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Same-sex Marriage: The Cultural Wars and the Lessons of Legal History

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Our concern . . . is whether historical, cultural, religious or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.

Chief Justice Margaret Marshall, *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 965, n. 29 (Mass. 2003).

Introduction:

When the Supreme Judicial Court of Massachusetts ruled that same-sex couples have the right to obtain civil marriage licenses under the state constitution in *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) the majority opinion contained numerous historical references. A reading of the opinion shows that the Court was also acutely aware of cultural and religious differences on same-sex marriage. This Article examines these historical, cultural and religious differences and the Massachusetts decision in the light of legal history.

The Personal and Cultural View of Marriage:

When people live in a particular culture and in a particular period of time they often assume that marriage and family have always been identical to what they experience. For many individuals their own family life, their schooling and their religious beliefs often reinforce this construct. It is also difficult for some to acknowledge that marriage has changed throughout history or to acknowledge a view of marriage which differs from their own moral or religious convictions. Many believe that the state's definition of civil marriage should conform to their own personal memory of family life. For such people

marriage and family life have remained static for centuries and cannot change.¹ This is especially true when the topic is same-sex marriage.

Each of us has a photograph of marriage in mind. It is understandably difficult to see any other image as proper. In this Article I ask the reader to consider whether his or her mental photograph which may be perfectly valid as a religious, moral or personal concept, is also necessarily relevant to the state definition of civil marriage. It may be easier for the reader to form an opinion on this question by considering whether throughout history marriage has actually changed, or whether it has remained static.

Is Marriage a Static Institution?

When the Supreme Judicial Court of Massachusetts announced that the state could not exclude same-sex couples from access to the license needed to effect a valid civil marriage² in violation of the Massachusetts Constitution,³ it produced a political firestorm. Massachusetts Governor Mitt Romney denounced the decision by saying that it overturned “three thousand years of recorded history.”⁴ Apparently the Governor, himself a Mormon, was oblivious to the fact that just a little more than a century earlier this nation was so intensely divided on the definition of marriage that it actually resulted in a small civil war.⁵ This struggle occurred because the Mormon Church refused for several decades to accept the majority view of marriage.

¹ See Stephanie Coontz, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (2nd 2000) [political leaders continue to distort memories of family life and changes through historical mythologizing, giving specific examples].

² *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003). The defendant Department of Public Health is charged by statute with enforcing the issuance of marriage licenses and keeping marriage records. See Mass.Gen.L. c. 17, § 4 (2003).

³ The decision was based on Articles 1, 6, 7 and 10 of the Massachusetts Constitution, providing for free and equal rights and liberties, the denial of title to community or public advantages by some over others, the need for government to protect the safety, prosperity and happiness of all and not for the private interest of one man, family or class of men, and the right of each individual to be protected in life, liberty and property according to law. The plaintiffs also asserted other provisions in the state constitution, but the defendant claimed they had been waived and the court did not consider them.

Chief Justice Marshall wrote for the court, joined by Justices Ireland and Cowin. Justice Greaney concurred on the basis of the Equal Rights Amendment to the state constitution. The three dissenting judges, Justices Spina, Sosman and Cordy, all joined the dissenting opinions written by each of them, arguing that among other things the common law definition of marriage was not irrational, the decision has so extended due process that the meaning of due process has been distorted and that the majority has intruded into the legislative function of government by this decision.

⁴ Frank Phillips and Rick Klein, *Lawmakers are divided on response*, **The Boston Globe**, Nov. 19, 2003, p. A1, col. 5 [quoting Governor Romney].

⁵ In 1857 the United States Army was sent into the Utah Territory to end the Mormon government which was openly promulgating bigamous marriage, a view of marriage which the majority of Americans found objectionable. This started a dispute between the Church and the federal government which lasted almost a half century, and resulted in criminal convictions of Mormon leaders. See text below and footnotes 6 to 10, *infra*.

The early Republican Party argued that Congress had a duty to enforce the majority view of marriage through federal legislation.⁶ It took a Supreme Court decision enforcing the concept of monogamous marriage,⁷ a congressional enactment revoking the charter of the Church of the Latter-day Saints,⁸ and a federally mandated state constitutional prohibition on polygamy as a condition of the admission of Utah to the Union to finally compel the acceptance of monogamy as the legal form of state-sanctioned civil marriage.⁹ The intense controversy over polygamy demonstrates that civil marriage has been the subject of disagreement and religious conflict,¹⁰ throughout American history. No doubt it will also continue to be in the future.

Religion and Marriage:

The Western concept of marriage has been influenced by Judeo-Christian theology. However, over the course of legal history the civil construct of marriage has changed in significant ways and not always in conformity with its religious origins. Supreme Court Justice Sandra Day O'Connor has noted that "many religions recognize marriage as having spiritual significance."¹¹ Diverse religions have different concepts of marriage. Since for many people marriage is in part a religious institution it is important to distinguish between religious concepts and the law governing civil marriage. This is especially important in a democracy, where different religious beliefs flourish but one law governs all.

In the light of the criticism of the *Goodridge* decision¹² on same-sex marriage by many religious leaders the historical connection between religion and marriage has some relevance in understanding the evolution of modern civil marriage. Chief Justice Margaret Marshall acknowledged that "[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one

⁶ The first platform of the Republican Party urged that Congress had a duty to outlaw the "twin relics of Barbarism-Polygamy and Slavery" in the territories. See Don Fehrenbacher, *DRED SCOTT: ITS SIGNIFICANCE TO AMERICAN LAW AND POLITICS* 202 (1978).

⁷ *Reynolds v. United States of America*, 98 U.S. 145 (1878) [affirming conviction of a man who had taken two wives in conformity with the teachings of his religion].

⁸ *The Late Corporation of Jesus Christ of the Church of the Latter-day Saints v. United States of America*, 136 U.S. 1 (1890) [Court upheld legislation revoking the 1851 charter of the Church on grounds that a primary purpose of the Church was the promotion of polygamy].

⁹ Utah Const., Art. III, § 1, providing "polygamous or plural marriages are forever prohibited."

¹⁰ See Sarah Barringer Gordon, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA*, 206 (2002) [noting the identification of Mormon and Roman Catholic "despotism," in the minds of many 19th Century Protestants]. As to the Mormon advocacy of polygamy Professor Gordon suggests that this rejection of the majority view is similar to the Catholic rejection of Protestant-dominated public schools, and that by instituting plural marriage the Mormons were challenging the "prevailing Protestant theories of child-rearing and education." *Id.* at 198.

¹¹ *Turner v. Safley*, 482 U.S. 78 at 95 (1986) [right of prisoners to marry].

¹² Jenna Russell, *Bishops call SJC decision "tragedy," Boston Sunday Globe*, November 30, 2003, p. B1, col. 1 [Catholic Bishops call for mobilization against same-sex marriage ruling and urge support for constitutional amendment to reaffirm marriage as a union between one man and one woman]. See also, Michael Paulson, *Protestants weigh same-sex marriage, Boston Sunday Globe*, November 30, 2003, p. B10, col. 5 [describing internal debate in various denominations over the same-sex court decision].

woman, and that homosexual conduct is immoral.”¹³ Given the historical evolution of marriage as a religious institution one must ask how contemporary ideas of marriage as a state licensed civil institution came about.

The origins of marriage at the dawn of civilization are obscure. Marriage may have evolved as a way of binding a male to a female and children, giving him a stake in the family unit. Maybe the family was also a means of dividing labor or providing protection against hostile enemies. But whatever the social reasons that marriage evolved as a form of family life it also took on religious meaning at a relatively early historical period.

The oldest extant religious text is the Torah, the Five Books of Moses. “The LORD GOD said, ‘It is not good for man to be alone; I will make a fitting helper for him . . . Hence a man leaves his father and mother and clings to his wife, so that they become one flesh.’”¹⁴ In time the institution of marriage came to be institutionalized in Jewish law, including prohibitions on incest¹⁵ and having “carnal relations with your neighbor’s wife”.¹⁶ It was also prohibited for a man to “lie with a male as one lies with a woman.”¹⁷ No doubt these legal prohibitions had a practical civil function, but they were primarily religious in nature since they were attributed to “the LORD” who “spoke to Moses.”¹⁸ While the texts quoted above suggest that marriage was viewed in ancient Hebrew society as something like modern monogamous marriage, the texts also cite other models of family life. For example, Jacob was married to Leah, and later also took Rachel as his wife, and later both women gave Jacob their maids as concubines.¹⁹ However over centuries Jewish law evolved and in time monogamous marriage became the norm.

Christianity built on the Jewish concept of marriage, and viewed marriage as a religious act. In the Christian scriptures when Jesus is asked to explain marriage he quoted Genesis 2.24 and then added “so they are no longer two, but one. What therefore God has joined together, let no man put asunder”²⁰ Since Christian theology sees marriage as originating in God, it logically followed that eventually the church mandated the solemnization of marriage in a church and blessed by a priest before it attained validity. Tertullian, an early Father of the Christian Church, wrote in the second century that marriage not solemnized in a church was almost as bad as fornication.²¹ The Christian churches taught that God is the author of marriage.²² In 1215 Pope Innocent

¹³ Goodridge v. Dept. of Public Health, 798 N.E.2d 941 at 948 (Mass. 2003).

¹⁴ Genesis, 2.18 and 2.24, from Jaroslav Pelikan (ed.), Sacred Writings-Judaism: The Tanakh [English translation] Genesis, 2.18 and 2.24 (1985).

¹⁵ Id., Leviticus, 18.6 to 18.18.

¹⁶ Id., Leviticus, 18.20. See also, Ezekiel, 16.38, referring to the “punishment of women who commit adultery.”

¹⁷ Id., Leviticus, 18.22.

¹⁸ Id., Leviticus, 18.1.

¹⁹ The story is told in Genesis, chapters 29-30.

²⁰ Matthew 19.5 Revised Standard Version.

²¹ Cited in Otto E. Koegel, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES, 11 (1922).

²² For a modern formulation of this concept see the Second Vatican Council *Pastoral Constitution on the Church in the Modern World*, § 48, quoted in Austin Flannery (ed.), VATICAN COUNCIL II, 950 (1975) [“God is the author of marriage”]. While the Protestant reformers did not accept the Roman Catholic

III ordered that throughout the Christian world marriage banns had to be published in church, and in 1563 the Council of Trent ordered that marriages had to be solemnized in the presence of a priest.²³

Influenced by the established Church of England, Lord Hardwicke's Act²⁴ affirmed the religious nature of marriage by requiring that solemnization take place in a church.²⁵ The English example is especially important since that legal system was imported into the American colonies. The Norman Conquest resulted in the evolution of both common law civil courts and separate ecclesiastical courts. While civil courts enforced the king's justice the ecclesiastical courts enforced the canon law, which included many matters affecting marriage. However, it was not until 1857, long after the American Revolution, that jurisdiction over marriage cases was transferred from the English ecclesiastical courts to the civil courts. While the many colonies were established by religious dissenters,²⁶ and ecclesiastical courts based on the Church of England model were rare, the substantive law of marriage which had evolved in the ecclesiastical courts was imported into what later became the United States.

The civil law came to reflect the religious English view of marriage as a permanent monogamous union of one man and one woman, with the wife under the disabilities of coverture and judicial divorce not sanctioned.²⁷ But Colonial society, influenced by Protestant religious dissenters,²⁸ considered marriage as a "civil thing,"²⁹ rather than a purely religious relationship notwithstanding that marriage in America had religious roots in the Judeo-Christian tradition.

Over time this common law view of marriage gradually evolved further away from its religious roots. This evolution included the adoption of the Married Women's Property Acts which abolished common law disabilities of the married women.³⁰ In ecclesiastical

doctrine of sacramental marriage, they did teach that marriage is from God. This Judeo-Christian view of marriage as divinely inspired influenced the law of marriage in the United States. "Anywhere on the side and shifting spectrum of Protestantism in the early republic, from deism to Anglicanism, the basic Christian beliefs about marriage were in place." Nancy F. Cott, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION*, 11 (2000).

²³ Koegel, note 21 supra. At 11-13.

²⁴ 26 Geo. II, c 33.

²⁵ Homer H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*-2ND ed., Vol. 1, § 2.1(1987).

²⁶ The Pilgrims in the Plymouth Bay Colony, the Puritans in the Massachusetts Bay Colony, Catholics in Maryland, Swedish Lutherans in Delaware and later Methodists and Baptists in Georgia are examples of American areas populated by people who did not accept the authority of the Church of England.

²⁷ Charles P. Kindregan, Jr. and Monroe L. Inker, *FAMILY LAW AND PRACTICE*-3RD ed., § 1:3 (2003) and authorities cited therein.

²⁸ For a summary of Protestant views on same-sex marriage see *Protestant Formulations* in Lynn D. Wardle et al. (eds.) *MARRIAGE AND SAME SEX UNIONS*, 52-55 (2003).

²⁹ Charters and General Laws of the Colony and Province of Massachusetts Bay, 152 (1814).

³⁰ Massachusetts became the first state to enact a true Married Women's Property Act, which today is Mass.Gen.L. c. 209, §§ 1-13 (2003). The original statute was modest in its effect judged by modern standards; see Joseph L. Warren, *Husband's Right to Wife's Services*, 38 *HARV. L. REV.* 421, 622 (1925) [legislation governing rights of married women were only enacted piecemeal]. The common law disabilities of married woman included her husband's right to own her personal property, his right to use

law the disability of a married woman was based on the Biblical concept that husband and wife are “one flesh”³¹ The English religious tradition was that marriage was permanent, i.e. not dissolvable by divorce,³² but this was abandoned in America before divorce was legally permitted in England. Massachusetts by its Constitution provided for divorce in 1780³³ whereas it was not until three quarters of century later that English law authorized divorce.³⁴

Attempts to overturn the traditional Christian tradition of monogamous marriage took place in the last half of the 19th Century. Although such attempts produced much friction and political debate they were unsuccessful.³⁵ It was the religious teaching of the Mormon founder Joseph Smith,³⁶ which brought on this conflict. It ended only after the imprisonment of polygamous Mormon leaders and the dissolution of the Church’s charter by federal legislation on the grounds that the Church was a criminal enterprise promoting polygamy.³⁷

The Sunni Muslim religious tradition allowing polygamous marriage had so little influence in the United States that the Supreme Court of the United States denounced it as “almost exclusively a feature of the life of Asiatic and African people.”³⁸ Apparently the views of such “foreign” people were not to be considered because they differed from the predominant Judeo-Christian teachings on marriage which existed among the Euro-American majority.

and control her real estate, inability of a married woman to contract with others or with her husband, to sue her husband in tort, to sue others in tort or contract without joining her husband etc. For a 19th Century legal criticism of these disabilities see George O. Ernst, *THE LAW OF MARRIED WOMEN IN MASSACHUSETTS*-2nd ed. (1897). As to repeal of these disabilities see Clark, note 25, supra, at § 8.2.

³¹ Genesis, 2.24, note 5, supra.

³² Civil divorce was not made legal in England until the enactment of the Matrimonial Causes Act of 1857, 20 and 21 Vict. C. 85.

³³ Mass. Const. Pt. 2, Ch. 3, Art. V [providing for causes of divorce to be heard by the governor and the council until the legislature would authorize grant of divorce by the judiciary].

³⁴ See note 32, supra.

³⁵ The best modern account of these events is found in Sarah Barringer Gordon, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* (2002).

³⁶ Joseph Smith’s asserted divine revelation was contained in the *Revelation on Celestial Marriage*, which was based in part on the bigamous example of Abraham (who of course is revered alike by Jews, Christians and Muslims). Brigham Young actively promoted the practice of polygamy. While the polygamy debate constituted the most famous debate involving religious beliefs and marriage, the issue sometimes still arises in the courts. See, for example, *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) in which the court upheld the right of a state attorney general to revoke a job offer which had been made to a female attorney when the official learned that she had married another woman in a Reconstructionist Jewish ceremony. The court rejected the woman’s argument that this interfered with her freedom of religion. See also, Mark Strasser, *Same-sex Marriage and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 *Loy. U. Chi. L. Rev.* 597 at 616-619 (2002) [discussing the implications of the *Shahar* decision].

³⁷ See Gordon, note 35, supra.

³⁸ *Reynolds v. United States*, 98 U.S. 145 at 164 (1878). The Court also noted that the marriage laws of England were formed and enforced in the church courts. *Id.* at 164-165.

Equally unknown among Christian Americans was the Muslim Shi'i allowance of temporary marriage.³⁹ Other religious concepts of marriage, such as those of Hinduism, also developed independently of western influences and unlike Christianity had no impact on the development of civil law in the United States.⁴⁰

Common Law Marriage in the United States

Marriage gradually evolved over the centuries from a religious status to a civil status in English and American law. But this movement was uneven, and near the end of the century the Supreme Court of the United States was still equating marriage with Christian doctrine. In the *Davis* case in 1890 Justice Field wrote that there had been “sects which denied as part of their religious tenants that there should be any religious tie, and advocated promiscuous intercourse” and upheld the government’s “punitive power” to compel marriage conformity to the view of “the Christian world in modern times.”⁴¹

But while the Supreme Court was promulgating the Christian view of marriage it was at the same time undermining a traditional religious concept promulgated both by the Council of Trent and the Church of England, i.e. that valid marriage depends on solemnization. In 1877 the Court entered a remarkable judgment recognizing informal or so-called common law marriage.⁴² Common law marriage means that the union is not solemnized and recorded in a church or government record but is instead created by the consent and cohabitation of the marrying couple.⁴³

The practice of solemnizing marriage in England originated in ecclesiastical law. Massachusetts never required a religious solemnization,⁴⁴ but has always rejected legal recognition of informal unions.⁴⁵ However, the 1877 U.S. Supreme Court decision affirming the right of people to legally create informal marriages moved the concept of marriage away from one of its religiously-based premises. The Court’s ruling marked a substantially new interpretation of marriage. Certainly it was a change from the prior law which in many states held that compliance with marriage licensing and formalities was

³⁹ Shahla Haeri, *LAW OF DESIRE-TEMPORARY MARRIAGE IN SHI'I IRAN* (1989) [explaining the Shi'i doctrine of temporary marriage, which is still legal in Iran].

⁴⁰ See, for example, *Sharma v. Sharma*, 667 P.2d 395 (Kan.App. 1983) [in husband’s divorce action the court declined to entertain wife’s argument that a Hindu marriage cannot be dissolved by divorce].

⁴¹ *Davis v. Beason*, 133 U.S. 333, 343 (1890). Professor Gordon, note 35, *supra*, at 232, writes that the antipolygamists believed that constitutional doctrine had to be based on a “Christian foundation.”

⁴² *Meister v. Moore*, 96 U.S. (6 Otto) 76 (1877) [ruling that the Michigan statute governing formalities of marriage was merely directory and did not invalidate an informal marriage to which the parties consented].

⁴³ See Otto E. Koegel, *COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES* (1922) [explaining common law informal marriage] and Stuart J. Stein, *Common Law Marriage: Its History and Certain Contemporary Problems*, 9 **J. Fam. L.** 271 (1970) [development of the common law marriage doctrine].

⁴⁴ *Commonwealth v. Munson*, 127 Mass. 459, 460-466 (1879).

⁴⁵ *Milford v. Inhabitants of Worcester*, 7 Mass. 48 (1810) [consent marriage exchanged by a couple in a tavern without other solemnization was not a valid marriage]. The Massachusetts Bay Colony had earlier by statute prohibited non-solemnized marriages; Mass.Col.Laws 68 (ed. 1660).

the only way to create a valid marriage.⁴⁶ While most (but not all) states did eventually expressly prohibit common law informal marriages, the Supreme Court by its ruling took a significant step away from identification of civil marriage with its historical origins in religious theory.

Miscegenation:

Most American colonies had laws prohibiting marriages between persons of different races, and after the Declaration of Independence many states continued to ban such unions.⁴⁷ Stated simply, American law for many decades accepted the proposition that legal marriage between persons of different races was not possible.⁴⁸ Some saw the prohibition on interracial marriage as an essential element of marriage, mandated by God.⁴⁹ Abraham Lincoln rejected interracial marriage in the famous Lincoln-Douglas debates,⁵⁰ and in this he reflected the then-current view about marriage. But over a Century later the Supreme Court of the United States in 1967 ruled that a state could no longer prohibit interracial marriages.⁵¹ When the Supreme Court in *Loving* ended legal miscegenation it also opened the door for consideration of state bans on other kinds of unions, including same-sex marriage. If a court on a constitutional basis could overturn a state's choice to outlaw interracial marriage commentators began to ask whether a court could also overturn a state's ban on a person's choice to marry another of the same gender.⁵²

In the *Loving* decision Chief Justice Earl Warren wrote that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival."⁵³ While written in the context of interracial marriage, this concept has relevance to the issue of whether the state can prohibit a person from marrying another person because he or she is of the same gender. In both the

⁴⁶ Informal marriage appears to have first been recognized by the New York court in *Fenton v. Reed*, 4 Johns 52 (N.Y. 1809) and thereafter in a few state decisions until the Supreme Court decided *Meister* in 1877.

⁴⁷ See Peter Wallenstein, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE AND LAW-AN AMERICAN HISTORY* (2002) for an extensive review of the statutes governing inter-racial marriage in the United States from the enactment of the first miscegenation statute in colonial Maryland to the repeal of the last such statute in Alabama in the year 2000.

⁴⁸ Races were classified in many different ways including American Indian, Asian and Whites and Blacks and various degrees of mixed races. The practical difficulty with such classifications is illustrated by the dilemma which Virginia faced in enacting a miscegenation statute in 1924 to exempt the socially prominent descendants of the interracial marriage of the Caucasian John Rolfe and the Native American Pocahontas by declaring them to be White as long as there was no mixture of African blood. *Id.* at 139.

⁴⁹ The Supreme Court of Virginia declared that interracial marriages are "so unnatural that God and nature seem to forbid them." *Kinney v. Commonwealth*, 30 Grattan (71 Va.) 858 at 869 (1878).

⁵⁰ Wallenstein, note 47, supra, at 54-57.

⁵¹ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵² See, for example, the arguments advanced in Mark Strasser, *LEGALLY WED: SAME SEX MARRIAGE AND THE CONSTITUTION* (1997); James Trosino, *American Wedding: Same Sex Marriage and the Miscegenation Analogy*, 73 **Boston U. L. Rev.** 93 (1993) [the same arguments which were used against interracial marriage are now being used against same-sex marriage].

⁵³ *Loving v. Virginia*, note 51, supra, at 12.

Massachusetts court's opinion upholding a state constitutional right of same-gender couples to marry⁵⁴ and the concurring opinion⁵⁵ the judges approvingly cite and quote Warren's language. Noting that "history must yield to a more fully developed understanding of the invidious quality of the discrimination" the court drew a parallel between the state's denying marriage to a couple based on "skin color" and doing so based on "sexual orientation."⁵⁶

The Changing Social Dynamic of Family Life:

There will always be discord between civil and religious views of marriage in a democratic society which must accommodate people with numerous religious differences. Many Americans today continue to accept and support the traditional Judeo-Christian view of marriage. But many others live in alternative non-traditional families. The latter include various kinds of alternative family structures which exist outside of traditional marriage, and have achieved legal recognition in varying degrees. While the existence of alternative forms of non-marital life may seem irrelevant to the same sex-marriage issue they actually are closely related. Some have seen the legal recognition of non-marital unions based on contract or equitable theories as subversive of marriage itself.⁵⁷ Still others have argued that since many forms of family life have been widely accepted in society it makes no sense for the law to refuse to provide any standards except those which evolved to govern the traditional marital nuclear family.⁵⁸ These alternatives to the marital nuclear family are so common today that they may be properly called "the new family."⁵⁹ Yale historian Nancy Cott has observed that today American state courts focus primarily on family support issues, and as a result the "formality and conformity of marriage-like arrangements matter far less in the law now than in the past, because support can be traced through cohabitation and biological parenthood."⁶⁰

Massachusetts acknowledged the growth of alternative non-traditional families a decade before the court's decision on same-sex marriage. A decade before *Goodridge*

⁵⁴ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 948-970 (Mass. 2003) [Marshall, C.J.].

⁵⁵ *Id.*, 798 N.E.2d at 970-974 [Greaney, J.].

⁵⁶ *Id.*, 798 N.E.2d at 958. See also, Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 *Harv. C.R.-C.L. L. Rev.* 255 (2002) [drawing parallel between opposition to legalization of interracial marriage and same-sex marriage].

⁵⁷ See, for example, the decision of the Supreme Court of Illinois in *Hewitt v. Hewitt*, 394 N.E.2d 1204 (1979) refusing to enforce a domestic partnership contract between an unmarried man and woman because to do so would confer a legal status on unmarried cohabitation].

⁵⁸ For example, in allowing visitation to a non-parent former same-sex domestic partner of the mother a Pennsylvania court noted that "[i]n today's society, where increased mobility, changes in social mores, and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child." *J.A.L. v. E.P.H.*, 682 A.2d 1314 at 1320 (Pa.Super. 1996).

⁵⁹ The phrase "new family" was coined by Professor Mary Ann Glendon of Harvard Law School. See Glendon, *THE NEW FAMILY AND THE NEW PROPERTY* (1981).

⁶⁰ Nancy F. Cott, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION*, 213 (2000). See also, Symposium, *Unmarried Partners and the Legacy of Marvin v. Marvin*, 76 *Notre Dame L. Rev.* 1261 (2001) [exploring various legal remedies applied to issues involving unmarried cohabitation over the last three decades].

Massachusetts courts interpreted the adoption statute to permit the adoption of a child by a same-sex couple. In doing so the Court recognized a non-traditional family based on the need of the child not to be left a “legal limbo for years while their future is disputed in the courts.”⁶¹ Five years before the same-sex marriage decision the Supreme Judicial Court recognized the right of non-married cohabiting couples to enter into binding legally-enforceable contracts respecting their property and financial interests.⁶² In the *E.N.O.* case the Massachusetts Court ruled that under its equity jurisdiction a non-parent former domestic partner of the biological mother had standing to seek visitation with a child who was not her own:

A child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent. The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children. It is to be expected that children of nontraditional families, like other children, form relationships with both persons who function as parents.⁶³

Dissenting in *E.N.O.*, Justice Charles Fried, a former Harvard law professor and Solicitor General of the United States, correctly predicted that by this decision the Massachusetts Court had opened the door to the recognition of same-sex marriage:

What the court must be saying is that a contract of union between a same-sex couple creating expectations of mutual care for a child stands on a special footing. The subject of same-sex unions is difficult, controversial, and important. The court’s decision is a clear step in granting legal force to such unions. If that is what the court intends, it should say so directly.⁶⁴

The Changing Law of Marriage:

That marriage was not a static institution gradually became clear over the century preceding the controversy over same-sex marriage. While it may be distressing to those who believe that religion should structure civil society, the reality is that in modern American society civil state-sanctioned marriage has long been detached from its religious origins. Laws which criminalized such “sinful” conduct as abortion, contraception and sodomy have been declared unconstitutional. Laws prohibiting other “sins” such a blasphemy, adultery and fornication have either been repealed or are not enforced. Laws governing marital dissolution have changed in every generation over the last century, shifting the focus from marital fault to the resolution of the practical economic, social and child-centered issues.

⁶¹ Adoption of Tammy, 619 N.E.2d 315 at 320 (Mass. 1993).

⁶² Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998) [enforcing property agreement made by a cohabiting man and woman].

⁶³ *E.N.O. v L.M.M.*, 711 N.E.2d 886 at 891(Mass. 1999).

⁶⁴ *Id.*, at 898 [Field, J., dissenting].

Churches and religious leaders opposed the enactment or liberalization of civil divorce laws as being destructive of marriage.⁶⁵ The religious aspect of this argument was based on the theological premise of the permanence and indissolubility of marriage. But over the course of a century and a half the legislatures of each state enacted divorce laws, and then gradually liberalized them.⁶⁶ Professor Clark, the leading family law scholar noted that during the last half of the 20th Century marriage and divorce law had undergone a remarkable change even between the first and second edition of his treatise. These changes he acknowledged reflected radical changes in social attitudes about marriage and divorce.⁶⁷ Divorce was made easier for people to obtain by the enactment of no-fault divorce laws in most states,⁶⁸ abolition of the common law prohibition on husband-wife contracts, the introduction of equitable property division, increased enactment of uniform state and federal laws governing child custody and child support, and other statutes which revolutionized family law in America.

When the same-sex marriage issue came before the Supreme Judicial Court of Massachusetts these remarkable changes in civil marriage law which had taken place over more than a century of American legal history played a significant role in the court's analysis. The Court noted that a quarter century earlier Massachusetts had abrogated the "doctrine immunizing a husband against certain suits because the common-law rule was predicated on 'antediluvian assumptions concerning the role and status of women in marriage and in society.'"⁶⁹

The *Goodridge* opinion also noted the changes which have taken place in domestic relations law "since at least the middle of the Nineteenth Century," including "the expansion of the rights of married women and the introduction of 'no fault' divorce."⁷⁰ And Chief Justice Marshall added optimistically that [m]arriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution"⁷¹ after the advent of same-sex marriage. These comments clearly

⁶⁵ See Gordon, note 35, supra, 172-181 for an excellent discussion of the anti-divorce movement in 19th Century America. So strong was the anti-divorce movement that some political leaders advocated a federal marriage law restricting marital termination. With the onset of the Civil War Presidents Buchanan and Lincoln both argued that the federal union was like a marriage, i.e. not dissolvable by the parties. *Id.* at 178.

⁶⁶ For an analysis of legislation changing the divorce laws between the adoption of the Massachusetts Constitution in 1780 and the present see Charles P. Kindregan, Jr. and Monroe L. Inker, *FAMILY LAW AND PRACTICE*, 3RD ed. (2003), § 1:6-1:8.

⁶⁷ Homer C. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES-2ND ed.*, Vol. I, § 13.1 at 699 (1987).

⁶⁸ So alarmed are some people about the liberalization of divorce laws that they have supported proposed changes in the law of marriage. These proposed changes would enact an alternative form of marriage called covenant marriage. See Elizabeth S. Scott, *The Social Norms and the Legal Regulation of Marriage*, 86 *VA. L. REV.* 1901 at 1959 (2000) [discussion of covenant marriage as an alternative to now extant civil marriage in order to reduce the potential for divorce]; Katherine Shaw Spaht, *What's Become of Louisiana Covenant Marriage Through the Eyes of Social Scientists*, 47 *LOYOLA L. REV.* 709 (2001) [concluding that five years after legal recognition of the alternative of covenant marriage it enjoys general support].

⁶⁹ *Goodridge v. Dept. of Public Health*, note 54, supra, at 967, citing and quoting in part *Lewis v. Lewis*, 351 N.E.2d 526 (Mass. 1976).

⁷⁰ *Goodridge*, *id.* at 967.

⁷¹ *Id.*

reflect the majority's conviction that civil marriage is not unchangeable, but has in fact frequently changed throughout the ages. This in turn led the court to the crucial issue at hand, namely whether the common law definition of marriage can be challenged based on state constitutional mandate of equality before the law, liberty and due process of law.

Early Challenges to the Law Prohibiting Issuance of Marriage Licenses to Same-sex Couples:

Massachusetts was not the first state to confront the question of whether a state can be required to issue marriage licenses to persons of the same-sex. Early cases in Kentucky⁷² and Washington⁷³ ruled that marriage is a union of a man and woman and therefore the state had no constitutional mandate to issue licenses to same-sex couples.

In 1993 the Supreme Court of Hawaii ruled that under the state constitution's equal protection clause a denial of a marriage license to a same-sex couple was presumably unconstitutional unless the state established a compelling reason for doing so.⁷⁴ The lawsuit was later dismissed⁷⁵ after the Hawaiian Constitution was amended to allow the legislature to define marriage as between a man and woman.⁷⁶ However, for the first time in American law the legislature of Hawaii enacted a statute which gave domestic partners many of the benefits which the law accorded to married couples.⁷⁷

On the last day of the 20th Century the Supreme Court of Vermont ruled that the common benefits clause of the state constitution⁷⁸ required the state to provide qualified same-sex couples with the same legal benefits accorded in marriage to opposite-sex couples.⁷⁹ The Vermont legislature responded by authorizing same-sex couples to enter civil unions, the partners in which will enjoy a lengthy list of benefits which previously were only available to married couples.⁸⁰

The Hawaii and Vermont decisions were based on principles of equal treatment under law. However, an Alaskan trial court went further and in 1998 ruled that the right of privacy guaranteed in the state constitution gave same-sex couples the right to choose life partners.⁸¹ Thereafter the Constitution of Alaska was amended to define marriage as a relationship between a man and a woman.⁸²

⁷² Jones v. Halliahah, 501 S.W.2d 588 (Ky.Ct.App. 1973) [two women denied a license].

⁷³ Singer v. Hara, 522 P.2d 1187 (Wash.App. 1974) [two men denied a license].

⁷⁴ Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

⁷⁵ Baehr v. Miiike, 994 P.2d 566 (1999).

⁷⁶ Haw. Const., Art. 1, § 23. See also, Symposium, *Same-sex Marriage: The Debate in Hawaii and the Nation*, 22 **U. Hawaii L. Rev.** 1 (2000) [discussing constitutional and legislative developments in Hawaii relating to same-sex unions].

⁷⁷ Haw. Rev. Stat. § 572C-1 (2003) [creating same-sex domestic partnerships].

⁷⁸ Vt. Const. ch. I, art 7.

⁷⁹ Baker v. State, 744 A.2d 864 (Vt. 1999). See also, Robert F. Williams, *Old Constitution and New Issues: National Lessons from Vermont's State Constitutional Case on Same-Sex Couples*, 43 **B.C. L. Rev.** 73 (2001) [under the federal system Baker decision is model for other state courts].

⁸⁰ Vt. Stat. Ann., Tit.15, §§ 1202-1206 (2003).

⁸¹ Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super 1998).

⁸² Alaska Const., Art. I, § 25.

The various lawsuits challenging the exclusion of same-sex couples from marriage, especially the Hawaii decision, created a national debate about the issue. Proponents of “traditional” marriage argued that some form of national legislation was needed before some state actually legalized same-sex marriage which might be entitled to full faith and credit under the United States Constitution.⁸³ In response to these concerns Congress enacted the Defense of Marriage Act, which provides that no State, territory, possession or Indian tribe “shall be required to give effect to an public act, record or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as marriage under the laws of such State, territory, possession or tribe, or to a right or claim arising from such relationship.”⁸⁴ Many states enacted state legislation exempting themselves from the need to give recognition to same-sex marriages recognized elsewhere. It is highly probable in the coming years that constitutional challenges to the federal and state laws of these kinds will take place.⁸⁵

The Canadian Cases:

Canada, like the United States, follows the common law. It also has a constitutional scheme which like both the United States and Massachusetts embodies principles of equality. Thus developments in Canada regarding constitutional interpretations of marriage law held considerable interest for American lawyers and judges. The Massachusetts court in *Goodridge* noted that “Canada, like the United States, adopted the common law of England that civil marriage is ‘the voluntary union for life of one man with one woman, to the exclusion of all others.’”⁸⁶ The Massachusetts Court then cited a Canadian precedent holding that same-sex couples cannot be excluded from marriage.

The Court of Appeal for Ontario had recently ruled that the common law definition of civil marriage violated § 15.1 of the Canadian Charter of Rights and Freedoms⁸⁷ because it discriminates by excluding same-sex couples from marriage.⁸⁸ A similar ruling from

⁸³ U.S. Const. Art. 4, § 1.

⁸⁴ 28 U.S.C. § 1738C (2003). Congress also enacted into law a definition of marriage as “between one man and one woman as husband and wife” for purposes of interpreting the words marriage or spouse in the federal statutes; 1 U.S.C. § 7 (2003).

⁸⁵ For discussion of potential challenges to the Defense of Marriage Act see Mark Strasser, *Some Observations about DOMA, Marriages, Civil Unions and Domestic Partnerships*, 30 **Cap. U. L. Rev.** 363 (2002); Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 **Cap. U. L. Rev.** 387 (2002); Veronica C. Abreu, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the “Deeply Rooted” Test Should Not be a Barrier to Finding the Defense of Marriage Act Unconstitutional under the Fifth Amendment Due Process Clause*, 44 **B.C. L. Rev.** 177 (2002).

⁸⁶ *Goodridge v. Dept of Public Health*, 798 N.E.2d 941 at 953-954. This definition was formulated in an English decision, *Hyde v. Hyde* [1861-1873] All E.R. 175 (1866).

⁸⁷ Can. Const. (Constitution Act 1982) pt. I (Canadian Charter of Rights and Freedom) § 15.1 provides that “[e]very individual is equal before and under the law and has the right to equal protection and equal benefit based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

⁸⁸ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 at 969 (Mass. 2003), *citing* *Halpern v. Toronto (City)*, 172 O.A.C. 276 (6/10/03) [exclusion of same-sex couples from marriage under the common law definition violates the Charter].

the British Columbia Court of Appeal⁸⁹ also decided that the Charter invalidates the same-sex marriage prohibition inherent in the common law rule of marriage. A trial court decision in Quebec ruled in favor of same-sex marriage notwithstanding that the legislature had enacted a civil union bill giving same-sex couples the benefits of marriage but without conferring the right to enter the marital state.⁹⁰

Goodridge Challenges the Common Law Definition of Marriage:

In *Goodridge* the Court noted that the marriage-licensing statute⁹¹ does not define marriage. However, the legislative failure to specifically define marriage as a relationship between a man and woman did not support the plaintiff's argument that the judges could interpret the statute to include same-sex unions. In accord with common statutory interpretation the court ruled that the legislature in enacting a compulsory marriage-licensing law incorporated the common law definition of marriage as a union between persons of different genders.⁹² However, the court noted that a quarter century earlier the Massachusetts courts had abrogated a common law doctrine immunizing a husband from suit by his wife which had long been considered an inherent part of established marriage law.⁹³

The common law definition of marriage as a union between a man and woman was directly challenged by the plaintiffs in *Goodridge*. The Massachusetts Court was squarely faced with the question of whether the common law rule could be sustained consistent with the state constitution. Unlike some of the earlier cases in *Goodridge* the plaintiffs were not seeking equal benefits with those who enjoyed the benefits of legal marriage; they were seeking the right to marry itself. The majority ruled that restricting access to civil marriage only to opposite-gender couples offends the guarantee of equality before the law. Such a restriction was also held to offend the liberty and due process provisions of the state constitution.

The Massachusetts Court's constitutional analysis was anticipated in part by the United States Supreme Court decision in *Lawrence v. Texas*,⁹⁴ decided a few months before the *Goodridge*. In *Lawrence* the Court declared unconstitutional a Texas statute which criminalized sodomy even if taking place in private between competent consenting adults. Two men were arrested and charged with "deviate sexual intercourse, namely

⁸⁹ *EGALE Canada, Inc. v. Canada (Attorney General)* (2003) B.C.J. No. 994, B.C.C. LEXIS 2711 (May 1, 2003) [ruling that the common law definition of marriage which bars same-sex marriage violates § 15 of the Canadian Charter of Rights and Freedoms].

⁹⁰ A trial court decision in the Superior Court of Quebec ruled that offering marriage benefits to same-sex partners under the civil union bill adopted unanimously by the L'assemble Nationale du Quebec (Bill 84) in 2002 under a scheme different from that afforded by marriage to heterosexual partners is a form of separate but equal which cannot be justified under the Charter. *Hendricks v. Quebec (Procureur General)* [Quebec Super. Ct., Dist. of Montreal] (No. 500-05-059656-007) [French] (Sept. 5, 2002).

⁹¹ Mass.Gen.L. c. 207 (2003).

⁹² *Goodridge v. Dept. of Public Health*, note 88, *supra*, at 953-954.

⁹³ *Id.*, at 967.

⁹⁴ *Lawrence v. Texas*, 123 S.Ct. 2472(2003).

anal sex, with a member of the same sex (man)”⁹⁵ The Supreme Court granted certiorari to consider the defendant’s challenges to their conviction on equal protection and due process grounds,⁹⁶ and to reconsider its earlier decision in *Bowers*⁹⁷ which had upheld a state’s power to criminalize sodomy.

Justice Kennedy, writing for the majority in *Lawrence*, stated that the defendant’s “right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”⁹⁸ In reaching that conclusion Kennedy provided an historical analysis of the evolution of the legal history of privacy over the prior decades. “These references show an emerging awareness that liberty gives substantial protection to adult person in deciding how to conduct their private lives in matters pertaining to sex. ‘[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.’”⁹⁹ In language which foreshadowed Marshall’s due process analysis in *Goodridge*, Kennedy commented that the drafters of the due process clause “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”¹⁰⁰

Just as Justice Greaney concurred in *Goodridge* on equality grounds, so also in *Lawrence* Justice O’Connor concurred on grounds that the Texas sodomy statute discriminates against homosexuals. “Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”¹⁰¹

In dissenting in *Lawrence* Justice Scalia argued that the decision is not “deeply rooted in this Nations history and tradition”¹⁰² and that “Court has taken sides in the culture war, departing from its rule of assuring, as neutral observer, that the democratic rules of engagement are observed.”¹⁰³ Anticipating a future ruling such as *Goodridge*, Scalia wrote that [t]oday’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned....” and in the light of the majority opinion “what justification can there possibly be for denying the benefits of marriage to homosexual couples” . . .¹⁰⁴

Due Process, Liberty and Equality Before the Law:

⁹⁵ Id., at 2476

⁹⁶ *Lawrence v. Texas*, 537 U.S. 1044 (2002) [*cert. granted*].

⁹⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁹⁸ *Lawrence v. Texas*, note 94, *supra*, 123 S.Ct. at 2484.

⁹⁹ Id., at 2480, quoting in part *County of Sacramento v. Lewis*, 523 U.S. 833 at 837 (1998).

¹⁰⁰ Id., at 2484.

¹⁰¹ *Lawrence v. Texas*, 123 S.Ct. at 2486, quoting in part *Romer v. Evans*, 517 U.S. 620 at 633 (1966) [O’Connor, J., concurring].

¹⁰² *Lawrence v. Texas*, 123 S.Ct. at 2492 [Scalia, J., dissenting].

¹⁰³ Id. at 2497

¹⁰⁴ Id. at 2498

Writing that “history cannot and does not foreclose the constitutional question”¹⁰⁵ Chief Justice Marshall expressed a central idea in *Goodridge* that marriage is not static and must be viewed in the light of evolved constitutional principles. Both the liberty and equality provisions of the state constitution prohibit unwarranted government interference into the private life of its citizens. They also protect the freedom to share in the benefits which the government creates for the common good. However, the Massachusetts Court declined to apply a strict scrutiny standard in reaching the decision that restricting marriage to different-sex couples violated the state constitution. Instead it ruled that the common law definition of marriage does not even meet a rational standard of review under the due process or equal protection tests, so that there was no need to apply judicial strict scrutiny.¹⁰⁶

The Procreation Argument:

The Court reached the irrationality conclusion by reviewing the positions advanced by the defendant Department of Public Health and finding them wanting. At trial the Superior Court found the ban on same-sex marriage was on the proposition that the goal of marriage is the promotion of procreation of children.¹⁰⁷ Even though modern Christian theology has moved beyond the idea that the sole or primary purpose of marriage is to conceive and raise children¹⁰⁸ the earlier theological theory that marriage is intended primarily for the procreation of children has persisted among many who have read it into their understanding of civil marriage.

The problem with the theory of procreation is that it had no basis in Massachusetts law. Fertility of the partners is not and never was a basis for recognizing the validity of marriage.¹⁰⁹ At no point in history did the marriage licensing statute ever require that applicants have either the ability or the intent to have children. Chief Justice Marshall explained this by noting that “it is the exclusive and permanent commitment of the

¹⁰⁵ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 at 953 (Mass. 2003). The view that the primary purpose of marriage is procreation influenced the federal Congress in its enactment of the Defense of Marriage Act, P.L. 104-199, §§ 2-3, 110 Stat. 2419 (1996), as discussed in the House Report, H.R. 104-664, 12-13 [citing procreation as the purpose of marriage].

¹⁰⁶ *Id.* at 960-961.

¹⁰⁷ *Goodridge v. Dept. of Public Health*, Supreme Judicial Court docket 08860, Record Appendix 115-116 (Superior Court judgment).

¹⁰⁸ For example, the Second Vatican Council of the Roman Catholic Church abandoned the “primary purpose/secondary purpose” taught by many earlier theologians and joined the companionate/procreative purposes by defining marriage as a sacrament involving matrimony and conjugal love for the procreation and education of children. *Pastoral Constitution on the Church in the Modern World*, Art. 48 (English translation) Walter Abbott and Joseph Gallagher (eds.), THE DOCUMENTS OF VATICAN II.

¹⁰⁹ *Goodridge v. Dept. of Public Health*, Supreme Judicial Court docket 08860, Brief of Monroe Inker and Charles Kindregan, Amici Curiae (2003) [the state never required fertility or an intent to have children in order to marry]. *But see*, the contrary argument in Justice Cordy’s dissent that “[a]s long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor.” *Goodridge v. Dept. of Public Health*, note 105, *supra*, at 1002 [Cordy, J., dissenting].

marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”¹¹⁰

Another problem with the state tying its procreation theory to different-gender marriage is that modern Massachusetts law provides for equality of treatment of all children, regardless of whether they are born to a married couple or not.¹¹¹ Massachusetts law also permits same-sex couples to adopt children.¹¹² The law also has recognized under some circumstances a form of *de facto* parenthood of a person who lives in a same sex relationship with a biological parent and who co-parents that child.¹¹³

Massachusetts has many clinics providing alternative reproductive technology research and services and its law has been generally favorable to the use of medical services to procreate.¹¹⁴ Many same-sex couples have children by alternative reproductive technology methods.¹¹⁵ Massachusetts does not treat children conceived by non-sexual alternative methods any different from children conceived by coitus.¹¹⁶ By statute the law treats a husband who consents to his spouse’s insemination using the sperm of a third party donor as the father of her child as long as he consents to the procedure.¹¹⁷ Courts have approved agreements regarding use of donor gametes to have children by use of a surrogate birth mother.¹¹⁸ Clearly Massachusetts law prior to the *Goodridge* decision treated alternative reproductive methods of procreation favorably, even though not achieved by sexual intercourse. Certainly it made the state’s argument equating marriage with sexual reproduction difficult to justify, and in *Goodridge* the court rejected it.

The Derogation of Marriage and Interstate Conflict Arguments:

The *Goodridge* court also rejected the argument of the Department of Health that allowing same-sex marriage would trivialize or destroy marriage. In the view of the majority, “extending marriage to same-sex couples reinforces the importance of marriage

¹¹⁰ *Goodridge v. Dept. of Public Health*, note 105, supra at 961 [Marshall, C.J.].

¹¹¹ “Children born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children.” Mass.Gen.L. c. 209C, § 1, added by St.1986, c. 310, § 16 (2003).

¹¹² *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

¹¹³ *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

¹¹⁴ See generally, Susan Crockin, *ADOPTION AND REPRODUCTIVE TECHNOLOGY IN MASSACHUSETTS* (2000).

¹¹⁵ *E.N.O. v. L.L.M.*, note 113, supra [mother conceived child by intrauterine insemination by donor sperm and executed a co-parenting agreement with her same-sex partner]. “An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children.” *Id.* at 891 [Abrams, J.].

¹¹⁶ See, for example, *Woodward v. Comm’r. of Social Security*, 760 N.E.2d 257 (Mass. 2002) [children conceived by intrauterine insemination using husband’s cryopreserved sperm after his death are treated as his legal heirs].

¹¹⁷ Mass.Gen.L. c. 46, § 4B.

¹¹⁸ See *Culliton v. Beth Israel Deaconness Medical Center*, 756 N.E.2d 1133 (Mass. 2001) [declaratory judgment could be granted to approve uncontested pre-birth order when surrogate mother not genetically related to child she with which she was pregnant by intrauterine conception should have the genetic intended parents listed on the birth certificate].

. . . [t]hat same sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit."¹¹⁹

The Massachusetts court could not deny the state's argument that approval of same-sex marriage would likely lead to interstate conflict. It acknowledged that Massachusetts could not presume to dictate to other states how they should respond to the *Goodridge* decision. But Chief Justice Marshall's opinion stressed regardless of what other states do under our federal system "each State is free to address difficult issues of individual liberty in the manner its own Constitution demands."¹²⁰ However, any impartial commentator must acknowledge that conflicts between the Massachusetts law and that of other states, and between Massachusetts and joint federal-state programs, will likely present courts with many difficult issues in the future.

The constitutionality of both the Federal Defense of Marriage Act and various similar legislation enacted in the majority of states in regard to the Full Faith and Credit Clause and same-sex marriage will be litigated over the coming years.¹²¹ The United States Supreme Court decision in *Romer*¹²² has at least some potential for invalidating a state constitutional amendment which singles out homosexuals for disparate treatment. There may also be other constitutional theories which could endanger any political efforts to overturn a court decision which recognizes the right of same-sex couples to enjoy the right of marriage equally with heterosexual couples.¹²³ However, whatever the potential for interstate conflict, or for political conflict within the state, the Massachusetts court said it could not avoid interpreting the state constitution merely because laws in other states might be different or that political differences exist on the question of what constitutes marriage.

¹¹⁹ *Goodridge v. Dept. of Public Health*, note 105, *supra*, at 965.

¹²⁰ *Id.*, at 967

¹²¹ See, for example, Julie L.B. Johnson, *The Meaning of General Laws: The Extent of Congress's Power Under the Full Faith and Credit Clause and Constitutionality of the Defense of Marriage Act*, 145 **U. Pa. L. Rev.** 1611 (1997) [Defense of Marriage Act is not consistent with the dual system of government established by the Constitution]; Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 **New Eng. L.Rev.** 265 (1997) [review of the various constitutional issues surrounding the Defense of Marriage Act].

¹²² *Romer v. Evans*, 517 U.S. 620 (1996) [under the Equal Protection Clause of the 14th Amendment a state may not amend its constitution to single out homosexuals as not being entitled to any special legislative protections].

¹²³ Equal protection and due process remain the most obvious constitutional theories which could preclude legislative efforts to deny marriage to persons based on sexual orientation. Non-compliance with the full faith and credit clause to interstate bars on recognition is also a possible theory as to the Defense of Marriage Act. In one decision a federal district court ruled that the plaintiffs established a prima facie case that a state constitutional amendment is unconstitutional as a bill of attainder inasmuch as portions of Nebraska Defense of Marriage provision applies to an easily ascertainable members of a group and inflicts punishment on them; *Citizens for Equal Protection v. Bruning*, <http://pub.bna.com/fl/o33155.pdf> [U.S. Dist. Ct., D. Neb., Nov. 11, 2003, docket no. 4:03CV3155].

Conclusion:

Whether one agrees with the majority or the dissenting judges in *Goodridge*, the decision is a landmark in American family law. To understand it one must be open to the lessons of history, which were argued passionately by the judges in the U.S. Supreme Court in *Lawrence v. Texas*, just as they were by the Massachusetts judges. It requires everyone concerned to ask themselves what is essence of our legal history and tradition and how far we must go back to retain the best of the past in order to be true to our tradition of flexible constitutional interpretation. Is *Goodridge* merely a footnote in the development of family law? Or is the ruling like those earlier family law decisions which created great public controversy when mad but which came to be accepted as basic law over time? In other words, is the Massachusetts decision destined to be a legal dead-end or will it someday be a landmark as *Pierce*,¹²⁴ *Griswold*,¹²⁵ and *Loving*¹²⁶ are today recognized to be? Only when the legal history of our time is studied in the future will scholars and commentators be able to answer that question.

In the midst of the political controversy which now exists because of *Goodridge* it is difficult for man to take the long view. But it is also important to understand that the controversy which followed many of the significant constitutional cases required time for a consensus to develop. As lawyers we above all should appreciate the lessons which legal history teaches us. Whether the Massachusetts decision will survive the judgment of history remains to be seen but for the present it has raised issues which this generation of family law commentators and scholars will have to take seriously.

¹²⁴ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) [parents have the right to send their children to educationally qualified private and religious schools, notwithstanding a state law requiring all students to attend a public school].

¹²⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965) [married couple has privacy right to choose to use contraception free from state prohibition on its use].

¹²⁶ *Loving v. Virginia*, 388 U.S. 1 (1967) [state cannot prohibit a person of one race from marrying a person of a different race],