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Gay Marriage, Public Opinion and the Courts[†]

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This Article examines trends in public opinion and media coverage on gay marriage to evaluate the claim that the Supreme Court's decision in *Lawrence v. Texas* and the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Health* catalyzed an anti-gay "backlash." We find that in the immediate aftermath of *Lawrence* a larger share of the American public expressed hostile attitudes on questions tapping opinions on gay sex and gay marriage. That backlash continued through the two *Goodridge* decisions and the 2004 election, but appears to have leveled off and even returned to pre-*Lawrence* levels by the summer of 2005. Over that same period the public appears to have become more sharply divided along ideological lines regarding gay marriage. Another important difference is that a growing share of the public now expresses favorable attitudes toward same-sex civil unions. We conclude with some words of caution on the interpretation of polling data and with general thoughts concerning the impact of court decisions on public opinion.

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http://www.aei.org/publications/pubID.14882,filter.all/pub_detail.asp

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Introduction

Almost immediately after the Massachusetts Supreme Judicial Court ruled that the state's ban on same-sex marriages violated the state's constitution,¹ liberals and conservatives alike predicted political backlash. That backlash materialized in many forms: in a proposed, but ultimately rejected, amendment to the U.S. Constitution that would have banned same-sex marriage, in a series of thirteen successful similar amendments to state constitutions passed in 2004, perhaps in the increase in the vote for certain Republican candidates,² and, as we explore in this paper, in a short-term increase in the share of the population with hostile attitudes towards gays and same-sex marriage. The political impact of that decision, as well as its less salient but equally influential Supreme Court predecessor, *Lawrence v. Texas*,³ has opened up old questions about the relationship between court decisions and public opinion change, as well as the proper role of courts in shaping social policy. This Article examines the possible role of these court decisions and related elite and media attention in the shaping of public opinion on gay marriage and on gay rights generally. The article also attempts to review the structure of public opinion on gay marriage and provides words of caution as to how to interpret the many public opinion polls conducted in this area. Although we do not generalize beyond the findings on this particular issue, we attempt to situate our findings in the larger debate over the effect of Supreme Court opinions on public opinion change.

Part I of this study reviews previous research and theoretical arguments on the role courts should play and have played in shaping public opinion on constitutional rights and notions of equality. Part II examines the trends in public opinion over the past twenty years on questions relating to gay rights, offering some new insights as to the role of media coverage of the AIDS epidemic in shaping public opinion concerning sex between gays. Part III examines American public opinion on same-sex marriage, paying particular attention to the trajectory of public opinion change alongside media coverage of the various court decisions and other political events. We present evidence there of a backlash in the two years following *Lawrence* that completely disappears by the summer of 2005. Part IV performs the same analysis for Massachusetts' respondents alone and finds little difference between the shape of the public opinion trend in that state and the nation. Massachusetts residents have always been more supportive of gay marriage than the country at large, but their backlash and resurgence on the issue follows the pattern of the rest of the country. Part V examines the structure or breakdown of opinion on gay marriage while offering some insights as to the extent of the opinion backlash among population subgroups. The most significant finding concerning the shift in the structure of opinion over the two-year period following *Lawrence* is the rise in the significance of ideology in explaining individual opinion on gay marriage. Like others who have analyzed similar data, we find that age, education, religiosity, race, ideology, and

¹ See *Goodridge v. Dep't of Health*, 798 N.E.2d 941 (Mass. 2003).

² We disagree with those who suggest that the issue of gay marriage was determinative of the 2004 presidential election, either nationally or in Ohio. In unpublished research, Simon Jackman has provided persuasive evidence that gay marriage referenda did not differentially mobilize Republican voters nor did it convince voters otherwise supportive of John Kerry to vote for President Bush. Much work remains to be done on this question, but little of the available evidence suggests gay marriage decided the 2004 election.

³ 539 U.S. 558 (2003).

partisanship explain much of the variation in opinion on same-sex marriage; however, we also refine earlier analyses to find that a respondent's rating on moral traditionalism and libertarianism scales predicts individual attitudes towards same-sex marriage. We also attempt to isolate the effects of these variables while holding constant individuals' hostility toward gays as reflected in "feeling thermometer" ratings that respondents assign to gays. In Part VI, we turn our attention to questions concerning civil unions and a constitutional amendment banning same-sex marriage. Although we notice a short-term backlash in opinion on same-sex marriage, as well as other gay rights issues, the share of the population expressing a favorable opinion on civil unions appears to have grown steadily over the same period. Opinion on a constitutional amendment is more complicated, and gives us an opportunity to discuss the various question-wording effects that can change the results by as much as twenty percentage points. We conclude in Part VII with words of caution in generalizing beyond the findings of this particular issue area to arrive at a general theory of court decisions' effects on public opinion.

A point we will reemphasize several times in this study concerns the notion of causation we explore with respect to the relevant court decisions. At times we will suggest that the Supreme Court's opinion in *Lawrence* or the Massachusetts Supreme Judicial Court's decision in *Goodridge* caused a shift in aggregate levels of public opinion. Such a suggestion should not be taken to mean that somehow the courts themselves flipped a switch that translated into public opinion change. Court opinions, we maintain, are events like any other that elevate issues onto the national agenda through media coverage, elite discussion and other behavior that follows in the wake of such opinion. Such discussion, related action and information flow shape public opinion on the issue. It is usually impossible to isolate the individual effect of court decisions when other salient events, such as a debate over a proposed constitutional amendment or a mayor's granting of marriage licenses to gays, occurs closely in time. Although we feel confident in saying that the courts got the ball rolling on the issue of same-sex marriage, the shifts in public opinion come not only from the decisions themselves but also from the series of events such decisions trigger.

Moreover, although we pay attention to the effect of court decisions on public opinion here, we do not mean to suggest that opinion shifts are the principal means of evaluating whether certain court decisions have done more harm than good. We think we add to, but do not come close to settling, the debate among scholars such as Gerald Rosenberg⁴ and Michael Klarman⁵, concerning the ability of courts to bring about social change. For the most part, these scholars concentrate on elite and mass action, as reflected in legislation, election results, and tangible policy change, as opposed to shifts in attitudes. Indeed, we do not dispute that such effects are more important in assessing the power of the backlash or leadership a court's decision produces. That being said, shifts in aggregate opinion and alterations in the structure of opinion represent important pieces of additional evidence in their own right of the political impact court decisions, as well as potential intervening factors leading to other, more tangible, policy changes.

⁴ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

⁵ Michael Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005).

I. The Effect of Court Decisions on Public Opinion: Normative Arguments and Empirical Evidence

Buckets of ink have been spilled on the pages of law reviews discussing the “countermajoritarian difficulty” presented by the position of the judicial branch in our constitutional system.⁶ That “difficulty”, if it is one, serves the purposes of several different kinds of arguments. On the one hand, advocates point to courts’ countermajoritarian nature as their chief virtue: No other institution of government is designed to protect “discrete and insular minorities” or unpopular individuals exercising rights the Constitution protects. Whether the subject is the integration of schools, protecting the right of Communists to speak, or securing the equal right to marry, courts are better positioned than the political branches to defend the rights of the unpopular. On the other hand, what makes countermajoritarianism difficult are the necessarily unpopular stances the courts take when striking down legislation majorities have supported. Therefore, each exercise of judicial review must be justified by some theory as to why unelected, life-tenured judges ought to interpret the Constitution in a way as to check majority will. The omnipresent fear that judges might behave like Platonic guardians—or worse, like Leviathans—often presents itself in arguments about judges imposing their own values on the Constitution or arrogantly predicting the trajectory of Americans’ (or even other countries’) understanding of constitutional values.

To some extent, the degree of difficulty presented by the courts’ countermajoritarian status can be assessed by how out of step court decisions are with public opinion on constitutional issues. After all, if courts merely reflected public opinion in their decisions, then whatever other problems they might have, they could not be described as countermajoritarian. Although the distinctive feature of the judicial role and position is its supposed insulation from the pressures of public opinion, in several recent cases the courts and litigants have put forth public opinion polls as evidence supporting a particular constitutional interpretation.⁷ When used in this way, appeals to majoritarian sentiment (whether measurable or not) often justify a mode of constitutional argument that views the Constitution as a “living document” and judges’ role as helping

⁶ See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290 (2003-04); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AMER. POL. SCI. REV. 87 (1993).

⁷ See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (striking down law permitting execution of mentally retarded defendants, based in part on polls suggesting the public was against such executions); *McConnell v. FEC*, 251 F. Supp. 2d 176, 512-15 (D.D.C.) (opinion of Kollar-Kotelly, J.), *aff’d in part*, 124 S. Ct. 619 (2003) (upholding most of the Bipartisan Campaign Reform Act based on polls showing public perception of corruption). See also THOMAS MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 31 (1989) (noting that the Supreme Court referred to public opinion in 142 opinions between 1934 and 1985-1986, although most references to polls occur in death penalty cases).

the Constitution to keep up with the times. For critics, the Constitution keeps up with the times through the Amendment process, and judges are particularly unqualified to assess and evaluate majoritarian sentiment.

Given the importance of the countermajoritarian difficulty to constitutional theory, it is surprising how little work has been done examining the effect of court decisions on American public opinion. For the most part, those who study the relationship between public opinion and the Supreme Court focus on public opinion of the Court itself and find that individual rulings have little effect, as compared to larger trends about government generally.⁸ In addition, scholars such as Robert Dahl⁹ and Lee Epstein¹⁰ have presented rigorous theoretical arguments as to why the appointment process and other constraints make it unlikely that the Supreme Court will stray too far from American public opinion. With the exception of Thomas Marshall's somewhat abbreviated study in 1989, *Public Opinion and the Supreme Court*,¹¹ though, no work has attempted to examine in any systematic way how court decisions affect public opinion on the issues the Court has considered. We attempt here to lay out the various hypotheses as to the relationship between court decisions and public opinion on constitutional controversies, and in the second half of the article we try to unearth which of these hypotheses is consistent with the data on public opinion and gay marriage.

A. The null hypothesis: the irrelevance of court decisions to public opinion on constitutional issues

The same argument as that concerning attitudes toward the Supreme Court might be true concerning how court decisions affect Americans' opinion on the issues the courts consider: external events, rather than court decisions, may be primarily responsible for shifts in public opinion on constitutional values. The null hypothesis suggests that public

⁸ See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 659-60 (1992); James L. Gibson, Gregory A. Caldeira, & Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (Apr. 2003); James L. Gibson, Gregory A. Caldeira, & Lester Kenyatta Spence, *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted, or Otherwise?* 33 BRITISH J. POL. SCI. 535 (2003); W. MURPHY, W. TANENHAUS & D. KASTNER, PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS (1973); Murphy & Tanenhaus, *Constitutional Courts and Political Representation*, in MODERN AMERICAN DEMOCRACY 541 (M. Danielson & W. Murphy eds. 1969); Murphy & Tanenhaus, *Explaining Diffuse Support for the United States Supreme Court: An Assessment of Four Models*, 49 NOTRE DAME L.REV. 1037 (1974); Murphy & Tanenhaus, *Public Opinion and Supreme Court: The Goldwater Campaign*, 32 PUB. OPINION Q. 31 (1968); Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOCIETY REVIEW 357 (1968), reprinted in FRONTIERS OF JUDICIAL RESEARCH (J. Grossman & J. Tanenhaus eds.); Murphy & Tanenhaus, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J.POL. 24 (1981).

⁹ Robert Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279 (1957).

¹⁰ Lee Epstein & Joseph F. Kobylka, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992); Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583 (2001).

¹¹ THOMAS MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989).

opinion on constitutional issues should not change at all in response to a court decision.¹² Undoubtedly, for most court decisions this must be true. Most issues courts deal with, whether they revolve around torts, antitrust, federal statutes or even important questions of constitutional law, are overly complex and/or below the radar of both the mainstream media and public attention. Therefore, the public often does not have either the relevant information concerning the court's decision or the tools to understand it, and we should not expect public opinion to change on those issues.¹³ Moreover, even with highly salient and understandable issues (*e.g.*, abortion, gay marriage, the death penalty), there is no *a priori* reason to believe that a court decision will shift people's opinions, which up until the decision have often been based on strong moral or political convictions.¹⁴

B. The Legitimation Hypothesis: Supreme Court as Republican Schoolmaster¹⁵

A second hypothesis, known in the political science literature as the legitimation hypothesis, suggests that in some cases public opinion will adjust to align with court decisions.¹⁶ In other words, some share of the population takes its cues as to how to think about issues from the courts, which are relatively respected institutions as compared to the political branches. Once courts, especially the Supreme Court, weigh in on an issue, perhaps some share of the population will now say, in effect, "if they believe it, it must be right." Those who view courts as some sort of conscience for the American people expect or hope that judges will lead us to our better selves – to be a "republican schoolmaster," as some have termed the Supreme Court. Whether the Court is persuading the American people of the unfairness of segregation or marshalling its political and institutional capital to weigh in on who should win the 2000 election, the relative respect the public has for the Court may lead to a presumption in favor of the position it takes in cases.

¹² See, *e.g.*, Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC. REV. 357, 378 (1968) (finding that only 12.8 percent of American adults are aware of the Court's existence, recognize its function, and believe it to be impartial and competent); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 Nw. U. L. Rev. 985 (1989-90) (updating their previous work, in the context of the Bork nomination fight); Gregory A. Caldeira, *Courts and Public Opinion in THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 303 (John B. Gates & Charles A. Johnson, eds. 1991) (citing a 1989 Washington Post poll in which fewer than 10 percent of respondents could name the Chief Justice of the U.S. Supreme Court, while over one-quarter of respondents could identify television's Judge Wapner).

¹³ We should note that the level of information about the court decisions concerning same-sex marriage appears relatively low as well. For example, a national poll conducted by the University of New Hampshire in May 4-9, 2005, found that only 23 percent of Americans correctly answered Massachusetts to the question "based on what you know, is there any state in the U.S. in which it is legal for gay and lesbian couples to get married?"

¹⁴ Marshall finds that "Supreme Court decisions seldom influence public attitudes on specific issues." MARSHALL, *supra* note ___, at 156. However, Marshall also finds that "the Supreme Court decisions strongly influence short term public opinion changes [in favor of the court's opinion] only when the Court hands down liberal, activist rulings." *Id.*, at 154.

¹⁵ See Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 S. CT. REV. 127. See also Christopher Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

¹⁶ See, *e.g.*, ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 225 (1960).

Only under special conditions and among certain populations should we expect the Court to act as an opinion leader. In one respect, we should expect the Court to have the most influence on issues that are complex and technical and among populations with weak prior beliefs. When an issue is confusing or novel, the Court's decision is likely to be the only (or perhaps the most credible) signal that the average person receives. That being said, the person must actually *receive* the signal: for the decision to have any effect on public attitudes, the issue must be one where the media conveys the Court's signal to the population. Of course, these factors cut in opposing directions. On the one hand we should expect the Court to have the greatest influence on low salience issues concerning which most people have not yet developed opinions, while at the same time, for the Court to have any influence the news of its decision must be salient enough for it to be transferred to the public. We also might add into this mix the importance of the clarity of the Court's signal: unanimous decisions might have a greater pro-decision effect than would divided rulings because the information flow directed toward the otherwise uninformed public would be more likely to be one-sided.¹⁷ Of course, the power and clarity of the Supreme Court's signal on an issue could be obscured by the expressed opinions of elites other than dissenting Justices. Uniform approval of the Court's decision (as with any public policy) should have a greater pro-decision public opinion effect than would a decision that creates a firestorm of disapproval: that is, the elite filter for the Court's decisions can be more important as to the impact of the Court's signal than either the reasoning of the opinion itself or the unanimity of agreement on the Court.

Given the many ingredients needed for the Court to behave as an opinion leader perhaps we should not be surprised that very few studies have found Court decisions that shift public opinion in the Court's direction. Experiments that prime a subset of respondents as to the Supreme Court's ruling on an issue come to conflicting results as to the persuasive effect of the signal sent by the Court's imprimatur.¹⁸ Valerie Hoekstra also finds some support for the notion that in the community directly affected a court decision has affects public opinion in a positive direction.¹⁹ Marshall finds some evidence that the Court's decisions striking down bans on interracial marriage or restrictive covenants were followed by favorable public opinion trends, but given the preexisting liberal trends on these issues it is unclear if the Court accelerated those trends.²⁰ The same could be said for the Court's decisions reinstating the death penalty, originally upholding bans on sodomy, and striking down bans on contraception, all of which failed to interrupt preexisting trends in the direction of the Court's decision. Moreover, many other decisions, such as *Brown v. Board of Education*, *Roe v. Wade* and *Miranda v. Arizona*, become accepted, at least in name if not in principle, by a large share

¹⁷ See MARSHALL, *supra* note __, at 148 (evaluating the effect of unanimity of opinion change); JOHN ZALLER THE NATURE AND ORIGINS OF MASS OPINION (1992) (discussing the importance of a one-sided versus a two-sided information flow on publics with firm or weak prior beliefs).

¹⁸ Compare Jeffrey J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675 (1994) (finding a legitimation effect), with Dean Jaros & Robert Roper, *The U.S. Supreme Court: Myth, Diffuse Support, Specific Support, and Legitimacy*, 8 AMER. POL. Q. 85 (1980) (finding no effect); Larry R. Bass & Dan Thomas, *The Supreme Court and Policy Legitimation: Experimental Tests*, 12 AMER. POL. Q. 335 (1984) (also finding no effect).

¹⁹ VALERIE HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS (2003); Valerie Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AMER. POL. SCI. REV. 89 (2000).

²⁰ See MARSHALL, *supra* note __, at 155.

of the population over the long term, such that public opinion surveys indicate a large share of the public says it is against overruling those precedents.²¹

C. Backlash

A third theory about the relationship between court decisions and public opinion (“backlash”) has engendered little systematic exploration, even if popular and scholarly accounts often suggest that the public will backlash against the positions taken by the Court.²² The psychological and political dynamic that produces backlash would appear a bit more complicated. In the event the public has a low opinion of the Court to begin with and therefore has a presumption against its decisions, we would expect the opposite dynamic to that predicted by the legitimation hypothesis. Precisely because an unpopular institution (the Court) advocates a particular position, the public will then react as if to say “if they believe it, then it must be wrong.” However, backlash could have other roots as well. A court decision on an issue could raise its salience in some respondents’ minds, and they perceive a threat they did not perceive before.²³ Or perhaps, in the wake of a court decision, elites and interest groups mobilize against its holding, discussion of the issue becomes more critical than when the issue was absent from the media radar screen, and a section of the public then develops an opinion contrary to the Court’s resolution of the case. Moreover, insofar as the decision itself has tangible policy effects (*e.g.*, busing or the settling of a Presidential election) or the political branches respond with laws that have tangible policy effects, respondents may accordingly change their positions on the issue due to these newly observed and felt implications of the Court’s decision.

Contrary to legitimation, backlash should be more likely when the decision is salient enough to send a signal to an otherwise inattentive public and simple enough for the public to understand it and react unfavorably.²⁴ Similar to legitimation, though, we should expect those with weak prior beliefs to be most likely to change their mind. In

²¹ According to recent Gallup polls, two thirds of the population is against overruling *Roe v. Wade*. See The Gallup Poll, *Abortion*, available at <http://poll.gallup.com/content/default.aspx?ci=1576&pg=1> (66 percent of respondents answer no to the following question posed in January 20-22, 2006: “Would you like to see the Supreme Court overturn its 1973 Roe versus Wade decision concerning abortion, or not?”). However, a poll taken in November 11-13, 2005 asked the following question: “Do you think abortions should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances? (If certain circumstances) Do you think abortion should be legal in most circumstances or only in a few circumstances?” 16 percent said illegal in all circumstances and 39 percent said legal in only a few circumstances. The public seems more supportive of the issuance of *Miranda* warnings, if not uniformly in favor of the exclusionary rule. See Lydia Saad, *Americans React to Supreme Court Decisions, Public agrees with 2 out of 5 major decisions*, June 28, 2000, available at <http://poll.gallup.com/content/default.aspx?ci=2770&pg=1>. 94 percent answer yes to the question: “When the police arrest someone, do you think the police should or should not be required to inform that person of their constitutional rights?” However, the public is evenly split in answering the following question: “Do you think confessions obtained from defendants who were not read their constitutional rights when they were arrested should or should not be admissible in trial?” 45 percent answer yes and 49 percent answer no.

²² See Michael Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH L. REV. 431 (2005).

²³ See *id.* (discussing Southern resistance to *Brown*).

²⁴ To be sure, perhaps in an exceptional case elite manipulation and one-sided media discussion might provoke backlash even on complicated, non-salient topic.

other words, the *swayable* public should be the most susceptible to the Court's legitimating or backlash-inducing decisions, as should be true for any government action.

Although few have performed sophisticated analyses of the public opinion effects of Court decisions, several famous cases usually make the "backlash" list. At least in popular lore, many think public opinion in favor of school desegregation, especially in the South, declined in the immediate aftermath of *Brown v. Board of Education*, although pro-integrationist opinions were shared by a small share of the Southern population even before the decision.²⁵ The best example of backlash, given the substantial rise from 1972 to 1976 in the share of the population favoring the death penalty, may come from the Court's 1972 decision in *Furman v. Georgia*.²⁶ According to Gallup polls, 54 percent of the population favored the death penalty for murderers in 1972 whereas 66 percent favored it in 1976. However, in 1971 – a year before the Court delivered its decision in *Furman* – only 49 percent favored the death penalty, suggesting that the pro-death penalty trend may have existed before the Court's intervention, even if the decision accelerated it. Moreover, after a small dip just following the Court's undermining of *Furman* in *Gregg v. Georgia*,²⁷ the share of the population in favor of the death penalty continued to rise over the succeeding decade.²⁸ The same could be said regarding opinion against legalization of same-sex sexual relations following *Bowers v. Hardwick*. Public opinion against legalization rose both before and immediately after *Bowers*, as we discuss in the next Part.

As with legitimation, it is striking how few actual cases of measurable short-term backlash exist. To be sure, there are plenty of instances where the share of the public expressing a certain opinion about a constitutional issue rises or declines following a court decision, but a change in direction from a *preexisting* trend happens quite rarely. For this reason, we find the short-term backlash following *Lawrence v. Texas*, discussed later, to be quite extraordinary.

D. Polarization

Not only might public opinion move in the same or opposite direction as the Court's decision, but a decision could also alter the structure of public opinion on an issue. Many people might change their mind on an issue following court intervention

²⁵ See George Gallup, *Vote Favoring Desegregation Up Slightly Since a Year Ago: However Sentiment in South is Still Strongly Opposed; 3 Out of 4 Disapprove of Verdict*, PUBLIC OPINION NEWS SERVICE, May 15, 1955. The Gallup question was: "The U.S. Supreme Court has ruled that racial segregation in the public schools is illegal. This means that all children, no matter what their race, must be allowed to go to the same schools. Do you approve or disapprove of this decision?" In the nation as a whole, disapproval in the year after *Brown* dropped slightly from 41 percent to 38 percent, while disapproval in the South rose from 71 percent to 73 percent. The size of the shifts is probably within the margin of error so we would not make much of the results.

²⁶ 408 U.S. 238 (1972).

²⁷ 428 U.S. 153 (1976).

²⁸ See The Gallup Poll, *Death Penalty*, available at <http://poll.gallup.com/content/default.aspx?ci=1606>. Timothy Johnson and Andrew Martin argue that *Furman* polarized opinion in addition to producing a backlash. See Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AMER. POL. SCI. REV. 299, 305 (1998).

even though the aggregate shift in opinion might appear slight or nonexistent. In addition, a decision could solidify people’s prior beliefs, causing them to feel more strongly about the issue.

For polarization to occur we suspect elite signals must be quite clear and the issue should be salient enough such that those signals will be sent and received. Unlike legitimation or backlash, though, we should expect a two-sided information flow to be more likely to cause polarization than would a situation in which elite signals all push in the same direction. We should expect the undecided and the uninformed to pick sides according to elite discussion of the decision, with people taking cues from their reference groups and from opinion leaders they trusted before the decision. What might have been a bell shaped or even random distribution of opinion prior to a court decision, under certain conditions could turn into more of a bimodal distribution as people sort themselves according to elite framing of the issue. Such “sorting out” could occur on the basis of ideology, partisanship, religion, race or any other group defining characteristic.²⁹

The paradigmatic case of polarization is public opinion concerning abortion. Charles Franklin and Liane Kosaki³⁰ find that while there was little aggregate change in public opinion regarding abortion after the Supreme Court’s 1973 decision in *Roe v. Wade*, the salience of the decision led to an increasing polarization among demographic groups regarding the legalization of discretionary (*i.e.*, non health-related) abortions. In particular, the gap in opinion on discretionary abortion grew in 1973 between whites and blacks and between Protestants and Catholics. Franklin and Kosaki hypothesize that this polarization is most likely to take place in the wake of highly salient Supreme Court decisions. Such decisions become news events that dramatically raise the public’s level of information and interest about the issue. As a result of the conversations and debates that take place in the wake of these news events, individuals’ opinions become more like those of others in their immediate environment. The result is that “the effect of group interaction is to increase agreement with the modal response within the immediate social environment.”³¹ Thus, following *Roe*, the opinion of Protestants became more like those of other Protestants (who were relatively pro-choice to begin with)—and the same happened in the more pro-life Catholic community.

E. A Note on Short Versus Long Term Effects and the Revisiting of Constitutional Controversies

No single theory provides a universally applicable explanation for how and when courts affect public opinion. Moreover, the effect of a court decision – as mediated through other elite action and mass mobilization – may be felt more over the long term than in the few years following the decision. Controversial holdings – such as the one-person, one-vote rule, the requirement of *Miranda* warnings, or perhaps the striking down of bans on same-sex sex – may become accepted over the long-run, while others, such as

²⁹ See ZALLER, *supra* (concerning the importance of information flow on the shift in opinion in population subgroups).

³⁰ Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion and Abortion*, 83 AMER. POL. SCI. REV. 751 (1989).

³¹ *Id.* at 763.

upholding a right to an abortion, may become more controversial over time and generate a increased opposition a decade after the decision. As difficult as it is to assess causality for short term effects, it is even more so with respect to changes in public opinion over the long term. Nevertheless, we do not mean to pretend that the public opinion effects of a court decision – as with any legislative or executive action – should only be felt in its immediate aftermath.

Moreover, as other scholars have noted,³² we should not expect the Court’s reaffirmation, revisiting or overturning of a holding to produce the same effect as its initial decision. Timothy Johnson and Andrew Martin find that later rulings on abortion rights and the death penalty did not alter the structure of opinion, as did the initial court cases in this area. Indeed, lurking in their research as well as Marshall’s is probably a theory concerning how court decisions that upset the status quo may have more dramatic public opinion effects than those that keep things the way they are. Indeed, as we describe with respect to the two Court decisions concerning gays’ right to have sex, the reverse of what Johnson and Martin find appears to be true: *Bowers v. Hardwick*, which upheld a law banning sodomy, appeared not to affect the preexisting public opinion trend or structure on this issue, while *Lawrence v. Texas* produced a measurable backlash.

II. Public Opinion on Gay Rights

The debate over same-sex marriage that intensified in 2003 and 2004 arrived in the wake of a remarkable, decades-long shift in American attitudes toward gay rights. Over the past thirty years, American public opinion regarding gay people, gay rights and homosexual sex has moved unambiguously toward acceptance and tolerance.³³ However, Americans remain deeply uncomfortable with gays as compared to other demographic groups, and their support for gay rights does not extend as strongly to the domains of sexuality and relationships.

Any discussion of public opinion regarding gays and lesbians must begin with the fact that Americans view homosexual behavior through a strong moral lens: in 2004, 57 percent of the public told the General Social Survey that same-sex relations are “always wrong.” However, this figure has declined in a relatively steady fashion since the late 1980s, when it peaked at 78 percent.³⁴ Notably, the decline in morally traditionalistic views regarding homosexuality has not been accompanied by increasing permissiveness on other matters of private behavior related to sexuality. As shown in Figure 1, opinion regarding discretionary abortion, premarital sex, and pornography has remained relatively

³² See Timothy R. Johnson & Andrew D. Martin, *The Public’s Conditional Response to Supreme Court Decisions*, 92 AMER. POL. SCI. REV. 299 (1998).

³³ See Paul R. Brewer, *The Shifting Foundations of Public Opinion about Gay Rights*, 65 J. POL. 1208 (2003); Patrick J. Egan & Kenneth Sherrill, *Neither An In-Law Nor An Outlaw Be: Trends in Americans’ Attitudes Toward Gay People*, PUBLIC OPINION PROS, February, 2005; Alan S. Yang, *The Polls—Trends: Attitudes Towards Homosexuality*, 61 PUB. OP. Q. 477 (1997); Paul R. Brewer and Clyde Wilcox, *Trends: Same-Sex Marriage and Civil Unions* 69 PUBLIC OPINION QUARTERLY 599 (2005).

³⁴ See Bowman, *supra* note † .

steady over the past thirty years—and Americans’ condemnation of adultery has risen during this time period.³⁵

³⁵ The wording of the questions depicted in Figure A follows. The graph includes interpolated data for years in which the survey was not administered or individual questions were not asked.

homosexuality: What about sexual relations between two adults of the same sex--do you think it is always wrong, almost always wrong, wrong only sometimes, or not wrong at all?

pornography: Which of these statements comes closest to your feelings about pornography laws? Illegal for all, illegal for those under 18, or legal for all?

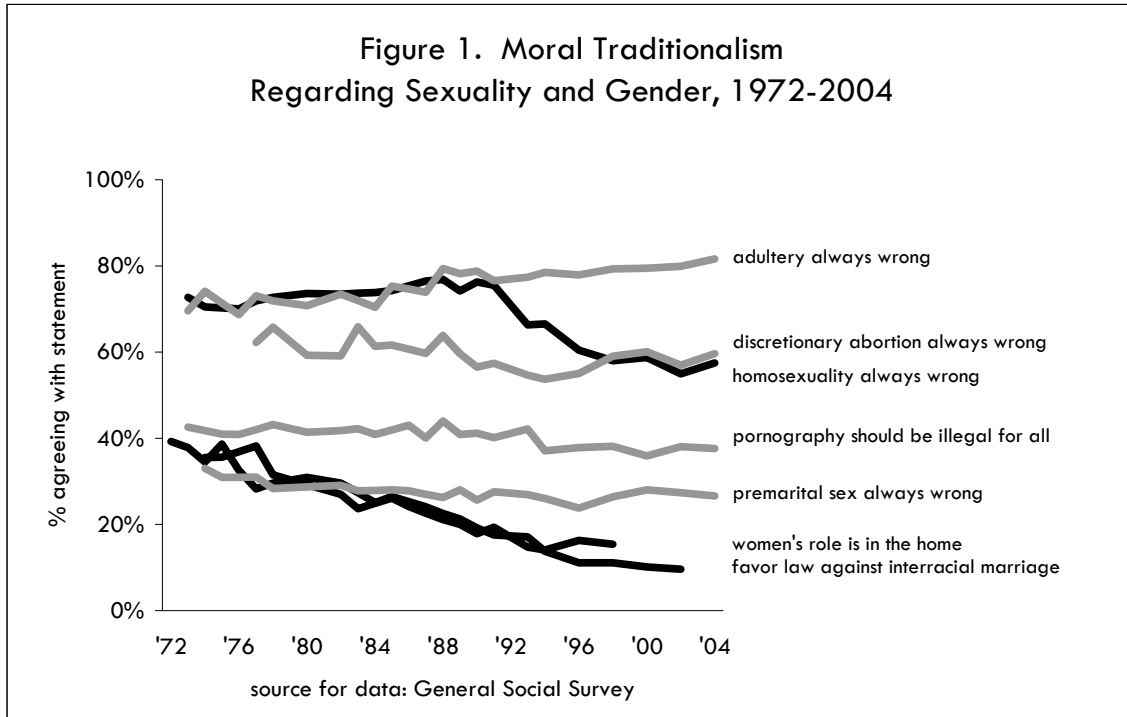
interracial marriage: Do you think there should be laws against marriages between (Negroes/Blacks/African-Americans) and whites?

discretionary abortion: Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion if . . . the woman wants it for any reason?

premarital sex: There's been a lot of discussion about the way morals and attitudes about sex are changing in this country. If a man and woman have sex relations before marriage, do you think it is always wrong, almost always wrong, wrong only sometimes, or not wrong at all?

adultery: What is your opinion about a married person having sexual relations with someone other than the marriage partner--is it always wrong, almost always wrong, wrong only sometimes, or not wrong at all?

women's role: Do you agree or disagree with this statement? Women should take care of running their homes and leave running the country up to men.



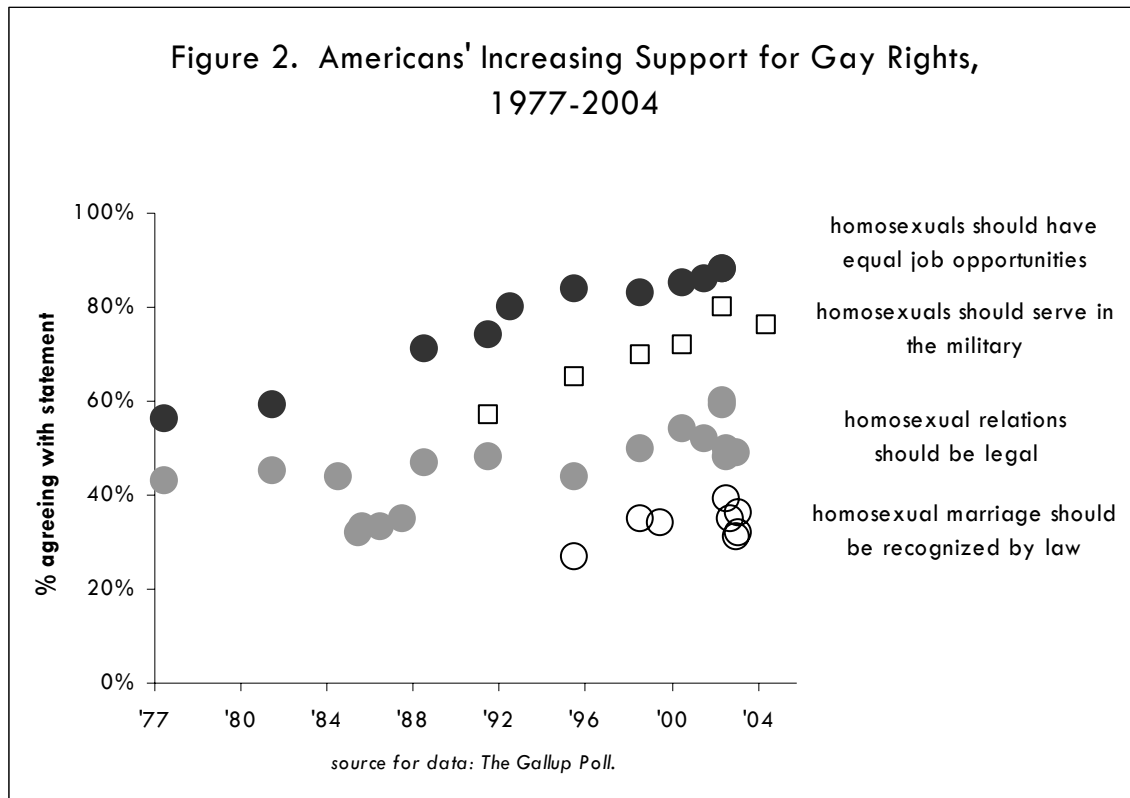
Instead, the trend line of Americans' views on homosexuality appears to parallel (if trail behind) their opinions on issues like interracial marriage and the proper role for women in society—issues that are generally framed in terms of equal rights rather than in terms of freedom of choice. For this reason it is no coincidence that over the same time period, a growing share of Americans has come to believe that homosexuality as an identity, rather than a choice. In 1983, 16 percent of the public told the *Los Angeles Times* Poll that homosexuality is “something that people are born with,”—a figure that rose to 32 percent in 2004. (However, a stable proportion of the public—37 percent in 1983 and 35 percent in 2004—said homosexuality is “just the way some people prefer to live.”)³⁶ Individual-level analysis has found a strong relationship between beliefs about the etiology of homosexuality and feelings regarding gay people and gay rights.³⁷

Over the past three decades, overwhelming majorities of Americans have come to believe that gay people deserve equal employment rights, including employment in the military, medicine, politics, and (to a lesser extent) as teachers or clergy. Yet on aspects of gay rights that touch upon gay relationships and sexuality, Americans are less supportive—and their opinions have changed much more slowly. As shown in Figure 2, a solid majority of Americans has supported equal opportunities for gays in terms of jobs since the late 1980s, but support for legalizing homosexual sex has risen less dramatically since the Gallup Poll first fielded a question regarding this topic in 1977. Opinion regarding the legalization of sex between gays has also been more variable over time than opinion on employment rights. Finally (and as is discussed in greater detail in the

³⁶ See Egan & Sherrill, *supra* note ____.

³⁷ See note ____ *infra* and accompanying text.

remainder of this Article), support for the legalization of gay marriage has risen only slightly since 1996, the first year Gallup asked Americans their opinion on this issue.

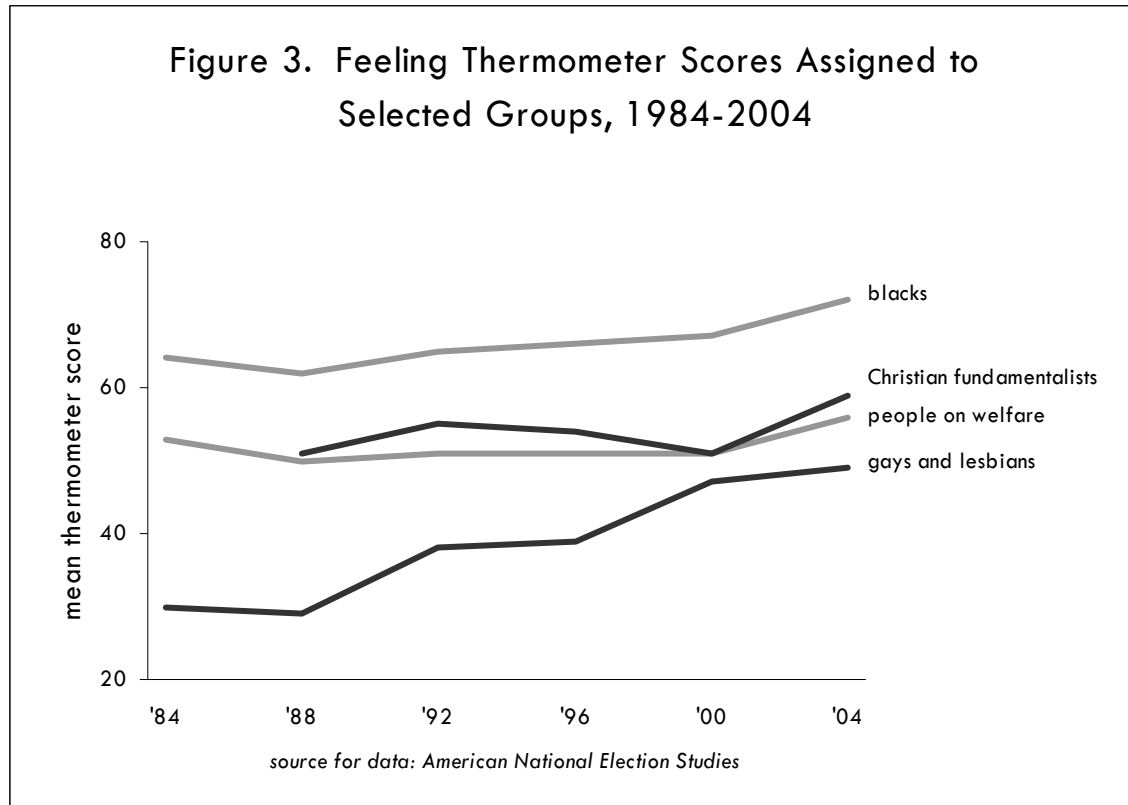


The rise in Americans' tolerance of homosexuality and their embrace of some aspects of the gay rights agenda has been accompanied by a growing familiarity and comfort with gay and lesbian people. Personal contact with gay people has risen dramatically: in 1985, 54 percent of Los Angeles *Times* Poll respondents said they had no friends, family members, or co-workers who were gay. By 2004, this figure dropped to 27 percent. As Americans have gotten to know more gay people, they have also become more comfortable with them. The proportion of *Times* Poll recipients reporting that they were sometimes or always uncomfortable around gay people fell from 38 percent in 1983 to 20 percent in 2004.³⁸

By a widely-used measure of sentiment toward demographic groups—the so-called “feeling thermometer”—Americans have grown decidedly more warm toward gays and lesbians over the past twenty years. Surveys with feeling thermometers ask participants to rate groups on a scale of zero (cold) to 100 (warm), with a score of 50 considered neutral. As shown in Figure 3, the average thermometer score assigned to gays and lesbians by participants in the American National Election Studies (ANES) has increased sharply, from 30 “degrees” in 1984 to 49 in 2004. It is notable, however, that while Americans have begun to express more warmth toward gay people, these feelings

³⁸ See <http://www.latimesinteractive.com/pdfarchive/nationworld/la-poll041104-pdf.pdf>

lag far behind those regarding other demographic groups. In fact, ANES respondents have consistently ranked gays and lesbians either last or next-to-last among *all* demographic groups in *every* administration of the survey since gays were first included in the battery of feeling thermometer questions in 1984.



Research has identified many sources of attitudes regarding gays and lesbians, but four variables are consistent, strong predictors of these attitudes: education, religiosity, political ideology, and year of birth (cohort).³⁹ All things being equal, religiosity and conservative ideology is associated with opposition to homosexuality and gay rights, while youth and education are associated with support. Table A displays how respondents to the American National Election Studies survey with varying levels of these four demographic variables scored on an index constructed from five survey items regarding gay issues.⁴⁰ The index ranges from zero (least supportive) to 100 (most supportive). A glance at Table 1 indicates how strong the association is between each of these four characteristics and support for gay rights: the difference in the index scores between respondents at the lowest and highest values of each variable exceeds 20 points.

³⁹ Note that “birth cohort” is a different concept than “age.” Egan and Sherrill, *supra* note __, present evidence indicating that the gay-supportive attitudes of younger survey respondents are due to cohort effects, not life-cycle effects—i.e., that individuals do not become less supportive of gay rights as they grow older.

⁴⁰ The index was constructed from a simple average of ANES items measuring respondents’ attitudes toward gay marriage, adoption of children by homosexual couples, allowing gays to serve in the military, and employment rights, as well as the feeling thermometer score assigned to gays and lesbians. The scale reliability coefficient of this index (Cronbach’s alpha) is .75 .

**Table 1. Gay-rights index scores
by demographic categories, 2004**

Index is scaled zero (least supportive of gay rights) to 100 (most supportive).

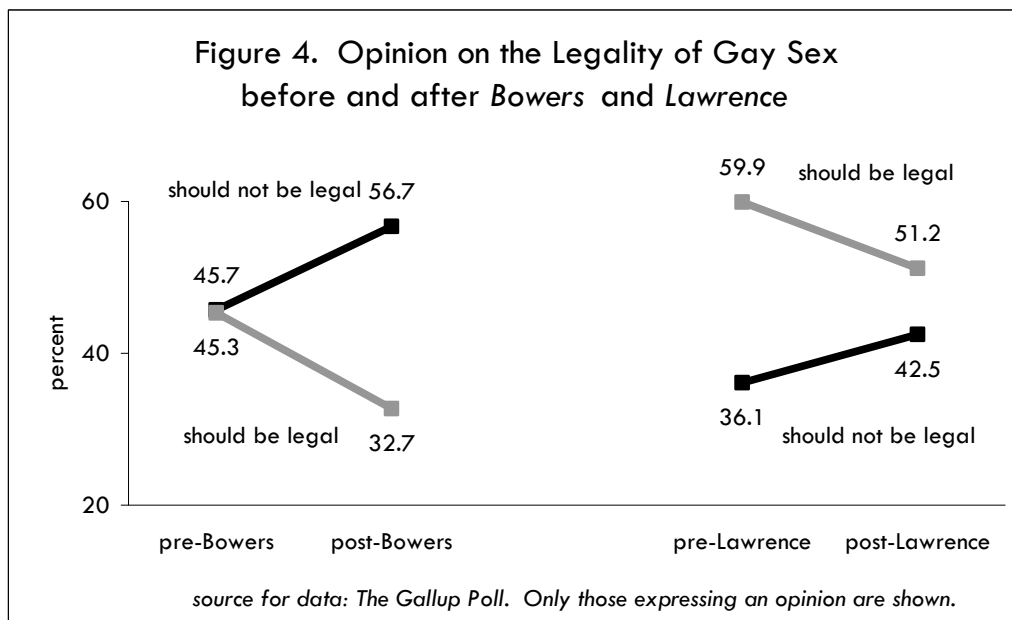
Categories	Mean score
Education	
less than HS diploma	46
HS diploma	50
college degree	64
post-graduate study	72
Birth cohort (year born)	
before 1927	35
between 1927 and 1942	48
between 1943 and 1958	57
between 1959 and 1974	59
after 1974	66
Ideology	
conservative	48
moderate	56
liberal	71
Religiosity (attendance of religious services)	
every week	42
almost every week	49
once/twice per month	54
few times per year	68
Never	66

Source for data: 2004 American National Election Studies.

III. The Possible Role of Supreme Court Precedent in Shaping Public Opinion on Gay Rights

While recognizing that two cases do not a generalization make, the pair of U.S. Supreme Court cases adjudicating the constitutionality of state bans on sodomy provides a unique opportunity to consider how court decisions affect public opinion. The two cases – *Bowers v. Hardwick* and *Lawrence v. Texas* – reach opposite results, with the former finding no constitutional problem with the arrest of a Georgia man pursuant to that state’s ban on sodomy, and the latter striking down on its face Texas’s ban on sex between same-sex couples. The shifts in public opinion in the wake of both decisions can fairly be characterized as anti-gay. In the immediate aftermath of both *Lawrence* and *Bowers*, the share of respondents who disagreed that “homosexual relations between consenting adults should be legal” increased dramatically. As shown in Figure 4 below, before *Bowers* only 46 percent of the population thought gay sex should be illegal. Afterward, that figure rose to 57 percent. The magnitude of the jump in anti-gay

sentiment was similar after *Lawrence*, even though the population had become much more in favor of legalization in the years between the decisions. Before *Lawrence*, only 36 percent thought homosexual relations should be illegal; afterwards, that figure rose to 43 percent.⁴¹ In addition to examining aggregate change, we have also looked for changes in the determinants of opinion on homosexual sex following each decision. In regression analyses not presented here, we found no such change following *Bowers*, but some change in structure following *Lawrence*.⁴²



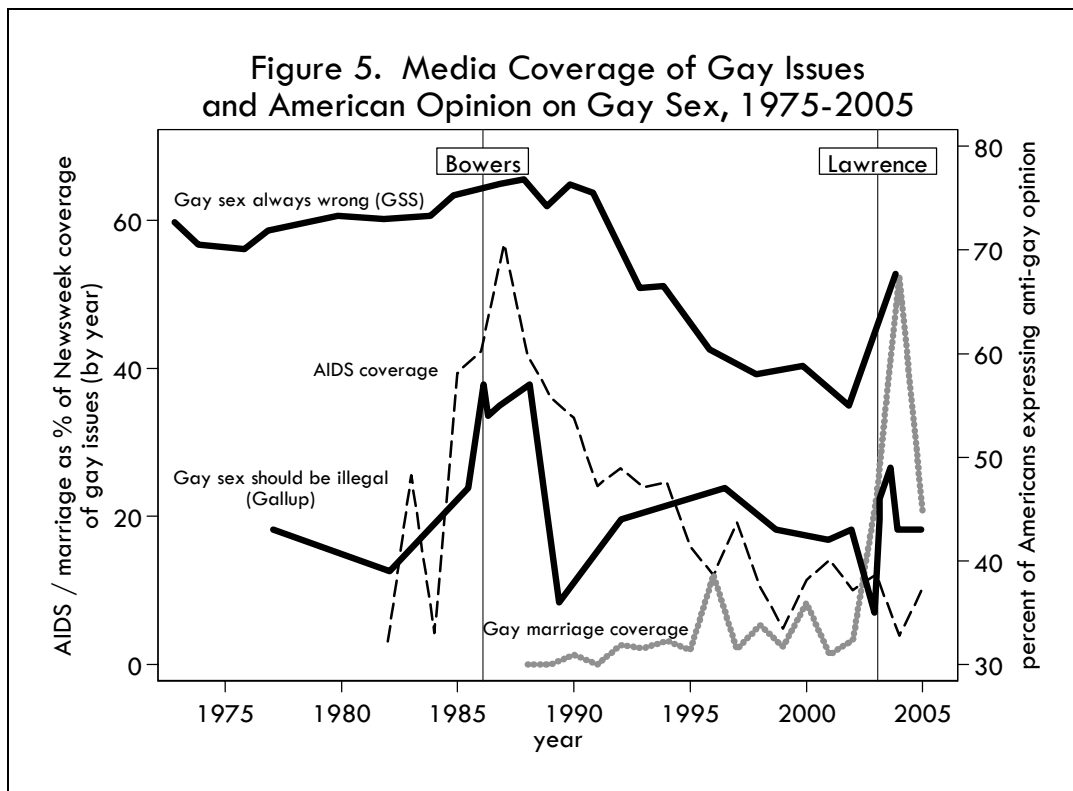
We may have an alternative explanation for the rise in anti-gay sentiment both before and after *Bowers*. As Figure 5 suggests below, the increasingly negative or (at best) static trend in attitudes concerning gay sex remained unaffected by the *Bowers* decision in 1986.⁴³ The trend appears to map well onto coverage that linked gays with

⁴¹ In both cases, the change in opinion is statistically significant at $p < .001$. Question wording for surveys: “Do you think homosexual relations between consenting adults should or should not be legal?” *Bowers v. Hardwick* was announced June 30, 1986; surveys were administered November 11-18, 1985 and July 11-14, 1986. *Lawrence v. Texas* was announced June 26, 2003; surveys were administered May 19-21, 2003 and July 25-27, 2003.

⁴² In particular, post-*Lawrence* African Americans became less in favor of legalizing same-sex relations, holding constant typical demographic, socio-economic status, and political variables. The same was true for all respondents who either identified with a political party. At the same time, education became an even stronger predictor of support for legalizing same-sex relations after *Lawrence* than it was before the decision was handed down. None of these trends were found following *Bowers*.

⁴³ The top line on the graph refers to the trend according the General Social Survey question: “What about sexual relations between two adults of the same sex--do you think it is always wrong, almost always wrong, wrong only sometimes, or not wrong at all?” The line refers to the percent saying “always wrong.” The second solid trendline refers to the Gallup question: “Do you think homosexual relations between consenting adults should be legal or not?” The line refers to the percent saying gay sex should be illegal. As explained further in the text, the dotted lines refer to coverage of gay issues from *Newsweek* magazine. The line that crests in 1986 refers to the percent of stories in that year mentioning the word gay or homosexual and also mentioning AIDS. The line referring to marriage, which begins in 17988, refers to

the AIDS epidemic, however, as reflected in the dashed line indicating the percent of stories in *Newsweek* magazine mentioning the words “gay” or “homosexual” and also mentioning AIDS. Around the time when this share of news stories peaked, so do our indicators of negativity toward homosexual sex. More dramatically, as the share of such stories dropped, the share of the population expressing anti-gay attitudes also fell. In 1986, 42 percent of *Newsweek* stories including the words gay or homosexual also mentioned AIDS. At the same time, public opinion on whether homosexual relations should be illegal (according to the Gallup Poll), and whether gay sex is always wrong (according to the General Social Survey, or GSS) turned markedly negative. The proportion of GSS respondents agreeing with the statement that “sexual relations between two adults of the same sex” is “always wrong” rose to its highest level ever—76 percent—in the spring of 1987. The proportion of Gallup respondents saying that homosexual sex should be illegal rose to its highest point ever: 64 percent, in the Gallup survey administered post-*Bowers* in July 1986.

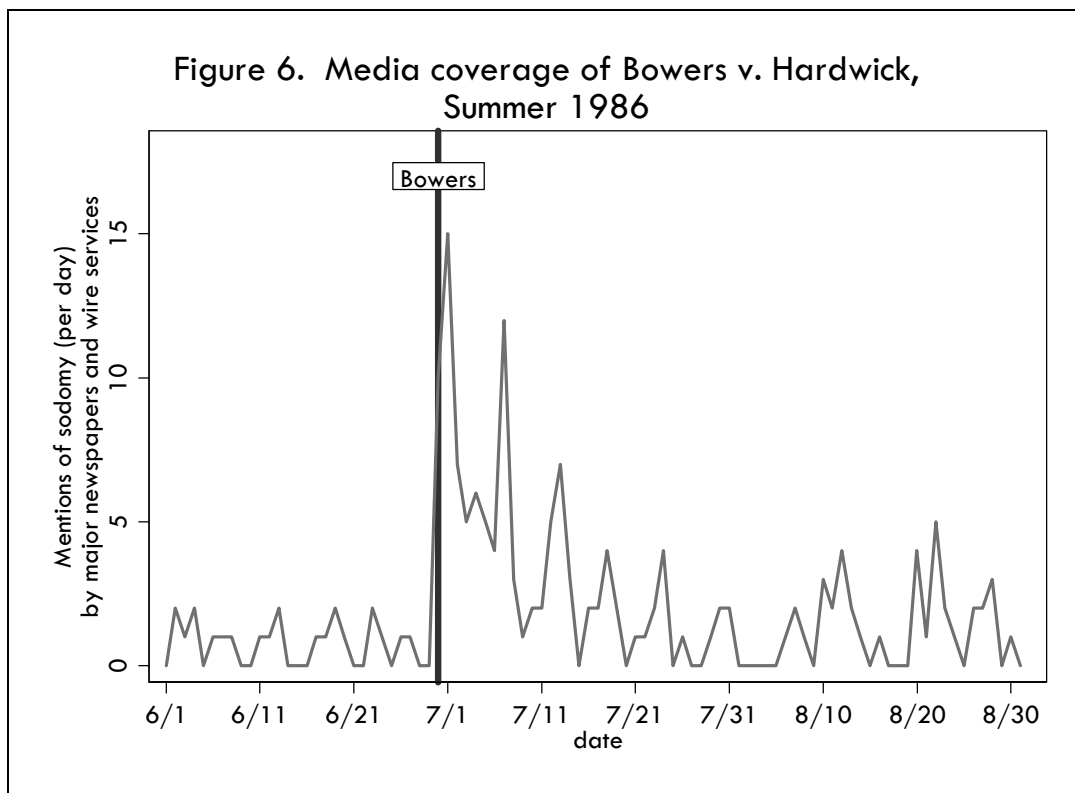


A strikingly similar pattern is seen at the end of the time series—although this time the topic is “gay marriage,” rather than AIDS. As the proportion of gay-themed stories mentioning gay marriage (indicated by the gray line in Figure 5) reached its height in 2004, anti-gay opinion rose, too: the GSS “always wrong” measure spiked upward by

the percent of stories per year mentioning the word gay or homosexual and also mentioning marriage. We chose *Newsweek*, as have other scholars, because *Newsweek*'s influence has remained relatively constant and the number of articles per issue of the magazine has remained approximately equal. See Paul Kellstedt, *Media Framing and the Dynamics of Racial Policy Preferences*, 44 AMER. J. POL. SCI. 245 (2000).

13 percentage points from 2002 to 2004, and anti-gay opinion in the Gallup measure jumped as well.

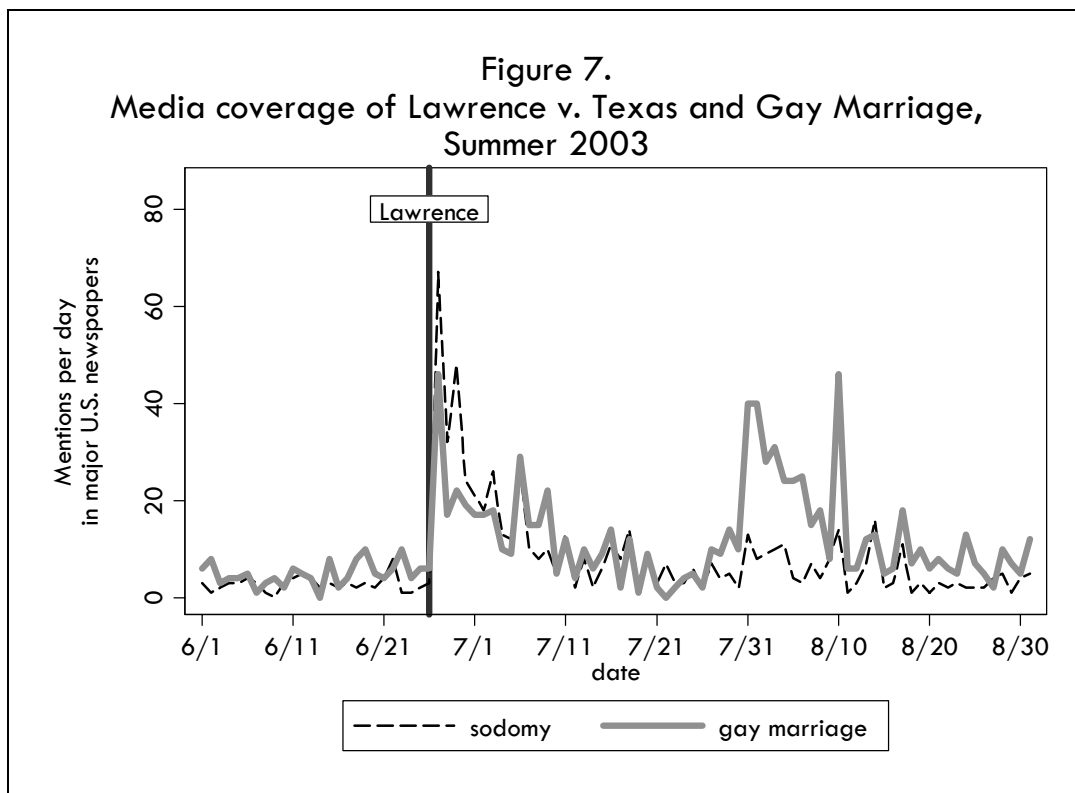
We cannot completely reject the possibility that *Bowers* had some legitimating impact on anti-gay public opinion, but our alternative explanation focusing on coverage of the AIDS epidemic suggests the story is (at least) more complicated. We should also note that *Bowers* itself does not appear to have been a highly salient news event. As shown in Figure 6 below, media coverage mentioning the word “sodomy” (a term that would likely correlate with newspaper stories describing the Court’s ruling) declined to pre-*Bowers* levels within three weeks after the announcement of the Court’s decision on June 30, 1986. The chart depicts the number of times the terms “sodomy” appeared in stories published by newspapers in the Lexis-Nexis “Major Papers” and “News Wires” archives before and after the *Bowers* decision.



We have also examined media coverage in the wake of *Lawrence*. As shown in Figure 7, with respect to coverage of “sodomy” the pattern is similar to *Bowers*: a short burst of coverage during the week of the decision and then a tapering off to pre-decision levels soon after. But media coverage in the wake of *Lawrence* also focused on the issue of marriage: nearly 50 stories concerning gay marriage ran in major U.S. newspapers on the day after *Lawrence*.⁴⁴

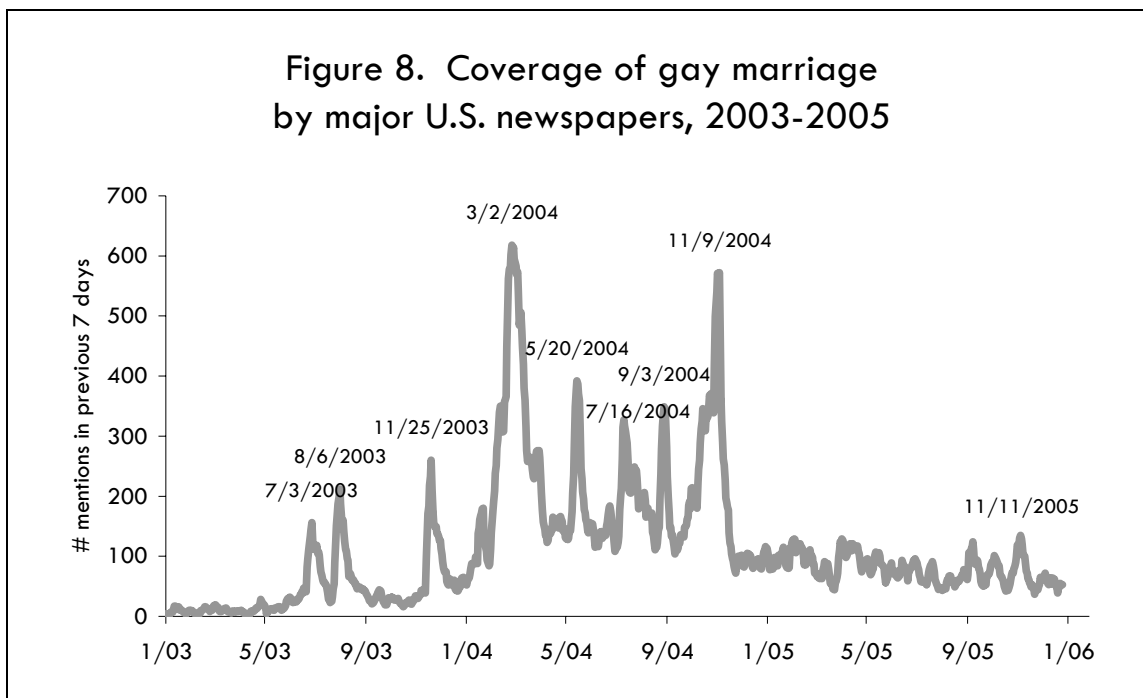
⁴⁴ The Lexis-Nexis “Major Papers” archive has limited coverage of U.S. newspapers from 1986. To augment this data, we added stories from the “News Wires” archive in constructing Figure 6. Because we

As shown in Figures 7 and 8, the *Lawrence* decision was the first event in a series that generated extensive coverage of the gay marriage issue. Over the two years following *Lawrence*, coverage of gay marriage spiked periodically with several major news events: (1) the Vatican’s announcement in the beginning of August 2003 condemning gay marriage, (2) the announcement of the first *Goodridge* opinion in November 2003, (3) the release of the second *Goodridge* opinion on February 4, 2004, the decision by San Francisco Mayor Gavin Newsom to issue marriage licenses one week later (February 12), and President Bush’s announcement of support for a constitutional amendment banning same-sex marriage (February 23), (4) the beginning of the granting of marriage licenses to gays in Massachusetts on May 17, (5) the defeat of the gay marriage Constitutional amendment in the U.S. Senate on July 14, and (6) finally, the coverage of the results of the November 2, 2004 presidential election.



did not face the problem of limited coverage for 2003, Figure 3 includes only stories in the “Major Papers” archive.

Figure 8. Coverage of gay marriage by major U.S. newspapers, 2003-2005



Throughout this period of intense media scrutiny, the public soured notably on the notion of gay marriage. As shown in Figure 9 (indicating results from surveys conducted by the Pew Research Center, which has asked one of the longest-running, consistently-worded series of questions on this topic) and Figure 10 (a smoothed plot depicting data from eight different survey houses⁴⁵), public opinion in favor of same-sex marriage fell in the months following the *Lawrence* decision (from about 38 percent to 30 percent of the population), continued to fall in the aftermath of *Goodridge* and through the 2004 election, and only in the summer of 2005 began to approach (and maybe even exceed) pre-*Lawrence* levels. To get a better sense of the pace of media attention and public opinion shifts, Figure 11 overlays the smoothed plot of opposition to same-sex marriage onto the number of stories mentioning gay marriage each month in *USA Today*. As media coverage of gay marriage increased, so did the share of the public opposing it. As coverage decreased and then evaporated in 2005, the shifts in public opinion that began immediately after *Lawrence* disappeared. By the summer of 2005, the intense, sustained national debate over gay marriage that began with *Lawrence v. Texas* in June 2003 and continued with *Goodridge* had receded. Support for gay marriage had inched towards 40 percent of the population, while opposition hovers somewhere between 50 and 60 percent.

⁴⁵ Symbols in the graph indicate the survey houses from which data were obtained.

Figure 9. Opinion on legalization of gay marriage, 1996-2006

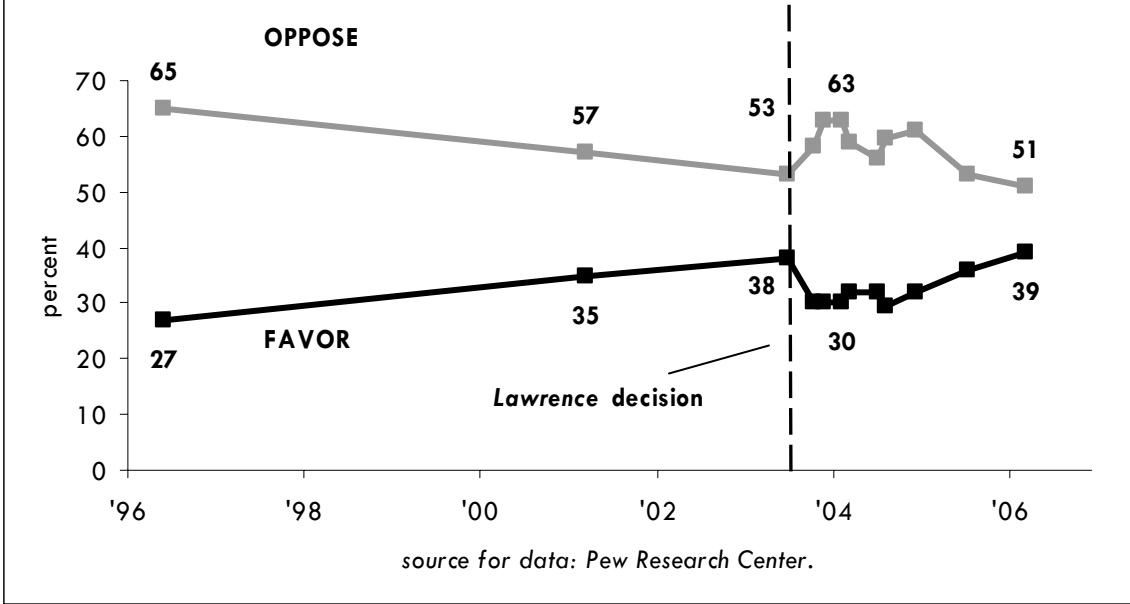
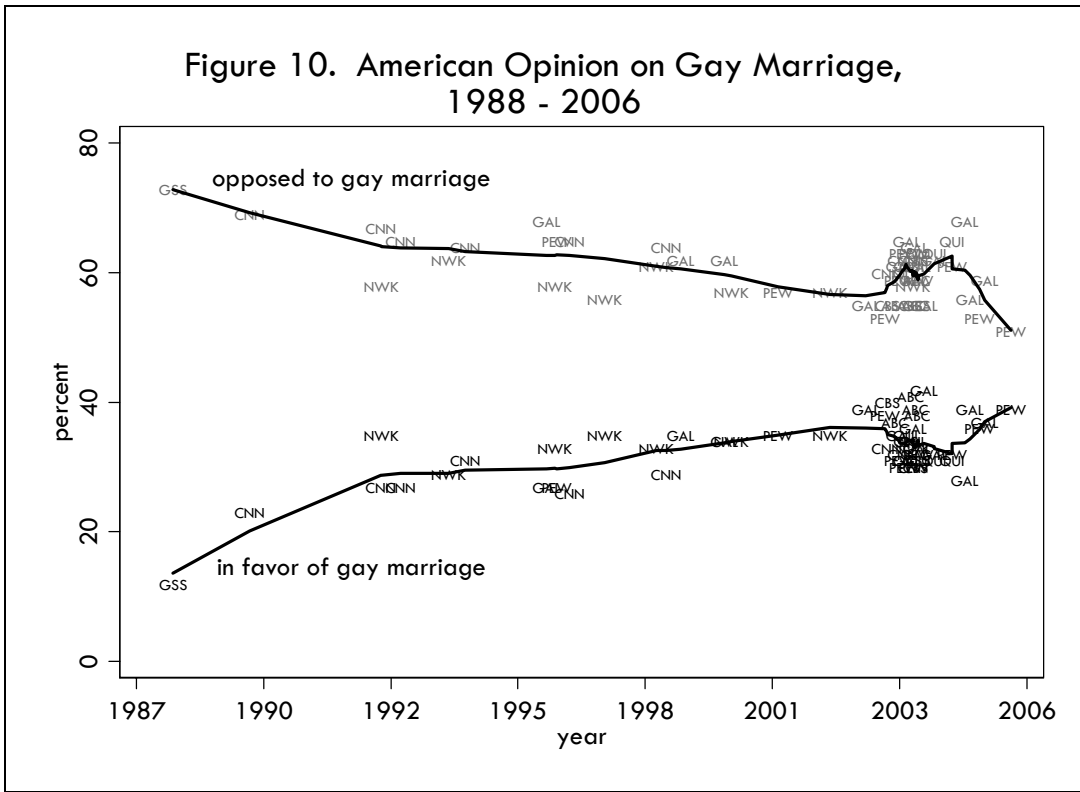
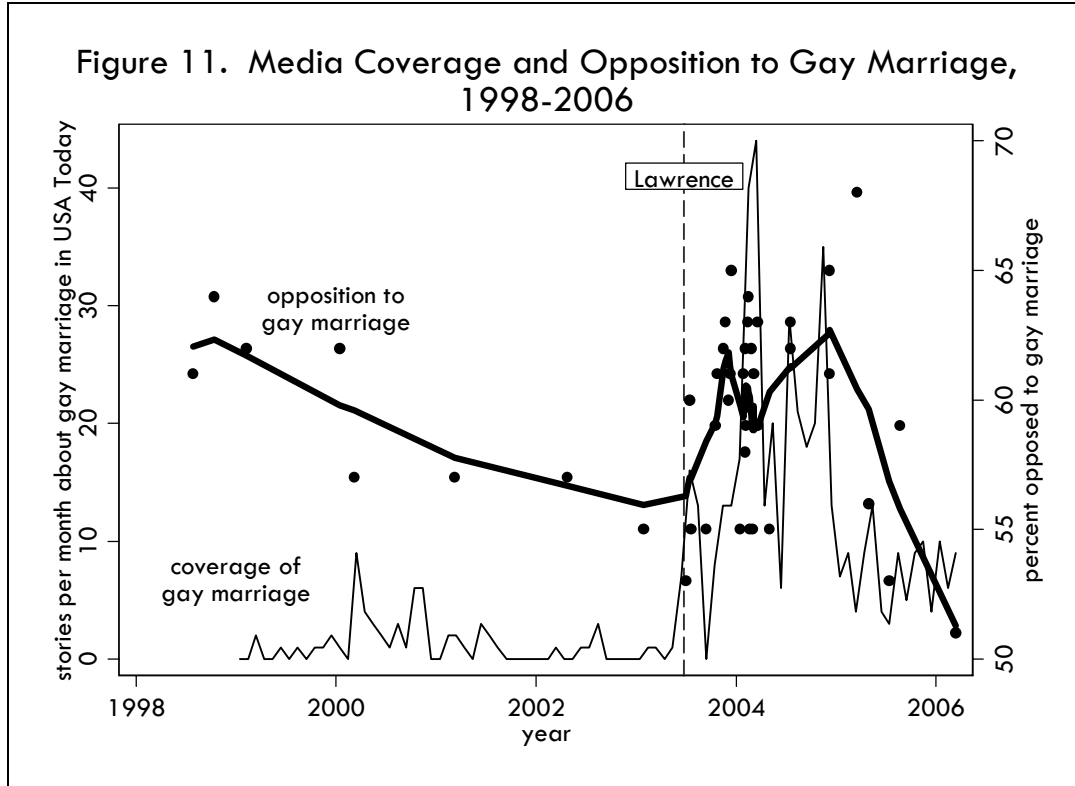


Figure 10. American Opinion on Gay Marriage, 1988 - 2006

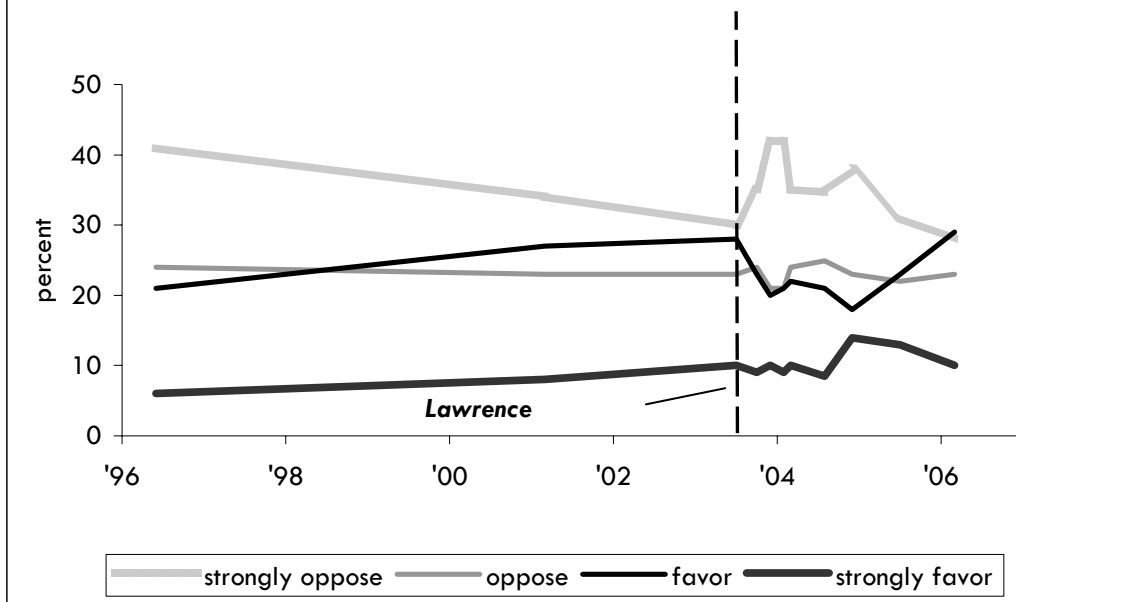




To get a better grasp on the nature of the temporary backlash on the issue of gay marriage in the two years following *Lawrence*, it is important not only to pay attention to the aggregate shifts in favorability, but also changes in the intensity of people's beliefs. As revealed in the Pew data displayed in Figure 12, most of the movement in public opinion from 2003 to 2005 came from the increasing share of the population that became strongly opposed to same-sex marriage. Whereas about 30 percent of the population strongly opposed same-sex marriage at the time of *Lawrence*, that figure increased about 10 percentage points by the time of *Goodridge*. Those strongly in favor increased also, but more modestly, from 8 percent to about 14 percent, but that shift takes place over a year after *Lawrence*, at the time of the 2004 election. The gain among those with strong feelings came mainly at the expense of those who merely supported gay marriage: the share of the population falling into that category dropped immediately after *Lawrence*. Before *Lawrence*, 28 percent merely supported gay marriage, while in the first poll taken after *Lawrence* only 18 percent merely supported gay marriage. Over the two year period, the share of the population that opposes same sex marriage (but does not do so strongly) does not change much at all. More significantly, these substantial shifts among intensity groupings evaporate by 2005: not only do aggregate support and opposition return to pre-*Lawrence* levels but the intensity of support and opposition appear almost identical as well.

Figure 12. Intensity of opinion regarding gay marriage, 1996-2006

source for data: Pew Research Center.



One plausible interpretation of the public opinion data following the *Bowers* and *Lawrence* decisions would be that whenever and however the Court considers gays' rights to have sex, the public recoils and a backlash against liberalization results. In other words, the Court's decision in *Bowers* is consistent with a story of "legitimation" of decreasing tolerance of legalized sex between gays, while the shift in attitudes following the pro-gay rights decision in *Lawrence* is consistent with a backlash. We cannot disprove that hypothesis, but based on the media coverage of gay-related issues in the wake of those decisions we find alternative stories more persuasive. With respect to *Bowers*, the rise and decline in media coverage concerning the AIDS epidemic tracks shifts in opinion on legalizing gay sex both before and after *Bowers*, a decision that we note was not terribly salient even a month after its release. With respect to *Lawrence*, we think the Court's decision did have an effect on attitudes on legalization of gay sex, but only insofar as the decision led to a reframing of gay rights (including the right to have sex) according to the frame of marriage. As Figure 7 reveals, *Lawrence* was, in a sense, a marriage decision. Justice Scalia's dissent portrayed it as such⁴⁶ and the media discussion of gays' right to marry begins immediately after the decision.

This analysis begs another question, though. Why would the debate following *Lawrence* lead Americans to *change* their opinions about gay marriage and the legality of gay sex? It is not readily obvious why some portion of the population would actually

⁴⁶ *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting).

become more anti-gay in their attitudes on sex and marriage in the wake of a pro-gay rights decision. The answer, we suspect but cannot prove with the available data, derives from the “one-sided information flow” on the issue of gay marriage that followed the *Lawrence* decision. No nationally prominent politician took a pro-gay marriage stance during the period in which we see a backlash. Only now, in the summer of 2006, have four sitting U.S. Senators declared their support for legalization of same-sex marriage.⁴⁷ As political scientists have demonstrated in other contexts, a public debate in which political elites take positions on only one side of a particular issue can lead to substantial opinion change among those with weak prior views.⁴⁸ The result in the case of gay marriage was a highly salient, one-sided public discussion in which opponents of gay rights were the most vocal, contributing to the dip in support for legalization of gay sex and gay marriage seen in the eighteen months following *Lawrence*.

IV. What about *Goodridge*?

Until now, we have made little mention of the decisions of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*⁴⁹ in November 2003 and *In re Opinions of the Justices to the Senate*⁵⁰ in February 2004. This oversight might appear peculiar, given that it was the Massachusetts Court’s decisions, not the Supreme Court’s decision in *Lawrence*, which actually legalized gay marriage. However, what may have seemed like a big political splash at the time was actually one more significant wave in a tide of events surrounding gay marriage in 2003 and 2004. We time the beginning of the backlash in public opinion in the summer of 2003, immediately post-*Lawrence* but pre-*Goodridge*. To be sure, the *Goodridge* decisions, like the other events concerning the marriage controversy in the year leading up to the 2004 election, kept the issue in the news. As a result, we suspect those decisions drew out the period of lowered public acceptance of gay marriage that began in the summer of 2003 and ended by 2005.

The pace and trajectory of opinion change in Massachusetts did not differ substantially from that of the rest of the country, as depicted in Figure 13. Although the opinion of Massachusetts respondents concerning gay marriage has always been about 15 percentage points more favorable than that of the rest of the country, the timing and extent of the backlash appear consistent with the story we have told for the rest of the country. The Massachusetts public was about evenly split on the issue of gay marriage before *Lawrence*, approval dropped about seven percentage points at the nadir when the court released the second *Goodridge* opinion, and in 2005 a majority, perhaps even more substantial than in the pre-*Lawrence* period approves of legalization.

⁴⁷ National Gay and Lesbian Task Force, *Press Release: National Gay and Lesbian Task Force salutes U.S. Sen. Russ Feingold for supporting marriage equality*, April 4, 2006, available at <http://thetaskforce.org/media/release.cfm?releaseID=932>. The four supporters are Democratic Senators Russ Feingold (Wisconsin), Edward Kennedy (Massachusetts), and Ron Wyden (Oregon), and Republican Lincoln Chafee (Rhode Island).

⁴⁸ See ZALLER, *supra* note __; John Zaller, *The Myth of Massive Media Impact Revisited: New Support for a Discredited Idea*, in *POLITICAL PERSUASION AND ATTITUDE CHANGE*, ed. Diana C. Mutz, Paul M. Sniderman and Richard A. Brody, U. Michigan Press (1996)

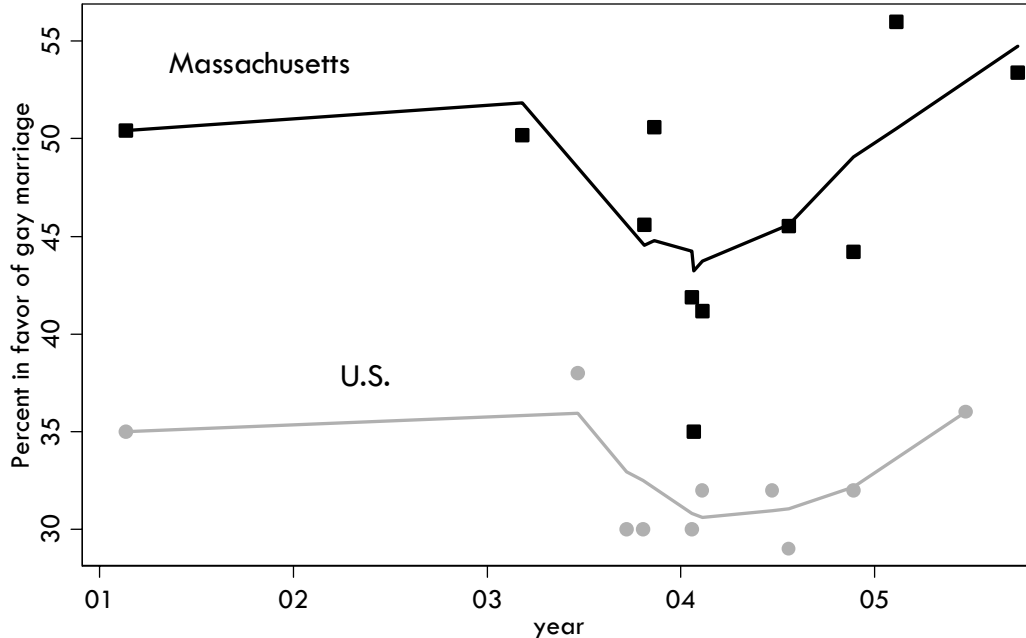
⁴⁹ *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941 (2003).

⁵⁰ *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (2004).

Figure 13

Support for Gay Marriage, 2001-2005

Source for data: Pew Research Center, state polls



If we are right about the timing of the backlash on gay marriage, then we think we have added a wrinkle to the traditional account of how courts affect public opinion change. If *Lawrence* was the principal catalyst for public opinion change on the issue of marriage, then the reach of a Supreme Court opinion is to a large extent outside of the hands of the Justices. In other words, the fact that a decision striking down bans on gay sex led to a backlash on the issue of marriage suggests that broad signals from the Court can be easily manipulated to spill over into areas upon which it did not even pass judgment. Most would view the *Lawrence* decision as more restrained and moderate than *Goodridge*: striking down unpopular bans on sodomy would have seemed less controversial and more restrained than forcing a state to rewrite and completely transform its legal definition of marriage. Nevertheless, as a result of elite framing of the issue, this seemingly less-controversial decision produced a short-term but wide ranging backlash on the issue of gay rights, specifically gay marriage.

Of course, if the Court had not handed down its decision in *Lawrence*, but the Massachusetts Court still decided the *Goodridge* cases the way it did,⁵¹ we still would have expected a backlash to occur, although somewhat later.⁵² *Goodridge*, rather than

⁵¹ We are assuming here that *Lawrence* did not lead the Massachusetts Court to decide *Goodridge* the way it did. Although we feel comfortable with that assertion, we should acknowledge the possibility that *Lawrence* emboldened the *Goodridge* majority both to strike down the state's ban on same-sex marriage and reject civil unions as a compromise. See *Goodridge*, 798 N.E. 2d at 948 (citing *Lawrence*).

⁵² We note only in passing that our analysis of the data from the early 1990s does not suggest that the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), or the debate over the

Lawrence, would have been the catalyst for public opinion change, and it probably still would have been followed by the decision of the mayor of San Francisco to allow same-sex marriages, the debate over a federal Constitutional amendment to ban same-sex marriages, and the placement of anti-gay marriage referenda on the 2004 ballot – all of which kept the issue in the news and kept the backlash going. We cannot know for sure how public opinion would have played out in such an alternate universe. All we do know is that in this one the Supreme Court’s decision led to an effect in the direction opposite of the decision itself.

V. The structure of opinion on gay marriage

To get a handle on “who” has believed “what” about same-sex marriage “when” it would be optimal to have a survey with many more independent variables of interest than those in the Pew surveys analyzed above. The Pew surveys have the advantage of being taken several times over the two year period of interest and give us a sense of the shifts in public opinion on the issue. In contrast, the National Election Study (NES) survey⁵³ we analyze in this section was conducted only in the nine weeks preceding the 2004 election, at a time when the issue of gay marriage figured prominently as revealed in the media attention data presented in Figure 5.⁵⁴

The NES, however, has the advantage of hundreds of questions in addition to the demographic and ideological variables of the Pew survey. For example, the NES has several items designed to capture three core political values—egalitarianism, moral traditionalism and belief in limited government—and a “feeling thermometer” that asks respondents to place gays and lesbians (as well as about two dozen other demographic groups, institutions and political figures) on a 100-point scale designed to capture how “warm” or “cool” respondents feel toward them. We present the cross tabulations of the NES data in Appendix B, and discuss in this Part a model derived from that survey, and depicted in Figure 14 and Table 2.⁵⁵

Federal Defense of Marriage Act produced a backlash akin to that observed in the *Lawrence-Goodridge* period. Perhaps a state court decision without a preceding Supreme Court decision on a similar topic would not have the effect on public opinion we observed in the recent data. However, unlike *Goodridge*, the Hawaii decision did not lead to any marriages between gays, so the issue quickly faded from public view and we are unsurprised at the absence of public opinion backlash.

⁵³ The NES question on gay marriage is the following: “Should same-sex couples be ALLOWED to marry, or do you think they should NOT BE ALLOWED to marry?”

1. Should be allowed
2. Should not be allowed
3. Should not be allowed to marry but should be allowed to legally form a civil union [VOLUNTEERED]
4. Other [VOLUNTEERED] (SPECIFY)
5. Don't know
6. Refused

⁵⁴ One might also suppose that the existence and eventual success of anti-same-sex marriage referenda in 13 states would also make the pre-election period exceptional in several respects. However, our analysis of the NES data in the 13 referenda states (available upon request) indicates that trends in opinion on gay marriage were not affected in any detectable way by the referenda campaigns in these states.

⁵⁵ However, even the NES is insufficient to give us a full picture of the structure of opinion on same-sex marriage. It does not include, for example, whether the respondent is gay or whether he or she has a gay family member, friend or coworker. Therefore, we attempt to supplement our discussion of the NES and

Pew surveys with other surveys and other scholars' research. See Patrick J. Egan & Kenneth Sherrill. *Neither An In-Law Nor An Outlaw Be: Trends in Americans' Attitudes Toward Gay People*, PUBLIC OPINION PROS, (February 2005); Joe Bergeron, *Examining Determinants of American Support for Same-Sex Marriage*, Paper presented at the annual meeting of the American Political Science Association, Washington, D.C., 2005; Paul R. Brewer, *From the Podium and the Pulpit: Opinion Leadership and Same-Sex Marriage*. Paper presented at the annual meeting of the American Political Science Association, Washington, D.C.; Donald Haider-Markel & Mark Joslyn, *Attributions and the Regulation of Marriage: Considering the Parallels Between Race and Homosexuality*, 38 PS: POLITICAL POLITICAL SCIENCE AND POLITICS 233 (2005); C. E. Tygart, *Genetic Causation Attribution and Public Support of Gay Rights*, 12 INT'L J. PUB. OP. RES. 259 (2000); Clyde Wilcox & Robin Wolpert. 2000. *Gay Rights in the Public Sphere: Public Opinion on Gay and Lesbian Equality*, in THE POLITICS OF GAY RIGHTS (Craig A. Rimmerman, Kenneth D. Wald, & Clyde Wilcox eds., 2000).

Figure 14. A multi-stage model of determinants of attitudes toward gay marriage

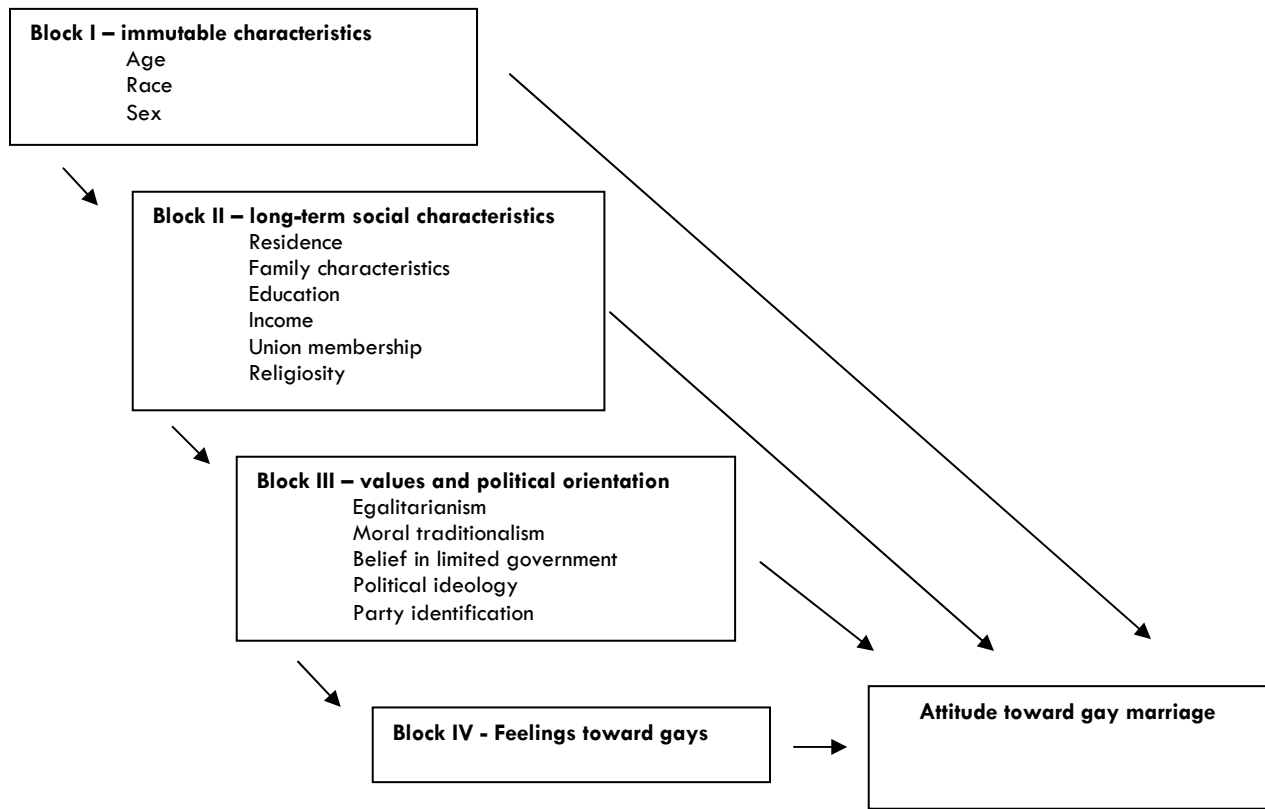


Table 2. Predicting support for same-sex marriage,
Fall 2004 National Election Study Survey⁵⁶

Variables	I	II	III	IV (direct effects)
Immutable demographic characteristics				
Age	-.44 ***	-.30**	-.24*	-.20
Black	-.15 **	-.07	-.16**	-.16**
Hispanic	-.05	-.01	-.09	-.11
Female	.04	.08*	.09*	.03
long-term social characteristics				
South		-.10	-.06	-.02
West		-.03	-.03	-.04
Midwest		-.13 *	-.11	-.08
Urbanicity		.07	-.01	.02
married/widowed		-.05	-.02	-.04
divorced/separated		-.01	-.03	-.04
children in household		-.07	-.05	-.02
Education		.41 ***	.35***	.27**
Income		-.06	-.02	-.07
union household		.01	.01	.01
attendance of religious services		-.38 ***	-.21***	-.20***
values and political orientation				
Egalitarianism			.12	.08
moral traditionalism			-.85 ***	-.80***
belief in limited government			.10	.13*
political ideology			.15 **	.14**
party identification			.13 **	.12*
Feelings toward gays				
Gay feeling thermometer score				.63 ***
log likelihood	-501.20	-438.21	-338.65	-306.88
pseudo-R ²	.05	.17	.36	.42
N	805	805	805	805

⁵⁶ Cell entries are first differences derived from a probit analysis. They are estimates of the change in probability of supporting gay marriage given a shift from the minimum to the maximum value of each independent variable, holding all other variables constant at their means. Cell entries in bold are a variable's total effect—that is, the effect of a variable on support for gay marriage before the consideration of the mediating effects of any intervening variables. Probit coefficients are significantly different from zero at * $p < .05$, ** $p < .01$, *** $p < .001$.

The regressions depict the effect of four different groups (or “blocks”) of variables on attitudes toward gay marriage, listed in rough causal order: (block I) immutable demographic characteristics; (II) long-term social characteristics; (III) values and political orientation; and (IV) feelings toward gays and lesbians. By organizing the analysis in this way we can assess the direct effects of each block on attitudes on same-sex marriage, as well as the indirect effects of earlier blocks, as mediated through the variables in the intervening groups.⁵⁷ For example, education is associated with higher levels of support for gay marriage. However, education likely has both a direct effect on attitudes toward gay marriage and an indirect effect through the intervening variable of egalitarianism, which is correlated with both education and support for gay marriage.

Rather than present difficult-to-interpret probit coefficients, Table 6 instead presents “first differences,” which are calculated from the probit estimations and are the estimated change in probability of supporting gay marriage given a shift from the minimum to the maximum value of each independent variable, holding all other variables in the model constant at their mean value.⁵⁸ For example, in Model IV we see that the direct effect of a shift in education from its minimum value (eighth grade or less) to its maximum value (post-graduate study) is a 27-percentage point increase in the probability of supporting gay marriage, holding all other variables constant at their means. We can compare this direct effect to the total effect of education (estimated in Model II at 41 percentage points) and thus calculate the indirect effect of education through the intervening variables in blocks III and IV as $41 - 27 \approx 14$ percentage points.

A. Demographic characteristics

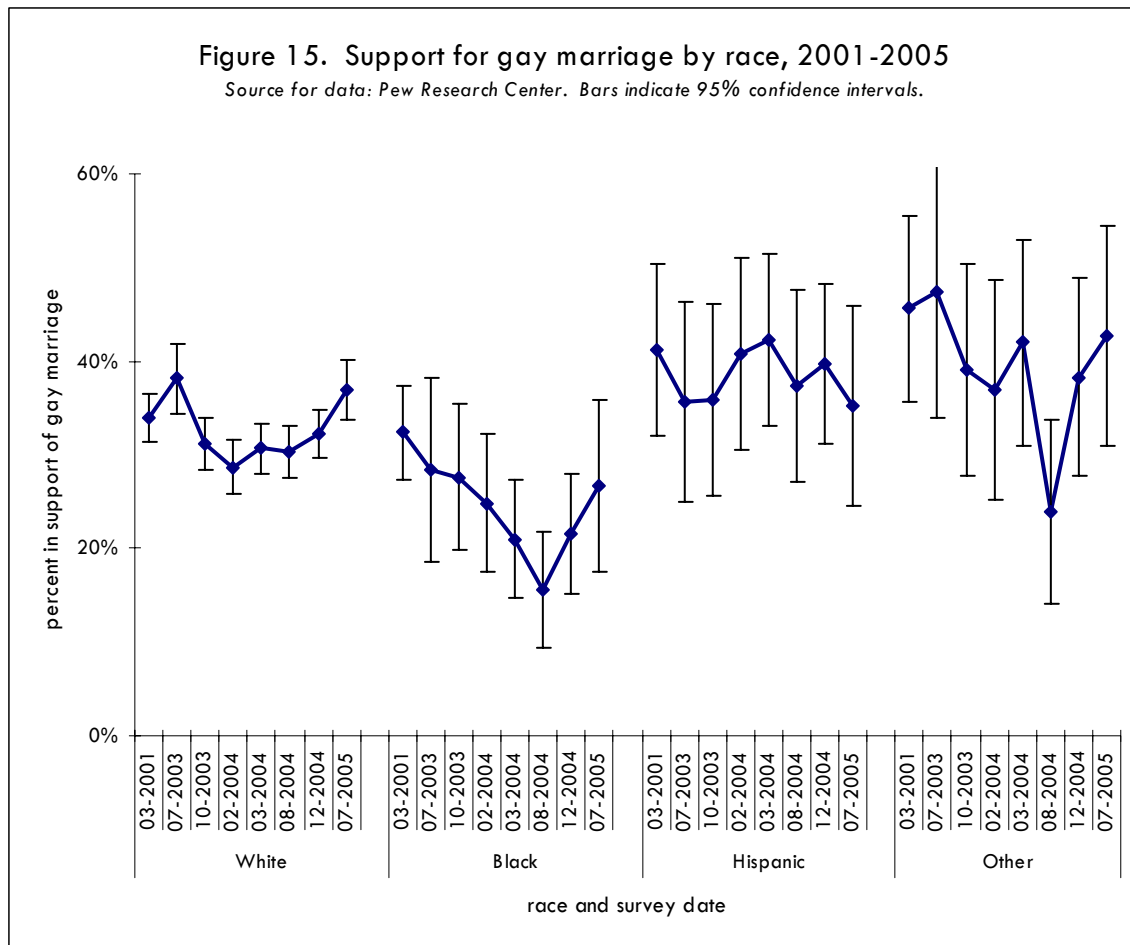
We consider first the effects of three immutable demographic characteristics: gender, race and age. With respect to gender, we confirm what others have found:⁵⁹ namely, women tend to be more supportive of gay rights than men. The differences are not substantial (about 2 to 4 percentage points), but the relationship grows when controlling for other factors, and then disappears once feeling toward gays is included.

⁵⁷ This analysis, conducted in what is known as a “block recursive” approach, is performed with a series of four probit estimations that have the binary choice of support for gay marriage (with value one) or opposition (with value zero) as the dependent variable. For a description of this technique, see WARREN E. MILLER & J. MERRILL SHANKS, *THE NEW AMERICAN VOTER* (1996); JAMES A. DAVIS, *THE LOGIC OF CAUSAL ORDER* (1985). The first estimation (Model I) includes only the variables from block I. Each subsequent analysis adds an additional block in the causal chain, until the final model (Model IV) includes all independent variables of interest. The *total effect* of any variable is estimated via the model that controls for all variables prior to the variable in question, but that does not control for any intervening variables. These effects are presented in boldface type in Table A. Model IV, which controls for the effects of all the variables, provides estimates of the *direct effects* of all variables. The *indirect effect* of a variable through intervening factors is calculated by subtracting the variable’s direct effect from its total effect.

⁵⁸ For more on this approach to presentation, see Gary King et al., *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AMER. J. OF POL. SCI. 2 (2000); SCOTT J. LONG, *REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES* (1997).

⁵⁹ See, e.g., Haider-Markel & Joslyn, *supra* note __.

Racial differences in opinion on same-sex marriage are more pronounced: Hispanics are most supportive of gay marriage (41 percent), followed by whites (36 percent), who are followed by African Americans (25 percent). Once placed in the more sophisticated models and even controlling for anti-gay feelings, the statistical significance of being an African American remains (although such is not the case for Hispanics probably because age is responsible for their differential support). African Americans remain in distinct opposition to same-sex marriage in Model IV, which estimates that holding other variables constant, blacks are 16 percentage points less likely to gay marriage than whites. In analyzing the Pew polls, we also noticed the remarkable magnitude of the shift among African Americans in the past two years and the residual differences that remain as of the most recent survey. As depicted in Figure 15, in July 2003, 31 percent of African Americans approved of same-sex marriage, a figure that dropped to 19 percent by August 2004, and as of summer 2005 had made up most of the lost ground. (As is the case with most opinion surveys, the relatively small sizes of the non-white samples in the Pew data make it difficult to assess whether variation over time is due to actual change or simply sampling error.)



As discussed in the previous Part, age is one of the strongest predictors of attitudes on same-sex marriage, with respondents in the youngest age group (age 18 to 25) nearly 40 percentage points more supportive of same-sex marriage than those over 65. The effect diminishes once controlling for other variables, and disappears once controlling for feelings toward gays. We must admit that we cannot explain the substantial movement in the age coefficient over time, as depicted in Figure 13. The size of this coefficient varies considerably between 17 and 29 points.

B. Long-Term Social Characteristics

The regressions allow us to dispel some of what might be conventional wisdom concerning the effect of long term social characteristics on attitudes toward same-sex marriage. As the crosstabs depict, substantial differences exist among groups as defined by family makeup, region of residence, religion and education. Of these variables, though, only education and religiosity (as measured by church attendance) remain significant once the other controls are added. For example, a little more than half of those who are single, but only 30 percent of those who are married, are in favor of same-sex marriage. The effect of marital status does not hold up once controlling for age (younger people are disproportionately single, of course). Similarly, the regional differences in opinion on same sex marriage – with Northeasterners and Westerners about fifteen to twenty percentage points more supportive than Southerners or Midwesterners – are not statistically significant once controls are added for religiosity, race and education.⁶⁰

Substantial differences exist among education groups. At the time of the 2004 election, according to the NES, overwhelming majorities (over 70 percent) of those with a high school diploma or less opposed same-sex marriage, while close to half (49 percent) of those with a college degree were in favor. That relationship holds up in multivariate analysis, with the effect of moving from the lowest to the highest education grouping ranging from 27 to 41 percentage points, depending on the model. Crosstabs from the most recent Pew data, as of July 2005, reveal a comparable gap, although as depicted in Figure 13 the magnitude of the education effect has declined to pre-*Lawrence* levels.

Although religion does not appear to have any statistically significant effect,⁶¹ religiosity continues to have – both over time and once other variables are added to the regression – a very powerful influence on opinion in opposition to same-sex marriage.

⁶⁰ The same pattern holds for urbanicity – whether one lives in a city, suburb or rural area. Those in large cities are much more supportive of same-sex marriage (45 percent support) than those in rural areas (25 percent support) but the relationship does not hold up once adding the typical controls.

⁶¹ Protestants have much more hostile attitudes on same-sex marriage than Catholics. On average, about a fifteen percentage point gap exists between the two groups, but that difference does not hold up once the other variables are added. Although small sample size prevents one from making any statistically significant conclusions about Jews, it is notable that overwhelming percentages of Jews in any survey conducted on this issue have voiced support for same-sex marriage – 72 percent according to the NES survey.

Those who attend church weekly are about 38 percentage points more likely to be against same-sex marriage as those who never attend (83 percent, as opposed to 47 percent). The relationship diminishes by half when we control for ideology, traditionalist moral attitudes and anti-gay affect, but still remains quite powerful as compared to other variables in this block. Frequency of church attendance is only one way to get at the differences between Americans based on religiosity. One could also look at the difference between those who call themselves evangelical (only 15 percent support) and those who do not (39 percent support). Breaking the population up according to how respondents regard the Bible shows the religious differences most starkly. Of those who say the “Bible is the actual word of God and is to be taken literally,” 85 percent oppose legalization of same-sex marriage, whereas 73 percent of those who say the “Bible was written by men” support of same-sex marriage.

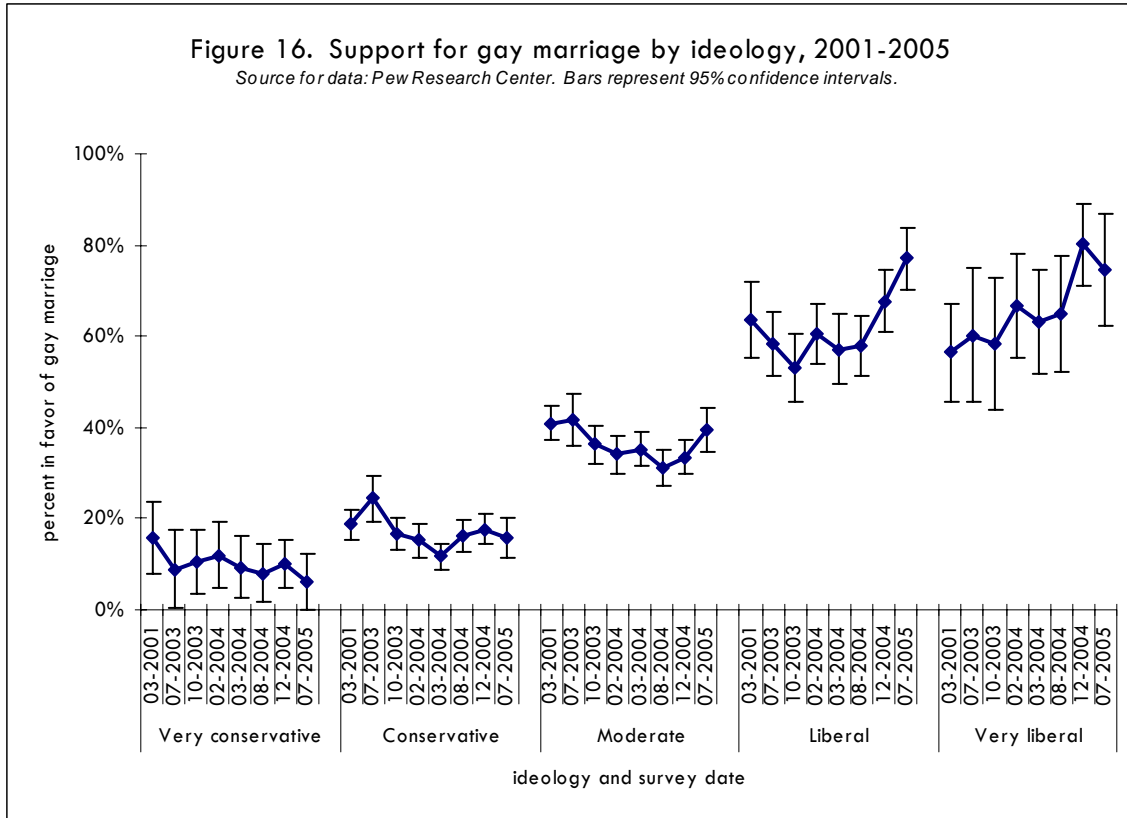
C. Values and Political Orientation

Ideology has always been an important predictor of individual level opinion on same-sex marriage, and the variable has continued to rise in importance over the past two years. According to the NES, over 77 percent of those who described themselves as extremely liberal or liberal were in favor of same-sex marriage, while over 87 percent of conservatives or extreme conservatives opposed it. As the regressions indicate, the independent effect of ideology remains even when one controls for moral traditionalism and anti-gay feelings.⁶² Figure 16 depicts the movement in opinion among ideological groups over the past few years. All ideological groupings decreased in support on same-sex marriage in the immediate post-*Lawrence* period (between the July 2003 and October 2003 Pew polls). Conservatives and moderates have not yet recovered to their pre-*Lawrence* levels, while liberals (especially those who describe themselves as “very liberal” of whom about 80 percent approve) are now much more supportive of same-sex marriage.

⁶² We observe the same pattern for party identification, and that variable’s significance remains even when controlling for ideology.

Figure 16. Support for gay marriage by ideology, 2001-2005

Source for data: Pew Research Center. Bars represent 95% confidence intervals.

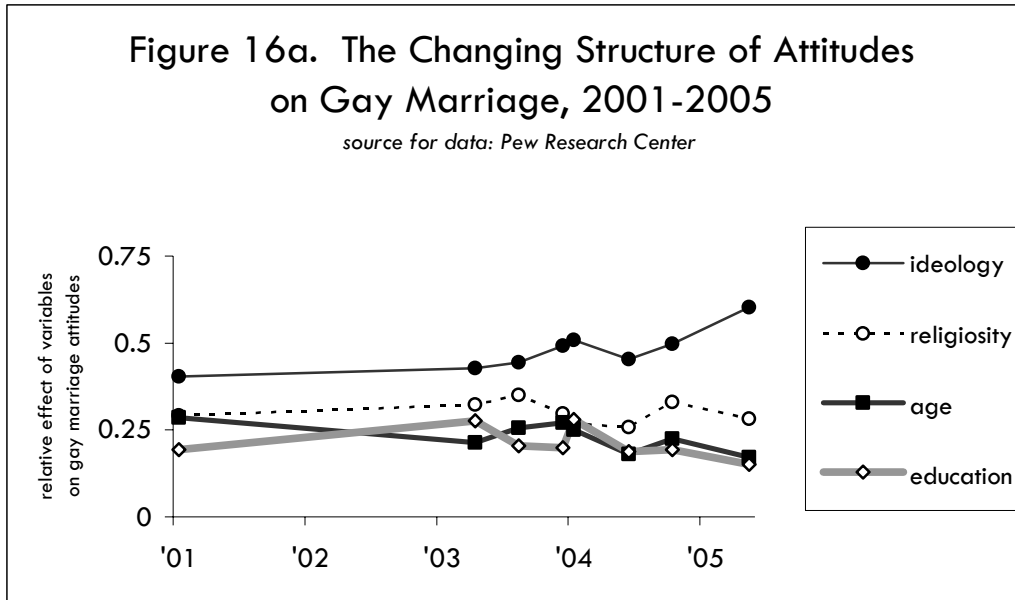


The differences between ideological groupings are not terribly surprising, but the finding that ideology became an increasingly powerful predictor of opinion on same-sex marriage is more interesting. We demonstrate that in Figure 16a below, which graphs the coefficients from a multivariate analysis and estimates how the effects of the four main predictors of opinion—ideology, age, education, and religiosity—changed from 2001 to 2005.⁶³ The effect of ideology on gay marriage attitudes (holding other variables constant) grew dramatically over the two-year period following *Lawrence*: a 19-point change that was statistically significant ($p = .002$). That is, the *ceteris paribus* difference between the gay marriage attitudes of very liberal and very conservative Americans increased by .19 (on a zero to one scale) from 2003 to 2005. None of the demographic variables show any change of similar magnitude in the post-*Lawrence* period.

⁶³ This figure is derived from a regression analysis incorporating all respondents from the seven Pew surveys administered between 2001 and 2005. We scaled the dependent variable—a four-choice measure of gay marriage attitudes—from zero (strongly oppose) to one (strongly favor). We included dummy variables for each wave of the survey, and terms for respondents' age, education, ideology, and attendance of religious services, as well as their sex and race. In addition, age, education, ideology, and attendance of religious services were interacted with each of the wave dummy variables. Because we ran the estimation without a constant term, the coefficients on the interaction terms are the *ceteris paribus* estimates of the effects of these four variables at each wave of the survey. The absolute values of these coefficients are plotted in Figure 13. Because all variables were scaled zero (minimum) to one (maximum), the relative sizes of these coefficients indicate the relative magnitudes of the variables' effects.

Figure 16a. The Changing Structure of Attitudes on Gay Marriage, 2001-2005

source for data: Pew Research Center



Arraying respondents according to a five or seven-point ideological scale hides heterogeneity among ideological groups. By controlling for different types of ideological commitments we can get a better sense of what is driving opinion on same-sex marriage. We employ here familiar indices derived from several NES questions that attempt to capture attitudes defined by moral traditionalism, egalitarianism and belief in limited government (libertarianism).⁶⁴ We broke respondents up into thirds – high, medium or

⁶⁴ The Moral Traditionalism index derives from respondents' agreement or disagreement with the four items below:

1. "The world is always changing and we should adjust our view of moral behavior to those changes."
2. "The newer lifestyles are contributing to the breakdown of our society."
3. "We should be more tolerant of people who choose to live according to their own moral standards, even if they are very different from our own."
4. "This country would have many fewer problems if there were more emphasis on traditional family ties."

The Egalitarianism index refers to responses on the following items:

1. Our society should do whatever is necessary to make sure that everyone has an equal opportunity to succeed.
2. We have gone too far in pushing equal rights in this country.
3. One of the big problems in this country is that we don't give everyone an equal chance.
4. This country would be better off if we worried less about how equal people are.
5. It is not really that big a problem if some people have more of a chance in life than others.
6. If people were treated more equally in this country we would have many fewer problems.

The Limited Government index derives from responses to the following three items:

1. Agree more with: ONE, the main reason government has become bigger over the years is because it has gotten involved in things that people should do for themselves; OR TWO, government has become bigger because the problems we face have become bigger.

low – based on the number of statements in the indices to which they agreed or disagreed. We are unsurprised by the finding that moral traditionalists are much more likely to be against same-sex marriage than non-traditionalists: 81 percent of “high” scorers on the moral traditionalism scale are opposed to same sex marriage, while only 42 percent of “low” scorers are opposed. The magnitude of the effect, even once controlling for all demographic, ideological and other variables, including anti-gay affect, is still quite striking: moving from the lowest to the highest third on the moral traditionalism index increases one’s probability of being against same-sex marriage by between 80 and 85 percentage points. Indeed, moral traditionalism is the most powerful explanatory variable of all those we include – even more than anti-gay affect as measured by the feeling thermometer.

In contrast, a belief in limited government (libertarianism) increases the probability that one will favor legalization of same-sex marriage. Because libertarianism is often correlated with other values of political conservatism, those who score high appear in the cross tabs more opposed to same-sex marriage than those who are low scorers (32 percent as opposed to 42 percent). Once we control for these other variables though, including anti-gay affect, the highest scorers are about 13 percentage points more likely to favor same-sex marriage than the lowest scorers.

We were surprised to find no direct, statistically significant relationship for egalitarianism on attitudes concerning same-sex marriage. Of course, before adding any controls, egalitarians are more likely to be in favor of same-sex marriage. Those in the highest third according to the egalitarianism scale are evenly split on the issue of same-sex marriage while over 70 percent of the lowest scorers are against same-sex marriage. However, this relationship is not statistically significant in the regressions, suggesting that most of the power of egalitarianism as an explanatory variable may be subsumed by ideology, party identification and moral traditionalism.

D. Feelings Toward Gays and Attitudes about Homosexuality

Of course, those who express “warm” feelings toward gays are much more likely to be in favor of same-sex marriage than those who express “cool” feelings. 88 percent of those who gave gays a rating between 0 and 45 on the feeling thermometer were opposed to same-sex marriage, while only 31 percent of those who gave ratings between 61 and 100 opposed same sex marriage. A move from the lowest to the highest feeling thermometer score increases the probability of being in favor of same-sex marriage by 63 percentage points.

Perhaps the most interesting finding is that the inclusion of the respondent’s feelings toward gays does not undermine the direct effect that most of the values and

-
2. Agree more with: ONE, we need a strong government to handle today's complex economic problems; OR TWO, the free market can handle these problems without government being involved.
 3. Agree more with: ONE, the less government, the better; OR TWO, there are more things that government should be doing?

political orientation variables have on attitudes toward same sex marriage. In contrast, age and gender (but not race) decline to statistical insignificance once we include feelings toward gays in the regression. This suggests that age and gender have an effect on respondents' attitudes towards gays but not an independent and direct effect on their attitudes toward same-sex marriage per se.

Several other researchers have recognized a relationship between individuals' beliefs as to the origins (or etiology) of homosexuality and their support for same-sex marriage.⁶⁵ Those studies find, for example, that respondents who see homosexuality as the result of genetic or biological factors rather than as the result of situational factors and personal choices were more likely to support same-sex marriage and domestic partnership laws. Indeed, Donald Haider-Markel and Mark Joslyn find that support for same-sex marriage has gone up almost in parallel with rates of response attributing homosexuality to genetics instead of upbringing.⁶⁶

Our analysis of the October 2003 Pew survey confirms what these researchers have found. That survey asked the following question: "In your opinion, when a person is homosexual is it something they are born with, something that develops because of the way people are brought up or just the way that some people prefer to live." It also asked the respondent "Is homosexuality something that can be changed?" The answers to both questions are highly correlated with the respondent's support or opposition to same-sex marriage as the tables below indicate. 59 percent of those who think homosexuality is something people are born with support same-sex marriage (38 percent merely support and 21 percent strongly support), whereas among those who think it is the result of upbringing or personal preferences only 23 percent support same-sex marriage. Similar disparities are apparent from the "born with" question, and both variables are significantly associated with opinion on gay marriage when placed alongside the familiar variables from Figure 14. (Because this question was asked only once and not alongside the other questions from which we derived the moral traditionalism and other indices we cannot know for sure how well these variables hold up.)

⁶⁵ See Tygart, *supra* note __; Haider-Markel & Joslyn, *supra* note __; Bergeron, *supra* note __.

⁶⁶ See Haider-Markel & Joslyn, *supra* note __.

Table 3. Explanations of Homosexuality and Same-Sex Marriage Attitudes

		<u>Opinion on Same-Sex Marriage</u>			
		Strongly Oppose	Oppose	Support	Strongly Support
<u>Beliefs about causes of homosexuality</u>					
	fixed at birth	18.2	22.4	38.1	21.2
	due to upbringing	51.5	25.1	18.1	5.3
	The way some people prefer to live	47.8	28.9	19.4	3.8
	don't know	21.2	29.3	21.3	6.3
<u>Beliefs about whether homosexuality can be changed</u>					
	can be changed	53.3	27.0	16.4	3.3
	cannot be changed	22.9	23.1	36.6	17.4
	don't know	42.6	35.1	17.4	4.9

Source for data: Pew Research Center survey, October 2003. N = 2,434.

The data concerning whether someone knows someone who is gay follows a similar pattern. The July and October 2003 Pew surveys asked respondents “Do you have a friend, colleague or family member who is gay?” Those who answered “yes” were about twice as likely to support same-sex marriage as those who said they did not know someone who was gay (49 percent as opposed to 25 percent). Although we suspected that knowing someone who is gay (or at least admitting it to a survey researcher) is highly correlated with liberalism, education, region and other factors, we find that the variable is still statistically significant ($p < .001$) when placed in a regression alongside the other variables in the Pew survey. As with one’s beliefs about the origins of homosexuality, we cannot be sure how this relationship would hold up if we controlled for moral traditionalism and attitudes toward gays. However, we suspect that proximity to gays has its principal effect on one’s attitudes toward them (the type of opinion the feeling thermometer picks up) as opposed to marriage per se. Even so, we should note that to know someone is not necessarily to love them (or to want the state to recognize their love for another). It is not as if most people who know someone who is gay think gays ought to have the right to marry – they are split down the middle in their support for same-sex marriage.

Table 4 – Proximity to Gays and Attitudes toward Same Sex Marriage

	Opinion on Same-Sex Marriage			
	Strongly Oppose	Oppose	Support	Strongly Support
<u>Do you have a friend, colleague or family member who is gay?</u>				
Yes	30.3	21.0	33.1	15.6
No	42.3	32.4	20.8	4.5
Not Sure/Refused	32.5	53.2	14.3	0

Source for data: July and October 2003 Pew Research Center surveys, N = 3,830.

VI. Opinion on questions related to legalization of same-sex marriage

A. Civil unions

The heated debate surrounding same-sex marriage produced an important outcome favorable to gay-rights activists: an unmistakable rise in support for civil unions. As shown in Figure 17, support for civil unions—which provide some legal status to same-sex couples but fall short of marriage—grew between mid-2003 and mid-2005.⁶⁷ This may partially be due to the fact that during this time, political elites across the ideological spectrum expressed support for civil unions – that is, the information flow on civil unions was largely in a pro-gay rights direction. For example, both President Bush and his Democratic challenger, John Kerry, stated their support for civil unions during the 2004 election campaign.⁶⁸

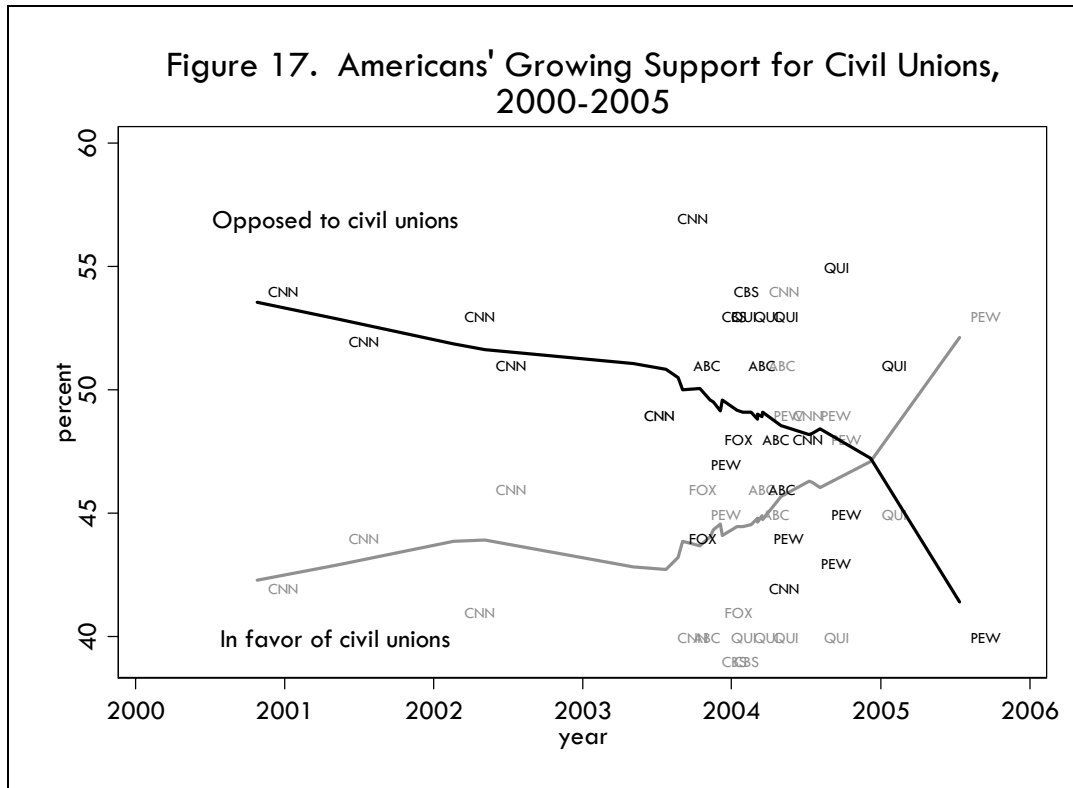
In this context, small differences in question wording can have big impacts on responses. Two important question-wording effects regarding civil unions can be identified. First, surveys that offer an up-or-down choice on civil unions (like those charted in Figure 17) tend to find less support for some kind of legal recognition of gay couples than do surveys that offer three options (marriage, civil unions, or no legal recognition). When the question is asked in the three-option format, a majority supports some form of legal recognition: in recent surveys, 20 to 28 percent say they favor marriage, 30 to 39 percent are in favor of civil unions, and 35 to 45 percent believe gay couples should have no legal recognition. Support for marriage and opposition to any legal recognition are thus less than what is found in up-or-down questions regarding marriage and civil unions. In other words, offering the “middle” civil union option draws people away from the extremes, a phenomenon familiar to survey researchers.⁶⁹

⁶⁷ See generally Karlyn Bowman, *supra* note † ; Ken Cimino & Gary M. Segura, *From Radical to Conservative: Civil Unions, Same-sex Marriage, and the Structure of Public Attitudes*, Paper presented at the American Political Science Association Annual Meeting, Washington, DC, 2005.

⁶⁸ See Elisabeth Bumiller, *The 2004 Campaign: Same-Sex Marriage; Bush Says His Party Is Wrong To Oppose Gay Civil Unions*, NEW YORK TIMES, Oct. 26, 2004, at A21.

⁶⁹ See G. Kalton et al., *The Effects of Offering a Middle Response Option with Opinion Questions*, 29 THE STATISTICIAN 65 (1980); Stanley Presser & Howard Schuman, *The Measurement of the Middle Position in Attitude Surveys*, 44 PUB. OP. Q. 70 (1980).

A second important effect of question wording is that survey participants are more comfortable granting gay couples specific marriage-like rights than they are in favor of allowing either same-sex marriage or creating civil unions. Steady majorities of Americans are in favor of inheritance rights, social security survivor benefits, hospital visitation, and other specific rights for gay couples.⁷⁰ In other words, when the benefits of civil unions (or for that matter, marriage) are unpacked, the public is quite in favor of the sum of the parts of marriage and civil unions that it is in favor of the whole.



Regardless of how the question was asked in opinion surveys, civil unions became markedly more popular in the year when same-sex marriage received great attention in the courts and on the front page of the nation's newspapers. As with same-sex marriage, we have tried to get a sense of the changing structure of opinion on civil unions. In multivariate analysis (not provided here for space reasons) conducted with data from four Pew surveys, we find that the structure of support for civil unions was very similar to that for same-sex marriage: for example, education, liberal ideology, and Democratic party identification were significantly associated with support for civil unions.⁷¹ We also found that more religious, lower income, and male respondents to be

⁷⁰ See generally Karlyn Bowman, *supra* note † (detailing survey results for a host of questions on gay rights).

⁷¹ The precise wording of the Pew survey question on civil unions is: "Do you strongly favor, favor, oppose, or strongly oppose allowing gay and lesbian couples to enter into legal agreements with each other

more likely to be opposed to civil unions, holding other variables constant. Only the variable of age—an important predictor of attitudes regarding marriage—did not emerge as a significant predictor of support of civil unions.

B. Constitutional amendment banning same-sex marriage

As with civil unions, the format of the question on a constitutional amendment to ban gay marriage can have predictable and considerable effects on the response received. Support for a constitutional amendment banning same-sex marriage has vacillated between 40 percent and 60 percent since the idea was proposed. However, questions that stress the dramatic nature of a constitutional amendment or its effect on state power elicit a much lower level of favorable response than do questions that simply highlight the proposed amendment’s definition of marriage.

Questions that emphasize the character of the amendment as “defining marriage as between a man and a woman” usually elicit majority support. For example, the share of the population giving a favorable response to the Gallup question – “Would you favor or oppose a constitutional amendment that would define marriage as being between a man and a woman, thus barring marriages between gay or lesbian couples?” – has hovered between 48 percent and 57 percent.⁷² By contrast, questions that prime respondents to think about federalism or the exceptional nature of a constitutional amendment elicit favorable reactions from only a minority of the population. The Annenberg National Election Study asked the following question three times in 2004: “Would you favor or oppose an amendment to the U.S. Constitution saying that no state can allow two men to marry each other or two women to marry each other?” Only 40 percent to 42 percent of the population said they favored such an amendment.⁷³ For the most part, when controlling for question-wording effects, support for a constitutional amendment is consistently lower than opposition to legalization of same-sex marriage, but follows the same pattern: a rise in support following *Lawrence* and *Goodridge* and through to the 2004 election, and then a decline by the summer of 2005.⁷⁴

The pattern of opinion on the constitutional amendment and civil union questions suggests both the firmness of the convictions of opponents of same-sex marriage and the

that would give them many of the same rights as married couples?” The surveys were administered in October 2003, March 2004, August 2004, and July 2005.

⁷² See Bowman, *supra* note ____.

⁷³ A similar result comes from the ABC/Washington Post polling question that asked: “Would you support amending the U.S. Constitution to make it illegal for homosexual couples to get married anywhere in the U.S., or should each state make its own laws on homosexual marriage?” Only 38 percent supported such an amendment in January of 2004 and 46 percent supported it a month later.

⁷⁴ We do not have much of a story to tell with respect to the structure of opinion on a constitutional amendment. Throughout the four surveys where Pew asked the question the power of different variables in our same-sex marriage model to predict opinion on a constitutional amendment varies considerably. The only notable findings, it would appear, were a temporary rise in the power of religiosity, education and ideology at the time of the August 2004 survey, and the relatively small effect that age has on opinion concerning an amendment. The Pew survey question on a proposed constitutional amendment is as follows: “There has been a proposal to change the U.S. Constitution to ban gay marriage. Do you think amending the Constitution to ban gay marriage is a good idea, or a bad idea?”

potential strategies for each side in framing the debate. On the one hand, a core 35 percent to 40 percent of the American population will favor almost any measure to prevent gays and lesbians from achieving legal recognition for their relationships, even to the point of approving of a constitutional amendment to prevent states from recognizing gay marriages. In the middle are the 25 percent to 30 percent of the population who are opposed to the idea of attaching the word “marriage” to gay and lesbian relationships, but when phrased as encroaching on state discretion they will oppose (or at least not support) a constitutional amendment and they are open to legal recognition of gay relationships through civil unions or other measures. Then there are the die-hard gay marriage supporters, who amount to about 25 to 30 percent of the population, who favor gay marriage and civil unions, and oppose constitutional amendments preventing them. Finally, there are the 5 percent to 10 percent of Americans who do not have an opinion on any of these issues.

VII. Conclusions

It is quite fashionable for academics to postulate about the backlash that results from alleged instances of judicial overreaching. In fact, at least in terms of the effect of court decisions on public opinion on the particular issue adjudicated, short-term backlash is quite rare. From our preliminary look at comparable data, we do not find that *Brown v. Board of Education*, *Roe v. Wade*, or *Furman v. Georgia* altered the preexisting trends concerning desegregation, abortion rights or the death penalty.⁷⁵ We also have not found such an effect with respect to the school prayer cases, the flag burning cases or *Miranda*. For the most part, the trend that preexists the decision continues afterward or in a few cases, the trend in public opinion on the issue may move in the direction of the Court’s decision.

The public opinion changes following *Lawrence* are unique in this respect. Unlike *Bowers*, which did not interrupt a rising tide of anti-gay opinion that tracked concerns about AIDS, *Lawrence* temporarily reversed a trend in favor of legalization of same-sex sexual relations. Given the extensive media coverage on the issue of same-sex marriage following the decision, we argue (but cannot definitively prove) that the framing of gay rights issues in terms of marriage led to this temporary backlash. The rise in the share of the population expressing unfavorable views on same-sex marriage continued as events unfolded over the next two years, such as the Vatican’s pronouncement, the two *Goodridge* decisions, the granting of marriages to same-sex couples in San Francisco, President Bush’s calling for a constitutional amendment restricting marriage to straight couples, and the 2004 election campaign. Our analysis suggests that the rise in the salience and coverage of same-sex marriage had two effects: it temporarily pushed the entire population in a direction against same-sex marriage and gay rights, and it polarized respondents with respect to marriage along ideological lines.

The *Lawrence* backlash appears to have been short-lived. As the dust has settled, aggregate opinion on same-sex marriage appears to be quite similar to its pre-*Lawrence*

⁷⁵ See PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSIES (Nathaniel Persily, Jack Citrin and Patrick Egan eds., forthcoming 2008).

levels, and in the meantime, the share of the population approving of civil unions appears to have increased. This is not to say that Americans have suddenly become keen to the idea: a majority of Americans continues to disapprove of same-sex marriage, and those who disapprove feel stronger about their convictions than those who approve. Smaller shares of the population approve of the idea of a constitutional amendment banning same sex marriages, although question wording differences on these polls can produce widely varying results.

The structure of opinion on same-sex marriage follows much of the conventional wisdom on the issue. As one would expect, age, education, ideology and religiosity are very strong predictors of opinion on gay marriage, with younger, liberal, more educated, and less religious respondents the most likely to approve. However, even when one controls for anti-gay attitudes, moral traditionalism, more so than the various demographic factors or conservatism and religiosity as conventionally defined, explains opposition to same-sex marriage. In addition, a person's belief in limited government has a significant impact, with libertarians more likely to be in favor of same-sex marriage, all other things being equal.

The shifts in the structure of opinion since *Lawrence* give us some insight into one potential relationship between court decisions and shifts in public opinion. We find evidence that in the post-*Lawrence* era ideology has become a better predictor of opinion on same-sex marriage. This provides some evidence for the hypothesis that, by increasing the salience of certain issues that are not ideologized in the mass public, a court's decision, alongside related media discussion and elite behavior, can ideologize an issue not previously thought to fall on the liberal to conservative continuum. We do not want to overstate the case either with respect to same-sex marriage or judicial action generally. Indeed the greatest leap in significance in ideology occurs well after the courts decisions. Nevertheless, if our evaluation of the evidence is correct, we should not expect much in the way of opinion backlash from another court decision on this issue. If opinion on same-sex marriage has now become a function of people's pre-existing ideological commitments, instead of the degree to which people are informed or attentive to the issue, then additional court decisions and other elite action should not produce the same kind of shifts that followed the original wave of elite action between 2003 and 2004. This assessment should be greeted with a mixed reaction by gay rights supporters. The more fully ideologized the issue of gay marriage is, the smaller the expected impact of any future political event, including a court case. On the other hand, if being liberal means (in part) supporting gay marriage and being conservative means opposing it, then we should not expect many people to stray far from the ideological and moral commitments that anchor their attitudes on this issue.

APPENDIX A

Support for legalization of gay marriage, July 2005

Source: Pew Research Center

	Strongly Favor	Favor	Oppose	Strongly Oppose	DK/ Refused
TOTAL	11.8	22.3	23.5	30.5	11.9
GENDER					
Male	10.8	21.3	24.9	32.8	10.1
Female	12.7	23.2	22.2	28.3	13.6
RACE					
White	12.1	22.1	23.8	30.7	11.4
Black	6.9	18.5	24.6	36.2	13.8
Hispanic	14.7	22.1	24.2	28.4	10.5
Other	12.4	26.8	17.5	26.8	15.5
AGE					
18-29	21.3	25.0	17.6	31.4	4.8
30-40	17.2	24.8	20.0	28.0	10.0
40-50	10.3	23.8	23.2	30.8	11.9
51-62	11.8	26.0	22.3	26.6	13.3
63+	5.5	14.0	29.3	35.9	15.3
EDUCATION					
Less than High School	10.0	11.1	26.7	41.1	11.1
High School	8.8	18.1	27.4	34.7	11.0
Some College	8.8	22.2	22.7	32.2	14.1
College +	17.0	27.3	20.4	24.5	10.8
INCOME					
~ \$30,000	10.4	20.4	25.3	30.0	13.9
\$30,000-50,000	13.2	20.6	26.5	31.2	8.5
\$50,000-100,000	11.9	23.5	20.9	33.5	10.3
\$100,000 +	19.8	29.3	21.6	21.6	7.8
HAVING CHILDREN					
No Child	11.6	22.7	23.4	29.9	12.4
Have children	12.8	21.4	22.8	32.3	12.4
REGION					
Northeast	12.2	29.9	22.6	21.2	14.2
Midwest	10.1	21.7	24.6	31.3	12.2
South	8.9	16.4	23.8	38.6	12.4
West	18.0	26.0	22.6	24.5	8.9

	Strongly Favor	Favor	Oppose	Strongly Oppose	DK/Refused
RELIGION					
Protestant	6.7	16.9	27.2	38.3	10.9
Catholic	10.6	26.5	22.3	27.4	13.2
Other	5.5	16.4	34.2	39.7	4.1
EVANGELICAL					
Yes	4.9	10.0	24.9	52.0	8.3
No	11.4	27.8	27.2	20.5	13.1
RELIGIOUS ATTENDANCE					
More than once a week	4.6	6.7	21.4	60.9	6.3
Once a week	6.2	16.4	26.2	40.8	10.5
Once or twice a month	13.0	22.6	26.0	22.6	15.9
A few times a year	12.0	29.7	26.3	20.5	11.6
Seldom/Never	20.7	33.1	19.4	13.4	13.4
IDEOLOGY					
Very Liberal	46.2	33.8	1.5	12.3	6.2
Liberal	33.2	34.0	10.5	9.3	13.0
Moderate	8.3	28.8	26.8	22.1	14.0
Conservative	2.7	10.8	31.4	47.2	7.9
Very Conservative	2.9	2.9	16.5	74.8	2.9
PARTY IDENTIFICATION					
Republican	3.2	11.8	31.1	45.8	8.2
Independent	14.8	26.8	19.1	26.2	13.1
Democrat	17.7	27.7	20.1	21.1	13.5
NEWS ATTENTION (Scale)					
Low	13.0	22.7	19.5	32.5	12.2
Medium	10.6	24.9	27.8	25.3	11.4
High	12.8	19.3	23.7	33.3	10.9

News Attention Scale (derived from 5 items)

News about the current situation in Iraq
The retirement of Supreme Court Justice Sandra Day O'Connor
The move by a Chinese firm to buy the American oil company Unocal
Recent hurricanes that have affected the Gulf Coast of the U.S.
The terrorist bombings in London, England

APPENDIX B

Demographic Breakdown of Attitudes toward Same Sex Marriage, Fall 2004

Source: National Election Studies

	Support	Oppose	DK/ Refused
TOTAL	35.1	61.8	3.2
GENDER			
Male	34.4	63.8	1.9
Female	35.7	60.0	4.3
RACE			
White	36.2	60.9	3.0
Black	25.4	70.4	4.1
Hispanic	41.2	55.9	2.9
Asian	51.9	44.4	3.7
AGE			
18-29	50.2	47.2	2.6
30-40	42.9	54.2	3.0
41-50	33.3	64.0	2.7
51-62	32.2	64.9	2.9
63+	18.3	77.2	4.6
EDUCATION			
Less than High School	23.8	73.3	2.9
High School	24.3	71.6	4.1
Some College	35.5	62.2	2.5
College +	49.0	48.1	2.9
INCOME			
~ \$25,000	32.4	63.3	4.3
\$25,000~50,000	36.5	62.3	1.2
\$50,000~105,000	37.0	60.5	2.4
\$105,000~	40.1	56.3	3.5
MARITAL STATUS			
Married	29.7	66.9	3.4
Widowed	18.2	76.1	5.7
Divorced	38.6	57.9	3.6
Separated	24.4	75.6	0.0
Never Married	51.0	47.1	1.9
HAVING CHILDREN			
No Child	35.4	61.7	3.0
1 Child	34.2	63.3	2.5
2 + Children	34.0	61.3	4.7
REGION			
Northeast	44.8	52.2	3.0
North Central	28.1	67.8	4.1
South	27.1	69.7	3.3
West	48.4	49.6	2.0

	Support	Oppose	DK/ Refused
URBANICITY			
Rural	25.4	71.0	3.6
Small Town	34.4	62.5	3.2
Suburb	34.8	60.9	4.2
Large City	45.1	52.8	2.1
Inner City	37.1	60.0	2.9
RELIGION			
Protestant	15.6	80.5	3.9
Catholic	32.2	63.3	4.5
Jewish	81.5	18.5	0.0
Other	28.0	69.3	2.8
RELIGIOUS ATTENDANCE			
Every Week	14.7	82.7	2.6
Almost Every Week	17.8	79.3	3.0
Once or Twice a Month	28.1	66.5	5.4
A Few Times a Year	48.5	47.4	4.1
BIBLE			
Bible is actual word of God and is to be taken literally	11.1	85.1	3.8
Bible is the word of God but should not be taken literally	40.6	56.3	3.1
Bible is written by men	73.3	25.6	1.1
IDEOLOGY			
Extremely Liberal	77.8	22.2	0.0
Liberal	77.1	20.0	2.9
Slightly Liberal	54.7	43.2	2.1
Moderate	42.2	54.5	3.3
Slightly Conservative	20.6	76.5	3.3
Conservative	10.9	87.5	1.6
Extremely Conservative	9.1	90.9	0.0
(Haven't thought)	(28.3)	(66.9)	(4.8)
PARTY IDENTIFICATION			
Republican	17.3	79.9	2.7
Independent	41.3	56.3	2.4
Democrat	44.2	51.9	3.9
EGALITARIANISM (Scale)			
Low	24.7	71.8	3.6
Medium	31.0	67.3	1.6
High	46.9	50.1	2.9
MORAL TRADITIONALISM (Scale)			
Low	55.1	42.3	2.6
Medium	30.0	67.5	2.5
High	15.5	81.4	3.1
BELIEF IN LIMITED GOVERNMENT (Scale)			
Low	42.2	55.6	2.2
Medium	33.5	63.8	2.8
High	32.2	65.3	2.5

	Support	Oppose	DK/ Refused
FEELING THEROMOMETER ON GAYS AND LESBIANS			
0-45	10.1	87.8	2.1
46-60	36.8	58.7	4.5
61-100	67.1	31.0	1.9

Wording of questions for egalitarianism, moral traditionalism and limited government scales:

Egalitarianism (six agree/disagree items):

- Our society should do whatever is necessary to make sure that everyone has an equal opportunity to succeed.
- We have gone too far in pushing equal rights in this country.
- One of the big problems in this country is that we don't give everyone an equal chance.
- This country would be better off if we worried less about how equal people are.
- It is not really that big a problem if some people have more of a chance in life than others.
- If people were treated more equally in this country we would have many fewer problems.

Moral traditionalism (four agree/disagree items):

- "The world is always changing and we should adjust our view of moral behavior to those changes."
- "The newer lifestyles are contributing to the breakdown of our society."
- "We should be more tolerant of people who choose to live according to their own moral standards, even if they are very different from our own."
- "This country would have many fewer problems if there were more emphasis on traditional family ties."

Belief in limited government (three forced choice items):

- Agree more with: ONE, the main reason government has become bigger over the years is because it has gotten involved in things that people should do for themselves; OR TWO, government has become bigger because the problems we face have become bigger.
- Agree more with: ONE, we need a strong government to handle today's complex economic problems; OR TWO, the free market can handle these problems without government being involved.
- Agree more with: ONE, the less government, the better; OR TWO, there are more things that government should be doing?