Legislating from the bench?

By Steven Porter
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The U.S. Supreme Court has decided to consider whether to grant review of the Defense of Marriage Act. This follows the recent appellate court decision declaring the 16-year-old law unconstitutional. Judges in New York and Boston have now said DOMA violates the 14th Amendment's equal protection clause and interferes with a state's right to set marriage eligibility requirements.

But the final word will come from the Supreme Court. The Court has been accused at times of stretching the Constitution to apply in situations it was not written to address. If the Court affirms the recent decisions, it will no doubt be accused yet again of such judicial legislation.

Is that a fair accusation? Let's consider a related pair of cases: *Bowers v. Hardwick* in 1986 and *Lawrence v. Texas* in 2003.

The Court upheld Georgia's anti-sodomy laws in 1986, ruling that the Constitution does not provide for the right of individuals to engage in sodomy. But in 2003, the Court overturned its own precedent and ruled that Texas could not prohibit private, consensual homosexual sex acts while permitting the same acts for heterosexual couples.

Only three justices presided over both rulings: William Rehnquist, John Paul Stevens and Sandra Day O'Connor. Rehnquist stayed consistent, validating state anti-sodomy laws with the majority in 1986 and siding with the minority in 2003. Stevens stayed consistent as well, voting with the minority in 1986 and the majority in 2003.

O'Connor, however, sided with the majority both times—first upholding Georgia's anti-sodomy statute, and later declaring all anti-sodomy laws unconstitutional. What gives?

In a concurring opinion filed with the 2003 decision, O'Connor defended the 1986 decision:

> The only question in front of the Court in Bowers was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy… This case raises a different issue than Bowers: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not.

No flip-flopping or bench-legislating here, just a coherent rationale for equal protection under the law. Let’s hope that such a carefully reasoned respect for the rule of law will guide the Court as it considers DOMA.