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"'Til Death Do Them Part?": Assessing the Permanence of Goodridge

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"'TIL DEATH DO THEM PART?": ASSESSING THE PERMANENCE OF *GOODRIDGE*

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AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE. By Daniel R. Pinello. New York: Cambridge University Press. 2006. Pp. 213.

Abstract: In *America's Struggle for Same-Sex Marriage*, Daniel Pinello explores the social and political underpinnings of the controversy surrounding so-called "gay" marriage. Pinello's analysis is directed toward using the struggle for marriage equality as an empirical basis for achieving a better understanding of how public policy derives from the interactions of citizens, interest groups, and government entities. This Book Review argues the importance to policy formation of a force Pinello tends to underemphasize: the counter-majoritarian influence of constitutional law and judicial review. The significance of this factor is considered primarily in relation to state constitutional amendments that purport to "define" marriage as being strictly between one man and one woman. This Book Review concludes that such amendments, by their nature, violate the Federal Equal Protection Clause. Separate consideration is given to the particular illegitimacy and vulnerability of such an amendment in Massachusetts, where state constitutional jurisprudence requires equal marriage rights for same-sex couples.

Introduction

Amid the sea of "Let the People Vote!" placards, with strains of *Amazing Grace*, *This Little Light of Mine*, and *Battle Hymn of the Republic* ringing through the air, one might have guessed that a vigorous suffrage battle was underway.[1] Yet this otherwise reasonable conclusion would have done nothing to explain the accompanying "No Special Rights for Sodomites" poster, to say nothing of the giant red "Jesus Is Lord" balloon flying forty feet above Boston Common—at least until the threat of lightning brought it down.[2] Then there was the opposition: less probable agents of disenfranchisement could scarcely be imagined.[3] Stand-

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[1] *See Blogging the ConCon*, Bay Windows, July 12, 2006, http://tinyurl.com/y5gw4m [hereinafter *Blogging the ConCon*].

[2] *See id.*

[3] *See id.*

ing across Beacon Street from the "Let the People Vote!" contingent, they sang spirituals and hymns and carried signs reading "What If We Had Voted on Loving v. Virginia?" and "No Discrimination in the Constitution."[4] For all its apparent incongruity, this bizarre set of circumstances actually makes complete sense—but not until the illusoriness of the voting-rights dispute is exposed.[5]

Stripped of all such pretense, this was a demonstration about the civil rights of gays and lesbians and the role of the courts in defending them.[6] The controversy was fueled, in particular, by the recognition of equal marriage rights for same-sex couples by the Massachusetts Supreme Judicial Court (SJC).[7] Indeed, unfolding that day before the eyes of anyone who cared to see was a textbook demonstration of the practice, more rampant now than ever, of mobilizing the rhetoric of democracy to disguise unprincipled attacks on the independent judiciary.[8] Whatever their intention, those assembled under the supposed banner of voting rights had gathered, in fact, to inveigh against a much-embattled *function* of the courts—that of enabling minorities to exercise their constitutional rights.[9]

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[4] *Id.* In *Loving v. Virginia*, the Supreme Court found statutes banning interracial marriage "subversive of the principle of equality at the heart of the Fourteenth Amendment" and, thus, unconstitutional. 388 U.S. 1, 12 (1967). It is not difficult to imagine what the outcome of a popular vote on the issue would have been: at the time *Loving* was decided, seventy-two percent of Americans were opposed to interracial marriages and forty-eight percent went so far as to assert that such marriages should be criminally punishable. Daniel R. Pinello, America's Struggle for Same-Sex Marriage 169 (2006).

[5] *See Blogging the ConCon*, *supra* note 1. The ostensible "disenfranchisement" derived not from restrictions upon *who* may vote, but rather from adherence to long-established constitutional restrictions on which *issues* are appropriately made the subject of a popular vote. *See id.* For instance, a sign on the "Let the People Vote!" side proclaimed: "Say 'No' to Judicial Tyranny! Say 'Yes' to the Democratic Process!!" *Id.* Another read: "No to Gay Marriage: It's Not About Civil Rights, It's About Right and Wrong." *Id.*

[6] *See id.*

[7] *See supra* note 5; *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968, 969 (Mass. 2003).

[8] *See* Alexis de Tocqueville, Democracy in America 269 (J.P. Mayer ed., George Lawrence trans., HarperCollins 2000) (1850) ("I am aware of a hidden tendency in the United States leading the people to diminish judicial power . . . . [S]ooner or later these innovations will have dire results and . . . it will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked."); Sandra Day O'Connor, Editorial, *The Threat to Judicial Independence*, Wall St. J., Sept. 27, 2006, at A18 (documenting an increase in populist animosity toward the judicial branch and in threats to its independence, and cautioning that both run counter to fundamental theories underlying American governance); *see also supra* note 5.

[9] *See* United States v. Caroline Prods., 304 U.S. 144, 152–53 n.4 (1938) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819)) ("[P]rejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to

The day of these events, July 12, 2006, the Massachusetts General Court (the state legislature) was scheduled to hold a constitutional convention.[10] Among the constitutional amendments slated for consideration was one from the Massachusetts Family Institute (MFI) seeking statewide implementation of its narrow and exclusionary "definition" of civil marriage.[11] If successful, this proposed amendment ("the initiative") would require that Massachusetts prospectively "define marriage only as the union of one man and one woman."[12]

An amendment of this kind to a state constitution would hardly be unique.[13] Already twenty-seven states have included language in their constitutions intended to exclude same-sex couples from civil marriage, beginning with Alaska in 1998.[14] Yet there is no precedent for the adop-

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be relied upon to protect minorities [and] may call for a correspondingly more searching judicial inquiry."); THE FEDERALIST NO. 78, at 500 (Alexander Hamilton) (Robert Scigliano ed., 2001) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from . . . dangerous innovations in the government, and serious oppressions of the minor party in the community.").

[10] Scott Helman, *A Legislative Vote Hangs in the Balance*, BOSTON GLOBE, July 12, 2006, at B1; *see also* MASS. CONST. pt. II, ch. I, § I, art. I. In Massachusetts, a constitutional convention consists of the Senate and House of Representatives meeting in joint session to determine whether proposed amendments to the constitution merit eventual placement on the ballot. MASS. CONST. amend. art. XLVIII, Init., pt. IV, §§ 4, 5.

[11] Helman, *supra* note 10. The MFI formed VoteOnMarriage.org to advance its initiative petition. Kris Mineau, Press Conference (June 16, 2005), http://www.mafamily.org/mineauremarks.htm [hereinafter Mineau Press Conference]. VoteOnMarriage.org is a Ballot Question Committee of the sort required by Article 48 of the Massachusetts Constitution. *See id.*

[12] Initiative Petition for a Constitutional Amendment to Define Marriage, Massachusetts Initiative Petition 05-02 (2005), *available at* http://www.ago.state.ma.us/filelibrary/petition05-02.rtf [hereinafter Initiative Petition 05-02] ("When recognizing marriages entered into after the adoption of this amendment by the people, the Commonwealth and its political subdivisions shall define marriage only as the union of one man and one woman.").

[13] *See, e.g.*, OHIO CONST. art. XV, § 11.

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Id. Ohio's amendment is of a particularly pernicious sort; in addition to barring same-sex marriages from legal recognition, it also attempts to foreclose the possibility of statutorily enacted provisions for civil unions or domestic partnerships. *Id.*

[14] *See* NAT'L GAY & LESBIAN TASK FORCE, ANTI-GAY MARRIAGE MEASURES IN THE U.S. (2006), *available at* http://thetaskforce.org/downloads/reports/issue_maps/Marriage_Map_06_Nov.pdf [hereinafter TASK FORCE, MARRIAGE MAP]; Chris L. Jenkins, *Ban on Same-Sex Unions Added to Va. Constitution*, WASH. POST, Nov. 8, 2006, at A46. The states are: Alabama, Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michi-

tion of a constitutional amendment to prohibit same-sex marriage in a state whose highest court has found the denial of marriage equality to be unconstitutional.[15] The potential for this situation to arise currently exists only in Massachusetts—the single American state to acknowledge same-sex couples' constitutional entitlement to equal marriage rights.[16]

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gan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. Task Force, Marriage Map, *supra*; Jenkins, *supra*. In Hawaii, the constitution was amended in 1998 to allow the legislature to prohibit same-sex marriages by statute, which it did later that year. *See* Task Force, Marriage Map, *supra*. Nebraska's amendment was ruled unconstitutional by a federal district court on the grounds that it abridged rights other than marriage in such a way as to deny gays and lesbians the equal protection of the laws; the amendment's constitutionality, however, was affirmed on appeal. Citizens for Equal Prot. v. Bruning, 368 F. Supp. 2d 980, 1002 (D. Neb. 2005), *rev'd* 455 F.3d 859, 868–69 (8th Cir. 2006).

[15] *See* Andrea Estes & Scott Helman, *Legislature Again Blocks Bid to Ban Gay Marriage: Lawmakers Recess Without Voting on Constitutional Amendment*, Boston Globe, Nov. 10, 2006, at A1 (noting that the Massachusetts Legislature appeared to have killed a proposed constitutional amendment to limit marriage to opposite-sex couples); *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968, 969 (Mass. 2003). A constitutional amendment adopted in Hawaii in 1998 very nearly establishes such a precedent, however. *Compare* Haw. Const. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."), *and* Haw. Rev. Stat. § 572-1 (2005) ("[T]he marriage contract . . . shall be only between a man and a woman . . . ."), *with* Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (Levinson, J., plurality opinion) ("On remand, in accordance with the 'strict scrutiny' standard, the burden will rest on [the State] to overcome the presumption that [a statutory ban on same-sex marriage] is unconstitutional . . . ."). In 1993, a plurality of the Supreme Court of Hawaii held that a statutory ban on same-sex marriage "regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex" and, therefore, "establishes a sex-based classification" which must survive strict-scrutiny review in order to be ruled constitutional. *Baehr*, 852 P.2d at 64, 68. On remand, the trial court found that the State had failed to rebut the statute's presumptive unconstitutionality—a conclusion the Hawaii Supreme Court affirmed. Baehr v. Miike, No. 91–1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. 1996), *aff'd* 950 P.2d 1234, 1234 (Haw. 1997). In response, the Hawaii Legislature proposed a constitutional amendment intended to restore its authority to ban same-sex marriage. Haw. Const. art. I, § 23; Pinello, *supra* note 4, at 27. This proposed amendment appeared on the November 1998 ballot, where it received the approval of sixty-nine percent of voters. Pinello, *supra* note 4, at 27.

[16] *Opinions of the Justices*, 802 N.E.2d at 572; *Goodridge*, 798 N.E.2d at 968, 969. The high courts of New Jersey and Vermont have each held that same-sex couples are entitled, as a matter of constitutional law, to the same rights heterosexual couples derive from marriage. Lewis v. Harris, 908 A.2d 196, 223, 224 (N.J. 2006); Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999). Both courts, however, very deliberately exempt one particular marriage right from the otherwise broad sweep of their rulings—the simple right to have one's putative marriage-equivalent actually called a marriage by the sovereign authority that established it. *Lewis*, 908 A.2d at 224; *Baker*, 744 A.2d at 867. Many find this difference significant and disturbing; others trivialize it. *Compare Opinions of the Justices*, 802 N.E.2d at 569 ("Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status."), *and Lewis*, 908 A.2d at 226 (Poritz, C.J., concurring in part and dissenting in part) ("We must not underestimate the

In Massachusetts, a proposed initiative amendment does not become eligible for placement on the ballot until it obtains the support of not less than twenty-five percent of the General Court in each of two consecutive legislative sessions.[17] Once on the ballot, the initiative must then receive a majority of the popular vote before it can operate to amend the state constitution.[18] The July 12, 2006 constitutional convention was the first occasion on which the MFI initiative came before the legislature.[19] The measure was widely expected to receive the support necessary to advance to the next session of the General Court.[20] Instead, before a vote on the merits of the initiative could be taken, the convention decided by a simple majority vote to recess until November 9, 2006.[21] This outcome infuriated the MFI, for whom success on the merits would have required *less than half* of a simple majority.[22] The initiative was sidelined again on November 9, when the convention voted to recess until the final day of the legislative session—January 2, 2007—rather than take a substantive vote on the measure.[23] Because an initiative expires unless it succeeds in the legislative session during which it is introduced, proponents and detractors of the MFI initiative alike believed that the November 9 convention had ensured the measure's demise.[24]

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power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. . . . By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and [those] of heterosexual couples."), *with Opinions of the Justices*, 802 N.E.2d at 572 n.1 (Sosman, J., dissenting) ("The insignificance of according a different name to the same thing has long been recognized: 'What's in a name? / That which we would call a rose / By any other name would smell as sweet . . . .'" (quoting WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2)).

[17] MASS. CONST. amend. art. XLVIII, Init., pt. IV, §§ 4, 5. To merit consideration by the General Court, an initiative must have been signed by a number of registered voters not less than three percent of the total number of votes cast in the preceding gubernatorial election. *Id.* § 2.

[18] *Id.* § 5. More precisely, the initiative is required to receive the support of both (1) a majority of voters who choose to vote on the initiative itself and (2) thirty percent of voters who cast a ballot generally. *Id.*

[19] Helman, *supra* note 10.

[20] *Id.*; *see* MASS. CONST. amend. art. XLVIII, Init., pt. IV, §§ 4, 5.

[21] Andrea Estes & Russell Nichols, *Lawmakers Delay Vote on Gay Marriage Measure*, BOSTON GLOBE, July 13, 2006, at A1.

[22] MASS. CONST. amend. art. XLVIII, Init., pt. IV, §§ 4, 5; Press Release, VoteOnMarriage.org, Legislature Stalls Vote on the People's Amendment on Marriage Until November (July 12, 2006), http://www.voteonmarriage.org/news.shtml#071206pr.

[23] Estes & Helman, *supra* note 15.

[24] *See* Hilsinger v. Sec'y of the Commonwealth, 444 N.E.2d 936, 938–39 (Mass. 1983) ("Not having received approval by one-fourth of the members of the [first] constitutional convention, [the initiative] became a nullity for the purposes of the next constitutional convention."); Estes & Helman, *supra* note 15.

Would it were so.[25] On November 24, Governor Mitt Romney and the ten original signatories to the MFI's initiative petition brought suit against Secretary of the Commonwealth William Galvin and Senate President Robert Travaglini.[26] The plaintiffs sought, among other even more extraordinary forms of relief, a declaration that "the Marriage Initiative Amendment is a matter constitutionally required to be voted on by the joint session . . . and that such a vote is required to be on the merits of the initiative."[27] In a unanimous decision, the SJC correctly noted that it lacked "statutory authority to issue a declaratory judgment concerning the constitutionality of legislative action, or inaction, in this matter."[28] Yet the court, in uncharacteristically expansive dicta, proceeded to issue the practical equivalent of a declaratory judgment nonetheless:

> We conclude that, while the plaintiffs cannot obtain declaratory judgment or mandamus against the Legislature, and, therefore, the complaint must be dismissed, it is our obligation, in these circumstances, to restate what [the constitution] requires.
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> . . . .
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> . . . The members of the joint session have a constitutional duty to vote, by the yeas and nays, on the merits of all pending initiative amendments before recessing on January 2, 2007 . . . .[29]

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[25] Editorial, *A Shameful Reversal of Rights*, Boston Globe, Jan. 3, 2007, at A10 ("[A] vote for the amendment is a vote to eliminate a civil right that is contained in the state Constitution—a shameful and perhaps unique reversal of the long forward march of civil rights . . . . Each such vote is, as Governor-elect Deval Patrick said yesterday, 'irresponsible and wrong.'").

[26] Complaint at 1, Doyle v. Sec'y of the Commonwealth, 858 N.E.2d 1090 (Mass. 2006) (No. SJ 2006–0486) [hereinafter Romney Complaint]; *see also* Initiative Petition 05-02, *supra* note 12. Plaintiffs sued in their individual capacities; Travaglini was sued principally in his capacity as Presiding Officer of the constitutional convention. *See* Romney Complaint, at 1.

[27] Romney Complaint, *supra* note 26, at 7. Plaintiffs also requested writs of mandamus to compel Sen. Travaglini to hold a vote on the merits of the MFI initiative and, failing that, to compel Secretary Galvin to place the measure directly on the ballot. *See id.* at 7–8; Brief of the Plaintiffs, *Doyle*, 858 N.E.2d 1090 (No. SJC–09887), at 1–2. These requests were so plainly overreaching that counsel abandoned them at oral argument. *See Doyle*, 858 N.E.2d at 1092 n.4.

[28] *Doyle*, 858 N.E.2d at 1095.

[29] *Id.* at 1092–93. The court did not merely lack statutory authority to issue a declaratory judgment—it was statutorily forbidden from doing so. *See* Mass. Gen. Laws ch. 231A, § 2 (2006) ("[T]his section shall not apply to the governor and council or the legislative

As a direct result of the SJC's strongly-worded opinion, lawmakers at the January 2 constitutional convention decided to vote on the merits of the MFI amendment.[30] As expected, the measure received the support of slightly more than twenty-five percent of legislators (passing 62 yeas to 134 nays) and thereby became cleared for consideration by the next General Court.[31]

Already twice the subject of litigation, the MFI initiative continues to raise elemental and largely unresolved questions of law.[32] Should further legal challenges to the initiative be advanced, the central inquiry is likely to be whether the character of the proposed amendment is rights-stripping or merely definitional.[33] If the former characteriza-

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and judicial departments."). Moreover, the legal question posed by *Doyle* had already been litigated. *See LIMITS v. President of the Senate*, 604 N.E.2d 1307, 1308 (Mass. 1992). The complaint in *LIMITS* properly was dismissed on two independent grounds: the statute immunizing the legislature from declaratory judgments and the court's prudential concern for the continued vitality of separation-of-powers principles. *See id.* at 1310. The gratuitous admonitions of the *Doyle* court are a disturbing contrast—particularly because they appear in an opinion that acknowledges, in spite of itself, that the constitution plausibly imposes no duty to vote on the substance of proposed initiative amendments. *See* 858 N.E.2d at 1095–96 ("Some members of the General Court may have reasoned, in good faith, that a vote on the merits of the initiative amendment . . . was not required by the constitutional text . . . ."). The constitutional directive that "[f]inal legislative action in the joint session upon any amendment shall be taken *only* by call of the yeas and nays" could quite reasonably be understood to specify only the manner in which final action must be taken *if such action is taken at all*. *Compare* MASS. CONST. amend. art. XLVIII, Init., pt. IV, § 4 (mandating that proposed initiative amendments receive legislative approval before placement on the ballot) (emphasis added), *with* MASS. CONST. amend. art. XLVIII, Init., pt. V, § 1 (allowing proposed initiative *statutes* not receiving the required legislative approval to appear on the ballot by other means). *Doyle* is not the mere restatement of the law it purports to be. *Compare* 858 N.E.2d at 1092, *with id.* at 1093, 1096.

[30] Frank Phillips & Lisa Wangsness, *Same-sex Marriage Ban Advances*, BOSTON GLOBE, Jan. 3, 2007, at A1.

[31] *Id.*

[32] *Doyle*, 858 N.E.2d at 1092; Schulman v. Attorney Gen., 850 N.E.2d 505, 512–13 (Mass. 2006) (Greaney, J., concurring). The issue in *Schulman* was whether the initiative related to "the reversal of a judicial decision"—a matter expressly barred from being made the subject of an initiative by that part of the constitution establishing the initiative procedure. 850 N.E.2d at 506–07; *see also* MASS. CONST. amend. art. XLVIII, Init., pt. II, § 2 (enumeration of excluded matters). The SJC held unanimously that this initiative would not operate to "reverse" a judicial decision but rather to "overrule" one. *Schulman*, 850 N.E.2d at 511. The initiative could not be a "reversal" because it made no provision for its own retroactive application (i.e., for the nullification of existing same-sex marriages). *See id.* at 507 ("[P]rospective application . . . is fundamentally different.").

[33] *See Schulman*, 850 N.E.2d at 513 n.3 (Greaney, J., concurring) (citing Romer v. Evans, 517 U.S. 620, 633 (1996)). The opinions in *Romer* help illustrate the distinction between rights-stripping and wholly definitional enactments. *Compare* 517 U.S. at 633 (characterizing an anti-gay amendment to Colorado's constitution as rights-stripping) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to

tion is found to control, the courts would then have to determine whether the Massachusetts and Federal Constitutions each could abide, let alone compel, enforcement of a measure so antithetical to the protection of equality and fundamental rights.[34]

This Book Review attempts to resolve these constitutional questions. Part I examines Daniel Pinello's *America's Struggle for Same-Sex Marriage* and finds it to be neglectful of the courts' role in ensuring that state constitutions do not become vehicles for discrimination.[35] Part II defends judicial review, argues that the framers intended its potentially anti-majoritarian effect, and discusses how the MFI initiative threatens the integrity of the Massachusetts Constitution. Part III argues for the nullification, on federal equal protection grounds, of all state constitutional provisions that abridge rights discriminatorily.

I. An Indecent Proposal?

In *America's Struggle for Same-Sex Marriage*, author Daniel Pinello chronicles the ensuing social and political controversies in five states where, through varied means and with widely differing outcomes, marriage licenses have been issued to same-sex couples.[36] For each featured state, Pinello constructs a separate narrative by juxtaposing related excerpts from his interviews with numerous, ideologically-diverse subjects.[37] The book profiles California,[38] Massachusetts,[39] New Mexico,[40]

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seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."), *with id.* at 636 (Scalia, J., dissenting) (characterizing the amendment as definitional) ("The constitutional amendment before us here is . . . a modest attempt . . . to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.").

[34] *See Schulman*, 850 N.E.2d at 512–13 (Greaney, J., concurring). "If the initiative is approved by the Legislature and ultimately adopted, there will be time enough, if an appropriate lawsuit is brought, for this court to resolve the question whether our Constitution can be home to provisions that are apparently mutually inconsistent and irreconcilable." *Id.* at 512; *see also Romer*, 517 U.S. at 633 (majority opinion).

[35] *See generally* Pinello, *supra* note 4.

[36] *See id.* at 18–20.

[37] *See id.* at 21 (expressing author's intention "to collect and to present . . . the unvarnished words of the people who lived them").

[38] *Id.* at 73–101. On February 12, 2004, San Francisco Mayor Gavin Newsom announced his decision to instruct the San Francisco County Clerk to issue marriage licenses to same-sex couples. *Id.* at 73–74. Licenses were issued to 4037 same-sex couples during that so-called "Winter of Love" until March 11, when California Attorney General Bill Lockyer secured a judicial stay from the California Supreme Court. *Id.* at 74, 80. Later, in August, the high court also held that the California same-sex marriages were void from their inception. Lockyer v. City of San Francisco, 95 P.3d 459, 498 (Cal. 2004). The court quite correctly identified the issuance of marriage licenses as a ministerial rather than a

discretionary duty. *Id.* at 472. The court also found that the relevant statutes confer no authority (ministerial or discretionary) upon a mayor with regard to marriage licensure; these powers are vested in county clerks and recorders alone. *Id.* at 471. Significantly, the court emphasized that the constitutionality of California's statutory ban on same-sex marriage was not a matter before the court and that the *Lockyer* decision therefore "is not intended, and should not be interpreted, to reflect any view on that issue." *Id.* at 464.

In a fascinating coda to the *Lockyer* affair, the California Legislature, on September 6, 2005, became the first in the United States to pass, without judicial prompting, a measure legalizing same-sex marriage. Assem. B. 849, 2005-06 Reg. Sess. (Cal. 2005); Dean E. Murphy, *Same Sex Marriage Wins Vote in California*, N.Y. TIMES, Sept. 7, 2005, at A14 [hereinafter Murphy, *Marriage Wins Vote*]. Some opponents of same-sex marriage unwittingly showcased the disingenuousness of their customary attacks against the judiciary by mobilizing the exact same arguments against what, one imagines, they might call "activist legislators." *See* Murphy, *Marriage Wins Vote*, *supra*. Assemblyman Ray Haynes, for example, offered the following insight: "Engaging in social experimentation with our children *is not the role of the legislature*. . . . [W]e are gambling with the lives and future of generations not yet born." *Id.* (emphasis added).

California Governor Arnold Schwarzenegger immediately vowed to veto the measure—and ultimately did so. *California: No Same-Sex Marriages*, N.Y. TIMES, Sept. 30, 2005, at A18. Schwarzenegger justified the veto by pointing to the fact that the marriage ban had been adopted by the people via Proposition 22 (an initiative that appeared on the 2000 California ballot)—and that it would therefore be unconstitutional for the legislature to permit same-sex marriage absent a court decision or another popular vote. Cal. Prop. 22 (2000) (codified at CAL. FAM. CODE § 308.5 (2006)) ("Only marriage between a man and a woman is valid or recognized in California."); Dean E. Murphy, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES, Sept. 8, 2005, at A18. Schwarzenegger's claim is probably correct because Proposition 22 does not contain a provision allowing for its unilateral amendment or repeal by the legislature. *See* CAL. CONST. art. II, § 10(c) ("The Legislature . . . may amend or repeal an initiative statute [solely] by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."); Cal. Prop. 22 (2000).

The main constitutional defense of the legislature's attempt to establish same-sex marriage without a prior popular vote is an argument that Proposition 22 concerned only whether California would recognize same-sex marriages established in other jurisdictions. Assem. B. 849 § 3(k), 2005-06 Reg. Sess. (Cal. 2005). This strained reading of Proposition 22 is plausible only because California amended its marriage statutes in 1977 to remove certain ambiguities that could have been construed to permit same-sex marriage. *See* 1977 Cal. Stat. ch. 339, § 1 (codified in part at CAL. FAM. CODE § 300 (2006)). As a result of these modifications, the establishment of same-sex marriages in California was already clearly prohibited at the time Proposition 22 was passed. *Id.* Arguably, then, the only purpose of Proposition 22 was to ensure that same-sex marriages formed in other jurisdictions were not recognized in California. *See id.*; Cal. Prop. 22 (2000). Only on this decidedly counter-textual reading could Proposition 22 present no constitutional impediment to the establishment, by ordinary legislation, of marriage equality in California. *See* CAL. CONST. art. II, § 10(c); Cal. Prop. 22 (2000).

[39] *See* PINELLO, *supra* note 4, at 33–72.

[40] *See id.* at 1–17. Victoria Dunlap, clerk of Sandoval County, New Mexico, began issuing same-sex marriage licenses on February 20, 2004. *Id.* at 1, 2. Constituents had requested such licenses, and no one was able to demonstrate to Dunlap's satisfaction that New Mexico law expressly forbade them. *Id.* at 1, 2–4. Sixty-four same-sex couples were issued licenses on February 20. *Id.* at 4. That same day, New Mexico Attorney General Patricia Madrid issued an expedited advisory letter asserting that New Mexico law re-

New York,[41] and Oregon,[42] but among these and all other states, only Massachusetts has issued marriage licenses to same-sex couples statewide or for any appreciable length of time.[43]

The exceptional stability of same-sex marriage in Massachusetts is surely a result of the judicial (or, strictly speaking, constitutional) origin of marriage equality in that state.[44] The great advantage of constitutional litigation, in general, is its ability to shield fundamental rights from the vicissitudes of politics.[45] So it was here: in *Goodridge v. Depart-*

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stricted marriage to "a man and a woman" and that same-sex marriage licenses ought not to have any legal effect. *Id.* at 16. Although the Sandoval County Commission voted to allow the same-sex couples married on February 20 to register their marriages with the clerk's office, it also joined Attorney General Madrid in seeking (and obtaining) a restraining order to enjoin Dunlap from issuing additional same-sex marriage licenses. *Id.* The legal status of the New Mexico same-sex marriages remains uncertain. *See id.*

[41] *See id.* at 143–55. On February 27, 2004, Jason West, the Mayor of the Village of New Paltz, New York, presided over the marriage of twenty-four same-sex couples. *Id.* at 144. He felt it "crystal-clear" that New York law permitted same-sex marriage. *Id.* at 143. Within a week, West was criminally charged with solemnizing marriages without a license. *Id.* at 144. The District Attorney, having concluded that a trial would be inflammatory, dropped all charges against West in July 2005. *Id.* at 147. In July 2006, the Court of Appeals of New York effectively repudiated West's interpretation of New York law governing marriage. *See* Hernandez v. Robles, 855 N.E.2d 1, 5 (N.Y. 2006). The court ruled that New York statutes impliedly forbid same-sex marriage and that the state constitution does not require such marriages to be recognized. *Id.* at 5–6.

[42] *See* PINELLO, *supra* note 4, at 102–42. Largely at the prompting of the gay rights organization Basic Rights Oregon, the Multnomah County Commission issued approximately 3000 marriage licenses to same-sex couples during March and April 2004. *Id.* at 103, 105–06. That November, Measure 36—a ballot initiative forbidding same-sex marriage by constitutional amendment—passed by a margin of fifty-seven to forty-three. OR. CONST. art. XV, § 5a; PINELLO, *supra* note 4, at 102, 113, 123, 131. In April 2005, the Supreme Court of Oregon declared the same-sex marriages to have been void from their inception. Li v. Oregon, 110 P.3d 91, 102 (Or. 2005). The court invalidated the Oregon same-sex marriage licenses on the grounds that Multnomah County officials had lacked the authority to issue them. *See id.* at 91. The *Li* decision preceded, and was thus independent of, Measure 36. *Id.*

[43] *See* PINELLO, *supra* note 4, at 19. *See generally Li*, 110 P.3d 91; Lockyer v. City of San Francisco, 95 P.3d 459 (Cal. 2004). Pinello acknowledges that the town clerk of Asbury Park, New Jersey issued marriage licenses to seven same-sex couples on March 8, 2004, but neglects to further discuss the circumstances surrounding these New Jersey licenses. PINELLO, *supra* note 4, at 19.

[44] *See, e.g.*, Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004). Here, the court emphasizes its function of shielding a minority's rights from the antipathy of the majority: "The argument . . . that, apart from the legal process, society will still accord a lesser status to [same-sex] marriages is irrelevant. Courts define what is constitutionally permissible . . . . That [anti-gay] prejudice exists is not a reason to insist on less than the Constitution requires." *Id.* Recall that *Opinions of the Justices* itself resulted from a legislative attempt to forestall marriage equality. *Id.* at 566, 569; *see also* PINELLO, *supra* note 4, at 19, 186.

[45] *See* Complaint at 30, Goodridge v. Dep't of Pub. Health, No. 01-1647A, 2002 WL 1299135 (Mass. Super. May 7, 2002), *rev'd* 798 N.E.2d 941 (Mass. 2003), *available at* http://

ment of Public Health, the SJC held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[46] The order in *Goodridge* was stayed for 180 days to allow the legislature to enact corrective legislation independently, without further involvement by the court.[47] Yet, at the time, most legislators were disinclined to implement marriage equality unless absolutely necessary.[48] Within a month of the *Goodridge* decision, a bill entitled "An Act Relative to Civil Unions" was brought before the Senate.[49] Its stated intention was "to give same-sex couples the opportunity to obtain the legal protections, benefits, rights and responsibilities associated with civil marriage, while preserving the traditional, historic nature and meaning of the institution of civil marriage."[50] These dual objectives were to be accomplished by the creation of "civil unions" for same-sex couples, mirroring civil marriage in every way but name.[51]

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www.glad.org/marriage/Goodridge/MAmarriagecomplaint.PDF ("The . . . practice of refusing same-sex couples the opportunity to apply for a marriage license is in violation of . . . their rights under the Declaration of Rights, articles I, VI, VII, X, XII and XVI, and Pt. II, c.1, sec. 1, art. 4, as amended, of the Massachusetts Constitution."); *see also Lockyer*, 95 P.3d at 485.

[46] *Goodridge*, 798 N.E.2d at 969.

[47] *Id.* at 970.

[48] *See* PINELLO, *supra* note 4, at 45, 56. In March 2004, at a constitutional convention, the General Court voted 105 to 92 in favor of the Travaglini-Lees Amendment. *Id.* at 56. That Amendment, if successful, would have excluded same-sex couples from marriage and then established a separate legal status for them equivalent to marriage in everything but name. *Id.* Under Massachusetts law, a constitutional amendment is either an initiative amendment (introduced to the legislature by an initiative petition) or a legislative amendment (introduced to the legislature by a Senator or Representative). MASS. CONST. amend. art. XLVIII, Init., pt. IV, § 1. To succeed, a legislative amendment (of which the Travaglini-Lees Amendment was one) must receive the votes of a majority of the General Court in each of two consecutive legislative sessions and then the majority of votes cast by the public. *Id.* at §§ 4, 5; PINELLO, *supra* note 4, at 55–56. Consistent with the above, the Travaglini-Lees Amendment came before the next General Court at a constitutional convention held in September 2005. PINELLO, *supra* note 4, at 71. Only then was the Amendment defeated, by a vote of 157 to 39. *Id.* The MFI initiative, unlike the Travaglini-Lees Amendment, intentionally makes no provision for extending a parallel set of benefits (i.e., civil unions) to same-sex couples. Mineau Press Conference, *supra* note 11. Some of the votes against the Travaglini-Lees Amendment, particularly at the second convention, resulted not from support for same-sex marriage, but from opposition to extending any kind of benefits whatsoever to same-sex couples. *See* PINELLO, *supra* note 4, at 182.

[49] *See generally* S.B. 2175, 183d Gen. Court, Reg. Sess. (Mass. 2003).

[50] *Id.* § 1(g).

[51] *Id.* § 2. The tangible (i.e., not strictly dignitary, expressive, or symbolic) benefits and burdens of marriage identified by the court in *Goodridge* include: joint Massachusetts income tax filing; automatic rights to inherit the property of an intestate spouse; the right to share the medical insurance policy of one's spouse; equitable division of marital property

The Senate admitted "grave doubt" as to whether the bill would satisfy the constitutional demands of *Goodridge*.[52] Yet these doubts did not prompt the Senate to reject the constitutionally suspect measure.[53] Instead, demonstrating a predilection for minimal compliance with *Goodridge*, the Senate requested an advisory opinion as to the measure's constitutionality from the Justices of the SJC.[54] In *Opinions of the Justices to the Senate*, the court stated that the Senate's proffered "civil union" scheme would be unconstitutional.[55] The court found that the proposal's only purpose was to ensure reservation of the word "marriage" for heterosexual couples.[56] Unable to imagine any legitimate state interest that this form of discrimination rationally could be thought to advance, the SJC was constrained to conclude that the Senate proposal had been motivated by a naked desire to ascribe same-sex relationships an inferior status.[57] The court's insinuation that proponents of the bill sought only to legislate this prejudice was not subtle: "If . . . no message is conveyed by eschewing the word 'marriage' and replacing it with 'civil union' for same-sex 'spouses,' we doubt that the attempt to circumvent [our] decision in *Goodridge* would be so purposeful."[58]

Opinions of the Justices dispelled any lingering doubts as to whether marriage equality was required in Massachusetts as a matter of constitu-

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on divorce; temporary and permanent alimony rights; the right to bring claims for wrongful death and loss of consortium; protection against having to testify against one's spouse in certain circumstances; the right to direct the medical treatment of an incompetent or disabled spouse in the absence of a contradictory health care proxy; and the application of predictable rules of child custody, support, and removal out-of-state. 798 N.E.2d at 955–56.

[52] *See* S.B. 2176, 183d Gen. Court, Reg. Sess. (Mass. 2003).

[53] *See id.*

[54] *Id.* In Massachusetts, each house of the legislature has the authority "to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." MASS. CONST. pt. II, ch. III, art. II.

[55] Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) ("The bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples . . . ."). Advisory opinions, it is important to acknowledge, "are . . . given by the justices as individuals . . . without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of stare decisis." Commonwealth v. Welosky, 177 N.E. 656, 658 (Mass. 1931). However, because (1) the majorities in *Goodridge* (which was not advisory) and *Opinions of the Justices* comprise exactly the same individuals and (2) the opinions decide the same constitutional question, *Opinions of the Justices* should be entitled to unusual deference. *See Opinions of the Justices*, 802 N.E.2d at 571, 572 (indicating that the issue presented is equivalent to that in *Goodridge*); *Goodridge*, 798 N.E.2d at 948, 974.

[56] *Opinions of the Justices*, 802 N.E.2d at 571. "We recognize the efforts of the Senate to draft a bill in conformity with the *Goodridge* opinion. Yet the bill, as we read it, does nothing to 'preserve' the civil marriage law, only its constitutional infirmity." *Id.* at 569.

[57] *See id.* at 570.

[58] *Id.*

tional law.[59] The result was a remarkable shift in the dynamics of the marriage debate in Massachusetts.[60] Prior to *Goodridge*, civil rights activists carried the full burden of persuading legislators to enact measures for the recognition of same-sex couples.[61] After *Opinions of the Justices*, by contrast, equal marriage was a legal certainty in Massachusetts—so much so that *at least* a constitutional amendment would be required to alter that result.[62] Redressing this dramatic inversion of power is the admitted purpose of the MFI, and the MFI initiative is but its most recent attempt to accomplish this goal by saddling the Massachusetts Constitution with discrimination.[63]

Pinello's book attempts to distill, from numerous accounts of the same-sex marriage controversy, a better model of "how citizens, interest groups, and government interact to produce policy in America."[64] Not surprisingly, Pinello is quick to identify "the role and impact of courts in a democratic society" as a prominently recurring theme in his study.[65] He goes on, however, to identify "a conspicuous absence of consensus [among academics] whether American courts are important governing institutions with their own distinct power."[66] Pinello's ultimate contribution to this debate is surprisingly tepid—particularly given his consistent praise for *Goodridge*.[67] Indeed, he concludes only that his findings should "diminish the perception that courts are hollow hopes for significant social reform."[68] This clear understatement of the judicial capacity to correct social injustice is difficult to reconcile with the effusive sentence that immediately follows it:

> With nearly all other state and national policy makers at odds with its goal, the Massachusetts Supreme Judicial Court none-

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[59] *See id.* at 571, 572.

[60] PINELLO, *supra* note 4, at 46.

[61] *Id.* at 45.

[62] *See id.* at 45–46. Even a constitutional amendment may not suffice, as there is substantial cause to doubt the validity of any amendment purporting, either expressly or by implication, to overrule *Goodridge*. *See infra* Part III. It is more definite that the SJC itself could halt prospective application of *Goodridge*, were it so inclined and a suitable case brought. *See* Schulman v. Attorney Gen., 850 N.E.2d 505, 508 (Mass. 2006). Yet the reliance of gays and lesbians on *Goodridge* is so substantial that principles of stare decisis alone make such a decision very unlikely. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854–55 (1992).

[63] *See* Mineau Press Conference, *supra* note 11.

[64] PINELLO, *supra* note 4, at 156.

[65] *Id.* at 30–31.

[66] *Id.* at 30.

[67] *See id.* at 193.

[68] *Id.*

> theless achieved singular success in expanding the ambit of who receives the benefits of getting married in America, in inspiring political elites elsewhere in the country to follow suit, and in mobilizing grass-roots supporters to entrench their legal victory politically.[69]

Pinello may have contemplated a more modest role for the judiciary because past court decisions recognizing marriage equality have had such unpleasant secondary effects—including a torrent of state constitutional amendments and so-called "Defense of Marriage Acts."[70] The threat of popular backlash has, without doubt, delayed or otherwise tempered past efforts to litigate violations of gay rights.[71] But such concerns cannot alone explain Pinello's reserved conclusion, particularly given his contention that the negative repercussions of *Goodridge* have been "relatively modest."[72]

Inexact conceptions of the judicial task have led many—and perhaps Pinello as well—to define too attenuated a role for the courts in the struggle for equal marriage.[73] Pinello, for example, tends to portray courts as fully autonomous sources of public policy, neglecting to make clear that almost all policies "created" by the courts represent their attempt to give effect to statutory provisions or, in the case of marriage equality, to constitutional constraints.[74] The relevant distinction is between purposefully outcome-driven policymaking (which *freely selects* a given policy), on the one hand, and principled constitutional adjudication (which *sometimes necessitates* a given policy), on the other.[75] One particularly clear mischaracterization of the judiciary as outcome-driven occurs when Pinello asserts that the *Goodridge* court "achieved singular success . . . in inspiring political elites elsewhere in the country to follow suit [by issuing marriage licenses to same-sex couples in their

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[69] PINELLO, *supra* note 4, at 193.

[70] *See id.* at 32.

[71] *See id.* at 24–25.

[72] *See id.* at 180.

[73] *Compare id.* at 193 (discussing the success of the SJC in attaining a "goal"), *with* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 966 (Mass. 2003) ("We owe great deference to the Legislature to decide social and policy issues, *but it is the traditional and settled role of the courts to decide constitutional issues.*") (emphasis added).

[74] *See Goodridge*, 798 N.E.2d at 966 ("The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded."); PINELLO, *supra* note 4, at 30–31, 32, 33, 193.

[75] *See supra* note 73.

own jurisdictions]. . . ."[76] To describe the behavior of these politicians as a "singular success" for the SJC is to play right into the hands of those waiting to pounce at the first hint of a supposed "activist" judge.[77] Pinello's attribution of "success" here suggests that the *Goodridge* court had political motives when, in fact, there is no cause whatsoever to doubt that the only "goal" of the court was a faithful interpretation of the constitution.[78]

An additional consequence of this mistaken characterization becomes apparent in Pinello's treatment of constitutional amendments purporting to forbid same-sex marriages.[79] At no point, unfortunately, does Pinello discuss the possibility that such amendments are themselves vulnerable to legal challenge.[80] Such a broad omission suggests that *Goodridge* has been treated more like ordinary public policy (e.g., equal marriage is *desirable*) than constitutional law (e.g., due process and equal protection *require* equal marriage).[81] This is a dangerous error for Pinello and others to propagate—especially when the fate of

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[76] PINELLO, *supra* note 4, at 193. Pinello is referring mainly to the municipal officials who issued marriage licenses to same-sex couples in San Francisco, Sandoval County (New Mexico), New Paltz (New York), and Multnomah County (Oregon). *See id.* at 18–20, 32.

[77] *See id.* at 32, 193; O'Connor, *supra* note 8.

[78] *Compare Goodridge*, 798 N.E.2d at 966 (asserting a basis in law), *with* PINELLO, *supra* note 4, at 32, 193 (suggesting a basis in politics). The attribution here is especially improper because many of the politicians whom Pinello discusses knowingly violated the marriage statutes in their respective jurisdictions. *See* PINELLO, *supra* note 4, at 75–76 (referencing the refusal of San Francisco's mayor to abide by an explicit same-sex marriage ban that, in his view, was unconstitutional). *But see id.* at 2–4 (relating how the Sandoval County clerk, upon finding that New Mexico law was silent on same-sex marriage, refused to prohibit such marriages). Municipal officials who adopt extralegal tactics undermine their own legitimacy and may even compromise more fundamental protections. *See* Lockyer v. City of San Francisco, 95 P.3d 463 (Cal. 2004) (emphasizing societal interest in "ensuring that public officials execute their official duties in a manner that respects the limits of the authority granted to them as officeholders"). As the California Supreme Court aptly notes, it remains inappropriate, post-*Goodridge*, for executive officials in other jurisdictions to make ad hoc declarations that state marriage laws are unconstitutional and not to be followed. *See id.* at 492 n.36. A legitimate use of *Goodridge*, by contrast, would be to file an analogous lawsuit in one's jurisdiction and then argue that the local constitution, like the Massachusetts Constitution, compels the result reached in *Goodridge*. *See id.* at 485.

[79] *See, e.g.*, PINELLO, *supra* note 4, at 45–72 (discussing attempts to amend the Massachusetts Constitution in response to *Goodridge*).

[80] *See generally id.*

[81] *See Goodridge*, 798 N.E.2d at 961 ("We conclude that the [same-sex] marriage ban does not meet the rational basis test for either due process or equal protection.").

marriage equality itself may come to turn upon the legal viability of this disturbing new class of rights-stripping amendments.[82]

II. Let the Justices Adjudicate!

Tension between courts and legislators, though perhaps brought to a new prominence by the same-sex marriage controversy, is neither unique to Massachusetts nor a recent development.[83] This sort of friction has always been a predictable outcome of the judiciary's legitimate protection of minority rights from undue abridgment by majority rule.[84] Indeed, it would be decidedly odd were legislatures—beholden as they are, in theory, to democratic majorities—not regularly found arrayed against courts engaged in their potentially anti-majoritarian function of judicial review.[85] Nonetheless, the recent *inundation* of our public discourse with accusations that "activist judges" and "elitist judges" are "legislat[ing] from the bench" remains a rather alarming

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[82] *See* Schulman v. Attorney Gen., 850 N.E.2d 505, 512 (Mass. 2006) (Greaney, J., concurring). If the MFI initiative succeeds in amending the Massachusetts Constitution, and the resulting amendment survives legal challenge, the consequences will be enormous:

> The . . . effect . . . will be to make same-sex couples, and their families, unequal to everyone else; this is discrimination in its rawest form. Our citizens would, in the future, be divided into at least three separate and unequal classifications: heterosexual couples who enjoy the right to marry; same-sex couples who were married before the passage of the amendment (but who, if divorced, would not be permitted to remarry someone of the same sex); and same-sex couples who have never married and, barring the passage of another constitutional amendment on the subject, will be forever denied that right.

Id.

[83] *See* 102 Cong. Rec. 4459–60 (1956) (the "Southern Manifesto") ("We regard the decisions of the Supreme Court in the school [racial desegregation] cases as a clear abuse of judicial power. It climaxes a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people."). *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[84] *See* The Federalist No. 51, *supra* note 9, at 332 (James Madison or Alexander Hamilton) (identifying the legislative branch as that most prone to abuse its power and advocating extensive structural precautions "to guard against [its] dangerous encroachments").

[85] *See* The Federalist No. 52, *supra* note 9, at 337 (James Madison or Alexander Hamilton) ("As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people."); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 78 (1980) (noting diminished capacity of the political process to correct the unjust treatment of electoral minorities and the disenfranchised).

development.[86] The trend is worrisome, in particular, because friction among the branches of government was created intentionally by the framers to establish structural protections of liberty.[87] Courts assessing the constitutionality of legislation are performing their *job*, and today's characterization of the separation of powers as an annoyance or usurpation for which the judiciary is to be blamed is a most unwise innovation.[88]

Yet opponents of equal marriage find it expedient, and perhaps even necessary, to dismiss judicial review as though it were somehow a misappropriation of power by the nation's courts.[89] *Goodridge* itself has come to be held out as a paradigmatic example of judicial usurpation, with some of the most scathing criticism coming from dissenting Justices on the SJC.[90] Indeed, the wholly imagined perils of *Goodridge*—including the destruction of democracy,[91] marriage itself,[92] and God's

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[86] O'Connor, *supra* note 8.

[87] *See* The Federalist No. 51, *supra* note 9, at 331 (James Madison or Alexander Hamilton) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition."); O'Connor, *supra* note 8.

[88] O'Connor, *supra* note 8.

[89] *See, e.g.*, President George W. Bush, State of the Union Address (Jan. 20, 2004), 150 Cong. Rec. H20, H23. President George W. Bush, for example, has mobilized such rhetoric to transform a discussion about the importance of marriage into one about the ostensible subversion of democracy by tyrannical judges:

> A strong America must also value the institution of marriage. . . . Activist judges . . . have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional [amendment] process.

Id.

[90] *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 574 (Mass. 2004) (Sosman, J., dissenting) ("[I]t is beyond the ability of . . . this court, no matter how activist it becomes in support of [same-sex marriage,] to confer . . . on same-sex 'married' couples . . . the entire package of benefits and obligations that being 'married' confers on opposite-sex couples."). It is shocking to find judges themselves, surely aware of the acute harm caused the judiciary and constitution, participating in the "judicial activist" smear campaign. *See* O'Connor, *supra* note 8.

[91] *See* Lewis v. Harris, 908 A.2d 196, 222 (N.J. 2006) ("Before the Legislature has been given the opportunity to act, the dissenters are willing to substitute their judicial definition of marriage for the statutory definition [and] for the definition that has reigned for centuries . . . ."); Laura Mansnerus, *Legislators Vote for Gay Unions in New Jersey*, N.Y. Times, Dec. 15, 2006, at A1.

[92] *See* Mel White, Religion Gone Bad 187 (2006).

natural order[93]—are so fanciful and outrageous that one not knowing better could mistake the SJC for a modern-day Star Chamber.[94] Other attacks on judicial review are presented in a distinctly more moderated way, often evincing concern for the ability of overworked judges to make sound policy decisions.[95] Here the danger of disingenuousness is extreme, as many speakers cynically adopt this tack simply to lend an underserved semblance of objectivity to their criticism of policies whose substance—not source—they find objectionable.[96]

In fairness, some objections to the judicial recognition of marriage equality are more misguided than cunning.[97] For instance, one Pinello interviewee supports equal marriage in principle but takes offense at what she considers the unspoken message of the related litigation: that voters are not "smart enough or fair enough or wise enough" to extend such rights themselves at the polls.[98] Though genuine, this viewpoint fails to appreciate the reason for—and effect of—the framers' decision to temper our democracy with a written constitution.[99] In America, nei-

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> Most gays and lesbians do not want to marry each other. That would entangle them in all sorts of legal constraints. Who needs a lifetime commitment to one person? The intention here is to destroy marriage altogether. . . . Unless we act quickly the family as it has been known for five thousand years will be gone. With its demise will come chaos such as the world has never seen.

Id. (omissions in original) (quoting Dr. James Dobson).

[93] *See* Pinello, *supra* note 4, at 158–59 ("[E]ven though [the court] can write a new definition for marriage, I say that marriage is a part of the moral law, that it was spoken into our very creation. . . . It goes right to the core of our understanding of scripture, of what's good, of what's right, and what's best.") (quoting interviewee).

[94] *See* Frederic W. Maitland & Francis C. Montague, A Sketch of English Legal History 118–19 (James F. Colby ed., 1915) (describing the Star Chamber as "a political court and a cruel court, a court in which divines sought to impose their dogmas and their ritual upon a recalcitrant nation").

[95] *See, e.g.*, Pinello, *supra* note 4, at 172–73. Pinello interviewee Tim Nashif argues: "Legislators are sensitively going to listen to hearings and [the] people[] . . . . When an activist judge drops a gavel and says, this is the way it should be, he has no clear understanding of . . . how that choice is going to affect the economy, jobs, and society." *Id.*

[96] *See id.* at 159. MFI's Ronald Crews remarks: "What [the *Goodridge*] court did . . . overlooked mountains of social science evidence, historical precedent, and the right of legislators to legislate. Instead, by fiat, the court created a social experiment . . . . *What they've done is create—not homosexual marriage—but fatherless unions and motherless unions.*" *Id.* (emphasis added); *see also* O'Connor, *supra* note 8 ("[E]lected officials routinely score cheap points by railing against the 'elitist judges,' who are purported to be out of touch with ordinary citizens and their values.").

[97] *See* Pinello, *supra* note 4, at 134.

[98] *Id.*

[99] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003). *Goodridge* acknowledges the diversity, but also the legal irrelevance, of public opinion concerning the propriety of same-sex marriage:

ther the electorate itself (irrespective of how smart, fair, or wise it is) nor its representatives may define the substance or applicability of constitutional rights by means of an ordinary vote.[100] The people have the authority to advance marriage equality, but they certainly are not entitled to withhold or impede it.[101] More generally, it is both dangerous and incorrect to propose that asserting a constitutional claim impugns the intelligence, fairness, or wisdom of the people—litigation, in truth, advances the fundamental will of the people by enabling the judiciary to accomplish its constitutionally intended purpose of redressing legal injuries swiftly and justly.[102]

> Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. *Neither view answers the question before us.* Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.

Id. (emphasis added).

[100] *See* U.S. CONST. art. V; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental, and as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

Marbury, 5 U.S. (1 Cranch) at 176. The framers' insistence upon an independent judiciary provides further evidence that the purpose of a constitution was, in their view, to shield the provisions contained therein from public sentiment. *See* THE FEDERALIST NO. 78, *supra* note 9, at 500 (Alexander Hamilton) ("If . . . the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices [to permit the] independent spirit . . . essential to the faithful performance of so arduous a duty.").

[101] *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004) ("[Equal marriage] is not a matter of social policy but of constitutional interpretation."). Here, the court is criticizing not the substance of popular opinion but the notion that it is, at all times, a relevant and appropriate consideration. *See id.* The infirm practice of measuring constitutional law against popular opinion necessarily subordinates the former to the latter, giving rise to a false and dangerous sense of entitlement among voters to decide who is entitled to what fundamental rights. *See, e.g.*, PINELLO, *supra* note 4, at 134 (quoting voter offended by reliance on courts for the acknowledgment and defense of gay rights).

[102] *See* U.S. CONST. art. III, § 2 (requiring case or controversy as a prerequisite to adjudication); *see also* JAMES MADISON, Memorial and Remonstrance Against Religious Assessments, Address Before the General Assembly of the Commonwealth of Virginia (June 20, 1785), *in* 2 THE WRITINGS OF JAMES MADISON 185–86 (Gaillard Hunt ed., Putnam 1901).

Goodridge and *Opinions of the Justices* held that no legitimate governmental purpose is advanced by the exclusion of same-sex couples from marriage.[103] Rarely is a direct response made to this controlling legal argument, as the inquiry tends to be diverted to the entirely separate question of what governmental interests are furthered by "*heterosexual" marriage.*[104] The social utility of heterosexual marriage, however substantial, is inapposite for the simple reason that same-sex marriages are intended to exist alongside opposite-sex marriages—not to replace them.[105] While a great number of legitimate state interests are surely achieved by permitting heterosexual couples to marry,[106] the desirability of heterosexual marriage, standing alone, provides no justification at all for barring same-sex couples from marriage.[107] Indeed, it suggests that the state is likely to have an analogous interest in *encouraging* same-sex couples to marry.[108] Thus, recognizing that no rational reason exists

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> [I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.

MADISON, *supra*, at 185–86.

[103] *See Opinions of the Justices*, 802 N.E.2d at 570 ("[N]either may the government, under the guise of protecting 'traditional' values, even if they be the traditional values of the majority, enshrine in law an invidious discrimination that our Constitution . . . forbids.").

[104] *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting). When the lead dissent in *Opinions of the Justices* attempts to rationalize the *exclusion*, it can only lamely propose that Massachusetts may wish to call its same-sex unions something other than "marriages" to avoid confusing other jurisdictions. *See* 802 N.E.2d at 575–76 (Sosman, J., dissenting).

[105] *See Opinions of the Justices*, 802 N.E.2d at 569; *Goodridge*, 798 N.E.2d at 965, 969.

[106] *Goodridge*, 798 N.E.2d at 995 (Cordy, J., dissenting). The encouragement of a stable family environment in which potential children could be raised tends to be the strongest governmental interest cited. *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

[107] *See Goodridge*, 798 N.E.2d at 965, 968.

[108] *Id.* at 965; *Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting).

> The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare . . . . The State's interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses.

Hernandez, 855 N.E.2d at 32 (Kaye, C.J., dissenting).

for excluding same-sex couples from civil marriage, the SJC acted squarely within the scope of its authority in *Goodridge* and, in fact, would have been remiss had it decided the case differently or fashioned the remedy less completely.[109]

Now, however, the MFI initiative is poised to riddle the Massachusetts Constitution with alarming and ungainly contradictions.[110] The venerable and elegant constitutional guarantees of due process and equal protection would be precisely and designedly countervailed by operation of the theoretically degenerate MFI initiative.[111] Nor could the irreconcilability be any more sweeping or fundamental.[112] Given the constitutional holdings in *Goodridge* and *Opinions of the Justices*, it is now a legal certainty that any enforcement of the MFI amendment would require nothing short of suspending the due process and equal protection guarantees of same-sex couples unjustly denied the right to wed.[113] As one SJC Justice notes,

> There is no Massachusetts precedent discussing, or deciding, whether the initiative procedure may be used to add a constitutional provision that purposefully discriminates against an oppressed and disfavored minority of our citizens in direct contravention of the principles of liberty and equality protected by . . . the Massachusetts Declaration of Rights.[114]

Fortunately, Massachusetts and federal law together provide the tools needed to vindicate our storied traditions of due process and equal protection and, thus, to thwart the MFI's perverse effort to turn the Massachusetts Constitution against the liberty, freedom, and dignity of those who need its protections most.[115]

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[109] *See Goodridge*, 798 N.E.2d at 966 ("To label the court's role as usurping that of the Legislature . . . is to misunderstand the nature and purpose of judicial review."). *Compare id.*, *with* Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006) (civil unions sufficient), *and* Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999) (civil unions sufficient).

[110] Schulman v. Attorney Gen., 850 N.E.2d 505, 512–13 (Mass. 2006) (Greaney, J., concurring).

[111] *See id.* at 512.

[112] *See id.*

[113] *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004); *Goodridge*, 798 N.E.2d at 968.

[114] *Schulman*, 850 N.E.2d at 512 (Greaney, J., concurring).

[115] *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996); *Schulman*, 850 N.E.2d at 513 n.3 (Greaney, J., concurring).

III. Keeping State Constitutions Constitutional

There is, perhaps, no better indication of how wildly specious the MFI's siren song is than what happened the last time a state simply "let the people vote" on whether to eviscerate the civil rights of gays and lesbians.[116] In 1992, the people of Colorado amended the state constitution through a referendum ("Amendment 2") to require that:

> Neither the State of Colorado . . . nor any of its . . . political subdivisions . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.[117]

Amendment 2 was immediately challenged on equal protection grounds.[118] The Colorado Supreme Court determined that the measure burdened a fundamental right—namely, that of equal participation in the political process—and thus applied strict scrutiny.[119] The court then proceeded to hold Amendment 2 unconstitutional, finding that it furthered no "compelling governmental interest in a narrowly tailored way."[120] The U.S. Supreme Court upheld this outcome, but on substantially different grounds.[121] In particular, the Court did not subject the measure to strict scrutiny.[122] Instead, it ruled that Amendment 2 could not withstand even the exceedingly deferential "rational basis" test—a conclusion that obviated any need to engage in a separate strict scrutiny analysis.[123]

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[116] *See* U.S. Const art. VI; U.S. Const amend. XIV, § 1; *Romer*, 517 U.S. at 631–32.

[117] *Romer*, 517 U.S. at 624.

[118] Evans v. Romer, 882 P.2d 1335, 1339 (Colo. 1994), *aff'd on other grounds*, 517 U.S. at 626.

[119] *Id.*

[120] *Id.* at 1350. Colorado argued that Amendment 2 was essential to "deterring factionalism;" "preserving the integrity of the state's political functions;" "preserving the ability of the state to remedy discrimination against suspect classes;" "preventing the government from interfering with personal, familial, and religious privacy;" "preventing government from subsidizing the political objectives of a special interest group;" and "promoting the physical and psychological well-being of Colorado children." *Id.* at 1339–40.

[121] *Romer*, 517 U.S. at 626.

[122] *Id.* at 635.

[123] *Id.* at 632. The rational basis test is summarized as follows: "[I]f a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* at 631. Note that the dissent in *Romer* incorrectly insinuates that use of the rational basis test may be

Despite the Court's application of the most deferential standard of review, its scrutinization of the Colorado amendment was rigorous and evinced particular dissatisfaction with the measure's brazenly malicious purpose:

> Amendment 2 fails, indeed defies, [rational basis] inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . . .[124]

In order to appreciate why the Court relegates Amendment 2 to an "invalid" class of legislation, one must understand what kind of "broad and undifferentiated disability" the Colorado amendment intended to perpetrate upon gays and lesbians.[125] Defenders of Amendment 2 contend that the measure sought only to prevent gays and lesbians from procuring "special treatment" and would be limited in effect to keeping them "in the same position as all other persons."[126] But, as the Court rightly observed,

> Amendment 2's reach may not be limited to *specific laws passed for the benefit of gays and lesbians.* It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of *general laws and policies* that prohibit arbitrary discrimination in governmental and private settings.[127]

Thus *Romer*, at a minimum, may be relied upon for the proposition that it is unconstitutional to withhold the general benefits and protections of the law from a group based solely upon that group's unpopularity among the electorate.[128] This aspect of *Romer* critically undermines

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taken as evidence that no fundamental rights are at issue. *See id.* at 650 n.3 (Scalia, J., dissenting).

[124] *Id.* at 632 (majority opinion); *see also supra* note 120.

[125] *See Romer*, 517 U.S. at 632.

[126] *Id.* at 637, 638 (Scalia, J., dissenting).

[127] *Id.* at 630 (majority opinion) (emphasis added).

[128] *Id.* at 635. Discrimination of this kind violates the Equal Protection clause:

> Central both to the idea of rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . Respect for this

state constitutional amendments seeking to prohibit same-sex marriage.[129] Proving the vulnerability of these amendments requires both (1) demonstrating their essential similarity to Amendment 2 in Colorado and (2) explicating the theoretical underpinnings of the *Romer* Court's assertion, concerning Amendment 2, that "[i]t is not within our constitutional tradition to enact laws of this sort."[130]

In Massachusetts, where marriage equality is required by law, it is undeniable that a constitutional amendment purporting to define marriage strictly as the union of one man and one woman is nothing but a particularized version of Colorado's Amendment 2.[131] *Opinions of the Justices* definitively established that civil marriage is a benefit that derives from universally applicable state law.[132] The availability of same-sex marriage is therefore most emphatically *not* a "special benefit" conferred upon gays and lesbians.[133] Accordingly, any constitutional provision that aims to "define" marriage in a manner that excludes same-sex couples *per se* strips gays and lesbians of a fundamental right the law itself makes generally available.[134] That such is the precise objective of those who promote amendments of this unprincipled variety is made wholly apparent by their otherwise inexplicable insistence upon and obsession with modifying *constitutions*.[135] Few people, until recently, would have ever regarded state constitutions as sensible or even vaguely appropriate repositories for supposed family law "definitions."[136]

Looking beyond Massachusetts, it is essential to remember that the failure of all other states to acknowledge the marriage rights of same-sex couples does nothing to prove that there are no such yet-to-be rec-

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principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.

Id. at 633.

[129] *See* Schulman v. Attorney Gen., 850 N.E.2d 505, 513 n.3 (Mass. 2006) (Greaney, J., concurring) (citing *Romer*, 517 U.S. at 633).

[130] *See Romer*, 517 U.S. at 633.

[131] *See Schulman*, 850 N.E.2d at 513 n.3 (Greaney, J., concurring).

[132] Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

[133] *See id.*

[134] *See Schulman*, 850 N.E.2d at 512 (Greaney, J., concurring).

[135] *See id.*

[136] *See* Ely, *supra* note 85, at 88 (quoting Lon Fuller). Note that the purported "definitions" of marriage advanced by those who assert a need to "protect" that institution from the inclusion of same-sex couples tend to be far more illustrative of anti-gay prejudice than of the attributes of marriage itself. Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 Harv. L. Rev. 2684, 2700–01 (2004) ("The [Federal Defense of Marriage] Act 'defines' marriage only so far as to say that it is something that same-sex couples cannot have. The singling-out function of this exclusionary definition is quite similar to the effect of Colorado's Amendment 2 . . . .").

ognized constitutional entitlements elsewhere.[137] The obvious-yet-profound corollary of this observation is that provisions claiming to ban same-sex marriage are rights-stripping in all jurisdictions where the underlying right to equal marriage itself exists—regardless of whether that right is formally acknowledged.[138] Moreover, because American constitutional law regards marriage as a fundamental (and therefore universal) right, the discrimination inherent in these anti-gay provisions very directly implicates the protections extended by the Court in *Romer*.[139]

Two interrelated standards should guide any assessment of a law's legitimacy: (1) electoral vulnerability and (2) general applicability.[140] In the absence of either, the likelihood that the enactment in question is, as the Supreme Court concluded in *Romer*, "not within our constitutional tradition" is substantially increased.[141] *Electoral vulnerability* is present when those significantly burdened by a particular piece of legislation possess, in the aggregate, enough influence to exert a correspondingly substantial effect upon the composition of the legislature.[142] This structural protection of liberty, despite its immense power, can do nothing to protect fundamental rights the democratic majority

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[137] *See* Hernandez v. Robles, 855 N.E.2d 1, 34 (N.Y. 2006) (Kaye, C.J., dissenting); *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003), *rev'g* Bowers v. Hardwick, 478 U.S. 186 (1986).

[138] *See Schulman*, 850 N.E.2d 512, 513 & n.3 (Greaney, J., concurring). An unacknowledged right to equal marriage very plausibly exists throughout the United States on account of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1; *see Schulman*, 850 N.E.2d at 512, 513 & n.3 (Greaney, J., concurring); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003).

[139] *See* Romer v. Evans, 517 U.S. 620, 630 (1996); Loving v. Virginia, 388 U.S. 1, 12 (1967). The U.S. Supreme Court discusses same-sex marriage throughout *Lawrence*, almost certainly in response to Justice Scalia's argument that the majority's holding eviscerates the supposed legal basis upon which equal marriage can be forbidden. *See* 539 U.S. at 604–05 (Scalia, J., dissenting). Writing alone, Justice O'Connor suggests arguments for the constitutionality of same-sex marriage bans that would, in her view, survive the majority's holding. *Id.* at 585 (O'Connor, J., concurring). Interestingly, however, the majority never attempts to refute Justice Scalia's assertion that its decision lays the foundation for a constitutional imperative that same-sex marriage be recognized. *Compare id.* at 578 (majority opinion) (saying only that "[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"), *with id.* at 585 (O'Connor, J., concurring) (directly contesting Justice Scalia's claim).

[140] *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819).

[141] *Romer*, 517 U.S. 633; *see* Ry. Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *McCulloch*, 17 U.S. (4 Wheat.) at 431.

[142] *See McCulloch*, 17 U.S. (4 Wheat.) at 428 ("The only security against the abuse of [the taxation] power, is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents.").

regards with indifference or hostility—an important argument for judicial review.[143] *General applicability*, on the other hand, is present when a law makes no arbitrary or improper distinctions in its distribution of benefits and burdens.[144] This precept, without which there could be no meaningful legislative accountability, relies substantially upon the Equal Protection Clause for enforcement:

> Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. . . . The framers of the Constitution knew, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected.[145]

Most Western philosophy reflects essentially the same view, finding justice to reside in general principles from which no one is exempt.[146]

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[143] *See* United States v. Caroline Prods., 304 U.S. 144, 152–53 n.4 (1938); Ely, *supra* note 85, at 78 ("What the [political] system . . . does *not* ensure is the effective protection of minorities whose interests differ from most of the rest of us. For if it is not the 'many' who are being treated unreasonably but rather only some minority, the situation will not be so comfortably amenable to political correction.").

[144] *See Smith*, 494 U.S. at 879; *Ry. Express Agency*, 336 U.S. at 112, 113 (Jackson, J., concurring); *see also* Plyler v. Doe, 457 U.S. 202, 216 (1982); Loving v. Virginia, 388 U.S. 1, 8–9 (1967).

[145] *Ry. Express Agency*, 336 U.S. at 112 (Jackson, J., concurring).

[146] *See, e.g.*, Immanuel Kant, Fundamental Principles of the Metaphysic of Morals, *in* Kant's Critique of Practical Reason and Other Works 1, 19–20 (Thomas Kingsmill Abbott ed. & trans., London, Longmans, Green, & Co., rev. 4th ed. 1899) (1785) ("I do not, therefore, need any far-reaching penetration to discern what I have to do in order that my will may be morally good. . . . I only ask myself: Canst thou also will that thy maxim should be a universal law? If not, then it must be rejected . . . ."); *see also* John Rawls, A Theory of Justice 12 (1971).

> Among the essential features of the [original position] is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. . . . [T]he parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. . . . [A]ll are similarly situated and no one is able to design principles to favor his particular condition . . . .

Constitutional amendments obstructing same-sex marriage are not generally applicable in any meaningful sense.[147] Nor have they proven susceptible to correction by ordinary political processes; such measures instead have spread like a contagion and now defile the constitutions of more than half of all American states.[148] Only in Arizona have voters arguably defeated an amendment of this kind on the ballot.[149] By contrast, in Mississippi, a constitutional provision opposing marriage equality captured the support of an astonishing eighty-six percent of voters in 2004.[150] Statistics this dismal suggest that equal protection challenges to such enactments may be as strategically necessary as they are legally meritorious.[151]

An amendment to the Massachusetts Constitution seeking to end marriage equality could not withstand an equal protection challenge modeled after that in *Romer*.[152] Indeed, the parallels between *Romer* and *Goodridge* are striking.[153] *Romer* concludes: "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."[154] *Goodridge* condemns discriminatory marriage policies on exactly the same grounds and, also

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RAWLS, *supra*, at 12.

[147] *See* Schulman v. Attorney Gen., 850 N.E.2d 505, 512, 513 & n.3 (Mass. 2006) (Greaney, J., concurring). These amendments are generally applicable only insofar as they forbid both heterosexuals and homosexuals from marrying someone of the same sex. *See* Hernandez v. Robles, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring). Reliance upon such obviously contrived constructions, however, is both disingenuous and insulting. *Cf.* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("To say the issue [at stake is] simply the right to engage in certain sexual conduct demeans the claim . . . put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

[148] *See* TASK FORCE, MARRIAGE MAP, *supra* note 14; Jenkins, *supra* note 14.

[149] Jenkins, *supra* note 14. The defeated Arizona measure sought to ban civil unions as well, which may have caused its failure. *See* Ariz. Prop. 107 (2006), *available at* http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop107.pdf.

[150] PINELLO, *supra* note 4, at 102.

[151] *See* United States v. Caroline Prods., 304 U.S. 144, 152–53 n.4 (1938). To be clear, the enmity of the majority does not itself *confer* constitutional status upon an asserted "minority" right, just as popular support for a constitutional right does not strip it of its constitutional status. *See id.* This in no way conflicts with the proposition that laws tending to suggest "prejudice . . . against discrete and insular minorities" are *more likely* to abrogate constitutional rights. *See id.*

[152] *See* Romer v. Evans, 517 U.S. 620, 635 (1996); Schulman v. Attorney Gen., 850 N.E.2d 505, 513 n.3 (Mass. 2006) (Greaney, J., concurring).

[153] *Compare Romer*, 517 U.S. at 635, *with* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

[154] *Romer*, 517 U.S. at 635.

like *Romer*, declares that laws grounded in animus *can never* rationally advance a legitimate governmental purpose:

> The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[155]

Thus, were something like the MFI initiative ever to succeed in Massachusetts, one dispositive inquiry in the inevitable equal protection challenge—whether a rational basis underlies the measure—would have to be answered, as a matter of state constitutional law, have to be answered with a resounding "No!"[156]

The prospects for success in states other than Massachusetts are vastly more difficult to predict and depend, for the most part, upon what standard of review is selected by the courts.[157] At present, only

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[155] *Goodridge*, 798 N.E.2d at 968 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)). In a remark that will doubtless cause him much difficulty in the future, Justice Scalia effectively concedes that bans on same-sex marriage are based solely upon "persistent prejudices" of the kind condemned by the Massachusetts court: "If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry." Lawrence v. Texas, 539 U.S. 558, 604–05 (2003) (Scalia, J., dissenting) (internal citations omitted).

[156] *See Goodridge*, 798 N.E.2d at 968; *see also Schulman*, 850 N.E.2d at 512 (Greaney, J., concurring) ("[T]he *Goodridge* decision may be irreversible because of its holding that no rational basis exists, or can be advanced, to support the definition of marriage proposed by the initiative and the fact that the *Goodridge* holding has become part of the fabric of the equality and liberty guarantees of our Constitution."); *Opinions of the Justices*, 802 N.E.2d at 570 ("For no rational reason the marriage laws of [Massachusetts] discriminate against a defined class; no amount of tinkering with language will eradicate that stain."). Further, strong evidence that civil rights and liberties were not intended to be among the permissible subjects of an initiative petition makes the MFI amendment and its ilk even less likely to survive judicial scrutiny. *See* MASS. CONST. amend. art. XLVIII, Init., pt. II, § 2 (barring initiatives that impede, among other rights, "access to and protection in courts of justice").

[157] *See Schulman*, 850 N.E.2d at 513 n.3 (Greaney, J., concurring).

Massachusetts law expressly holds that no legitimate state interest is advanced by denying same-sex couples access to civil marriage.[158] Other state courts, even in relatively progressive jurisdictions, have shown themselves to be more inclined to invent hypothetical "legitimate" governmental interests to be "rationally" advanced by the exclusion.[159] Thus, to the extent that courts continue to apply the rational basis test to discrimination against gays and lesbians, there may be little success in voiding the numerous constitutional amendments that now obstruct access to civil marriage for same-sex couples.[160]

Recent developments in constitutional jurisprudence do, however, provide much cause for optimism.[161] In 2003, the Supreme Court declared anti-sodomy laws unconstitutional in the landmark case of *Lawrence v. Texas*.[162] In doing so, the Court subjected Texas's anti-sodomy law to a conspicuously more stringent analysis than the "rational basis" test normally entails, all the while avoiding any express indication of what level of scrutiny had been applied.[163] Many scholars therefore believe that *Lawrence* signifies an intention to return to defining "fundamental rights" (i.e., those of constitutional import) broadly and abstractly rather than narrowly and by rigid enumeration.[164] If this understanding is correct, then the outrageous practice of sanctioning discrimination against gay and lesbian citizens so long as there is an asserted "rational basis" finally will cease and the prospects for invalidating anti-gay and anti-family "defense of marriage" amendments will be much enhanced.[165]

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[158] *See* Task Force, Marriage Map, *supra* note 14; Jenkins, *supra* note 14.

[159] *See* Lewis v. Harris, 908 A.2d 196, 222 (N.J. 2006); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

[160] *See Lewis*, 908 A.2d at 222; *Hernandez*, 855 N.E.2d at 7.

[161] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

[162] *Id.* at 578.

[163] Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1916, 1917 (2004).

[164] *See id.* at 1904, 1934.

[165] *See id.* at 1939, 1940 & n.181.