

2011

Same-Sex Marriage and the New Judicial Federalism: Why State Courts Should Not Consider Out-of-State Backlash

Neal Devins

William & Mary Law School, nedeви@wm.edu

Repository Citation

Devins, Neal, "Same-Sex Marriage and the New Judicial Federalism: Why State Courts Should Not Consider Out-of-State Backlash" (2011). *Faculty Publications*. 1190.
<https://scholarship.law.wm.edu/facpubs/1190>

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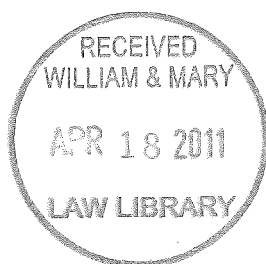
CONSTITUTIONAL LAW

DUAL ENFORCEMENT OF NORMS

EDITED BY

JAMES A. GARDNER

JIM ROSSI



OXFORD
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Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

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Library of Congress Cataloging-in-Publication Data

New frontiers of state constitutional law:
dual enforcement of norms/edited by James A. Gardner and Jim Rossi.
p. cm.

Includes bibliographical references and index.

ISBN 978-0-19-536832-1 (hardback : alk. paper)

1. Federal government—United States. 2. Constitutional law—United States—States.
3. Judicial review—United States—States.

I. Gardner, James A., 1959- II. Rossi, Jim, 1965-

KF4600.N49 2010

342.73'042—dc22

2010020544

1 2 3 4 5 6 7 8 9

Printed in the United States of America on acid-free paper

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6. SAME-SEX MARRIAGE AND THE NEW JUDICIAL FEDERALISM: WHY STATE COURTS SHOULD NOT CONSIDER OUT-OF-STATE BACKLASH

NEAL DEVINS

I. INTRODUCTION

Thirty years after Justice William Brennan's call for state courts to "step into the breach" left by the U.S. Supreme Court's supposed underenforcement of individual rights protections, the contours of the "new judicial federalism" remain a mystery.¹ There is, of course, the methodological question about whether state courts should rely on state-specific sources (the text and history of the state constitution) and, in so doing, develop a "coherent discourse of state constitutional law."² More fundamentally, does Brennan's call for a new judicial federalism have anything to do with federalism or is Brennan simply a "false prophet," asking states to pick up the slack for a recalcitrant Supreme Court and pursuing the Warren Court's nationalistic agenda of expanding civil and individual rights protections?³ Under this view, it simply does not matter whether state courts employ a "coherent discourse of state constitutional law"; all that matters is that state courts expand rights protections.

In sorting out whether the "new federalism" has anything to do with federalism, traditionally understood, this chapter considers recent battles over same-sex marriage. In particular, I will examine whether state courts should consider out-of-state backlash when deciding cases. For example, when assessing whether to extend marriage protections to same-sex couples, should the Massachusetts Supreme Judicial Court have taken into account the possibility that its ruling would contribute to the electoral defeat of presidential candidate John Kerry or the enactment of state constitutional amendments banning same-sex marriage? If the "new federalism" is simply a rallying call for the nationalistic expansion of rights, such out-of-state effects should matter. But if the "new federalism" is about sovereign, independent states serving as "laboratories" where new legal

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

2. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 764 (1992).

3. Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HAST. CONST. L.Q. 429 (1988).

concepts can be tried out, there is simply no principled reason for state courts to take out-of-state resistance into account.

In the pages that follow, I will argue that the new judicial federalism should be something more than window dressing for an outcome-driven nationalistic agenda. For this very reason, I will defend the decision of the Massachusetts Supreme Judicial Court to protect same-sex marriage in *Goodridge v. Department of Public Health*. Unlike critics of the decision, I will argue that the Massachusetts court did not engage in judicial overreaching by failing to take into account out-of-state backlash. At the same time, I will explain why state courts should take into account in-state backlash when deciding cases. State courts cannot serve as laboratories in a new judicial federalism if their decisions are ignored or nullified. Likewise, state courts cannot pursue doctrinal innovations if judges fail to win reelection because they pursued politically unacceptable causes. In other words, just as the U.S. Supreme Court seeks to protect its turf and maximize its influence over the other branches, state supreme courts should take implementation concerns into account.

This chapter proceeds in two parts. First, I will explain why state courts should pay attention to in-state but not out-of-state backlash. I will discuss both the need for courts to pay attention to the practical consequences of their decisions and how that need should be channeled through the lens of the “new judicial federalism.” Moreover, in arguing that state courts should not consider the extra-territorial effects of their decisions, I will draw a distinction between two types of out-of-state backlash. Although state courts should not consider the potential out-of-state backlash of their decisions, it is nevertheless sensible for state courts to look to the experiences of other states in assessing whether there will be an in-state backlash. State courts, in other words, are both independent (doing right by the citizens of their state without considering negative out-of-state effects) and part of a national system (recognizing that the experiences of other states are instructive in assessing what type of decision best serves in-state interests).

Second, I will apply the principles of the first part of the chapter to same-sex marriage, focusing my attention on four states that rejected state prohibitions against it: Hawaii (1993), Vermont (1999), Massachusetts (2003), and California (2008). By looking at the state political culture at the time of the decision, I will criticize the decision of the Hawaii Supreme Court, defend the decisions of the Massachusetts and Vermont courts, and offer a mixed assessment of the California Supreme Court. In Hawaii, the state supreme court went out of its way to push its views upon a reluctant legislature and hostile electorate. In sharp contrast, courts in Vermont and Massachusetts took steps to minimize conflict and, in so doing, staved off efforts to undermine these court decisions through legislation or constitutional amendments. Vermont and Massachusetts are instructive for another reason: because it is extremely difficult to amend the state constitutions in these two states, the decisions of these courts are largely insulated from potential voter backlash. In sharp contrast, many western states facilitate voter-driven constitutional initiatives. For this very reason, the California court—while having reason to believe that its decision would be acceptable to

state political leaders and perhaps a majority of California voters—should have considered delaying its same-sex marriage ruling.

II. POSITIVE POLITICAL THEORY AND THE NEW JUDICIAL FEDERALISM

State court judges should care whether people would be outraged by their rulings.⁴ In part, courts have no choice but to be consequentialist. Lacking the power of the purse and the sword, a judge's power "rests on the willingness of the public, and the political actors accountable to it, to respect his independence and the decrees of the court."⁵ Beyond the practical necessity of taking potential backlash into account, the new judicial federalism offers a second account of why state courts ought to consider the consequences of their decisions. The new federalism is premised on the belief that constitutionalism is not a "single set of truths" but rather an ongoing national discourse about "ideas of liberty, equality, and due process."⁶ Under this view, state courts learn from each other so that one state's experience informs the decision making of another state. State courts therefore should look to other states in assessing the effectiveness of competing decisional rules. In saying that state courts should pay attention to consequences, however, the new federalism draws a sharp line between a state court learning from another state's experience and its recalibrating a decisional rule for fear of out-of-state backlash. The new federalism, properly understood, treats state courts as independent entities—not simply part of a larger national discourse.

This section will spell out these two accounts of why state courts ought to be consequentialist. First, I will detail the institutional incentives for courts, especially state courts, to take backlash into account. Second, I will discuss the "new judicial federalism," focusing on the fundamental distinction between in- and out-of-state backlash.

A. Institutional Incentives

Supreme court justices (both state and federal) have "institutional preferences that may enhance or weaken the strength of [their] ideological preferences."⁷

4. This sentence plays off the title of Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007). Like Sunstein's article, this section will consider both normative and consequential arguments about the relevance of backlash. Unlike Sunstein, however, I will consider this question through the lens of the new judicial federalism—where states are at once independent and part of a national dialogue about the appropriate scope of rights protections. By contrast, Sunstein's analysis seems tied to a unitary court system and is therefore most useful in thinking about U.S. Supreme Court interpretations of federal law.

5. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005).

6. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147 (1993).

7. Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 783 (1996).

In particular, implementation concerns sometimes figure into court decisions. This is true for the U.S. Supreme Court (where life tenure and an extremely burdensome constitutional amendment process significantly reduce the risk of backlash). And it is especially true for state supreme courts (where, in many states, there is great risk of backlash because of judicial elections, interest group-driven initiatives, and the relative ease of amending state constitutions).

In understanding why courts *should* take backlash into account, consequentialists focus their attention on whether court rulings actually advance the goals intended by the court. A second reason why consequentialists should care about backlash is the larger interest of courts to maintain judicial power in our system of divided government. Each of these arguments has common sense appeal, and each argument is tied to one of the dominant models that political scientists use to explain Supreme Court decision making (external strategic actor and new institutionalism).⁸ Embracing the teachings of the external strategic actor model, consequentialists argue that judges should be both goal-oriented and strategic so that “the preferences and likely actions of other relevant actors” shape the contours of judicial decision making.⁹ Under this view, judges should be policy maximizers, advancing preferred outcomes without risking a counterproductive backlash. Second, by making use of the new intuitionism, consequentialists argue that judges seek to preserve, if not strengthen, the court’s institutional capital. Specifically, the new institutionalism emphasizes that the Supreme Court has institutional as well as policy-maximizing goals. Under this view, Supreme Court justices see the Court as an institution whose identity is defined by patterns of interaction with other parts of government. Accordingly, the Court cannot lose sight of its responsibilities to “maintain a distinctive and valued presence in the political system” by advancing some “vision of the special functions that [it] should perform.”¹⁰

8. A third political science model, the attitudinalist model, claims that U.S. Supreme Court justices vote their policy preferences without fear of political backlash. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). Defenders of this model contend that the U.S. Supreme Court is largely insulated from political backlash; consequently, there is no reason for the justices to calibrate their decisions in anticipation of political backlash. Although generally correct, the attitudinalist model overstates matters. As the balance of this section will demonstrate, the attitudinalist model does not extend to state supreme courts—where fears of political reprisals are often substantial.

9. Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS L.J. 783, 800 (2003). For a more detailed explication of this model, see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1997).

10. Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 85 (Cornell W. Clayton & Howard Gillman, eds., 1999).

Examples of the U.S. Supreme Court taking social and political forces into account when deciding cases are legion. Numerous studies have empirically established that the Court shapes its “decisions and methods according to their perceived vulnerability to congressional override” and that it takes “cues regarding public and political interest and acceptability of outcomes from the public and organized interests.”¹¹

State courts likewise take into account potential opposition to their rulings. As one state supreme court justice put it: “There’s no way a judge is going to be able to ignore the political consequences of certain decisions. . . . That would be like ignoring a crocodile in your bathtub.”¹² In death penalty cases, empirical studies demonstrate that “politicization of the death issue has affected state court behavior.”¹³ More relevant to this chapter (and something I will discuss in greater detail in the next section), the Vermont Supreme Court made explicit reference to its fear of political reprisals in explaining why there was a state constitutional right to civil unions but not to same-sex marriage.

State courts are especially sensitive to possible in-state backlash for two reasons. First, state constitutions are much easier to amend than the federal constitution. Of more than 5,000 proposed amendments to the U.S. Constitution, only seventeen have been approved since the Bill of Rights and only three amendments explicitly overruled decisions of the U.S. Supreme Court. State constitutions, in contrast, have been amended more than 5,000 times.¹⁴ From 1996–1997, for example, forty-two states considered 233 proposed constitutional amendments, approving 178 of them.¹⁵ Second, state judges are often subject to direct democratic control. In the majority of states, justices are either elected or subject to retention votes. Empirical studies back up the common sense notion that judicial selection methods “significantly affect judicial policy in several important areas of the law.”¹⁶ Indeed, the success of interest groups in pushing for either

11. Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 LAW & SEXUALITY REV. 11, 28 (2006) (citing studies). See also NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U.L. REV. 1437 (2001).

12. This quote comes from California Supreme Court Justice Otto Kaus. It is favorably quoted by Washington Supreme Court Justice Robert F. Utter in *State Constitutional Law, The United States Supreme Court, and Democratic Accountability*, 64 WASH. L. REV. 19 (1989).

13. John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 503 (1999).

14. John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS 12, 14 (Mar. 1988).

15. Janice C. May, *Amending State Constitutions 1996–97*, 30 RUTGERS L.J. 1025 (1999).

16. DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY* 130 (1996).

the election or removal of state court judges has called into question the impartiality of state court decision making and, more generally, is considered a profound threat to the independence of state court systems.

Not only are state courts less insulated from popular reprisals than federal courts, state courts are far better positioned than federal courts to weigh the costs and benefits of potential backlash: "[S]tate judges are systematically exposed to and experienced in the legal institutions of their states;" "state judges spend their professional lives dealing with state legislation and administration regulation;" "[t]hey are much more likely than are their federal counterparts to know or be able to learn readily what is out there, how it came to be, and how well or badly it works."¹⁷

Of course, state court knowledge of in-state traditions does not extend beyond state boundaries. State judges know about their states and can make consequentialist judgments about the potential backlash of a decision there. But state judges do not know about the on-the-ground facts and legal traditions of other states, so they cannot be expected to make informed judgments about out-of-state backlash.

Another reason that state judges ought not to think about out-of-state backlash is tied to the new judicial federalism. Although part of a national discourse, state courts must retain their essential sovereignty—an issue that I will now address.

B. The New Judicial Federalism and Out-of-State Backlash

The new judicial federalism sees the states as critical players in the shaping of national constitutional values. Although there are as many iterations of this "new federalism" as there are law professors and judges who have written on this topic, proponents generally fall into one of two camps. The fault line here is whether a state court has some obligation to undertake an independent analysis of the state's constitution or, alternatively, may it "simply disagree with contemporary Supreme Court methods or doctrines in applying its state constitution without searching for special reasons in the state's text or traditions"?¹⁸

Without minimizing the importance of this question, let me suggest a paradigm shift so that the focus of the inquiry becomes the implementation of a state court's preferred doctrine. This question has received no attention in the literature, even though state courts have been criticized for not taking out-of-state backlash into account. Decisions by the Hawaii and Massachusetts Supreme Court on same-sex marriage have been savaged on these very grounds (principally by supporters of same-sex marriage) as "disastrous" and "provok[ing] the

17. Lawrence Gene Sager, *State Courts and the Strategic Space between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 976 (1985).

18. Hans A. Linde, *State Constitutions are Not Common Law*, 24 RUTGERS L.J. 927, 931 (1993).

biggest anti-gay backlash since the McCarthy era.”¹⁹ In the next section, I will discuss this backlash, but for now I want to focus on whether and when state courts should think about out-of-state implementation.

Federalism assumes that states have different laws and that state supreme courts speak authoritatively about the meaning of state law. Correspondingly, in determining whether to embrace one or another legal rule, state courts have unique responsibilities to their citizens rather than to the country as a whole. In particular, state courts ought not to limit the rights of their citizens in order to stave off a potential out-of-state backlash (assuming that out-of-state backlash does not boomerang into a federal constitutional amendment or federal law that undermines a state court ruling).

There is a second reason that state courts ought not to consider out-of-state backlash. For states to serve as laboratories in a nationwide conversation about constitutional values, states must experiment. In-state backlash is relevant to these experiments, but out-of-state backlash has no bearing on them. Specifically, state courts must preserve space in which they are allowed to experiment. In-state backlash undercuts judicial authority and may limit the types of experiments that states can pursue. Out-of-state backlash is quite another matter. Assuming no in-state boomerang effect, out-of-state backlash has no bearing on in-state experimentation.

At the same time, state courts can learn from the implementation experiences of other states. If interest groups (especially national interest groups) seek to oust judges or pursue constitutional reforms in one state, there is no reason to think those groups will not seek to countermand similar decision making in other states. And if these efforts either fail or are not pursued in the first instance, state courts may have reason to think that they have greater room for experimentation. Separate and apart from direct repeal efforts, state courts may see whether those subject to a court order follow it or, alternatively, resist the ruling by either dragging their feet or ignoring it altogether. If there is some type of nonacquiescence, it may make sense to pursue a different remedial strategy.

This, of course, is what the new judicial federalism is all about—state courts learning from each other and “contributing to the larger project of interpreting shared constitutional text.”²⁰ Sometimes state courts will be pathbreakers, pursuing doctrinal innovations that may shape decision making in other states. At other times states will wait and see if other states’ approaches point to a better way of interpreting state law. Whatever role a state chooses to play, out-of-state backlash ought not to limit state innovations.

19. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 812 (2006); WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE* 26 (2002).

20. Lawrence Friedman, *The Constitutional Values of Dialogue and the New Judicial Federalism*, 28 *HAST. CONST. L.Q.* 93, 137 (2000).

One final observation before turning to the same-sex marriage case study: state judges are engaged in two distinct, interrelated constitutional dialogues. To the extent that state courts pay attention to what has happened in other states and make doctrinal moves that inform the judgments of other state courts, the new judicial federalism has a nationalistic cast. Most advocates of the new federalism emphasize this side of things, talking broadly about the “values placed in a constitution” and about constitutionalism as “not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order.”²¹ But states are not simply minions in some larger national enterprise. State courts also participate in an intrastate dialogue that includes state lawmakers and voters. They “need not apologize for undercutting national unity” if they validate the ways in which states are different from one another.²²

III. THE NEW JUDICIAL FEDERALISM AND SAME-SEX MARRIAGE

Academic and popular commentary about state court efforts to extend marriage or civil union rights to same-sex couples has largely focused on out-of-state backlash. In particular, the Hawaii and Massachusetts supreme courts have been sharply criticized for triggering a host of anti-gay legislative enactments and constitutional amendments. These attacks have largely ignored the question of whether these courts operated within their state’s social and political norms. In the pages that follow, I will address that very question.

My discussion will be organized chronologically, focusing on rulings by the supreme courts of Hawaii (1993), Vermont (1999), Massachusetts (2003), and California (2008). In so doing, I will call attention to the way state courts can learn from the experiences of other states while, at the same time, respecting essential state sovereignty by refusing to consider the extraterritorial effects of their decisions. This, as Section I details, is the core principle of the new federalism—a principle that allows states to be both independent and part of a national conversation. It is also a principle at odds with the nationalistic goals of Justice Brennan and other proponents of rights-expanding state court decision making. In particular, state courts may sometimes have good reasons (consistent with the new federalism) to expand in-state rights while simultaneously prompting an out-of-state backlash that frustrates the pursuit of a nationwide expansion of rights.

Bad Beginnings: Hawaii. The nationwide debate over same-sex marriage was triggered by *Baehr v. Lewin*,²³ a 1993 Hawaii Supreme Court decision that found

21. Kahn, *supra* note 6, at 1148; Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 442 (1998).

22. Linde, *supra* note 18, at 932.

23. 852 P.2d 44 (Haw. 1993).

Hawaii's prohibition of same-sex marriage to be gender discrimination. Rather than formally grant same-sex couples the right to marry, however, the court remanded the case to see if the state could demonstrate that its prohibition satisfied strict scrutiny review. Over the next five years (while the litigation worked its way back towards the Hawaii Supreme Court), Hawaii lawmakers struggled with the court's decision. On the one hand, the lawmakers reached out to gays and lesbians by enacting domestic partnership laws and, in so doing, established "the most sweeping protections ever offered to same-sex couples anywhere in the U.S."²⁴ On the other hand, demonstrating their commitment to traditional marriage, lawmakers both passed a law limiting marriage contracts to those between a man and woman and sent to state voters a constitutional amendment proposal that would grant the state legislature the power to outlaw same-sex marriage. In November, 1998, Hawaii voters approved that amendment by a 69 to 29 percent margin, thus mooting the *Baehr* litigation.²⁵

Baehr did much more than set in motion an intrastate dialogue about same-sex marriage. After *Baehr*, "an issue that had been a curiosity became an apocalyptic sensation."²⁶ State lawmakers, fearing that lesbians and gays would travel to Hawaii to get married and then seek to have those marriages recognized at home, enacted legislation prohibiting recognition of same-sex marriages. Between 1995 and 2001, thirty-five states enacted nonrecognition laws.²⁷ For its part, Congress enacted and President Clinton signed the 1996 Defense of Marriage Act (DOMA).²⁸ DOMA, as the House Committee report put it, was a "response to a very particular development in the State of Hawaii."²⁹ Echoing the concerns of state nonrecognition laws, Congress declared that "permitting homosexual couples to marry in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States."³⁰

Baehr, it would seem, did more harm than good to the cause of same-sex marriage. Outside of Hawaii, the federal DOMA and state nonrecognition statutes were a huge setback for proponents of same-sex marriage. In Hawaii, the state constitutional amendment foreclosed court-ordered same-sex marriage; proponents of same-sex marriage would now have to convince state lawmakers to repeal existing bans on same-sex marriage. The question remains: did the

24. Martin Bowley, *Same-Sex Couples, Different Rules*, THE LAWYER, Sept. 16, 1997 at 13.

25. For a detailed discussion of the politics behind the Hawaii Marriage amendment, see David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning, and Fate*, 22 U. HAW. L. REV. 19 (2000).

26. ESKRIDGE, *supra* note 19, at 26.

27. *Id.* at 27–28.

28. Pub. L. No. 104–199, 110 Stat. 2419 (1996).

29. H.R. Rep. No. 104–664 at 2 (1996).

30. *Id.*

Hawaii Supreme Court have reason to think that its ruling would prompt a counterproductive in-state backlash and, if so, what should it have done?

To start, the Hawaii Supreme Court, by taking the lead on this issue, did not know that court-ordered same-sex marriage would prove to be a nationwide sensation. This issue was not on the national radar at the time of the decision; indeed, it was the uproar over *Baehr* that prompted Gallup to start polling on same-sex marriage in 1996. So what did the Hawaii Supreme Court know? It knew that there was nationwide hostility to President Clinton's efforts to significantly expand gay rights protections. At the very time that the Hawaii Supreme Court decided *Baehr*, lawmakers were crafting the "Don't Ask, Don't Tell" law that prevented open gays from serving in the military. The court also knew that social conservatives were paying close attention to the case. The Rutherford Institute, for example, filed an amicus brief urging the state court to reject same-sex marriage.³¹ More significant, the court probably knew that Hawaii voters did not support same-sex marriage. A 1991 *Honolulu Star Bulletin* poll found that "only 34 percent [of Hawaii residents] think couples of the same sex should be allowed to marry and only 36 percent think such couples should be allowed to adopt children."³² The court may also have known that national gay rights interest groups played no role in the filing of the lawsuit, worried that the case was coming too early.³³ And finally, the court knew that it was easy to amend the Hawaii Constitution—all that is needed to refer a constitutional amendment to a majority referendum vote is the support of a majority of lawmakers over two legislative sessions (or a two-thirds supermajority in one session).

All of these bits of information suggest that the Hawaii Supreme Court had reason to fear an in-state backlash to a decision supporting same-sex marriage. At the same time, the Hawaii Court was well aware of the "island's history of tolerance and the state's broad privacy law," that Hawaii was the first state to legalize abortion, and that close to half of Hawaii's marriages are interracial.³⁴ Put another way, the court knew that the people of Hawaii were more likely to accept same-sex marriage than the citizens of any other state.

Assuming that Hawaii's Supreme Court sincerely believed that same-sex marriages should be legal, the question becomes: why wait? The answer, I think, is that certain risks are not worth taking. First, by ruling that *all* same-sex classifications were subject to strict scrutiny review, the court created incentives for opponents of

31. Linda Hosek, *Group Says Gays Should Not Get OK to Marry*, HONOLULU STAR BULLETIN, May 23, 1992 at A-3.

32. Linda Hosek, *Residents Draw the Line on Some Gay Rights*, HONOLULU STAR BULLETIN, Apr. 24, 1991 at A-4.

33. ESKRIDGE, *supra* note 19, at 16–17.

34. Linda Hosek, *Isles May Be First for Gay Marriage*, HONOLULU STAR BULLETIN, Apr. 24, 1991 at A-1.; Sherry Jacobson, *Hawaii Debates Gay Marriage: States May Recognize Such Unions After Court Ruling*, DALLAS MORNING NEWS, Sept. 17, 1993 at A-1.

same-sex marriage to harden their position and to look for ways either to argue that the same-sex prohibition satisfies strict review or to amend the Hawaii Constitution to forbid same-sex unions. Instead, the court should have looked for ways in which the state and Hawaiian people could have found a way to work within parameters set by the court. For example, the court could have signaled its willingness to consider domestic partner or civil union legislation. Hawaii lawmakers were open to such legislative outs; in the wake of *Baehr*, Hawaii lawmakers enacted sweeping domestic partnership legislation. Second, not only did the Hawaii court go too far, it went too fast. An intermediate state court had upheld the same-sex marriage prohibition. Rather than fill the breach immediately, the Hawaii Supreme Court could have declined to hear the case without expressing any opinion about the constitutionality of the marriage ban. That is precisely what the U.S. Supreme Court did in 1955 when, fearing a political backlash, it delayed ruling on a constitutional challenge to Virginia's anti-miscegenation law.³⁵

Let me be clear: unlike other critics of the Hawaii Supreme Court (who point to the federal DOMA and nonrecognition statutes passed by states other than Hawaii), my criticism focuses on the state court's failure to think about in-state concerns. The Hawaii Court should have either refused to hear the appeal in this case or decided the case narrowly so as to limit backlash.

The Triumph of Minimalism: Vermont. Six years after the Hawaii court's misstep in *Baehr*, the Vermont Supreme Court took a fundamentally different approach to same-sex marriage in *Baker v State*.³⁶ Although finding that the Vermont Constitution guarantees same-sex couples "the common benefit, protection, and security that Vermont law provides opposite-sex married couples," the Vermont court refused to extend marriage protections to same-sex couples. The court instead ruled that Vermont's existing statute should remain in effect "for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion."³⁷ By remanding the case to the state legislature, Vermont opened the door for state lawmakers to determine if they wanted to legalize same-sex marriage or, alternatively, enact civil union legislation that would provide "marriage protections to same-sex couples."

In explaining its refusal to extend marriage rights to same-sex couples, the court spoke openly about its fear of a counterproductive in-state backlash. Expressing its desire both to issue a remedy that would endure and to provide "[greater] protections for same-sex relationships than have been recognized by" any state supreme court other than Hawaii, the court concluded that it would be too politically risky to order the state to grant marriage licenses to same-sex couples. Indeed, the court chastised a concurring opinion that called for the

35. For a defense of the Court's decision, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 174 (1962).

36. 744 A.2d 864 (Vt. 1999).

37. *Id.* at 886.

outright recognition of same-sex marriage as “significantly insulated from reality.”³⁸

For reasons I will soon detail, it is far from clear whether Vermonters would have repudiated a state supreme court decision ordering same-sex marriage. At the same time, the Vermont court’s political calculation was eminently sensible. To start, the *Baker* decision took place against the backdrop of Hawaii’s repudiation of same-sex marriage in *Baehr*. More than that, Alaska lawmakers and voters preempted an ongoing challenge to Alaska’s marriage laws by approving a constitutional amendment barring same-sex marriage.³⁹ Specifically, in the immediate wake of a February 1998 trial court ruling that same-sex couples had a fundamental right to marry, Alaska lawmakers (in March 1998) put a constitutional amendment proposal on the November ballot. That proposal was approved by a lopsided 68 to 32 percent vote.

The Hawaii and Alaska experiences are relevant for another reason. The Alaska and Hawaii constitutional amendment fights were financed, in part, by out-of-state interest groups. The national movement to enact the federal DOMA and state non-enforcement statutes was also propelled by national interest groups. Throughout the 1990s, moreover, social conservatives had pushed (with great success) state-wide initiatives limiting gay rights in at least a dozen states. So when the Vermont Supreme Court received seventeen amicus briefs from national interest groups, it had reason to know that a decision validating same-sex marriage would trigger an intense political battle over whether Vermonters, like Hawaiians and Alaskans, should approve a state constitutional amendment banning same-sex marriage. And if that were not enough, a poll taken shortly before the release of the *Baker* decision revealed that Vermonters, by a 56 to 33 percent margin, supported a constitutional amendment proposal to “keep Vermont’s definition of marriage as the union of one man and one woman.”⁴⁰

Against this backdrop, there is little doubt that judicial validation of same-sex marriage would have triggered a donnybrook. A constitutional amendment would have been introduced, and national interest groups would have invested significant time and resources in this constitutional amendment battle. At the same time, there is reason to think that a constitutional amendment proposal would have failed. National trends pointed to growing acceptance of gay rights.⁴¹

38. *Id.* at 888.

39. For a detailed treatment of the events leading up to the Alaska constitutional amendment, see Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People’s Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999).

40. *Take it to the People*, Press Release, Support for Traditional Marriage Remains Strong in Vermont, Dec. 16, 1999.

41. By 1999, the social conservative campaign against gay rights had slowed. A 1996 Supreme Court decision, *Romer v. Evans*, 517 U.S. 620 (1996), cast doubt on the constitutionality of anti-gay initiatives. A 1998 Georgia Supreme Court decision nullified—on

In Vermont, the Coalition for Lesbian and Gay Rights had scored numerous legislative successes in the early 1990s—so much so that a public relations campaign for same-sex marriage was launched in 1994.⁴² And although Vermonters opposed same-sex marriage, it was far from clear that state lawmakers would pursue a constitutional amendment banning it. Vermont's constitutional amendment process is "notoriously difficult. . . . Legislators can introduce amendments only once every four years. If approved, an amendment must pass in two consecutive two-year legislative sessions. Only then can people vote on the proposal."⁴³

The fact that a constitutional amendment proposal might have failed, however, does not mean that the Vermont Supreme Court erred in *Baker*. Even assuming that the court backed same-sex marriage, it had good reason to minimize very real risks. By leaving it to the state legislature to sort out how best to remedy the state's illegal discrimination against same-sex couples, the "court, in effect, forced the legislature to join it in taking responsibility for fashioning and implementing a remedy."⁴⁴ In so doing, the court shifted the debate on same-sex marriage. Instead of fighting over a possible amendment to the state constitution, the focus of the Vermont legislature was whether to enact a civil union bill or legalize same-sex marriage.⁴⁵

By leaving "breathing space for participants in the democratic process," *Baker* was able to build on "an extended legislative willingness to recognize and protect non-traditional families, while at the same time declining to disturb the yet-to-be-repudiated view of traditional families."⁴⁶ A decision demanding marriage rights for same-sex couples would have run against the grain of Vermont traditions and facilitated adversarial politics. More to the point, *Baker* exemplifies what the new federalism should and should not be. The Vermont Supreme Court

state constitutional grounds—the anti-sodomy statute that the Supreme Court had upheld in *Bowers v. Hardwick*. See *Powell v. State*, 510 S.E. 2d 18 (Ga. 1998). Public opinion polls, moreover, reveal ever-growing support of gay rights, especially among younger voters. See Jack Egan et al., *Gay Rights*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 234 (Nathaniel Persily et al., eds., 2008). There was thus less intense opposition to same-sex marriage in 1999 than there had been in 1993 (when the Hawaii Supreme Court decided *Baehr*).

42. Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 25–30 (2000).

43. David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61, 68 (2000).

44. Tonja Jacobi, *Same Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary's Role*, 26 VT. L. REV. 381, 403 (2002).

45. See William N. Eskridge, *Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 870–76 (2001).

46. Gil Kujovich, *An Essay on the Passive Virtue of Baker v. State*, 25 VT. L. REV. 93, 109 (2000). See also Johnson, *supra* note 42.

looked to out-of-state experiences to inform its judgment about in-state concerns. And although the court may have succeeded in establishing a right to same-sex marriage, it minimized the risks of backlash while setting in motion a process of incremental reform. State lawmakers could embrace the broader right, but, if not, the court could return to the issue of same-sex marriage. That option was not available to the Hawaii Supreme Court, whose unilateralism prompted a constitutional amendment forbidding such court-ordered reform.

*The Massachusetts Gamble: Judicial Hubris or the New Judicial Federalism at Work?*⁴⁷ In November 2003, the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health*⁴⁸ that the state ban on same-sex marriage was unconstitutional. Finding that the state either had to allow same-sex couples the right to marry or eliminate civil marriage altogether, the court gave state lawmakers 180 days to “take such action as it may deem appropriate in light of this opinion.”⁴⁹ In February 2004, acting on a request from state lawmakers to clarify this ruling, the court said that only full and equal marriage rights for same-sex couples—not proposed civil union legislation—would satisfy the court’s ruling. Three months later, Massachusetts became the first state to allow same-sex marriage.

Reaction to the Massachusetts decision was intense. Inside Massachusetts, Governor Mitt Romney pushed for a constitutional amendment to overturn the ruling. And although lawmakers did not approve an amendment, a constitutional convention was convened in February 2004, and a proposed ban on same-sex marriage passed through a first-stage vote in March 2004. After same-sex couples began marrying in May 2004, however, public opposition to same-sex marriage began to wane.⁵⁰ Indeed, state voters rewarded opponents of the proposed constitutional ban in the November 2004 election cycle: all opponents of the ban won reelection, some proponents of the ban lost reelection, and opponents of the ban won six of eight open seats.⁵¹ By March 2005, support for same-sex marriage

47. In writing about Massachusetts, I have benefited greatly from the work of Tonja Jacobi, whose published work is cited in this section. I also benefited from a student paper I supervised in the spring 2007 semester (before Professor Jacobi’s published her *Goodridge*-related scholarship). That paper was written by Matthew Koldziej, a 2007 graduate of George Washington Law School. Although I suggested the paper topic to Mr. Koldziej, my interest in writing this chapter was nonetheless spurred on by Mr. Koldziej’s outstanding paper.

48. 798 N.E. 2d 941 (Mass. 2003).

49. *Id.* at 970.

50. Tonja Jacobi, *How Massachusetts Got Gay Marriage: The Intersection of Public Opinion, Legislative Action, and Judicial Power*, 15 J. CONTEMP. LEGAL ISSUES 219, 221 (2006).

51. Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 LAW & SEXUALITY REV. 11, 39–41 (2006).

among Massachusetts residents had increased to 56 percent.⁵² In September 2005, lawmakers rejected a proposed constitutional ban of same-sex marriage by a vote of 157 to 39.⁵³ With an increasingly supportive legislature and citizenry, the campaign to ban same-sex marriage floundered. In November 2006, lawmakers refused to vote on a citizen-proposed ballot initiative. In July 2008, lawmakers repealed a state law prohibiting the issuance of marriage licenses to couples who could not marry in their home state, paving the way for same-sex couples from other states to marry in Massachusetts.

Outside of Massachusetts, *Goodridge* proved to be a lightning rod. On the one hand, the decision was part of a mix of factors that in the spring and summer of 2004 prompted city and county officials to grant marriage licenses to same-sex couples in San Francisco, California; Portland, Oregon; New Paltz, New York; and elsewhere.⁵⁴ And while state courts uniformly rejected these local initiatives as unauthorized usurpations of state law, *Goodridge* undoubtedly contributed to the willingness of gay rights interests to push for same-sex marriage. On the other hand, the collective impact of these local initiatives and *Goodridge* was to energize opponents of same-sex marriage. In an effort to appeal to their social conservative base, Republicans in Congress sought both to amend the Constitution to prohibit same-sex marriage and to enact legislation stripping the federal courts of jurisdiction in same-sex marriage cases. Although Congress did not act on either proposal, there is little question that social conservatives saw same-sex marriage as a wedge issue in the November 2004 elections. Most telling, thirteen states approved constitutional amendment proposals forbidding same-sex marriage.⁵⁵ Moreover, conservative Christians helped propel the candidacies of George W. Bush and other Republicans. In Ohio, for example, "political analysts credited the ballot measure with spurring Republican voter turnout in the socially conservative western and southern portions of the state."⁵⁶ Same-sex marriage also worked to the advantage of Republicans in U.S. Senate races, providing the margin of victory in Kentucky and South Dakota.⁵⁷

Goodridge has been roundly criticized for prompting a national backlash against gay rights interests. Indeed, criticism of the case has almost exclusively focused on this question. The issue of in-state backlash has received, at best,

52. Scott S. Greenberger, *One Year Later, Nation Divided on Gay Marriage*, BOST. GLOBE, May 15, 2005.

53. Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept 15, 2005 at A-14.

54. For a discussion of how these initiatives (and other related matters) shaped public attitudes towards gay rights during this time, see Egan et al., *supra* note 41.

55. See Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431 (2005).

56. James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Race*, N.Y. TIMES, Nov. 4, 2004 at A-4.

57. See Klarman *supra* note 55, at 468–70.

scant attention. This is truly unfortunate. State courts, as explained earlier, ought not to sacrifice their essential sovereignty by taking out-of-state backlash into account and thereby limiting rights protections for their citizens. What then of potential in-state backlash at the time of *Goodridge*? That is something that the Massachusetts court should have taken into account. For reasons I will now detail, the Supreme Judicial Court had good reason to think that a decision granting marriage rights to same-sex couples would withstand in-state resistance. Furthermore, by delaying its remedial order in the case, the court successfully minimized in-state backlash.⁵⁸

To start, the Supreme Judicial Court undoubtedly knew that its decision would prompt an outcry in Massachusetts and throughout the nation, including efforts to amend the Massachusetts Constitution. In anticipation of *Goodridge*, an initiative amendment to ban same-sex marriage was proposed in the Massachusetts legislature in the summer of 2002. Although this measure was not acted on, lawmakers promised to seek a constitutional ban on same-sex marriage if the Supreme Judicial Court found a right to same-sex marriage in *Goodridge*. The Supreme Judicial Court also knew that these efforts would be backed by many of the “[h]undreds of [interest] groups” that had signed amicus briefs in the case, including “Catholic, Protestant fundamentalist and Orthodox Jewish groups.”⁵⁹

The volatility of the same-sex marriage issue was also fueled by two June 2003 developments: Canada’s granting of marital rights to same-sex couples and the U.S. Supreme Court ruling in *Lawrence v. Texas* that anti-sodomy statutes were unconstitutional.⁶⁰ *Lawrence* is especially relevant, for Justice Scalia’s dissenting opinion claimed that the Court’s decision paved the way for a federal constitutional right to same-sex marriage.⁶¹ *Lawrence* fueled public repudiations of same-sex marriage by the Southern Baptist Conference and U.S. Catholic bishops.⁶² It also resulted in same-sex marriage becoming *the* defining issue for social conservatives, including the Family Research Council and Focus on the Family. These groups spoke about the need “for the American people” to “rise up and defend this indispensable institution” because “the homosexual activist movement . . . is poised to administer a devastating . . . blow to the traditional family.”⁶³

58. For a detailed treatment of this issue, see Jacobi, *supra* note 50.

59. Kathleen Burge, *SJC Puts Off a Decision on Gay Marriage*, BOST. GLOBE, July 15, 2003 at A-1; Kathleen Burge, *SJC to Weigh Arguments on Gay Marriage*, BOST. GLOBE, Mar. 2, 2003 at A-1.

60. See Egan et al., *supra* note 41.

61. See Esther Kaplan, *The Religious Right’s Sense of Siege is Fueling a Resurgence*, NATION, July 5, 2004 at 33.

62. See Klarman, *supra* note 55, at 460.

63. Mary Leonard, *Gay Marriage Stirs Conservatives Again*, BOST. GLOBE, Sept. 28, 2003 at A-1; Christopher Marquis, *U.S. Gays Who Marry in Canada Face Hurdles*, N.Y. TIMES, June 19, 2003 at A-8.

Finally, *Lawrence* contributed to an increase in public opposition to same-sex marriage at the very time that the Massachusetts court was set to decide *Goodridge*.

The Massachusetts court was well aware of all this. Just weeks after the U.S. Supreme Court decided *Lawrence*, the Massachusetts court announced that it would delay its decision in *Goodridge*. Three months earlier (when hearing oral arguments in *Goodridge*), justices on the Massachusetts court likewise signaled their sensitivity to the interplay between the court, the Massachusetts legislature, and the public. In particular, the justices quizzed both sides on the appropriateness of the court resolving the same-sex marriage issue and the related possibility that Massachusetts voters (through a constitutional amendment) or legislators (through civil union legislation) might be able to resolve this issue.⁶⁴ By the time the justices decided *Goodridge*, they almost certainly knew that lawmakers supported civil union legislation but not the constitutionalization of same-sex marriage.

Why then did the Massachusetts court test the limits of its authority by establishing a right to same-sex marriage? The short answer is that the justices supported a right to same-sex marriage and thought that a decision establishing such a right would stick. To start, the Massachusetts Constitution is difficult to amend. Massachusetts is one of nineteen states that has had only one constitution, and among those states, it has the lowest amendment rate.⁶⁵ Amendments must be voted on in two successive legislative sessions before being submitted to the voters. This process is, by definition, time-consuming. It is intended to ensure that there is continuing public and lawmaker support for an amendment proposal. Against this backdrop, public opinion seemed to be on the side of *Goodridge*. Opinion polls taken just before the decision revealed that Massachusetts residents supported same-sex marriage 50 to 44 percent. And although *Goodridge* might have influenced public opinion (by focusing both state and national attention on same-sex marriage), the justices had reason to think that the decision would not result in sustained support for a constitutional amendment banning same-sex marriage. In addition to somewhat favorable polling numbers at the time of the decision, public support for gay rights, including same-sex marriage, was on the rise. That trend was likely to continue as younger voters overwhelmingly supported gay rights, including same-sex marriage. More than that, the justices knew that their decision would take effect in May 2004—at least two years before a constitutional amendment proposal could make its way to voters. That would likely mitigate opposition to same-sex marriage; in particular, the burden of inertia would likely favor it. A constitutional amendment would ask voters to

64. *From Judges, Pointed Questions*, BOST. GLOBE, Mar. 5, 2003 at A-6.

65. Donald S. Lutz, *Towards a Theory of Constitutional Amendment* 248–49, in *RESPONDING TO IMPERFECTION* (Sanford Levinson ed., 1995).

take away a preexisting right rather than (as was true in other states) back up existing state policy against same-sex marriage.⁶⁶

The justices, moreover, took strategic steps to mitigate public and lawmaker opposition to their rulings. Rather than call for immediate implementation of court-ordered same-sex marriage, the Massachusetts court remanded the case to the legislature for 180 days. At the same time, by ruling on “basic premises of individual liberty and equality of the law,” the court also made clear that same-sex couples had a constitutional right to marry (strongly suggesting that civil union legislation would likewise be unconstitutional).⁶⁷ This legislative remand suggests one of two things. First, it created an escape hatch so that the court could embrace civil union legislation if the in-state backlash against its decision were truly severe. Second, the court—albeit with a wink and a nod—returned the issue to the democratic branches to build public and lawmaker support for same-sex marriage. Not only did the court signal that the “legislature retains broad regulatory power over civil marriage,” it sought to facilitate legislative support of same-sex unions (or at least diminish legislative opposition to same-sex marriage). For their part, Massachusetts lawmakers took up a civil union bill and asked the court if such a bill would satisfy *Goodridge*. Even though the Massachusetts court turned down this request, the stay succeeded in drawing lawmakers into the process and, in so doing, changing the baseline about same-sex unions away from legislative opposition and toward some form of legislative acceptance.⁶⁸

For a court interested both in advancing its vision of constitutional truth and maximizing its power, *Goodridge* is a masterstroke. The court had good reason to think its decision would not be overturned by a constitutional amendment; the court facilitated public and legislative acceptance of its decision by delaying the effective date of the remedy and remanding the case to the state legislature; and the court created a remedial delay that allowed it the opportunity to back away from its ruling if there were severe public and legislative opposition. Also, as justices on the Massachusetts Supreme Judicial Court are not subject to recall election, there was no risk of the decision limiting their ability to stay on the court.

California: A Calculated Risk that Backfired. On May 15, 2008, the California Supreme Court overturned the state’s ban on same-sex marriage.⁶⁹ At that time,

66. It is also possible that public awareness of same-sex couples who marry might mitigate opposition to same-sex marriage. This would be especially true if there were favorable newspaper and television coverage about the same-sex couples who choose to marry. As it turns out, opposition to same-sex marriage did wane after same-sex couples began to marry. See Jacobi *supra* note 51.

67. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003).

68. For a more detailed presentation of this idea, see Jacobi, *supra* note 51, at 28–38.

69. *In re Marriage Cases*, 43 Cal. 4th 757 (2008).

the justices had good reason to think that their decision both matched prevailing social and political forces and was especially vulnerable to political attack. On the one hand, public opinion polls, the action of state lawmakers and Governor Schwarzenegger, and editorial commentary by the state's leading newspaper all suggested that California was ready to embrace gay marriage. On the other, anti-gay marriage groups had mobilized after the court agreed to decide the case so that California voters would have an opportunity to vote on a proposed constitutional amendment that would ban same-sex marriage. On November 4, 2008, California voters narrowly approved this amendment.⁷⁰

Therefore, the California Supreme Court was simultaneously sensitive and tone deaf to the central lessons of this chapter. By granting certiorari to hear this case in December 2006, the California court paid insufficient attention both to the risks of in-state backlash and to the out-of-state backlash that followed *Goodridge*. When deciding the case, however, the court had good reason to strike down the state prohibition of same-sex marriage. At that time, the risks of in-state backlash, while substantial, did not warrant the court's retreat from its preferred position in the case.

When agreeing to rule on the constitutionality of same-sex marriage, the California Supreme Court was certainly aware of the backlash against same-sex marriage that followed *Goodridge* and the contemporaneous efforts of localities, most notably San Francisco, to recognize it. Indeed, the case was an appeal by San Francisco of a state appeals court ruling that nullified San Francisco mayor Gavin Newsom's efforts to grant marriage licenses to about 4,000 same-sex couples. More than that, the court knew that post-*Goodridge* efforts to constitutionalize same-sex marriage had failed. In 2006, two state supreme courts, Washington and New York, reaffirmed state prohibitions on same-sex marriage and a third state supreme court, New Jersey, concluded that the state must allow for civil unions but not same-sex marriage.

The California court also knew that well-funded Christian conservatives were poised to put an initiative against same-sex marriage on the 2008 ballot. With 2006 public opinion polls showing that Californians opposed same-sex marriage by a 50 to 44 percent margin, the court had good reason to fear that a decision legalizing same-sex marriage would be turned back by voters. In particular, the California Constitution is far easier to amend than most state constitutions. A constitutional amendment initiative is placed on the ballot after 8 percent of the total voters in the last gubernatorial race sign a petition calling for the amendment. And once on the ballot, a simple majority is sufficient to amend the Constitution. For this very reason, the California Constitution is routinely amended—so much so that at eight times the length of the U.S. Constitution, it

70. In May 2009, the California Supreme Court upheld Proposition 8 while simultaneously declaring it did not nullify same-sex marriages performed before its enactment.

has been labeled a “bloated mishmash” filled with “obfuscation, clutter and dysfunction.”⁷¹

Put another way: California was no Massachusetts. Unlike the Massachusetts court, the California court could not escape the fact that its Constitution was especially vulnerable to amendment and that a decision backing same-sex marriage might well be turned back by California voters.⁷² The California court, moreover, was well aware of on-the-ground facts that cut against its recognizing a right to same-sex marriage. Not only were opponents of same-sex marriage poised to launch an initiative drive, voters in thirteen states, responding to the efforts of the Massachusetts Supreme Judicial Court and Mayor Newsom, had in 2004 approved constitutional amendment initiatives outlawing same-sex marriage. And while the pendulum of public opinion was shifting in favor of same-sex unions, there was little reason for the California court to think that public opposition to same-sex marriage would turn into voter support for it during the window between December 2006 (when the court agreed to hear the case) and November 2008 (when California voters would almost certainly be asked to approve a constitutional ban on it).

Lessons from other states as well as in-state political realities suggest that the California court jumped the gun. The court should have held off on deciding this question for a few more years, when public support for same-sex marriage was likely to command clear majority support among California voters. In making this point, I do not mean to suggest that when granting certiorari in this case, the court should have known that a decision legalizing same-sex marriage was doomed to fail. Leading state newspapers supported same-sex marriage, state lawmakers approved a bill legalizing same-sex marriage in September 2005, and Governor Schwarzenegger’s veto of that bill signaled that he too would support a court ruling backing same-sex marriage rights. In particular, the governor’s veto message said that the power to negate California’s law banning same-sex marriage (passed by a 2000 voter initiative) was reserved to state courts (which could declare the initiative unconstitutional) or “another vote of the people of our state.”⁷³ Also, by December 2006, Massachusetts voters and lawmakers had rallied behind same-sex marriage, suggesting that the political landscape of 2004

71. Edward L. Lascher Jr. et al., *It’s Too Easy to Amend the California Constitution*, L.A. TIMES, Feb. 4, 2009.

72. In drawing a comparison between the constitutional amendment process in California and Massachusetts, this discussion assumes that the nullification of state court decisions by voter initiatives is the very type of backlash that state courts should seek to avoid. With that said, a competing argument can be made—namely, that states with easy-to-amend constitutions should engage voters in constitutional dialogues by staking out positions that voters and lawmakers might not independently pursue.

73. Michael Finnegan & Maura Dolan, *Citing Prop. 22, Gov. Rejects Gay Marriage Bill*, L.A. TIMES, Sept. 8, 2005 at 1.

might give way to increasing public, elite, and lawmaker support. In other words, the California court may have taken a strategic gamble: thinking it could make history by riding the crest of a growing wave in support of same-sex marriage rights.

One final comment about the California Supreme Court's decision to hear the same-sex marriage case: in determining whether it should run risks in order to recognize a state constitutional right to same-sex marriage, the court may have considered two other variables. First, even if the court refused to hear this case, it is quite possible that opponents of same-sex marriage would have pushed for a ballot initiative amending the state constitution. Second, unlike Vermont, there was little to be gained by staking out a middle-ground position by establishing a right to civil unions. California's then-existing domestic partnership laws granted domestic partners most of the same rights and responsibilities as marriage under California law. These laws, moreover, were politically popular—a 2003 effort to repeal these laws through a state-wide initiative did not attract enough signatures even to make it to the ballot. For this reason, the same-sex marriage issue was largely symbolic.⁷⁴

When the California court issued its decision in May 2008, elected officials, leading newspapers, and California voters supported same-sex marriage. A May 2008 Field Poll found that California registered voters supported same-sex marriage by a 51 to 42 percent margin.⁷⁵ For their part, state lawmakers reenacted a bill legalizing same-sex marriage in 2007. And although Governor Schwarzenegger vetoed that bill, the governor had also declared one month before the court's ruling that efforts to amend the state constitution to ban same-sex marriage were a "total waste of time" and that he would "fight against that." Mayors of California's three largest cities (Los Angeles, San Diego, and San Francisco) all backed same-sex marriage as did nearly all of the state's leading newspapers.

Against this backdrop, the California Supreme Court, having already spurred on a voter initiative by agreeing to decide the case, had no reason to back away from its preferred position on this issue. The fact that California voters rejected same-sex marriage does not undercut this conclusion; instead, the populist repudiation of same-sex marriage underscores the fact that states with easy-to-amend constitutions should be especially sensitive to the risks of in-state backlash. In other words, it was not enough that voters, the media, and the political establishment in California were more supportive of same-sex marriage than in other states. The California Court, when agreeing to decide the same-sex marriage issue,

74. When upholding Proposition 8, the California Supreme Court emphasized that Proposition 8 did not fundamentally change the legal rights of same-sex couples, which suggests the Court might have reached a different conclusion if Proposition 8 meaningfully curtailed fundamental rights. *Strauss v. California*, 46 Cal.4th 364 (2009).

75. Bill Ainsworth, *51 percent Support Same-Sex Marriage*, THE SAN DIEGO UNION-TRIBUNE, May 28, 2008 at A1.

should have paid more attention to the risks of in-state backlash—risks amplified by nationwide resistance to same-sex marriage after *Goodridge*.

IV. CONCLUSION

State courts can and should participate in a nationwide conversation about constitutional values. State courts must also operate as independent sovereigns and, consequently, cannot consider the extraterritorial effects of their decisions. This chapter has suggested that state courts can thread this needle by paying attention to the experiences of other states in sorting out whether their rulings may prompt a counterproductive in-state backlash. In this way, state courts simultaneously operate as independent sovereigns while participating in a nationalistic conversation about core constitutional values—values that transcend any one state.

The ongoing battle over same-sex marriage exemplifies the ways states can retain their sovereignty while simultaneously learning from the experiences of other states. The on-the-ground facts of same-sex marriage changed dramatically from 1993 to 2008. State courts should have paid attention to those changes, especially the intra- and interstate ramifications of other state court decisions. In so doing, state courts could have learned effectively to marshal resources and render decisions that would prove politically acceptable to voters and elected officials in their states. Needless to say, profound differences among state court systems allow some states to recognize rights claims that other states cannot. Most significant, states with easy-to-amend constitutions need to be especially sensitive to the risks of counterproductive populist attacks on their decision making.

State courts should pay attention to the ways in which they are both similar and different from each other and, in so doing, participate in a nationwide conversation about rights. For this very reason, state supreme courts should recognize that justice delayed may not be justice denied. By paying attention to in-state but not out-of-state backlash, state courts can respect their essential sovereignty while being a part of the new judicial federalism.