



How Civil Rights are Born – By Democracy, Not Lawsuits

*Why the People Should Vote on Marriage, and
What Will Happen if They Don't*

A Response to the Argument that
"Civil Rights Should Not Be Put to a Vote"

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Democracy **1 a** : government by the people; *especially* : rule of the majority; **b** : a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections; . . . **4** : the common people especially when constituting the source of political authority

Merriam-Webster Dictionary

Introduction

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.” *Majority Opinion, Goodridge v. Department of Public Health* ¹

A vote for this amendment is a vote for bigotry – pure and simple. . . . Americans believe in tearing down the walls of discrimination and inequality, not creating new barriers for civil rights. *Ted Kennedy, U.S. Senate, Massachusetts* ²

The use of racial analogies in the discussion of same-sex marriage . . . threatens to place the traditional view of marriage beyond the pale. *Cathy Young, Boston Globe Columnist* ³

The citizens of Massachusetts have petitioned the Massachusetts General Court to send a marriage amendment to the 2008 ballot. The amendment requires new marriages entered into after 2008 to be limited to opposite-sex unions. Opponents call this prejudice and a denial of civil rights. Defenders of traditional marriage call this democracy and a vote for common sense.

The proposed amendment reads: “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 between one man and one woman.”

Is it hate to define marriage this way? In the *Goodridge* case, four unelected judges said yes. Those who oppose same-sex marriage are as evil as racists, the judges concluded.

The consequences of the court ruling in favor of same-sex marriage will be harsh, already resulting in persecution against ordinary people accused of being bigots because they disagree. The judges placed traditional marriage “beyond the pale,” and thus usurped the people’s sovereign authority.

This is wrong. The paper examines how civil rights are born in a democracy, and argues that same-sex marriage needs to be addressed by the people, given the harsh

¹ 440 Mass. 309, 341 (2003) (quoting from racial discrimination case, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)), published online at <http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/goodridge.html>.

² Ted Kennedy, “GOP Says ‘I Do’ to Bigotry,” *Boston Herald*, June 25, 2006, published online at [TedKennedy.com, http://www.tedkennedy.com/journal/893/gop-says-i-do-to-bigotry](http://www.tedkennedy.com/journal/893/gop-says-i-do-to-bigotry) (describing federal marriage amendment).

³ Cathy Young, “Marriage, Sexual Complementarity and Sexual Difference,” *The Y Files*, Oct. 26, 2005, <http://cathyyoung.blogspot.com/2005/10/marriage-sexual-complementarity-and.html>.

consequences at stake for those who disagree. The goal is to inform the public conversation about the issue of civil rights and whether the people should vote on marriage.

The paper relies almost entirely on citations from supporters of same-sex marriage or from neutral authorities to make its case – let the people vote!

Executive Summary

The claim that “civil rights should not be put to a vote” ignores how civil rights are born. Civil rights are creatures of democracy, not lawsuits. The people determine what is to be protected as a civil right through the democratic process. So the issue is not about putting civil rights to a vote, but about voting whether to elevate a claim to the level of a civil right in the first place. The people enjoy a civil right to decide by ballot if traditional marriage is a matter of common sense or bigotry that violates a civil right. [Pages 3-5]

The history of civil rights in our country affirms that the courts’ role is to apply, not to create, civil rights protections. Such protections arise through the enactment of constitutional amendments or statutes that 1) command the courts to recognize a civil right or 2) signal that a particular group merits special constitutional protection. The people lead, and the courts follow. [Pages 6-9]

The desegregation ruling in *Brown v. Board of Education* upheld democracy by applying the 14th Amendment. Though unpopular at the time it was issued, the Supreme Court’s 1954 desegregation ruling in *Brown v. Board of Education* had its roots in an earlier and still-binding democratic process. The civil rights amendments to the federal constitution, passed a century before, declared protection against race-based policies to be a civil right. The same has never been true with same-sex marriage. [Pages 10-11]

Same-sex marriage in our state is solely the creature of a court ruling, not democracy. Democracy has not declared same-sex marriage to be a civil right and the people have not determined that disagreement with it is a form of bigotry. In *Goodridge v. Department of Public Health*, the Supreme Judicial Court endorsed same-sex marriage without the people’s backing. The lawsuit was filed to preempt public debate. This is not how civil rights are born. [Pages 12-16]

If ballot access is denied, then opposition to same-sex marriage will be punishable as bigotry without the people’s consent. The SJC characterized opposition to same-sex marriage as analogous to racial bigotry, thus laying the groundwork for severe government sanctions with far-reaching impact. Persecution is already occurring and persecution without representation denies democracy. [Pages 17-23]

Allowing the people to exercise their right to vote on marriage promotes democracy, not tyranny. Fears of the “tyranny of the majority” cannot justify denying people the right to vote – which is the very essence of tyranny. Supporters of same-sex marriage are more than capable of waging a strong campaign at the ballot against the marriage amendment to influence the outcome in their favor. [Pages 24-27]

Conclusion: Let the people vote! The proposed amendment defines marriage as the union between one man and one woman. Putting it on the ballot allows the people to decide whether limiting marriage to opposite-sex unions is a matter of bigotry or common sense. [Page 28]

The Claim That “Civil Rights Should Not Be Put To A Vote” Ignores How Civil Rights Are Born

Whether you start this in a court or you start this in a legislature, ultimately to succeed we have to convince Americans that it is wrong to exclude same-sex couples from marriage. *Matthew Coles, ACLU's Lesbian Gay Bisexual Transgender Project* ⁴

[A]s Rev. Dr. Martin Luther King, Jr. explained, **no minority can succeed without the assistance of the majority.** *Mary Bonauto, Attorney for Plaintiffs in Goodridge case* ⁵

In short, African Americans made progress in the 1960s because a majority of white Americans wanted them to. *Prof. Jack M. Balkin, Yale Law School* ⁶

MassEquality, a leading supporter of same-sex marriage in Massachusetts, titles an online fact sheet, “Why people’s rights should not be put to a vote.”⁷ The title begs the question. Where do “people’s rights” come from in the first place? In our system of democracy, civil rights come through the people who directly, or through their elected representatives, vote to create civil protections. As conceded by supporters of same-sex marriage, they ultimately have to convince average Americans that a claimed right deserves civil status. That is how democracy works.

The origin of civil rights

There are different types of rights – such as natural, human, fundamental, inherent, inalienable, substantive, “positive,” customary, personal, communal, procedural, and contractual. A “civil” right is one that the citizenry adopts through some civic process in order to direct civil authorities to protect it. “Civil” rights may or may not be rooted in or correspond to natural, human, fundamental, or inherent rights, which arise apart from government. But even rights regarded today as fundamental, such as the

⁴ Quoted in Warren Richey, “For Gay Marriage Backers, Rulings Portend Long Road,” *Christian Science Monitor*, July 28, 2006, at <http://www.csmonitor.com/2006/0728/p02s02-ussc.html>.

⁵ Mary L. Bonauto, “*Goodridge* in Context,” 40 *Harvard Civil Rights-Civil Liberties Law Review* 1, 22 (2005) (citing to King’s “I Have a Dream” speech), published online at http://www.law.harvard.edu/students/orgs/crcl/vol40_1/bonauto.php.

⁶ Jack M. Balkin, “What Brown Teaches Us About Constitutional Theory,” 90 *Virginia Law Review* 1537, 1554 (2004).

⁷ MassEquality, “Why People’s Rights Should Not Be Put to a Vote,” undated, at http://www.massequality.org/background/no_vote.htm.

freedoms of religion, speech, assembly, and so forth, to be practically enforced as civil rights in a democracy, had to be ratified initially through democratic means, the form by which our system of self-government operates.

As one author wrote around the time of the debate over the 14th Amendment's ratification:

There is a tendency, . . . to forget that rights are and can be real, only as they are established in the civil and political organization. They are slowly, and only with toil and endeavor, enacted in laws, and moulded in institutions. It is only with care and steadiness and tenacity of purpose that those guarantees are forged which are the securance of freedom, and they are to be clinched and riveted to be strong for defense and against assault.⁸

Before civil rights can be threatened with being "taken away," they have to exist. In a democracy, a civil right comes into legal existence through the democratic process. Such a right, or more properly its civil status, is voted into being as part of constitutional documents or amendments, or enshrined in legislation, what the philosophers call "positive" or written law. Either the people directly at the ballot or the people's elected representatives at the statehouse reach a consensus about what the law will protect as a civil right, and formalize this consensus in a new amendment or statute. Popular enactments are the official recordings, so to speak, of a majority's backing for a particular rights claim.

Thus, the people, acting through Congress and constitutional conventions in the states, had to approve our nation's Bill of Rights and successive additions such as the 14th Amendment before the rights declared therein became binding. The same democratic process occurred in Massachusetts, whereby voters in the towns first called for, and then ratified the Declaration of Rights as part of our state constitution. New rights must be approved at the ballot by Massachusetts voters before they are added as constitutional amendments.

The rule at work here is, of course, "the consent of the governed." At the root of democracy is the individual or representative vote, the way that citizens exercise their consent. To gain civil status, therefore, a claimed right must be consented to, that is voted on, by the people directly or through their elected representatives.

So it makes no sense to argue that rights claims should not be put to a vote when it is precisely a popular or representative vote to which civil rights owe their civil existence. In a democracy, claimed rights become enforceable as civil rights through the

⁸ Elisha Mulford, *The Nation: The Foundations of Civil Order and Political Life in the United States* 83 (1871) available online at <http://books.google.com>.

democratic process. A necessary link exists, therefore, between a right's civil status and democracy.

As will be argued below, neither direct nor representative democracy has elevated same-sex marriage to the status of a civil right in Massachusetts. So the issue here is not about putting civil rights to a vote, but about voting to create a civil right in the first place.

The ballot initiative is a civil right

The connection between democracy and the creation of civil rights is so fundamental that the people in Massachusetts enjoy a civil right to consider basic questions at the ballot. Article 48 of the state constitution, approved by legislators and ratified by the voters in the early 1900s, empowers "a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection" through an initiative petition.⁹

According to the Massachusetts Supreme Judicial Court (SJC), the civil right to petition the voters allows for "public debate [to] be focused on whether some laws, or the Constitution, ought to be amended to conform with the current expectations and wishes of the people."¹⁰ The civil right to initiate ballot questions recognizes that the people, not the courts or the legislature, are sovereign when it comes to determining what the law ought to be.

Thus, regarding the courts, the SJC has affirmed that the people may use "the initiative process to amend the Constitution prospectively, thereby changing the substantive law to be applied and effectively 'overruling' the precedential effect of a prior court decision interpreting it."¹¹ Just because a court rules one way does not prevent the people from amending the applicable law to change the underlying value judgments that the courts must subscribe to and apply in the future.¹²

Similarly, regarding the legislature, the SJC has explained that the civil right to initiate ballot questions offers "a means by which the people could move forward on measures which they deemed necessary and desirable without the danger of their will being thwarted by legislative action."¹³ Article 48 sets up a process that involves the legislature only to "ensure that initiative amendments submitted to the people for approval have at least a reasonable amount of public support, as reflected by the

⁹ Mass. Const. Art. 48, part II, § 2.

¹⁰ *Schulman v. Attorney General*, 447 Mass. 189, 196 (2006). Article 48 excludes certain subjects from ballot review, none of which applies to the proposed marriage amendment. *Id.* at 197.

¹¹ *Id.* at 193.

¹² *Id.* at 197.

¹³ *Buckley v. Secretary of State*, 371 Mass. 195, 199 (1976).

favorable votes of at least one fourth of the legislators elected to the General Court.”¹⁴ The legislators have a constitutional duty not to use parliamentary tricks or delays to avoid taking “final action,” that is, an up-or-down roll call vote on whether to send an initiative petition to the ballot,¹⁵ since the initiative is “the people’s process.”¹⁶

Indeed, “[t]he principle of the initiative and referendum in its purity means that the people of this Commonwealth may have such laws and may have such a Constitution as they see fit themselves to adopt.”¹⁷ That is, the people, acting as sovereign, retain the civil right to address basic social questions at the ballot, over and against the opinions of their servants in government.

The existence of the civil right to initiate ballot questions in Massachusetts reinforces the principle that behind every authentic civil right there should be a democratic vote, since it is ultimately the people that establish the laws by which they are governed.

¹⁴ Opinion of the Justices to the Senate, 386 Mass. 1201, 1212 (1982).

¹⁵ *LIMITS v. President of the Senate*, 414 Mass. 31, 34 (1992).

¹⁶ *Buckley*, 371 Mass. at 199.

¹⁷ *Id.* (quoting Mr. Joseph Walker, a member of the constitutional convention approving Article 48).

The History Of Civil Rights In Our Country Affirms That The Courts' Role Is To Apply, Not To Create, Civil Rights Protections.

Today, the court has transformed its role as protector of individual rights into the role of creator of rights. Justice Francis X. Spina, dissenting in Goodridge case ¹⁸

As one State House wag in Massachusetts put it, "We used to have government of the people, by the people and for the people, now we're getting government by four people!" Prof. Mary Ann Glendon, Harvard Law School ¹⁹

Opponents of letting the people vote on the definition of marriage act as if same-sex marriage is already a civil right. They point to the SJC ruling in the *Goodridge* case where four out of seven unelected justices redefined marriage to allow same-sex couples to obtain marriage licenses. However, as will be explained below, the *Goodridge* ruling lacked the requisite democratic foundation. The same-sex marriage claim endorsed in that case never gained civil rights status through a vote of the people.

The democratic basis for civil rights is evidenced in our country's political history. Contrary to the assertions of some, the judicial role is not to enforce social change by making new law, but to apply the law that the people have adopted. The courts must rely on direction from the political arena in the form of constitutional amendments or civil rights statutes, either directly commanding the courts to protect a claim as a civil right, or signaling that a particular group deserves heightened constitutional protection. Civil rights for racial minorities, and for women, for example, have been created through the democratic process, not the courts.

In short, when it comes to civil rights, the people lead and the courts follow. A brief survey in the areas of rights for racial minorities and women is instructive.

Racial discrimination

Chief Justice Margaret Marshall, author of the SJC's same-sex marriage ruling in *Goodridge*, once boasted in an interview that the courts have the power to stamp out various practices they deem to be evils "with one stroke of the pen of a judicial opinion."²⁰ Marshall mentioned as proof an early Massachusetts court proceeding

¹⁸ *Goodridge v. Department of Public Health*, 440 Mass. 309, 349 (2003).

¹⁹ Mary Ann Glendon, "For Better Or For Worse? The Federal Marriage Amendment Would Strike A Blow For Freedom," *Wall Street Journal*, Feb. 25, 2004, available online at <http://www.opinionjournal.com/editorial/feature.html?id=110004735>

²⁰ Margaret Marshall, quoted in Emily Bazelon, "A Bold Stroke," *Legal Affairs*, May-June, 2004, available online at http://www.legalaffairs.org/issues/May-June-2004/feature_bazelon_mayjun04.msp.

referred to as the “Quock Walker case” and reputed to have abolished racial slavery in the Commonwealth.²¹

Yet, as her interviewer noted, “most of the historians who have studied the [Walker] case have concluded that the Massachusetts court didn’t end slavery with a righteous bang. Instead, the practice lost popular support and gradually withered away. Slaves simply wandered off, won their freedom from sympathetic juries, or were given it by their masters. No grand stroke of the judicial pen was necessary.”²²

Also, Marshall’s interviewer continued, “[m]uch of the [Goodridge] opinion’s moral weight is borne by a historical analogy between gay marriage and interracial unions.”²³ Marshall referred in *Goodridge* to a 1948 California Supreme Court decision, *Perez v. Sharp*, which struck down a state ban on interracial marriage.²⁴ Yet,

The parallel between *Perez* and *Goodridge* is not a perfect one, however. Behind the California decision stood the equal protection clause in the 14th Amendment, which Congress passed to ensure full citizenship for black Americans after the Civil War. The Massachusetts Declaration of Rights, with its ringing statement that ‘All people are born free and equal,’ has strong guarantees of liberty and equality. But no state or federal law passed expressly to guarantee gay people full rights stands behind *Goodridge*.²⁵

Contrary to the grandiose perspective of Chief Justice Marshall, the national history of civil rights for racial minorities necessarily begins not with the courts but with the enactment of the 13th, 14th, and 15th amendments to the U.S. Constitution in the 1800s, barring government discrimination on the basis of race. Other landmark major civil rights enactments by Congress include the Civil Rights Acts of the 1870s, 1964, and 1968. These and numerous state counterparts were majoritarian expressions of

²¹ *Id.* See John Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the “Quock Walker Case,”* 5 *The American Journal of Legal History* 118 (1961).

²² Bazelon, *supra* note 21.

²³ *Id.*

²⁴ *Goodridge v. Department of Public Health*, 440 Mass. 309, 318, 324, 327, 328 (2003) (citing *Perez v. Sharp*, 32 Cal.2d 711 (1948)).

²⁵ Bazelon, *supra* note 21. In the *Perez* decision, the California Supreme Court noted that “Race restrictions must be viewed with great suspicion, for the Fourteenth Amendment ‘was adopted to prevent state legislation designed to discriminate on the basis of race or color’ . . . and expresses ‘a definite national policy against discriminations because of race or color.’ . . . Any state legislation discriminating against persons on the basis of race or color has to overcome the strong presumption inherent in this constitutional policy.” 32 Cal.2d at 719 (citations omitted). Unlike the hotly debated issue of race at the time of the 14th Amendment’s adoption, the issue of same-sex marriage was never debated during the colonial period of the Declaration of Rights’ adoption.

democracy, penalizing private racial discrimination in a host of contexts including employment, public accommodations and housing.²⁶

As described by the U.S. Supreme Court in the first case to apply the 14th Amendment, the primary intent behind the Amendment was “to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.”²⁷ A similar objective lies behind the legislative adoption of numerous civil rights acts guaranteeing racial minorities equal treatment by various private actors.²⁸

As vehicles for the democratic establishment of a civil right not to be discriminated against on the basis of race, the civil rights amendments of the 1800s, and subsequent federal and state statutes expressly banning racial discrimination in particular areas, handed the courts their marching orders. Subsequent landmark Supreme Court decisions on race, including *Brown v. Board of Education* as discussed separately below, thus owe their authority not to the power of judges, but to the will of the people.

Sex discrimination

The same subordination of the judiciary to democracy is found in the context of sex discrimination. In 1920, women gained the right to vote through the democratic enactment of the 19th Amendment to the U.S. Constitution.²⁹ Subsequently, Congress and the states have created specific civil rights protections guaranteeing equal treatment of men and women in particular areas.

In 1972, a plurality opinion of the U.S. Supreme Court, calling for heightened constitutional scrutiny of laws discriminating on the basis of sex, observed that “over the past decade, Congress has itself manifested an increasing sensitivity to sex-based

²⁶ See *Hernandez v. Robles*, ___ N.E. 2d ___, 2006 WL 1835429 (N.Y. 2006) (contrasting lengthy history behind our country’s eventual adoption of civil rights protection against racism, following the recognition of racism as a “revolting moral evil . . . at first by a few people and later by many more,” and involving a civil war “to eliminate racism’s worst manifestation, slavery, . . . three constitutional amendments to eliminate that curse and its vestiges,” and “the civil rights revolution of the 1950’s and 1960’s,” with the “relatively new” idea that same-sex marriage “is even possible,” let alone deserving of protection as if it were a civil right).

²⁷ *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880).

²⁸ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

²⁹ In 1875, the U.S. Supreme Court ruled that the 14th Amendment did not guarantee suffrage for women. *Minor v. Happersett*, 88 U.S. 162 (1874). The Court concluded that “For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be. . . . If the law is wrong, it ought to be changed; but the power for that is not with us. . . . No argument as to woman’s need of suffrage can be considered. We can only act upon her rights as they exist.” *Id.* at 177-78.

classifications.”³⁰ Cited were the Civil Rights Act of 1964, the Equal Pay Act of 1963, both of which added sex to the other prohibited classifications, and a federal Equal Rights Amendment (ERA) sent by Congress to the states for ratification.³¹

Yet when ruling on sex-based policies under the 14th Amendment the Court does not apply the same level of scrutiny it uses in cases involving race-based policies.³² This may be due partly to two factors. First, race-based discrimination was clearly the overriding concern during the 14th Amendment debates. The status of women was not in focus. Second, the proposed Equal Rights Amendment, seeking to add sex to the list of suspect classifications, has failed to gain ratification by the states. Thus, the Court lacks in federal cases a clear constitutional command from the people to treat sex-based discrimination in the same manner it treats racial discrimination.

In Massachusetts, however, the people approved a state ERA at the ballot in 1976, thereby expressly creating a civil right not to be discriminated against on the basis of sex. According to the SJC in the first decision construing the state ERA,

Article 106 incorporates into our State Constitution an express prohibition of discrimination on the basis of sex, grouping it with other prohibited bases for discrimination which are subject to strict judicial scrutiny. All the categorical bases listed therein logically are subject to the same degree of judicial scrutiny, and in our opinion that degree of scrutiny must be at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications. Therefore, we conclude that the people of Massachusetts view sex discrimination with the same vigorous disapproval as they view racial, ethnic, and religious discrimination.³³

The judicial reliance on the people’s direction in the context of sex discrimination, like that in the context of racial discrimination, upholds democracy and respects the limits against judicial lawmaking inherent in a democratic system of government. Enforcing the law as adopted by the people, rather than substituting a court’s own opinion as to what the law should be, characterizes the creation of civil rights.³⁴

As indicated in the next section, the circumstances surrounding the abolition of racially segregated schools are consistent with this pattern. The ruling in *Brown v. Board of*

³⁰ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1972).

³¹ *Id.* In a later case, Justice Scalia noted other congressional statutes enacted to protect women from discrimination, including Title IX of the Education Amendments of 1972, the Women’s Business Ownership Act of 1988, and the Violence Against Women Act of 1994. *United States v. Virginia*, 518 U.S. 515, 575-76 (Scalia, J. dissenting).

³² The “heightened” scrutiny applied by the Court to sex-based discrimination lies between the “strict” level applied to laws employing racial classifications, which rarely withstand such scrutiny, and the “rational basis” level applied to general social and economic legislation, which usually survive constitutional review.

³³ *Commonwealth v. King*, 374 Mass. 5, 21 (1977).

³⁴ There are anomalous exceptions, of course, that prove the rule due to their continuing controversial nature. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

Education does not serve as precedent for the constitutionally aberrant ruling in the *Goodridge* case.

The Desegregation Ruling in *Brown v. Board of Education* Upheld Democracy By Applying the 14th Amendment.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. *Unanimous Opinion, U. S. Supreme Court, Brown v. Board of Education* ³⁵

As a matter of social history, today's opinion may represent a great turning point that many will hail as a tremendous step toward a more just society. As a matter of constitutional jurisprudence, however, the [*Goodridge*] case stands as an aberration. Justice Martha B. Sosman, *Dissenting Opinion in Goodridge case* ³⁶

In the 1954 ruling in *Brown v. Board of Education*, the U.S. Supreme Court struck down racial segregation in the public schools of Topeka, Kansas. Supporters of same-sex marriage argue that if one rejects the *Goodridge* ruling on same-sex marriage as “judicial activism” that overrides the will of the people, then one also must reject the *Brown* ruling on racial segregation. Both rulings were unpopular at the time they were issued.³⁷

Yet the *Brown* ruling, unlike the *Goodridge* ruling as explained below, was rooted in a prior exercise of democracy directly bearing on the value choices confronting the judiciary. Although general in its terms, the 14th Amendment was debated, adopted by Congress, and ratified by the states in the 19th century precisely as a response to racial discrimination.³⁸ In light of this historical context, the Supreme Court rightly observed in *Brown* that the 14th Amendment “was primarily designed” to protect persons of color against state-imposed racial inequality.³⁹

The democratic process creating the 14th Amendment had imposed on the government a civil rights duty binding on the courts and applicable to the racial segregation context. Once the Supreme Court found in *Brown* that the segregation policies before it were race-based and exacted unequal burdens on persons of color, then it was authorized to

³⁵ *Brown v. Board of Education of Topeka*, 347 U.S. 483, 490 (1954).

³⁶ 440 Mass. 309, 363 (Sosman, J., dissenting).

³⁷ See, for example, the remarks of Gary K. Daffin of the Massachusetts Gay and Lesbian Political Caucus: “If we had put the *Brown v. Board of Education* decision to a popular vote in 1954, it would have lost. Same with the Civil Rights Act of 1964, and black people would not have civil rights in this country.” Michael J. Meade, “Massachusetts Marriage Ban on Hold,” 365gay.com Newscenter, Nov. 10, 2003, at http://www.theweddingparty.org/inthenews/2003_11_01_archive.html.

³⁸ See *supra* note 26 and accompanying text.

³⁹ *Brown*, 347 U.S. at 490 n.5 (quoting *Slaughter-House Cases*, 16 Wall. 36, 67-72 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880)).

act, not by the dictate of the Court's own opinion of what is right and decent, but by the mandate of the people's elected representatives who enacted the 14th Amendment.⁴⁰

As a result, while the *Brown* decision may have been unpopular when it was issued, it was not undemocratic. The ruling in 1954 had its roots in a political consensus, albeit one achieved a century before and misconstrued by the judiciary since the *Plessey v. Ferguson* case.⁴¹ This original consensus was enshrined democratically in the fundamental law of the land, the federal Constitution, through the 14th Amendment. The political debate which produced the 14th Amendment focused squarely on the propriety of using race as a discriminating factor.

The resulting civil right not to be subjected to official discrimination based on race, arising from the people's deliberative exercise of sovereignty, was appropriately within the power of the judiciary to apply at the time of the *Brown* litigation. Thus, when striking down the Topeka schools' segregation policy, the Supreme Court did not usurp the people's sovereignty but instead voted to uphold it. That makes *Brown* incomparable to *Goodridge*.

⁴⁰ The *Brown* ruling has been defended on "originalist" grounds against the charge of judicial activism concerning the specific issue of whether desegregation in the public schools was constitutionally intended. That is, did the framers of the 14th Amendment contemplate, and would they have supported the *Brown* ruling in the context of educational segregation? For two excellent articles by those answering in the affirmative based on an exhaustive examination of the historical record, see Michael W. McConnell, "Originalism and the Desegregation Decisions," 81 *Virginia Law Review* 947 (1995) and Kenyon Bunch, "If Racial Desegregation, Then Same-Sex Marriage? Originalism and the Supreme Court's Fourteenth Amendment," 28 *Harvard Journal of Law & Public Policy* 781 (2005).

⁴¹ 163 U.S. 537 (1896) (reversed by *Brown* decision).

Same-Sex Marriage In Our State Is Solely The Creature Of A Court Ruling, Not Democracy.

We are mindful that our decision marks a change in the history of our marriage law. *Majority Opinion in Goodridge case* ⁴²

Another factor sped the timing of the decision to litigate: we knew we would soon be on the defense in a constitutional amendment campaign. *Mary Bonauto, Attorney for Plaintiffs in Goodridge case* ⁴³

If the decision of the Supreme Judicial Court in Goodridge is "judicial tyranny," let there be more of it. *Rev. Peter Gomes, Harvard University* ⁴⁴

Two features of the *Goodridge* case are notable. First, the outcome overturned democracy by rejecting the long-standing political consensus limiting marriage to opposite-sex unions. Second, the lawsuit was filed to beat to the punch a new exercise of democracy asking the people to reaffirm that consensus. This is not how civil rights are born.

No democratic roots.

By a bare one-vote majority among unelected justices, the SJC declared in *Goodridge* that marriage must be defined without reference to the sexes and made accessible as a civil right to same-sex couples.⁴⁵ The majority acknowledged that the democratically enacted laws of the Commonwealth had heretofore incorporated the "every-day meaning of marriage" referring to "the legal union of man and woman as husband and wife."⁴⁶ It also agreed that "our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries."⁴⁷

The majority did not argue, nor could it, that those who framed the Massachusetts Constitution during the colonial era and those who ratified it had same-sex marriage in mind.⁴⁸ The general terms of the Declaration of Rights, guaranteeing liberty and equality, were not forged, debated or approved in the context of any public controversy involving the definition of marriage. Only once was the matter publicly raised as a

⁴² 430 Mass. 309, 310 (2003).

⁴³ Mary L. Bonauto, "Goodridge in Context," 40 Harvard Civil Rights-Civil Liberties Law Review 1, 26 (2005).

⁴⁴ Peter J. Gomes, "For Massachusetts, A Chance and a Choice," Boston Globe, Feb. 8, 2004, at http://www.glad.org/marriage/Goodridge/press/Peter_Gomes_Op-ed.shtml.

⁴⁵ 430 Mass. at 343-44.

⁴⁶ *Id.* at 318.

⁴⁷ *Id.* at 337.

⁴⁸ When the Massachusetts Constitution was adopted, sexual relationships involving same-sex couples were legally prohibited and marriage was understood universally as the union between one man and one woman.

constitutional question, during the referendum debate over the proposed state ERA, and the framers of that amendment disavowed any intent to give same-sex couples a civil right to marry.⁴⁹ Thus, the courts were not obliged by the people to recognize same-sex marriage as a civil right.

Instead, the majority described the governing constitutional mandate in the *Goodridge* case as one prohibiting state policies from being “arbitrary or capricious.”⁵⁰ All it was doing, the majority argued, was carrying out the judiciary’s constitutional duty to ensure that laws are rational.⁵¹ But the majority’s negative assessment of the rationality of traditional marriage laws lacked any democratic reference. In determining what it found rational or irrational, the majority employed value judgments that the people never endorsed and that were highly suspicious of traditional marriage policy.

Against the well-reasoned and strong objections of three other justices who dissented, the majority in *Goodridge* rejected traditional marriage policy due to what it characterized as the “invidious quality of the discrimination” supposedly involved.⁵² The majority asserted that requiring marriage to include both sexes “confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.”⁵³ The majority also contended that the State excluded children of same-sex couples from the benefits availed to children of married opposite-sex couples because it “disapproves of their parents’ sexual orientation.”⁵⁴ The majority suggested in conclusion that traditional marriage policy is “rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.”⁵⁵

Democracy in our country has never adopted such negative characterizations or assessments of traditional marriage policy. No constitutional amendment or law — whether in the Commonwealth or in the rest of the nation — expresses or signifies the people’s agreement that limiting marriage to opposite-sex couples somehow is symptomatic of a desire to harm, based on stereotype, or disrespectful towards individuals because of their sexual orientation.

In view of the number of referenda and legislative enactments in our country reaffirming marriage as the union between one man and one woman, it is clear that

⁴⁹ See sources cited in *id.* at 430 Mass. at 377-79 (Cordy, J., dissenting). See also *Id.* at 350 n.6 (Greany, J., concurring) (“Justice Cordy’s separate opinion points out, correctly, that, when art. 1 was revised by the people in 1976, it was not then intended to be relied on to approve same-sex marriage.”).

⁵⁰ *Id.* at 329.

⁵¹ *Id.* at 331, 338.

⁵² *Id.* at 327.

⁵³ *Id.* at 333.

⁵⁴ *Id.* at 335.

⁵⁵ *Id.* at 340.

democracy has produced the opposite judgment.⁵⁶ The people see such limits as a matter of common sense, and not as the product of irrational prejudice. Thus, there is no authoritative evaluation emanating from the democratic process that supports the suspicion and negativity displayed by the majority in *Goodridge*. The findings of irrationality declared therein were influenced by factors lacking any roots in democracy.

Facing similar arguments claiming that traditional marriage is a form of bigotry, the state supreme courts of New York and Washington had this to say:

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.⁵⁷

Turning first to the plaintiffs' claim that DOMA [Washington's Defense of Marriage Act] was motivated by animus, we cannot agree that the only reason the legislation was enacted was because of anti-gay sentiment. It is unfortunate that the dissents accept this argument . . . because it is demonstrably incorrect. A substantial number – 15 – of the legislators who voted for DOMA in 1998 also voted to add sexual orientation to the laws against discrimination in 2006. Even if some of these legislators may have had a "change of heart," the far more likely explanation for the majority, if not all, is that they were not motivated by antigay sentiment in 1998 but instead were convinced for other reasons that marriage should not be extended to same-sex couples. In assuming that everyone who voted for DOMA is a bigot, Justice Fairhurst's dissent is not only wrong, it sadly oversteps the bounds of judicial review.⁵⁸

The rights claim endorsed by the majority in *Goodridge* differs in a fundamental respect from other claims achieving civil status through democratic means. Not any sustained public discussion, deliberated consensus, and authoritative ratification of a sovereign majority, but only a lawsuit, is all that backs the newly imposed marriage policy in Massachusetts. Nowhere have the people of the Commonwealth directed the SJC to treat same-sex marriage as a civil right or defenders of traditional marriage as bigots.

⁵⁶ Forty-six states have enacted constitutional amendments or statutes affirming the traditional definition of marriage. This year, the highest courts in New York and Washington rejected same-sex marriage claims. *Hernandez v. Robles*, ___ N.E. 2d ___, 2006 WL 1835429 (N.Y. 2006); *Anderson v. King County*, 138 P. 3d 963 (Wash. 2006).

⁵⁷ *Hernandez*, ___ N.E. 2d at ___.

⁵⁸ *Anderson*, 138 P. 3d at 980-81.

As result of the SJC’s ruling, citizens from every walk of life stand condemned for harboring what the government must now consider to be intolerable beliefs equated to racism, not by a majority of their peers, but by four unelected judges who have arrogated to themselves the perquisites of sovereignty. Democracy was usurped by the *Goodridge* decision, not upheld.

Let’s “beat ‘em to the punch” to preempt public debate

When Thurgood Marshall and the NAACP planned a legal assault against racial segregation, democracy had already vindicated the principle thrust of their appeal to the courts – by passing the 13th, 14th and 15th Amendments, the people had judged racism to be an evil that must be eradicated. When Mary Bonauto and the Gay and Lesbian Advocacy and Defenders (GLAD) filed their lawsuit in the *Goodridge* case, their appeal to the courts sought not to vindicate democracy, but to bypass it in order to change a democratically accepted policy. Limiting marriage to opposite-sex couples was not adjudged previously by the people to be an evil, but was and still is uniformly regarded as a matter of common sense.

Employing the tactic of “beat ‘em to the punch,” the advocates for same-sex marriage used the judiciary in *Goodridge* as a means to strengthen their position in, and perhaps even to knock out the possibility of, a Massachusetts referendum to uphold traditional marriage policy. Preemption, not vindication, was and remains their goal.

In an article describing the strategy behind the *Goodridge* litigation, Mary Bonauto, lead attorney for the plaintiffs, revealed a critical objective.⁵⁹ Alerted early on to efforts to put a constitutional amendment upholding the traditional definition of marriage before the people, the advocates for same-sex marriage calculated that a court case would give them crucial political leverage.

[W]e viewed an affirmative marriage case as an opportunity to frame the issues positively and in the voices of LGBT people. We also thought the best defense was the same thing that had moved us forward so far: shining a light (this time through a lawsuit) on the lives of the real people affected and the bedrock American principles of fairness and equality. We knew we had a window of opportunity: a constitutional amendment must be approved by two legislatures before it can be put out to the voters for ratification at a general election.

⁵⁹ Mary L. Bonauto, “*Goodridge* in Context,” 40 Harvard Civil Rights-Civil Liberties Law Review 1(2005).

If the case were resolved successfully, then Massachusetts voters would have the chance to see for themselves that relationship recognition and marriage rights for LGBT people were fair before they voted on the question of taking away those rights. If we lost the case, there would be less impetus to vote in favor of an amendment. Even more importantly, many more people in the electorate would understand the harms to our communities from being denied relationship recognition and marriage rights, thus increasing pressure on the Massachusetts legislature to take steps to ameliorate the discrimination.⁶⁰

Now that the *Goodridge* decision is on the books, same-sex marriage advocates argue that the marriage question should be treated as settled because the courts have ruled, and thus “it’s time to move on.”⁶¹ That is, the people must be denied an opportunity to exercise their sovereign authority because the courts, without any warrant from the democratic process, have taken that authority away from them on this issue. If this is judicial tyranny, the advocates conclude, then in the words of Harvard’s Rev. Peter Gomes cited above, belying a distrust of the people, “let there be more of it.” This makes a mockery of how civil rights are produced in a democracy, through the consent of the people, not the tyranny of judges.

Thus, a political coup would be achieved with the assistance of the judiciary if the door to the ballot is slammed shut. The sovereign, the people, would be denied the opportunity to consider whether same-sex marriage deserves civil rights status and whether those who oppose it are bigots. The *Goodridge* ruling would be used as an excuse to bypass the very source of civil rights in our system of government, the democratic process, in order to lock in a mandate of official intolerance towards those who support traditional marriage. That mandate, imposed by unelected public servants in *Goodridge*, will cause serious and pervasive government persecution.

⁶⁰ *Id.* at 27.

⁶¹ See, e.g., Laura Kiritsky, “Silbert Says Ditch the Amendment,” Bay Windows, Aug. 10, 2006, at <http://www.baywindows.com> (quoting candidate for lieutenant governor Andrea Silbert, responding during a televised debate when asked if the voters should have the opportunity to vote on a constitutional amendment defining marriage: “I think this issue has been settled; it was settled by the courts, we need to move on.”).

If Ballot Access Is Denied, Then Opposition To Same-Sex Marriage Will Be Punishable As Bigotry Without The People's Input Or Consent.

In this case, as in *Perez and Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance – the institution of marriage – because of a single trait: skin color in *Perez and Loving*, sexual orientation here. As it did in *Perez and Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination. *Majority Opinion in Goodridge case.* ⁶²

Those who favor another vote on gay marriage are 21st century crackers. *Editorial, Boston Phoenix* ⁶³

I'm having a hard time coming up with any case in which religious liberty should win. *Prof. Chai Feldblum, Civil Rights Expert and Gay Rights Advocate at Georgetown University* ⁶⁴

The legalization of same-sex marriage would represent the triumph of an egalitarian-based ethic over a faith-based one, and not just legally. The remaining question is whether champions of tolerance are prepared to tolerate proponents of a different ethical vision. I think the answer will be no. *Marc D. Stern, Civil Rights Expert with American Jewish Congress* ⁶⁵

When the majority in *Goodridge* asserted that “history must yield to a more fully developed understanding of the invidious quality of the discrimination” supposedly involved in traditional marriage policy, their words served as a warning.

When U.S. Senator Ted Kennedy (D-Mass.) accused backers of a federal marriage amendment of pushing “bigotry – pure and simple” because the amendment would limit marriage to a man and a woman,⁶⁶ and when media outlets equate

⁶² *Goodridge v. Department of Public Health*, 430 Mass.309, 327 (2003) (referring to *Loving v. Virginia*, 388 U.S. 1 (1967) and *Perez v. Sharp*, 32 Cal. 2d 711 (1948), striking down laws banning mixed-race marriages).

⁶³ Editorial, “Nouveaux Jim Crow: Those Who Favor Another Vote On Gay Marriage Are 21st Century Crackers,” *Boston Phoenix*, July 7, 2006, at http://phx.com/article_ektid16800.aspx.

⁶⁴ Quoted in Maggie Gallagher, “Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty,” *Weekly Standard*, May 15, 2006, at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp?pg=2>.

⁶⁵ Marc D. Stern, “Gay Marriage and the Churches,” paper submitted to the Becket Fund for Religious Liberty during a December 2005 conference, at <http://www.becketfund.org/files/e13e7.pdf>.

⁶⁶ See *supra* note 2 and accompanying text.

VoteOnMarriage.org and other backers of the Massachusetts marriage amendment with the Ku Klux Klan, calling them “21st century crackers,”⁶⁷ these words too are a warning.

When the Religious Coalition for the Freedom to Marry released an “open letter” charging the Massachusetts Catholic Bishops with “promoting prejudice, intentionally or not” by campaigning for a marriage amendment at the state level, and urged them to stop speaking out, their words echoed the harsh refrain.⁶⁸

Indeed, every time supporters of same-sex marriage accuse the other side of bigotry and hate, they amplify the inevitable – if it is considered hate to believe that marriage is the union between one man and one woman, then policies and actions reflecting that belief must be punished.

And so the warning is this: After *Goodridge*, opposition to same-sex marriage can not be tolerated in the Commonwealth and will have to be silenced. As civil rights experts including Chai Feldblum, Marc Stern, and others predict,⁶⁹ the state’s interest in abolishing discrimination against “equal marriage” will be deemed overriding. Religious freedom and common sense will suffer.

In short, words have consequences. Once supporters of traditional marriage are branded as bigots and haters, then, as is the case with racial discrimination, government persecution must follow.

What makes this official intolerance particularly unjust is that it will occur without the backing of democracy if the people in Massachusetts are barred from voting on marriage. Before any segment of society is punished as if akin to racial bigots, the public should be heard. Is traditional marriage policy a matter of common sense or is it hate? That’s the issue that should be put to the people, and those who stand to be punished deserve the right to appeal to their peers. In the end, persecution without representation denies democracy.

Equating traditional marriage policy with racism

A divided Supreme Judicial Court laid the groundwork in the *Goodridge* case for persecution against defenders of traditional marriage by equating traditional marriage policy with racial bias. In her majority opinion, Chief Justice Marshall cited several

⁶⁷ The Boston Phoenix editorial was accompanied by a photograph of a white-sheeted KKK member.

⁶⁸ Anne C. Fowler et al., Religious Coalition for the Freedom to Marry, “Open Letter to Cardinal O’Malley and the Roman Catholic Bishops of Massachusetts,” June 27, 2006, at <http://www.rcfm.org/LettertoRCBishops.htm>.

⁶⁹ The Becket Fund for Religious Liberty invited several civil rights experts, most of whom favored or took no position on same-sex marriage, to submit papers at a December 2005 conference addressing the questions of whether and how the legalization of same-sex marriage would impact religious liberty. See list of and links to all the papers at <http://www.becketfund.org/index.php/article/494.html>. See also Peter Steinfelds, “Will Same-Sex Marriage Collide With Religious Liberty?,” New York Times, June 10, 2006, available online at <http://www.wrn.org/article.php?idd=21811&sec=59&con=4>.

court decisions dealing with racial discrimination which talked about the state's obligation to eradicate racial prejudice.⁷⁰ To know how supporters of traditional marriage will fare under the new legal regime dictated by the *Goodridge* decision, one need only examine how the law and society treats racists today.

The government opposes racism in a variety of situations, thus providing the conceptual framework to be used in the marriage context. Constitutional amendments and civil rights statutes have caused public and private institutions, such as schools,⁷¹ as well as private individuals,⁷² to 1) abandon their race-based policies or conduct, 2) pay civil and criminal damages, and 3) forgo government benefits, such as tax-exemptions and public funds.⁷³

The push to eliminate racist practices was dictated by the vote of the people and their elected representatives, that is, by democracy itself. After wrenching debate, the people decided to regulate themselves on matters concerning race, thus providing democratic warrant for aggressive measures against institutions and individuals. As explained above, that is the way democracy works. Again, no such public debate or democratic vote has preceded the redefinition of marriage.

The objective of the aggressive civil rights measures described above is to eliminate racial bias as an intolerable evil. This official approach in racial discrimination cases provides the roadmap for the way that support for traditional marriage policy will be punished.

The coming persecution against defenders of traditional marriage

As a result of the *Goodridge* ruling, the law in Massachusetts will now have to treat the marriage doctrine of the federal government, of other states, and of society itself, recognizing marriage as the union between one man and one woman, as equal to a desire to harm persons, and thus an intolerable evil. Consequently, the state government will have to penalize individuals and institutions which fail to recognize and uphold same-sex marriage in their policies and actions.

⁷⁰ *Goodridge v. Department of Public Health*, 430 Mass. 309, 320 (2003) (*Perez v. Sharp*, 32, Cal. 2d 711 (1948) (interracial marriage)), 320-21 (*Bolling v. Sharpe*, 347 U.S. 497 (1954) (racial segregation) and *Brown v. Board of Education of Topeka*, 347 U.S. 493 (1954) (same)), 324 (*Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage)) & 327-28 (*Perez* and *Loving*).

⁷¹ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (public schools); *McCrary v. Runion*, 427 U.S. 160 (1976) (private non-religious schools); *Bob Jones University v. United States*, 461 U.S. 574 (1983) (private, faith-based schools).

⁷² *Jones v. Alfred H. Mayer Company*, 392 U.S. 409 (1968) (upholding award of civil damages against private individuals found liable for discriminating on the basis of race in the sale of property).

⁷³ Federal and state civil rights statutes include 42 U.S.C. §§ 1981-88 (providing for federal civil damages), M.G.L. c. 12, §§ 11H, -I (providing for state civil damages), M.G.L. c. 265, § 37 (providing for state criminal penalties). See also *Bob Jones University v. United States*, 461 U.S. 574 (1983) (upholding removal of tax exempt status from private, faith-based schools with racially-based admission and student policies).

This persecution will be accomplished through the automatic expansion and application of any state law that prohibits discrimination based on sexual orientation or punishes any interference with civil or constitutional rights.

The majority in *Goodridge* declared that limiting marriage to opposite-sex unions may reflect “persistent prejudices” against “persons who are (or are believed to be) homosexual,” that is, because of their sexual orientation.⁷⁴ Thus, the majority reduced traditional marriage policy to a form of sexual orientation discrimination. As a result, the refusal to recognize a marriage license or the married status of a same-sex couple will have to be included within the scope of harms that sexual orientation laws must address.⁷⁵ And, of course, since the majority of the court declared same-sex marriage to be a constitutional right, the state civil rights laws are brought into play as well.

These laws provide a range of enforcement mechanisms designed to punish and eliminate interference with civil rights.⁷⁶ For example, the attorney general and private parties have the right to sue for damages and injunctive relief, and prosecutors can bring criminal charges against public and private institutions and against private individuals alleged to have obstructed the exercise of another’s civil rights. *Due to the wording and interpretation of the civil rights laws, any appeal to morality in defense of not recognizing same-sex marriage in an institution’s policies or an individual’s conduct will be deemed to be a form of coercive force interfering with the so-called civil right created by the Goodridge case.*⁷⁷

The harsh implications of the *Goodridge* ruling first came to light when justices of the peace were warned that the refusal to accommodate marriage license applications by same-sex couples would expose the officials to legal sanctions. David Fried, the chief of enforcement at the Massachusetts Commission Against Discrimination, warned a gathering of justices of the peace the month before the *Goodridge* ruling went into effect that “[r]efusing to marry gay couples could leave justices individually liable, raising the

⁷⁴ *Goodridge v. Department of Public Health*, 430 Mass. 309, 354 (2003).

⁷⁵ This despite the fact that the legislature expressly excluded “homosexual marriage” from the scope of the sexual orientation non-discrimination provisions in M.G.L. c. 151B. *Goodridge*, 430 Mass. at 354, (Spina, J., dissenting).

⁷⁶ M.G.L. c. 12, §§ 11H, -I (providing for state civil damages), M.G.L. c. 265, § 37 (providing for state criminal penalties); M.G.L. 151B (authorizing the Massachusetts Commission Against Discrimination to pursue various remedies in the employment, credit, and service areas).

⁷⁷ See, e.g., M.G.L. c. 12, §§ 11H, -I (providing civil cause of action for “threats, intimidation or coercion” that interfere with another’s exercise of a “civil right”); M.G.L. c. 265, §37 (criminalizing interference “by force” with the “free exercise or enjoyment” of a “constitutional right”). “Coercion” and “force” have been construed broadly to refer to “the application to another, of such force, either physical *or moral*, as to constrain [the victim] to do against his will something he would not otherwise have done.” *Planned Parenthood League of Massachusetts, Inc. v. Blake*, 417 Mass. 467, 474 (1994) (emphasis added). The interference need not be “overtly harmful or frightening” or involve “the exertion of pressure to frighten or harm” to be punishable. *Reproductive Rights Network v. President of the University of Massachusetts*, 45 Mass. App. Ct. 495, 507, 508 (1998).

possibility of punitive damages in court.” If a justice could not comply, then he or she should resign.⁷⁸

Soon after the *Goodridge* ruling, as if on cue, public school officials in Boston and Lexington informed teachers and parents about the new way the marriage debate is to be handled in the classroom for students. Teachers must promote same-sex marriage as a civic virtue, and parents must be denied any recourse. Teachers who object will be fired; parents who ask that their child not be indoctrinated will be refused.⁷⁹

Then state officials trained their sights on adoption services. Catholic agencies were told to assist adoptions by same-sex couples or get out of adoptions altogether. Zero-tolerance forced the Boston Catholic Charities to shut down the largest and oldest adoption program in the state.⁸⁰

These developments, presaged by the accusations of hate and bigotry by Senator Kennedy and other supporters of same-sex marriage, foretell the fate of those who disagree with them. In the name of “marriage equality,” defenders of traditional marriage will be punished as severely as bigots in a broad array of settings if they do not give equal treatment to same-sex marriage.

Persecution will have broad impact

As a result of the *Goodridge* ruling, numerous entities including “schools, health care centers, social service agencies, summer camps, homeless shelters, nursing homes, orphanages, retreat houses, community centers, athletic programs and private businesses or services that operate by religious standards, like kosher caterers and marriage counselors” will have to toe the line.⁸¹

In many instances, private entities cannot operate without a license, and the licensing agencies in Massachusetts may be obliged to enforce the state’s new marriage policy by

⁷⁸ Jennifer Peter, Associated Press, “Justices of the Peace Warned Not to Discriminate Against Same-Sex Couples,” April 25, 2004, at http://s120620558.onlinehome.us/GayPASG/PressClippings/2004/April%202004/justices_of_the_peace_warned_not.htm.

⁷⁹ See Testimony of Scott FitzGibbon, Boston College Law School, before the U.S. Senate Judiciary Committee (Oct. 20, 2005) at http://judiciary.senate.gov/testimony.cfm?id=1641&wit_id=4717 (discussing memos issued by the Boston schools superintendent instructing teachers to promote the *Goodridge* ruling in the classroom “as another step in our continuing efforts to create a more just society for all of our citizens” and warning that students will be expelled and employees terminated who offend persons with homosexual orientation, and by the Lexington schools superintendent advising parents that school officials have no obligation to notify parents before topics involving same-sex couples or parents are discussed in class).

⁸⁰ Patricia Wen, “Catholic Charities Stuns State, Ends Adoptions,” *Boston Globe*, March 11, 2006, at A1; Patricia Wen & Frank Phillips, “Bishops to Oppose Adoption by Gays,” *Boston Globe*, Feb. 6, 2006, at A1; Patricia Wen, “Archdiocesan Agency Aids in Adoptions by Gays-Says Its Bound by Antibias Laws,” *Boston Globe*, Oct. 22, 2005, at A1.

⁸¹ Steinfelds, *supra* note 69.

refusing to license or accredit institutions that dissent from the vision of marriage enshrined in the *Goodridge* case.⁸² Further, many such institutions receive state funds and other official support to carry out key programs. As indicated by the Catholic Charities situation in Boston, those resources may have to be denied to any institution that fails to accept same-sex marriage in its internal policies and customer services.⁸³ Moreover, the whole question of tax-exempt status will be thrust to the fore.⁸⁴

Individuals also will feel the impact. For example, parents with children in the public schools may be forced to allow their children to be indoctrinated about the merits of same-sex marriage and the “invidiousness” of their parents’ belief in limiting marriage to opposite-sex couples.⁸⁵ Voiced objections to same-sex marriage will be labeled as hate speech.⁸⁶ Landlords may be required to rent to same-sex couples with marriage licenses contrary to their moral objection to accommodating unmarried sexual partners.⁸⁷ Faith-based owners of function halls, such as those operated by the Knights of Columbus, and other businesses involved in wedding-related services may be liable

⁸² “Future legal conflict is virtually certain with regard to licensing of psychological clinics, social workers, marital counselors, and the like, as groups (or individuals) seek licenses from the government or accrediting agencies to run facilities, professional practices or operate accredited schools in keeping with their religious beliefs. The American Psychological Association’s code of ethics regarding homosexuality excludes conservative Protestants, Catholics, and Orthodox Jews.” Marc Stern, “Two Way Street,” N.Y. Sun, June 14, 2006, at <http://www.nysun.com/article/34436>.

⁸³ “State authorities say adoption agencies cannot discriminate, however. Any agency in Massachusetts that handles adoptions must obtain a state license, which prohibits them from turning down prospective parents based on sexual orientation, religion, and race, among other factors, said Constantia Papanikolaou, general counsel for the Department of Early Education and Care, which licenses all adoption agencies. If an agency knowingly discriminates, it could be stripped of its license to broker all adoptions. “You can’t have a discrimination policy,” Papanikolaou said. “It’s a condition of their license. . . . She said she does not believe her department would allow an adoption agency to have a policy of discriminating against gay couples seeking to adopt.” Patricia Wen & Frank Phillips, “Bishops to Oppose Adoption by Gays,” Boston Globe, Feb. 6, 2006, at A1.

⁸⁴ “Gay rights and same-sex marriage are issues that promise to reignite this controversy over tax-exempt status.” Jonathan Turley, “An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices” (undated draft article) at <http://www.becketfund.org/files/70e6d.pdf?PHPSESSID=5620ae41d76295a12bb4799005ad972e#search=%22%22s ame%20sex%20marriage%22%20%22tax%20exempt%20status%22%22>.

⁸⁵ FitzGibbon, *supra* note 80.

⁸⁶ When Sen. John Kerry objected to the inclusion of a plank in the Massachusetts Democratic Party platform endorsing same-sex marriage, Joshua Frank from dissidentvoice.org responded that “Kerry’s statement is the kind of hate speech we were hearing from racist Democrats down South during the civil rights struggles.” Joshua Frank, “John Kerry’s Hate Speech,” May 7, 2005, at <http://www.dissidentvoice.org/May05/Frank0507.htm>; Rick Klein, “Democrats Platform Shouldn’t Back Gay Marriage, Kerry Says,” Boston Globe, May 6, 2005, at http://www.boston.com/news/local/articles/2005/05/06/democrats_platform_shouldnt_back_gay_marriage_kerry_says/

⁸⁷ “If same-sex relationships were legally recognized, regardless of the couples’ identity as married or civilly united, the constitutional calculations would necessarily shift. Same-sex couples granted marriage or civil union status would obtain the rights of spouses and would no longer be regarded as less protected cohabiting couples. Thus, under the [Attorney General v.] Desilets analytical framework [in a Massachusetts case involving the claim that a landlord wrongly refused to rent an apartment to unmarried partners on religious grounds] anti-discrimination mandates may very well be construed in the same-sex marriage context as so compelling to override a claim of religious freedom.” Daniel Avila, “To Wed & Let Wed? The Intrusive Impact on Dissenting Religious Belief & Practices Created By Same-Sex Marriages,” 38 New England Law Review 621, 624 (2004).

for refusing involvement in same-sex weddings.⁸⁸ Faith-based employers may have to extend equal spousal benefits despite moral or religious objections to recognizing same-sex marriage.⁸⁹ Employees or job applicants may experience discrimination in the workplace, especially for government positions, because of their supposedly “homophobic” beliefs about the definition of marriage.⁹⁰

The breadth of impact on private and especially religious entities will be enormous as marriage touches on so many different areas of life. As one author has put it,

These are just a few instances of the broader phenomenon to come: where church and state apply different definitions of "marriage," there will be church-state conflicts in every area where legal relations are determined according to whether parties are "married." And these areas are just too numerous to count, because changing the legal meaning of marriage doesn't just change one law, it changes thousands, all in one stroke.⁹¹

In short, as is the case for racial bigots, the persecution against the newly branded “marriage bigots” will be strong and pervasive, unless checked at the ballot box. Like racists, supporters of traditional marriage in Massachusetts will be pushed to the margins of society and forced to pay for their “sins” in myriad ways.

The critical difference is that racism was condemned by the people through democratic means, and rightly so, while traditional marriage policy, far from being condemned,

⁸⁸ A tribunal of the British Columbia Human Rights Commission ordered a Knights of Columbus hall to pay damages for refusing to rent the hall for a same-sex wedding reception without accommodating the same-sex couple’s search for another hall. CTV.ca News Staff, “B.C. Tribunal Awards Lesbian Couple Damages,” CTV.com, Nov. 30, 2005, at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20051129/tribunal_lesbiancouple_051129/20051130?hub=CanadaAM; a copy of the ruling in *Smith & Chymyshyn v. Knights of Columbus* (Nov. 29, 2005) can be found at http://www.bchrt.bc.ca/decisions/2005/pdf/Smith_and_Chymyshyn_v_Knights_of_Columbus_and_others_2005_BCHRT_544.pdf.

⁸⁹ “An employer who refuses to extend spousal benefits to a spouse in a same-sex marriage may well face a charge of discrimination on the basis of sexual orientation, marital status, or gender depending on the jurisdiction in question.” Jeffrey M. Tannenbaum et al., “The Impact of Same-Sex Marriage on the Work Place,” Nixon Peabody LLP Employment Law Alert at 3 (February 2004).

⁹⁰ “A candidate for reappointment to the board of fire engineers, Leo Childs, was called on the carpet by Selectman Paul Asher-Best for signing a recently circulated petition opposing gay marriage. Childs' bid for reappointment was denied when selectmen voted unanimously to appoint other candidates. Most selectmen said their reason for not reappointing Childs was in the interest of having new faces on a town board. Asher-Best defended his vote not to reappoint Childs on more personal grounds during an interview yesterday. ‘If you think I'm not entitled to civil marriage, then the only conclusion I can draw is that you don't think I'm fully human, or that my humanity is not on par with yours,’ he said. Asher-Best, who said he recently married his longtime partner, said he felt Childs had shown a bias against gay people by signing the petition. ‘There are a lot of households in Truro headed by gay and lesbian people, and I just need to make sure that they're going to have equal protection and not have people who are biased against them in charge of public safety situations,’ he said.” Eric Williams, “Gay Petition Signature Riles Selectman,” Cape Cod Times, April 22, 2006, at <http://knowthyneighbor.blogs.com/home/2006/04/index.html>.

⁹¹ Anthony Picarello, Becket Fund for Religious Liberty, web log on [marriedebate.com](http://www.marriedebate.com), May 9, 2006, at <http://www.marriedebate.com/2006/05/marriage-matters-i-agree-with-jonathan.htm>.

continues to be reaffirmed emphatically by the people (and the courts) in state after state. Massachusetts, like the forty-nine other states, remains a democratic republic over which the people are sovereign. Given the harsh consequences of a court ruling that declared such a deeply rooted consensus on marriage to be an intolerable form of bigotry, it would be unjust to deny the people of the Commonwealth an opportunity to decide, for themselves, whether such a declaration reflects their sovereign will.

Allowing the people to exercise their right to vote on marriage promotes democracy, not tyranny.

I know no safe depository of the ultimate powers of the society, but the people themselves. And if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion. *Thomas Jefferson* ⁹²

I think people always deserve a right to vote, and if you have a referendum process, Tim, people have a right to exercise it. *John Kerry, U.S. Senate, Massachusetts* ⁹³

Supporters of same-sex marriage oppose the campaign to put a marriage amendment on the referendum ballot by arguing that minority rights should never be subject to majoritarian consent. They raise the specter of a “tyranny of the majority.”⁹⁴ The essence of tyranny is absolute control which denies to the people the power to vote.⁹⁵ Thus, those now subject to the harsh consequences of the *Goodridge* ruling have the better of the argument – the court decision was an act of tyranny usurping the people’s civil right to determine which claims to protect as civil rights.

Blocking the people from considering the marriage issue at the ballot would aggravate the injury. Tyranny *of* the people is not the answer to the risk of tyranny *by* the people. As Thomas Jefferson argued, “the remedy is not to take [the ultimate powers of the society] from [the people], but to inform their discretion.” There is no other way that a democracy can accomplish the task of self-governance without ceasing to be a democracy.

A ballot campaign on the marriage issue in Massachusetts will require supporters of same-sex marriage to argue before the voters that such people and official entities as Massachusetts Senator John Kerry,⁹⁶ New York Senator Hillary Clinton⁹⁷ and her

⁹² Letter to William Charles Jarvis, Sept. 28, 1820, in John Bartlett, *Familiar Quotations* 473 (14th ed. 1968).

⁹³ Response to a question from Tim Russert during a “Meet the Press” televised interview, NBC News, June 24, 2002, about whether Massachusetts voters should be allowed to vote at the ballot on the same-sex marriage issue.

⁹⁴ “It is fundamentally un-American for the tyranny of the majority to determine the rights of any minority. That’s what this country was raised on. You don’t have popularity contests about who is equal under the law.” Arline Isaacson, *MassEquality*, quoted in Raphael Lewis, “Gay Marriage Foes Push Referendum,” *Boston Globe*, Jan. 8, 2004 at http://www.boston.com/news/local/articles/2004/01/08/gay_marriage_foes_push_referendum/.

⁹⁵ “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” James Madison, *The Federalist* no. 47 (1788).

⁹⁶ Klein, *supra* note 87.

⁹⁷ “[Hillary] Clinton, who is seeking the Democratic nomination for the U.S. Senate from New York State, said January 10 that she opposes same-sex marriage. She also said she would have voted for the Defense of Marriage Act, a bill passed by Congress in 1996 that prevents federal recognition of same-sex marriage. ‘Marriage has got historic, religious, and moral content that goes back to the beginning of time, and I think a marriage is as a marriage

husband former President Bill Clinton,⁹⁸ civil rights leaders in the black community,⁹⁹ 188 of the 193 countries in the world,¹⁰⁰ the U.S. federal government,¹⁰¹ the majority of voters in nineteen out of the nineteen states so far ratifying traditional marriage policy at the ballot,¹⁰² the U.S. Supreme Court,¹⁰³ the supreme courts of four other states,¹⁰⁴ as

has always been, between a man and a woman,' Clinton said." "All in the Family—Hillary Rodham Clinton Supports Defense of Marriage Act—Brief Article," *The Advocate*, Feb. 15, 2000, at http://www.findarticles.com/p/articles/mi_m1589/is_2000_Feb_15/ai_59410444.

⁹⁸ "[Former President Bill] Clinton, speaking at rally to raise money for [Maine] Democratic Gov. John E. Baldacci's re-election campaign, stressed that he continues to believe that "the union of a man and woman in marriage is the most enduring and important human institution.'" 365Gay.com Newscenter Staff, "Clinton Berates Bush Gay Marriage Stand," June 6, 2006, at <http://www.365gay.com/Newscon06/06/060606clinton.htm>. According to the article, the former president saw no reason to enact a federal marriage amendment backed by President George Bush, saying that "This is a debate about amending the Constitution on gay marriage when only one court in the country has legitimized it and the voters in Massachusetts may reverse it. So it's hardly a flaming issue [nationally]."

⁹⁹ "In Massachusetts, the state that's served as one of the main battlegrounds over same-sex marriage, the Rev. Jesse Jackson declared Monday that the fight of gays and lesbians wanting to marry should not be compared to the fight African Americans faced for civil rights. 'The comparison with slavery is a stretch in that some slave masters were gay, in that gays were never called three-fifths human in the Constitution and in that they did not require the Voting Rights Act to have the right to vote,' Jackson remarked in an address at Harvard Law School. Later, in an appearance at Holy Cross Church in Worcester, Jackson made sure others knew that he did support some rights for same-sex couples, noting 'Gays deserve the right of choice to choose their own partners.' 'If you don't agree, don't participate and don't perform the service,' he said, according to the Associated Press. But Jackson reiterated his support for the heterosexual definition of marriage, saying, 'In my culture, marriage is a man-woman relationship.'" Christopher Curtis, "Jesse Jackson: Gay Marriage Rights Are Not Civil Rights," PlanetOut.com Network, Feb. 17, 2004, at <http://www.planetout.com/news/article.html?date=2004/02/17/6>. "Consider the Rev. Walter Fauntroy. In a long career of religious and political activism, he organized civil rights marches with Martin Luther King Jr., went to Congress as a District of Columbia delegate and helped found the Congressional Black Caucus. Fauntroy supports the marriage amendment idea. He does so, he says, because the family unit in the African-American community is already under assault, and changing marriage only worsens the situation. 'I'm unalterably opposed to anything that redefines marriage as anything other than an institution for two purposes, the socialization of children and the perpetuation of the species,' he said." Mark O'Keefe, "Rare Coalition Aligns Against Gay Marriage," Newhouse News Service, Oct. 6, 2003, at <http://www.newhousenews.com/archive/okeefe100703.html>. See also Joint Statement of the Black Ministerial Alliance of Greater Boston, Inc., the Boston Ten Point Coalition & the Cambridge Black Pastors Conference, Feb. 6, 2004, at http://www.macathconf.org/04joint_statement_religious_lead.htm.

¹⁰⁰ Of the 193 countries listed by the U.S. Department of State (see U.S. Dep't of State, "Independent Countries of the World," at <http://www.state.gov/s/inr/rls/4250.htm>), only Belgium, Canada, The Netherlands, Spain, and South Africa recognize same-sex marriage. BBC News, "Gay Marriage Around the Globe," Dec. 22, 2005, at <http://news.bbc.co.uk/2/hi/americas/4081999.stm>. See also Dwight G. Duncan, Testimony Before the General Court Concerning House No. 4617, April 11, 2006 (listing countries and their position on marriage's definition).

¹⁰¹ "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

¹⁰² The people have adopted constitutional amendments in Alaska, Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Texas, and Utah. Voters in California approved a statute on the statewide ballot.

¹⁰³ "One of the major obstacles to a pro-[same-sex] marriage ruling is a 35-year-old U.S. Supreme Court case called *Baker v. Nelson* ("our first same-sex marriage case," says Paul Cates, public education director of the ACLU). In 1971, two men in Minnesota applied for a marriage license and were denied. They and the ACLU went to the Minnesota Supreme Court, which ruled against them. They appealed to the U.S. Supreme Court on the basis that they were being denied their equal-protection and due-process rights, but the Supremes refused to hear the case, stating only that it lacked sufficient constitutional question. When the U.S. Supreme Court refuses to hear a case for

well as fellow voters in the Commonwealth¹⁰⁵—because such people and entities believe that marriage is the union of man and woman—are therefore bigots and haters. It is not tyranny to insist that this argument be tested by democracy.

Tyranny is all about exclusion from the arena within which public policy is shaped. Blocking the voters from considering the proposed marriage amendment fits that paradigm. On the other hand, if the amendment is sent to the ballot, then both sides will have the full opportunity to make their respective cases.

Supporters of same-sex marriage in the Commonwealth have demonstrated an extraordinary capacity to influence public policy and would enter a ballot contest on marriage in Massachusetts with decided political advantages. They enjoy the local backing of the major media,¹⁰⁶ prominent civic leaders,¹⁰⁷ the Democratic Party,¹⁰⁸ and various professional associations.¹⁰⁹ They can expect a tremendous influx of money and other resources from national organizations to aid their anti-amendment campaign.¹¹⁰ These strengths insure against the risk of ballot tyranny.

Thus no one can argue that persons in Massachusetts wanting the protection of a so-called civil right to same-sex marriage are somehow a “discrete and insular” minority

lack of constitutional question, that decision can be binding on lower courts—unless precedent has changed substantially.” Daniel Adkison, “The Queer Issue: Bliss or Miss—Getting Over the Gay Wedding Jitters,” Village Voice, June 20, 2006, at <http://www.villagevoice.com/nyclife/0625.adkison.73593.15.html>.

¹⁰⁴ The highest courts of Minnesota, New York, Vermont, and Washington have rejected claims seeking the right to redefine marriage to include same-sex marriage. The people of Alaska and Hawaii enacted constitutional amendments reaffirming the traditional definition of marriage in response to preliminary decisions by the courts in those states indicating support for same-sex marriage.

¹⁰⁵ The highest number of signatures from Massachusetts voters ever collected for a ballot issue was achieved in 2005 on behalf of the proposed marriage amendment. From a total of over 170,000 signatures collected by VoteOnMarriage.org, the Secretary of State certified the historically unprecedented amount of 123,000, more than acquired for any other issue, such as the Clean Elections, tax roll-back, and death penalty issues. Are all these voters bigots?

¹⁰⁶ Almost every daily newspaper in the Commonwealth has editorialized in favor of same-sex marriage and against amending the state constitution to ban it, although almost every daily newspaper has urged the legislature to vote on whether to let the people vote.

¹⁰⁷ Frank Phillips, “Leaders Oppose Bid to Ban Gay Marriage: 165 Prominent Names Ask State to Drop Issue,” Boston Globe, July 6, 2006, at http://www.boston.com/news/local/articles/2006/07/06/leaders_oppose_bid_to_ban_gay_marriage/.

¹⁰⁸ “We affirm our commitment to the Massachusetts constitutional guarantee to same-sex marriage; and all of its rights, privileges and obligations; and reject any attempt to weaken or revoke those rights.” Massachusetts Democratic Party Platform, at <http://www.massdems.org/about/platform.htm>.

¹⁰⁹ Professional allies include the Massachusetts Bar Association, the Boston Bar Association, the Massachusetts affiliates of the American Psychiatric and Psychological Associations (see http://www.massequality.org/supporters/allies_supp.html), and the Massachusetts Chapter of the National Association of Social Workers. See <http://www.naswma.org/content.asp?contentID=623>.

¹¹⁰ See Sandeep Kauship, “Gay Marriage Backers Focus on Ore. Gay Marriage Battle,” Boston Globe, Sept. 27, 2004, at http://www.boston.com/news/nation/articles/2004/09/27/gay_marriage_backers_focus_on_ore_battle/ (reporting that financial contributions and other resources from national organizations supporting same-sex marriage were pouring into Oregon in an effort to defeat a state constitutional amendment on the ballot defining marriage as the union between one man and one woman; opponents of the amendment were out-raising supporters by 3-1).

lacking political power.¹¹¹ If the marriage amendment wins at the ballot, it will succeed only because the public heard the arguments against it, guaranteed to be loud and clear given the clout of the amendment's adversaries, and found them wanting. Such is not an earmark of tyranny.

When it comes to determining what the law ought to be, the people get it wrong sometimes. But as Winston Churchill once said, "democracy is the worst form of government except all those other forms that have been tried from time to time."¹¹² The courts have also gotten it wrong in history and so have legislatures.¹¹³

Given the lack of a perfect alternative – since judges and politicians possess no greater claim to perfection than possessed by the people – a ballot campaign on marriage puts a crucial social question before the right jury. Neither judges nor politicians are more qualified to answer the issue at stake than the people themselves, and it is the people who are sovereign and the judges and politicians who are servants, not vice-versa.

On such fundamental questions as the meaning of marriage, the scope of civil rights, and the degree to which citizens are to be treated as bigots, in a democracy it is the people that possess the ultimate power to declare a judgment. While democracy may be imperfect, no other more perfect means exists for resolving the debate. Leaving it to the unchecked discretion of judges to declare what is a marriage, a civil right, or bigotry, is the worst of all options. That is tyranny, not democracy.

¹¹¹ The U.S. Supreme Court has inquired in the past as to whether a particular group alleging discrimination warranted special judicial protection because it lacked sufficient capacity to participate in and influence the democratic process due to its status as a "discrete and insular" minority. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938).

¹¹² Remarks made before Britain's House of Commons, Nov. 11, 1947.

¹¹³ See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (refusing to recognize slaves as citizens in free states). As one summary of the ruling puts it: "Dred Scott's case holds a unique place in American constitutional history as an example of the Supreme Court trying to impose a judicial solution on a political problem. It called down enormous criticism on the Court and on Chief Justice Roger Brooke Taney; a later chief justice, Charles Evans Hughes, described it as a great 'self-inflicted wound.'" U.S. Department of State, "InfoUSA: Introduction to the Court Opinion on the Dred Scott Case," at <http://usinfo.state.gov/usa/infousa/facts/democrac/21.htm>. An example of legislators getting it wrong would be provided by the failure of the Massachusetts General Court to vote on whether the people should have a vote, or otherwise killing the marriage amendment.

Conclusion: Let the people vote!

All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them. *Massachusetts Constitution, Declaration of Rights, Article V, authored by John Adams*

This paper has argued that:

- 1) same-sex marriage was never elevated to the level of a civil right by the people;
- 2) civil rights come from the people, not lawsuits;
- 3) the courts and not the people endorsed same-sex marriage in Massachusetts;
- 4) due to the court decision in *Goodridge*, and without the people's approval, many will be persecuted as bigots for pursuing policies and actions that refuse to support same-sex marriage; and
- 5) the people are sovereign in a democracy, and should decide if traditional marriage policy will be punished as if a product of bigotry or reaffirmed as a matter of common sense.

The paper did not address arguments for or against defining marriage solely as the union between one man and one woman. That's for the voters to debate.

The paper responded instead to the civil rights argument used to urge the Massachusetts General Court to kill the marriage amendment, blocking the voters from considering it at the ballot.

As Massachusetts *Common Cause* has advised state legislators although it opposes the marriage amendment,

the constitution does require you to hold a vote on initiative amendments placed before you. While the SJC has repeatedly held there is nothing that can be done to force you to vote, the plain language of article XLVIII [of the state constitution] indicates that that is what is required.¹¹⁴

Follow the law. Let there be in the legislature a vote to vote on the amendment, indicating whether at least 50 legislators would send it to the ballot for the people's decision. A vote by the people *against* the marriage amendment ratifies the *Goodridge* ruling, thus mandating same-sex marriage and the punishment of those who disagree.

¹¹⁴ Letter to Massachusetts General Court from Pamela H. Wilmot, Executive Director, Massachusetts Common Cause (July 11, 2006), at <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1849643>.

A vote *for* the amendment reaffirms traditional marriage and denies that its defenders are bigots. The choice is clear. Since the people are sovereign, let the people decide.