

Afterword: The Courts and Social Change

On November 18, 2003, the Massachusetts Supreme Judicial Court (SJC) handed down a decision that has already generated widespread legal and political consequences for lgb people. In *Goodridge v. Dept. of Public Health*, the court held that the state's refusal to marry same-sex couples violated both the Liberty and Equality Clauses of the Massachusetts constitution. On May 17, 2004, as a direct result of *Goodridge*, Massachusetts became the first state in the nation to permit same-sex couples to marry.

If litigation is a match, *Goodridge* was lit above a tinderbox. The decision and its subsequent implementation sparked a veritable explosion of political and legal activity by both proponents and opponents of extending the right to marry to same-sex couples. The battle over *Goodridge* and its meaning is currently playing out in courts, legislatures, and ballot boxes across the nation and will continue to do so for some time. A complete discussion of the legal and political implications of *Goodridge* is beyond the scope of this afterword. But because the case speaks so resonantly to several of the core themes of this book—including the relationship between LOS and POS, the balance between structure and agency, and the promises and limits of legal mobilization as a tactic for achieving social reform—a short discussion of the case and its impact is in order.

Winning *Goodridge*

In 2001, seven same-sex couples sued Massachusetts for the right to marry. *Goodridge v. Dept. of Public Health* was one of several cases filed in the aftermath of the historic decision in Vermont's *Baker v. State*. In fact, Mary Bonauto of GLAD, the lead attorney in *Goodridge*, had been one of the three main attorneys in *Baker*. GLAD saw in *Goodridge* a chance to push the right-to-marry envelope further. Massachusetts shared many of the qualities that made Vermont a friendly venue for lit-

igation. Its judiciary had shown openness to gay rights claims. The SJC's ruling in *Adoption of Tammy* (1993), for example, made Massachusetts only the second state in the nation to expressly authorize a second-parent adoption by a same-sex couple.¹ In addition, the court had a track record of reading Massachusetts's Equal Protection Clause more expansively than the federal Equal Protection Clause.

Furthermore, the state's constitution was difficult to amend. Legislatively generated amendments require approval by both the house and the senate in two successive two-year legislative sessions followed by a simple majority vote at the next regularly scheduled congressional election. Citizen-initiated amendments require signatures from registered voters numbering at least three percent of the vote cast during the most recent gubernatorial election, gathered within a period of about two months, followed by the approval of twenty-five percent of the legislature in each of two successive two-years sessions and then a simple majority vote at the next regularly scheduled congressional election.

Massachusetts was also considered among the most politically tolerant of lgb people. In 1989, for example, the legislature had passed what was then the broadest gay rights law in the nation, outlawing discrimination on the basis of sexual orientation in matters of public and private employment, public accommodations, housing, and education.² Similarly, a 1992 executive order allowed state workers to register as domestic partners for purposes of bereavement leave and visitation rights in state prisons and hospitals. Lgb people were a core Democrat constituency in many areas of the state. In short, Massachusetts seemed one of the most promising states in the nation to pursue a right-to-marry case.

Like most of the marriage challenges preceding it, *Goodridge* lost in the early stages of litigation. The trial court dismissed the case in 2002, finding, among other things, that the state had a legitimate interest in fostering procreation and that restricting marriage to opposite-sex couples was rationally related to that interest. GLAD appealed to the SJC, which agreed to review the lower court's decision.

Bonauto made a bold tactical move during the course of the appeal: in addition to arguing that the state had no rational reason for restricting marriage to opposite-sex couples, she went on to argue that the separate-but-equal status conveyed by civil unions would not satisfy the requirements of the Massachusetts constitution. As she noted during oral argument:

It's certainly the plaintiff's view that the Vermont approach is not the best approach for this Court to take. The reason for that is that when it comes to marriage, there really is no such thing as separating the word "marriage" from the protections it provides. The reason for that is that one of the most important protections of marriage is the word because the word is what conveys the status that everyone understands as the ultimate expression of love and commitment and everyone understands that that spouse of yours has an automatic right to be by your side no matter what the circumstances. I'd also say that creating a separate system just for gay people simply perpetuates the stigma of exclusion that we now face because it would essentially be branding gay people and our relationships as unworthy of this civil institution of marriage.

One danger of this strategy was that it risked alienating justices on the high court who, like many Americans, might be open to the notion of civil unions but unreachable on the question of marriage. And, unfortunately, GLAD had little information about the attitudes of the current SJC justices with respect to gay rights claims. While the SJC had authorized second-parent adoptions by same-sex couples in 1993, only one justice from that case remained on the court. Moreover, six of the seven justices on the *Goodridge* court had been appointed by Republican governors; Republican-appointed judges are somewhat less open to gay rights claims than judges appointed by Democrats (Pinello 2004).

Ultimately, the gamble paid off. By a 4–3 majority, the SJC ruled that Massachusetts had "failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples" (*Goodridge*, 312). Marriage, it said, could no longer be defined as "the union for life of one man and one woman, to the exclusion of all others." The court instead construed civil marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others" (343). The SJC then stayed its decision for 180 days in order "to permit the Legislature to take such action as it may deem appropriate in light of this opinion" (344).

The legislature's initial response was to ask the SJC to clarify whether the creation of Vermont-style civil unions would satisfy constitutional requirements. The SJC asked both sides in to respond to this question. A wide variety of individuals and organizations, including Lambda, filed amicus briefs arguing that civil unions were not an acceptable alternative to marriage; opponents of same-sex marriage filed a small handful of

amicus briefs as well. The SJC's reply came down some two months later in *Opinions of the Justices to the Senate* (2004). By the same 4–3 division, the high court made it clear that opening marriage to same-sex couples was the only constitutionally permissible option.

The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. . . . The bill would have the effect of maintaining and fostering a stigma of exclusion that the [Massachusetts] Constitution prohibits. It would deny to same-sex “spouses” only a status that is specially recognized in society and has significant social and other advantages. The Massachusetts Constitution, as was explained in the *Goodridge* opinion, does not permit such invidious discrimination. (*Opinions of the Justices*, 570, quotation marks in original)

This ruling all but guaranteed that Massachusetts would begin issuing marriage licenses to same-sex couples. Short of refusing to execute the high court's order—and thereby precipitating a major constitutional crisis—the governor had no power to prevent same-sex marriages from occurring. The legislature likewise had no ability to forestall the implementation of *Goodridge*. While it could begin the process of amending the state constitution to reserve marriage to opposite-sex couples if it so chose, such an amendment could not take effect until the end of 2006 at the earliest. And indeed, on May 17, 2004, when the 180-day stay imposed by the SJC expired, Massachusetts became the first state in the nation with an official public policy of recognizing marriages between members of the same sex. By the end of the year, 5,994 same-sex couples had filed marriage licenses with the state, according to unofficial tracking data compiled by the Massachusetts Bureau of Vital Records and Statistics. Rhetoric by some antigay activists notwithstanding, civilization has not collapsed.

Why Massachusetts?

Chapter 7 utilized a comparative case study of marriage litigation in Hawaii, Alaska, and Vermont to argue that similar judicial signals can create dissimilar opportunities for a particular set of disputants because

of systematic differences in the political and legal opportunity structures in which those signals reverberate. *Goodridge* offers us the opportunity to revisit this subject. Massachusetts is the only state in which litigators seeking to open marriage to same-sex couples actually got what they were seeking. Why? What made postlitigation events in Massachusetts play out differently than they had in Hawaii, Alaska, and Vermont? In the following pages, I compare the legal framing of same-sex marriage, access to the formal institutional structures of the law, and the configuration of legal and political elites in Massachusetts and Vermont. Ultimately, I suggest that the central difference between the two states concerned the legal framing of the high court's decision.

Legal Framing of Same-Sex Marriage and Configuration of Judicial Elites

The legislatures in Vermont and Massachusetts were both faced with *faits accomplis*. Massachusetts's *Goodridge* echoed Vermont's *Baker v. State* in ruling that the state-level rights and responsibilities associated with marriage be made available equally to same- and opposite-sex couples. Where *Goodridge* differed from *Baker* is in the mandate given to the state legislature. The Vermont court explicitly declined to order the legislature to open marriage to same-sex couples and indicated that an alternative regulatory scheme such as the establishment of a domestic partnership registry for same-sex couples might well pass constitutional muster. The Massachusetts court, in contrast, appeared to indicate that the only acceptable legislative action was to open marriage to same-sex couples. When asked by the Massachusetts senate to clarify whether the institution of Vermont-style civil unions for same-sex couples would satisfy constitutional requirements, the response from the high court was unambiguous: no.

It is beyond the scope of this afterword to determine precisely why the high courts in Vermont and Massachusetts had different positions on the constitutional adequacy of the separate-but-equal institution of civil unions. It may be that differences in the availability of case law in each state partly explains the divergence in outcomes. It may also be that Bonauto's argument that civil unions were not an acceptable solution managed to capture four justices on the SJC, leading them away from a solution that they might otherwise have deemed acceptable. It may alternately be that the Vermont justices were simply more willing to temper their interpretation of what the law required based on their understand-

ing of what political elites and popular opinion was willing to accept. It is clear that the Vermont Supreme Court was acting strategically in the way it framed its decision. Justice Amestoy's majority opinion shows that the court was cognizant of the political backlash *Baker* might cause, and that it was hoping to defuse that backlash by giving Vermont's legislature the ability to choose whether to extend marriage rights to same-sex couples or develop a parallel institution (see chap. 7). No matter what the impetus for the SJC's ruling, it clearly constrained the alternatives available to the legislature in a way *Baker* did not.

Configuration of Political Elites and Access to the Formal Institutional Structure of the Law

It is difficult to know whether Massachusetts legislators were less open to the possibility of same-sex marriage than Vermont legislators were. It is clear, however, that they were not more open than their Vermont counterparts. Legislative reaction in Massachusetts initially mirrored the reaction in Vermont. Although the wording of *Goodridge* seemed unambiguous, a number of legislators expressed the belief that the 180-day stay imposed by the SJC was in fact a signal to the legislature that, in the words of Governor Mitt Romney (R), "a provision which provided benefits, obligation, rights, and responsibilities, which are consistent with marriage but perhaps could be called by a different name, would be in conformity with their decision" (Phillips and Lewis 2003). The senate moved rapidly to pursue the possibility of civil unions. Within a few weeks, it had crafted a bill and sent it up to the SJC for an advisory opinion clarifying whether the institution of civil unions for same-sex couples would in fact satisfy constitutional requirements. Further legislative consideration of *Goodridge* was tabled pending the high court's decision.

When the SJC quashed the civil union option, however, the legislature actively took up the question of amending the state's constitution to circumvent the high court's ruling. By happenstance, *Opinions of the Justices to the Senate* came down on February 4, 2004, just one week before a constitutional convention was scheduled to begin. (Constitutional conventions in Massachusetts are simply joint meetings of the house and senate in which potential constitutional amendments are discussed.) Although a dozen or so possible constitutional amendments were slated for discussion, the subject of same-sex marriage leapfrogged to the top of the agenda, ultimately becoming the sole focus of the gathering.

The convention was deeply divided, with legislators falling into three

main blocs. House Speaker Finneran (D), an opponent of same-sex marriage, backed an amendment that limited marriage to opposite-sex couples but did not prevent the legislature from providing some statutory benefits to same-sex couples. This bloc was numerically the largest, falling just shy of the votes needed to insure the amendment's passage. The second largest bloc favored implementing *Goodridge*. The final bloc supported Senate President Travaglini's preferred amendment, which would ban same-sex marriage while at the same time creating civil unions (Lewis 2004). Neither Finneran nor Travaglini was able to forge a majority coalition within the two-day time period allotted for the convention. Another day-long convention was scheduled for mid-March.

Intense politicking for votes on all sides occurred during that month. Finneran and Travaglini eventually joined together to back an amendment that would ban same-sex marriages but create civil unions that functioned like marriages for all purposes of state law. This amendment ultimately passed, but not without impassioned debate, several revisions, and not until the end of March, after yet a third constitutional convention had been convened. If the house and senate pass the amendment again during the 2005–6 legislative term, it will go before voters in November 2006.

Political opposition to *Goodridge* was not limited to the legislature. Within hours of the decision's announcement, Governor Romney held a press conference denouncing the ruling and calling for a constitutional amendment to reserve marriage to opposite-sex couples. He fought against implementation of the ruling every step of the way. Immediately after the legislature okayed a proposed constitutional amendment, Romney announced that he would ask the SJC to stay the implementation of *Goodridge* until the November 2006 vote, arguing that too much confusion would result if same-sex couples married and then voters banned such marriages. His intention was stymied, though, when the state's attorney general, whose responsibilities include representing the executive branch in all court matters, refused to transmit Romney's request, saying that the governor lacked valid legal grounds for requesting a stay (Phillips and Burge 2004).

In an attempt to at least limit the number of same-sex couples who could marry, Romney then turned to a 1913 law that prohibited out-of-state couples from marrying in Massachusetts if such a marriage was against the public policy of their home state.³ He ordered municipal clerks not to issue licenses to same-sex couples who resided outside of Massachusetts, since no other state in the nation permitted them to

marry. He likewise ordered the state's Registry of Vital Records and Statistics to refuse to record such marriage licenses.⁴

In sum, the different outcomes in Massachusetts and Vermont cannot be attributed to a more favorable configuration of political elites in the former state. The governor of Massachusetts fought actively against implementing the high court's ruling, using the power of his office to limit the scope of the decision whenever possible. Legislators in both states initially plunked for civil unions, but when that option was foreclosed in Massachusetts, the legislature began the cumbersome process of amending the state's constitution in order to prevent same-sex couples from marrying. Vermont legislators might well have chosen the same route, of course, had the decision in *Baker* not given them the freedom to craft an alternative to marriage for same-sex couples. We will never know.

Marriage vs. Civil Unions

In February 2006, as I write this afterword for the paperback edition, lgb people in Massachusetts find themselves in an unusual position. They live in the only state in the nation that recognizes the right of same-sex couples to marry as a matter of public policy. In many ways, their legal status is analogous to the status of lgb people in Vermont. As with civil unions in Vermont, marriages in Massachusetts entitle same-sex couples to all the state-level benefits and responsibilities accorded to married opposite-sex couples. And like civil unions, those marriages do not currently entitle same-sex couples to any of the myriad of federal benefits and responsibilities allotted as a matter of course to opposite-sex couples. Nor is it clear that same-sex marriages performed in Massachusetts will be recognized by other states.

Given the extent of the legal similarities between civil unions in Vermont and same-sex marriages in Massachusetts, one might wonder why Bonauto and others were so intent on pursuing marriage. The answer is that the institutions differ in two important respects, one involving legal frames and the other involving cultural frames. There is a crucial legal difference between same-sex couples married in Massachusetts and couples joined in civil union. The former, but not the latter, have standing to challenge federal and state laws that fence lgb people out of marriage.

It is likewise clear that the cultural frames surrounding marriage and

civil unions differ significantly. Civil unions are, after all, nothing more than attempts to give same-sex couples the legal status that attaches to marriage *without* giving them the cultural status that attaches to marriage. That the Vermont and Massachusetts legislatures both preferred to design a new, separate-but-equal legal status for same-sex couples rather than allow them to marry is testament to this fact. That people attach different cultural meanings to the two terms is also evidenced in public opinion surveys. A January 2004 Gallup poll, for example, showed that 24 percent of respondents supported legal marriage for same-sex couples while 34 percent supported the establishment of civil unions.⁵

The decision by GLAD to pursue marriage instead of civil unions reflected its awareness of the differences between the two institutions; the organization pursued its goal despite its awareness that winning the right to marry would be more likely to stir a political backlash than winning the right to civil union. In part, it wanted to win the right to marry in Massachusetts because being married would give same-sex couples access to federal court to challenge the constitutionality of DOMA as well as the constitutionality of statewide antimarriage laws. As noted in chapter 5, all things being equal, organized litigators generally prefer to bring cases in federal rather than state courts, because litigating state by state is more time consuming and expensive than litigating in the federal system. A well-executed federal challenge has the potential to disable all state antimarriage laws in one fell swoop.

That said, GLAD, Lambda, and the other members of the Litigators' Roundtable would prefer to *avoid* a federal DOMA challenge for the next several years at least. Their preference is instead to continue filing cases in states perceived to be relatively open to gay rights claims. In Bonauto's words, "I would like the opportunity for states to wrestle with this before we have to go into federal court" (Garrow 2004, 57). In part they are concerned that a hastily brought federal challenge would result in a legal loss, creating an additional hurdle for future litigation. And indeed, several challenges to the constitutionality of the Defense of Marriage Act have already been filed, and all have failed.⁶ They are equally—if not more—concerned that precipitous federal litigation would provoke a massive political backlash. The state-by-state approach, as they see it, would give judges, legislators, and the general public time to get comfortable with the notion of same-sex couples marrying; to realize that, again in Bonauto's words, "the sky doesn't fall" (57). The preferred litigation strategy of Roundtable members reflects their keen awareness of the overlap between legal and cultural frames.

The second reason GLAD chose to pursue marriage rather than civil unions had less to do with the legal differences between the two institutions and more to do with the cultural differences. Bonauto and many of her fellow litigators were frankly upset that the Vermont Supreme Court had stopped short of requiring marriage in *Baker v. State*, instead allowing the legislature to create a separate-but-equal institution for lgb people. Indeed, Beth Robinson, one of the three cocounsel in *Baker*, referred to the day she received news of the Vermont high court's decision as one of the worst days in her life.⁷ The decision, as she saw it, recognized the legal impermissibility of discrimination against same-sex couples but facilitated the continued imposition of social distinctions between same-sex and opposite-sex couples. For all that civil unions inarguably advanced the legal interests of same-sex couples, the different labeling was a symbolic slap in the face, and one that gay rights litigators were determined to address.

Indeed, *Goodridge* was not the only case filed post-*Baker* with the specific intent to secure marriage rather than civil unions or some equivalent separate-but-equal legal status. Lambda had filed *Lewis v. Harris* in New Jersey in 2002. It too argued that marriage—and only marriage—was required under the state's constitution.⁸ *Goodridge* was simply the first case in which the argument prevailed. GLAD's success in turn shifted the LOS surrounding same-sex marriage in a far-reaching fashion.

The Consequences of Winning *Goodridge*

A core premise of the LOS approach is that legal decisions—whether wins or losses—should be understood as creating moments of opportunity for a wide range of legal and political actors operating within their own specific legal and political contexts. These opportunities may or may not be exploited successfully, depending on the actors' particular constraints and capabilities as well as their strategic choices. Courtroom victories, in other words, do not translate inexorably into legal reform; legal reform is contingent on the interaction of a variety of institutional, cultural, and strategic factors. I suggested in chapter 8 that social movement litigation was a metaphorical match: always dangerous, occasionally prone to fizzle out when struck, but also a potentially useful tool. An examination of a few of the most prominent early responses to *Goodridge* reveals both the danger and potential utility of litigation as a tool to achieve social reform.

The Impact of Goodridge in Massachusetts

The most obvious consequence of winning *Goodridge* is that Massachusetts was forced to open marriage to same-sex couples. The case thus gave same-sex couples who reside in the Bay State access to a plethora of legal protections previously unavailable to them; several thousand couples have already availed themselves of those protections. At the same time, winning *Goodridge* so completely—that is, winning the right to marry rather than the rights of marriage—also fomented a legislative backlash in the state. It seems clear that the state legislature would have passed a civil union law without feeling the need to resort to the constitutional amendment process had only the SJC—and by extension GLAD and other gay rights advocates—been amenable to it. Had the amendment become law, lgb people would have had access to a legal status (civil unions) that they did not have prior to *Goodridge*, but at the cost of a new constitutional prohibition against same-sex marriage.

But the proposed amendment did not become law. The same amendment that passed with a narrow majority of 105 to 92 in March 2004 suffered a resounding 157 to 39 defeat in September 2005. There are a number of plausible explanations for the amendment's shifting fortune. According to media reports, the actual marriages of same-sex couples played a central role in the amendment's demise (e.g., Belluck 2005; LeBlanc and Emery 2005; R. Lewis 2005). Some legislators said they became converts to the cause after seeing how the right to marry had positively affected the lives of many families. Others focused on the absence of societal harm accruing from the marriages. Still others expressed concern about creating two classes of lgb citizens: one already married and one unable to marry. The results of the 2004 elections probably also played a role in defeating the amendment. Every legislator who opposed the amendment in 2004 won re-election. Moreover, four legislators who voted for the amendment were replaced by proponents of extending the right to marry to same-sex couples. The election results indicated, at a minimum, that voters did not view the anti-amendment stances of legislators as a reason to vote them out of office and may well have emboldened legislators to reverse their initial positions.

Although the legislative backlash receded quickly, there remains significant political opposition to *Goodridge* in Massachusetts. Not all legislators who voted against the amendment the second time around did so because they favored marriage equality. Some voted no in order to clear the decks for a new, differently worded amendment—one that

would ban all future same-sex marriages without providing any other form of legal recognition for same-sex couples. In contrast to the first amendment attempt, which proceeded via the legislative process, the second attempt is proceeding via the citizen initiative process. As such, it faces a different set of hurdles. Amendment proponents must first gather certified signatures from 65,825 registered voters within a two-month time frame. The proposed amendment must then garner the approval of at least 25 percent of the legislature in two consecutive sessions, followed by a simple majority vote at the 2008 election, in order to become law.

The Massachusetts Family Institute (the sponsor of the new amendment) cleared the first hurdle early in December 2005, submitting approximately 147,000 certified signatures—more than double the number required. Yet the amendment's future is far from certain. It is unclear at this point whether there are fifty members of the legislature willing to support an outright ban on same-sex marriage. It is also unclear whether the Massachusetts citizenry will vote in favor of the amendment if it comes before them in 2008. In a January 2005 survey conducted by the University of Massachusetts, Lowell, 38 percent of voters surveyed said that "gay marriages" should be allowed and that the constitution should not be amended, 21 percent indicated that the constitution should be amended to "ban gay marriage but not civil unions," and 21 percent said that the issue did not matter to them. Only 12 percent believed that the constitution should be amended to ban both gay marriage and civil unions (see table 13).

When voters were given the more limited option of supporting or opposing an amendment to ban same-sex marriage, without reference to civil unions, the results shifted somewhat. The September 2005 State House News Poll found that 52 percent of registered voters in Massachusetts opposed the citizen-initiated ballot measure, while 43 percent supported it. The October 2005 Bay State Poll found a lesser level of support for the measure: 37 percent of registered Bay State voters in that poll supported the citizen-initiated ballot language, while 53 percent opposed it.

The variation in responses suggests that attitudes about marriage and its meaning are in a state of flux in Massachusetts.⁹ Notwithstanding the instability of their attitudes, however, voters in Massachusetts are significantly more supportive of marriage equality than are voters nationwide. As table 13 shows, about half of Massachusetts voters agree that same-sex couples should be allowed to marry, an assessment shared by only a third of voters nationwide.

GLAD and other gay rights advocates hope that the percentage of Bay

TABLE 13. Attitudes about Same-Sex Marriage in Massachusetts and Nationwide (in percentages)

Issue:	Which of the following options does respondent prefer: allowing same-sex couples to marry, allowing same-sex couples to form civil unions but not to marry, or prohibiting legal recognition of same-sex relationships?		
	Marriage	Civil Unions	Neither
Massachusetts Voters			
January 2005 ^a	38	21	12
Voters Nationwide			
April 2005 ^b	20	29	40
November 2004 ^c	25	35	37

Issue:	Does respondent think same-sex couples should be allowed to marry?		
	Yes	No	Undecided
Massachusetts Voters			
October 2005 ^d	53	37	10
September 2005 ^e	52	43	5
Voters Nationwide			
July 2005 ^f	36	53	11
May 2005 ^g	35	50	13

^aThe University of Massachusetts, Lowell, Poll ($n = 403$, $MoE \pm 5$) asked: "As you know, the Massachusetts Supreme Judicial Court legalized gay marriage in May 2004. If you had to pick just one of the following positions, which would it be, would you: allow gay marriage, and do not amend the state constitution; amend the state constitution to ban gay marriage but not civil unions; amend the state constitution to ban gay marriage and civil unions; it doesn't matter to me."

^bThe ABC News/Washington Post Poll ($N = 1,082$, $MoE \pm 3$) asked: "Do you think same-sex couples should be allowed legally to marry, should be allowed legally to form civil unions but not to marry, or should not be allowed to obtain legal recognition of their relationships?"

^cThe Edison & Mitofsky 2004 General Election Exit Poll ($N = 12,219$, $MoE \pm 3$) asked: "Which comes closest to your view of gay and lesbian couples: they should be allowed to legally marry; they should be allowed to legally form civil unions, but not marry; there should be no legal recognition of their relationships."

^dThe Bay State Poll ($n = 503$, $MoE \pm 4.5$) asked: "Do you favor or oppose the proposed amendment to the Massachusetts Constitution that would define marriage as a union between a man and a woman, and thus prohibit gay marriage in the Bay State?"

^eThe State House News Poll ($N = 400$, $MoE \pm 5$) asked respondents to indicate whether they supported or opposed a ballot question that, if approved, "would require state, local, and county governments to license and recognize only those marriages between man and a woman, prohibiting future same-sex marriages but allowing those already established."

^fThe Pew Forum on Religion & Public Life Survey ($N = 1,502$, $MoE \pm 3$) asked: "Do you strongly favor, favor, oppose, or strongly oppose allowing gays and lesbians to marry legally?"

^gThe Boston Globe Poll ($N = 760$, $MoE \pm 3.6$) asked: "Overall, do you approve or disapprove of gay and lesbian couples being allowed to get married?"

Staters supporting marriage equality will rise as same-sex marriages continue to occur and voters realize that, in the words of Senate Republican Leader Brian Lees, “Gay marriage has begun, and life has not changed for the citizens of the commonwealth, with the exception of those who can now marry” (LeBlanc 2005). In other words, gay rights litigators are gambling that same-sex marriage will become normalized in Massachusetts and that this process will allay residual fears about the possible negative consequences of such marriages.

In sum, the impact of *Goodridge* in Massachusetts has largely been favorable to the interests of lgb people, at least to date. Same-sex couples living in Massachusetts now have the right to marry and with it access to a myriad of legal rights and responsibilities. Over 6,500 Bay State couples have already taken advantage of their *Goodridge*-derived ability to marry. The initial legislative backlash has receded and same-sex couples no longer need to fear a constitutional amendment stripping them of their newfound right to marry and substituting in its place the separate-but-equal institution of civil unions. They must still grapple with the threat of a citizen-initiated constitutional amendment that, if successful, would decimate *Goodridge* and erect a constitutional barrier to all future same-sex marriages. However, that amendment has numerous hurdles still to surmount, and legislative and public opinion appears to be trending in the direction of marriage equality. In terms of Massachusetts, then, *Goodridge* illustrates the value of litigation as a tool to effect social reform.

The Impact of Goodridge beyond Massachusetts

As with *Baehr v. Lewin* and *Baker v. State* before it, the impact of *Goodridge* has reverberated far beyond the borders of its home state. The dominoes set into motion by *Goodridge* are still falling, and it is not yet possible to assess the case’s full effect on the larger struggle for gay rights. Even at this early stage, however, it is obvious that *Goodridge* has been the catalyst for widespread mobilization across the nation as supporters and opponents of the decision have used the case as a centerpiece of their efforts to reframe the cultural and legal meaning of marriage.

Among the costs of winning *Goodridge*, the most consequential to date has been this: legislators, governors, and citizens across the nation have sought to insulate their states from the Full Faith and Credit implications of legalizing same-sex marriage in Massachusetts. Within a year of the *Goodridge* decision, thirteen states had amended their constitu-

tions to limit marriage to opposite-sex couples (table 14). Legislatures initiated the amendment process in seven states, while in the other six the amendments were the result of citizen petition drives.¹⁰ This trend shows no sign of abating. Kansas and Texas both voted to amend their states constitutions in 2005. Seven states—Alabama, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin—have scheduled marriage amendments for a vote during 2006.¹¹ Marriage measures are at earlier stages of legislative consideration in several other states including Indiana, where a proposed ballot amendment has made it past the first of two required legislative votes.

It is not surprising that states such as Oklahoma, Mississippi, Texas, and Utah reacted to *Goodridge* by passing constitutional amendments designed to circumvent its holding and deter subsequent litigation; they have a history of general hostility toward gay rights claims. In line with this record of hostility a whopping 86 percent of Mississippi voters supported that state's marriage amendment. It is more troubling that Michigan, Ohio, and Oregon passed antimarriage amendments, and by wide margins. These states have moderately good records on gay rights issues. Yet even in Oregon, widely viewed as a state in which equal marriage activists had a reasonable chance of defeating the amendment, the measure passed by 57 percent. These electoral outcomes bode poorly for advocates of equal marriage rights; no statewide ballot measure designed to prevent same-sex couples from marrying has ever failed (Peterson 2004).

To add injury to insult, none of the amendments either passed or awaiting electoral ratification provides for civil unions as an alternative legal institution for same-sex couples. Worse, eleven of the fifteen measures passed in *Goodridge's* aftermath bar state recognition of *any* formal legal status for same-sex relationships. Ohio's amendment, for example, states the following:

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

It is too early to gauge the impact of these broadly worded amendments, but advocates of gay rights have some cause for alarm. In Michi-

TABLE 14. Anti-Marriage Amendments

Year	State	Origin ^a	For (%)	Amendment Prohibits
1998	Alaska	L	68	Same-sex marriage (SSM)
	Hawaii	L	69	n.a. ^b
2000	Nebraska	C	70	SSM; civil unions; domestic partnership; "other similar relationship" ^c
2002	Nevada	C	70	SSM
2004	Arkansas	C	75	SSM; any identical or substantially similar legal status ^d
	Georgia	L	76	SSM; benefits of marriage ^c
	Kentucky	L	75	SSM; similar legal status ^d
	Louisiana	L	80	SSM; legal incidents of marriage; similar legal status ^d
	Michigan	C	59	SSM; similar union
	Mississippi	L	86	SSM
	Missouri	L	71	SSM
	Montana	C	67	SSM
	North Dakota	C	73	SSM; other domestic union
	Ohio	C	62	SSM; any legal status approximating the "design, qualities, significance or effect" of marriage ^d
	Oklahoma	L	76	SSM; legal incidents of marriage ^e
	Oregon	C	57	SSM
	Utah	L	66	SSM; substantially equivalent legal status
2005	Kansas	L	70	SSM; rights or incidents of marriage
2005	Texas	L	76	SSM; legal status identical or similar to marriage

^aL = legislatively initiated amendment; C = citizen initiated amendment.

^bHawaii's amendment gives the legislature "the power to reserve marriage to opposite-sex couples."

^cProhibitions refer specifically to same-sex couples.

^dProhibitions refer specifically to unmarried couples.

^eProhibitions refer specifically to unmarried couples or groups.

gan, for example, the attorney general issued a legal opinion concluding that the state's newly passed constitutional amendment prohibited state and local governments from granting domestic partnership benefits to their employees, to the extent that the definition of a domestic partner was characterized by reference to the attributes of a marriage.¹² The question is currently being litigated. Lesbian parents in both Ohio and Utah have invoked broadly worded constitutional amendments in an attempt to deny their ex-partners any parental rights to children conceived and raised within the context of an existing same-sex relationship (McDonough 2005; Resnick 2005). Several judges in Ohio have concluded that their state's new amendment makes it unconstitutional to enforce domestic violence laws in the context of unmarried couples (Mabin 2005).

The spate of constitutional amendments passed in *Goodridge*'s shadow illustrates the interdependence of legal and political opportunity structures and lends additional support to the claim that courts issuing decisions too far in the vanguard of social change will find their rulings ignored, evaded, or overturned. One way to construe the impact of *Goodridge* is to say that advancing the legal rights of lgb people in one state has engendered significant damage to the legal interests of lgb people in *fifteen* other states as well as the very real potential for similar damage in *at least eight* other states. Viewed this way, *Goodridge* was clearly a pyrrhic victory.

To make matters even worse from the perspective of gay rights advocates, the existence of constitutional amendments on the ballots of eleven states—including Ohio—in the 2004 presidential election may have facilitated the re-election of George W. Bush. Opinions are mixed. Some scholars have concluded that the existence of those ballot measures did not contribute in any meaningful way to the outcome of the presidential race (e.g., Hillygus and Shields 2005). Others have concluded that the measures did contribute to President Bush's re-election (e.g., G. Lewis 2005). If—and this is a big if—the existence of antimarriage ballot measures did indeed contribute to President Bush's re-election, then *Goodridge* indirectly worsened the legal opportunity structure surrounding gay rights on the federal level. Since his re-election, President Bush has had the opportunity to fill two seats on the U.S. Supreme Court.¹³ The wealth of literature on Supreme Court nominations indicates that Democratic presidents select justices with more liberal jurisprudential visions than do Republican presidents (e.g., Abraham 1999; Yalof 1999). It thus seems highly likely—albeit unknowable—that Bush's choices to fill those seats will be less inclined to view gay rights claims favorably than John Kerry's choices would have been had he won the election.¹⁴

Has *Goodridge* accomplished anything positive on the national stage? Arguably, yes. Of all the early responses to *Goodridge*, the most unexpected was this: in early 2004, San Francisco, Multnomah County, Oregon, and a handful of other localities began issuing marriage licenses to same-sex couples until ordered to desist by courts, state attorneys general, and other authoritative interpreters of state law. San Francisco and Multnomah County were by far the most consequential actors. Together they issued over seven thousand licenses while the other localities issued fewer than one hundred licenses altogether.

A full examination of the reasons why these localities took the actions they did when they did is beyond the scope of this afterword. For the

moment, I simply note that these actions were clearly influenced by *Goodridge*. To take just one example, San Francisco mayor Gavin Newsom (D) was in the audience when President Bush responded to *Goodridge* by opining about the need to protect the sanctity of marriage in his 2004 State of the Union address. Newsom released a press statement decrying Bush's statement within a few days of the address and began consulting with his staff, the NCLR, the ACLU, and others involved in the movement for gay rights about whether it was possible for San Francisco County to begin issuing marriage licenses to same-sex couples.¹⁵ Under his direction, San Francisco began issuing licenses on February 12, 2004, and continued to do so for four weeks, until the California Supreme Court ordered it to desist.

The actions by Newsom and other local officials provided additional ammunition for those seeking to amend state constitutions to bar same-sex marriage, but they also exposed fissures in the prevailing political opportunity structure surround gay rights, indicating a new openness to the argument that same-sex couples were deserving of legal protections. And indeed, legislatures in several states have recently taken unprecedented steps to extend legal protections to the relationships of same-sex couples. In April 2004, Maine created a domestic partnership registry establishing same-sex partners as next of kin for purposes of medical decision-making, funeral arrangements, and inheritance. In May 2005, the Maryland legislature passed a similar measure. The Medical Decision Making Act would have allowed unmarried couples to designate each other as next-of-kin for medical purposes, but the bill was vetoed by the state's Republican governor. In April 2005, the Connecticut legislature passed a civil unions statute that was signed into law by the Republican governor; the measure took effect in October 2005, making Connecticut the third state in the nation to treat same-sex unions as the legal equivalent of opposite-sex marriages. In July 2005, Oregon's state senate passed a civil unions bill as well; that measure died when the house refused to take it up before the end of the legislative session. And in September 2005, the California legislature became the first in the nation to vote to open marriage to same-sex couples, although the bill was subsequently vetoed by the state's Republican governor.¹⁶

I want to be clear that *Goodridge* did not single-handedly spark legislative interest in protecting the relationships of same-sex couples. Legislatures in both California and New Jersey voted to extend an array of legal rights to same-sex couples before *Goodridge* was decided, even though the implementation of both measures took effect after the case

came down.¹⁷ At the same time, it seems evident that marriage litigation created the context for legislative consideration of the legal hurdles facing same-sex couples. Only one state, California, gave serious consideration to the problems faced by same-sex couples prior to the 1999 Vermont Supreme Court decision in *Baker v. State*.¹⁸ Moreover, the legislative votes in Connecticut, Maryland, New Jersey, and Oregon took place in the shadow of state constitutional challenges, as did the marriage vote in California.

Another way to conceptualize the impact of *Goodridge*, then, is to say that it appears to have increased the political palatability of civil unions and other alternative legal mechanisms for providing protections to same-sex couples. In the aftermath of *Baker v. State*, civil unions were at the vanguard of successful lgb claims on the polity. In the aftermath of *Goodridge*, civil unions have become the compromise option. Public opinion polls bolster this perception: support for civil unions consistently outpaces support for marriage (see e.g., table 13).

But while the political palatability of civil unions has increased, interest in entering into them has decreased. Nearly 2,500 same-sex couples entered into civil unions the first year Vermont offered them, 80 percent of them non-Vermonters for whom the value of the license was solely symbolic. The response to civil unions in Connecticut, by contrast, was underwhelming. Clerks across the state saw only a dribble of applicants, if any, during the first month civil unions were offered (Wallheimer 2005). Data about the ratio of out-of-state to in-state applicants are not yet available, but it is evident that couples are not racing to Connecticut to symbolically affirm the worth of their relationships. It seems plausible to suggest that the advent of marriage equality in one state has lessened the appeal of civil unions for same-sex couples, reeking as they do of second-class status even as they provide the state-level rights of marriage to couples in states that honor them.

The SJC's decision in *Goodridge* together with the decision by various localities to issue marriage licenses has also, predictably, engendered a spurt of new right-to-marry litigation. Lambda, the ACLU, and the NCLR jointly filed suit in California, arguing that the state's refusal to allow same-sex couples to marry violated state constitutional guarantees of liberty, privacy, and equality (*Woo v. Lockyer*). Lambda initiated additional lawsuits in Idaho (*Varnum v. Brien*), New York (*Hernandez v. Robles*), and Washington (*Andersen v. Sims*). The ACLU in turn filed right-to-marry cases in Maryland (*Deane and Polyak v. Conaway*) and Oregon (*Li v. Multnomah County*), as well as separate cases in New

York (*Samuels v. New York*) and Washington (*Castle v. State of Washington*). The NCLR filed a marriage challenge in Florida (*Higgs v. Kolhage*). GLAD brought suit in Connecticut (*Kerrigan and Mock v. Connecticut Dept. of Public Health*). Private litigators have also pursued right-to-marry cases in a handful of states.

Several of these cases have already garnered early legal success: trial courts in California, Maryland, New York, and Washington all struck down their state marriage laws, staying their rulings pending appellate review. Lambda's *Andersen v. Sims* has proceeded the furthest to date. The case has been argued in the Washington Supreme Court, and the decision is pending as the updated version of this book goes to press (as is the New Jersey Supreme Court's decision in Lambda's *Lewis v. Harris*).

In addition to proactive right-to-marry cases, organized litigators have also involved themselves in several marriage suits that seek to overturn newly passed amendments rather than to establish legal recognition of same-sex relationships. The most consequential of these cases to date has been *Citizens for Equal Protection v. Bruning* (2005), brought jointly by Lambda and the ACLU. In May 2005, a federal district court struck down Nebraska's constitutional amendment, ruling, among other things, that the amendment imposed impermissible burdens on the expressive and intimate associational rights of lgb people as well as impermissible burdens on the ability of lgb people to participate in the political process. The ruling is under appeal as this edition goes to press.

It is quite clear at this point that marriage will be at the center of gay rights litigation for the foreseeable future, in both its proactive and reactive form. Whether such litigation is wise is another question. Gay rights litigators evidently have the *capacity* to win right-to-marry suits in court. But as this afterword and preceding chapters have shown all too clearly, litigation is not a panacea for advocates of social reform. Winning in court does not translate simplistically into real world reforms (just as losing in court does not translate automatically into real world harms). Whether and how progressive court decisions are translated into public policy depends heavily on the legal and political contexts in which they occur as well the relative skills and abilities of the actors struggling to exploit those decisions for their preferred political ends. *Goodridge* sparked momentous gains *and* losses for lgb people because different actors were able to deploy the case in a variety of different political contexts, for diametrically opposing ends.

Would lgb people be better off today had organized gay rights litiga-

tors refrained from pursuing marriage equality in court, or had contented themselves with separate-but-equal institutions such as civil unions? The answer to this question is simultaneously unknowable, irrelevant, and important. It is unknowable for obvious reasons: we have no alternative history against which to weigh our own. It is irrelevant because the Litigators' Roundtable holds no veto power over marriage litigation. Private litigators can and do file suit independently of the desires of the organized gay rights bar, representing same-sex couples intent on pursuing what they see as their constitutional rights. Indeed, it was a private litigator acting independently of the major gay rights litigation organizations who filed *Baehr v. Lewin*, the case that started the marriage equality bandwagon rolling. The only thing organized litigators can do is try to craft the best legal arguments in the most favorable legal and political environments.

Yet the question is important because it speaks to an assumption at the heart of most, if not all, movements for progressive reform in the United States: that litigation is a valuable tool for achieving sociolegal change. Would lgb people be better off today had *Baehr*, *Baker*, and *Goodridge* never happened? I confess no easy answer to this question. This brief exploration of *Goodridge* and its impact certainly lends additional credence to the claim that courts too far in the vanguard of social change will find their rulings ignored, evaded, or overturned. Worse, such rulings can provoke a political backlash great enough to result in significant damage to the interests of the party that prevailed in litigation. In other words, courtroom wins can provoke real world losses when the structure of legal opportunities diverges too radically from the structure of political opportunities.

Yet *Baehr*, *Baker*, and *Goodridge* also engendered some favorable shifts in the legal and cultural frames surrounding gay rights in general and same-sex marriage more particularly. At a minimum, same-sex couples in Hawaii, Vermont, and Massachusetts were accorded greater legal status. More broadly, litigation on behalf of marriage equality has fundamentally reshaped the landscape for political debate. Same-sex marriage is no longer an oxymoron in the United States, and barring a federal constitutional amendment to the contrary it seems highly unlikely that this genie will ever be put back into the bottle.