

ARTICLE

WHO GETS TO INTERPRET THE
CONSTITUTION?
THE CASE OF MAYORS AND MARRIAGE
EQUALITY

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INTRODUCTION

Early in 2004, mayors in California, New York, and Oregon issued marriage licenses to same-sex couples, on the same terms as heterosexual couples. They asserted that the exclusion of same-sex couples violated their state constitutions. This article offers a complex defense of the mayors' actions.

Part I speaks in the voice of a local legal journalist. It describes the local executives, their actions, and the state constitutional principles on which they relied. In 2004, public officials in New York, California, or Oregon could reasonably have believed that their state constitutions prohibited discrimination against otherwise qualified same-sex couples seeking marriage licenses. Nonetheless, in each of these states, courts held that local public officials had no authority to act on their constitutional understandings. Part I criticizes these state decisions as inconsistent with prior state law and unwise.

Part II speaks in a more general constitutional, political, and historical voice. It considers the difficult question whether, when, and how an executive may interpret constitutions differently than courts or legislatures. Through U.S. history, these issues have been debated at the federal, rather than state or local, level. Thus the experiences discussed in Part II are not directly analogous to the situation of the mayors. Nonetheless, the federal analogies, while imperfect, are illuminating. Part II-A discusses prior moments in our history in which executive officials have asserted authority to interpret the federal Constitution, independent of judicial decrees. Part II-B considers the important work the federal Office of Legal Counsel has done to articulate the principles that should guide the president when he concludes that the Congress has acted unconstitutionally. Part II-C explores why it matters. Constitutional interpretation is a complex enterprise. Why not just leave the constitution to the courts? Part II-D defends the role of executives and legislators in constitutional interpretation.

Part III speaks in the voice of a political activist who supports the liberty and equality claims of gay and lesbian people and addresses the practical impact of the mayors' actions. Even if the mayors' actions were constitutionally justifiable, were they politically wise? One important political consideration is the impact of the mayors' actions on electoral politics. It is widely perceived that "values" were a factor in the election of George W. Bush in 2004 and that the actions of the mayors played a role in energizing an anti-gay marriage vote. Part III-A challenges that popular belief. A second practical political consideration is the impact of the mayors' actions on the development of civil rights law in the courts. Should the civil rights agenda be largely controlled by advocates who bring carefully selected test cases asserting constitutional claims in the courts, or should public officials also play a role? Part III-B defends the mayors as having a legitimate role. At the same time, in 2006, the movement for recognition of same-sex unions suffered serious set backs as the highest courts in New York and Washington and intermediate

courts in Indiana and California rejected constitutional claims of same-sex couples seeking equal access to marriage. Did the actions of the mayors contribute to these defeats? How does the community seeking dignity and equality for LGBT families move forward?

All of the questions raised by this article are difficult and the conclusions offered are debatable. The purpose is to inform debate, rather than to advocate a particular position, or to defend a particular action.

I. THE MAYORS' ACTIONS AND POLITICAL AND LEGAL REACTIONS

In 2003, gay people's claims to constitutional rights of liberty and equality were affirmed in several fora. In June, the United States Supreme Court held, 5-4, in *Lawrence v. Texas* that a law criminalizing adult, consensual sex violated the Fourteenth Amendment, overruling the Court's 1986 decision in *Bowers v. Hardwick*.¹ On June 10, 2003, the Ontario, Canada Court of Appeals held that denying same-sex couples access to marriage violated the Canadian Charter of Rights and Freedoms, and thousands rushed to wed.² On November 18, 2003,

1. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986). Because of *Bowers*, claims asserting a federal constitutional right to marriage equality were not presented to federal courts. *Lawrence* did not raise the question of marriage equality. Justice Kennedy, for the plurality, affirmed the legitimacy of same-sex relationships, "whether or not entitled to formal recognition in the law." *Lawrence*, 539 U.S. at 558. Justice O'Connor, concurring, stated that legitimate state interests to disadvantage same-sex couples would include "preserving the traditional institution of marriage." *Id.* at 585. Justice Scalia, dissenting, warned that "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices." *Id.* at 590.

2. *Halpern v. Toronto (City)*, [2003] 65 O.R.3d 161 (Can.). The court rejected as circular the Attorney General's argument that marriage is by definition a relationship between a man and a woman. In 2000, the Canadian Parliament passed the Modernization of Benefits and Obligations Act, 2000 S.C., ch. 12 (Can.), that extended to same-sex couples the same material rights and obligations provided married heterosexual couples. The Ontario court held that this did not justify the exclusion of gay couples from marriage.

[S]ame-sex couples are excluded from a fundamental societal institution B marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

Halpern, 65 O.R.3d at 171.

Two months earlier, the Court of Appeals for British Columbia had held that excluding same-sex couples from marriage violated the Charter. *EGALE Can. Inc. v. Attorney Gen. of Can.*, [2003] 225 D.L.R. 4th 472, 480 (Can.). However, the court stayed its order to go into effect. The Attorney General declined to appeal the Ontario and British Columbia decisions to the Supreme Court of Canada. By June 2005 same-sex couples could marry in eight of ten provinces and one territory. Clifford Krause, *Gay Marriage is Extended Nationwide in Canada*, N.Y. TIMES, June 29, 2005, at A4. Parliament then acted to legalize same-sex marriage throughout the country. *Id.*

the Massachusetts Supreme Judicial Court (SJC), in a divided opinion, held that “barring an individual from the protection, benefits, and obligations of civil marriage solely because that person would marry a person of the same-sex violates the Massachusetts Constitution.”³ These developments set the stage for the actions of the mayors early in 2004.

On February 10, 2004, Mayor Gavin Newsom of San Francisco instructed city clerks to issue marriage licenses to same-sex couples.⁴ On February 27, Mayor Jason West of New Paltz, New York, married same-sex couples,⁵ and on March 3, the County Commissioners of Multnomah County instructed licensing clerks to do likewise.⁶ In the next month, over seven thousand same-sex couples got married in these three jurisdictions.⁷ By March 11, all of these

3. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). As a remedy, the court ordered that the state of Massachusetts recognize the marriage of same-sex couples within six months of the opinion’s issuance. *Id.* at 970. The SJC later held that it was an insufficient remedy under the Massachusetts Constitution merely to afford same-sex partners the same benefits as married couples without also recognizing their unions as marriage. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569-72 (Mass. 2004). Opponents of same-sex marriage sought relief in federal court, arguing that only the legislature or the people through constitutional amendment could alter the meaning of marriage and that the judicial action violated Article IV, Section 4 of the United States Constitution, providing that: “The United States shall guarantee to every state in this Union a Republican Form of Government . . .” The federal courts rejected this challenge. *Largess v. Supreme Judicial Court for the State of Mass.*, 373 F.3d 219 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 618 (2004).

4. *Lockyer v. City & County of S.F.*, 95 P.3d 459, 465 (Cal. 2004); see Part I-A, *infra*.

5. Kathianne Boniello, *Ulster Wins Appeal to Prosecute Over Gay Vows*, POUGHKEEPSIE J., Feb. 3, 2005, at 1; see *infra* text at notes 79 to 122.

6. *Statements of Multnomah County Commissioners About Gay Marriage*, OREGONIAN, Mar. 5, 2004, at A17; see Part I-C, *infra*.

7. Over 4,000 were married in California, *Lockyer*, 95 P.3d at 465; 25 in New Paltz, New York, *People v. West*, 780 N.Y.S.2d 723, 723 (Just. Ct. New Paltz, 2004); and 3,000 in Oregon, *Li v. State of Oregon*, 110 P.3d 91, 94 (Or. 2005) [hereinafter *Li v. State*]. In California, over 90% of the couples were from the state, though couples from 46 states came to San Francisco to get married. Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs from 46 States*, N.Y. TIMES, Mar. 18, 2004, at A26. More than three-quarters of the couples were younger than fifty years old, and nearly seventy percent of them had college degrees or more. *Id.*

On March 9, 2004, in Asbury Park, New Jersey, an assistant deputy city clerk, D. Kiki Tomek, began accepting applications for same-sex marriage licenses. Ms. Tomek also processes applications for licenses for dogs and liquor. After checking with the local city attorney, she began accepting applications from all couples who passed the residency test and provided a photo ID, proof of address, Social Security number, and \$28. Asbury Park law requires that the bride be a local resident or that both partners be out-of-state residents. Assistant Deputy Clerk Tomek let couples decide which partner would be the bride. Couples began traveling to Asbury Park to marry. Thomas Crampton, *Issuing Licenses, Quietly, to Couples in Asbury Park*, N.Y. TIMES, Mar. 11, 2004, at B5. Assistant Deputy Clerk Tomek declined her daughter’s invitation to speak at Rutgers University. “I am not Rosa Parks; I am just doing my job.” *Id.*

On February 20, 2004, in Bernalillo, New Mexico, a clerk began issuing marriage licenses to same sex couples, after noting that the state law was gender neutral and the

marriages outside of Massachusetts had been halted by the courts.⁸ Thousands of same-sex couples have been married in Massachusetts.⁹

This Part considers these actions. It describes the public officials, their decision-making process, and the aspects of state constitutional law that supported or undercut their constitutional conclusions. It recounts reactions and criticizes state courts decisions concluding that local officials lack authority to act on their understanding of state constitutional law.

A. San Francisco, California

Gavin Newsom, a Democrat, was elected mayor of San Francisco on December 9, 2003, in a closely contested run off.¹⁰ Born in 1967, Newsom was raised in a large middle-class family in San Francisco and Marin County, attended public schools and earned a BA in political science from Santa Clara University in 1989.¹¹ His father, Bill, loved local politics and sports, and introduced his son to these worlds and people.¹² Prior to being elected mayor, Gavin Newsom had served on the San Francisco Board of Supervisors and was the proprietor of several successful, up-scale cafes. He campaigned on a platform promising to crack down on the city's homeless problem by giving poor people rent vouchers rather than cash.¹³

The newly elected mayor attended George W. Bush's January 2004 State of the Union address as a guest of U.S. House Minority Leader, Nancy Pelosi. He was angered by the President's promise to preserve the sanctity of traditional marriage.¹⁴ Newsom studied the Massachusetts Supreme Court decision holding that gay couples could marry, the U.S. Supreme Court decision holding the Texas sodomy law unconstitutional, and the California Constitution.¹⁵ He consulted with the leadership of the gay rights and civil liberties bar who grappled with both the legal questions and the possible

county attorney told her that the state law was unclear. Susan Montoya Bryan, *Gay Couples Marry in New Mexico*, ASSOCIATED PRESS, Feb. 21, 2004. She stopped issuing licenses when the state attorney general said that they were invalid. Susan Montoya Bryan, *New Mexico Briefly Joins Rush to Allow Gay Marriage*, PITTSBURGH POST-GAZETTE, Feb. 21, 2004, at A5.

8. *Lockyer*, 95 P.3d at 467.

9. Between May 17, 2004 and March 1, 2005, 6,142 same-sex couples married in Massachusetts. Scott S. Greenberger, *In Bay State, Pace of Gay Marriage Steadily Declining*, BOSTON GLOBE, May 7, 2005, at B4.

10. Dean E. Murphy, *San Francisco Democrats Survive a Scare*, N.Y. TIMES, Dec. 11, 2003, at A38.

11. Julian Guthrie, *Gonzales, Newsom: What Makes Them Run?*, S.F. CHRON., Dec. 7, 2003, at A1.

12. *Id.*

13. *Id.*

14. Chris Taylor, *I Do . . . No, You Don't*, TIME MAG., Mar. 1, 2004, at 40.

15. *Id.*

political impacts of legalizing same-sex marriage in San Francisco.¹⁶ Initially, Newsom's advisors were divided, but most soon agreed that he should offer marriage licenses to same-sex couples. Newsom notified the Secretary of State and the state Attorney General of his plans. He sought advice from California Senators Dianne Feinstein and Barbara Boxer and openly gay Massachusetts Representative Barney Frank. They all advised him against challenging the law by issuing licenses to same sex couples. Frank, one of the most sophisticated intellectuals of U.S. politics and a staunch supporter of gay rights, cautioned that Newsom could "jeopardiz[e] gay marriage elsewhere and make a federal constitutional amendment more likely."¹⁷ Frank advised that it was better to go "though established legal procedures. . . . We are far better off having the issue be the fundamental one about whether the California Constitution permits discrimination, rather than the issue—which never had any chance to win—as to whether a single elected official could simply declare by himself that the action was unconstitutional."¹⁸

Despite this strong advice that marrying gay people was politically unhelpful, Newsom concluded that the exclusion of same-sex couples from marriage was discriminatory and violated the state constitution.¹⁹ On February 10, 2004, he asked the San Francisco County Clerk to change the marriage license forms and documents "to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation."²⁰ The mayor's short letter cites the oath he took upon becoming mayor "to uphold the constitution of the State of California." He noted that:

The California courts have interpreted the equal protection clause of the California Constitution to apply to lesbians and gay men and have suggested that laws that treat homosexuals differently from heterosexuals are suspect. The California courts have also stated that discrimination against gay men and lesbians is invidious. The California courts have held that gender discrimination is suspect and invidious as well. The Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage.²¹

16. Among those involved in this consultation were: Steve Kawa, Newsom's Chief of Staff and a gay man; Peter Ragone, Newsom's Director of Communications; Kate Kendell, Executive Director of the National Center for Lesbian Rights; Tamara Lange, ACLU attorney; and Geoffrey Kors of the gay rights advocacy group, Equality California. Rachel Gordon, *Uncharted Territory: Bush's Stance Led Newsom to Take Action*, S.F. CHRON., Feb. 15, 2004, at A1.

17. Taylor, *supra* note 14, at 40.

18. Barney Frank, *Opinion: The California Marriage Decision*, Mar. 29, 2005, at <http://www.planetout.com/news/feature.html?sernum=1110>.

19. Taylor, *supra* note 14, at 40.

20. The letter is quoted in *Lockyer v. City & County of S.F.*, 95 P.3d 459, 465 (Cal. 2004).

21. *Id.*

That is all he said. Mayor Newsom cited no cases and provided no detailed legal analysis.

On February 12, city officials began granting marriage license to same-sex couples at San Francisco City Hall. By invitation of the mayor, lesbian pioneers Del Martin, 83, and Phyllis Lyon, 79, were the first couple married, celebrating their 51st anniversary as a couple.²² Almost 4,000 luminaries and ordinary people married to the eventually hoarse voices of the Gay Men's Choir.²³

Did Newsom have a reasonable basis for concluding that the California Constitution protected access to same-sex marriage? In March 2000, the voters of California, by a large margin, adopted Proposition 22, clarifying that, as a matter of statutory law, marriage in California was limited to opposite-sex couples.²⁴ While this precluded any argument based on legislative ambiguity, it did not answer the constitutional question.

California has a long tradition of pioneering decisions protecting equality and individual liberty. In 1948, California became the first state to hold that laws barring interracial marriage violated the state constitution,²⁵ long before the Supreme Court reached that conclusion under the federal Constitution in 1967.²⁶

In 1971, California held that classifications based on gender are constitutionally suspect and subject to the most demanding review;²⁷ the United States Supreme Court has rejected claims that gender-based classifications are subject to strict scrutiny under the federal Constitution.²⁸ The constitutionality of excluding same-sex couples from marriage had not yet been addressed by the California Supreme Court.

The day after marriage licenses were offered to same-sex couples at City Hall two groups opposed to same-sex marriage filed separate actions in San Francisco County Superior Court, seeking an immediate halt to the city's issuance of marriage licenses to same-sex couples. In each case, after a hearing, the superior court denied the request for a stay of the city's actions.²⁹

22. Gordon, *supra* note 16.

23. *Lockyer*, 95 P.3d at 465.

24. *See In re Coordination Proceedings*, No. 4365, 2005 WL 583129, at *6 (Cal. Superior Ct. 2005) [hereinafter *Coordination Proceedings*].

25. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

26. *Loving v. Virginia*, 388 U.S. 1 (1967).

27. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1 (Cal. 1971); *see also Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that excluding same-sex couples from marriage is gender discrimination under the Hawaii Equal Rights Amendment).

28. *Frontiero v. Richardson*, 411 U.S. 677 (1973). In *United States v. Virginia*, 518 U.S. 515 (1996), Justice Ginsberg, writing for the Court, articulated a standard of review for gender-based classifications that seems the functional, if not formal, equivalent of strict scrutiny. As head of the ACLU Women's Rights Project, Ginsberg argued for the plaintiffs in *Frontiero*.

29. *Lockyer v. City & County of S.F.*, 95 P.3d 459, 465-66 (Cal. 2004).

On February 27, 2004, California Attorney General Lockyer filed a petition in the state supreme court for “an original writ of mandate, prohibition, certiorari, and/or other relief, and a request for an immediate stay.”³⁰ Lockyer invoked his duty to assure that the state marriage law was administered on a uniform basis throughout the state, asserted that local officials were agents of the state in administering the marriage laws, and urged the Supreme Court to resolve the substantive question whether the California Constitution permits exclusion of same-sex couples from marriage.³¹ On March 11, the California Supreme Court issued an order prohibiting local officials from issuing licenses to same-sex couples, and set an expedited hearing schedule that resulted in a decision on August 12, 2004.³²

The opinion of California Chief Justice George, writing for four of the seven members of the Court, was sharply critical of the mayor’s actions. Justice George began by framing the issue tendentiously—“whether a local executive official who is charged with the ministerial duty of enforcing a state statute exceeds his or her authority when, without any court having determined that the statute is unconstitutional, the official deliberately declines to enforce the statute because he or she determines or is of the opinion that the statute is unconstitutional.”³³ Justice George then noted that the case before the court “involves the determination of a fundamental question that lies at the heart of our political system: the role of the rule of law in a society that justly prides itself on being ‘a government of laws, and not of men’ or women.”³⁴ Under the “classic understanding of the separation of powers doctrine,” he asserted, only the judicial branch has power to determine whether a statute is constitutional.³⁵

Both Attorney General Lockyer and Mayor Newsom urged the court to address the substantive question of whether denying marriage licenses to otherwise-qualified same-sex couples violated the California Constitution. The California Supreme Court declined to do so. “[T]he substantive question of the constitutional validity of California’s statutory provision limiting marriage to a union between a man and a woman is not before our court.”³⁶ Mayor Newsom’s actions were wrong whether or not the exclusion of same-sex couples from marriage violated the California Constitution.

Attorney General Lockyer “relied primarily on the provisions of article III, section 3.5 of the California Constitution . . . in maintaining that the challenged actions of the local officials were improper.”³⁷ This quirky state constitutional provision provides that “an administrative agency” has no power to “refuse to

30. *Id.* at 466.

31. *Id.*

32. *Id.* at 467.

33. *Id.* at 462.

34. *Id.* at 463.

35. *Id.*

36. *Id.* at 464.

37. *Id.* at 473.

enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such a statute is unconstitutional.”³⁸ Lockyer argued that this California constitutional provision encompassed mayors in its restrictions on “administrative agencies,” while the mayor argued that it had been adopted to address a specific problem in relation to state administrative agencies and was applicable only to them.

The California Supreme Court declined to rely on article III, section 3.5, preferring to rest on two more general principles.³⁹ First, a statute, once duly enacted, “is presumed to be constitutional.”⁴⁰ This chestnut is undoubtedly correct, but as Chief Justice George concedes, some laws are unconstitutional despite the presumption of validity.⁴¹ Second, the court relied on the general principle that when “a public official’s authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute.”⁴² Again the principle is true, but begs the question of whether an official is entitled to consider whether his or her actions are consistent with constitutional principles. On the basis of these two general principles, the *Lockyer* court concluded that “prior to the adoption of article III, sec 3.5, it was already established under California law . . . that a local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis to refuse to apply the statute.”⁴³

Having declared the general principle and its resulting conclusion, the court acknowledged three exceptions. First, state administrative agencies, exercising quasi-judicial power, had been held to have the authority to determine whether the statute it is asked to apply is constitutional.⁴⁴ But, the

38. *Id.*

39. *Id.* at 475.

40. *Id.*

41. Early Harvard Law Professor James B. Thayer argued that judicial interpretation of the Constitution should be based on a strong presumption that official action is constitutional. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). That remains the governing principle in relation to economic regulation. However, the presumption of constitutionality weakens or disappears when official action threatens interests explicitly protected by the Bill of Rights or otherwise recognized as fundamental liberties, or when officials draw lines based on race, gender, or other invidious classifications. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Exclusion of same-sex couples from marriage arguably raises fundamental liberty concerns and creates an invidious classification that requires more demanding scrutiny and makes the presumption of constitutionality inappropriate.

42. *Lockyer*, 95 P.3d at 476.

43. *Id.* at 475.

44. *Id.* at 478-79. That was the holding of *Southern Pacific Transportation v. Public Utilities Commission*, 556 P.2d 289 (1976), which was superseded by the adoption of article III, section 3.5 of the California Constitution. It seems that the general principle of California law was that government officials and agencies could interpret the constitution. Then the people spoke through a constitutional amendment saying that administrative agencies are not

Lockyer court said, that precedent has no applicability to “a local executive official such as a county clerk, who is charged with the ministerial duty to enforce a statute.”⁴⁵ It is not obvious why a local executive official, even if performing a ministerial duty, should be free to ignore the state constitution.

Second, the court acknowledged a prior line of California decisions in which “a public official . . . was permitted to refuse to perform a ministerial act when he or she had doubts about the validity of the underlying bond, contract, or public expenditure.”⁴⁶ Again the *Lockyer* court concluded that this precedent was inapplicable to the mayor’s actions because in those cases the local officials acted “to ensure that a mechanism was available for obtaining a timely judicial determination,”⁴⁷ whereas here “there existed a clear and readily available means, other than the officials’ wholesale defiance of the applicable statutes, to ensure that the constitutionality of the current marriage statutes would be decided by a court.”⁴⁸ However, both in these earlier cases and in Newsom’s situation, there were alternative mechanisms to raise constitutional claims, such as an action for declaratory relief by either public officials or injured parties. Further, Mayor Newsom was not seeking to avoid judicial review or defy judicial determinations.

In addition to the first two exceptions, the *Lockyer* court acknowledged that there are other cases, not involving the exercise of quasi-judicial function or bonds or contracts, in which California courts approved the actions of executive officials who relied on constitutional principles to disregard the letter of the law.⁴⁹ The *Lockyer* court distinguished these cases on the grounds that the constitutional issues presented were clearer in those prior cases. By contrast, the opinion states, “[T]his plainly is not an instance in which the invalidity of the California marriage statutes is so patent or clearly established that no reasonable official could believe that the statutes are constitutional.”⁵⁰ There are circumstances in which the law distinguishes between governmental actions and laws that are patently unconstitutional and those that are merely plain vanilla unconstitutional. (For examples, patently frivolous questions do not support arising under jurisdiction and parties are not required to comply with a patently unconstitutional injunction.)⁵¹ But both these examples raise special problems and it is not clear why, as a matter of principle, public officials’ power to conform conduct to their best understanding of constitutional norms should be limited to situations in which the unconstitutionality of the statute is

entitled to engage in constitutional interpretation. Obviously the people are entitled to amend the constitution in this way.

45. *Lockyer*, 95 P.3d at 478-79 (emphasis in original).

46. *Id.* at 483.

47. *Id.* (emphasis in original).

48. *Id.* at 485.

49. *Id.* at 486-87.

50. *Id.* at 488.

51. Thanks to Professor Helen Hershkoff for this point and these examples.

blatant. And, if the rule is that a local official can disregard a blatantly unconstitutional law, it seems that the reviewing court should consider the merits of the substantive constitutional claim.

Finally, the court offered a number of policy reasons that public officials should be denied power to act on the basis of their constitutional understanding. First, “[m]ost local executive officials have no legal training.”⁵² True, but elected officials do have other relevant sources of knowledge and legitimacy.⁵³ Further, in the early years of the Republic many judges were not lawyers and, even today, many judges are not.⁵⁴ Second, the court notes that the mayor acted “without affording the affected individuals any due process safeguards, and, in particular, without providing any opportunity for those supporting the constitutionality of the statutes to be heard.”⁵⁵ The meaning of this is not clear. When civil rights plaintiffs file suit in court their ideological opponents typically have no formal right to a role in the litigation. Nonetheless, regardless of how the constitutional issue is raised, opponents have opportunities to make their voices heard, as interveners, amici, or, as they did in California, with a prompt challenge to Mayor Newsom’s action.⁵⁶ Third, the court expressed concern that since there are many officials with different views, “the enforcement of statutes would become haphazard, leading to confusion and chaos and thwarting the uniform statewide treatment that state statutes generally are intended to provide.”⁵⁷ But, it is common for state statutes to be interpreted differently by executives and judges in different parts of the state.⁵⁸

52. *Lockyer*, 95 P.3d at 490.

53. Justice Stephen Breyer made a similar claim discussing the competence of Congress, relative to courts. “Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem and [find] an appropriate remedy. Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and, to what extent, refusals to accommodate a disability amount to behavior that is callous, or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly obtain information from constituents who have first-hand experience with discrimination and related issues.” *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting) (dissenting from the ruling that Congress lacked sufficient evidence of discrimination against people with disabilities to enact remedial legislation under Section 5 of the Fourteenth Amendment of the United States Constitution).

54. See e.g., *North v. Russel*, 427 U.S. 328, 339 (1976) (rejecting a defendant’s claim that conviction, with the possibility of imprisonment, by a non-lawyer police court judge violates Due Process). In New York, most town court judges are not lawyers. The system has persisted despite long criticism. William Glaberson, *How a Reviled Court System Has Outlasted Many Critics*, N.Y. TIMES, Sept. 27, 2006, at A1.

55. *Lockyer*, 95 P.3d at 491.

56. *Id.*

57. *Id.*

58. Examples abound. In New York, under a uniform state adoption statute, for many years some local jurisdictions allowed second parents to adopt, without terminating parental rights, while others did not. The Court of Appeals eventually resolved the issue, making second parent adoption available throughout the state. *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995). As a hypothetical, consider two Massachusetts mayors confronting the conflict

Where statewide uniformity is important, it can be achieved either by legislation or a state supreme court ruling that only one interpretation is legitimate.⁵⁹

The conclusions of the *Lockyer* court were not compelled by precedent.⁶⁰ The California Supreme Court made plain that it was not addressing the merits of the question whether excluding otherwise qualified same-sex couples from marriage violated the California Constitution,⁶¹ and that question remains unresolved. On March 14, 2005, Judge Richard A. Kramer of the Superior Court in the County of San Francisco held that the exclusion of same-sex couples from marriage violates the California Constitution.⁶² The court had consolidated six actions pending in the San Francisco trial courts, some seeking equal access to marriage and others seeking to defend the traditional rules. The state made two arguments. First, “tradition” supports reserving marriage to heterosexual couples. Second, California’s recent recognition of same-sex

resolved in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in which a gay group sought a permit to march in the Saint Patrick’s Day Parade and claimed the protection of a state law prohibiting discrimination on the basis of sexual orientation in public accommodations, while the parade organizers claimed a First Amendment right to determine the composition of the parade. It seems that one mayor could respect the state law, reject the First Amendment claim and grant the permit in compliance with the state statute, while another could invoke the First Amendment to deny the permit, as the Supreme Court eventually did. Thanks to Professor Nan Hunter, Brooklyn Law School, for this example.

59. Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005), argues provocatively that, as both a functional and constitutional matter, cities should have a larger role in defining the meaning of marriage. The mayors in California, New York and Oregon all assumed that the constitutionality of excluding same-sex couples from marriage would eventually be decided at the state level.

60. Kristin Ecklund, *The Question of Constitutionality: How Separate Are the Powers? The Administrative and Social Ramifications of Lockyer v. City and County of San Francisco*, 25 J. NAT’L A. ADMIN. L. JUDGES 367, 395 (2005) reaches a similar conclusion. (“Though the *Lockyer* Court drew a line in the sand as to where the executive branch’s power stops, it failed to elaborate as to the boundaries within which the executive branch has free reign to make its decisions.”).

Justice Moreno (joined by Justices Baxter, Chin and Brown), concurring, recognized that, “In California, generally speaking, courts faced with local governments’ or local officials’ refusal to obey assertedly unconstitutional statutes have decided the constitutional question before determining whether a writ or other requested relief should issue.” *Lockyer v. City & County of S.F.*, 95 P.3d 459, 500 (Cal. 2004). However, in this case they join in the decision halting a mayor’s actions. The concurring justices suggest that they might have exercised their discretion differently “if, for example the city had issued a single ‘test case’ same-sex marriage license. But Newsom went beyond a test case, issuing thousands of these marriage licenses.” *Id.* at 501. The point seems to be one of etiquette, rather than of law. It was not that Newsom lacked legal authority for his actions, or that he challenged the power of the courts to make the final decisions, but rather that it was impolite to act in a manner not sufficiently deferential to judicial authority.

61. *Lockyer*, 95 P.3d at 464.

62. *In re Coordination Proceedings*, No. 4365, 2005 WL 583129, *10 (Cal. Super. Ct. 2005).

domestic partnerships made it reasonable to reserve marriage for opposite-sex couples.⁶³ The court rejected these arguments. Tradition is not its own justification.⁶⁴ The recognition of domestic partnerships “belies any argument that the State would have a legitimate interest in denying marriage in order to preclude same-sex couples from acquiring some marital rights that might somehow be inappropriate for them to have.”⁶⁵ In addition to the state’s arguments, the trial court considered the claim of other parties that procreation defines the central purpose of marriage. The court rejected that claim, noting that “marriage is available to heterosexual couples regardless of whether they can or want to procreate.”⁶⁶

The trial court recognized that while most “legislative classifications are presumptively valid and must be upheld so long as there exists a rational relation between the disparity of treatment and some legitimate governmental purpose,”⁶⁷ even under this deferential standard, excluding same-sex couples from marriage was irrational. In addition, the court found that denying same-sex couples access to marriage created a suspect classification based on gender and burdened a fundamental right.⁶⁸ The exclusion demanded a stronger justification, which neither the state nor amicus were able to provide.⁶⁹

In September 2005, the California legislature became the first in the nation to pass equal marriage rights legislation for same-sex couples.⁷⁰ However, Governor Schwarzenegger vetoed the bill on grounds that it conflicted with Proposition 22, the 2000 initiative, making plain that, as a statutory matter, marriage was limited to a man and a woman.⁷¹

63. *Id.* at *6, *8.

64. The classic statement is from Justice Holmes. “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897); *see also* Lawrence v. Texas, 539 U.S. 558 (2003).

65. *Coordination Proceeding*, 2005 WL 583129, at *9.

66. *Id.* at *12.

67. *Id.* at *2.

68. *Id.* at *8.*11.

69. *Id.* at *11.

70. Dean E. Murphy, *Same Sex Marriage Wins Vote in California*, N.Y. TIMES, Sept. 7, 2005, at A14.

71. *Schwarzenegger to Veto Same-Sex Marriage Bill*, ASSOCIATED PRESS, Sept. 8, 2005 (The Governor’s Press Secretary said, “out of respect for the will of the people, the governor will veto the bill.” Further, “you can’t have a system where the people vote and the legislature derails that vote. Overall, Arnold wants the debate over same-sex marriages to be decided by the People and the courts.”); *Schwarzenegger Vetoes Gay Marriage Bill*, ASSOCIATED PRESS, Sept. 29, 2005, available at www.msnbc.msn.com/id/9535128.

CAL. CONST. art. II, § 10(c) (“The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.”); *see, e.g.*, Found. for Taxpayer & Consumer Rights v. Garamendi, 34 Cal. Rptr. 3d 354 (Cal. Ct. App. 2005); *Amwest Sur. Ins. Co. v. Wilson*, 906 P.2d 1112 (Cal. 1995).

In October 2006, the First District Court of Appeals, 2-1, overruled the trial court decision and upheld the exclusion of same-sex couples from marriage.⁷² First, the majority noted that same-sex marriage has not previously been deemed a constitutionally protected fundamental right because marriage has traditionally been defined as between a man and a woman.⁷³ Second, the court concluded that sexual orientation was not a suspect class for equal opportunity purposes. Although the court acknowledged that sexual orientation “bears no relation to a person’s ability to perform or contribute to society” and “has been associated with a stigma of inferiority and second class citizenship,”⁷⁴ it emphasized that “whether sexual orientation is immutable presents a factual question” about which “[t]he trial court did not conduct an evidentiary hearing.”⁷⁵ Thus the Court of Appeals considered whether the exclusion of same-sex couples was rationally related to a legitimate state purpose, concluding that because rational basis review is extremely deferential, “the state is under no obligation to produce evidence supporting the rationality of a classification.”⁷⁶ Thus, the court held that tradition, “common understanding” and maintenance of the status quo justify the exclusion.⁷⁷ The case has been appealed to the state Supreme Court.⁷⁸

B. New Paltz, New York

In 2003, Jason West was elected Green Party Mayor of the Village of New Paltz, New York.⁷⁹ Born in 1977, West grew up in a suburb of Albany, where he worked as a house painter, first with his father and then on his own. He attended college at SUNY New Paltz, where he became actively engaged in progressive politics.⁸⁰ A voracious reader, West told a reporter in 2004, “Activism doesn’t begin in the 60s . . . There’s the labor movement in the 30s. There’s anarchism in the early part of the last century. The populist movement

72. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *pet. for review granted*, 149 P.3d 737 (Cal. Dec. 20, 2006).

73. *Id.* at 700.

74. *Id.* at 713 (quoting *Sail’er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 18-19 (Cal. 1971)).

75. *Id.*

76. *Id.* at 718.

77. *Id.* at 724.

78. *In re Marriage Cases*, 149 P.3d 737 (Cal. Dec. 20, 2006). Even though he prevailed before the intermediate appellate court, the State Attorney Bill Lockyer does not oppose the appeal. A spokesperson said “this question won’t be resolved until the (state) Supreme Court has a chance to rule on the issue.” Bob Egelko, *The Battle Over Same-Sex Marriage: Lockyer Won’t Oppose Review; State’s High Court Likely to Take Case*, S.F. CHRON, Nov. 15, 2006, at B9.

79. Robert Sullivan, *Mayor with a Mission*, N.Y. TIMES, Mar. 28, 2004, at § 6 at 38.

80. *Id.*

in the 1880's. Reconstruction. The suffragists, and all the way back to the Revolutionary War. It's all part of the same movement."⁸¹

When he came to office as mayor of the 6,000 person university community eighty miles north of New York City, his agenda included environmental protection, senior housing, and energy, as well as gay marriage.⁸² To explore what he could do as Village Mayor, he began by reading the law. He told a local merchant, "You can read them on-line on the State Assembly's Web site."⁸³ He then asked the village attorney, a Republican legislator, for a legal opinion and was told that, while the law was unclear, he probably could not perform same-sex marriages.⁸⁴ West then sought other legal counsel. James Esseks, an expert on marriage law at the ACLU, recalled, "[h]e clearly had read the New York domestic relations law, and he understood the difference between having a marriage license and solemnizing."⁸⁵

West arranged to be represented, pro bono, by New York City lawyer E. Josh Rosenkranz, a partner at Heller, Ehrman, White & McAuliffe and one of the most effective civil rights lawyers in the nation.⁸⁶ West was clear that "he did not want the marriages to cost the Village money."⁸⁷ He did not notify or consult with the town board, and he moved ahead quickly with the marriages in part because he feared that he would be arrested before the ceremonies had been performed.⁸⁸

On February 27, 2004, West married twenty-five gay and lesbian couples in the Village Peace Park. He was served with a summons, charging him with multiple criminal "counts of solemnizing marriages for people who had not been issued marriage licenses."⁸⁹ West stopped performing marriages, but two ordained ministers of the Unitarian Universalist Church continued to do so until

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* Only a city clerk can issue a marriage license. Many people are authorized to solemnize a marriage, including clergy, judges and mayors. N.Y. DOM. REL. LAW § 11 (McKinney 2007).

86. Rosenkranz was the founding president and CEO of the Brennan Center for Justice at New York University School of Law. He also founded the Office of the Appellate Defender, a public defender office specializing in criminal appeals in New York state courts. Heller Ehrman, LLP, Attorney Biography, http://www.hellerehrman.com/en/attorneys/bios/Rosenkranz_Joshua.html (last visited Jan. 29, 2006). He successfully challenged restrictions on the speech and actions of legal services attorneys. *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001), and unsuccessfully represented law schools challenging the Solomon Amendment requiring schools to accommodate military recruiters who discriminate on the basis of sexual orientation. *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006).

87. Sullivan, *supra* note 79, at § 6 at 38.

88. *Id.*

89. *People v. West*, 780 N.Y.S.2d 723, 723 (Just. Ct. New Paltz 2004).

they were charged with the crime of solemnizing marriages without a license.⁹⁰ Ulster Valley Supreme Court Justice E. Michael Kavanagh issued a preliminary injunction against performing marriages for same sex couples.⁹¹

On March 24, 2004, West moved to dismiss the criminal charges against him on grounds that denying same-sex couples access to marriage violates the New York Constitution.⁹² On June 10, 2004, the Town Court found that it had “jurisdiction to dismiss criminal charges on grounds that the law defining the violation charged is unconstitutional,”⁹³ and that, even though higher New York courts had not addressed the question, the exclusion of same-sex couples from marriage violated the New York Constitution.⁹⁴ The Town Court noted that neither the local prosecutor nor the state Attorney General defended or condoned the discriminatory exclusion of same-sex couples.⁹⁵ On July 13, 2004, a different Town Court judge dismissed the criminal charges against the ministers, holding that prohibiting same-sex couples from marrying was not rationally related to furthering legitimate state interests in providing a favorable environment for procreation and child-rearing.⁹⁶

On appeal, on February 2, 2005, the criminal charges against Mayor West were reinstated by Ulster County Court Judge J. Michael Bruhn.⁹⁷ Judge Bruhn did not file a formal opinion but did comment from the bench that the case “is not about the constitutionality of gay marriage,” but rather whether a mayor may “ignore and flout” a law he believes is unjust or unconstitutional.⁹⁸ “[T]he appropriate and proper vehicles to effect change in this area are legislative

90. *People v. Greenleaf*, 780 N.Y.S.2d 899 (Just. Ct. New Paltz 2004).

91. *Hebel v. West*, 803 N.Y.S.2d 242 (App. Div. 2005). Kavanagh subsequently issued a permanent injunction on June 7, 2004, acknowledging that no “New York court has addressed the constitutional implications of the denial of marriage licenses to same-sex couples.”

92. *People v. West*, 780 N.Y.S.2d at 723.

93. *Id.* at 724.

94. *Id.* Judge Jonathan D. Katz of the New Paltz Town Court relied on *Brashci v. Stahl Assoc. Co.*, 74 N.Y. 2d 201, 211 (App. Div. 1989), in which the New York Court of Appeals held that a same-sex partner is a family member for purposes of succession to a rent-controlled apartment, and *Matter of Jacob*, 86 N.Y.2d at 668, in which the Court of Appeals interpreted New York adoption law to allow a biological parent’s same-sex partner to adopt her child. Judge Katz also noted lower court decisions supportive of gay rights. In *Matter of Carolyn B.*, 774 N.Y.S.2d 227 (App. Div. 2004), the court held that the sexual orientation of a proposed adoptive parent is irrelevant. In *Langan v. St. Vincent’s Hosp. of N.Y.*, 765 N.Y.S. 2d 411 (Sup. Ct. 2003) the court held that a surviving spouse of a Vermont civil union is entitled to bring a wrongful death action under New York law. The decision was reversed in *Langan v. St. Vincent’s Hosp. of N.Y.*, 802 N.Y.S.2d 476 (App. Div. 2005).

95. *People v. West*, 780 N.Y.S.2d at 725.

96. *People v. Greenleaf*, 780 N.Y.S.2d 899, 899 (Just. Ct. New Paltz 2004).

97. Michael Hill, *Charges Reinstated Against New Paltz Mayor*, ALBANY TIMES UNION, Feb. 3, 2005 at B3. (Judge Bruhn’s opinion is unreported. The town court judges’ opinions were reported. *People v. West*, 780 N.Y.S.2d 723; *Greenleaf*, 780 N.Y.S.2d 899. But Sheppard’s does not report that they were reversed.

98. Boniello, *supra* note 5, at 1.

action and judicial proceedings . . . not unilateral disobedience of the existing statutory scheme by a local official.”⁹⁹

Judge Bruhn’s ruling raises many questions. Most fundamental, and the central focus of this article, is whether public officials have a role in interpreting the constitution. Judge Bruhn firmly rejected Mayor West’s authority to interpret the constitution. But two of his judicial colleagues—albeit subordinate—on the Town Court had issued rulings on the merits, holding that the New York Constitution does not allow the exclusion of same-sex couples from marriage. As a formal matter, Judge Bruhn was not reviewing Mayor West’s actions but rather the judicial decisions of the trial courts. If “judicial proceedings” are the appropriate vehicle for constitutional interpretation, the trial court decisions were judicial proceedings. An appellate court judge owes his or her subordinate colleagues a reasoned elaboration of the reasons that they were wrong. Additionally and most disturbing, Judge Bruhn did not write an opinion. If judicial proceedings are a superior forum for elaboration of important constitutional issues, it is, in part, because they rest on published, reasoned decisions. Thus Judge Bruhn asserts, but does not embody, the values of judicial decision making.

As a result of Bruhn’s ruling, Mayor West was scheduled to go to trial in New Paltz in the fall of 2005. The defendant and his lawyers were looking forward to an opportunity to present their case to an Ulster County jury. On July 13, the Ulster County District Attorney announced that he was dropping the charges against the mayor.¹⁰⁰

While the New York courts avoided addressing the question of the mayor’s power to act on his understanding of the state constitution, the New York Attorney General offered an early opinion on all of the contested issues. On March 4, four days after Mayor West began performing marriages, then-New York Attorney General Elliot Spitzer issued an “Informal Opinion” on gay marriage.¹⁰¹ Spitzer, a Democrat then running for governor, is on record in

99. *Id.*

100. Steve Earley, *Charges Dropped Against New Paltz Mayor in Gay Marriage Case: Jason West is off the Hook*, KINGSTON DAILY FREEMAN, July 13, 2005.

101. 2004 N.Y. Op. Att’y Gen., Informal Opinion No. 1, (March 3, 2004) [hereinafter *N.Y. AG Opinion 2004*]. The opinion is cast as a response to inquiries from Darrin B. Derosia, Corporation Counsel for the City of Cohoes, and Peter Case Graham, Town Attorney for the Town of Olive. No one in either town was considering offering same-sex marriages. Spitzer apparently wanted a request for opinion to which he could respond. The New York Council of Mayors believed that it lacked authority to request such an opinion and hence asked two of their members to do so. Spitzer’s response came quickly after the request. Telephone Interview with Darrin B. Derosia, Corporation Counsel, City of Cohoes (July 6, 2005). Spitzer issued a press release on the same day as his informal opinion. It says, “Spitzer was asked by the Executive Branch to seek an injunction to prevent the mayor from performing the marriages but declined to do so because he did not believe the action met the legal standard for granting an injunction [which] involves a showing of ‘immediate and irreparable injury, loss or damage.’ In addition, the mayor’s conduct was addressed clearly by a section of law providing criminal misdemeanor penalties for persons who solemnize

support of same-sex marriage.¹⁰² His opinion was unusual for “the speed with which it was produced.”¹⁰³ It made three points. First, it noted that as a statutory matter, New York law is ambiguous as to whether marriage excludes same-sex couples.¹⁰⁴ Unlike California and other states, New York has no statutory language specifying that marriage is limited to a relation between a man and a woman.¹⁰⁵ On the other hand, marriage has traditionally been understood as limited to heterosexual couples and some statutory language is cast in gendered terms, e.g., bride and groom. When the Massachusetts Supreme Court in *Goodridge* confronted a similar statutory pattern, it concluded that the legislature intended to limit marriage to heterosexual couples, but decided that such a limit violated the Massachusetts Constitution.¹⁰⁶

Second, the opinion states that “the Attorney General’s Office traditionally does not issue opinions on the constitutionality of state laws, and we do not today opine on whether the federal or state constitutions require the State to permit same-sex marriage. New York courts have not yet ruled on this issue, and they are the proper forum for the resolution of this matter.”¹⁰⁷ It lays out the arguments on both sides of the New York constitutional law question, but reaches no conclusion.¹⁰⁸

Third, the opinion asserts that “New York law presumptively requires that parties to [Vermont civil unions or same-sex marriages recognized in other states] must be treated as spouses for the purposes of New York law.”¹⁰⁹ The question of whether a state will recognize a marriage that it would not allow, if it was valid in the place it was performed, is complex and contentious.¹¹⁰

marriages without licenses.” Press Release, N.Y. Department of Law, Attorney General Issue Opinion on Same Sex Marriage (March 3, 2004), *available at* http://www.oag.state.ny.us/press/2004/mar/mar03a_04.html. The Governor wanted the Attorney General to stop the marriages. The Attorney General declined to do so, leaving the job to the local district attorney. *Id.*

102. See Michael Slackman, *With Little Fanfare, Spitzer Says He Will Run for Governor in 2006*, N.Y. TIMES, Dec. 8, 2004, at A1; see also Matthew Daneman, *Spitzer: Let Gays Tie Knot*, ROCHESTER DEMOCRAT & CHRON., May 22, 2005, at B1; David Olive, *Spitzer Launches 2012 Campaign: First New York, Next Washington?*, TORONTO STAR, Dec. 11, 2004, at C1. In November 2006 Spitzer was elected Governor of New York. Danny Hakim, *Thorny Issue Faces Spitzer in Day-After Pleasantries*, N.Y. TIMES, Nov. 9, 2006, at P15.

103. Marc Santora, *Same-Sex Marriage: The Law; Spitzer’s Opinion Mixed on Status of Gay Marriage*, N.Y. TIMES, Mar. 4, 2004, at A1.

104. *N.Y. AG Opinion 2004*, *supra* note 101, at 2-11.

105. See Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE, Nov. 3, 2004, <http://www.stateline.org/live/printable/story?contentId=15576>.

106. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 952-53 (Mass. 2003).

107. *N.Y. AG Opinion 2004*, *supra* note 101, at 1-2.

108. *Id.* at 11-14.

109. *Id.* at 28.

110. The general rule, embodied in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971), provides that a “marriage which satisfies the requirements of the state

Attorney General Spitzer's opinion is internally inconsistent. On the one hand, he was not willing to offer an opinion on the controversial issue whether the exclusion of same-sex couples violates the New York Constitution, asserting that only courts are qualified to do constitutional interpretation. On the other hand, the Attorney General was willing to offer an opinion on another controversial issue of state law, i.e., the validity in New York of marriages recognized in other states. But if only courts have the power to answer legal questions, how can the Attorney General affirm that New York will respect marriages that are legal in other states? Indeed, the Attorney General went further, asserting that New York will recognize Vermont civil unions as marriages. That was a reasonable interpretation of New York law. But so too was Jason West's conclusion that the exclusion of same-sex couples from

where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." Some states, including New York, affirm the value of recognizing marriages that were valid where performed and are reluctant to find public policy reasons to deny the validity of marriages. For example, in *In re Estate of May*, 305 N.Y. 486, 490-93 (1953), the New York Court of Appeals recognized a Rhode Island marriage between an uncle and a niece that would have been void if performed in New York. Other states, for example Connecticut, are more willing to insist that marriage partners comply with state rules. In *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961), the Connecticut Supreme Court refused to recognize a marriage between an uncle and a niece, even though their marriage was legal in Italy, where they had married, and they had lived together as man and wife for many years. With respect to same-sex marriage, many states have made formal declarations that such marriages "violate strong public policy" of the state, while others have not. Since 1998, twenty-seven states have passed laws or constitutional amendments providing that same-sex marriage violates state public policy. Alliance Defense Fund, DOMA Watch: Marriage Amendments, <http://www.domawatch.org/amendments/amendmentsummary.html> (last visited Jan. 29, 2007).

Most scholars support the Restatement regime under which states get to decide what marriage rules violate "the strong public policy" of the state. This approach respects federalism and the fact that different states have different values. See, e.g., Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2208-13 (2005). Others argue that the Full Faith and Credit Clause of the U.S. Constitution requires that states respect marriages recognized in other states. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

In the wake of *Goodridge*, Massachusetts reinvigorated a 1913 requirement that out-of-state applicants for a marriage license affirm that "such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides" and that "such marriage would [not] be void if contracted in such other jurisdiction." *Cote-Whiteacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006). Six justices held that the law was constitutional, as applied to couples who came from states in which same-sex marriage had been explicitly rejected. Justice Ireland dissented, arguing that the Massachusetts constitutional guarantee of equality that invalidated the exclusion of resident couples from marriage also prohibits the exclusion of non-resident couples, and that comity does not demand that Massachusetts courts answer the speculative question whether other states would recognize Massachusetts marriages.

marriage violates the New York Constitution. Both conclusions are debatable, and neither had been finally decided by the courts. Both Spitzer and West are bound by oath to support the constitution and both are entitled to consider what that means. Indeed, West, as the local official responsible for the marriage registration process, may have a stronger claim to consider whether his actions conform to constitutional norms than Spitzer, who was only offering an advisory opinion, or more accurately, a non-opinion rendered on an expedited basis. The core point of this article is that, in some circumstances, both Spitzer and West are entitled to interpret the constitution by expressing their views on constitutional issues and seeking to conform their actions to their best understanding of constitutional principle.

The question whether, under New York law, executives have authority to interpret the state constitution in ways not specifically authorized by the courts is complex. In 1985 in *Under 21 v. Koch*, the New York Court of Appeals suggested that the answer might be “no.” There, New York City Mayor Ed Koch issued an executive order prohibiting those who contract with the city from refusing to hire people solely on the basis of “sexual orientation or affectional preference.” The Court of Appeals held that the mayor had no authority to adopt the policy. First, the court held that the policy violated separation of powers. The mayor acted outside his authority where there was no legislative enactment prohibiting employment discrimination on that basis. “[N]o matter how well-intentioned his actions may be, the mayor may not unlawfully infringe upon the legislative powers reserved to the City Council.”¹¹¹ The questions confronting Mayor West may be different. In *Under 21*, the relevant legislative body, the City Council, had recently and repeatedly been urged to prohibit such discrimination and had declined to do so.¹¹² By contrast, the relevant provisions of New York’s marriage law are both old and ambiguous. Further, while *Under 21* has never been overruled, it has not been influential.¹¹³

111. *Under 21 v. Koch*, 482 N.E.2d 1, 5 (N.Y. 1985). The Court of Appeals also noted that Mayor Koch could not defend his actions as necessary to avoid city complicity in unconstitutional discrimination because the private organizations with which the city contracts are not state actors. *Id.* at 8-10.

112. *Id.* at 5.

113. Court of Appeals judges have cited it in dissent. See *Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997) (Titone, J., dissenting) (arguing that the Governor can require the Attorney General to replace a district attorney unwilling to seek the death penalty, despite lack of legislative authorization to do so); *Associated Gen. Constr. v. N.Y. State Thruway Auth.*, 666 N.E.2d 185 (1996) (Smith, J., dissenting) (arguing to uphold a public authority’s power to write bidding rules to promote labor peace, despite lack of legislative authorization). In other cases it has been distinguished. See *Bourquin v. Cuomo*, 652 N.E.2d 171 (N.Y. 1995) (allowing a governor to require the Department of Public Service to set up a Citizens Utility Board, even though the legislature had not provided authorization because the action was not inconsistent with the legislation); *N.Y. State Health Facilities Ass’n v. Axelrod*, 77 N.Y.2d 340, 348-49 (1991) (holding that the Health Commissioner can

Just as Ulster County Judge Bruhn was reinstating the criminal charges against Mayor West, Manhattan Supreme Court Justice Doris Ling-Cohan held that denying same-sex couples the right to marry violates the equal protection, due process, and privacy guarantees of the New York Constitution.¹¹⁴ However, on July 6, 2006, a divided New York Court of Appeals held that excluding same-sex couples from marriage does not violate rights to due process or equal protection under the state constitution.¹¹⁵

The three judge plurality found that the legislature could conclude that same-sex couples could rationally be excluded from marriage because they “do not become parents as a result of accident or impulse.”¹¹⁶ Parenting is a complex enterprise. But it is difficult to understand why heterosexual parents are categorically better because they might become parents as the result of “accident or impulse.” Planned parenthood is the legal and cultural norm, if not always the reality. Second, the plurality rejected massive evidence that children raised by gay parents do well, finding that there is no “conclusive scientific evidence” that children are not better off in heterosexual families.¹¹⁷ The plurality found that the right to marry is not protected as fundamental, despite many cases recognizing such a right, because earlier cases involved heterosexual marriage.¹¹⁸ Judge Victoria A. Graffeo concurred separately, finding that reliance on *Loving v. Virginia* was inappropriate because there is no gender discrimination because both men and women are equally prohibited from marrying a person of their own sex.¹¹⁹

Chief Judge Judith Kaye, joined by Judge Carmen Ciparick, dissented. They argued that the right to marry is fundamental and, by analogy, *Loving v. Virginia* confirms that the exclusion of same-sex couples violates gender equality norms.¹²⁰

Defendants primarily assert an interest in encouraging procreation within marriage. But while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State,

promulgate regulations not specifically authorized by statute; distinguishing *Under 21* as a case in which the executive enacted a policy that the legislative body had not accepted).

114. *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005). On December 8, 2005, the Appellate Division for the First Department reversed, holding that only the legislature may redefine marriage and that the state’s traditional interest in protecting marriage as an institution for procreation and child rearing justifies the exclusion of same-sex couples. *Hernandez v. Robles*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

115. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (“The Legislature could find that unstable relationships between people of the opposite sex present a great danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.”).

116. *Id.* at 7.

117. *Id.* at 8.

118. *Id.* at 8.

119. *Id.* at 19-20 (Kaye, C.J., dissenting).

120. *Id.* at 22-26 (Kaye, C.J., dissenting).

the exclusion of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone.¹²¹

Even though Spitzer has long publicly supported marriage equality,¹²² since his election he has not indicated whether he would make this issue a legislative priority.

C. Multnomah County, Oregon

In late February 2004, inspired by the actions of Mayors Newsom and West, the Multnomah County Board of Commissioners in Portland, Oregon, considered whether the exclusion of same-sex couples violated Oregon statutes or the state constitution. The commissioners voted to ask the Multnomah County Attorney for a confidential formal opinion. That opinion, issued on March 2, concluded that each “Multnomah County Commissioner is required by state law to take an oath to support both the federal and state constitutions. The County’s duty to act in compliance with the constitution applies even when a court has not yet found a particular statute or government action unconstitutional.”¹²³ Because, by state statute, the legislature has delegated the authority to issue marriage licenses to the county clerks, they are obligated to comply with the constitution.¹²⁴ The statutes are ambiguous. On the one hand, state law defines marriage in gender neutral terms.¹²⁵ “On the other hand, ORS 106.150 requires that the two individuals declare that they take each other as ‘husband and wife.’”¹²⁶ The County Attorney found that the exclusion of same sex couples from marriage violated a state constitutional provision prohibiting

121. *Id.* at 30.

122. Slackman, *supra* note 102, at A1.

123. Memorandum from Agnes Sowle, County Attorney, Multnomah County, to Diane Linn, Chair, Multnomah County 2 (Mar. 2, 2004) [hereinafter *County Attorney Memo*] (citing *Cooper v. Eugene School District*, 723 P.2d. 298 (Or. 1986), discussed *infra* at notes 124-28), available at

http://www.co.multnomah.or.us/marriage/county_attorney_opinion.pdf. The County Attorney sought a second opinion on this point from a respected local attorney who concluded “[a]s the Oregon Supreme Court has squarely held, ‘a state legislative interest, no matter how important, cannot trump a state constitutional command.’ *State v. Stoneman*, 323 Or. 536, 542, 920 P.2d 535 (1996).” Letter from Charles F. Hinkle to Agnes Sowle, County Attorney, Multnomah County (Mar. 2, 2004). The court in *Stoneman* upheld, against a claim that it violated the state constitutional right to free expression, application of a state statute criminalizing the purchase of a videotape and magazine which depicted sexually explicit conduct by child under 18 years of age. *Stoneman*, 323 Or. 536 at 539.

124. *County Attorney Memo*, *supra* note 123, at 3.

125. *Id.* at 1. Marriage is defined as “a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.” OR. REV. STAT. § 106.010 (2006).

126. *County Attorney Memo*, *supra* note 123, at 2.

favoritism,¹²⁷ relying primarily on a 1998 Oregon Court of Appeals decision holding that a state policy providing medical benefits to the spouse of its married employees while denying them to the domestic partners of its homosexual employees violated this state constitutional provision.¹²⁸

On March 3, Multnomah County began issuing licenses to same-sex couples,¹²⁹ and over 3,000 couples received them.¹³⁰ Governor Ted Kulongoski asked his Attorney General for an opinion. On March 12, Hardy Myers, the Oregon Attorney General, offered his view that the statutory scheme referred to “husband” and “wife,” and that everyone had always understood that marriage is limited to heterosexual couples.¹³¹ Myers noted that “[b]ecause both gender and sexual orientations are personal characteristics that exist independent of the marriage statutes,” classifications based on them are subject to demanding justification under Oregon constitutional law.¹³² Nonetheless, Attorney General Myers explained that the conclusion that excluding same-sex couples from marriage is unconstitutional under Oregon law is not self-evident. “If the Supreme Court concludes that immutability is a necessary attribute of a suspect class, whether sexual orientation is suspect may depend on the nature of evidence, expert opinion, or other authority presented at trial or on appeal.”¹³³ Because the constitutional law was ambiguous, the Attorney General concluded, “[I]t would be unwise to change current state practices until, and unless, a decision by the Supreme Court makes clear what, if any, changes are required.”¹³⁴ At the instruction of the Governor, the State Registrar refused to file or register any same-sex marriage records.¹³⁵

Within days after the marriages began, Multnomah County, the ACLU, and Basic Rights Oregon filed suit seeking a judicial declaration that same sex

127. *Id.* at 2. Article I, section 20, of the Oregon Constitution “states that ‘[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.’”

128. *County Attorney Memo, supra* note 123, at 4 (citing *Tanner v. Or. Health & Sci’s Univ.*, 971 P.2d 435 (Or. Ct. App. 1998)).

129. *Li v. Oregon*, No. 0403-03057, 2004 WL 1258167, at *1 (Or. Cir. Ct. Apr. 20, 2004).

130. *Li v. State*, 110 P.3d 91, 94 (Or. 2005).

131. Letter from Hardy Myers, Or. Dep’t of Justice, to Ted Kulongoski, Governor at 2 (Mar. 12, 2004) [hereinafter *Oregon AG Opinion*].

132. *Id.*

133. *Id.* at 8. This focus on the critical relevance of whether sexual orientation is chosen or fated follows the view of the swing vote, Burns J. concurring, in the Hawaii gay marriage case. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993). In that case, the distinction was not developed because the State chose to rely on the argument, eventually rejected, that heterosexual people are categorically better able to raise children than same-sex couples. The question whether sexual orientation is chosen or biologically driven, and whether the answer is constitutionally relevant, remains controversial and is not the subject of this article.

134. *Oregon AG Opinion, supra* note 131, at 11.

135. *Li v. State*, 110 P.3d at 94.

marriages were protected by the Oregon Constitution.¹³⁶ A group opposed to same-sex marriage was allowed to intervene as a party defendant.¹³⁷ On April 20, 2004, the circuit court issued an opinion strongly suggesting that denying same-sex couples the right to marry violated the Oregon Constitution.¹³⁸ Following the model set by the Vermont Supreme Court, the Oregon Circuit Court held that it would allow the legislature ninety days after the commencement of the next session to produce legislation.¹³⁹ Until that time Multnomah County was enjoined from issuing marriage licenses to same-sex couples.¹⁴⁰

While the case was on appeal to the Oregon Supreme Court, on November 4, 2004, the people of Oregon adopted Ballot Measure 26, a voter-initiated amendment to the Oregon Constitution, providing, “It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.”¹⁴¹

Thus the question that reached the Oregon Supreme Court in *Li v. State* in the Spring of 2005 was fundamentally different from the question addressed by the Commissioners of Multnomah County. The people of Oregon had amended their constitution. The Oregon Supreme Court rejected plaintiffs’ argument that the word “policy” in the voter-initiated amendment was meant to be merely a precatory statement requiring further legislative action.¹⁴² In light of the 2004 constitutional amendment, it was difficult to avoid the conclusion that the Oregon Constitution did not protect same-sex marriage.

The more controversial aspect of the Oregon Supreme Court’s decision was whether the County Commissioners had authority to act prior to the 2004 constitutional amendment. Citing dicta from a number of cases, the court “conclude[s] that Oregon law currently places the regulation of marriage exclusively within the province of the state’s legislative power.”¹⁴³ While no one contested the general proposition that state legislatures have primary authority over the regulation of marriage, it seems implausible that the Oregon court meant to say that the legislature is entitled to violate the constitution in its definition of marriage. The more difficult issue for the court was whether officials other than judges have authority to interpret the constitution, a question the Oregon Supreme Court answered in the negative.

The Multnomah County Attorney and the plaintiffs relied on the Oregon Supreme Court’s 1986 decision in *Cooper v. Eugene School District No 4J*.¹⁴⁴

136. *Id.*

137. *Id.* at 95.

138. *Id.* at 96.

139. *Id.* at 96 n.7 (citing *Baker v. State*, 744 A.2d 864 (Vt. 1999)).

140. *Id.* at 97.

141. OR. CONST. art. XV, § 5a (effective Dec. 2, 2004).

142. *Li v. State*, 110 P.3d at 97.

143. *Id.* at 99.

144. *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298 (Or. 1986).

There, plaintiff was suspended as a public school teacher for wearing a white dress and turban in violation of a state statute providing that “[n]o teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher.”¹⁴⁵ The Oregon Supreme Court described the dispute saying:

What the parties wanted the Superintendent to decide was the constitutional validity of the law forbidding a teacher to wear religious dress while on duty. The Superintendent concluded that he had no power to decide the constitutional question. [He asserted] “judicial decisions are not completely in accord, but the clear consensus seems to be that in a proceeding such as this the administrative agency has no authority to declare an act of the legislature to be contrary to the federal and state constitutions. That decision is to be made by a court.”¹⁴⁶

In *Cooper*, the Oregon Supreme Court rejected the view that only courts can interpret the constitution. The court observed that “[l]ong familiarity with the institution of judicial review sometimes leads to the misconception that constitutional law is exclusively a matter for courts. To the contrary, when a court sets aside government action on constitutional grounds, it necessarily holds that legislators or officials attentive to a proper understanding of the constitution would or should have acted differently.”¹⁴⁷

The *Cooper* court noted that legislative and executive officials take an oath to uphold the constitution.¹⁴⁸ “As these provisions show, the constitution does not contemplate that legislators and officials will act as they think best and leave the constitutionality of their acts to the courts. Courts may have the last word in interpreting the constitution, but [*Marbury v. Madison*] . . . did not imply that constitutional law is the province and duty only of the judicial department, leaving Congress and executive officials unconstrained to pursue their ends subject only to judicial review.”¹⁴⁹

However, the Oregon Supreme Court in *Liv. State* distinguished *Cooper* saying that it

did not view the constitutional duty to take the oath as creating a general license for any governmental official to go forth and remedy any constitutional wrong that the official perceived. Instead, the court [in *Cooper*] made its statement concerning an official’s independent duty to consider the constitution in the context of any agency official deciding a contested case, a circumstance in which the particular official (there, the superintendent) specifically was authorized by

145. *Id.* at 300.

146. *Id.* at 301-02.

147. *Id.* at 303.

148. *Id.* at 303 n.7

149. *Id.* at 303.

statute to exercise quasi-judicial authority to resolve a legal dispute between the parties before him.¹⁵⁰

The distinctions may make sense, but it is far from clear how they apply. It is not obvious that the action of the superintendent firing a teacher is an exercise of “quasi-judicial authority,” or that the actions of the County Commissioners are not, or that the superintendent, but not the commissioners, were “*deciding a contested case.*”

In addition to distinguishing *Cooper*, the *Li v. State* court observed that the laws governing marriage “are matters of statewide, not local, concern,” an observation the court used to fortify its conclusion that officials other than judges do not have authority to interpret the constitution.¹⁵¹ The fact that marriage is of state-wide concern led the court to conclude:

[T]he remedy for such a perceived constitutional problem would be either to amend the statutes to meet constitutional requirements or to direct some other remedy on a statewide basis. Obviously, any such remedy must originate from a source with the authority to speak on that basis. The legislature has such authority and, in an appropriate adversary proceeding, the courts have it as well.¹⁵²

But, as noted earlier, it is not uncommon to see divergent interpretations of state constitutions and laws in different parts of the state.¹⁵³ Were it the case that only authorities with state-wide jurisdiction have authority to interpret state-wide rules, lower courts, as well as local officials, would be unable to interpret constitutions and laws. In addition, it is not obvious why the conflict between Multnomah County and the state is not “an appropriate adversary proceeding” in which the court is able to offer a state-wide remedy. Nonetheless, the Oregon Supreme Court found that the County Commissioners did not have authority to interpret the constitution. That decision, along with the 2004 amendment to the Oregon Constitution, suggest that same-sex marriage will come to Oregon, if at all, only through the process of constitutional amendment.

The experiences in San Francisco, New Paltz, and Multnomah County have much in common. In each state, when the officials took action, there had been no definitive ruling on the constitutionality of the gay-marriage exclusion, either by the state’s highest court, or by the people through the amendment process.¹⁵⁴ Each state had a history of legal protection for gay

150. *Li v. State of Oregon*, 110 P.3d 91, 101 (Or. 2005).

151. *Id.*

152. *Id.* at 101-2.

153. *See supra* note 58.

154. For California, see *Sail’er Inn, Inc. v. Kirby*, 5 Cal. 3d 1 (Cal. 1971); *Perez v. Sharp*, 198 P.2d 17, 17 (Cal. 1948). For New York, see *People v. West*, 780 N.Y.S.2d 723, 724 (Just. Ct. New Paltz, 2004). For Oregon, see *Li v. Oregon*, No. 0403-03057, 2004 WL 1258167, at *1 (Or. Cir. Ct. Apr. 20, 2004); *County Attorney Memo, supra* note 123, at 2. *See generally* *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967).

relationships.¹⁵⁵ In each state the judiciary quickly became involved in adjudicating whether the exclusion of same-sex couples from marriage was constitutional under state law, though only in Oregon has the question of the legality of the exclusion of same-sex marriage been resolved.¹⁵⁶

But the stories also have important differences. First, the Multnomah County experience is different from those of Gavin Newsom and Jason West in that no individual is identified as the primary actor.¹⁵⁷ Second, Multnomah County's actions are also different from those of Newsom and West in that the official lawyer was asked for a formal opinion before actions were taken, and that advice was followed.¹⁵⁸ Newsom and West consulted broadly before they acted, but they picked their advisors.¹⁵⁹ Third, West, from a small village with a meager budget, declined to spend public resources and instead recruited volunteer help, while the other executives took advantage of public staff.

The most important similarity of the three cases is that, in each case, the objection to the mayors' actions was not that they got the substantive constitutional principles wrong, but rather that they were not entitled to have an opinion and to act on it. The next Part considers other moments in which executive officials have asserted authority to interpret constitutions and argues that, in some circumstances, it is legitimate for public officials to seek to conform their actions to their best understanding of the constitutions they are sworn to uphold. Whether and when it is politically wise to do so raises complex questions explored in Part III.

II. EXECUTIVE INTERPRETATION OF THE FEDERAL CONSTITUTION

In February 2004, when the mayors began issuing licenses to same-sex couples, several of my sophisticated colleagues reacted saying, "It is just like Orville Faubus."¹⁶⁰

155. See *supra* note 154.

156. For California, see *Lockyer v. City & County of S.F.*, 95 P.3d 459, 465-66 (Cal. 2004). For New York see *People v. West*, 780 N.Y.S.2d at 723. For Oregon, see *County Attorney Memo*, *supra* note 123, at 2.

157. All of the Multnomah County Commissioners cited their oath of office and desire to uphold constitutional principles of equality as the basis of their decision. Some also spoke of the value of families and marriage. One invoked her "sense of justice and Christian faith." Another spoke of gay friends who had asked for the right to marry. Commissioner Serena Cruz expressed appreciation "to the leaders from Basic Rights Oregon and the ACLU who encouraged us to take this important step forward." *Statements of Multnomah County Commissioners about Gay Marriage*, OREGONIAN, Mar. 5, 2004.

158. *County Attorney Memo*, *supra* note 123.

159. For Mayor Newsom, see Taylor, *supra* note 14, at 40; *supra* note 16; Frank, *supra* note 18. For Mayor West, see Sullivan, *supra* note 79, at § 6 at 38; *supra* note 86.

160. See also Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 481 (2005) (observing that the actions of the mayors made them locally popular, "much as southern governors such as Orval Faubus and George Wallace became virtually unbeatable politically by defying federal-court integration orders after *Brown*.").

Most of the scholarship addressing executive and legislative authority to interpret the constitution focuses on situations in which the relevant courts have spoken, interpreting the federal Constitution.¹⁶¹ Governor Faubus resisted the Supreme Court's decision in *Brown v. Board of Education*, and the local federal judges who enforced it. Part II-A, *infra*, argues that the actions of the mayors bear little resemblance to those of Orville Faubus. It discusses prior moments in our history in which executive officials have asserted authority to interpret the Constitution, independent of judicial decrees. Part II-B considers the far more common situation in which the relevant constitutional principles are murky and argues that both principle and practicality support executive authority to act on constitutional understanding on particular terms and conditions. Part II-B focuses on the work of the federal Office of Legal Counsel (OLC). OLC has articulated the principles that should guide the President when he believes that Congress has acted unconstitutionally. Finally, Part II-C defends a limited executive role in constitutional interpretation.

This Part focuses on experience under the federal Constitution because that is where issues have been analyzed and debated. It is not that the federal principles are controlling, or even that they provide clear answers, but rather that state constitutional understanding is commonly influenced by federal approaches, even when states choose to follow a different route.¹⁶² Questions of executive authority to interpret a constitution might well be different at the state or local level, or indeed different from state to state. By analogy, Part III discusses how the fact that state constitutions are generally easier to amend than the federal Constitution influences the ways in which state judges approach constitutional interpretation.¹⁶³ Part II-A describes a variety of positions that state executives and courts have taken, in particular contexts, on the power of executive officials to interpret state constitutions, independent of the judiciary. In addition to the mayors, several officials and courts affirmed that state and local executives have a legitimate role to play in the interpretation

161. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (challenging the thesis that nonjudicial officials do not need to treat Supreme Court opinions as authoritative in order to comply with their duty to obey the Constitution); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359 (1997) (defending a constrained, but independent, role for non-judicial actors in constitutional interpretation); Mark V. Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437 (1992) (exploring the Congressional response to *Texas v. Johnson*, 491 U.S. 397 (1989) striking down Texas ban on flag burning); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) (developing Lincoln's observation that resistance to constitutional decisions gives the courts a chance to reconsider. But, "[w]hen that chance has been exploited and has run its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation?").

162. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 183-85 (1988).

163. See *infra* text accompanying notes 289-91.

of state constitutions: the two New York town court judges;¹⁶⁴ the San Francisco County Superior Court;¹⁶⁵ and the Oregon Supreme Court in *Cooper v. Eugene School District No. 4J*.¹⁶⁶ On the other hand, several officials and courts deny that state and local executives have such authority: the California Supreme Court;¹⁶⁷ former New York Attorney General Spitzer;¹⁶⁸ and Ulster County Court Judge Bruhn.¹⁶⁹

But these scattered examples do not provide the basis for a comprehensive answer to the question whether and when local officials may legitimately act on the basis of their understanding of state constitutional law. Indeed, a broad answer to this question would probably need to be undertaken on a state-by-state basis. That task is beyond the scope of this Article. However, any effort to develop a general answer would wisely begin with an examination of the experience and literature developed at the federal level.

A. Historical Experience

In 1954, in response to the Supreme Court's first decision in *Brown v. Board of Education*, the Arkansas legislature amended the state constitution to command resistance to the "[u]n-constitutional desegregation decisions . . . of the United States Supreme Court."¹⁷⁰ When the school board decided to admit nine African-American children to the Central High School, Governor Orville Faubus dispatched the Arkansas National Guard to prevent the children from entering.¹⁷¹ Angry demonstrations at the school were so large that President Eisenhower dispatched federal troops to Little Rock to effectuate the admission of the African-American students.¹⁷²

In March 1958, the school board asked the federal district court to postpone their desegregation plan because of "extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of

164. *People v. West*, 780 N.Y.S.2d 723 (Just. Ct. New Paltz, 2004); *People v. Greenleaf*, 780 N.Y.S.2d 899, 899 (Just. Ct. New Paltz 2004).

165. *Lockyer v. City & County of S.F.*, 95 P.3d 459, 465-66 (Cal. 2004) (describing the Superior Court's ruling).

166. *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298 (Or. 1986).

167. *Lockyer*, 95 P.3d 459.

168. *N.Y. AG Opinion* 2004, *supra* note 101, at 1-2.

169. *Boniello*, *supra* note 5.

170. *Cooper v. Aaron*, 358 U.S. 1, 9 (1958).

171. *See Aaron v. Cooper*, 257 F.2d 33, 35-38 (8th Cir. 1958). Faubus, who was elected Governor six times and served from 1954 until 1966, was defeated after the adoption of the Voting Rights Act of 1965. He continued to run for Governor, unsuccessfully, until he was defeated by Bill Clinton in 1986. In the 1970s, in financial distress, he was forced to sell his home and take a job as a bank clerk in Huntsville, Ark. *Orville Faubus*, THE ANYTHING ARKANSAS ENCYCLOPEDIA,

http://www.anythingarkansas.com/arkapedia/pedia/Orval_Faubus/.

172. *Aaron*, 257 F.2d at 36.

the Governor and the Legislature.”¹⁷³ In June, the district court granted the delay, citing conditions of “chaos, bedlam and turmoil,”¹⁷⁴ and in August, the Court of Appeals for the Eighth Circuit reversed.¹⁷⁵ The Supreme Court heard the case on an expedited basis on September 11, 1958 and the next day a unanimous Supreme Court affirmed the circuit court and asserted a broad concept of its own power. *Marbury v. Madison*

declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land. . . . Every state legislator and executive and judicial officer is solemnly committed by oath . . . “to support this Constitution.”¹⁷⁶

To underscore the power of its ruling, the Court acted unanimously, *per curiam*, and each individual Justice signed the decision.¹⁷⁷

In 1986, as part of the celebration of the bicentennial of the Constitution, then Attorney General, Edwin Meese discussed this historic example and challenged the Court’s assertion that the Supreme Court interpretation of the Constitution, as well as the Constitution itself, is the “supreme law of the land.”¹⁷⁸ Meese’s argument was historical, suggesting that government officials have sometimes rightfully resisted Supreme Court pronouncements. The Supreme Court has announced principles that, in retrospect, are recognized to be egregiously wrong. Meese relied primarily on *Dred Scott*, the Supreme Court decision that declared that Congress could not prevent the extension of slavery into territories because the right of white citizens to possess slaves was a property right protected by the Constitution.¹⁷⁹ His point was not simply that *Dred Scott* was wrong and was subsequently reversed by the Court, but rather that while it was “the supreme law of the land,” respectable people, including President Abraham Lincoln, repudiated it.¹⁸⁰ Meese could have pointed to many other examples. As President, Thomas Jefferson, believing the Alien and

173. *Cooper*, 358 U.S. at 12.

174. *Id.* at 13.

175. *Id.*

176. *Id.* at 18.

177. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 255 n.10 (3d ed. 2000).

178. Edwin Meese, *The Law of the Constitution*, 61 *TUL. L. REV.* 979 (1987). He led with a rhetorical point, i.e. that if decisions are supreme law binding on all, the Court could never reverse itself. *Id.* at 983. However, judicial decisions could be supreme and, at the same time, modifiable by the body that made them, in accordance to with principles of *stare decisis*. *Id.*

179. *Id.* at 984.

180. *Id.*; Abraham Lincoln, Speech during the Lincoln-Douglas Senatorial Campaign (Oct. 1858), in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 255 (Basler ed. 1953); Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 *MESSAGES AND PAPERS OF THE PRESIDENTS* 5, 9-10 (Richardson ed. 1897).

Sedition Act to be unconstitutional, pardoned those convicted under it, even though no court had held it unconstitutional.¹⁸¹ President Andrew Jackson vetoed the bill to re-charter the Bank of the United States, believing it unconstitutional, even though the Supreme Court had famously held otherwise.¹⁸² FDR persistently challenged Supreme Court decisions striking down his New Deal programs and urged Congress to disregard those decisions.¹⁸³

The Meese talk provoked a storm of protest from the civil rights community, the media, and the academy.¹⁸⁴ His talk was disturbing for several reasons. First, the subject matter of *Cooper*—the end of state mandated racial segregation in the public schools—was constitutionally and socially important and, in 1957, still deeply controversial.¹⁸⁵ Second, Meese defended Governor Faubus and the Arkansas legislature which had mobilized the military power of the state to resist, not simply the general principles of *Brown*, but the concrete orders of federal courts in a specific case. By contrast, Jefferson, Lincoln, Jackson, and Roosevelt used powers of persuasion and political mobilization, rather than brute military force, to express their disagreement with the Court's interpretation of the Constitution. Third, Meese, as legal advisor to President Ronald Reagan, had pushed the edges of legitimate Executive disagreement with the Congress, the Court, and the Constitution.¹⁸⁶

181. Thomas Jefferson, Letter to Abigail Adams (Sept. 11, 1804), in 8 THE WRITINGS OF THOMAS JEFFERSON 310 (Ford ed. 1897) (“The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution.”).

182. Andrew Jackson, Veto Message, (July 10, 1832), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576, 581-83 (Richardson ed. 1896). The Supreme Court had upheld the constitutionality of the bank in *M'ulloch v. Maryland*, 17 U.S. 316 (1819).

183. When the Court held that Congress lacked constitutional authority to adopt the National Industrial Recovery Act, President Roosevelt urged Congress to adopt a similar program for the coal industry. “[I] hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.” Franklin D. Roosevelt, Letter to Congressman Hill (Jul. 6, 1935), in 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297-98 (1938).

184. See Stuart Taylor, *Liberties Union Denounces Meese*, N.Y. TIMES, Oct. 24, 1986, at A17 (quoting Eugene C. Thomas, the President of the American Bar Association, saying that Supreme Court decisions are indeed the law of the land and that “public officials and private citizens alike are not free simply to disregard their status as law.”). Ira Glasser, executive director of the American Civil Liberties Union, described Meese's speech as “an invitation to lawlessness.” *Id.*; see also Paul Brest, *Meese, the Lawman, Calls for Anarchy*, N.Y. TIMES, Nov. 2, 1986, § 4 at 23; Anthony Lewis, *Law or Power*, N.Y. TIMES, Oct. 27, 1986, at A23 (quoting Yale President, Benno Schmidt, saying that Meese was taking the country on a “disastrous course”); Dan Ostrow, *View that Court Doesn't Make Law is Scorned*, L.A. TIMES, Oct. 24, 1986, § 1, at 1.

185. See, e.g., Klarman, *supra* note 160, at 442-49.

186. As Attorney General from 1985 to 1988, Meese “developed comprehensive and detailed constitutional positions at odds with Supreme Court precedent on a broad range of

In retrospect, it seems that Meese was wrong in suggesting that the actions of Governor Faubus fell within the sphere of legitimate disagreement with Supreme Court interpretation of the Constitution.¹⁸⁷ Meese quickly moderated his view. In *The Tulane Speech: What I Meant*, he said that he had only advocated a policy of “debating, litigation, and legislating” to gain judicial reconsideration of an issue.¹⁸⁸

On the other hand, judicial and academic commentary concedes that Meese was on strong ground in challenging the *Cooper* dicta that political actors, like the public officials in New York, California, and Oregon, who are sworn to uphold the Constitution, are bound to support particular Supreme Court interpretations, as well as the Constitution itself.¹⁸⁹ As Professor Laurence Tribe says, “[T]he ‘meaning’ of the Constitution is subject to legitimate dispute, and the Court is not alone in its responsibility to address that meaning.”¹⁹⁰

Some of the classic examples of executive disagreement with judicial interpretation of the Constitution do not provide support for the mayors’ actions. First, basic principles of free expression protect the right of public officials to criticize the courts.¹⁹¹ However, this does not support the mayors’ actions because they purported to act as officials, not merely expressing an

issues, including abortion, congressional power, federalism, and affirmative action.” Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 106 (2004). Meese was counselor to the President, member of the President’s Cabinet and the National Security Council from 1981 to 1985, and Attorney General from 1985 to 1988. He was the subject of Independent Counsel Investigation in 1984 and again from 1984-1989, though no charges were presented to a grand jury. In 1983 Congress placed significant limits on official U.S. assistance to the Nicaraguan Contras. In late 1986 it was revealed that President Ronald Reagan’s administration had sold arms to Iran, then an avowed enemy of the United States, and diverted proceeds from the sale to the Contras. Both the sale of weapons and the funding of the Contras violated stated administration policy as well as legislation passed by the Democratic-controlled Congress. THE CAMBRIDGE DICTIONARY OF AMERICAN BIOGRAPHY 492-93 (John S. Bowman ed. 1995); Digital National Security Archive, <http://nsarchive.chadwyck.com/collections/ICintro.jsp>.

187. A contemporaneous editorial in the Washington Post, *Why Give That Speech?*, urged him to repudiate the “subtle, unspoken” message of endorsement of the Governor’s actions and to claim that Supreme Court decisions have no general applicability. Editorial, *Why Give That Speech?*, WASH. POST, Oct. 29, 1986, at A18.

188. Edwin Meese III, *The Tulane Speech: What I Meant*, WASH. POST, Nov. 13, 1986, at A20.

189. For an earlier articulation of this point see, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 264 (1962) (characterizing the *Cooper* opinion as mandating, indefensibly, that “[w]hatever the Court lays down is right, even if wrong, because the Court and only the Court speaks in the name of the Constitution.”); Sanford Levinson, *Perspective on the Authoritativeness of Supreme Court Decision: Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987).

190. TRIBE, *supra* note 177, at 256.

191. This principle justifies President Lincoln’s criticism of *Dred Scott*, *supra* note 180.

opinion on a constitutional issue, but rather undertaking official action on the belief that denying licenses to same-sex couples was unconstitutional.¹⁹² Second, some matters, such as vetoes and pardons, are constitutionally delegated to the sole discretion of the executive.¹⁹³ This also fails to provide support for the mayors' actions since none claimed that the determination of who could marry was expressly delegated to their discretion. Rather, all recognized that marriage is governed by their states' domestic relations law and constitution, and simply adopted a constitutional interpretation on an issue that had not been resolved by the relevant courts.

Nonetheless, the mayors are not Faubus. First, Faubus, sworn to uphold the Constitution of the United States, acted in defiance of the Supreme Court's holding in *Brown* that state-mandated racial segregation violated the Fourteenth Amendment. The mayors did not act in defiance of any federal or state constitutional ruling on the legitimacy of excluding same-sex couples from marriage. None relied on a personal understanding of natural justice, fundamental fairness, or higher law. Rather, the mayors relied on their own state constitutions. In California, New York, and Oregon, the question whether state constitutions allowed same-sex couples to be excluded from marriage was contested. The mayors acted on a reasonable—if controversial—belief that the exclusion was unconstitutional. Faubus not only rejected the general principles articulated by the Supreme Court in *Brown*, he also defied specific orders of the local court with jurisdiction over his actions.¹⁹⁴ By contrast, when local courts told the mayors to stop marrying same-sex couples, they immediately complied.

B. Lessons from the Federal Office of Legal Counsel

Executives often confront constitutional issues on which courts are silent or divided. The mayors acted on a slate that, while not entirely clean, contained no constitutional rule settled by the text of the document or judicial interpretation. Many constitutional questions are not black and white, but shades of grey. It is

192. Many people have suggested to me that the mayors' actions could best be defended as a form of civil disobedience. Their actions share many of the classic characteristics of civil disobedience. They were motivated by principle, open, nonviolent, and willing to submit to state authority. MOHANDAS K. GANDHI, *SATYAGRAHA IN SOUTH AFRICA* (1928); MARTIN LUTHER KING, JR., *Letter from Birmingham Jail* in *WHY WE CAN'T WAIT* (1964); HENRY DAVID THOREAU, *RESISTANCE TO CIVIL GOVERNMENT* (1849). But the mayors acted as public officials, not private citizens. They claimed state power to uphold the law, as they understood it, not to resist it as unjust.

193. For example, because the President is free to veto legislation or issue a pardon for any reason, he or she can veto or pardon on grounds of disagreement with the constitutionality of the legislation or conviction. This discretion explains and justifies the actions of President Jefferson, pardoning those convicted under the Alien and Sedition Act, and the actions of President Jackson, vetoing the bill to reauthorize the Bank of America. See *TRIBE*, *supra* note 177, at 258.

194. *Aaron v. Cooper*, 257 F.2d 33, 35-38 (8th Cir. 1958).

common for executive officials to operate in areas in which the constitutional principles are not clear. That was the situation confronting the mayors.

The federal Office of Legal Counsel (OLC) provides one thoughtful model of how an executive should approach constitutional interpretation.¹⁹⁵ Professor Dawn E. Johnsen is a leading scholar on the question of executive power to interpret the Constitution and to act on the basis of constitutional understanding. Building on the work of other scholars and her experience in the federal Office of Legal Counsel, 1993-1998, she offers and defends a comprehensive set of principles to guide the President in determining whether to decline to enforce or defend a statute he believes to be unconstitutional.¹⁹⁶ This Subpart briefly summarizes Johnsen's theory and explores how the principles that have developed in the OLC apply to the actions of the mayors as local executive officials.

At one extreme, some argue that the constitutional command that the President "take care that the Laws be faithfully executed" requires executive enforcement, despite constitutional doubts.¹⁹⁷ At the other, many argue that every public official is obligated to take seriously his or her oath to uphold the Constitution.¹⁹⁸ Johnsen critiques these views and argues that the "President does not most faithfully execute the laws either by invariably refusing to enforce statutes based solely on his independent views of what the Constitution means or by enforcing all statutes regardless of their constitutional infirmities."¹⁹⁹ Context matters. The actual practices of Presidents and their legal advisors have varied, depending on circumstances, and prior practice is an important part of context.²⁰⁰

In most situations the President should presume that duly enacted laws are constitutional. That presumption should be overcome only when the

195. In 1950, Congress created the Office of Legal Counsel headed by its own Assistant Attorney General. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Nominative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993).

196. Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000) [hereinafter *Johnsen 2000*]; Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROB. 105 (2004) [hereinafter *Johnsen 2004*]; Dawn E. Johnsen, *Guidelines for the President's Legal Advisors*, 81 IND. L. J. 1345 (2006) [hereinafter *Guidelines*]; Walter Dellinger, et. al., *Principles to Guide the Office of Legal Counsel: Dec. 21, 2004*, 81 IND. L. J. 1348 (2006) [hereinafter *OLC Principles*] (a statement by 19 former OLC lawyers, including Dawn Johnsen).

197. See, e.g., Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994).

198. See, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990). Judge Easterbrook asserts that, "The tough question in *Marbury* was not whether the Constitution trumps a statute, but who interprets the meaning of the Constitution." *Id.* at 919-20. For more general discussion, see *Johnsen 2000*, *supra* note 196, at 17-22.

199. *Johnsen 2000*, *supra* note 196, at 22.

200. *Id.* at 23-29.

executive's disagreement with positive law "results from a principled, deliberative, transparent process that appropriately respects the views and authorities of the other branches."²⁰¹ A 2004 statement by nineteen former OLC lawyers identified several factors that should guide lawyers giving the executive constitutional advice. First, "the OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies."²⁰² It should respect the constitutional authority of coordinate branches, particularly when executive action is unlikely to be subject to judicial review.²⁰³ Disagreements with Congress should be rare and openly disclosed in a timely manner.²⁰⁴ The OLC should consult broadly with affected agencies before rendering advice.²⁰⁵

Did the mayors' actions meet these standards? Each acted on the basis of a principled understanding that the exclusion of same-sex couples from marriage violated their state constitutions. They did not purport to act on the basis of personal preference or politics. While the constitutional defect in California's, New York's, and Oregon's exclusion of same-sex couples was not clear, it was legitimately arguable. The processes by which they acted were deliberative, though not as elaborate as those employed by OLC. All consulted broadly.²⁰⁶ The mayors' actions were "transparent," with the possible exception of West's decision to delay informing the town board of his plans until after he had begun performing marriages.²⁰⁷

Were the mayors "appropriately respectful of the views and authorities of the other branches"? Consider first whether their actions respect the legislative branch and the people acting legislatively through referenda. Executives owe greatest deference to legislatures when they have acted recently, and considered the constitutionality of their actions. By contrast, the need for executive deference to the legislature is at the lowest point when the legislation is old, subsequent developments in constitutional law cast doubt on the legislative

201. *Johnsen 2004, supra* note 196, at 110. In discussing the President's authority to decline to enforce a law he believed to be unconstitutional norms, Johnsen set the following standards: "a presumption of enforceability of statutes . . . should be overcome only when non-enforcement would allow the President responsibly and usefully to advance constitutional norms and dialogue regarding their definition. In making non-enforcement decisions, the President should be respectful of the functions and competencies of the other branches and should not seek to impose his own views to the exclusion of those of Congress and the courts." *Johnsen 2000, supra* note 196, at 12.

202. *OLC Principles, supra* note 196, at 1348.

203. *Id.* at 1349.

204. *Id.* at 1350.

205. *Id.* at 1351-52.

206. For Mayor Newsom, see Taylor, *supra* note 14, at 40; *supra* note 16; Frank, *supra* note 18. For Mayor West, see Sullivan, *supra* note 79, at § 6 at 38; *supra* note 86.

207. *Supra* text at note 89.

rule, and the question of constitutionality was not addressed by the legislature.²⁰⁸

On this dimension, Gavin Newsom is on weakest ground. The people of California, through referenda, had recently declared that marriage was limited to a man and a woman.²⁰⁹ While, as a technical matter, this did not resolve the constitutional issue, it did underscore that Newsom's interpretation of the California Constitution was at odds with the recently expressed will of the people. By contrast, West's actions are least disturbing in terms of respect for legislative authority. New York's statutory definition of marriage is old,²¹⁰ and has not been reconsidered by the legislature in light of subsequent constitutional and cultural developments. (On the other hand the New York Court of Appeals eventually said that West's understanding of the constitution was wrong.²¹¹) In Oregon, the legislature had adopted legislation recognizing civil unions between same-sex couples, and the state supreme court had held that failure to extend state medical benefits to such same-sex couples violated the state constitution.²¹² On the other hand, neither the legislature nor the courts had taken the next step to require marriage equality.

Did the mayors' actions reflect appropriate respect for the paramount role of the judiciary in constitutional interpretation? In each case, the mayors appreciated that the constitutionality of the marriage exclusion would ultimately be decided by the courts. When courts ordered them to stop marrying same-sex couples, they complied.

For several reasons, the OLC model is not directly applicable to the mayors. First, the constitutional principles delineating the powers of the three branches are more explicit and well developed at the federal level than in most states. Second, the OLC has a more extensive, dedicated expert staff than is available to any mayor.²¹³ Third, in practice, the OLC does not always live up to its aspirations.²¹⁴ Still, the OLC's aspirations provide a useful model by which to evaluate the mayors' actions.

208. "The President, for example, promotes implementation of the Supreme Court's pronouncements by declining to enforce laws that are indistinguishable from those the Court has held unconstitutional." *Johnsen 2004, supra* note 196, at 130-31.

209. *In re Coordination Proceedings*, No. 4365, 2005 WL 583129, *6 (Cal. Sup. Ct. 2005).

210. Article 2 and 3 of New York Domestic Relations Law were adopted in 1909. *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006).

211. *Hernandez*, 855 N.E.2d at 1.

212. *Tanner v. Or. Health & Sci's Univ.*, 971 P.2d 435 (Or. Ct. App. 1998).

213. The OLC has a "politically appointed and Senate-approved Assistant Attorney General at the head, four deputies, and approximately twenty career Attorney Advisors." Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 713 (2005).

214. *OLC Principles, supra* note 196; Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1150 (2006).

In sum, it seems that the mayors' actions at least came close to meeting the standards articulated by the OLC to define the President's authority to interpret the federal Constitution. At a minimum, the mayors came close enough to complying with these multifaceted principles to make the judicial and public outrage that they had acted at all appear overstated. At the same time, the question is close. Indeed, Johnsen, relied upon here, believes that the mayors' actions were not legitimate. Her main objections are that their actions were unnecessary to present the constitutional issue to the courts and that the need for uniformity and stability is greater when a local official, rather than a President, acts.²¹⁵

Since September 11, 2001, in the name of national security and the war on terror, President George W. Bush has asserted expansive, unprecedented, often secret, executive authority with respect to preemptive self-defense, warrantless surveillance, detention of "enemy combatants," military tribunals, torture, and other extreme forms of interrogation.²¹⁶ The federal OLC has defended these assertions of presidential authority.²¹⁷ In so doing, President Bush and his OLC depart dramatically from the principles articulated and applied by its predecessors and many have contested the new assertion of Presidential power.²¹⁸ In September 2006, the Congress affirmed most of the Presidential assertions of authority.²¹⁹ The profoundly important issues raised by these developments are beyond the scope of this article. The actions of President Bush and the mayors are fundamentally different. The President acts in the name of national security in time of war, while the mayors address concerns that, while important, are far less able to sustain an assertion of executive authority. On the other hand, the actions of the mayors were far more transparent and respectful of the authority of coordinate branches.

215. Personal Correspondence from Dawn E. Johnsen (Oct. 2, 2005).

216. See, e.g., Elizabeth Drew, *Power Grab*, N.Y. REV. OF BOOKS, (June 22, 2006).

217. Between 2001 and 2003, John Yoo in the Justice Department, and White House counsel Alberto Gonzales developed the theory that Article II gives the president independent authority to decide what the law means, unchecked by other branches. The claim rests on the authority of the inherent power of the commander in chief, and more generally on the concept of a unitary executive. JOHN YOO, *THE POWER OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

218. David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355 (2006); Koh, *supra* note 214. Three times the Supreme Court cautiously rebuffed broad assertions of executive authority. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (noting that Congress had not authorized trial of non-citizen enemy combatant by military tribunal); *Rasul v. Bush*, 542 U.S. 466 (2004) (requiring habeas corpus be available to non-citizens detained at Guantanamo Bay, a U.S. territory); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that due process requires a fair hearing for indefinite detention of citizens defined as enemy combatants).

219. Scott Shane & Adam Liptak, *Shifting Power to a President*, N.Y. TIMES, Sept. 30, 2006, at A1.

C. Why it Matters Whether Executives Seek to Act on the Basis of Constitutional Understanding

Constitutional issues are pervasive in modern legal culture. Public officials decide whether an in-person hearing prior to the termination of benefits in circumstances in which it is unclear whether a prior hearing is constitutionally required.²²⁰ Local officials decide whether denying a building permit constitutes an unconstitutional taking.²²¹ A school board decides whether to remove a book from the library in response to parent complaints.²²² Public officials decide who can participate in public events.²²³ Public employees are fired, or not, on the basis of their speech.²²⁴

The claim that local officials should take the constitution seriously in situations where the constitutional principles are unsettled is supported by reasons of both practicality and principle. Sometimes constitutional issues could be raised in court in some alternative way and adjudicated by the judiciary. Nonetheless, most of the time, no court will ever pass on the constitutional issues. That is not because the claims are not justiciable or that the public official would resist a judicial determination, but rather for more practical reasons. Many people asserting constitutional claims have no realistic possibility of going to court. It is much easier to find a lawyer who will make a constitutional argument to an administrative official than to find one who will go to court.

Paul Brest has long been an eloquent advocate of the view that all branches of government, not just the courts, should seek to conform their public actions to constitutional principles. He observes that moral issues are frequently constitutional issues in our culture. If the courts' duty to interpret the constitution is exclusive, politics becomes drained of morality, and political

220. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that an in person hearing required prior to the termination of welfare) with *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that no in-person hearing was required prior to the termination of Social Security Disability benefits).

221. See *Lockyer v. City & County of S.F.*, 95 P.3d 459, 462-63 (Cal. 2004).

222. *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (removing controversial books from the shelves of a high school library may violate the First Amendment, if it exceeds a school board's discretion in managing school affairs).

223. See Waite David, *City Opens Parade to All*, HONOLULU ADVERTISER, June 24, 2004, at 3B (noting how the City refused to open the parade, the plaintiffs sued, the City settled and paid the ACLU \$85,000 in attorney fees); see also Brent T. White, *Say You're Sorry: Court Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1263-1264 (2006).

224. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006) ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.").

actors make decisions solely on the basis of practicality and political expediency, rather than constitutional principle.²²⁵

Our practices for determining issues of public morality are deeply flawed. We rely too heavily on the Supreme Court of the United States to determine them for us. We give too much responsibility to the Court, and too little to other institutions; we evade our own responsibility as citizens in a democratic polity. The problem is not that too many issues are “constitutionalized,” for many of our most important public moral issues are quite properly treated as constitutional questions. The problem, rather, is that we assume that only the Court is authorized to decide, or is capable of deciding, constitutional questions.²²⁶

As Professor Laurence Tribe puts it, “a variety of actors must make their own constitutional judgments, and possess the power to develop interpretations of the Constitution which do not necessarily conform to the judicially enforced interpretation articulated by the Supreme Court.”²²⁷

There is tremendous popular hostility to judicial power.²²⁸ While complaints about “activist judges” are not new, “the current uproar is particularly worrisome—both because of the extreme nature of the restraints being proposed and the degree to which such sentiments are being voiced not by a powerless fringe but by those in positions of authority.”²²⁹ Further, this anger is being “directed at a federal judiciary in general, and a Supreme Court in particular that is far more conservative than the liberal bench that once provoked similar complaints.”²³⁰

The assumption that only the courts have the power and duty to interpret constitutions means that only the courts take the political heat when people disagree with the conclusions that they reach. In the prior examples, if the

225. Paul Brest, *A Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

226. Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986).

227. TRIBE, *supra* note 177, at 257.

228. Erwin Chemerinsky, Op-Ed., *Attack On Courts Threatens Crucial Checks and Balances*, DAILY JOURNAL, Apr. 12, 2005 (Senator John Cornyn, R-Texas, publicly links violence against a federal judge's family in Chicago and in a Georgia courtroom to public frustration with “political decisions” by judges that “builds up and up to the point where some people engage in violence.” Chemerinsky sensibly observes, “The tragic violence in Chicago and Atlanta were the acts of disturbed individuals; Cornyn glorifies the murders by falsely turning them into political statements.”); Sheryl Gay Stolberg, *Majority Leader Asks House Panel to Review Judges*, N.Y. TIMES, Apr. 14, 2005, at A1 (Representative Tom DeLay, the House Majority leader, asserted that the state and federal judges that allowed Terri Schiavo's feeding tube to be removed should be impeached. He then retreated, suggesting that they should be subject to Congressional investigation and “held responsible.” He said, “We set the jurisdiction of the courts. We set up the courts. We can unset the courts.”).

229. Ruth Marcus, Editorial, *Booting the Bench: There's New Ferocity in Talk of Firing Activist Judges*, WASH. POST, Apr. 11, 2005, at A19.

230. *Id.*

school board decides to keep the book on the shelf and that decision is unpopular, it will bear some of the political criticism. If the mayor allows gay families to join the parade, he or she will share in the political credit or blame. Particularly if the results are constitutionally mandated, it is healthy that public officials, in addition to judges, share in responsibility for constitutional fidelity.

III. EVEN IF LEGALLY JUSTIFIABLE, WERE THE MAYORS' ACTIONS POLITICALLY WISE?

This final Part speaks in the voice of a civil rights advocate. Like the mayors, I see marriage equality as a core issue of individual dignity and human equality, as well as a constitutional right. This Part asks whether the actions of the mayors helped or hurt the larger principles that they sought to implement.

Any civil rights movement must balance the benefit of a possible, temporary victory in a particular context, and the backlash that any "victory" might produce. Examples abound. *Roe v. Wade*,²³¹ protecting women's right to choose whether to bear a child, was a huge victory for women's liberty and equality.²³² But *Roe* precipitated a backlash unprecedented in our constitutional history.²³³ In 1993, the Hawaii Supreme Court held that the exclusion of same-sex couples from marriage violated the gender equality provisions of the state constitution.²³⁴ That was a cause for celebration for gay people. But in 1998 the voters of Hawaii amended the state constitution to authorize the legislature to limit marriage to men and women.²³⁵ In 1996 Congress adopted the Defense of Marriage Act,²³⁶ and many states acted affirmatively to reject same-sex

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

232. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 981 (1984) ("Nothing the Supreme Court has ever done has been more concretely important for women.").

233. DALLAS A. BLANCHARD, *THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIERY PROTEST* (Twayne Publishers 1994).

234. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

235. *Baehr v. Miiike*, 994 P.2d 566 (Haw. 1999).

236. The two provisions of the Defense of Marriage Act (DOMA) appear in two, separate volumes of the U.S. Code. Section 2(a) of the original act, Pub. L. 104-199 (1996), provides that "No state . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C (1996). Since states have always had that authority, *see supra* note 110, this federal provision is largely symbolic. Section 3(a) of the original act, Pub. L. 104-199 (1996), provides that for the purposes of all federal laws, marriage is "a legal union between one man and one woman." 1 U.S.C. § 7 (1996). As a practical matter this means that same-sex couples do not qualify for tax, Social Security, and other federal benefits available to married people.

marriage.²³⁷ (On the other hand, the Hawaii decision had a direct influence on the courts in Vermont and Massachusetts that recognized same-sex unions.)²³⁸ By contrast, while the 1986 Supreme Court decision in *Bowers* was contemptuous of gay people, they continued to make progress in efforts to achieve liberty and equality in courts, legislatures and public opinion.²³⁹

How should the mayors, or other advocates for equality, think about the fact that success generates backlash?²⁴⁰ The conventional wisdom is that constitutional interpretation is a matter of principle, rather than social policy or politics, while also understanding that these lines are not sharp.²⁴¹ We assume that courts have a high obligation to act on principle, while recognizing that they take practical considerations into account in constitutional interpretation. These assumptions mean that judges are expected to act on their best understanding of legal principle, without fear that their decisions will be unpopular or produce resistance. At the same time, judges do, inescapably, consider the practical effect and political reactions to their decisions.²⁴²

237. As of Nov. 15, 2006, 28 states had adopted laws rejecting same sex marriage. DOMA Watch, Marriage Amendment Summary, <http://www.domawatch.org/amendments/amendmentsummary.html>. Courts in four states have rejected state constitutional claims to marriage equality. Washington: *Anderson v. King Co.*, 138 P.3d 963 (Wash. 2006); New York: *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); California in its intermediate court of appeals: *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *pet. for review granted* 149 P.3d 737 (Cal. Dec. 20, 2006); and Indiana in its intermediate court of appeals: *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).

238. *Baker v. State*, 744 A.2d 864 (Vt. 1999) (Johnson, J., concurring, rested on the gender discrimination analysis of the Hawaii Supreme Court in *Baehr v. Lewin.*); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring and providing a critical vote, also adopted the gender discrimination analysis of the Hawaii Supreme Court in *Baehr.*).

239. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 61-65 (2d ed. 2003).

240. For recent comparisons of the backlash generated by *Brown* and *Lawrence*, see Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006) ("The aftermaths to *Brown* and *Goodridge* teach us that backlash is a predictable result of significant civil rights advances. The aftermath to *Brown*, however, also teaches us that the backlash can be overcome."); Klarman, *supra* note 160, at 482 ("By outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance.").

241. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977); Tushnet, *supra* note 161.

242. *Brown v. Board of Education*, 347 U.S. 483 (1954), provides a classic example. Practical concerns about resistance to school desegregation were a central focus of the Supreme Court's consideration. RICHARD KLUGER, *SIMPLE JUSTICE* 650-728 (1976). Politically, *Brown* provided "immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world people[]." Derek Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

Public officials other than judges have much greater latitude to consider practicality and politics.²⁴³ But the point of this article is that they also should consider constitutional principle. The question of how to strike the balance between principle, practicality, and politics is difficult and no general answer is possible.

This Part considers two factors that might influence judgment on the question of whether the actions of the mayors made political sense. First, did the actions of the mayors make a critical difference in the Presidential election of 2004? George W. Bush won the popular vote by 2.4% and the Electoral College by a very small margin.²⁴⁴ The mayors who married same-sex couples also opposed the election of George W. Bush. This Part examines the evidence and arguments for and against the proposition that the same-sex marriage debate made a decisive difference in the 2004 Presidential election. Second, the mayors broke a long-standing pattern in which civil rights advocates seek to present major constitutional issues to courts in a considered and coordinated manner. Was the addition of mayors to this complex advocacy movement politically prudent?

A. Mayors and the Presidential Election

The 2000 Presidential election brought us the concept of red and blue states.²⁴⁵ U.S. politics have long been defined by geography. Prior to the Civil Rights Movement of the 1960s, the solid South was the political base of the Democratic Party.²⁴⁶ Since the late 1970s, the South has become increasingly Republican, first at the presidential level, and then in state and local government.²⁴⁷ By contrast, in the Northeast in 1976, Gerald Ford beat Jimmy Carter in four of the six New England states. By 2000, the political map gave the South and the Midwest to the Republicans, while the Democrats controlled the East and West coasts.²⁴⁸ This big picture masks the fact that there are many blue voters in red states, and vice versa. Our winner-take-all form of elections, and the Electoral College system for presidential elections, means that state by state outcomes matter. In the 2004 presidential election, victory for Bush or Kerry was a foregone conclusion in most states.

243. Members of Congress often vote for and Presidents often sign bills containing a provision that they regard as unconstitutional because the program authorized is important, or the unconstitutional provision is only one small aspect of an important legislative package. See *Johnsen 2000, supra* note 196, at 46.

244. LARRY J. SABATO, *DIVIDED STATES OF AMERICA: THE SLASH AND BURN POLITICS OF THE 2004 PRESIDENTIAL ELECTION* 54 (2005).

245. JAMES W. CEASER & ANDREW E. BUSCH, *RED OVER BLUE: THE ELECTIONS AND AMERICAN POLITICS* 1 (2005).

246. *Id.* at 22.

247. *Id.* at 24.

248. SABATO, *supra* note 244, at 55-65.

Thus, political activists and observers focused on the swing states. In the 2004 elections only three states changed their political color from 2000. New Hampshire crossed from red to blue, while Iowa and New Mexico went from blue to red. In each of these states the margin of victory was small in both years. All together, they did not make a difference in electing a president.²⁴⁹ The swing states were those with sufficient electoral votes to make a difference in the outcome, and sufficient uncertainty about whether they were red or blue, to make them worth contesting. Most analysts defined the swing states as Ohio, Pennsylvania, Florida and Michigan. None of them changed color. In 2000 and 2004, Pennsylvania and Michigan narrowly voted Democratic, while Ohio and Florida narrowly voted Republican.²⁵⁰ The 2004 election saw unusually high voter participation; 59.4% of eligible voters went to the polls, as compared to around 50% from 1988 to 2000. Not since the 1960s had voter turnout approached the 60% mark.²⁵¹

The primary evidence that the gay marriage issue helped Republicans in 2004 is a widely discussed exit poll showing that 22% of voters ranked “moral values” at the top of their list of concerns, and 80% of that group voted for George Bush.²⁵² The 2004 race was proclaimed a “values election.”

More concretely, in response to the decision of the Massachusetts Supreme Judicial Court in November 2003,²⁵³ Republicans in Congress proposed a constitutional Amendment that would have mandated a federal definition of marriage as limited to a man and a woman. In July 2004, a 48-50 procedural vote thwarted Republican hopes to bring a constitutional amendment banning same-sex marriage before the Senate. The House waited until September 30 to bring the amendment to the floor; it attained a 227-186 majority, but fell short of the constitutionally required two-thirds vote. The vote may have had political consequences for both its supporters and opponents.

James W. Ceaser, a professor of politics at the University of Virginia, and Andrew E. Busch, a professor of government at Claremont McKenna College, both scholars of U.S. presidential elections, suggest that “the congressional votes likely mobilized more social conservatives to take action on the state level. If Congress would not act, the states would—a sentiment that boosted Republican turnout in the states.”²⁵⁴

In addition, in 2004, eleven states, including the swing states of Ohio and Michigan, offered voters ballot initiatives amending state statutes and

249. CEASER & BUSCH, *supra* note 245, at 10.

250. *Id.*

251. SABATO, *supra* note 244, at 54-55.

252. CNN.com Exit Poll, *at*

<http://www.cnn.com/ELECTION/2004/pages/results/states/us/p/00/EPOLLS.0.html> (Other matters defined as “most important” were: Economy/Jobs (20%), Terrorism (19%), Iraq (15%), Health Care (8%), Taxes (5%), and Education (4%).).

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

254. CEASER & BUSCH, *supra* note 245, at 149-50.

constitutions to declare that marriage is limited to one man and one woman.²⁵⁵ Some claimed that the measures “acted like magnets for thousands of socially conservative voters in rural and suburban communities who might not otherwise have voted.”²⁵⁶ All of the initiatives passed by wide margins. In only two states—Michigan and Oregon—were the amendments held to less than 60% of the vote.²⁵⁷

On the other hand, a powerful case can be made against the claim that the backlash against same-sex marriage was a determinative factor in the 2004 election. The much touted claim that the 2004 race was a “values election” does not withstand scrutiny. While 22% of the voters identified “moral issues” as the most important factor explaining their votes, 34% identified “national security issues,” including both terrorism and the war in Iraq as most important.²⁵⁸ Twenty-five percent cited economic issues as most important, including jobs and taxes.²⁵⁹ As a technical matter the poll questions were formulated to give greater weight to “moral issues” by lumping them all together.²⁶⁰ The phrase “moral issues” was not defined. Many voters viewed the war in Iraq, the veracity of the President, or lack of jobs and health insurance as “moral issues.”²⁶¹ In addition, from the conservative perspective “moral issues” encompasses concerns about abortion, sex education, and stem cell research, as well as opposition to same-sex marriage.

Ceasar and Busch observe that these “technical issues, however, were only the backdrop to the psychological wish many had to believe that the election was determined by millions upon millions of evangelical voters who had turned out in a fit of primitive prejudice to express their fear of homosexual marriage This view of the electorate was frightening to those who espoused it, but it was also consoling: it proved that defeat was at the hands of those whose votes had no moral, ethical, or intellectual worth.”²⁶² While Ceasar and Busch thus underscore possible liberal motivation to depict the election as a moral struggle over gay marriage, the conservative evangelicals have even more incentive to

255. *Id.* at 133-34.

256. James Dao, *Same-Sex Marriage Issue Key to Some GOP Races*, N.Y. TIMES, Nov. 4, 2004, at P4.

257. CEASER & BUSCH, *supra* note 245, at 161-62; *see also*, Klarman, *supra* note 160, at 466 (arguing that gay marriage may have helped elect Bush).

258. CEASER & BUSCH, *supra* note 245, at 15.

259. *Id.*

260. *Id.*

261. THOMAS FRANK, WHAT’S THE MATTER WITH KANSAS? 309 (2005).

262. CEASER & BUSCH, *supra* note 245, at 15 (pointing specifically to a column by Garry Wills asserting that Bush had mobilized those who believe “more fervently in the Virgin birth than in evolution” and was able to be reelected “precisely by being a divider, pitting the reddest aspects of the red states against the blue half of the nation.”); Garry Wills, *The Day the Enlightenment Went Out*, N.Y. TIMES, Nov. 4, 2004, at 25; *see also* Charles Krauthammer, “Moral Values” Myth, WASH. POST, Nov. 12, 2004, at A25 (challenging the view that the issue of same-sex marriage was responsible for the Bush victory).

do so. If they deliver the White House to George Bush, they can reasonably expect him to deliver on their issues.

MIT political science professors Stephen Ansolabehere and Charles Stewart III analyzed the Presidential election vote in the eleven states that had measures before the voters to prohibit gay marriage in 2004. They note that all but Michigan and Oregon had voted for Bush in 2000.²⁶³ Only three—Michigan, Ohio and Oregon—were battleground states. This suggests that the movement to ban same-sex marriage was independent of the Republican presidential campaign because “these are hardly the states one would choose if gay marriage were being used as a wedge issue.”²⁶⁴ In addition, contemporaneous reports from the campaigns for Bush and against same-sex marriage confirm that they were not coordinated.²⁶⁵

Overall, Bush lost vote share in each of the three battleground states with gay-marriage bans on the ballot, falling from 49.7% of the overall two-party vote in these states in 2000 to 49.6% in 2004.²⁶⁶ John Kerry lost Ohio, a state with a ballot initiative and substantial efforts by the Christian right to mobilize voters. But Kerry won a greater percentage of the vote in Ohio in 2004 than Gore did in 2000.²⁶⁷ In contrast, Bush gained vote share in the battleground states that did not vote on gay marriage. In Florida, Iowa, Minnesota, New Mexico, Pennsylvania, and Wisconsin, Bush’s combined 50.4% of the vote represented a one-percentage-point increase over 2000.²⁶⁸

Ansolabehere and Stewart claim that voting patterns at the county level provide additional support for the conclusion that the marriage referenda did not help Bush. In states without gay marriage on the ballot, Bush’s gains were a fairly constant three percent across counties. “But in states with gay marriage on the ballot, where counties that were pro-Bush in 2000 were even more pro-Bush in 2004 and counties that were pro-Gore in 2000 were even more pro-Kerry in 2004, there was an overall net shift of 2.6 percentage points *away from Bush* from the first election to the second. In other words, in states where gay

263. Stephen Ansolabehere & Charles Stewart III, *Truth in Numbers*, BOSTON REV., Feb./Mar. 2005, available at <http://bostonreview.net/br30.1/ansolastewart.html> (listing the eleven states: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Oregon, and Utah.).

264. *Id.*

265. Alan Cooperman & Thomas Edsall, *Evangelicals Say They Led Charge for the GOP*, WASH. POST, Nov. 8, 2004, at A1 (noting how the idea of a ban on gay marriage “initially met resistance” from the White House; as one minister put it, “It was a good thing we weren’t coordinating with the Republican Party, because there wasn’t anyone to coordinate with.”).

266. CEASER & BUSCH, *supra* note 245, at 22.

267. 48.9% rather than 48.2%. See Ansolabehere & Stewart, *supra* note 263.

268. *Id.*

marriage was on the ballot, partisan voting patterns became more pronounced, with a net advantage for Kerry.”²⁶⁹

Thus, and perhaps inevitably, the evidence about the impact of same-sex marriage on the Presidential election is inconclusive. By 2006, Republican pollsters and consultants agreed that the gay marriage initiatives did not drive turn out or make a decisive difference in the election.²⁷⁰

B. The Mayors and the Civil Rights Bar

Since the 1950s civil rights lawyers in a wide variety of areas have sought, with greater or lesser success, to be thoughtful and broadly consultative in making complex political judgments about how claims can best be framed, and when and where they can best be brought. This model of law reform in the service of a civil rights movement was first developed in the 1950s by Thurgood Marshall of the NAACP Legal Defense Fund.²⁷¹ In the late 1960s, the Welfare Rights Movement and the newly created Legal Services organizations followed and modified the NAACP model in formulating law strategy.²⁷² In the 1970s, the women’s movement, under the legal leadership of Ruth Bader Ginsburg of the ACLU Women’s Rights Project, similarly crafted a careful and substantially successful strategy, to extend constitutional norms of liberty and equality to women.²⁷³ The ACLU provides thoughtful leadership in shaping civil rights and civil liberties claims in many areas.²⁷⁴ As the gay rights movement emerged,²⁷⁵ it also looked to legal rights organizations to frame and mount legal challenges, especially constitutional claims.²⁷⁶ Conservatives have

269. *Id.* at ¶ 9. (“The effect is not enormous, but it is statistically significant and politically meaningful.”).

270. Bush pollster Matthew Dowd doubts that gay marriage made a decisive difference. “It didn’t drive turnout in 2004. That is urban legend.” GOP consultant Grover Norquist agrees. Debra Rosenberg, *Politics of the Altar*, NEWSWEEK, May 11, 2006, at 34.

271. KLUGER, *supra* note 242.

272. MARTHA DAVIS, *BRUTAL NEED: THE WELFARE RIGHTS MOVEMENT* 56, 72 (1993).

273. Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 TEX. J. WOMEN & L. 157, 165-240 (2002); *see also* Law, *supra* note 232.

274. *See generally* SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (2d ed. 1999).

275. Virtually every analysis of gay Liberation dates its birth to June 27, 1969, when gay male patrons of the Stonewall bar in New York City responded to routine police harassment, shouting resistance and throwing bottles and paving stones. JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 231-33 (1983).

276. *See* Brewer et al., *Sex and the Supreme Court: Gays, Lesbians, and Justice*, in *THE POLITICS OF GAY RIGHTS* 377, at 383-85 (Craig A. Rimmerman, Clyde Wilcox & Kenneth D. Wald, eds., The University of Chicago Press 2000).

created litigation organizations to oppose abortion,²⁷⁷ government regulation,²⁷⁸ and gay rights.²⁷⁹

These premier civil rights organizations do not have complete power to determine what claims should be brought, how they should be framed, and where they should be pursued. People with civil rights claims may be prosecuted criminally²⁸⁰ and must be defended even if the defendant is not a poster child for the claim or the venue is not the best possible. Or a particular person may be able to find a lawyer outside of the elite civil rights bar to represent him or her. But civil rights claims are costly and labor intensive. As a practical matter, the national legal organizations exercise a great deal of influence in determining what claims are brought.

The mayors introduced a new complication into the now familiar world of civil rights litigation. Unlike most ordinary civil rights plaintiffs, mayors have much greater access to media and to legal resources. As a long time civil rights advocate, I appreciate the value in having important civil rights litigation led and shaped by national experts. Each of the mayors consulted extensively with the civil rights bar before they acted.²⁸¹ Given that, in the end, courts or legislatures will decide, the questions become who gets the ball rolling and what are the advantages and disadvantages of starting the process through official action, as opposed to filing a conventional civil rights lawsuit.

There seems to be broad consensus amongst advocates for marriage equality on many issues.²⁸² First, in the foreseeable future, change toward equality between homosexual and heterosexual couples is unlikely to occur at the federal level. The best that can be hoped from Washington is that the

277. The National Right to Life Committee, founded in 1973 in response to *Roe v. Wade*, has 3000 chapters in all 50 states in 2005. It engages in both litigation and legislative advocacy. National Right to Life Committee, <http://www.nrlc.org/Missionstatement.htm>.

278. Founded in 1991, the Institute for Justice describes itself as the "nation's only libertarian public interest law firm." Institute for Justice, <http://www.ij.org>. It represented the plaintiffs in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (rejecting plaintiff's challenge to a compensated taking of private property for public use).

279. Thomas Crampton, *Using the Courts to Wage a War on Gay Marriage*, N.Y. TIMES, May 9, 2004, at § 1 at 14 (describing the Liberty Counsel, a non-profit organization with revenues of \$1.3 million in 2002). See generally Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223 (2005) (examining the growth of conservative and libertarian public interest legal organizations).

280. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (involving criminal prosecution for sodomy).

281. For Mayor Newsom, see Taylor, *supra* note 14, at 40; *supra* note 16; Frank, *supra* note 18. For Mayor West, see Sullivan, *supra* note 79, at § 6 at 38; *supra* note 86. For Multnomah County, see *supra* note 123.

282. Much of the remainder of this article is based on speeches delivered at the Charles R. Williams Project on Sexual Orientation on the Law and Public Policy at UCLA, 4th Annual Update on Sexual Orientation Law and Public Policy (Feb. 25, 2005) [hereinafter 2005 *Williams Project*]. A list of speakers from that conference is available at <http://www.law.ucla.edu/williamsinstitute/programs/AnnualUpdate2005.html>.

Constitution is not amended to prohibit states from recognizing same-sex marriage or civil unions. Preventing a constitutional amendment seems to be a reasonable aspiration. Never before in our history has the Constitution been amended to restrict rights of liberty and equality. Our federal Constitution is notoriously difficult to amend.²⁸³ Family law, and particularly the definition of marriage, has historically been the province of state law, and even conservatives who oppose same-sex marriage also oppose federal efforts to diminish state sovereignty.²⁸⁴

Second, as a corollary, the civil rights struggle for the recognition of same-sex marriage must take place at the state level. This is true not simply because a move toward equality at the federal level is practically impossible, but also because the states are sharply divided. Many states have recently explicitly rejected same-sex marriage,²⁸⁵ while Vermont, Massachusetts, and New Jersey have given formal recognition to same sex couples.²⁸⁶ The issue remains contested in other states, including California and New York.²⁸⁷

Third, given the sharp division in local values, our historic principles about recognition of marriages from other states make sense. The general rule is that a marriage valid where it was performed is valid every place. This principle recognizes the central importance of marriage and seeks to preserve stability. However, there is a general exception to this rule that allows states to refuse to recognize a marriage that violates a “strong public policy” of the state. The exception recognizes that Alabama or Mississippi should not be compelled to accept same-sex marriage, just because Massachusetts or Canada has done so. People in the red states expect this and those in the blue states understand it. It

283. See generally RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENTS (Sanford Levison ed., 1995). Whether or not this is a good thing is controversial. See John Ferejon & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929 (2003) (the difficulty of amendment promotes wise interpretation); William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability*, 81 TEX. L. REV. 1965 (2003) (amendment rules do not need to be as restrictive).

284. Raymond Hernandez, *Call to Ban Gay Marriage is Dividing Republicans*, N.Y. TIMES, Feb. 28, 2004, at B6. For an earlier discussion of the complex assumption that family law is formulated at the state level, see Sylvia A. Law, *Families and Federalism*, 4 WASH U. J. OF L. & POL’Y. 173 (2000) (affirming federal power as a constitutional matter, but noting that because historically states have much greater experience, federal interventions are often uninformed and unwise).

285. *Supra* note 237.

286. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 952-3 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

287. In California the First District Court of Appeals overruled the trial court, 2-1, and upheld the exclusion of same-sex couples from marriage. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 675 (Cal. Ct. App. 2006). The California Supreme Court has agreed to review the decision. *In re Marriage Cases*, 149 P.3d 737 (Cal. Dec. 20, 2006). While a divided Court of Appeals rejected a constitutional claim of marriage equality, see *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), Elliot Spitzer, elected Governor in 2006, is on record in support of marriage equality. Slackman, *supra* note 102, at A1.

is easy to imagine a state that would not choose to embrace same-sex marriage, but would, at the same time, recognize the validity of such marriages entered into in other jurisdictions where they were valid. A state could say, “[I]t is not our policy to recognize same-sex marriages,” without also saying, “[S]uch marriages violate a strong public policy.” That was basically New York Attorney General Spitzer’s position.²⁸⁸ Most of the political actors in the campaign for marriage equality accept state diversity, even though it is in tension with the traditional assumption that core human rights are universal.

Fourth, because state constitutions can more easily be amended, state constitutional courts may be better fora than federal courts for adjudicating the liberty and equality claims raised by the same-sex marriage cases. Justice Jeffrey Amestoy, former Chief Justice of the Vermont Supreme Court, eloquently explains the point.²⁸⁹ He notes that most judges and lawyers are trained to the notion that federal constitutional law is made by judges, but observes that the practice and understanding with regard to state constitutions is different. Judges are important actors in the interpretation of state constitutions. But, in many states, judges can easily be overruled through constitutional amendment.²⁹⁰ Thus, many of the state decisions on same-sex marriage have invited interaction among the legislatures, the courts and the people.²⁹¹

Fifth, this difference between state and federal constitutions leads former Chief Justice Amestoy to another point: “When the court does not have the last word, the first words matter.”²⁹² In recognizing a constitutional right to civil unions for gay people, the Vermont Supreme Court avoided the federal constitutional rhetoric of suspect classifications and fundamental rights. Rather the court relied upon the Common Benefits Clause of the Vermont Constitution.²⁹³ After exploring the reasons offered to exclude same-sex couples from marriage, the Court concluded that “none of the interests asserted

288. *N.Y. AG Opinion* 2004, *supra* note 101, at 28.

289. Former Chief Justice Jeffrey Amestoy, Vt. Supreme Court, Keynote Address at the 2005 *Williams Project*, *supra* note 282 (Feb. 25, 2005).

290. Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1834, 1902 (2001). That is what happened in Hawaii. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

291. For example, in *Baker v. State*, 744 A.2d 864 (Vt. 1999), having found that denying marriage to same-sex couples violates the state constitutional common benefits clause, the court held that the unconstitutional “scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion.” So too, the Massachusetts Supreme Judicial Court in *Goodridge* stayed entry of judgment for 180 days “to permit the Legislature to take such action as it may deem appropriate in light of this opinion.” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003).

292. Justice Amestoy, Keynote Address, *supra* note 289.

293. The Vermont Constitution of 1777, Ch. I, Art 7, provides, “That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.”

by the State provides a reasonable and just basis for the continual exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law.”²⁹⁴ The effort was to frame the issue in a way that anticipated popular debate. The Vermont Court did not charge the legislature with invidious discrimination. Rather, it affirmed that gay couples are fellow citizens and neighbors entitled to “common benefits.” Especially in the state constitutional context, message matters. The constitutional right of same-sex couples can be defended as a matter of general equal protection, gender discrimination, fundamental right, or “common benefit.” Justice Amestoy’s point is that when a judge knows that a controversial decision will trigger intense debate about constitutional amendment, he or she should articulate a decision of principle in ways that are most likely to be politically persuasive. His judgment was that the inclusive message of “common benefits” was more politically powerful than the critical message of discrimination.

Sixth, the best way to influence public opinion on gay marriage is to implement it.²⁹⁵ In Vermont, initial reaction to the Supreme Court’s decision that civil unions were constitutionally required was extremely hostile. So too, in Massachusetts. As Representative Barney Frank notes, if the Massachusetts Constitution could have been amended the day after *Goodridge*, it would have been. But, as time has passed and same-sex couples have gotten married in greater numbers, it has, in Frank’s words, “become boring” and thereby acceptable with the new question being: “What do you get your lesbian neighbors from Crate and Barrel?”

The final question then is how does this civil rights consensus inform evaluation of the actions of the mayors from the point of view of civil rights advocates for liberty and equality for same-sex couples? It supports the actions of the mayors in that they implemented same-sex marriage. John Davidson, Legal Director of Lambda says, “Gavin Newsom jumpstarted a movement.”²⁹⁶ Barney Frank disagrees. He argues that civil rights movements must be smart and strategic.²⁹⁷ He suggests that the movement for liberty and equality for

294. *Baker*, 744 A.2d at 886.

295. Representative Barney Frank, Keynote Address at the *2005 Williams Project*, *supra* note 282 (Feb. 25, 2005).

296. John W. Davidson, Legal Director, Lambda Legal Defense and Education Fund, Remarks at the *2005 Williams Project*, *supra* note 282 (Feb. 25, 2005).

297. Frank tells the story of his experience in Mississippi in 1965, as part of Mississippi Freedom Summer. The focus was on voting rights. Congress passed the Public Accommodations Act. They could have claimed the benefits of that federal law and sought to integrate lunch counters. But the leadership said that voting was more important than lunch counters. Frank, Keynote Address, *supra* note 295.

Professor Arthur Leonard of New York Law School, a long-time respected observer of gay rights law, comments on the 2006 New Jersey decision, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006). He notes that the decision “illustrates the importance of careful strategy in test-case litigations. . . . During the current post-Hawaii wave of same-sex marriage litigation, we have ‘won’ three cases: Vermont, Massachusetts, and New Jersey. . . . By no coincidence, these three are the carefully planned test cases that were filed before the frenzied winter of

same-sex couples should only focus on states that meet two conditions. First, the law and the courts must be open to the possibility of marriage equality. Second, the state constitution must be difficult to amend, so that people can become comfortable with same-sex couples in their community. Justice Amestoy's core point, in contrast to Frank's, is that judges actually have more freedom to offer new interpretations of state constitutions if the constitution is easy to amend.

My tentative assessment is that the actions of the mayors moved the ball forward practically and politically. Thousands of couples, many of whom had been in committed relationships for decades, affirmed their commitments on the steps of City Hall with the cameras rolling. In addition, civil rights organizations that support marriage equality—like all civil rights organizations—are stretched for resources. These organizations devote an enormous proportion of their energies to fundraising, and typically must pick carefully among the possibly meritorious cases that they can afford to bring. In this situation, mayors bring new resources to the table. In San Francisco and Multnomah County, the city legal departments provided legal advice and defense. Even in New Paltz, where Jason West would not allow his actions to cost the town a penny, as a mayor he had capacity to recruit first class legal talent on a pro-bono basis. West's actions generated two eloquent town court judicial decisions affirming same-sex marriage. They were overruled, but by a judge who did not even articulate reasons. These decisions, and the official opinion of counsel supporting the actions of the Multnomah County Commissioners, are building blocks in constructing the case for marriage equality. Additionally, apart from legal and financial resources, the mayors have a greater capacity than civil rights organizations to command public attention.

On the other hand, the mayors' actions drew harsh criticism, unrelated to the merits of the question of whether same-sex couples should be able to marry. The mayors themselves became the issue. The legitimacy of their actions was criticized even by people who support same-sex marriage. And, of course, they all failed to make same-sex marriage a reality. Since 2004, several courts have rejected traditional civil rights claims challenging the exclusion of same-sex couples from marriage.²⁹⁸

2004, when Gavin Newsom's San Francisco stunt ignited a brushfire of copycat marriage litigation that has so far eventuated in spectacular losses in New York and Washington State, as well as the cruel California Court of Appeal decision." *Same-Sex Marriage and the Importance of Strategy*, Leonard Link, http://newyorklawschool.typepad.com/leonardlink/2006/10/samesex_marriag.html (Oct. 29, 2006).

298. Courts in four states have rejected state constitutional claims to marriage equality. See *supra* note 237.

CONCLUSION

The path to *Brown v. Board of Education* was decades long.²⁹⁹ State rules enforcing the racial segregation of marriage survived for thirteen years after they were forbidden in every other area.³⁰⁰ It took a century of struggle to win the right to vote for women.³⁰¹ Hawaii's marriage equality decision, the opening volley in the current debate, is just over a decade past.³⁰²

The social and legal meaning of marriage has changed rapidly in the past three decades, as traditional patriarchal marriage rules were abandoned and other forms committed relations gained legal and social legitimacy. In this context, it seems likely that gays and lesbians will win equal marriage rights. When that day comes, we will be better equipped to analyze whether the mayors' actions helped or hurt in furthering marriage equality.

299. KLUGER, *supra* note 242.

300. *Loving v. Virginia*, 388 U.S. 1 (1967).

301. ELEANOR FLEXNER, *A CENTURY OF STRUGGLE* (1973).

302. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).