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THE U.S. SUPREME COURT’S “MAVERICK” JUSTICE:
JOHN PAUL STEVENS AND SAME-SEX MARRIAGE

being

A Thesis Presented to the Graduate Faculty
of the Fort Hays State University in
Partial Fulfillment of the Requirements for
the Degree of Master of Liberal Studies

by

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ABSTRACT

This thesis predicts how United States Supreme Court Associate Justice John Paul Stevens would have ruled on the constitutionality of same-sex marriage if the issue were to have come before him while he was on the Court. The hypothesis is that he would have found a constitutional right to same-sex marriage. The hypothesis is substantiated based on an analysis of Stevens' record in ten specific cases. The thesis puts forth the argument that these ten cases most accurately predict how Stevens would have voted on the constitutional issue. Stevens' opinions and dissents in these cases are examined. Additionally, included is an analysis of his viewpoints, as evidenced in interviews, oral "arguments," public speeches, and articles.

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CHAPTER ONE: INTRODUCTION

There is perhaps nothing more controversial in American society than social issues. Social issues are polarizing and elicit strong reactions from both conservatives and liberals. Many conservatives often feel that social issues are best decided by legislative bodies rather than unelected members of the judicial branch (Dershowitz, 2001). Liberals believe that the rights of the minority should be placed out the hands of the majority and decided by the independent judiciary branch (Hirsch, 2005).

When Massachusetts became the first state in the United States to legalize same-sex marriage in 2004 (Same-Sex, 2009), the issue became one of the most polarizing social topics (Marcus, 2006). In response, many states have amended their constitutions to prevent same-sex marriage (Same-Sex, 2004). Furthermore, Congress has voted twice on a federal constitutional amendment to ban same-sex marriage, but it failed to pass both times (Kellman, 2006). As of 2010, Connecticut, Iowa, Vermont, New Hampshire, and Washington, D.C. have also legalized same-sex marriage either through judicial rulings or legislative action (Urbina, 2009). In 2008, a California Supreme Court ruling briefly allowed same-sex marriage, but a voter referendum overturned that decision just six months later (Same-Sex, 2009).

As same-sex marriage and other relationships for homosexuals become legal, the United States is becoming a patchwork of states where the unions of same-sex couples are allowed in some states but not recognized in others (Rauch, 2004). Because most states do not recognize same-sex unions performed in other states (Vestal, 2009), the

issue has and will become an increasingly difficult issue for the courts to address (Marcus, 2006). Will Arizona or Kentucky eventually have to recognize a same-sex marriage legalized in Iowa or Connecticut?

At issue is Article IV, Section 1 of the U.S. Constitution. Commonly known as the Full Faith and Credit, this clause states:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. (U.S. Constitution)

It would appear that a state would be required to recognize same-sex marriages performed elsewhere, “but whether or not it actually does is a matter of debate” (Tuccille, 2009, ¶ 4).

In 1996, the United States Congress passed the Defense of Marriage Act (DOMA). It permits states to refuse recognition of same-sex marriages performed in another state. And it also provides a federal definition of what marriage is: a union between a man and woman (DOMA, 1996).

Since its inception, the constitutionality of DOMA has been debated by political leaders and legal experts alike (Battle, 2004). There has been a “long-held standard of American case law known as the ‘public policy exception’ [which] exempts any state from recognizing a law from another state if it is found to be ‘offensive’ to the receiving states’ public policy” (Battle, 2004, ¶ 12). Despite the public policy exception, states

overwhelmingly recognize heterosexual marriages performed out of state – this is done to maintain the stability of law (Battle, 2004).

Critics contend that DOMA goes beyond the public policy exception because only gays and lesbians are singled out. Battle (2004) states that this is in direct violation of the equal rights guaranteed under the Fourteenth Amendment of the Constitution. However, supporters of DOMA contend that homosexuals have “no legal precedent to reinforce their central position...[because] marriage laws were not invented to persecute...[and] deny marriage to homosexuals” (Jackson, 2006, p. 237). Instead, marriage laws in the United States have always been about a union between a man and a woman, not two members of the same gender (Jackson, 2006).

The Supreme Court case of *Loving v. Virginia* is often used as the model for what the gay marriage movement hopes to accomplish on a national scale (Jackson, 2006). In *Loving*, two residents of Virginia, a white man and a black woman, married in Washington, D.C. When they returned to their home state, they were arrested for violating the state’s anti-miscegenation law. They were convicted and sentenced to one year in prison, but the sentence was suspended for twenty-five years so long as the couple left the state. With help from the American Civil Liberties Union, the couple sued and the case eventually made it to the Supreme Court. *See Loving v. Virginia*, 388 U.S. 1 (1967).

The Court ruled unanimously that Virginia had violated the couple’s equal rights that are guaranteed under the Fourteenth Amendment. The opinion eviscerated

Virginia's anti-interracial marriage law and any other state's similar statute. Writing for the majority, Chief Justice Earl Warren held that "the freedom to marry has long been recognized as one of the vital personal rights essential to orderly pursuit of happiness by free men...[it] is one of the 'basic civil rights of man,' fundamental to our very existence and survival" (ibid, p. 12). In addition, "Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual, and cannot be infringed on by the State" (ibid, p. 12).

Same-sex marriage supporters believe that the basis of *Loving* should be applied to homosexuals because the same discriminatory principle is being applied: preventing a person from marrying the person of their choice (Jackson, 2006). Extending gays and lesbians to the right to marry would be "a logical extension of the same liberal tradition that fought for civil rights for blacks and women" (Reich, 2004, p. 70). Just like blacks and women before them, homosexuals are viewed as a threat to the system that has been traditionally run by white males: "They made every effort to block the Civil Rights Act, fight desegregation, and prevent the Equal Rights Amendment from becoming part of the Constitution. Now they want to block the civil rights of gay Americans" (Reich, 2004, p. 70). Most recently, the Full Faith and Credit clause "has been used at the appeals courts level to force socially conservative states to recognize adoptions by same-sex couples that have been approved by other states" (Tuccille, 2009, ¶ 8). If this has been the case, gay rights activists argue, then it should be used for marriage as well (Tuccille, 2009).

Critics argue that using *Loving* as an analogy for same-sex marriage is not correct.

Loving dealt with race and it did not redefine the definition of what marriage has been for thousands of years: a union between a man and a woman (Jackson, 2006). And that is why there are laws like DOMA in place to preserve traditional marriage, critics contend (Gaines, 2010).

Eventually it will be “imperative that the [Supreme Court] clarify...the marriage issue” (Marcus, 2006, p. 410). The United States is “simply too big and too diverse” (Rensberger, 2007, p. 31) to allow multiple interpretations of marriage; a single standard will have to be established (Rensberger, 2007). It is impossible to predict “the exact form a same-sex marriage case heard by the Court will...take, from which jurisdiction it will originate, which law will be challenged, and on what grounds” (Marcus, 2006, p. 414), but there will be constitutional questions that the justices of Supreme Court will have to answer (Marcus, 2006).

This thesis argues John Paul Stevens, if he were still on the Court, would rule that same-sex marriage is a constitutional right. In every case concerning gay rights that Stevens considered, he ruled in its favor (Constitutional, 2009). Furthermore, he firmly supports civil liberties and equal rights (Smith, 2006). Because of Stevens’ jurisprudential history, this thesis argues that Justice Stevens would support same-sex marriage.

In Chapter Two, the methodology used in this thesis will be explained. Chapter Three will examine the jurisprudence of Stevens and how it influenced his decision making when it comes to Supreme Court cases. Chapters Four and Five will then go into

detail about the two essential foundations of this thesis' claim on which Stevens would build his support for same-sex marriage: right to privacy and equal rights. Finally, Chapter Six will sum up the findings.

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CHAPTER TWO: METHOD

Of all the current and living retired justices of the Supreme Court, John Paul Stevens is “gay Americans’ most reliable ally” (Murdoch & Price, 2001, p. 511). He once served as the leader of the liberal bloc of the Court (Wittes, 2006) and was its strongest voice (Savage, 2007). His ability to influence other justices to agree with his jurisprudential philosophy is well-documented, especially regarding Anthony Kennedy’s all-important swing vote (Rosen, 2007). In addition, as the most senior associate justice, Stevens had the ability to assign opinions. Thus: “When the chief justice is in the majority and Stevens [was] in the minority, Stevens [decided] who [would] write the principal dissent; when the roles [were] reversed, Stevens [assigned] the majority opinion” (Rosen, 2007, ¶ 5). This would have been decisive in getting a Supreme Court opinion that upheld the constitutionality of same-sex marriage, if such a case had arrived at the Court during Stevens’ tenure.

In order to predict the constitutional principles from which Stevens would have based his decision supporting same-sex marriage, his judicial record in certain constitutional areas must be examined. Recent same-sex marriage cases have only been decided by state courts and not at the federal level. These cases have been accepted or rejected based on state constitutional provisions. There is not any precedent involving the issue at the federal level. Therefore, it cannot be known for sure exactly what constitutional principles would be used to decide a case involving same-sex marriage at the federal level.

The Supreme Court “has repeatedly held that there is a constitutionally protected right to marry” (Gerstmann, 2004, p. 69), although the cases have only dealt with marriage between a man and a woman (Gerstmann, 2004). However, enough precedent exists in other areas of constitutional law that could be used to help decide whether same-sex marriage should be legalized or not. The two strongest legal arguments for same-sex marriage would be based on the right to privacy and equal rights. Since the right to privacy (discussed in Chapter Four) and equal rights (discussed in Chapter Five) have been used as an extension of civil rights, the Supreme Court would most likely incorporate them in a case involving same-sex marriage (Feigen, 2004).

Because he is an ardent supporter of civil liberties like the right to privacy (Arledge, 1989) and equal rights (Smith, 2006), this thesis will argue that Stevens would have found a constitutional right to same-sex marriage based on the constitutional grounds of right to privacy and equal rights. This hypothesis is substantiated by an analysis of the following: (a) Stevens’ record in ten specific cases (see Table 2.1); (b) Stevens’ writings in law journals; (c) viewpoints that he has publicly expressed either through interviews, oral arguments, and public speeches; and (d) a literature review of any other applicable facts.

Table 2.1: The Ten United States Supreme Court Cases Used to Argue that John Paul Stevens Would Have Found a Constitutional Right to Same-Sex Marriage

U.S. Supreme Court Case	John Paul Stevens Supports or Rejects
1. <i>Roe v. Wade</i> (1973) – This case struck down laws in every state that restricted a women’s access to an abortion on the basis of a right to privacy. <i>See Roe v. Wade</i> , 410 U.S. 113 (1973).	Supports
2. <i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> (1992) - This case upheld the ruling of <i>Roe</i> ’s right to privacy, which constitutionally protected a woman’s right to choose. <i>See Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833 (1992).	Supports
3. <i>Stenberg v. Carhart</i> (2000) – The Court ruled if exceptions are not made to protect a mother’s life, partial-birth abortions are an unconstitutional violation of a woman’s right to privacy. <i>See Stenberg v. Carhart</i> , 530 U.S. 914 (2000).	Supports
4. <i>Bowers v. Hardwick</i> (1986) – The Court held that the Constitution did not protect a right for sexual relations between homosexuals. <i>See Bowers v. Hardwick</i> , 478 U.S. 186 (1986).	Rejects
5. <i>Lawrence v. Texas</i> (2003) – The Court overruled <i>Bowers</i> by striking down a Texas law that criminalized sexual intimacy between consenting adults of the same gender. Furthermore, any remaining sodomy laws in the United States were deemed unconstitutional. <i>See Lawrence v. Texas</i> , 539 U.S. 558 (2003).	Supports

6. <i>Romer v. Evans</i> (1996) – The Court struck down a Colorado constitutional amendment that would have prevented sexual orientation from being protected by discrimination laws. <i>See Romer v. Evans</i> , 517 U.S. 620 (1996).	Supports
7. <i>Boy Scouts of America v. Dale</i> (2000) – The Court held that despite existing state antidiscrimination laws, private organizations are allowed to exclude certain individuals based on the First Amendment’s freedom of association. <i>See Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000).	Rejects
8. <i>Oncale v. Sundowner Offshore Services</i> (1998) - The Court held that protection afforded by Title VII of the Civil Rights Act of 1964 was applicable to workplace harassment involving members of the same sex. <i>See Oncale v. Sundowner Offshore Services</i> , 523 U.S. 75 (1998).	Supports
9. <i>Board of Regents of the University of Wisconsin System v. Southworth et al</i> (2000) – The Court ruled that mandatory student fees at public universities can be used to support gay student groups despite protests from conservative students. <i>See Board of Regents of Univ. of Wis. System v. Southworth</i> , 529 U.S. 217 (2000).	Supports
10. <i>United States v. Virginia</i> (1996) – The Court held that the male-only admission policy at the Virginia Military Institute violated the Fourteenth Amendment’s Equal Protection Clause. <i>See United States v. Virginia</i> , 518 U.S. 515 (1996).	Supports

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CHAPTER THREE: JOHN PAUL STEVENS' JURISPRUDENCE

On June 28, 2010, at age 90, John Paul Stevens, retired after 34 years of service on the United States Supreme Court (Gresko, 2010). He was the senior associate justice on the Court (Greenhouse, 2007) and one of its longest-serving members in history (Rosen, 2007). Appointed to the Court in 1975 by President Gerald Ford (Brinkley, 2007), Stevens evolved to become a powerful and influential justice (Smith, 2006). With his penchant for bowties and nice-guy attitude, Stevens often moved the Court to his side with a philosophy of law, also known as jurisprudence, that is “clear thinking and original [in] approach” (Sloan, 2005, ¶ 9).

As a judge, Stevens took a case-by-case approach to issues that came before him (Siskel, 2002). In an article titled “The Supreme Court of the United States, Reflections After a Summer Recess,” Stevens wrote that when he decided a case he did so by identifying “the problem that needs to be solved...[so that] the best solution [can be found]” (Stevens, 1985c, p. 448). As the years passed, Stevens’ search for the best solution led him to increasingly liberal results (Rosen, 2007).

In fact, before his retirement, Stevens was the most liberal justice on the Court (Rosen, 2007). In contrast, he was considered a moderate when he first joined the Court (Arledge, 1989). For example, on the issue of civil rights, a study of Stevens’ voting patterns revealed that in 1989 he was voting in support of civil rights 55.9% of the time (Arledge, 1989). By 2004, that rate had soared to 91.7% (Epstein & Walker, 2001).

One of the core themes of Stevens’ jurisprudence is his concern for people’s

liberties (or freedoms), especially those of minority groups (Arledge, 1989). In an article titled “The Third Branch,” Stevens noted that “one of the elements of liberty is the right to be respected as a human being” (Stevens, 1986, p. 278). Stevens believes that the “individual dignity...[of] people whose interest are not traditionally labeled fundamental may deserve protection if the government treats them thoughtlessly” (Popkin, 1989, p. 1135). In other words, minorities sometimes have to be protected from the majority (Greenburg, 2007).

Stevens’ commitment to civil liberties has led to him being labeled a “judicial activist” (Greenhouse, 2007). “Judicial activism” is when judges make the law rather than interpret it. This charge occurs most frequently when people feel that a judge does not interpret the Constitution as its writers intended (Roosevelt, 2006). The “plausibility of the charge of activism...depends...on the ideas that there is a clearly correct answer [in the Constitution]...that judges are disregarding” (Roosevelt, 2006, p. 15). The Constitution, though, is often unclear about multiple issues. Therefore, the “complaint that judges are departing from the plain meaning of the Constitution has very little force...for the words of the Constitution themselves convey very little information about how to decide particular cases” (Roosevelt, 2006, p. 16).

According to Stevens, the Constitution is a “mysterious document” (Stevens, 1985a, p. 437) that is silent on many different issues (Stevens, 1985a). When it is, Stevens believes that a judge’s role is to find solutions (Stevens, 1982) so that people’s fundamental rights are protected even if the Constitution does not specifically mention

them (Gottlieb, 2000). Stevens likened the role of a judge to that of a mystery novelist: “The skillful author of a mystery story may provide us with a handful of clues in his first chapter, but then require us to consider a variety of alternative solutions” (Stevens, 1985a, p. 437).

The ambiguousness of the Constitution has led to the evolution of two different camps of constitutional interpretation (O’Brien, 2005). Interpretivists “generally hold that the constitutional interpretation should be confined to the text and historical context of provisions of the Constitution” (O’Brien, 2005, p. 302). In contrast, non-interpretivists “maintain that that constitutional interpretation frequently requires going beyond text and historical context to structural arguments grounded in the Constitution and to broader principles of constitutional politics” (O’Brien, 2005, p. 302). According to Andrew Siegel, a former law clerk for Stevens, his former boss would fall somewhere in the middle of the two camps: “Stevens believes that constitutional decision-making is conducted through the interpretation of a mix of various sources – a complex balancing act” (quoted in Toobin, 2010, ¶ 66).

Stevens acknowledges the fact that it is not a judge’s place to make the law, but rather to interpret it (Greenhouse, 2005). While on the Court, he practiced considerable judicial restraint by deferring to the legislative bodies of government (Gottlieb, 2000). However, Stevens says that “when it is necessary to announce a new proposition of law in order to decide an actual case or controversy between adversary litigants, a court has a duty to exercise” (Stevens, 1982, p. 180). He did this even if that “judicial

interpretation...involves overruling...[laws and] policies...of the legislative and executive branches of the federal and state governments” (Halpern & Lamb, 1982, p. 8)

Despite his willingness to correct laws and policies that he believed were unconstitutional, Stevens showed great respect for *stare decisis* (Stevens, 1982), the legal principle that holds the Supreme Court should not overrule its previous decisions (Abraham, 1992). Respecting precedent is important because it “promotes legal stability...[and helps] maintain similar treatment of persons” (Gerstmann, 2004, p. 142). Yet he did overrule precedents that he believed were wrongly decided (Abraham, 1992). During his Senate confirmation hearings prior to becoming a Supreme Court justice, Stevens discussed his view about precedent:

I would say that I certainly would weigh very carefully any decision that had already been reached by a prior Court and I would be most reluctant to depart from prior precedent without a clear showing that departure was warranted....[however] I think there are occasions, particularly in constitutional adjudication, where it is necessary to recognize that a prior decision may have been erroneous and should be reexamined. (quoted in *Nomination*, 1975)

In the article “Legal Questions in Perspective,” Stevens stated that he is able to approach the law from “four different perspectives...as a citizen, as a law student, as a lawyer, and as a judge” (Stevens, 1985b, p. 1). These perspectives have undoubtedly influenced how he ruled on constitutional questions that came before him (Levin, 2005) so that he could make sure that the Court is “the protector of groups denied protection by

the more democratic branches of government” (Arledge, 1989, p. 587). Chapters Four and Five will continue the discussion of Stevens’ jurisprudence. Chapter Four will focus on his jurisprudence regarding the right to privacy. Chapter Five will focus on his jurisprudence regarding equal rights.

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CHAPTER FOUR: JOHN PAUL STEVENS AND THE RIGHT TO PRIVACY

Stevens consistently ruled in favor of upholding the constitutional principle of the right to privacy. According to Richards (2005), the right to privacy is a “basic human right to intimate life” (p. 89). In other words, people have the right to be left alone by government and make their own decisions about their life (Gerstmann, 2004). Stevens defines privacy as “a constitutional right, and any activity which a majority of Justices determine is ‘private’ is logically encompassed therein, regardless of the nature or history of the particular interest claimed” (quoted in Horan, Forsythe, & Grant, 1987, p. 262).

Over the last few decades, the Court has “reaffirmed the constitutional protection of personal decisions relating to marriage, procreating...homosexual sex...and a person’s right to be free from unwarranted governmental intrusion into matters fundamentally affecting that person” (Feigen, 2004, ¶ 2). Although “marriage is a public act, marriage is among the most personal of all decisions” (Gerstmann, 2004, p. 109). Therefore, the right to privacy would very likely be a cornerstone for a ruling favoring support for same-sex marriage (Feigen, 2004). Because the right to privacy is now a part of constitutional law and Supreme Court precedent involving heterosexual marriage has incorporated it, many hope that same-sex marriage will also fall under this legal umbrella.

To better understand Stevens’ jurisprudence on the right of privacy and why he would he would have applied it to a case involving same-sex marriage, examining his stance on issues like abortion and gay rights is essential. A summary of Stevens’ record in right to privacy cases can be found in Table 4.1.

The belief that the Constitution protects a person's right to privacy has its roots in Justice John Harlan's 1961 dissent in *Poe v. Ullman*. The case concerned the constitutionality of a Connecticut law that forbade its citizens from using birth control. Harlan believed that the Fourteenth Amendment's Due Process Clause protected people from unreasonable intrusion. *See Poe v. Ullman*, 367 U.S. 497 (1961). Harlan's dissent in *Poe* would eventually become the "foundation for almost every subsequent argument in favor of sexual and procreational freedom from contraception and abortion to homosexual rights" (Lazarus, 1999, p. 336).

Four years after *Poe*, Harlan's call for the establishment of a right to privacy became law when he concurred with the majority opinion in *Griswold v. Connecticut*. It overturned the Connecticut law as well as any other state laws against married couple's use of contraceptives. This ruling enshrined the precedent that the Constitution gave people the right of privacy. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

In his majority opinion, Justice William Douglas noted that the Constitution does not contain the word "privacy," but the Bill of Rights provides guarantees that make it a fundamental right. Moreover, Douglas wrote that the Due Process Clause of the Fourteenth Amendment, recognizes any rights that are not specifically in the Constitution (*ibid*).

Eisenstadt v. Baird followed *Griswold* in 1972. The case invalidated a Massachusetts law that banned the use of contraceptives by those who were not married, thus expanding the right to privacy to unmarried persons. *See Eisenstadt v. Baird*, 405

U.S. 438 (1972). The Court ruled that “if the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” (ibid, p. 453).

In 1973, the right to privacy was expanded further in *Roe v. Wade* in which the Court struck down laws restricting abortion. The lawsuit was filed by an unmarried, pregnant woman who alleged that a Texas law forbidding abortion violated her constitutional rights. The Court declared that a woman’s right to terminate an unwanted pregnancy was constitutionally protected. It allowed less restricted access to abortion during the first trimester, but permitted states to impose more restrictions as the viability of the fetus increased. Any restrictions on abortion outside of the parameters of *Roe* must be narrowly tailored. *See Roe v. Wade*, 410 U.S. 113 (1973).

All of the previous cases were decided before Stevens arrived on the Court. During his first year on the Court, he immediately exhibited a jurisprudence that supported the right to privacy and a respect for precedent set by the previously mentioned cases. In the case of *Planned Parenthood of Central Mo. v. Danforth*, Stevens supported striking down Missouri’s requirement that a married woman must get consent from her husband before she could get an abortion. *See Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52 (1976)

Stevens did, however, support the parental consent provision of the law in *Planned Parenthood of Central Mo. v. Danforth*: an unmarried minor had to obtain the

consent of at least one parent before an abortion could be performed (ibid). Stevens' reason for supporting it was based on the age of the person involved:

The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible...The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives. This assumption is, of course, correct and consistent with the predicate which underlies all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make. In all such situations, chronological age has been the basis for imposition of a restraint on the minor's freedom of choice. (ibid, p. 103; 105)

At the time, the NARA Pro-Choice America Foundation believed that this was a sharp limitation on the right to choose (Justice, 2009). This thesis argues that despite the parental consent notification required for which Stevens voted for, this decision was less about abortion and more about the privacy rights for adolescents, a topic which goes beyond the scope of this thesis. It is simply mentioned because it was the only restriction that Stevens ever applied to abortion. Stevens has always been supportive of abortion

rights (Justice, 2009).

Stevens believes that abortion should remain a private decision that is best decided by the main person involved – the woman – instead of legislatures or judges (Rosen, 2007). Stevens' concurrence in another abortion case perhaps best explains his constitutional philosophy about abortion and the importance of a woman's privacy when deciding whether to abort a pregnancy: "Acceptance of the fundamental premises that underlie the decision in *Roe v. Wade*, as well as the application of those premises in that case, places the primary responsibility for decision in matters of childbearing squarely in the private sector of our society." See *Thornburgh v. American College of Obstetricians and Gynecologists*, 475 U.S. 747, 781 (1986).

Another example of Stevens' belief in the constitutionality of abortion is in the 1989 case of *Webster v. Reproductive Health Services*. The constitutional question at hand was whether Missouri could prevent abortions from being performed in public hospitals. See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Chief Justice William Rehnquist's ideological view was that the constitutional standard concerning abortion needed to be changed. He believed that a woman's right to have an abortion was protected by the Constitution, but it could nonetheless be regulated by the states so long as the regulation was in the interest of the state (Tushnet, 2005).

Stevens wrote a letter to Rehnquist stating that his approach to the case "gave 'no weight at all' to 'the woman's interest in making the abortion decision'" (quoted in Tushnet, 2005, p. 206). To make his point, Stevens offered several regulations that

would survive Rehnquist's requirements which included placing a tax on abortions (Greenhouse, 2005) and "tests of the woman's knowledge of Shakespeare or American history" (Tushnet, 2005, p. 207). Of course, rational tests would not incorporate such nonsensical matters. Stevens criticized Rehnquist's encroachment upon the very "foundation...[of the] 'right to privacy' upon which *Roe* had been built" (Smolla, 1995, p. 81). Stevens' words to Rehnquist were "a credential of abortion rights liberalism" (Smolla, 1995, p. 81). Ultimately, Rehnquist was deprived of the majority vote to implement his position. *See Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

In 1992, the Court was given the opportunity to uphold *Roe v. Wade* or overturn it completely. *Planned Parenthood of Southeastern Pennsylvania v. Casey* challenged the constitutionality of Pennsylvania's abortions restrictions, which included the requirement that a woman notify her husband and wait 24 hours before having an abortion. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). At the heart of the case, though, was whether *Roe v. Wade* would survive. Many observers of the Court thought that *Roe* would be overruled because of the retirements of *Roe*-supporting justices and the addition of justices who were definitively more conservative than their predecessors (Epstein & Walker, 2001). During oral arguments for *Casey*, the counsel for the George H.W. Bush administration urged the Court to overturn *Roe* (Irons, 1999). Stevens questioned the administration's argument and "asked to see the provision that made fetuses 'persons' with legal rights" (Irons, 1999, p. 456).

Stevens joined four other members of the Court and upheld the central rulings of *Roe*. Justices David Souter, Sandra O'Connor, and Anthony Kennedy issued a joint majority opinion. The majority explained that the Fourteenth Amendment protects a person's right to privacy: "At the heart of liberty is the right to define one's own concept of existence." *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

Furthermore, the majority felt obligated to protect the liberties of individual persons and not apply a moral code to people's lives: "Some of us as individuals find abortion offensive to our most basic principles of morality but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code" (ibid, p. 911).

Stevens' concurrence in *Casey* elucidated the importance of following precedent:

The Court is unquestionably correct in concluding that the doctrine of *stare decisis* has controlling significance in a case of this kind...the central holding of *Roe v. Wade*...[has been] a "part of our law" for almost two decades...[and] it was a natural sequel to the protection of individual liberty established in *Griswold v. Connecticut*. *Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women... part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. (ibid, p. 919-20)

Stevens acknowledged that "the State may promote its preferences by

funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family” (ibid, p. 916). However, any limitations set by the state cannot infringe upon an individual’s right to have an abortion (ibid).

Casey’s core concept of liberty is one of much debate (Levin, 2005). The Constitution does not list every right that people have, but liberty is one of those “rights beyond those described by the Bill of Rights” (Garbus, 2002, p. 83). Justice William Brennan once very eloquently defined liberty:

I would identify three groups of fundamental freedoms that “liberty” encompasses...first, freedom from bodily restraints or inspection, freedom to do with one’s body as one likes and freedom to care for one’s health and person; second, freedom of choice in basic decisions of life, such as marriage, divorce, procreation, contraception, and the education and upbringing of children; and third, autonomous control over the development and expression of one’s intellect and personality. (as quoted in Garbus, 2002, p. 83-84)

Stevens has also ruled that partial-birth abortions are a constitutionally protected privacy right. In 2000, Stevens sided with the majority in *Stenberg v. Carhart* when the Court struck down a Nebraska state law banning the procedure, because its lack of exception for when a woman’s life is in danger. *See Stenberg v. Carhart*, 530 U.S. 914 (2000). Furthermore, Stevens’ concurring opinion questioned how the state could possibly have “any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman” (ibid, p.

946).

However, in 2007 the Court revisited the constitutionality of partial-birth abortions. In the case of *Gonzales v. Carhart*, the Court upheld the federal government's Partial-Birth Abortion Ban Act, thus overruling the decision in *Stenberg*. See *Gonzales v. Carhart*, 550 U.S. 124 (2007). Stevens joined Justice Ginsburg's dissent in declaring that the Court "refuses to take *Casey* and *Stenberg* seriously...[by ignoring]...the principles of *stare decisis*" (ibid, p. 3) and the Court's action was "effort to chip away at a right declared again and again by this Court" (ibid, p. 24).

Stevens has also applied the right to privacy to cases involving gay rights. Stevens' judicial record on gay rights has consistently indicated an effort to extend constitutional rights to homosexuals (Murdoch & Price, 2001). Even early in his tenure on the Supreme Court, Stevens openly expressed a willingness to review cases involving gay rights. In 1976, Stevens, along with Justices Thurgood Marshall and William Brennan, voted for the Court to hear *Doe v Commonwealth*, a case challenging Virginia's anti-sodomy laws. See *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 E.D. Va. (1975). However, the Court never heard the case, for lack of a fourth vote to hear it (McKeever, 1993).

It wouldn't be until 1986 that the Court decided the legality of laws banning gay sex. *Bowers v. Hardwick* arose from a civil lawsuit brought by Michael Hardwick against the state of Georgia for violation of his constitutional rights. Hardwick was arrested for violating a Georgia statute that banned sodomy. A police officer came to

Hardwick's residence to serve him a warrant for failure to pay a fine. The officer obtained permission to enter the residence from Hardwick's roommate, and subsequently found him engaged in sexual relations with another man. The officer arrested Hardwick, who spent twelve hours in jail before being released. Although criminal charges were dropped, Hardwick filed a civil lawsuit. *See Bowers v. Hardwick*, 478 U.S. 186 (1986).

During oral arguments, counsel for the state of Georgia, Michael Hobbs, defended the statute by declaring that homosexuals did not have a “‘constitutional ‘right’...to engage in [sexual relations]...or any other type of extramarital sexual relationship’” (quoted in Murdoch & Price, 2001, p. 296). Furthermore, Hobbs “‘tried to de-sex the Court’s privacy decisions’” (Murdoch & Price, 2001, p. 296).

In response, Stevens tore away at Hobbs’s argument by forcing Hobbs to admit that it would be unconstitutional to prosecute a married heterosexual couple for sodomy. Stevens then asked why Georgia did not follow through with prosecuting Hardwick instead of dropping the charge against him. Hobbs replied that was hard to enforce the statute (Murdoch & Price, 2001). Stevens then pointed out the case was “‘presented on a silver platter and they declined to go forward...it seems to me there is some tension between the obvious ability to convict this gentleman and the supposed interest in general enforcement’” (quoted in Murdoch & Price, 2001, p. 297).

In a 5-4 vote, with Stevens in the minority, the Court rejected Hardwick’s “claim that homosexual sodomy is a fundamental right...[because there was] little or no textual support in the constitutional language...despite the due process clauses of the Fifth and

Fourteenth Amendments.” See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). The majority opinion, written by Justice Byron White, pointedly acknowledged that the Court’s prior decisions on the rights to privacy involving marriage, family, and procreation did not extend to homosexual activity (ibid).

Moreover, White noted that homosexuality was considered a crime under English common law, as well as prohibited by the thirteen original colonies. Even as late as 1961, sodomy was a crime in all fifty states (ibid). Therefore, White believed that claiming that a “right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition,’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious” (ibid, p. 194).

In his dissent, Stevens countered White’s moral argument: “The fact that the government majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law” (ibid, p. 216). Stevens’ dissent clearly articulated his liberal view of gay rights. A liberal jurisprudence holds that a person has the right to privacy and there should not be any government restrictions on it, so long as no one else is being hurt by the behavior of the individual, even if the majority of society dislikes it (Schwartz, 2002).

Furthermore, Stevens chided the majority for ignoring previous precedents that has been established concerning the sexual freedom of people: “Individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause

of the Fourteenth Amendment.... moreover, this protection extends to intimate choices by unmarried as well as married persons.” See *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986).

Critics of the Court’s decision compare *Bowers* to being the “Dred Scott case...for the gay rights movement” (Kaiser, 1997, p. 320) because the highest court in the land had the chance to bring equality to gays and lesbians, but instead chose not to. Stevens, though, showed that he supports liberty for gays and lesbians (Murdoch & Price, 2001) when he said that “every free citizen has the same interest in ‘liberty’ that the members of the majority share...the homosexual and the heterosexual have the same interest in deciding how he will live his own life...[and] intrusion into the private conduct of either is equally burdensome.” See *Bowers v. Hardwick*, 478 U.S. 186, 218-219 (1986). This passage is perhaps the most indicative foreshadowing of why Stevens would have ruled for same-sex marriage.

Seventeen years after *Bowers*, Stevens’ dissent in the case would have the chance to become Court precedent when it became the basis for the landmark gay rights ruling in *Lawrence v. Texas*. The case eliminated bans on intimate acts between homosexuals that *Bowers* had upheld. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

The facts of *Lawrence* are very similar to those of *Bowers*. Houston police received a call reporting that a man with a gun was causing a disturbance. County sheriff deputies arrived at the apartment where the man allegedly was. There was not a gunman at all. Instead, the deputies entered the apartment (the door was ajar) and caught Tyron

Garner and John Lawrence having sex. The two men were arrested for violating Texas law. Believing that their rights had been violated, they went to court (ibid).

The case was decided in a 6-3 vote. Stevens assigned Justice Anthony Kennedy to write the majority opinion. Kennedy relied heavily on Stevens' dissent in *Bowers*. The right to privacy was central to the *Lawrence* decision (ibid). According to Kennedy, the country's "laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" (ibid, p. 574). Therefore, these traditions and laws had to be extended to homosexual relationships because banning such relations "furthers no legitimate state interest which can justify its intrusion in to the personal and private life of the individual" (ibid, p. 560).

Kennedy admitted that *Lawrence* was in fact a departure from *stare decisis* (ibid). But sometimes the Court must ignore that practice and fix past injustices that have been brought upon people (Gerstmann, 2004). Kennedy explained that respecting Court precedent is important so that the law has stability, but there are times when a prior decision is a mistake and should be reversed. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

Stevens adhered to *stare decisis* (Stevens, 1982), but he rejected it when he believed that a prior case had been decided incorrectly (Abraham, 1992) so it is no surprise that he would support *Lawrence* to overrule *Bowers*. In the end, *Lawrence* became "the greatest legal victory that gay Americans...[had] ever won" (Devins &

Douglas, 2004, p. 57).

The Court's ruling in *Lawrence* did not come without criticism. Justice Antonin Scalia's dissent in the case accused the Court of taking sides in America's culture wars. *See Lawrence v. Texas*, 539 U.S. 558 (2003). Critics of the Court's decision in *Lawrence* feared that the case planted the seeds for a constitutional challenge by homosexuals seeking the right to marry (Devins & Douglas, 2004). Scalia wondered what the implications of *Lawrence* on the issue of same-sex marriage would be:

If moral disapprobation of homosexual conduct is 'no state interest' for purposes of proscribing [private adult sex]...[then] what justification could there possibly be for denying the benefits of marriage to homosexual couples? Surely not the encouragement to procreation, since the sterile and the elderly are allowed to. *See Lawrence v. Texas*, 539 U. S. 558, 604-605 (2003).

Meanwhile, Kennedy emphasized *Lawrence* was about sex, not whether the government must formally recognize same-sex relationships (ibid).

Critics of the Court say cases like *Casey* and *Bowers* illustrate why Stevens was a judicial activist: his support for the constitutional principle of the right to privacy is "subverting the Constitution at will, and using...public trust to impose...policy preferences on society" (Levin, 2005, p. 22). Criticism of the Court's recognition of the right to privacy goes back to when the precedent was set in *Griswold v. Connecticut* (Bork, 1990). Because the right to privacy is not explicitly mentioned in the Constitution, critics contend that *Griswold* was just the beginning of the Court's creating

new rights “without support in constitutional text or history” (Bork, 1990, p. 113).

Critics will acknowledge that there are “certain areas or zones of privacy or freedom [that] are protected by the Constitution...that...[have] specific textual support” (Bork, 1990, p. 113). An example of this would be the Fourth Amendment which protects people from unreasonable searches and seizures. However, the Constitution’s limited scope regarding right to privacy does not explicitly mention issues like abortion or contraception use (Bork, 1990). Strict constructionists, who see the Constitution as an unchanging charter rather than a constantly evolving document, argue that only the legislative branch can make decisions about broadening the Constitution’s scope (Levin, 2005).

Stevens’ unfailing support of liberty indicates that he would have supported same-sex marriage. He was not a judge who stepped backwards. Instead, he was a judge who evolved (Simon, 1995). An example of this would be in a speech that Stevens gave in 1991. He lambasted the Court about some recent decisions it had handed down. He felt that it had become “extraordinarily aggressive...[by] narrowing the Constitution’s protection of civil liberties...[and depreciating] the value of liberty” (Simon, 1995, p. 226). This statement confirms that Stevens’ judicial interpretation of the Constitution is a liberal one.

As demonstrated by his jurisprudence in the previous cases, it is evident the right to privacy/liberty comprises a large portion of Stevens’ constitutional foundation. He has elucidated this fact in questions at oral arguments and in his judicial opinions. By

applying this principle in cases involving gay rights and abortion as well as his respect for the constitutional precedents established in cases like *Griswold v. Connecticut*, it can be extrapolated that he would have applied it to a case involving same-sex marriage. As the right to privacy has evolved in the American judicial system (Glenn, 2003), so has marriage (Chauncey, 2004). Stevens would have presumably helped the institution of marriage evolve even further to encompass same-sex couples. Despite the critics who contend that a constitutional interpretation like Stevens' is wrong and usurps the other branches of government (Levin, 2005), Stevens' judicial record proves that he would step in and argue in favor of issues that he believed to be Constitutional.

Table 4.1: Record of Justice John Paul Stevens With Regard to Right to Privacy Cases

U.S. Supreme Court Case	John Paul Stevens Supports or Rejects
1. <i>Roe v. Wade</i> (1973) – This case struck down laws in every state that restricted a women’s access to an abortion on the basis of a right to privacy. <i>See Roe v. Wade</i> , 410 U.S. 113 (1973).	Supports
2. <i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> (1992) - This case upheld the ruling of <i>Roe</i> ’s right to privacy, which constitutionally protected a woman’s right to choose. <i>See Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833 (1992).	Supports
3. <i>Stenberg v. Carhart</i> (2000) – The Court ruled if exceptions are not made to protect a mother’s life, partial-birth abortions are an unconstitutional violation of a woman’s right to privacy. <i>See Stenberg v. Carhart</i> , 530 U.S. 914 (2000).	Supports
4. <i>Bowers v. Hardwick</i> (1986) – The Court held that the Constitution did not protect a right for sexual relations between homosexuals. <i>See Bowers v. Hardwick</i> , 478 U.S. 186 (1986).	Rejects
5. <i>Lawrence v. Texas</i> (2003) – The Court overruled <i>Bowers</i> by striking down a Texas law that criminalized sexual intimacy between consenting adults of the same gender. Furthermore, any remaining sodomy laws in the United States were deemed unconstitutional. <i>See Lawrence v. Texas</i> , 539 U.S. 558 (2003).	Supports

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CHAPTER FIVE: JOHN PAUL STEVENS AND EQUAL RIGHTS

In addition to the constitutional principle of the right to privacy, equal rights could be the other constitutional principle applied in a case involving same-sex marriage (Feigen, 2004). Stevens' juridical history on equal rights is indicative that this might have been the principle he would have applied to find that same-sex marriage is constitutional. A summary of Stevens' record in cases involving equal rights can be found in Table 5.1.

Stevens' views on equal rights became evident when he served as a law clerk in the 1940s for Supreme Court Justice Wiley Rutledge (Thai, 2006). Years before *Brown v. Board of Education* (the landmark case that desegregated schools), Stevens expressed the opinion that "segregation [should] be ruled unconstitutional" (Amann, 2006, p. 1573). As a circuit judge, Stevens believed that minority groups should receive equal treatment from the states (Becker & Walsh, 1976). As a Supreme Court justice, Stevens was very protective of equal rights for groups like women, prisoners, and homosexuals (Arledge, 1989). Stevens has consistently voted for equal protection guarantees for gays and lesbians (Murdoch & Price, 2001).

The Supreme Court's first major homosexual equal rights case was *Romer v. Evans*. *Romer* concerned the constitutionality of a proposed amendment to the Colorado Constitution that would have prevented cities and municipalities from passing laws that prohibited sexual orientation-based discrimination in employment, housing, public accommodations, and other areas. The amendment was immediately challenged in court.

The Colorado Supreme Court ruled that the amendment was unconstitutional. The case was appealed to the Supreme Court. *See Romer v. Evans*, 517 U.S. 620 (1996).

During oral arguments, lawyers for the state of Colorado claimed that Amendment 2 came to fruition because homosexual groups were trying to seek special rights. Stevens wanted the counsel to explain the rational basis for the amendment (Murdoch & Price, 2001). After hearing contradictory answers, Stevens finally got the counsel to admit that gays and lesbians, as well as bisexuals, “could be refused service in a restaurant, turned away from an inn or turned down for a job because of their sexual orientation” (Murdoch & Price, 2001, p. 469).

Eventually, by a 6-3 vote, the Supreme Court struck down Amendment 2. To assure that the majority held together, Stevens chose Justice Kennedy to write the opinion for him and the liberal bloc. Kennedy began the opinion with the fiery line: “One century ago...Justice Harlan admonished the Court that the Constitution ‘neither knows nor tolerates classes among citizens.’” *Romer v. Evans*, 517 U.S. 620, 623 (1996). Kennedy found Amendment 2 directly violated this principle (ibid).

The opinion held that “if the constitutional conception of ‘equal protection of the laws’ means anything...[the] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest” (ibid, p. 624). The amendment represented nothing more than animosity towards gays and lesbians (ibid). The 6-3 decision showed the nation that Stevens as well as five other justices were “comfortable with the idea of gay people as citizens, as people who exist beyond sexual acts” (Murdoch & Price, 2001,

p. 482).

In 2000, Stevens' support of homosexuals was never more apparent than in *Boy Scouts of America v. Dale* (Murdoch & Price, 2001), which addressed whether a public organization is required to admit everyone. Specifically, the case involved the Boys Scouts chapter in New Jersey. When the organization revoked the membership of an openly gay scout member, the scout claimed that the Boys Scouts had violated a New Jersey statute that prohibited discrimination based on sexual orientation. See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

In contrast, the Boy Scouts believed that being required to admit homosexuals violated their constitutional rights. The Boy Scouts argued that they were entitled to decide who could join their organization, and, finding homosexuality incompatible with the organization's value system, moved to exclude those with contradictory values (ibid).

In a 5-4 ruling, the Supreme Court supported the position of the *Boy Scouts*. The Court held that the Boy Scouts had the right to deny homosexuals membership in the organization because it was protected by the First Amendment's right to free association. In response, Stevens chose himself to write a dissent for the liberal bloc (ibid). He believed that the majority excluded homosexuals from the Constitution's protection:

The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone-unlike any other individual's-should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is

irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority. (ibid, p. 696)

In addition, Stevens pointedly noted that the treatment of homosexuals must change as society changes:

Unfavorable opinions about homosexuals 'have ancient roots'...Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions...[However, it is clear that] prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect. (ibid, p. 699-700)

Stevens' pro-gay argument in *Boy Scouts* could easily be applied to same-sex marriage (Merin, 2002).

In 1998, Stevens joined a Court decision that ruled that Title VII of the 1964 Civil Rights Act protects individuals from harassment, not only from members of the opposite sex, but also the same gender. The case of *Oncale v. Sundowner Offshore Services, Inc.* (1998) concerned a heterosexual man (Oncale) who worked for Sundowner Offshore Services on an oil rig in the Gulf of Mexico. Oncale alleged that he had been sexually harassed, both verbally and physically, by three male co-workers – including two

supervisors. Oncale reported his co-workers to the company management. The co-workers were not reprimanded, though. Oncale quit because he feared that he would be raped and he filed a lawsuit. *See Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

Oncale's lawsuit was dismissed by the U.S. Court of Appeals. It ruled that Title VII does not protect a person from harassment by a person of the same gender. Oncale appealed to the Supreme Court. The Court reversed the lower court's decision (*ibid*). *Oncale* is considered a very important gay rights victory because it expanded the scope of protection of Title VII (Barnhart & Zalesne, 2004) to include gays and lesbians in protection from workplace harassment (Lambda, 1998).

The Board of Regents of Univ. of Wis. System v. Southworth et al case was a legal challenge by a group of conservative law students at the University of Wisconsin. The lawsuit challenged the university's policy of using mandatory student activity fees that funded all student groups. There were some groups (gay groups, specifically) that held viewpoints with which the plaintiffs disagreed. *See Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217 (2000). The university believed that "such fees enhance students' educational experience by promoting extracurricular activities, stimulating advocacy and debate on diverse points of view, enabling participation in campus administrative activity, and providing opportunities to develop social skills, all consistent with the University's broad educational mission" (*ibid*, p. 219).

During oral arguments for the case, Stevens told the plaintiff's counsel that

despite the conservative students' objections, the "university, as a state actor, has a duty to respect the right of conscience [of all students]" (quoted in Lithwick, 1999, ¶ 15).

Stevens and a unanimous Court ruled that student groups at public universities are protected by the First Amendment. *Board of Regents of Univ. of Wis. System v.*

Southworth, 529 U.S. 217, 219. It held that it is important that "minority views are treated with the same respect as are majority views" (ibid, p. 235). The case laid the foundation for the protection of freedom speech for all public university students, including gays and lesbians (*Board - Amicus*, 2000).

In addition to favoring equal protection of gay rights, Stevens was a strong protector of women's rights. He consistently sought to invalidate "laws or policies distinguishing between the sexes" (Lamb & Halpern, 1991, p. 363). In 1996, Stevens was part of a Court decision that struck down the Virginia Military Institute's policy of admitting only men. *See United States v. Virginia*, 518 U.S. 515 (1996).

The case began in 1989 when an unidentified woman applied to the school, but was denied admission. The Justice Department sued on the behalf of the woman, claiming that the school was violating the civil rights of women. The school argued that its almost 200-year-old policy of single-sex education was a diversified educational approach. The United States Justice Department had countered that the college's segregation by sex was unconstitutional and comparable to racial segregation (ibid). The Court's majority opinion, written by Justice Ruth Bader Ginsburg, held that the policies like that of the VMI could "not be used to create or perpetuate the legal, social, and

economic inferiority of women” (ibid, p. 516).

Stevens has also supported equal protection for prisoners (Arledge, 1989) and detainees (Amann, 2006). His jurisprudence on the constitutional treatment of these groups became evident early in his career as a circuit judge. *See United States ex rel Miller v. Twomey*, 479 F 2d. 701 (7th Cir. 1973). Stevens claimed that “the restraints and punishment which criminal conviction entails do not place a citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual... ‘liberty’ and ‘custody’ are not mutually exclusive concepts” (ibid, p. 712).

In 1984, the Supreme Court ruled that the Fourteenth Amendment did not apply to prison inmates. *See Hudson v. Palmer*, 468 U.S. 517 (1984). Stevens dissented and believed that “prisoners are truly the outcasts of society... disenfranchised, scorned and feared, often deservedly so, shut away from public view... [they] are surely a ‘discrete and insular minority’” (ibid, p. 557).

When it comes to the issue of the “war on terror” and the detainment of suspected terrorists at the U.S. Naval Station at Guantanamo Bay, Cuba, Stevens served as the leader of the Court’s critical review of the government’s policies (Congressional Research Service, 2010). Stevens’ background has made him perhaps the most qualified justice to decide military matters. By the time he retired, Stevens was the only sitting justice who was a military veteran (Toobin, 2010). He has stated that his “‘experiences during World War II have shaped my thinking in some cases’” (quoted in Interview, 2009, p. 9).

In addition to his military experience, Stevens' experience as a law clerk for Supreme Court Justice Wiley B. Rutledge right after World War II exposed him to legal cases that dealt with military and national security issues, most notably the issue of habeas corpus in the case *Ahrens v. Clark* (Barnhart & Schlickman, 2010). The case stemmed from the detention of a hundred and twenty German-born residents of the U.S. during World War II. As of 1948, they were still being confined to Ellis Island. The big question surrounding the case was whether the detainees could challenge their detainment in an American Court. *See Ahrens V. Clark*, 335 U.S. 188 (1948). The issue of habeas corpus is extremely important because it is the "building block of a free society and the foundation of a fair judicial system...dating back at least to the Magna Carta in thirteenth-century England" (Barnhart & Schlickman, 2010, p. 73).

In a memo written to his boss, Stevens opined that "I should think that even an alien enemy ought to be entitled to a fair hearing on the question whether he is in fact dangerous" (quoted in Toobin, 2010, ¶ 47). Furthermore, Stevens believed that the case "raised an issue affecting every member of the community equally" (quoted in Barnhart & Schlickman, 2010, p. 72).

However, Stevens and Rutledge would be on the losing end of the case. Six of the nine justices would disagree with the two men. *See Ahrens v. Clark*, 335 U.S. 188 (1948). In response, Stevens and Rutledge accused the Court of playing with fire:

The Court...cuts much more sweepingly at the roots of individual freedom...[and] attenuates the personal security of every citizen. So does any serious contraction

in the availability of the writ of habeas corpus. For the first time this Court puts a narrow and rigid territorial limitation upon issuance of the writ by the inferior federal courts. Heretofore such constrictive formulations have been avoided generally, even assiduously, out of regard for the writ's great office in the vindication of personal liberty. (ibid, 194)

Stevens and Rutledge, however, would be vindicated many years later when the same issue came before the Court in the 21st century. Stevens would use the dissent in *Ahrens* as his basis for his majority opinion in 2004's *Rasul v. Bush* (Barnhart & Schlickman, 2010, p. 73). *Rasul* held that detainees at Guantanamo Bay could invoke habeas corpus. See *Rasul v. Bush*, 542 U.S. 466 (2004).

Hamdan v. Rumsfeld would eventually follow in 2006. The majority opinion in *Hamdan* would also be written by Stevens. The Court ruled that the Bush administration violated the Geneva Conventions and the Uniform Code of Military Justice when it created military commissions to try Guantanamo Bay detainees. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Although a lot of the opinion is about governmental procedure, it is largely concerned about fairness and the need for protections, especially from the judicial branch: "These review bodies clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces, and thus bear insufficient conceptual similarity to state courts" (ibid, 23).

Although *Rasul* and *Hamdan* were decided on statutory grounds and did not specifically address whether the detainees had a constitutional right to challenge their

detention in U.S. courts, they laid the ground work for *Boumediene v. Bush* (Congressional Research Service, 2010). In *Boumediene*, the Court found that the detainees are protected by the Constitution. See *Boumediene v. Bush*, 553 U.S. 723 (2008). No matter how despicable a criminal/terrorist might be, Stevens supported rights for that person: “If this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.” See *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004).

The Constitution provides equal rights protection to Americans, but the extent to which these protections are extended remains hotly contested (Rosen, 2006). Critics contend that expanding the scope of equal rights and including minorities in areas where they were previously excluded in the Constitution qualifies as judicial activism (Keck, 2004). In the case of same-sex marriage, there is bound to be continuous disagreement as to whether gays and lesbians are being denied their equal rights by not being allowed to legally married (Schlafly, 2004).

Stevens believes that equal rights that protect minorities should not be narrowed (Simon, 1995). Perhaps his concurrence in *Craig v. Boren* (1976) most eloquently explains Stevens’ viewpoint concerning equal protection and the Constitution: “There is only one Equal Protection Clause...it does not direct the Courts to apply one standard of review in some cases and a different standard in other cases.” See *Craig v. Boren*, 429 U.S. 190, 211-12 (1976). Stevens applied this judicial viewpoint to a wide variety of minority groups: women, homosexuals, and prisoners. Stevens would have undoubtedly

applied this principle in a case involving same-sex marriage.

Table 5.1: Record of John Paul Stevens With Regard to Equal Rights Cases

U.S. Supreme Court	John Paul Stevens Supports or Rejects
1. <i>Romer v. Evans</i> (1996) – The Court struck down a Colorado constitutional amendment that would have prevented sexual orientation from being protected by discrimination laws. <i>See Romer v. Evans</i> , 517 U.S. 620 (1996).	Supports
2. <i>Boy Scouts of America v. Dale</i> (2000) – The Court held that despite existing state antidiscrimination laws, private organizations are allowed to exclude certain individuals based on the First Amendment’s freedom of association. <i>See Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000).	Rejects
3. <i>Oncale v. Sundowner Offshore Services</i> (1998) - The Court held that protection afforded by Title VII of the Civil Rights Act of 1964 was applicable to workplace harassment involving members of the same sex. <i>See Oncale v. Sundowner Offshore Services</i> , 523 U.S. 75 (1998).	Supports
4. <i>Board of Regents of the University of Wisconsin System v. Southworth et al</i> (2000) – The Court ruled that mandatory student fees at public universities can be used to support gay student groups despite protests from conservative students. <i>See Board of Regents of Univ. of Wis. System v. Southworth</i> , 529 U.S. 217 (2000).	Supports
5. <i>United States v. Virginia</i> (1996) – The Court held that the male-only admission policy at the Virginia Military Institute violated the Fourteenth Amendment’s Equal Protection Clause. <i>See United States v. Virginia</i> , 518 U.S. 515 (1996).	Supports

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CHAPTER SIX: CONCLUSION

Every civil rights movement is about a group of people who are “ignored or excluded...[from] the extensions of constitutional rights and protections.” *See United States v. Virginia*, 518 U.S. 515, 557 (1996). Barely a decade into the 21st century, it is now the country’s sexual-orientation minority group that is fighting for its equal place alongside the majority in having marriage rights (Bonauto, 2007). Pro-gay marriage advocates say that it is not just about marriage, but more “about the place of gay people in...society in the context of a century’s worth of official anti-gay discrimination” (Bonauto, 2007, p. 814).

Some people say that there has “never been a day when homosexuals have been denied the kind of rights...[like] black people...[with] separate water fountains, separate schools” (Suarez, 2006, p. 103). The truth is, however, gays and lesbians have been legally disadvantaged by laws in the United States. Homosexuals are similar to blacks in that both groups have experienced a “type of history that only a group with relatively little political power could have” (Simson, 2006, p. 372). Although life for homosexuals has gradually improved since the Stonewall Riots (Carter, D., 2005), gays and lesbians across this country are still being denied access to the “Constitution’s promises of equality and liberty” (Bonauto, 2007, p. 813) when the government denies them marriage, and when it “enforces a singular and inflexible definition of [it]” (Bernay, 2008, p. 91).

Unless the U.S. Congress amends the Constitution to ban same-sex marriage, the Supreme Court will be the arbiter that will finally resolve the issue of same-sex marriage once and for all (Carter, J., 2005). Unfortunately, Justice John Paul Stevens retired before he had an opportunity to be a part of the judgment on same-sex marriage. Because of his support of privacy rights (Arledge, 1989) and equal rights (Justice, 1987), Stevens was the most supportive justice on the Supreme Court of gay rights (Murdoch & Price, 2001). This thesis concludes that it would only make sense that Stevens would have applied those same principles to a case involving same-sex marriage. The right to privacy and equal rights are a natural extension of the history of *Griswold* and the subsequent rulings it has produced (Gerstmann, 2004). As this thesis argues, Stevens was a “judicial activist,” but only when a precedent presents a gross constitutional violation (Levin, 2005). When a judge like Stevens makes decisions that are reasoned well and principled, then judicial activism can be healthy (Lazarus, 1999).

Stevens’ extensive judicial record, in conjunction with the opinions he has expressed in arguments, interviews, and articles, substantiate the conclusion that Stevens would have extended the right to marry to homosexuals. Stevens would not have risked his jurisprudential reputation by sanctioning a decision against marriage for gays and lesbians. Had he done so, he would have thrown away all those years that he supported civil rights. During an interview, Stevens was asked whether it was frustrating for him when the Court decides a case and he was in the minority. Stevens replied that “when you’re in dissent, you know one of two things: Either the court’s wrong or you’re wrong,

and you don't want either one of those things to be true... you'd rather not be in dissent'" (quoted in Interview, 2001, ¶ 24). It is safe to say that Stevens would not have made a bad decision regarding marriage rights for a minority group that he has protected for years.

After more than 34 years of service, John Paul Stevens retired from the Supreme Court in June 2010 (Gresko, 2010). In one of the last cases before he retired, Stevens explained what a judge must do when the Constitution is silent on certain issues: "When answering a constitutional question to which the text provides no clear answer, there is always some amount of discretion; our constitutional system has always depended on judges filling in the document's vast open spaces." *See McDonald v. Chicago*, 561 U.S. ____, 54 (2010). As a justice, Stevens was an empathetic judge who was concerned about the rights of the individual and supported the promises of the Constitution. Same-sex marriage is not explicitly mentioned in the Constitution, but this thesis argues that Stevens would have found constitutional support for it using his judicial vision to fill in the gaps that the Constitution has.

On his last day on the Court, Stevens apologized if he had "'overstayed [his] welcome'" (quoted in Gresko, 2010, ¶ 3) but he did so because he felt that being a Supreme Court justice "'is such a unique and wonderful job'" (quoted in Gresko, 2010, ¶ 3). When asked about how he would want to be remembered after left the Court, Stevens hoped that people will judge him "'based on what my written opinions say...I just hope they say he did the best he could'" (quoted in An Interview, 2007, ¶ 33).

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