Public Opinion, Cultural Change, and Constitutional Adjudication

Calvin R. Massey
UC Hastings College of the Law, masseyc@uchastings.edu

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When do courts pay attention to public opinion in deciding constitutional issues? When should courts do so? This Article provides a limited answer to those questions. Courts often pay attention to public opinion when deciding constitutional issues, especially when the issue is one that involves a challenge to a long-standing cultural norm. That pattern is present, for example, in each of Plessy v. Ferguson and Brown v. Board of Education. The Court changed its view of equal protection because public opinion about racial segregation changed. Today, the long-standing cultural understanding of marriage is challenged by those who claim that its perpetuation violates the equal protection and due process guarantees. While nobody can predict with any certainty what the judicial resolution of this issue may be, it should not be surprising if that resolution reflects public opinion on the matter. Public opinion data on issues of special concern to the homosexual community suggests that each of the legislative and judicial responses at the state level reflects public opinion or, if anything, lags a bit behind. But the courts catch up, and it is appropriate for courts to consider public opinion when weighing constitutional challenges to deeply embedded and long-accepted cultural practices.
There are two obvious aspects to any discussion of public opinion and its influence on the judicial manufacture of constitutional law: Should courts be influenced by public opinion? Are courts so influenced? The short and cryptic answer to the first question is "sometimes." The short, and less cryptic, answer to the second question is "most of the time." Actually, Finley Peter Dunne, the American humorist of the early twentieth century, had Mr. Dooley deliver a more trenchant verdict on this latter issue: "No matter whether the Constitution follows the flag or not, the Supreme Court follows the election returns." Mr. Dooley's description may well have been right, but he had no answer to the question of whether courts should do so, nor even a general answer to the question of when courts follow public opinion. I shall try to provide some sharper answers to these questions in the context of the current debate over governmental limits upon the ability of same-sex partners to enter into marriage. Public opinion concerning the wisdom and legality of confining marriage to opposite-sex partners is divided, and in the course of deciding whether state limits upon same-sex marriage are valid, the courts will necessarily be required to confront the question of what role, if any, public opinion will play in their decisions.

In a series of three lectures delivered shortly before his death, Justice Robert Jackson reminded his audience that the Supreme Court is a unit of government, a law court, and a political institution. This observation is also true of the highest courts of appeal of the several states with respect to matters of state constitutional law that do not implicate federal law. It is the lot of those courts to resolve matters with finality. "We are not final because we are infallible, but we are infallible only because we are final," declared Justice Jackson. His reflections serve to focus the problem of judicial consideration of public opinion. Because courts are final (including state supreme courts, which are final on matters of state law that are independent of federal law) and constitute a branch of government, public opinion is relevant to their decisions, as it is to all questions of governance in a representative democracy. How that relevance should be admitted to judicial deliberations is another question, one which I shall defer answering for

2. See infra Appendix. State-by-state data is presented in a graph on file with the Hastings Law Journal.
3. Robert H. Jackson, The Supreme Court in the American System of Government 2 (1955) ("[The Supreme Court] is a unit of a complex, interdependent scheme of government from which it cannot be severed. Nor can it be regarded merely as another law court."). Jackson's three lectures bore the titles "The Supreme Court as a Unit of Government," "The Supreme Court as a Law Court," and "The Supreme Court as a Political Institution." Id. at 1, 28, 53.
the moment. You might think that when judges are acting purely as umpires in courts of law they should eschew public opinion and confine themselves to legal analysis. But this is far too simple an answer. For one thing, courts are never either solely a branch of government or a law court; they are always and everywhere simultaneously both agents of democratic governance and deciders of legal disputes.

So, how is one to break this particular Gordian knot? First, not all problems brought to courts for decision share the same qualities. Some issues of statutory interpretation may be resolved without considering public opinion, except in the most remote sense. Surely I cannot deduct from my income, as ordinary and necessary business expenses, veterinary charges pertaining to my pet dog. But if I develop a comedy act as a profitable sideline in which my pet dog is a star character, I may well be able to deduct those veterinary expenses. The determination of whether those expenses are ordinary and necessary business expenses does not hinge on public opinion so much as it does upon well-developed criteria concerning the revenue derived from the enterprise and the relationship of the expenses to the business.5

While there may be statutory issues that do not implicate public opinion very much, many such issues do involve public opinion. A tariff that taxes imported fruits at one rate and vegetables at a different rate might require a court to determine whether a tomato is a fruit or a vegetable. It is a botanical fact that the tomato is the fruit of its plant, but public opinion holds that it is a vegetable. Courts might refer to the legislative history, and if that source tells us that the tomato is a vegetable, the answer is surely shaped by public opinion. If the legislative history is definite that the tomato is a fruit, courts might ignore contrary public opinion, reasoning no doubt that the legislature can always correct its popular error. But courts may just as easily impute to the legislature an intention that corresponds to public opinion, even though that intention lacks support in the legislative history.

There are even more familiar examples. A statute that directs courts not to enforce unconscionable contracts requires courts to examine the public understanding of that highly elastic term. A statute that requires contracting parties to conduct themselves in good faith or a commercially reasonable manner necessarily obligates the judicial interpreter to inquire into the opinion of businessmen concerning what is commercially reasonable, or to look to a broader social perception of conduct that is or is not undertaken in good faith.6

6. See, e.g., CAL. CIV. CODE § 1995.260 (West 1985 & Supp. 2010) ("If a restriction on transfer of the tenant's interest in a lease requires the landlord's consent for transfer but provides no standard for giving or withholding consent, the restriction on transfer shall be construed to include an implied standard that the landlord's consent may not be unreasonably withheld. Whether the landlord's
Consideration of public opinion also occurs when common law principles are in question. Should contributory negligence be a complete bar to recovery in tort? When the California Supreme Court decided that the “all or nothing” rule of contributory negligence should be displaced by pure comparative negligence, part of its rationale was the fact that juries “allow recovery in cases of contributory negligence, and ... the compromise in the jury room does result in some diminution of the damages because of the plaintiff’s fault.” But some common law issues are resolved by courts without much consideration of public opinion. When the New Mexico Supreme Court decided that the common law principle of destructibility of contingent remainders was not part of the common law of New Mexico, it mentioned only in passing that the rule operated to destroy a grantor’s intention; most of the court’s rationale was the thoroughgoing anachronism of the rule and the haphazard effect of its continuation. If public opinion had been the court’s guide, the rule’s implacable destruction of a grantor’s intention for no good reason would have figured more prominently in its reasoning.

The role of public opinion in judicial decisions of constitutional issues is particularly vexing. It is a hoary maxim that courts are expected to protect constitutional liberties from majoritarian invasion. It is equally axiomatic that majority sentiment, translated through our democratically elected representatives, is entitled to govern those aspects of our lives that are not protected by constitutional liberties. The problem arises when courts are asked to veto governmental practices
that have long been assumed to be constitutionally valid. Almost always, these challenges implicate cultural practices. Can the scope of constitutional liberties be determined without reference to strongly held cultural notions? Conversely, should courts ignore public opinion about cultural practices in deciding constitutional meaning?

Historical lessons provide contradictory answers. Consider *Dred Scott*. At the time of the decision, public opinion about the cultural practice of human slavery was intensely divided. Southerners, of course, defended the odious practice on several levels, all of which we now regard as bogus. Northern sentiment varied from passive toleration of slavery to adamant advocacy of abolition. But even Northerners who tolerated slavery strongly resented its introduction into the western territories, if only because of the competitive advantage afforded slaveholders, who could derive the full value of slave labor while undercutting the wages of free workers. The arid and abstract decision of the Court in *Dred Scott* took little account of this divided public opinion in concluding that slavery could not be barred from the territories. Yet, the Court asserted that it was examining public opinion when it reasoned that black Americans could not be citizens:

> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.... This opinion was at that time fixed and universal in the civilized portion of the white race....

> And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people....

> The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic....

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16. See *Dred Scott*, 60 U.S. at 452.
We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions.17

Of course, the conclusion drawn by the Court was that blacks were never intended to be included as citizens of the United States. According to the Court, the original intentions of the framers governed:

No one... supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning.... Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.18

The irony is that the Court relied on public opinion to determine the original intentions of the Constitution's Framers, but denied that public opinion had any role to play in later interpretations of the Constitution's text. Perhaps this is the logical result of a jurisprudence of original intentions, but because we now declare that we are not bound inexorably to original intentions (even if knowable) we are left with the question of how much influence public opinion should have upon courts when interpreting the Constitution in light of contemporary conditions.

Consider in this respect Plessy v. Ferguson.19 The Court was required to determine whether a Louisiana law requiring racial segregation in railroad coaches violated the equal protection guarantee.20 The Court said that the Equal Protection Clause requires every exercise of the police power to be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class:

[T]he question [is] whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established

17. Id. at 407–09.
18. Id. at 426.
20. Id. at 540.
usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.21

At the core of Plessy is the idea that the judiciary should defer substantially to public opinion in determining the contours of constitutional liberties. But that notion is also embedded in Brown v. Board of Education,22 the case that repudiated Plessy. In Brown, a unanimous Court declared,

We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.23

This conclusion was grounded on contemporary perceptions of the effects of racial segregation:

“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. . . .” 24

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.25

While such perceptions were ostensibly those of psychologists and judges, underlying Brown was a shift in public opinion concerning racial segregation. In 1942, only forty-two percent of American whites thought blacks to be as intelligent as whites; by January 1956, seventy-eight percent of whites considered blacks to be as intelligent as whites.26 In 1942 only thirty percent of white adults thought blacks and whites should

21. Id. at 550.
23. Id. at 492–93.
24. Id. at 494 (quoting one of the United States District Court for the District of Kansas’s findings of fact).
be schooled together; but by 1954, when Brown was decided, fifty-four percent of Americans nationally agreed with the decision, and sixty-four percent of Americans outside of the South agreed with Brown. While it is true that seventy-one percent of Southerners disagreed with the decision, the polling data suggest that the Court in Brown was staking out a position consistent with public opinion in most of the nation. The Court was aware of public opinion; it just did not refer to it explicitly as a basis for its decision.

Critics may counter that when the Supreme Court decided Loving v. Virginia in 1967, most Americans were opposed to interracial marriages. It is true that a Gallup poll conducted in late June of 1968 revealed that seventy-three percent of Americans disapproved of marriage between whites and blacks. Only twenty percent approved of such marriages. What this data does not reveal is the proportion of Americans in the mid-sixties who thought that interracial marriages ought to be prohibited by law. It is entirely possible that a majority of Americans could disapprove of interracial marriage, yet still think that such marriages should be legally available to those who wish to enter into them. Indeed, that conclusion is bolstered by the fact that, at the time of the Loving decision, only sixteen states had laws prohibiting interracial marriages, and all of them were Southern states where racial segregation had made its last stand.

Putting history aside, what criteria ought to be relevant to the question of when the Court should consider public opinion in interpreting the Constitution? Because constitutional rights are frequently expressed in general and abstract terms, there must necessarily be some rules to implement those guarantees. The meanings of such terms as "cruel and unusual," "due process of law," and "equal protection of the laws" are so far from self-evident that courts are required to create an elaborate maze of constitutional decision rules to determine when those guarantees have been abridged. The difficulty is compounded when these guarantees are invoked to protect behavior that

26. Id. at 139–40. Six years before Brown was decided the armed services had been desegregated by executive order of President Truman. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948). The effect of this political action on public opinion, taken at a time when white opinion of blacks was still riddled with considerable prejudice, is difficult to pinpoint, but must be thought to have had some influence.

27. Erskine, supra note 25, at 140.


30. Id.

31. Loving, 388 U.S. at 6 & n.5.

is at odds with long-settled cultural norms. That was surely an aspect of the Court's reaction to the challenge posed by Homer Plessy. Of course, we now abhor the cultural norm accepted by the Court in Plessy v. Ferguson, but that is because the cultural norm has thoroughly changed since that time. Moral philosophers who believe in absolute and universal truth may claim that racial segregation was always morally repugnant, but moral relativists must admit that what seemed true then is a lie today. Whatever may be the resolution of the arguments from moral philosophy, there can be little doubt that the cultural norms of 1896 and 2010 are vastly different.

When entrenched cultural practices are under assault there are multiple fronts in the resulting culture war. The most significant front is social—the attitudes and assumptions of the people who compose the culture and thus fashion the cultural norms—but another front is legal. The legal front takes two forms: pressure for change to statutes that codify existing cultural practices or which assume their existence, and pressure for invalidation of such statutes in order to vindicate paramount constitutional liberties. I am only concerned here with the influence of public opinion on the judicial process by which constitutional liberties are ascertained. Because the content of constitutional liberties is malleable, arguments about the proper application of these liberties take many forms—doctrinal or precedential, prudential, historical, structural, textual, and (most importantly for our present purposes) cultural.

The question of whether limiting marriage to two partners of the opposite sex is constitutionally valid implicates most of these modes of constitutional reasoning, but has a particularly strong cultural element. To see this, first consider the argument that relies on precedent in the form of Loving v. Virginia. In striking down Virginia's law making interracial marriage a crime, the Supreme Court declared that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness," and characterized the right to marry as a "fundamental freedom." Later cases, such as Zablocki v. Redhail, have held that laws that significantly interfere with the exercise of the right to marry "must be subjected to rigorous scrutiny." But the cultural assumption that undergirds these decisions from the 1960s and 1970s is that marriage is an institution between one man and one woman. Same-sex marriage advocates challenge that cultural assumption, but when they rely upon such cases as Loving and

33. Cf. Ernest Hemingway, True at First Light 5 (Scribner 1999) ("In Africa a thing is true at first light and a lie by noon.").
34. See generally Philip Bobbitt, Constitutional Fate (1982).
35. 388 U.S. 1 (1967).
36. Id. at 12.
Zablocki, they invoke cases that implicitly incorporate the very assumption that they challenge.

Precedent supports the constitutional argument for same-sex marriage only if the precedents are stripped of their cultural context. This is a possible move, of course, because the text of those precedents (especially Loving) is couched at a high enough level of generality to support any cultural conception of marriage, whether it be same-sex marriage, polygamy, or any other arrangement. But such a move is myopic: constitutional interpretations that are premised upon universally observed cultural practices cannot be divorced from their foundational premise.\(^\text{38}\)

While some might argue that constitutional challenges that seek to extend rights to a group previously denied such rights must necessarily use precedent that incorporates the very assumptions that they challenge, this is not so. The challenges to racial segregation that culminated in Brown v. Board of Education\(^\text{39}\) are claimed to be an example. Yet, the strategy of the lawyers challenging racial segregation was not to attack separate-but-equal as inherently unequal but was to attack the "equal" prong of Plessy’s separate-but-equal mantra in a series of as-applied challenges.\(^\text{40}\) Eventually, of course, separate-but-equal was revealed as

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\(^{38}\) An analogous problem occurs when one attempts to state the level of generality at which a claimed unwritten constitutional right should be pitched. A good example is Michael H. v. Gerald D., which involved the question of whether California’s conclusive presumption that the husband is the father of a child born into an extant marriage violated the claimed constitutional right of the biological father (a stranger to the marriage) to maintain contact with his child. 491 U.S. 110, 113 (1989). The Court upheld the validity of the presumption, and a plurality of four justices looked to historical traditions concerning the rights of adulterous natural fathers to maintain contact with their offspring to determine that the natural father’s claimed right was not constitutionally fundamental. Id. at 122–27. Justice Stevens concurred in the judgment on the ground that the natural father was given a full and fair opportunity to prove that the best interests of the child would be served by granting him visitation rights. Id. at 133–34. Of special interest was the dismissal of the dissent’s methodology by Justice Scalia:

Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally “whether parenthood is an interest that historically has received our attention and protection.” ... We do not understand why, having rejected our focus upon the societal tradition regarding the natural father’s rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon “parenthood.” Why should the relevant category not be even more general—perhaps “family relationships”; or “personal relationships”; or even “emotional attachments in general”? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. Id. at 127–28 n.6 (quoting id. at 139 (Brennan, J., dissenting)).

\(^{39}\) 347 U.S. 483 (1954).

the falsehood it always was, and Brown was its unmasking.41 But that strategy used precedent in a very different way—by exposing its flawed assumptions rather than relying on them to prove the death of the assumptions upon which reliance was placed.

In any case, reliance on precedent to support same-sex marriage, at least in the lower federal courts, is dangerous. In Baker v. Nelson, the Supreme Court summarily dismissed an appeal from the Minnesota Supreme Court’s decision that Minnesota’s limitation of marriage to opposite-sex partners was constitutionally valid.42 Because the summary disposition was of a case within the Court’s appellate jurisdiction, rather than a mere denial of certiorari, the Court’s disposition was on the merits and therefore constitutes binding precedent.43 The scope of that precedent is uncertain, however,44 and thus not an insuperable obstacle to the goal of obtaining a judicial decision that prohibitions of same-sex marriage violate either or both of equal protection and due process.

Our focus is public opinion, so let us not be unduly preoccupied with arguments about precedent. Let us grant the premise that the Court is aware of and to some extent responsive to public opinion when constitutional interpretation involves breaking with settled cultural norms; what is public opinion about the nature of marriage?

41. Brown, 347 U.S. at 495.
42. 409 U.S. 810, 810 (1972).
43. See, e.g., Pamela R. Winnick, Comment, The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda, 76 Colum. L. Rev. 508, 511 (1976) (“[A] dismissal by the Supreme Court is an adjudication on the merits ... [A] lower federal court must consider itself bound by the dismissal when a similar challenge comes before it.”). But see Eugene Gressman et al., Supreme Court Practice ch. 5.17, at 365 (9th ed. 2007) (“The Court has become increasingly concerned that these summary dispositions on the merits are uncertain guides to the lower courts bound to follow them and not infrequently create more confusion than coherence in the development of the law.”). Note also that the Court, in Edelman v. Jordan, held that summary dispositions, while of some precedential value, are not considered as binding on the Court as a holding on the merits:

Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law.

44. The precedential effect of summary dismissals is limited to cases presenting materially indistinguishable facts and the same constitutional questions. See Mandel v. Bradley, 432 U.S. 173, 176–77 (1977); id at 180 (Brennan, J., concurring). However, if subsequent doctrinal developments are contrary to the prior summary disposition, the precedential effect of the summary disposition is diminished. Hicks v. Miranda, 422 U.S. 332, 344 (1975) (“[I]f the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.” (quoting Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967))). The foregoing statement must be qualified by the Court’s declaration in Rodriguez de Quijas v. Shearson/American Express, Inc.: “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” 490 U.S. 477, 484 (1989).
The answer is not clear. On one hand, thirty-one states have now rejected same-sex marriage at the ballot box. Only five states—Iowa, Vermont, New Hampshire, Massachusetts, and Connecticut—permit same-sex marriage, and four of those states did so through judicial decision based on the state constitution. If public opinion as measured by ballot results is the determining factor, we should expect the Court to reject claims that equal protection or substantive due process require states to extend marriage to same-sex couples.

But that is not the end of the public opinion story. Political scientists Jeffrey Lax and Justin Phillips have assembled data comparing public opinion in each of the states on policy issues of concern to gays and lesbians and the adoption of those policies by the relevant states. The policy issues are job and housing discrimination, health benefits for same-sex partners, adoption of a partner’s child by the other same-sex partner, hate crime legislation, civil unions, and marriage. In general, states lag behind public opinion in adopting policies sought by gay and lesbian interests other than those concerning marriage. Of specific interest to this discussion is public opinion on marriage and civil unions. In only six states does public opinion support same-sex marriage. Rhode


46. Id.


48. Some might object that public opinion should be assessed by the population represented by the states rather than the absolute number of states. This is not unreasonable, but if population is to be the criteria then one must delve further into the total number of voters arrayed on either side of various issues. This can be done, but I am not sure the result is worth the effort. Many of the states that have rejected same-sex marriage have done so by wide margins; some, like California, have been more evenly divided; and some states have not submitted this issue to the ballot. See, e.g., Kavan Peterson, 50-State Rundown on Gay Marriage Laws, STATELINE.ORG, Nov. 3, 2004, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576 (cataloguing these actions). A careful calibration of public sentiment would be essential if public opinion is the sole criterion of decision, but that is neither what I contend is nor should be the case. The number of states that have rejected same-sex marriage in the polling booth is a rough measure of public opinion, and that is good enough for purposes of broadly gauging public attitudes as a data point that is relevant but by no means dispositive.

Island and New York are the only states where the majority of the public favors same-sex marriage but which have not adopted that policy. Iowa is the only state that recognizes same-sex marriage despite public opinion opposed to that policy. However, public opinion in twenty states favors civil unions, while only eleven states have adopted civil union statutes.

What are we to make of this? Perhaps some illumination is to be had in the tale of Bowers v. Hardwick and its repudiation by Lawrence v. Texas. At the time Bowers was decided, about two-thirds of the public supported criminal sanctions against homosexual sexual activity, but by the time Lawrence was decided only about one-third of the nation approved of such criminal sanctions. And in the course of his opinion for the Court in Lawrence, Justice Kennedy noted that since Bowers was decided, the number of states with criminal penalties for same-sex sexual intimacies had been reduced from twenty-five to thirteen, “of which 4 enforce their laws only against homosexual conduct.”

Public opinion matters to constitutional interpretation. Public opinion matters the most when the constitutional question hinges on alteration or non-recognition of well-established cultural patterns. As a predictive matter, the Court is unlikely to embrace same-sex marriage as a constitutional right unless it is reasonably satisfied that public opinion comports with that judgment.

No matter how much public opinion may influence any decision of the Supreme Court, it is not likely to openly acknowledge this as the basis of its decision. The influence of public opinion may be manifested in several ways. The Court may not grant certiorari. Assume that the four “liberals” (Stevens, Ginsburg, Breyer, and Sotomayor) are predisposed to find that the Constitution bars states from limiting marriage to heterosexual couples, and that the four “conservatives” (Roberts, Scalia, Thomas, and Alito) are disinclined to do so. It is entirely possible that each camp would eye the “centrist” Justice Kennedy warily. The conservatives would recall that Kennedy authored the Court’s opinion in Romer v. Evans and Lawrence v. Texas; the liberals would recall Kennedy’s disclaimer in Lawrence that the case did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Moreover, the liberals may well recall the burst of popular repudiation of same-sex

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50. See infra Appendix.
52. 539 U.S. 558 (2003).
54. Lawrence, 539 U.S. at 573.
55. 517 U.S. 620, 623 (1996) (striking down an amendment to Colorado’s constitution designed to prevent the recognition of homosexuals as a protected class).
56. 539 U.S. 558.
57. Id. at 578.
marriage and its presumed advocates in the Democratic Party that followed the Massachusetts Supreme Judicial Court's decision to grant marriage rights to same-sex couples in *Goodridge v. Department of Public Health*. As a result, the four conservatives might vote against granting review (out of fear that Kennedy will desert them) and the four liberals might vote against granting review (out of the same fear plus the concern that a popular backlash will smite both the Court and their ideological kin). In this scenario only Justice Kennedy would vote to review the case.

If the Court should reach the merits of the matter, its deference to public opinion might be manifested by an opinion that contains the following key elements. Concerning equal protection, the majority would reiterate that classifications drawn on sexual orientation do not trigger heightened scrutiny. The majority might contend that whether or not sexual orientation is immutable, the trait is not readily observable and, in any case, gays and lesbians have considerable access to political power. The majority might also find that state polities have a legitimate interest in officially recognizing deeply entrenched and still widely-accepted cultural practices surrounding marriage. In a country dedicated to the principle of popular sovereignty, the majority might say, radical cultural alterations are primarily the responsibility of the people themselves. The states should remain free to decide whether to jettison old cultural mores and embrace new ones, at least until a national consensus is formed. Limiting marriage to heterosexual couples could be described as rationally related to this end. As to the due process argument, the Court might observe that *Lawrence* applied minimal scrutiny because it struck down the Texas law for want of a legitimate state interest. The Court could then observe that the declaration in *Loving* that the right to enter into marriage is a constitutionally fundamental right was premised on an understanding that marriage was a relationship between one man and one woman, and the argument to the contrary was rejected by the Court in *Baker v. Nelson*. Applying minimal scrutiny, the majority could restate its conclusions concerning the legitimate governmental objective of recognizing deeply held cultural norms and the rational relationship to that end of limiting marriage to heterosexual couples.

But when *should* the Court consider public opinion? When constitutional answers turn on long-entrenched cultural norms, the Court

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59. See generally *Lawrence*, 539 U.S. 558 (applying minimal scrutiny); *Romer*, 517 U.S. 620 (same).

60. *Lawrence*, 539 U.S. at 578–79.
should be attentive to public opinion about those norms. This is not to say that the Court should pay attention to transitory fashions and the fickle whims of the public. Whatever may be public opinion about droopy but non-obscene trousers, the question of whether there is a protected right of expression or a fundamental liberty interest in selecting one’s apparel is one that should be answered without much consideration of public opinion. There is no deeply-entrenched norm about apparel, apart from the near-universally held view that clothing should cover the erogenous zones. But the question of whether to mandate a significant change in the culture’s understanding of marriage is another matter. Marriage has been a fundamental organizing cultural principle for millennia, and the conception of marriage as a nominally monogamous union of one man and one woman has been a fundamental cultural principle of America since its settlement by Europeans. A redefinition of marriage to include same-sex unions is an enormous cultural change, a cultural seismic event. Such cultural upheavals are best left for the people to decide, through their usual methods of assessment of cultural propriety. That is what is happening in America. At the moment, some pockets of American culture, like San Francisco, embrace same-sex marriage, while other cultural enclaves strongly resist this change in the cultural understanding of marriage. It may well be that the culture as a whole will eventually perceive marriage to include same-sex partners. When that happens, the vestigial barriers to same-sex marriages will be stricken as inconsistent with constitutional guarantees of liberty and equal protection. That process of constitutional development recognizes that when the Constitution is invoked to compel major cultural change, the force of the argument depends on the degree to which the society has adopted that cultural change. The Court is a political actor as well as a law court. Its ability to impose political judgments as constitutional commands depends on voluntary acquiescence to its decrees. Expenditure of its political capital in opposition to popular understanding of long-held and deeply entrenched cultural practices is a dangerous business. The Court has no sword, and if it waves a rubber blade around it will be seen as the feeble institution it is when it lacks the voluntary compliance of other political actors.

61. See, e.g., Edmund Newton, Ban on Drooping Drawers Faces Legal Challenge, N.Y. TIMES, Apr. 12, 2009, at A12.

In the graph, the vertical axis presents each of the fifty states. The horizontal axis represents the portion of the public in any given state that supports each of seven different rights: same-sex marriage, civil unions, health benefits for same-sex partners, second parent adoption for same-sex couples, job discrimination, housing discrimination, and hate crime protection. Public opinion with respect to each right is depicted by a different color circle. A dotted vertical line represents evenly-divided public opinion on any particular issue concerning homosexuals. Circles to the left of the line represent public opinion opposed to the particular claimed right; circles to the right of the line represent public opinion in favor of the particular right. Solid circles in different colors represent policies that have been adopted by the state in question; the open circles represent policies that have not been adopted. It is noteworthy that there are many more open circles to the right of the vertical line (denoting policies that the public in that state favors but which have not been adopted) than there are solid circles to the left of the line (denoting policies that have been adopted despite public disfavor of such policies).

On same-sex marriage, Rhode Island and New York are the only states where public opinion favors same-sex marriage but which have not adopted that policy. Iowa is the only state that recognizes same-sex marriage despite public opinion opposed to that policy. Because the data was assembled after Maine’s legislature had adopted same sex marriage but prior to the November 2009 election, Maine is shown as recognizing same-sex marriage despite public opposition. In that election, Maine voters rejected same-sex marriage. According to the data assembled by Lax and Phillips, public opinion in only one in six states supports same-sex marriage.