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 SUPREME COURT NOMINEE | *The Battle Over Same-Sex Marriage*

GAY ISSUES DESTINED FOR TOP COURT

By Carolyn Lochhead

CHRONICLE WASHINGTON BUREAU

WASHINGTON — Abortion may dominate next month's Senate hearings on whether to confirm John Roberts to the U.S. Supreme Court, but gay rights is the stealth issue.

Democrats aren't as eager to push for same-sex marriage as they are to protect abortion, but there is little question that the leading edge of civil rights law involves lesbians and gays rather than more settled questions of gender and racial equality.

Over the next decade or more — and if confirmed, the 50-year-old Roberts could be on the court for 30 years — activists on both sides expect the Supreme Court

**Activists agree
Justice Roberts
would be pivotal
in same-sex
marriage cases**



to decide the constitutionality of state bans on same-sex marriage, the 1996 Defense of Marriage Act denying homosexuals federal benefits conferred by marriage and the "don't ask, don't tell" ban on gays and lesbians in the military.

Several such cases already are moving through lower courts, though they may be several years away from the Supreme Court.

"I don't think there's any question" such cases ultimately will come before the Supreme Court, said Tony Perkins, president of the Family Research Council, a leading social conservative group, who supports President Bush's nomination of Roberts to the court.

Jon Davidson, legal director of

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left to right:
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**WE ALL
DESERVE
THE
FREEDOM
TO MARRY**



Gay rights in top justices' court

► ROBERTS

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Lambda Legal, a gay advocacy group, agreed. "Whoever gets appointed is going to be on the court for a long time, and eventually, these issues are going to reach the Supreme Court," Davidson said.

Although the stakes are high, both sides are downplaying the issue for strategic reasons.

Some gay leaders warn against making gay issues a focus of the confirmation hearings, fearing such a move could backfire.

Very few Democratic senators support same-sex marriage, and the public remains largely opposed to the idea. Activists are advising the Senate Democrats to address the issue indirectly under the rubric of a constitutional right to privacy.

Privacy rights underpin not only the Supreme Court's 1973 *Roe vs. Wade* decision permitting abortion but also the landmark 2003 *Lawrence vs. Texas* decision that struck down state sodomy laws.

Religious conservatives want to avoid imposing a litmus test on gay rights so that liberals cannot demand one on abortion. Bush himself has carefully avoided doing so.

"We're not setting litmus tests; it's the other side doing that," said Peter Sprigg, vice president for policy at the Family Research

Council.

Still, he added, "I would say that we would not want a candidate to say they considered *Lawrence vs. Texas* to be settled law or beyond the scope of review on constitutional grounds."

The sensitivity of the gay rights issue became clear last week with the revelation that Roberts provided free legal advice for gay plaintiffs on a groundbreaking 1996 Supreme Court case, *Romer vs. Evans*, which struck down a Colorado ballot initiative banning antidiscrimination laws for gays.

The work sparked momentary alarm among religious conservatives that Roberts could harbor secret sympathies.

Most religious conservatives said they had been assured that Roberts would be reluctant as a judge to overturn the will of voters or legislators despite his work on *Romer*, although a Virginia group, Public Advocate of the United States, said Tuesday it would oppose his nomination. Gay rights groups say his work on the case does nothing to reassure them.

Same-sex marriage was a central cultural issue in the 2004 presidential campaign after the Massachusetts high court made that state the first ever to allow such unions. For religious conservatives, the ruling epitomized activist judges imposing their own moral code and overriding legislatures and voters.

"You had four members of the Massachusetts Supreme Judicial Court who suddenly found a right to same-sex marriage in the oldest written constitution still enforced in the world," said Jan LaRue, chief counsel of Concerned Women for America. "That is a prime example of what we mean by judicial activism."

The decision became a rallying cry for voter mobilization drives that helped win re-election for Bush — who denounced the ruling and promised to nominate conservative judges. It also fueled a raft of state constitutional amendments to ban same-sex marriage as well as an effort in Congress to amend the U.S. Constitution.

Bush's promise to name conservatives justices, "more than perhaps any other, charged me and millions of other values voters across the land to vote for Mr. Bush," Perkins said after Justice Sandra Day O'Connor's retirement. He said the new court vacancy "presents the most important opportunity we may have for decades to stop the nation's courts from stripping away our Judeo-Christian heritage."

The Massachusetts ruling re-

lied heavily on the *Lawrence* decision that decriminalized homosexuality. That 6-3 ruling was penned by Justice Anthony Kennedy, a Republican appointee of President Ronald Reagan, denounced afterward as "the most dangerous man in America" by Focus on the Family founder James Dobson.

The stakes are every bit as high for lesbians and gays.

A Supreme Court ruling against same-sex marriage would be disastrous for the gay rights movement, which views marriage as a core right that could in one stroke eliminate nearly all other forms of discrimination.

Fearing such a setback, gay legal advocacy groups are deliberately holding back on challenges to the 1996 federal Defense of Marriage Act, even though the Massachusetts marriages present the first opportunity to challenge that law.

Instead, they are concentrating on getting more state courts or legislatures to permit same-sex marriage or civil unions while waiting for cultural norms to shift in their favor.

Gay advocacy groups are "trying to make it possible for more

same-sex couples to marry in more parts of the country before this matter gets taken to the Supreme Court," Davidson said. "That's not at all unusual in various human rights struggles. You don't ask the highest court to decide questions until they've been vetted by other courts and more discussed by the general public."

The only gay rights-related case on next term's Supreme Court docket addresses whether colleges can keep military recruiters off their campuses because the military discriminates against gays.

Bigger issues may still be several years off.

These include a challenge to Nebraska's constitutional amendment banning not only same-sex marriage but also civil unions, domestic partnerships or any similar contract between lesbian and gay couples.

U.S. District Judge Joseph Bataillon struck down the amendment as violating the Constitution's guarantee of equal protection, citing *Romer vs. Evans*. Both sides vow to take the case to the Supreme Court.

Gay rights groups are highly skeptical of Roberts on the basis of his decisions in the District of Columbia Court of Appeals and his work for the Reagan and first Bush administrations that imply a narrow view of the judiciary's role

in overseeing executive and legislative action.

They will be concentrating on whether Roberts believes the Constitution contains a right to privacy, and whether he believes the *Romer* case he helped win was correctly decided.

"Judicial restraint is a buzzword just like activist judge," said Evan Wolfson, head of Freedom to Marry. "Everybody's in favor of judicial restraint, but what does it mean? If it means not acting as a check against majoritarian excesses or upholding constitutional rights against improper government action, then restraint is not something admirable."

Most of Roberts' work — such as a decision he joined in *Hamdan vs. Rumsfeld* allowing military tribunals — shows "a very cramped view of constitutional protection for personal liberty," Wolfson said.

Geoffrey Kors, executive director of Equality California, finds no reassurance in Roberts' work on *Romer*.

"(It) tells us absolutely nothing about his views on whether lesbian, gay, bisexual and transgender Americans are protected by the Constitution or whether our relationships are entitled to equal protection," Kors said.

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