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Goodridge v. Department of Public Health: The Wrong Step at the Wrong Time for Same-Sex Marriages

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GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH: THE WRONG STEP AT THE WRONG TIME FOR SAME-SEX MARRIAGES

INTRODUCTION

Over the last ten years, states across the country have questioned the constitutionality of excluding same-sex partners from the benefits of civil marriage available to opposite-sex couples.[1] Most recently, Massachusetts answered the constitutionality debate by deciding that the Massachusetts Constitution protects same-sex couples' right to marry.[2] The core issues surrounding *Goodridge v. Department of Public Health*[3] include: 1) whether same-sex marriage is a constitutionally protected right making the regulation thereof subject to judicial scrutiny; and 2) whether laws excluding same-sex couples from access to marriage licenses discriminates solely on a suspect classification, such as sex, in violation of due process and equality provisions of state constitutions.[4]

This Comment addresses the wisdom of electing to pursue legitimization of same-sex marriage through judicial action instead of through the legislative process. Specifically, by pursuing legal recognition of same-sex marriages in the courtroom, gay-rights groups have opened the door to a backlash of constitutional amendments. As a result, these amendments could preclude long-term legal equality for same-sex committed relationships in the United States.

Part I of this Comment reviews the facts of *Goodridge*. Part II discusses similar cases from other states that preceded Massachusetts's landmark decision. Part III analyzes the majority and dissenting opinions in *Goodridge*. Finally, Part IV catalogues the public opinion and legislative actions generated by the decision.

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1. *See generally* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (concluding marriage statute violated Vermont Constitution's common benefits clause; resolved by creation of a civil union system); *but see* Standhardt v. Superior Court, 77 P.3d 451, 453 (Ariz. Ct. App. 2003) (holding marriage statute does not violate liberty interests under either Federal or Arizona Constitution).

2. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

3. *Goodridge*, 798 N.E. 2d at 941.

4. *Id.* at 953.

I. FACTS OF *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*[5]

On April 11, 2001, seven same-sex couples in Massachusetts filed suit in the Superior Court against the Department of Public Health and the Commissioner of Public Health for wrongfully denying them marriage licenses.[6] Procurement of a valid state-issued marriage license is a prerequisite to civil marriage in Massachusetts.[7] The plaintiffs argued that by denying these couples marriage licenses, the Department of Public Health deprived same-sex couples in the state from the obligations, benefits, and protections of civil marriage.[8] The defendants admitted to the practice of denying marriage licenses to same-sex couples in Massachusetts, but denied that this violated any law.[9]

The plaintiffs and defendants filed cross-motions for summary judgment.[10] On May 7, 2002, the superior court judge entered judgment for the defendants.[11] The judge reasoned that the statutory language was plainly inconsistent with the interpretation that a union between persons of the same sex could fall under the definition of marriage.[12] In addition, the superior court judge dismissed claims that denial of marriage licenses to these same-sex couples violated constitutional rights.[13] The court concluded that the Massachusetts Constitution does not guarantee a fundamental right to marry a person of the same sex.[14] Moreover, the ban on same-sex marriage did not "offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution."[15] Furthermore, even if denying marriage licenses to same-sex couples violates their constitutional rights, the court opined that the legislature could limit certain rights if doing so rationally furthered a legitimate interest.[16]

The plaintiffs appealed the superior court's decision to grant summary judgment in favor of the defendants.[17] The Massachusetts Supreme Court vacated the summary judgment for defendants and remanded the case to the superior court to enter judgment for the plaintiffs.[18] However, the Supreme Court stayed its judgment for 180 days to allow the legislature time to take any appropriate action based on the decision.[19]

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5. 798 N.E.2d 941 (Mass. 2003).
6. *Goodridge*, 798 N.E. 2d at 949-50.
7. *Id.* at 950.
8. *Id.*
9. *Id.* at 950–51.
10. *Id.* at 951.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 969-70.
19. *Id.* at 970.

II. BACKGROUND

Historically, the definition of marriage is the union of one man and one woman.[20] The concept of civil marriage in the United States is derived from English common law.[21] Colonists adopted the English concept of marriage to regulate the procreation and care of children.[22]

A. Overview of Massachusetts Marriage Laws and Benefits

In Massachusetts, General Laws c. 207 (hereinafter "G.L. c. 207") is the marriage licensing statute.[23] The marriage licensing statute keeps close relatives, persons with syphilis, persons who are already married, and in some cases minors from obtaining a license for civil marriage.[24] The statute also delineates the procedures for making the civil marriage a matter of public record.[25]

The Massachusetts Constitution guarantees equality under the law and protects due process and liberty for all persons.[26] Although civil marriage is statutorily created, arguably it is a part of the constitutionally protected rights to equality and liberty.[27] In fact, the Massachusetts Constitution protects an individual's liberty from government intrusion into private matters to a greater extent than the Federal Constitution.[28] The promulgation of these laws affords married couples an exhaustive list of benefits.

Civil marriage offers many benefits in the Commonwealth of Massachusetts that domestic partnerships do not receive.[29] In civil marriages, courts and lawmakers have established predictable rules that govern stability and private responsibility for the care of children.[30] Additionally, married couples enjoy certain unique property rights.[31] For example, when a person dies intestate,[32] the surviving spouse will automatically inherit the deceased's property.[33] In wrongful death actions, surviving spouses, unlike unmarried domestic partners, may sue for loss of consor-

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20. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 952 (Mass. 2003).
21. *Goodridge*, 798 N.E.2d at 969.
22. *See id.* at 961.
23. *Id.* at 951.
24. *Id.* at 951-52.
25. *Id.* (citing MASS. GEN. LAWS ch. 207, § 20 (1998); MASS. GEN. LAWS ch. 207, § 28 (1998); MASS. GEN. LAWS ch. 207, § 40 (1998); MASS. GEN. LAWS ch. 17, § 4 (1998)).
26. *See id.* at 959-60.
27. *See id.* at 957.
28. *Id.* at 959 (citing Planned Parenthood League of Mass., Inc. v. Attorney Gen., 677 N.E.2d 101 (Mass. 1997); Corning Glass Works v. Ann & Hope, Inc., 294 N.E.2d (Mass. 1973)).
29. *Id.* at 955 (citing Wilcox v. Trautz, 693 N.E.2d 141 (1998)).
30. *Id.* at 956.
31. *See id.* at 955.
32. Intestate is defined in pertinent part as: "Of or relating to a person who has died without a valid will." BLACK'S LAW DICTIONARY 840 (8th ed. 2004).
33. *Goodridge*, 798 N.E.2d at 955 (citing MASS. GEN. LAWS ch. 190, § 1 (2004)).

tium.[34] Also, certain life insurance policies and social security benefits are only available to those who are or were married.[35] The right to marry, and thereby gain access to this myriad of benefits, is considered a "civil right."[36]

B. Marriage as a "Civil Right"

With technological innovations in the area of fertility, rising divorce rates, and changes in adoption policies, the concepts of marriage and family in the United States have changed over the last four decades.[37] Since the late 1960s, there has been a series of cases across the United States that classify marriage as a "civil right."[38]

1. *Perez v. Sharp*[39]

In 1948, the Supreme Court of California decided *Perez v. Sharp*.[40] In *Perez*, a mixed-race couple challenged a California law making it illegal for whites and blacks to marry.[41] The court ruled that the legislature may only interfere with the right to marry if there is "an important social objective [of public health, safety, and welfare]," and by "reasonable means."[42] The court reasoned that it is a violation of due process and equal protection to deny access to the fundamental right to marry based solely on "prejudice" and "oppressive discrimination."[43] In addition, the court ruled that part of the fundamental right to marry is the right to choose whom to marry.[44] Therefore, the court concluded that the statute was impermissible because it restricted the right of people to choose to marry somebody of a different race.[45]

2. *Loving v. Virginia*[46]

Cases challenging the constitutionality of denying same-sex couples the right to marry often rely on the reasoning in the 1967 Supreme Court

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34. *Id.* at 956 (citing MASS. GEN. LAWS ch. 229, § 2 (2000)).
35. *Id.* at 955.
36. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); *see also* Milford v. Worcester, 7 Mass. 48, 56 (1810).
37. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d at 961.
38. *See, e.g.*, *Loving*, 388 U.S. at 12 (quoting *Skinner*, 316 U.S. at 541); *see also Milford*, 7 Mass. at 56.
39. 198 P.2d 17 (Cal. 1948).
40. *Perez*, 198 P.2d at 17.
41. *Id.* at 17–18.
42. *Id.* at 19.
43. *Id.*
44. *Id.* at 21.
45. *Id.*
46. 388 U.S. 1 (1967).

decision *Loving v. Virginia*.[47] Like *Perez*, *Loving* addressed the constitutionality of a law prohibiting interracial marriage.[48] The Supreme Court held that Virginia's anti-miscegenation statutes violated the Due Process Clause of the Fourteenth Amendment and, thus, were constitutionally impermissible.[49] Specifically, classifications in statutes cannot be "an arbitrary and invidious discrimination."[50] Statutes that classify by race are particularly scrutinized because the category is considered automatically suspect.[51] These types of classifications are only permissible if they accomplish some state objective that is independent from racism.[52] The logic behind the *Loving* ruling fits nicely into same-sex marriage cases because denial of marriage licenses to same-sex couples is based on the gender of the potential spouse. Like race, gender is an automatically suspect classification.[53]

3. *Lawrence v. Texas*[54]

Advocates of same-sex marriage may have regarded the recent Supreme Court decision in *Lawrence v. Texas*[55] as evidence that the United States was ready for a case like *Goodridge*. In *Lawrence*, the Supreme Court held that a Texas sodomy statute, making it a crime for consenting adults of the same sex to engage in certain sexual conduct in private, was unconstitutional.[56] *Lawrence* overruled a prior Supreme Court decision, *Bowers v. Hardwick*,[57] which had held that such a statute did not violate the Due Process Clause of the Fourteenth Amendment.[58]

The *Lawrence* Court claimed that the liberty issue before the Court was not merely "the right to engage in certain sexual conduct," as claimed in *Bowers*, but rather the liberty allowing homosexual persons the right to "choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[59] The Texas statute subjected consenting adult homosexuals to criminal charges for private sexual conduct.[60] According to the Court, despite the misdemeanor nature of the crime, homosexuals convicted under the statute would have to report a criminal record on job and hous-

47. *Loving*, 388 U.S. at 1; *see also* Baehr v. Lewin 852 P.2d 44, 63 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause); *Goodridge*, 798 N.E.2d at 957.
48. *Loving*, 388 U.S. at 3-4.
49. *Id.* at 12.
50. *Id.* at 10.
51. *Id.* at 11.
52. *Id.*
53. *Goodridge*, 798 N.E.2d at 961 n.21.
54. 539 U.S. 558 (2003).
55. *Lawrence*, 539 U.S. at 558.
56. *See id.* at 578-79.
57. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 558.
58. *See Lawrence*, 539 U.S. at 578.
59. *Id.* at 567 (discussing framing of the issues in Bowers v. Hardwick, 478 U.S. 186 (1986)).
60. *Id.* at 562-63.

ing applications.[61] Additionally, in certain states, homosexuals convicted of sodomy would have to register as sex offenders.[62]

The *Lawrence* Court reviewed the history of sodomy statutes in the United States that revealed a trend toward abolishing same-sex prohibitions in sodomy laws.[63] Also, the Court claimed that there was widespread disapproval of the *Bowers* decision.[64]

The Court found no permissible rational basis for Texas to convict consenting adults acting in private under this sodomy law.[65] While the Court acknowledged that there is a deep-rooted belief in America that homosexual relationships are morally wrong, it concluded that it is not for the majority to impose their personal moral convictions on individuals.[66] The Court confirmed that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[67] Thus, in the matter of engaging in private consensual homosexual acts, the government has no right to interfere with the personal liberty of same-sex couples.[68] Although the Court used some language aimed at limiting the holding of *Lawrence* to same-sex sexual conduct,[69] the Court's reasoning could be extended to argue that same-sex marriage prohibitions violate the Due Process Clause of the Fourteenth Amendment.[70]

C. Same-Sex Marriage Cases Across the Nation

The Massachusetts Supreme Judicial Court was not the first state supreme court to encounter the constitutionality of denying access to civil marriage to same-sex couples. In the last decade, Hawaii, Alaska and Vermont all decided similar cases.[71] Each case concluded that it was impermissible under the respective state constitutions to deny state con-

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61. *Id.* at 575-76.
62. *Id.* at 575.
63. *Id.* at 572-73.
64. *Id.* at 576.
65. *Id.* at 578.
66. *Id.* at 571.
67. *Id.* at 574 (citing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992)).
68. *Id.* at 578.
69. *See, e.g., id.* at 567:

> The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals . . . [t]his, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.

Id.

70. *Id.* at 599–600 (Scalia, J., dissenting).
71. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 at *6 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); *Baehr*, 852 P.2d at 55; Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (resolved by creation of civil union system).

ferred marital benefits to same-sex couples.[72] Yet, inevitably, the legislature in each state responded to the court's opinions by enacting legislation to expressly deny same-sex civil marriage.

1. Hawaii: *Baehr v. Lewin*[73]

Hawaii took the first steps toward judicially recognizing same-sex marriages in the United States.[74] In *Baehr v. Lewin*,[75] the plurality of the Hawaii Supreme Court reasoned that a state law excluding same-sex couples from obtaining marriage licenses may violate the Equal Protection Clause and Equal Rights Amendment of Hawaii's constitution.[76] The court stated that allowing opposite-sex couples access to marriage licenses, while denying marriage licenses to same-sex couples, constituted sex discrimination.[77] In looking at United States Supreme Court decisions that addressed the right to marriage, the court concluded that while there is a constitutional right to marriage, *same-sex* marriage is not a fundamental right. Specifically, the court opined that same-sex marriage was not covered by the right to privacy nor deeply "rooted in traditions."[78] Accordingly, the court overruled the trial court's judgment on the pleadings in favor of the defendant Health Department and remanded the case on the theory that denying same-sex couples access to marriage licenses might constitute a discrimination based on gender.[79] Moreover, the court requested an evidentiary hearing to decide if the statute in question "further[ed] compelling state interests" and was "narrowly drawn to avoid unnecessary abridgments of constitutional rights."[80] On remand, the trial court determined that the statute violated the Equal Protection Clause of the Hawaii Constitution and required the Health Department to issue marriage licenses to same-sex couples.[81]

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72. *See, e.g., Brause*, 1998 WL 88743 at *6 (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); *Baehr*, 852 P.2d at 55 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); *Baker*, 744 A.2d at 886.

73. 852 P.2d 44 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

74. *See Baehr*, 852 P.2d at 68 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

75. 852 P.2d 44 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

76. *Baehr*, 852 P.2d at 55 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

77. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 11 (1996).

78. *Id.* at 13.

79. *Id.* at 13-14.

80. *Id.* at 15.

81. Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 at *22 (Haw. Cir. Ct. Dec. 3, 1996) (superseded by HAW. CONST. art. I, § 23).

In response to *Baehr*, the Hawaii legislature amended the Hawaii Constitution in 1998 to reserve marriage for opposite-sex couples.[82] However, in exchange, the legislature agreed to provide a benefits package for couples who were not married, including same-sex couples.[83] The same year that the Hawaii legislature amended Hawaii's constitution to exclude same-sex couples from the definition of marriage, the Supreme Court of Alaska decided a case similar to *Baehr*.

2. Alaska: *Brause v. Bureau of Vital Statistics*[84]

In 1998, Alaska became the second state to address the constitutionality of statutes banning same-sex marriage.[85] The court in *Brause v. Bureau of Vital Statistics*[86] held that the Alaska marriage code limiting civil marriage to unions between one man and one woman violated the right to privacy and equal protection provisions of Alaska's constitution.[87] The court equated the right to privacy with the right to be free from government intrusion into "intimate personal decisions of the individual."[88] Accordingly, because the Alaska marriage code interfered with the "intimate personal decision" of whom to marry, the court determined that the code violated an individual's right to privacy.[89] The court further reasoned that to ensure equal protection of fundamental rights, a state statute that discriminated based on sex should be subjected to the highest level of scrutiny.[90] Therefore, the court ruled that the parties needed to engage in further hearings to determine whether the state had a compelling interest in denying same-sex partners the fundamental right to marry.[91]

Although the court recognized the discrepancies between the rights of same-sex couples and those of opposite sex couples, subsequent legislation silenced this opinion. Like *Baehr*, an amendment to the Alaska constitution superseded the *Brause* decision.[92] Once again the legislature recognized marriage as "exist[ing] only between one man and one woman."[93]

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82. HAW. CONST. art. I, § 23.
83. David Orgon Coolidge, *The Hawai'i Marriage Amendment: It's Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 116 (2000).
84. No. 3AN-95-6562 CI, 1998 WL 88743 at *6 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska).
85. *Brause*, 1998 WL 88743 at *3-*4, *6.
86. *Id.*
87. *Id.* at *1.
88. *Id.* at *6.
89. *Id.* at *5.
90. *Id.* at *6.
91. *Id.*
92. ALASKA CONST. art. I, § 25.
93. *Id.*

3. Vermont: *Baker v. State*[94]

One year later, the Vermont Supreme Court ruled that denying same-sex couples access to marriage licenses was impermissible under the state's constitution.[95] Unlike Hawaii, Alaska, and Massachusetts, Vermont's constitution includes a Common Benefits Clause distinct from equal protection.[96] The core of the Common Benefits Clause is the inclusion of all political groups.[97] Specifically, no one person or group can receive special benefits and advantages from the government that are not available to other groups.[98] The court concluded that because marriage came with certain unique benefits, the state could not arbitrarily exclude a group of persons from these state-conferred benefits.[99]

After *Baker*, the Vermont legislature had the choice to either include same-sex couples under the existing marriage laws or create a parallel statutory relationship to ensure equal benefits to same-sex couples.[100] Not surprisingly, the state legislature responded by codifying a system of civil unions that give all of the state benefits of marriage to same-sex committed partnerships without conferring on them the status of civil marriage.[101]

The federal government immediately reacted to the success of same-sex marriage cases. In 1996, following *Baehr*, Congress approved a bill to allow states to not recognize same-sex marriages performed in other states.[102] Additionally, the Defense of Marriage Act sought to define federally marriage as a union between one man and one woman.[103] On September 21, 1996, President Clinton signed the bill into law.[104] The federal government, faced with the possibility of same-sex marriage gaining recognition in certain states, enacted legislation on civil marriage, a subject traditionally left to the states to regulate.

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94. 744 A.2d 864 (Vt. 1999).

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

96. *See* VT. CONST. art. VII, ch. 1:

> 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; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

Id.

97. *Baker*, at 874-75.

98. VT. CONST. art. VII, ch. 1; *see also Baker*, 744 A.2d at 867.

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

100. *Id.* at 869.

101. VT. STAT. ANN. tit. 15, § 1204 (2003).

102. Charles Bierbauer, *Anti Gay Marriage Act Clears Congress*, CNN.com, (Sept. 10, 1996), *at* http://www.cnn.com/us/9609/10/gay.marriage.

103. Louise Schiarone, *Amendments Tie Up Anti Gay-Marriage Bill*, CNN.com, (Sept. 5, 1996), *at* http://www.cnn.com/us/9609/05/gay.marriages/index.html.

104. 1 U.S.C. § 7 (1996); *see also* Defense of Marriage Act of 1996, H.R. 3396, 104th Cong. § 2-3 (1996).

In summary, the fate of past court decisions from other states on the same-sex marriage issue were indicators that: 1) public opinion did not support same-sex marriage; and 2) if a court ruling threatened to force a state to issue marriage licenses to same-sex couples contrary to public opinion, legislatures would act on behalf of constituents to prevent it. Despite this backdrop, seven same-sex couples brought a case similar to *Baehr*, *Brause*, and *Baker* in Massachusetts.

III. *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*[105]

Notwithstanding the failure of the previous state cases to enact longstanding change, seven same-sex couples in Massachusetts turned to the judicial system to grant them access to civil marriage. In *Goodridge v. Department of Public Health*,[106] the Supreme Judicial Court of Massachusetts found that: 1) same-sex couples were statutorily denied marriage licenses; and 2) this denial violated the Massachusetts Constitution.[107]

First, the court dissected the literal and textual meaning behind the Massachusetts marriage license statute, G.L. c. 207, and concluded that it excluded same-sex couples from obtaining marriage licenses.[108] Next, the court analyzed whether G.L. c. 207 violated the state constitution's due process and equal protection provisions.[109] Using a rational basis standard of review, the majority concluded that the marriage license statute violated the state constitution.[110] Alternatively, the concurring justice felt that the court did not need to consider due process and equal protection arguments because the statute impermissibly discriminated on the basis of sex in violation of Article I of the Declaration of Rights as amended by Article 106 of the Amendments to the Massachusetts Constitution.[111] Finally, the dissenting justices disagreed that the marriage license statute violated the state constitution.

A. *Majority Opinion: Rejecting the Defendants' Rational Basis Arguments to Find G.L. c. 207 Violated the State Constitution*

The defendants first claimed that G.L. c. 207 was rational because it promoted procreation.[112] Although the procreation of future generations was of great importance in early American history, the majority reasoned that fertility was no longer the core purpose of marriage.[113] The majority

105. 798 N.E.2d 941 (Mass. 2003).
106. *Goodridge*, 798 N.E. 2d at 941.
107. *Id. at* 953, 963.
108. *See* MASS. ANN. LAWS ch. 207, § 1 (Law. Co-op. 2004); *Goodridge*, 798 N.E.2d at 951, 953.
109. *Goodridge*, 798 N.E.2d at 960–61, 963.
110. *Id.* at 960–61.
111. *Id.* at 970 (Greaney, J., concurring).
112. *Id.* at 961.
113. *Id.*

based their assessment on the facts that: 1) not all married couples can or do have children;[114] 2) marriage is not a prerequisite to bearing children; and 3) lack of fertility is not a valid ground for dissolving a marriage.[115] Thus, the majority disagreed with the defendants' procreation rationale by noting that procreation is not the central defining goal of the institution.[116]

The majority also discarded the defendants' second claim that the statute was permissible because it guaranteed the "optimal" setting for child rearing.[117] The majority found this claim baseless. The fact that same-sex couples could already legally adopt children in the state undermined this argument.[118] In addition, the majority reasoned there was a lack of sufficient research to prove definitively that a household with parents of the opposite-sex was the best setting for child rearing.[119] The majority further suggested that the classification of same-sex couples as a less desirable child-rearing unit may have, in part, been based on the fact that same-sex couples were denied the benefits of civil marriage in the first place.[120] Therefore, the defendants failed to convince the court that the marriage license statute furthered a legitimate government interest in the welfare of children.

Finally, the majority rejected the defendants' third argument that the statute was rationally permissible because it safeguarded state and private resources.[121] The majority reasoned that many of the *Goodridge* same-sex couples had dependants who needed the same state protections afforded to dependants of opposite-sex couples.[122] Also, the majority explained that the decision to provide married couples with certain benefits was not based on a demonstration of financial dependence of one partner.[123] Thus, the majority reasoned that even if same-sex couples were financially less dependant on one another, their independent financial stability was not a reason to deny them the benefits of civil marriage.[124]

In conclusion, the defendants failed to provide a rational basis for the legislature to deny same-sex couples access to civil marriage. As a result, the majority found that the marriage license statute was impermissible under the Massachusetts Constitution.[125]

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114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 961, 963.
118. *Id.* at 962.
119. *Id.* at 962–63.
120. *Id.* at 963.
121. *Id.* at 964.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

B. Justice Greaney's Concurring Opinion: G.L. c. 207 Impermissibly Discriminates Based on Gender

In his concurrence, Justice Greaney opined that the court could resolve the issue based on constitutionally impermissible sex discrimination alone.[126] Justice Greaney asserted that the court need not look beyond Article I of the Declaration of Rights as amended by Article 106 of the amendments to the Massachusetts Constitution, which prohibits discrimination based on "sex, race, color, creed, or national origin."[127] Simply put, Justice Greaney reasoned that because the right to marry was part of a fundamental right to enjoy life and that discriminating against same-sex couples was a discrimination based on the sex of the marital partner, the marriage licensing statute was unconstitutional.[128]

Justice Greaney further stated that the court was not limited to the traditional definition of marriage as being between one man and one woman.[129] Specifically, he suggested that the court should scrutinize the validity of that definition in light of Article I.[130] According to Justice Greaney, "neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families."[131] In fact, Justice Greaney likely would have included same-sex committed couples in the definition of marriage despite the literal and textual meanings of marriage derived by the majority.

C. Justice Spina's, Justice Sosman's, and Justice Cordy's Dissents: The Court Misapplied the Rational Basis Standard and, thus, Usurped Legislative Power

Justices Spina, Sosman, and Cordy dissented.[132] The dissenting justices in *Goodridge* did not agree that the Massachusetts marriage statute violated the state constitution. Justice Spina expressed concern with: 1) the court usurping legislative power;[133] 2) the court misconstruing the sex discrimination element of the equal protection argument;[134] 3) the char-

126. *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring).

127. *Id.* at 970 (citing MASS. CONST. art I (2004), *amended by* MASS. CONST. art. CVI. Art. I). All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Id.

128. *Id.* at 970–71 (Greaney, J., concurring).

129. *Id.* at 972–73 (Greaney, J., concurring).

130. *Id.* at 973 (Greaney, J., concurring).

131. *Id.* (Greaney, J., concurring).

132. *Goodridge*, 798 N.E.2d at 974.

133. *Id.* at 974 (Spina, J., dissenting).

134. *Id.* at 975 (Spina, J., dissenting).

acterization of the fundamental right to marry as including same-sex unions;[135] and 4) the revising of the statute to be gender neutral.[136] Justice Sosman, on the other hand, feared that the court did not properly apply the rationality standard of review.[137] Finally, Justice Cordy shared Justice Spina's concerns regarding redefining marriage to include same-sex unions, and deciding the same-sex marriage debate in court instead of through the legislative process.[138] Justice Cordy also opined that there was no fundamental right to privacy issue at stake.[139]

1. Justice Spina's Dissent

Justice Spina expressed concerns that the majority overstepped its judicial boundaries.[140] Simply put, the power to regulate marriage is held by the legislature and, therefore, Justice Spina argued that the court was usurping that power.[141]

According to Justice Spina, the Massachusetts statute does not discriminate against any particular group but applies to all individuals equally.[142] Justice Spina reasoned that the gender contemplated was the gender of the person to whom the law applies, not the gender of that person's partner.[143] Thus, the inability to marry a person of the same sex applied equally to all persons under the law.[144] Additionally, Justice Spina explained that the marriage statute did not discriminate based on sexual orientation.[145] First, like a heterosexual person, a homosexual person was free to enter into a permissible civil marriage with a person of the opposite sex.[146] Second, homosexual and heterosexual persons were also equally denied the ability to marry a person of the same sex.[147] Despite the plaintiffs' equal protection argument, Justice Spina found that G.L. c. 207 did not discriminate on the basis of gender.[148]

Next, Justice Spina addressed the plaintiffs' due process argument. Justice Spina reasoned that because same-sex marriage was not "deeply rooted in the nation's history," it did not meet the test of a fundamental right.[149] While Justice Spina conceded that people have a right to choose whom to marry, he claimed that the choice had not traditionally involved

135. *Id.* at 976 (Spina, J., dissenting).
136. *Id.* at 977 (Spina, J., dissenting).
137. *Id.* at 978–79 (Sosman, J., dissenting).
138. *Id.* at 984, 987 (Cordy, J., dissenting).
139. *Id.* at 986 (Cordy, J., dissenting).
140. *Id.* at 974 (Spina, J., dissenting).
141. *Id.* (Spina, J., dissenting).
142. *Id.* (Spina, J., dissenting).
143. *Id.* (Spina, J., dissenting).
144. *Id.* (Spina, J., dissenting).
145. *Id.* at 975 (Spina, J., dissenting).
146. *Id.* (Spina, J., dissenting).
147. *Id.* (Spina, J., dissenting).
148. *Id.* at 974 (Spina, J., dissenting).
149. *Id.* at 976 (Spina, J., dissenting).

the right to choose a person of the same sex.[150] According to Justice Spina, there was no constitutionally protected right, fundamental or otherwise, at stake in this case and, therefore, the majority was wrong to apply even a rational basis test.[151]

Finally, Justice Spina reasoned that the majority's remedy of making the statute gender neutral was outside the bounds of permissible judicial discretion.[152] The judiciary may only revise a legislative statute if the legislative intent is preserved.[153] Thus, according to Justice Spina, changing gender specific wording into gender neutral language violated legislative intent.[154]

2. Justice Sosman's Dissent

Justice Sosman opined that the majority misused the rational basis standard of review by holding it to too high of a threshold.[155] The rational basis standard of review requires that the statute "satisfies a minimal threshold of rationality."[156] Thus, the reasons given by the defendants met this minimal threshold. In addition to her concerns about use of the rational basis standard, Justice Sosman also was concerned that there was no compelling reason for the court to force the state to give same-sex couples the benefits singled out for opposite-sex couples.[157] According to Justice Sosman, there was insufficient evidence that same-sex couples are essentially the same as opposite-sex couples.[158] In fact, Justice Sosman noted that many opposite-sex couples with families are not receiving the benefits of marriage. Hence, Justice Sosman concluded that there was no compelling reason to single out same-sex couples to receive benefits denied to all types of families without sufficient scientific studies to back up the assertion.[159]

3. Justice Cordy's Dissent

Finally, Justice Cordy expressed concern with the majority's interpretation of the definition of marriage, and believed this issue was better left to the legislature.[160] In Justice Cordy's opinion, the majority improperly redefined marriage to include unions of same-sex partners so that it could declare that the Massachusetts marriage license statute vio-

150. *Id.* (Spina, J., dissenting).
151. *Id.* (Spina, J., dissenting).
152. *Id.* at 977 (Spina, J., dissenting).
153. *Id.* (Spina, J., dissenting).
154. *Id.* (Spina, J., dissenting).
155. *Id.* at 978–79 (Sosman, J., dissenting).
156. *Id.* at 978 (Sosman, J., dissenting).
157. *Id.* at 978–79 (Sosman, J., dissenting).
158. *Id.* at 979 (Sosman, J., dissenting).
159. *Id.* at 981 (Sosman, J., dissenting).
160. *Id.* at 984, 1004 (Cordy, J., dissenting).

lated a fundamental right to marry.[161] Yet, according to Justice Cordy, the fundamental right to marry has never included the right to marry a person of the same sex.[162] Justice Cordy argued that many of the cases claiming that the right to marry was a fundamental right implicitly meant that procreation with a chosen partner was a fundamental right.[163] Therefore, Justice Cordy concluded that this case did not implicate the right to privacy issue because the right to privacy only applies to sexual relations.[164] In particular, G.L. c. 207 did not interfere with the ability to have a homosexual relationship; it merely meant that the state did not want to single out such relationships for these types of benefits.[165] Furthermore, Justice Cordy advised that the court should hesitate to make decisions that might create a new fundamental right when public opinion on same-sex marriage was unknown.[166] According to Justice Cordy, the best way to determine public opinion is to leave it to the legislature to decide the same-sex marriage issue.[167]

The majority and dissenting opinions in *Goodridge* disagreed about whether the case involved determining the constitutionality of a state statute or deferring a political decision to the legislature. However, even if the court agreed that the case was about the constitutionality of the Massachusetts statute, the majority and dissent disagreed about how to apply the rational basis standard of review to the statute. Because the majority deemed the case to be a determination of the constitutionality of a state statute, it was properly decided by the court and not by the legislature. However, the plaintiffs' wisdom in bringing the case rather than pursuing legislative action was dubious in light of the backlash of constitutional amendments that similar cases in other states had sparked.

IV. ANALYSIS

The *Goodridge* dissents' concern that the issue of same-sex marriage should have been left to the legislature is well founded. Although marriage is a civil institution, it also has deep religious and traditional meanings to Americans that are inconsistent with the inclusion of same-sex partnerships. Such an emotionally charged issue should be left to the representatives of popular opinion to decide. This analysis will cover several of the issues related to deciding this question in court instead of through the legislative process. First, there is recent legislative and judicial action indicating that Americans on the whole favor a definition of marriage limited to unions between one man and one woman. Second,

161. *Id.* at 984 (Cordy, J., dissenting).
162. *Id.* (Cordy, J., dissenting).
163. *Id.* at 985 (Cordy, J., dissenting).
164. *Id.* (Cordy, J., dissenting).
165. *Id.* at 986–87 (Cordy, J., dissenting).
166. *Id.* at 1004 (Cordy, J., dissenting).
167. *Id.* (Cordy, J., dissenting).

the bans on same-sex marriage, anti-miscegenation laws, and sodomy are not so analogous as to indicate a need for judicial action to override constitutional violations. Third, polls of public opinion indicate a more favorable political environment for same-sex civil unions with marriage-like benefits than for same-sex marriages. Finally, by resolving the issue in court, *Goodridge* has resulted in pre-emptive strikes against same-sex marriages in both state and federal forums that leave persons granted same-sex marriages in Massachusetts in a tenuous legal position.

A. Legal Action Indicates Resistance to Same-Sex Marriage

Legal recognition of committed domestic relationships and equal access to benefits regardless of sexual orientation undoubtedly is desirable. However, forcing recognition and access through a state supreme court decision may not be the best route to achieving this goal. Without the support of popular opinion, a state supreme court decision leaves the door open for constitutional amendments that would definitively exclude same-sex couples from ever having access to the institution of marriage. In fact, a similar holding in the Supreme Court of Alaska led to exactly that result.[168]

Following the landmark decision in *Baehr v. Lewin*[169] in 1993, the Republican dominated Congress passed the Defense of Marriage Act.[170] This act defined marriage at the federal level as being the union of one man and one woman.[171] In addition, this legislation gave states permission to give no credit to same-sex marriages solemnized in other states.[172] President Clinton signed the bill into law in 1996.[173] State legislatures across the country followed suit and enacted state Defense of Marriage Acts to: 1) define marriage as a union between one man and one woman; and 2) express their intentions to hold as invalid any same-sex marriage solemnized in other states.[174]

Thirty-eight states have current statutes defining marriage as the union between one man and one woman.[175] In addition, in Minnesota, one of the states without such a statute, the supreme court ruled in 1971 that

168. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 at *4 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, ALASKA CONST. art. I, § 25).

169. 852 P.2d 44, 68 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

170. *See* Charles Bierbauer, *Anti Gay Marriage Act Clears Congress*, CNN.com, Sept. 10, 1996, *at* http://www.cnn.com/us/9609/10/gay.marriage.

171. *See* Louise Schiavone, *Amendments Tie Up Anti Gay-Marriage Bill*, CNN.com, Sept. 5, 1996, *at* http://www.cnn.com/us/9609/05/gay.marriages/index.html.

172. Schiavone, *supra* note 171.

173. Bierbauer, *supra* note 170.

174. *See* B.A. Robinson, *Same Sex Marriages (SSM) and Civil Unions*, RELIGIOUS TOLERANCE.ORG, *at* http://www.religioustolerance.org/hom_marr.htm (last updated March 8, 2005).

175. Robinson, *supra* note 174.

same-sex marriage is not allowed under the statute and that the statute does not deprive these couples of any fundamental right.[176]

Cases similar to *Goodridge* and previous same-sex marriage disputes have been unsuccessful in Arizona and the District of Columbia.[177] Of the four state supreme courts that have declared state statutes limiting marriage to opposite-sex couples to be a violation of state constitutions, only the decision in Massachusetts resulted in an order to grant marriage licenses to same-sex couples.[178] Of the three remaining states, Alaska and Hawaii passed amendments to the state constitutions defining marriage as the union between one man and one woman.[179] These constitutional amendments rendered the state statutes at issue in the cases constitutionally valid. Finally, Vermont created a parallel institution to grant state benefits and the responsibilities of marriage to same-sex couples without giving them the status of being married.[180]

In 2004, courts in both New York and California decided cases brought against public officials for solemnizing same-sex marriages in violation of state statutes.[181] While the Justice Court of New York dismissed the charges, because the court determined the statute refusing marriage licenses to same-sex couples violated equal protection laws,[182] the case from California resulted in invalidation of all same-sex marriages obtained in violation of the state statute.[183]

These court decisions, statutory enactments and proposed constitutional amendments demonstrate a lack of cohesion across the United States in opinions about same-sex marriage. However, the fact that to date no state has enacted a law or constitutional amendment declaring same-sex marriage legal is a clear indicator that public opinion does not strongly support same-sex couples having the right to marriage.[184] In fact, the myriad of Defense of Marriage Acts and amendments to state constitutions specifically excluding same-sex couples from the definition of marriage, demonstrate a greater tendency of Americans to vote against marriage for same-sex couples when given the choice.[185] The plaintiffs

176. *See* Baker v. Nelson, 191 N.W.2d 185, 186–87 (Minn. 1971).

177. *See* Standhardt v. Super. Ct. of Ariz., 77 P.3d 451, 465 (Ariz. Ct. App. 2003); Dean v. Dist. of Columbia, 653 A.2d 307, 361 (D.C. 1995) (per curiam).

178. *See* ALASKA CONST. art.1, § 25; HAW. CONST. art. I, § 23; *Brause*, 1998 WL 88743 at *4 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, ALASKA CONST. art. I, § 25); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003); Baker v. State, 744 A.2d 864, 889 (Vt. 1999).

179. *See* ALASKA CONST. art.1, § 25; HAW. CONST. art. I, § 23.

180. *See Baker*, 744 A.2d at 889.

181. *See* Lockyer v. City and County of San Francisco, 95 P.3d 459, 464 (Cal. 2004); People v. West, 780 N.Y.S.2d 723, 723-24 (N.Y. Jus. Ct. 2004).

182. *West*, 780 N.Y.S.2d at 725.

183. *Lockyer*, 95 P.3d at 499.

184. *See generally* Robinson, *supra* note 174.

185. *See, e.g.*, ALASKA CONST. art.1, § 25; HAW. CONST. art. I, § 23.

in *Goodridge* obviously were undeterred by the negative history evidenced by the other similar same-sex marriage cases.

The plaintiffs in *Goodridge* may have sought access to civil marriage through the court system because the United States has a history of promoting important social change by engaging the judicial branch.[186] Arguably, the civil rights movement of the 1960s was spurred by the Supreme Court's opinion in *Brown v. Board of Education*.[187] In *Brown*, the Court recognized the social stigma and psychic harm caused by segregating school children.[188] A backlash of resistance to desegregation followed the *Brown* decision, just as a backlash of resistance to inclusion of same-sex unions in the definition of marriage followed *Goodridge* and similar cases.[189] Supporters of seeking access to civil marriage for same-sex couples through the judicial system may see the eventual acceptance of desegregation and success of the civil rights movement as indicators that long-term social change will result from decisions like *Goodridge*. However, there is an argument that *Brown* was not the start of the civil rights movement, just a step in a process already in motion.[190] In fact, there may have already been a social, economic, and political climate that would have eventually led to the Civil Rights Act in the absence of *Brown*.[191] Some argue that *Brown's* major contribution to the civil rights movement was motivating opponents of desegregation to violence.[192] This display of violence may have sparked otherwise unmotivated supporters to take action.[193]

So far, *Goodridge* and similar cases have not sparked violence by opponents, just constitutional amendments precluding the possibility of long-term access to civil marriage for same-sex couples.[194] The continuing success of these state constitutional amendments defining marriage as the union between one man and one woman shows that the present social, economic and political climate of the United States does not support a social change in favor of civil marriage for same-sex couples.

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186. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954); Roe v. Wade, 410 U.S. 113, 164–65 (1973).

187. *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 13 (1994) (citing EARL BLACK, SOUTHERN GOVERNORS AND CIVIL RIGHTS: RACIAL SEGREGATION AS A CAMPAIGN ISSUE IN THE SECOND RECONSTRUCTION 109 (1976)).

188. *See Brown*, 347 U.S. at 494–95.

189. *Compare* Klarman *supra* note 187, at 11 *with* Kavan Peterson, *50-state rundown on gay marriage laws*, Stateline.org (last updated Nov. 3, 2004), *at* http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058.

190. *See* Klarman, *supra* note 187, at 80–85.

191. *See* Klarman, *supra* note 187, at 71–76.

192. Klarman, *supra* note 187, at 76.

193. Klarman, *supra* note 187, at 11.

194. *See* Peterson, *supra* note 189.

B. Goodridge *not analogous to* Lawrence v. Texas,[195] Perez v. Sharp,[196] *and* Loving v. Virginia[197]

Despite the emergence of state constitutional amendments against same-sex marriage, the recent Supreme Court decision in *Lawrence v. Texas*[198] might be construed as an indicator of a favorable political climate for change in the treatment of homosexual couples.[199] Yet, *Lawrence* dealt strictly with the right to privacy and freedom from governmental intrusion into the private sexual conduct of its citizens.[200] *Lawrence* did not deal with state-conferred benefits for couples engaged in those private relationships.[201] While the *Lawrence* decision took the government officially out of the role of actively prosecuting private intimate associations, the ruling did not mandate that legislatures provide statutory support for homosexuality.[202]

At issue in *Lawrence* was a Texas criminal statute used to prosecute adult homosexuals engaged in private consensual acts.[203] At issue in *Goodridge* was a civil code used to confer on heterosexual couples a public status and to give them certain state benefits.[204] Criminalizing the private conduct of a class of citizens is different from offering a package of benefits to go along with a civilly conferred status. Moreover, denying same-sex couples access to civil marriage does not attach the same stigma to homosexuals as having a criminal record for engaging in their private intimate relationships. Additionally, unlike *Lawrence*, the state did not rationalize offering civil marriage only to opposite-sex couples by condemning the morality of same-sex relationships.[205] Instead, the state argued that the statute furthered legitimate government interests in procreation, guaranteed optimal child-rearing settings, and safeguarded state and private resources.[206]

Finally, there has been no similar movement in the United States to criticize or refuse to adhere to civil marriage statutes. Although, there have been a few isolated legal cases, and some disobedience of controlling civil marriage laws, there has not been a pattern of not enforcing the limitation of marriage to opposite-sex couples.[207] In fact, the few court

195. 539 U.S. 558 (2003).
196. 198 P.2d 17 (Cal. 1948).
197. 388 U.S. 1 (1967).
198. *Lawrence*, 539 U.S. at 578–79.
199. *See id.* at 599–602 (Scalia, J., dissenting).
200. *See id.* at 578.
201. *See id.*
202. *Id.* at 578–79.
203. *Id.* at 563.
204. *Goodridge*, 798 N.E.2d at 950–51.
205. *See id.* at 961.
206. *Id.*
207. *See, e.g.*, *Brause*, 1998 WL 88743 at *4–*6 (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, article I, section 25 of the Constitution of Alaska); *Lockyer*, 95 P.3d at 498; *Baehr*, 852 P.2d at 57–58 (concluding

decisions and acts of disobedience have mostly been met with backlash and, thus, reaffirm the disapproval of same-sex marriage.[208]

Because *Lawrence* decided only the constitutionality of prohibiting private sexual conduct by criminalizing it, and not promoting certain civil relationships for legitimate government purposes, the decision does not support the idea that civil marriage laws violate due process and equal protection.[209] As a result, the Massachusetts Supreme Court's decision to recognize same-sex marriage may do more harm than good for homosexuals in the United States. While *Lawrence* may have seemed like an invitation by the Supreme Court to challenge the constitutionality of denying same-sex couples access to marriage, the Court limited its holding to criminalized private sexual conduct.[210] Thus, state laws banning same-sex marriage are easily differentiated from those criminalizing private adult consensual homosexual acts.

Moreover, unlike the couples in *Perez v. Sharp*[211] and *Loving v. Virginia*,[212] same-sex couples do enjoy a host of benefits similar to those enjoyed by married couples.[213] Plaintiffs questioning the constitutionality of denying same-sex couples the right to civil marriage tend to rely on the reasoning of these two cases that struck down anti-miscegenation laws.[214] Under the respective provisions of the statutes in *Perez* and *Loving*, mixed-race couples could not get married.[215] In fact, prior to the 1980s, no private or governmental entities in the United States conferred benefits on domestic partners.[216] Thus, without recognition of their civil marriages, these mixed-race couples had no protective legal relationship available to them.[217] While same-sex couples do not qualify for civil marriage in the majority of states, they do qualify for many domestic partner benefits similar to those offered to married couples.[218] Overall, the political standing of same-sex couples in the United States today is

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marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); *Baker*, 744 A.2d at 886; *but cf. Dean*, 653 A.2d at 361; *West*, 780 N.Y.S. 2d at 725.

208. *See, e.g.*, Peterson, *supra* note 189.

209. *See Lawrence*, 539 U.S. at 578.

210. *See id.*

211. 198 P.2d 17 (Cal. 1948).

212. 388 U.S. 1 (1967).

213. Mikaila Mariel Lemonik Arthur, *An Encyclopedia of Gay, Lesbian, Bisexual, Transgender, and Queer Culture: Domestic Partnerships* (Feb. 28, 2004), *at* www.glbtq.com/social-sciences/domestic_partnerships.html (last visited January 17, 2005).

214. *See, e.g., Standhardt*, 77 P.3d at 458; *Baehr*, 852 P.2d at 61–63 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); *Goodridge*, 798 N.E.2d at 957–58.

215. *Loving*, 388 U.S. at 6; *Perez*, 198 P.2d at 18.

216. Arthur, *supra* note 213.

217. *Id.*

218. *Id.*

not as perilous as the standing of mixed-race couples facing anti-miscegenation laws prior to recognition of domestic partner benefits.[219]

C. *Reactions to* Goodridge

1. Popular Opinion

At this time, there are no clear indicators that popular opinion in Massachusetts supports access to civil marriage for same-sex couples. Specifically, popular opinion polls on same-sex marriage indicated that Massachusetts's voters are divided on the issue. A poll taken in Massachusetts following the *Goodridge* decision indicates that popular opinion did support the court's ruling to legalize same-sex marriages.[220] The poll results showed that 50 percent of the 400 persons asked supported the court's decision, while only 38 percent opposed it.[221] When polled about support for an amendment to the state constitution defining marriage to exclude same-sex couples, 53 percent opposed passing an amendment and only 36 percent supported it.[222] While these results seem to indicate the support of popular opinion for the social change sought by the plaintiffs, another poll taken in Massachusetts produced different results.[223]

According to a poll conducted by RKM Research and Communications, 76 percent of Massachusetts voters believed that same-sex couples should have access to the same marital benefits afforded to opposite sex couples.[224] However, only 49 percent of the polled individuals supported calling the system of benefits for same-sex couples "marriage."[225] The results of this poll indicate that the political and social climate of the state may be ready for civil unions but not for same-sex civil marriage.[226]

Recent legislative decisions in other states indicate that civil unions have more popular support than do civil marriages for same-sex couples.[227] When the Vermont legislature decided to enact a parallel system of civil unions in place of same-sex civil marriage, the Vermont legislature explained: "Granting benefits and protections to same-sex couples

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219. *Id.*

220. Frank Phillips & Rick Klein, *Fifty Percent in Poll Back SJC Ruling on Gay Marriage*, BOSTON GLOBE, Nov. 23, 2003, *available at* http://www.glad.org/marriage/globe+herald_polls_11-23-03.shtml (taken for Boston Globe and WBZ-TV).

221. *Id.*

222. *Id.*

223. David R. Guarino, *Same-Sex Benefits Get Voters' Blessings: Most OK Gay Marriage*, BOSTON HERALD, Nov. 23, 2003, *available at* http://www.glad.org/marriage/globe+herald_polls_11-23-03.shtml.

224. *Id.*

225. *Id.*

226. *See id.*

227. *See* An Act Relating to Civil Unions, Pub. Act No. 91, § 1(10), 2000 Vt. Acts & Resolves (2000), *available at* http://www.leg.state.vt.us/docs/2000/acts/act091.htm (last visited March 8, 2005); David Orgon Coolidge, *Same-Sex Marriage: As Hawaii Goes . . .* , 72 FIRST THINGS 33, 33–37 (1997), *available at* http://www.firstthings.com/ftissues/ft9704/articles/coolidge.html.

through a system of civil unions will provide due respect for tradition and long-standing social institutions, and will permit adjustment as unanticipated consequences or unmet needs arise."[228] The civil union approach was also palatable to Hawaiians following the state supreme court's ruling in *Baehr*.[229] The amendment to Hawaii's constitution defining marriage as a union between one man and one woman did not pass until there also was a bill proposing a civil union system of benefits for same-sex couples.[230]

In an effort to recognize civil unions, an amendment excluding same-sex couples from getting married and instead creating a Vermont-style civil union system has already passed the first round of approval in the Massachusetts legislature.[231] If the amendment gets re-approved in 2005, Massachusetts's voters could decide the issue in 2006.[232] If this amendment becomes part of the state constitution, it is unclear what status same-sex couples married between May 17, 2004 and 2006 will have.[233] Therefore, without a clear majority in favor of the decision in *Goodridge*, same-sex couples are getting married in Massachusetts absent guarantees that their marriages will be valid two years from now.[234]

Despite the Massachusetts legislature's movement toward a civil union system, the *Goodridge* court opined that civil unions were not enough to satisfy the constitutional issues.[235] According to the court, only full scale civil marriage for same-sex couples would suffice.[236] Because the *Goodridge* court refused to substitute civil unions for civil marriage, same-sex couples in Massachusetts may only receive state-conferred marital benefits through an institution not clearly supported by public opinion. As a result, same-sex married couples in Massachusetts are in a tenuous position that they would not have been in had they sought change through legislation and not through the court system.

2. Interstate Effects

Furthermore, the *Goodridge* decision put other states on alert about the constitutionality of Defense of Marriage Act laws. States have reacted by enacting pre-emptive state constitutional amendments precluding the possibility of widespread recognition of same-sex marriages in the United States. An opinion poll conducted with a national sample

228. Act Relating to Civil Unions, *supra* note 227, at § 1(10).
229. *See* Coolidge, *supra* note 227.
230. *Id.*
231. *See* Peterson, *supra* note 189.
232. *Id.*
233. Theo Emery, *Same-Sex Couples Marry in Massachusetts*, GrandForksHerald.com, May 17, 2004, *at* http://www.grandforks.com/mld/grandforks/8682758.htm (last visited March 8, 2005).
234. *See id.*
235. *See* In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004) (court responding to legislature's question about whether civil unions would suffice).
236. *Id.* at 571–72.

showed a similar tendency to favor civil unions over civil marriage for same-sex couples.[237] While 56 percent of people oppose or strongly oppose civil marriage for same-sex couples, only 32 percent favor or strongly favor civil marriage.[238] Only 43 percent of those polled oppose or strongly oppose a system of civil unions and 49 percent favor or strongly favor civil unions.[239] Winning recognition of same-sex marriage in one state does not result in federal marriage benefits for these couples, nor does it guarantee recognition of the marriage in any other state.[240] Forcing legal recognition of marriages between persons not fitting the traditional definition of a married couple in one state puts other states on alert to take pre-emptive measures to exclude these marriages from recognition in their borders.[241] Ultimately, this will impede the mobility of same-sex married couples, because moving outside the State of Massachusetts could mean losing marriage benefits.[242]

In response to *Goodridge*, Governor Romney of Massachusetts has revived a turn-of-the-century miscegenation law preventing couples that are not legally eligible to marry in their own states from getting married in Massachusetts.[243] The majority of states already have Defense of Marriage Acts in their statutory schemes.[244] A number of these statutes make clear that states that have banned same-sex marriage will not recognize same-sex marriages formed in states like Massachusetts.[245] The Federal Defense of Marriage Act of 1996 granted these states the power to ignore same-sex civil marriages formed outside the state, despite the Constitution's requirement of states to give full faith and credit to contracts formed in other states.[246] The Federal Defense of Marriage Act led to a body of law across the country largely unwelcoming to married same-sex couples.[247] Therefore, in addition to having a tenuous future status in

237. *See* Pew Research Center for the People & the Press, Pew Forum on Religion & Public Life: August 2004 News Interest Index (Aug. 24, 2004), *available at* http://people-press.org/reports/print.php3?PageID=875.

238. *Id.*

239. *Id.*

240. Arthur, *supra* note 213.

241. *See* Peterson, *supra* note 189.

242. *Id.*

243. *See, e.g.*, Scott S. Greenberger, *Reilly Says Curb on Gay Marriage Blunts Backlash*, BOSTON GLOBE, July 13, 2004, *available at* http://www.equalmarriage.org/press.php.

244. *See* Peterson, *supra* note 189 (for example, CAL. FAM. CODE § 308.5 (West 2004) states that "[o]nly marriage between a man and a woman is valid or recognized in California."); MINN. STAT. ANN. § 517.03 (West 2004):

> Subdivision 1. General. (a) The following marriages are prohibited: . . . (4) a marriage between persons of the same sex. (b) A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.

Id.

245. *See, e.g.*, ALA. CODE § 30-1-19 (2004); ARK. CODE ANN. § 9-11-208 (2003).

246. *See* Robinson, *supra* note 174.

247. *See* Peterson, *supra* note 189.

Massachusetts, same-sex married couples also risk losing recognition of their union should they decide to move to a different state.

3. Constitutional Amendments

Various states are already taking pre-emptive action against future cases like *Goodridge* by amending their constitutions.[248] In November 2004, the public in eleven states voted for constitutional amendments restricting the definition of marriage to apply only to opposite-sex couples.[249] Additionally, the voters in Missouri passed such an amendment to the state constitution in early August 2004.[250]

The ruling in *Goodridge* sparked a pre-emptive reaction from the federal government.[251] Senator Wayne Allard of Colorado introduced a federal marriage amendment that would ban same-sex marriages but leave room for civil unions.[252] The proposal was the third attempt to pass such an amendment since 2002 and was defeated on July 14, 2004.[253] An ABC News/Washington Post survey of public opinion across the United States about same-sex marriage indicated that more Americans oppose same-sex marriage than support it.[254] However, the poll also showed that most people also oppose a pre-emptive federal constitutional amendment to settle the issue.[255]

4. Colorado

Colorado has a history of rejecting the legislative protection of homosexuals. In the early 1990s, Colorado voters passed an amendment to the state constitution that prohibited state and local governments from enacting any measure to protect homosexuals from discrimination.[256] The Supreme Court struck down the Amendment because it persecuted a specifically targeted group of people and had no rational state interest.[257] Despite this landmark decision, Colorado continues to stifle homosexuals' rights. For instance, Colorado has a statute defining marriage as the

248. *Id.*

249. Peterson, *supra* note 189 (the eleven states are: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah).

250. Peterson, *supra* note 189.

251. *See, e.g., Marriage Will Be Defined Nationally—but How?*, USA TODAY, Feb. 17, 2004, *available at* http://www.usatoday.com/news/opinion/editorials/2004-02-17-marriage_x.htm.

252. *Id.*

253. *See, e.g.*, Alan Cooperman, *Gay Marriage Ban in MO May Resonate Nationwide*, WASHINGTONPOST.COM, Aug. 5, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A38861-2004Aug4.html.

254. *See* David Morris & Gary Langer, *Same Sex Marriage: Most Oppose It, but Balk at Amending Constitution*, ABCNEWS.COM, Jan. 21, 2004, *at* http://abcnews.go.com/images/pdf/945a2GayMarriage.pdf.

255. *Id.*

256. *See* Romer v. Evans, 517 U.S. 620, 623–24 (1996).

257. *See id.* at 636.

union between one man and one woman.[258] Moreover, a private non-partisan polling company reported that as of 2003, 56 percent of Coloradoans opposed the legalization of same-sex marriages.[259] While representatives and senators from Colorado have been instrumental in introducing federal marriage amendments to Congress, there was no such amendment on the ballot in Colorado for November 2004.[260]

Because same-sex couples do enjoy a variety of marriage-like benefits in most states, they can afford to bide their time and wait for a favorable political climate to seek recognition of their right to marry through the legislative process. In the end, the backing of the legislature and popular opinion would more likely result in long-term widespread acceptance of same-sex marriages in the United States.

CONCLUSION

Over the last ten years, same-sex couples have launched cases around the country challenging the constitutionality of denying them access to civil marriage.[261] In most states, same-sex couples certainly do not receive benefits under the law equal to those of opposite-sex married couples.[262] However, the goal of equality is not best met through state supreme court decisions in the absence of a socially, politically and economically favorable climate.[263]

Before the court decided *Goodridge*, there was already a trend of victory for same-sex marriage in state court followed by a rush to amend the state constitution, or otherwise permissibly exclude same-sex couples from civil marriage.[264] Not only have these cases inspired voters in the affected states to enact restrictive legislation, but the outcome of the cases has also prompted other states to take pre-emptive legislative ac-

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258. COLO. REV. STAT. § 14–2–104(b) (West 2004).

259. Floyd Ciruli, *Colorado Voters Support Gay Rights but Not Gay Marriage*, CIRULI ASSOCIATES, Dec. 8, 2003, *at* http://www.ciruli.com/polls/gay1203.htm.

260. *See* Peterson, *supra* note 189.

261. *See generally* Brause vs. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, article I, section 25 of the Constitution of Alaska); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); Baker v. State, 744 A.2d 864, 889 (Vt. 1999) (concluding marriage statute violated Vermont Constitution's common benefits clause); *but see* Standhardt v. Superior Court, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) (marriage statute does not violate liberty interests under either Federal or Arizona Constitution).

262. Robinson, *supra* note 174.

263. *See* Klarman, *supra* note 187.

264. *See* ALASKA CONST. art. I, § 25 (2003); HAW. CONST. art. I, § 23 (2003); *Brause*, 1998 WL 88743, at *4–5 (concluding marriage statute violated right to privacy provision in Alaska Constitution) (superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); *Baehr*, 852 P.2d at 68 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); *Baker*, 744 A.2d at 888–89 (resolved by creation of civil unions).

tion against same-sex marriage.[265] Despite this backdrop, same-sex couples brought their action to court instead of using the legislative process.[266]

Although the Massachusetts Constitution is open to the interpretation that the right to choice of marital partner, regardless of gender, is protected,[267] because judges are not elected officials, their decisions to recognize same-sex rights to marry do not necessarily reflect public opinion. Because of the resulting backlash of constitutional amendments that foreclose the possibility of long-term equality for homosexuals,[268] same-sex couples married in Massachusetts are now in limbo, waiting to see if their state will pass an amendment to the constitution invalidating their unions.[269] In the case of same-sex marriage, bad timing and choice of forum may have stunted rather than promoted social change.

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265. *See* Peterson, *supra* note 189.

266. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

267. *See id.* at 966–67.

268. Peterson, *supra* note 189.

269. *See* B.A. Robinson, Same Sex Marriages in Massachusetts: A Lawsuit: Goodridge v. Department of Public Health. A Proposed Amendment to the Massachusetts Constitution, RELIGIOUS TOLERANCE.ORG, May 29, 2004, *at* http://www.religioustolerance.org/hom_marm.htm.

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