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# THE BACKLASH THESIS AND SAME-SEX MARRIAGE: LEARNING FROM *BROWN V. BOARD OF EDUCATION* AND ITS AFTERMATH

Carlos A. Ball\*

## INTRODUCTION

The last three years have been like no other time in the history of the gay rights movement. During that period, the U.S. Supreme Court held that states cannot criminalize gay sexual conduct,<sup>1</sup> Massachusetts recognized same-sex marriages,<sup>2</sup> and Connecticut created the institution of civil unions for lesbian and gay couples.<sup>3</sup> In that same period, the President and many members of Congress endorsed a proposed federal constitutional amendment that would prohibit states from recognizing same-sex marriages.<sup>4</sup> In addition, fifteen states amended their constitutions to prohibit same-sex marriages, and most of those provisions also ban alternative forms of legal recognition (such as civil unions and domestic partnerships) of same-sex relationships.<sup>5</sup> From a gay rights perspective, in other words, it seems as if lately every encouraging victory is soon followed by a troubling defeat.

This article attempts to make sense of the current period in the struggle for gay rights by putting it in a broader historical context. The article focuses in particular on an earlier period in American history when a judicial opinion, that of *Brown v. Board of Education*,<sup>6</sup> prompted a severe political and legal backlash.<sup>7</sup> There are interesting similarities between the backlash that followed *Brown* and that which has followed the Massachusetts Supreme Judicial Court's same-sex marriage opinion

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<sup>1</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>2</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>3</sup> William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. TIMES, Apr. 21, 2005, at B5.

<sup>4</sup> See *infra* notes 64, 67 and accompanying text.

<sup>5</sup> See *infra* notes 165–84 and accompanying text. The fifteen states are: Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Ohio, Oklahoma, Oregon, North Dakota, Texas, and Utah.

<sup>6</sup> 347 U.S. 483 (1954).

<sup>7</sup> See *infra* Part II.A.

in *Goodridge v. Department of Public Health*.<sup>8</sup> In fact, the gay rights movement can learn important lessons from these similarities. One lesson is that political and legal backlashes are a foreseeable consequence of controversial judicial victories that require majority groups to reassess in fundamental ways the manner in which they have in the past treated and understood certain minority groups. A second related lesson is that civil rights struggles in this country have traditionally consisted of moments of heartening progress followed by instances of discouraging setbacks.

The current backlash has created considerable anxiety within the gay rights movement as many have questioned whether the same-sex marriage litigation has backfired by, in effect, encouraging social conservatives to flex their political muscles to the detriment of lesbians and gay men.<sup>9</sup> I argue in this article that despite the harmful backlash experienced by the gay rights movement following marriage cases such as *Goodridge*, lesbians and gay men are nonetheless better off as a result of those cases. The gains from the litigation, in other words, have so far outweighed the losses.

The article will proceed as follows. In Part I, I compare the period immediately after *Brown* with the one immediately after *Goodridge* to explore how the plaintiffs in both cases were faced with similarly crucial decisions about whether to moderate their demands for judicial relief in the face of growing political opposition.<sup>10</sup> In Part II, I examine the similarities in the backlash that followed each opinion.<sup>11</sup> Both opinions politically galvanized conservatives, leading to many changes in state laws, including the approval of several constitutional amendments.<sup>12</sup> In Part III, I discuss what has become known as the *Brown* backlash thesis.<sup>13</sup> That thesis holds that *Brown* did not, at least in the short run, contribute meaningfully to the undermining of segregation in the South because of the massive resistance that the opinion provoked among white southerners.<sup>14</sup> I note in Part III that some have made similar arguments in the aftermath of *Goodridge* by contending that the opinion has been, at least in the short run, largely unhelpful to the attainment of gay rights goals because of the backlash that it has provoked among conservatives.<sup>15</sup> In Part IV, I disagree with gay rights supporters who have criticized same-sex marriage cases such as *Goodridge* by arguing that the benefits arising from the lawsuits have so far outweighed the backlash-related costs.<sup>16</sup> I finish Part IV, however, by suggesting that the gains from the marriage litigation are unlikely to continue at the same pace in

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<sup>8</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>9</sup> See *infra* notes 222–37 and accompanying text.

<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> See *infra* Part III.

<sup>15</sup> See *infra* notes 222–37 and accompanying text.

<sup>16</sup> See *infra* Part IV.

the future and that the same-sex marriage movement must begin to pay greater attention to the legislative and political arenas and (proportionally) less attention to the courts.<sup>17</sup>

### I. THE REMEDIAL AFTERMATHS OF *BROWN* AND *GOODRIDGE*

One of the many interesting similarities between *Brown* and *Goodridge* is that, as important as the two opinions were for the issues of school desegregation and same-sex marriage respectively, the decisions were also, in crucial ways, incomplete. *Brown* held that school segregation on the basis of race was unconstitutional, but left remedial questions for another day.<sup>18</sup> *Goodridge* held that the ban against same-sex marriage violated the liberty and equality provisions of the Massachusetts Constitution, but was somewhat ambiguous as to the issue of remedies.<sup>19</sup> *Goodridge* did not make explicit, for example, whether providing same-sex couples with an alternative legal structure to marriage, such as that offered by civil unions, was sufficient to correct the marriage ban's constitutional defects as identified in the opinion.<sup>20</sup>

As a result, in both instances, crucial remedial issues remained unresolved until after the respective courts issued subsequent opinions. The periods between the first and second opinions in *Brown* and in *Goodridge* raise similar questions about what kind of legal strategy should be pursued by civil rights advocates given growing public disenchantment with previous judicial victories. On both occasions, the plaintiffs' lawyers chose to continue demanding full and immediate equality, even in the face of growing public opposition.

#### A. *The Period Between Brown I and Brown II*

Fifty-four weeks elapsed between the issuance of the first opinion in *Brown*, known as *Brown I*, and the subsequent opinion, known as *Brown II*, in which the Court addressed the remedial issues.<sup>21</sup> The reaction to *Brown I* by many blacks was

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<sup>17</sup> See *infra* notes 304–08 and accompanying text.

<sup>18</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>19</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968–70 (Mass. 2003).

<sup>20</sup> See Pam Belluck, *Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003, at A1 (noting that legal experts disagreed on whether *Goodridge* allowed for civil unions as a permissible alternative to marriage); see also Cass R. Sunstein, *Massachusetts Gets It Right*, NEW REPUBLIC, Dec. 22, 2003, at 21 (noting that the *Goodridge* court “appears to be saying that the Massachusetts legislature could satisfy its constitutional duty by recognizing civil unions”).

<sup>21</sup> In this article, I refer to the first *Brown* opinion, 347 U.S. 483 (1954), as *Brown I* only when necessary to contrast it to the second *Brown* opinion, 349 U.S. 294 (1955). Otherwise, I refer to the former simply as *Brown*.

one of jubilation and optimism.<sup>22</sup> At the time, *Brown I* represented a crowning achievement in a long struggle for civil rights, one that began with the Civil War and the subsequent adoption of the Fourteenth Amendment, seemed to take root in the Reconstruction period, and then stalled for decades as de jure segregation spread unimpeded to every corner of the South.<sup>23</sup> By the time *Brown I* was decided in 1954, the NAACP, under the stewardship of Thurgood Marshall, had for years been chipping away at Jim Crow laws by challenging race-based restrictions on the right to vote and racial segregation in higher education, housing, and transportation.<sup>24</sup> Only after initial victories in these areas were firmly in place, did the NAACP turn its full attention to what was the most sensitive issue for many whites across the country — that of racial segregation in primary and secondary schools.<sup>25</sup> When the Supreme Court unanimously held in *Brown I* that segregated schools were unconstitutional, it seemed that true racial equality was within reach for the first time in American history.

The initial response to *Brown I* by southern conservatives was at first muted.<sup>26</sup> Governors Francis Cherry of Arkansas and James Folsom of Alabama, for example, stated shortly after the opinion was issued that they would obey the law as determined by the Supreme Court.<sup>27</sup> Compliance with the ruling in border states like Delaware, West Virginia, and Kentucky began almost immediately.<sup>28</sup> In the summer of 1954, the school systems in Baltimore, Louisville, St. Louis, and Washington

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<sup>22</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 717 (2004); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 70–71 (2001). Thurgood Marshall, the day after the *Brown I* opinion was issued, told the *New York Times* that school segregation in the U.S. would end within five years. See KLUGER, *supra*, at 717.

<sup>23</sup> See ROBERT WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT* 4 (1990).

<sup>24</sup> MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 196–225 (2004).

<sup>25</sup> See *id.* at 290–91. Similarly, the same-sex marriage lawsuit in Massachusetts was filed only after decades of successful efforts, before both the state legislature and state courts, to advance gay rights positions. See Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 8–17 (2005). Some of the earlier victories included the passage of a state law prohibiting discrimination on the basis of sexual orientation, the expansion of hate crimes legislation to cover sexual orientation, and the ruling in *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993), which made it possible for same-sex couples to adopt jointly. See Bonauto, *supra*, at 10–14.

<sup>26</sup> See PATTERSON, *supra* note 22, at 72.

<sup>27</sup> *Id.*; see also JOHN A. SALMOND, “MY MIND SET ON FREEDOM”: A HISTORY OF THE CIVIL RIGHTS MOVEMENT, 1954–1968, at 27 (1997) (noting that in the “crucial first weeks after the *Brown* decision . . . [a] number of political and social leaders counseled compliance, or at least moderation”).

<sup>28</sup> See PATTERSON, *supra* note 22, at 72.

D.C. all took significant steps to desegregate and continued those efforts into the following academic year.<sup>29</sup>

Despite these early promising signs, there were also indications of mounting resistance by segregationists. The first troubling incident took place in the southern Delaware town of Milford after school officials, in the late summer of 1954, admitted eleven black children to the white high school.<sup>30</sup> A meeting of white parents was soon called and about 1,500 parents and other locals attended.<sup>31</sup> A petition in support of segregation was circulated at the meeting, and threats of violence were made.<sup>32</sup> In response, the school board temporarily closed down the high school.<sup>33</sup> Outside agitators soon flocked to Milford rallying white parents, threatening violence, and burning crosses.<sup>34</sup> When the high school did reopen, most white parents kept their children at home; shortly thereafter, the boycott spread to neighboring towns.<sup>35</sup> As a result of political pressure, the Milford school board dissolved, and the new one decided to end the effort to desegregate the high school.<sup>36</sup> The NAACP sought judicial intervention, but it would be another eight years before blacks were admitted to Milford's white schools.<sup>37</sup>

With the opposition and resistance to *Brown I* growing in the South,<sup>38</sup> the NAACP, as it prepared for arguments in *Brown II*, was faced with a crucial strategic decision: Should it return to the Court with a "gradualist position" that recognized the need for some delay in the desegregation of schools in some parts of the country, or should it continue to demand the immediate desegregation of schools across the nation?<sup>39</sup> Marshall's advisors were divided on this point.<sup>40</sup> Some argued on behalf of the former

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<sup>29</sup> See KLUGER, *supra* note 22, at 723. In fact, by 1955, seventy percent of school districts in the border states had at least some classrooms with both black and white students. See PATTERSON, *supra* note 22, at 75.

<sup>30</sup> See KLUGER, *supra* note 22, at 723–24 (describing the events that took place in Milford in 1954); see also PATTERSON, *supra* note 22, at 72–75.

<sup>31</sup> PATTERSON, *supra* note 22, at 73.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 74–75.

<sup>35</sup> *Id.* at 75.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> "Five weeks [after *Brown*], the governor of Virginia, who had greeted the . . . decision with moderate words and the pledge to consult with leaders of both races, declared: 'I shall use every legal means at my command to continue segregated schools in Virginia.'" KLUGER, *supra* note 22, at 717. The day after *Brown* was issued, the school board of Greensboro, North Carolina, voted to obey the ruling. See PATTERSON, *supra* note 22, at 72. A few weeks later, however, the board made clear that it would not attempt to desegregate schools any time soon. See *id.* at 79. In fact, Greensboro did not begin to desegregate schools until 1971 when it was explicitly ordered to do so by the courts. See *id.*

<sup>39</sup> KLUGER, *supra* note 22, at 725.

<sup>40</sup> See *id.*

strategy, contending that the Court was likely to appreciate moderation on such an explosive issue.<sup>41</sup> These advisors contended that if the NAACP was willing to moderate its demands regarding the timing of desegregation, that might prevent the further hardening of resistance among southern whites.<sup>42</sup> One of the benefits of a gradualist position was that it would provide an opportunity to change (or at least mollify) hostile community attitudes in the South, which, it was argued, had to take place before court-ordered desegregation could proceed in a meaningful way.<sup>43</sup>

Other NAACP insiders, however, disagreed. The sociologist Kenneth Clark, who was a close advisor to Marshall<sup>44</sup> and whose work the Court cited in *Brown I*,<sup>45</sup> contended that attitude changes were not necessary in order to modify behavior.<sup>46</sup> Clark argued, in other words, that opponents of desegregation would go along with what the courts required of them even if they strongly disagreed with those demands.<sup>47</sup> To wait for attitudes to change, Clark contended, would entail a long wait indeed.<sup>48</sup> To countenance delay, Clark and others pointed out, would only give opponents of integration the opportunity to further harden their resistance. As one of Clark's associates put it:

When we try to solve the conflict to accord with their consciences as Americans, we naturally arouse all the protests and threats and dying gasps of their prejudices . . . . But let the backbone come from the Supreme Court, and it will strengthen the moral backbone of those who now live in conflict. . . . Let the line of public morality be set by authoritative pronouncements, and all the latent good in individuals and communities will be strengthened.<sup>49</sup>

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<sup>41</sup> The most important advocate of the gradualist position was William Coleman. *See id.* at 725–26. Coleman was the first black person to serve as a law clerk on the Supreme Court and had been a trusted advisor to Marshall for many years. *See id.* at 292–93.

<sup>42</sup> *See id.* at 725–26.

<sup>43</sup> *See id.* Jack Weinstein, for example, then a professor at Columbia Law School and an advisor to the NAACP, was leery of asking the Court to order the immediate desegregation of schools without an attempt by desegregation supporters to prepare and educate local populations. *See id.* at 725.

<sup>44</sup> *See id.* at 723.

<sup>45</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

<sup>46</sup> As Clark put it, “The hypothesis that attitudinal and other subjective changes are necessary antecedents to behavioral changes is not supported by the empirical data . . . . On the contrary, th[e] data suggests that situationally determined behavioral changes generally precede any observable attitudinal changes.” KLUGER, *supra* note 22, at 722.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* Clark explained that “[p]rompt, decisive action on the part of recognized authorities usually results in less anxiety and less resistance [than] a more hesitant and gradual procedure. It is similar to the effect of quickly pulling off adhesive tape — the pain is sharper but briefer and more tolerable.” PATTERSON, *supra* note 22, at 114.

<sup>49</sup> KLUGER, *supra* note 22, at 722 (quoting Harvard professor Gordon Allport).

In the end, after extensive internal debate, the NAACP rejected the gradualist strategy and instead demanded in its brief to the Court in *Brown II* that desegregation begin immediately.<sup>50</sup> At issue in the case, the NAACP reminded the Court, were the constitutional rights of the black plaintiffs as determined in *Brown I*.<sup>51</sup> The enforcement of those rights should not be delayed “because of anticipation of difficulties arising out of local feelings.”<sup>52</sup> The brief urged the Court not to allow objections based on local mores and customs to stand in the way of enforceable rights under the Fourteenth Amendment.<sup>53</sup>

The brief also explicitly rejected the position that a gradualist approach would be more effective than an order requiring immediate desegregation.<sup>54</sup> It questioned the view that “change in attitude must precede change in action” by pointing to a “considerable body of evidence,” which showed that when an individual is required to “act as if he were not prejudiced, he will so act, despite the continuance, at least temporarily, of the prejudice.”<sup>55</sup> The brief ended by urging the Court to require desegregation by the beginning of the 1955–1956 school year.<sup>56</sup>

In contrast, the defendant states asked the Court to delay meaningful desegregation until public opinion in the South had accepted the advisability of racially mixed schools.<sup>57</sup> In the end, the Court charted a middle course of sorts by adopting a gradualist position that called on the defendants to admit the plaintiffs to schools in a nondiscriminatory manner “as soon as practicable.”<sup>58</sup> In doing so, however, the Court noted that district courts would have to deal with a series of obstacles to the effectuation of the plaintiffs’ interests and that it was permissible for them to take into account those obstacles in reviewing desegregation plans.<sup>59</sup> The Court ended with what would become its (in)famous instruction that desegregation should proceed “with all deliberate speed.”<sup>60</sup>

As discussed below, southern states responded to the flexibility demonstrated by the Court in *Brown II* not by compromising and gradually desegregating, but instead by doing everything they could, including the approval of state constitutional

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<sup>50</sup> Brief for Appellants in Nos. 1, 2, and 3 and for Respondents in No. 5 on Further Re-argument at 10–23, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), 1954 WL 45729.

<sup>51</sup> *Id.* at 10–11.

<sup>52</sup> *Id.* at 14.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 17.

<sup>55</sup> *Id.* at 18 (citations omitted).

<sup>56</sup> *Id.* at 31.

<sup>57</sup> For a summary of the arguments raised by the defendants in *Brown II*, see KLUGER, *supra* note 22, at 726–29.

<sup>58</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (*Brown II*).

<sup>59</sup> See *id.* The Court stated that it would be proper for the lower courts to consider obstacles to immediate desegregation on matters related to, inter alia, school administration, transportation, and the physical condition of buildings. *Id.*

<sup>60</sup> *Id.* at 301.



amendments and the enactment of new laws, to impede school desegregation.<sup>61</sup> The Court implicitly encouraged this resistance by failing to make clear, in the years that followed *Brown II*, that the growing efforts taken by southern states to obstruct desegregation were constitutionally unacceptable.<sup>62</sup>

We will, of course, never know how the southern states would have responded if the Court in *Brown II* had called for the immediate desegregation of public schools. It is difficult to imagine, however, how that response could have been much worse, in terms of concerted efforts to oppose and resist desegregation, than what actually took place in the years that followed the opinion. Hindsight makes it relatively easy to agree with Kenneth Clark and others that it is unrealistic, when facing a regime of entrenched inequality, to wait to change the minds of resisters before one attempts to change their behavior. The Court in *Brown II* sought to accommodate Southern white sensibilities and concerns by refusing either to call for immediate desegregation or to establish a precise timetable for such. The result was that ten years after *Brown I*, only 1.2 percent of black children in the eleven states that made up the old Confederacy attended schools with whites.<sup>63</sup>

#### *B. The Period Between Goodridge and the Advisory Opinion*

The response on the part of social conservatives to *Goodridge* was both immediate and forceful. On the day the opinion was issued, President George W. Bush released a statement promising that he would work with Congressional leaders “to do what is legally necessary to defend the sanctity of marriage.”<sup>64</sup> Republican Representative Tom Delay, the then-House majority leader, denounced what he deemed a “runaway judiciary.”<sup>65</sup> For their part, conservative advocacy groups strongly

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<sup>61</sup> See *infra* notes 117–46 and accompanying text.

<sup>62</sup> The Court provided full review of only one school desegregation case between 1956 and 1963. See *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding that the threat of disorder in desegregating Little Rock’s Central High School was not a sufficient ground for delaying desegregation).

<sup>63</sup> PATTERSON, *supra* note 22, at 113. Mississippi was the last state to begin desegregation. See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 94 (1994). In 1964, no black children in Mississippi attended school with white children. See *id.* The pace of school desegregation in the border states was considerably faster than in the South, but even in those states, almost half of the black children attended all-black schools in 1964. See PATTERSON, *supra*, at 78.

<sup>64</sup> Belluck, *supra* note 20.

<sup>65</sup> Adam Nagourney, *A Thorny Issue for 2004 Race*, N.Y. TIMES, Nov. 19, 2003, at A1. The criticism of the judiciary became a central theme of opponents of same-sex marriage. See, e.g., Susan Milligan, *Lawmakers Voice Concern for States’ Rights*, BOSTON GLOBE, Feb. 25, 2004, at B6 (quoting President Bush as saying that “[a]fter more than two centuries of American jurisprudence and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization.”);

criticized the Court and called on elected officials to defend the institution of heterosexual marriage.<sup>66</sup> A few days after *Goodridge* was decided, five Republican U.S. senators proposed a constitutional amendment that would limit marriage to the union of a man and a woman.<sup>67</sup> A national poll taken several weeks later found that fifty-five percent of Americans favored the constitutional amendment, while forty percent opposed it.<sup>68</sup>

Meanwhile, Massachusetts Governor Mitt Romney, on the day the *Goodridge* opinion was issued, stated that he “disagreed deeply” with the court and that he was prepared to fight for a state constitutional amendment that would limit marriage to different-sex couples.<sup>69</sup> Several members of the state legislature concurred on the need for such an amendment.<sup>70</sup> The Massachusetts Family Institute, an advocacy group opposed to same-sex marriages, announced that it would work with conservative organizations from across the country to lobby and petition against their recognition.<sup>71</sup> National conservative groups such as Operation Rescue and the Christian Family Coalition pledged support for promoting political opposition to same-sex marriage inside Massachusetts.<sup>72</sup> In addition, the state’s Catholic Bishops issued a statement referring to the court’s decision as “a national tragedy” and endorsing the idea of amending the state constitution.<sup>73</sup>

Support for same-sex marriage, however, was greater in Massachusetts than in the rest of the country.<sup>74</sup> A poll of Massachusetts residents conducted a few days after *Goodridge* was decided found that fifty percent of respondents supported the

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Editorial, *The Road to Gay Marriage*, N.Y. TIMES, Mar. 7, 2004, §4, at 12 (stating that “[o]pponents of gay marriage have tried to place all of the blame for recent events on ‘activist judges.’”). In the Senate, John Cornyn (R-Tex.) “called for a Congressional investigation of ‘judicial invalidation of traditional marriage laws.’” *Id.*

<sup>66</sup> Katharine Q. Seelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. TIMES, Nov. 20, 2003, at A29.

<sup>67</sup> See Mary Leonard, *Foes of Same-Sex Marriage Welcome Proposed Constitutional Amendment*, BOSTON GLOBE, Nov. 27, 2003, at A12. An identical resolution was proposed in the U.S. House of Representatives the previous May, drawing 100 co-sponsors. See *id.*

<sup>68</sup> Katharine Q. Seelye & Janet Elder, *Strong Support Is Found for Ban on Gay Marriage*, N.Y. TIMES, Dec. 21, 2003, §1, at 1.

<sup>69</sup> Kathleen Burge, *Gays Have Right to Marry, SJC Says in Historic Ruling*, BOSTON GLOBE, Nov. 19, 2003, at A1.

<sup>70</sup> Raphael Lewis, *Gay Marriage Debate Splits Democrats*, BOSTON GLOBE, Jan. 9, 2004, at B1; Frank Phillips & Rick Klein, *Lawmakers Are Divided on Response*, BOSTON GLOBE, Nov. 19, 2003, at A1.

<sup>71</sup> See Raphael Lewis, *Groups Muster to Fight Gay Marriage in Mass.*, BOSTON GLOBE, Nov. 20, 2003, at A1.

<sup>72</sup> *Id.*

<sup>73</sup> Jenna Russell, *Bishops Call SJC Decision “Tragedy”*, BOSTON GLOBE, Nov. 30, 2003, at B1.

<sup>74</sup> See Frank Phillips & Rick Klein, *50% in Poll Back SJC Ruling on Gay Marriage*, BOSTON GLOBE, Nov. 23, 2003, at A1.

opinion while thirty-eight percent opposed it.<sup>75</sup> In the same poll, fifty-three percent opposed a state constitutional amendment while thirty-six percent supported it.<sup>76</sup> In addition, early indications were that a significant number of state legislators opposed a constitutional amendment if it would ban both same-sex marriage and civil unions.<sup>77</sup>

Given the political atmosphere in the state, which seemed to favor providing same-sex relationships with at least some form of legal recognition, the idea of making civil unions available to same-sex couples, while limiting marriage to different-sex couples, soon emerged as a compromise position.<sup>78</sup> Toward that end, the state senate, three weeks after *Goodridge*, asked the state supreme court whether a proposed bill that would grant same-sex couples, through the institution of civil unions, the same rights and benefits provided by state law to married couples while withholding from them the status of marriage, would pass constitutional muster.<sup>79</sup>

When civil unions were first created by the Vermont legislature in 2000,<sup>80</sup> some gay rights advocates embraced the development as an important and significant step toward full equality for lesbians and gay men. Professor William Eskridge, for example, in his book *Equality Practice: Civil Unions and the Future of Gay Rights*, argued in favor of the pragmatism and gradualism represented by civil unions.<sup>81</sup> The danger of demanding full marriage equality too quickly on an "unwilling populace," Eskridge noted, was that it encouraged a majoritarian backlash via the ballot box.<sup>82</sup> Other gay rights supporters, however, were highly critical of civil unions because they viewed their creation as a means toward the institutionalization of separate equality for lesbians and gay men.<sup>83</sup> In fact, critics often analogized between civil unions and

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<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See* Raphael Lewis, *In Lawmaker Poll, Few Back Limiting Marriage*, BOSTON GLOBE, Dec. 1, 2003, at B1.

<sup>78</sup> *See id.*

<sup>79</sup> *See* Frank Phillips, *Senate Eyes Civil Union Bill for SJC*, BOSTON GLOBE, Dec. 11, 2003, at A1; *Senate Progresses on Civil Union Bill*, BOSTON GLOBE, Dec. 12, 2003, at B8.

<sup>80</sup> VT. STAT. ANN. tit. 15, §§ 1201–07 (2002).

<sup>81</sup> WILLIAM N. ESKRIDGE JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 147–58 (2002).

<sup>82</sup> *Id.* at 148. For further discussion of Eskridge's position on civil unions, see *infra* notes 221–25 and accompanying text. Greg Johnson also argued that gay rights proponents should embrace civil unions. Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315 (2002); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000).

<sup>83</sup> *See, e.g.*, YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES* 293–94 (2002); Barbara Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 124–47 (2000); Andrew Sullivan, *State of the Union*, NEW REPUBLIC, May 8, 2000, at 18.

the type of segregation that was upheld by the Supreme Court in *Plessy v. Ferguson*.<sup>84</sup> From this perspective, the separate but equal component of civil unions legitimated and maintained the second-class citizenship status of lesbians and gay men.<sup>85</sup>

When the Massachusetts senate sought an advisory opinion from the state's highest court on the constitutionality of civil unions, the lawyers at Gay and Lesbian Advocate and Defenders (GLAD) — the organization that represented the plaintiffs in *Goodridge* — were faced with a dilemma similar to the one confronted by the NAACP lawyers fifty years earlier.<sup>86</sup> The GLAD attorneys, like their earlier counterparts at the NAACP, had to decide whether (1) to adopt, in the face of the political firestorm that followed their initial legal victory, a gradualist strategy that accepted an outcome that fell short of complete equality, or (2) to continue to press for immediate full equality. The GLAD lawyers, like the advocates at the NAACP in the mid-1950s, chose the latter option.

In its brief to the state supreme court on the question presented to it by the state senate, GLAD emphasized that the proposed civil union bill failed to address the constitutional infirmities found in *Goodridge*.<sup>87</sup> In particular, the GLAD brief reminded the court that in *Goodridge*, it had emphasized not only the tangible benefits that accompany marriage, but also the intangible ones that make marriage a defining personal choice in our society.<sup>88</sup> The brief noted that *Goodridge* held that the ban against same-sex marriage violated not only principles of equality under the state constitution, but also those of due process and liberty.<sup>89</sup> This meant that the creation of a different institution that purportedly sought to provide the same benefits as marriage was constitutionally problematic because it did not address the due process and liberty interests implicated by the institution of marriage.<sup>90</sup>

The brief also contended that, from an equality perspective, civil unions fell far short of what the state constitution required. Only by having access to the institution of marriage will “the plaintiffs . . . be understood to share the love and commitment of spouses, and all the protections, benefits and obligations that flow from that culturally unique status.”<sup>91</sup> The use of the word “marriage,” the brief argued, matters

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<sup>84</sup> 163 U.S. 537 (1896). See MERIN, *supra* note 83, at 294; Cox, *supra* note 83, at 124–28.

<sup>85</sup> MERIN, *supra* note 83, at 294; Cox, *supra* note 83, at 124–47. Eskridge questioned the analogy between civil unions and racial segregation. ESKRIDGE, *supra* note 81, at 139–47. The Vermont supreme court's opinion in *Baker v. State*, 744 A.2d 864 (Vt. 1999), Eskridge argued, “is much more like *Brown* than like *Plessy*,” *id.* at 145, because a civil union scheme confers rights and benefits to lesbians and gay men and by so doing it “ameliorates rather than ratifies a sexuality caste system.” *Id.* at 140.

<sup>86</sup> See *supra* notes 39–50 and accompanying text.

<sup>87</sup> Brief of Interested Party/Amicus Curiae, Gay & Lesbian Advocates & Defenders, at 4–5, *In re Request for an Advisory Opinion from the President of the Senate*, 802 N.E.2d 565 (Mass. 2004) (No. 09163) [hereinafter Brief of Interested Party].

<sup>88</sup> *Id.* at 12–15.

<sup>89</sup> *Id.* at 14.

<sup>90</sup> See *id.*

<sup>91</sup> *Id.* at 27.

because that is the institution which society already recognizes and respects.<sup>92</sup> If the state were allowed to withhold the word “marriage” from the plaintiffs, it would leave them with the burden of having to explain and defend continuously the legitimacy of their relationships.<sup>93</sup>

The brief added, in language reminiscent of the NAACP’s brief in *Brown II*,<sup>94</sup> that “[t]he constitutional commands of equality and liberty brook no compromise.”<sup>95</sup> The plaintiffs’ lawyers contended that the proposed civil union bill created a two-tiered approach that was no different from that which the Supreme Court struck down in *Brown I*.<sup>96</sup> A regime of separate but equal benefits creates and reinforces a caste system grounded in the notion of second-class citizenship.<sup>97</sup> Such a “perversion of equality,” the brief concluded, was rejected by the Supreme Court in *Brown I* and should be rejected in the follow-up to *Goodridge*.<sup>98</sup>

In the end, the Massachusetts court agreed entirely with GLAD’s arguments. It held that there was no rational basis for “[s]egregating same-sex unions”<sup>99</sup> into a separate institution and for assigning them “to second-class status.”<sup>100</sup> The effect of the proposed bill, the court added, would be to maintain and foster a regime of exclusion, and as such, it constituted the same type of invidious discrimination that *Goodridge* had prohibited.<sup>101</sup> The court made clear that the constitutional infirmities found in *Goodridge* could be remedied only by affording lesbian and gay couples the opportunity to marry.<sup>102</sup>

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<sup>92</sup> *Id.* at 28.

<sup>93</sup> *See id.* at 35. The brief expressed a particular concern with the response by private parties, such as insurance companies, to membership in institutions other than marriage. It noted that “because marriage ties into an existing vocabulary and is already understood, it is simply common sense that a life insurer faced with a married couple — including a same-sex married couple — is more likely to extend the married rates to that couple than to a couple joined in civil union.” *Id.*

The brief also emphasized the inequality in portability of civil unions when compared to marriages. *See id.* at 28–32. It pointed to the experience of couples civilly unionized in Vermont who have had a difficult time getting other jurisdictions to recognize their unions. *See id.* at 29–30. Although the brief acknowledged that the majority of jurisdictions have enacted laws making it clear that they will not recognize same-sex marriages from within or without those jurisdictions, Massachusetts nonetheless had a “duty as a sovereign to provide the full measure of equality that it may to its citizens.” *Id.* at 31 (citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)).

<sup>94</sup> *See supra* notes 52–53 and accompanying text.

<sup>95</sup> Brief of Interested Party, *supra* note 87, at 36 (footnote omitted).

<sup>96</sup> *Id.* at 36–40.

<sup>97</sup> *Id.* at 41.

<sup>98</sup> *Id.* (footnote omitted).

<sup>99</sup> Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

<sup>100</sup> *Id.* at 570.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 570–71.

Despite the fact that both the president and the governor were expressing deep misgivings about same-sex marriages,<sup>103</sup> that the state legislature was considering a constitutional amendment that would ban those marriages,<sup>104</sup> and that opinion polls showed that most Americans were opposed to gay marriage,<sup>105</sup> GLAD rejected the gradualist gains offered by the institution of civil unions in favor of continuing to demand immediate and full marital equality. There is much to GLAD's decision that harkens back to the debates within the NAACP after *Brown I* about whether attitudes must be changed before the law seeks to change behavior.<sup>106</sup> The GLAD lawyers in effect asked the Massachusetts court to provide the moral backbone necessary to show citizens in the state and across the country that constitutional principles "brook no compromise."<sup>107</sup>

Although Massachusetts began to issue marriage licenses three months after the supreme court's advisory opinion, by the end of the year, voters in thirteen states, by commanding majorities, approved state constitutional amendments that banned same-sex marriage.<sup>108</sup> The high water mark for gay rights in 2004, as represented by the issuance of legally valid marriage licenses to same-sex couples in Massachusetts, in other words, was soon followed by a severe and harmful backlash across the country. It is necessary to explore the causes and effects of that backlash in order to assess whether the gains for lesbians and gay men arising from *Goodridge* and the subsequent advisory opinion outweigh the costs associated with the backlash that followed. In order to better understand the backlash that *Goodridge* provoked, I explore in the next section similarities between it and the backlash that followed *Brown*.

## II. THE POLITICAL AND LEGAL RESPONSES TO *BROWN* AND *GOODRIDGE*

*Brown II* and the Massachusetts Supreme Court's advisory opinion sought to address the remedial questions left open by *Brown I* and *Goodridge* respectively. The former opinions did not, of course, lead critics of the two courts to cease their

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<sup>103</sup> See *supra* notes 64, 69 and accompanying text.

<sup>104</sup> See Raphael Lewis, *Gay Marriage Foes Push Amendment*, BOSTON GLOBE, Jan. 8, 2004, at B1. The legislature eventually approved a state constitutional amendment that would ban same-sex marriages and create civil unions. See Pam Belluck, *Setback Is Dealt to Gay Marriage*, N.Y. TIMES, Mar. 30, 2004, at A1. The amendment, however, could not take effect until it was approved by the legislature in the following legislative session and then by voters. See *id.* (The legislature resoundingly rejected the amendment when it came up for a second vote in 2005. See *infra* note 275 and accompanying text). For a detailed discussion of the constitutional conventions held by the Massachusetts legislature in early 2004, see Bonauto, *supra* note 25, at 49–55.

<sup>105</sup> See Leonard, *supra* note 67, at A12 (reporting on a national poll finding that fifty-nine percent of respondents opposed same-sex marriage); Seelye & Elder, *supra* note 68 (reporting on a national poll finding that sixty-one percent of respondents opposed same-sex marriage).

<sup>106</sup> See *supra* notes 39–50 and accompanying text.

<sup>107</sup> Brief of Interested Party, *supra* note 87, at 36 (footnote omitted).

<sup>108</sup> See *infra* notes 165–83 and accompanying text.

political and legal efforts to undermine the latter decisions. This section of the article summarizes the post-*Brown* and post-*Goodridge* backlashes and emphasizes important similarities between the two.

#### *A. Political and Legal Responses Following Brown II*

Although the Court in *Brown II* did not call for the immediate desegregation of public schools as the plaintiffs requested, Marshall and others at the NAACP initially remained optimistic that meaningful desegregation of public schools in the South would soon begin.<sup>109</sup> They were, however, quickly and deeply disappointed as the resistance by southern states to court-mandated desegregation only strengthened in the months and years to come.

The objections to *Brown* on the part of many white southerners were two-fold. First, the opinion was highly resented as a form of federal interference with state and local affairs.<sup>110</sup> The federal government, this time represented by the Supreme Court, was once again seen as improperly meddling in the affairs of the South, a type of resentment, of course, with a long history going back to the Civil War.<sup>111</sup> Second, *Brown* addressed an issue of great sensitivity for many white southerners. The apartheid society that still existed in the South in the 1950s was built on the idea that blacks were inherently inferior to whites.<sup>112</sup> The system of segregated public education was a cornerstone of white supremacist ideology in the South.<sup>113</sup> It was one thing, for example, for federal courts to require whites to share train compartments with blacks;<sup>114</sup> it was quite another for them to tell white parents that their children had to attend school with black children.<sup>115</sup> Segregationists correctly realized that a regime built on the notion of white supremacy was unlikely to survive if black children had enforceable constitutional rights to attend schools with white children.<sup>116</sup>

The Supreme Court's failure in *Brown II* to order the immediate desegregation of public schools, or even to set a precise timetable for such, was interpreted by many in the South as a sign of weakness.<sup>117</sup> Rather than mollifying southern white conservatives, *Brown II* had the opposite effect. Resistance efforts, which were already

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<sup>109</sup> See KLUGER, *supra* note 22, at 749–50; PATTERSON, *supra* note 22, at 84–85.

<sup>110</sup> Senator Harry Byrd of Virginia, for example, contended that the decision was “the most serious blow that has yet been struck against the rights of the states in a matter vitally affecting their authority and welfare.” KLUGER, *supra* note 22, at 713.

<sup>111</sup> See ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 211 (2003).

<sup>112</sup> See *id.*

<sup>113</sup> See PATTERSON, *supra* note 22, at 11–12.

<sup>114</sup> See, e.g., *Henderson v. United States*, 339 U.S. 816 (1950).

<sup>115</sup> See PATTERSON, *supra* note 22, at 88 (discussing the “uniquely sensitive place” of schools in provoking racial tensions).

<sup>116</sup> See *id.*

<sup>117</sup> See KLARMAN, *supra* note 24, at 390 (“*Brown II* fueled further resistance, as many southern whites detected weakness in the justices’ efforts to be conciliatory.”).

under way after *Brown I*, only intensified after *Brown II*. Grass-roots organizations such as Citizens' Councils, which "were committed to preserving white supremacy by all means short of violence," mushroomed throughout the South.<sup>118</sup> Even more problematically, the late 1950s saw a resurgence of the Ku Klux Klan as a growing number of southern whites came to see violence and intimidation as necessary means to preserve their lifestyle.<sup>119</sup>

The strong opposition to *Brown* by segregationists soon had its effects on electoral politics. Although virtually all Southern politicians who were in office at the time *Brown* was decided were segregationist, many were, by the standards of the time, racial moderates who had not overtly opposed pre-*Brown* efforts to implement gradual racial reforms in areas such as voting rights and public transportation.<sup>120</sup> Several of these moderate politicians had run for office on a platform of economic populism, calling for increased government spending on matters such as education, roads, and public health.<sup>121</sup> These officials, such as Governors Jim Folsom of Alabama and Orval Faubus of Arkansas, enjoyed the support of broad coalitions of working class whites and blacks who found the message of economic populism and governmental largesse appealing.<sup>122</sup>

White moderate politicians in the South, however, became an endangered species in the second half of the 1950s. The response to *Brown* among the white populace was so intensely negative that it became practically impossible for politicians to be elected or re-elected unless they were uncompromising in their support for segregation. Some, like Governor Folsom, were defeated in the next election because of their moderation.<sup>123</sup> Others, like Governor Faubus, transformed themselves into dogmatic supporters of segregation, assuring themselves reelection for years to come.<sup>124</sup> A candidate's ability to succeed electorally in the South following *Brown* depended on his willingness to make sure that there was no other candidate to his right on the issue of segregation.<sup>125</sup> This charged political environment left little room for moderation or compromise.<sup>126</sup>

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<sup>118</sup> *Id.* The first Citizens' Council was formed two months after *Brown*. PATTERSON, *supra* note 22, at 96. *See generally* NEIL R. MCMILLEN, *THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-64* (1971) (providing a detailed exploration of the role of Citizens' Councils in the southern resistance to desegregation).

<sup>119</sup> *See* KLARMAN, *supra* note 24, at 392.

<sup>120</sup> *See id.* at 385-86.

<sup>121</sup> *See id.* at 386.

<sup>122</sup> *See id.* at 386, 394.

<sup>123</sup> *See id.* at 396-97.

<sup>124</sup> *See id.* at 394-99.

<sup>125</sup> *See id.* The early political career of George Wallace is perhaps the best known example of this phenomenon. When Wallace first ran for governor in Alabama in 1958, he was perceived as being "soft" in his commitment to segregation. *See id.* at 399. Wallace learned his lesson and returned four years later easily winning the election after selling himself as the most committed segregationist of all the candidates. *See id.* at 406.

<sup>126</sup> J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, at 73-74 (1979); *see also* Matthew D. Lassiter & Andrew B. Lewis,



The federal government, for its part, was hesitant and timid in its response to *Brown*. President Dwight Eisenhower refused to support *Brown* in public and was quite critical of the opinion in private.<sup>127</sup> Congress enacted a civil rights statute in 1957, the first since the Reconstruction,<sup>128</sup> but its scope was limited and had no impact on the pace of school desegregation in the South.<sup>129</sup> With the exception of President Eisenhower's decision to send federal troops to restore order in Little Rock in 1957 after that city descended into violent chaos when school officials made a modest effort to desegregate one school,<sup>130</sup> the federal government in the 1950s remained a bystander observing from the sidelines.<sup>131</sup> In fact, the most vocal federal officials on the issue of school segregation were Southern congressmen. Almost 100 of them signed a proclamation issued in 1956, called the Southern Manifesto, which criticized the Supreme Court for a "clear abuse of judicial power" and called on "all lawful means to bring about a reversal of this decision which is contrary to the Constitution."<sup>132</sup>

*Brown* not only galvanized white conservatives and radicalized Southern politics, it also provoked specific legal responses by southern states as they sought to change their laws to obstruct the desegregation of schools. One of the favored legal responses to *Brown* in the 1950s — as it was to *Goodridge* in 2004<sup>133</sup> — was to amend state constitutions. In 1954, for example, Louisiana added a provision to its constitution stating that "[a]ll public elementary and secondary schools . . . shall be operated separately for white and colored children."<sup>134</sup> The provision added that the amendment was not adopted "because of race"; instead the goal was supposedly to protect the health and morals of the public, as well as to promote the proper education of children.<sup>135</sup> For their part, Arkansas voters approved a constitutional amendment

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*Introduction to THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA* 1, 3 (Matthew D. Lassiter & Andrew B. Lewis eds., 1998) [hereinafter *THE MODERATES' DILEMMA*] ("In the aftermath of *Brown*, the charged political climate surrounding issues of race and education muffled the voices of many who dissented from the defiant course chosen by the region's political leaders."). For a discussion of the inability of southern liberals and moderates to counteract the massive resistance to *Brown* offered by committed segregationists, see Tony Badger, *Fatalism, Not Gradualism: The Crisis of Southern Liberalism, 1945–65*, in *THE MAKING OF MARTIN LUTHER KING AND THE CIVIL RIGHTS MOVEMENT* 67, 80–88 (Brian Ward & Tony Badger eds., 1996).

<sup>127</sup> See KLARMAN, *supra* note 24, at 324–25; PATTERSON, *supra* note 22, at 80–82.

<sup>128</sup> See KLARMAN, *supra* note 24, at 366.

<sup>129</sup> See *id.* A provision that would have given the U.S. attorney general the authority to bring desegregation suits was removed at the last moment with President Eisenhower's support. See *id.* at 325. The final bill enacted into law "covered only voting rights, and even that it did ineffectively." *Id.*

<sup>130</sup> See PATTERSON, *supra* note 22, at 109–11.

<sup>131</sup> See KLARMAN, *supra* note 24, at 324–25.

<sup>132</sup> PATTERSON, *supra* note 22, at 98.

<sup>133</sup> See *infra* notes 165–83 and accompanying text.

<sup>134</sup> 1 RACE REL. L. REP. 239 (1956) (quoting LA. CONST. art. XII, § 1).

<sup>135</sup> *Id.* Louisiana also enacted a statute in 1956 suspending compulsory education in school systems that were under a court order to desegregate. *Id.* at 728 (citing LA. REV. STAT. tit. 17,

in 1956 requiring the legislature to interpose state sovereignty by doing everything within its power to nullify *Brown*.<sup>136</sup>

Alabama also amended its constitution in 1956 by making it clear (1) that there was no right to a public education and (2) that the legislature had the authority to enact laws that would allow parents to have their children “attend schools provided for their own race.”<sup>137</sup> The former provision was intended to allow school districts the opportunity to close down altogether rather than to integrate, an option pursued by some localities in the South<sup>138</sup> until the Supreme Court put an end to the practice in 1964.<sup>139</sup> The latter section was a constitutional codification of a policy pursued by all southern states after *Brown* through what became known as “freedom of choice” laws. These laws gave parents, rather than government officials, the ability to determine which schools their children attended.<sup>140</sup> They sought, in other words, to replace a system of de jure segregation with one of de facto segregation. Supporters of the laws knew that the vast majority of white parents would choose to keep their children in white schools, while a significant number of black parents would choose to protect their children from intimidation and violence by keeping them in black schools.<sup>141</sup>

South Carolina took a different constitutional tack. That state in 1952, presumably under the expectation that it would eventually be required by the federal courts to desegregate its schools, repealed a constitutional provision that required the legislature to “provide for a liberal system of free public schools for all children between the ages of six and twenty-one.”<sup>142</sup> In its place, the legislature enacted a

§ 221 (1950). Other southern states enacted similar laws: Arkansas, 2 RACE REL. L. REP. 453 (1957), Florida, 4 RACE REL. L. REP. 753 (1959), Mississippi, 1 RACE REL. L. REP. 422 (1956).

<sup>136</sup> 1 RACE REL. L. REP. 1116 (1956) (citing ARK. CONST. amend. 47). The legislatures of six other southern states issued similar “interposition and nullification” resolutions: Alabama, 1 RACE REL. L. REP. 437 (1956), Florida, 2 RACE REL. L. REP. 707 (1957), Louisiana, 1 RACE REL. L. REP. 753 (1956), Mississippi, 1 RACE REL. L. REP. 440 (1956), South Carolina, 1 RACE REL. L. REP. 443 (1956), and Virginia, 1 RACE REL. L. REP. 445 (1956).

<sup>137</sup> 1 RACE REL. L. REP. 418 (1956) (quoting ALA. CONST. § 256). The state senator who proposed the amendment stated at the time that “[i]t gives sufficient authority to the Legislature to authorize school boards of education to vary their educational plans when necessary to avoid integration.” Taylor Bright, *Language Stems from 1956 Session*, BIRMINGHAM POST-HERALD, Nov. 27, 2004, at 1. It is telling of the charged racial politics of the time that only one Alabama legislator voted against the amendment. *See id.* Interestingly, on November 2, 2004, the same day in which voters in eleven states across the country voted to amend their constitutions to prohibit same-sex marriages, *see infra* notes 182–83 and accompanying text, Alabama voters rejected an effort to repeal the segregationist language contained in their constitution. *See* Manuel Roig-Franzia, *Defeat of Constitutional Amendment*, NEWSDAY, Nov. 29, 2004, at A23.

<sup>138</sup> *See* WILKINSON, *supra* note 126, at 82–83.

<sup>139</sup> *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964).

<sup>140</sup> *See* PATTERSON, *supra* note 22, at 100–01.

<sup>141</sup> *See id.* The Supreme Court did not strike down the “freedom of choice” laws until fourteen years after *Brown*. *See Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

<sup>142</sup> 1 RACE REL. L. REP. 241 n.a (1956).

statute in 1955 that withheld state funds from school districts that were under a court order to transfer students from one school to another.<sup>143</sup>

In addition to closing down schools, implementing freedom to choose laws, and cutting off funding for schools under desegregation orders, other legal responses to *Brown* included the enactment of pupil placement laws and the adoption of so-called grade-a-year plans that sought to desegregate school systems one grade at a time, starting with either the first or the twelfth grade. The purpose of the pupil placement laws was to use ostensibly neutral criteria, such as aptitude, psychological fitness, and health, to make school assignment decisions that left racial segregation firmly in place.<sup>144</sup> The purpose of the grade-a-year plans was to make sure that no school system was fully desegregated in less than twelve years.<sup>145</sup>

The radicalization of southern politics, and the related state constitutional and statutory responses to *Brown*, were for years quite effective in preventing any meaningful desegregation. In fact, as already noted, by 1964, a full decade after *Brown*, only one percent of black children in the South were attending school with white children.<sup>146</sup>

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<sup>143</sup> See *id.* at 241. In Virginia, a commission appointed by the Governor, known as the Gray commission, suggested in 1955 replacing the provision in the state constitution that called for racially segregated schools with amendments calling for a pupil placement plan and authorizing the use of state funds to pay for the education of white students whose parents preferred that they attend private schools rather than desegregated public schools. See Lassiter & Lewis, *Introduction to THE MODERATES' DILEMMA*, *supra* note 126, at 6. (For an explanation of pupil placement laws, see *infra* note 144 and accompanying text). Two-thirds of the Virginia voters approved a constitutional convention to implement the commission's proposals. See Lassiter & Lewis, *supra*, at 6. In the end, however, the legislature chose to enact "a package of 'massive resistance laws,' including [a pupil placement law], a provision to cut off state funding to any school system which desegregated, a measure empowering the governor to close any public school facing court-ordered desegregation, and a series of laws designed to intimidate and obstruct the NAACP." *Id.* at 7.

<sup>144</sup> For a discussion of pupil placement laws, which were adopted by every southern state, see KLARMAN, *supra* note 24, at 329–31, 358–59; PATTERSON, *supra* note 22, at 100. In 1958, the Supreme Court summarily affirmed the denial of a facial challenge to a pupil placement law. *Shuttlesworth v. Birmingham Bd. of Educ.*, 358 U.S. 101 (1958).

<sup>145</sup> See PATTERSON, *supra* note 22, at 108. The Sixth Circuit in 1959 upheld Nashville's grade-a-year plan, which included a so-called minority-to-majority transfer option that allowed students who attended schools in which their racial group was a minority to request a transfer. *Kelley v. Bd. of Educ.*, 270 F.2d 209 (6th Cir. 1959). "This [scheme] ensured that no whites would be compelled to attend a majority-black school and encouraged blacks, through a variety of formal and informal pressures, to transfer out of racially mixed schools to which they had been assigned." KLARMAN, *supra* note 24, at 331. The Supreme Court, over the objection of Chief Justice Warren, Justice Brennan, and Justice Douglas, refused to review *Kelley*. 361 U.S. 924 (1959).

<sup>146</sup> See *supra* text accompanying note 63.

*B. Political and Legal Responses to Goodridge*

The most recent backlash against same-sex marriage began in the summer of 2003, six months before *Goodridge* was decided.<sup>147</sup> It was then that the Supreme Court in *Lawrence v. Texas* held that the criminalization of consensual sodomy is unconstitutional.<sup>148</sup> Many conservatives were outspokenly critical of the opinion, in part, because they perceived it as setting the stage for the eventual striking down of bans against same-sex marriage.<sup>149</sup> The clamor raised by conservative critics following *Lawrence* seemed to have an impact on public opinion. A poll taken a month after the decision was issued found that only forty-eight percent of respondents thought that same-sex relations between consenting adults should be legal, down from sixty percent three months earlier.<sup>150</sup>

Six months after *Lawrence*, the Massachusetts Supreme Court issued its opinion in *Goodridge*. The response by social conservatives to *Goodridge* was immediate and forceful as they criticized the court for its purported judicial activism and its disregard for traditional values.<sup>151</sup> Conservative groups reached out to supporters with a sense of urgency and determination because, as they saw it, the institution of marriage was in great peril.<sup>152</sup> These groups were quite successful in encouraging scores of conservatives across the nation to organize and become politically involved on the issue of marriage.<sup>153</sup>

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<sup>147</sup> I say most recent because there were earlier backlashes. In the 1990s, after the Supreme Court of Hawaii issued its opinion in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), Congress enacted the Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2005) (defining marriage as “a legal union between one man and one woman as husband and wife”). Many states followed Congress’s lead by enacting their own so-called mini-DOMAs. See *infra* notes 243–44 and accompanying text.

<sup>148</sup> 539 U.S. 558 (2003).

<sup>149</sup> Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, § 5 (Magazine), at 48. Senator Rick Santorum (R-Pa.) stated two months before *Lawrence* was issued that “[i]f the Supreme Court says that you have the right to consensual sex within your home, then you have the right to bigamy, you have the right to incest, you have the right to adultery.” Sheryl Gay Stolberg, *Persistent Conflict for Gays and G.O.P.*, N.Y. TIMES, Apr. 23, 2003, at A20. The Senator added that “[i]n every society, the definition of marriage has not to my knowledge included homosexuality. . . . That’s not to pick on homosexuality. [Marriage is] not, you know, man on child, man on dog, or whatever the case may be.” *Id.*

<sup>150</sup> Susan Page, *Americans Less Tolerant on Gay Issues*, USA TODAY, July 29, 2003, at 1A. Polls taken after *Lawrence* also showed a drop in support for civil unions for lesbians and gay men from “49 percent in May to 37 percent in August.” Rosen, *supra* note 149, at 48. These numbers have since changed, however, with a majority of Americans now supporting civil unions for lesbians and gay men. See *infra* note 285 and accompanying text.

<sup>151</sup> See *supra* notes 64–68 and accompanying text.

<sup>152</sup> See Seelye, *supra* note 66, at A29.

<sup>153</sup> See David D. Kirkpatrick, *Bush’s Plans for Marriage Falls Short for Conservatives*, N.Y. TIMES, Jan. 15, 2004, at A18.

Conservative groups, in the weeks that followed the issuance of *Goodridge*, pursued a two-part strategy. The first, as already noted, was to push for a federal constitutional amendment that would take away from the states the power to recognize same-sex marriage.<sup>154</sup> The second was to focus on the state level by pressing for state constitutional amendments banning same-sex marriage.<sup>155</sup>

The political mobilization on the part of social conservatives soon began to bear fruit. In January 2004, two months after *Goodridge*, the Ohio legislature enacted a broad-ranging statute that not only made Ohio the thirty-eighth state with a so-called mini-Defense of Marriage Act that banned the recognition of same-sex marriage, but also prohibited the state from providing domestic partnership benefits to its employees.<sup>156</sup> In the same month, President Bush, under strong pressure from conservatives, said in his State of the Union message that he would resort to the "constitutional process" if necessary in order to defend the "sanctity" of marriage.<sup>157</sup> For his part, San Francisco Mayor Gavin Newsom, apparently responding to the president's speech, ordered that marriage licenses be issued to same-sex couples.<sup>158</sup> During the following four weeks, San Francisco issued more than four thousand such licenses before a court ordered it to cease.<sup>159</sup>

The sight of lesbian and gay couples receiving marriage licenses in San Francisco further angered social conservatives across the country.<sup>160</sup> They increased the pressure

<sup>154</sup> See *supra* note 67 and accompanying text.

<sup>155</sup> James Dao, *State Action Is Pursued on Same-Sex Marriage*, N.Y. TIMES, Feb. 27, 2004, at A24; Mary Leonard, *SJC Ruling Aftermath: Mass. Rulings Push States to Seek a Ban*, BOSTON GLOBE, Feb. 7, 2004, at A1.

<sup>156</sup> See *Legislative Notes*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Feb. 2004, at 27. Two months later, both chambers of the Virginia Legislature, by commanding majorities, approved an amendment to the state's mini-DOMA that prohibited civil unions or other arrangements "purporting to bestow the privileges and obligations of marriage." *Marriage & Partnership Legislative Notes*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Apr. 2004, at 58.

<sup>157</sup> Robin Toner & Robert Pear, *Ban on Gay Marriages Leads List of Proposals*, N.Y. TIMES, Jan. 21, 2004, at A17.

<sup>158</sup> Dean E. Murphy, *San Francisco Mayor Exults in Move on Gay Marriage*, N.Y. TIMES, Feb. 19, 2004, at A14.

<sup>159</sup> Dean E. Murphy, *San Francisco Forced to Halt Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at A1; Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs from 46 States*, N.Y. TIMES, Mar. 18, 2004, at A26. The California Supreme Court later held that the city inappropriately issued the licenses and that they had no legal validity. See *Lockyer v. City & County of S.F.*, 95 P.3d 459 (Cal. 2004). Other municipalities, such as New Paltz, New York, and Portland, Oregon, also issued marriage licenses to lesbian and gay couples for a brief period in early 2004. See Sabrina Tavernise and Thomas Crampton, *Gay Couples to Be Wed Today in New Paltz, Mayor Declares*, N.Y. TIMES, Feb. 27, 2004, at B5; Matthew Preusch, *Oregon County, with Portland, Offers Same-Sex Marriages*, N.Y. TIMES, Mar. 4, 2004, at A26.

<sup>160</sup> Ralph Z. Hallow, *Evangelicals Frustrated by Bush, Threaten to Stay Home for Election*, WASH. TIMES, Feb. 20, 2004, at A1.

on the president to articulate, in unequivocal terms, his support for a federal constitutional amendment prohibiting states from recognizing same-sex marriages.<sup>161</sup> The president heeded to their requests, announcing, at a White House briefing in February 2004, that he was calling on Congress to approve the amendment.<sup>162</sup> It was widely understood at the time that the president needed to endorse the amendment in order to retain the strong support of his political base.<sup>163</sup> Without that support, his prospects for reelection were diminished.<sup>164</sup>

State legislatures soon joined the fracas. The Arizona House Judiciary Committee and the Virginia House of Representatives called on Congress to approve the federal constitutional amendment.<sup>165</sup> The legislatures in Georgia, Kentucky, Mississippi, Oklahoma, and Utah<sup>166</sup> approved constitutional amendments prohibiting same-sex marriage and ordered that the issue be put before voters in the upcoming November election. In the meantime, conservative activists were busy in other states canvassing the electorate. Sufficient signatures were gathered in Arkansas,<sup>167</sup> Michigan,<sup>168</sup> Montana,<sup>169</sup> North Dakota,<sup>170</sup> Ohio,<sup>171</sup> and Oregon<sup>172</sup> to put constitutional amendments banning same-sex marriage on the November ballots.<sup>173</sup>

It is important to note that the majority of the proposed constitutional amendments not only called for the prohibition of same-sex marriages, but also for the banning of alternative means through which the state might provide same-sex

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<sup>161</sup> *Id.*; see also David D. Kirkpatrick, *Conservatives Using Issue of Gay Unions as a Rallying Tool*, N.Y. TIMES, Feb. 8, 2004, at 1; Mary Leonard, *Pace Quickens on Push for an Amendment*, BOSTON GLOBE, Feb. 14, 2004, at A2.

<sup>162</sup> Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

<sup>163</sup> Robin Toner, *Keeping Faith with His Base*, N.Y. TIMES, Feb. 25, 2004, at A1.

<sup>164</sup> *Id.*

<sup>165</sup> See *Same-Sex Marriage: Other Political and Legal Developments*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Mar. 2004, at 36–37.

<sup>166</sup> See *Marriage & Partner Recognition Legislative Notes*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), May 2004, at 87.

<sup>167</sup> *Marriage & Partnership Legislative Notes*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Summer 2004, at 134.

<sup>168</sup> See *id.*

<sup>169</sup> See James Dao, *Renewed State Efforts Made Against Same-Sex Marriage*, N.Y. TIMES, July 16, 2004, at A17.

<sup>170</sup> See *id.*

<sup>171</sup> See *Notes on Anti-Marriage Constitutional Amendment Developments*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Oct. 2004, at 197.

<sup>172</sup> See *Marriage & Partnership Legislative Notes*, *supra* note 167, at 135.

<sup>173</sup> Local officials also got into the act. The district attorney for Ulster County in New York, for example, filed misdemeanor charges against two ministers for performing civil marriages for same-sex couples. See Thomas Crampton, *Two Ministers Are Charged in Gay Nuptials*, N.Y. TIMES, Mar. 16, 2004, at B1. The charges were eventually dismissed by a trial judge. See Debra West, *New Paltz: Gay-Marriage Charges Dropped*, N.Y. TIMES, June 11, 2004, at B5.

couples with some or all of the rights and benefits that it traditionally assigns through the institution of marriage. Thus, for example, the North Dakota amendment, in addition to defining marriage as "the legal union between a man and a woman," also stated that "[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."<sup>174</sup> The Oklahoma provision stated that "[n]either this Constitution nor any other provision of law shall be construed to require that marital status or legal incidents thereof be conferred upon unmarried couples or groups."<sup>175</sup>

As the months progressed, it appeared that the same-sex marriage issue was going to play an important role in the upcoming elections. In Missouri, for example, the legislature approved placing that state's constitutional amendment relating to marriage before voters,<sup>176</sup> but a disagreement broke out between Republicans and Democrats as to when the vote should take place. Republicans, hoping that the issue would help their candidates at the ballot box, wanted the amendment voted on during the general election in November.<sup>177</sup> The Democrats preferred that the vote be held during the August primary.<sup>178</sup> Even though the Democrats prevailed, the amendment was approved by a commanding seventy percent of voters.<sup>179</sup> A few weeks later, almost eighty percent of voters in Louisiana approved that state's constitutional amendment.<sup>180</sup>

The same-sex marriage issue continued to energize social and religious conservative groups throughout the fall of 2004, helping them with grass-roots organizing and voter registration.<sup>181</sup> On election day, voters in all eleven states that had constitutional provisions on the ballot related to same-sex marriage approved them by large majorities.<sup>182</sup> This was the case not only in conservative states, such as Utah

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<sup>174</sup> N.D. CONST. art. XI, § 28 (2005).

<sup>175</sup> OKLA. CONST. art. 2, § 35(A) (2004). Another provision makes it a misdemeanor for "[a]ny person knowingly issuing a marriage license in violation of this section." *Id.* § 35(C).

<sup>176</sup> *Marriage & Partner Recognition Legislative Notes*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), May 2004, at 86.

<sup>177</sup> *See Same-Sex Marriage & Partnership Legislative Notes*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Sept. 2004, at 164.

<sup>178</sup> *See id.*

<sup>179</sup> *See* Monica Davey, *Missourians Back Amendment Barring Gay Marriage*, N.Y. TIMES, Aug. 4, 2004, at A13.

<sup>180</sup> *See Gay-Marriage Ban Passes in Louisiana*, N.Y. TIMES, Sept. 19, 2004, § 1, at 24.

<sup>181</sup> The Republican National Committee, a month before the election, "blanketed Ohio with direct mail that screamed 'Traditional Values Are Under Attack From the Radical Left,' and urged that 'one vote' could 'protect marriage.'" Sarah Wildman, *Wedding-Bell Blues*, AM. PROSPECT, Dec. 2004, at 39. Karl Rove, President Bush's chief political strategist, "made the 11 marriage amendments a cornerstone of his get-out-the-evangelical-vote campaign, enlisting the help of prominent Republicans and national Christian organizations." *Id.* Conservative groups organized rallies in support of traditional marriage in states such as Mississippi and North Carolina that were attended by thousands of supporters. *See id.*

<sup>182</sup> *See* Cheryl Wetzstein, *Eleven States Uphold Traditional Marriage*, WASH. TIMES, Nov. 3, 2004, at A1.

and Mississippi, but also in more liberal ones, such as Oregon.<sup>183</sup> Furthermore, the conventional wisdom immediately after the election was that issues of values and morality in general, and same-sex marriage in particular, played an important role in the presidential race, especially in Ohio, the state that ended up deciding the election.<sup>184</sup>

There are interesting parallels, therefore, between the post-*Brown* and post-*Goodridge* periods. Then, as now, a judicial opinion that promoted civil rights galvanized social conservatives prompting them to mobilize politically.<sup>185</sup> Then, as now, state constitutions were amended and laws were enacted that reflected the growing displeasure among many citizens with court-mandated equality.<sup>186</sup> And then, as now, some elected officials did their best to stoke that displeasure by criticizing judges as irresponsible for issuing judicial opinions that were out of step with majoritarian views.<sup>187</sup>

Despite the similarities in the responses to *Brown* and *Goodridge*, it is necessary to acknowledge important differences. The backlash in the 1950s and early 1960s was not only political and legal; it was also violent. During that period, Southern blacks (and some of their white supporters) were subjected to violence, intimidation, and harassment at the hands of segregationists.<sup>188</sup> Although lesbians and gay men, as well as bisexuals and transgendered individuals, are today among the most likely to be the victims of hate crimes,<sup>189</sup> that violence is not politically organized and coordinated as it was in the South five decades ago.

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<sup>183</sup> See *id.*

<sup>184</sup> See, e.g., James Dao, *Same-Sex Marriage Issue Key to Some GOP Races*, N.Y. TIMES, Nov. 4, 2004, at P4 (reporting that political analysts stated that the “constitutional amendments banning same-sex marriage increased the turnout of socially conservative voters in many of the 11 states where the measures appeared on the ballot . . . providing crucial assistance to Republican candidates including President Bush in Ohio and Senator Jim Bunning in Kentucky.”); Notebook, NEW REPUBLIC, Nov. 15, 2004, at 10 (suggesting that “gay marriage may have been instrumental in tipping the balance to Bush, particularly with so many Bush voters citing his moral qualities as a reason to support him.”); Paul Starr, *Morals of the Election*, AM. PROSPECT, Dec. 2004, at 4 (arguing that “the reaction against gay marriage has triggered a huge evangelical turnout, probably tipping Ohio and thus the Electoral College.”); David Osborne, *Moral Issues at the Heart of the Vote*, SEATTLE POST-INTELLIGENCER, Nov. 4, 2004, at B9 (arguing that moral issues decided the election). The conventional wisdom, however, was later questioned by some. See, e.g., Pam Belluck, *Maybe Same-Sex Marriage Didn’t Make the Difference*, N.Y. TIMES, Nov. 7, 2004, § 4, at 3; Kenneth Sherrill, *Did Same-Sex Marriage Doom Kerry?*, GAY & LESBIAN REV. WORLDWIDE, Jan. 2005, at 14.

<sup>185</sup> See *supra* notes 120–26, 151–56 and accompanying text.

<sup>186</sup> See *supra* notes 134–43, 174–84 and accompanying text.

<sup>187</sup> See *supra* notes 65–66, 124–26, 132 and accompanying text.

<sup>188</sup> See PATTERSON, *supra* note 22, at 87; KLARMAN, *supra* note 24, at 431–41.

<sup>189</sup> See William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213 (2004).



Another important difference between the civil rights era of the 1950s and the contemporary struggle for gay rights is the level of oppression. For all of the discrimination experienced today by lesbians and gay men, they do not live under an apartheid regime such as the one that existed in many parts of the United States well into the second half of the twentieth century.<sup>190</sup>

Despite these important differences, the similarities in the responses to *Brown* and *Goodridge* relating to the political galvanization of conservatives, as well as to the approval of state constitutional and statutory changes aimed at impeding civil rights advancements, is striking. The similarities, in fact, raise important questions about the backlash that frequently follows highly controversial judicial opinions that side with civil rights proponents. In the next section, I explore what has become known as the *Brown* backlash thesis, which holds that the opinion was, at least in the short run, counterproductive from a civil rights perspective because of the backlash that it provoked. Interestingly, similar arguments have been made about *Goodridge*.

### III. THE BACKLASH THESIS

*Brown* is for many an iconic opinion that is like no other in the history of the nation.<sup>191</sup> The conventional wisdom is that *Brown* played a crucial role in fostering the civil rights movement, dismantling Jim Crow laws, and changing American society forever.<sup>192</sup> Some, however, have questioned this widely accepted understanding of *Brown*'s impact by arguing that the opinion initially was relatively insignificant in ending segregation in the South, and that it was actually counterproductive in the

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<sup>190</sup> For a summary of that regime, see Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 1018–27 (2005) (reviewing KLARMAN, *supra* note 24).

<sup>191</sup> See, e.g., Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3, 4 (Jack M. Balkin ed., 2001) (arguing that "there is no doubt that [*Brown*] is the single most honored opinion in the Supreme Court's corpus."); see also KLUGER, *supra* note 22, at 713 (arguing that *Brown* "represented nothing short of a reconsecration of American ideals"); WILKINSON, *supra* note 126, at 6 ("*Brown* may be the most important political, social, and legal event in America's twentieth-century history.").

<sup>192</sup> See, e.g., COTTRILL ET AL., *supra* note 111, at 8 (describing *Brown* as having "played a pivotal role in the postwar civil rights movement in the United States. . . , a movement that would ultimately bring about far-reaching change in American race relations"); KLUGER, *supra* note 22, at 754 (arguing that *Brown* "spawned" the civil rights movement); WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS 162–63 (1988) (noting that "[t]he importance of *Brown I* was clear from the start. . . . *Brown* led not only to the transformation of Southern society but to major changes in Northern society as well."); Finkelman, *supra* note 190, at 1018 (arguing that "it is impossible to imagine the civil rights revolution having succeeded so quickly in sweeping away de jure segregation without *Brown*.").

struggle for civil rights because of the backlash that it engendered. This perspective has become known as the *Brown* backlash thesis. Its most prominent proponent is Professor Michael Klarman, who defends the thesis in great detail in his recent book *From Jim Crow to Civil Rights*.<sup>193</sup>

Klarman begins his argument by suggesting that by the time *Brown* was decided, most parts of the country other than the South had made significant progress in the desegregation of public schools. De jure desegregation, for example, had ended in northern states, such as New Jersey and Illinois, by the early 1950s, while several western states, such as Arizona and New Mexico, had begun to desegregate before *Brown*.<sup>194</sup> Klarman also suggests that border states like Delaware, Maryland, West Virginia, and Missouri “might have followed similar paths and desegregated without Court intervention.”<sup>195</sup>

The first part of Klarman’s argument, then, is that desegregation was possible in most of the country in the absence of a constitutional mandate issued by the Supreme Court. Klarman then proceeds to question the conventional wisdom that *Brown* played an indispensable role in educating white Americans about the evils of racial segregation.<sup>196</sup> Klarman notes that the opinion played no such role in the South, where most whites felt disdain for the Court, the *Brown* opinion, and the idea that the Constitution required the racial desegregation of schools.<sup>197</sup> Klarman also argues that social and economic forces, as well as the lingering revulsion toward Nazi policies, played a greater role in moving public opinion in the North toward greater egalitarianism in racial matters than did *Brown*.<sup>198</sup> As he puts it, “*Brown* may have had a marginal impact on those who were undecided and thus most susceptible to the Court’s influence, but it did not fundamentally transform the racial attitudes of most Americans.”<sup>199</sup>

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<sup>193</sup> See generally KLARMAN, *supra* note 24. Gerald Rosenberg also argues “that while there is little evidence that *Brown* helped produce positive change, there is some evidence that it hardened resistance to civil rights among both elites and the white public.” GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 155 (1991). He adds that “[w]hile it must be the case that Court action influenced some people, I have found no evidence that this influence was widespread or of much importance to the battle for civil rights.” *Id.* at 156.

A different criticism of *Brown* holds that African Americans have been poorly served by the opinion’s integrationist approach. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORMS* (2004). The backlash thesis does not question the integrationist goal of the opinion; instead, it questions the opinion’s effectiveness in achieving that goal.

<sup>194</sup> See KLARMAN, *supra* note 24, at 344–45.

<sup>195</sup> *Id.* at 345.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 367.

<sup>198</sup> *Id.* at 368.

<sup>199</sup> *Id.* Klarman points out that an opinion poll taken in 1959 found that five percent more Americans agreed with *Brown* than they did in 1954, an increase of only one percent a year. *Id.*

Klarman also argues that while *Brown* encouraged more legal challenges to segregation laws, it did not, as is generally assumed, play an important role in motivating the direct-action protests that were ultimately responsible for the demise of Jim Crow. Klarman points out that civil rights protests did not begin in earnest until 1960, weakening the causal connection between *Brown* and them.<sup>200</sup> He adds that the protests were the result of social, economic, and political changes such as the migration of blacks from farms to cities, which made it easier for them to organize politically, as well as increases in prosperity and educational levels among blacks.<sup>201</sup>

In fact, Klarman suggests that *Brown* may have *discouraged* direct-action protests because it encouraged blacks to rely on litigation rather than on collective action on the streets.<sup>202</sup> This may explain the relative paucity of direct-action protests in the late 1950s, as most blacks, under the urging of the NAACP, waited to see what could be accomplished through the courts.<sup>203</sup> Klarman categorizes the NAACP's focus on litigation after *Brown* as "myopic" because "the capacity of litigation to transform race relations was limited."<sup>204</sup> Litigation, rather than promoting a sense of agency and self-determination among blacks, encouraged them to be passive and to wait and see what white institutions, such as the courts, could offer them.<sup>205</sup>

In the end, Klarman argues, *Brown* did not lead directly to either the spawning of the civil rights movement or to the demise of Jim Crow. Instead, the impact of *Brown* was primarily indirect: it provoked a massive resistance movement among southern whites, which led to direct-action protests by blacks, which, in turn, eventually ended de jure segregation in the South.

The frustration felt by blacks as a result of the seeming inability of major institutions, including the courts, to put an end to the massive resistance to *Brown* led them to protest in the streets.<sup>206</sup> It was, in other words, the backlash among Southern whites against *Brown* that resulted in the mobilization of an effective grassroots movement on behalf of civil rights. White officials in the South, in turn, reacted to the street protests with a ferocity and violence that finally awakened the dormant conscience and sense of (in)dignity of the rest of the nation.<sup>207</sup> Pressure for meaningful

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<sup>200</sup> *Id.* at 374. Klarman also disputes the view that *Brown* inspired the Birmingham bus boycott. *Id.* at 370–71.

<sup>201</sup> *Id.* at 374–75. Klarman posits that the protests may have begun in 1960 because of the demise of McCarthyism — which freed civil rights and liberal groups from having to defend themselves from accusations of a lack of patriotism and of sympathizing with communists — and of the ongoing decolonization of Africa, which showed black Americans what collective action could accomplish. *Id.* at 376.

<sup>202</sup> *Id.* at 377.

<sup>203</sup> The NAACP, well into the 1960s, was skeptical of the advisability of direct-action protests and counseled instead in favor of pursuing litigation. *See id.* at 377–79.

<sup>204</sup> *Id.* at 379.

<sup>205</sup> *See id.*

<sup>206</sup> *See id.* at 382–84.

<sup>207</sup> *See id.* at 429–42.

reform began to be applied only when whites outside of the South were exposed, primarily through television, to the brutality perpetrated by police officers, as well as by segregationist thugs, against peaceful civil rights protestors in places like Birmingham, Alabama and Selma, Mississippi.<sup>208</sup> It was this pressure that finally led Congress to become involved by enacting the Civil Rights Act of 1964, the first comprehensive federal civil rights law since the Reconstruction, which, by prohibiting discrimination in almost every sector of American society, provided the mortal blow to Jim Crow.<sup>209</sup> It was only after Congress, along with officials in the Kennedy and Johnson administrations, began to make it clear that southern resistance to school desegregation was no longer acceptable that the Supreme Court, almost ten years after *Brown*, reentered the fray by issuing opinions striking down laws and policies aimed at impeding meaningful desegregation.<sup>210</sup>

A key component of Klarman's backlash thesis is the notion that *Brown* radicalized white politics in the South.<sup>211</sup> This radicalization had wide-ranging consequences. It is possible that, in the absence of the radicalization, desegregation would have progressed steadily under the guidance of moderate politicians and school officials.<sup>212</sup> This might have mollified blacks sufficiently so as to have made direct-action protests unnecessary. Instead, most Southern whites were so angered by *Brown*, and were so implacably opposed to its strictures, that they rejected out of hand any effort to compromise.<sup>213</sup> This, in turn, left blacks with no choice but to seek change through protests and demonstrations.<sup>214</sup>

For Klarman, then, the crucial impact of *Brown* was the backlash that it provoked. That backlash eventually led to the end of de jure segregation because it forced the rest of the country and the federal government to pay attention to what was happening in the South. But the Civil Rights Act of 1964 was not enacted until ten long years after *Brown* was decided, with much violence, anger, recrimination, and polarization along the way, and with, up until that point, very little actual desegregation of southern schools.<sup>215</sup> Without *Brown*, Klarman argues, desegregation would likely have been both more peaceful and more timely.<sup>216</sup>

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<sup>208</sup> See *id.* at 435–41.

<sup>209</sup> See *id.* at 442.

<sup>210</sup> See *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (holding that closing schools to maintain racial segregation was unconstitutional); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963) (striking down a minority-to-majority transfer scheme that allowed students who attended schools in which their racial group was a minority to request a transfer).

<sup>211</sup> KLARMAN, *supra* note 24, at 389–408.

<sup>212</sup> See *id.*

<sup>213</sup> See *id.*

<sup>214</sup> See *id.* at 382–84.

<sup>215</sup> See *supra* note 63 and accompanying text.

<sup>216</sup> KLARMAN, *supra* note 24, at 441–42.

The *Brown* backlash thesis has received significant attention since Klarman first proposed it more than ten years ago.<sup>217</sup> There are some commentators who remain unpersuaded. The historian James Patterson, for example, argues that the thesis overestimates the willingness of Southern whites to implement some form of limited desegregation prior to *Brown*.<sup>218</sup> It is likely, Patterson argues, that white intransigence would have continued with or without *Brown*.<sup>219</sup> The legal historian Paul Finkelman takes issue with Klarman's thesis by arguing that *Brown* was an indispensable moral force for change and that it "set the stage" for the dismantling of segregation.<sup>220</sup>

The purpose of this article is not to argue the merits of the *Brown* backlash thesis. Instead, I am interested in whether it makes sense to think of *Goodridge* in the way that Klarman thinks of *Brown*. Although no one has yet articulated a backlash understanding of *Goodridge* that is as rich and complex as Klarman's understanding of *Brown*, several gay rights supporters have raised concerns about the dangers associated with a backlash to court-mandated equality in the context of marriage that parallels Klarman's critique of *Brown*. For example, Bill Eskridge, as already noted, has called for pragmatism and gradualism in the pursuit of the legal recognition of lesbian and gay relationships.<sup>221</sup> Eskridge is concerned that court-mandated marriage equality will antagonize gay rights opponents leaving little room for moderation or dialogue.<sup>222</sup> As such, Eskridge argues that the Vermont Supreme Court acted appropriately in *Baker v. State* when it refused to require recognition of same-sex marriage and instead encouraged the legislature to develop an alternative institution.<sup>223</sup> This type of incremental approach, Eskridge notes, leaves room for conversation and persuasion, as the public is given the opportunity to adjust its views on the legal and

<sup>217</sup> Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

<sup>218</sup> PATTERSON, *supra* note 22, at 115–16.

<sup>219</sup> *Id.* at 116; *see also* Dennis J. Hutchinson, *Perspectives on Brown*, 8 GREEN BAG 2d 43, 44 (2004) (arguing that the claims of the backlash thesis are overstated); John Valery White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 LA. L. REV. 785, 800–01 n.62 (2003) (arguing that the backlash thesis "overlooks the fact that . . . quite little change was coming to the South, and that 'moderate' southerners worked affirmatively to preserve segregation in order that 'radical' segregationists would not be inflamed").

<sup>220</sup> Finkelman, *supra* note 190, at 978. Finkelman adds that "while Klarman bemoans the violence against blacks after *Brown*, it is easy to imagine a much more violent and lethal civil rights movement in the 1950s and 1960s if the Court in *Brown* and its progeny had not been a stalwart friend and supporter of civil rights." *Id.* at 976. *See also* David J. Garrow, "Happy" Birthday, *Brown v. Board of Education? Brown's Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693, 728 (2004) (criticizing Klarman's "excessive and disappointing diminution of *Brown*") (reviewing KLARMAN, *supra* note 24).

<sup>221</sup> *See supra* notes 81–82 and accompanying text.

<sup>222</sup> ESKRIDGE, *supra* note 81, at 152–58.

<sup>223</sup> 744 A.2d 864 (Vt. 1999).

moral need to recognize the relationships of lesbians and gay men.<sup>224</sup> The alternative is that courts will move too far ahead of public opinion leading to the “nightmare scenario” of constitutional amendments banning same-sex marriage.<sup>225</sup>

This type of concern with a backlash to court-mandated marriage equality was expressed with some frequency after *Goodridge* was decided. Professor Jeffrey Rosen, for example, writing in the *New Republic* a month after *Goodridge*, stated that “[i]n addition to being constitutionally unconvincing, the decision was also politically naive.”<sup>226</sup> Rosen worried that “by presuming to redefine marriage, [*Goodridge*] threatens to provoke an unnecessary political backlash.”<sup>227</sup>

For many, the predictions of a dangerous backlash became true in the November 2004 election. For example, Diane Feinstein, the Democratic senator from California, concluded after the election that same-sex marriage had come “too much, too fast, too soon” and that it “served as a rallying point to get conservative people to the polls.”<sup>228</sup> A liberal commentator, in providing a post-mortem of the election, argued that “[t]he gay movement thought it could win from judges what the electorate overwhelmingly opposes. In a decision that was bad law and worse politics, the Massachusetts Supreme Judicial Court set the issue in motion.”<sup>229</sup> Another noted that “[e]ven supporters of

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<sup>224</sup> As Eskridge puts it:

A process that forces minority rights onto an unwilling populace will often not “stick” in a democracy; a process that is incremental and persuades the people or their representatives of the acceptability or even desirability of minority rights is much more likely to stick. The incremental process will take a lot longer, but it will also be more lasting.

ESKRIDGE, *supra* note 81, at 148. See also Nancy K. Kubasek et al., *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 U. FLA. J.L. & PUB. POL’Y 229, 230 (2004) (arguing that “proponents of same-sex marriage need to consider the possibility that the title ‘marriage’ is too hotly protected. Perhaps winning the rights that married couples get without winning the title is the best that can be done.”).

<sup>225</sup> ESKRIDGE, *supra* note 81, at 150. Eskridge’s book was published after Hawaii and Alaska amended their constitutions in response to judicial opinions favorable to same-sex marriage but before the slew of constitutional amendments that followed *Goodridge*.

<sup>226</sup> Jeffery Rosen, *Immodest Proposal: Massachusetts Gets It Wrong on Gay Marriage*, NEW REPUBLIC, Dec. 22, 2003, at 19.

<sup>227</sup> *Id.*

<sup>228</sup> Editorial, *Gay Marriage Backlash*, BOSTON HERALD, Nov. 8, 2004, at 24. See also Mitchell Katine, *Introduction to Out of the Closet and into the Light: The Legal Issues of Sexual Orientation*, 24 ST. LOUIS U. PUB. L. REV. 5, 9 (2005) (“Had the *Lawrence* decision not come out when it did, followed by the *Goodridge* decision, the Republican Party would not have been able to take advantage of the opportunity to use gay and lesbian marriages as a catalyst to further its conservative views on election day.”).

<sup>229</sup> Starr, *supra* note 184. See also Paul Starr, *Winning Cases, Losing Voters*, N.Y. TIMES, Jan. 26, 2005, at A17 (“As last year’s disastrous crusade for gay marriage illustrated, Democrats cannot allow their constituencies to draw them into political terrain that can’t be defended at election time.”). Some commentators also blamed the electoral defeat on the decision by

the *Goodridge* ruling should now have second thoughts about the prudence in creating a right to same-sex marriage by strictly judicial processes at the beginning of a year-long national election cycle.”<sup>230</sup> And leaders of the Human Rights Campaign (HRC) — the largest gay rights advocacy organization in the country — expressed the concern, shortly after the election, that “aggressively pursuing same-sex marriage only played into the hand of Republicans and religious conservatives, who skillfully used the issue this fall to energize their voters.”<sup>231</sup> As a result, the HRC announced that in the future it would emphasize incremental steps, such as seeking Social Security survivor benefits and hospital visitation privileges for same-sex couples, “rather than reaching for the gold ring of marriage right away.”<sup>232</sup>

When all of these comments and concerns are pieced together, a backlash understanding of *Goodridge* begins to emerge, one that views the impact of the case, at least in the short run, as harmful to the interests of lesbians and gay men. From this perspective, the post-*Goodridge* events, and in particular the approval of more than a dozen state constitutional amendments banning same-sex marriage in 2004 alone,<sup>233</sup> with the likelihood that even more will be approved in the near future,<sup>234</sup> shows that the public is not ready for same-sex marriage, especially when it is judicially mandated. As a result, it is better to pursue a gradualist or incremental strategy that seeks limited rights and benefits for lesbian and gay couples in order to get the public accustomed to the (at least partial) legal recognition of same-sex relationships. Only then, it is argued, does it make sense to pursue same-sex marriage through the courts.<sup>235</sup>

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San Francisco to issue marriage licenses several months before the election. See, e.g., John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1 (reporting that U.S. Representative Barney Frank, Democrat of Massachusetts, strongly criticized Mayor Newsom for allowing the “spectacle weddings” earlier in the year); Alexander Cockburn, *Don't Say We Didn't Warn You*, NATION, Nov. 22, 2004, at 9 (“If the Democrats had wanted to identify a serious saboteur of their chances they should have homed in on Mayor Gavin Newsom of San Francisco, whose OK to gay marriage saw all those same-sex couples on the steps of City Hall embracing, on every front page and nightly news in America.”).

<sup>230</sup> Brian P. Burke, *Same-Sex Marriage Affected Election*, WORCESTER TELEGRAM & GAZETTE (Worcester, Mass.), Nov. 8, 2004, at A9.

<sup>231</sup> Broder, *supra* note 229.

<sup>232</sup> *Id.*

<sup>233</sup> See *supra* notes 165–85 and accompanying text.

<sup>234</sup> In 2005, voters in Kansas and Texas approved constitutional amendments prohibiting same-sex marriage by more than a two-thirds majority. See Janet Elliot, *Gay Marriage Ban Put in Texas Constitution*, HOUSTON CHRON., Nov. 9, 2005; Brad Knickerbocker, *Ripples Spread as States Vote on Same-Sex Marriage*, CHRISTIAN SCI. MONITOR, Apr. 7, 2005, at 2. In 2006, constitutional amendments will be before voters in five states (Alabama, South Carolina, South Dakota, Tennessee, and Virginia). See Wyatt Buchanan, *San Francisco Same-Sex Marriage Still a Hot Topic*, S.F. CHRON., Feb. 15, 2006, at B1.

<sup>235</sup> Matt Foreman, the executive director of the National Gay and Lesbian Task Force, complained after the 2004 election that “[i]f the movement had been thinking clearly, we would have had a political and public education strategy that preceded the legal strategy.” Brad Knickerbocker, *Political Battles over Gay Marriage Still Spreading*, CHRISTIAN SCI. MONITOR, Nov. 29, 2004, at 1.

The backlash that followed *Goodridge* has been undeniably harmful to the interests of lesbians and gay men. In fact, we are currently experiencing what is likely the strongest backlash against gay rights since the beginning of the gay rights movement.<sup>236</sup> In my estimation, however, it would be a mistake for gay rights supporters to take away from the current backlash the lesson that the pursuit of marriage equality through the courts was a mistake.<sup>237</sup> As I argue in the next section, that strategy has, up until now, led to greater gains than losses for lesbians and gay men. This is not to say that there is no need, *going forward*, to reassess the marriage strategy by, for example, emphasizing incremental steps and by paying more attention to the legislative and political arenas and (proportionally) less attention to the courts. But *looking backward*, *Goodridge* and most of the other same-sex marriage cases have produced sufficient gains for lesbians and gay men to have made their pursuit worthwhile despite the backlash that they have provoked.<sup>238</sup>

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<sup>236</sup> See generally Symposium, *The Legislative Backlash to Advances in Rights For Same-Sex Couples*, 40 TULSA L. REV. 371 (2005) (discussing the extent and impact of the current backlash against gay rights).

<sup>237</sup> In a recent article, Professor Klarman compares the backlash that followed *Brown* to that which followed *Goodridge*. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 452–83 (2005). Klarman is as critical of the timing of *Goodridge* as he is of that of *Brown*. He argues that “[b]y outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance.” *Id.* at 482. Klarman’s article appeared as this article is going to press, so I cannot here fully address its contents. As I argue in Part IV, however, I believe that the same-sex marriage cases have, on the whole, advanced rather than retarded gay rights causes. Klarman argues that cases like *Goodridge* make compromise positions, such as that represented by civil unions, “untenable.” *Id.* at 479. I disagree. I believe that civil unions have become a viable option in some jurisdictions because the same-sex marriage cases have raised compelling questions about the intrinsic unfairness of denying legal recognition to same-sex relationships. See *infra* Part IV.B. I do agree with Klarman when he notes that the shift in public opinion in favor of marriage or civil unions for same-sex couples “within just a few years has been truly astonishing.” Klarman, *supra*, at 485 (footnote omitted). It seems to me, however, that the same-sex marriage cases have contributed in important ways to that shift. See *infra* Parts IV.A. and IV.B.

<sup>238</sup> There have been exceptions along the way. One such ill-advised lawsuit led to the first rejection of a constitutional challenge to a ban against same-sex marriage by a state appellate court since the 1970s. See *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003). Same-sex marriage litigation should be brought only in states where there have already been significant legislative and judicial victories on gay rights issues. See Bonauto, *supra* note 25, at 18–21. Arizona is not one of those states.



#### IV. SAME-SEX MARRIAGE LITIGATION: GAINS HAVE (SO FAR) OUTWEIGHED LOSSES

Although a few same-sex marriage cases were brought in the 1970s,<sup>239</sup> it was not until the Hawaii litigation of the 1990s that the issue first received national attention. In particular, it was the Hawaii Supreme Court's ruling in *Baehr v. Lewin*,<sup>240</sup> which held that the ban against same-sex marriage constituted a form of sex classification that required the state to establish the existence of a compelling interest, that simultaneously exhilarated gay rights supporters and angered gay rights opponents across the country.<sup>241</sup> In the ten years between *Baehr* and *Goodridge*, there were many defeats for same-sex marriage proponents along the way. During that period, Congress enacted the Defense of Marriage Act,<sup>242</sup> thirty-seven states passed so-called mini-DOMAs,<sup>243</sup> and four states amended their constitutions to prohibit same-sex marriages.<sup>244</sup> Furthermore, as elaborated on in Part II, more than a dozen states have also, since *Goodridge*, modified their constitutions to ban same-sex marriages.<sup>245</sup> The result has been statutory and constitutional codifications that explicitly prohibit the recognition of same-sex relationships as marital, and that, in some instances, ban alternative forms of recognition such as civil unions and domestic partnerships.<sup>246</sup>

It is important not to minimize the harmful effects of this codification. The federal DOMA makes same-sex couples ineligible for the many federal rights and benefits afforded to married couples.<sup>247</sup> In the nineteen states that currently have constitutional provisions prohibiting same-sex marriage, it will take either judicial intervention (based on the federal Constitution) or a new state constitutional amendment to nullify the bans. Neither of these scenarios is likely in the short run. Furthermore, the negative effects of the constitutional amendments, especially of those that ban not only marriage but alternative forms of recognition, is already being felt. Some Ohio trial judges, for example, have ruled that the state's new constitutional

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<sup>239</sup> See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

<sup>240</sup> 852 P.2d 44, 67 (Haw.1993).

<sup>241</sup> See ESKRIDGE, *supra* note 81, at 26.

<sup>242</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>243</sup> For a list of states that have enacted statutes restricting marriage to different-sex couples, see Phyllis G. Bossin, *Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage?*, 40 TULSA L. REV. 381, 381 n.2 (2005).

<sup>244</sup> ALA. CONST. art. I, § 25; HAW. CONST. art. I, § 23; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21.

<sup>245</sup> See *supra* notes 165–85 and accompanying text.

<sup>246</sup> See *id.*

<sup>247</sup> See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 3–4 (1997) (listing some of the rights and benefits that same-sex couples are ineligible to receive under DOMA).

amendment prohibits the filing of domestic violence charges against unmarried individuals.<sup>248</sup> In Michigan, the state attorney general has opined that the state's new constitutional provision prohibits public employers from providing domestic partnership benefits to their employees.<sup>249</sup>

Although it is difficult to quantify with much precision either the backlash-related costs or the benefits arising from the same-sex marriage litigation, I believe that, on the whole, the latter have (so far) outweighed the former. In this section of the article, I explore three important ways in which the gay rights movement has benefited from the same-sex marriage cases.

### *A. Some Lesbian and Gay Couples in the U.S. Are Now Married*

The aftermath of *Brown* shows just how difficult it can sometimes be to translate judicially conferred rights into meaningful equality on the ground. The desegregation of schools turned out to be an extremely complicated matter. Meaningful desegregation began in the South only ten years after *Brown*.<sup>250</sup> Furthermore, it was necessary for federal courts throughout the country to oversee school desegregation plans for decades after *Brown*.<sup>251</sup> Some of the delays were undoubtedly the result of foot-dragging on the part of state and local officials. But the pace of school desegregation was also slowed down considerably by factors such as the pervasive housing segregation that exists within many municipalities and the flight by whites from urban

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<sup>248</sup> *Unintended Consequences Stem from Ohio Marriage Amendment*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Apr. 2005, at 74. An appellate court has since rejected the notion that the amendment limits the criminal prosecution of domestic violence. *See State v. Newell*, No. 2004CA00264, 2005 WL 1364937 (Ohio Ct. App. May 31, 2005).

<sup>249</sup> *See* Op. Mich. Att'y Gen. 7171 (2005), available at 2005 WL 639112. A trial court has disagreed with the attorney general's interpretation of the amendment. *See Nat'l Pride at Work, Inc., v. Granholm*, No. 05-368-CZ, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005).

Conservatives, apparently invigorated by their electoral victories in 2004, have continued to flex their political muscles on gay rights issues. In Montgomery County, Maryland, a parents' group successfully pressured the school board to eliminate a health education course that included a discussion of homosexuality. *See Michael Janofsky, Gay Rights Battlefields Spread to Public Schools*, N.Y. TIMES, June 9, 2005, at A18. Social conservatives in Oklahoma succeeded in getting the legislature to enact a resolution calling on libraries to limit children's access to books with a gay theme while gay rights opponents in Alabama are seeking to have lawmakers prohibit state spending on school books that portray homosexuality in a favorable light. *See id.*

<sup>250</sup> *See supra* note 63 and accompanying text.

<sup>251</sup> *See generally* Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157 (2000) (discussing school desegregation litigation).

municipalities to suburban ones.<sup>252</sup> These complicating factors are not easily addressed through judicially-imposed solutions.<sup>253</sup>

It has proven easier and quicker to “integrate” marriage than it was to integrate public schools. In fact, in Massachusetts, the former was done literally overnight. If lesbian and gay couples in that state had sought marriage licenses on May 16, 2004, their applications would have been denied. And yet, a day later, the licenses were issued without any difficulty.<sup>254</sup>

The fact that there are now thousands of lesbian and gay couples married in Massachusetts is, of course, of great importance to them.<sup>255</sup> They now enjoy full equality under Massachusetts law, with the same rights, benefits, and obligations afforded to married heterosexual couples. Married same-sex couples in Massachusetts no longer have to endure the burdens and humiliations, both large and small, that accompanied the state’s previous refusal to recognize the legal validity of their relationships.

It has not been, however, only the married same-sex couples in Massachusetts that have benefited from their marital status. The gay rights movement in general has also benefited and will likely continue to do so. The existence of thousands of married same-sex couples in Massachusetts is extremely helpful from an educational and political perspective. Significant numbers of Massachusetts residents now have neighbors and co-workers who are lesbian and gay and who are married. The idea that it is

<sup>252</sup> See Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55–56 (2002); see also Finkelman, *supra* note 190, at 1007 (arguing that “[m]ost [school] segregation today is due to housing patterns, employment patterns, and private decisionmaking.”).

<sup>253</sup> This became especially true after the Supreme Court held that suburban schools did not have to participate in metropolitan desegregation plans unless they had contributed to the racial segregation of city schools. *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974).

<sup>254</sup> Yvonne Abraham & Michael Paulson, *Wedding Day: First Gays Marry; Many Seek Licenses*, BOSTON GLOBE, May 18, 2004, at A1 (reporting that more than one thousand lesbian and gay couples applied for marriage licenses on the first day in which they were available); Pam Belluck, *Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. TIMES, May 18, 2004, at A1 (reporting that “[o]n the first day . . . , the issuing of licenses and the marriage ceremonies proceeded without many snags or confrontations.”). The only disputed issue became whether same-sex couples from other states were eligible to marry in Massachusetts. *Id.* at A21. The governor, relying on a 1913 state law that prohibits the issuance of licenses to couples if the marriages would not be recognized in their home states, ordered that non-resident same-sex couples not be allowed to marry. Pam Belluck, *Governor Seeks to Invalidate Some Same-Sex Marriages*, N.Y. TIMES, May 21, 2004, at A14. The 1913 law was aimed in part at restricting interracial marriages. See Raphael Lewis, *Law Curbing Out-of-State Couples Faces a Challenge*, BOSTON GLOBE, Apr. 22, 2004, at B1. The constitutionality of that law is currently before the Massachusetts Supreme Judicial Court. See Jonathan Saltzman, *SJC Hears Challenge to Marriage Law*, BOSTON GLOBE, Oct. 7, 2005, at B1.

<sup>255</sup> Over six thousand same-sex couples were married in Massachusetts during the first nine months after same-sex marriages in the state became legal. See William Lee Adams, *Gay to Wed*, NEWSWEEK, May 23, 2005, at 12.

possible for two women or two men to be married to each other seems intrinsically contradictory to many Americans.<sup>256</sup> It is reasonable to believe that many of the neighbors and co-workers of married same-sex couples in Massachusetts are realizing that what they share with lesbian and gay couples (in terms, for example, of commitment and love for their partners and families) is greater and more important than the differences as represented by the gender of the parties.

Studies have shown that a person's opinion about homosexuality frequently depends on whether that person knows someone who is lesbian or gay.<sup>257</sup> Individuals are more likely to be supportive of gay rights positions if they know someone who is openly lesbian or gay.<sup>258</sup> It would be consistent with these findings for the support of gay rights in general and same-sex marriage in particular to increase once large segments of the population get to know lesbian and gay couples as *married* couples.

Although opponents of gay rights frequently categorize same-sex marriage as a threat to the institution of marriage and to the well-being of society,<sup>259</sup> the experience in Massachusetts shows otherwise. No heterosexual couple in that state has gotten divorced, and no heterosexual couple has failed to get married, because of *Goodridge*.<sup>260</sup> It is easy for opponents of same-sex marriage to use fiery rhetoric about how society will be endangered if same-sex couples are permitted to marry. In Massachusetts, that possibility has been replaced with reality with no evidence of harm to anyone. Although implacable opponents of same-sex marriage are unlikely to allow facts such as these to weaken their resolve, more open-minded citizens are likely to be persuaded of the moral legitimacy behind claims for gay equality by simply observing and getting to know lesbian and gay couples as married couples.

In fact, if schools in the South had somehow been fully integrated two years after *Brown* (in the same way that marriage in Massachusetts is fully "integrated" two years after *Goodridge*), the worst fears of segregationists would have been proven then to

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<sup>256</sup> See Russell Shorto, *What's Their Real Problem with Gay Marriage? (It's the Gay Part)*, N.Y. TIMES, June 19, 2005, § 6 (Magazine), at 37 (noting opposition to same-sex marriage by some on the ground "that the definition of the word 'marriage' necessarily involves one person from each sex").

<sup>257</sup> See, e.g., Gregory M. Herek & John P. Capitanio, "Some of My Best Friends": *Inter-group Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 412 (1996); Gregory M. Herek & Erik K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey*, 30 J. SEX RES. 239 (1993).

<sup>258</sup> See Joseph Shapiro et al., *Straight Talk About Gays*, U.S. NEWS & WORLD REP., July 5, 1993, at 42, 46 (noting that seventy-three percent of those who know someone who is gay favor civil rights protections while only fifty-five percent of those who do not know gay people support such protections).

<sup>259</sup> Shorto, *supra* note 256, at 41 (noting views held by many social conservatives that same-sex marriage represents a threat to the stability of society).

<sup>260</sup> In fact, Massachusetts has the lowest divorce rate in the nation. See Editorial, *Happy Anniversary*, BOSTON GLOBE, May 17, 2005, at A14.

have been unfounded. If civil rights proponents had been able to show in 1956 what we take for granted today, namely, that it is indeed possible for children of different races to receive an education in the same institution without negative consequences for the students, the institution, or society, it is likely that open-minded citizens across the country would have rejected the resistance to *Brown* put forward by Southern segregationists much earlier than they did.<sup>261</sup>

It is instructive to compare the status of same-sex marriage today with that of interracial marriage almost sixty years ago. In 1948, the Supreme Court of California in *Perez v. Lippold* struck down, on federal constitutional grounds, California's ban against interracial marriages.<sup>262</sup> At the time, thirty states had anti-miscegenation laws,<sup>263</sup> and an overwhelming number of Americans supported the racial marriage bans.<sup>264</sup> Slowly but steadily those bans were repealed so that by the time the United States Supreme Court in 1967 held that the laws violated the Constitution,<sup>265</sup> only sixteen states still had them in the books.<sup>266</sup> When *Perez* was first decided, it seemed as if the California court was pushing the fringes of constitutional doctrine given that "Jim Crow segregation was still regarded as constitutionally permissible."<sup>267</sup> And yet, when the Supreme Court, less than twenty years later, reached the same conclusion, there was little opposition or resistance.<sup>268</sup> It is likely that *Goodridge* will have a similar impact on the question of same-sex marriage as *Perez* did on the issue of interracial marriage.<sup>269</sup>

The early indications of the educational and political benefits for the gay rights movement arising from the recognition of same-sex marriage in Massachusetts are promising. In November 2004, six months after the state first issued marriage licenses to same-sex couples, all of the Massachusetts state legislators who opposed the constitutional amendment to ban same-sex marriage were reelected, while several of those who supported it were not.<sup>270</sup> In addition, in special elections held in 2005, three

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<sup>261</sup> See *supra* notes 206–216 and accompanying text.

<sup>262</sup> *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948). The case was originally reported as *Perez v. Sharp*, 32 Cal. 2d 711 (1948).

<sup>263</sup> RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 259 (2003).

<sup>264</sup> See *Perez*, 198 P.2d at 31–32.

<sup>265</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>266</sup> See KENNEDY, *supra* note 263, at 259.

<sup>267</sup> *Id.*

<sup>268</sup> See *id.* at 278.

<sup>269</sup> As Mary Bonauto, the lead plaintiffs' attorney in *Goodridge*, notes: "[M]any of us are now grateful that the [*Perez*] court saw the issue as one of human equality and dignity and broke what had been a logjam of discrimination." Bonauto, *supra* note 25, at 68.

<sup>270</sup> See *Happy Anniversary*, *supra* note 260, at A14; Frank Phillips, *Bid Seen Weakening to Ban Gay Marriage: Amendment Foes May Get Majority*, BOSTON GLOBE, Jan. 18, 2005, at A1.

legislators who opposed gay marriage were replaced with ones who favor it.<sup>271</sup> Furthermore, a recent poll of Massachusetts residents found that fifty-six percent of them support same-sex marriage,<sup>272</sup> an increase of six percentage points from the time *Goodridge* was decided.<sup>273</sup> Another recent survey found that eighty-four percent of Massachusetts residents believe that same-sex marriage has had a positive impact, or no impact at all, on the quality of life in the state.<sup>274</sup> Finally, and perhaps most importantly, the Massachusetts legislature in 2005, after giving preliminary approval to a constitutional amendment banning same-sex marriage, resoundingly rejected the amendment when it came up for a second vote.<sup>275</sup>

The trend in Massachusetts on the issue of same-sex marriage is consistent with what happened in Vermont after the state legislature there enacted its civil unions law.<sup>276</sup> Although some legislators who voted for the law were not returned to office in the election that followed the enactment,<sup>277</sup> civil unions in Vermont today are widely supported by citizens and elected officials alike.<sup>278</sup> Experience with the actual consequences (or lack thereof) of providing legal recognition to same-sex relationships has made all of the difference in Vermont. Many initial opponents of granting legal

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<sup>271</sup> See Pam Belluck, *Massachusetts Plans to Revisit Amendment on Gay Marriage*, N.Y. TIMES, May 10, 2005, at A13.

<sup>272</sup> See Raphael Lewis, *Group to Seek Referendum Against Gay Marriage Plan Would Counter Bid for Civil Unions*, BOSTON GLOBE, June 15, 2005, at B1.

<sup>273</sup> See *supra* text accompanying note 75.

<sup>274</sup> See Adams, *supra* note 255, at 12.

<sup>275</sup> The legislature, which in March of 2004 had approved the amendment by a vote of 105–92, overwhelmingly rejected the same amendment in September 2005 by a vote of 157–39. See Raphael Lewis, *After the Vote, Both Sides in Debate Energized*, BOSTON GLOBE, Sept. 15, 2005, at A1. “The lopsided defeat for the amendment was largely due to the fact that 55 lawmakers more than 25 percent of the Legislature who had supported the amendment last year switched and voted no. . . . Seventeen of the Legislature’s 18 freshman lawmakers also voted against the amendment.” *Id.* One legislator — who voted for the amendment the first time but voted against it the second time — explained that “[g]ay marriage has begun and life has not changed for the citizens of the commonwealth, with the exception of those who can now marry who could not before.” Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005, at A14. Another legislator who changed his mind noted that “[w]hen I looked into the eyes of the children living with [same-sex married] couples, I decided that I don’t feel at this time that same-sex marriage has hurt the commonwealth in any way. In fact, I would say that in my view it has had a good effect for the children in these families.” *Id.*

<sup>276</sup> VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002).

<sup>277</sup> See DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE 257–60 (2004).

<sup>278</sup> See *id.* at 261–62; see also David Moats, Op-Ed, *The Lessons of Vermont May Help in Massachusetts*, BOSTON GLOBE, Nov. 26, 2003, at A19 [hereinafter Moats, *Lessons of Vermont*]. Exit polls after the 2004 election found that seventy-six percent of Vermonters favored making marriage (forty percent) or civil unions (thirty-six percent) available to same-sex couples. See David Gram, *Gay Unions Gaining Acceptance in Vermont*, ASSOCIATED PRESS, Nov. 6, 2004, available at [http://www.boston.com/news/local/vermont/articles/2004/11/06/gay\\_unions\\_gaining\\_acceptance\\_in\\_vermont](http://www.boston.com/news/local/vermont/articles/2004/11/06/gay_unions_gaining_acceptance_in_vermont).

recognition to same-sex couples in that state have learned that allowing lesbians and gay men to be civilly unionized has had no negative policy repercussions and has not affected or endangered the relationships of married heterosexual couples or the social institution of marriage.<sup>279</sup> The same reaction appears to be taking hold in Massachusetts with respect to same-sex marriage.

Finally, the educational and political benefits arising from the fact that there are now same-sex married couples in Massachusetts will not be limited to that state. Although most jurisdictions, at least in the short term, are unlikely to recognize the Massachusetts marriages unless required to do so by courts,<sup>280</sup> the fact that soon thousands of Massachusetts lesbian and gay married couples will travel or move to other states is likely to have a positive impact for gay rights across the country. As these couples travel or move, they will be able to legitimately put themselves forward as having been married in another jurisdiction, bringing attention to the unequal treatment and unfairness that accompanies the legal recognition of relationships as marital in some states but not in others.<sup>281</sup>

### *B. Civil Unions as the Moderate Alternative*

As already noted, the Supreme Court's opinion in *Brown* had a radicalizing effect on Southern politics on matters related to racial segregation.<sup>282</sup> The effect of *Goodridge* and other same-sex marriage cases favoring lesbian and gay plaintiffs<sup>283</sup> has been more complicated. Although it is undeniable that the successes of the same-sex marriage litigation strategy have led to an entrenchment of anti-gay marriage views as reflected in the constitutional amendments and statutory enactments that have reinforced pre-existing marital bans,<sup>284</sup> the marriage cases, and the national debate that they have engendered, have also moderated the views of many Americans on the broader issue of whether same-sex relationships deserve some form of legal

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<sup>279</sup> Cf. Howard Dean, Op-Ed, *Vermont's Lessons on Gay Marriage*, BOSTON GLOBE, May 17, 2004, at A11; Moats, *Lessons of Vermont*, *supra* note 278.

<sup>280</sup> For a brief and helpful summary of interstate recognition issues, see generally Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005).

<sup>281</sup> A national survey conducted in May 2005 by the University of New Hampshire on behalf of the Boston Globe found that thirty-seven percent of Americans supported same sex marriage. See Law and Civil Rights, PollingReport.com, <http://pollingreport.com/civil.htm> (last visited Mar. 7, 2006). When asked, however, whether Massachusetts same-sex marriages should be recognized in other states, forty-six percent said "yes." *Id.*

<sup>282</sup> See *supra* notes 120–26 and accompanying text.

<sup>283</sup> I am thinking in particular of *Baker v. State*, 744 A.2d 864 (Vt. 1999), and *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>284</sup> See *supra* notes 243–46 and accompanying text.

recognition. In particular, civil unions have emerged as an appealing alternative to marriage embraced by those who believe that marriage should be restricted to different-sex couples but who also believe that the law should provide some recognition of and protection to same-sex relationships.

Only five years after Vermont created what, at the time, was the highly controversial institution of civil unions, a majority of Americans support those unions for same-sex couples.<sup>285</sup> As a result, many elected officials have embraced civil unions as a compromise position between denying same-sex couples all legal recognition and offering them full access to the institution of marriage. In fact, the proposed federal constitutional amendment that would ban same-sex marriage floundered in Congress, in part, because of the uncertainty over whether the proposed language also prohibited states from enacting civil unions.<sup>286</sup> There was sufficient support among at least some opponents of same-sex marriage for civil unions that it derailed the amendment's progress in Congress.<sup>287</sup> Even conservative politicians who are strongly opposed to same-sex marriage, such as President Bush, have stated that they support civil unions.<sup>288</sup>

What was to many, only a few years ago, a radical idea (that lesbians and gay men should have the same rights and benefits afforded to married couples under state law, albeit under the auspices of an alternative legal regime), has now, in effect, become a mainstream alternative to same-sex marriage. It is exceedingly unlikely that civil unions would have the support of so many Americans today, and thus of so many elected officials, *but for* the ability of the same-sex marriage litigation strategy to place the issue of the lack of legal recognition of lesbian and gay relationships squarely

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<sup>285</sup> A national poll taken in July of 2005 found that fifty-three percent of Americans support civil unions, up from forty-eight percent in August of 2004. *See Marriage: By the Numbers*, ADVOCATE, Sept. 13, 2005, at 16 (reporting on a poll conducted by the Pew Research Center for the People and the Press); *see also* Shorto, *supra* note 256, at 37 ("The fact that civil unions, as well as efforts to extend specific rights and benefits to gay couples, receive significant support in polls suggests that many who object to gay marriage nevertheless see an underlying civil rights issue.").

<sup>286</sup> *See* Carl Hulse, *Backers Revise Amendment on Marriage*, N.Y. TIMES, Mar. 23, 2004, at A21.

<sup>287</sup> *See id.*; Mary Leonard, *GOP Divided On Marriage Amendment: Republicans Grapple with Same-Sex Issue*, BOSTON GLOBE, Mar. 28, 2004, at A1; Mary Leonard, *Marriage Measure Revised to Allow Some State Rights*, BOSTON GLOBE, Mar. 23, 2004, at A1; Sheryl Gay Stolberg, *Amendment's Backers Try Again on Same-Sex Marriage*, N.Y. TIMES, June 23, 2004, at A20.

<sup>288</sup> A few days before the November 2004 election, President Bush stated in an interview with a reporter that he supported civil unions. *See* Wildman, *supra* note 181, at 40. M. Jodi Rell, the Republican Governor of Connecticut, has also supported civil unions while arguing that the institution of marriage should be maintained for opposite-sex couples exclusively. *See* Yardley, *supra* note 3.



before the American public.<sup>289</sup> The political debate in a growing number of states is no longer *whether* lesbian and gay couples deserve legal recognition; instead, the debate is about *what type of* legal recognition they deserve.<sup>290</sup> That in and of itself represents considerable progress for gay rights proponents.

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<sup>289</sup> Jason Pierceson argues that the same-sex marriage litigation in Hawaii and Vermont, which led to a reciprocal benefits law in the former and civil unions in the latter, played a crucial role in framing the political debate regarding the legal recognition of same-sex relationships. JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* 192 (2005). He notes that the

litigation resulted in a discussion of lesbian and gay civil rights that demanded a consideration of equality. Over and over again, one sees evidence that the intention of many political actors was to recognize same-sex relationships on a level similar to heterosexual marriage. Without the legal arguments and decisions to frame this debate, it can be argued that only arguments based on tradition and the desire to preserve the institution of marriage would have had any salience.

*Id.*

<sup>290</sup> See Bossin, *supra* note 243, at 418–20 (discussing actions taken by legislatures in California, Connecticut, New Jersey, and Vermont to provide legal recognition of same-sex relationships). Maine has also recently enacted a domestic partnership registry that inter alia allows partners to inherit from each other without a will and make funeral and burial arrangements. See 2004 Me. Legis. Serv. 672 (West); see also ME. REV. STAT. ANN. tit. 22, § 2710 (2005). In 2005, the Maryland legislature overwhelmingly approved a measure giving unmarried partners, including same-sex ones, the ability to make health care decisions for each other and to enjoy hospital visitation rights. See James Dao, *Partners Bill Is Vetoed by Governor in Maryland*, N.Y. TIMES, May 21, 2005, at A10. Even though the governor vetoed the bill, legislators have vowed to try again in the next legislative session. *Id.*

The progress has not been limited to liberal states. The Virginia legislature, for example, recently enacted a measure that permits insurance companies and businesses to extend health insurance coverage to same-sex couples. See *Marriage & Partnership Legislation Notes*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Apr. 2005, at 77. Also recently, the members of a committee of the Utah Senate, with the support of the Republican governor, unanimously approved a bill providing some domestic partnership rights, including rights to hospital visitation and intestacy, to any two adults. See *Marriage & Partnership Legislative Notes*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Feb. 2005, at 28. Although the bill eventually failed to pass the full senate, see *Gay Ban Unmended*, GRAND RAPIDS PRESS, Feb. 2, 2005, at A3, the support that it did receive among otherwise conservative legislators shows that the debate over same-sex marriage can have some positive impact even in states that have approved constitutional amendments banning same-sex marriage. See also E.J. Graff, *Marital Blitz*, AM. PROSPECT, Mar. 2006, at 41, 42 (reporting that in 2005 “Cincinnati, Indianapolis, and Topeka — hardly liberal bastions — passed LGBT antidiscrimination laws [and] Virginia’s governor and Salt Lake City’s mayor extended health-insurance coverage to government employees’ same-sex domestic partners.”).

*C. Progress on Other Gay Rights Issues and the Overcoming of Invisibility*

I have focused so far on the benefits arising from the same-sex marriage litigation strategy in matters related to the legal recognition of lesbian and gay relationships, whether in the form of marriage or in the form of alternative institutions such as civil unions.<sup>291</sup> Although it is not possible to establish a firm causal connection, it is reasonable to believe that the national debate engendered by the same-sex marriage cases regarding the lives and relationships of lesbians and gay men has also had a positive impact on gay rights issues that do not involve relationship recognition. Even though the issue of same-sex marriage continues to strongly divide the country, other gay-related policy matters, such as whether the state should criminalize same-gender sexual conduct or provide protection against discrimination and hate crimes on the basis of sexual orientation, have become considerably less controversial. For example, by the time *Lawrence v. Texas* was decided,<sup>292</sup> the majority of states had eliminated, either legislatively or through judicial decree, their sodomy statutes.<sup>293</sup> Since 1993, which was the year in which the *Baehr v. Lewin* decision was issued by the Hawaii Supreme Court,<sup>294</sup> ten states, as well as the District of Columbia, have enacted laws prohibiting discrimination on the basis of sexual orientation<sup>295</sup> while twenty have passed laws addressing hate crimes motivated by sexual orientation.<sup>296</sup> There has

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<sup>291</sup> See *supra* notes Parts IV.A and IV.B.

<sup>292</sup> 539 U.S. 558 (2003).

<sup>293</sup> See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 328–37 (1999) (listing state sodomy statutes).

<sup>294</sup> 852 P.2d 44 (Haw. 1993).

<sup>295</sup> The states are Illinois (2005), Maine (2005), Maryland (2001), Minnesota (1993), Nevada (1994), New Mexico (2003), New Hampshire (1997), New York (2002), Rhode Island (1995), and Washington (2006). See *Statewide Anti-Discrimination Laws and Policies*, Human Rights Campaign, available at [http://hrc.org/Template.cfm?Section=Your\\_Community&Template=ContentManagement/ContentDisplay.cfm&contentID=14821](http://hrc.org/Template.cfm?Section=Your_Community&Template=ContentManagement/ContentDisplay.cfm&contentID=14821) (last visited Feb. 3, 2005). There are presently a total of seventeen states that prohibit discrimination on the basis of sexual orientation. See *id.*

<sup>296</sup> CAL. PENAL CODE § 422.55 (West 2005); COLO. REV. STAT. ANN. § 18-9-121 (West 2005); CONN. GEN. STAT. ANN. §§ 53a-181j-1 (West 2005); DEL. CODE ANN. tit. 11, § 1304 (2005); HAW. REV. STAT. § 846-51 (2004); KY. REV. STAT. ANN. § 532.031 (West 2005); LA. REV. STAT. ANN. § 14:107.2 (2005); ME. REV. STAT. ANN. tit. 17-A, § 1151 (2005); 2005 Md. Laws 571; MD. CODE ANN., CRIM. LAW §§ 10-301–06 (West 2005); MASS. GEN. LAWS ANN. § 265:39 (2005); MO. ANN. STAT. § 557.035 (West 2005); NEB. REV. STAT. § 28-111 (2004); NEV. REV. STAT. ANN. § 41.690 (West 2005); N.J. STAT. ANN. § 2C:16-1 (West 2005); N.M. STAT. ANN. § 31-18B-3 (West 2005); N.Y. PENAL LAW §§ 240.30–31 (McKinney 2005); 18 PA. CONS. STAT. ANN. § 2710 (2005); R.I. GEN. LAWS § 12-19-38 (2004); TENN. CODE ANN. § 40-35-114 (2005); TEX. PENAL CODE ANN. § 12.47 (Vernon 2005). There are presently thirty-one states that penalize hate crimes based on sexual orientation. See *Statewide Hate Crimes Laws*, Human Rights Campaign, available at [http://www.hrc.org/Template.cfm?Section=Your\\_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentId=19445](http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentId=19445) (last visited Feb. 3, 2006).

also been progress in the area of parent-child relationships, with New Hampshire repealing its ban against adoption by lesbians and gay men<sup>297</sup> and several states, including California, Connecticut, New Jersey, and Vermont, allowing gay and lesbian couples to adopt jointly.<sup>298</sup>

The national debate engendered by the same-sex marriage cases has contributed to progress in all of these areas because the marriage issue has increased the visibility of lesbians and gay men in ways that no other gay rights issue had done before. The cases have, in effect, helped to humanize lesbians and gay men by encouraging (at least some) skeptical Americans to better understand the full lives of those with a same-gender sexual orientation. The fact that the gay rights movement has placed such importance on the legal recognition of same-sex relationships challenges the stereotype of lesbians and gay men as individuals who are only interested in sexual gratification.<sup>299</sup> The marriage litigation, in other words, has contributed to the gap between the perception of lesbians and gay men as individuals defined exclusively through their sexual conduct and the observable reality of lesbians and gay men as full human beings who, among other traits, care for and love others.

Relatedly, the same-sex marriage litigation has required citizens and elected officials alike to think through and articulate their views on the lives and relationships of lesbian and gay people. Although those views, of course, do not always correspond with gay rights positions, the important point is that many Americans have been forced to take a position on these important issues rather than continue to pretend that lesbians and gay men either do not exist or that their interests are not even worth considering. In this sense, *Goodridge* and the other same-sex marriage cases have had a positive impact on the status of gay Americans that is similar to that which *Brown* had on the status of black Americans.

In many ways, overcoming invisibility is the first step in successfully demanding basic civil rights. It is perhaps no coincidence that *Invisible Man*, Ralph Ellison's famous novel about the pain and misery associated with the invisibility of the black

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<sup>297</sup> *N.H. Law Repeals Ban on Gay Adoptions*, BOSTON GLOBE, May 4, 1999, at B5.

<sup>298</sup> CAL. FAM. CODE § 9000 (West 2002); CONN. GEN. STAT. ANN. §45a-727 (West 2004); N.J. STAT. ANN. §9:3-43 (West 2002); see also John J. Goldman, *N.J. Settlement OKs Adoptions by Gay Couples*, L.A. TIMES, Dec. 18, 1997, at A1; VT. STAT. ANN. tit. 15, § 1204(e)(4) (2002). But see MISS. CODE ANN. § 93-17-3(2) (West 2002) (prohibiting same-sex couples from adopting); OKLA. STAT. ANN. tit. 10, §7502-1.4(A) (West 1998 & Supp. 2005) (prohibiting state courts and agencies from "recogniz[ing] an adoption by more than one individual of the same sex from any other state or foreign jurisdiction"). The constitutionality of a Florida statute, which prohibits all lesbians and gay men from adopting, FLA. STAT. ANN. § 63.042(3) (West 2002), was upheld in *Lofton v. Secretary of the Department of Children & Family Services*, 358 F.3d 804, 827 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005).

<sup>299</sup> See Shorto, *supra* note 256, at 41 (noting that "in conservative Christian circles . . . homosexuality is not an innate condition but a hedonistic way of living, one devoted to partying, drugs and wanton sex that ends, often, in illness and early death.").

man in America, was published only two years before *Brown*.<sup>300</sup> Black people after *Brown* may still have been hated by some and feared by others, but they were no longer invisible. After *Brown*, it no longer was tenable to reject out of hand the claims by African Americans to equal citizenship.

The same applies to lesbians and gay men and their position in society today. The same-sex marriage cases, and the significant and ongoing national debate that they have engendered, makes it impossible for most Americans to ignore the reality that some of their co-citizens are lesbians and gay men who are entitled to some rights and protections under law. As a result, the idea of decriminalizing sodomy or of protecting lesbians and gay men from the harms associated with discrimination and hate crimes no longer seems problematic in the same ways that it did only a generation ago.

To illustrate how far the gay rights movement has come in the years since the same-sex marriage issue exploded onto the national scene, it is helpful to contrast two issues faced by two Republican presidents twenty years apart. In the mid-1980s, as the devastation wrought by AIDS on the gay community (among others) was becoming apparent, one of the political goals of the gay rights and AIDS movements was to pressure President Ronald Reagan to utter the word "AIDS" in public.<sup>301</sup> It was thought at the time that the President's utterance of the word would be an implicit recognition of the existence of people with AIDS, many of whom were gay. And when the President did begin to say "AIDS" in public, after thousands of gay men (among others) had died of the disease, the gay rights and AIDS movements considered that a belated political victory of sorts.<sup>302</sup>

Fast forward almost twenty years later to early 2004 when President George W. Bush was forced to take a public position on same-sex marriage by explicitly supporting a federal constitutional amendment that would ban same-sex marriages. That position, of course, is inconsistent with the views of the gay rights movement, but the important point for my purposes here is to note how President Bush, as a result of the same-sex marriage litigation, was forced to acknowledge (albeit indirectly) the existence of the lives and relationships of lesbians and gay men. That acknowledgment in and of itself constitutes progress for the movement because it reduces

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<sup>300</sup> RALPH ELLISON, *INVISIBLE MAN* (1952).

<sup>301</sup> See RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* 579 (1987).

<sup>302</sup> The first time President Reagan said the word "AIDS" in public was at a press conference in 1985. See JAMES KINSELLA, *COVERING THE PLAGUE: AIDS AND THE AMERICAN MEDIA* 266 (1989). He stated at that time that he understood why parents did not want their children to be "'in school with these kids who have 'AIDS.'" *Id.* President Reagan waited until 1987 to give his first major address on the epidemic. See Timothy E. Cook & David C. Colby, *The Mass-Mediated Epidemic: The Politics of AIDS on the Nightly Network News*, in *AIDS: THE MAKING OF A CHRONIC DISEASE* 84, 111 (Elizabeth Fee & Daniel M. Fox eds., 1992); see also SHILTS, *supra* note 301, at 596 ("By the time President Reagan had delivered his first speech on the epidemic of Acquired Immune Deficiency Syndrome, 36,058 Americans had been diagnosed with the disease; 20,849 had died.").

the invisibility of lesbians and gay men. President Bush may not believe that same-sex relationships merit marital recognition, but he cannot, as President Reagan did twenty years earlier, pretend that gay people do not exist.

I argued in the previous section that but for the same-sex marriage cases, it is highly unlikely that a majority of Americans would today approve of civil unions.<sup>303</sup> The same cannot be said of progress in policy matters that do not involve relationship recognition. It is likely, in other words, that some states, for example, would have enacted laws protecting lesbians and gay men against discrimination and laws criminalizing hate crimes on the basis of sexual orientation in the absence of the same-sex marriage cases. The cases, however, by decreasing the invisibility of lesbians and gay men and by drawing attention to the problems and burdens associated with their status as second-class citizens, have made the claims by the gay rights movement in non-marital matters more normatively compelling and politically powerful.

If we balance the costs associated with the backlash to the same-sex marriage cases against the benefits, both direct and indirect, created by those cases, I believe, as I have argued here, that the latter outweigh the former. It would be a mistake, therefore, for gay rights supporters to conclude that the same-sex marriage litigation has been a strategic mistake because of the backlash that it has provoked. In my estimation, gay rights, despite the backlash, are ahead of where they would have been in the absence of the litigation.

It is not clear, however, that the same can be said once we shift the focus from looking backward to looking forward. It is fair to say that the movement has probably reached the point of diminishing returns when it comes to the progress that can result from judicial successes in the area of marriage equality. The chances that those successes will be overturned by voters are simply too great for the movement to continue to rely so heavily on the courts. The time has come, on the issue of marriage, to shift the emphasis away from the courts and toward the political and legislative arenas.<sup>304</sup> The movement, in other words, must begin to rely less on lawyers in the courtroom and more on reaching out to moderate Americans in neighborhoods, schools, and places of work and worship. Much of this can be accomplished by lesbians and gay men living openly, as single individuals and as couples, with dignity and courage so that skeptical but open-minded heterosexuals can become convinced that they have nothing to fear or lose if the society were to accept lesbians and gay men as true equals. At the same time, there must be increased efforts at political organizing and

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<sup>303</sup> See *supra* Part IV.B.

<sup>304</sup> I do not mean to suggest that the litigation option should be abandoned altogether in the pursuit of marriage equality. The lawsuits still have a role to play in states where prior gay rights victories in the legislative and judicial arenas are likely to make the recognition of same-sex marriage politically palatable. See *supra* note 25. A key question that should be asked by those who want to litigate on behalf of marriage equality in any given state is whether it is likely that legislators or voters will overturn judicial victories. If the answer to that question is either yes or uncertain, then it would be prudent to wait on the lawsuit.

grass-roots mobilizing to convince legislators of the need to provide at least some legal protections to the relationships and families of lesbians and gay men.<sup>305</sup>

This way of effecting change can be slow and laborious, without guarantees of success. Nonetheless, we have already seen some progress in the political and legislative arenas. Recently, the Connecticut legislature enacted a civil union law<sup>306</sup> while the California legislature approved a comprehensive domestic partnership statute.<sup>307</sup> What is particularly promising about these legislative developments is that they were the result of elected officials acting on their own, presumably at the behest of their constituents, in the absence of court-mandated change. Unlike their counterparts in Massachusetts and Vermont, lawmakers in Connecticut and California provided significant forms of legal recognition to lesbian and gay relationships that are important and meaningful because they wanted to and not because a court forced them to do so.<sup>308</sup> Although I am skeptical that these legislative successes would have been possible this quickly in the absence of the national debate engendered by the same-sex marriage litigation in states like Massachusetts and Vermont, it seems clear that, going forward, lawsuits on their own will not, at least in the short run, provide meaningful equality for lesbians and gay men in the area of relationship recognition because of the likelihood of voter backlash.

To return once again to *Brown*, de jure racial segregation did not end with the issuance of that opinion. Instead, the opinion created the necessary legal and political space that allowed other institutions, most notably the legislative and executive branches of the federal government, eventually to become involved to remedy what the Court had declared was unacceptable inequality. Similarly, same-sex marriage opinions such as *Goodridge* are helpful in focusing national attention on the equality claims of lesbians and gay men. But *Goodridge*, like *Brown*, is the beginning and not the end. The more difficult and more time-consuming project entails reaching out to the hearts and minds of straight Americans; it is they who must eventually be convinced that the inequality inherent in prohibiting lesbians and gay men from marrying is indeed unacceptable.

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<sup>305</sup> Since the electoral defeats of 2004, gay rights advocacy groups have developed a fifteen-year strategic plan to mobilize politically across the country on behalf of same-sex marriage. See Graff, *supra* note 290, at 41. The effort includes a plan to disburse funds to candidates for elected office who support gay rights positions and to build coalitions with civil rights groups and unions. See *id.* at 42–43. The strategy also calls for the reaching out to individual voters. In California, for example, activists intend to have “two million conversations with individual Americans about why gay and lesbian couples need and deserve access to [marriage].” *Id.* at 44.

<sup>306</sup> See Yardley, *supra* note 3.

<sup>307</sup> CAL. FAM. CODE. §§ 297–299.6 (West 2004). The California Domestic Partner Registration Act was enacted in 1999 and became fully effective in 2005. See Bossin, *supra* note 243, at 419. In September 2005, the California legislature became the first in the country to enact a bill allowing same-sex marriages. Governor Arnold Schwarzenegger vetoed the bill three weeks later. *California: No Same-Sex Marriages*, N.Y. TIMES, Sept. 30, 2005, at A18.

<sup>308</sup> See Yardley, *supra* note 3 (noting that many of the Connecticut “lawmakers said . . . that their support for civil unions was less a defensive act against a potential court ruling than the obvious next step for a state with a 15-year history of expanding gay rights.”).

## CONCLUSION

Although it is understandable that so many gay rights supporters feel despair and anguish in the face of the severe backlash against gay rights that we are currently experiencing, *Brown* and its aftermath teach us that backlash is a part and parcel of the history of civil rights struggles in this country. Those struggles are, at their core, about getting the majority to give up privileges, both tangible and intangible, that reinforce their perceived superiority. The fact that, prior to *Brown*, laws and regulations kept blacks out of the white (and much better) schools created and reinforced the view in the minds of many whites that they were superior to blacks.<sup>309</sup> And for years after *Brown*, many of those whites, especially in the South, did everything they could to retain the long standing regime of privileges that benefited them at the expense of blacks.<sup>310</sup>

Similarly today, the maintaining of the institution of marriage as exclusively heterosexual reinforces the views of many straight individuals that they are morally superior to lesbians and gay men because their relationships are more meaningful, valuable, and important. And despite cases such as *Goodridge* — indeed, *because* of cases such as *Goodridge* — many heterosexuals will do everything they can to maintain the long standing regime of privileges that benefit them at the expense of lesbians and gay men.

Once we understand that backlash is an intrinsic component of civil rights struggles because those struggles aim to eliminate cherished privileges enjoyed by majority groups, the (re)occurrence of backlash is both less threatening and surprising, if not, at least in the short run, necessarily less harmful. The aftermaths to *Brown* and *Goodridge* teach us that backlash is a predictable result of significant civil rights advances. The aftermath to *Brown*, however, also teaches us that the backlash can be overcome.

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<sup>309</sup> See *supra* notes 112–16 and accompanying text.

<sup>310</sup> See *supra* notes 117–26, 134–45 and accompanying text.