/prohibition.htm.

230 Brown v. Board of Ed., 347 U.S. 483 (1954).

231 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (where a generally conservative Court overturned criminal sanctions for private sexual activities for homosexuals), and Kelo v. City of New London, 545 U.S. 469 (2005) (where the liberal and conservative justices appeared to switch political sides in handing down a holding which expanded the doctrine of eminent domain for the benefit of private developers).

Such surprises have certainly made it more challenging to "read" the position of the Court for any anticipated decision, but there is a positive side that comes from this seeming disorder. The Supreme Court was designed to be, and ought to be, the authority on the law, not the minion of special interests. Respect for the decisions of the Court rests with the ability of the public to view the Court as a neutral arbiter, rather than one that is controlled by politics.[232] Even more pertinent is that those who are awaiting decisions on some of the current controversial issues know that whether the Court ignores or follows precedent and the social changes of the time, will not change the fact that practices such as abortion and same-sex relationships will continue to persist. The ultimate question, then, is whether they will continue with or without the protections of the law.

[232] *See* Christopher E. Smith, The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution, 79 KY. L.J. 317, 321, (1991).