SOMETHING OLD, SOMETHING NEW: DOES THE MASSACHUSETTS CONSTITUTION PROVIDE FOR SAME-SEX "MARRIAGE"?*

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I. WHERE TO FROM HERE?—MASSACHUSETTS

The introduction of radical changes to the "first bond of society"[1] through Vermont civil unions leaves the American public and law with many unanswered questions about civil unions and same-sex "marriage."[2] One question that can be answered is where will same-sex "marriage" advocates go after Vermont.[3] The

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* With gratefulness to God for the life of David Orgon Coolidge, 1956-2002, I Cor. 11:1.

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[1] *See* CICERO, DE OFFICIIS, BOOK I, CH. xvii, at 57 (Walter Miller trans., 1913) ("For since the reproductive instinct is by Nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common. And this is the foundation of civil government, the nursery, as it were, of the state . . . . Then follow between these in turn, marriages and connections by marriage, and from these again a new stock of relations; and from this propagation and after-growth states have their beginnings.").

[2] The term same-sex "marriage" is in quotation marks to reflect the belief that same-sex unions are not marriages, a belief which I realize some readers will not share. For a discussion of the substantive issues behind this belief about marriage, *see* David Orgon Coolidge, *Same-sex Marriage?* Baehr v. Mike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997).

[3] The same-sex "marriage" debate is very much a national issue, even though it occurs on a state-by-state basis due to the nature of family law. The *Goodridge* lawsuit in Massachusetts is merely part of a broader agenda to get same-sex "marriage" legalized or recognized in every state. *See, e.g.*, Shannon P. Duffy, *Pushing the States on Gay Unions, Vermont Law Will Lead to Suits Elsewhere, Advocates Say*, NAT'L L. J., Dec. 4, 2000, A1. This broader national agenda reveals the necessity of state defense of marriage

answer is Massachusetts.

Boston-based, homosexual rights group Gay Lesbian Advocates and Defenders ("GLAD") has taken less than a year after the *Baker v. Vermont*[4] decision to demand legalization of same-sex "marriage" in another state. Again unwilling to seek redefinition of marriage through the legislature or before a vote of the people, the same attorneys from GLAD who acted as co-counsel in *Baker* have filed a test case in Massachusetts courts, *Goodridge v. Department of Public Health*.[5]

This act in the same-sex "marriage" drama has all the trappings one might expect: an appeal to the judiciary, a body which has proven more willing than the voting public to change the marriage laws, in a state where those in the judiciary and Attorney General's office have expressed support for civil unions and same-sex "marriage." Same-sex "marriage" advocates have again chosen a state which has a lengthy process for amending the state constitution, which is ultimately the only way citizens can protect marriage policies from judicial as well as legislative redefinition if these branches are susceptible to the tactics of a special interest group like GLAD, as they were in Vermont. While a domestic partnership bill has been introduced in the Massachusetts General Court for the last several years, neither GLAD nor other same-sex "marriage" advocates have put forth "civil union" or same-sex "marriage" legislation in Massachusetts. Again, same-sex "marriage" advocates would rather ask the seven justices on the Supreme Judicial Court to redefine marriage to no longer require sexual diversity, hoping that the Massachusetts court will engage in creative lawmaking as willingly as Vermont's Supreme Court.[6]

A. Changing Marriage: The Goodridge *Lawsuit*

On April 11, 2001, GLAD attorneys, Mary Bonauto and Jennifer Levi, previous co-counsel for the *Baker* plaintiffs, filed suit against the Massachusetts

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acts and amending state constitutions to protect marriage. Same-sex "marriage" is often not understood as a national issue, however, until it threatens marriage in one's own state; the general public may even be unaware of this issue at times. The public's lack of awareness is often due to the media's tendency to not cover the issue or to same-sex "marriage" advocates keeping the issue in the courtroom, rather than discussing the issue before the voting public.

[4] 744 A.2d 864 (Vt. 1999). For a discussion of the *Baker* decision see David Orgon Coolidge & William C. Duncan, *Beyond* Baker*: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61 (2000).

[5] No. 01-1647-A, 2002 Mass. Super. LEXIS 153 (Suffolk County. Super. Ct. May 7, 2002).

[6] On January 18, 2002, GLAD filed a motion to transfer *Goodridge* to the Supreme Judicial Court before the trial court heard the case. The SJC denied this motion and returned that case to the trial court for a hearing on the parties' summary judgment motions. Order Denying Plaintiffs' Motion to Transfer and Consolidate, *Goodridge*, (Feb. 2, 2002) (No. SJ-2002-0024).

Department of Public Health on behalf of seven same-sex couples. The GLAD plaintiffs claimed that "refusing same-sex couples the opportunity to apply for a marriage license" violates Massachusetts' law and various portions of the Massachusetts Constitution.[7]

GLAD's brief attempts to find a fundamental right to marry "the person of one's choosing" in the due process provisions of the Massachusetts Constitution and asserts that the marriage laws, which allow both men and women to marry, violate equal protection provisions.

GLAD's complaint and memorandum in support of their motion for summary judgment sets out the personal stories of the plaintiffs' relationships, how each were told by their respective town clerks that Massachusetts law does not recognize same-sex "marriage," and why the plaintiffs need marriage to be redefined for their personal benefit. The plaintiffs do not attempt to prove that legalizing same-sex "marriage" will be good for marriage, the Commonwealth, or society. Rather, they expect the Commonwealth to change hundreds of its laws and social policies for their benefit, without the approval of the people of Massachusetts.

This Article addresses the appropriateness of the *Goodridge* suit and whether a right to same-sex "marriage" can be found under the Massachusetts Constitution. As the *Goodridge* claim for same-sex "marriage" rights is based on certain provisions of the Massachusetts Declaration of Rights, the history and intent of the Massachusetts Constitution, liberty, equality, fundamental rights, and other principles integral to faithfully interpreting the Massachusetts Constitution will be explored.

B. Legal Landscape in the Bay State

When GLAD named the Massachusetts Department of Public Health as defendant in the complaint that launched the *Goodridge* litigation, Attorney General Thomas Reilly's professional integrity was immediately called into question. As Attorney General Reilly himself admitted, and as others have been quick to point out, defending the Commonwealth's marriage law and policy runs counter to his "own personal beliefs."[8]

During Reilly's two years as attorney general, he has publicly endorsed Vermont civil unions and repeatedly taken official action cooperating with the demands of gay activists. Speaking of the Vermont Supreme Court's decision

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[7] Verified Complaint at 30, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[8] In speaking to the Massachusetts Gay and Lesbian Bar Association, Reilly reportedly expressed that "the most challenging aspect of his job [has] been abiding by his oath to defend the government and its laws, regardless of his own personal beliefs." Laura Kiritsy, *AG Reilly Meets With Gay Lawyers To Discuss Issues*, BAY WINDOWS ONLINE, *available at* http://www.baywindows.com/main.cfm?include=detail&storyid=2256880 (last visited June 27, 2002).

mandating civil unions, Reilly described the case in the context of a larger, undefined goal, "an important landmark decision, a positive step for fairness."[9] In a 1999 letter to the Massachusetts General Court, Reilly opposed legislation that would have clarified the existing definition of marriage as a male-female union, calling the bill inappropriate and stigmatizing.[10] Significantly, that bill did nothing more than restate the policy which Reilly is now defending in *Goodridge*. In other cases, Reilly lent the weight of his office to the causes of domestic partner benefits and enforced integration of homosexuality in the Boy Scouts, only to be rebuffed by the courts.[11] In still another case, Reilly allegedly defaulted on his duty to defend the Commonwealth's sodomy law, intentionally overlooking fatal procedural defects in the lawsuit in order that the case might be brought before the Supreme Judicial Court.[12] In order to function properly, the legal system requires zealous proponents on both sides of the litigation. These public positions have raised many questions about Reilly's ability to zealously defend the Commonwealth's marriage laws.[13]

While previous attorneys general have recused themselves from defending state laws because of opposing personal views,[14] Reilly has rejected suggestions to that

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[9] Michael Crowley, *Gay Rights Bill Would Face Battle in Massachusetts*, BOSTON GLOBE, Dec. 23, 1999, at B1.

[10] Dwight Duncan, *Reilly Not Up to Defending Marriage Suit*, MASS. LAW. WKLY., Apr. 30, 2001.

[11] Reilly filed an amicus curiae brief supporting domestic partner benefits in *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999). Ultimately, the Supreme Judicial Court found such benefits to be unlawfully extended. *Id.* at 342. Reilly also filed a brief in opposition to the free association rights of the Boy Scouts of America, whose rights the United States Supreme Court ultimately upheld. *See* Amicus Curiae brief of State of New York et al., Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[12] *See* Laura Kiritsy, *Supreme Judicial Court Defends Sodomy Laws*, BAY WINDOWS ONLINE, *available at* http://www.baywindows.com/main.cfm?include=detail&storyid=194213 (last visited Jan. 31, 2003) (quoting First Assistant Attorney General, Dean Richlin, whose comments on GLAD's challenge to the Commonwealth's sodomy laws, GLAD v. Attorney General, 763 N.E.2d 38 (Mass. 2002), raises questions about the ability of the Attorney General's office to defend the Commonwealth's laws without prejudice favoring GLAD: "The first line of defense was to say that really this [bringing suit without an actual controversy] isn't an appropriate process. . . . We did not do what we could have done, which is to file a motion to dismiss.") Instead the AG's office and GLAD worked out a strategic agreement and decided to have the SJC settled the matter. The SJC, however, made no decision based on GLAD's arguments and instead remanded the case to trial court, which dismissed the complaint on a position it appears the Attorney General's office should have argued for originally. *GLAD*, 763 N.E.2d at 42.

[13] *See* Crowley, *supra* note 9, at B1. *See also* Yvonne Abraham, *Gay Union Foes Doubt If Reilly Should Try Case*, BOSTON GLOBE, Apr. 19, 2001, at B1 (noting that Reilly's announcement to defend against the *Goodridge* challenge "did not convey great enthusiasm for the case").

[14] *See* Abraham, *supra* note 13, at B1 (noting that former Attorneys General Francis X.

end, acknowledging his duty to defend the state laws "in a fair and responsible way so that the court can make the most well-informed and legally sound decision."[15] To date in the *Goodridge* litigation, Reilly has remained faithful to that duty, though his public comments continue to raise questions. Although Reilly is not handling the case himself, the legal pleadings and oral arguments at trial presented a full range of arguments in support of marriage. Following the March 12, 2002, oral arguments at Suffolk County trial court, Reilly's spokesperson, Ann Donlan, echoed what appears to be a general consensus in Massachusetts: "Any radical changes in the marriage statute are a matter for the Legislature and not the courts."[16]

Nonetheless, Reilly appeared to undercut the efforts of his office in a statement made at the annual meeting of the Massachusetts Gay and Lesbian Bar Association shortly after the trial decision was handed down. There, Reilly was questioned about his office's defense of the marriage laws and specific arguments defending the Legislature's legitimate interest in fostering optimal childrearing with mother and father parenting through the marriage laws. "How do things like that happen?" said Reilly, referring to the Commonwealth's brief supporting married mother and father parenting. "You know it's no other explanation other than that shouldn't have gotten by. It did. And if that's something I can correct then I will."[17]

Attorney General Reilly has acknowledged the conflicting personal, professional, and political pressures that he faces in the defense of *Goodridge*. The apparent dichotomy between his words and his actions leave advocates on both sides of the issue skeptical and unsure of what to expect in the future.

II: CONSTITUTION, COMPACT, AND COMMON GOOD

A. Constitutional Interpretation—Will It Change for the Sake of Marriage?

GLAD's lawsuit rests heavily on the proposition that the Massachusetts Constitution must be newly interpreted to reflect "[e]volving [t]rends of [r]espect for [g]ay and [l]esbian [c]itizens and [f]amilies in Massachusetts."[18] More specifically, GLAD asserts that the Massachusetts Constitution protects a

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Bellotti and James Shannon both said they would not defend state policies which conflicted with their personal views on allowing homosexuals to be foster parents).

[15] *Id.*; Cosmo Macero, Jr., *Lawsuit Seeks Gay Unions in Mass.*, BOSTON HERALD, Apr. 12, 2001, at 4.

[16] David Weber, *Seven Gay Couples To Seek Marriage License Via Court*, BOSTON HERALD, Mar. 12, 2002, at 1.

[17] Kiritsy, *supra* note 8.

[18] Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 28, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153 [hereinafter Plaintiffs' Memorandum].

fundamental right "to marry the partner of one's choice."[19] Their brief to the court suggests that the legal recognition of same-sex "marriage" is a natural and unalienable right that the drafters of the Massachusetts Constitution intended to preserve.[20]

None of these assertions, however, reflect the reality of Massachusetts constitutional law or history. A faithful reading of the Massachusetts Constitution reveals that an unfettered "right to marry the partner of one's choice," and ever expanding individual rights, much less "couples' rights," are not among the ends which the constitution was designed to accomplish.

Massachusetts case law firmly establishes that the entire constitution, including the Declaration of Rights, must be construed with deference to the purposes and expectations of those who authored it. The Massachusetts Supreme Judicial Court ("SJC") makes clear that the constitution "is to be interpreted in the light of the conditions under which it and its several parts were framed, the ends which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy."[21] The words in the constitution are also to be construed "according to the common and approved usage at the time of [the document's] adoption."[22]

The court's statements on the constitution are in sharp contrast to the ends that GLAD would use it. GLAD reads into the constitution a requirement for same-sex "marriage" or extension of marital recognition to same-sex couples. The SJC, however, finds no such prescription for lawmaking in the constitution:

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[19] *Id.* at 24.

[20] *See id.* at 11-13.

[21] Cohen v. Attorney Gen., 259 N.E.2d 539, 543 (Mass. 1970) (quoting Tax Comm'r v. Putnam, 116 N.E. 904, 906 (Mass. 1917)).

[22] Mazzone v. Attorney Gen., 736 N.E.2d 358, 368 (Mass. 2000) (quoting Gen. Outdoor Adver. Co. v. Dep't of Pub. Works, 193 N.E. 799, 803 (Mass. 1935)). GLAD acknowledges this as well as construing constitutional, and assumedly statutory, provisions according to the plain meaning of the words and "in a sense most obvious to the common intelligence." GLAD Brief at 10, Albano v. Attorney Gen., 769 N.E.2d 1242 (quoting Yont v. Sec'y of the Commonwealth, 176 N.E. 1, 2 (Mass. 1931)). It is this plain meaning interpretation according to "common intelligence" which the Commonwealth sets forth in support of the marriage laws in its memorandum to the court in the *Goodridge* suit. *See* Memorandum in Opposition to Plaintiff's Motion for Summary Judgement and in Support of Defendants' Motion for Summary Judgment at 15, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153. *See also Yont*, 176 N.E. at 2.

> It was designed by its framers and accepted by the people as an enduring instrument, so comprehensive and general in its terms that a free, intelligent and moral body of citizens might govern themselves under its beneficent provisions through radical changes in social, economic and industrial conditions. It declares *only fundamental principles* as to the form of government and the mode in which it should be exercised . . . . It is a statement of *general principles* and *not a specification of details*.[23]

GLAD attempts to have it both ways by stating "our constitutional principles have never been viewed as static," but then calling the principles "guideposts that can weather radical changes in social, economic and industrial conditions."[24]

Constitutional principles do serve as guideposts that weather socioeconomic changes. This very function, however, precludes any suggestion of transient and evolving constitutional principles. If a constitution is to have any benefit as the guidepost that GLAD suggests it to have, by definition that guidepost must be static. An ever-moving guidepost is no guidepost at all. The principles of the constitution keep laws and our system of government consistent throughout changes in society. Constitutional principles do not force those changes on society or the Commonwealth.

The Massachusetts Constitution's treatment of same-sex relationships can be seen as no different under the conditions which the document was framed. Furthermore, it cannot be reasonably asserted that the constitution was designed to accomplish same-sex "marriage" or to give marital benefits to same-sex couples. At the time the constitution was written, as in all centuries before, marriage was understood as the union of one man and one woman.[25] It has always been understood as a social custom based on the laws of human nature, at times licensed or recognized by the government, in order to protect the institution for the common good.[26]

It is a very different matter to assert that the constitution is applicable in a variety of changing social situations than it is to assert that the constitution must be judicially rewritten to apply differently to the same situation. In context, the SJC's rulings referenced above clearly indicate that the constitution was drafted in general terms so as to provide a consistent standard for changing social and

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[23] *Putnam*, 116 N.E. at 906 (emphasis added).

[24] Plaintiffs' Memorandum at 8, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153 (quoting *Cohen*, 259 N.E.2d at 542).

[25] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES (2d ed. 1988).

[26] *See* Letter of John Adams to John Taylor, *in* 6 WORKS OF JOHN ADAMS 516 (Charles Francis Adams ed., 1851) ("[T]he first want of man is his dinner, and the second his girl, were truths well known . . . that the second want is frequently so impetuous as to make men and women forget the first, and rush into rash marriages."); *see also* SAMUEL WILLIAMS, THE NATURAL AND CIVIL HISTORY OF VERMONT, *reprinted in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 952-53 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (connecting marriage customs and human nature).

economic conditions. It is then the "free, intelligent and moral body of citizens" who "govern themselves" through these changes, always subject to the constitution's provisions as originally intended by its framers.[27]

B. The Social Compact

GLAD claims that the Massachusetts Declaration of Rights requires Massachusetts courts to redefine marriage to include same-sex couples, or as they put it, to provide the right to marry any person of "one's choosing." They claim that this reading of the constitution is inherent in the "social contract theory" reflected in the constitution and in the constitutional provisions protecting the liberty of the people of Massachusetts.[28] This claim does not accurately reflect the nature of the Commonwealth's constitution. A more faithful interpretation requires an understanding of liberty, equality, and the common good[29] as understood by the constitution's framers.

Written primarily by John Adams and adopted in 1780, the Massachusetts Constitution creates a government for a commonwealth.[30] The preamble sets forth the document's purpose as creating a social compact whose end is the common good, not the creation of individual rights: "The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[31]

The social compact theory of government allows individuals to band together in community, out of their state in nature, to form a body politic for their common

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[27] *Putnam*, 116 N.E. at 906.

[28] *See* Plaintiffs' Memorandum at 11-13, 33, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[29] The term "common good" was used during the Revolutionary period interchangeably with the term "public good." *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLIC IDEOLOGY AND THE MAKING OF STATE CONSTITUTION IN THE REVOLUTIONARY ERA 218 (Rita Kimber & Robert Kimber trans., 1980).

[30] *See* 4 WORKS OF JOHN ADAMS 215-216 (Charles Francis Adams ed., 1851) ("[A]fter extended discussion, [the 1779 constitutional committee] delegated to a sub-committee of three members, the duty of preparing a draught [sic] of a constitution. The three were Mr. Bowdoin, Mr. Samuel Adams, and John Adams. By this sub-committee the task was committed to John Adams, who performed it . . . . The preparation of the declaration of rights was intrusted by the general committee to Mr. Adams alone." Adams himself said of the document, "the state constitution of Massachusetts—a child, of which I am . . . the putative father." Letter of John Adams to John Taylor (Apr. 15, 1814), *in* 6 THE WORKS OF JOHN ADAMS 463 (Charles Francis Adams ed., 1851). Because Adams drafted the Declaration of Rights, and because of GLAD's reliance on his theories and writings, Adams' intent for the Declaration of Rights and theories on government will be explored to reveal an accurate picture of the Declaration of Rights. *See* Plaintiffs' Memorandum at 11, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153..

[31] MASS. CONST. pmbl.

good and security. This creates the body politic that then secures the rights of the individuals as the common good is pursued. An individual who does not associate with the body politic in pursuit of the common good finds their rights in greater jeopardy than if they joined the social compact in pursuit of the protections of all. To enter civil society, every individual binds "himself to the authority of the whole," the people, and "is therefore no longer possessed of the same liberty that he enjoyed antecedent to the compact."[32] It is this distinction that explains why throughout late eighteenth century political writings the common good was given precedence over the claims of individuals.

One explanation of Massachusetts' social compact theory describes it this way:

> Upon entering civil society each individual surrenders to the community his alienable rights, in order that all might be regulated for the common good. As has been seen, this forfeiture of control over the natural rights of individuals is virtually total. In civil society, the repository of authority over the rights of individuals is the body of people who constitute the community. Nothing can be done without the consent of the people. In particular, no form of government can be established for the community on a legitimate basis without the consent of the people. This proposition is derivable as a strict matter of logic from the political freedom and the political equality of the state of nature.[33]

The social compact theory arises in the context of man's pre-political natural state. In this state, the individual has complete individual autonomy, possessing his or her natural rights, not subject to political or governmental boundaries, and is focused on satisfying his or her interests.

Inequality in the state of nature is most drastically seen where there is disagreement between the interests of two individuals. Force ultimately resolves conflict in the state of nature, and the inequality of nature places even the natural rights of the weaker in jeopardy before the force of the stronger. This insecurity provides the motivation for individuals to join civil society, so that the power of the whole may secure the rights and interests of each individual.[34] The Declaration of Independence also sets forth the idea of a social compact: "[T]hat they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the

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[32] RONALD J. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 95 (1978).

[33] *Id.*

[34] *See* THE ESSEX RESULT (1778), *reprinted in* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780 326 (Oscar Handlin & Mary Handlin eds., 1966) ("The reason and understanding of mankind, as well as the experience of all ages, confirm the truth of this proposition, that the benefits resulting to individuals from a free government, conduce much more to their happiness, than the retaining of all their natural rights in a state of nature.").

Consent of the Governed."[35]

Joining civil society requires the individual to no longer be concerned merely with his or her individual interests but to concern him or herself with the interests also of the whole society. Having joined civil society for their own protection, individuals are united to seek the protection of all individuals—the common good—since this is the primary obligation of and purpose for creating civil society.[36] All individual interests then are subject to this primary interest of seeking the common good.

This is why the interests of all or most of those in society take precedence over the interest of one or the few. Whereas individuals in a state of nature are not equal physically, in civil society they are equal partners and, therefore, must participate equally in policy making for the society. It is the collective consent that will reach the common good and is required for making appropriate political decisions.[37] "Since only the people as a whole are motivated to secure the common interest, it is therefore the people as a whole who should govern if the common interest is to be achieved."[38]

With this trade, the individual also gives up certain alienable natural rights while retaining his unalienable rights. Under a constitutional government, civil rights are then given to individuals in exchange. These civil rights are "claims to freedom that individuals may advance against the authority of government."[39]

Interestingly, GLAD seeks to use civil rights claims to demand greater governmental intrusion and authority into individuals' lives, rather than using civil rights for their true purpose of claiming freedom from government intrusion. This is in opposition to the social compact theory of civil rights. "These [civil] rights are sanctioned by the sovereignty of the people, however, and do not constitute claims against that sovereignty, nor against the majority rule by which it is expressed."[40]

Early American constitutions were heavily influenced by political theories focused on the good of the whole society, rather than specific government

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[35] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[36] *See* PETERS, *supra* note 32, at 104 ("'The voice of reason and the voice of God,' he said in 1778, 'both teach us that the great object or end of government is the public good.'" (quoting Phillips Payson, *A Sermon Preached Before the Honorable Council and the Honorable House of Representatives (May 27, 1778)*, *in* THE PULPIT OF THE AMERICAN REVOLUTION 284 (J.W. Thornton ed., 1860))); JOHN ADAMS, DISSERTATIONS ON THE CANON AND FEUDAL LAW (1765), *reprinted in* 1 PAPERS OF JOHN ADAMS 103–28 (Robert J. Taylor et al. eds., 1977) ("For government is a frame, a scheme, a system, a combination of powers for a certain end, namely—the good of the whole community. The public good, the *Salus populi*, is the professed end of all government.").

[37] *See* PETERS, *supra* note 32, at 106 ("The majority of the people of Massachusetts was seen as the binding political authority in the community which the people of the state comprised.").

[38] *Id.* at 179.

[39] *Id.* at 184.

[40] *Id.*

benefits to individuals, as the purpose of government.[41] British writings widely read in late eighteenth century America included the Dillys' *British Liberties* which stated that "the ultimate end of government, in its original institution certainly was, as it still ought to be, the *good* of the *whole society*."[42] Oscar and Mary Handlins' collection of documents on the 1780 Massachusetts Constitution notes that in Massachusetts, "[t]he end and design of government was 'to promote the welfare and happiness of the community.'"[43]

The Massachusetts Constitution repeatedly references "the common good."[44] This emphasis on the common good reveals the framers' understanding that individuals' rights are not absolute, but are circumscribed directly and formally by the right of the people to self-government.[45] The goal was to secure the peoples' collective well-being, their "common wealth," not supremely the rights of individuals. It is no coincidence that John Adams suggested that Massachusetts adopt the title of "Commonwealth" and placed it in its constitution the goal of creating a government of laws for the common good.[46] The constitution, with only minimal limitations, protected the right of the citizens of the Commonwealth to make laws and set policies that affirmed the common good, *i.e.*, "common wealth."

This understanding of individual rights was prominent in Massachusetts

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[41] Additionally, the purpose of marriage laws is not to create a system of government benefits for married couples. Marriage laws and licensing were created to recognize and protect the monogamous, male-female nature of marriage. Other laws then incorporated the natural family and marriage into them, recognizing marriage's impact on other areas of life, such as property ownership and distribution, and care for children who resulted from the marital union. Few, if any, individuals seek to marry in order to obtain government benefits and recognition, as do the GLAD plaintiffs. Plaintiffs' claims to marriage are disingenuous. Not only are the plaintiffs not similarly situated to male-female couples when it comes to marriage, but they do not come to marriage for the same reasons. *See* Teresa Stanton Collett, *Benefits, Nonmarital Status and the Homosexual Agenda*, 12 WIDENER J. PUB. L. (forthcoming 2003).

[42] BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM 24 (1994) (quoting DILLY & DILLY, BRITISH LIBERTIES xli (1766)).

[43] *Journal of the Convention (June 17, 1777 - Mar. 6, 1778)*, *reprinted in* THE POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 34, at 27; Letter of John Adams to Francis Dana (Aug. 16, 1776), *in* 9 WORKS OF JOHN ADAMS 430 (Charles Francis Adams ed., 1851). *See also* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 70–71 (1988) ("Far from valuing complete independence in a virtual state of nature, Americans above all valued the communities in which they lived. It was as a developing nation of communities rather than of individuals that Americans first formed their constitutions at the state and national levels. They believed that humans develop and maintain their highest moral and material existence on Earth while living in communities.").

[44] *See* MASS. CONST. pmbl., pt. 1, arts. VII, XIX, XXII.

[45] *See* PETERS, *supra* note 32, at 55.

[46] *See* Letter of John Adams to Francis Dana, *in* 9 WORKS OF JOHN ADAMS, *supra* note 43, at 430 ("I hope the Massachusetts will call their government a commonwealth.").

political writings during the time of the Declaration of Rights' drafting.[47] The response of the Berkshire County representatives to the proposed but failed 1778 constitution clearly sets out their intent that their new government and laws be concerned with the common good of the whole society: "[M]ankind being in a state of nature equal, the larger Number (Caeteris paribus) is of more worth than the lesser, and the common happiness is to be preferred to that of Individuals."[48]

In order to secure this common good, Massachusetts created a republic, a government in which the people make the laws.[49] A republican government has as its end the common good, and because the people as a whole make the laws out of interest for themselves, it is the most likely government to lead to the public or common good.[50] As will be discussed in Section V, GLAD and other supporters of same-sex "marriage" have worked to hinder the right of the people to determine their own laws regarding marriage.

C. Individual Rights and the Common Wealth

GLAD suggests, without authority, that the title of the constitution, "A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts," indicates a focus on individual rights.[51] From a historical context, this could not be further from the truth. In 1779, the Commonwealth of Massachusetts was still embroiled in the War for Independence. Much like the Declaration of Independence signed three years earlier, the Massachusetts Constitution constituted a declaration of the liberties belonging jointly to the

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[47] *See, e.g.*, LUTZ, *supra* note 43, at 70–71, 76; THE ESSEX RESULT, *supra* note 34, at 324-65.

[48] Statement of Berkshire County Representatives (Nov. 17, 1778), *in* POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 34, at 375.

[49] In response to the failed 1778 constitution, Theophilus Parsons called for a republican form of government: "Let us now attend to those principles, upon which all republican governments, who boast any degree of political liberty, are founded, and which must enter into the spirit of a FREE republican constitution. For all republics are not FREE." Theophilus Parsons, THE ESSEX RESULT, *supra* note 34, at 330.

[50] *See* PETERS, *supra* note 32, at 179 ("A republican government, because it is a public thing, has as its end the attainment of the public good. It was defined, however, in procedural terms. A republic is a government in which the people make the laws. Because Massachusetts was to be a representative democracy in which the laws were to be made by the elected representatives of the people, it fulfilled this definitional requirement. But the people of Massachusetts were also to be governed by fixed laws. Therefore their government would be a free republic. A free republic is best suited for a commonwealth, because in a free republic the common good is most apt to be achieved. In other words, when the people govern by fixed laws, which they have made themselves, the common good will probably be secured. In no other form of government is there any guarantee of this.").

[51] *See* Plaintiffs' Memorandum at 12, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

inhabitants of the Commonwealth, not primarily a declaration of individual rights and liberties.[52] Moreover, the Massachusetts Constitution itself explicitly declares preservation of the common good to be the purpose of government:

> Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.[53]

This clause which GLAD claims gives same-sex couples the right to marital recognition, benefits, or licenses, speaks of "the people" as a whole, not individuals or couples.[54]

While individuals and their rights were protected, this protection was found in the individual's association with the larger community.[55] Massachusetts' constitutional tradition places great emphasis on direct, popular control over the General Court and government, but tempers individualism in light of the needs of the greater community.[56]

Where there was a conflict between the values, interests, and rights of the people (the larger community) and those of individuals or an individual group in the community, those of the larger community were considered superior.[57] The remedy for government intrusion into private rights was "a government of laws

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[52] *See* LUTZ, *supra* note 43, at 54 ("The early state constitutions, however, protected the rights of local communities rather than the rights of individuals within them.").

[53] MASS. CONST. pt. 1, art. VII.

[54] *See* Plaintiffs' Memorandum at 36-39, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153. Montesquieu, the most cited and authoritative author during Massachusetts' constitutional era, warned against overemphasis on individual rights stated "the independence of individuals is the end aimed at by the laws of Poland, [and] thence results the oppression of the whole." BARON DE MONTESQUIE, SPIRIT OF THE LAWS 150-52 (Hafner Publ'g Co. 1949) (1748).

[55] *See* PETERS, *supra* note 32, at 179 ("A free republic is best suited for a commonwealth, because in a free republic the common good is most apt to be achieved. In other words, when the people govern by fixed laws, which they have made themselves, the common good will probably be secured. In no other form of government is there any guarantee of this. Why is it the case that a free republic is more likely to achieve the common good than any other form of government? Since only the people as a whole are motivated to secure the common interest, it is therefore the people as a whole who should govern if the common interest is to be achieved. But the people as a whole might seek the common good at the expense of private rights. Therefore, only if the people govern by fixed laws that provide security for individuals, are the good of society and the good of each member of society both apt to be secured. When this is the case, the common good may be said to have been secured to the fullest possible extent.").

[56] *See id.* at 193-94.

[57] *See* LUTZ, *supra* note 43, at 76.

and not of men."[58] Laws were fixed by decision-making of the whole people or their elected representatives, whereas a government of men lent itself to oppression of the whole by the will of a few—an experience too well known by those who drafted and consented to the Massachusetts Declaration of Rights.[59]

The interest in pursuing the common good by responding to the voice of the majority was balanced by considering long-term community interests that would ultimately answer the needs of individuals and minority groups.[60] "[I]ndividuals and minorities must place their interests in a broader context on issues that are deemed part of the public arena, *and* government in its treatment of them must refer to long-term community interests and not favor one group of individuals over another."[61]

John Adams understood that government could not accommodate itself perfectly to every individual or address every exception to a given rule, yet the GLAD plaintiffs wish to adjust the Commonwealth's marriage laws to give legal recognition to their personal choices.[62] "Government cannot accommodate itself to every particular case as it happens, nor to the circumstances of particular persons. It must establish general comprehensive regulations for cases and persons. The only question is, which general rule will accommodate most cases and most persons."[63]

Marriage laws were created to recognize and to protect the marital relationship that is common to most persons, to have a view to the common good of present and future generations, and to recognize the unique impact which male-female marriage has had, and still has, on many areas of the spouses' lives and the lives of their families. The benefits of the male-female union of marriage undeniably contribute to the common good and strength of society, as well as to the individuals in the union.[64] The strength of the marriage institution in any given culture has a direct impact on the well-being of that community's children, individuals, economy, and overall social health.[65] The SJC has specifically noted

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[58] MASS. CONST. pt. 1, art. XXX.

[59] *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 30-31; THE ESSEX RESULT, *supra* note 34, at 87.

[60] *See* ADAMS, *supra* note 29, at 229 ("[The Framers] presupposed not the uniformity of private interests but only the possibility of resolving conflicts within the framework of the new political system . . . . They assumed that with the help of a fair system of representation, conflicts could be resolved and the common good achieved.").

[61] LUTZ, *supra* note 43, at 77.

[62] *See* Verified Complaint at 31, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[63] Letter of John Adams to James Sullivan (May 26, 1776), *in* 9 WORKS OF ADAMS, *supra* note 43, at 378

[64] *See* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2001).

[65] *See* Steven L. Nock, *The Social Costs of De-Institutionalizing Marriage*, *in* REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY, AN AGENDA FOR STRENGTHENING MARRIAGE 1 (Alan J. Hawkins et al. eds., 2002).

the importance of marriage to the Commonwealth: "[M]arriage is a social institution, or status, in which, because the foundations of the family and domestic relations rest upon it, the Commonwealth has a deep interest to see that its integrity is not put in jeopardy, but maintained."[66]

The Commonwealth's generally comprehensive and neutral marriage laws need not change to include same-sex relationships, which attempt to fulfill some of the functions of marriage without encompassing the full nature of marriage as a sexually diverse, potentially life-creating, generation-extending union, and which have not been proven to benefit the common good as marriage does.[67]

The GLAD plaintiffs' view of the constitution ignores the crucial need to protect the common good and instead asserts that the Declaration of Rights "[d]emonstrates a [p]assionate [c]ommitment to [r]espect [f]or [i]ndividual [c]hoice."[68] They posit that this protection of individual choice in one's personal life requires the legal redefinition of marriage so an individual can marry anyone of his or her choosing regardless of the Commonwealth's neutral marriage laws. GLAD also would extend this "commitment to individual choice" not only to include the freedom to do as one wishes, but also to demand government recognition of one's individual, personal choices.[69] As seen above, it cannot be ignored that "[t]he political theory of the Massachusetts Constitution of 1780 subordinates the individual to society," so the common good of all can be most perfectly met.[70]

While individual rights are important in a government by the people for the common good, respect for individual choice is not the same as a constitutional mandate to adjust neutral laws to provide governmental benediction on private choices.

III. EQUALITY AND MARRIAGE

GLAD's second argument relies heavily on an understanding of equality that is not embraced in the Massachusetts Declaration of Rights.[71] GLAD's interpretation of equality in the Declaration of Rights would give same-sex couples a right to civil marriage[72] and the "benefits of marriage."[73] Plaintiffs' cull

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[66] Coe v. Hill, 86 N.E. 949, 950 (Mass. 1909).

[67] Though it has been argued that other societies and cultures have embraced same-sex "marriage," these arrangements actually did not depart from the male-female nature of marriage. *See* Peter Lubin & Dwight Duncan, *Follow the Footnote or The Advocate as Historian of Same-sex Marriage*, 47 CATH. U. L. REV. 1271 (1998).

[68] Plaintiffs' Memorandum at 9, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[69] *See id.*

[70] PETERS, *supra* note 32, at 193.

[71] *See* Plaintiffs' Memorandum at 30, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[72] Clearly, the plaintiffs as individuals currently have a right to civil marriage as do all Massachusetts citizens. However, they seek to create a right to marry as a same-sex

their equality claims from Articles I, VI, VII, and X of the Declaration of Rights.[74]

Article I of the Declaration of Rights states:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

While plaintiffs call on John Adams and Massachusetts' political history to support their claims, these sources neither support GLAD's rendering of late eighteenth century equality nor the redefinition of marriage to include same-sex couples.[75]

First, it should be understood that the Declaration of Rights was created partly in response to the people of Massachusetts rejecting the 1778 constitution.[76] The town of Essex County, for example, required that

> a bill of rights, clearly ascertaining and defining the rights of conscience, and that security of person and property, which every member in the State hath a right to expect from the supreme power thereof, ought to be settled and established, previous to the ratification of any constitution for the State.[77]

The Declaration of Rights, then, is not a constitutional provision for ever-expanding rights of individuals and does not provide individuals with the right to

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couple. This is a novel demand, as fundamental rights and the right to marry are *individual* rights; the right to marry is an individual's right to enter a sexually diverse marital unit, as recognized by the marriage laws and the nature of marriage. *See, e.g.*, Adarand Contractors v. Pena, 515 U.S. 200, 230 (1995) (noting there is a "long line of cases understanding equal protection as a personal right;" equal protection does not belong to *couples* or *groups*).

[73] Governmental marriage recognition would likely have little practical benefit to same-sex couples, particularly since they have the ability to make most of these legal arrangements privately. This is admitted by same-sex "marriage" advocates as well:

> Remember, it simply isn't true that the lack of marriage benefits harms the same-sex couple . . . . Most immediately, we don't need the government to grant us any rights or benefits for us to fix this problem on our own, and we should be working to remedy this problem, with fairer agreements and voluntary equitable distributions of family assets.

Frederick Hertz, *Legal Expert Says: It's Not Gay Marriage; The Issue is Gay Divorce*, ASCRIBE NEWSWIRE, Aug. 13, 2002; *see also* Teresa Stanton Collett, *supra* note 41.

[74] *See* Plaintiffs' Memorandum at 30, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[75] *See id.* at 33-34.

[76] *See* THE ESSEX RESULT, *supra* note 34, at 324.

[77] *Id.*

make demands on the government regarding their personal lifestyles. Rather, its purpose is to clearly set forth rights of conscience that are to be left unimpaired by the government and to secure persons and their property from tyrannous government intrusion.

Freedom and equality with certain natural, essential, and unalienable rights refers not to the demand of government rights, but of equality in a state of nature and freedom to dispose of one's persons and property within the bounds of the Laws of Nature.[78] Stemming from that, the equality one possesses after leaving the state of nature and joining civil society, as under the Commonwealth created by the Massachusetts Constitution, is equality under the law.

At the time of the Declaration of Rights' framing, Americans emphasized the equal public rights of the collective people under the law over the privileged interest of their rulers.[79] This was America's direct answer to Britain and Europe's aristocracy and inheritance of power, which elevated the privileged few above obedience to the laws. This understanding of the Declaration of Rights precludes manipulation of the law for private purposes because equality is an equal subjection to the rule of law.

According to John Adams,

> all are subject by nature to equal laws of morality, and in society have a right to equal laws for their government, yet no two men are perfectly equal in person, property, understanding, activity, and virtue, or ever can be made so by any power less than that which created them.[80]

The term "liberty" in Article I of the Declaration of Rights, while often used to refer to equality, has also been construed to "mean[] a liberty regulated by law . . . subject to reasonable restraints made by general law for the common good."[81]

GLAD also relies on Article I's Equal Rights Amendment ("ERA") provision, seeking to have sexual preference treated the same as sex. Here, they cite to decisions prohibiting exclusion of boys from girls' sports teams and exclusion of girls from boys' sports teams, claiming that because of "the intense concern from the SJC in matters of exclusion from sports programs, that much more concern must be directed when the exclusion is from a major institution in civic life."[82]

GLAD claims that Article I's equality provision is violated because each "individual's choice of marital partner was constrained because of the sex of that other individual, and it is the individuals' right to be free from sex discrimination

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[78] *See* PETERS, *supra* note 32, at 70.

[79] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1972).

[80] John Adams, Discourses: A Series of Papers on Political History, *in* 6 WORKS OF JOHN ADAMS, *supra* note 26, at 223, 285–86.

[81] Commonwealth v. Libbey, 103 N.E. 923, 924 (Mass. 1914).

[82] Plaintiffs' Memorandum at 44, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

that is protected by the constitution."[83] While it certainly is the individual's right to be free from sex discrimination, it is obvious that no individual of either sex is discriminated against or prohibited from marriage on the basis of their sex.

While the ERA prohibits inequality under the law based on sex, the ERA framers specifically noted that it is "not concerned with the relationship of two persons of the same sex; it only addresses those laws or public-related actions which treat persons of opposite sexes differently."[84] And while sex is mentioned in the ERA, the sexual preference of an individual is not a specifically protected classification.[85]

Moreover, although the Massachusetts Supreme Judicial Court, in dicta, has called same-sex sexual preference "sex-linked . . . in a somewhat difference sense" than pregnancy is considered sex-linked, it is clearly not applicable to only one sex, as is pregnancy, and has never been interpreted in the class of "sex" protected by Massachusetts anti-discrimination laws or Article I of the constitution.[86] The court noted that "[t]he uniform interpretation of statutes prohibiting discrimination in employment because of sex has limited the statutes to discrimination between men and women. Discrimination based on sexual preference has been excluded."[87]

Not only do GLAD's equality arguments differ from the type of equality guaranteed in the Declaration of Rights, they also attempt to render meaningless every distinction natural to marriage and included in the marriage laws to protect individuals and family institutions.

GLAD's arguments, both in their briefs and at trial, if applied to all marriage laws, would precariously change the entire legal nature of marriage to include polygamous, underage and incestuous marriages. For example, their brief reads: "The [Commonwealth] here discriminate[s] on the basis of sex by excluding individuals from marrying the partner of their choice based on the sex of the partner, and by excluding gay and lesbian individuals from marrying the person

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[83] Plaintiffs' Memorandum at 41, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[84] SPECIAL COMMISSION AUTHORIZED TO STUDY THE EFFECT OF THE RATIFICATION OF THE PROPOSED [ERA] UPON THE LAWS, BUSINESS COMMUNITIES AND PUBLIC IN THE COMMONWEALTH, INTERIM REPORT, S. DOC. NO. 1689, at 21, 28–29 nn. 66, 67 (1976). In addition, the Washington Court of Appeals determined that the equal rights amendment of its state constitution does not afford a basis for validating same-sex marriage. *Id.* at 21, 28 n. 66. The Colorado Attorney General issued an opinion similar to the decision of the court in Washington. *Id.* at 21, 29 n. 67.

[85] The ERA does not provide special protection for classifications other than those expressly listed. Attorney Gen. v. Desilets, 636 N.E.2d 233, 239 (Mass. 1994) (marital status not protected under ERA); Powers v. Wilkins, 506 N.E.2d 842, 846 n.11 (Mass. 1987) (illegitimacy not covered by ERA, only sex, race, color, creed, or national origin).

[86] Macauley v. Mass. Comm'n Against Discrimination, 397 N.E.2d 670, 671 (Mass. 1979).

[87] *Id.* at 671.

of their choice, *i.e.*, a same-sex partner."[88] This same argument is interchangeable with arguments concerning the age, family relationship, and marital status of another individual one may wish to marry.[89] This goal of removing all protections from marriage and the family by same-sex "marriage" advocates is not surprising as it has already been stated in some of their literature.[90]

GLAD argues that Article VI of the Massachusetts Constitution is similar to Vermont's "common benefits" clause and does "not privilege people except to ensure the common good."[91] The trial court in *Goodridge*, however, noted that "Massachusetts' Constitution does not contain any provisions that are analogous to the "common benefits" clause found [in] Vermont's Constitution."[92] In Massachusetts, Article VI was intended to prohibit special privileges of nobility, hereditary titles, and public offices, similar to those bestowed on nobility by English royalty.[93] This constitutional provision has been most commonly applied

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[88] Plaintiffs' Memorandum at 42–43, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[89] For example, laws prohibiting incestuous marriage discriminate on the basis of consanguinity by excluding individuals from marrying the partner of their choice based on their previous family relationship with the partner, laws prohibiting underage marriage discriminate on the basis of age by excluding individuals from marriage the underage partner of their choice, and laws prohibiting bigamous marriage discriminate on the basis of marital status by excluding individuals from marrying the married partner of their choice.

[90] *See* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 490-91 (1996) ("If the law of marriage can be seen as facilitating the opportunities of two people to live an emotional life that they find satisfying—rather than as imposing a view of proper relationships—the law ought to be able to achieve the same for units of more than two . . . . [I]t seems at least as likely that the effect of permitting same-sex marriage will be to make society more receptive to the further evolution of the law. By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive of units of three or more (all of which, of course, include at least two persons of the same sex) and to units composed of two people of the same sex but who are bound by friendship alone. All desirable changes in family law need not be made at once."); JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 126 (1996) ("If we begin to value the meaning and quality of intimate bonds over their customary forms, there are few limits to the kinds of marriage and kinship patterns people might wish to devise . . . . [P]erhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small-group marriages arranged to share resources, nurturance and labor."). *See also* Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991).

[91] Plaintiffs' Memorandum at 36, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[92] *Goodridge*, 2002 Mass. Super. LEXIS 153, at *19.

[93] *See* Hewitt v. Charier, 33 Mass. 353, 355 (1835); Sheridan v. Gardner, 196 N.E.2d

in the context of public offices or public employment.[94] Where it has applied in situations of sex-based classifications, it has served to include both sexes into a statutory scheme, not separate one sex from the other, even though the given activity did not inherently require both sexes as marriage does.

Adams' words are also instructive on Article VI.[95] His understanding, reflecting the general understanding of equality during the time, was that neither the king, the aristocracy, nor the wealthy were above the law: "[T]he meanest and the lowest people, are, by the unalterable indefeasible laws of God and nature, as well intitled to . . . air to breathe, light to see, food to eat, and clothes to wear, as the nobles or the king. All men are born equal."[96] Notably, Adams does not mention that it is the government's duty to provide "legal security" or community acceptance as the *Goodridge* plaintiffs would like the Commonwealth's marriage laws to provide for them.[97] Rather, equality is protection under law so that individuals are free to acquire the basic needs of life without inappropriate government intervention.

Additionally, the trial decision in *Goodridge* noted that even where a statute "confer[s] special privileges within the meaning of Article VI, it does not violate Article VI unless the challenged statute's *purpose*, not merely it's indirect or incidental effect, is to confer such privileges."[98]

GLAD also argues that Article VII requires "distributing government benefits equally."[99] Article VII, however, stands inapposite to GLAD's desires for the Commonwealth's marriage debate because it provides the people of the

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303, 309 (Mass. 1964); White v. City of Boston, 700 N.E.2d 526, 530 (Mass. 1998).

[94] Even where legislation does confer a benefit to a private individual under, this is legitimate under Article VI if the public good is served. *See* Opinion of the Justices to the Senate, 238 N.E.2d 855 (Mass. 1968).

[95] MASS. CONST., pt. 1, art. VI provides: "No man, nor corporation or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendents, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge is absurd and unnatural."

[96] John Adams writing to William Pym in the *Boston Gazette* under the pen name of Clarendon (Jan. 27, 1766), *in* 1 PAPERS OF JOHN ADAMS, *supra* note 36, at 167–68.

[97] At trial, GLAD attorney Jennifer Levi argued that same-sex couples will "value what [being recognized as "married"] will signal to their families and their community about the nature of their relationship." David Weber, *Judge Hears Same-Sex Marriage Case*, BOSTON HERALD, Mar. 13, 2002, at 2.

[98] *Goodridge*, 2002 Mass. Super. LEXIS 153, at *22 (emphasis added). The court concludes that "[b]ecause the marriage statutes do not concern public employment, were not enacted for the purpose of conferring special privileges, and embody a legislative determination that limited marriage to opposite-sex couples further the public interest, Article 6 affords no basis for invalidating those laws." *Id.* at *23.

[99] Plaintiffs' Memorandum at 37, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

Commonwealth an incontestable right to be involved in lawmaking and control of government. It originates from the founding era when the colonies declared their independence from England and established their right to self-government:

> Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.[100]

The SJC has specifically ruled that this provision is not to serve as the basis of a statutory challenge[101] and has "never held that art. 7 creates an equal protection right."[102]

The understanding of marriage reflected in Massachusetts law is consistent with the principle of equality expressed in the constitution. The law applies equally to all citizens of the Commonwealth, regardless of "sex, race, color, creed or national origin."[103] Any individual may marry, subject to the neutral laws of the Commonwealth, which apply equally to every person. Even under Massachusetts' "Equal Rights Amendment,"[104] same-sex "marriage" was not contemplated. The only proposed change in the laws was to equalize the age at which males and females could enter marriage.[105] While many domestic relations statutes were amended after passage of the state equal rights provision, the requirement of sexual diversity in marriage was not eliminated in the marriage statutes.[106] When the General Court included "sexual orientation" in the state anti-discrimination statute, it expressly provided that "[n]othing in this act shall be construed so as to legitimize or validate a 'homosexual marriage,' so-called, or to provide health insurance or related employee benefits to a 'homosexual

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[100] MASS. CONST., pt. 1, art. VII.

[101] *See* Commonwealth v. Ellis, 708 N.E.2d 644, 650 n.15 (Mass. 1999).

[102] Town of Brookline v. Sec'y of the Commonwealth, 631 N.E.2d 968, 978 n.19 (Mass. 1994). Even if the marriage statutes were considered discriminatory, the SJC has stated that "a statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." Connor v. Metro. Dist. Water Supply Comm'n, 49 N.E.2d 593, 595 (1943) (quoting Metro. Cas. Ins. Co. v. Bromnell, 294 U.S. 580, 584 (1935)). The SJC has also stated that statutory classifications will not be struck if there is a "fair and substantial relationship to the Legislature's objective." Plaintiffs' Memorandum at 26, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153 (citing to Opinion of the Justices to the Senate and the House of Representatives, 22 N.E.2d 49, 60 (Mass. 1939)).

[103] MASS. CONST., pt. 1, art. 1.

[104] *See id.*

[105] *See* SPECIAL COMMISSION AUTHORIZED TO STUDY THE EFFECT OF THE RATIFICATION OF THE PROPOSED [ERA] UPON THE LAWS, BUSINESS COMMUNITIES AND PUBLIC IN THE COMMONWEALTH, INTERIM REPORT, S. DOC. NO. 1689, at 21 (1976).

[106] *See* MASS. GEN. LAWS ANN. ch. 207, §§ 1-2 (1998).

spouse,' so-called."[107]

Massachusetts marriage laws apply equally to men and woman and to individuals of any race, national origin, or other status in the Commonwealth. All individuals are limited from marrying another person if they are already married, from marrying someone to whom they are related within certain degrees of consanguinity, and from marrying someone of the same sex. Clearly, no one in the Commonwealth can marry any person "of their choosing" or anyone with whom they have fallen in love. The marriage laws apply equally to all.

Rather than creating a sex-based classification, similar to race-based classifications, as the *Goodridge* plaintiffs assert,[108] the Commonwealth's marriage laws permit both men and woman to marry. Both are subject to the marriage statutes and both may apply for a marriage license. No person of either sex, however, is permitted to "marry the partner of [their] choosing."[109] Marriage itself creates a unity out of the sexual diversity found in nature, and it is this unification that the marriage laws recognize and uphold. Rather than making distinctions on sex, *i.e.*, by not allowing men to marry or not allowing women to marry, the marriage laws recognize that marriage uniquely includes both sexes.

GLAD fails to see that the very nature of marriage, unlike any other social institution or government-recognized relationship, requires the community of both sexes. In this sense, marriage is the epitome of diversity. This is understood in U.S. Supreme Court jurisprudence where previously supposed inherent differences based on race are now rejected, but as noted by Justice Ginsburg, "[p]hysical differences between men and women, however, are enduring."[110] In a jury sex discrimination case, Justice Ginsburg noted that:

> The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables . . . . [A] flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.[111]

This difference between a community of one sex and a community of both

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[107] 1989 Mass. Acts ch. 516, § 19.

[108] *See* Plaintiffs' Memorandum at 43, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[109] Marriage laws, historic and current, do not recognize as "marriage" many types of coupling or "loving, committed relationships." Even where same-sex "marriage" advocates have had the most success in Vermont, the court did not redefine marriage to include same-sex couples, but instead required the legislature to write laws giving same-sex couples marriage-like benefits and recognition. While this is a distinction in name only, it is interesting that the Vermont court was not willing to change the legal definition of "marriage" so that it would be in conflict with the male-female nature of marriage. *See* Baker v. State, 744 A.2d 684 (Vt. 1999).

[110] U.S. v. Virginia Military Inst., 518 U.S. 515, 533 (1996).

[111] Ballard v. U.S., 329 U.S. 187, 193-94 (1946).

sexes, while important in the jury setting, is the fundamental basis of marriage. Because of this difference, marriage can only be that community of both sexes. The "distinct quality" of marriage's uniqueness as an institution is lost "if either sex is excluded."[112]

This is noted by the Court's realization that the exclusion of one sex, even in a non-marital setting, is less representative than a group where not all races or economic groups are represented. The differences between the sexes cross all racial, economic, and other class lines, which is why marriage remains a male-female union regardless of the parties' race, national origin, or other characteristics.

It would also be inconsistent with the Declaration of Rights' equality and liberty provisions to require government benefits to go to certain individuals. There is no provision in the Massachusetts Constitution similar to the Vermont Supreme Court's rendering of their constitution's common benefits clause, as requiring legislation for a marriage-like statutory scheme for same-sex couples.[113]

IV. LIBERTY AND THE RIGHT TO MARRY

A. What is Liberty?

At the time the Declaration of Rights was drafted, civil liberty meant "natural liberty restricted by established laws as is expedient or necessary for the good of the community."[114] As understood by John Adams and his contemporaries, civil and political liberty did not allow individuals to demand privileges, rights, or government recognition from the Commonwealth, rather liberty meant "[s]elf direction or [s]elf-government."[115]

Liberty was understood as the freedom to choose whether to follow "the [l]aws of [n]ature and of [n]ature's God,"[116] and the power to determine one's self-direction rather than an entitlement to benefits or government intervention. Richard Price, in his 1776 Boston publication, *Observations on the Nature of Civil Liberty*, set forth an understanding of liberty adopted by John Adams, noting that moral, religious, physical and civil liberty have "one general idea, that runs

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[112] *Id.* at 194.

[113] *See Baker*, 744 A.2d 864 (holding that excluding same-sex couples from benefits and protections incident to marriage under state law violated the common benefits clause of the Vermont Constitution).

[114] LUTZ, *supra* note 43, at 73.

[115] *See* ADAMS, *supra* note 29, at 156 (quoting RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA, 2-3 (1776)). John Adams accepted Price's definition of liberty as his own. *See* 4 WORKS OF JOHN ADAMS, *supra* note 30, at 401, 403 (Charles F. Adams ed., 1851) ("As the society governs itself, it is free, according to the definition of Dr. Price.").

[116] DECLARATION OF INDEPENDENCE, para. 1.

through them all . . . the idea of Self-direction."[117]

Adams was greatly concerned that liberty would be misused to frequently change the laws, which is what same-sex "marriage" advocates are attempting to do to change the marriage laws.

> All republics, especially such as are not well constituted, undergo frequent changes in their laws and manner of government. And this is not owing to the nature either of liberty or subjection in general, as many think, but to downright oppression on one hand, or unbridled licentiousness on the other . . . . It is very true that most republics have undergone frequent changes in their laws; but this has been merely because very few republics have been well constituted. It is very true also, that there is nothing in the nature of liberty, or of obedience, which tends to produce such changes; on the contrary, real liberty and true obedience rather tend to preserve constancy in government. It is, indeed oppression and license that occasion changes; but where the constitution is good, the laws govern, and prevent oppression as well as license.[118]

As the Declaration of Rights declares, liberty is to protect individuals' natural right to "enjoy[ ] and defend[ ] their Lives and Liberties," against unlawful government and individual intrusion if necessary.[119] Joseph Priestly, in *First Principles of Government*, exemplifies this understanding of liberty at the time the Declaration of Rights was written. He wrote that civil or political liberty is:

> that power over their own actions, which the members of the state reserve to themselves and which their officers must not infringe [and]. . . the right [an individual] has to be exempt from the control of the society, or its agents; that is, the power he has of providing for his own advantage and happiness.[120]

The citizens of Concord, Massachusetts, in their 1776 recommendation for a constitutional convention, also point out that they intended the Declaration of Rights to "[s]ecure the Subjects in the Possession and enjoyment of their Rights and Privileges, against any encroachments of the governing part."[121] Liberty, then, is the right that citizens have to be free from the control or licensing of the government, and it gives citizens areas of their lives which government cannot

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[117] PETERS, *supra* note 32, at 71 (quoting PRICE, *supra* note 115, at 2-3). Liberty as provided for in the Declaration of Rights is the power one has over their own actions, "the power [one] has of providing for his own advantage and happiness." ADAMS, *supra* note 29, at 155.

[118] John Adams, A Defense of the Constitutions of Governments of the United States of America, *in* 5 WORKS OF JOHN ADAMS 6, at 66 (Charles Francis Adams ed., 1851) (Adams' defense was specific to the Massachusetts Constitution).

[119] MASS. CONST., pt. 1, art. 1.

[120] JOSEPH PRIESTLY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT, AND IN THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY 12-14 (1768) (quoted in W.P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS 155 (1980)).

[121] *Massachusetts Archives* CLVI, 182.

enter without legal justification.

Liberty is not a power to demand that society as a whole or the Commonwealth recognize or privilege one's individual choices. Nonetheless, while claiming "spheres of individual choice and behavior over which the sovereign majority has relinquished control,"[122] GLAD uses the constitution's liberty provisions to demand government control, recognition, and endorsement of their personal relationship choices. The same-sex couple plaintiffs do not seek liberty, but governmental and societal validation of their private conduct.[123]

The plaintiffs' complaint and memorandum set forth their purposes in using the government to approve of their private lives. One set of plaintiffs "seek to marry to express their love for each other [and] . . . to provide maximum legal security to and for each other."[124] While all of these are valid goals for individuals to seek, these are not the government's obligation to provide. It is not the government's duty to create a statutory means of expressing one's love for another person, celebrating commitment, or requiring communal respect of others. In fact, many types of love may be expressed to many individuals and do not constitute marriage; the government does not license or prohibit expression of love between many familial and non-familial individuals in society. Furthermore, it is not the government's duty to provide individuals with a statutory scheme in which they provide retirement security for others. These are all individual and personal interests which families, couples, and individuals are responsible for themselves. None of these are purposes behind the Commonwealth's marriage laws.

Another set of plaintiffs want the state to officially recognize their same-sex relationship "as a way to acknowledge[] and celebrate the deep and abiding commitment they share with one another. They want the world to see them as they see themselves."[125] They seek state-recognized marriage "as a public expression of their commitment to one another . . . as well as to provide greater legal security to each other"[126] "so that the wider world understands that they [sic] as important to each other as are spouses are [sic] to one another,"[127] "to make a statement about their enduring love and commitment, and because they

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[122] Plaintiffs' Memorandum at 13, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[123] *See* Verified Complaint at 6 n.31, 9 n.45, 11 n.56, 17-18 n.91, 21 n.107, and 24 n.121, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153. At trial, GLAD attorney Jennifer Levi argued that same-sex couples will "value what [being recognized as "married"] will signal to their families and their community about the nature of their relationship." Weber, *supra* note 97.

[124] Plaintiffs' Memorandum at 2, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[125] Verified Complaint at 24, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[126] *Id.* at 9.

[127] *Id.* at 11.

want their two sons to grow up in a world where their parents' relationship is legally and communally respected."[128]

The same-sex couples want to radically redefine marriage to "make a statement for themselves and others" about their individual, personal relationship.[129] This has never been a function of law and certainly would not be considered one under the Massachusetts Constitution. While the Declaration of Rights protects one's right to free speech, neither it nor constitutional liberty provisions require government to speak for individuals.[130] Nor can the Commonwealth automatically create a world where same-sex relationships are viewed and respected by all as a marriage. This is not the role of government, nor is it the ends for which the constitution and the marriage laws are to be used—to try to force the world to see us as we see ourselves.

As to Article XI's association rights, the *Goodridge* trial court noted that "plaintiffs bear the burden . . . to demonstrate that the present statutory scheme intrudes on those interests 'to an extent which would constitute an unconstitutional interference by the State'" and that "the challenged action must be 'coercive or compulsory in nature.'"[131]

With regard to Articles X and XII of the Declaration of Rights, GLAD "invokes the principle that all cases must be decided according to existing law or else some citizens would 'enjoy privileges and advantages which are denied to all others under like circumstances.'"[132] Article XII actually sets out the right to trial, right to a jury and procedural protections for criminal charges.[133] In *Holden*

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[128] Plaintiffs' Memorandum at 3, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[129] To do this, they claim that under Article XVI of the Declaration of Rights the state violates their constitutional right to free speech and free association by not giving them a marriage license.

[130] *See Goodridge*, 2002 Mass. Super. LEXIS 153, at *42 ("Without deciding whether or not the issuance of a marriage license is speech, it would be speech by the government, not by the applicants or licensees. Speech by the government is immune from judicial scrutiny in the context of the First Amendment.").

[131] *Id.* at *43 (citations omitted).

[132] Plaintiffs' Memorandum at 36, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153 (quoting Holden v. James, 11 Mass. 396 (1814)). The *Holden* decision invokes Article XII rather than Article X, as GLAD's brief asserts.

[133] MASS. CONST., pt. 1, art. XII.

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or

v. James, the SJC relies on Article XII to hold that the General Court cannot suspend execution of laws for certain individuals while enforcing them against others.[134] Again, this interpretation of Article XII demonstrates the framers' intent: for equal protection under the laws; of all citizens being equally subject to the same laws; and an *individual's*, rather than a couple's, right to freedom from physical restraint absent lawful justification. In no way does Article XII allow cases to be decided outside of existing law or require judicial changes to existing law, as GLAD pleads.

GLAD bases its demand for marriage licensing for same-sex couples on "the right to a government that 'protect[s] individuals, absent adequate justification, from interference with those decisions and activities that may be deemed basic, or essential, to their identity and well being.'"[135] GLAD plaintiffs, however, have experienced no governmental interference with decisions and activities related to their personal relationships, whether or not those relationships are basic or essential to their identity and well-being. The Commonwealth has left plaintiffs free in their same-sex relationships without licensing, state interference, or statutory structure as to how their property and other areas of life will be impacted by these relationships.[136] The GLAD plaintiffs may even conduct a religious or other type of ceremony recognizing their relationship as a "marriage," "union," or "partnership," as they desire. The Commonwealth, however, has chosen not to regulate their relationship, leaving them completely at liberty in this area of their lives and social structuring. In this way, the *Goodridge* plaintiffs already have what GLAD says they seek—to have their relationship recognized a certain way by the community.[137] This is in no way

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infamous punishment, excepting for the government of the army and navy, without trial by jury.

[134] *See Holden*, 11 Mass. at 405 ("It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted. There is no doubt that the General Court may suspend a law, or the execution or operation of a law, whenever they shall think it expedient . . . But it was never supposed that it could be suspended as to certain individuals by name, and left to be enjoyed by all the other citizens.").

[135] Plaintiffs' Memorandum at 13, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153 (quoting Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS L.Q. 1 (1997)).

[136] The Massachusetts Attorney General has specifically stipulated that he will not use the state sodomy law to prosecute private, consensual sodomy. *GLAD v. Attorney Gen.*, 763 N.E.2d 38, 40 (Mass. 2002). GLAD argues inconsistent versions of constitutional liberty rights in *GLAD*, where they argue that the constitutional right to privacy prohibits the government from prosecuting private, consensual sodomy, and in *Goodridge*, where they argue that constitutional liberty provisions require public and governmental approbation of same-sex relationships based on private, consensual sodomy as "marriage."

[137] Verified Complaint at 6 n.31, 9 n.45, 11 n.56, 17-18 n.91, 21 n.107, 24 n.121,

inconsistent with the Declaration of Rights' liberty clauses insofar as the Commonwealth's marriage laws and licensing requirements place no restrictions or interference on this area of their lives.

B. A Fundamental Right to Whatever You Want

While recent arguments for same-sex "marriage" have relied heavily on equality claims, GLAD's brief in the *Goodridge* suit emphasizes an argument that the due process liberty provisions in the Declaration of Rights and the fundamental right to marry demand redefinition of marriage to include same-sex couples. GLAD's brief claims that "Massachusetts has developed an independent constitutional jurisprudence which protects the fundamental personal right to marry the partner of one's choosing."[138]

No such jurisprudence exists in Massachusetts, however. While Massachusetts does recognize the federal due process right to marry, Massachusetts case law actually makes no mention of a "fundamental right to marry," much less a fundamental right to marry "the person of one's choice," and GLAD cites to no Massachusetts precedent dealing with the fundamental right to marry. While this Article does not contend that the Massachusetts Constitution does not protect the right to marry, it certainly cannot be said that Massachusetts courts have developed an "independent jurisprudence" on this topic.

It is an even greater leap of constitutional law to assert that there is a fundamental personal right to marry "the partner of one's choosing." Finding such a right in Massachusetts or any other American case law is impossible.

This "fundamental right," as argued by the plaintiffs, is "the choice of marital partner[s]" without any state regulation. While the Commonwealth, including fundamental right jurisprudence, is not concerned with the character, religion, race, or even sexual preference of the individual one marries, it does recognize marriage as a unique institution[139] and places certain protections around marriage that limit every individual in the choice of his or her marital partner to some extent. The assertion that "[t]he choice of a marriage partner has been left to the individual with little state interference" is only partially true. Massachusetts law, which is consistent with both the nature of marriage and the Declaration of Rights, limits the freedom of every individual to marry. Siblings do not have the right to choose to marry a sibling; parents cannot choose to marry a child or

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Goodridge, No. 01-1647-A, 2002 Mass. Super. LEXIS 153. At trial, GLAD attorney Jennifer Levi argued that same-sex couples will "value what [being recognized as "married"] will signal to their families and their community about the nature of their relationship." Weber, *supra* note 97, at 2.

[138] Plaintiffs' Memorandum at 7, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153. *See also id.* at 1 ("[Plaintiffs] may not be arbitrarily hindered by the state in the exercise of the fundamental right to marry the partner of their choice.").

[139] *See* David Orgon Coolidge, *Marriage and Belonging: Reflections on* Baker v. Vermont, *in* REVITALIZING MARRIAGE, *supra* note 65, at 145.

grandchild.[140] No individual has the right marry an underage individual,[141] and married persons are completely prohibited from exercising their fundamental right to marry any other person so long as they remain married,[142] even if that person is the "person of their choosing" or the person they love. Such laws do not take away the fundamental right to marry; rather they are appropriate limitations protecting the intrinsic nature of marriage, from which marriage attains its fundamental right status.[143] Intrinsic and fundamental to marriage is also the Commonwealth's understanding that marriage consists of one man and one woman.

C. The Definition of Marriage

The GLAD plaintiffs claim that "[t]he Commonwealth cannot even articulate a legitimate public purpose" behind its marriage licensing laws. Their brief continues: "*A Fortiori,* the Commonwealth cannot withstand the heightened scrutiny applicable to a classification that implicates a fundamental right under the Declaration of Rights."[144] GLAD's brief, however, does not articulate a recognized fundamental right that would implicate heightened scrutiny for the challenged statutes in this case. Instead, the burden of proof is on the plaintiffs who must demonstrate beyond a reasonable doubt that there are no conceivable grounds to support the marriage statutes' validity.[145]

In their pleadings, GLAD argues that the fundamental right to marry recognized by the United States Supreme Court[146] should be understood to compel the court to redefine marriage to include same-sex couples. GLAD's brief correctly notes that marriage is a social institution of the highest importance, but fundamentally misstates the nature of the right to marry by characterizing it as the right to choose one's definition of marriage.

The fundamental right to marry is just that—the right of an individual to enter into a marriage. This right, protected under the federal constitution (and we will assume also under the Massachusetts Constitution), necessarily incorporates some

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[140] MASS. GEN. LAWS ANN. ch. 207, §§ 1-2 (1998).

[141] *Id.* at §§ 24-25.

[142] *Id.* at § 4.

[143] *See* Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (stating that those rights protected by substantive due process are based in "our Nation's history, legal traditions, and practices"). When determining whether there is a fundamental right, the Court surveys the history of the Western legal tradition, common law, colonial law, and current law in the states. *Id.* at 710-11. Under this criteria, same-sex "marriage" cannot be considered a fundamental right as sodomy has until recently been almost universally prohibited at law and federal law and thirty-five states specifically prohibit recognition of same-sex "marriage."

[144] Plaintiffs' Memorandum at 9, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[145] St. Germaine v. Pendergast, 626 N.E.2d 857, 860 (Mass. 1993).

[146] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

definition of marriage. However, Massachusetts law contains no specific definition of marriage. Federal statutes contained no such definition until 1997.[147] In the absence of statute, that definition can only be understood as the male-female union recognized under Massachusetts common law.

As early as 1810, the SJC articulated this understanding of marriage:

> Marriage is unquestionably a civil contract, founded in the social nature of man, and intended to regulate, chasten, and refine, the intercourse between the sexes; and to multiply, preserve, and improve the species. It is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife. From the nature of the contract, it exists during the lives of the two parties, unless dissolved for causes which defeat the object of marriage, or from relations imposing duties repugnant to matrimonial rights and obligations.
>
> Marriage, being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well regulated governments, among the first attentions of the civil magistrate to regulate marriages; by defining the characters and relations of parties who may marry, so as to prevent a conflict of duties, and to preserve the purity of families; by describing the solemnities, by which the contract shall be executed, so as to guard against fraud, surprise, and seduction; by annexing civil rights to the parties and their issue, to encourage marriage, and to discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals, and a dissolution of manners; and by declaring the causes, and the judicature for rescinding the contract, when the conduct of either party and the interest of the state authorize a dissolution. A marriage contracted by parties authorized by law to contract, and solemnized in the manner prescribed by law, is a lawful marriage, and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage.[148]

Massachusetts precedent clearly recognizes marriage as the union of one man and one woman and does not accord other relationships the same statutory recognition when they do not qualify as marriage. The *Milford* decision even references the governmental regulations placed on marriage for the common good, which limits some individuals in their choice of marital partner.

Massachusetts General Laws, though not defining marriage, clearly reinforce the common law understanding that marriage is a male-female union.[149] For example, the statutory prohibitions on incest are sex-based, prohibiting men from

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[147] *See* 1 U.S.C. § 7 (1997).

[148] Inhabitants of Milford v. Inhabitants of Worcester, 7 Mass. 48, 52-53 (1810).

[149] *See Goodridge*, 2002 Mass. Super. LEXIS 153, at *6 (noting that "because marriage is not defined in the statute itself, the term must be construed as it is 'commonly understood'") (citing Nile v. Nile, 734 N.E.2d 1153, 1157 (Mass. 2000)); Commonwealth v. Burke, 467 N.E.2d 846, 848 (Mass. 1984) ("As has long been recognized, a statute should not be interpreted as being at odds with the common law unless the intent to alter it is clearly express.").

marrying female relatives and vice versa.[150] More explicitly worded is the caveat contained in the 1989 amendments to Massachusetts nondiscrimination laws. To specifically address the suggestion raised by Plaintiffs in this case, the General Court stated, "[n]othing in this act shall be construed so as to legitimize or validate a 'homosexual marriage,' so-called."[151] Even the practice of the state Department of Public Health and city clerks reflects this definition.[152]

The absence of a statutory definition is also significant in that it emphasizes limitations upon the ability of the judiciary to redefine marriage. Marriage in Massachusetts has no statutory definition because it is not a statutory creation. Rather, Massachusetts common law has incorporated the long-standing historical, philosophical, religious, and social understanding of marriage as a male-female union.[153] Massachusetts common law incorporates a preexisting definition of marriage rather than creating marriage as a new institution. Therefore, marriage is not a legal construct but an independent institution not subject to redefinition by a court.[154] It must be restated that marriage is recognized, not defined, by statutory law. Only in this context can the fundamental right to marry be understood.

Implicitly acknowledging a court's inability to redefine the myriad social, religious, historical, and philosophical implications of marriage, GLAD attempts to artificially segregate the legal aspects of marriage (calling it "civil marriage") from its private sector significance.[155] Much to the contrary, there have never been multiple marital systems in the Commonwealth.[156] Married couples in 1780

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[150] MASS. GEN. LAWS ANN. ch. 207, §§ 1-2 (1998).

[151] 1989 Mass. Acts ch. 516, § 19.

[152] *See* Verified Complaint at 25-29, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[153] This history and tradition of marriage throughout every society in the world as a male-female relationship is in large part the reason for the right to enter marriage being recognized as fundamental. *Cf.* Washington v. Glucksberg, 521 U.S. 702 (1997) (deciding a case on the fundamental right to assisted suicide, the Court noted that with all due process cases they begin "by examining our Nation's history, legal traditions, and practices").

[154] The definition of marriage may be contrasted with statutory benefits accorded on the basis of marriage. Marital benefits *are* legal constructs that the General Court may legitimately alter or redefine. However, as supported by arguments presented elsewhere in this article, there is no constitutional mandate which would require this court to invalidate current policies extending benefits on the basis of marriage.

[155] *See* Plaintiffs' Memorandum at 1 n.1, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[156] For example, many individuals obtain a civil license which is then solemnized in a religious ceremony. The two are not separate marriages, but multiple aspects of the same marriage. Even before clergy were authorized to solemnize marriages, marriage had an indisputable social and religious significance. *See, e.g.*, SAMUEL WILLIAMS, THE NATURAL AND CIVIL HISTORY OF VERMONT 326-27, *reprinted in* AMERICAN POLITICAL WRITING, *supra* note 26, at 952-53.

did not remarry when the Massachusetts Constitution was adopted. The adoption of state laws regulating marriage did not require couples to "opt in." Rather, marriage has always been understood as a single institution with simultaneous legal, social, historical, philosophical, and religious significance.

Even if Massachusetts courts had jurisdiction to redefine the institution of marriage, incremental changes, rather than the wholesale redefinition requested by the Plaintiffs would be more acceptable because marriage has been incorporated as a common law institution.[157] Massachusetts marriage laws are not statutory provisions which may be immediately discarded as unconstitutional. Rather, marriage has been incorporated into the common law as a longstanding tradition to which changes should be made only incrementally, if at all.[158]

The fundamental right to marry doctrine has only ever functioned to prohibit unwarranted governmental restrictions on an individual's right to enter marriage as a male-female union. The first case to describe the right to marry was *Loving v. Virginia*.[159] In that case, the criminal convictions of a couple for violating Virginia's anti-miscegenation laws were overturned. The next important case discussing the right to marry was *Zablocki v. Redhail*.[160] In that case, the Court struck down a law that did not allow individuals who were not current in their child support payments to marry. The most recent case, *Turner v. Safley*, invalidated a law prohibiting prisoners from marrying without approval of a prison superintendent.[161] These cases set out the parameters of the constitutional right to marry. These parameters contrast starkly with the GLAD's description of that right.

The laws reviewed in the major fundamental right to marry cases added extrinsic restrictions to the accepted definition of marriage. In *Loving*, for example, that restriction was particularly odious because it employed a racial classification. Anti-miscegenation laws were only in place in a minority of states at the time of the decision.[162] Similarly, the *Turner* and *Zablocki* cases involved individuals who would have otherwise been able to marry under the legal definition of that status, but who because of another state regulation were prohibited from doing so.

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[157] In re Roche, 411 N.E.2d 466, 476 (Mass. 1980) (referring to "the incremental process of common law development" as a means to "avoid overly broad generalizations").

[158] In a similar case, the Supreme Court of British Columbia recently concluded that the redefinition of marriage to include same-sex couples would be much more than an incremental change, invoking numerous questions of social concern and legal interpretation. *See* Egale v. Attorney Gen. of Canada, 2001 B.C.S.C. 1365, 89-97 (observing that marriage is so entrenched in society, and the impact of redefining marriage so uncertain, that the matter must be addressed by the legislature rather than a court).

[159] 388 U.S. 1 (1967).

[160] 434 U.S. 374 (1978).

[161] 482 U.S. 78 (1987).

[162] *See Loving*, 388 U.S. at 6.

In contrast, GLAD's claim in *Goodridge* goes to the very nature of marriage. It seeks a declaration that the definition of marriage should be changed. This result would change current constitutional jurisprudence from a right to enter into marriage, as it has always been understood, to the right to define marriage as one likes. Unlike the right to marry cases that invalidated laws that were not widely accepted, this suit attempts to overturn the unanimous consensus on the definition of marriage in the United States.[163]

Understandably, the same-sex couples in *Goodridge* are anxious to advance a different and novel reading of the right to marry. Massachusetts courts, however, have generally interpreted Massachusetts due process provisions not to extend further than federal due process provisions and have been just as unwilling to recognize or create new fundamental rights.[164]

Due process and liberty protections of the Declaration of Rights have not been applied to laws in the area of marriage or family law. One of the most significant extension of due process provisions providing greater protections than the federal constitution was in *Coffee-Rich, Inc. v. Commissioner of Public Health*.[165] There, due process protections were levied against a legislative attempt to regulate economic activity. In contrast, GLAD attempts to gain just the opposite—greater legislative regulation in the private lives of individuals—when due process protections are actually designed to limit arbitrary governmental encroachment in individuals' private lives and private business decisions.[166] In their brief, GLAD argues that Massachusetts courts have shown a deference to "freedom of choice in matters of marriage and family life."[167] In support of this contention, they cite to

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[163] Federal law defines marriage as the union of one man and one woman. Thirty-five states currently have Defense of Marriage Acts defining marriage as the union of one man and one woman and refusing to recognize same-sex "marriage" or same-sex relationships as marriage. States where passage of constitutional amendments have been available to the people to overturn a court ruling recognizing same-sex "marriage" have passed constitutional amendments defining marriage as a male-female union (Hawaii and Alaska). Recent votes on the issue of marriage have resulted in laws or amendments defining marriage as male-female passing by margins of sixty to seventy percent. *See, e.g.*, Joyce Howard Price, *Nevada OKs Constitutional Amendment on Marriage*, WASH. TIMES, Nov. 7, 2002, at A17. *See also* http://www.ss.ca.gov/elections/sov/2000_primary/measures.pdf (last visited Jan. 17, 2003) (California marriage statute).

[164] *See, e.g.*, Tobin's Case, 675 N.E.2d 781, 784-83 (Mass. 1997) (holding no fundamental right to receive workers' compensation benefits); Doe v. Superintendent of Schs. of Worcester, 653 N.E.2d 1088, 1095 (Mass. 1995) (holding no fundamental right to education); English v. New England Med. Ctr., Inc., 541 N.E.2d 329, 333-34 (Mass. 1989) (holding no fundamental right to recover tort damages).

[165] 204 N.E.2d 281 (Mass. 1965).

[166] *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 45 (1991) (citing Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966)).

[167] Plaintiffs' Memorandum at 14-15, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

a number of cases from the Commonwealth.[168] These cases are all inapposite as none deal with the validity of a marriage or the nature of family.

The only case cited as authority for GLAD's novel "freedom of choice in marriage" argument that actually deals with marriage is *Perez v. Lippold*, a California case dealing with an anti-miscegenation law.[169] The issue in *Perez*, though, is not the definition of marriage. Rather, it answers the question of "whether the state can restrict [the right to marry] on the basis of race alone without violating the equal protection of the laws clause of the United States Constitution."[170] In fact, the majority opinion and the two concurrences dwell at length on questions of racial discrimination and prejudice that the judges correctly felt were central to the validity of the anti-miscegenation statute at issue in the case.[171] The court described the legal standard it was applying as "whether the rights of an individual are restricted *because of his race*."[172]

The court never questioned the State's definition of marriage. It only questioned the use of racial classifications to prevent people otherwise entitled to marry from doing so. In fact, the court accepted the view that marriage is a status that precedes state recognition. The *Perez* court stated, "[s]ince the essence of the right to marry is the *freedom to join in marriage* with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry."[173] This would clearly be a circular definition if marriage was not more than a mere statutory construct.

The court also seemed to implicitly accept the opposite sex nature of marriage. For instance, in describing the constitutional right to marry, the court cites to a U.S. Supreme Court opinion describing the right as a right "to marry, establish a home and bring up children."[174] Later, when the court discussed the argument that the progeny of mixed-race marriages will be inferior, the court did not

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[168] These cases include Opinion of the Justices to the Senate, 376 N.E.2d 810 (Mass. 1978) (requiring political candidates to file financial disclosure statements does not violate the candidate's right to privacy); Sec'y of the Commonwealth v. City Clerk of Lowell, 366 N.E.2d 717, 722 (Mass. 1977) (holding that individuals can change their names if no fraud is involved); Tarin v. Comm'n of the Div. of Med. Assistance, 678 N.E.2d 146 (Mass. 1997) (considering a Medicaid recipient's child support payments as "available" income does not violate recipient's constitutional rights); A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000) (holding that an agreement that upon separation preembryos would be given to one of the spouses, was unenforceable).

[169] 198 P.2d 17 (Cal. 1948).

[170] *Id.* at 19.

[171] *Id.* at 29 (holding the anti-miscegenation statutes violate the 14th Amendment "by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups"); *id.* at 30 (Carter, J., concurring) ("[I]t is not possible for the Legislature, in the face of our fundamental law, to enact a valid statute which proscribes conduct on a purely racial basis.").

[172] *Id.* at 20 (emphasis added).

[173] *Id.* at 21 (emphasis added).

[174] *Perez*, 198 P.2d at 18 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

dismiss the argument as irrelevant because procreation is not linked to marriage. Instead, it noted that the argument is just not true.[175]

Another provision of the Massachusetts Constitution on which GLAD relies for their asserted due process right is Part 2, ch. 1, § 1, art. 4.[176] This provision has not been used to extend individual constitutional liberties or rights, but instead is used to broadly empower the legislature to curtail individual liberties as necessary for the common good.[177]

Fundamentally, the GLAD plaintiffs' claim is for a court-ordered redefinition of marriage. Such a redefinition would completely change the meaning of the right to marry, just as it would change the meaning of marriage. Indeed, no other state in the United States has ever construed the right to marry in this way.[178]

V. THE ESSENCE OF A FREE REPUBLIC: POPULAR SOVEREIGNTY AND THE SAME-SEX "MARRIAGE" DEBATE[179]

With all we know about the principles behind the Massachusetts Constitution, its focus on the common good, government by the people, and separation of

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[175] *Id.* at 26.

[176] MASS. CONST., pt. 2, ch. 1, § 1, art. 4 provides:

> And further, full power and authority are hereby given and granted to the said general court . . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws . . . and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth . . . .

[177] *See Opinion of the Justices*, 376 N.E.2d at 1220 (referring to pt. 2, c. 1, § 1, art. 4 of the Massachusetts Constitution: "Thus the power to order social priorities, and to focus the energies of society into the accomplishment of designated objectives or programs is entrusted to the Legislature through the enacted of laws according to prescribed procedures.").

[178] Although a plurality of the Hawaii Supreme Court speculated that the state's marriage law might constitute sex discrimination, it specifically rejected the claim that there was a fundamental right of same-sex "marriage." Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). Likewise, a superior court judge in Alaska intimated that the state's definition of marriage might contradict that state's constitutional privacy provision, but characterized the right at issue as a fundamental right to "choose one's life partner" rather than a right to marry. Brause v. Bureau of Vital Statistics, 1998 WL 88743, at *6 (Alaska Super. 1998). Finally, the Vermont Supreme Court declined an invitation to rule Vermont's marriage statute unconstitutional. *Baker*, 744 A.2d at 889.

[179] Resolution of Massachusetts Constitutional Convention of 1780, *in* 4 WORKS OF JOHN ADAMS, *supra* note 30, at 215 ("[I]t is the essence of a free republic that they should be governed by FIXED LAWS OF THEIR OWN MAKING.").

powers, it is curious that same-sex "marriage" advocates would use the constitution to seek judicial redefinition of marriage. Obviously the Vermont Supreme Court took the bait, but should the same strategy work in Massachusetts?[180]

Massachusetts has a strong constitutional history and precedent supporting the right of the people to be involved in constitution-making, referendum, and determining the laws by which they would be governed. The last of the thirteen original colony-states to have a constitution, Massachusetts was the first to have a constitution approved by a vote of the people who would be subjected to its rule and written by representatives who were chosen for the express purpose of constitution-writing.[181] Constitutional referendum is not only appropriate and constitutional in Massachusetts, it is the way Massachusetts began. This is not solely a historical fact for the people of Massachusetts, but the only means by which they would willingly consent to be governed.[182]

A. Power from the People

"In free States the people are considered as the fountain of power," said the Berkshire County representatives in their 1778 statement calling for a new government and constitution.[183] Of all the principles integral to the Massachusetts Constitution, the right of the people to be governed by fixed laws to which they gave their consent, either directly or through representation, is the most valued.[184]

This principle was so important that it was included in the initial resolution of the Massachusetts Constitutional Convention before the constitution was drafted. The resolution reads: "Resolved, unanimously, That the government to be framed

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[180] *See Baker*, 744 A.2d 864. *See generally* Coolidge & Duncan, *supra* note 4.

[181] Representing the town of Pittsfield, Thomas Allen wrote in May 1776: "We have always been persuaded that the people are the fountain of power . . . a Representative Body may form, but cannot impose said fundamental constitution upon a people. They being but the servants of the people cannot be greater than their Masters and must be responsible to them. If this fundamental Constitution is to be above the whole General Court, the General Court cannot certainly make it, it must be the Approbation of the Majority which gives Life and being to it." Petition of Pittsfield (May 1776), *Massachusetts Archives* CLXXXI 42–45.

[182] *See* Paul C. Reardon, *The Massachusetts Constitution Marks a Milestone*, 12 PUBLIUS 45 (Winter 1982) ("In [Berkshire County] a group called the Constitutionalists loudly proclaimed that the Massachusetts government was illegitimate since the people had no voice in its establishment.").

[183] POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 34, at 374.

[184] *See* Statement of the General Court (Jan. 23, 1776), *in* POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 34, at 65 ("As the Happiness of the People, (alone) is the sole end of Government, so the Consent of the People is the only Foundation of it, in Reason, Morality, and the natural Fitness of Things; and therefore every Act of Government, every Exercise of Sovereignty, against, or without, the Consent of the People, is Injustice, Usurpation, and Tyranny.").

by this convention shall be a FREE REPUBLIC. Resolved, That it is of the essence of a free republic, that the people be governed by the FIXED LAWS OF THEIR OWN MAKING."[185]

Liberty is closely tied to consent in the Massachusetts Constitution.[186] The framing generation understood liberty as the people being subject only to laws to which they had given their consent. All individuals share in the ability to give their consent, so that the foundation of equality and liberty is the concept of consent. Liberty rests upon the consent of the people governed, and their equal ability to give consent to the laws is the true nature of equality. "Let it be thus defined; political liberty is the right every man in the state has, to do whatever is not prohibited by laws, TO WHICH HE HAS GIVEN HIS CONSENT. This definition is in unison with the feelings of a free people."[187] This is also why the lawmaking power is reserved to the legislative branch; that branch is directly elected by the people for the purpose of lawmaking. Were the judiciary to make or mandate laws, the people would not have given their consent, and, therefore, their liberty rights would be impaired.

The consent of all individuals was determined by the voice of the majority of the people because all individuals agreed to be bound by the decision of the majority through the social compact.[188] This is explained further in *The Essex Result*:

> If a fundamental principle on which each individual enters into society is, that he shall be bound by no laws but those to which he has consented, he cannot be considered as consenting to any law enacted by a minority: for he parts with the power of controlling his natural rights, only when the good of the whole requires it; and of this there can be but one absolute judge in the State. If the minority can assume the right of judging, there may then be two judges; for however large the minority may be, there must be another body still larger, who have the same claim, if not a better, to the right of absolute determination. If therefore the supreme power should be so modeled and exerted, that a law may be enacted by a minority, the inforcing of that law upon an individual who is opposed to it, is an act of tyranny. Further, as every individual, in entering into the society, parted with a power of controuling his natural rights equal to that parted with by any other, or in other words, as all members of that society contributed an equal

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[185] 4 WORKS OF JOHN ADAMS, *supra* note 30, at 215 (interestingly, the vote to write a new constitution (after the unapproved 1778 constitution) was 250-1, while the vote approving this resolution determining the type of government Massachusetts would have was a unanimous vote).

[186] The Attorney General's brief in *Goodridge* notes that "[t]he meaning of the term 'liberty,' as understood by the framers, also counsels against an expansive reading of the term . . . . At the time the Massachusetts Constitution was drafted, '[l]iberty' consisted primarily in having a voice in legislation.' Adams, at 127." Attorney General's Memorandum at 20, *Goodridge*, No. 01-1647-A, 2002 Mass. Super. LEXIS 153.

[187] THE ESSEX RESULT, *supra* note 34, at 331.

[188] *See* PETERS, *supra* note 32, at 138.

> portion of their natural rights, towards the forming of the supreme power, so every member ought to receive equal benefit from, have equal influence in forming, and retain an equal controul over, the supreme power.[189]

John Adams concurred with this desire that government be created by and "derive[] [its] just powers from the consent of the governed,"[190] necessarily approved by a majority. "I hope you proceed, in the Formation of a Constitution without any hurtfull [sic] Divisions, or Altercations. Whatever the Majority determine, I hope the Minority will chearfully [sic] concur in," he wrote.[191] The Berkshire County representatives considered majority rule an unalienable right:

> The people at large are endowed with alienable and unalienable Rights. Those which are unalienable, are those which belong to Conscience respecting the worship of God and the practice of the Christian Religion, and that of being determined or governed by the Majority in the Institution or formation of Government . . . . That the Majority should be governed by the Minority in the first Institution of Government is not only contrary to the common apprehensions of Mankind in general, but it contradicts the common Law of Justice and benevolence.[192]

It is clear to see that if laws are changed through the judiciary, or by a faction seeking personal benefits without the approval of people either directly or through their representatives, this would violate the social compact inherent in the Massachusetts Constitution.[193]

B. Arbitrary Rule and Role of the Judiciary

Without individual consent to the laws, political equality is likely to be abridged. The requirement of the people's consent to govern gives them equality before the law and protects against arbitrary use of power by those in government. The arbitrary misuse of power by rulers was of great concern to

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[189] THE ESSEX RESULT, *supra* note 34, at 331 (continuing to note that "to receive equal benefit from" the society (arguably, government created) is the security of his person and property and other unalienable right, not government-created rights and benefits such as legal recognition for marriage).

[190] DECLARATION OF INDEPENDENCE para. 2.

[191] Letter from John Adams to James Warran (June 11, 1777), *in* 5 PAPERS OF JOHN ADAMS 221 (Robert J. Taylor et al. eds., 1983).

[192] Statement of Berkshire County Representatives (Nov. 17, 1778), *in* POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 34, at 331.

[193] *See* Alexander J. Cella, *The People of Massachusetts, A New Republic, and the Constitution of 1780: The Evolution of Principles of Popular Control of Political Authority 1774-1780*, 14 SUFFOLK U. L. REV. 975, 1004-05 (Summer 1980) ("[T]he Constitution of 1780 itself reflected to an extraordinarily high degree a popular willingness to subordinate private interests and personal fears to the common good. New ideas of popular control of political authority did not spring full-blown from the mind of any one leader or political theorist. Instead, these new concepts evolved and were hammered out on the crucible of common experience.").

those who authored the Massachusetts Constitution.[194] The Massachusetts General Court understood the consent of the governed to be the foundation of a free government when they proclaimed in January 1776:

> As the Happiness of the People, (alone) is the sole end of Government, so the Consent of the People is the only Foundation of it, in Reason, Morality, and the natural Fitness of Things; and therefore every Act of Government, every Exercise of Sovereignty, against, or without, the Consent of the People, is Injustice, Usurpation, and Tyranny.[195]

Governor Winthrop spoke against the arbitrary use of power and its infringement on liberty:

> For reasons like these, the spirit of liberty is and ought to be a jealous, a watchful spirit . . . knowing that her enemies are secret and cunning, making the earliest advances slowly, silently, and softly . . . . It is one of these early advances, these first approaches of arbitrary power, which are the most dangerous of all, and, if not prevented but suffered to steal into precedents, will leave no hope of a remedy without recourse to nature, violence, and war.[196]

The constitution of Massachusetts makes specific provision for the structure of government preventing abuse of power by those charged with enacting and executing the laws. Article XXX of the constitution reinforces this separation of constitutional powers, so that there is no overlap between the powers of the executive, legislative or judicial branches:

> In the government of the Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them; The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[197]

This separation of powers provision comes directly from concerns raised by those who demanded that the Massachusetts Constitution balance government powers among three differing branches. The *Essex Result* states:

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[194] *See id.* (citing THE ESSEX RESULT, *supra* note 34, at 339) ("[T]he principle criticism of the draft constitution of 1778 was its failure to ensure sufficient independence of the legislative branch from executive or judicial control.").

[195] Proclamation of the General Court (Jan. 23, 1776), *in* POPULAR SOURCES OF POLITICAL AUTHORITY, *supra* note 34, at 37.

[196] Letter of Governor Winthrop to Governor Bradford, *in* 3 WORKS OF JOHN ADAMS 489-90 (Charles Francis Adams ed., 1851).

[197] MASS. CONST., pt. 1, art. XXX.

> The judicial power follows next after the legislative power; for it cannot act, until after laws are prescribed . . . . If the legislative and judicial powers are united, the maker of the law will also interpret it; and the law may then speak a language, dictated by the whims, the caprice, or the prejudice of the judge, with impunity to him—And what people are so unhappy as those, whose laws are uncertain.[198]

On several occasions, the Massachusetts Supreme Judicial Court has addressed its role under Article XXX. On each occasion, the court has refused to engage in revision of statutes in contrast to the legislature's intent or to create new legislation implementing the court's intent. In *Pielech v. Massasoit Greyhound, Inc.*,[199] the court cited to several previous cases noting that statutes must be construed as they are written, and that the court's authority is to interpret and apply statutes in accord with the General Court's intent, not to create new legislation:[200]

> The scope of the authority of this court to interpret and apply statutes is limited by its constitutional role as a judicial, rather than a legislative, body. In construing a legislative enactment, it is our duty to ascertain and implement the intent of the Legislature . . . . We cannot interpret a statute so as to avoid injustice or hardship if its language is clear and unambiguous and requires a different construction.[201]

The SJC has also noted its duty "to avoid judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions."[202] This principle was applied in *Connors v. City of Boston*, where the SJC would not construe the term "spouse" to include domestic partners, declaring that "[a]djustments in the legislation to reflect these new social and economic realities must come from the Legislature . . . ."[203] Specific to the *Goodridge* case, the trial court decision noted that "[t]his deferential standard [presumption of a statute's constitutionality] is rooted in separation of powers principles, which are even stronger when a court is asked to invalidate, rather than simply interpret, a legislative enactment."[204]

Massachusetts courts recognizing same-sex "marriage" or requiring marital benefits for same-sex couples, either from current statutes or out of whole cloth, would offend the constitutional principle of separation of powers which is recognized explicitly in the Massachusetts Constitution.[205] The SJC has specifically refused to "engage in a judicial enlargement of the clear statutory

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[198] THE ESSEX RESULT, *supra* note 34, at 336-38.

[199] 668 N.E.2d 1298 (Mass. 1996).

[197] *Id.* at 1302-03.

[201] *Id.* at 1302 (citations omitted).

[202] *Id.* (quoting Commonwealth v. A Juvenile, 334 N.E.2d 617, 627 (1975)).

[203] 714 N.E.2d 335, 341-42 (Mass. 1999).

[204] *Goodridge*, 2002 Mass. Super. Lexis 153, at *14.

[205] *See* MASS. CONST. pt. 1, art. XXX.

language beyond the limit of our judicial function," noting that it

> ha[s] traditionally and consistently declined to trespass on legislative territory in deference to the time tested wisdom of the separation of powers as expressed in art. XXX of the Declaration of Rights of the Constitution of Massachusetts even when it appeared that a highly desirable and just result might thus be achieved.[206]

The Massachusetts Supreme Judicial Court has always been loathe to reform statutory language to reach an unexpressed result or to cover cases which the General Court has not yet considered.[207] In *King*, the court expressly stated that it has "no right to conjure what the Legislature would have enacted if they had foreseen the occurrence of a case like this; much less can we read into the statute a provision which the Legislature did not see fit to put there."[208] Succumbing to GLAD's demand for judicial redefinition of the marriage laws would be the true constitutional violation in the *Goodridge* case.

The Massachusetts Legislature has not acted to create same-sex "marriage" or to give marital benefits to couples other than to male-female couples who are lawfully married. They have not legislated in this way even though the legislature has considered the possibility of homosexual marriage. When including "sexual orientation" as a protected class for discrimination purposes, the Massachusetts General Court specifically noted that "[n]othing in this act shall be construed so as to legitimize or validate a 'homosexual marriage' . . . or to provide health insurance or related employee benefits to a 'homosexual spouse.'"[209]

The Massachusetts Constitution establishes a government in which the people will be governed by laws of their own making, either through their elected representatives in the General Court, through their direct vote on a constitution, constitutional amendments, or other forms of laws. The Massachusetts Constitution never concedes lawmaking powers to the judicial branch as the *Goodridge* plaintiffs request the Massachusetts courts to take.

To create same-sex "marriage" or require issuance of marital benefits to same-sex couples "would require [the Court] to engage in a massive rewriting of the statute [which would] impermissibly infringe on the lawmaking function of the Legislature."[210] It is hoped of course, that the judiciary of Massachusetts will not

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[206] Dalli v. Bd. of Educ., 267 N.E.2d 218, 223 (Mass. 1971) (citing King v. Viscoloid Co., 106 N.E. 988, 988-89 (Mass. 1914)).

[207] *See King*, 106 N.E.2d at 988-89 ("The Legislature simply have not covered the case . . . . How can the court say which if either of these courses would have been adopted by the Legislature . . . we have no right to conjure what the Legislature would have enacted if they had foreseen the occurrence of a case like this; much less can we read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.").

[208] *Id.* at 989.

[209] 1989 Mass Acts ch. 516, § 19.

[210] Aime v. Commonwealth, 611 N.E.2d 204, 214 (Mass. 1993).

overstep its bounds and engage in such creative lawmaking. To do so would leave the Commonwealth electorate no recourse but to amend their constitution as was done in Alaska and Hawaii when courts in those jurisdictions headed toward legalization of same-sex "marriage."[211]

C. Opposing the People

While GLAD is willing to use the judiciary to redefine marriage, same-sex "marriage" advocates have opposed giving the people of Massachusetts an opportunity to fully debate and vote on this important social issue which impacts the future of every family in the Commonwealth.[212] If the legal definition of marriage is to be changed in Massachusetts, that change should be brought through specific legislative action rather than a court pronouncement of preference for a definition different from that presumed in Commonwealth law.[213]

Learning from Vermont's *Baker* ruling, pro-marriage groups in Massachusetts realized that the only way for them to protect marriage from redefinition by same-sex "marriage" advocates through the courts, legislature, or executive order was through a constitutional amendment. The Protection of Marriage Amendment[214] was proposed on July 31, 2001, and the signature petition drive to get the amendment on the ballot resulted in over 130,000 signatures in favor of the amendment.[215]

Same-sex "marriage" advocates' opposition to the democratic process has appeared evident ever since the amendment was introduced. Even before the Attorney General could give initial approval for the amendment for voters to sign

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[211] *See* Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 214-30 (1999); David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Constitutionality*, 22 U. HAW. L. REV. 19, 20-43 (2000).

[212] *See Opponents Gear Up for April 10 Amendment Hearing*, Apr. 4, 2000, Bay Windows Online, *available at* http://baywindows.com/news/229003.html.

[213] *See Connors*, 714 N.E.2d at 337-39.

[214] H.B. 4840, 182nd Gen. Ct., Reg. Sess. (Mass. 2002) ("It being the public policy of this Commonwealth to protect the unique relationship of marriage in order to promote, among other goals, the stability and welfare of society and the best interests of children, only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts. Any other relationship shall not be recognized as a marriage or its legal equivalent, nor shall it receive the benefits or incidents exclusive to marriage from the Commonwealth, its agencies, departments, authorities, commissions, offices, officials, and political subdivisions. Nothing herein shall be construed to effect an impairment of a contract in existence as of the effective date of this amendment.") Amendments must be approved by twenty-five percent of two successively elected joint sessions of the General Court.

[215] The Secretary of State eventually certified 76,607 signatures, well over the required 57,100 signatures. Certification of the Secretary of the Commonwealth William F. Galvin (Jan. 3, 2002).

onto it, GLAD and other pro-homosexual groups opposed it. GLAD filed a thirty-page legal memo requesting that the Attorney General decline to certify the amendment petition so it could never reach the ballot. The mayors of Boston, Cambridge, Sommerville, and Springfield, Massachusetts also filed statements in opposition to the voters having an opportunity to vote on the issue of marriage. GLAD even filed suit against the ballot initiative before the Supreme Judicial Court in hopes that the court would stop the amendment from going before voters.[216]

While happy to redefine the marriage laws before a small number on the court, GLAD appears unwilling to have same-sex "marriage" debated before the general public. Same-sex "marriage" advocates' opposition to the democratic process in a free republic is interesting in light of the fact that they would force same-sex "marriage" on the Commonwealth through judicial fiat, but at every step oppose giving the people of the Commonwealth an opportunity to vote on marriage for themselves.

Legislators opposing the right of the people to vote on the Protection of Marriage Amendment eventually blocked the amendment from going on the ballot by voting to adjourn the 2002 constitutional convention without voting on the amendment initiative.[217] The SJC has previously ruled that the Massachusetts Constitution requires the General Court to vote on amendment initiatives that come before it in constitutional convention.[218] However, it has never used its judicial gavel to force the legislature back into constitutional convention for a final vote on a popularly proposed amendment.

Senate President Tom Birmingham, who controlled the constitutional convention agenda, stopped the marriage amendment from coming to debate or a vote before the full convention could take place. He recessed previous sessions of the convention and finally on July 17, 2002, brought to the floor a vote to adjourn the convention without taking final action on the amendment.[219] While only 50 votes were needed to preserve the Protection of Marriage Amendment for the next constitutional convention, legislators voted on adjournment 137-53 without addressing the amendment. Birmingham even acknowledged that he did

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[216] *See Albano*, 769 N.E.2d 1242 (holding that the amendment initiative was properly certified for the ballot and met the constitutional requirements for initiatives).

[217] *See* Yvonne Abraham, *Gay Marriage Ban Thwarted Legislators Kill Ballot Question*, BOSTON GLOBE, July 18, 2002, at A1 (noting that legislators appeared to have known they were working against the constitutional process. One representative who voted in favor of adjournment noted that "[f]or those of us who believe in an open democratic process, this was not a comfortable vote." One Senator stated, "I thought we had a responsibility to take a vote on it given the number of signatures and the extraordinary effort that's been put into it, and basically as a reflection of respect for the process.").

[218] *See* LIMITS v. President of the Senate, 604 N.E.2d 1307, 1309 (Mass. 1992).

[219] *See* Abraham, *supra* note 217, at A1; Rick Klein, *Birmingham Pressured to Block Same-sex Marriage Ban*, BOSTON GLOBE, May 2, 2002, at B8; Chris Tangney, *Birmingham Looking to Block Gay Marriage Ban*, BOSTON GLOBE, July 16, 2002, at B1.

not allow final action to be taken on the amendment in order to defeat it: "I am proud that yesterday we defeated this amendment by voting to adjourn the Constitutional Convention."[220] Unfortunately for the Commonwealth, adjournment is not the appropriate means to defeat an amendment initiative.[221]

On its face this action appears to be thwarting democracy, but perhaps more problematic, it violates the Massachusetts Constitution. Violating the constitution, however, does not appear to bother some of the legislators. One legislator remarked, "I'll take a victory on this [defeating the ballot initiative] any way I can get it."[222]

The joint session in a constitutional convention is required by article XLVIII of the constitution to take "final action" on all pending amendments.[223] If final action by a vote is not taken, the only governmental remedy is for the Governor to call a joint session before the current term of the General Court ends.[224] When this does not occur, the SJC has noted that "when the purpose of art. 48 hasbeen frustrated, the only remedy may come from the influence of public opinion, expressed ultimately at the ballot box."[225]

Opposition to allowing the people to determine their marriage laws for the

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[220] Abraham, *supra* note 217, at A1; *see also* e-mail from Birmingham to constituents (July 18, 2002) ("Everybody recognizes a vote to adjourn was a vote up or down on [the amendment].").

[221] *See* MASS. CONST. art. XLVIII (requiring the legislature to take "final action" on constitutional amendments pending before it in joint session). When Birmingham allowed a final adjournment in July without raising any of the constitutional amendments, the Senate and Governor proposed questions to the Supreme Judicial Court on the propriety of the actions of the Legislature and their respective duties, and suit was filed challenging Birmingham's actions. While the SJC held that the Massachusetts legislature did not take final action on the amendments when it voted to adjourn in July without considering the amendments, the court did not require the governor to call the legislature back into session. *See* Opinion of the Justices to the Acting Governor, 780 N.E.2d 1232 (Dec. 20, 2002 Mass.); Answer of the Justices to the Senate, 780 N.E.2d 444 (Dec. 20, 2002 Mass.); Pawlick v. Birmingham, 780 N.E.2d 466 (Dec. 30, 2002).

[222] *See* Abraham, *supra* note 217, at A1 ("Cheryl A. Jacques, a leading opponent of the ballot question . . . conceded yesterday that her victory might not have been pretty. But she was no less satisfied for that. 'We had a recorded vote to adjourn . . . . I'm proud to have done anything possible to defeat this.'")

[223] Mass. Const. art. XLVIII, c. IV, § 2 ("If a proposal for a specific amendment of the constitution is introduced into the general court by initiative petition signed in the aggregate . . . consideration thereof in joint session is called for by vote of either house, such proposal shall . . . be laid before a joint session of the two houses, at which the president of the senate shall preside, and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof.").

[224] *See* Abraham, *supra* note 217, at A1. Governor Swift, who opposes the amendment initiative, said she would not reconvene a joint session.

[225] *LIMITS*, 604 N.E.2d at 1309.

common good is understandable, however, when the history of the marriage debate in other states is surveyed.[226] As Betsy Smith, director of a pro-homosexual political action group in Massachusetts has said, "[f]rankly, if [the Protection of Marriage amendment] makes it to the ballot, we stand a fair chance of losing."[227] Massachusetts legislators understand this aspect of the same-sex "marriage" agenda, as well. Representative Alice K. Wolf is cited as saying that gay rights advocates have long feared that conservative groups would take their campaign to the voting booth.[228]

In light of this, GLAD's strategy of taking its special interest claims to the courts is well designed. However, it is not constitutionally or politically appropriate. GLAD's additional litigation to stop the amendment from going on the ballot after all the signatures were gathered also serves their end. This, however, does not justify opposing the right of the people to govern themselves, as established by the Massachusetts Constitution, while demanding broader rights under that same constitution.

Same-sex "marriage" advocates should not have it both ways. Making their claims under the Massachusetts Constitution, they need to allow the people to be governed by laws of their own making, not have their liberty taken from them through judicial tyranny. This is fundamental to the Massachusetts Constitution and American liberty.

D. Commonwealth at a Crossroads

The striking contrast between the principles and provisions of the Massachusetts Constitution and the arguments and tactics of same-sex "marriage" advocates in Massachusetts leaves the Commonwealth and its courts at a crossroads in its politics and jurisprudence. If the court does not create same-sex "marriage," it will receive the usual intolerant derisions of "bigotry" and "hatemongering;" if it does require creation of same-sex "marriage" or some other rubric under which same-sex couples are recognized as "married" for purposes of the law, it will cross the wisdom of the Commonwealth's constitution, divining from it legislation the document was never intended to

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[226] Previous litigation challenging the marriage laws in Hawaii and Alaska resulted in voters amending their state constitutions to legally define marriage as a male-female union. *See* HAW. CONST. art. 1, § 23; AK. CONST. art. 1, § 25 (2001). Voters in Nebraska also amended their state constitution to define marriage as a male-female union and to specifically not recognize domestic partnerships or other same-sex relationships as "marriage." In total, thirty-five states have either amended their constitutions or passed laws through the democratic process to protect the male-female nature of marriage. *See also* Clarkson et al., *supra* note 211; David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning, and Constitutionality*, *supra* note 211.

[227] Elizabeth Leimbach, Gay Activist Intimidation Fails to Keep a Marriage Amendment Off the Mass. Ballot (unpublished article, on file with the author).

[228] *See* Benjamin Geden, *Ballot Effort Eyes Gay Marriage Ban*, BOSTON GLOBE, Aug. 25, 2001, at B2.

create. Faithfulness to the fundamental principles of the constitution, interpreting it in light of the conditions under which it was created, and allowing the people to govern themselves under its provisions is the surest course for a court to take under such an enduring instrument as the Massachusetts Constitution.[229]

The Commonwealth's constitutional government provides an opportunity for the people to determine the common good through their vote, and in matters of social policy such as marriage it is even more appropriate for the people, rather than the courts, to determine what those policies will be.

Limiting the right of the people of the Commonwealth to determine their own laws and revise their constitution as they deem necessary and sidelining the democratic process all fly in the face of the Commonwealth and its constitution. Pursuing the same-sex "marriage" agenda in this manner while making claims under this same constitution is only disingenuous. Every player in the marriage debate should seek to include the people in the process, because it is the people and their common good that will ultimately be the most deeply impacted by the Commonwealth's laws on marriage.[230]

A Boston Herald editorial, published two days after GLAD filed the *Goodridge* suit, says it best:

> If gays and lesbians cannot convince the public and voters through their elected representatives that the law needs to be changed to allow civil unions, then clearly the time is not right—and perhaps it never will be. To attempt to use the courts as an end run around the political process is a perversion of the legal system.[231]

Just as they did in 1780, the people of Massachusetts should engage in the political process—this time to protect marriage for the common good and their posterity.

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[229] *See Cohen*, 259 N.E.2d at 542-43 (Mass. 1970); *Putnam*, 116 N.E. at 906.

[230] *See Goodridge*, 2002 Mass. Super. LEXIS 153, at *11 ("The state recognizes marriage as the most important civil institution, 'the very basis of the whole fabric of civilized society.'") (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE § 29 (1856)). The impact of changing marriage laws on the common good can be seen from the negative effects of no-fault divorce laws. This change in the marriage laws taught society that marriage was of a non-binding nature. For example, faith in marital permanence has greatly decreased since passage of no-fault divorce laws, and children of divorced parents (as opposed to only high-discord parental marriages) are more likely to divorce themselves, not because of poor relationship skills but because of the loss of the ideal of marital permanence. *See* Paul R. Amato & Danelle D. DeBoer, *The Transmission of Marital Instability Across Generations: Relationship Skills or Commitment to Marriage?*, 63 J. OF MARRIAGE AND FAM. 63, 1038-51 (2001).

[231] Editorial, *Wrong Forum for Gay Rites*, BOSTON HERALD, Apr. 13, 2001, at 24.