



POLICY BRIEF

Marriage: Legal Protections for Families and Children

by Sean Cahill and Samuel Slater

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THE BENEFITS OF MARRIAGE

Marriage aims to promote healthy families, protecting the economic and emotional interdependence of family members and giving priority to their bonds. Legal protection of partner relationships can increase a couple's ability to care for each other and provides families security and peace of mind, creating a more secure environment for raising children.

MARRIAGE

“...civil marriage is, and since pre-colonial days has been precisely what its name implies: a wholly secular institution. Civil marriage anchors an ordered society by encouraging stable relationships over transient ones.”¹

—Massachusetts Supreme Judicial Court,
Goodridge v. Department of Public Health, Nov. 18, 2003.

Marriage is about making a long-term commitment to a partner, and Americans deserve the right to make a personal choice about their partner. Marriage provides a comprehensive package of economic and social protections to couples and their children. In 1996, the U.S. General Accounting Office listed 1,049 ways in which marital relationships are given special treatment by the federal government.² There are also hundreds of rights, benefits, and responsibilities automatically conferred upon married couples that have implications at the local and state level, and in relation to employers and private entities. As Massachusetts' highest court recently ruled, “Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”³

1. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 321 (2003). For more information on the Goodridge case, see Gay & Lesbian Advocates & Defenders, available at <http://www.glad.org>

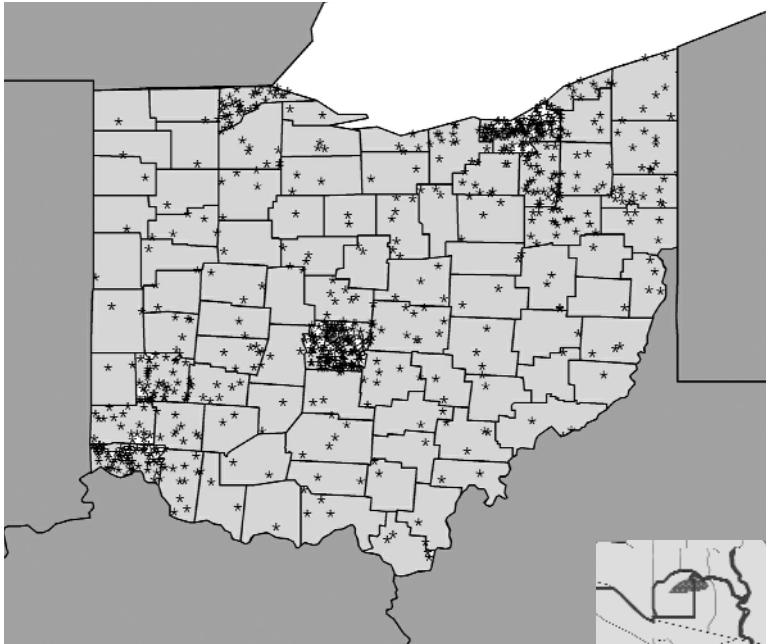
2. General Accounting Office. (1997, January 31). *Tables of Laws in the United States Code Involving Marital Status, by Category*. Retrieved December 4, 2003, from <http://www.gao.gov/archive/1997/og97016.pdf>

3. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 342 (2003).



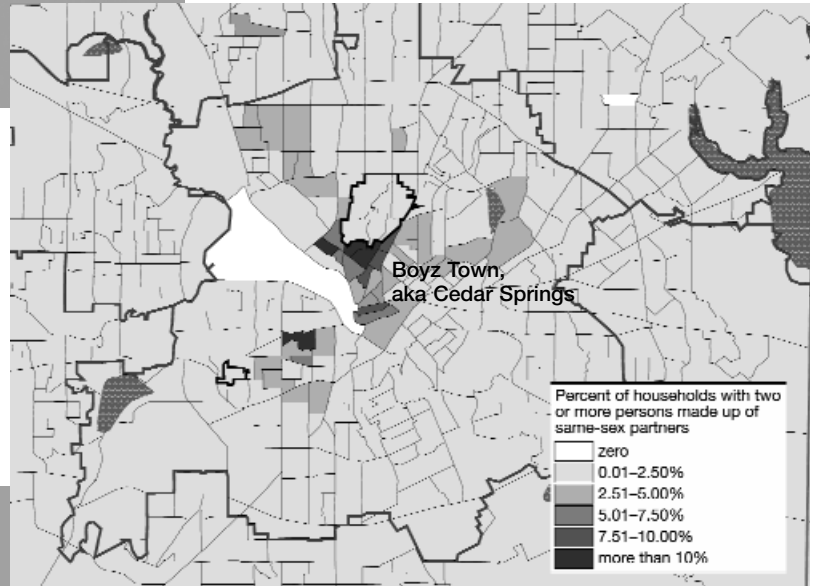
2000 CENSUS DATA: SAME-SEX PARTNERED HOUSEHOLDS

OHIO

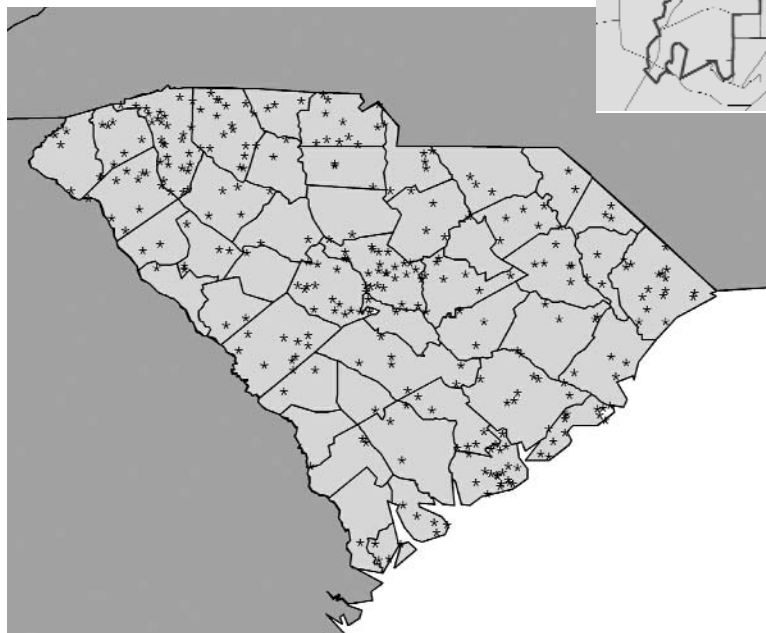


* = 25 same-sex households
 Total Same-Sex Households: 18,937
 Relative Growth since 1990 Census: 4.61

DALLAS



SOUTH CAROLINA



* = 25 same-sex households
 Total Same-Sex Households: 7,609
 Relative Growth since 1990 Census: 5.85

Because same-sex couples cannot marry anywhere in the U.S. at the moment, gay and lesbian people are excluded from these rights and responsibilities. These couples have the same needs as opposite-sex couples: same-sex couples are often emotionally and economically interdependent, sharing household and financial responsibilities, and often raising children or taking care of other family members together. Studies show that gay and lesbian couples are comparable to straight couples in many ways, and that relationship quality and satisfaction are about the same across all couple types (straight, gay, lesbian).⁴ Of the 594,000 cohabiting same-sex couples who self-identified on the 2000 Census, 34% of lesbian couple households had children under 18 living at home, as did 22% of gay male cohabiting couples.⁵ Lesbian couples parent at about 75% the rate that married couples parent (46% of married couples have children under 18), and gay male couples parent at about half the rate of married couples.

Many protections and responsibilities are afforded through marriage. Some elements of this package include:

Health-related rights and protections:

- Access to employer-provided health and retirement benefits for partner and non-biological/adoptive children
- Access to partner's coverage under Medicare and Social Security
- Ability to take sick or bereavement leave to care for a partner or a non-biological/adoptive child
- Ability to visit or make medical decisions for an ill or incapacitated partner

Increased financial and emotional security:

- Exemption from taxation of gifts, inheritance rights, and shared health benefits
- Right to sue for wrongful death of partner
- Access to pensions, workers' compensation, Social Security death benefits and spousal benefits
- Access to the courts in case of divorce
- Ability to sponsor one's partner for immigration
- Protection of one's home under the Medicaid spend-down provision, if one partner has to go to a nursing home

Protections for children:

- Marital children gain family stability and economic security because of their parents' legal marriage that is inaccessible to nonmarital children, including the enhanced approval of marital children in society
- Streamlined step-parent adoption and couple adoption processes, creating a legal tie to *both* parents

4. Gottman Institute. (2001). *12 Year Study of Gay and Lesbian Couples*. Retrieved January 5, 2004, from <http://www.gottman.com/research/projects/gaylesbian>

5. Simmons, T., & O'Connell, M. (2003, February). *Married-Couple and Unmarried-Partner Households: 2000: Census 2000 Special Reports*. United States Census Bureau. Retrieved December 4, 2003, from <http://www.census.gov/prod/2003pubs/censr-5.pdf>; (While most same-sex couples identify as gay or lesbian, some same-sex partners identify as bisexual).



- Access to health benefits and inheritance from *both* parents⁶
- Right to maintain relationship with non-biological/adoptive parent in the event of other parent’s death (in states without same-sex second-parent adoptions)
- Right to financial support and a continued relationship with *both* parents should parents separate

In *Goodridge*, the Massachusetts Supreme Judicial Court ruled that children, as well as their parents, suffer from the inability of same-sex couples to marry. “Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by marriage. Notwithstanding the Commonwealth’s strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, the fact remains that marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to non-marital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one’s parentage.”⁷

CIVIL UNIONS

As local and state governments begin to understand the importance of protecting same-sex relationships, they have taken steps toward rectifying this situation. They have offered domestic partnership protections and, in Vermont and Hawaii, civil unions and reciprocal beneficiaries as limited alternative means of protecting same-sex relationships.⁸ While these are extremely valuable measures that remedy some of the problems that same-sex couples face, marriage continues to be the only means of creating full and complete equality for same-sex couples and their children.

Civil unions represent meaningful steps, but in no way would they meet the test of the Massachusetts Supreme Judicial Court decision. The decision is clear that only marriage will satisfy the Court. As evidence of this, the Court stated:

- “We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs’ constitutional injury, and furthers the aim of marriage to promote stable, exclusive relationships.”
- “Extending 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 commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.”
- And, as one of the dissenting judges stated, “the majority concluded that a marriage license cannot be denied to an individual who wishes to marry someone of the same sex.”

6. If a child has already been adopted by the non-biological partner through second-parent adoption, then the child would be eligible for the Social Security death benefits from both partners, regardless of marriage.

7. *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 324 (2003).

8. Cahill, S., Ellen, M., and Tobias S. (2002). *Family Policy: Issues Affecting Gay, Lesbian, Bisexual and Transgender Families*. New York: National Gay and Lesbian Task Force Policy Institute. Retrieved December 4, 2003, from <http://www.ngltf.org/library/familypolicy.htm>



In 2000, Vermont became the only state to offer civil unions to same-sex couples, although bills have been introduced in a number of states and an increasing number of elected officials have expressed support for civil union legislation.⁹

- Civil unions grant same-sex partners the same rights, privileges, and responsibilities as married spouses *under state law*.
- However, they offer *no federal recognition* and in general are not deemed portable (i.e. a couple's Vermont civil union is not recognized in any other state).
- Some of the benefits of marriage that a civil union cannot offer include:
 - federal tax benefits
 - Social Security survivor benefits
 - access to federal family leave to care for a partner, or state family leave in all states except California, and
 - the ability to sponsor partner for immigration.
- Also, if you are married, you can get divorced in any state in which you are a resident. For couples who have a Vermont civil union, however, the only way to divorce may be to establish residency in Vermont and file for divorce there.

As the lead attorney for the same-sex couples in *Goodridge*, Mary Bonauto of the Gay & Lesbian Advocates & Defenders, recently said:

“Civil unions,” however defined, are not an adequate remedy. By definition they are not marriage. Everyone knows that a married person has the right to be by his or her spouse's side no matter what emergency may arise. Only a legally married couple has the unique legal status marriage confers and which allows marriage to be respected by state and federal governments, other countries and third parties like banks and employers.¹⁰

Even if there were no substantive differences in the way the law treats marriages and civil unions, the fact that a civil union remains a separate status just for gay people represents real and powerful inequality. Our state and federal constitutions require legal equality for all. “The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.”¹¹

DOMESTIC PARTNERSHIPS

Domestic partner benefits are generally employment-related. Ten states and the District of Columbia offer domestic partner benefits to the same-sex partners of public employees, as do several dozen U.S. municipalities.¹² Three states—Hawaii, California, and New Jersey—have enacted laws that give domestic partnerships varying degrees of protections. California's domestic partnership law, which will take effect in January 2005,

9. In 1999, civil union or same-sex marriage bills were introduced in California, Connecticut, Hawaii, New York, Rhode Island and Washington and, in 2001, such bills were introduced in Connecticut, Rhode Island, Washington and Wisconsin. In 2002, several prominent candidates for statewide office expressed support for same-sex marriage without experiencing a loss of support in the polls.

10. Bonauto, M.L. (2003, November 21). Statement of Mary L. Bonauto, in response to recent statements of Governor Mitt Romney and Attorney General Tom Reilly. *Gay & Lesbian Advocates & Defenders*. Retrieved December 3, 2003, from http://www.glad.org/News_Room/press64-11-21-03.shtml

11. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 312 (2003).

12. Rayside, D. (2002). Recognizing Same-Sex Relationships: Profiling Change in Canada and the United States. Paper delivered at annual meeting of American Political Science Association, August 29-September 1 2002, Boston, MA. pp. 21-23; Human Rights Campaign. (2002). Domestic Partner Benefits. Retrieved December 4, 2003, from <http://www.hrc.org/worknet/dp/index.asp>



will provide the broadest array of protections, including eligibility for family leave, other employment and health benefits, the right to sue for wrongful death of partner or inherit from partner as next-of-kin, and access to the step-parent adoption process. Although anti-gay leaders have denounced California’s policy as “homosexual marriage by another name,”¹³ in fact, California’s law only provides some of the hundreds of benefits and obligations conferred upon married couples under state law, and *none* of the federal rights. Thus, myriad rights and protections will still be withheld from same-sex couples. Furthermore, the incremental, piecemeal approach leads to confusion regarding what protections are in place over the course of time.

Ways to Protect Same-Sex Relationships: A Comparison

	Portability	Federal Law	Availability	Benefits Provided
Marriage	Portable, i.e. those married in one state are recognized as married in every other state.	Federal protections conferred by 1,049 federal laws and policies, such as Social Security, family medical leave, federal taxation and immigration policy.	Available in all states, unless couple is same-sex.	The broadest array of federal and state benefits including: Social Security benefits; inheritance; Medicaid spend-down protections; the right to take family leave under federal law; the right to file federal taxes jointly; the right to sponsor a partner for immigration; and many others.
Civil Unions	Unclear to what extent are portable, i.e. those who have entered into a civil union in Vermont most likely lose some or all the benefits of their status when they enter another state. To date, Vermont civil unions have not been recognized by other states.	No federal rights, responsibilities or protections.	Available only in Vermont and only to same-sex couples.	Provides access to all state benefits in Vermont.
Domestic Partnerships	Most commonly not portable.	No federal protections.	Available in many states and cities as offered by private and public sector employers. Provisions vary widely.	Benefits can include health care, hospital visitation, the right to meet with your nonbiological child’s teacher, and, in California, a broad array of state benefits.

13. California State Senator Pete Knight (R-Palmdale) quoted in Sanders, J. (2003, September 23). Suit targets domestic partners law. *The Sacramento Bee*.



A TREND TOWARDS RESPECTING MARRIAGES OF SAME-SEX COUPLES

INTERNATIONAL CONTEXT

Internationally, there is a distinct trend toward protecting the committed relationships of same-sex couples. Two countries, the Netherlands and Belgium, have ended marriage discrimination against same-sex couples.¹⁴ Canada is on the verge of doing this as well, with two provinces containing over half the country's population, Ontario and British Columbia, already marrying same-sex couples. Taiwan is considering legalizing same-sex marriage. Many other countries protect same-sex relationships. Brazil allows same-sex couples to inherit each other's pension and Social Security benefits. Tasmania, one of Australia's most conservative states, has created a broad domestic partnership status.¹⁵ Worldwide, 14 countries, including South Africa, Israel, and Britain, protect same-sex couples for the purposes of immigration.

PUBLIC OPINION SUPPORTS EQUAL TREATMENT FOR SAME-SEX PARTNERS

A slight majority of Massachusetts voters supports marriage equality. An October 2003 Decision Research poll found 59% support.¹⁶ A November 2003 Boston Globe/WBZ-TV poll found 50% in favor of marriage for same-sex couples, 38% opposed, and 11% undecided.¹⁷ Majorities in New Jersey, Connecticut and New Hampshire also support marriage rights for same-sex couples.¹⁸ Nearly five years ago, two thirds (66%) of Americans said that same-sex marriage would be legalized in their lifetime.¹⁹ A majority of Americans support equal access to the specific benefits of marriage. Most people feel that gays and lesbians should be entitled to inheritance rights (73%) and Social Security survivor benefits (68%). 58% of U.S. college freshmen surveyed in 2001-2002 support same-sex marriage.²⁰

We are hopeful that, with time and public education, a majority of Americans will understand and support equal treatment of same-sex couple families. However, the rights of members of a stigmatized minority should not be determined by the prejudices of the majority. James Madison warned that majority rule, unchecked, can lapse into majority tyranny.²¹ Prejudice should never determine public policy. Our system of representative

14. Levene, Abigail. (2001, April 1). World's first legal gay weddings held in amsterdam. *Reuters*. Retrieved December 4, 2003, from <http://www.travelandtranscendence.com/holland-news.html>; Associated Press. (2003, January 30). Belgium approves same-sex marriages. *CBS.com*. Retrieved December 4, 2003, from <http://www.cbsnews.com/stories/2003/01/30/world/main538668.shtml>

15. Rohter, Larry. (2000, June 10). Brazil grants some legal recognition to same-sex couples. *New York Times*; Hacker, Peter. (2002, September 25). Taiwan move to allow gay unions. *BBC News*; Hogg, Chris. (2003, October 28). Retrieved December 4, 2003, from <http://news.bbc.co.uk/2/hi/asia-pacific/3219721.stm>; Australian state grants partner rights. Retrieved December 4, 2003, from <http://www.365Gay.com>

16. Decision Research. (2003, October 29). Retrieved January 5, 2004, from <http://www.ftmss.org/PollMemoOct2911.pdf>

17. Phillips, F., & Klein, R. (2003, November 23). 50% in poll back SJC ruling on gay marriage. *The Boston Globe*. p. A1.

18. New Jersey voters favored same-sex marriage in a July 2003 Zogby poll 55% to 41%. Peterson, I. (2003, July 29). Metro briefing New Jersey: Poll finds support for gay marriage. *New York Times*. Decision Research Memorandum. (2003, November 18). 57% to 38% of Connecticut voters favor civil marriage for same-sex couples. Retrieved December 4, 2003, from <http://www.lmfct.org>; 54% of New Hampshire voters favor same-sex marriage in May 2003 University of New Hampshire poll. Staff Writer. (2003, May 23). New Hampshire residents favoring law for same-sex marriages. *The Associated Press*.

19. Wall Street Journal/NBC News poll conducted by Peter Hart and Robert Teeter, Sept. 9-13, 1999. Cited in Lambda Legal Defense and Education Fund. (1999, December 10.) Preliminary Notes on the Hawaii Supreme Court's 12/9/99 Decision. Retrieved December 4, 2003, from <http://www.lmbdalegal.org/cgi-bin/iowa/documents/record?record=544>

20. 2001-2 Freshmen Survey: Their Opinions, Activities, and Goals. (2002, February 1.) *The Chronicle of Higher Education*. p. A37. Retrieved December 4, 2003, from <http://www.chronicle.com/free/v48/i21/opinions.htm>

21. Madison, J. Federalist 10. *The Federalist Papers*. New York: Penguin Classics.



government, separation of powers, checks and balances, and the Bill of Rights was designed to prevent against majority tyranny over unpopular minority groups.²²

RELIGIOUS PROTECTION

Access to civil marriage is completely unrelated to the right of religions to decide whom they will marry. Many legal marriages, such as marriages after divorce or inter-faith marriages, are not blessed within particular religious traditions, but the state still recognizes them. That said, an increasing number of religions, including Reform Judaism, Unitarianism, along with many United Church of Christ congregations and Quaker groups, conduct same-sex marriages. Some Episcopalian congregations bless same-sex unions. However, these couples' unions are not recognized by U.S. law. Religious congregations should have the freedom of religion to marry those couples they wish to marry. Allowing marriage for same-sex couples will not change this.

STATE AND FEDERAL MEASURES TO ENACT NEW KINDS OF DISCRIMINATION

“SUPER DOMAS”

A new threat to gay and lesbian families is legislation informally referred to as “Super DOMAs.” Building on federal and state Defense of Marriage Acts (“DOMAs”) that prohibit recognition of the marriages of same-sex couples, Super DOMAs typically aim to prohibit any kind of recognition of same-sex relationships. These laws or amendments may potentially endanger employer-provided domestic partner benefits, joint and second-parent adoptions, recognition of same-sex couples' legal contracts, health care decision-making proxies, or indeed any policy or document that recognizes the existence of a same-sex partnership. While, to date, only Nebraska has passed such a law, legislators need to actively oppose these very dangerous proposals that could make same-sex partners and their non-biological children legal strangers. Such legislation could cause a child to be torn away from a non-biological parent because a second-parent adoption is not recognized. An ill partner could be denied health care because domestic partner benefits are eliminated. These bills attempt to negate family bonds and tear families apart, potentially causing great harm to children and partners during times of crisis.

THE FEDERAL MARRIAGE AMENDMENT

On May 21, 2003, Rep. Marilyn Musgrave (R-CO) introduced H. J. Resolution 56 to amend the U.S. Constitution to define marriage as between a man and a woman, and to prevent legislatures or courts from mandating more limited benefits, such as civil unions or domestic partnerships. As of December 2003, there were 107 bipartisan cosponsors in the U.S. House of Representatives. On November 25, 2003, Senator Wayne Allard (R-CO) introduced S. J. Resolution 26 as a companion bill with four Republican cosponsors. This amendment reads, “Marriage in the United States shall consist only of the union of a man and a

22 Madison, J. *Federalist 51*. *The Federalist Papers*. New York: Penguin Classics



woman. Neither this Constitution or the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”

This amendment should not be adopted. This amendment would divide communities and threaten families. Amending the U.S. Constitution is very unusual and has only been done to address great public policy need. In 214 years, our Constitution has only been amended 17 times since the original Bill of Rights in 1791. Amendments historically have been used to protect or clarify rights and liberties of the American people, not to remove rights.

Even some opponents of same-sex marriage agree that a constitutional amendment is a bad idea. Senator Chuck Hagel (R-NE) stated, “I don’t think the Constitution was ever written and set up for those kinds of amendments. I think those kinds of issues are better left to the states.” Former Congressman Bob Barr (R-GA), lead sponsor of the Defense of Marriage Act, opposes the Federal Marriage Amendment, as does former U.S. Senator Alan Simpson (R-WY). Vice President Dick Cheney, in his Vice Presidential debate with U.S. Senator Joseph Lieberman (D-CT), said “I think the fact of the matter, of course, is that matter is regulated by the states. I think different states are likely to come to different conclusions and that’s appropriate. I don’t think there should necessarily be a federal policy in this area.”²³

Even some opponents of same-sex marriage agree that the Federal Marriage Amendment is a bad idea.

GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH

On November 18, 2003, the Massachusetts’ Supreme Judicial Court declared that marriage is a civil right and that gays and lesbians have a constitutional right, under the due process and equal protection provisions of the Massachusetts Constitution, to marry the person of their choice. The court stayed the judgment for 180 days “to permit the Legislature to take such action as it may deem appropriate in light of this opinion.” This stay allows the Legislature time to conform its marriage laws with the Court’s opinion which unequivocally calls for access to marriage for same-sex couples. The Legislature need not take any action to effectuate the Court’s declaration of constitutional rights. The Legislature has no ability to legislate away gays and lesbians’ constitutional right to marry the person of their choice. It also cannot, at this juncture, provide rights less than marriage under an alternative legal structure such as civil unions or domestic partnerships.

23. *VP Debate Excerpts: Gay Rights and Wrongs*. TheGully.com. Retrieved January 6, 2004, from http://www.thegully.com/essays/gaymundo/001009transcript_q.html



CONCLUSION

Goodridge was not a radical decision. Six of the seven judges and three of the four in the majority were appointed by Republican governors. Countries around the world are moving in the direction of equality. Fair-minded legislators should seek to end marriage discrimination for same-sex couples in order to end the unnecessary harm done to them and their children. Simultaneously, reactionary Super DOMA bills attempting to negate any protection of same-sex relationships must be vigorously opposed as dangerous to all gay and lesbian families.

*For more detailed information and analysis, model legislation and families' stories, see **Family Policy Manual: Issues Affecting Gay, Lesbian, Bisexual, and Transgender Families** by National Gay and Lesbian Task Force Policy Institute, available at <http://www.ngltf.org/library/familypolicy.htm>*



RESOURCES

For more detailed information and analysis, model legislation, and families' stories, see:

- *Family Policy Manual: Issues Affecting Gay, Lesbian, Bisexual, and Transgender Families* published by the National Gay and Lesbian Task Force Policy Institute
Available at <http://www.ngltf.org/library/familypolicy.htm>
- Freedom to Marry
116 W 23rd Street, Suite 500
New York, NY 10011
(212) 851-8418
E-mail: evan@freedomtomarry.org
Web: <http://www.freedomtomarry.org>
- Gay & Lesbian Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108
(617) 426-1350
E-mail: gladlaw@glad.org
Web: <http://www.glad.org>
- Human Rights Campaign
1640 Rhode Island Avenue N.W.
Washington, DC 20036
(202) 628-4160
E-mail: hrc@hrc.org
Web: <http://www.hrc.org>
- Equal Marriage—The Freedom to Marry Coalition of Massachusetts
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Web: <http://www.equalmarriage.org>

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