GOODRIDGE AND "THE JUSTICIARY" OF MASSACHUSETTS

LYNN D. WARDLE*

"The Justiciary of Aragon . . . became by degrees the lawmaker."[1]

I. INTRODUCTION: HAS THE MASSACHUSETTS SUPREME JUDICIAL COURT BECOME LIKE THE" JUSTICIARY OF ARAGON"?

On November 18, 2003, in *Goodridge v. Department of Public Health*,[2] the Massachusetts Supreme Judicial Court (SJC), by a vote of 4 to 3, declared that the state marriage laws allowing only male-female couples to marry and denying all benefits of marriage to same-sex couples violates the Massachusetts Constitution. The seven members of the SJC produced five opinions. Chief Justice Margaret Marshall wrote "the court's opinion."[3] Justices Ireland and Cowan joined Marshall's opinion without writing separate opinions. Justice Greaney, filed a concurring opinion in which he declared that he "agree[d] with the result reached by the court, the remedy ordered, and much of the reasoning in the court's opinion."[4] Justices Spina,[5] Sosman,[6] and Cordy.[7] filed dissenting opinions, and all joined in one another's dissenting opinions.

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* Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, UT 84602. I have benefited from the valuable research of Justin W. Starr, and Brinton Wilkins, and from the research of two students in my Origins of the Constitution Seminar, Todd K. Jenson *Judicial Review As the Framers Intended* (Winter 2004), and Darren R. Watts, *The Judicial Mandate As Understood by the Founders: A Study of the Debate on the Role and Power of the Courts to Review the Acts of Other Branches in the Constitutional Convention* (Winter 2003). This article is based upon a paper I presented on June 11, 2004, at a Conference on "Same-Sex Marriage in Massachusetts: The Meaning and Implications of *Goodridge v. Department of Public Health*" at Southern New England School of Law.

[1] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 463 (Adrienne Koch, ed., Ohio Univ. Press 1966) (statement of Mr. Dickenson, Aug. 15, 1787).

[2] 798 N.E.2d 941 (Mass. 2003).

[3] *See id.* at 948 (Greaney, J., concurring). [Marshall's opinion referred to hereinafter "the *Goodridge* opinion."]

[4] *Id.* at 970 (Greaney, J. concurring). Greaney's statement is interesting, for had Greaney not joined Marshall's opinion, her opinion would have been a mere plurality opinion and not the opinion of the court. Yet while Greaney both calls Marshall's opinion "the court's opinion," he indicates that he does not agree with some of her reasoning. Perhaps Justice

Following its introduction, the majority opinion contains a six-paragraph section of legislative interpretation holding that the Massachusetts marriage laws do not allow same-sex couples to marry.[8] This part of the opinion contains credible, straightforward, legal analysis. The court clearly states the applicable legal standards: "We interpret statutes [1] to carry out the Legislature's intent, [2] determined by the words of a statute [3] interpreted according to 'the ordinary and approved usage of the language.'"[9] The court shows the "ordinary and approved" meaning of the term "marriage" by reference to Black's Law Dictionary, by prior decisions, and from the common law,[10] all showing "the long-standing statutory understanding, derived from the common law that 'marriage' means the lawful union of a woman and a man."[11] The court even reinforces this conclusion by reference to related statutes, all of which show that "[t]he only reasonable explanation is that the Legislature did not intend that same-sex couples be licensed to marry."[12] The analysis is crisp, coherent, and logical.

The Court then launches into a long section addressing the constitutional question whether such legislation violates the Massachusetts Constitution.[13] From the outset the analysis in this section differs dramatically from that of the previous section. Where the legal analysis of the statutory interpretation sets forth a clear standard, nowhere in the analysis of the constitutional provisions is there mention of anything approaching a clear legal standard. While the statutory analysis section looked to binding precedents, legal history, and accepted usage, the constitutional analysis section does not look to such sources of law. Instead, it uses legal sources as mere illustrations, slogan-sources, and proof-texts, rather than as binding precedent. While the statutory interpretation is almost ascetic in its spare, direct, logical reasoning, the constitutional sections rely instead upon rhetorical flourish, shoot-from-the-hip philosophizing, and occasional moralizing. The contrast in analytical style in *Goodridge* between the statutory interpretation section (legal, analytical, objective, logical) and the constitutional interpretation section (breezy, subjective, fluffy, rhetorical, lacking standards, *a priori*) is one of the most remarkable characteristics of Chief Justice Marshall's opinion. Likewise, Justice Greany's concurring opinion resorts, especially in the final paragraph, to what can most charitably be described as judicial sermonizing and preaching.[14]

Greaney meant that he agreed with Marshall's opinion enough to sign it, but he thought that it could be improved in the ways he explained in his concurring opinion.

[5] *Id.* at 974 (Spina, J., dissenting).

[6] *Id.* at 978 (Sosman, J., dissenting).

[7] *Goodridge*, 798 N.E.2d at 983 (Cordy, J., dissenting).

[8] *Id.* at 951-53.

[9] *See id.* at 952.

[10] *Id.*

[11] *Id.* at 953.

[12] *Id.*

[13] *See Goodridge*, 798 N.E.2d at 953-68.

[14] *See id.* at 973. ("I am hopeful that our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not

The prevailing Justices' opinions reflect a radically subjective and self-defining view of marriage. In *Goodridge* the question concerned simply "plaintiffs' right to marry their chosen partner,"[15] and the court described civil marriage as:

> at once *a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.* "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Because *it fulfils yearnings for security, safe haven, and connection that express our common humanity,* civil marriage is an esteemed institution, and the decision whether and whom to marry is *among life's momentous acts of self- definition.*[16]

Moreover, "[w]ithout the right to marry -- or more properly, the right to choose to marry -- one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'"[17] Denying same-sex couples the right to marry "confers an official stamp of approval on [a] destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect."[18] Same-sex couples are indistinguishable from conjugal couples in terms of advancing the state's interests in marriage:

> [E]xtending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and

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referring here to acceptance in the sense of grudging acknowledgment of the court's authority to adjudicate the matter. My hope is more liberating. The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher, therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do.")

[15] *Id.* at 954-55.

[16] *Id.* at 954-55 (emphasis added).

[17] *Id.* at 957 (citing *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999)).

[18] *Goodridge*, 798 N.E.2d at 962. Chief Justice Marshall wisely chose not to try to explain the court's questionable assumption that finding some relationships are "unstable and inferior" to conjugal unions in terms of accomplishing state interests relating to marriage means that such relationships "are not worthy of respect." Clearly, that close relatives cannot marry does not mean that those very important relationships are not worthy of respect.

commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.[19]

Repeatedly finding the state's denial of marital status to same-sex couples to be irrational,[20] the court redefined "civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."[21] Justice Greaney agreed, stating in his concurring opinion agreed that "as a matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families."[22]

The court stayed its ruling in *Goodridge* for 180 days to allow the legislature to address the matter. In the final paragraphs of the *Goodridge* decision, the Court was vague about whether it interpreted the state constitution to allow same-sex couples to marry, or whether another form of domestic union for same-sex couples with the same, or substantially all of the benefits of marriage, would suffice.[23]

The leadership of the Massachusetts Senate proposed a bill to create Vermont-style "civil unions" with all of the legal status, rights, and benefits of marriage for

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[19] *Id.* at 965.

[20] *Id.* at 960 ("[A]ny law failing to satisfy the basic standards of rationality is void."); *id.* (standard of review); *id.* at 961 ("We conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny."); *id.* at 963 (denying "rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the 'optimal' child rearing unit."); *id.* at 964 ("It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."); *id.* ("An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy."); *id.* at 966 (courts in last instance must decide whether a rational basis exists for legislation); *id.* at 968 ("The [same-sex] marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason."); *id.* at 972 (Greaney, J., concurring) ("The justifications put forth by the State to sustain the statute's exclusion of the plaintiffs are insufficient").

[21] *Id.* at 969.

[22] *Id.* at 973 (Greaney, J., concurring). This statement is notable for its boldness in blatantly misrepresenting the Commonwealth's arguments justifying conjugal marriage. It also contradicts the Greany's personal conviction, declared just a few lines earlier in footnote 5, that "confining eligibility in the institution, and all of its accompanying benefits and responsibilities, to opposite-sex couples is basely unfair." *Id.* at n.5.

[23] *Goodridge*, 798 N.E.2d at 969. ("In their complaint the plaintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil marriage violates Massachusetts law. We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.")

same-sex couples, but without the label of "marriage."[24] The Senate also filed a special proceeding with the justices seeking an advisory opinion (which is allowed under the Massachusetts Constitution) about whether the proposed "civil union" scheme would satisfy the *Goodridge*.[25] On February 3, 2004, the SJC rendered its second same-sex marriage opinion, holding (by the same 4 to 3 vote) that to create "civil unions" for same-sex couples while continuing to forbid them to marry would "violate[] the equal protection and due process requirements of the Constitution of the Commonwealth and the Massachusetts Declaration of Rights...The [civil union] bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples."[26]

On March 29, 2004, following the SJC's rejection of civil unions the Massachusetts legislature passed a proposed constitutional amendment to ban same-sex marriages but allow same-sex civil unions.[27] House Bill 3190, as amended, declares that "only the union of one man and one woman shall be valid or recognized as a marriage in the Commonwealth," but also provides that "[t]wo persons of the same sex shall have the right to form a civil union."[28] However, the procedure for amending Masachusetts' Constitution is very cumbersome, lengthy,

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[24] S. 2175, 2004 Legis., 183rd Gen. Ct., (Ma. 2004), *available at* http://www.mass.gov/legis/bills/st02175.htm (last visited Sept. 27, 2004).

[25] Opinion of the Justices to the Senate, 802 N.E.2d 565, 566-67 (Mass. 2004).

[26] *Id.* at 572.

[27] Rick Klein, *Vote Ties Civil Unions to Gay-marriage Ban, Romney to Seek Stay of SJC Order,* BOSTON GLOBE March 30, 2004, at A1, *available at* http://www.boston.com/news/local/massachusetts/articles/2004/03/30/vote_ties_civil_unions_to_gay_marriage_ban/ (last visited May 11, 2004); *see also* Jill Schachner Chanen, *The National Pulse: Gay Marriages Halter, But 3,000 Unions Upheld, Oregon Judge Urges Legislature to Recognize Rights of Same-Sex Couples*, 3 No. 17 A.B.A. J. E-Report 3, 5 (2004).

[28] H.R. 3190, 2004 Legis., 183rd Gen. Ct., *available at*, http://www.state.ma.us/legis/journal/jsj032904.htm (last visited May 11, 2004). The text of the proposed amendment reads:

The unified purpose of this Article is both to define the institution of civil marriage and to establish civil unions to provide same-sex persons with entirely the same benefits, protections, rights, privileges and obligations as are afforded to married persons, while recognizing that under present federal law benefits same-sex persons in civil unions will be denied federal benefits available to married persons.

It being the public policy of this Commonwealth to protect the unique relationship of marriage, only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth. Two persons of the same sex shall have the right to form a civil union if they otherwise meet the requirements set forth by law for marriage. Civil unions for same sex persons are established by the Article and shall provide entirely the same benefits, protections, rights, privileges and obligations that are afforded to persons married under the law of the commonwealth. All laws applicable to marriage shall also apply to civil unions.

This Article is self-executing, but the general court may enact laws not inconsistent with anything herein contained to carry out the purpose of this Article.

difficult, and anti-populist. Therefore, before House Bill 3190 becomes effective, the next Massachusetts legislature must vote to reconfirm it, and then the citizens of Massachusetts must vote to ratify the proposed amendment during the next general election (in November 2006).[29]

On Monday, May 17, 2004, the 180-day stay in Massachusetts expired, and *Goodridge* took effect. An estimated 2,500 marriage licenses were issued to same-sex couples in Massachusetts in the first week, following the legalization of same-sex marriage.[30] It was reported, three weeks later, that the number of same-sex marriages had slowed to "just a trickle."[31] The rate of same-sex marriages likely slowed due to the fact that Massachusetts law forbids the formation and denies the validity of marriages involving citizens of other states if the marriage is forbidden by those states.[32] Governor Romney has insisted upon strict compliance with that statute, thus precluding marriages between non-resident gay and lesbian couples.[33]

Goodridge revolutionized marriage law and the institution of marriage in Massachusetts. People who favor legalizing same-sex marriage are pleased with the result, while people who oppose legalizing same-sex marriage are displeased with the result. This article addresses a different, deeper, structural issue of constitutional law and republican self-government; namely, whether the *Goodridge* decision is consistent with the principle of separation of powers -- whether the judiciary can legitimately redefine marriage by judicial interpretation. This is an important issue because if the judiciary cannot be trusted with the power of judicial review and uses it instead to promote judges' personal policy preferences, then the judiciary's independence is in jeopardy.

Part II reviews the background for and implications of an intriguing remark made by one of the most astute lawyers at the Constitutional Convention in Philadelphia in 1787. John Dickenson, expressing opposition to "the power of the Judges to set

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[29] There is a lesson here about making the amendment process too remote from, and inaccessible to, the people.

[30] Christine MacDonald, Bill Dedman, *About 2,500 Gay Couples Sought Licenses in 1st Week*, BOSTON GLOBE, June 17, 2004, at A1. *See generally supra* note 25 and accompanying text.

[31] *See* Jason Lefferts, *Gay-marriage License Deluge Slows To A Trickle*, LOWELL SUN June 9, 2004.

[32] MASS. GEN. L. ch. 207, § 11 (2004). The section of the marriage chapter, entitled "Non-residents; marriages contrary to laws of domiciled state," provides: "No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void." Therefore, persons from at least 39 other states (and arguably from all 49 other states) where same-sex marriages would be void (at least they are not authorized) are prohibited by Massachusetts from marrying in Massachusetts, and any such marriages that are contracted in Massachusetts are, under Massachusetts law, "null and void."

[33] Jonathan Finer, *Only Mass. Residents To Get Marriage Licenses; Romney Won't Allow Unions for Out-of-State Gays*, WASHINGTON POST, Apr. 30, 2004, at A3; Yvonne Abraham, *Romney: Gay Outsiders Can't Marry in Mass.*, BOSTON GLOBE, Apr. 25, 2004, at A1.

aside the law,"[34] observed that "[t]he Justiciary of Aragon . . . became by degrees, the lawmaker."[35] The historical basis for this comment is reviewed, and the concern about creeping intrusions upon and usurpation of the lawmaking power by the judiciary is noted. The balance of this article considers whether in *Goodridge* the Supreme Judicial Court acted as the "Justiciary" of Massachusetts, in violation of basic principles of separation of powers.

Part III examines Massachusetts' long history of rejection of law-making by judges. The Massachusetts delegation to the Constitutional Convention of 1787 made a remarkable contribution to establishing separation of powers and rejecting judicial policy-making in American government. The influence of John Adams' writings, including the Massachusetts Constitution of 1780, of which he was the primary author, in repudiating judicial law-making is also noted. The long line of SJC precedents reiterating the importance of the separation of powers is also briefly summarized, and *Goodridge* is examined in light of those historical concerns about judicial violation of separation of powers.

The special role of Chief Justice Margaret H. Marshall to preserve the separation of powers is considered in Part IV. She knew what she was doing in *Goodridge*. She previously spoke eloquently about the importance of separation of powers. With her background in South African culture and history, she, especially, should have understood the critical importance for judicial integrity and for separation of powers of judges' and resisting the temptation to dramatically intrude into the law-making function.

In Part V, this article concludes that *Goodridge* is an illegitimate decision in terms of method, substance, and procedure. The court had no authority to use its power of judicial review to redefine the institution of marriage to include same-sex couples; it so doing it usurped a power explicitly delegated in the state constitution to the legislature. Those who value the long Massachusetts' (and American) tradition of an independent judiciary recognize the threat that unprincipled judicial activism, like that of the SJC in *Goodridge*, creates for the judicial branch.

II. THE HISTORY OF THE "JUSTICIARY OF ARAGON"

During the debates in the Constitutional Convention in Philadelphia in 1787, several delegates proposed a "Council of Revision" be created including both executive branch officials and members of the national judiciary, who would endorse or reject proposed legislation before it was enacted. Governor Randolph of Virginia included such a proposal in his fifteen Resolves which provided the framework for the discussions in the Philadelphia Convention of 1787.[36]

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[34] MADISON *supra* note 1, at 463 (statement of Mr. Dickenson, Aug. 15, 1787).

[35] *Id.*

[36] *Id.* at 52 ("Res[olve]d that the Executive and a convenient number of the National Judiciary, ought to compose a 'Council of Revision' with authority to examine every act of the National Legislature before it shall operate, and every act of a particular legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount

Presumably, the Council of Revision would be involved in the political give-and-take surrounding the enactment of legislation. Several delegates found the idea of judges being involved in such a political process to give it the benefit of their legal acumen very attractive and efficient; and even after the delegates rejected the proposal some key delegates reintroduced the idea several times. Other delegates feared the potential for tyranny of such a fundamental violation of the principle of separation of powers.[37] The delegates debated the Council of revision proposal extensively, on several occasions, during the Constitutional Convention.[38] On August, 15, 1787, during one of those debates, one of the most interesting comments about the judicial power and the principle of separation of powers was made by arguably the best educated lawyer then at the convention, John Dickenson of Delaware.[39] Dickenson was one of the few American lawyers who had actually formally studied law in England; he had read law in Philadelphia, then studied law in London at Middle Temple, then in the Inns of Court, and finally at Westminster.[40] Following the statement of the ever-practical and carefully suspicious Mr. Sherman of Connecticut that he "disapproved of Judges meddling in politics and parties,"[41] Dickenson explained that he, too, opposed "the power of the Judges to set aside the law. He thought no such power ought to exist. . . . The Justiciary of Aragon he observed became by degrees, the lawmaker."[42]

The reference to the "Justiciary of Aragon" is an historical reference that is little understood today, but it would have been very ominous to educated students of legal and political history in 1787 for two reasons. First, the long history of Spanish tyrannies was well-known in colonial America; Spain long threatened the British Isles from which most of the Founders (or their ancestors) had come.[43] At the time of the convention, Spain still had vast holdings on the American continent and continued to have possessions and influence for many decades after the Constitutional Convention of 1787.[44]

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to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [ ] members of each branch."

[37] *See infra* Part III.

[38] *See, e.g.,* MADISON, *supra* note 1, at 61-66 (June 4, 1787); *id.* at 79-81 (June 6, 1787); *id.* at 336-43 (July 21, 1787); *id.* at 461-65 (Aug. 15, 1787); *see further infra*, Part III.

[39] George Wythe might have been identified as the best educated and most able lawyer at the convention; he taught law at William & Mary in Williamsburg, Virginia (he taught Thomas Jefferson, among others). However, he had left Philadelphia by this time due to his wife's illness.

[40] MILTON E. FLOWER, JOHN DICKENSON CONSERVATIVE REVOLUTIONARY 10-19 (University Press of Virginia, Charlottesville 1983).

[41] MADISON, *supra* note 1, at 464.

[42] *Id.* at 463.

[43] *See, e.g.,* THE OXFORD HISTORY OF ENGLAND 69-71 (George Clark ed., Oxford University Press 1961).

[44] *See generally* ABRAHAM P. NASATIR, SPANISH WAR VESSELS ON THE MISSISSIPPI 1-9, (1968); JOHN PRESTON MOORE, *Anglo-Spanish Rivalry on the Louisiana Frontier 1763-68, in* THE SPANISH IN THE MISSISSIPPI VALLEY 1762-1804, 72-86 (John Francis McDermott ed.,

Second, eighteenth-century legal and historical literature available to the Founders described the "Justiciary of Aragon." In 1769, nearly two decades before the Philadelphia convention, William Robertson published a volume entitled "A View of the Progress of Society in Europe from the Subversion of the Roman Empire to the Beginning of the Sixteenth Century," which included a description of the justiciary, or *justiza*,[45] of Aragon and how it became the most influential lawmaking body in the kingdom.[46] Robertson reported the *justiza* had tremendous power from the thirteenth through the fifteenth centuries in Aragon.[47] He wrote:

> [T]he Aragonese had recourse to an institution peculiar to themselves, and elected a *justiza*, or supreme judge. This magistrate, whose office bore some resemblance to that of the ephori in ancient Sparta, acted as the protector of the people and the comptroller of the prince. The person of the *justiza* was sacred, his power and jurisdiction almost unbounded. *He was the supreme interpreter of the laws.* Not only inferior judges, but *the kings themselves, were bound to consult him* in every doubtful case, and to receive his responses with implicit deference. *An appeal lay to him from the royal judges*, as well as from those appointed by the barons within their respective territories. *Even when no appeal was made to him, he could interpose by his own authority*, prohibit the ordinary judge to proceed, take immediate cognisance of the cause himself, and remove the party accused to the manifestation, or prison of the state, to which no person had access but by his permission. *His power was exerted with no less vigour and effect in superintending the administration of government*, than in regulating the course of justice. *It was the prerogative of the justiza to inspect the conduct of the king. He had a title to review all the royal proclamations and patents, and to declare whether or not they were agreeable to law, and ought to be carried into execution. He, by his sole authority, could exclude any of the king's ministers from the conduct of affairs, and call them to answer for their mal-administration.* He himself was accountable to the cortes only for the manner in which he discharged the

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1974); ARTHUR A. NATELLA, JR., THE SPANISH IN AMERICA 1513-1979 (Oceana Publications 1980).

[45] Dickenson's use of "justiciary" rather than "judge" or *justiza* reflects "Hallam's 'History of the Middle Ages,' Chap. IV.," where "Hallam calls the *Justiza* the Justiciary. Spinoza suggested, however, that "the literal translation, Justice, seems warranted by our own English use of the word to designate certain judges." BENEDICT DE SPINOZA, A POLITICAL TREATISE – PART 2 343, n.1 (1677), *available at* http://www.yesselman.com/TPguset2.htm (seen Sept. 28, 2004); *see also infra* note 57 (citing Hallam's View of the State of Europe). Thus, Justice Marshall is literally *Justiza* Marshall, and the justices of the SJC are literally "the Justiciary" of Massachusetts.

[46] William Robertson, *A View of the Progress of Society in Europe from the Subversion of the Roman Empire to the Beginning of the Sixteenth Century* (1769), *available at* http://www.eliohs.unifi.it/testi/700/robertson/proofs30-35.htm (last visited Sept. 22, 2004).

[47] *Id.* at 584, n.xxxi.

> duties of this high office, and performed functions of the greatest importance that could be committed to a subject.[48]

The *justiza* and nobility had such power in the kingdom of Aragon that, at one point, only "a very small portion of power remained in the hands of the king."[49]

The *justiza* initially held office at the pleasure of the king, and "the privilege of the union [of the nobility with balancing power] was a sufficient and effectual check to any abuse of the royal prerogative."[50] Robertson suggests that, at some point, the people looked upon the *justiza* as "the guardian of their liberties."[51] Eventually, "when the privilege of the union was abolished as dangerous to the order and peace of society, the government agreed that the *justiza* should continue in office during life," and a law guaranteeing the *justiza* life-tenure was enacted in 1442.[52] Later, "[t]he ancient constitution of their country was overturned, and despotism established on the ruin of its liberties . . . ."[53] The *justiza* "possessed . . . vast powers" and, at least initially, was subject to some control by the nobility, from whose lower ranks the *justiza* was selected.[54] Later, on occasion, the *justiza* even overruled the King, as in one case regarding the powers which an heir to the throne might exercise.[55] While Robertson emphasized the good the *justiza* could do, he also acknowledged the almost plenary, totalitarian power these judges came to wield in the kingdom of Aragon.

Other historical scholarship with which the Founders might have been familiar confirmed the tremendous power of the *justiza* of Aragon in the thirteenth, fourteenth and fifteenth centuries. For instance, Spinoza described the *justiza* (which he called "the Justice") as "the supreme interpreter, and therefore supreme judge," in this period in Aragon, and noted that he held power for life. The *justiza* also had

> "the absolute right of revising and annulling all sentences passed upon any citizen by other courts, civil or ecclesiastical, or by the king himself, so that every citizen had the right to summon the king himself before this council. (7:30:9) [Moreover], they once had the right of electing and deposing the king."[56]

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[48] *Id.* at 131-32 (emphasis added).

[49] *Id.* at 132-33.

[50] *Id.* at 584, n.xxxi.

[51] Robertson, *supra* note 46, at 584, n.xxxi.

[52] *Id.* at 584, n.xxxi.

[53] *Id.*

[54] *Id.* at 585, n.xxxi. The *justiza* were periodically examined by "the court of inquisition" which "met at three stated terms in each year," and had power to impose capital punishment upon *justiza* who violated their powers or trust. *Id.*

[55] *Id.*

[56] SPINOZA, *supra* note 45, at Ch. XI-B, at 343.

British historians were fascinated with the law and constitutional structures in medieval Europe including the justiciary of Aragon. For instance, Henry Hallam's *View of the State of Europe During the Middle Ages,* published less than three decades after the Constitution was ratified, cited and summarized numerous prior histories of Aragon in presenting his thorough description of the history and power of the officer he called, as did Dickenson, "the justiciary" of Aragon.[57] Hallam noted: "Gradually, as notions of liberty became more definite, and laws more numerous, the reverence paid to their permanent interpretations grew stronger."[58] Hallam described the immense power of "the justiciary" whose decrees at one point even superceded those of the king of Aragon,[59] and acknowledged that this judicial officer had "high powers, imported for the prevention of abuses, [that c]ould themselves be abused, necessitating the inquisitorial office."[60]

Likewise, more recent scholarship confirms the immense power of the "justiciary" or *justiza* of Aragon from roughly the twelfth through the fifteenth centuries.[61] Professor Bisson used the term *justicia* for this unique Aragonese judicial officer.[62] Professor Shneidman's multi-volume history, *The Rise of the Aragonese-Catalan Empire 1200-1350*, noted that "both the kings and the aristocracy recognized the preeminence of the Justicia of Aragon for at least a century before 1348."[63] Shneidman noted that "initially the individual called Justicia was more than a local judge,"[64] and that "there is no mention made of his primacy until the end of the fourteenth century, when the Cortes officially recognized his preeminence."[65] This confirms Mr. Dickenson's observation made during the Constitutional Convention opposing "the power of the Judges to set aside the law," because the "Justiciary of Aragon . . . *became by degrees, the lawmaker.*"[66]

Professor Shneiderman asked how "the local Justicia of Zaragoza became the [powerful] chief justice of Aragon." His answer was intriguing: "[I]t would seem that the institution as it evolved in Aragon was unique and resulted from a

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[57] HENRY HALLAM, VIEW OF THE STATE OF EUROPE DURING THE MIDDLE AGES 529-35 (1882).

[58] *Id.* at 529.

[59] *Id.* at 530-33.

[60] *Id.* at 534.

[61] *See generally* JOSEPH F. O'CALLAGHAN, A HISTORY OF MEDIEVAL SPAIN 598-99 (1975).

[62] T.N. BISSON, THE MEDIEVAL CROWN OF ARAGON, A SHORT HISTORY 88 (1986) (The *justicia* dates from the Union of 1283); *id.* at 92 (king agreeing not to proceed against members of the union without approval of the *justicia*); *id.* at 109 (From the mid-fourteenth century, the *justicia* was "effectively the defender of Aragonese liberties"); *id.* at 131 (the *justicia* were "agents of the estates" [nobility] and countered the power of the king); *id.* at 140 (king's agreement to regulation in 1442 "strengthen[ed] the *justicia's* position"); *id.* at 158 (the *justicia* weakened after 1445).

[63] J. LEE SHNEIDMAN, THE RISE OF THE ARAGONESE-CATALAN EMPIRE: 1200-1350 126-27 (1970).

[64] *Id.* at 126.

[65] *Id.*

[66] MADISON, *supra* note 1, at 463 (Mr. Dickenson, August 15) (emphasis added).

combination of factors . . . ."[67] Probably the best reason for the establishment of the Justicia was given in the *Rueros of Sobrarbe* by the nobles who created the institution: "[S]o that we will not suffer the loss or reduction of our laws and liberties, there will be a justice of mediation to whom it will be allowed and permitted to appeal from the monarch."[68] Apparently, the good intention of the nobles who created the office of "the justiciary" was to give a judicial officer the power to protect the laws and liberties from usurpation or abuse by the king. Over the years, however, "the Justicia became the leading political figure in the state"- "by degrees" as Dickenson states.

The action of the Massachusetts SJC in *Goodridge*, in ordering the legalization of same-sex marriage, reminds one of the power of "the Justiciary of Aragon" at its pinnacle. The Massachusetts *Justiza* acted without any credible legal basis whether in text, history, or precedent for doing so. Although the reasons given in Chief Justice Marshall's majority opinion and Justice Greaney's concurring opinion are interesting and moving, they are essentially policy preferences, not legal analysis. They lack the adherence to objective standards, discipline, consistency with legal text and precedent, as well as the moderation of credible legal analysis. Like the Justiciary of Aragon at the height of its power, the SJC in *Goodridge* acted as the ultimate lawmaker, using its power of constitutional interpretation to dictate a radical redefinition of marriage.

III. MASSACHUSETTS' RICH SEPARATION-OF-POWERS LEGACY

A. The Massachusetts Delegates to the Constitutional Convention in 1787

The SJC's violation of the separation of powers doctrine in *Goodridge* betrays a long, and important legacy. Massachusetts led the way in establishing separation of powers in the structure of American government. The separation of powers specified in the United States Constitution, especially the principle that judges should not have the power to make laws, was chiefly the work of the Massachusetts delegates sent to the Constitutional Convention. Massachusetts sent four delegates to Convention: Elbridge Gerry, Nathan Gorham, Rufus King, and Caleb Strong.[69] All active in supporting separation of powers and all made strong statements about

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[67] SHNEIDMAN, *supra* note 63, at 126.

[68] *Id.* Shneidman suggests that "[t]he king's purpose in supporting an independent judiciary seems obvious: having neither the physical force nor the weight of tradition to curtain the nobility's activities, the kings welcomed a mediator whose authority the aristocracy would respect. Why the ricos ombres, who held the military and political power in the state, should have sanctioned a restrain on their actions can only be surmised. [Shneiderman surmises that the Romanification of Aragon law complicated cases to the point that the nobility could no longer decide cases on their own,] they were forced to leave legal matters to trained jurists. . . . In return for a legal check on the sovereign's powers the ricos ombres were willing to surrender some of their power." *Id.* at 127.

[69] CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA xviii (1966 ed., 1986).

the need to prevent the judiciary from assuming legislative or executive law-making functions. Indeed, the Massachusetts delegation constituted the strongest state delegation opposed to law-making by judges, repeatedly expressing grave concerns about the need for judicial restraint, and consistently espousing the need for separation of powers to prevent the judiciary from becoming a law-making body.

On June 4, 1787 for example, the Committee of the Whole first considered Proposition 8 of the Randolph Plan relating to the creation of a Council of Revision including "a convenient number of the National Judiciary."[70] Mr. King of Massachusetts supported Gerry's motion to postpone consideration of that part of the resolution, observing that "[j]udges ought to be able to expound the law ... free from the bias of having participated in its formation."[71] Likewise, on July 21, in the debate over Wilson's motion that "the supreme Nat[iona]l Judiciary should be associated with the Executive in the Revisionary Power,"[72] Caleb Strong expressed his opposition. Madison later noted: "Mr. Strong thought with Mr. Gerry that the power of making [the laws was] to be kept distinct from that of expounding, the laws. No maxim was better established. The judges, in exercising the function of expositors, might be influenced by the part they had taken in framing the laws."[73]

In that same debate, Nathaniel Gorham of Massachusetts also expressed his opposition to allowing judges to have part of the Revisionary power.

> Mr. Gorham did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Nor can it be necessary as a security for their constitutional rights. The Judges in England have no such additional provision for their defense, yet their jurisdiction is not invaded. He thought it best to let the Executive alone be responsible, and at most to authorize him to call on Judges for their opinions.[74]

Ten delegates, three of whom from Massachusetts, were recorded as having spoken vigorously in the debate on Wilson's motion that day. Several of the delegates, including Gorham, spoke more than once. As the debate raged, Mr. Gorham noted "two objections ag[ain]st admitting the Judges to share in [the power to check the legislature] which no observations on the other side seem[ed] to obviate." One of the objections was "the Judges ought to carry into the exposition of the laws not prepossessions with regard to them. . . . ."[75] Wilson's motion failed, getting the support of only three states.[76]

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[70] MADISON *supra* note 1, at 32 (Mr. Randolph, May 29).
[71] *Id.* at 61 (Mr. King, June 4).
[72] *Id.* at 336 (Mr. Wilson, July 21).
[73] *Id.* at 338 (Mr. Strong, July 21).
[74] *Id.* at 337 (Mr. Gorham, July 21).
[75] MADISON, *supra* note 1, at 342-43 (Mr. Gorham, July 21).
[76] *Id.* at 343.

While Gorham, King and Strong were firmly opposed to judges' making laws or setting legal policy, the fourth Massachusetts delegate was even more adamant. No delegate was more opposed to letting judges have a voice in making the laws than Elbridge Gerry of Massachusetts. On June 4, when the delegates first discussed Randolph's proposal that the judiciary form part of a Council of Revision, Gerry decried the fact that in "some States the Judges had actually set aside the laws as being ag[ain]st the Constitution. This was done too with general approbation. It was quite foreign from the nature of [th]e office to make the judges of the policy of public measures."[77] While he did not oppose judges having power to decide the constitutionality of laws, he did not believe that they had powers to nullify.[78] He proposed giving the Executive a veto power instead of the Judiciary, and the proposal passed the Committee of the Whole.[79]

On July 21, Wilson revived his motion that "the supreme Nat[iona]l Judiciary should be associated with the Executive in the Revisionary Power."[80] While Madison, Mason, and Elsworth supported Wilson's motion, Mr. Gerry immediately argued the motion "was liable to strong objections. It was combining [and] mixing together the Legislative [and] the other departments. It was establishing an improper coalition between the Executive [and] Judiciary departments."[81] Later in the day, following responses by the supporters of the proposal, Gerry reiterated his concern about the danger of judges playing a role in forming the laws. He would "rather give the Executive an absolute negative for its own defense than thus to blend together the Judiciary & Executive departments. It will bind them together in an offensive and defensive alliance ag[ain]st the Legislature, and render the latter unwilling to enter into a contest with them."[82] As noted earlier, the Massachusetts delegates successfully blocked the proposal for a Council of Revision.

Three weeks later, on August 15, Madison revived the proposal of a Council of Revision consisting of "the Executive and Supreme Judiciary Departments" with power to separately veto legislation before it took effect.[83] Gerry quickly pointed out that this was essentially the same proposal that had been rejected earlier.[84] The delegates voted immediately, and Madison's motion failed by a vote of three states to eight states.[85] When Morris tried to repackage the idea, others delegates picked up Gerry's earlier arguments. Mr. Sherman stated that he "disapproved of Judges

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[77] *Id.* at 61.

[78] *Id.*

[79] *Id.* at 61, 66.

[80] *Id.* at 336.

[81] MADISON, *supra* note 1, at 338.

[82] *Id.* at 342 (Mr. Gerry, July 21). The stunning failure of the Massachusetts' legislatures in 2004 to pass a straight amendment to ban same-sex marriage shows how correct Gerry was; the legislature was unwilling to stand up to a strong court despite the state executive's willingness to do so. Gerry may not have anticipated the influence of partisan politics, but if he had, that would only have heightened his concerns.

[83] *Id.* at 461 (Mr. Madison, August 15).

[84] *Id.* at 462 (Mr. Gerry, August 15).

[85] *Id.*

meddling in politics and parties."[86] Mr. Dickenson "thought no such power ought to exist." He was at the same time at a loss what expedient to substitute. The Justiciary of Aragon, he observed, became by degrees, the lawgiver."[87] The motion failed and the Council of Revision proposal never made it into the Constitution, due in no small part to the strenuous opposition of the Massachusetts delegates.

B. The Constitution of 1780

It is little wonder that the Massachusetts delegation in 1787 was so unanimously and insightfully concerned about judicial law-making. Seven years earlier Massachusetts thoroughly considered those issues and explicitly rejected judicial law-making when it adopted the Massachusetts Constitution of 1780. John Adams, the principal drafter of that constitution, "embraced separation of powers and checks and balances as more workable than 'civic virtue' as a basis for a sound government."[88] He believed "that the separation of powers is an indispensable element of constitutional liberalism; that '[p]ower must be opposed to power, force to force, strength to strength, interest to interest . . . and passion to passion.'"[89] Adams has been described as "the symbolic defender of mixed government during the founding period."[90] However, he "believed in the inevitability of competition and massive power imbalances in society, building his theory of liberty, representation, and the separation of powers around them[,] . . . in an idiosyncratic mishmash of doctrines tied together by his belief that 'mixed government and separation of powers could be employed as overlapping and mutually reinforcing principles.'"[91] Adams' prescient, practical version of separation of powers has aged quite well -- except, ironically, in Massachusetts.[92]

The Massachusetts Constitution, which John Adams drafted, reads:

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[86] MADISON, *supra* note 1, at 464 (Mr. Sherman, August 15).

[87] *Id.* at 463 (Mr. Dickenson, August 15).

[88] THE ORIGINS OF THE AMERICAN CONSTITUTION, xiv-xv (Michael Kammen ed., Penguin Books 1986)(1961), *cited in* Bruce A. Antkowiak, *The Ascent of an Ancient Palladium: The Resurgent Important of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing,* 13 WIDENER L.J. 11, 27 n.68 (2003). *See also* JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1787).

[89] JOSEPH J. ELLIS, PASSIONATE SAGE 98 (1993), cited in Thomas A. Barnico, *The Public Law Decisions of Chief Justice Herbert P. Wilkins,* 84 MASS. L. REV. 109, 116 (1999) (citing JOSEPH J. ELLIS, PASSIONATE SAGE 98 (1993)).

[90] Jamison E. Colburn, *"Democratic Experimentalism:" A Separation of Powers For Our Time?,* 37 SUFFOLK U. L. REV. 287, 324 (2004) (citing C. BRADLEY THOMPSON, JOHN ADAMS AND THE SPIRIT OF LIBERTY 216 (1998)).

[91] *Id.* (citing THOMPSON, *supra* note 90, at 217).

[92] Colburn states: "A rich irony here is that Adams's eclecticism comes closest descriptively to what the federal judiciary has actually made of 'the separation of powers' in its constructions of the doctrine over the last two centuries." *Id.* at 325. The focus of Colburn's article is on administrative law and separation of powers.

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[93]

The separation of powers principle is quite emphatic in this version of what John Adams wrote; but it is even clearer in his original version in which he disaggregated the statement as follows:

> XXXI. The judicial department of the State ought to be separate from and independent of, the legislative and executive powers.
> CHAPTER II.
> The Frame of Government.
> . . . .
> In the government of the Commonwealth of Massachusetts, the legislative, executive, and judicial power, shall be placed in separate departments, to the end that it might be a government of laws and not of men.[94]

While combination of the two provisions is economical and coherent, Adam's original version more clearly reveals the force and importance of separation of powers in the government's structure as a component necessary to liberty's preservation. Separation in the text calls attention to the constitutional separation of the three branches of government. Thus, the Massachusetts Constitution clearly links the legitimacy of republican government to separation of powers; "[f]or John Adams the statement that we have 'a government of laws and not of men' was joined to the separation of powers."[95]

The Massachusetts Constitution of 1780 set up three *separate* branches of government, describing the powers and limits with some specificity. The Chapter of the Massachusetts Constitution of 1780 conferring the Judicial Power limited judicial authority by setting term limits for justices of the peace (seven years),[96] allowing for removal of all judges,[97] requiring probate courts to hold sessions "as the convenience of the people shall require,"[98] and specifically excluding the authority to regulate "marriage, divorce and alimony" from the control of the

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[93] MASS. CONST. of 1780, pt. I, art. XXX.

[94] 8 PAPERS OF JOHN ADAMS 242 (Richard A. Ryerson et al. eds., 1989), *cited in* S.B. Benjamin, *The Significance of the Massachusetts Constitution of 1780,* 70 TEMP. L. REV. 883, 885 n.6 (1997).

[95] Thomas M. Reavley, *The Rule of Law for Judges,* 30 PEPP. L. REV. 79, 80 (2002).

[96] MASS. CONST. of 1780, pt. II, ch. III, art. III. Terms were limited "in order that the people may not suffer from the long continuance in place of any justice of the peace, who shall fail of discharging the important duties of his office with ability or fidelity . . . ."

[97] *Id.* at pt. II, ch. III, art. I.

[98] *Id.* at pt. II, ch. III, art. IV.

judiciary, delegating it to "the governor and council until the legislature shall, by law, make other provision."[99]

C. Other Writings by John Adams and Contemporaries

It was not just in the Massachusetts Constitution of 1780 that John Adams expressed his strong insistence upon separation of powers. In his influential 1776 essay, *Thoughts on Government*,[100] Adams wrote:

> The dignity and stability of government in all its branches, the morals of the people, and every bless of society depend so much upon an upright and skilful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that . . . . Their minds should not be distracted with jarring interests . . . .[101]

Likewise, Adams devoted a significant portion of his work, *A Defence of the Constitution of Government of the United States of America,* to establishing the importance of separation of powers, balance, and checks by one branch on the powers of the others, making them a (if not *the*) primary theme of that well-known 1787 treatise.[102] Adams reviewed the political history and constitutional

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[99] *Id.* at pt. II, ch. III, art. V (covering "[a]ll causes of marriage, divorce, and alimony . . . .").

[100] JOHN ADAMS, *Thoughts on Government* (1776), *reprinted in* THE POLITICAL WRITINGS OF JOHN ADAMS 482-491 (George W. Carey ed., Regnery Publishing 2000).

[101] *Id.* at 488.

[102] JOHN ADAMS, *A Defence of the Constitution of Government of the United States of America Against the Attack of M. Turgot, in his Letter to Dr. Price, Dated the Twenty-Second Day of March, 1778, reprinted in* THE POLITICAL WRITINGS OF JOHN ADAMS, *supra* note 100, at 108 (commending "[t]he checks and balances of republican governments,"); *id.* at 110 ("We shall learn to prize the checks and balances of a free government . . . if we recollect the miseries of Greece, which arose from its ignorance of them."); *id.* at 125 (commending the government of England because "[t]hey endeavor to balance these different powers, as if this equilibrium, which in England may be a necessary check to the enormous influence of royalty . . . ."); *id.* at 132-166 (opinions of philosophers - from Greek and Roman to Harrington, Swift, Price and Franklin reviewed on the subjects of, *inter alia*, division and balancing of power in government); *id.* at 134 (separation of powers necessary to prevent tyranny); *id.* at 135 (the "true meaning of balance of power"); *id.* at 136 (beware because power held in many hands may also be abused; to prevent abuse make known the limits of power allocated to each party); *id.* at 189 (in the American Constitution "The executive is excluded from the two legislative assemblies; and the judiciary power is independent, as well as separated from all."); *id.* at 201 (commending the government of Lacaedemon because the balanced the power of the three orders was "nearest resembling" that of England); *id.* at 214 (ancient Greek and German governments failed because of failure to define the powers of the orders, "From the want of independence in each of them, and [the want of] a balance between them."); *id.* at 215 ("liberty and the laws depend entirely

organization of many other nations, modern and ancient, comparing them with the Constitution of the United States, and concluded that the American governments were the most protective of separation of powers:

> In every republic . . . we have observed a multitude of curious and ingenious inventions to balance, and in their turn, all those powers, to check the passions peculiar to them, and to control them from rushing into those exorbitancies to which they are most addicted. The Americans will then be no longer censured for endeavoring to introduce an equilibrium, which is much more profoundly mediated, and much more effectual for the protection of the laws, than any we have seen, except in England. We may even question whether this is an exception."[103]

John Adams was not the only leader in Massachusetts to insist on separation of powers, nor was the Massachusetts Constitution of 1780 the only founding document to require separation of powers. The Essex Result, which delegates from a dozen Massachusetts towns drafted in 1778, was one of the important precursors of the Massachusetts Constitution. It declared:

> The judicial power follows next after the legislative power; for it cannot act, until after laws are prescribed . . . .
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> . . . .
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> A little attention to the subject will convince us, that these three powers ought to be in different hands, and independent of one another, and so balanced, and each having that check upon the other, that their independence shall be preserved -- If the three powers are united, the government will be absolute, *whether these powers are in the hands of one or a large number.* The same party will be the legislator, accuser, judge and executioner; and what probability will an accused person have of an acquittal, however innocent he may be, when his judge will be also a party.
>
> If the legislative and judicial powers are united, the makers of the law will also interpret it; and the law may then speak a language, dictated by the whims

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on a separation of [the branches of government] in the frame of government,"); *id.* at 237 (criticizing a sovereign single assembly because "[t]he judges . . . will be obsequious enough to their inclinations. The whole judicial authority . . . will be employed, perverted and prostituted to the purposes of electioneering. No justice will be attainable . . . in the judicial courts . . . ."); *id.* at 303 (concluding that the Constitution of 1787 is "the greatest single effort of national deliberation that the world has ever seen").

[103] *Id.* at 130. *See also id.* at 132 ("After all, let us compare every constitution we have seen with those of the United States of America, and we shall have no reason to blush for our country . . . . We shall reason to exult . . . . [because] the legislative, executive and judicial powers are carefully separated from each other . . . .").

> the caprice, or the prejudice of the judge, with impunity to him -- And what people are so unhappy as those, whose laws are uncertain.[104]

D. Massachusetts Supreme Judicial Court Precedents Protecting Separation of Powers

The SJC has long protected the integrity of the principle of separation of powers.[105] Less than three decades before *Goodridge*, the court stated that "[t]he Massachusetts version [of separation of powers], like those of only a handful of other States, is in a most explicit form, and on its face calls for a complete and rigid division of all powers among the three branches."[106] Moreover,

> "The court is ever solicitous to maintain the sharp division between the three departments of government as declared by art. 30 of the Declaration of Rights." We have stated that "[t]hese limitations, though sometimes difficult of application, must be scrupulously observed."[107]

The Supreme Judicial Court solemnly declared that it will observe Article XXX's explicit demand for separate branches of government. "[W]hat cannot be tolerated is the creation of interference by one department with the power of another department."[108] "The time tested wisdom of the separation of powers" bars the Supreme Judicial Court from engaging in "judicial legislation"[109] by artificially enlarging the statutory language that the legislature adopted. Just seven years

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[104] Essex Result, *reprinted in* POPULAR SOURCES OF POLITICAL AUTHORITY, DOCUMENTS OF THE MASSACHUSETTS CONSTITUTION OF 1780, 324-40 (Oscar Handlin & Mary Flug Handlin, eds., Harvard 1966), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch4s8.html (last visited Sept. 30, 2004).

[105] The Commonwealth emphasized this in its Brief to the Supreme Judicial Court in *Goodridge*. *See* Brief of the Defendants-Appellees, at 23-26, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2004)(No. SJC 08860), *available at* http://marriagelaw.cua.edu/Law/cases/ma/goodridge/sjc/state_brief.pdf (last visited Sept. 29, 2004). So did an amicus brief filed by five state legislators. *See* Brief Amici Curiae of Hon. Phillip Travis, et al, at 23-26, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2004)(No. SJC 08860), available at http://marriagelaw.cua.edu/Law/cases/ma/goodridge/sjc/d_legislator_amicus.pdf (last visited Sept. 29, 2004).

[106] Opinion of the Justices to the House of Representatives, 309 N.E.2d 476, 478 (Mass. 1974).

[107] *Id.* at 478 (citations omitted). The court admitted, however, that "we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments . . . ." *Id.* at 479.

[108] New Bedford Standard-Times Publ. Co. v. Clerk of the Third Dist. Ct. of Bristol, 387 N.E.2d 110, 114 (Mass. 1979).

[109] *Id.* at 1302-03. *See also* Opinion of the Justices to the House of Representatives, 425 N.E.2d 750, 754 (Mass., 1981) ("To maintain a constitutional balance and preserve the separation of powers," Governor's veto power must be co-extensive with the legislative power; so separable provision veto is constitutional).

before *Goodridge*, the Court noted that its constitutional role as a judicial, rather than a legislative, body limits its authority to interpret and apply statutes. "In construing a legislative enactment, it is our duty to ascertain and implement the intent of the Legislature. . . ."[110] Moreover, "'[a]s Justice Qua stated in *Commonwealth v. Isenstadt*, 318 Mass. 543, 548, 62 N.E.2d 840 (1945), *this court is under a duty 'to avoid judicial legislation* in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions.'"[111] Indeed, the court rejected the notion that judges should revise legislation "even when it appear[s] that a highly desirable and just result might . . . be achieved."[112]

In *Massachusetts v. Leno*, the court declared:

> The defendants' argument is that, in their view, the prescription requirement for possession and distribution of hypodermic needles and syringes is both ineffective and dangerous. The Legislature, however, has determined that it wants to control the distribution of drug-related paraphernalia and their use in the consumption of illicit drugs. That public policy is entitled to deference by courts. Whether a statute is wise or effective is not within the province of courts. It is not for this court to judge the wisdom of legislation or to seek to rewrite the clear intention expressed by the statute. Our deference to legislative judgments reflects neither an abdication of nor unwillingness to perform the judicial role; but rather a recognition of the separation of powers and the undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature.[113]

Likewise, in *Mellor v. Berman*, the court reiterated the separation between the judicial and legislative roles. "It is not for this court to judge the wisdom of legislation or to seek to rewrite the clear intention expressed by the statute."[114] Deference to the legislative prerogative is not an abdication of the judicial role, but an important part of that role:

> Our deference to legislative judgments reflects neither an abdication of nor unwillingness to perform the judicial role; but rather a recognition of the separation of powers and the "undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature." Thus, it is not the court's function to launch an inquiry to resolve a debate which has already been settled in the legislative forum. "(I)t [is] the judge's duty . . . to

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[110] *Id.* at 1302, quoting Rosenbloom v. Kokofsky, 369 N.E. 2d 1142, 1143-44 (Mass. 1977), citing Milton v. Metropolitan Dist. Comm'n, 172 N.E.2d 696, 700 (Mass. 1961).

[111] Pielech v. Massasoit Greyhound, Inc., 668 N.E.2d 1298, 1302 (Mass. 1996) (quoting Commonwealth v. A Juvenile, 334 N.E.2d 617, 627 (Mass. 1975)) (emphasis added).

[112] *Id.* at 1303.

[113] 616 N.E.2d 453, 456-457 (Mass. 1993) (internal quotations and citations omitted).

[114] Mellor v. Berman, 454 N.E.2d 907, 913 (Mass. 1983).

> give effect to the will of the people as expressed in the statute by their representative body. It is in this way . . . that the doctrine of separation of powers is given meaning." . . . This respect for the legislative process means that it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment. Most laws dealing with economic and social problems are "matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests the people."[115]

The SJC has repeatedly rejected invitations to engage in judicial legislation.[116] More than thirty years before *Goodridge*, the court declared:

> We have traditionally and consistently declined to trespass on legislative territory in deference to the time tested wisdom of the separation of powers as expressed in art. XXX of the Declaration of Rights of the Constitution of Massachusetts even when it appeared that a highly desirable and just result might thus be achieved. We will not do so now.[117]

Just four years before *Goodridge*, the SJC reiterated that "[a]djustments in . . . legislation to reflect . . . new social and economic realities must come from the Legislature . . . ."[118] In 1993 case, the court had refused "to engage in a massive rewriting of the statute" because that would "impermissibly infringe on the lawmaking function of the Legislature."[119] That "massive rewriting" of the marriage laws is precisely what the court presumed to do in *Goodridge*, and that constitutes a judicial usurpation of the legislative function.

The deference due the legislature, and to laws of the legislature representing the unbroken, consistent rule of law since time immemorial, defining marriage as a conjugal union, is especially substantial. More than 130 years before *Goodridge*, the SJC declared: "[w]hat marriages between our citizens shall be recognized as valid in the Commonwealth is a subject within the power of the Legislature to

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[115] Shell Oil Co. v. City of Revere, 421 N.E.2d 1181, 1185 (Mass. 1981) (citations omitted).

[116] *See* Commonwealth v. Amirault, 612 N.E.2d 631, 633 (Mass. 1993); Blues Hills Cemetery, Inc., v. Bd. of Registration in Embalming and Funeral Directing, 398 N.E.2d 471, 475 (Mass. 1979); Zayre Corp. v. Attorney General, 362 N.E.2d 878, 884 (Mass, 1977); Commonwealth v. Leis, 243 N.E.2d 898, 908 (Mass. 1969); Spery & Hutchinson Co. v. McBride, 30 N.E.2d 269, 274 (Mass. 1940); Slome v. Godley, 23 N.E.2d 133, 136 (Mass. 1939).

[117] Dalli v. Bd. of Educ. 267 N.E.2d 219, 223 (Mass. 1971) (internal citations omitted).

[118] Connors v. City of Boston, 714 N.E.2d 335, 341-42 (Mass. 1999).

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

regulate."[120] Indeed, as noted earlier, and discussed in a companion piece in this issue, since 1787 the Massachusetts' constitution explicitly prohibited the state judiciary from the regulation of marriage or divorce.[121]

The Massachusetts' courts emphasis on legislative regulation of marriage is consistent with the U.S. Supreme Court's observation in *Maynard v. Hill*,[122] that

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.[123]

One wonders whether the Constitutional guarantee of a republican form of government is not implicated by the radical redefinition of marriage by judicial fiat.

Numerous legal commentators have discussed the importance of the unique separation of powers doctrine in Massachusetts' constitutional law and doctrine.[124]

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[120] Commonwealth v. Lane, 113 Mass. 458, 462-63 (1873).

[121] *See supra* note 101 and accompanying text. This provision is discussed in another article in this issue, Dwight G. Duncan, *How Brown in Goodridge? The Appropriation of A Legal Icon*, 14 B.U. Pub. Int. L. J. 27 (2004).

[122] 125 U.S. 190 (1888).

[123] *Id.* at 205.

[124] *See* Francis D. Doucette, *Literal Interpretation and "Absurd" Results: Commonwealth v. Wallace and "Trial on the Merits,"* 36 NEW ENG. L. REV. 373, 382-383 (2002) (noting that the Supreme Judicial Court has "practically boasted of its ability to recognize the limits of its authority by quoting strong language from its earlier cases: 'We have traditionally and consistently declined to trespass on legislative territory in deference to the time tested wisdom of the separation of powers as expressed in art. XXX of the Declaration of Rights of the Constitution of Massachusetts even when it appeared that a highly desirable and just result might thus be achieved.'"); Daniel Geyser, *Needle Exchange Program Funding*, 37 HARV. J. ON LEGIS. 265 (2000) ("As noted by the Massachusetts Supreme Judicial Court in Commonwealth v. Leno, '[o]ur deference to legislative judgments reflects neither an abdication of nor unwillingness to perform the judicial role; but rather a recognition of the separation of powers and the 'undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature.'"); Wendy Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-Sex "Marriage"?*, 12 B.U. PUB. INT. L.J. 137, 176-177 (2002) ("The SJC has also noted its duty 'to avoid judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions.' . . . [R]ecognizing same-sex 'marriage' or requiring marital benefits for same-sex couples, either from current statutes or out of whole cloth, would offend the constitutional principle of separation of powers . . ."); *see also* Jeremy Bucci & John P. Zanini, *"The Interests of Public Justice" and the Judicial Decision to Terminate*

Thus, the Commonwealth's magnificent history of leadership in establishing, and legacy of protecting the crucial principle of separation of powers in government, seems in *Goodridge* to have been traded by an ambitious set of judges for the opportunity to be the first American court to force upon the people a radical new definition of marriage. That seems much too expedient and much too paltry a price to receive in exchange for so precious a principle as separation of powers, and so proud a state heritage of steadfastly maintaining that principle.[125]

IV. CHIEF JUSTICE MARGARET H. MARSHALL AND SEPARATION OF POWERS

Chief Justice Marshall's justification for her action is irreconcilable with the precedents and history of separation of powers in Massachusetts. The Chief Justice clearly has not completely internalized the value and meaning of separation of powers in the American, much less the Massachusetts', tradition.

Given her personal background in South African culture and history,[126] Chief Justice Marshall should understand the critical importance of preserving the principle that judges must reject the invitation or opportunity to use their position to intrude into the law-making function. Alan Paton, one of South Africa's greatest writers, and one of the first highly-recognized South African writers to publicly question the regime of apartheid, poignantly describes the judge's role in achieving justice and upholding the rule of law.

Criminal Prosecutions: Silencing the Voice of the People, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 163, 177 (2000).

[125] *Cf. Genesis* 24: 29-34 (King James):

> And Jacob sod pottage: and Esau came from the field, and he was faint: And Esau said to Jacob, Feed me, I pray thee, with that same red pottage; for I am faint: therefore was his name called "Edom." And Jacob said, Sell me this day thy birthright. And Esau said, Behold, I am at the point to die: and what profit shall this birthright do to me? And Jacob said, Swear to me this day; and he sware unto him: and he sold his birthright unto Jacob. Then Jacob gave Esau bread and pottage of lentiles; and he did eat and drink, and rose up, and went his way: thus Esau despised his birthright.

[126] *See generally* Gary Buseck, Keynote Address, *Civil Marriage For Same-sex Couples,* 38 NEW. ENG. L. REV. 495, 503 (2004) ("Chief Justice Margaret Marshall is fond of reminding us both that the South African Constitution was inspired by the Massachusetts Constitution, and that the constitutional jurisprudence of South Africa can provide guidance for us in return."); Joan A. Lukey, President's Page, *Inspiration*, 45 BOSTON B.J., May-June 2001, at 2 ("Chief Justice Margaret Marshall has been inspiring people since she was barely more than a girl, and she certainly isn't slowing down now. At the BBA Annual Meeting last September, when she accepted our award for her courageous leadership as a young woman opposing apartheid in South Africa . . . .")

> You may not smoke in this Court, you may not whisper or speak of laugh. You must dress decently, and if you are a man, you may not wear your hat unless such is your religion. This is in honour of the Judge and in honour of the King whose officer he is; and in honour of the Law behind the Judge, and in honour of the People behind the Law. When the Judge enters you will stand, and you will not sit till he is seated. When the Judge leaves you will stand, and you will not move till he has left you. This is in honour of the Judge, and of the things behind the Judge.
>
> For to the Judge is entrusted a great duty, to judge and to pronounce sentence, even sentence of death. Because of their high office, Judges are called Honourable, and precede most other men on great occasions. And they are held in great honour by men both white and black. Because the land is a land of fear, a Judge must be without fear, so that justice may be done according to the Law; therefore a Judge must be incorruptible.
>
> The Judge does not make the Law. It is the People that make the Law. Therefore if a Law is unjust, and if the Judge judges according to the Law, that is justice, even if it is not just.
>
> It is the duty of a Judge to do justice, but it is only the People that can be just. Therefore if justice be not just, that is not to be laid at the door of the Judge, but at the door of the People, which means at the door of the White People, for it is the White People that make the Law.[127]

Later in the story, the Judge justifies his decision to sentence the boy to death, stating:

> [T]here is nevertheless a law, and it is one of the most monumental achievements of this defective society that it has made a law, and has set judges to administer it, and has freed those judges from any obligation whatsoever but to administer the law. But a Judge may not trifle with the Law because the society is defective. If the law is the law of a society that some feel to be unjust, it is the law and the society that must be changed. In the meantime there is an existing law that must be administered, and it is the sacred duty of a Judge to administer it. And the fact that he is left free to administer it must be counted as righteousness in a society that may in other respects not be righteous. I am not suggesting of course that the learned Counsel for the defence for a moment contemplated that the law should not be administered. I am only pointing out that a Judge cannot, must not, dare not allow the existing defects of the society to influence him to do anything but administer the law.[128]

Historically, gays and lesbians often received criminal sanctions for illicit sex, while most promiscuous heterosexuals largely escaped punishment for their irresponsible and often heart-breaking sexual exploitations, adulteries, and

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[127] ALAN PATON, CRY, THE BELOVED COUNTRY 157-158 (1948).
[128] *Id.* at 199-200.

philandering.[129] While homosexual and heterosexual nonmarital sex certainly may be distinguished, an individual sympathetic to the victims of such past discrimination may perceive a dilemma that forces the individual to choose between fidelity to the rule of law and interpreting the law so as to establish the principles of equality and equity such as those he or she may believe underlie a claim for same-sex marriage. A justice sitting on the SJC might abhor the cold, jejune classification of the judge Paton describes, and thus feel drawn to make a statement about equality regardless of sexual preference.

Paton, however, did not shy away from acknowledging and describing a very real dilemma in *Cry the Beloved Country*. Powerful and important social interests on both sides create a genuine moral tension. On one side, profound reasons, including institutional integrity and prevention of tyranny of the unelected, call for separation of powers, for separating judges from the policy-making process, and for confinement of the judicial role to the consistent and reliable application of the law created by the other branches and institutions of the legal system. On the other hand, a sympathetic, just, and truly capable judge might find some way to ameliorate the harshness of the law, to interpret and apply it to achieve faithful consistency in law without sacrificing basic justice in cases such as that which Paton describes. But Paton does not seem to suggest, much less endorse, judicial abandonment of fidelity to the rule of law, or violation of the fundamental principle of separation of powers. Rather, Paton recognizes the importance of the judiciary in upholding these guiding principles. Thus, the commentator in *Cry, the Beloved Country* also observes:

> In South Africa men are proud of their Judges, because they believe they are incorruptible. Even the black men have faith in them, though they do not always have faith in the Law. In a land of fear this incorruptibility is like a lamp set upon a stand, giving light to all that are in the house.[130]

To extinguish that light would do even greater harm, cause even greater injustice, than to await a change in the law by democratic processes. In deciding how to make a statement to advance a perceived just cause, a just judge must also act very carefully to preserve the integrity of the legal system.

Ironically, Chief Justice Marshall described the importance of separation of powers under the Massachusetts Constitution just three years before rendering the opinion in *Goodridge*. She suggested to members of the Boston Bar:

> I suggest that you keep in mind the compelling role played by the Massachusetts Constitution in our nation's history, its continuing vitality *as an independent source of constitutional protections to the citizens of the Commonwealth*, and the central importance of an independent judiciary to our constitutional system.

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[129] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

[130] PATON, *supra* note 127, at 158.

> The Massachusetts Constitution of 1780 was drafted by John Adams, perhaps the most learned political theorist of his day in the colonies. It significantly influenced the Federal Constitution, adopted nine years later. The very framework of the federal *government mirrored the Massachusetts model invented by Adams: three co-equal branches of government, with a separation of powers among them*, a bicameral legislative branch, and an independent judiciary.[131]

Chief Justice Marshall commendably and eloquently articulates the importance of separation of powers and an independent judiciary. Sadly, however, Chief Justice Marshall failed to apply these laudable principles in deciding *Goodridge*.

V. CONCLUSION: *GOODRIDGE*, SEPARATION OF POWERS, AND TRUSTING AN INDEPENDENT JUDICIARY

Chief Justice Marshall devotes thirty-eight paragraphs to analysis of constitutional provisions in *Goodridge*.[132] This analysis contains abundant, well-written -- even elegant -- social policy arguments such as those which one might find in sophisticated political, social science, or humanities essays. However, those paragraphs of the *Goodridge* opinion (and the complementary parts of Justice Greany's concurrence) contain virtually no legal analysis.

The essence of legal analysis, the crux of the judicial function, requires courts to apply the law. The law consists of objective, set standards for human behavior. Under principles of separation of powers, the judiciary interprets standards set by the other branches and institutions of government because the body responsible for making the law cannot also, with integrity, interpret the law. Moreover, under the separation of powers principles, the legislative power and judicial power do not overlap ensuring that no man is the judge in his own case.[133] Thus, the essence of judicial power is to construe standards set by the other branches or institutions of government. In cases of statutory construction, the other branch is primarily the legislature. In cases of constitutional interpretation, the other institution is the body, composed of representatives elected by the people, that drafted the Constitution. In both cases, the sovereign people who ratified the constitution and elected the legislature (and the executive) provide the ultimate source of the language interpreted by the court.

In exercising its interpretative authority, the court does not act on its own authority as a principal. Rather, the court acts as an agent for another institution of government. In the case of statutory interpretation, the principal is the legislature. In the case of constitutional interpretation, the principals are those who drafted and ratified the constitution. In constitutional cases, the court does not assert its own will, but acts to effectuate the will of the persons who created the Massachusetts

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[131] Margaret H. Marshall, *Foreword*, 44 BOSTON B.J., Jan.-Feb. 2000, at 4.

[132] *Goodridge*, 798 N.E.2d at 953-968.

[133] *See* MADISON, *supra* note 1, at 338 (Mr. Strong, July 21) (discussing the separation of powers).

Constitution. In both cases, the ultimate principal is the sovereign -- the people of the Commonwealth who ratified the Massachusetts Constitution and elected the legislature (and the executive). The SJC's disregard for the principle of separation of powers in *Goodridge* is especially notable due to Massachusetts' well-established separation-of-powers tradition, dating back to the time of the drafting of the state's constitution.

The analysis of the constitutional issues by the majority in *Goodridge* bears little resemblance to legitimate legal analysis. The court simply forgot, or rejected, its basic duty to apply the standards set by other institutions, specifically by the institution that created the Massachusetts Constitution. The *Goodridge* court enforced its own political will, and applied its own policy preferences, in violation of the core principle of separation of powers.

The *Goodridge* decision is clearly an illegitimate judicial decision in method, substance, and procedure. *Goodridge* is illegitimate in method; the SJC simply disregarded the precedents and abandoned the discipline of legal analysis. *Goodridge* is illegitimate in substance, because its rationale fails to rise above the level of political policy preference, and because the SJC has no more constitutional authority to redefine marriage than the Boston Transit Authority has. *Goodridge* also is illegitimate in procedure because it forced its radical interpretation down the throats of the Commonwealth in just six months, even though the legislature proposed an amendment that would explicitly overturn *Goodridge* during a constitutional convention held well before the decision took effect. The *Goodridge* court's actions stand in stark contrast to the Hawaii Supreme Court which promptly granted a stay (of a pending appeal) when the Hawaiian legislature passed a proposed constitutional amendment overturning a decision of the Hawaii Supreme Court.[134] The stay lasted more than a year and a half, until the people of Hawaii voted on the issue.[135]

Goodridge is a classic example of judges misusing their judicial authority to impose their own personal policy preferences under the guise of interpreting a constitution. Both Chief Justice Marshall's majority opinion and Justice Greaney's concurring opinion provide only policy (legislative) rationales for their ruling. In their airy analyses, the Marshall and Greaney opinions merely contain a collection of political arguments that purport to explain why a wise legislator -- as Marshall or Greaney might conceive of one -- should seek to legalize same-sex marriage,[136] as well as incidental moral and ideological justifications for their personal belief that

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[134] Baehr v. Miike, No. 20371, 1999 LEXIS 391, at *6 (Haw. Dec. 9, 1999).

[135] Kathleen Burge & Frank Phillips, *Stay By SJC Called Unlikely*, BOSTON GLOBE, Mar. 13, 2004 at A1; *See also* Julia Silverman, *Marriage Fight To Move To Courts*, STATESMAN J. (Or.), Oct. 4, 2004, at http://news.statesmanjournal.com/article.cfm?i=87701 (last visited Oct. 7, 2004).

[136] *Goodridge*, 798 N.E.2d at 963 ("Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.").

legalizing same-sex marriage is the right thing to do regardless of other considerations.[137]

Unfortunately, the SJC behaved like "the Justiciary of Aragon" in *Goodridge*. If the marriage law in Massachusetts needed to change, this change should have come through democratic processes, not by judicial fiat. The *Goodridge* decision could cause thoughtful citizens to lose faith in judges and to doubt their political incorruptibility, particularly their ability to resist the ever-present temptation to abuse the great power of judicial review. Sadly, the SJC extinguished the lamp of judicial incorruptibility when Chief Justice Marshall and three other justices exercised their judicial power to accomplish the political task of redefining the basic social institution of marriage. Ironically, in stepping forward to become the "Justiciary" of Massachusetts Chief Justice Marshall may have forgotten that Alan Paton, whose gripping description of heartless "justice" sentencing youthful "offenders" to death for their efforts to achieve equality and freedom, also wrote of the importance of incorruptible justice.[138]

The *Goodridge* decision imperils the long American and Massachusetts' tradition of an independent judiciary. Such judicial over-reaching destroys trust in the political neutrality and integrity of the judicial system.[139] *Goodridge* is so blatantly political that it undermines respect for courts everywhere. The *Goodridge* decision provides ammunition for curtailing the influence and power of the courts to persons who oppose or apprehend the radical changes that activist courts may implement. For example, in his 2004 State of the Union speech, President George W. Bush declared, "[a]ctivist judges . . . have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. . . . If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process."[140] Accordingly, the best hope for the continued independence of the judiciary in Massachusetts rests on the state constitutional amendment process in Massachusetts working effectively, despite extraordinary political obstacles, to overturn the *Goodridge* decision. For the sake of Massachusetts, its judiciary, and indirectly for the sake of the nation, the judiciary throughout the nation, and the institution of marriage, it will be best if the state constitutional amendment process in Massachusetts reaches the same result

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[137] *Id.* at 955 ("Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."); *id.* ("Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do."); *id.* at 973 (Greaney, J., concurring).

[138] PATON, *supra* note 127, at 191.

[139] *See generally* Marshall, *supra* note 131, at 4.

[140] Address Before a Joint Session of the Congress on the State of the Union, 40 WEEKLY COMP. PRES. DOC. 40 (Jan, 26, 2004), available at: http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.

the amendment processes reached in Hawaii,[141] and Alaska,[142] when trial court decisions there attempted to redefine marriage.

[141] Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999) (recognizing that the recently passed marriage amendment to the Hawaii Constitution rendered the constitutionality of same-sex marriage moot).

[142] *See generally*, Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999).