Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases

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I. INTRODUCTION

Volumes are being written in journals and the press about same-sex marriage litigation; yet some fundamental issues remain misunderstood. First, facts have been misconstrued. Same-sex marriage did not determine the outcome of the 2004 presidential election, and the state constitutional amendments banning same-sex marriage did not represent a national backlash against the development of gay rights. Second, an important legal development has gone unnoticed in the fervor of the controversy. A trend of dividing legal rulings of unconstitutionality from the provision of remedies to aggrieved parties is emerging in same-sex marriage cases. This development is important not only for its doctrinal implications, as it defies the principles articulated in the United States Supreme Court's holding *Marbury v. Madison*,[1] but also for practical political reasons. It is the separation of rulings and remedies that has

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1. *See* 5 U.S. (1 Cranch) 137, 154-68, 171-75 (1803) (explaining that where a plaintiff has a legal right, remedies exist whenever that right is invaded or violated).

allowed courts in Vermont and Massachusetts to mitigate potential backlash to their decisions on the issue of same-sex marriage.

This Article examines the intent behind, and effect of, remedial delay in *Goodridge v. Department of Public Health*, the Massachusetts case that first recognized the right to same-sex marriage in the United States.[2] To understand judicial intent, *Goodridge* must be compared with *Baker v. State*, the Vermont case that ushered in civil unions.[3] Just as civil unions were made possible and acceptable by the Vermont Supreme Court's utilization of tactics of delay and deference, so too was the judicial introduction of same-sex marriage itself made possible in Massachusetts by the Supreme Judicial Court involving the legislature in the process of developing marriage alternatives for same-sex couples.

Since the Massachusetts Supreme Judicial Court took the controversial step of finding a constitutional right to same-sex marriage,[4] it may appear at first glance that the justices were immune to popular and legislative pressure. However, the court's initial act of staying its decision in *Goodridge* and delaying the declaration that only same-sex marriage satisfied the requirements of the Massachusetts Constitution until its subsequent decision in *In re Opinions of the Justices to the Senate*, revealed the court's appreciation of its own limitations.[5] A close examination of the advantages of, and justifications for, this unusual institutional process reveals much about the motivations and strategies of the majority justices in these two pivotal Massachusetts opinions.

The extent of popular opposition to same-sex marriage is determined partly by judicial and legislative action. By delaying the provision of a remedy, the Massachusetts Supreme Judicial Court encouraged the state legislature to propose a compromise in the form of

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2. *See* 798 N.E.2d 941, 969 (Mass. 2003). Plaintiffs Julie and Hillary Goodridge, along with other same-sex couples in committed relationships, had attempted to obtain marriage licenses from city and town clerk's offices throughout Massachusetts. *See id.* at 949-50. After the couples were denied licenses, they filed suit against the Department of Public Health and its supervising commissioner, seeking a judgment that "the exclusion of the [p]laintiff couples and other qualified same-sex couples from access to marriage licenses and the legal and social status of civil marriage . . . violates Massachusetts law." *Id.* at 950.

3. *See* 744 A.2d 864, 874-85, 888-89 (Vt. 1999). The same-sex plaintiff couples applied for marriage licenses with their respective town clerks and each couple's application was denied. *See id.* at 867. Plaintiffs then filed suit against the state and various towns and cities seeking a declaratory judgment that the refusal to issue marriage licenses violated the state's marriage statutes and its constitution. *See id.* The Vermont Supreme Court ultimately held that denial of marriage licenses unconstitutionally violated the plaintiffs' right to benefits and protections of marriage. *See id.* at 888-89.

4. *See Goodridge*, 798 N.E.2d at 969.

5. *See* 802 N.E.2d 565, 572 (Mass. 2004). In this opinion, the Massachusetts Supreme Judicial Court concluded that the state senate's proposed bill legalizing civil unions violated the equal protection and due process guarantees of the state's constitution. *See id.*

legislation permitting civil unions for same-sex couples.[6] Although this compromise was ultimately ruled unconstitutional, its proposal nevertheless worked to the advantage of the court by reframing the issue, altering public perceptions, and ultimately, reducing the court's costs in providing the full right to same-sex marriage itself.

Whether judges separate legal findings and remedial solutions has important effects on the formulation of law relating to same-sex marriage. As such, this trend and its varied application warrant close scrutiny. An understanding these techniques is also central to an understanding of the political impact of the decision in *Goodridge*. Polling data taken before, between, and after the two Massachusetts opinions were rendered shows that the justices successfully used remedial delay to reduce public opposition to same-sex marriage.

In contrast, media and popular orthodoxy hold that a national backlash against same-sex marriage occurred in 2004, that this backlash was made manifest in state constitutional bans of same-sex marriage, and that President George W. Bush rode to electoral victory on the coattails of a national sentiment "moral values."[7] This characterization is wrong; it is based on a misguided analysis of a poorly worded opinion poll. Using more comprehensive polling data, this Article shows that same-sex marriage did not have a significant effect on the elections of 2004. It also shows that the state constitutional amendments did not constitute a national backlash. Twelve of the thirteen amendments banning same-sex marriage occurred in states that already outlawed the practice, and were thus a restatement of preexisting sentiment, not a shift in voter sentiment. Additionally, those states that passed bans were not representative of the nation: a majority of Americans still support at least *some* legal recognition of same-sex relations.

This Article addresses two questions. First, what purpose did remedial delay serve in Massachusetts, given the rulings by the high court that the state's constitution protected a right to same-sex marriage? Second, what was the practical effect of the two Massachusetts cases on attitudes to same-sex marriage, both at the state and national levels? Part II provides a doctrinal examination of the similarities and differences between the remedial legislative remand granted by the Vermont Supreme Court in the *Baker* decision and the remedial stay granted by

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6. *See Goodridge*, 798 N.E.2d at 970.

7. *See, e.g.*, Elise Castelli & Emma Stickgold, *Gay-Marriage Backers, Opponents Vow Fights*, BOSTON GLOBE, Nov. 19, 2004, at B2; Editorial, *Goodridge Legacy: National Backlash*, BOSTON HERALD, Nov. 18, 2004, at 42; Mickey Wheatley, *For the Moment, Concentrate on Being Civil; We Gays Miscalculated on Marriage. Now We Must Work for Legal Unions*, L.A. TIMES, Nov. 10, 2004, at B11.

the Massachusetts Supreme Judicial Court in the *Goodridge* decision.[8] This examination shows that the numerous factors that made remedial delay appropriate in *Baker* were not applicable in *Goodridge*. Part III provides a functional analysis of the political strategy undertaken by the Massachusetts Supreme Judicial Court. It shows that the interaction between popular opinion, legislative action, and judicial freedom to act provides an explanation for the justices' decision to delay provision of a remedy in the *Goodridge* case. Part IV empirically examines the broader impact of *Goodridge* on Massachusetts and the nation and its potential future role in shaping the law of same-sex marriage. It shows that *Goodridge* did not cause a national backlash against same-sex marriage or determine the 2004 election.

Finally, although the *Goodridge* decision did not herald a national backlash against same-sex marriage, it did entrench opposition within some states already opposed to the practice. Additionally, some of the amending states outlawed even more basic rights to partnership recognition and private contracting. If the Massachusetts justices were acting in a tactical manner and taking account of the pragmatic effects of their rulings, this raises interesting questions as to whether judges ought to consider the broader ramifications of their decisions. Should judges consider only the effects of their rulings on the jurisdiction over which they directly preside, or ought they consider the effect of such rulings on a larger population? This line of inquiry raises associated questions. Does the recognition of rights in one jurisdiction have a catalytic effect on jurisdictions hostile to those rights? Are the setbacks to the recognition of same-sex marriage rights in these states merely temporary "glitches" typical of the patchwork development of civil and political rights, or are they fatal obstacles? Part IV concludes by considering these jurisprudential dilemmas.

II. REMEDIAL DELAY IN *BAKER* AND *GOODRIDGE*

Vermont and Massachusetts are not the only states to have faced judicial challenges to same-sex marriage prohibitions. Prior to the Vermont Supreme Court's decision in *Baker*, courts in Hawaii[9] and

8. Legislative remand, a concept akin to judicial remand, occurs when a court explicitly passes the determination of an issue to a legislature, while retaining authority for subsequent review. *See* Tonja Jacobi, *Same-Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary's Role*, 26 VT. L. REV. 381, 396 (Winter 2002).

9. The Hawaii court found in *Baehr v. Lewin*, that the relevant legislation was presumptively unconstitutional, unless or until it could be shown that the statute's sex-based classification was justified by a narrowly drawn, compelling state interest. *See* 852 P.2d 44, 64 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. 1, § 23 (amended 1998).

Alaska[10] found the gender specifications in their respective marriage statutes to be unconstitutional and then judicially remanded the cases for determination of further issues.[11] Meanwhile, each state's legislature passed constitutional amendments banning same-sex marriage.[12] Subsequent to the decision in *Baker*, Arizona's one-man-one-woman marriage requirement was also upheld.[13] Additionally, thirty-seven states and the federal government have adopted legislation akin to the Defense of Marriage Act (DOMA), and in 2004, thirteen states passed state constitutional amendments banning same-sex marriage.[14]

Nevertheless, the high court decisions in *Baker* and *Goodridge* demand close attention for two reasons. First, both courts made full determinations of the constitutional issues, assessing the weight of each state's regulatory interests.[15] Nevertheless, each court explicitly delayed providing a remedy to allow another branch of government the opportunity to act and to alleviate the need for further judicial intervention.[16] Dividing rulings from remedies in constitutional rights cases is procedurally unusual and warrants examination.[17] Second, the apparent similarities between the judicial actions in these two cases fuelled the perception that the Massachusetts Supreme Judicial Court was taking a tack similar to that taken by the Vermont Supreme Court, and appears to have encouraged the Massachusetts Legislature to propose and adopt legislation allowing civil unions.[18] This second issue is explored in Part III. The current Part shows that the trend of dividing

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10. In *Brause v. Bureau of Vital Statistics*, the relevant legislation was held to be constitutionally implicated and was judicially remanded to determine whether a compelling state interest could be shown for ban of same-sex marriage. *See* No. 3AN-95-6562 CI, 1998 WL 88743, at *1-6 (Alaska Super. Ct. Feb. 27, 1998).

11. *See id.* at *6; *Baehr*, 852 P.2d at 646.

12. *See* ALASKA CONST., art. I, § 25 (amended 1998); HAW. CONST. art. I, § 23 (amended 1998).

13. *See* Standhardt v. Superior Court, 77 P.3d 451, 459-60 (Ariz. Ct. App. 2003) (noting that "not all personal decisions sounding in personal autonomy are protected fundamental rights").

14. *See* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165-94 (2005) (listing and discussing the same-sex marriage bans enacted throughout the states).

15. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959-68 (Mass. 2003); Baker v. State, 744 A.2d 864, 881-86 (Vt. 1999).

16. *See Goodridge*, 798 N.E.2d at 970; *Baker*, 744 A.2d at 225-26.

17. *See infra* text accompanying note 49. More recently, the California Supreme Court issued a ruling on same-sex marriage that arguably separated the legal ruling from the remedy. *See* Lockyer v. City of San Francisco, 95 P.3d 459, 499 (Cal. 2004). However, in this case, the California Supreme Court reversed the process and imposed a remedy *prior* to a full determination of the legal issues, striking down over 2000 same-sex marriages performed by the City of San Francisco. *See id.* at 472-73.

18. *See* VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2001).

remedies and rulings in same-sex marriage cases has different implications depending on the circumstances of the individual case. The *Goodridge* court used similar devices of delay and involvement of the state legislature, but the advantages of delay that applied in *Baker* do not apply to *Goodridge*.

A. The Different Uses of Remedial Delay in Baker *and* Goodridge

In *Goodridge*, the Massachusetts Supreme Judicial Court conceded that the legislature retains broad regulatory power over civil marriage and noted both the importance of civil marriage as an institution and the important state interest that exists in marriage regulation.[19] But the court also recognized that marriage is associated with many tangible and intangible benefits, ranging from the social and emotional advantages of the security and the status marriage provides,[20] to practical effects, such as medical decision-making, property inheritance, and health insurance inclusions.[21] Referencing *Baker*, the court concluded that a same-sex couple's exclusion from the right to marry bars such individuals from the enjoyment of the "full range of human experience and . . . [the] full protection of the laws" and "violates the basic premises of individual liberty and equality of the law protected by the Massachusetts Constitution."[22] Ultimately, the court found that there existed no rational relationship between the admittedly important state interest in marriage regulation and the prohibition barring individuals from marrying persons of the same sex.[23]

Similarly, in *Baker*, the Vermont Supreme Court recognized the state's legitimate interest in regulating marriage and family relationships, and the many benefits of marriage that the state was denying to same-sex couples.[24] Like the majority in *Goodridge*, the court found that there was no logical connection between the state's interest in regulating marriage and the statutory exclusion of same-sex couples.[25] Consequently, the court found a constitutional obligation existed to

19. *See Goodridge*, 798 N.E.2d at 954-55, 958.
20. *See id.* at 955-56.
21. *See id.* at 955. The U.S. General Accounting Office (GAO) made an investigation of the number of federal laws that made legal obligations, benefits, rights, and privileges contingent on marital status and found at least 1049 practical effects. *See* GAY & LESBIAN ADVOCATES & DEFENDERS, IS DOMA DOOMED?: THE FEDERAL "DEFENSE OF MARRIAGE ACT" AND STATE ANTI-GAY MARRIAGE LAWS 7 & n.8 (2001), http://www.glad.org/rights/IsDOMADoomed.pdf.
22. *Goodridge*, 798 N.E.2d at 957, 968.
23. *See id.* at 969.
24. *See* Baker v. State, 744 A.2d 864, 870, 881, 201 (Vt. 1999).
25. *See id.* at 884-85.

extend to same-sex couples "the common benefit, protection, and security that Vermont law provides opposite-sex married couples."[26]

The popular and academic responses to the decisions in both *Goodridge* and *Baker* have been intense, but most scholarly work focuses on the substantive holdings and their effects on the rights of same-sex couples.[27] Much analysis has been performed on the issues arising from these cases, including numerous polemics and some scholarly works written criticizing the cases.[28] Issues of interest include whether the *Baker* decision introduced into constitutional decision making a more stringent form of rational basis scrutiny,[29] potential hindrances to interstate recognition of civil unions,[30] dilemmas over which institution constitutes the most appropriate forum for determining same-sex rights,[31] the influence of the Supreme Court's recent antisodomy decision in *Lawrence v. Texas*,[32] and the two cases' implications for federalism.[33]

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26. *Id.* at 886.

27. As of April 9, 2006, a Lexis-Nexis® search produced 553 law review articles written on *Baker*, 533 written on *Goodridge*, and 154 written on *In re Opinions of the Justices to the Senate*.

28. *See, e.g.*, Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB POL'Y 729 (2000); David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61 (2000); Wendy Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-Sex "Marriage"?*, 12 B.U. PUB. INT. L.J. 137 (2002); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004); Lynn D. Wardle, *'Multiply and Replenish': Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB POL'Y 771 (2001); Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 REGENT U. L. REV. 121 (2003-2004).

29. *See* Jonah M. A. Crane, *Legislative and Constitutional Responses to* Goodridge v. Department of Public Health, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 465 (2003-04); Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003 (2004); Jay Weiser, *The Next Normal—Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48 (2004).

30. *See* Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075 (2000-2001); Mark Strasser, *Mission Impossible: On* Baker, *Equal Benefits, and the Imposition of Stigma*, 9 WM. & MARY BILL RTS. J. 1 (2000); Weiser, *supra* note 29.

31. *See* Kevin J. Worthen, *Who Decides and What Difference Does It Make?: Defining Marriage in "Our Democratic, Federal Republic"*, 18 BYU J. PUB. L. 273 (2004); *see also* Lino A. Graglia, *Single-Sex "Marriage": The Role of the Courts*, 2001 BYU L. REV. 1013, 1013-(2001) (discussing the impact of judicial notions of social progress on decisionmaking in the marriage realm).

32. *See* 539 U.S. 558, 578-79 (2003).

33. *See* Lawrence Friedman & Charles H. Baron, Baker v. State *and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125 (2001); Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73 (2001).

Little scholarly work, however, has touched on the equally important procedural aspects of the two cases.[34] These procedural approaches constitute the means by which the courts ensured the provision of the newly discovered constitutional rights to the benefits and protections of marriage. Although the Vermont Supreme Court determined in *Baker* that a denial of a marriage license to a same-sex couple may deny that couple constitutionally protected rights, the court nevertheless refused to grant an immediate remedy, stating that "[w]e do not purport to infringe upon the prerogatives of the [l]egislature to craft an appropriate means of addressing this constitutional mandate."[35] Instead, the court left the statutory prohibition in place "for a reasonable period of time to enable the [l]egislature to consider and enact implementing legislation."[36] According to the court, legislation that allowed same-sex couples the ability to marry could satisfy the constitutional obligation, as could the establishment of a parallel domestic partnership or equivalent statutory alternative to marriage.[37]

In *Goodridge*, the Massachusetts Supreme Judicial Court did not discuss alternative statutory equivalents to marriage.[38] Instead, the court framed its analysis in terms of the choice between providing marriage to all or none.[39] The court stated, however, that striking down the marriage laws was an inappropriate form of relief, as a complete elimination of civil marriage would be "wholly inconsistent with the [l]egislature's deep commitment" to promoting marriage and family life.[40] Thus, both to prevent the unconstitutional exclusion of opposite sex couples from civil marriage and to maintain the institution of civil marriage, the court reconstrued the definition of civil marriage "to mean the voluntary union of two *persons*" regardless of gender.[41] However, as in *Baker*, the *Goodridge* court framed the constitutional question as "whether . . . the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."[42] In a procedural move reminiscent of *Baker*, rather than enforcing its ruling immediately, the Massachusetts Supreme Judicial

34. Three exceptions exist. *See* William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001); Jacobi, *supra* note 8, at 383-406; Gil Kujovich, *An Essay on the Passive Virtue of* Baker v. State, 25 VT. L. REV. 93 (2000).

35. Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

36. *Id.* at 887

37. *See id.* at 867.

38. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

39. *See id.* at 957-58, 968-69.

40. *Id.* at 969

41. *Id.* (emphasis added).

42. *Id.* at 948.

Court stayed entry of its judgment for a period of 180 days "to permit the [l]egislature to take such action as it may deem appropriate in light of this opinion," without specifying the significance such action could have on the court's judgment.[43]

Despite the opinion's failure to mention civil unions as a possible alternative to extension of marriage rights to same-sex couples, the *Goodridge* decision is evocative of *Baker*. In both cases, the majority delayed the provision of remedial relief, in spite of judicial acknowledgment of the unconstitutionality of the then-current statutory discrimination against individuals seeking to marry persons of the same sex.[44] Both actions were procedurally unusual because the courts delayed the implementation of their decisions, despite having made findings on the ultimate issue presented by the cases.[45] This approach contrasts with the usual use of remedial delay, in which the imposition of a remedy typically requires extensive policy making and often revenue raising by courts, as exemplified in prison and school reform cases.[46] Because the issue in *Baker* could be resolved by the court without such judicial interference with legislative and executive functioning, one Vermont judge described the court's inaction as an abdication of its "constitutional duty to redress violations of constitutional rights."[47]

These concerns are significant. The principle of providing remedial relief when violations have been found, particularly constitutional violations, is axiomatic, recognized since the United States Supreme Court's decision in *Marbury v. Madison*.[48] Constitutional rights would be meaningless if courts failed to provide remedies that enforced those rights.[49] Remedial delay can nevertheless be justified in some circumstances; the next sub-Part considers the conditions which justified remedial delay in *Baker*. However, to satisfy the *Marbury* principle, the default rule must be one of providing remedial relief when a constitutional violation has been established, and justifying any departure from that principle.

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43. *Id.* at 970.

44. *See id.* at 969-70; Baker v. State, 744 A.2d 864, 887 (Vt. 1999).

45. *See Goodridge*, 798 N.E.2d at 969-70; *Baker*, 744 A.2d at 886-87.

46. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973). For a comparison of these cases and their similarities, and the topic of remedial delay in the context of same-sex marriage, see Jacobi, *supra* note 8, at 391-95.

47. *Baker*, 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part). In *Goodridge*, the dissenting judges considered that the decision went too far, rather than not far enough, and so this issue did not arise. *See Goodridge*, 798 N.E.2d at 974-1005.

48. *See, e.g.*, Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 737-67 (1992).

49. *See id.*

Although there are some similarities between the decisions in *Baker* and *Goodridge*, these similarities are superficial, and significant differences exist between the two cases. These differences raise questions as to whether *Baker*'s justifications for invoking remedial delay were applicable in *Goodridge*. Before examining these differences, however, it is important to note that the apparent similarities between the institutional approaches taken in the cases meant that the decisions also had similar effects. This is likely because the two decisions were perceived by others, particularly state legislators, to be meaningfully alike in what they signaled about judicial expectations of acceptable state legislative responses to their holdings.[50]

Following the court's threat in *Baker*, that it would act on its own to remedy marriage inequality, the Vermont General Assembly passed, and the governor signed, legislation establishing a legally binding relationship known as a civil union.[51] The act provided same-sex couples with the most of the benefits, protections, and responsibilities of marriage.[52] Following *Goodridge*, the Massachusetts Legislature proposed the adoption of a bill prohibiting same-sex marriage but allowing civil unions, which would provide the "benefits, protections, rights and responsibilities" of marriage to same-sex couples.[53] This legislative proposal was undertaken explicitly in response to the *Goodridge* ruling, and the high court's threat of unilateral action if the legislature did nothing.[54] This point is extremely important for later analysis: the state legislature believed that in light of the *Goodridge* opinion, there was some possibility that a law establishing civil unions in Massachusetts would satisfy the court's requirement that discrimination against same-sex couples end.

Despite appearances, *Baker* and *Goodridge* are fundamentally different, in both their substantive holdings and remedial tactics, a point

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50. A Lexis-Nexis® search yielded 823 newspaper articles written in the nearly three-month period between the decisions in *Goodridge* and *Opinions of the Justices to the Senate* cases that referred to same-sex marriage in Vermont. This search excluded articles that referred to "dean" within the same paragraph, in order to exclude articles on Governor Howard Dean's presidential campaign.

51. *See* VT. STAT. ANN. tit 15, §§ 1201-07 (Supp. 2001).

52. Some argue, however, that it is not possible for all the benefits and protections of marriage to be provided by legislation legalizing civil unions. For example, interstate recognition of marriage does not currently apply to civil unions. *See* Bradley, *supra* note 28, at 730; Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Union Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 137-44 (2000). However, even if same-sex marriages were allowed in one of the jurisdictions, this would not ensure interstate recognition. *See* Koppelman, *supra* note 14, at 2154-59.

53. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 568 (Mass. 2004) (quoting S.R. 2175 (Mass. 2003)).

54. *See Goodridge*, 798 N.E.2d at 969-70.

made particularly clear by the Massachusetts Supreme Judicial Court in *In re Opinions of the Justices to the Senate*.[55] First, the substantive holding of the Vermont Supreme Court was the finding of a state constitutional right to "the benefits and protections that flow from marriage."[56] In contrast, the Massachusetts Supreme Judicial Court recognized a "personal interest of 'fundamental importance'" in marriage itself.[57] Since the *Goodridge* opinion did not consider alternatives to marriage, it appeared possible that the high court's finding may have been equivalent to the Vermont court's findings in *Baker*, just expressed differently. However, *In re Opinions of the Justices to the Senate* explained that *Goodridge* had already ruled that forbidding same-sex marriages was unconstitutional.[58] The high court stated further that the differences between marriage and civil unions were "more than semantic" and explained that distinguishing between the two was not an innocuous exercise, but one that relegated same-sex couples to "second-class status."[59] The court held that the legislature's proposed bill establishing civil unions was unconstitutional, and that only marriage satisfied the requirements of the Massachusetts Constitution.[60]

Delaying the provision of a remedy in the *Baker* case made sense: if civil unions could satisfy the constitutional defects in Vermont's marriage law, then remanding the remedial determination to the state legislature allowed the forging of an exactly calibrated remedy. Conversely, at least in retrospect, delay in *Goodridge* presented no such opportunity as the Massachusetts Supreme Judicial Court held that prohibition of same-sex marriage was constitutionally unacceptable and that any legislative alternative to marriage was also untenable.[61] Delaying the constitutional remedy in *Goodridge*, then, served no obvious purpose, as there was no more perfectly adjusted remedy than that which the court was able to supply itself.

Second, the nature of the remedial delay in the two cases was also different. In *Baker*, a majority of the court held that Vermont's discriminatory statutory scheme should remain in effect "for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion."[62] To

55. *See* 802 N.E.2d at 567-72.
56. *See* Baker v. State, 744 A.2d 864, 867 (Vt. 1999).
57. *Goodridge*, 798 N.E.2d at 957 n.14 (quoting Zablocki v. Redhail, 434 U.S. 374, 383 (1978)) (internal citations omitted).
58. *See* 802 N.E.2d at 569.
59. *Id.* at 570.
60. *See id.* at 571-72.
61. *See id.*
62. Baker v. State, 744 A.2d 864, 887 (Vt. 1999).

ensure legislative obedience, the court warned that if the benefits and protections of marriage were not statutorily granted to same-sex couples, it would grant the injunction sought by the plaintiffs and would allow them to acquire a marriage license.[63] In contrast, the high court's purpose in delaying entry of its judgment in *Goodridge*, the justices later revealed, "was to afford the [l]egislature an opportunity to conform the existing [marriage] statutes to the provisions of the *Goodridge* decision."[64] However, as Justice Sosman's dissenting opinion pointed out, since the 180-day deadline did not "realistically allow for a review of every one of the 'hundreds of statutes' in Massachusetts that are 'related to marriage and marital benefits,'" the court drastically limited the options available to the legislature that would satisfy the court's ruling.[65] Given that the court held that civil unions would be an unsatisfactory and unconstitutional response to the *Goodridge* holding, the only option the court appeared to leave the legislature was adoption of the right to same-sex marriage, a move the court declared it would have made on its own after the expiration of the 180 days.[66]

So the *Goodridge* court could have achieved the result it came to in *In re Opinions of the Justices to the Senate* without delay.[67] If the high court did not delay for the same reasons as the Vermont Supreme Court, why did the Massachusetts court stay its own decision? Part III proposes an answer to that question. But first, the next sub-Part shows what the court did *not* achieve via the stay. The differences between *Goodridge* and *Baker* outlined above illustrate that the doctrinal reasons and political advantages that justified remedial delay in *Baker* could not justify such delay in *Goodridge*.

B. The Inapplicability of Baker*'s Justifications to* Goodridge

Due to the differences previously outlined, both the doctrinal justifications for, and the pragmatic advantages of, remedial delay that applied in the decision in *Baker* were not applicable in *Goodridge*. Given that most scholarly attention on *Baker* focused on the substantive result of the case and not the remedial mechanism the decision utilized, this sub-Part examines the applicability of the justifications examined in

63. *See id.*
64. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 568 (Mass. 2004).
65. *Id.* at 577 (Sosman, J., dissenting) (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).
66. *See Goodridge*, 798 N.E.2d at 970.
67. *See id.*

my prior work, one of the few pieces to focus on the significance and validity of the Vermont Supreme Court's delay tactics.[68]

Essentially, because the Vermont Supreme Court found only a constitutional right *only to the benefits and protections of marriage*, which could be protected by a remedy of less than full marriage for same-sex couples, remanding the remedial determination to the legislature was both doctrinally justified minimalism and politically sound avoidance of controversy. Remedial delay enabled the court's majority to largely prevent unconstitutional discrimination against gay couples, while allowing the court to skirt much of the blame for this highly controversial outcome, by forcibly engaging the Vermont General Assembly and the governor in the provision of those rights. The elected branches passed compromise legislation legalizing civil unions[69] under the high court's threat of judicial enforcement of same-sex marriage.[70]

More specifically, there were four justifications for, and advantages of, legislative remand. Ranging from the most doctrinal in nature to the most pragmatic, these justifications were: 1. Legislative remand was the remedy most closely tailored to the limited ruling; 2. Remand was an appropriate exercise of deference to the legislature; 3. Remand provided the most reliable protection of the constitutional rights of a disadvantaged minority; and 4. Remand protected the authority of the court by sharing responsibility for a controversial decision.

These four benefits are discussed in turn, as is their inapplicability to the *Goodridge* holding. But there may be another, simpler explanation for the use of remedial delay in *Baker*—it may have been the best compromise available to a court that a majority would support. Clearly this advantage did not apply *Goodridge*, as a majority of the justices in that case supported the recognition of same-sex marriage in both cases where the issue came before the court.[71]

The first justification for *Baker*'s legislative remand was that it was the only remedy that enabled the Vermont Supreme Court to achieve an outcome that was precisely tailored to its limited ruling.[72] In contrast,

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68. *See* Jacobi, *supra* note 8, at 381-401. For a more general discussion of separation of rulings from remedies, see Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 889-90 (2003) (discussing the disconnect between the rule of law and actual legal controversy). *See also* Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1336-59 (2001) (analyzing judicial power from a structural perspective); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-28 (1978) (discussing the tactic of judicial "underenforcement").

69. *See* VT. STAT. ANN. tit.15, §§ 1201-07 (Supp. 2001).

70. Baker v. State, 744 A.2d 864, 887 (Vt. 1999).

71. *See In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004); *Goodridge*, 798 N.E.2d at 969-70.

72. *See* Jacobi, *supra* note 8, at 402.

the three alternatives to legislative remand available to the court were untenable. The first option was that of holding the state's marriage act unconstitutional, but this would have been an extreme and counterproductive action.[73] The second option was to strike down or alter all statutes that relied on marriage as a distinction, but, as mentioned, this option could not be realistically achieved within a workable time period. The third option was to abolish the gender distinction in the marriage law, which would grant same-sex couples the substantive right to marry. The *Baker* decision held only that same-sex couples had rights to the *benefits* and *protections* of marriage, *not* the right to marriage itself.[74] Consequently, the actual legalization of same-sex marriage would have gone further than the ruling required, whereas the provision of civil unions or some other alternative statutory scheme establishing a marriage equivalence status could have satisfied the constitutional mandate exactly.

The court in *Goodridge*, on the other hand, did not face these three unsatisfactory alternatives. It held that a substantive right to same-sex marriage existed in Massachusetts Constitution.[75] Entry of a judicial declaration that marriage is gender-neutral would have precisely achieved this constitutional requirement, without the need for delay tactics. So unlike the case in *Baker*, remedial delay in *Goodridge* was not explicable on the basis of the existence of being a more closely tailored remedy that only the legislature could craft.

The second reason for favoring legislative remand in *Baker* was that such an approach arguably represented an appropriate level of judicial deference to the legislature's right to decide an important and controversial public policy issue. As the *Baker* majority stated: "When a democracy is in moral flux, courts may not have the best or the final answers. . . . Courts do best by proceeding in a way that is catalytic rather than preclusive and that is closely attuned to the fact that courts are participants in the system of democratic deliberation."[76] Judicial deference is a complicated aim, both because deference may be inappropriate where it results in the continuation of a violation of a constitutional right,[77] and because it can be counterproductive to its own aim, as courts inviting legislative action can force judges into a position

73. The *Goodridge* court itself explicitly rejected this option as extreme and counterproductive. *See Goodridge*, 798 N.E.2d at 968-69.

74. *Baker*, 744 A.2d at 867-68, 888-89.

75. *Goodridge*, 798 N.E.2d at 968-70.

76. *Baker*, 744 A.2d at 888

77. *See id.* at 912 (Johnson, J., concurring in part and dissenting in part).

where they have to oversee legislative functions.[78] Nevertheless, to the extent that deference through legislative remand was a laudatory goal, the *Goodridge* stay did not similarly advance that goal.

Although it provided the legislature with an opportunity to act in response to its ruling, the only action the *Goodridge* court left open to the that body was that of either overturning Massachusetts' Marriage Act or adopting the court's own definition of civil marriage.[79] Since the acknowledged legislative intent of both the marriage act and the constitutionally offensive gender distinction it contained was to preserve heterosexual marriage, the only genuine option available to the legislature was to adopt the court's interpretation or to do nothing. In dissent, Justice Spina argued forcefully that abolishing the gender specific language in the marriage act was directly contrary to the legislature's intent, and so doing would "replace [] the intent of the [l]egislature with that of the court."[80] This position may be justified, but it is not judicial deference. Since all other avenues were closed to the legislature, allowing that body an opportunity to act only in a way contrary to its intention, but exactly as the court itself would prefer, was only a pretense of deference. Whether judicial deference to the legislature was appropriate in this case is a question open to argument, but it was not the motivation for, or effect of, the Massachusetts Supreme Judicial Court's decision to stay its judgment.

The third advantage of remedial delay in *Baker* was that it best promoted the substantive protections of a disadvantaged group, in this case, individuals seeking to marry partners of the same sex.[81] This advantage may be viewed as either a doctrinal or practical consideration. Arguably, courts have a special responsibility to protect disadvantaged or minority groups.[82] Alternatively, the Vermont Supreme Court may

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78. *See generally* Jacobi, *supra* note 8, at 396 (explaining that legislative remand allows the judiciary the ability to avoid judicial supervision of the legislature, thus preserving constitutional and structural distinctions between the two branches).

79. *See Goodridge*, 798 N.E.2d at 968-70.

80. *Id.* at 977 (Spina, J., dissenting).

81. Note, however, that some have argued that the same-sex marriage movement's insistence on the importance of the recognition of the right to marriage places further stigmas on the sexually promiscuous and other social outliers who refuse to conform to societal mores regarding sexual behavior and sexual responsibility, and thus arguably harms other disadvantaged minorities. *See* Marie A. Failinger, *A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to Its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195, 199 (2004); *see also* Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 607-15 (2004) (explaining that while same-sex marriage does carry benefits, all GLBT couples may not benefit from the institution's preference for two-parent families).

82. A "more searching judicial inquiry" is justified for "discrete and insular minorities." United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

simply have had a policy preference for the promotion the rights of this disadvantaged group.

Remanding the remedy determination to a legislature to allow it to choose between the extension of civil unions and the provision of full marriage rights provides less formal and immediate protection to same-sex couples than would a judicial declaration of same-sex marriage. However, in some situations, legislative remand has the *potential* to provide greater substantive and long-term protection to same-sex couples, because aggressive judicial action of independent pronouncement on marriage rights is more likely to promote a backlash against gays.[83] For example, as discussed, judicial recognition of same-sex marriage in Hawaii and Alaska prompted successful constitutional amendments barring same-sex marriages in those states.[84] Analogously, in the wake of the Supreme Court's decision in *Lawrence v. Texas* to overturn a Texas law punishing sodomy,[85] a poll conducted by the Pew Research Center found a national backlash against the recognition of even civil unions for same-sex couples.[86]

To avoid this outcome, perhaps the Vermont Supreme Court strategically "hedged its constitutional ruling" to avoid such a public backlash and gave the legislature a chance to choose an option that provided substantive and functional, if not formally complete, equality through a scheme with a far greater chance of political survival.[87] In Vermont, legislative remand prompted the passage of the Civil Union Act, which has been operative since 2001; implementation and enforcement of that act has been highly successful.[88]

The public reaction to same-sex marriage in any particular state is hard to predict; it is therefore difficult to know whether stronger court protection, with the risk of backlash, will provide greater protection for same-sex couples than the compromise of civil unions. Parts III and IV discuss the effect of *Goodridge* in detail, but the important point to note here is that remedial delay in Massachusetts did not constitute a choice in favor of the potential benefit of greater substantive protection in lieu of

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83. *See* Jacobi, *supra* note 8, at 404-05.

84. *See* Mae Kuykendall, *Gay Marriages and Civil Unions: Democracy, the Judiciary and Discursive Space in the Liberal Society*, 52 MERCER L. REV. 1003, 1004-16 (2001).

85. *See* 539 U.S. 558, 578-79(2003).

86. *See* PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS & PEW FORUM ON RELIGION & PUB. LIFE, REPUBLICANS UNIFIED, DEMOCRATS SPLIT ON GAY MARRIAGE: RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY 18 (Nov. 18, 2003), http://pewforum.org/publications/surveys/religion-homosexuality.pdf [hereinafter REPUBLICANS UNIFIED].

87. *See* Eskridge, *supra* note 34, at 865-75.

88. *See* OFFICE OF LEG. COUNCIL, REP. OF THE VT. CIVIL UNION REV. COMM'N 8 (2002), *available at* http://www.leg.state.vt.us/baker/Final%20CURC%20Report%20for%202002.htm.

greater formal protection, as it did in Vermont. The *Goodridge* court granted the right to marriage, so a gamble of granting greater formal protection had already been taken. Utilizing a delay mechanism for legislative action, but nevertheless granting the right to same-sex marriage, does not represent a choice in favor of partial substantive protection over full formal protection.

The fourth advantage of legislative remand in *Baker* was that, by deferring to the legislature and granting a less interventionist remedy than judicial recognition of same-sex marriage rights, the Vermont Supreme Court was protecting itself from public anger over "judicial imperialism." Simultaneously, remand protected the court by enlisting the support of the other branches of government; in placing the onus on the legislature and the executive to act, the *Baker* court forced other branches of government to share in the responsibility for both fashioning a remedy and protecting gay rights.[89]

The *Goodridge* decision appears not to provide either of these "blame avoidance" advantages. First, although the decision raised the possibility that legislation creating civil unions would be constitutionally sufficient, the Massachusetts Supreme Judicial Court's subsequent ruling in *In re Opinions of the Justices to the Senate*, gave the legislature no incentive to act.[90] Unlike the decision in *Baker*, which threatened more extreme judicial action if the legislature did not act, the Massachusetts Supreme Judicial Court had such no credible threat, as it would only approve of legislative action that granted same-sex marriage rights. Second, the court took the more interventionist step of recognizing same-sex marriage, ultimately failing to refrain from policy making.

In summary, the four advantages that motivated the Vermont Supreme Court to delay its decision offered little benefit to the Massachusetts Supreme Judicial Court. The action did not allow the legislature to craft a more exact remedy than the court could fashion; it did not defer policy making power to the legislature; it did not attempt to provide greater substantive protection than a grant of full, formal equality might provide; and it did not shield the court from responsibility for granting same-sex marriage rights.

Yet it is unsafe to assume that there was no point or rational intent behind the majority's decision in *Goodridge* to delay enforcement of its own holding. The following Part proposes an explanation for the court's remedial delay. Although this explanation is not the same as the blame-

89. *See* Jacobi, *supra* note 8, at 403.
90. *See* 802 N.E.2d 565, 571-72 (Mass. 2004).

avoidance effect of legislative remand, it is nevertheless a similarly pragmatic response to the judiciary's constrained institutional power.

III. AN ALTERNATIVE EXPLANATION OF *GOODRIDGE*

Since the Supreme Court's holding in *Marbury v. Madison*, courts have anticipated and adjusted to their vulnerability vis-à-vis the elected branches and potential public opposition when making their most controversial decisions. Numerous studies have empirically established, for example, that courts shape their decisions and methods according to their perceived vulnerability to congressional override,[91] and take cues regarding public and political interest and acceptability of outcomes from the public[92] and organized interests.[93] Equally, however, courts influence public opinion, by both drawing attention to issues[94] and mobilizing interested groups,[95] which in turn affects the policy choices of elected representatives. Appreciating this interaction between popular opinion, legislative action, and judicial freedom to act provides the key to understanding the institutional advantages of remedial delay in *Goodridge*.

This Part provides an explanation for the actions of the majority justices on the Massachusetts Supreme Judicial Court in the decisions in *Goodridge* and *In re Opinions of the Justices to the Senate*. We cannot know for sure what was in the minds of these justices, but given the lack of both principled and apparent practical reasons for remedial delay, this Part attempts to formulate a rational explanation for the justices' behavior, given the available information. To that end, this Part considers what is known of the motivations of the *Goodridge* majority, the Massachusetts Legislature, and of public opinion; it examines changes in public opinion following legislative and judicial actions, and considers how those changes both respond to and shape legislative and judicial choices. It also demonstrates how remedial delay in *Goodridge* enabled the court to achieve the outcome of recognition of same-sex

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91. *See, e.g.*, Lee Epstein, Jeffrey Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002).

92. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

93. *See, e.g.*, Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 717-20 (1993).

94. *See, e.g.*, Roy B. Flemming, John Bohte, & B. Dan Wood, *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-92*, 41 AM. J. OF POL. SCI. 1224, 1226-28 (1997).

95. *See, e.g.*, MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 48-91 (1994).

marriage at a lower political cost, in terms of public opposition, than acting initially would have provoked.

Central to this Part's approach is the recognition that the choices of each branch of government are shaped by the other branches and also by popular opinion. However, popular opinion is also endogenous, in that it is affected by both judicial and legislative action. Judicial and legislative pronouncements can both shape public opinion directly as well as frame and define which options are considered relevant alternatives. Much prior scholarship has established the effect that the number and order of the presentation of alternatives have on the outcome of decisions.[96] For example, as discussed in more detail below, public opposition to civil unions is greatly reduced if subjects are first questioned about their attitudes concerning same-sex marriage. Seemingly, by framing the potential outcome of civil unions with reference to what many consider a "far worse" result—same-sex marriage—a large percentage of the public becomes more amenable to allowing some protections for same-sex couples.[97]

The strong language in the majority's opinion in *Goodridge* indicates a clear judicial preference for recognizing the right to same-sex marriage.[98] For example, the court considered that the right to marry is so fundamental that, without it, "one is excluded from the full range of human experience and denied full protection of the laws";[99] The court also held that the state's actions denying the right to same-sex marriage "confer[red] an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and not worthy of respect"[100] and that "extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities" and is "a testament to the enduring place of marriage in our laws and in the human spirit."[101]

The imposition of the remedial stay makes it equally apparent that the *Goodridge* majority appreciated the institutional limitations on its ability to embrace that outcome. As discussed, there was no doctrinal need for a remedial delay. Instead, in delaying the effect of its own remedy, the majority was acknowledging the limits of its own power to

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96. *See, e.g.*, ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE (1974); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. OF BUS. S251(1986); SHANTO IYENGAR, IS ANYONE RESPONSIBLE?: HOW TELEVISION FRAMES POLITICAL ISSUES (1991).

97. *See infra* text accompanying notes 119-120.

98. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968-70 (Mass. 2003).

99. *Id.* at 957.

100. *Id.* at 962.

101. *Id.* at 965.

independently establish the controversial right to same-sex marriage. Although the practical considerations that encouraged delay in *Baker* did not exist in *Goodridge*, other practical motivations provided incentives for the justices to temporarily refrain from imposing their preferred outcome.

Same-sex marriage faces less opposition in Massachusetts than it does in most of the United States; however, even in that state it is still very controversial.[102] Although some polls have suggested that in the days leading up to the *Goodridge* decision, a majority of Massachusetts residents accepted or supported same-sex marriage,[103] all polls showed that at least a substantial section of the populace were highly opposed to the recognition of such rights.[104] This opposition is evidenced both in terms of the numbers who oppose gay marriage—at times reported to be a majority of Massachusetts voters,[105] and as many as 2 out of 3 in national polls[106]—and by the intensity of such sentiment—44% considered the issue to be extremely or very important.[107] Thus, even if the Massachusetts justices only read Boston newspapers, prior to the *Goodridge* decision, they had ample evidence of these sentiments available to them.[108]

As they were contemplating the likely reaction to their future opinion in *Goodridge*, evidence that voters were especially opposed to same-sex marriage being initiated through a court case must have been particularly relevant to the justices. Seventy-one percent of Massachusetts respondents in one poll said "they wanted voters to be able to define marriage, not the courts or the [l]egislature."[109] In fact,

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102. *See* Frank Phillips, *Support for Gay Marriage Mass. Poll Finds Half in Favor*, BOSTON GLOBE, Apr. 8, 2003, at A1 (reporting the results of a *Boston Globe* Poll showing 50% support and 44% opposition to same-sex marriage, compared to national polls showing support ranging from 35-39% and opposition at around 55%). However, note that cross-poll comparisons may be unreliable, as each poll may ask different questions, or differently framed questions etc., which could skew Phillips' suggested comparative results.

103. *See* Decision Research, Memorandum to Freedom to Marry Coalition of Massachusetts, Oct. 29, 2003, *available at* http://www.uua.org/news/2003/freedomtomarry/PollMemoOct29.pdf.

104. *See id.*

105. *See* Rick Klein, *Vote Ties Civil Unions to Gay-Marriage Ban: Romney To Seek Stay of SJC Order*, BOSTON GLOBE, Mar. 30, 2004 at A1 (reporting 53% opposition to gay marriage in Massachusetts and 60% support for civil unions).

106. *See* REPUBLICANS UNIFIED, *supra* note 86, at 10.

107. *See* Frank Newport, *Americans Evenly Divided on Constitutional Marriage Amendment: Majority Oppose Same-Sex Marriage in Principle*, GALLUP NEWS SERV., Feb. 11, 2004, at 5.

108. *See, e.g.*, Klein *supra* note 105; Michael Paulson, *Papal Report; Vatican Warns on Same-Sex Marriage Broad Edict Has Message for Catholic Politicians*, BOSTON GLOBE, Aug. 1, 2003, at A1.

109. Klein *supra* note 105.

after the decision in *Opinions of the Justices* was delivered, fifty-three percent of Massachusetts residents supported Governor Mitt Romney's attempts to have the high court stay this ruling.[110]

Accordingly, it appears that the *Goodridge* court knew it was dealing with an issue that was extremely controversial on a topic that the public did not want the high court deciding for them. The court could have expected strong reactions to its initiation of same-sex marriage and that such opposition could manifest itself in costly attacks on the court. The current political climate has proven very hostile to the judiciary, particularly on the issue of same-sex marriage. For instance, at the federal level, the United States House of Representatives passed a bill to limit the federal courts' jurisdiction over issues concerning arising under the Defense of Marriage Act.[111] Virginia even had a proposal to impeach judges if they ruled in favor of same-sex marriage.[112] The federal Congress also proposed a constitutional amendment to ban same-sex marriage.[113] These proposals were made after the *Goodridge* decision, but because of the controversy over same-sex marriage, such hostility may have been anticipated. Although each of these regulatory attempts ultimately failed, arguably even the public contemplation of such punishments harms the judicial reputation.

The *Goodridge* court, then, could have anticipated considerable opposition to its recognition of same-sex marriage. However, the court could have expected less public opposition if it engaged the legislature in the process of guaranteeing marriage rights for same-sex couples. As Gerald Rosenberg has showed, courts are far more effective in bringing about social change when they have the support of at least one other branch of government.[114] Although the Massachusetts Supreme Judicial Court was unwilling to accept the compromise solution of civil unions, which would have provided same-sex couples with the benefits and protections of marriage, it could nevertheless still be advantaged by influencing popular opinion through involving the legislature in the process of recognizing same-sex rights.

While judicial and legislative action is constrained by public opinion, public opinion is also shaped by judicial and legislative actions.

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110. *See id.*

111. *See* H.R. RES. 3313, 108th Cong. (2004); 150 CONG. REC. H6580-02.

112. *See* H.B. 727, 385th Leg., Reg. Sess. (Va. 2004) (providing that "any judge who rules the provisions of this section to be unconstitutional shall be deemed to have committed malfeasance in office and may be subject to impeachment under the provisions of Article IV, Section 17 of the Constitution of Virginia").

113. *See* H.R.J. Res. 106, 108th Cong. (2004).

114. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 157-69 (1991).

For example, the June 2003 decision in *Lawrence v. Texas*, which held that antisodomy laws were unconstitutional,[115] prompted a backlash in public opinion against homosexuality. The percentage of poll subjects who believed that "homosexuality should be considered an acceptable lifestyle" dropped from 54% in May 2003 to 46% in July of that same year.[116] There is no reason to believe that this effect only occurs in the direction of inflaming public passions: judicial and legislative action may also cause increased public tolerance. This tolerance is particularly likely to result from joint or dual governmental action, as broader coalitions of elites supporting an issue will send a message of both acceptability and inevitability in the expansion of a right.

Tests of the effect of framing illustrate the public's openness to influence on these matters, despite strong feelings. Both the Pew Research Center and the Gallup Organization, two comprehensive polling centers, tested subjects' views on civil unions, subject to the context of queries about same-sex marriage. Pew found that subjects' amenability to civil unions increased 8% if asked about civil unions *after* being questioned about gay marriage.[117] Gallup found a difference of 21% support for civil unions and 22% opposition, depending on the order of questions.[118]

The court's declaration in *Goodridge* of the unconstitutionality of the status quo, where marriage is only available for heterosexuals, changed the costs associated with the options available to the legislature. The court's stay created ambiguity regarding the constitutionality of civil unions, suggesting that continuing inaction by the legislature would result in the substantive right to same-sex marriage being judicially recognized, whereas the enactment of legislation allowing civil unions legislation could have potentially prevented judicial recognition of same-sex marriage. Thus, high levels of public opposition to same-sex marriage would have the effect of pressuring the legislature to propose civil unions legislation. The legislature could then expect greater costs in maintaining its policy of inaction than by passing such legislation, because doing nothing would allow the court to recognize the right to same-sex marriage. This helps explain the Massachusetts Legislature's decision to propose laws recognizing civil unions.

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115. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

116. *See* REPUBLICANS UNIFIED, *supra* note 86, at 18.

117. *See id.* at 16.

118. *See* David W. Moore & Joseph Carroll, *Support for Gay Marriage/Civil Unions Edges Upward: Public Remains Divided on Constitutional Amendment To Ban Gay Marriage*, GALLUP NEWS SERV., May 17, 2004.

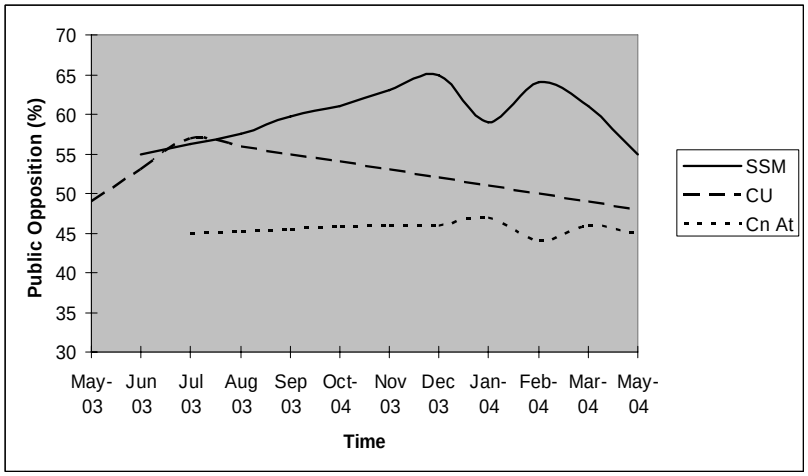
By staying its decision, the *Goodridge* court allowed the legislature an opportunity to partake in the development of a solution to the unequal provision of rights to same-sex couples. Within three months, in response to the stay, the Massachusetts State Senate proposed a bill providing a system of civil unions, under which same-sex couples could receive the benefits and protections of marriage.[119] Prior to *Goodridge*, state lawmakers had not acted to provide any such protection to same-sex couples. Thus, the court's decision altered the disposition of the legislature on the issue of same-sex marriage: that body went from proposing nothing and maintaining the status quo to proposing legislation recognizing civil unions.

The legislature's action also changed the apparent nature of the debate concerning same-sex unions. The "elite" debate, and the presentation of the public's choice, changed from the choice between same-sex marriage and the status quo to the choice between same-sex marriage and civil unions. By the time the court found that civil unions were a constitutionally unsatisfactory remedy, this framing effect had been established, and the legislature was on the record proposing legislation allowing civil unions.

Additionally, these events altered public opinion in the direction of greater tolerance for same-sex marriage as revealed by data from the Gallup News Service polls.[120] Figure One uses a national poll, as it is more comprehensive and reliable for examining trends over time than the Massachusetts polls that were conducted on a more ad hoc basis. Looking at the same polling service over time creates less chance of variation due to problems such as framing. The Massachusetts Supreme Judicial Court may have been more concerned with Massachusetts public opinion than national public opinion; however, the national attention given to events in Massachusetts, as evidenced, for example, by the rash of state proposals to ban same-sex marriage following *Goodridge* and its progeny, suggests that changes in public opinion are likely to be largely universal, even though absolute numbers will vary by region. Massachusetts residents may have been less amenable to a constitutional ban of same-sex marriage but even they appear to be subject to the same swings in opinion on the issue.

119. *See* S. Res. 2175, 183d Leg., 1st Sess. (Mass. 2003).
120. *See* Moore & Carroll, *supra* note 118, at 2.

Figure 1: Public Opposition Associated with Same-Sex Marriage over Time



Data source: time-series Gallup polls, May 2003 to June 2004, aggregated in Moore and Carroll. Error is +/- 3%.

Figure One maps the public's opposition over time to same-sex marriage (SSM), civil unions (CU), and a proposed constitutional amendment to ban same-sex marriage (Cn At). It examines opposition, rather than support, because courts are institutionally designed to be concerned with intense opposition, but nonelected judges have no institutional incentive to seek out public support for their actions.[121]

Figure One shows that public opposition to same-sex marriage is highly variable, ranging from 55% in June 2003 to a peak of 65% in December 2003; subsequently, opposition dropped to 59% in February 2004, rose again later that month to 64%, before falling again to 55% in May. In contrast, opposition to civil unions and a constitutional amendment are both comparatively stable. Opposition to civil unions generally hovered around 50%, with one exceptional peak of 57% in July 2003. Opposition to a constitutional amendment also centered around 50%, ranging in the year only 6 percentage points.

The most noteworthy changes in public opinion represented in the data are the following:

1. Prior to *Goodridge*, during a period of public anticipation of possible judicial action to legalize same-sex marriage, popular opposition to same-sex marriage increased from 55% in late June to 61% in late October;

121. *See id.* (listing data from time-series Gallup polls from May 2003 to June 2004).

2. Following *Goodridge*, public opposition to same-sex marriage peaked at 65% in mid-December;
3. With legislative action prompted by the *Goodridge* remedial stay, the decision in *Opinions of the Justices* did not cause an increase in opposition to same-sex marriage; in the days after the opinion, same-sex marriage opposition was at 59%;
4. Opposition to same-sex marriage increased again, to 64%, only later in the month;
5. In May, with same-sex marriages about to commence with apparent legislative acceptance, opposition to same-sex marriage fell again to 48%.[122]

The third point is particularly remarkable. The holding in *In re Opinions of the Justices to the Senate*, in which the Massachusetts Supreme Judicial Court fully embraced the right to same-sex marriage, did not result in a public backlash. The high court handed down the decision on February 3, 2004, and only 59% of subjects polled between February 6-8, 2004 expressed opposition to same-sex marriage. This percentage only rose to 64% when subjects were polled on February 16-17, 2004, as anticipation grew that President Bush was going to call for the passage of a constitutional amendment banning same-sex marriage, a call which he made on February 24, 2004.[123] Most commentators, however, have missed this point, bundling the increased opposition to same-sex marriage that came later, stemming from executive interference, with the direct effect of the ruling in *In re Opinions of the Justices to the Senate* on popular opinion.[124]

Consequently, these results suggest that a number of effects followed from judicial and legislative action in Massachusetts. Prior to *Goodridge*, anticipation of judicial action to introduce same-sex marriage, combined with public expressions regarding the controversy, led to a dramatic increase in opposition to same-sex marriage. Following the *Goodridge* decision, opposition to same-sex marriage continued to increase. As the legislature began to debate providing rights to same-sex couples, opposition to same-sex marriage decreased significantly, as *two* branches of government began to recognize the rights of same-sex couples, encouraging greater acceptance in the general population. Then, when the Supreme Judicial Court made its second ruling in *In re*

122. *See id.*

123. *See* Dana Bash, *Bush Renews Call for Same-Sex Marriage Ban*, CNN.COM, May 17, 2004, http://www.cnn.com/2004/ALLPOLITICS/05/17/bush.gay/index.html.

124. *See, e.g.*, Crane, *supra* note 29, at 484. "*Goodridge* did much to advance the civil rights of gay citizens, but this [advancement] has come at considerable cost. The reaction to *Goodridge* has been almost uniformly negative, and the gay rights cause has suffered many setbacks in recent months." *Id.*

Opinions of the Justices in early February 2004, fully endorsing the right of same-sex couples to marry, public opposition did not increase. Only later, when *other* public officials, including the President, expressed *intolerance* of same-sex marriage and proposed policies to that effect, did public opposition increase again.

Interestingly, *variation* in public opinion on the proposed constitutional amendment itself was minimal. The low point in public opposition to a constitutional amendment corresponded with the second peak of opinion in opposition to same-sex marriage; but once again, this peak occurred *after* the President called for a constitutional ban, *not* immediately after the Supreme Judicial Court rendered its decision in *In re Opinions of the Justices to the Senate*. These results support the notion that combined elite support of even a controversial topic such as same-sex marriage increases public acceptance, and that this acceptance can be undermined by expressions of opposition by elected leaders.

These results also suggest that the decision by the high court in *Goodridge* to stay its holding had a palpable and practical advantage. By prompting legislative action on civil unions, despite the fact that this legislation was ultimately held insufficient to remedy the unconstitutional denial of rights, the remedial stay increased public acceptance of same-sex marriage. By staying its decision and drawing the legislature into the process, the court reduced the institutional costs of ultimately enforcing the right to same-sex marriage itself. Unlike the opinion in *Goodridge*, which was associated with large *increases* in public opposition to same-sex marriage, the court's eventual recognition of the right to same-sex marriage in *Opinions of the Justices* was accompanied by continued *decreases* in opposition to marriage equality. Although the court was alone in requiring same-sex marriage, it was no longer alone in its support for substantive equal protection for same-sex couples.

Remedial delay in *Goodridge*, and the ambiguity it created regarding the constitutionality of potential civil unions, changed the institutional costs for both the state legislature and the court. This delay prompted the legislature to propose legislation legalizing civil unions, leading to a decrease in public opposition to *both* civil unions and same-sex marriage. This change in public opinion, in turn, lowered the costs faced by the court in fully recognizing the right of same-sex couples to marry. While a few astute scholars have recognized the fact that state actors are both influential upon and constrained by public opinion,[125] none have realized that the Massachusetts Supreme Judicial Court was

125. *See, e.g.*, Eskridge, *supra* note 34, at 877, 879.

able to successfully utilize not only its *own* ability to influence public opinion, but it was also able to manipulate the state's legislative body's influence over public opinion to mitigate the constraining effect of popular opposition to equal marriage rights.[126]

It is possible that these effects were not intended by the justices; the ambiguity inherent in the *Goodridge* opinion may have simply reflected the judicial uncertainty as to the level of public anger the ruling would provoke. The justices may simply have delayed implementation so as to leave themselves the "fallback position" of accepting civil unions as a compromise. Even if this was the case, however, the causal effect remains the same: the ambiguity inherent in the *Goodridge* ruling created an incentive for the legislature to involve itself in the process, which in turn lowered public opposition to same-sex marriage, and enabled the court to take the clearer stance it took in *In re Opinions of the Justices to the Senate*.[127]

If this was the court's strategy, it was not without risk. As President Bush's proposed constitutional amendment illustrates, even such strategic success can prompt public hostility. Of potentially greater significance to the Massachusetts justices may have been Governor Romney's attempt to stay the effect of the court's rulings and the constitutional amendment process initiated in Massachusetts. However, constitutional change is now looking highly unlikely, as the second stage in the Massachusetts constitutional amendment process failed in the state legislature.

The following Part explores in greater detail the public response to same-sex marriage in the first election after *Goodridge* in both Massachusetts and the nation. It also considers the implications of the election for the proposed amendment to the Massachusetts Constitution, and constitutional amendments banning same-sex marriage in other states.

IV. A BACKLASH AGAINST *GOODRIDGE*?

By co-opting the Massachusetts Legislature into the process of devising same-sex rights, and thus tempering public opinion, the *Goodridge* decision paved the way for public acceptance of same-sex marriage. However, one question remains. After *In re Opinions of the Justices to the Senate* was implemented, did a backlash against same-sex marriage occur?

126. *See id.*
127. *See* 802 N.E.2d 565, 572 (Mass. 2004).

There are two differing answers to this question, a local answer and a national one. In Massachusetts, same-sex marriage has not suffered a political backlash: polls indicate that it has largely become popularly accepted. Additionally, the electoral results from 2004 show that in Massachusetts, legislative supporters of same-sex marriage gained ground over opponents. Whether a national backlash occurred is less clear. Reports that same-sex marriage determined the presidential and congressional elections in 2004 appear to be based on poorly designed polling, premature conclusions, and an uncritical analysis of the significance of state constitutional amendments banning same-sex marriage. The extent of the national backlash has been overplayed in the media, but some damage was done to the rights of same-sex couples in some parts of the country as a result of *Goodridge*. This Part demonstrates that, in Massachusetts, the results are clear; the judicial strategy of remedial delay was successful in securing protections for same-sex couples. It then provides a more nuanced answer to the empirically difficult question of the effect of *Goodridge* on the nation.

A. The Electoral Response to Same-Sex Marriage in Massachusetts

The main sign of a backlash within Massachusetts was the proposal of a constitutional amendment banning same-sex marriage.[128] But even this proposal simultaneously enshrined civil unions and specified that these relationships would have "all the benefits, protections, rights and responsibilities under state law as are granted to spouses in a marriage."[129] This provides further evidence that the Massachusetts State Legislature precommitted itself to legalizing civil unions as a result of the court's actions. It also means that, by involving the state legislature in the process of creating marriage equality, the court ensured that the fallback position, in the event of a successful constitutional amendment, was the protection of the rights and benefits of marriage. The nature of the proposed state constitutional amendment illustrates the argument made above, that *Goodridge* has transformed the previously "radical" notion of civil unions into a moderate default position.

Yet, it is far from clear that the Massachusetts Constitution will ever be amended to ban same-sex marriage. Although the proposed ban passed through the first stage of the amendment process by a vote of 105 to 92, the legislature then voted 157 to 39 against the proposed amendment, with even many proponents recognizing that the measure is

128. H. Res. 3190, 183d Leg., 2d Sess. (Mass. 2004).
129. *See id.*

no longer appropriate now that same-sex couples have been legally married.[130]

Two other measures clearly indicate the absence of a backlash in Massachusetts. First, once same-sex marriages commenced, the issue lost much of its controversy, and public acceptance of same-sex marriages increased dramatically. Second, in the legislature, advocates of same-sex marriage were not punished by voters, and in fact, improved their standing.

Up until the time of the constitutional convention, both sides actively pursued protests, but Massachusetts legislators reported receiving significantly less contact from voters about same-sex marriage after it came into effect at the end of the first constitutional convention.[131] There are a number of related reasons for the loss in controversy and increase in public acceptance of same-sex marriage. First, when same-sex marriages commenced, people's lives didn't change dramatically. In particular, many previous opponents of same-sex marriage realized that their own heterosexual marriages and relationships were largely unaffected.[132] Second, same-sex couples came to be seen as people, rather than simply as political symbols. Josh Friedman, Director of the Freedom to Marry Coalition of Massachusetts stated that "people here see these couples as their neighbors, their family members, [and] their friends."[133] Third, political opposition by legislators to same-sex marriage lessened after the marriages began to be performed, because once marriages commenced, the rights at issue were no longer theoretical. Ongoing opposition to same-sex marriage would involve opposition to the actual marriages of people who were lawfully wed by the state, and endorsing stripping those couples of their vested rights. The response in Massachusetts was nicely summarized by one *Boston Globe* reporter:

> Last year, same-sex marriage was legalized in Massachusetts with a huge uproar. But the sky never fell, and the uproar became a low hum. In *The Advocate*, [Human Rights Campaign activist, Hillary] Rosen worried,

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130. *See* Steve LeBlanc, Mass. Legislature Rejects Proposed Amendment Banning Gay Marriages, Sept. 14, 2005, *available at* http://www.boston.com/news/local/Massachusetts/articles/2005/09/14/lawmakers_convene_constitutional_convention_on_same_sex_marriage/.

131. *See* Yvonne Abraham, *Activists Seek Wider Gay-Marriage Rights: Sticking to Goals Despite Impact on US Election*, BOSTON GLOBE, Nov. 18, 2004, at A14; Pam Belluck, *Setback Is Dealt to Gay Marriage*, N.Y. TIMES, Mar. 30, 2004, at A1; Mary Bonauto & Marty Rouse, *Gay Marriage Is Not To Blame*, BOSTON GLOBE, Nov. 9, 2004, at A15; Michael Kunzelman, *Support Still: Election Favors Rights Backers*, MILFORD DAILY NEWS, Nov. 7, 2004.

132. *See* Abraham, *supra* note 131; Bonauto & Rouse, *supra* note 131; Kunzelman, *supra* note 131.

133. Kunzelman, *supra* note 131.

> "This election may have shown us that the change agents for gay marriage are looking too much like a noisy red Ferrari speeding down quiet Main Street." But in Massachusetts, they now look more like an SUV with two parents, a kid, and a golden retriever on a quiet suburban street.[134]

As for the electoral outcome in Massachusetts, all Massachusetts legislators supporting same-sex marriage were re-elected.[135] By contrast, three legislators who supported the proposed constitutional amendment banning same-sex marriage lost their seats.[136] Furthermore, legislators opposed to the constitutional ban won six of the eight open seats.[137] Many of those politicians who supported the amendment were returned to office with smaller margins than those who supported same-sex marriage.[138] Finally, the Massachusetts voters elected a new House Speaker, Salvatore DiMasi (D-Boston), who supports same-sex marriage.[139] These results indicate that voters in Massachusetts either approved of legislators' support for same-sex marriage or that the issue simply was no longer salient and influential enough to determine their votes.

The proposal to amend the state constitution to ban same-sex marriage was the primary sign of a potential for backlash within Massachusetts.[140] Support for the amendment has dissipated, and is only likely to weaken with time, as same-sex marriage becomes more established. Voters and legislators alike appear to be accepting same-sex marriage; the *Goodridge* strategy has therefore been successful within Massachusetts. Whether that success has come at the cost of approval of same-sex marriage elsewhere in the country is addressed next.

B. The Effect of Goodridge *on the Nation*

So far, this analysis has shown that the strategies the Massachusetts justices used to mitigate opposition to their rulings were largely

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134. Ellen Goodman, *Must Gay Rights Wait for Our 'Comfort'?*, BOSTON GLOBE, Dec. 16, 2004, at A23.

135. *See* Bonauto & Rouse, *supra* note 131.

136. *See* Kunzelman, *supra* note 131.

137. *See* Bonauto & Rouse, *supra* note 131.

138. *See id.*; Kunzelman, *supra* note 131.

139. *See* Kunzelman, *supra* note 131.

140. Most other actions, such as a proposal to remove the judges who formed the majority in *Goodridge*, seem largely symbolic. *See* Jules Crittenden, *Goal: Oust Gay-Wed Judges*, BOSTON HERALD, Mar. 28, 2004, at 4. The only substantive setback to the same-sex marriage movement in Massachusetts, other than the proposed constitutional amendment, was Governor Romney's determination to use a 1913 law to prohibit the same-sex marriages to non-Massachusetts residents. *See* MASS. GEN. LAWS. Ch. 207, § 11 (1913). This prohibition was recently upheld by the Supreme Judicial Court. *See* Cote-Whitacare v. Dep't of Pub. Health, No. SJC-09436, 2006 WL 786227, at *18 (Mass. Mar. 30, 2006).

successful in Massachusetts. Many reports, however, suggest that *Goodridge* was responsible for a backlash against same-sex marriage throughout the rest of the nation.[141] If true, this arguably undermines the justification for the use of remedial delay in *Goodridge*, that of paving the way for greater acceptance of same-sex couples exercising their constitutional rights. This Part answers two empirical questions. First, did judicially imposed same-sex marriage cause a political backlash in the nation more broadly? Second, in particular, did the Massachusetts decisions in *Goodridge* and *In re Opinions of the Justices to the Senate* determine the outcome of the presidential election in 2004?

In the wake of the 2004 presidential election, the immediately prevailing consensus of political commentators was that the candidates' contrasting positions on "moral values," a term largely taken to mean same-sex marriage, determined the outcome of the election.[142] More specifically, the common belief was that *Goodridge* and other developments resulting in same-sex rights caused conservative voters to rush to the polls, giving George W. Bush and the congressional Republicans the election win in 2004.[143] Given the President's preference for a constitutional amendment banning same-sex marriage, this line of reasoning suggests that *Goodridge* may have actually harmed the prospects for implementation of same-sex marriage at the national level. Additionally, on election day, eleven states passed constitutional amendments prohibiting same-sex marriage.[144]

This Part challenges the orthodoxy that same-sex marriage determined the election by critically analyzing polling data. Within hours of the election, political pundits had developed erroneous sound bites summarizing the election, based on a superficial examination of a poorly worded exit poll.[145] Despite the emergence of evidence to the contrary, the initial characterization of same-sex marriage's electoral effect has stuck, but same-sex marriage probably had only a minimal effect on the outcome. Similarly, the significance of the several successful state constitutional amendments banning same-sex marriage is

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141. *See, e.g.*, *Moral Values: A Decisive Issue?*, CBSNEWS.COM, Nov. 3, 2004, http://www.cbsnews.com/stories/2004/11/03/60II/main653593.shtml.

142. *See* Adam Nagourney, *"Moral Values" Carried Bush, Rove Says*, N.Y. TIMES, Nov. 10, 2004, at A3.

143. *See* Debra Rosenberg & Karen Breslau, *Culture Wars: Winning the 'Values' Vote*, MSNBC.COM, http://msnbc.msn.com/id/6401635/site/newsweek; Jack Torry & Jonathan Risking, *DeWine Wants To Ban Gay Unions: Republican Now Backs Amending Constitution*, COLUMBUS DISPATCH, Mar. 31, 2006, at 1A.

144. *See* Sarah Kershaw et al., *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States*, N.Y. TIMES, Nov. 2, 2004, at P1.

145. *See* David Brooks, *The Vote-Values Myth*, N.Y. TIMES, Nov. 6, 2004, at A6; Gary Langer, *A Question of Values*, N.Y. TIMES, Nov. 6, 2004, at A19.

more complicated than has been portrayed by the media. Although the media has emphasized that all eleven states contemplating amendments passed them overwhelmingly,[146] this does not herald a backlash because these states *already* opposed same-sex marriage. A majority of Americans, however, still favor some legal recognition and protection of same-sex relationships. Nationally, 21% support same-sex marriage and an additional 32% support civil unions; only 43% oppose both.[147] I deal first with the state amendments issue.

The election day passage of constitutional bans of same-sex marriage by eleven states and the passage of two previous state bans in 2004 has been characterized as signaling a backlash against same-sex marriage on two fronts.[148] The first claim is that the state amendments *themselves* constituted a backlash against same-sex marriage. The second claim is that the state amendments brought conservative voters to the polls in far greater numbers than would otherwise have occurred, and thus constituted the mechanism by which the Republicans won the election on the back of the same-sex marriage issue. Despite the popularity of these conclusions, they are both flawed.

The constitutional amendments have had both practical and symbolic ramifications for same-sex couples. Practically, the entrenchment of constitutional same-sex marriage prohibitions will be harder to overcome than legislative restrictions, although some have since been struck down by the courts. Additionally, many of the bans prevent not only same-sex marriage and civil unions, but many contractual arrangements that same-sex couples use to protect their loved ones.[149] Symbolically, the constitutional amendments are also significant for the hostility they publicly represent towards the rights of gay couples. Just as the symbolic power of the *Goodridge* court's recognition of same-sex marriage mattered to individual liberty and equality, the symbolic power of the constitutional amendments matters as well.

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146. *See* Kershaw et al., 144.

147. The Gallup Organization, *Homosexual Relations*, GALLUP POLL NEWS SERV., Nov. 19-21, at 12 [hereinafter *Homosexual Relations*].

148. *See* Pam Belluck, *Maybe Same-Sex Marriage Didn't Make the Difference*, N.Y. TIMES, Nov. 7, 2004, at 5. The eleven states that passed constitutional bans on same-sex marriage on election day in 2004 were Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, Ohio, Oklahoma, Oregon, North Dakota, and Utah. *See* Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39. Additionally, Louisiana and Missouri had previously passed marriage bans. *See id.* Louisiana's amendment was initially ruled invalid due to flaws in its wording, but the Louisiana Supreme Court subsequently reinstated the amendment in January 2005. *See* Forum for Equal. PAC v. McKeithen, 893 So.2d 715, 716, 720 & n.12, 729-37 (La. 2005).

149. *See, e.g.*, Associated Press, *Judge Voids Same-Sex Marriage Ban in Nebraska*, N.Y. TIMES, May 12, 2005, at A4.

The timing of the state constitutional amendments is taken as clear-cut evidence of the backlash effect of *Goodridge*.[150] Even some same-sex marriage advocates have blamed the constitutional amendments on *Goodridge*, claiming the case "generated a backlash of ballot questions across the country that was inevitable and should have been expected."[151] All of the proposed constitutional amendments passed by large margins.[152] Even Oregon, considered by most to be a more liberal state, passed the constitutional amendment by almost sixty percent.[153] But there are three reasons why both the practical and symbolic ramifications of the state constitutional amendments are not as significant as they seem. First, the amendments do not represent a significant change in sentiment in the states in which they were passed. Second, they are not representative of the views of the nation. Third, they are not clearly a result of *Goodridge* decision.

The first weakness of the amendments-as-backlash claim is that while the "clean sweep" of the amendments has been strongly emphasized, the states proposing constitutional amendments are not a representative sample of states of the Union.[154] With the exception of Oregon, all of the states passing constitutional amendments already had both exclusively heterosexual definitions of marriage, as well as state defense of marriage provisions, under which the states refuse to recognize out of state same-sex marriages.[155] Even within the states that passed constitutional amendments prohibiting same-sex marriage, there was no backlash, because those states already embraced the view the amendments expressed. Only in Oregon was there any change in views or the applicable law. The significance of this change is considered in the following sub-Part. The populace of the other twelve amending states did not oppose same-sex marriage because of *Goodridge*, they merely felt greater need to express their preexisting sentiment. Of course, a constitutionally enshrined ban on same-sex marriage in a given state is a greater setback to the prospects of legalization of the right than is mere legislation. However, the short- and medium-term practical

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150. *See, e.g.*, Joan Vennochi, *Was Gay Marriage Kerry's Undoing?*, BOSTON GLOBE, Nov. 4, 2004, at A15. Vennochi stated that Massachusetts' "activist judges inspired ballot questions seeking to prevent the same type of judicial activism elsewhere. On [e]lection [d]ay, voters in [eleven] states approved constitutional amendments banning same sex marriages. It was a clean sweep for proponents of traditional marriage." *Id.*

151. Abraham, *supra* note 131 (quoting Arline Isaacson of the Massachusetts Gay and Lesbian Political Caucus).

152. *See* Kershaw et al., *supra* note 144.

153. *See id.*

154. *See* Vennochi, *supra* note 150.

155. *See* Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, Nov. 3, 2004, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576.

effects of the amendments are minimal, since same-sex rights were already substantially curtailed in these states. The level of support for the amendments suggests that no state legislative change would have established those rights any time in the foreseeable future.

The second weakness is that, despite the "clean sweep" of the amendments, the states constitutionally banning same-sex marriage is not indicative of the national prospect for legalization of same-sex marriage. Developments in other states show much more promise for the future of same-sex marriage. New Mexico, New York, Rhode Island and Connecticut have all maintained nongender specific definitions of marriage.[156] Additionally, officials in New York, Rhode Island, and Connecticut have stated their intent to recognize same-sex marriages performed outside of their states.[157] Also, California, the District of Columbia, Hawaii, Maine, and New Jersey have joined Vermont in offering some of the benefits of marriage to same-sex couples.[158] These states may also be unrepresentative, as they are at the "other end" of the spectrum on same-sex marriage. The best indication of the prospects for national acceptance of same-sex marriage comes from national polling data. Two pieces of information are important. First, the proposed federal constitutional amendment lacks popular support and has yet to be passed in Congress.[159] Second, as discussed above, even after the 2004 elections, a majority of voters polled supported some sort of recognition of same-sex relationships, with 21% supporting same-sex marriage and

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156. *See* N.Y. DOM. REL. LAW §§ 1-7 (McKinney 2005); CONN. GEN. STAT. ANN. §§ 46b-20-34 (West 2005); N. M. STAT. ANN. §§ 40-1-1-9 (West 2005); R.I. GEN. LAWS § 15-1-1 (2005).

157. *See* Sarah Schweitzer & Donovan Slack, *R.I., Conn. Attorneys General Expected To Decide on Mass. Nuptials*, BOSTON GLOBE, May 17, 2004, at B5; Human Rights Campaign, Recent Developments in Massachusetts, *available at* http://www.hrc.org. In Washington, same-sex marriage recognition has been the subject of ongoing litigation. In *Anderson v. King County*, a state superior court held that the statute prohibiting same-sex marriage denied substantive due process rights and violated the privileges and immunities clause of the Washington Constitution. *See* No. 04-2-04964-4-SEA, 2004 WL 1738447, at *7 (Wash. Super. Ct. Aug. 4, 2004). Similarly, in *Castle v. State*, a state superior court held that the state's defense of marriage act violated the privileges and immunities clause of the Washington Constitution. *See* No. 04-2-00614-4, 2004 WL 1985215, at *14-17 (Wash. Super. Ct. Sept. 7, 2004).

158. Maine has enacted legislation creating domestic partner relationships. *See* 2004 Me. Legis. Serv. 672 (West). New Jersey has also enacted laws recognizing domestic partners. *See* 2003 N.J. Sess. Law Serv. 246 (West). Hawaii's Reciprocal Beneficiaries law provides state residents who are unable to marry many of the benefits and protections of marriage. *See* HAW. REV. STAT. ANN. §§ 572C-4 to -5 (LexisNexis 2005). In California, the updated domestic partner law provides registered partners with a wide variety of benefits, including rights to community property and support after separation. *See* CAL. FAM. CODE §§ 297-298 (West 2005). In the District of Columbia, domestic partners have the right to certain workplace and healthcare protections. *See* D.C. CODE ANN. §§ 32-702 to -06 (LexisNexis 2005).

159. A majority of those polled disapproved of the proposed federal constitutional amendment to ban same-sex marriage. *See* Adam Nagourney & Janet Elder, *Americans Show Clear Concerns on Bush Agenda*, N.Y. TIMES, Nov. 23, 2004, at A1.

an additional 32% supported civil unions; only 43% opposed both.[160] Combined, this data shows that the thirteen states that passed same-sex marriage bans in 2004 are not representative of the direction of the nation as a whole in its response to same-sex marriage. The amendments serve to emphasize the sentiment of one section of the public, a sentiment that existed prior to *Goodridge*, rather than indicating a national trend. As such, even the symbolic effect of the amendments has also been overplayed.

The third weakness in the argument that state constitutional bans were a backlash against *Goodridge* is that the two Massachusetts cases were not the only potential catalysts for the state constitutional amendments. In 2004, officials in San Francisco, California and Portland, Oregon began marrying same-sex couples, with thousands of same-sex marriages taking place in each state.[161] Some politicians, including Senator Dianne Feinstein (D-California), claimed that it was these official actions that agitated people into supporting same-sex marriage bans.[162] It is arguable that these events were inspired by the decision in *Goodridge*; however, in 2003, when the Supreme Court held anti-sodomy laws unconstitutional in *Lawrence v. Texas*, Justice Scalia claimed that *that* ruling heralded the inevitable legalization of same-sex marriage.[163] This is not to deny that *Goodridge* likely contributed to the

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160. *See Homosexual Relations*, *supra* note 147, at 12. Additionally, a Witeck-Combs study of same-sex marriage's effect on the 2004 election noted numerous other electoral effects that indicate growing tolerance of homosexuality. The U.S. electorate

> [v]oted in many races to elect and re-elect openly gay candidates throughout the nation; [e]lected or re-elected all six LGBT candidates running for legislative offices in California; [e]lected open lesbians to North Carolina's state senate, to the Idaho state house and to the Missouri state house; [e]lected the first ever open lesbian Latina as sheriff in Dallas County, Texas; [r]e-elected every Massachusetts lawmaker on the ballot, Democrat and Republican, gay and straight, who supported gay rights; and [e]nacted a ballot measure in Cincinnati *to repeal* a law that prevents the city from passing legislation to protect gays and lesbians from discrimination—this favorable result in a state that also adopted a state constitutional ban on same-sex marriage.

Gay Issues and the 2004 Election, Directions for the Marketplace, WITECK-COMBS COMMUNICATION, Nov. 5, 2004, at 2.

161. *See* Ryan Kim & Nanette Asimov, *The Battle over Same-Sex Marriage; Out-of-Towners Leap at Chance To Wed in San Francisco*, S.F. CHRON., Feb. 15, 2004, at A17; Matthew Preusch, *Oregon County, with Portland, Offers Same-Sex Marriage*, N.Y. TIMES, Mar. 4, 2004, at A26.

162. *See* Carolyn Lochhead, *Gay Marriage: Did Issue Help Re-Elect Bush?*, S.F. CHRON. Nov. 4, 2004, at A1.

163. As Justice Scalia stated in his dissent:

> The Court today pretends that it . . . need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada . . . [T]he Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought

motivations behind the constitutional amendment proposals, or that many voters may have had Massachusetts marriages in mind when voting on the amendments; however, this analysis shows that the *Goodridge* decision was part of a national and international change taking place in how the law deals with same-sex relations.[164]

Thus, contrary to popular media portrayals, state constitutional amendments, in and of themselves, constitute an ambiguous signal of the future prospects of same-sex marriage. However, the state constitutional amendments were also popularly characterized as providing a secondary blow to same-sex marriage: the amendments were said to have drawn conservative voters to the polls, providing the requisite margin of victory for George W. Bush and the Republicans in the United States House of Representatives and Senate.[165] Political pundits and conservative advocacy groups now claim that "[t]he 2004 election . . . energized social conservatives with an overwhelming mandate on traditional marriage and abortion."[166] Certainly, evangelical leaders claimed that the state amendments gave evangelical voters an extra incentive to turn out and vote.[167] The strategy of Republican political advisor Karl Rove was to mobilize the "missing" evangelical Protestants who did not turn up for

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> displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct . . . and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution?"

539 U.S. 558, 604-05 (2003) (citations omitted) (Scalia, J., dissenting). Similarly, Eugene Volokh argues that Vermont's prior legislative recognition of other gay rights set up a "slippery slope" that lead to the establishment of civil unions. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1077-1134 (2003).

164. Same-sex marriage is now legal in Belgium, Canada, the Netherlands, Spain, and recently, South Africa. *See* Michael Wines, *Same-Sex Unions To Become Legal in South Africa*, N.Y. TIMES, Dec. 2, 2005, at A12.

165. *See, e.g.*, James Dao, *Same-Sex Marriage Issue Key to Some GOP Races*, N.Y. TIMES, Nov. 4, 2004, at P4; Michael Tackett, *Moral Issues Swayed Voters; Worries About Iraq, Economy Overshadowed*, CHI. TRIB., Nov. 3, 2004, at C3.

166. *See* Press Release, *Election Sweep Brings Marriage and Morals Mandate*, Liberty Counsel, Nov. 3, 2004, http://www.lc.org/pressrelease/2004/nr/10304.htm.

167. *See, e.g.*, Elizabeth Bumiller, David M. Halbfinger & David E. Rosenbaum, *Turnout Effort and Kerry, Too, Were G.O.P.'s Keys to Victory*, N.Y. TIMES, Nov. 4, 2004, at A1.

the 2000 election, and he even claimed success on this basis.[168] These claims, however, are not empirically supported. For example, proponents of the argument point to a poll that shows that five percent of voters in Michigan "said the ballot measure [proposing a same-sex marriage ban] was the predominant reason they voted."[169] However, not only did Democratic presidential candidate Senator John Kerry (D-Mass.) win in Michigan, one of the three "battleground states" with constitutional amendments on the ballot (Michigan, Ohio, and Oregon), Kerry did better in percentage terms than did former Vice President Al Gore in 2000.[170] Also, although President Bush improved his margin in East Coast states such as New York, Connecticut, and even Massachusetts, he did not gain significantly in any of the eleven states with gay marriage amendment proposals on the ballot.[171] Upon an examination of polling data, rather than anecdotal evidence, Andrew Kohut of the Pew Research Center concluded: "there was no disproportionate surge in the evangelical vote this year. Evangelicals made up the same share of the electorate this year as they did in 2000."[172] There was also no statistically significant difference in popular support of President Bush between voters in states proposing same-sex marriage bans (57.9%) and those that were not (50.9%).[173] The insignificance of the differences between these figures is highlighted by the significance of other factors, including the characterization of a state as a "battleground state," which affected turnout by 7.5%.[174] Similarly, while President Bush's electoral returns were 7% higher in states with constitutional amendment proposals, they were in fact 7.3% higher in 2000, "when same-sex marriage was but a twinkle in the eye of the Massachusetts Supreme Judicial Court."[175]

Although state constitutional amendments do represent a setback to same-sex marriage, by entrenching preexisting legislative prohibitions into foundational state law, they do not represent the drastic backlash

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168. Mr. Rove claimed that opposition to gay marriage is "one of the most powerful forces in American politics today and that politicians ignored at their peril." Nagourney, *supra* note 142; *see also Back to Basics: George Bush Wins*, ECONOMIST, Nov. 6, 2004, at 23 (detailing the efforts of Republican campaign strategists to ensure the election of George W. Bush).

169. Dao, *supra* note 165.

170. *See* Belluck, *supra* note 148; Goodman, *supra* note 134.

171. *See* Brooks, *supra* note 145.

172. *Id.*

173. *See* Paul Freedman, *The Gay Marriage Myth: Terrorism, Not Values, Drove Bush's Reelection*, SLATE, Nov. 5, 2004, http://slate.msn.com/id/2109275 (stating that "by a statistically insignificant margin, putting gay marriage on the ballot actually reduced the degree to which Bush's vote share in the affected states exceeded his vote elsewhere").

174. *See id.*

175. *Id.*

commonly portrayed in the media. More starkly, the amendments had no significant effect in bringing conservatives to the polls on election day. There was, however, another element to the argument that the decisions in *Goodridge* and *In re Opinions of the Justices to the Senate* constituted a backlash, by having determined the outcome of the 2004 presidential election. In contrast to the weak anecdotal basis for other claims of a same-sex marriage backlash, this line of reasoning was based squarely on polling data.

The argument that same-sex marriage directly won President Bush the 2004 presidential election was that voters based their choice primarily on same-sex marriage, and Bush won because of his opposition to the practice. This claim hinges upon a poll result that 22% of those polled on election day named "moral values" as the most critical issue in making their decision; additionally, polls showed that President Bush was supported by 80% of those who listed "moral values" as their top concern.[176] There are many problems with reliance on these two pieces of data. The spuriousness of conclusions based on the second result can be dealt with quickly. The fact that 80% of voters who cared about "moral values" voted for Bush does not show any causation between same-sex marriage as an issue and Bush's electoral success, as those 80% were likely to have voted for Bush anyway. Just as voters in states inclined to vote for Bush are also inclined to oppose gay marriage, as discussed above, voters who are opposed to same-sex marriage are likely to have voted for Bush regardless of his position on same-sex marriage.

Only 8% of those who voted for President Bush believed that same-sex couples should be allowed to marry, compared to 32% of those who voted for Senator Kerry.[177] Those who voted for Bush were also more likely than those who voted for Kerry to believe that government should promote traditional values (75% to 33%)[178] and more likely to completely agree that the President's religious faith is important (60% to 34%).[179] All of these issues are correlated: voters' views on religion, same-sex marriage, abortion and other social issues tend to be similar, as

176. *See* The Gallup Organization, *Bush Voters Support Active Government Role in the Values Arena*, GALLUP NEWS SERV., Nov. 29, 2004, http://poll.gallup.com/content/default.aspx?ci=14158

177. *See Poll: America's Cultural Divide*, CBSNEWS.COM, Nov. 22, 2004, http://www.cbsnews.com/stories/2004/11/22/opinion/polls/main657068.shtml.

178. *See Bush Voters Support Active Government Role in the Values Arena*, *supra* note 176.

179. Pew Forum on Religion and Public Life, *But Stem Cell Issue May Help Democrats: GOP the Religion-Friendly Party*, PEW RES. CENTER, Aug. 24, 2004, at 8, *available at* http://www.pewforum.org/docs/index.php?DocID=51.

is their likelihood to favor Bush over Kerry.[180] As such, the fact that eighty percent of voters who listed "moral values" as a key determinant of their decision to vote for President Bush tells us little of how they would have voted *but for* the issue of same-sex marriage having such prominence. The only information on that particular question is data indicating that a similar percentage of Bush supporters saw "moral values" as equally important in 2000 as they did in 2004.[181] So voters' views on moral values have not changed as a result of *Goodridge*, and thus the eighty percent figure means little.

The other result, that twenty-two percent of polled voters based their decision on "moral values," is equally misleading, but for more complicated reasons. There are three interrelated problems with interpreting the significance of this figure. First, "moral values" is an overly broad category that stood in stark contrast to the other options available to the poll respondent, and thus was more likely to be chosen. Second, "moral values" is a term that means different things to different people, and is not equivalent with same-sex marriage, and so cannot be equated. Third, the "moral values" response was prompted by questioning, and other results show that the response would not have been given voluntarily. Each of these three problems is explored in turn.

Polled voters had a range of seven options to choose from to describe what was most important in determining their vote.[182] However, unlike the term "moral values," which is a broad category covering many issues, the other six options were specific and narrowly tailored: taxes, education, Iraq, terrorism, the economy and jobs, and health care.[183] Gary Langer, Director of Polling for ABC News, which ran the poll in question, predicted the problems with this question when it was first proposed and unsuccessfully opposed its use. He explained the problem:

> Six of [the response options] are concrete, specific issues. The seventh, moral values, is not, and its presence on the list produced a misleading result. . . . While morals and values are critical in informing political judgments, they represent personal characteristics far more than a discrete political issue. Conflating the two distorts the story of [the election].[184]

Andrew Kohut of the Pew Research Center agreed, calling the conclusion that moral values mattered most in vote choice misleading:

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180. *See id.* at 4-17, 20-26.
181. *See* Freedman, *supra* note 173.
182. *See* Langer, *supra* note 145.
183. *See id.*
184. *Id.*

the fact that moral values was a catchall phrase made it appealing and so ambiguous as to encompass a wide variety of election year issues.[185]

One reason the moral values exit poll result is misleading is that the term "moral values" means different things to different people. One poll asked voters "what comes to mind when you think about 'moral values'?"[186] Forty-four percent of those who chose moral values as most important from a list of seven issues defined the term to mean social issues broadly, and only twenty-nine percent believed it referred to issues of homosexuality and gay marriage.[187] Many other social issues were included, such as abortion as well as poverty, and economic inequality.[188] Twenty-three percent of respondents defined moral values as referring to the personal characteristics of the candidates, including honesty, integrity and religiosity.[189] Thus, the breadth of the "moral values" category makes it impossible to ascertain how much of voter sentiment about moral values related to responses to same-sex marriage.

The breadth of the "moral values" category also makes it an unreliable indicator of the strength of voter sentiment on moral values. If voters had been given a range of options that were similar in breadth, the results are likely to have been very different. For example, if the responses that listed Iraq and terrorism as most important were combined as a general "international security" category, which would be much more akin to the broad "moral values" category, this category would encompass thirty-four percent of responses, considerably more than the category of "moral values."[190] This simple additive approach is not reliable, because it cannot be assumed that respondents' answers would have remained the same under this different label. The words "Iraq" and "terrorism" may evoke stronger emotional responses than simply "security." However, subsequent polls have undertaken the task of determining how moral values would have fared against other broad category choices. The polls offered respondents three simple choices to describe which factor was most important in their vote: national security, economic issues or moral issues. When competing with other similarly broad categories, moral issues came in third of the three choices, at 24%,

185. *See* Peter Steinfels, *Voters Say Values Matter, but It's Important To Find Out What Reality Is Behind This Convenient Catchall*, N.Y. TIMES, Nov. 6, 2004, at A15.

186. *See* Report, Pew Research Center for the People and the Press, *Voters Like Campaign 2004, but Too Much "Mud Slinging"*, Nov. 11, 2004, http://people-press.org/reports/display.php3?ReportID=233.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See* Steinfels, *supra* note 185.

behind national security at 32%, and economic issues at 37%.[191] Without a theory as to why voters would systematically underestimate the influence of moral values three weeks after the election, this result would seem to comprehensively rebut the claim that moral values determined the election. In fact, this poll probably underestimates the divergence between reality and the misleading initial poll of 22% deciding on moral values. Because of the enormous media attention given to the conclusion that moral values were determinative, if anything, we should expect that moral values would be cited *more* in retrospect, because the entire post-election analysis was framed in those terms.[192]

This raises the third problem with the exit poll data showing moral values was strongly determinative of electoral votes: the question did not allow respondents to volunteer their own opinions, but instead prompted the respondent to choose from a prefabricated list. Prior to the election, surveys asked open-ended questions that allowed respondents to volunteer the issues of importance to them, without prompting; responses relating to moral values were consistently in the low single digits.[193] An October survey found only 1% of respondents independently mentioned moral values.[194] One Pew study directly tested the effect of prompting: it found 27% of voters chose moral values from a list of seven items as most important, but only 9% volunteered it in an open-ended question.[195] "Specific social issues—including abortion, gay marriage and stem cell research—were volunteered by 3%."[196] Once again, this is despite the fact that the election acts as a background prompt. Given the subsequent results and the three weaknesses of the exit poll data, it is safe to conclude that the result that 22% of votes hinged on moral values is entirely unreliable.

Even of those persons voting on moral values, estimated by more reliable surveys to be in the low single digits, only a fraction of those specifically meant same-sex marriage. As such, the claim that same-sex

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191. *See Poll: America's Cultural Divide*, *supra* note 177.

192. *See* Sheryl Gay Stolberg, *Democrats Getting Lessons in Speaking Their Values*, N.Y. TIMES, Feb. 11, 2005, at A20. In response to this framing effect, Democratic strategists are reframing their platform in terms of values language. *See id.* The Democrats are stressing that instead of "below the waist" morality, values can be defined to include such programs as better schools, access to health care, legal justice and environmental responsibility. *See id.*

193. *See* Langer, *supra* note 145, at A19.

194. *See* Jim Rutenberg & David D. Kirkpatrick, *Poll Question Stirs Debate on Meaning of "Values"*, N.Y. TIMES, Nov. 6, 2004, at A13 (quoting Humphrey Taylor, Chairman of the Harris Poll).

195. *See* Tim Rutten, *Regarding Media Tim Rutten; Sudden Focus on "Moral Values"*, L.A. TIMES, Nov. 13, 2004, at E1.

196. *Id.*

marriage determined the outcome of the 2004 election can be confidently rejected. Additionally, the fact that thirteen states passed constitutional amendments banning same-sex marriage in 2004 does not mean that a national groundswell has developed against same-sex marriage in the wake of *Goodridge*. Polls consistently show that tolerance of homosexuality is continuing to increase and legal recognition of same-sex unions is still supported by a majority of the populace.[197] The states passing same-sex marriage bans do not represent the direction of the nation. *Goodridge* did not prompt a national backlash against same-sex marriage.

C. Judicial Consideration of Extra-Jurisdictional Effects

The backlash story was grossly overplayed in the media. Tolerance for homosexuality and acceptance of legal recognition of same-sex unions increased after *Goodridge*, and both now have majority support. Additionally, 12 of the 13 states passing constitutional bans already had legislative prohibitions on same-sex marriage. Nevertheless, the state amendments do represent an important effect: parts of the nation had a visceral reaction to *Goodridge* and other pro-same-sex marriage developments. Also, although 12 of the 13 amending states were already opposed to same-sex marriage, the amendments do have some practical and symbolic effects. Finally, the amendment to Oregon's Constitution changes the legal and political landscape for same-sex couples in that state. These changes do not represent a backlash, even in the other amending states. A backlash involves a reversal of a trend towards greater tolerance; instead the amendments constitute a restatement of hostility that already existed. But those sentiments were perhaps reinvigorated. Not all of that re-emergent hostility to same-sex couples can be blamed on *Goodridge* and *In re Opinions of the Justices to the Senate*. The extent of *Goodridge*'s role in the creation or reinvigoration

197. *See Homosexual Relations*, *supra* note 147, at 5, 10-13. Eighty-nine percent of people now consider that "homosexuals should have equal rights in terms of job opportunities," up from 59% in 1982. *See id.* at 5. A majority also feel that "homosexuality should be considered an acceptable alternative lifestyle," up from 34% in 1982. *See id.* at 11. Fifty-two percent think that "homosexual relations between consenting adults" should be legal, up from 45% in 1982. *See id.* at 2-3. Each of these areas showed consistent upward trends, except for in mid-2003, suggesting the effect of the Supreme Court's decision in *Lawrence v. Texas*. *See* 539 U.S. 558 (2003). For example, a majority supported legalization of homosexual relations since early 1999, and only polls taken in July 2003 and January 2004 showed less than majority support for this view, compared to a high of 62% in May of 2003 (62% was the figure in relation to 2 men having consensual sex, 63% was the figure for 2 women, but this is not a statistically significant difference). *See Homosexual Relations*, *supra* at 2-4, 17-18. Similarly, the acceptability of homosexuality as an "alternative lifestyle" dropped below a majority in July 2003 for the first time since 1999. *See id.* at 11.

of those sentiments is difficult to objectively ascertain, but anecdotal evidence and common sense suggests it was significant.

The first half of this Article showed that the *Goodridge* justices considered the practical ramifications of their actions; they delayed providing a remedy in order to shore up support for same-sex marriage, and that strategy was effective. The second half of this Article showed that *Goodridge* was not responsible for the outcome of the 2004 elections or a nationwide backlash against same-sex marriage. But to the extent that it heralded an increase in hostility to gay rights in some regions, does it follow then that the judges should have considered the potential for such repercussions in other jurisdictions? If *Goodridge* and *In re Opinions of the Justices to the Senate* led to substantial protection of marriage rights in Massachusetts, but diminished those rights elsewhere, how should the judges have proceeded? Even if we accept that judges consider the political ramifications of their decisions, should that analysis stop at the geographical boundaries of the judges' jurisdiction, or do they have a responsibility beyond Massachusetts?

These are jurisprudential and normative dilemmas that have no clear answers. The questions are further complicated by the empirical uncertainty over whether the current developments, including the adverse repercussions on gay rights, are an inevitable part of the development of any fundamental rights movement. It is unclear whether the state constitutional amendments banning same-sex marriage represent an irreversible harm to the same-sex marriage movement, or whether they are expected "bumps" on the road in the overall march to rights recognition; just as proponents of the civil rights movement faced riots, lynching and arrest, so too, do proponents of equal marriage rights face the threat of voter intolerance at the polls.

A number of advocates for gay rights argue that the setbacks witnessed in the elections of 2004 are equivalent to the upheaval the civil rights movement faced after *Brown v. Board of Education*.[198] "[The] . . . classic American pattern of civil rights advance[s] . . . [is a] patchwork" of advances, resistance, and regression.[199] Says another:

> There is not more homophobia in America today because of the *Goodridge* decision . . . What is becoming clear is how much homo phobia [sic] previously existed and is just now rising to the surface, and this is

198. *See* 347 U.S. 483, 495-96 (1954).

199. Belluck, *supra* note 148 (quoting Evan Wolfson, Executive Director of Freedom to Marry); Goodman, *supra* note 134. Similar comments, that the election day losses "were part of the cycle seen in any civil rights struggle," were made by members of the National Gay and Lesbian Task Force at their annual convention. Kate Zernike, *Groups Vow Not To Let Losses Dash Gay Rights*, N.Y. TIMES, Nov. 14, 2004, at 30.

> traditional in a civil rights struggle. What they're doing right now is saying, "if you press for equality, there will be repercussions." But the repercussions if we don't press for equality are far greater.[200]

Not all gay rights advocates agree: many have scaled back their offensive litigation, and are pursuing litigation only as defensive strategies, more akin to *Lawrence* than *Goodridge*, out of fear of worsening the public reaction. Much of this reaction stems from the media's mischaracterization of the so-called backlash; but the disagreement among gay advocacy groups also hinges on how to interpret and respond to the adverse public reaction that did occur, particularly the state constitutional amendments. The disagreement is also over whether fear of these adverse responses should prevent active pursuit of same-sex marriage rights now.

This debate is similar to that which ensued in response to *Baker*, over whether civil unions and remedial delay should be accepted as a pragmatic but qualified alternative to same-sex marriage. I argued then that although *Baker* delayed provision of a remedy to those whose rights had been recognized as violated, and although civil unions could not provide all of the rights associated with marriage, the Court's strategy was the best way of achieving its apparent aim of providing substantive protection of same-sex rights. That prediction has been borne out—polling data and popular accounts show that civil unions, which were previously enormously controversial, are now accepted by a majority and "considered a fallback position to gay marriage, even by some conservatives."[201] The *Baker* court brought about substantial, albeit qualified, protection through compromise, utilizing remedial delay. Similarly, *Goodridge* utilized remedial delay and not only brought about substantial improvement of gay rights in Massachusetts, but arguably in the nation overall. Even if those changes were already occurring, the *Goodridge* approach still makes sense, by taking advantage of, or even buttressing, those developments in support of the right the Court had recognized.

To say that the *Goodridge* justices should nevertheless have qualified their judgment in order to avoid a negative reaction in other parts of the country is to ask too much of a state court. Acceptance of an intensely controversial judicial ruling in the state's own jurisdiction, and improved tolerance of the assertion of those rights in the nation overall, must be the high watermark of what we require of judges. To do otherwise, would overly stifle any possibility of social change.

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200. Josh Friedes of the Freedom to Marry Coalition, *quoted in* Abraham, *supra* note 131.
201. Zernike, *supra* note 199.

Also, the intensity of the opposition to same-sex marriage in those states that had an adverse reaction to *Goodridge* can also be an argument for persevering with the development of those rights. As discussed, with the possible exception of Oregon, the thirteen amending states did not backlash, because they never moved forward in recognition of these rights. Those constitutional amendments will be long-lasting; but without some catalyst for change, the preexisting opposition to same-sex marriage rights was unlikely to ever change. It is one thing to compromise and slow down a process bringing dramatic change, as in Vermont; it is quite another to forestall change to accommodate states that are unlikely to respond to compromise measures anyway. To do the former is to pragmatically shore up the substance of rights; to do the latter is to sacrifice rights so as not to stir up preexisting hostility, which is ultimately just pandering.

Remedial delay can be justified because it is temporary; the level of hostility in some of the amending states is so intense that there is no apparent way to bring about gradual and more accepted rights recognition. Given that, the most the *Goodridge* court could ever achieve was to lay the groundwork for acceptance of same-sex rights in Massachusetts, and hope that this will act as an example for the nation.

V. CONCLUSION

Part II showed that the four justifications for remedial delay in *Baker*—those of allowing the court to perfectly tailor the remedy to the limited ruling, deferring to the state legislature, ensuring genuine protections of the rights of a vulnerable minority, and avoiding judicial blame for a divisive outcome—did not apply to *Goodridge*. However, remedial delay in *Goodridge* was not without purpose. Part III showed that by delaying provision of a remedy, and involving the legislature in the legal recognition of the rights of same-sex couples, the Massachusetts Supreme Judicial Court made its eventual imposition of same-sex marriage rights more publicly accepted. Part IV showed that, despite many claims to the contrary, the Massachusetts justices' strategy of tempering public opinion was effective in the long run also, and in the nation more generally.

This Article also emphasized the differences between *Baker* and *Goodridge*, and showed that *Baker*'s justifications did not apply to *Goodridge*. Nevertheless, the pragmatic advantage of remedial delay—to involve the state legislature, and so reduce public opposition to judicial recognition of same-sex marriage—presents elements familiar from *Baker*. First, genuine deference to the state legislature did not

occur in *Goodridge*, as argued above; however, the *Goodridge* court used the appearance of deference to change the public position of the state legislature. The result of its remedial delay, whether intended or not, was to suggest the possibility of civil unions satisfying the constitutional demand, and so to provoke the legislature to propose a civil unions alternative, which in turn aided the court's ultimate ruling.

Second, delay in *Goodridge* did not constitute a trade-off between lower formal recognition of same-sex rights offset by an expectation of greater public acceptance, in contrast to full legal rights coupled with risk of a public backlash, that the *Baker* decision represented. However, the *Goodridge* court may have done one better in providing substantive protection of the rights of a disadvantaged minority. By delaying its remedy, and incorporating the legislature in the remedial process, which reduced public opposition to same-sex marriage, the Massachusetts Supreme court found a way to provide full legal rights and greater public acceptance of those rights. Thus, *Goodridge*'s use of remedial delay constituted a third way of balancing the legal and the practical.

Finally, the *Goodridge* court provided the substantive right to same-sex marriage itself, and thus did not use the full extent of *Baker*'s blame-avoidance technique, that of burdening the state legislature with the ultimate responsibility of fashioning a remedy that protects the rights of same-sex couples. However, by delaying the creation of a remedy and instead involving the legislature in the process, which in turn reduced public opposition, the court still lowered its costs. Rather than shifting blame, it reduced blame.

So although the advantages of remedial delay that applied in *Baker* do not directly apply in *Goodridge*, and the most principled doctrinal justification does not apply at all, the judicial tactics employed by the Massachusetts and Vermont courts are similar, and familiar to scholars of judicial behavior. The Massachusetts Supreme Judicial Court used three time-honored judicial strategies: using delay to buy time to ultimately do what the court initially refrained from doing; using deference to ultimately increase the Court's own power,[202] and adapting judicial action to public opinion without kowtowing to it.

This result is interesting from two perspectives. First, it provides insight into judicial motivation and strategy: it reveals a judicial strategy that has been seen in different forms and contexts, but was not immediately recognizable. Second, it highlights a still underappreciated aspect of one of the most controversial contemporary topics: the ongoing disjunction between the recognition of rights and the provision

202. *See* ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

of remedies to same-sex marriage. A recent California case on same-sex marriage[203] illustrates that this division is likely to be ongoing. That case arguably reversed the approach of *Baker* and *Goodridge*, imposing a remedy before the relevant holding. This is a topic for a subsequent article; the pertinent point here is that a precedent of remedial-legal division is being forged in the state courts with minimal scholarly comment, despite the significance and complexity of this development.

Finally, this trend has potential significance beyond its application to the highly salient topic of same-sex marriage. Other courts can be expected to face the doctrinal and practical dilemmas associated with remedial delay, not only in future same-sex marriage decisions, but in other cases that raise intense social issues. As such, the themes identified in this Article have implications for the ways in which courts will deal with other controversial issues, such as assisted suicide, stem cell research, and even terrorism. Predicting how judges are likely to respond to the controversy surrounding these other issues can be greatly aided by an understanding of how judges have utilized remedial delay tactics in same-sex marriage cases, and more broadly, how judges can influence both legislative action and popular opinion.

203. *See* Lockyer v. City of San Francisco, No. S122923, 2004 Cal. LEXIS 2184, at *1 (Cal. Mar. 11, 2004).