Storytelling as a Policy Tool: 
An Examination of Same-Sex Marriage in Massachusetts

A Dissertation Presented By

Edward F. Kammerer, Jr., Esq.

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ABSTRACT OF DISSERTATION

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ABSTRACT

Policy debates often hinge on careful frame selection. Frames are ways of organizing the world, emphasizing certain aspects of a policy debate or issue while deemphasizing others. Storytelling is a useful technique for framing. Stories are central to how the mind processes information and makes decisions. Stories, and storytelling, present information that may not be purely rational, but is still important in the decision making context. They add emotion and heighten interest. Applied Legal Storytelling scholars have begun exploring the role of stories in legal disputes. Using the framework developed in that literature, this study looks at the types of stories told during the policy debate over same-sex marriage in Massachusetts.

Beginning with Goodridge v. Department of Public Health, I explore the specific and general stories used throughout the litigation that resulted in same-sex marriage becoming legal in Massachusetts. I then turn to the Constitutional Convention debates after Goodridge as the legislature considered attempts to amend the Massachusetts Constitution to overturn the Court’s decision. Next I explore the media campaign launched by MassEquality at this time to increase popular support for the recognition of same-sex marriages.

Advocates across all three branches told a variety of stories, some personal and some universal. The themes, however, were consistent throughout the policy debate. Same-sex marriage becomes the next chapter in an on-going story of American progress and the expansion of rights recognition.
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There are only two or three great human stories, and they go on repeating themselves as fiercely as if they had never happened before.

– Willa Cather, *O Pioneers!*

You gotta give ‘em hope!

– Harvey Milk

No one ever marched on Washington because of facts on a flowchart.

– Kendall Haven

There is something remarkable about words that speak to justice, to civil rights, to freedom. What is remarkable about those words is once they are expressed and written, they no longer belong to the people who wrote them or said them but to the people who hear them.

– Byron Rushing
The movement for marriage equality has recently achieved many important victories. In 2012, proponents of same-sex marriage won popular campaigns in four states. In Maine, Washington, and Maryland voters were seeking to proactively legalize same-sex marriage. One campaign, in Minnesota, was fought against an attempt to add a ban on same-sex marriage to the state constitution. These victories were the first ever for same-sex marriage at the ballot box, ending a losing streak 32 elections long (Fetters 2012). These wins reflect the shift in support for same-sex marriage. Survey data from earlier in 2012 show growing national support for marriage equality. A Gallup poll conducted in May 2012 showed 50% of Americans in support with only 48% opposed to recognition of same-sex marriage (Newport 2012). In March 2012, Washington Post/ABC News poll showed 51-53% support for legal marriage for same-sex couples (Washington Post/ABC News 2012). Other polls illustrate a similar trend (Blumenthal 2012). This trend continued into 2013 and 2014 with many federal court victories, including partial victories in the United States Supreme Court.

Some attribute this trend to a shift in persuasive attempts. Instead of emphasizing legal claims and equal rights, supporters of same-sex marriage are now using personal stories to illustrate emotions and the impact marriage has on couples, both gay and straight, and their families (Lopez 2012). These stories add a human element that is often lacking in purely legal arguments. While this particular framing strategy may appear new, it is part of a long history of storytelling in the gay rights movement.

Early gay activists believed that, once the heterosexual world knew and understood homosexuals, discrimination would end. Coming out, the process where gays and lesbians disclose
their sexual orientation, is the chief means by which this understanding is conveyed. Telling these very personal stories was seen as a way to break down the negative beliefs held about the gay community. Through this process, gays and lesbians made the personal political. Harvey Milk, one of the first openly gay men elected to public office, urged people to come out as a way of influencing public policy (Shilts 1982). Specifically urging gays and lesbians to come out, to friends, families, and co-workers, was a new tactic, but one that has been continued by later activists (Armstrong 2002).

Even today, after substantial progress in equality since the 1970s, the importance of personal storytelling is evident. Two recently formed organizations, I'm From Driftwood and It Gets Better, have created spaces where the GLBT community can share personal stories, both to educate the heterosexual community about gays and lesbians, but more importantly, to remind GLBT youth that they are not alone (I'm From Driftwood 2012; It Gets Better Project 2012). Both of these organizations see storytelling as lifesaving for troubled youth. Hearing stories from those who have survived similar experiences gives the younger generation hope. This is the power of personal storytelling.

This study examines storytelling in a related, but more formal setting: the public policy process. Using the issue of same-sex marriage in Massachusetts, I will look at how supporters of the right for gays and lesbians to marry used storytelling to frame their issue and persuade policymakers across government and the public to support their view. I will also look at the opposition’s use of storytelling to counter the narratives asserted by the supporters. To properly understand the context in which the fight for marriage equality arose, I will first outline a brief history of the gay, lesbian, bisexual and transgender (GLBT) rights movement in the United States. Then I will review the literature on framing, storytelling, and persuasion. From there, I will analyze the storytelling used in
Massachusetts in the judiciary, the Constitutional Conventions at the State House, as well as the campaign in the media.

From Early Gay Rights Activism to the 1990s

“Gay rights” is a relatively new concept. The evolution of the concept of gay identity and the fight for gay rights and gay equality can be traced back to early organizers, starting in the 1940s and 1950s. The idea of a gay identity did not exist until approximately the 1940s. Early gay rights groups, like the Mattachine Society and the Daughters of Bilitis, had to first construct a homosexual identity. Harry Hay, the founder of the Mattachine Society, saw this as one of the most important projects for his organization (Hay 1996). Only then could the fight for gay rights begin in earnest. Armstrong (2002) analyzes this from a sociological perspective, with a focus on San Francisco, California. Using a legal history lens, Klarman (2013) takes a more national approach. Hirshman (2012) also uses history, but with a focus on the individuals active at different stages of the movement. She uses these personal stories to weave the thread of gay rights organizations from before the founding of the Mattachine society through the marriage movement of today. All three scholars provide an extensive overview of the early obstacles and struggles of gay rights organizing in the United States and how those obstacles were, at least partially, overcome.

While full equality has not yet been achieved in the United States, the progress made by the GLBT movement since the 1950s is astounding (Chauncey 2004). The speed of success has increased rapidly since the 1990s, particularly in the area of public opinion. Laws have changed as well, but often trail behind popular support for GLBT equality (Lax and Phillips 2009). Some of this

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1 I will refer to this movement at varying times as the GLBT movement as a whole, the gay rights, or the gay and lesbian rights movement. Much of this reflects changes in terminology used by the movement itself as it grew over time (Armstrong 2002, xix).
disconnect could be attributable to issue salience, as Lax and Phillips (2009) discuss. One of the
greatest successes of the GLBT movement has been to increase issue salience on a host of its
corns. In the early years of the gay rights movement, there was no salience. Few were talking
about gay rights at all (Chauncey 2004; Klarman 2013). Even early gay organizations, like the
Mattachine Society, did not immediately seek to raise the issue of gay rights to prominence, choosing
instead a slower more incremental approach (D'Emilio 1992, 46-47). Now, media representations of
gays and lesbians are common and issues are discussed in the news and at the dinner table
(Chauncey 2004). To understand this shift, and the prominence of marriage as a policy goal, it is
important to briefly review the history of the GLBT movement.

The modern gay rights movement is generally traced back to the riots in 1969 at New York
City’s Stonewall Inn (Tadlock, Gordon, and Popp 2007). But early gay rights groups, like the
Mattachine Society, had been organizing since 1950 (Armstrong 2002; D'Emilio 1992; Hay 1996;
Hirshman 2012; Hull 2006). Without this early organizing, the rapid growth in the 1960s and early
1970s around the time of the Stonewall Riots would have been impossible. Armstrong (2002) also
disputes the importance of Stonewall more specifically. She links the birth of the gay liberation
movement to interactions between early gay rights groups and the New Left that had been occurring
across the country for years. The goals of the New Left, according to Armstrong, did more to
change the course of gay rights than the riots in New York City in 1969. This may be true, to a
degree, but it negates the importance of the Stonewall Riots in continuing, and increasing, the
momentum toward a changed gay rights movement. The annual pride parades that form an
important part of Armstrong’s theory were founded specifically to commemorate the Stonewall
Riots (Hirshman 2012). This raises questions about her easy dismissal of the Stonewall “myth”
(Armstrong 2002, 62). Other gay bars, of course, had been raided and violent responses were
provoked from the gay community. But only Stonewall was commemorated with an anniversary march not only in New York City where the riots occurred but in other cities as well (Hirshman 2012). While other factors contributed to the changes in the organized gay rights movement, the importance of the Stonewall Riots cannot be underestimated.

Regardless of how much weight is given to the 1969 Stonewall riots, the rapid acceleration of the gay rights movement in the late 1960s and 1970s was only possible because a foundation had been put in place previously. This early organizing of the gay community was complicated by the legal status of homosexuals. At this time, nearly every state in the United States criminalized same-sex sexual behavior (Chauncey 2004; Eskridge 2008; Klarman 2013, 3). In New York City, and elsewhere, it was illegal for bars to serve known homosexuals and police actively raided gay bars (Klarman 2013, 4). Arrests were made public by the press and generally led to severe consequences, both legally and socially, for the gay men caught up in the bar raids and other police stings targeting the gay community (Chauncey 2004). It was legal, and common, for people to be fired from their jobs because of their sexual orientation. The American Psychiatric Association considered homosexuality a mental illness until 1973 (Klarman 2013). During this period, being a known homosexual was automatic disqualification for many government jobs. During the McCarthy-era, more homosexuals were fired from government positions than communists (Chauncey 2004). The total prohibition on homosexuals in the U.S. Civil Service was not lifted until 1975, but even then it remained as a disqualification from some jobs and protection from discrimination in federal government hiring was not enacted until the 1990s, although discrimination in the military persisted. (Chauncey 2004; Klarman 2013). That prohibition did not end until 2011 (Bumiller 2011).

By 1969, when the Stonewall Riots started, gay organizations had already started to see some progress, albeit minimal. Leaders of the Mattachine Society, finally moving into the policy debate,
were included in discussions with policymakers addressing gay issues. Many in the medical community had already begun to question the view of homosexuals as diseased. Police harassment was on the decline, although few states had seriously considered repealing their sodomy laws. Only two had done so by 1971, two years after the Stonewall Riots. In fact, sodomy laws were still enforced in several states until the United States Supreme Court found them unconstitutional in the 2003 case *Lawrence v. Texas* (Eskridge 2008).

But Stonewall, and similar incidents in other cities, marked an important shift in the gay rights movement (Armstrong 2002). The *Village Voice* called the response to the police raid at the Stonewall Inn “unprecedented” (Truscott 1969). The gay rights movement had moved from the somewhat tepid activism of the Mattachine Society to the bold, antagonistic activism of the Gay Liberation Front. Many new, grassroots organizations were formed in its wake. Marches and demands for gay rights grew rapidly in the post-Stonewall Era. The 1970s even saw the first attempts to use the courts to win legal recognition for same-sex marriage. None were successful. In fact, as Klarman (2013, 19) notes, the litigants, and their arguments, were treated with derision by the courts.

During the 1970s, the leading gay rights organizations were focused on issues more pressing than marriage. Marriage did not register as a goal at this early stage of gay and lesbian activism (Hirshman 2012). Discrimination, in both employment and public accommodations, and repealing sodomy laws were of more immediate concern. Local non-discrimination ordinances became more common, but were not always well-received. In Dade Country, Florida, the non-discrimination law enacted in 1977 quickly, and famously, lead to backlash (Eskridge 2008; Stone 2012). A repeal campaign led by Anita Bryant successfully overturned the law with 68 percent of the vote (Klarman 2013). This led to other attempts to repeal ordinances in other cities and place other restrictions on
gays and lesbians (Stone 2002). Contemporaneously with these repeal efforts, for example, California considered, and ultimately rejected, a ballot initiative to bar gays and lesbians from the teaching profession (Eskridge 2008).

In the early 1980s, the gay rights movement was hit with the AIDS epidemic and, again, the focus of gay rights groups shifted (Klarman 2013, 35). Health concerns and funding for AIDS research took precedence on the agenda. Some groups remained focused on other concerns, as well. The 1980s saw efforts from Lambda Legal to overturn sodomy laws via a legal challenge appealed to the United States Supreme Court. Many gay rights groups saw sodomy laws as the foundation on which all other discrimination against gays and lesbians was justified (Eskridge 2008). Because sodomy was criminalized, every gay and lesbian person was presumptively a criminal (Ibid.). Unfortunately for the gay rights movement, the United States Supreme Court’s ruling in Bowers v. Hardwick upheld the challenged sodomy law, a huge blow to the efforts for gay and lesbian equality not overcome until the Court reconsidered the issue in 2003 (Klarman 2013).

Efforts for Marriage Equality – Hawaii, Vermont, Massachusetts, and Beyond

Early in the 1990s, the National Gay and Lesbian Task Force polled members on issues facing the gay and lesbian community. Marriage, again, was not part of the conversation (Klarman 2013, 48). With few exceptions, the organized gay and lesbian rights movement was not focused on, nor very much interested in, marriage equality (Chauncey 2004). But as is often the case with social movements, individual actors can derail an organized movement’s goals. In the 1990s, that happened to the gay rights movement. Marriage made its way onto the agenda through private litigation filed in Hawaii in 1991 challenging the exclusion of gays and lesbians from civil marriage. Confronted with a same-sex marriage case they did not want and were not planning, organized groups ultimately chose to intervene via amicus curiae briefs. While the plaintiffs secured a legal victory in Hawaii, gay
marriage never became law because the Hawaiian constitution was quickly amended to overturn the court victory. But the agenda had been set: marriage equality was now a concrete, realizable goal for the gay rights movement (Klarman 2013).

The brief, limited victory in Hawaii was not without backlash. Even though no same-sex marriages had taken place, those opposed to the idea used the Hawaii litigation to justify increasing bans on same-sex marriage. In 1996, Congress got involved, passing the Defense of Marriage Act. This provided the first federal definition of marriage, limiting it to opposite-sex couples. It also permitted states to deny full faith and credit to same-sex marriages performed elsewhere. Several states took advantage of this exception to the Full Faith and Credit Clause of the federal Constitution and enacted their own versions of the Defense of Marriage Act. Some states acted through legislation while others, like Hawaii, amended their constitutions (Klarman 2013).

The next stage in the quest for the same-sex marriage was much further north. In the late 1990s, the Gay & Lesbian Advocates & Defenders filed a lawsuit in Vermont seeking marriage equality. This case, Baker v. State of Vermont, was filed by a gay rights organization and crafted carefully as challenge to existing marriage laws. Vermont was chosen for a variety of reasons. For one, it was seen as more liberal than other states, and thus more receptive to the marriage equality argument. Another reason, based on lessons learned in Hawaii, was that the Vermont constitution was particularly difficult to amend. Any court victory would be markedly harder to overturn than in most other states. The Vermont Supreme Court, like its Hawaiian counterpart, ruled in favor of the plaintiffs challenging state law. But the Vermont court did not go so far as to order same-sex marriage. Instead, the remedy was left to the legislature. Marriage itself was an option. But, as long as the remedy provided same-sex couples with the benefits and obligations of marriage, even if it was not called marriage, it would be acceptable to the court (Baker v. State of Vermont). The legislature,
taking this approach, created civil unions as a parallel system of recognition that, under state law, would be equal to marriage (Klarman 2013).

Many praised this outcome; it was the closest the gay rights movement had come to achieving the goal of marriage and would, in fact, extend many legal protections to same-sex couples under Vermont state law. Others, both in the GLBT community and those in opposition to marriage equality, saw the decision has severely flawed. Some marriage equality supporters felt that the legislature did not go far enough. They invoked the legacy of Brown v. Board of Education and claimed that, as a separate institution, civil unions were still discriminatory. On the other side of the debate, the actions by Vermont were seen as getting too close to undermining the institution of marriage. Those opposed to marriage equality felt that civil unions were a slippery slope and would lead, eventually, to recognition of same-sex marriages (Klarman 2013). Marriage equality would not happen for several more years.

Massachusetts: Same-Sex Marriage Legalized and Maintained

In 2003, the Supreme Judicial Court (SJC) of Massachusetts issued a landmark decision. In Goodridge v. Dept. of Public Health, the court held that barring same-sex couples from the institution of marriage served no legitimate governmental purpose. Under the Massachusetts constitution, the state could not “deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry” (Goodridge v. Dept. of Public Health p. 948). The Court acknowledged that this marked “a change in the history of [the Commonwealth’s] marriage law” (Ibid.). After a lengthy opinion, the SJC stayed its ruling for “180 days to permit the Legislature to take such action as it may deem appropriate” in light of the Goodridge Court’s holding (Ibid. p. 970).
That 180 day period saw concerted effort from both supporters of same-sex marriage and those against it. Those in opposition sought to overturn the Goodridge decision. Supporters of marriage equality fought to maintain their newly acquired right. The state senate entered the fray, seeking clarification of the Supreme Judicial Court’s ruling by certifying a question to the Court about the adequacy of civil unions as an alternative to marriage. In response, the Supreme Judicial Court remained adamant; when the Court said marriage it meant marriage, not civil unions (Opinion of the Justices to the Senate). This political fight continued long past the initial 180 day stay. After several attempts to amend the Massachusetts state constitution, the issue was not finally decided until June of 2007 — over three years after the first same-sex marriages were performed in the Commonwealth.

The marriage equality debate in Massachusetts presents an opportunity to observe competing narratives on a single policy issue across several branches of government, as well as in the popular press and other media campaigns directed at the general public. Marriage equality in Massachusetts started in the judicial branch. Attempts to limit the influence of the court started in the legislative branch, and, when those failed, work began again in the legislative branch to overturn the Goodridge decision entirely through constitutional amendment. That initial attempt failed and was followed almost immediately by a second attempt, using a different legal framework, to accomplish the same goal. And while the issue never directly reached the voters, there was a public campaign targeting voters in case the issue did reach the ballot, as well as substantial news coverage during the multi-year debate.

The remaining chapters in this study will focus on the nature of this debate. First, I will review the literature on framing. I will apply this literature to an analysis of storytelling, emotion, and persuasion. Using the themes of applied legal storytelling, I will look at framing and storytelling
in each of three policy arenas: judicial, legislative, and popular media. I will attempt to explain how each side of the debate on same-sex marriage in Massachusetts used storytelling to advance its position. In the judicial arena, I will examine the briefs filed by the parties and amicus curiae as well as the opinions filed by the courts. For the legislative arena I will look at the testimony during the constitutional conventions that considered efforts to overturn the Goodridge decision. Lastly, in the popular media arena I will examine the commercials and other advertising materials prepared by the advocates on both sides in an effort to build support for each side in Massachusetts’ voters. I end with an overview of the current trends in marriage equality. After Massachusetts ended the debate on the issue, other states took it up. Federal courts, mostly at the District Court level, have also been active. The trajectory toward equality, most clearly begun in Massachusetts continues.
CHAPTER TWO: REVIEW OF THE LITERATURE

Much has already been said about same-sex marriage from a legal and policy standpoint. (See, e.g. Chauncey 2004; Hull 2006; Keck 2009; Klarman 2013; Nussbaum 2010; Rimmerman and Wilcox 2007; Rosenberg 2008; Schwartz 2010). This study, instead, focuses on the rhetoric used in debating the issue of marriage equality as it made its way through the various policy arenas in Massachusetts around the time of the Supreme Judicial Court’s 2003 ruling in Goodridge v. Dept. of Public Health. Since Massachusetts’ debate over legal recognition of same-sex marriages took place in the courts, the legislature, and in the popular media, a focus on Massachusetts provides a great opportunity to study the issue in each of these contexts. Using themes from the applied legal storytelling movement, this study seeks to understand and illustrate how each side used storytelling as a frame in an attempt to gain support for its side, in each of the different policy arenas.

Framing is crucial to success in any policy debate. Frames help define the problem and, thereby, limit the scope of debate. Certain frames lead to certain problems that require certain solutions. The fight over how to frame an issue is, ultimately, a fight over how to solve a problem. While “story” is not a frame itself, storytelling is a way of framing specific problems. Relying on traditional story components, heroes and villains and quests and drama, makes problems compelling. Stories motivate. According to Stone (2002), Gottschall (2012), and others, stories are so inherent in our political discourse and our lives that their presence goes unnoticed and unrecognized. This study will bring these stories to the surface and examine the way that they are used to frame support for and opposition to same-sex marriage.

Framing Theory

Combined, storytelling and emotion provide a useful way of framing issues for maximum persuasiveness. Frames are the basic ways of organizing information (Noakes and Johnston 2005).
Frames are, at their core, packages of symbols and meanings that advocates and movement actors use to explain their position or policy proposal to the public (Gamson and Modigliani 1989; Price, Nir, and Capella 2005). Frames focus attention rather than provide new information, emphasizing certain aspects while deemphasizing others. How people process information and react to it depends on the frame through which they view the information. Those on different sides of an issue will look at it differently. Each side views certain factors as more important than others, leading to a different problem definition which in turns leads to different solutions (Price, Nir, and Capella 2005). Frames do not operate in isolation; for every frame there is a counter frame. Many public policy debates are battles over which frame should control the conversation. Win the frame, win the game. Other debates occur within the same frame and are more focused on frame application and nuance. Here, both sides agree on which lens to use to view the issue but differ as to what that lens reveals. But even these intra-frame debates are, in a sense, about frame definition and meaning. For example, both sides can agree that the policy under examination is one of “liberty” – but what does liberty mean? Liberty for whom? How does that liberty get expressed in concrete policy proposals? This is sometimes articulated as the difference between ideology and framing. The same frame can be used by completely divergent ideologies (Oliver and Johnston 2005). Frames are a process by which the content of an ideology is expressed and understood (Ibid.).

Framing is heavily influenced by the media. The media’s portrayal of an issue will influence how the public responds to that issue. Under the constructionist theory of framing, however, this is not done in isolation. The public takes a more active role in framing issues. Instead of passively adopting the frames selected by the media, the public meets those frames with its own understanding and life experience (Gamson and Modigliani 1989). This view is common in sociological literature (Price, Nir, and Capella 2005). The literature in psychology takes a slightly
different tack, focusing more on individual cognitive responses to frames. This research is usually conducted by studying individual responses to manipulated frames. As Price, Nir, and Cappella find, this research tends to view individuals as “passively subject to invidious influence” (Price, Nir, and Capella 2005, 181). Little experimental research has been done on the interactive effects of framing or on the limits of framing (Price, Nir, and Capella 2005).

Framing involves several different techniques. Word choice is crucial. The recent policy debate surrounding the “Don’t Ask, Don’t Tell” policy that banned openly gay and lesbian people from serving in the United States Armed Forces provides a clear example. Opinion polls clearly showed a bias depending on how the questions were framed. When asked about allowing “gays and lesbians” to serve in the military, support was much higher than when asked about “homosexuals” (Hechtkopf 2010). This can also be seen in the attempts to define the issue of same-sex marriage as either “marriage equality” or “gay marriage”. Two of the leading GLBT rights organizations, Marriage Equality USA and The National Gay & Lesbian Task Force, consistently refer to the issue as “marriage equality” on their websites (Marriage Equality USA 2011; National Gay and Lesbian Task Force Foundation 2012). The leading oppositional group, the National Organization for Marriage (“NOM”), prefers the term “gay marriage.” In fact, NOM’s website features a talking points section with a strong focus on frame selection. NOM advises against specific language because it has negative polling implications for their preferred policy position (National Organization for Marriage 2011).

Beyond language selection, framing techniques include imagery. There is a reason why pro-environmental groups highlight the threats to popular and cute animals. The threats to a polar bear’s habitat are more compelling than to other equally threatened but less majestic animals. Other images can also invoke pro-environmental concerns: smoke stacks and other sources of pollution, for
example. Storytelling, particularly emotionally charged storytelling, is an example of a framing technique. Which stories get told, and how they get told, can invoke frames and aid policy advocates in their persuasive efforts. Like framing, which emphasizes certain facts over others, storytelling helps to focus attention on specific aspects of issues under consideration. Storytelling and framing work together to persuade.

**Storytelling: What Makes a Story a Story**

In a 2012 interview with CBS News, President Obama said that he believed his biggest mistake in his first term was “putting policy over storytelling” (Boerma 2012). He explained further that getting the policy right is only part of the role of the presidency. Presidents must also tell a story to the American people that is both inspiring and unifying. President Obama’s realization applies across all levels of government. It is not just presidents that need an inspiring story. Legislators, judges, litigants, and policy advocates all benefit from a compelling story. But how should this be done? What are the aspects of storytelling that are used in policy debates? How are the issues framed?

Before we begin analyzing the prevalence and prominence of stories in politics and in everyday life, it is important to define key terms. Haven (2007) illustrates the problem succinctly: in reviewing the literature for his book on storytelling, he noted that the vast majority of scholars all defined story in differing ways. Each of these, according to Haven, presents a flaw in understanding the power of story as he defines it. Before giving us that definition, however, he explores three “pervasive and counterproductive” beliefs about stories and storytelling that are present in many of the definitions in other scholarship (Haven 2007, 13).

The first, what he calls the “Blanket Myth” is the belief that everything is a story. Not every event, even if told in narrative form, constitutes a story. Some things are just not worth telling about.
These are the stock scripts that Amsterdam and Bruner (2000) say that, while not themselves stories, form the basis of storytelling; until a script has been violated or otherwise made inapplicable, there can be no story. Similarly, Haven (2007, 14) argues that not everything is a story, “but it could become one.” The next myth Haven addresses is the “Binary Association Myth.” Stories are often, unconsciously, linked with fiction and falsehood (Chestek 2010). Haven found this misconception in many of his interactions over time. Stories are suspect when they are used to make a point. People want the facts, not the story version. Haven addresses this misconception by distinguishing story from content. Story is a method of delivering information, not the information itself (Haven 2007). This is often compounded by another binary association: child and adult. Haven calls this “The Childhood Myth.” To Haven, too often scholars treat stories as the stuff of childhood, with no place in the serious work of adults. Story is seen as the last resort of those with a weak argument or a need to hide or shade the truth (Haven 2007).

Haven also takes issue with the standard, primary dictionary definition and with scholars whose definitions mirror the dictionary. For Haven, too many of these definitions rely on only one aspect of a story. As he notes, they often define story as a series of events, whether real or imagined. Dalkir and Wiseman (2004, 58) define story as “the telling of a happening or connected series of happenings, whether true or fictitious.” Posner’s (2009) definition adds a bit more. He defines story as “a sequence of events invented, selected, emphasized, or arranged in such a way as to vivify, explain, inform, or edify.” He goes on to note that stories require a logically arranged, although not necessarily chronologically presented, beginning, middle, and an end (Posner 2009, 424). Pennington and Hastie (1991) define story similarly, focusing on causal links between human events. While a start, as noted by Haven, these seem to be as lacking as the dictionary definition. Haven compares this to the definition of plot and finds them synonymous. Something more than plot is essential for
storytelling. Things that are not “stories” will meet the standard definition. Haven uses this example: “He went to the store.” It is a narrative account of an event, either real or imagined, used to inform but it is hardly a story (Haven 2007, 16).

Other scholars focus on other aspects when defining story. Zacharias (2011, 116) sees narrative as, at its heart, “a technique of persuasion.” Like Posner, Zacharias emphasizes the structural elements of narrative. There is a time sequence and certain events are used to illustrate relationships. One element that Zacharias adds is that of emotion. The narrator colors the story with an emotive value, tragic or comic, to aid in the persuasion. Yet something is still missing from this expanded concept of story.

What, then, is story? Haven (2007, 79) defines a story as a “detailed, character-based narration of a character’s struggles to overcome obstacles and reach an important goal.” This adds the crucial missing elements from the more standard plot-focused definitions. Some scholars rely on this definition either explicitly (Chestek 2010; 2011) or implicitly (Amsterdam and Bruner 2000; Gottschall 2012). Haven goes on to distinguish this character-centered definition from other forms of plot-based narratives. When a narrative is plot-based, according to Haven, it fails to capture the reader’s interest. Readers of stories identify with protagonists, not events. For persuasion, this is crucial. Stories, driven as they are by character, are more likely to engage the audience. “Events happen not for their own sake, but to explain the struggles of a character” (Haven 2007, 79). Other scholars also emphasize the importance of character. Scalise Sugiyama (2005) summarizes much of this research. Her emphasis is to show that stories are human endeavors. Even when the characters are not themselves human, they are humanized in some way. She states it clearly: “narrative by definition involves characters” (Scalise Sugiyama 2005, 184) Thus, while plot is necessary, stories must be about someone more than something. Character driven storytelling invites an emotional
response and connection from the audience. This is crucial for persuasion, as will be discussed below in Section III.

Amsterdam and Bruner (2000) define story similar to Haven, but with somewhat more detail. Like Posner, they start with the structural: stories must recount a series of events and the plot must have a beginning, a middle, and an end. Their definition also requires the character elements emphasized by Haven, with a particular emphasis on the goals of the characters. The events are less important than the motivations of the characters and the obstacles that hinder them. Their basic definition of a story requires it “to be either a fiction or a real account of events; it does not have to specify which. It needs a cast of human-like characters, beings capable of willing their own actions, forming intentions, holding beliefs, having feelings. It also needs a plot with a beginning, a middle, and an end, in which particular characters are involved in particular events” (Amsterdam and Bruner 2000, 113 emphasis in original). Other scholars have a similar formulation of the elements of a story (Batt 1990; Grose 2010; Robbins 2006). The scholars who rely on each emphasize the same factors: detail, character, obstacles, and goals. Amsterdam and Bruner (2000, 113-114, emphasis in original) further define plot as having the following elements:

1. A “steady state grounded in the legitimate ordinariness of things”,
2. A “Trouble” that upsets this initial state. This trouble must be “susceptible to change by human intervention,
3. Efforts by the character to overcome this trouble, that either succeed or fail,
4. A return to the initial “steady state” or the creation of a new steady state,
5. A conclusion whereby the telling of the story and the story itself are linked through a “coda”, the “moral of the story”.

They also distinguish stories from scripts. Scripts are the stock narratives of life, the implied and understood way of handling specific situations. They are the “steady state” at present the start of a story, but are not, themselves a “story” using the definitions above. For example, an average trip to the market for groceries is a stock script. Unless something unscripted happens, this is unlikely to be
something related as a story. Only in the violation or absence of an established script can a story be found (Amsterdam and Bruner 2000; Batt 1990; Bruner 1991). Scripts can have stock violations — a cheating spouse, for example, is a stock violation of the generally accepted marital script. These violations, while common enough to be considered stock, still provide the “Trouble” necessary to make a script into a story.

Stories, then, are defined as character driven, narratively arranged events, focusing on the goals driving that character to overcome obstacles and challenges.

Neither character nor a simple series of plot point is sufficient. Stories need more. It is in the conflict and the attempts to resolve that conflict that stories are found. This disconnect between the way things are and the way that things ought to be is what is most compelling about stories (Amsterdam and Bruner 2000; Aristotle 1951; Haven 2007; Scalise Sugiyama 2005). Fixing this disconnect is the goal of the character. Aristotle discussed this as a central feature of the dramatic arts in his Poetics. Amsterdam and Bruner call this “Trouble”. This is also a central feature of Boyd’s evolutionary argument, as discussed below. While “[w]e crave one another’s attention, … no one wishes to pay attention to a story that discloses only the banal and expected: one would be better off attending to the real world” (Boyd 2005, 164). Stories, to hold our attention, must surprise us, or, at the very least, intrigue us more than the quotidian.

Now that we have a common definition of story, we can turn to the importance of stories in human interaction.

**Evolution and the Predisposition for Narrative**

Stories permeate our lives from earliest childhood through adulthood (Batt 1990; Bruner 2002; Gottschall 2012). People have been telling stories since before antiquity. Evolution has shaped our brains, creating a predisposition to favor storytelling as a way of interacting with the world. In,
On the Origin of Stories, Brian Boyd (2009) explores this genetic predisposition and posits explanations for the storytelling adaptation for both storytellers and listeners. He compares storytelling to other forms of play, noting that while not all researchers agree on why play is an adaptation they most agree that it is an adaptation. Play helps animals (including humans) develop skills that will likely prove useful in later, non-playful situations. Play, and the pleasure-inducing dopamine it releases, encourages animals to engage in learning activities rather than rest. Storytelling is similar. “Stories help train us to explore possibility as well as actuality” (Boyd 2009, 188). Scalise Sugiyama also explores the evolutionary basis for narrative. She attempts to “reverse-engineer” narrative to see how the component parts fit together. While she does not argue that there is conclusive evidence of narrative-as-adaptation, she presents a strong case for it. (Scalise Sugiyama 2005). Haven (2007) also addresses the evolution issue, concluding that the lengthy history of reliance on storytelling has led to evolutionary hardwiring for a story disposition. This, coupled with the cultural emphasis on storytelling during childhood, leads adults to think “irrevocably” in stories (Haven 2007, 27).

While this story-focused thought process can involve both true and invented stories, Boyd goes on to discuss fictive stories as a particular type of adaptation. By toying with reality, we learn from more situations, preparing ourselves for future responses, faster and more broadly than by relying solely on narrative accounts of actual events. Bruner (2002) also illustrates the importance of stories in preparing us for dealing with the unexpected and the novel. In addition to play and preparation for the unexpected, storytelling also serves a communal function. Information sharing provides substantial benefit, particularly for early humans in harsh environments. Storytelling allows for important life lessons to be shared without having to learn them “the hard way.”

According to Boyd and others, storytelling also plays a role in humanity’s desire to monitor one another. Gossip, an early form of storytelling, has been shown to have important social
functions, particularly during the early formation of civilization (Boyd 2009; Haidt 2012; Haven 2007). By highlighting the transgression of norms, gossip allows the community to shame members into compliance and prevent further deviation. Bruner (2002) argues that the entirety of human civilization would be impossible without narrative. He states, “I doubt such collective life would be possible were it not for our human capacity to organize and communicate experience in a narrative form” (Bruner 2002, 16). Nettle agrees that narrative — he examines it in the form of dramatic literature – is evolutionarily and inextricably tied to human society. He compares it to the grooming rituals in other primates. Grooming allows primates to understand, and even challenge, the hierarchy of their particular group. Language, and particularly narrative, serves the same purpose in human society. Through narrative the same ideas are expressed and human social groups can form and change (Nettle 2005). Narrative thinking is at the center of human interaction.

Like Haven (2007), Boyd also supports his conclusions on the evolutionary drive for storytelling with examples from childhood development. From earliest childhood on, interest in and use of stories is nearly constant. Babies learn to detect and respond to the key story elements before they learn to talk (Haven 2007). Scalise Sugiyama (2005) argues that storytelling is similar across cultures. While the details and particular references may change, the structure of stories is the same. All have the essential characteristics addressed here. This fits well with Boyd’s research on the evolutionary predisposition for storytelling. Storytelling, as a technique, appears to be both universal and innate.

Other scholars dispute that presence of narrative at birth, placing the development of a narrative way of thinking slightly later in infancy or even childhood (Nelson 2003). Nelson places the development of full narrative later than other scholars. She seems to premise this conclusion on the lack of sophistication in children’s grasp of narrative. She ranks three characteristics as
“essential” and finds that these characteristics remain weak in children as old as five. These three characteristics are “temporal perspective, the mental as well as physical perspective of self and of different others, and essential cultural knowledge of the unexperienced world” (Nelson 2003, 28). For Nelson, these three factors are the basis of narrative for “personal and cultural growth” (Nelson 2003, 28). While this level of sophistication is important in developing the full potential for narrative, its absence does not weaken the conclusions of other scholars about the fundamental presence of narrative. Part of this disagreement comes from Nelson’s distinguishing scripts from narrative. Scripts are routine recounting of everyday events, lacking character motivation or problems or troubles to overcome. Narrative, as indicated above, embraces these as essential.

Narrative is so essential to our thought processes that our brains seek it out, even when it’s not there. Our brains strive to perceive character and plot – two of the central elements of stories – even where none is to be found (Paulos 1998). The need to attribute agency to chance events is, arguably, derived from our brains inherent preference for story thinking. It is also safer to perceive agency when absent than to fail to perceive it when present; thinking a moving bush is a predator when, in fact, it is just the wind is a better survival strategy (Boyd 2005; Haidt 2012). This gives further support to the biological basis for narrative. It also supports the importance of storytelling for persuasion. The mind wants narrative; giving the mind what it wants makes persuasion that much easier. I turn now to how the legal system has used storytelling in advocacy.

**Story and the Legal System: Beyond Logical Reasoning?**

Lawyers have long known of the importance of storytelling. While this is particularly true of trial attorneys, it reaches into all aspects of the practice and study of law (Batt 1990; Bennett and Feldman 1981; Massaro 1989; McKenzie 1992-1993; Meyer 1993-1994; Meyer 2014; Robbins 2006). Basic trial practice texts nearly universally encourage storytelling techniques as a means of
persuading juries. Trial lawyers must learn to hear their clients’ stories and then retell them in the most persuasive way permitted by the evidence and the rules of law (Burns 1999, 2006; Rosen 1996). This becomes the theory of the case and guides the entire trial process (Mauet 2002). Appellate lawyers, similarly, must carefully craft the facts they present in their briefs to support the outcome they seek. Even legal education is built on storytelling; the case method used in most law school classrooms relies, in some part, on storytelling (Batt 1990).

The cases with the most impact are those with a compelling narrative element. Batt calls these “master cases.” Master cases are the basis of legal education and the basis of the common law more broadly (Batt 1990). The narrative links the details of the case with the arguments, both legal and policy, that come from it. This in turns aids the student in remembering all of the details. Narrative is the key to this process. Bruner argues that even outside of the legal system, facts not part of a larger story do not get remembered with the same permanence as facts important to a clear story (Bruner 1998).

Additionally, the Applied Legal Storytelling movement has recently begun asking questions about the role of storytelling in law school and legal practice (Foley 2008). Foley’s article focuses on the “Fact-Law Divide”, arguing that “facts” in the law are as mutable, if not more so, as the legal rules applied to them. Legal facts have little to do with real world facts. The fact/law divide is also addressed by Bruner (1998), who, while noting that law school is built on maintaining this divide, argues that in reality the two concepts cannot be neatly separated. For Bruner facts only get their relevance in context and that can change based on the situation at hand. Facts cannot, for Bruner, be found in the abstract without first being shaped, to some degree, by the process used to find them. This is what makes Foley’s point so important: proper understanding of the malleability of facts is crucial to good lawyering and, thus, to persuasion. This can be accomplished through proper
training in narrative. Storytelling provides a way for students and skills faculty (clinical professors and similar) to teach fact finding and organization; storytelling is inherently about “controlling and presenting” the facts of a case for persuasive effect (Foley 2008, 35).

**Legal Storytelling and “The Double-Helix of Persuasion”**

Burns (1999), and later Chestek (2010), explore the concept of persuasion in the legal system. Burns focuses on persuasion at trial. Burns argues that persuasion at the trial level is comprised of two strands: narrative and argumentative. Like the double-helix of DNA, both strands are necessary. Without supporting argument, narrative will be useless. But similarly, without a compelling story, a strong argument is left unsupported and its ability to persuade is lessened. According to Burns, each strand has a specific role and can be addressed to specific actors in the legal system. The narrative is the more important for persuading triers of fact in most cases. The argument strand only becomes relevant for the trier of fact in limited circumstances. These occur, for example, when jurors persuaded by the narrative strand use the argument strand to convince holdouts to vote with the majority of jurors. The main purpose of the argument strand is to pass muster with the trial judge and the reviewing appellate courts. Since both the trial judge and the appellate judge maintain deference to determinations made by the jury, the argument strand need only be plausible enough to support the conclusions based on the narrative strand (Burns 1999).

Chestek refers to the argument strand as “the theory of case” and the story strand as the “theme”. This separation of theme and theory is counter to the bulk of the literature in trial advocacy. For most scholars, the theory of the case must include the theme. Chestek is right to characterize the functions of each strand as distinct from the other, but his chosen terminology is unnecessarily confusing. Only by combining argument and theme, logos and pathos, law and story, can an appropriate theory of the case truly emerge. The double helix itself is the theory of the case.
Chestek conducted a study using Burns’ double helix theory to determine if the story strand actually aided in persuasion. Rather than looking exclusively at jurors, however, Chestek’s study focused on those with legal training. He drafted a series of briefs designed to test the double helix model of persuasion against the pure logic method often cited as the preferred way to draft legal briefs for judicial audiences. His study included appellate judges and their law clerks, appellate court staff attorneys, appellate lawyers, and law professors.

While small and of potentially limited generalizability, Chestek’s study supports the double helix model of persuasion. The briefs that included story strands, rather than pure law, were found more persuasive. While the sample was small, particularly when divided into groups by job function, there appears to be a strong link between story and persuasion. Interestingly, Chestek’s analysis shows that the longer respondents had been working, the more persuasive they found the story briefs. Law clerks, the youngest professionals in the study, were the only group to be evenly divided on the persuasiveness of the two styles of briefing; all other groups found the story briefs more persuasive. There is clearly room for further study in this area, but the initial findings are helpful in understanding the basic issues at play (Chestek 2010).

Once the decision to use a story strand has been made, brief writers must then figure out how to properly craft the story. One key feature of this is casting. Characters, as discussed above, are central to a story. In a legal dispute, the characters are often chosen before the lawyer enters the picture. But that does not mean that lawyers do not influence casting decisions. How to frame the various parties, witnesses, and participants in the legal dispute involves important decision-making on the part of the lawyer.
The Hero’s Journey — A Story Frame for Advocacy

Robbins (2006) suggests using the archetypical “hero’s journey” as the basis for crafting the client’s story. Chestek (2011) used this framework when he analyzed the various challenges to the Affordable Care Act. Advocates should cast their clients as “heroes on a particular life path” (Robbins 2006, 769). Heroes can take various forms; they need not all be the standard action movie hero. Situating the client’s story in the form of a heroic tale aids the advocate in focusing on the motivations and goals of the client. What is the client attempting to accomplish and why has that resulted in a legal dispute? The hero’s quest also gives the advocate access to the standard forms of conflict: person versus person, person versus nature, person versus society, person versus self. Some of these fit more neatly into the heroic story than others. In particular, Robbins cautions against framing the heroic quest as one of person versus person. Rather, she suggests that true heroism most often comes not in fighting against a person but what that person represents. Centering representation on the idea of the hero’s quest allows the advocate to be mindful of these decisions when casting the various participants into their roles in the story strand of persuasion. The concept of heroic archetypes has been used in other areas, as well. For example, they have been used in marketing and branding to help companies get and retain customers (Mark and Pearson 2001).

For Robbins, the most important casting decisions are those of the client and the judge. The client must be the hero. This, of course, means that the judge cannot be. Difficulty can arise here because, according to Robbins, judges, and society more generally, are often taught to view the judge as the hero of the courtroom. Advocates must recast the judge into another, more appropriate role, freeing the hero’s spot for the client. Choosing roles for the remaining actors, while important to do intelligently, is secondary to how the advocate frames the client and the decision-maker. The roles other than hero that can be cast include “mentor, companion, gatekeeper, dragon, goddess/damsel,
and shape-shifter” (Robbins 2006, 775). These casting decisions are, of course, complicated by the fact that opposing counsel is striving to do the same thing, with his or her own client as the hero. Casting is not done in isolation. The opposing sides will not often agree on how to cast the other participants in the dispute.

What, for Robbins, makes a character in a story a hero? Heroes are transformative. Using either “internal reflection” or “outward action”, heroes transform themselves or their society (Robbins 2006, 775). The hero’s quest is this journey toward transformation. Audiences identify most with the hero and, therefore, storytellers need to imbue their heroes with qualities universal to the audience. A hero nobody can relate to is not truly a hero at all. Echoing Amsterdam and Bruner’s definition of stories more broadly, heroes must encounter some type of trouble. This can be an internal flaw or an external problem that impacts their life and, through their journey, they seek to better their situation by overcoming their flaw or solving their problem. Heroes come in many forms: warrior, creator, scholar, lover, pioneer, prophet (Robbins 2006, 777). Campbell (2008) found six basic heroic archetypes. Other scholars have found more (Robbins 2006). However the basic divisions are made, the key for lawyer/storytellers is to be aware that different heroic options exist for framing their client. As Chestek (2011) argues, choosing the correct hero type makes the story more persuasive and easier to tell.

Another caution that Robbins provides involves how to cast the opposing party. Many think that, since they are by definition in opposition to the goals of the client, casting the other side as villain makes the most sense. This is not always true. The villain of one party’s story would be the hero of their own. Competing interpretations may cancel each other out and serve to weaken the advocate’s client’s position. Robbins suggests, instead, casting the opposing party as a “threshold guardian,” a sort of minor obstacle to be overcome in the quest to confront the actual villain.
Threshold guardians exist to test heroes as they progress along their journeys. This casting can often be accomplished by framing the lawsuit itself as an obstacle in a larger quest. The hero’s goal is not winning the case, but winning the case is a necessary step toward achieving the ultimate goal. Robbins also argues that the opposing side can be cast as a shape shifter. Shape shifters are characters who appear helpful at first but ultimately prove to be negative influences (Robbins 2006). The shifting behavior can also be useful in explaining, in certain cases, why the hero was associated with the opposing party in the first place. These characters can be seen as a form of threshold guardian in that detecting their shift and overcoming it can be a challenge the hero must overcome in order to progress.

Fitting with the definition of story above, Robbins (2006) outlines three distinct phases of the hero’s journey: departure, initiation, and return. She borrows heavily from Campbell (2008) in this conception. While not exactly the same as the beginning, middle, and end included in the story definition (Amsterdam and Bruner 2000), the phases loosely correspond to story parts (Chestek 2011). Amsterdam and Bruner’s concept of story requires goals and troubles, much like a hero’s quest to change society is complicated by obstacles and villains. Neither the hero’s journey nor a more general story need to proceed linearly or chronologically. The story can begin in the present, after the return, and look back to the departure and initiation, and then end again in the present. Similarly, the journey itself can be circular or interrupted.

Chestek utilized Robbins’ theory to understand how stories were used in the various lawsuits challenging the Patient Protection and Affordable Care Act (“PPACA”). Chestek attempts to present an alternative to the predominating explanation for the different outcomes in the various trial courts addressing the PPACA. Conventional wisdom believes that the different outcomes are partisan in nature. Judges appointed by Democrats upheld the law; Republican appointees struck the
law down. Chestek (2011) argues that there is a more nuanced explanation: the plaintiffs had different stories to tell.

In studying the challenges to the PPACA, Chestek looked at eleven cases. In these, he grouped the plaintiffs into three general types of protagonists: private individuals, physicians and their advocacy groups, and state governments (Chestek 2011). In general, his assessment of the storytelling on behalf of plaintiffs shows that their briefs did not fully take advantage of narrative reasoning. For example, the private individuals shared a goal of preserving their right to not buy health insurance, but Chestek points out that the goal was never well articulated. Rather than develop the goal as a personal freedom, the brief writers focused on obstacles. There was no explanation of the importance of the goal. The story told by the defendant (the United States federal government in varying forms) is, according to Chestek, a better example of storytelling. The goals and obstacles are clearly articulated in a way that feels true, providing an example of “narrative fidelity” as discussed by Rideout (Chestek 2011; Rideout 2008).

After analyzing how the stories were told in the eleven cases under consideration, Chestek attempts to draw inferences about how those stories influenced the case outcomes. He initially disclaims any attempt to prove how the different story styles influence persuasion, instead restricting the scope of his article to “evidence that narrative reasoning can be observed in the briefs and opinions” in the cases (Chestek 2011). While he may not go into the science behind persuasion, he does seem to try to do more than seek evidence that stories are present. For example, when analyzing the outcome of the physician’s challenge, Chestek claims that “one can reasonably attribute the plaintiff’s failure in this case as a failure to tell a good enough story.” (Chestek 2011). However, he never really addresses the other strand of reasoning from his earlier article. No mention is made of the possibility of a pure lack of legal justification.
The discussion of the different outcomes in the individual patient cases is much more persuasive. First, Chestek addresses the logos strand head on: under the Commerce Clause, both plaintiffs and defendants cited “basically” the same cases for precedent. The key difference was in the narrative strands of the arguments. Chestek’s analysis shows that the competing hero stories in the cases may have had an influence in the final outcomes, all of which favored the federal government by ultimately upholding the individual mandate. The government’s narrative effectively countered the plaintiffs’ narratives. Chestek also finds stories in the only two cases where the plaintiffs successfully challenged the PPACA. Here, the state government plaintiffs were able to portray their clients’ goals as worthy and successfully cast the federal government as an obstacle standing in the way of that goal.

After reviewing the challenges to the PPACA, Chestek ultimately concludes that storytelling is important, both in questions of law and in questions of fact. He does emphasize the importance of storytelling in fact-intensive inquiries, calling it “essential” and “self-evident” (Chestek 2011). For questions of law, Chestek asserts that narrative reasoning is still important, particularly in “open areas” of the law. When the law is unsettled, pure logos will not provide all the justifications necessary to support a ruling for one party or the other. In both cases, Chestek returns to his double helix theory. Both strands must be present, must fit together, and must sound true (Chestek 2010, 2011). This echoes Rideout’s requirements for narrative persuasion (Rideout 2008).

Chestek concludes with a caution about audiences. When presented with competing stories, judges ultimately decide on which story they will rely. Some of this can be influenced by the parties and how they frame their story, but much of it can depend on the judge’s preconceived beliefs or inclination to prefer one type of story over another. Judges predisposed to favor stories lauding rules and processes may, ultimately, ignore stories about stories human struggle against those rules. As will
be discussed in more detail in the next section, these entrenched biases can shade how stories are received because of the way that reason and emotion are linked around fundamental beliefs (Haidt 2012). Being aware of the biases in an audience, or at the very least the potential for bias, is crucial for all advocates, even those with a compelling story to share. The advocate must know the audience (Chestek 2011).

**Emotions: What Are They and How Do They Work With Storytelling and Persuasion**

Like “story”, the concept of “emotion” seems, at first, hard to define (Maroney 2011b, p. 665). Everyone has experienced an emotion and innately knows what emotions are. But precise definition can be elusive. The word emotion is sometimes used interchangeably with mood or feelings, further compounding the difficulty of definition. It is imperative, like with story, to arrive at a common definition before proceeding to analyze the role of emotions in decision making. Emotions are both biological and mental states. They are brought about in response to specific stimuli. Brader (2006, 51) defines emotions as “specific sets of physiological and mental dispositions triggered by the brain in response to the perceived significance of a situation or object for an individual’s goals.” He distinguishes this from both feelings and moods. Feelings, according to Brader, are the subjective awareness of the experience of emotions. Damasio (1994, 129-149), while noting his formulation is “unorthodox,” makes a similar distinction between emotion and feelings. Moods are diffusive states, either positive or negative, lacking the focused specificity of emotions. Other scholars have similar, although not identical, definitions (Deigh 2008; Maroney 2011b; Neuman et al. 2007; Rolls 2007). Often these stimuli can be beyond conscious awareness. The emotional center of the brain works faster than the cognitive center (Brader 2005). This means that, often, a feeling of emotion can be the first indication of an important stimulus’s presence or absence. We feel fear before we know why we are afraid.
Central to all these conceptions of emotions is the idea that emotions are “intentional” — they are about something, brought on by some specific stimuli, even if the conscious mind is unaware of the stimuli. Hope is a state focused on future events or conditions; fear is a state focused on stimuli likely to cause harm. This target or trigger is crucial. Additionally, emotions are related to goals. The relationship between the stimuli and the goal is what creates the specific response in the form of an emotion. Because the goals of individuals vary, emotions are not always universal in their appearance or expression (Brader and Valentino 2007). What causes fear or grief in one person may trigger opposite emotions in others. While not everyone experiences joy at seeing children or puppies, there are generally acceptable associations likely to cause similar responses in similar people. Much of emotion can, therefore, be said to be cultural. For example, certain sexual behaviors would be a source of pride in an American high school today and a source of shame in the Victorian era (Neblo 2007). As with legal storytelling above, understanding the audience is imperative. Understanding both the link and the particular stimuli likely to arouse certain emotions in specific audiences is crucial to using emotion to persuade (Aristotle).

Emotions, like narrative, have an evolutionary basis. Some fundamental emotions are clearly adaptive; fear of predators leads to better survival. Emotions are also flexible, allowing for situational responses. These responses are particularly useful in the unpredictable world. Beyond pure survival, emotions also play a social role. Shame, for example, helps support community development and aids in maintaining cohesion (Barreto 2009). Emotions have also been shown to be central to concepts of fairness. People react to perceived injustices more from anger than from a rational consideration of what would have been a “just” outcome. Similarly, shame and guilt moderate behavior in actors, keeping them from exceeding the bounds of what would be considered
just (van Winden 2007). This dual survival/social role of emotions mirrors that of narrative, as discussed above.

**Emotion and the Mind**

Research has shown that the mind is organized around emotional links (Cassino and Lodge 2007). Evaluations are made about objects based on the affect associated with those objects. This occurs along a sort of spectrum from “good” to “bad”. Once an object has been associated with a particular affect, new information about that object is processed in light of that affective association. This makes it particularly hard to reevaluate judgments about affectively charged objects (Cassino and Lodge 2007; Haidt 2012). The mind seeks to preserve the initial judgment rather than adapt to new, conflicting information (Cassino and Lodge 2007). In making decisions and recalling information from memory mood matters. Positive moods lead to positive appraisals and the recall of positively valenced memories. The same is true for negative moods. This can lead to bias in judgment since it influences which information is sought, how that information is processed, and what conclusions are thus drawn from it (Cassino and Lodge 2007; Haidt 2012; Westen 2007).

Certain emotions, particularly anxiety, can prompt a more considered re-evaluation of the objects and the affect associated with them (MacKuen *et al.* 2007). MacKuen and co-authors argue that there are two general decision making environments: the novel and the familiar. Each lends itself to different methods of choice. In familiar situations, one can rely on past judgments. What worked before will likely work again. This is countered to situations that are novel or troubling, which require more considered reasoning. This detailed consideration is costly and time consuming, which is why in more familiar situations, it is avoided entirely. Other scholars have shown similar results in their studies (Brader 2005; Graber 2007). The distinction between the routine and the
novel mirror the difference discussed above between scripts and stories. The mind processes scripts, routine situation, differently than stories, which are new or different in some way.

While many of the scholars disagree about the question of how, the research makes it clear that emotion is in some way central to appraisal and, through that, to reasoning and political decision making.

**Emotion and Reason – Which Persuades When?**

Emotion can often overtake reason. As individuals, we are told to keep our heads cool and not let emotion cloud our judgment. The law, in perhaps the most stark example, has enshrined this in the way homicides are prosecuted. Cold-blooded murder is murder in the first degree, subject to the harshest penalty. A homicide committed in the heat of passion — under the overwhelming pressure of emotion — can be mitigated and prosecuted instead as manslaughter. Only those who rationally kill can be held fully responsible. For those overcome by their emotions, in limited cases, the law is more understanding and lenient. This is particularly true when those individuals can demonstrate remorse for their conduct. Succumbing to emotion can have devastating consequences. But so too can avoiding emotion entirely.

Modern research, however, has shown that reason and emotion are inseparable (Barreto 2009, 33-57). Reasoning is emotional. Emotion guides reason (Damasio 1994; Haidt 2012). Damasio’s research focuses on victims of traumatic brain injuries. Those with severe injuries to the emotion-processing centers of the brain become unable to make even the simplest decisions. Something in the emotional center of the brain allows individuals to weigh options and ultimately make a decision. Without that, even something as simple as scheduling a meeting becomes nearly impossible (Damasio 1994). Understanding the importance of emotion in decision making is crucial to persuasion. Aristotle discussed emotion — pathos — as a persuasive technique in his treatise on
rhetoric. There, Aristotle outlines the three fundamental ways of persuading an audience: ethos, pathos, and logos. Logos is persuasion by means of logic and syllogism. Ethos relies on the reputation of the speaker; we are more persuaded by those we respect and trust than those who are either unfamiliar or have misled us in the past. Arguments grounded in pathos rely on inspiring an emotional response in the listener. Not all methods are appropriate for every situation. Knowing which method is available and likely to succeed in any specific effort to persuade is the key to being a master of the art of rhetoric.

Haidt (2012) argues that, in fact, pathos is often the only way to persuade. Well-reasoned arguments, if sufficiently counter to the audience’s predetermined preferences, will never persuade. The brain is always capable of rationalizing away logical arguments that it wants to resist. His focus is on explaining why people have difficulty changing their moral outlooks. His research shows that intuition always precedes logic when addressing questions with moral import. The brain accepts or rejects a proposal based on gut feeling and then comes up with a justification after the fact. To persuade people to change their views on morality, you need to work on the intuitive level not the logical (Haidt 2012). In other words, persuade emotively.

Much of the research on how to use emotion in decision making, and by extension, persuasion, focuses on the valence of the emotional response. Positive emotions have one influence; negative emotions another. This fails to account for the potential differences in similarly valenced emotions. For example, does someone experiencing fear act the same as someone experiencing anger? Generally, intuitively, we would assume no. Research into this area is, unfortunately, lacking (Lerner and Keltner 2000). In one study, Lerner and Keltner (2000) showed that anger and fear do influence risk perception differently.
Stories, as defined by Haven and expanded on by Amsterdam and Bruner provide a clear way to achieve this emotional persuasion. Stories can also be tailored to elicit specific emotional responses. As discussed above, storytelling is innate and evolutionary. Humans are pre-disposed to think and reason narratively. People connect with stories on an emotional level.

Not all stories are equally persuasive. One key feature in narrative persuasion is coherence. Stories must cohere if they are to persuade (Rideout 2008). This involves both internal consistency and completeness (Pennington and Hastie 1991). Stories need both if they are to be persuasive. Even an internally consistent story that lacks certain expected elements or fails to account or explain for missing evidence will not persuade (Rideout 2008). Additionally, the narrative must correspond to what the audience believes to be plausible or possible under the circumstances. Does the story fit what they expect from similar situations (Pennington and Hastie 1991; Rideout 2008)? Essentially, this is a type of external coherence. This is different from Fisher’s concept of narrative fidelity. He views narrative correspondence as a structural element and narrative fidelity as a substantive one. Correspondence is general, fidelity specific. Fidelity also encompasses an attempt by Fisher to add a normative component to narrative persuasion. Stories persuade because they give good reasons for acting or believing (Rideout 2008). Amsterdam and Bruner support this, expanding the normative to the entirety of law, and then linking narrative as the justification. Narrative explains why certain things are permissible or impermissible under certain laws, particularly in trial advocacy (Amsterdam and Bruner 2000).

Rideout emphasizes this as a crucial element of narrative fidelity. The incorporation of values and normative judgments separate legal argument from formal logic. This is particularly true in appellate argument. “For Supreme Court decisions, the narratives are stories not only about the case at hand, but also about who we are or wish to be as a community” (Rideout 2008, 77). This is
also seen in the larger narratives that Supreme Court justices use to support their decisions. The larger societal narrative into which the decision is cast can affect its persuasive value (Zacharias 2011). At its heart, narrative fidelity is the key to moral persuasion that Haidt emphasized. Does the story resonate with our perceived moral outlook? If so, it will have fidelity and be persuasive. As Rideout states, “persuasive stories should win hearts as well as minds” (Rideout 2008, 86).

**Emotion and the Legal System**

Much of legal persuasion is aimed at judges, both at the trial and appellate levels. Only rarely do issues in dispute in the legal system reach a jury. It is, therefore, imperative to understand what judges think is important in terms of persuasion and how they view storytelling as compared to more traditional conceptions of persuasion. Judges, of course, do not always agree on this. While some judges acknowledge the persuasive force of emotion, the traditional view requires judges to be dispassionate (Brennan 1988; de Grazia 1988; Maroney 2011b; Scalia and Garner 2008). Only by ignoring emotion can judges properly do their job of judging. Because they are contrary to this traditional view, overt appeals to emotion will discredit an advocate in the judges’ eyes (Scalia and Garner 2008).

The concept of judicial dispassion traces its roots to the formalist movement and the attempt to make the study of law more closely resemble that of science (Brennan 1988; Maroney 2011b). This movement was, itself, a reaction to the early partisan critiques leveled against the judiciary (Brennan 1988) For the judiciary to maintain its independence, judges had to be seen as finding or discovering the law, not creating it. Basing the law in reason that could be explained in reported decisions and understood was crucial to this goal. Emotion had no place in the process. Brennan saw the failure to understand factors other than reason as a great threat to judicial vitality and independence (Brennan 1988). Until the legal realist movement started to question these
assumptions, the idea of judicial dispassion reigned uncontested (Maroney 2011b). Judge Posner (2008) would disagree with much of this, as discussed below.

As Maroney illustrates, the idea of judicial dispassion persists today, although not with the same universal dominance it has had in the past. She examines the Supreme Court confirmation hearings of Justice Sotomayor and political the battle over “empathy”. While the Republicans and Democrats were debating both the meaning and importance of empathy, both sides agreed that judges should not use emotion. But, she claims, as culturally dominant as the script of judicial dispassion is, it is not always accurate. Judges often cite emotion as a factor or exhibit emotion during their proceedings. Trial judges, in particular, reference emotional reactions during official proceedings. Sentences are often pronounced with emotional overtones (Maroney 2011b). Emotion, according to Maroney, permeates many aspects of judging. Some scholars, including judges, even argue that emotion is essential to all aspects of judging. Maroney counters the traditional narrative and argues, instead, for judges to apply emotion in appropriate circumstances and appropriate ways (Maroney 2011a, 2011b).

Defining the appropriate circumstances for judicial emotion is not easy. Everything from the legal rules to the relevant facts of a case can be influenced by emotion (Brooks 2009). How should the legal system deal with emotion? As Damasio shows, emotions are what help us value options. Without emotion, it becomes impossible to decide because all choices are equally acceptable (Damasio 1994). Judges, in determining which facts to value over others, are influenced by emotions (Brooks 2009; Minow and Spelman 1988). Justice Brennan saw the “interplay” of reason and emotion as “central” to the “vitality” of the process of judging (Brennan 1988, 3). Without the human dimension, according to Justice Brennan, law becomes unreasonable and can often deny equality and dignity to the parties in question.
In many cases that come before a court, more than one “correct” answer is possible (Brennan 1988; de Grazia 1988). Judge Posner refers to these as the “open area” where reasonable judges can differ (Posner 2006, 1054; 2008). Posner argues that the traditional means of legal interpretation are not applicable in all cases. Some cases require using other decision means. This can include political ideology, life experience, and even, when appropriate, gut feeling (Posner 2008). This is especially true when precedent is either nonbinding, as with a jurisdiction’s highest court, nonexistent, or otherwise inapplicable. New cases require new techniques.

Justice Brennan (1988) argued that these situations arose most often in constitutional interpretation, particularly with respect to the Due Process Clause. Brennan discusses the much reviled case of *Lochner v. New York*. While the decision was correct logically, that was only because of an emotionally based decision on how to view the case. Other, completely opposite outcomes could also have been logically supported had the Court chosen to view the case through a different lens and from a different starting point (Brennan 1988). Similarly, he discusses the need for human understanding in *Goldberg v. Kelly*, a case about termination of welfare benefits. Only with a proper understanding of the deprivation an incorrect determination to stop welfare payments would create could the case be properly, from Brennan’s perspective, decided. This understanding requires using the passions, particularly empathy, to understand the position of the party facing termination. Using “sterile rationality” would not permit that understanding and would lead to an inappropriate outcome in many similar cases (Brennan 1988, 21).

The main argument that Brennan makes is that justice requires human understanding. Justice is not simply the mechanical application of rules to cases. That leaves too much risk for decency to be ignored. Logical consistency is not justice (Minow and Spelman 1988). It is the need for individual attention that Brennan seeks to reaffirm with his plea for passion. Brennan’s analysis and
application of passion to these two cases is not without criticism (Cohen 1988; Minow and Spelman 1988). While apt in some respects, Cohen’s critique misses Brennan’s larger point: passion plays a part in judicial processes. Cohen places too much emphasis on a lack of precision in Brennan’s articulation rather than addressing the concept at the generalized level Brennan intends. But, he does rightly note that, like many other scholars of law and emotion, Brennan raises more questions than he fully answers (Cohen 1988). Cohen’s conclusion, ultimately, is similar to the argument made by Maroney: if emotion is present, it must be engaged with and understood, openly and fully. The only difference is that Cohen frames the question as an “if” and Maroney as a “when” (Cohen 1988; Maroney 2011a). Minow and Spelman, ultimately, agree with Justice Brennan’s plea for passion. Their critique is more focused on Brennan’s explanation for choosing certain views in the examples he chooses. By focusing his argument on the Due Process Clause, he leaves open questions about passion in other contexts. Minow and Spelman also question whether this view expresses “anything more than his [Brennan’s] own particular interpretation of the specific legal doctrines he discusses” (Minow and Spelman 1988, 49). Minow and Spelman conclude their article with a list of criteria for judging judges, focusing closely on issues of empathy and passion as defined by Brennan.

As the role of emotion in decision making, and in judging, becomes more clear, the question, then, becomes not should judges use emotion, but how and in what circumstances (Brooks 2009). Maroney’s survey of the literature reveals very little work has been done on answering this broad question. She finds that the field of law-and-emotion work has been expanding rapidly, but little of it has focused on the judge specifically. The research that has looked at emotion and judges has been only in limited, narrow circumstances. Two leading scholars, Posner and Nussbaum, raise more questions than they answer (Maroney 2011b). Bringing together the study of judicial behavior and
the field of emotion regulation, Maroney (2011a) seeks to provide an answer to many of these questions.

Emotion regulation is the process of influencing “what emotions we have, when we have them, and how those emotions are experienced or expressed” (Maroney 2011a, 1486). This is something everyone does. Emotions are regulated according to time and place, social expectations, and other factors. Situationally inappropriate, emotions are sure to cause social disapproval and, in certain circumstances, can lead to harsh punishment. Taking as given that emotion has a place in persuasion and reason, emotion regulation can help answer the questions about how to properly use it in legal circumstances. For judges, the expectation is one of strict dispassion (Maroney 2011a, 2011b). This creates immense pressure as judges must work to fight the very human emotions that confront them in their work (Maroney 2011a). Maroney argues that there is a better way to regulate emotion in the judicial sphere than simply banning it totally. She outlines several general techniques for emotion regulation based on the central concepts of avoidance and approach. With negative emotions, one can regulate by, for example, avoiding situations that cause the emotion or by avoiding paying attention to specific stimuli. Her approach theory involves engaging directly with the emotion. Most notable here is reappraisal. Rethinking the stimulus or the emotion can be a way of directly engaging with, and thereby regulating, emotion. Other techniques include disclosure and mindfulness (Maroney 2011a).

Turning to judges specifically, Maroney argues against avoidance. Engaging with emotion is, according to her, better for judges and the public who rely on judicial determinations. She provides a method to help judges “prepare realistically for the emotional stimuli they encounter, respond thoughtfully to any emotions that arise, and integrate those emotions meaningfully into their decisional and learning processes” (Maroney 2011a, 1510). Her first suggestion parallels training in
By training judges to expect certain emotions, but to work through them professionally, like doctors examining patients, judges will be able to handle many types of emotion and maintain proper professional regulation. Those emotions incapable of being expected can also be reappraised as they are experienced; judges can seek to look at the emotion from another perspective, allowing the judge to understand the cause of the emotion and deal with it in an appropriate way. Both of these techniques have limits. Emotions that cannot be addressed by either process need to be examined in Maroney’s third proposal: integration. Judges need to be able to focus on their emotion and integrate the experience of that emotion, properly, into judicial decisions. This is accomplished through introspection and disclosure. Judges need to examine their emotions closely and seek out the sources of their feelings. Once that has been done, disclosure helps explain the result and allow others to learn from the experience (Maroney 2011a).

Maroney’s advice on how to integrate emotion into judicial decision making is of particular importance to understanding how emotion can persuade judges. Acknowledging that judging is fraught with emotion is, itself, an important step, counter to much of the general expectations of society (Maroney 2011b). Encouraging the use of those emotional responses in decision making is even more important. This is particularly true in those cases where the “zone of reasonableness” permits several correct outcomes. Engaging with the judge on an emotional level can help the advocate steer the judge toward ruling for the advocate’s client, rather than their opponent. As discussed, when judges must choose between conflicting premises from which to analyze the case, something more than pure reason must be used in deciding (Brennan 1988; Burns 1999, 2006; Chestek 2010, 2011; Maroney 2011a, 2011b; Minow and Spelman 1988). The “double-helix” of persuasion advocated by Burns and by Chestek provides that something more (Burns 1999; Chestek
Storytelling allows the advocate to engage the emotions of the judge in a way that provides the foundations for favorable decisions.

**Emotion and the Political Process**

The legal system and the political system share many similarities. In both, advocates for one cause or side of a dispute attempt to persuade an audience to adopt their proposed course of action. Unlike the legal system, however, emotional appeals have long been considered appropriate for politics and political decision making. Legal arguments, the traditional view goes, must be rationally based and thoroughly reasoned. Political arguments are somehow different. They must make sense, but we permit more emotional reasoning in political debate than we do in legal argument. Even so, the true role of emotion in political persuasion is only recently beginning to be fully understood (Brader 2005).

More recent scholarship has shown that, as Aristotle intuited, reason and emotion are inseparable in decision making. This holds true in politics as elsewhere. In fact, many scholars argue that emotion is the primary motivator in political decision making (Brader 2006; MacKuen et al. 2007; Westen 2007). Reason is then used to justify, post-hoc, the emotionally driven decisions that were made (Haidt 2012).

For Westen (2007, 12), “political persuasion is about networks and narratives.” Activating the right networks of associations requires an understanding of emotion. Throughout *The Political Brain*, Westen explores the role of emotion in political campaigns, finding that properly crafted emotional appeals consistently win out over rational policy arguments. The key question for political advocates is how to trigger the best networks and associations for persuasion. Brader (2005) has shown that music and visual cues have a strong influence on activating these networks. He demonstrated this for both positive (enthusiasm) and negative (fear) based campaign advertisements.
If a positive advertisement features appropriately positive music and visual clues, it will be more effective at maintaining voter enthusiasm for the candidate. Huddy and Gunnthorsdottir (2000) showed a similar influence from positive emotional imagery. Fear based advertisements, as predicted, encouraged more anxiety when accompanied by appropriately fearful music and imagery and led to corresponding changes in political decision making. Brader does provide some caveats; most notably, his study focused on short term emotional motivation which may act differently than longer term emotion during an entire campaign period. Similarly, in a real world campaign, viewers are exposed to multiple conflicting campaign advertisements. The combined effects of different emotional appeals from different sources were not a factor in Brader’s study. How these emotional appeals play out in the real world needs to be further explored (Brader 2005).

Westen’s analysis of advertisements in actual campaigns supports Brader’s conclusions. For Westen, much of the recent failures of the Democratic Party can be attributed to a lack of emotional intelligence. Too much focus is placed on reasoning and not enough of feeling. This allows the Republic Party, more attuned to the emotions of the electorate, to win with far more consistency. Haidt’s (2012) analysis, as noted above, further bolsters this conclusion.

Before I apply these concepts to same-sex marriage in each of the policy arenas outlined above, I will explain the general methodology for this study. Where the methods are unique or specific to a single policy arena, they will be addressed in the chapter pertaining to that arena.
CHAPTER THREE: OPPOSITION ARGUMENTS

Groups opposed to same-sex marriage advocated in all the major policy arenas during the time that Massachusetts was considering marriage equality and throughout the history of the marriage equality movement. Many of their arguments are the same, regardless of which policy forum they are utilizing at the time. These include protecting children, traditional values, and the proper role of marriage in society. Some are specific to certain arenas. Here we see argument over the proper role of the courts, the legislature, and direct democracy. “Activist judges” are pitted against the will of the people, either through their elected officials or directly through ballot initiatives. These arguments are similar to those used throughout the history of the gay rights movement, going at least as far as the 1970s campaign in Miami-Dade County Florida. Many of these arguments are not specific to a particular campaign or a particular forum.²

One of the most common themes used to argue against recognition of same-sex marriage is the need to protect children. This argument has shifted over time as more gays and lesbians began to raise children — either their own biological children or children adopted singly or jointly with their partner. In the general gay rights context, this argument can be seen reaching back as far as the 1970 “Save Our Children” campaign launched by Anita Bryant in response to the passage of nondiscrimination laws in Miami-Dade County Florida (Eskridge 2008). More recently, this was seen in the Proposition 8 campaign in California that amended the California constitution to prohibit same-sex marriages. Here the concern was about what children would learn about in schools if the state were forced to recognize same-sex marriage. The need to protect the children is also argued in the judicial context. Here, as discussed in more detail below, the argument focuses on what the

² Stone (2012) discusses the history of opposition arguments with respect to direct democracy in her book on gay rights and ballot initiatives.
optimal setting for child-rearing is and to what extent the government can favor certain settings over others.

Chauncey (2004) attributes the success of many anti-equality arguments, in part, to the forgotten history of early laws restricting gays and lesbians. As discussed above, gays and lesbians faced significant discrimination for decades. In the pre-Stonewall era, laws and social norms prohibited discussion of gay and lesbian issues in media. More gays and lesbians were fired by the federal government during the McCarthy era than communists. Much of this history, however, is not well known and some has been all but forgotten. Chauncey argues that this is what gives strength to the arguments against same-sex marriage, particularly in the judicial context. As gays and lesbians have gained more social acceptance, it has become harder to argue that they are an oppressed minority. This can hurt some legal claims, particularly under the Equal Protection and Due Processes clauses of the federal constitution.

This chapter will analyze the ways in which those groups structured their arguments during the fight in Massachusetts, with reference to other arguments as relevant. This chapter is intended to provide context for the subsequent chapters and their more detailed analysis of the arguments advanced by marriage equality advocates. As such, this will be a briefer overview of the opposition arguments and not the same in-depth analysis that will occur in the remaining chapters.

The Judiciary

As mentioned in the first chapter, marriage equality litigation is not a new phenomenon. Courts began addressing same-sex marriage in response to litigation filed by same-sex couples in the 1970s. The basic arguments used against those litigants have not changed significantly since then. The same arguments used, for example, in *Baker v. Nelson* in Minnesota in the 1970s were used in *Goodridge v. Department of Public Health* in 2003. These include both the substantive issues of
marriage equality and the procedural arguments of who should decide the issue. The only difference
is that the courts, in the 1990s, began to take the arguments of gays and lesbians on this, and other
issues, more seriously requiring the opposition to similarly increase their efforts.

**Defendant’s Procedural Arguments**

Among the arguments against same-sex marriage raised by the Department of Public Health
through their counsel at the Attorney General’s Office were procedural. The courts, they argue, are
not the place to decide these types of policy questions. Fundamental changes in major public policy
issues, like this one, are best left to the political branches or the people directly. “[R]ather than break
new ground in this highly controversial area, the Court should defer to the Legislature’s policy
judgment” (Defendant-Appellee’s Supreme Judicial Court Brief p. 2). Later, in the same brief:
“Construing the marriage statutes to permit same-sex marriage would also run afoul of separation of
powers requirements… permitting same-sex couples to marry would nevertheless constitute a major
change in established public policy, which should be left to the Legislature, not the courts, to
accomplish” (Ibid. p. 4). Courts should play a limited role. The defendants support their separation
of powers argument by referring to the policy change as “major” and “far-reaching” (Ibid. p. 23).
They also note that the legislature has seen fit to expand the definition of marriage previously,
“repealing statutory restrictions on interracial marriage, remarriage after divorce, and marriage by
persons with mental disabilities” (Ibid. p. 24). Same-sex marriage should be no different. It is for
the legislature, not the courts, to decide when, and if, same-sex marriage should be recognized in the
Commonwealth (Ibid.).

**Defendant’s Substantive Arguments**

After addressing the procedural issues, the argument shifts to the substance. Here, the
arguments again parallel those made for decades. Traditional values, protecting children, and the
nature of marriage are used to deny recognition for same-sex couples and their relationships. Like the plaintiffs, discussed in the next chapter, the defendants address both statutory and constitutional claims. The argument for both, at its core, is that neither the statutes nor the Massachusetts Constitution can be interpreted to require or permit same-sex marriage because gays and lesbians cannot take part in the central tenet of marriage: biological procreation (Defendant-Appellee’s Supreme Judicial Court Brief p. 20). Other factors are raised, as well, but this definitional defense is central to the entire argument.

The definitional-based argument can be seen in the frame selections made by the defendants. From the start, the defendants are careful to frame the argument in ways to avoid constitutional implications. For example, for equal protection analysis, the defendants use same-sex and opposite-sex couples as the essential categories, not males and females (Defendant-Appellee’s Supreme Judicial Court Brief p. 8). This avoids implicating the heightened scrutiny applied for sex-based classifications. Instead, the burden class becomes sexual orientation, which had never been given the protections of heightened scrutiny. Similarly, the defendants urge the court to breakdown the due process argument into its constituent parts rather than view it as one all-encompassing right to marry (Ibid. pp. 6-7). “Such analysis reveals that the interests plaintiffs assert...are either not shared by same-sex couples, not implicated by the challenged statutes, or otherwise not entitled to enhanced protection” (Ibid.).

Starting with a statutory analysis, defendants further expand on their definitional argument. Since the drafters of the marriage statute clearly had one vision, an opposite-sex vision, of marriage in mind when the statutes were enacted, that definition must control for statutory analysis (Defendant Appellee’s Supreme Judicial Court Brief pp. 11-16). Moreover, the defendants argue, the “history and purpose” of marriage makes it clear the intent was to create a heterosexual
Historically, marriage envisioned a gendered division of labor. Men farmed and provided financial support; women bore and raised children while keeping house (Ibid. p. 18). Even as it moved toward a more “companionate model”, it remained essentially gendered (Ibid.). This was because of the importance of procreation (Ibid. p. 55). This focus on procreation is what permits the exclusion of same-sex couples. “As other courts and commentators have recognized, same-sex couples cannot procreate on their own and therefore cannot accomplish the ‘main object’ of marriage as historically understood” (Ibid. p. 20, internal citations omitted).

With respect to the constitutional arguments, the defendants make similar arguments. Again, framing is crucial. The defendants attempt to frame the right in question as the “right of same-sex couples to marry” instead of “the right to marry or the right to choose a marriage partner” as the plaintiffs urge (Defendant-Appellee’s Supreme Judicial Court Brief pp. 28-29). The defendants start by asserting that every court to confront the issue has failed to find a fundamental right for same-sex couples to marry, with the exception of one state level trial court (Ibid.). This frame selection, as mentioned above, is also important for equal protection analysis. Keeping the focus on the rights of same-sex couples as couples allows the equal protection analysis to compare couples rather than individuals for disparate treatment.

For due process, the defendants again assert a type of procedural argument. Here, respect for separation of powers and traditional interpretation of liberty provisions caution against expansive judicial readings of the requirements of due process (Defendant-Appellee’s Supreme Judicial Court Brief p. 40). Historically, the Supreme Judicial Court “has been wary of recognizing or creating new fundamental rights” (Ibid. p. 42). The Defendants then, in keeping with their chosen framing, attempt to show that same-sex marriage would be a “new” right, one that is not deeply rooted in the history and tradition of Massachusetts and thus should not be afforded constitutional protection.
But again, crucial to this argument, is the framing. The right in question is argued to be “same-sex marriage” — a new right — and not marriage more generally — a right long recognized as fundamental.

Similarly, equal protection analysis fails to help the plaintiffs. The defendants, again relying on history, argue that Article 1 of the Massachusetts Declaration of Rights, the equal protection article, fails to recognize broad equality protections. In fact, when first adopted, it failed to recognize any individual rights at all (Defendant-Appellee’s Supreme Judicial Court Brief p. 78). Ultimately, the Equal Rights Amendment was added to rectify this omission. The ERA, however, does not reach same-sex couples (Ibid. pp. 80-82). The ERA does prohibit discrimination based on sex, but because the defendants frame the classification here as one of same-sex couples, not individuals, the discrimination is not sex-based. “If the marriage statutes discriminate at all, they do so not between individuals of different sexes but between two types of couples, same-sex and opposite-sex” (Ibid. p. 90). It is, at best, sexual orientation based, and that class has never been afforded heightened review under equal protection analysis (Ibid.).

Procreation is again important in the defendant’s equal protection argument. Here, the “fostering and protecting the link between marriage and procreation” becomes a potential rational basis for limiting marriage to opposite-sex couples. The state’s “unquestioned” authority to regulate entry into marriage is justified by the need “to provide a favorable setting for procreation” (Defendant-Appellee’s Supreme Judicial Court Brief pp. 110; 111). Again, the defendants emphasize the “central purpose” of marriage is that of procreation (Ibid. p. 111). Even after procreation, children remain an important justification for excluding same-sex couples from marriage. Childrearing, another important aspect of marriage, was historically another justification for regulating marriage. Marriage ensured that children would be raised by their parents as a family.
Limiting marriage to opposite-sex couples is rationally related to the government interest of providing the optimal setting for raising children (Ibid. p. 117-122).

The Defendants conclude with another appeal to procedure and separation of powers:

Even if the Court were to find any of the plaintiffs’ statutory or constitutional claims meritorious, it should nevertheless decline to accept plaintiffs’ invitation to ‘declare that the plaintiffs are entitled to marriage licenses…Indeed, the appropriate remedy for any such legal infirmity should be determined by the Legislature, which is best able to consider the practical and policy implications of such basic and far-reaching change and to craft a workable solution within whatever legal parameters the Court defines. (Defendant-Appellee’s Supreme Judicial Court Brief. p. 127)

The Court should be restrained, cautious, and defer to the legislature to address any changes to the marriage laws. The plaintiffs, who may well have the better argument, should seek their remedy elsewhere, and “pursue their quest” in the legislative halls and not the courtroom (Ibid. p. 128).

The Goodridge Dissents

The Goodridge court was divided 4 to 3. Each of the three dissenting justices wrote separately to explain his or her reasons for not joining the majority. Each dissenting opinion, while authored by a single justice, was joined by all three of the dissenters. Many of the arguments in the various dissents are the same as those raised by the advocates in their briefs. And, while the Goodridge dissents are more detailed and nuanced, at their core, the arguments are the often the same as those raised in the 1970s in earlier court rulings on same-sex marriage. The three Goodridge dissents are discussed below, with an emphasis on the areas where the dissent takes particular and specific objection to portions of the majority opinion.

Like the defendants, the dissenters addressed both the procedural and substantive issues. Justice Spina emphasized the separation of powers issue. He frames that issue succinctly in the first sentence of his dissent: “What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to
effectuate social change without interference from the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights” (Goodridge v. Dept. of Public Health p. 350-351). Spina addresses the substantive equal protection and due process arguments as necessary to show that the issue is really one of judicial deference to legislative power. Spina also takes issue with the remedy adopted by the majority, again arguing for deference to the legislature. Traditionally, if a statute fails to meet constitutional muster, it is struck in its entirety; it is not modified. The Court’s modification of the statute again usurps the legislative power.

Justice Sosman’s dissent focuses on the application of the rational basis test. Sosman argues that the majority opinion “tortured” the rational basis test to arrive at the result it did (Goodridge v. Dept. of Public Health p. 363). Sosman’s dissent is interesting in its critique of the majority. Sosman accuses the majority of ruling emotionally rather than logically. Her critique is not truly on the substance, but instead on the application of the standard of review to the particulars of this case. She finds the majority opinion to be full of “emotionally laden invocations” (Goodridge v. Dept. of Public Health p. 361). Sosman argues, perhaps correctly, that “the emotionally compelling nature of the subject matter should not affect the manner in which [courts] apply the rational basis test” (Ibid.). Throughout her dissent, Sosman is careful to avoid tackling the substantive issues and thus attempts to avoid the emotional pitfalls of the majority. In fact, she gives some credit to the arguments of the plaintiffs: “there is much to be said for the argument that excluding gay and lesbian couples from the benefits of civil marriage is cruelly unfair and hopelessly outdated” (Ibid. p. 363). Her opinion, however, remains a cautionary one. Too quick an acceptance of those arguments, emotionally compelling as they are, undermines the role of the judiciary, leading to this improper and “tortured” application of the rational basis test. For example, she writes: “The issue is whether it is rational to reserve judgment on whether this change can be made at this time without damaging
the institution of marriage or adversely affecting the critical role it has played in our society” (Ibid. p. 362). Another example: “Our belief that children raised by same-sex couples should fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief” (Ibid. 359.) The untested effects of same-sex couples raising children are central to the caution that Sosman feels the legislature can rationally rely on when choosing whether to “redefine” marriage. She acknowledges that families with same-sex couples are “perhaps promising” while again stating that they are still an “essentially untested alternate family structure” (Ibid. p. 361). Caution, in that circumstance, is justified, if not required.

Unlike Justice Sosman, Justice Cordy believes the plaintiffs have made “a powerfully reasoned case” for expanding the institution of marriage to include same-sex couples (Goodridge v. Dept. of Public Health p. 363). In recognizing the powerful reasoning of the plaintiffs’ argument, Cordy does not accuse the majority of being swayed by emotional invocations. That powerful reasoning, however, is still insufficient to overcome the deference due to the legislature under the rational basis test. He does acknowledge, like Justice Sosman, that “it may be desirable for many reasons to extend to same-sex couples the benefits and burdens of civil marriage” (Ibid.) but that expansion remains the job of the legislature, not the Supreme Judicial Court. Denying same-sex couples access to marriage is neither a violation of due process nor the equal protection provisions of the Massachusetts Declaration of Rights. Cordy is careful to limit the definition of the asserted rights. For Due Process, he focuses on the right to same-sex marriage. Under equal protection, he limits the analysis to gender discrimination. Since same-sex marriage is not deeply rooted in the history and traditions of Massachusetts, it cannot be deemed a fundamental protected by the Massachusetts constitution. Similarly, since the marriage laws burden both men and women equally (since neither sex can marry a member of the same-sex), there is not equal protection violation.
Discussion

There are two general themes evident in the opposition’s legal arguments. First, the defendants and the dissenting justices argue for caution. Change should come, if at all, after careful consideration and deliberation by the legislature. The Courts are not the proper venue for this type of major social change. The next argument is one that has been commonly used against the gay and lesbian community: the need to protect children. In this case, that argument takes a slightly modified form. Instead of looking directly at the harm gays and lesbians can bring to children, the focus is shifted to the importance of heterosexual procreation and childrearing. This is an important, and major, change from the more broadly anti-gay and lesbian arguments used in previous decades. I will address these two themes in more detail below.

As discussed in the following chapter, the plaintiffs, and their supporters as amici curiae, stress a story of progress and evolution. They talk about the importance of society adapting to change and the need for increased recognition of rights in that changing society. Opponents, on the contrary, emphasize the need for caution and restraint. The story the defendants and dissenters tell is one of unknowns. To counter the story of progress, the dissenters stress the lack of data on households led by same-sex parents and the legislature’s rational reliance on caution in the face of that absent information (Goodridge v. Dept. of Public Health pp. 358-359; 386-387). This cautionary tale casts the radical judiciary, moving recklessly toward unknown and unforeseen consequences against the rational legislature and public, aware of the potential pitfalls, and proceeding with care. The story elements discussed by Amsterdam and Bruner (2000), Chestek (2010), Robbins (2006) and Haven (2007), can be seen, somewhat, in the way that the defendants and the dissent frame their procedural argument. The pre-marriage equality status quo is privileged over the post-Goodridge world. The Trouble that is necessary for storytelling exists in the tension
between that earlier state and the change that the majority decision creates without proper forethought. Like many stories, the plaintiffs seeking recognition of same-sex marriage present a choice: accept marriage as it stands, excluding some who seek to join it, or change and risk, as Justice Sosman frames it, the very edifice of society (Goodridge v. Dept. of Public Health p. 362). The defendants urge, and the dissent would have required, the more cautious approach.

The second theme that is prevalent throughout is the importance of procreation and family structure. Both the defendants and all three dissenting justices emphasize this as a reason for excluding same-sex couples from marriage. Justice Cordy states it most clearly: “an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism” (Goodridge v. Dept. of Public Health p. 382). He goes on to emphasize the link even more: “The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic” (Ibid. p. 382-383). For Cordy, procreation and childrearing is the overarching state interest in marriage. The other dissents, and the defendants, do not raise procreation above all other purposes as clearly as Cordy does, but they do emphasize the importance of procreation and preserving the traditional family as a rational governmental purpose.

The “protect the children” type argument has, of necessity, evolved since it was effectively used against gays and lesbians in successful campaigns like, for example, “Save Our Children” in 1970s Miami-Dade County (Stone 2012). Those arguments were harder to make after the courts recognized the right of same-sex couples to jointly adopt children. As discussed in the next chapter, gay and lesbian parents are important to the plaintiffs’ argument. Many of the plaintiff couples are raising children. The harms faced by these families are a major factor in their argument for recognition of the couples’ right to marry. This reality presents a challenge for the opposition.
Characterizing these families as somehow less than families led by heterosexual parents would be difficult in light of the other legal protections afforded to the families of gay and lesbian parents. Instead, the focus is shifted to the importance of marriage for heterosexuals. By framing marriage as a specifically heterosexual institution, designed for the purposes of procreation and regulation of the families made through procreation, the need for same-sex couples to have access to marriage is diminished. Instead of telling a story of the evolution of marriage beyond regulating heterosexual intercourse, as the plaintiffs do, the defendants emphasize the historic origins of marriage and downplay the changes it has undergone since its creation.

Relying on history, instead of evolution, further supports the cautionary tale discussed above and the need for judicial restraint. The two stories work together to attempt to reframe the issue from individual rights, as the plaintiffs argue, to the proper way to balance authority between the courts and the people, either directly or through their representatives. Since that reframed story did not win in the Courts, the policy debate shifted to the legislature in an effort to overturn the Goodridge decision through constitutional amendment.

The Legislature

In Massachusetts, the Supreme Judicial Court’s ruling legalizing same-sex marriage would be final unless there was sufficient support to amend the state constitution. There were several attempts to do that in the years following the Goodridge ruling. Like the opposition arguments in the judiciary, these took on dimensions of both procedure and substance. The legislators focusing on the procedural issue argued that the Supreme Judicial Court had exceeded its authority and the ruling needed to be repudiated for that reason alone. With this argument was the idea that the people should have a voice in this type of major policy change, either directly as part of a ballot initiative or through their elected officials in the state house. Other legislators in opposition focused on the
substance of the issue sought to overturn Goodridge because of an objection to same-sex marriage itself. Each of these issues is analyzed in turn.

Procedural Arguments

The majority of the procedural arguments focused on the “right” of the people to vote on the issue. The legislators are concerned with the expansion of judicial authority. Policy, they argue, is for the people or their elected representatives. Overturning the Goodridge decision is important, not because same-sex marriage is wrong, but because the people were silenced by the courts. Senator Lees, sponsor of one of the proposed amendments, argued that it was “important” to bring the issue to the voters. Legislators emphasized their constituents’ desire to vote on the issue. They also discussed the sweeping nature of the policy change and the importance of the people’s voice in that process.

Speaker Finneran, one of the first to address the Constitutional Convention, most clearly articulated the separation of powers argument. He specifically seeks to prevent the court from intruding “in an area where they are not to operate, the area of policy” (State House News Service 2004a). Policymaking, he continues, “is emphatically not the domain of the SJC” (Ibid.). This sentiment was echoed by Representative O‘Flaherty: “The Legislature is the proper place to make public policy, not the Supreme Court” (Ibid.). Representative Loscocco argued that the Supreme Judicial Court’s action “stifled debate by the people and the legislators” (State House News Service 2004b). He uses harsher language, accusing the Court of usurping the legislature’s power. Later in the debates, he calls for “universal outrage at legislating from the bench” (State House News Service 2005). Representative Golden also spoke of the importance of separation of powers, but with a focus instead on the role of the people. He does not want “to be complicit in the abandonment of the notion that self government is a good thing” (State House News Service 2004c). Representative
Knuttila also believes the people provide a necessary check on the Court, particularly on an issue this important: “the people have a right to pass on this issue” Similarly, Representatives Lepper, Fagan, and Parente argued for a clear, fair vote for their constituents.

Substantive Arguments

Many legislators objected to same-sex marriage, not the procedures used to recognize the right to marriage for gay and lesbian couples. These legislators often invoked religion in their argument. Religion, as justification, was largely absent from the judicial debate over the issue, although some amici did rely on religious freedom, both in support of and in opposition to recognition of same-sex marriage.

Representative Flynn invokes natural law to support his opposition to same-sex marriage. “The Supreme Judicial Court can and does invoke the law of man. The Supreme Judicial Court cannot repeal the law of nature” (State House News Service 2004a). Representative Peterson also argues for the law of nature. She believes that “to continue on this society and this species, that marriage should be defined as between a man and a woman” (State House News Service 2004b). This theme further developed by Representative Parente. Parente referred to Mother Nature’s blueprint, “the DNA of a man and a woman” (Ibid.). This formed the basis for the statutory marriage. It was to protect the family unit, “the man and woman and the children they create” (Ibid.) There are “unique qualities that the man and woman bring to the relationship that teach people how to function” (Ibid.). When confronted with alternative family structures, she refers to them as “bad behavior” and argues that bad behavior cannot be a justification in this case (Ibid.). Representative Larkin makes a similar argument: “It is my belief that heterosexual marriage provides unique protection for children, by giving them a man and a woman… Men and women are profoundly different in strengths and needs and desires” (State House News Service 2004c).
Senator Pacheco argued in favor of civil unions. He wanted to provide gay and lesbian couples some of the benefits of marriage, but was not in favor of extending the word marriage itself. He believed the general public supported that position as well. Representative O’Brien made the same argument. Denying gay and lesbian couples the benefits that come with marriage is wrong. But civil unions can remedy that wrong without redefining marriage. Legislators making this argument did not offer significant reason for not using the word marriage. They took it as a given that marriage should retain its traditional definition.

**Legislative Opposition – General Discussion**

Storytelling elements are more clearly seen in the procedural arguments than in the substantive arguments. The procedural story is one of transgression. The Supreme Judicial Court acted beyond the scope of its authority. The legislature, confronted with this, must act to preserve its own authority and restore the proper balance of power between the branches of government. The tension that is the crux of storytelling comes from the Court’s failure to respect the separation of powers, one of the foundations of the government. The legislators using procedural arguments cast themselves as the hero, capable of stopping the Court and empowering the people. Using Robbins’s (2006) theory of heroic archetypes, these legislators are cast as a traditional Warrior hero fighting an injustice.

The procedural story is also kept clearly distinct from the substantive issues. Some of the legislators who argued for allowing the vote to proceed made clear that they were not opposed to same-sex marriage. The focus is kept on the Court and the proper scope of judicial authority. They do not cast the marriage equality advocates as the villains of the story. This, as Robbins (2006) discusses, is important. Choosing how to portray the opposing side is crucial to storytelling. The
Court, unable to participate in the Constitutional Convention or the policy debate on the issue, is a strong choice for villain.

The substantive arguments are not framed as stories. Unsurprisingly, these arguments mirror those discussed above in the judicial section. They are the same arguments that have been made throughout the gay rights movement. Children must be protected. Heterosexual marriage is the optimal setting for children and, because of that, only heterosexual marriages should be recognized by the state. These arguments ignore the counter-story about progress on gay and lesbian rights issues, and the reality of gay and lesbian families. This narrative of progress, which ultimately won out in the debates, is discussed in more detail in the following chapters.

Public Opinion

Unlike the activists in favor of marriage equality, the opposition argument did not run a major popular opinion campaign. This is likely, at least in part, because the issue never directly reached the voters. While national polls at the time favored those opposed to marriage equality, the polling in Massachusetts was more mixed. A majority supported some recognition for gay and lesbian relationships, but at the time Goodridge was decided, there was no majority support for marriage itself (See Bonauto 2005). National polling would not show a majority in support of marriage equality for several years (Newport 2011). The need for the level of effort seen from the pro-equality side was simply not necessary for the opposition. That said, the opposition did engage in some efforts to persuade the general public to support their view of the issue. The most visible was through participation in rallies outside of the statehouse during the Constitutional Conventions.

At the rallies, the opposition used both substantive and procedural frames in their arguments. This was mostly seen through chants and signage. “Let the People Vote” and “Marriage: One Man, One Woman” were the two common signs and slogans used throughout the debate.
While paralleling the frames used in both the legislative and judicial debates, the arguments here were less fully formed.

**Conclusion**

The substantive arguments used against gay and lesbian equality changed little between the 1970s and the fight for marriage equality in Massachusetts in 2003. Protecting the children and preserving traditional family values were still the main frame that the opposition used to substantively argue against gay and lesbian equality. This frame, however, was beginning to lose its appeal as more gay and lesbian families became known. Public opinion polling in Massachusetts showed support for same-sex marriage and a lack of support for amending the constitution to overturn *Goodridge*. To supplement this, procedural arguments were raised that argued that the way gays and lesbians gained recognition for their right to marriage was flawed. Here, the focus was not on gays and lesbians, but on democracy and the proper role for the courts in society. The Constitutional amendment would have allowed the people to participate in the policy process again, regardless of the outcome of the substantive vote.

As will be discussed in later chapters, neither argument was persuasive in Massachusetts.
CHAPTER FOUR: THE JUDICIAL ARENA

The judicial branch has long been thought “the least dangerous” branch of government (Hamilton 2003, 464). Unlike the other, political branches, the judiciary lacks the means to enforce its rulings directly. It has no army and no police force. It depends on the legislature for the necessary funds to operate. Courts cannot seek out disputes to resolve, but instead must wait for parties to bring a dispute to them (Newmyer 1968). Even then, once a dispute is properly before a court, the remedy is narrow. It technically applies only to the current case and only on the specific legal question at issue. The rules announced in an opinion can be applied to future cases as precedent if they are accepted. To ensure that these decisions are accepted, courts must be persuasive. Not only must they persuade the parties to the case that the decision was just, but they must persuade the other branches of government and the general public (Ibid.).

Judicial opinions live or die by their persuasive force. Unpopular judicial opinions can be undone or undermined by a motivated populace. This is most clearly seen in cases where courts either outpace the political branches in changing social norms and requirements or fall behind, frustrating attempts a social change. Examples here include desegregation of the schools after Brown v. Board of Education or the limits on President Roosevelt’s New Deal, which was initially blocked by the Supreme Court. Southern states were slow to implement the sweeping mandate of Brown and the Supreme Court ultimately overturned its decisions against Roosevelt’s economic reforms. Similarly, the Supreme Court’s attempt to address abortion led to a political debate that has been raging consistently since Roe v. Wade was decided in 1973.

Rosenberg (2008) argues that courts, acting alone, can never bring about social change. Other scholars question Rosenberg’s analysis. Posner (2008) believes courts, particularly the Supreme Court, are far from weak. While not always right, courts acting in the open areas discussed
above are “plenty strong” and capable of influencing the development of law and policy (Posner 2008, 273). Keck (2009) argues that courts are often instrumental in achieving the type of changes that Rosenberg believes courts are ill-equipped to address. One way to strengthen the position of the judiciary and its role in policy debates is for courts to provide persuasive justifications for their decisions. Early in the Supreme Court’s history, Chief Justice Marshall, aware of the need for unified, persuasive opinions, instituted the practice of having a single, majority opinion in each case rather than the older practice where each justice drafted his own opinion (Newmyer 1968). The belief in increased persuasive authority from the appearance of unanimity was also seen in Chief Justice Warren’s successful effort to prevent dissenting opinions in Brown v. Board of Education.

Justices, when crafting opinions, must be aware of the various potential audiences for the opinion in order to be as persuasive as possible. Cases with broad social implications, like those on civil rights or other constitutional issues, are more widely read and discussed than cases involving narrow legal provisions applicable to only a small segment of the population. Judges on lower courts must persuade the justices on higher courts in order to avoid being reversed on appeal. A recent example can be seen in the trial court opinion in Perry v. Schwarzenegger\(^3\) and the 9\(^{th}\) Circuit decision in the same case. As commentators have consistently noted, both opinions are written to appeal directly to Justice Kennedy, seen as the crucial swing vote on same-sex marriage at the United States Supreme Court (Lithwick 2010; McCarthy 2010; Sacks 2012a, 2012b; Schwartz 2010). Court decisions are also useful even when they are not binding on other courts. State supreme court and federal circuit court decisions become persuasive authority for courts in other jurisdictions. The

\(^3\) At the 9\(^{th}\) Circuit Court of Appeals, the case was renamed Perry v. Brown to reflect the change in the California governorship. That decision was appealed to the United States Supreme Court as Hollingsworth v. Perry. This name change occurred because of the refusal of the California government to continue the appellate process. The United States Supreme Court declined to reach the merits and instead dismissed the case for lack of standing.
more persuasive a decision is the more likely it will be referenced in other jurisdictions and supported over time. Judicial decisions can also enter the public discourse. As seen below in Chapter 5, for example, the “separate but equal” language of Brown v. Board of Education is very commonly employed in discussions of equal protection. Other examples include “clear and present danger” and the Court’s attempt to define obscenity by saying “I know it when I see it.”

And, of course, judicial opinions are themselves the response to persuasive appeals, often several attempts from multiple parties. As a case progresses through the judicial system, the opportunities for each party to persuade increase. The more important a case’s policy implications are, the more likely is there to be an amicus curiae brief filed by at least one interested, outside party. The number of amicus briefs filed, particularly in the Supreme Court, has increased dramatically in recent years (Simard 2008). The persuasive effect of these non-party briefs varies. Factors include the party drafting the brief, the side supported, the number of amicus briefs filed, and others (Ibid.). The competing efforts of persuasion from parties and amici curiae on each side of the dispute eventually result in a decision as a judge or panel of judges is swayed in favor of one side or the other.

Using the framework discussed previously, this section will analyze various attempts at persuasion in the Massachusetts courts during that state’s same-sex marriage litigation. This analysis will consist of an analysis of several documents filed with and by the court system. This will include the two Supreme Judicial Court cases on the issue: Goodridge v. Department of Public Health and Opinion of the Justices to the Senate. I will also look at the merits briefs filed by the plaintiffs and other supporters of marriage equality at the various stages of litigation.
Setting the Stage: The Plaintiff’s Trial Court Pleadings

The plaintiffs in the Goodridge case were represented by attorneys from the advocacy organization Gay & Lesbian Advocates & Defenders (GLAD). GLAD’s mission is to provide legal representation to those facing discrimination based on sexual orientation, gender identity, and HIV status in the New England area. Founded in 1978, GLAD has successfully brought civil rights actions in a variety of areas, including adoption, students’ rights, health care, and marriage. GLAD also represents individuals whose cases may impact public policy. In its early years, this included defending gays and lesbians charged with criminal violations for their advocacy for gay and lesbian rights. GLAD works both proactively to file lawsuits challenging state or private actors’ conduct and defensively when lawsuits are filed that threaten GLBT rights. In addition to litigation, GLAD advocates legislatively and conducts public education around the core issues of their mission.

In April of 2001, GLAD filed a complaint in the Superior Court for Suffolk County on behalf of seven gay and lesbian couples seeking access to civil marriage. The plaintiffs sought “declaratory judgment that the exclusion of the Plaintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violates Massachusetts law” (Complaint at 31). They placed specific emphasis on the relief sought. Granting the plaintiffs full access to marriage, in both its tangible and intangible aspects, was the only acceptable remedy. No mention was made of civil union or other types of relationship recognition.

The plaintiffs are described as couples and not individuals. The caption of the complaint clearly lists the couples as the complainants, and not the individual members of each couple. This is accomplished by intentional groupings: “Hillary Goodridge and Julie Goodridge, David Wilson and Robert Compton”, and so on. Each couple is listed as a unit on its own line. This couple-centric
focus is further evident in the “Parties” section. Each couple is discussed jointly in a single paragraph. The complaint then becomes not about Hillary Goodridge’s inability to marry Julie Goodridge, but instead about the couple’s exclusion from marriage as a couple. The focus, from the start, is on couples.

The plaintiffs start their complaint with a direct invocation of emotion; they allege that the plaintiff couples have been denied the right “to join in civil marriage with the person they love” (Complaint p. 2). After briefly outlining the parties and the jurisdictional basis for the complaint, the complaint then turns to the plaintiffs in greater detail. The details introduced here go far beyond the legally required facts. Instead, these additional facts serve to further develop the plaintiffs as characters in their quest for legal recognition of their relationships. They tell a story.

The lead plaintiffs, Hillary and Julie Goodridge, are described in several paragraphs. The attorneys outline the length of their relationship, their joint ownership of a home, their employment, their joint finances, and briefly their struggle to have a child. We even learn that their daughter, now five years old, studies both piano and ballet (Complaint at 3-5). The discussion goes on further, explaining the acceptance of the Goodridges’ extended family. The court is also told that the family has done everything possible to ensure they receive as much of the protection that comes from marriage as is possible without actually being legally married. These protections, however, proved insufficient. The complaint next outlines the problems the Goodridge family had to endure in the hospital during the birth of their child and their uncertainty over whether similar conduct could occur again in the future. They attribute the denial of these protections to the lack of formal, legal recognition of their relationship. The complaint, in language replicated for each couple, also alleges the denial of emotional benefits and obligations that married couples enjoy. It places these
emotional benefits on par with the financial and legal ones inherent in marriage. This proved important later when the Supreme Judicial Court considered the sufficiency of civil unions.

Each of the other plaintiff couples receives similar detailed descriptions.

Like the Goodridges, the other couples are homeowners, parents, active in the communities, and seeking formal, legal recognition of their emotional bonds. Some of the plaintiffs, like David Wilson, suffered tragedy when previous relationships were not recognized. For example, Wilson’s prior partner of 13 years died suddenly and the lack of legal protections made it particularly difficult for Wilson to address his partner’s last wishes. As the complaint notes, this experience has increased Wilson’s “concern” about his current relationship’s lack of legal recognition. Similar language is used for each of the plaintiff couples in explaining their desire to marry.

After describing the plaintiff couples and the history of their relationships, the complaint proceeds to discuss each couples’ attempt to obtain a marriage license. Three of the couples sought their marriage licenses from the City of Boston. One couple each attempted to get their marriage license from Newton, Northbridge, Orleans, and Northampton. At each clerk’s office, the couple was denied a marriage license. The complaint, however, is clear not to cast the clerks as villains. Using the framework outlined by Robbins (2006), the clerks are merely threshold guardians. They represent an obstacle on the hero-plaintiff’s path, but not the ultimate villain.

In denying the applications for licenses, many of the clerks shifted the blame to the law or another agency. The complaint is careful in its treatment of the clerks. It emphasizes that some the clerks seemed inclined to help but were prohibited by law from doing so. Each time a clerk denied the application, the complaint describes it as having been done “politely” (Complaint, pp. 24-28). The clerks often offered suggestions as to how to proceed. Since no state legally recognized same-sex marriage, these suggestions were not always accurate. Some clerks suggested the couples seek
recognition of their relationship in Vermont, apparently confusing a Vermont civil union with marriage. The clerk in Orleans suggested that plaintiffs Bailey and Davies “get a partnership in Provincetown” (Ibid., 28).

The clerk in Boston, who handled requests from three of the plaintiff couples, suggested that the couples address their concerns to the Registrar of Vital Statistics because that is where the rules for eligibility for marriage originate. As the complaint describes, the clerk was polite, but firm. Hillary Goodridge, one of the plaintiffs denied a license in Boston, took the Boston clerk’s suggestion and contacted the Registrar of Vital Statistics. Again, the complaint is careful not to cast the Registrar as the villain. Like the clerks, the Registrar was polite. The Registrar indicated that the law restricted her abilities to help the Goodridges in their quest to marry. The implication, evident in the complaint, is that the Registrar, like the majority of the clerks, would help if granting marriage licenses were permitted by the law. From the plaintiff’s construction in the complaint, the villain is not any of the people who actually denied the plaintiff couples their marriage licenses; the villain is Law itself. Changing that law becomes the ultimate goal of the plaintiffs’ quest.

Discussion – What’s the Story

The complaint demonstrates many of the themes of storytelling advocated in the applied legal storytelling literature. As Robbins (2006) advises, the plaintiff’s attorneys have cast their clients as heroes on a journey. As discussed in greater detail in Chapter 2, the hero’s quest is a storytelling device useful for framing legal disputes. But the casting of characters is not always obvious. Many, as Robbins discusses, try to cast the judge as hero. She advises strongly against this, instead encouraging attorneys to cast their clients as heroes.

Heroes come in different kinds. The heroic archetypes are outlined by Mark and Pearson (2001) and used by Robbins (2006) and Chestek (2011) in their analyses of heroes’ quests in legal
advocacy. Not all heroes are Warriors. Other examples include Lover, Outlaw, Innocent, Ruler, Creator, Explorer, Caregiver, Sage, and Everyman (Robbins 2006). The defining characteristic of a hero is that he or she is seeking, through the heroic quest, to bring about some form of change. As a character in search of change, heroes are often allowed to be imperfect. They make mistakes. If they did not, they would not likely need to venture forth on a quest to better themselves.

Heroic quests are about transformation. The hero seeks to change himself or society by completing the quest. This change often requires assistance from other characters. Sometimes this help takes the form of a talisman – a tool necessary for the hero to achieve victory. Helper characters can be guides, mentors, or companions. Not all stories will have all secondary characters, but their presence can be useful.

Using the different archetypes and their basic quests, summarized by Robbins (2006, p. 802-803), classifying the complaint’s portrayal of the plaintiffs is complicated. One possible heroic type is the traditional Warrior hero on a quest for an important cause, fighting against the injustice of society. This empowers the client and gives them a goal to work toward — changing the law to better the world. But, in looking at the way the complaint frames the goals of the couples, it’s unclear whether or not this particular archetype is the most applicable.

None of the couples claim fighting injustice as a reason for their seeking to marry or for filing their lawsuit to gain the right to marry. The reasons that each couple gives are more humble and focus more on their own needs. Hillary and Julie Goodridge, for example, want to “obtain the same protections and responsibilities” available to other married couples and to provide their daughter with “the social recognition and security which comes from having married parents” (Complaint p. 6). David Wilson and Robert Compton are seeking to marry for similar reasons. First, they state they want to make a “public expression of their commitment to one another — an
expression that is understood by their families, colleagues and the world at large” and also “to provide greater legal security to each other” (Ibid. p. 9). Heidi Norton and Gina Smith come closest to the Warrior ideal. In addition to wanting to marry “for their own sake” they want their “their two sons to grow up in a world where their parents’ relationship is legally and communally respected” (Ibid. p. 21). But even here, the goal, while framed in terms of changing a society, is about their specific family.

The plaintiffs are not properly Warrior type heroes. Their goals are more focused on their own relationships and familial needs. They are not seeking to change the entirety of society for the sake of changing society. Instead, they seek to better define and protect their relationships and any societal change that occurs as a result is merely incidental to their main goal.

Another potential archetype that might fit the plaintiffs better is the Lover – seeking to “gain freedom to follow bliss through relationships” (Complaint p. 803). Robbins cautions against too much reliance on this particular hero because it can make the client appear too much like a “damsel-in-distress” rather than an empowered hero (Ibid.). At first glance, this does seem an appealing characterization. The goal is marriage. What is more loving than that? Each couple, as a joint heroic team, is seeking the freedom to marry for the happiness and protections it brings. With Robbins’s caveat in mind, before settling on the Lover hero, consideration should be given to others to see if any are a closer fit or can overcome the potential damsel-in-distress associations of the Lover.

Everyman heroes are seeking to “connect with society” (Robbins 2006, p. 803). Robbins gives the examples of Harry Potter and Bill Clinton — particularly during his first presidential campaign — as Everyman heroes (Ibid., p. 778). The key virtue of an Everyman hero is empathy. Because the hero is an ordinary individual, others can easily identify — empathize — with him. In the plaintiff’s complaint, the emphasis is on societal recognition. Nearly every couple talks about
making a “public expression” of their love or seeking recognition of their relationship from “the wider world” (Complaint pp. 9, 11). This sentiment is perhaps most eloquently stated by Gloria Bailey and Linda Davies who “want the world to see them as they see themselves — a deeply loyal and devoted couple who are each other’s spouses in all ways” (Ibid. p. 24). Throughout the description of the plaintiffs’ reasons for seeking to marry, the recurring theme of societal recognition is present. The couples just ask “to obtain the same protections and responsibilities under law as other couples” (Ibid. p. 6). They want society to recognize their relationship as equal to any other loving relationship. Marriage is a central and vital social institution from which the plaintiff couples are excluded. Their quest is simply to be able to share in that institution.

The other archetypes that Robbins outlines are less applicable. Some, like the Outlaw, the Caregiver, and the Ruler have similarities. The Outlaw seeks “to destroy… what is not working in society” (Robbins 2006, 802). Marriage, because of its exclusionary nature with respect to the plaintiffs is an element of society that is not working. But the plaintiffs here are not seeking to destroy marriage. They see marriage as a vital social institution. They seek to join it, not destroy it. Caregiver heroes are focused on “helping others” (Ibid.) and the plaintiffs’ concern for their children has Caregiver elements. But the larger quest is closer to the Everyman hero and not the Caregiver. Similarly with the Ruler. Ruler heroes seek to “create a prosperous family … and gain power” (Ibid. at 803). Again, while family is a focus of the plaintiffs’ decision to marry, it is not the central point of the quest nor the justification for it.
Other archetypes are not relevant at all. Their features and goals do not line up with the goals as outlined in the plaintiff’s complaint. The closest match, from the plaintiff’s perspective, is the Everyman hero seeking to better fit into society.

The plaintiffs also cast other characters in their quest according to the formulation Robbins (2006) and Chestek (2011) discuss. For example, the city and town clerks, and Registrar of Vital Statistics, who all denied plaintiffs access to marriage licenses are handled with care. These actors could have easily been cast as the ultimate villain to be vanquished. That, however, comes with its own risks. Robbins (2006) cautions against casting the opposing party as the ultimate villain. This is particularly important in the adversarial legal system. Villains are often heroes if viewed from the opposite side. Casting the opposing party as the ultimate villain can allow opposing counsel to “reverse the logic and make the hero look like the actual villain” (Ibid. 787). Robbins also talks about the risks for the lawyer and his or her relationship with the judge. Casting the opposing side as the ultimate villain allows that side the opportunity to more favorably depict themselves to the judge who must ultimately decide who the true hero is.

Instead of casting the opposing party as villain, Robbins (2006, 788) suggests the role of “threshold guardian or gatekeeper.” These are minor hurdles and lesser villains that stand in the way of the hero’s quest. This is a particularly good casting decision for the defendants in a case where the quest is more than just winning the lawsuit. The clerks and the Registrar, as agents of the defendants, in the Goodridge complaint are closer to threshold guardians than to true villains. To complete their quest, the plaintiff-heroes need more than just a marriage license. They need full, legal representation of their relationships. The clerks, the Registrar, and even the Department of Public Health, are powerless to grant this. Each clerk indicates that they would like to help, if

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4 Jester, Magician, Explorer, Innocent, and Sage are all types that Robbins discusses as potentially useful in certain types of legal disputes.
permitted. But the law compels them to deny the plaintiffs. The complaint casts Law as the villain, leaving the clerks as merely those forced by the law to act in a particular way.

Choosing the archetype and the other cast of characters is one step in the storytelling process, but it is not the only one (Meyer 2014). As Amsterdam and Bruner (2000) and Haven (2007) outline, stories have many elements that must be carefully analyzed. Not all narratives are stories. Stories require more than a mere chronological catalogue of events. Conflict is crucial. Amsterdam and Bruner call this Trouble. The Trouble is some disconnect between the way things are and the way things ought to be. Stories are about the characters’ efforts to overcome this and correct the disconnect.

For the plaintiffs, the disconnect comes from their inability to marry. Marriage is central to society. The benefits conferred by marriage are many, covering legal, financial, social, and emotional areas. Being denied access to those benefits presents the plaintiff couples with a challenge. As discussed above, the couples’ reasons for seeking marriage speak directly to this conflict. They want to join society, fully, and secure the necessary protections and recognition for their families that can only be achieved through marriage.

**Emotional Appeal**

As Chestek (2010, p. 2) argues, stories are persuasive because of their emotional appeal. “Stories… work because they allow readers to imagine for themselves how the protagonist might be feeling and relate that feeling to the readers’ own experiences.” The emotional connection is what makes stories work. Invoking the right emotion, at the right time, in the reader is a key component in persuasion. Emotional details are often legally irrelevant. Including them in advocacy, particularly when the decision maker is a judge and not a jury, is necessary but requires caution. Some judges, like United States Supreme Court Justice Antonin Scalia, urge against including legally irrelevant
emotional details (Scalia and Garner 2008). Chestek (2008, 2010), however, argues in favor of including emotional details. His 2010 study, while based on a small sample, did show a preference for briefs that include story elements, including emotional appeals. This preference was strongest in those who had held their jobs the longest (Chestek 2010). Despite what Justice Scalia and others may argue, emotionally relevant factors play a significant role in persuasion and decision making (see, e.g. Damasio 1994; Haidt 2012). In this case, using an Everyman archetype while speaking about love and marriage, invites the audience — the judge — to empathize with the harms faced by the plaintiff couples. It allows the judge to begin to adopt the plaintiffs’ view that denying these couples access to marriage is a serious deprivation of rights.

The plaintiffs attempt to make this clearer by filing a motion for summary judgment, which I analyze below.

**Summary Judgment – Decision at the Trial Court Level**

Both parties filed petitions for summary judgment. Under the Massachusetts Rules of Civil Procedure, summary judgment is appropriate when there are no disputed issues of fact. The moving party is entitled to judgment as a matter of law. As a procedure, it is designed to reduce the need for trials. If the parties agree on the facts that control the dispute, and the only questions are the legal application of those facts, then a trial is not necessary. The court can rule on the legal matter without the need for witness testimony or jury deliberations. Often, one party will contest the justification for summary judgment by arguing there are disputed facts that require a full trial. That was not the case in Goodridge v. Dept. of Public Health. In this case, both parties agreed that there were no factual disputes. The disagreement was, instead, about the legal rules that governed, or should govern, the agreed upon facts. This disagreement is divided into two general arguments: a statutory argument and a constitutional one. Each of the arguments is analyzed below.
The Plaintiffs’ Motion for Summary Judgment

The plaintiffs begin their memorandum with an appeal to emotion. The issue is framed, from the first, as about “the right to marry the person you love, the person with whom you want to share your life” (Plaintiff's Memorandum p. 2). In the same paragraph, the decision to marry is termed “intimate and personal” further emphasizing the personal stake the couples in the litigation have in their relationships and the recognition given those relationships by the state. This is a stark difference from alternative frames sometimes used in the same-sex marriage debate. Often, as Stone (2012) discusses, proponents of same-sex marriage will use frames of non-discrimination. Most distinct from the emotional appeal here are arguments, also discussed by Stone, that find their support in the aversion to constitutional amendments generally. This ties in with the non-discrimination argument as the anti-amendment argument is linked to one against amending discrimination into a state’s constitution. But in these arguments, the compelling emotional appeal that defines marriage for most people — love — is absent.

In the facts section, the memorandum, like the complaint, provides detailed information about each couple’s desire to marry. Here, again, the plaintiffs are described as couples and not individuals. The focus is on each couple's reasons for wanting to marry, not on the individuals. These reasons include both purely emotional ones and a more practical focus on securing legal protections. There is also an emphasis on both benefits and obligations. The plaintiffs go to great length to frame their quest as one of mutual benefit and support. Obligations inherent in marriage, to their spouse and society, are as important as their own emotional benefits. This is in keeping with the Everyman archetype that the plaintiffs appear to be using to tell their story. While the information included here is briefer than that in the complaint, the general themes are the same. The story remains one of seeking to better fit into society as a full and equal member.
The plaintiffs’ attorneys begin their argument with a statutory construction argument, rather than a constitutional one. This is in keeping with standard legal practice that courts should avoid constitutional questions whenever possible. The attorneys argue that the only restrictions on marriage in the statutes are those of consanguinity and procedural ones, like blood tests and fees (Plaintiff’s Memorandum pp. 5-6). The few gender-specific references, plaintiffs’ counsel argues “are not controlling” (Ibid. 6). This is, according to counsel, in keeping with standard statutory construction that permit gender-specific terms be interpreted as encompassing the other gender when appropriate. Since the gender-specific terms work to prohibit marrying close relatives or while already married to another person, these can be applied in a gender-neutral fashion that would not prevent same-sex marriages.

As shown below, in the discussion of both the trial court and Supreme Judicial Court decisions, this argument was not particularly persuasive. It is also lacking in specific story elements. It’s closer to the pure legal argument that Chestek (2010) found unpersuasive in his study. The lawyers emphasize case law and canons of interpretation without an appeal to anything larger. This is more noticeable when compared to the constitutional argument.

In the constitutional argument, the lawyers reference larger principles and fundamental rights to place the argument into a wider context than they do with the statutory argument. This is unsurprising. Constitutions speak in broad terms, open to broader interpretation than do specific statutes. The great questions that confront and divide our country are often framed in terms of constitutional disagreements. When the legislature fails to provide a preferred outcome, citizens turn to the courts and the constitution for protection and vindication of their rights. In fact, as the memorandum notes in footnote 10, that was the guiding principle behind the drafting of the specific provisions at issue in the Massachusetts Constitution.
The added context in the constitutional argument helps provide the story elements that were lacking in the statutory argument. As noted above, story, as the term is used here, requires a tension between the way things are and the way they ought to be. This is the “Trouble” that either upsets a previous steady state or presents a challenge that the characters must seek to overcome, allowing them to bring the way things are and the way they ought to be closer together. The constitutional argument starts with describing the way things ought to be. The lawyers outline the justifications for the social contract as it stands, with an emphasis on individual liberty and happiness (Plaintiffs’ Memorandum p. 12). A focus on the individual's pursuit of happiness was a particular concern for the drafters. This historic commitment is evident, as the lawyers demonstrate, in the writings of the drafters of Massachusetts’s Constitution, specific guarantees of equality and liberty, and even more clearly, its official name: A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts (Ibid., pp. 12-13). The Massachusetts constitution is primarily concerned with the rights of the people of Massachusetts, and not the government. This is in contrast to the federal constitution. The federal constitution did not even mention individual rights until the first amendments were adopted. The plaintiffs emphasize this heightened focus on individual rights in Massachusetts to argue for greater protections for individual liberty under Massachusetts law than is generally available under the federal constitution (Ibid., pp. 10, 30-31).

The plaintiffs ground their constitutional argument in several different portions of the Massachusetts Declaration of Rights. First, they argue that marriage is a fundamental right. Limiting marriage to opposite-sex couples infringes this right and cannot be permitted. Next they raise equal protection claims. Preventing same-sex couples from marrying violates protections against discrimination based on sex and on sexual orientation. Lastly, the plaintiffs allege violations of their rights to free speech and freedom of association. I will address each of these in turn.
Due Process - Fundamental Right to Marriage

The plaintiffs begin their constitutional analysis with due process. Here, we begin to see story elements more clearly in place. The argument, while using constitutional text and precedent, is framed as part of a larger process of evolution and change. As the plaintiffs state, “constitutional principles have never been viewed as static” and the expansion of those principles to encompass same-sex marriage is just the next logical step in a story that has been on-going since the founding of the Commonwealth (Plaintiffs Memorandum p. 8). It is in this section that the historic evolution of the Massachusetts constitution’s protection for the individual is shown most clearly. Stagnation subverts the steady state that should exist. The failure of the law to continue adapting becomes the Trouble necessary for a story to start.

In order to show the fundamental nature of marriage, the plaintiffs begin by showing the long history of its importance in the Commonwealth. These precedents emphasize the freedom of choosing a marital partner. While some limitations were in initially place, the plaintiffs show a trend toward elimination of status-based restrictions on marriage. Interracial marriage, once prohibited, is now permitted. The same is true for marriage restrictions based on competency and limitations on remarriage after divorce. This fits in with the story the plaintiffs are telling of the historic expansion of marriage rights and fundamental freedom in choice of partner. Being able to marry the person of your choice is central to the right to marry. In seeking that right, the plaintiffs are again casting themselves as Everyman heroes trying to join society on the same terms available to everyone else.

Marriage's fundamental nature is also affirmed by the plaintiffs’ description of the rights and obligations that come from marriage. Marriage changes the status of the couple with respect to each other and, perhaps more importantly, to society. Some of these changes are in the form of legal protections afforded by the legislature. These include economic protections, like inheritance,
taxation, and requirements of mutual support. But they go further. Laws also provide for special recognition of the intimacy of marriage, giving spouses primacy in medical decision making for incompetent spouses, hospital visitation, and protection for marital communications. Marriage also has cultural signification. The plaintiffs’ claim that marriage “is a special status, perhaps universally understood by others” reflects the importance of marriage beyond its legal status.

After outlining the justification for marriage, and more specifically choice of marital partner, as a fundamental right, the plaintiffs’ attorneys turn to the specific harms faced by the couples based on their exclusion from marriage. It is here that we see the Trouble first articulated: “The only citizens of the Commonwealth who meet all of the express statutory requirements for marriage but may not marry are couples of the same sex” (Plaintiffs’ Memorandum p. 25). The plaintiffs, and all same-sex couples, should be able to marry. This is particularly true in light of the trend toward greater access to marriage. But these couples remain barred from civil marriage. This fits the arguments for same-sex marriage into the larger national story of a move away from prejudice and toward greater equality for many different groups.

In describing the harm that the plaintiffs face, the attorneys use greater detail and specificity than would be legally required. Rather than say that the plaintiffs are unable to jointly share in pension benefits, the memorandum says “Ed has a pension at Lucent, and Gary has one through the Shrewsbury public schools, but neither Ed’s partner Mike nor Gary’s partner Rich enjoy the same scope of pension coverage” available to married couples (Plaintiffs Memorandum p. 26). Other harms, while not as personalized, are still highlighted for their emotional value. These include references to caring for extended family and protections for their children. While clearly serious harms, these are also the kind that are more apt to pull at the heartstrings than purely financial difficulties.
In applying the history and evolution of Massachusetts law to the factual harms faced by the plaintiffs, the memorandum emphasizes two threads. One argues that the Massachusetts constitution’s protection for individual liberty and happiness must be applied to all citizens. The other argues that the general trend in Massachusetts is toward the recognition of gays and lesbians as full members of society. Under this theory, the recognition of same-sex marriage cannot be denied. This argument is in keeping with the Everyman heroic archetype that the plaintiffs appear to be using. Marriage is central, fundamental, to society and the plaintiffs are seeking to join it. Unlike other archetypes that would be more focused on changing society or destroying it, Everyman heroes seek to join society on its own terms. While the plaintiffs are advocating an expansion of the definition of marriage, they are not advocating a radical change. Marriage has been expanded before and the plaintiffs’ quest is completely in keeping with that process.

**Equal Protection**

The plaintiffs allege two separate violations of the right to equal protection. First, that limiting marriage to opposite sex couples represents discrimination based on sex. Each member of the plaintiff couples cannot marry the person of their choice based on the sex of that person. This is sex discrimination. Second, the plaintiffs argue that by preventing same-sex marriage, the laws discriminate against gays and lesbians. This is distinct from, but related to, the sex discrimination claim.

Like with the fundamental rights analysis, the plaintiffs begin this section with a story framework. The attorneys start by arguing that the protection for equality in the Massachusetts Constitution is greater than the corresponding portions of the federal constitution. The attorneys again reach back to the Revolutionary period to explain the evolution of the equality principles enshrined in the Massachusetts Constitution. Like notions of due process and liberty, the equality
provisions have been expanded beyond their initial scope as a reflection of society’s commitment toward greater equality. Massachusetts’s long standing commitment to equality serves as the background for the plaintiffs’ quest. The steady state, like with the due process argument, is framed as one of expanding notions of equality that encompass all of Massachusetts’s citizens. Excluded from this, the plaintiffs face a conflict that must be resolved. Like in the Due Process section, failing to follow the trend toward greater equality presents a disruption from the steady state that is expected. The Trouble comes again from attempting to freeze law in one form, a form that excludes the plaintiffs from the equality open to everyone else.

In this section, the plaintiffs also emphasize the notion of the common good. Laws must be for everyone. Privileged groups or classifications are strongly disfavored. Classifications that benefit certain groups must do so only “to ensure the common good” (Plaintiffs’ Memorandum p. 36). The plaintiffs argue that these common good provisions were concerned with distributing government benefits equally. Arbitrary distribution of benefits, even if the classifications do not trigger heightened scrutiny, is prohibited. Since marriage, as the plaintiffs argue, confers substantial government benefits, denying access to same-sex couples cannot be arbitrary. The classification must serve some common good. In relying on this provision, the plaintiffs appear to be invoking the Everyman archetype. They seek to join society on equal terms and participate in the “common good” on society’s terms. They then make specific arguments against sex and sexual orientation based discrimination as a violation of the equality provisions enshrined in the Massachusetts Declaration of Rights.

In order to prevail in an equal protection argument, the party challenging the law must first demonstrate that the law creates distinct classifications. Then those classifications must be shown to be improper. Not all government classifications are viewed as equally impermissible. Laws that
create classes based on race are always presumed improper. These can only be upheld in extremely limited circumstances. Classifications based on sex or gender, while not always improper, are still treated skeptically by the courts. Most classifications are not. For most classifications, particularly under the federal constitution, the government need only show that the classification created by the law is rationally related to some legitimate government purpose. The Massachusetts courts follow a similar analysis. This is not a toothless standard, but it is quite deferential to the government. Courts across the country are divided on how to address classifications based on sexual orientation. The majority of courts that have addressed the issue use the most permissive standard; others, seeing sexual orientation as closer to race or gender, use some level of heightened review.

First the plaintiffs make the argument that the restricting marriage to opposite sex couples is sex discrimination. The gender based classifications are “immediately apparent” (Plaintiffs’ Memorandum p. 40). Each couple is unable to marry because both people are the same sex. Were either person of the opposite gender, their marriage would be permitted. Men and women are, however, equally burdened by the classification. This does not, plaintiffs argue, negate the sex discrimination. They draw parallels to the United States Supreme Court decision in Loving v. Virginia, the case that overturned racially based marital restrictions. There, the defenders of the law argued that since both races were equally burdened, no racial discrimination occurred. The Supreme Court rejected this argument. This places the current plaintiffs’ claims as an extension of one of the more celebrated Supreme Court decisions on equal protection. Simply burdening both genders equally is no more acceptable than similarly burdening different races. This links marriage equality for gays and lesbians to the successful claims made by interracial couples.

The section on sex-based classification is comparatively shorter than the one on sexual orientation discrimination. This is based, in part, on the obviousness of the sex based classification.
The standard of review for claims of sex discrimination is also clearly defined. The Massachusetts Equal Rights Amendment requires that these types of classifications meet the “most searching scrutiny” and can only be upheld when “they further a demonstrably compelling purpose” and are tailored as “narrowly” as possible (Plaintiffs’ Memorandum p. 44; internal quotations omitted). When arguing for sexual orientation based discrimination, neither of these factors is clearly defined. The plaintiffs must, therefore, spend more time on framing their argument into terms that the court can properly address. It is here that the initial story of evolving equal protection analysis becomes most important.

Initially, the plaintiffs must overcome a clear hurdle: sexual orientation is not listed as a protected class in the Massachusetts Constitution. The plaintiffs argue that the list included in Article I should be seen as non-exhaustive. While classifications relying on those specified characteristics must be reviewed strictly, others can and should be as well. This is in keeping with the story told at the start of the equal protection section. Massachusetts has a strong, continuing, and, most importantly, evolving understanding of equal protection. It must be expanded to include new suspect classifications as discrimination against these groups comes to be seen as equally invidious and illegitimate. Factors that the courts have used to determine if new classifications should receive heightened scrutiny include a history of “purposeful unequal treatment”, based on traits that bear “no relation to ability to perform or contribute to society”, and relative “political powerlessness” (Plaintiffs’ Memorandum p. 46). Each of these factors, the plaintiffs argue, weighs in favor of treating sexual orientation as a suspect classification requiring heightened review.

The plaintiffs make their argument for heightened review by addressing each factor in turn. Discrimination against gays and lesbians has a long history. This can be inferred from a variety of sources, including the need for laws protecting against continued discrimination. It can also be seen
more overtly. The plaintiffs reference the exclusion of gays and lesbians from marching in South Boston’s St. Patrick’s Day Parade as an example and the exclusion from military service that was in place at the time the case was argued (Plaintiffs’ Memorandum pp. 48-49). They also reference scientific studies and statistics demonstrating high levels of violence against gays and lesbians. In the next section, they also state that “it is well established that sexual orientation... bears no relation to the ability to perform or contribute to society” (Ibid. p. 51). Laws that persist in maintaining a sexual orientation based classification, plaintiffs argue, can only be based on “rank prejudice” further supporting the argument that discrimination against gays and lesbians persists today (Ibid.).

Courts also consider the relative political powerlessness of groups targeted by potentially discriminatory legislation. A history of powerlessness furthers the argument that laws disadvantaging disfavored groups are simply an expression of discrimination, rather than for any legitimate government purpose. The plaintiffs argue that the lack of elected officials openly identifying as gay or lesbian, combined with limited legislative protection and increased legislative efforts to restrict protections for sexual orientation, and the history of societal discrimination previously discussed demonstrates a lack of political power. This is in spite of recent trends toward greater acceptance and greater legal protections.

This argument reflects a tension between this section and other parts of the brief. Here, the plaintiffs are telling a story of discrimination, “both historically and in present times” (Plaintiffs’ Memorandum p. 50). This is important for the equal protection analysis. Earlier in the due process section, however, the plaintiffs tried to show a trend toward greater social and legal acceptable of gays and lesbians. While not in direct conflict — the trend can be toward greater acceptance while discrimination does still persist — there is a tension that is not acknowledged overtly and, to a small degree, weakens each version of the story.
In making their specific claims for sex and sexual orientation discrimination, the plaintiffs’ argument appears to take two forms. With the sex discrimination claim, grounded on more clear constitutional text and with clearer case law as precedent, the argument takes a more traditional legal form. Little effort was made to frame this argument as a story. Sexual orientation discrimination, on the other hand, lacks the solid legal foundation of prohibitions against sex discrimination. It is here that the story elements are more present. The references to expanding notions of equality and the current stigma facing gays and lesbians in society need to be clearly articulated here because there isn’t specific legal language on point supporting the argument. This calls to mind Posner’s (2008) argument that storytelling, and with it emotion, are more useful when judges are called to act in a legal grey area. As with the due process section, however, the story emphasis is most clearly shown not in the specific legal argument sections. It is, instead, used to provide context and history. Story frames the general trend in equal protection, as it did in due process, rather than the specific legal arguments of sex and sexual orientation discrimination. But that contextualization is important and cannot be overlooked. It is this context that links the legal argument to the Everyman heroic archetype that the plaintiffs’ case is using as its central theme. The story, really, is the national story of a move away from prejudice in general, and against gays and lesbians in particular.

**Free Expression and Intimate Association**

In their shortest argument section, the plaintiffs make claims that restricting marriage to opposite sex couples denies the plaintiffs’ their rights to free expression and intimate association. This section spans only four pages. Comparatively, the due process and equal protection sections were each over twenty pages. This section attempts to make the argument that marriage is expressive conduct and, as such, should be protected absent substantial government interest to the contrary. The plaintiffs seek protection for the “expressions of love, commitment, and personhood” that
marriage conveys. “[B]ecause of their sex and their sexual orientation, [the plaintiffs] are forbidden from expressing their love and commitment through the Commonwealth’s marriage system” in violation of their rights (Plaintiffs’ Memorandum p. 59). Additionally, the plaintiffs allege violation of their rights to intimate association because they are prohibited from joining in marriage with the person of their choice. “Marriage is a paradigmatic example of a constitutionally protected intimate association” and limits on forming that association must be subjected to strict scrutiny by the courts (Ibid. p. 61).

This section is comparatively devoid of specificity. There is no reference to the individual plaintiffs and their reasons for seeking to make these protected expressions or form these associations. In both of the preceding sections, due process and equal protection, the attorneys were careful to personalize the argument with references to specific facts relevant to specific plaintiffs. In discussing the harm that comes from excluding the plaintiff couples from marriage, they used individuals’ names and workplaces to show the unfair application of pension plans. In discussing health care and access to loved ones in emergencies, the plaintiffs reference the difficult birth Julie Goodridge had with their daughter and the trouble Hillary Goodridge had gaining access to her partner and baby immediately after. The section on free expression and intimate association, however, fails to provide any similar information.

This omission is particularly striking when examined in the context of the legal argument in the section. Both the free expression and intimate association arguments are made in terms of emotion. The plaintiffs seek to express their love and join intimate associations based on love. Marriage is referred to as “among the most intimate” associations protected under the law (Plaintiffs’ Memorandum p. 61). The plaintiffs even quote case law that argues that intimate associations should be protected because “individuals draw much of their emotional enrichment
from close ties with others” (Ibid. p. 60; internal quotations omitted). And yet the attorneys never use anything to illustrate this emotion in the plaintiffs. There is no attempt to link the plaintiff couples’ attempts to marry into the larger story of recognition for intimate associations. With due process and equal protection, the plaintiffs’ quest is framed as part of a larger trend to increased recognition of gays and lesbians in society, increased trends toward equality, and greater protection for relationships. None of that is made here. It is not even incorporated by reference to the earlier sections of the brief.

This section could have been made more compelling, or at least more persuasive, by inclusion of some level of detail or specificity. The lack of context and emotional connection makes this almost seem an afterthought. It is most clearly the least persuasive section of the plaintiff’s argument. The attempt to invoke emotion without the elements of story — characters and plot — doesn’t work. Stories, as Haven (2007) and others argue, invite emotion. But emotion without story is not as effective. In this section, there is no well-developed character with whom to empathize.

**Purported Justifications and Conclusion**

After completing each section arguing why the court should review the exclusion of gays and lesbians from marriage with increased scrutiny, the plaintiffs then turn to the application of their arguments to the standard of review urged. This applies to all three arguments jointly since the purported justifications would likely be the same for exclusion under due process, equal protection, or free expression and intimate association. The section is organized by first reiterating why heightened review applies. After that, a variety of potential justifications are addressed in turn. For each, the plaintiffs argue that even under the most deferential standard, the justification cannot support the exclusion of gays and lesbians from access to civil marriage.
Marriage is described, again, as “personally and culturally expressive” and access to marriage being of the “utmost importance” (Plaintiffs’ Memorandum pp. 63, 62). While specific story elements are not as present as in earlier sections, this description does fit with the Everyman hero apparently used throughout the brief. In response to specific potential justifications, there is some minimal effort to link the plaintiffs’ position to larger stories and trends toward greater acceptance. In responding to a potential justification grounded in “gender differences”, the plaintiffs show that society has rejected the notion that men and women have different roles in marriages; maintaining those alleged roles is not a legitimate government purpose. This is in keeping with the trend toward greater gender equality, which is also invoked.

The section that is most clearly placed in the context of a larger story is the one focused on reproduction and childrearing. Protections for single parents, increased adoption, and the use of reproductive technology, all demonstrate that biological reproduction is not central to marriage. This is further supported by the ability of infertile couples and the elderly to marry. Gender and sexual orientation have not been shown to be a factor in child custody or foster care placement. How, then, the plaintiffs argue, can excluding all same-sex couples from marriage further the state’s interest in childrearing?

This section, like the section on free expression, does not utilize storytelling to the same degree as the due process and equal protection sections did. There is no specific reference to the plaintiffs or the facts of this case. This, however, makes some sense. The section is focused on applying the arguments made in those sections to the legal rules that follow from them. Some more reliance on story, however, could have been used in placing the likely justifications the state may rely on into a more persuasive context. This is done, minimally, by showing trends toward greater gender equality and less reliance on biological reproduction. But when discussing parenting, no mention is
made of the couples that are already parents. No specific link is made. Similarly, reference to same sex couples raising children more generally is not fully developed. Greater emphasis here might have been warranted. The “save the children” framing of those opposed to same sex marriage, and gay and lesbian rights more broadly, has been long understood (Stone 2012). Rebutting that with specific examples is crucial to success. Failing to tell a compelling counter-story, to show that gay and lesbian couples are equally capable of successful parenting could undermine the case for same-sex marriage as it undermined earlier fights for gay and lesbian rights (Ibid.).

**General Analysis**

The plaintiffs’ brief features both legal and storytelling argument style. The emphasis, however, is most clearly on the legal. Characterization of the plaintiffs is minimal, having been done in greater detail in the initial complaint filed. Use of story reasoning is limited to the introductory sections of the due process and equal protection arguments. It is most useful in outlining the steady state and source of conflict central to the definition of story articulated above. Having outlined that conflict, the brief does work to place the argument into a story framework. The plaintiffs are confronted with a disconnect between the way things should be – the greater trend toward equality and recognition of gays and lesbians as full members of society – and the way things are – same sex couples are still excluded from marriage, the most central institution in society. The lawsuit serves as a way to reconcile those two states.

The story, however, trails off. The brief fails to continue the framing. This is most obvious in the conclusion section which consists of a single sentence: “For all of the above reasons, this Court should grant the Plaintiffs’ motion for summary judgment and enter an order declaring that civil marriage must be made available to the Plaintiffs on the same terms as other couples in the Commonwealth” (Plaintiffs’ Memorandum p. 69). Here, no effort is made to emphasize the
particular plaintiffs and their reasons for seeking marriage. The conclusion fails to move the story. This is standard for legal briefs, where lawyers are trained to end their briefs quickly. Gardner (2007, p. 104), provides an illustrative example in his legal writing text: “For the foregoing reasons, plaintiff’s motion to amend the complaint should be denied.” This is the total of the conclusion in the sample brief he provides. The value of these brief conclusions, however, may be worth re-examining in light of the scholarship on storytelling. Stories that end without sufficient resolution leave the reader unfulfilled. That may have implications for appellate writing that should be explored.

But even before the conclusion, in the efforts to apply the earlier arguments to potential justifications the state may assert, little effort is made to use the plaintiffs’ story to frame the argument. Even attempts to reaffirm the general trends discussed earlier, placing the lawsuit in the context of a larger story of equality and change, are missing. This larger trend is crucial for the story. The amici curiae, discussed below, illustrate the trend quite clearly once the case reaches the Supreme Judicial Court. The plaintiffs do reference this, and in certain sections emphasize the trend, but overall the national trend toward greater acceptance could have been more clearly utilized.

What story there is, however, does appear to adhere to the recommendations that Robbins (2006) makes regarding proper characterization. The plaintiffs, continuing the characterization from the complaint, are cast as Everyman heroes on a quest to join society on the same terms as everyone else. The judge is cast as a helper. This is not as clear as the role of the plaintiffs themselves. But, the reference to evolving trends and this case being the logical extension of an ongoing move toward greater equality, places the judge in the role of helping that evolution continue. He can, alternatively, be seen as threshold guardian. The judge, in deciding the case, can just as easily thwart the plaintiff’s goals and end this portion of their quest. Neither the government broadly nor the opposing party
specifically is cast as villain. Robbins cautions against this because villains can easily be reframed to be heroes in their own right on a quest opposite to the clients’. Unlike in the complaint, where the opposing party is portrayed as a threshold guardian bound by the law to deny the plaintiffs’ request, little is done to characterize the defendants. The emphasis is on the relationship between the plaintiff and the law, not the plaintiffs and the defendant. The defendant is virtually ignored. This leaves the role of villain, the force to be overcome, and the restrictive marriage law itself. It is the law, not any particular individual or government department, which acts to prevent the plaintiffs from participating fully in society. Victory over the villain will come when the law is changed and the couples are allowed to marry.

Motion for Summary Judgment – The Plaintiffs’ Reply Brief

The plaintiffs filed a reply brief after the defendants filed their motion for summary judgment. This brief serves two purposes. First, it is an opposition to the defendant’s motion for summary judgment. It also serves as a response to the defendant’s objections to the plaintiffs’ motion. It is both reply and opposition. Its purpose is different than the purpose of the plaintiffs’ original brief. Here, the plaintiffs are not making an affirmative argument. Instead, they are focused on attacking the argument that the defendants make in their motion. This different structure presents different strategy decisions. Instead of creating and framing their own arguments on their own terms, the plaintiffs must work within the framework used by the defendants. Unlike in their memorandum in support of their own motion for summary judgment, the plaintiffs are able to specifically and directly respond to the defendant’s arguments to justify the exclusion of gay and lesbian couples from marriage. In their own brief, the plaintiffs could only counter what they expected the defendants might argue. This change allows the plaintiffs to engage directly with the defendants’ justifications and attempt to rebut them. The reply brief, being more focused, lacks
much of the story framing that was present in the initial plaintiffs’ memorandum. There, the brief used a story of evolving law to show the plaintiffs’ quest as the next logical step in an already progressing story. Here the focus is on responding, succinctly, to attempts to undermine that story. Retelling the story is not necessary or appropriate.

As the plaintiffs respond to specific justifications in the defendants’ memorandum, they rely most heavily on traditional legal argument. The focus is not on history or tradition. It is on case law and legal analogy. Emotionally compelling detail is almost nonexistent. There is an oblique reference to the fact that some of the plaintiff couples are raising children, but gone are the detailed personal descriptions. This is in part because the audience has not changed. The same judge who read the initial pleading and the plaintiffs’ own motion for summary judgment will be reading the plaintiffs’ opposition motion and, ultimately, issuing a decision. Repeating the details identically would not advance the plaintiffs’ cause.

Because of this, the story elements in this brief are reduced almost to zero. We again see a difference in technique as the purpose of each court filing changes. The pleading contains the most compelling story. This is unsurprising. Pleadings are factual accounts of the legal dispute. They must describe the situation that gave rise to the legal dispute, who the dispute involves, and briefly why they are entitled to the dispute resolution they seek. Pleadings call naturally for a story. This is not the same with the briefs in support and opposition to summary judgment. Legal briefs require more legal analysis and legal reasoning. Their purpose and expected structure require a greater emphasis on case law and analogies than on storytelling and facts. The facts, and through that the story, can only be relevant if it fits within an analogy supported by the case law. By the time the plaintiffs file their reply brief, the story has been told and the focus is solely on fitting that story into the appropriate case law.
Now we turn to the decision from the Superior Court to see if the Court itself uses storytelling to support its conclusions and persuade the litigants that its decision was the appropriate one.

**Superior Court Decision**

Judge Thomas E. Connolly of the Superior Court ruled in favor of the Department of Public Health, granting the defendant’s motion for summary judgment and denying the plaintiffs’. Because of the nature of the case, it can be assumed that Judge Connolly was aware that his decision, for whichever party he ruled, would be appealed by the other side. As is common in these situations, the judge wrote an opinion explaining his ruling rather than merely determining which party prevailed. As discussed above, judicial opinions are persuasive tools. They have multiple audiences. First and foremost, the opinion is directed to the parties in the case pending. It informs them of the outcome and provides justifications for it. When the decision is made by a trial judge, the opinion is also directed at appellate courts that may be called upon to review the decision. Judges, in general, strive to avoid having their decisions reversed on appeal. A well-crafted opinion can help reduce those chances by providing the appellate judges a reasoned argument to uphold.

Judge Connolly’s decision should be read as being addressed to both of these audiences. He starts by outlining the basics of the dispute and the controlling facts as agreed to by the parties. Next he turns to the general legal standards for summary judgment that govern the dispute at this stage. Lastly, he analyzes the two main claims relied upon by the plaintiffs: statutory interpretation and the constitutional argument. Examining these various factors in turn demonstrates some of the elements of storytelling as seen in the parties’ briefs.

While the description of the plaintiffs in their own pleadings span several pages, Judge Connolly reduces that character development to just over a single page. In this, he follows the
descriptions, often with the exact language, used by the plaintiffs in their summary judgment memorandum. Like the plaintiffs, he focuses on the couples rather than individuals. He does, however, provide information about each couple that goes beyond that legally required to support his ultimate decision in favor of the defendants. Beyond the description of the plaintiffs, Judge Connolly doesn’t provide much in the way of factual context. There is no description of the efforts the couples underwent to attempt to marry. After the short discussion of the plaintiff couples, Judge Connolly goes directly into his analysis of parties’ claims in their cross-motions for summary judgment.

The trial court’s decision is, like the motions for summary judgment, divided into a statutory and a constitutional analysis. The statutory analysis follows the same format as the one supplied in the plaintiffs’ brief. The plaintiffs urged a gender neutral interpretation of the marriage laws. The trial court rejected that as contrary to the clear history of the statute and intent of the legislature. Marriage has, historically, been inherently heterosexual. The legislature’s use of gender specific terms, both in the licensing statutes and in other statutes related to marital status makes clear the intent to keep marriage restricted to opposite sex couples (Suffolk Sup. Ct. 6). This section relies on traditional legal argument without much attempt to construct a narrative or a story.

The constitutional analysis section focuses on the due process argument. The claims brought by the plaintiffs under the Equal Rights Amendment are dismissed in a footnote without discussion (Suffolk Sup. Ct. 8-9, fn. 6). Articles 6 and 7, the sections traditionally seen as applying to hereditary titles and the right to alter government for the common good, are discussed in more depth than the ERA, but are ultimately dismissed. Like the statutory analysis section, the decision’s explanation for rejecting the Article 6 and 7 claims is legalistic. There is no story told. That changes, slightly, when the court gets to the liberty and due process analysis.
Under the due process analysis, the court adds hints of storytelling into the decision. The focus is still closer to traditional legal analysis. But the decision here has to counter the story told by the plaintiffs in making their due process claims. The structure of the legal analysis invokes, subtly, a counter-narrative. The plaintiffs had tried to tell a story of growing acceptance for gays and lesbians and their relationships. The trend was toward relationship recognition and full citizenship. While the trial court does not reject this trend outright, Judge Connolly’s decision emphasizes caution, more than courage, for the courts. The Massachusetts courts “have been wary of recognizing or creating new fundamental rights” (Suffolk Sup. Ct. 17). Finding a right to same-sex marriage would be a departure from that cautious approach to fundamental rights jurisprudence. Marriage, while deeply rooted in the history of the Commonwealth, has always been limited to opposite sex couples. Traditional, heterosexual marriage is the fundamental right protected by the Constitution. Attempts to expand the definition of marriage should be “directed to the Legislature, not the courts” (Ibid. p. 21). The legislature, not bound by judicial caution, is freer to act in this area. The court does, however, acknowledge that change from the legislature is unlikely to happen soon (Ibid.). This section, still, consists mostly of traditional legal analysis. But that analysis is organized to support a cautionary tale for the courts. New rights must be limited and recognition of them can only come after careful consideration of the purported right’s roots and history.

On Appeal: The Merits Briefs

Denial of a summary judgment motion can be appealed immediately. After their loss in the trial court, the plaintiffs’ attorneys sought further review of the case in the higher courts of Massachusetts. Massachusetts has two levels of appellate courts: the Massachusetts Appeals Court and the Supreme Judicial Court. Most appeals are decided at the Appeals Court level. A few are decided by the Supreme Judicial Court, either directly after the trial court decision or after
consideration by the Appeals Court. Lawyers can petition the Supreme Judicial Court for a direct review or the Court can transfer cases on its own motion (Clay 2008). In Goodridge v. Dept. of Public Health, the case was heard directly by the Supreme Judicial Court at the request of both parties.

In appellate cases, the parties are asking the higher court to review specific legal conclusions of the lower court. How those questions are posed can have implications for how those questions get answered. The plaintiffs made this point clearly in both their trial court and appellate court memorandum when discussing the fundamental right to marriage found in certain United States Supreme Court cases, most notably Loving v. Virginia. In this case, as expected, the plaintiffs and the defendants asked the Supreme Judicial Court different questions. These differences are explored in the sections below.

The parties also have an opportunity to specifically address the facts of the case, including the prior proceedings. Again, in this case there is little dispute over the underlying factual claims made by the plaintiffs. The only dispute is about the legal principles to apply and application of the agreed upon facts to the law. It is, therefore, unsurprising that the defendants adopted the plaintiffs’ statement of the case. They sought only to limit the “material facts” to the polite denial of marriage licenses (Defendants’ SJC Memorandum p. 4). By implication, the detailed descriptions of the plaintiff couples and their relationships, and reasons for attempting to marry, all included in the plaintiffs’ brief, are technically irrelevant to the legal dispute.

The plaintiffs’ brief is discussed below.

The Plaintiffs – Merits Brief

As discussed, framing the question presented for the court is an important part of appellate advocacy. Here, the plaintiffs have chosen three direct questions that encompass the same
arguments they had raised at the trial court. The first focuses on statutory interpretation and asks whether it is possible to interpret the marriage statutes in a gender-neutral fashion to include same-sex couples. The second and third questions each correspond to part of the plaintiffs’ constitutional argument. The first asserts a “fundamental right to marry”; the second invokes “equality” rights. These questions provide the basic structure for the argument section of the brief.

Before turning to their argument, however, the plaintiffs must first provide the factual background of the case. Like with their first trial level brief, the appellate memorandum’s fact section begins with a detailed description of the plaintiff couples. The focus remains on the plaintiffs as couples not individuals. Each couple receives a paragraph of description. The information focuses on the length and history of each relationship, their active membership in the community, and details about the family, including children and extended family members where appropriate. Some individual details, such as employment, is included, but the emphasis is on each pair of plaintiffs as a unified couple in search of recognition for their relationship. Often, the plaintiffs’ emotions are referenced. One couple is described has “worr[ied]” about their lack of legal protections, particularly when traveling (Plaintiffs’ SJC Memorandum p. 6). Other descriptions don’t use that word, but definitely refer to similar emotions, all stemming from the lack of certainty surrounding the legal status of their relationship. The detail in this section goes far beyond the legally required information. Including this information is helpful in humanizing the dispute. Characters, as discussed above in Chapter 2, are crucial to storytelling. Fully developing the plaintiff couples helps the reader connect with their story — their quest — in ways that are not possible with the bare legal minimum (Meyer 2014).

The plaintiffs next turn to their argument. Their appellate brief continues the same themes that were present in their earlier court submissions. Before making specific statutory and
constitutional claims, the plaintiffs explain the importance of marriage. Marriage is ranked as “one of the most fundamental of all our human and civil rights” but its importance is linked to being able to marry, specifically, “the person you love” (Plaintiffs SJC Memorandum pp. 10-11). Marriage is based on “the intangibles of love” (Ibid. p. 11). The plaintiffs rely on the emotional basis for marriage, rather than the legal rights and obligations, to demonstrate its central importance in life. Instead of basing the plaintiffs’ harm in a loss of legal benefits, it is framed as a denial of “personal fulfillment” (Ibid.). Only after asserting the emotional importance of marriage do the plaintiffs mention the legal rights and responsibilities that come with those emotional benefits.

In their appellate brief, however, the plaintiffs do not utilize story framing to the same degree that they did in the trial court. As discussed above, in the trial court the plaintiffs’ brief emphasized an ongoing story where due process and equal protection analyses were expanding to include new rights and new groups. Historic context was used to show this change over time. The expansion of constitutional protection is still mentioned at the appellate level, but it isn’t framed in the same way. Gone is the lengthy section dedicated to analyzing the colonial understanding of the constitutional provisions in question. When discussing the expansion of how those provisions have come to be understood the emphasis is on case law and precedent, not society. In the trial court brief, the plaintiffs had a section specifically arguing that “constitutional principles must be interpreted in light of evolving trends of respect for gay and lesbian citizens” (Plaintiffs’ Memorandum p. 28). That section focused on all three branches of government. The appellate brief, in contrast, does not include a specific section on evolving societal trends. Reference is made to legislation, but most often, only as a means of supporting a point of analysis relevant to a particular precedent case. These evolving trends become the story frame used by the Court in its decision.
The appellate brief, taken as a whole, is almost entirely pure legal reasoning. It is possible that this reflects an appreciation of the different audiences. Trials are the quintessential site of legal storytelling. It is here that witnesses are called to testify, to tell their story, and where jurors and judges combine all that testimony into a single story and issue a verdict. Trial attorneys are keenly aware of the need to have a unified theory of the case, a story that is both plausible and coherent. Trial judges are more familiar with stories and lawyers drafting for that audience may keep this in mind as they frame their arguments at the trial level. Appellate courts deal, for the most part, with law, not facts. It is still important for appellate lawyers to have a legal theory to advocate, but this is generally seen as removed from the construction of a story. The story was determined by the trial. The appellate process is designed to check that story against the applicable law and, where necessary, change that law for future cases and future stories. Drafting for an appellate panel is focused, then, on different facets of the case. Law takes precedence over story. Appellate judges want to know the legal issues and trust to trial judges to deal with the story that makes the case.

The plaintiff’s appellate brief, however, is not devoid of non-legal argument. One section in particular attempts to invoke emotion and storytelling, not legal reasoning. Starting on page 109, the brief focuses on the “profound harm” endured by the plaintiffs because of their exclusion from civil marriage. The section is short, barely filling two pages, but it is notable for its direct appeal to emotion. In discussing the importance of marriage to “one’s soulmate, one’s closest confidante and most steadfast ally” the plaintiffs assert that “no citation” is needed to demonstrate that importance. (Plaintiffs’ SJC Memorandum p. 110). Marriage is “one of the most joyful experiences” in someone’s life (Ibid.). By stating that no citation is needed, the plaintiffs are emphasizing the human aspects of marriage. Citation isn’t necessary because it is universally understood. Marriage transcends law and legal reasoning, entering the universal realm of human emotion and understanding.
The emotional appeal calls to mind the Everyman heroic type that, while not as readily apparent in this brief, set the tone for the lower court proceedings and still frames the legal dispute at the appellate level. The story is not front and center, but the plaintiffs’ goal remains to join society in that joyful union that is so vitally important to society and, more importantly, to the individual members of each married couple everywhere. This theme is also evident later when GLAD, the plaintiffs’ attorneys, files an *amicus* brief in response to legislative action seeking to limit the ultimate decision of *Goodridge*.

**The Plaintiffs’ Reply Brief**

The plaintiffs’ attorneys filed a reply brief with the Supreme Judicial Court, as they did in the trial court. The brief’s focus is on rebutting the justifications asserted in the defendant’s brief in support of marriage as an exclusively heterosexual institution. Much of this echoes claims made in the trial court. In doing so, the reply brief advances the Everyman story throughout its argument. Sometimes the reliance on the theme is clear. At others it is more subtle.

The brief starts with a strong emphasis on the Everyman theme. It emphasizes the ties the plaintiffs have to their communities. “They give of themselves to their communities, whether as Little League coaches, community choir singers, or field trip chaperones” (SJC Reply Brief 2). “The Plaintiffs’ lives speak to their cultural inclusion in “family” and the larger Massachusetts community” (Ibid.; emphasis in original). This is the Everyman archetype. Their desire for inclusion in the defining institution of society — marriage — is simply another expression of their inclusion in the family and life of the community. This frame, of the traditional all-American family, is also used in the media campaign discussed below.

The reply brief also echoes several themes that are present in the *amicus* briefs discussed below in the next section. Equal access to marriage for gays and lesbians is part of “the ongoing
legal evolution of marriage and family” that is already recognizing gay and lesbian families in many ways. This trend is more fully developed in the *amicus* briefs, but by referencing it here the plaintiffs further support their desire to join, not destroy, marriage as it already exists. They are seeking full participation in society not to fundamentally alter it.

Additionally, the reply brief addresses the assertion, made by the trial court and the defendants, that this is a policy decision best left to the legislature. The *amicus* brief from the Professors of Remedies, discussed below, addresses this issue in greater detail. But here, the brief is empowering the Court to help the plaintiffs overcome the problem, to resolve the tension in the story, and bring about an end to the plaintiffs’ quest. Because the plaintiffs’ claims are for “the same constitutional protections assumed” by the rest of society, the Courts are the proper place for them to seek redress (SJC Reply Brief 24).

To determine if the plaintiffs are entitled to the relief they seek, the Court must first determine the level of scrutiny to apply to the claims raised by the plaintiff and the justifications asserted by the defendants. The plaintiffs argue for “heightened scrutiny” (SJC Reply Brief 25). Here the brief focuses on proper frame selection. Plaintiffs argue that the Court must look at the right in question as the fundamental right to marry. Defendants, instead, argue that the purported right is one to same-sex marriage. Here, again, the plaintiffs rely on history and the growing trend toward acceptance of gays and lesbians to make their case for heightened scrutiny. But even if the Court uses a lower standard of review, the plaintiffs argue that the defendants cannot justify the law (Ibid. 38-46). This section has less of the story elements than other portions of the reply brief. It consists mostly of traditional legal argument with the limited invocation of historic trends.

The reply brief, structured as it is as a response to the defendant’s argument, is more legalistic than the original brief. Most of the plaintiffs’ story has been told already. The reply brief,
serving a different purpose, is less focused on making the plaintiffs’ claims. Instead it is designed to rebut, with legal support, the defendant’s arguments. Even with that shift in focus, however, the Everyman theme is still present in the brief. Storytelling, while not central, is still being used to support the plaintiffs’ argument and their desire for joining the institution of marriage.

**On Appeal: *Amicus Curiae***

Courts often permit non-parties, known as *amicus curiae*, or friends of the court, to file briefs in appellate proceedings. The briefs can be in support of either party or of neither party. Ideally, these briefs provide insight or information that assists the court in resolving the particular legal dispute. This advice often takes a policy focus as the *amici* have more freedom to explore issues outside of the narrow, adversarial context that constrains the parties. When a decision will have broad impact beyond the parties to the case, *amicus curiae* can help illuminate those issues for the court’s consideration. The number of *amicus curiae* briefs filed with the courts today is high. In examining the role of *amicus* briefs in the federal courts, Simard (2008, p. 671) emphasizes the “tremendous surge” in these briefs in the Supreme Court of the United States. The stakes are higher in federal court as the decisions there have more geographic impact. If the United States Supreme Court issues a ruling on federal law or federal constitutional principles, it becomes binding over the entire country. But state courts are also important influencers. This is particularly true in issue areas that are new or with legal arguments that are novel in some way. As courts confront new issues, they look to cases from courts in other jurisdictions. While not binding authority, decisions from one state can persuade other states to decide the issue in a similar fashion. This can be reason why *amicus curiae* intervene in state court cases likely to carry influence far beyond the state actually making the decision. *Goodridge v. Dept. of Public Health* was going to be such a case.
The Supreme Judicial Court received briefs from *amicus curiae* supporting both the plaintiffs’ and the respondents’ positions. In fact, this case received the most *amicus* briefs of any case in the Court’s history (Bonauto 2005). The number of groups participating is even higher as one brief was often joined by several groups. The brief submitted by the Urban League of Eastern Massachusetts, for example, was joined by over twenty other organizations. Other briefs were submitted by professors, medical and psychological professional associations, religious groups, international human rights groups, various other civil rights groups, bar associations, advocacy organizations, and other state governments. This section examines these briefs to see if storytelling themes were utilized in presenting their arguments to the court and if those themes support or contradict the themes used by the litigants themselves.

**Briefs in Support of the Plaintiffs**

The Supreme Judicial Court received 11 briefs in support of the plaintiff-appellants. As can be expected, these included many civil rights and GLBT rights organizations. But the supporters were much broader. Several groups of professors, with diverse specialties, including family law, history, constitutional law, freedom of expression, and remedies filed briefs. The Massachusetts Bar Association and the Boston Bar Association each filed a brief. While many religious groups oppose marriage equality, that opposition is not universal. The Religious Coalition for the Freedom to Marry, representing a varied mix of faiths and faith leaders, filed a brief in support of the plaintiff couples.

Some briefs used storytelling techniques to place the Goodridge case in the larger context of evolution of marriage and understanding of civil rights. Most briefs, however, were closer to purely legal argument than the storytelling one might expect in a persuasive context. In fact, some briefs used no storytelling techniques at all. In general, the use of narrative was hampered in the *amicus*
briefs because the majority of amici failed to craft their own version of the issues and facts. The facts section is the easiest place for a brief writer to use narrative techniques (Chestek 2008, 2010; Scalia and Garner 2008). Instead of drafting a narrative outline of facts, most brief writers chose to adopt the statement of case prepared by the plaintiffs. This made each amicus brief shorter but created a lost opportunity for reinforcing the story told in favor of the plaintiffs.

The brief from the Professors of the History of Marriage, Families, and the Law relied most on storytelling. Like the trial court submission from the plaintiffs, this brief focused on the evolution of marriage and how it has expanded to permit more types of marriages. This evolution changed who was eligible for marriage and the relationship of spouses within a marriage. Recognition of same-sex marriage is shown as the next logical step in this progression. The brief uses the denial of marriage licenses as the Trouble Amsterdam and Bruner’s (2000) see as central for a story. The steady state is the gradual expansion of marriage as our understanding of society changes. Denying same-sex couples access to marriage “flouts this robust tradition” (Brief of the Professors of History of Marriage, Families, and the Law at 2). By not following the robust tradition, the Department of Public Health has created a tension between the way things are and the way they ought to be, a tension that must be resolved by the story’s heroes.

The brief from the scholars of the history of marriage also supplements the plaintiffs’ story in an important way. As noted above, the plaintiffs’ briefs cast them as Everyman heroes on a quest to join society completely. This is distinct from other types of heroes. Outlaws, for example, would work to change or destroy society rather than join it. This brief uses the same archetype to frame the story. The plaintiffs are striving to join with society in its most fundamental institution. That their membership may change marriage doesn’t mean that marriage will be destroyed. Instead, marriage’s
constant evolution will continue and this group, once excluded, will now strengthen marriage as an institution. Marriage will remain central to society.

The brief submitted by the Professors of Remedies, Constitutional Law and Litigation also used storytelling in its structure, but with a different focus. This brief did not, directly, attempt to address the underlying legal claim. They do argue that the plaintiffs have a constitutional right to marry their same-sex partners, but do not argue that point. The focus of the brief is, instead, on the remedy available to the plaintiffs should the court agree that a violation exists. The brief focuses on convincing the Court to that it can, and should, rule on this issue, and in particular, for the plaintiffs. In this they attempt to rebut the defendant’s arguments in favor of deference to the legislature on the issue of marriage for gay and lesbian couples.

Because of the shift in focus, the Professors of Remedies, Constitutional Law and Litigation necessarily must tell a different story. The plaintiffs are no longer central to the argument. A new hero, with a new story, must be chosen. Looking back at the structure of the Hero’s Quest, it appears that this brief has chosen to frame the Court as the hero, one on the verge of accepting the quest. Campbell (2008) starts the hero’s quest with a choice; the hero can choose to accept or to reject the quest. The focus of this brief is on urging the Court to accept the quest before it and decide the pressing legal issue. The defendants have offered the Court an alternative, encouraging the court to defer to the legislature on this issue. In doing so, the brief asserts that the defendants have “question[ed] the very legitimacy of judicial review” (Professors of Remedies, Constitutional Law and Litigation at 4). To encourage the Court to accept the quest, to rule on the issue of same-sex marriage, the brief outlines the history the Court has of deciding controversial and contentious issues. Deferring to the legislature, as the defendants urge, is not part of the Court’s history.

This brief was joined by by Professors Michael Avery and Kate Nace Day of Suffolk University Law School who were both the authors’ professors and serve as references and mentors still.
Rejecting the quest is equated to abdicating the proper role the Court plays in our system of
government.

This brief also addresses the different remedial options. The Court could strike down the
marriage laws entirely. This is disfavored. Instead, the brief urges the Court to extend the marriage
laws in a gender neutral way to include the plaintiff couples. Here, again, the focus is on the
authority of the Court to act rather than on the substance of the plaintiffs’ claims. This fits with the
first part of the brief casting the Court as a hero about to begin a quest. The brief is merely
providing the tools necessary for the hero to succeed. The tools, as can be expected in a legal
argument, include precedent cases, legislation, and constitutional provisions that demonstrate that
the Court has the authority, and the ability, to successfully complete the quest before it.

The brief ends with a discussion of civil unions as a possible remedy. Civil unions were
created after the Vermont Court found that Vermont’s marriage laws violated constitutional
provisions, but deferred remedy to the legislature. The legislature took the opportunity to create the
separate, but theoretically equal, system of civil unions for same-sex couples. The plaintiffs in
Goodridge did not seek civil unions as a remedy. This brief argues that, should the Massachusetts
Supreme Judicial Court determine a violation exists, but defer remedy to the legislature, a similar
result might arise. Civil unions, however, would not cure the violation the plaintiffs allege. This
reaffirms, somewhat subtly, the plaintiffs’ argument that marriage is about more than just the
associated legal benefits and protections. Marriage is culturally significant in a way that civil unions
cannot replicate. In this section of the brief, the authors again affirm that the Court is the proper
forum to address the plaintiffs’ concerns. Anything else would fall short. The Court is again urged to
accept the quest, act as hero, and remedy the wrong the law does to the plaintiff couples. This issue
returns in Opinion of the Justices, discussed below.
The brief submitted by the Religious Coalition for the Freedom to Marry, like the Professors of Remedies, also begins by shifting the focus onto the courts. In the statement of the case, the Religious Coalition casts the trial court as a type of villain, specifically taking issue with the invocation of ecclesiastical law. The trial courts invoking religious law to support its decision “raises grave concerns” (Religious Coalition for the Freedom to Marry at 2). In explaining their concern, and urging the Supreme Judicial Court to reject the ecclesiastical justification, the brief’s authors use standard legal argument and discussion. Other than casting the trial court as villain, there is little evidence of storytelling technique. Highlighting the disagreement among religious institutions on this issue, however, was important. As discussed below, the Supreme Judicial Court noted this disagreement in its decision.

The Boston Bar Association and the Massachusetts Lesbian and Gay Bar Association filed a joint brief that discusses the specific legal harms faced by gay and lesbian couples because of the denial of marriage. These specific harms were included by reference by the Massachusetts Bar Association in its brief. The two briefs, however, rely almost entirely on traditional legal argument style. Neither has a clear narrative. The Boston Bar Association does attempt to show how much harm gays and lesbians suffer by being excluded from marriage, but the presentation is not done in a way that invokes a strong emotional response. Nothing in that brief particularizes the harm to these plaintiffs; the harms are instead kept at an abstract level.

The brief starts with the duty of fidelity and hospital visitation, but moves quickly onto more economic and financial focused benefits. The brief spends a significant amount of space talking about rights in tort law, inheritance, compensation for crime victims, and property rights. The

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6 The author has been a member of the Massachusetts Lesbian and Gay Bar Association, now called the Massachusetts LGBT Bar Association, since 2003 but had no role in the decision to file this amicus brief or in its contents.
economic losses that confront same-sex couples because of their inability to marry are most evident when confronted by the death of a partner or the dissolution of a relationship. The brief goes into detail on the laws of inheritance, probate, and administration of estates. It also explains how the divorce laws protect and help couples going through the dissolution of their relationships. Very few of this benefits are available to non-married couples.

After discussing the economic harms to the couples themselves, the brief turns to the children of same-sex couples. The *amici* argue that denying same-sex couples the right to marry harms the children of those couples. Same-sex couples have secured some legal rights in parenting and adoption, but in general, the brief argues that these do not go as far as, and are not as secure as, marriage. In this section the brief discusses the case by which married couples can claim their parental rights compared to the difficulty of non-married partners establishing parentage or, as is often the case in same-sex couples, *de facto* parent status.

In both sections — one addressing the same-sex couples specifically and the other their children — the language remains abstract and legal. Only in discussing the remedy available does the brief truly attempt to go beyond the purely legal. The only proper remedy is to extend the civil marriage to include same-sex couples. Civil unions, the brief argues, “fall short in symbolic and practical ways” (Boston Bar Association, 47). Civil unions lack the “cultural status” of marriage. The separate system would only send the message that gay and lesbian couples are not “full, equal, or valued members of the community” (Ibid. 48). Emphasizing the “separate” nature of civil unions invokes the legacy of *Brown v. Board of Education* and its insistence that separate is seldom, if ever, truly equal. But rather than end on this potentially powerful note, the brief returns to economic, legal arguments. Citing the problem of federal recognition, the brief gives the example of pension benefits under ERISA as support for marriage instead of civil unions. This, of course, ignores the
Defense of Marriage Act and its prohibition against federal recognition of same-sex marriage. But more importantly, it returns to marriage as money.

The humanity that was so evident it did need citation that closed the plaintiffs’ brief is gone. Now it is about ERISA and federal pensions. On the whole, the Boston Bar Association Brief lacks heart, character, and emotion. It lacks story. The laundry list presentation of harms faced by gay and lesbian couples is important to highlight. But it is not done in a particularly compelling way. There is no emotional chord struck.

Similarly, the brief from the International Human Rights organizations provides a non-narrative survey of the trend toward greater legal recognition and protection for gays and lesbians, as well as the small, but growing, recognition of same-sex marriage. This discussion comprises the bulk of the brief. Like the plaintiffs, though, there is an attempt to place the Goodridge decision into the context of the growing trend toward recognition of same-sex marriages. This brief, however, does not link that trend as closely to this case as the plaintiffs do in their brief.

This is similar to the brief submitted by the Professors of State Constitutional Law. This group, again, uses context to explain the evolution of the Massachusetts constitution and its guarantees of liberty and equality. This supports, with significantly more detail, the plaintiffs’ related discussion in their submission. This added detail is provided in a more straightforward legal discussion without much reliance on storytelling.

**General Discussion**

The various amicus briefs submitted in support of the plaintiff couples all present strong legal arguments. Only a few, however, support those legal arguments with story structures. Lacking direct involvement in the case, the amici often fail to include any specific information about these plaintiffs. This is not surprising. The amici are distinct from the plaintiffs. Instead, the amici have their own
concerns. But they do not frame those using storytelling techniques. They often adopt the plaintiffs’ statement of the facts and case without further explaining why the *amicis* as such are interested in the litigation. As shown below, few of the *amicus* briefs were mentioned by the Court in its decision. This, of course, does not mean that the briefs were unsuccessful or unnecessary. Even without citation or reference, the Court could have found the information in the briefs helpful or persuasive. The lack of direct citation raises more questions than it answers. Simard’s (2008) study of federal judges, however, does support the role of *amicus curiae* and could be applicable in the state context as well. This is an area where further study would be most welcome.

**The Decision: Goodridge and Beyond**

The Supreme Judicial Court issued its decision at the end of 2003, but stayed the effects for 180 days. The ruling was from a divided court. Four of the seven justices joined the majority opinion while the other three dissented. There was one concurrence from Justice Greaney that articulated a slightly different rationale for supporting the plaintiffs. This section will focus on the majority opinion as the controlling opinion in the case. After looking at the *Goodridge* decision, I will look at the legal attempts to limit the scope of the ruling. During the 180 day stay, the Massachusetts Senate sought clarification from the justices of the Supreme Judicial Court about the effects of *Goodridge* and the possible adoption of civil unions. The justices, again divided, affirmed *Goodridge*’s holding: marriage is the only remedy sufficient to cure the harm faced by the plaintiffs and all same-sex couples. I will look at *Opinion of the Justices* again focusing on the majority, as a conclusion to the judiciary’s treatment of same-sex marriage.

**Goodridge v. Dept. of Public Health - Supreme Judicial Court Decision**

The Supreme Judicial Court’s decision in *Goodridge v. Dept. of Public Health* was historic. It was the first appellate decision to require recognition of same-sex marriage. Other courts had
come close but, for a variety of reasons, did not reach the same result as Massachusetts. In Vermont, in *Baker v. State*, the high court’s decision required the state to provide same-sex couples the same rights and obligations as marriage but left the particulars of remedy to the legislature’s discretion. Earlier, the Hawaii courts had issued a ruling in *Bahr v. Lewin* that denying marriage licenses to same-sex couples was discrimination and required state justification. The Supreme Court of Hawaii remanded the case to the trial level to determine if the state had sufficient justification. Before that case could conclude, however, the voters of Hawaii amended the state constitution and made the issue moot. No ruling requiring same-sex marriage was ever issued. Massachusetts, with *Goodridge*, was first. The burden on the Court to justify its decision, while always present, was particularly heightened in this case. *Goodridge* would be as heavily scrutinized a decision as any issued by any court.

As discussed above, courts issue written decisions for a variety of audiences. The goal, however, with all audiences remains the same: persuasion. A court’s written opinion serves as explanation and justification for its decision. Since courts rely on others to enforce their judgments, these decisions must be persuasive. Courts derive their legitimacy from the force of their persuasion. Persuasion is even more crucial when the court is taking bold action that a majority of the population may not support. This was the situation when the Supreme Judicial Court decided the *Goodridge* case.

The Court begins their explanation with a description of marriage. “Marriage is a vital social institution” that “nurtures love and mutual support” between spouses (*Goodridge* p. 312). Marriage is “one of our community’s most rewarding and cherished institutions” (*Ibid.* p. 313). The Court also notes the legal and financial benefits of marriage but at the same time it clearly invokes the social benefits. The three are all equally important. The Court links the benefits for the spouses and
their children to the burdens imposed, including “social obligations” (Ibid. p. 312). These are explored in greater detail later in the opinion. But even this limited reference in the introductory section makes clear that marriage is both multifaceted and central to society.

The Court is always careful to talk about “civil marriage” and not just marriage generally. In the introductory section, the Court uses this phrase every time it specifically mentions same-sex marriage. Examples are numerous. “The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry” (Goodridge p. 312, emphasis added). “But [the Commonwealth] has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples” (Ibid., emphasis added). “Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage is a question not previously addressed by a Massachusetts appellate court” (Ibid. p. 312-313, emphasis added). Only when discussing the differing moral and religious views on the issue does the Court mention same-sex marriage without clearly delineating it as “civil marriage”. This reflects the tension in religious communities outlined in the brief from the Religious Coalition for the Freedom to Marry discussed above.

The distinct framing of same-sex marriage as “civil marriage” continues throughout the Court’s opinion. This emphasis is deliberate. The Court is striving to keep the state in the marriage. In describing the law in question, the Court makes the government’s role in marriage clear: “for all the joy and solemnity that normally attend a marriage, G.L. c. 207, governing entrance to marriage, is a licensing law” (Goodridge p. 318). And later, “Simply put, the government creates civil marriage” (Ibid. p. 321). Most clearly, the Court says, “In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State” (Ibid.) This is an interesting choice as it seems
to limit the emotional aspects of marriage. Marriage almost becomes just another government function. The state regulates entry to and exit from marriage and sets the various obligations and benefits that attend a marriage. The state’s presence and control over marriage is crucial to one particular story that the majority is seeking to tell: the story of marriage and its evolution.

Like several of the briefs submitted, the Court analyzes the history of marriage and the state’s regulation of it. Civil marriage is, and always has been, secular in Massachusetts. But, the Court says, it has changed dramatically in other ways. Here the Court focuses most clearly on racial equality in marriage. The United States Supreme Court decision in Loving v. Virginia and the California Supreme Court decision in Perez v. Sharp that preceded it clearly illustrate the changing nature of marital equality. The Supreme Judicial Court draws a direct comparison between the racial exclusion cases and same-sex marriage. “As it did in Perez and Loving, history must yield to a more fully developed understanding of the invidious quality of the discrimination” (Goodridge p. 328).

The Court returns to history a few pages later to address gender equality in marriages. Married women’s rights have grown dramatically as society has recognized greater equality among the sexes. The Court ends its review of history by noting that many of the same fears that are raised in opposition to same-sex marriage have been raised in the past in regards to other changes to marriage law. “Alarms about the imminent erosion of the ‘natural’ order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of ‘no-fault’ divorce. Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution” after same-sex couples are allowed entry to civil marriage (Ibid. p. 340). Like the plaintiffs and several of the amici, the Court places same-sex marriage in the context of an evolving institution. The next logical
progression in that story is the recognition of same-sex marriages, continuing the traditional American narrative of progress and expansion of rights.

As discussed above, in addition to framing same-sex marriage as the next step in an on-going evolution, the plaintiffs also attempted to cast themselves as Everyman heroes seeking to join society in its most treasured institution. The majority opinion similarly adopts this framing decision. While the decision “marks a significant change in the definition of marriage” it does not “disturb the fundamental value of marriage in our society” (Goodridge p. 337). The “plaintiffs seek only to be married, not to undermine the institution of civil marriage” (Ibid.). The Court outlines all the attacks on marriage that the plaintiffs are not making to illustrate that they really do seek to join marriage and not destroy it. In fact, the Court argues that same-sex couples’ desire to join the institution is “a testament” to the importance of marriage. Allowing these couples to marry will only strengthen the institution and “reinforce the importance of marriage” (Ibid.)

While the plaintiffs are featured in the opinion, and their story is discussed, the real story told is not theirs; they are not the main characters in the Court’s opinion. Instead, the most developed character is marriage itself. This is a different story from the one the plaintiffs advocated most clearly at the trial court, but is similar to the one told by many of the amici curiae. The Court outlines the creation of marriage and discusses its constant evolution over time. Marriage grows and changes. Like all protagonists (Robbins 2006), marriage is flawed. It is the flaws that allow us to relate to marriage and its efforts to be better. Here, the flaws outlined by the court are tied directly to the historical analysis provided. Marriage has a history of being exclusionary. It was unfair to women. But marriage has evolved beyond this to be more inclusive and more fair. If permitted, marriage will continue to evolve. The trend toward equality will continue in other contexts.
The Court also spends far more time describing marriage than any of the individual plaintiffs. Total, the plaintiffs receive two paragraphs of description. In addition to the history of marriage, we learn about the various benefits and obligations that come with entry into marriage. Description of the benefits incident to marriage spans six paragraphs. The historical evolution receives several more. The plaintiffs simply are not central to the Court’s decision. This is not surprising when the Goodridge case is looked at as a policy focused case. The individual plaintiffs, so central at the trial stage, are largely irrelevant at the appellate stage. This is a case about changing social policy not about rectifying harms done to individual plaintiffs. From the Court’s perspective, any same-sex couple could be chosen to stand in for the plaintiff couples. The advocates who brought the case would dispute that. In fact, Mary Bonauto, the lead counsel, has repeatedly discussed the process of selecting these specific plaintiffs as part of the preparation for bringing the lawsuit. The opinion, however, focuses less on the plaintiffs’ reasons for seeking to marry and more on the importance and centrality of marriage to everyone.

The story of marriage closely fits the criteria outlined by Amsterdam and Bruner (2000) and Chestek (2010, 2011). The constant evolution of marriage is the initial steady state that begins a story. Marriage, while flawed, has consistently expanded as society has come to understand these flaws. Couples that were once excluded are ultimately granted full inclusion into marriage, and through that, into society. Stopping the continued evolution of marriage disrupts the steady state and creates a conflict that must be rectified. It creates the Trouble necessary to a story. These foundational elements create the basic story that the Supreme Judicial Court is telling in its opinion. The rest of the opinion focuses on the obstacles that must be overcome to achieve success and the particular form that success takes.
These obstacles take the form of the arguments asserted by the defendants. In order to maintain the exclusion of gays and lesbians from marriage, the Commonwealth asserts a variety of potential justifications. These arguments were persuasive in the trial court, as discussed above. In the Supreme Judicial Court, however, the defendants were unable to prevail. Each of their justifications was found to be insufficient. The Court then turns to the proper remedy for the constitutional violation. Here, the opinion seems to adopt themes from the *amicus* brief submitted by the Professors of Remedies.

The *amicus* brief for the Professors of Remedies focused on the role of the courts in deciding these types of controversial issues. Unlike the other briefs, this one cast the Court in the role of proto-hero confronted with a choice between beginning the quest for justice or deferring to others. Courts must act, the brief argued, and must accept the role of hero to fulfill their obligations in our system of government. The defendants, of course, urged restraint on the Court, hoping to defer the question to the legislature. The Court addresses this in its decision.

Unlike the Supreme Court in Vermont, the Massachusetts Supreme Judicial Court is ready to accept its role and decide the issue. While the Court does state clearly that “it is the traditional and settled role of courts to decide constitutional issues”, it also notes that the legislature is entitled to “great deference… to decide social and policy issues” (*Goodridge* p. 339). To that end, the Court clearly finds a constitutional violation. Implementation of the decision, however, was delayed “for 180 days to permit the Legislature to take such action as it may deem appropriate” (Ibid. p. 344). The purpose of the stay of decision is unclear. The Court has made it clear that excluding same-sex couples from civil marriage is impermissible. No action by the legislature is required to implement that decision nor could any action from the legislature prevent it. Even an amendment to the Massachusetts Constitution seeking to overturn the decision could not take effect within the 180 day
period. The Court was ready, and able, to render a decision but still sought to involve the legislature. Perhaps this was in hopes that the legislature would act to provide additional legitimacy to the Court’s decision. If the legislature, acting as representatives of the people, had ratified the Court’s interpretation of the Constitution, that interpretation would have had more force. As shown below, however, that is not what happened.

**After Goodridge – The Senate Responds**

The Supreme Judicial Court stayed the effect of their decision for 180 days to allow the legislature to intervene as it felt necessary. The state senate took this opportunity to request an advisory opinion from the Court on proposed legislation. Unlike the federal courts, which are barred from issuing advisory opinions, the Supreme Judicial Court can respond to requests from the legislature about specific bills pending. Advisory opinions come from the justices of the Supreme Judicial Court acting as scholars learned in constitutional law and not from the Court itself. The process is clearly advisory and not adjudicatory. The opinion rendered is to provide the justices’ best understanding of the legal question presented. Advisory opinions cannot be used to limit or change the law; they serve to explain the law as it is currently constituted. Since the opinions come from the justices as advisors and not the Court, advisory opinions are not given precedential weight in later adjudicatory proceedings on the same issue. These limitations are in place to maintain the independence of the judiciary while still providing learned legal counsel to the other branches of government contemplating important policy questions with constitutional implications.

In this instance, the senate asked for clarification on a bill that sought to create civil unions available only to same sex couples. At the same time, it also limited marriage to opposite sex-couples. This was the remedy the Vermont legislature chose after the highest court there deferred to the legislature to determine the appropriate remedy. To answer the senate’s question, the Supreme
Judicial Court issued an open invitation for interested parties to submit *amicus* briefs. A number of groups and individuals made submissions. Many of the same organizations that submitted briefs in the *Goodridge* case also submitted briefs at this stage. This section will analyze those briefs before turning to the Court’s ruling in *Opinion of the Justices*.

**Amicus Briefs Opposed to Civil Unions and in Support of Marriage Equality**

Like in *Goodridge*, the Court received numerous *amicus* briefs on the question of civil unions as a remedy for denial of equal access to marriage for same-sex couples. The majority of these briefs were from organizations or groups of scholars, but a few individuals filed *pro se* briefs as well. Like the *amici* in the substantive *Goodridge* decision, the style of argument varied greatly among the *amicus* briefs filed in this case. Unlike *Goodridge*, however, there are no parties advocating the issue. The lawyers representing the plaintiffs in the *Goodridge* case, the organization Gay and Lesbian Advocates and Defenders (GLAD), did participate in this case as *amicus*. Some of the other *amici*, perhaps because of GLAD’s familiarity with the issue, at times deferred to GLAD’s brief. This mirrors the *amici* briefs in *Goodridge* that deferred to the plaintiffs statement of the facts. Deference was more common in the substantive case than in the advisory case, but it did occur in both.

GLAD’s brief in this case contained one overarching theme. GLAD argues that *Goodridge* was unambiguous in requiring same-sex couples’ be able to marry. There is no open question on which the justices can opine. They have already answered it. Marriage, not civil unions, is the only constitutionally sufficient remedy available. The first part of the argument analyzes the *Goodridge* decision to show that the court implicitly rejected civil unions. GLAD then goes on to argue that, while civil unions may appear equal to marriage, they fall far short in many ways. Lastly, again echoing *Goodridge*, GLAD argues that there is no rational basis for choosing civil unions over marriage.
The biggest hurdle GLAD has to overcome is the 180 day stay that the Goodridge Court put on their ruling “to permit the Legislature to take such action as it may deem appropriate in light” of the Goodridge ruling (Goodridge p. 344). If the Court was clear in Goodridge, what more is left for the legislature to do? GLAD argues that, like other jurisdictions, the period of the stay was designed to allow the legislature to update the hundreds of statutes that reference marital status. It was not designed to give the legislature time to undermine the holding of the case.

To make this argument, GLAD uses the text of Goodridge to show that it was emphatically about marriage and only marriage. This is closely linked with another argument GLAD makes: the Court has already said only marriage is sufficient. While broken into two sections, both arguments use the same strategy and the same language from the Court’s opinion. The argument style for both, however, does not include narrative elements. If anything, it’s an attempt to stop a new story from being told by arguing that we have already heard this and know the outcome. There is no Trouble. There is no story to tell.

In the last section of the argument, GLAD does address civil unions specifically. Like many of the other amici discussed below, the focus here is on two key issues: intangible benefits and portability. In discussing the intangible benefits, the brief references, by name, the children of the plaintiffs (GLAD Brief 23). The children will still have parents that are not married. A “dividing line” will continue to separate children whose parents are in a civil union from those who are married (Ibid. 24). This is unacceptable. The plaintiffs want, for themselves and their children, to join society equally. In a section that invokes the Everyman archetype central to the plaintiffs’ case, the brief emphasizes the plaintiffs’ reasons for seeking to marry. “It is only access to the same institution of marriage on the same terms as applied to others” that gives the plaintiffs full equality.
(Ibid. 27). Only marriage and its “culturally unique status” shows that the plaintiffs’ love and commitment are the same as others in society (Ibid.)

The brief then turns to portability and federal protections. These are, of course, both of limited utility because of DOMA. Under federal law, and the laws of most states, legal, same-sex marriages are not recognized. Some of these DOMA laws also prohibit recognition of civil unions. Portability, then, is not likely regardless of the system of recognition created. Portability, the brief notes, is an issue in some states that have not yet enacted DOMAs or in the case that other states repeal their existing laws. In that case, marriages are preferred because of the presumption of portability. The same is true for federal recognition. Marriage, and not civil unions, also provides couples with standing to challenge DOMA, both federally and in other states where recognition is denied.

These two sections, and the brief as a whole, rely on the same Everyman theme that is present in nearly all the court filings from the plaintiffs’ attorneys. Gays and lesbians in committed relationships are just like every other committed couple in their desire to participate in the important cultural institution of marriage. Separate institutions deny these couples full participation and full equality in society. The Supreme Judicial Court has already made this. Civil unions are not the same as marriage and cannot be constitutionally implemented.

The University of Nevada Las Vegas William S. Boyd School of Law’s Sexuality and Gender Equality organization (SAGE), submitted a brief that focused primarily on the issue of civil union portability. The brief is first hampered by numerous typographic errors. While those are distinct from the substance of the brief, they do distract the reader from the arguments that SAGE is attempting to make. First, SAGE makes the argument that civil unions are inadequate because they fail to provide the same benefits as marriage. In this section, SAGE makes many direct comparisons
to the United States Supreme Court Case Brown v. Board of Education. Like segregated schools, segregated relationship recognition places a badge of inferiority on same-sex relationships. This fosters discrimination. Creating civil unions, instead of permitting marriage between same-sex couples, also harms young people who are questioning their sexuality. Legally sanctioning discrimination will send a message to these young people that they are not as worthy as their heterosexual classmates.

The brief then turns to the issue of portability and recognition beyond Massachusetts. Here, SAGE is attempting to demonstrate the legal uncertainty that has hampered recognition of Vermont civil unions in other jurisdictions. Many states refuse recognition of Vermont civil unions precisely because a civil union is not a marriage. The courts that have confronted the issue are divided. This leaves same-sex couples unable to predict whether or not their relationship will be recognized. Marriages do not suffer from this unpredictability. Civil unions, then, fail to adequately provide the benefits and protections of marriage.

In this section, SAGE uses three stories to illustrate the problem facing civil union partners as they travel or conduct business beyond the borders of the state that granted the civil union. Two stories come from actual cases. The third is a hypothetical used to illustrate another facet of the problem with civil unions. The two cases explore the division over whether or not Vermont civil unions should be given recognition outside of Vermont. The Georgia Court, in part because of Georgia’s state level DOMA, did not recognize a valid Vermont civil union. The New York court took the opposite approach, noting the absence of a state DOMA there. The uncertainty created by civil unions, compared to the mandatory recognition of marriages, marks the Trouble that transforms a narrative into a story. But it may not be a story that should be embraced. SAGE is offering the Supreme Judicial Court the choice between two stories for Massachusetts. Civil unions
create uncertainty and deprive citizens of equality. Marriages move Massachusetts closer to equality for all citizens. The better choice, SAGE argues, is the safer choice. Marriages, and the predictability that come with them, are better for Massachusetts.

The Massachusetts Bar Association (MBA) submitted a brief in this case, as they did in the Goodridge case. The MBA brief is short compared to the other organizational briefs. This in part because they make many of their arguments by reference to their brief submitted in the Goodridge case rather than reargue them there (MBA Brief 10). What argument the MBA does make in this brief is focused on the “intangible” benefits of marriage (Ibid. 7). Civil unions “relegate same gender couples to something less than marriage” (Ibid. 8). While attempting to provide all the benefits of marriage, the Senate’s proposed bill would in fact deny crucial social benefits to same-sex couples. The MBA does not fully develop a story to make this denial clear. Like their brief in the substantive case, the MBA seems more interested in alerting the justices to the MBA’s views than actually persuading the Court or offering any new understanding of the issues under consideration.

A group of international human rights and LGBT rights organizations submitted an amicus brief in this case and in Goodridge. In this case, the human rights organizations were joined by several law professors. Like the Goodridge brief, the amici here provide an overview of current trends in international and comparative law that apply to gays and lesbians and recognition of their relationships. Like the MBA, the international human rights organizations see this brief as supplementing the earlier brief (International Human Rights Organizations Brief 7). In the short span between submitting their brief in Goodridge and their brief in the advisory proceeding, developments in this area of law in various places have increased the recognition of same-sex relationships in ways that are important for the justices to know and understand.
Much of the brief is focused on explaining the status of same-sex marriage in Canada, where equality jurisprudence is similar to Massachusetts and the United States. Canada has clearly rejected the creation of separate institutions for same-sex couples (International Human Rights Organizations Brief 18-30). The brief explains the evolution of Canada’s gay rights jurisprudence in detail. The focus, however, is on the different Canadian same-sex marriage cases brought in British Columbia, Ontario, and Quebec. In all three, the provincial courts ruled that marriage, and only marriage, cured the discrimination confronting gay and lesbian couples seeking recognition of their relationships (Ibid. 31). The government, through the Prime Minister, has declared no intention to appeal or otherwise limit the rulings. In fact, the federal government introduced legislation to extend same-sex marriage to the provinces that had yet to have court challenges (Ibid. 25).

In explaining this evolution, the brief quotes heavily from the various Canadian court decisions. This keeps the language framed much closer to traditional legal argument. The precedent cases are the building blocks of the argument. The different provincial cases are linked, but there is little effort to unify the argument into a single story. There is some allusion to story type reasoning in the comparison to Massachusetts’s situation. Canada’s rejection of civil union-like systems, and affirmative implementation of full marriage equality, should be persuasive for Massachusetts (Ibid. 31). Effectively, the brief is arguing that this story, the story of full equality, has already been told in Canada. Massachusetts does not need to attempt to write it on its own. It can look to the Canadian example and see why rejecting civil unions is the proper choice. But even here, there are few of the storytelling elements used by Chestek (2008, 2010) and Amsterdam and Bruner (2000).

The remainder of the amicus brief contains a survey of other countries and the status of their recognition of same-sex marriages. The brief is quick to note that, outside of the United States and Canada, judicial rulings requiring same-sex marriage do not exist (International Human Rights
Organizations Brief 32). But, it argues, the trend is clearly in support of increased rights, including relationship recognition rights, for same-sex couples. This trend includes foundational cases on other aspects of gay and lesbian equality and legislative enactments for relationship recognition. This is the same type of information presented in the corresponding brief filed in the Goodridge case. Demonstrating a trend, while closer to telling a story, still lacks the key features identified by the scholars. A trend without a Trouble does not provide the context for a story. There is nothing to change or overcome. It merely represents non-story narrative assessment.

In addition to the organizations that submitted amicus briefs, individuals filed pro se briefs. One pro se brief raised novel legal arguments, but did so without much attempt at storytelling as a persuasive tool. The brief submitted by Kelly Cunningham makes many of the same arguments that other briefs have made. Because they are not marriages, they cannot provide many of the tangible benefits of marriage that are tied to that status specifically. This is most evident with respect to federal law. They lack portability. Moving to a non-civil union state jeopardizes the civil union couple’s legal rights and expectations. But most importantly, civil unions cannot provide the intangible benefits of marriage.

Cunningham does raise at least one issue not previously raised. By denying same-sex couples marriage, the state thwarts their ability to “promptly” challenge a deprivation of rights (Cunningham Brief 23). Without a legally recognized marriage, the couples lack the standing necessary to challenge DOMA in the federal courts. Other amici, like SAGE, have made the standing argument, but only Cunningham links it to specific provisions of the Massachusetts constitution. That said, the argument does not include the essential storytelling elements. It stays closer to traditional legal analysis.
The last two pro se briefs seem less focused on the specific issue of civil unions. Instead, they appear to be using the opportunity to provide an amicus brief as a general invitation to critique other aspects of the law. This is most evident in the brief from Patrick A. Jorstad. His main concern is with corporate law and the State Street Corporation in particular (Jorstad Brief). He begins his brief by outlining particular stockholder issues he has encountered with State Street. He then attempts to make a comparison between ambiguity in corporate law with the ambiguity, he argues, will come from a civil union system. Throughout this, however, his focus is more on altering the justices to the flaws of corporate law and not civil unions.

Similarly, the brief from William G. Aylward is more focused on issues with the Catholic Church than on civil unions. Aylward is concerned that the Catholic bishops in Massachusetts are exceeding their authority in their advocacy against same-sex marriage. He cites to several aspects of Catholic law to support this argument. Like Jorstad, little time is spent on the substantive issue of civil unions. The focus, at best, seems to be an attempt to encourage the justices to ignore the Catholic Church’s input on the matter.

With both of these amicus briefs, there is almost no attempt at storytelling related to civil unions. Jorstad tells a story about State Street Corporation and its Ropes & Gray attorneys’ efforts to undermine corporate law, but that is not tied to civil unions except through a weak and underdeveloped analogy. Aylward’s brief lacks all narrative and relies, instead, on explaining papal law to show that the bishops cannot speak for the Church on this matter. He does spend one paragraph on civil unions specifically, but what argument is there consists of the conclusory statement that Goodridge fundamentally changed marriage and the Senate’s proposal is incompatible with that decision. This is, ultimately, the view the Court adopts, but Aylward does little to argue it. He merely states it as a given (Aylward Brief 5).
The last brief in support of full marriage equality, filed by a group of professors of law and legal history, has a unique approach\footnote{One of the author's former professors, Valerie Epps of Suffolk University Law School, joined this brief; the author has not discussed this brief or this issue with Professor Epps.}. The brief starts off by analyzing the role of advisory opinions, a rare power for courts. The advisory power does not permit the justices to overturn rulings from the Supreme Judicial Court. In arguing that \textit{Goodridge} has already, clearly, answered the senate's question, the \textit{amici} frame the issue as one of judicial integrity. Limiting \textit{Goodridge} now after taking “a courageous and principled stand” would subject the Court to “withering critique” (Law Professors Brief 49). Not only would that “gravely injure” the Court, it would be precedent for “erosion” of judicial review as a check on the branches of government (Ibid.). The debate between civil unions and marriage equality provide the opportunity for a full defense of judicial review and judicial finality in constitutional interpretation.

It is this issue that hints at story structure. The possible erosion of judicial review creates the Trouble that is one of the foundations of storytelling. Society must be able to rely on decisions from the courts. The legal concept of \textit{stare decisis} requires predictability in legal rules. A quick retreat from a landmark decision like \textit{Goodridge} undermines that and thus undermines faith in the judiciary as a whole. The Senate's attempt to undermine the Court presents the tension that forms the basis of a story. But, like many of the other briefs above, the argument here is about rejecting the story. There’s no need, according to the \textit{amici}, to revisit the issue. The story has been told. Reopening the issue, permitting the legislature to tell a different version of the story, is a threat to the Court and must not be allowed.

The majority of the argument section is an explanation of \textit{Goodridge}. Like the GLAD brief discussed at the start of this section, the \textit{amici} here argue that the question has already been answered. \textit{Goodridge} was clear and unambiguous. Marriage, and only marriage, remedies the
discrimination faced by same-sex couples. The brief does little to specifically argue the inadequacy of civil unions. Instead, the brief rests on Goodridge as having already rejected civil unions. “Time and again throughout its opinion, the SJC emphasizes its holding that Massachusetts must offer same-sex couples access to the civil institution of marriage on the same terms and conditions as those enjoyed by opposite sex couples (Ibid. 12, emphasis in original). This applies not only to the majority opinion, but also to the concurrence by Justice Greaney and the three dissents (Ibid 14). None of the opinions implies that civil unions would be acceptable (Ibid. 14-15). But, like most of the amicus briefs, this is done using traditional legal argument. The only attempt at storytelling is, as discussed above, is in deflecting the threat to judicial independence.

**Opinion of the Justices – The Supreme Judicial Court Reaffirms Goodridge**

The opinion begins with an analysis of the Goodridge decision. Here the majority outlines the holding and reasoning of the Goodridge court. Marriage is fundamental, bringing with it “tangible benefits” as well as “private and societal advantages” (Opinion of the Justices 6). Denying same-sex couples access to marriage causes substantial harm to those couples and their families (Ibid). Because the defendant, the Department of Public Health, could not provide sufficient justification for preventing same-sex couples from marrying, the classification was found unconstitutional. In Opinion of the Justices, the majority also makes clear that the Goodridge Court made no mention of civil unions. The focus in Goodridge was on marriage and only marriage (Opinion of the Justices 7).

The majority then turns to the proposed Senate bill. The proposed law purports to provide same-sex couples a “parallel institution” that provides identical benefits and obligations as civil marriage (Opinion of the Justices 8, 9). Civil unions would only be available to same-sex couples.
Marriage, at the same time, would only be open to opposite sex couples. The Senate bill also makes clear that the policy is implemented to preserve the traditional nature of opposite-sex marriage.

Like many of the amici, the majority here takes the view that the question offered by the Senate was already answered in Goodridge. Even with the new, clearly articulated purpose of preserving traditional marriage, the answer remains the same. In fact, the purpose provided by the Senate does nothing but preserve the “constitutional infirmity” already addressed (Opinion of the Justices 10). The same flaws the Court found in Goodridge are present and “exaggerated by” the senate’s proposed change (Ibid).

This becomes even more evident when the effects of the separate but equal regime is explored. Separating opposite-sex couples and same-sex couples into different relationship recognition regimes is more than “semantic” (Opinion of the Justices 13). It is a clear, “considered choice” to limit marriage to the preferred class, heterosexuals, while relegating the disfavored group, homosexuals, to a secondary, lesser status. This would perpetuate a “stigma” that the constitution cannot tolerate (Ibid. 14-15). The dissenting justices see this as a “squabble” over language (Ibid. 13). The majority believes that view “so clearly misses the point that further discussion appears to be useless” (Ibid. 14). The dissenting justices fail to account for the stigma in the choice of language.

The bulk of the analysis section remains a reaffirmation of the Goodridge holding. The only citations in the body of the analysis section are to Goodridge or the dissenting opinion. The citation to Brown v. Board of Education in the footnotes is the only other case mentioned by the majority at all. This supports the theme that the majority seems to be invoking; this question has been answered already. Goodridge was clear and controlling. Creating a system that makes gay and lesbian couples a separate, and lower, class of citizens is unacceptable. There is nothing new that needs to be said. The
analysis section, therefore, does not tell a new story distinct from Goodridge because there is no story to tell.

Discussion

Less storytelling was used post-Goodridge than in the Goodridge case itself. Most advocates, and the justices themselves, relied on Goodridge as the story. Because Goodridge already made clear that civil unions would not be sufficient there was no need to tell another story to explain that. The story has been told. Nothing more need be said. We see this most clearly, as discussed above, in the majority’s decision in Opinion of the Justices. That said, some briefs do attempt to do more than rely on Goodridge and its story.

Some briefs, as noted above, tell a story new story about the inadequacy of civil unions. In this story, civil unions are seen as the Trouble. Marriage equality, particularly after Goodridge, is the steady state that should be expected. Limiting this creates the reversal — the tension — that starts a story. If the justices permit civil unions, prohibiting same-sex couples from entering marriage, a disconnect would arise between the way things are and the way they ought to be. The international law amicus brief most clearly uses this story. They argue that Canada, through the courts, and the Netherlands, through the legislature, have rejected this story. Massachusetts, in the Goodridge case, has also rejected it. Permitting the legislature to overturn it now would set the stage for a story of discrimination that should not be told. In Opinion of the Justices, the majority makes clear that the constitution cannot tolerate a story of discrimination and reaffirms the Goodridge holding.

Conclusion

Mary Bonauto, the lead attorney for the plaintiffs during the Goodridge case, reflected on the decision and its place in the larger fight for gay and lesbian equality (Bonauto 2005). She believes that part of the success of the litigation came from the way it told a story (Ibid. 1). The plaintiffs
sought, simply, to be treated equally and told a story that placed their desire to marry in the same context as any other couple. The plaintiffs were everyday people, “partners, parents, Little League coaches, and literacy volunteers” (Ibid.). They sought marriage for the same reasons as other couples: “to express their deep and abiding love for one another” and “to secure protections for their families” (Ibid.). Telling that story, a story of love and equality, in a legal dispute helped the courts ultimately find for the plaintiffs and extend marriage to them and all same-sex couples.

Robbins (2006) argues that proper casting is essential to legal argument. Knowing who the hero is, and properly portraying that hero’s quest, makes persuasion more powerful. In a purely legal dispute, like the one in the Goodridge case, that casting matters more. The facts are not contested, so the only disagreement between the parties is on the legal application of those facts. It is here that the specifics of frame selection become most clear. As shown above, the plaintiffs are portrayed in their own filings as Everyman heroes on a quest to join one of society’s most important, most vital institutions. This framing furthers the story that Bonauto credits as part of the success of the case. The plaintiffs, and same-sex couples everywhere, are more similar to traditional families than they are different from those families.

This is most clearly seen in the way the plaintiffs frame the due process analysis. The plaintiffs frame the question as one about access to “marriage” and, since “marriage” is a fundamental right, whether or not the states’ restrictions on it are appropriate rather than arguing for a right to same-sex marriage. This is more than semantics. It changes the legal analysis entirely. Only fundamental rights require the highest level of scrutiny. If the right in question is marriage, strict scrutiny applies and the state must justify its restrictions with compelling reasons. If, on the other hand, the right is “same-sex marriage”, it is less likely to be seen as fundamental, and the state need only demonstrate a rational basis for the restriction.
The plaintiffs kept the focus on marriage and their status as Everyman heroes throughout the case. This theme is found in all their filings with the court, from the initial complaint in the trial court through both cases at the Supreme Judicial Court. By keeping the focus on this theme, all aspects of the litigation fit neatly together and work toward the logical conclusion: marriage must be made available to same-sex couples. While the theme is present throughout, each filing relies on it to a different extent. This variability is expected because different filings have different purposes. In traditional legal argument, as a case moves from a trial court to an appellate court, factual information becomes somewhat less important than legal analysis. Trial courts deal with facts; appellate courts deal with law. Many scholars, as noted above, dispute this and argue that even “law” can be argued using story techniques (Amsterdam and Bruner 2000; Chestek 2008, 2010). In Goodridge there was some evidence of this, but the amount of storytelling was clearly reduced as the case proceeded.

The complaint is the filing that most clearly uses storytelling techniques. Here is the basic characterization and the clear adoption of the Everyman theme. As the factual basis for the legal claims, complaints call for storytelling. It is here that the legal wrong, in this case the discrimination, must be explained. The fact-centric nature of the complaint makes a storytelling presentation easier. Keeping that focus as the purpose of the particular court process changes presents challenges for litigants.

In this case, we see this in the plaintiffs’ motion for summary judgment. Since the parties agree on the facts of the case, there is no need to re-tell them. The only dispute is a legal dispute. What does the law mean when applied to these facts? By definition, this calls for legal argument not more storytelling. But that legal argument should still further the story that the plaintiffs’ are trying to tell. And here it does. The same holds true at the appellate level. More law is required, but that
law needs to be argued persuasively. Keeping the story present helps. That does not mean, however, that the plaintiffs always kept the story as present as they should have. This was discussed above. The plaintiffs’ lawyers missed many opportunities to reaffirm the story they were trying to tell and their filings may have leaned too far toward the purely legal side.

On the whole, the *amicus* briefs were lacking in storytelling. Only a few fully utilized storytelling at all. Even fewer tied their story directly to the story the plaintiffs were trying to tell. This could be from a perceived limit on the role of *amicus* briefs, but those briefs that did tell a story did so within the rules of appellate procedure. Story can be used, and many would argue that it should be used, at all levels and from all parties.

Courts, too, can use storytelling to persuade audiences that their decision was the correct one. This was less evident in the various decisions in *Goodridge*. Courts face more pressure from the public to keep their decisions free of emotion and bias. This can lead to more “legal” style decisions. Hints of storytelling, as noted above, were present, but in general the court decisions relied on traditional legal argument.

This chapter sought to analyze the legal arguments made by proponents of same-sex marriage and the courts that addressed the issue. The goal was to describe the role of storytelling in the judicial fight for same-sex marriage. Storytelling was used throughout judicial process, to varying degrees. The next chapter turns to the political arena to examine the use of storytelling in that context.
CHAPTER FIVE: THE LEGISLATIVE ARENA

The Supreme Judicial Court’s decisions in Goodridge and Opinion of the Justices were not the end of the policy debate over same-sex marriage in Massachusetts. Although proponents of marriage equality had won two victories in the court, those opposed to marriage equality had one more chance to limit the effects of Goodridge. They could change the constitution. This, of course, is what happened in Hawaii after the courts there seemed poised to require same-sex marriage. Because Goodridge was a constitutional decision, changing the constitution would remove the legal support for the decision and allow the legislature to return to the pre-Goodridge definition of marriage. Amending the Massachusetts constitution, however, is not an easy task.

There are two ways an amendment to the Massachusetts constitution can be proposed. The first originates in the legislature, the second with the people. Both types of proposed amendments need to be passed by two consecutive legislatures sitting as a Constitutional Convention before being sent to the voters on the general election ballot. Measures proposed by legislators need a majority to advance to the next stage. Those proposed by the public need support from only 25% of the legislature. If a proposed amendment meets the appropriate threshold in both legislative sessions, it will be sent to the voters. If a majority of voters adopt the proposed amendment, it becomes part of the constitution. The process is lengthy and complicated. After Goodridge several proposed amendments were introduced to the legislature. One was introduced by citizen petition. While none ultimately advanced to the ballot, the process took several years to complete. Same-sex marriages were legal through most of the time the amendments were being debated.

This chapter looks at the Constitutional Convention debates during that time period to determine how stories were used to influence the legislators. These stories were told by the legislators themselves as they debated the series of proposed amendments. Some of the stories were
personal in nature. Others were more universal. Many were similar to the stories told by the *amici* in the two Supreme Judicial Court cases.

The record of the debates used to analyze these stories comes from the State House News Service, a non-partisan news agency that reports on issues from Beacon Hill. While State House News Service does not claim to provide a verbatim transcript of the proceedings, their reporting strives to capture as much of the direct language as possible. Using the Constitutional Convention debates provides an opportunity to analyze how the legislators framed and discussed the issue. Floor debate is, of course, an imperfect proxy for measuring attempts at political persuasion. Much of political decision making occurs long before the floor debate. This analysis does not include private communications among legislators, between constituents and their representatives, or those with lobbyists and activists. Floor debate, however, is the official record of the Constitutional Convention debate and as such it is extremely valuable. Additionally, throughout the Convention, many members commented on the publicity the Constitutional Convention was receiving. The members were aware of an audience and their speeches must be seen as attempting to persuade that audience, in addition to their fellow legislators.

Throughout the Convention debates, there were several procedural maneuvers used to shape the amendments under consideration or limit the scope of the debate more generally. This involved offering amendments, ordering votes strategically, and attempts to run out the clock on debate to delay or prevent votes entirely. Some of these procedural moves make it more difficult to determine whether or not the speakers supported or objected to the substance of the issue or the procedures structuring the vote. Where necessary, this has been explained in the various sections below.
Different Roles for Different Branches

Courts deal in specifics. They adjudicate specific legal disputes, brought by specific litigants, asking for specific relief. The sphere of action for courts is, thus, limited. They can only act when asked and only to decide the questions brought before them. Legislatures, on the other hand, are generalists. They decide issues with broad application. Legislatures need not wait for an issue to be brought to them. The legislative agenda is thus more fluid than the judiciary’s. This creates opportunity for dialogue between the branches. Often, courts must fill in gaps in general laws to apply them to specific situations. Judge Posner (2008) calls these legal grey areas and argues that judges are most free to make law when deciding cases in these gaps. But there exists a strong belief is that judges should not make law, but merely interpret it. Judges are the umpires of the legal world, calling balls and strikes, not making the rules up as they go. Under this thinking, legislators — and only legislators — are charged with creating the rules of the game. Of course, the executive and the legislature have some role in picking the umpires. But, in many systems, once the judge is appointed and confirmed, legislative and executive authority over that judge wanes. This is true in Massachusetts, where judges serve during good behavior until they reach the mandatory retirement age of 70.

While the legislators are charged with creating these rules of the game, enforcing those rules falls to the executive branch. The executive is often given great leeway in how to enforce the rules

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8 Posner (2008, 269) argues that because of the decrease in cases decided by the United States Supreme Court that it must act “legislatively” when deciding the cases before it. It cannot move in the “incremental” fashion of the common law; the Court simply cannot keep up with the increases in adjudication. The Court, instead, “tries to use the few cases that it agrees to hear as occasions for laying down rules or standards that will control a large number of future cases” (Ibid., 270). This does not change the fact that even the Supreme Court needs a “case or controversy” brought before it can issue any ruling. Lower courts with less control over their dockets are even more limited in their actions. The majority of courts cannot act “legislatively”.

created by the legislature. This can be done in a variety of contexts. Most commonly, executives charged with enforcement utilize rulemaking and agency interpretation to modify, explain, expand, or contract the rules initially adopted by the legislature. Courts give the agency charged with enforcement great deference in its interpretation of statutory language. This, again, comes from the belief that judges should not make law. Their role is different. The legislative and executive branches are better suited for policy development and implementation. Judges should not take an active, or activist, role in that process.

Additionally, the public expects and accepts different behavior from judges and other political actors, particularly elected officials. Judges are, as has been discussed above, to be above the emotional entanglements the cases before them often bring. They must be rational and logical. The law is already in place; judges merely apply it to the case at hand. Politicians have more leeway. They are expected to react with emotion and respond to needs and concerns of their constituents differently than a judge responds to litigants. This difference became clear during Justice Sotomayor’s confirmation to the United States Supreme Court. “Empathy” and its role in judging was a central point in the confirmation hearings. Should judges empathize? With whom? And to what degree? Concerns about empathy aren’t present with legislators. Empathy is, instead, prized. Throughout the Constitutional Convention, legislatures invoked many different emotions in their speeches: pride, hope, fear, love, anger. These overt emotional appeals were often used in conjunction with a story. Stories and emotions, as Haven argues, are very closely linked.

Judges and the political branches are often in dialogue about the proper interpretation of constitutional and statutory provisions (Barnes and Miller 2004; Fisher 2004; Kagan 2004). Judges interpret statutes passed by the legislature. If the legislators disagree with an interpretation, they can amend the law to make clear what the appropriate interpretation should have been. The process
then repeats as the amendments are interpreted. The same applies to constitutional analysis, with the caveat of course that most constitutions are harder to amend than a simple statute. Finding the proper balance for these roles was one of the main points in the debates following Goodridge. Many of those opposed to the Goodridge decision argued, not substantively against same-sex marriage but against its having been judicially imposed.

With these differences in mind, the next section analyzes the legislative debates over same-sex marriage in Massachusetts from 2003 – 2007.

**Constitutional Convention 2003-2004 Session – The Debate Begins**

On February 11, 2004, the Massachusetts legislature met as a Constitutional Convention to debate a legislatively proposed amendment to the Massachusetts constitution to overturn the Goodridge decision. The amendment, as initially proposed, defined marriage as a union of one man and one woman. Debate spanned several days. Many members offered amendments to the proposal. One of these was eventually accepted, altering the proposal to include specific language authorizing civil unions while maintaining the ban on marriage. The final vote, 105-92, on March 29, 2004 advanced the amendment for consideration by the next legislature. The following sections look at the general themes offered during the first Constitutional Convention as it met at various points in February and March 2004.

**Race and Civil Rights – Stories of Similarity**

During the debate, proponents of marriage equality asserted many different reasons for their view. There were, however, some general themes that were repeated by several of the members as they spoke. Links to racial discrimination and the civil rights movement were the most common. Several members invoked historic trends and the judgment of future generations. These were often linked to the civil rights theme. A handful of members referenced the importance of preserving
rights generally. These occasionally involved references to Nazi Germany. Tied to this theme was an aversion to amending the constitution, both in general and specifically to limit the rights of a minority. Some used personal stories that fit into the general themes of non-discrimination, protection of civil rights, and the role of history.

Many legislators drew parallels between racial discrimination and discrimination against gays and lesbians. Massachusetts had a long history of progress on racial issues. This history was invoked by many. Some legislators included personal stories to illustrate the link between discrimination against racial minorities with that against gays and lesbians. Senator Wilkerson, one of the black legislators who spoke in favor of marriage equality, told of her family growing up in the segregated South. She tells the story of her family’s struggle for equality and for civil rights. She concludes her remarks by saying “I can’t send anyone to that place from where my family fled. My grandmother would never forgive me (State House News Service 2004a). Consigning another group to the same second class citizenship that blacks fought, and continue to fight, to overcome is unacceptable. In this story, the presumption of equality and full civil rights is the steady state. Blacks, long denied that, have achieved legal, if not full social, equality. That story is the same story confronting gay and lesbian members of society. They are denied full civil rights. The quest for equality is the same and the story should have the same ending: full legal equality.

Other speakers made the same connection. Representative Rushing, another black legislator, spoke about the progress that the Commonwealth, and the country, had made on race. “We haven’t been perfect in our history” but, he argues, we are making ourselves better. He noted that, under the original understanding of the constitution, as a Black man it would have been unthinkable for him to hold elective office (State House News Service 2004c). Invoking Martin Luther King, Jr., Rep. Rushing ended by saying “I am convinced that we together, in this convention, are heading toward
justice” (Ibid.) Like Sen. Wilkerson, Rep. Rushing makes the links between racial equality and equality for gays and lesbians. He says that, in the future, we will celebrate this step toward gay and lesbian equality the same way we celebrate that Massachusetts was the first state to ban slavery.

Many other representatives alluded to the Black civil rights movement by invoking either Brown v. Board of Education directly or the “separate but equal” language that is derived from the case. These speakers did not use storytelling techniques in their speeches. Instead, using shorthand that was universally understood, they referred to the well-known story of the civil rights movement. Marriage equality for gays and lesbians, they argued, is a civil right. The same right was central to Loving v. Virginia and the issue of racial equality. Creating a distinct institution, civil unions, for gay and lesbian couples is wrong the same way that other segregated institutions of the past were wrong. This links to a story but is not, itself, a story. The parallels are obvious, but less overt and less “story” than those told by Senator Wilkerson and Representative Rushing.

Representative Wolf linked the fight for gay and lesbian equality to persecution of Jews in Nazi controlled Austria. Her family was denied equal rights, imprisoned, and ultimately fled to the United States. Rep. Wolf talked about the badges that the Jews had to wear and how that led to discrimination in society. “I was a little kid and my parents could not take me to the local playground because we had to wear a yellow start because we were a Jewish family… We could not go to the neighborhood park” (State House News Service 2004d). Later, she says, “Imagine two mothers taking their child to a playground and being scorned. It is no different than what happened to me” (Ibid.) Other speakers made reference to Nazi Germany but only Rep. Wolf did so in a fully formed story linking that persecution to the status of gays and lesbians in Massachusetts. Like the stories above, the steady state is one of equality. Disrupted, denied equality, the quest becomes to seek that equality. In the case of the Black civil rights movement, it was to change the laws. For Rep.
Wolf, it was fleeing to a more equal country. In both, placing gays and lesbians into a similar state — one where they are denied equality — is abhorrent. Rep. Wolf concludes, “These experiences of people living through discrimination are common. We have heard them at this rostrum. They are frightening experiences” (Ibid).

The stories told here are designed to link the quest for gay and lesbian equality into the civil rights movement. This is part of the larger narrative of progress toward a more just society. By tying these two movements together, the speakers are attempting to show that the same outcome should be expected in both: full legal equality combined with increasing social equality. History becomes a guide that can, and should, lead to the only acceptable outcome. This is shown even more clearly in the section below where history’s judgment is specifically invoked as a justification for supporting marriage equality for gay and lesbian couples.

**History’s Judgment – Stories from the Future and the Past**

Another recurring theme focused on the role of history. Representatives and senators questioned how history would judge the actions taken by the constitutional convention. Rep. St. Fleur asked “How will history judge us?” (State House News Service 2004a). Rep. Blumer began his remarks specifically invoking the future. He began, “I rise to speak to you about the future. I have been thinking about the meaning of this convention to my grandchildren” (State House News Service 2004d). He concluded by urging his colleagues “to be better than we ever were in the past” (Ibid.) Rep. Costello said that “We are in a historic position” and hoped that, in the future, his children would be proud of him for defending the rights of a minority (State House News Service 2004a). Senator Havern also invoked children. In twenty years, he argues, children will wonder what all the debate was about; same-sex marriage “will be the biggest non-event in Massachusetts” history (State House News Service 2004b). Rep. Walsh similarly invokes the judgment of the future:
“There’s one question the citizens of this Commonwealth will be able to answer today – where were you when the Massachusetts legislature voted to change our constitution….I will be able to tell my children and my grandchildren that I was right here in this chamber and I stood up to fight for the rights of others” (State House News Service 2004c). Children were also mentioned by Rep. Kaufman. Rep. Kaufman noted that the times “they are a changing” and that it’s a “new world” that “our kids consider normal” (Ibid.). Change is already coming and the future is already speaking to us. Clearly looking to the future, Rep. Teahan said “I want to be able to live my vote and be proud of what we do in this chamber” (Ibid.). Rep. Spilka wants future generations to be able to be proud of the constitution and the work done to keep discrimination out of it.

Many of the same speakers concerned about their role in history and the view from the future invoked the past, and more specifically past changes in society, to support their arguments. Here, we see the same story told by many of the amici in the Supreme Judicial Court being told in a legislative context. It is a story of trends towards justice, evolution of rights, and a growing understanding of civil rights. Representative Malia urged her colleagues “to recognize that the world we live in is an evolutionary creature” (State House News Service 2004g). Marriage, in particular, “has never been rigid and inflexible” (Ibid.) Rep. Malia then goes on to outline several changes in marriage that were argued in the Goodridge decision. Senator Resor also notes the changes in marriage law as marriage has “evolved” (State House News Service 2004f). Representative Demakis invokes the trend overtly: “there is a trend toward significant majority support in five to ten years toward extending full rights to gay and lesbian couples” (2004d). Senator O’Leary, like Rep. Demakis, invokes the tradition of change directly. “Massachusetts and Boston have another tradition. A tradition that embraces change. A tradition that embraces tolerance and optimism” (State House News Service 2004e).
This is a counterpoint to a history that, initially, was resistant to change and tolerance. Sen. O'Leary notes that “we have been far from perfect” in Massachusetts (State House News Service 2004c). He urges his colleagues to embrace the better tradition, the tradition of tolerance, and be on the right side of history. Later in the debates, Sen. O'Leary uses the history of religious discrimination to draw parallels to discrimination against same-sex marriage. He ends by reminding his legislative colleagues that “those who fail to study their history are condemned to repeat it. Remember your past… reject any amendment that restricts any rights for any minority” (Ibid.).

Rep. Balser questioned using history as a justification for a practice. To do this she listed several practices with long histories that have since been repudiated: the subjugation of women, Jews, Blacks, and Irish Americans. Denying these groups rights was wrong as is denying gays and lesbians their civil rights. She says, “the fact that something has been so for many years does not mean we are not free to alter it. We should expand our understanding of love and marriage” (State House News Service 2004b). Rep. Bosley also referenced change. “Anything we have not done before is new. We break new ground all the time” (Ibid.) Like many others, he links discrimination against gays and lesbians to other forms of discrimination that have been rejected: “Women could not vote. That didn’t make it right. We didn’t allow equal rights to blacks. It didn’t make it right” (State House News Service 2004e). Senator Walsh spoke strongly about the role of Massachusetts in setting trends. “We here in Massachusetts have always moved humanity forward because we recognize the truth of our dignity… I believe we are good enough and strong enough to assist in our growth and progress” (State House News Service 2004g). Like the other speakers, Sen. Walsh sees same-sex marriage as a step forward toward a greater recognition of rights and a greater understanding of humanity. Sen. Walsh gave many examples of how society is moving forward to “advance the human condition” and “human happiness” (Ibid). The social compact “has not been
fully realized” for every member of society, but the clear trend is toward greater recognition and inclusion, even if society is “moving like a moral glacier” on many issues (Ibid.)

Legislators invoked many historical figures to lend support to their position or to help make the stories they were telling resonate. The founding fathers are referenced repeatedly. Rep. Kaufman stated that “The authors of the constitution look down on us and across the generations. They ask if we are prepared to write discrimination into their sacred document” (State House News Service 2004e). Sen. Sprague urged the members to “Vote no to amending the constitution with language that does not respect our founding fathers” (Ibid.). Rep. Martin Walsh invoked the framer’s fight for freedom. He also cautioned against limiting the rights of others; “no change should be used to limit the rights of citizens or we risk becoming the force our founding fathers fought to defeat.” Speakers also invoked other historical figures in their remarks. President Lincoln, Justice Holmes, Rev. Martin Luther King Jr., and others were referenced to illustrate specific stories and to draw on specific cultural references to make those stories resonate (Ibid.).

Like the *amici* in the Supreme Judicial Court, these legislators, invoking both the past and the future, are seeking to place the fight for marriage equality into the larger story of progress and societal change. These shorter stories are part of a larger story of national growth, of movement away from discrimination and toward recognition of greater equality. Fitting the quest for marriage equality into this national story, this trend, helps the advocates by tapping into a pre-existing framework.

**Emotional Appeals**

Many legislators also specifically invoked emotion and emotional appeals. Rep. Linksy said “I will speak from my heart” (State House News Service 2004e). In referencing the stories told by earlier speakers, Linksy said: “The emotional stories pulled me away from my lawyerly stories and
made me feel it in my gut and soul” (Ibid.). The distinction between non-emotional lawyerly, thus presumably logical stories, and the emotional stories is interesting. Chestek has shown that lawyerly stories are not necessarily devoid of emotion but the general assumption in society, even among many lawyers, is to the contrary. Rep. Linksy also said that “The ladies [legislators] from Concord and Revere forced me to feel things from an emotional perspective” (Ibid.) Again, the emotional perspective is clearly posited as different and distinct from the lawyer’s logical perspective. After venturing out into the protesting crowd, Rep. Linksy was “overcome by emotion” and “could not stop crying” (Ibid.) This way of thinking about the difference between emotion and logic as forms of persuasion can be seen in Aristotle, Descartes (1989), and many others (See Barreto 2009). Modern research, however, has shown that the distinctions are not always so clear (Damasio 1994; Haidt 2012; Lakoff 2009).

Other legislators made reference to a variety of emotions. Pride was very common. Rep. Costello invoked pride, toward his father’s earlier support for gay rights and the hope that his children will feel pride at his current support (State House News Service 2004a). Rep. Spilka also invokes pride in the constitution. “The constitution is a document that our children’s children and their children must be proud of” (State House News Service 2004c). Rep. DiMasi told of how his grandfather saw the constitution as a source of hope for all people. He also said that he knew his grandfather would be “full of pride and humility to see his grandson seeking to protect the sanctity of the constitution he loved so dearly” (Ibid.). Rep. Martin Walsh also invoked pride. He said had “never been more proud to be a member” of the legislature (Ibid.). Rep. St. Fleur said that she was “proud… to be an American” and later in the same speech “proud to be a resident of Massachusetts” (State House News Service 2004g). In particular, she was proud that the legislature was tackling a difficult social question with decorum. She contrasted this with street violence and
protest common in other parts of the world. She was also, as referenced above, proud of
Massachusetts’s history of leading on these types of social issues (Ibid.)

Other emotions included love and anger. Rep. St. Fleur said that she had “come to a place
of anger for the first time since coming to this House” (State House News Service 2004g). She
explained that attempts to compromise on civil rights, to attempt to limit the rights of others, drove
her to anger. Rep. Kelly argued that the issue was all about love. “That is what this is about, the
judgment of love” (State House News Service 2004c). He urged his fellow legislators to think about
the love they feel for their spouses and question whether the love that Rep. Malia, an openly gay
member of the House, feels for her partner is somehow less.

Appeals also included general emotional feelings. Rep. Malia: “Look into your hearts” (State
House News Service 2004d). Rep. Spilka said that her “gut” told her that “this was discrimination”
(Ibid.) She researched the matter and was “torn by the passion of the debate” ultimately concluding
that “anything short of marriage is discrimination” (Ibid.) Senator Walsh took a different approach,
urging the members to “reach beyond our moral and emotional grasp” (State House News Service
2004g). Here, it seems as though he is arguing against negative emotions such as fear and prejudice.
By overcoming this, reaching beyond the initial emotions, “we become the nation that we want to
be…Equality under the law shall not be denied or abridged” (Ibid.).

These overt emotional appeals, often linked to the stories of discrimination and civil rights,
are very different than the limited emotional advocacy made in the judicial context. This is in
keeping with Scalia and Garner’s (2008) advice for lawyers on emotional appeals. They strongly
advise against overt emotional appeals in judicial advocacy and recommend that emotion be left to
the legislative context. As discussed in the previous chapter, the emotional appeals in the Goodridge
case were more subtle. By including information about the families, particularly the children, that
was not legally required to support the legal claim, the lawyers were able to humanize their clients and in the process invite an emotional connection. But, unlike in the legislature, there was never a direct attempt to encourage the judges to use their emotions in the decision making process. The lawyers never asked the judges to look into their hearts to decide the case.

**Personal Stories**

Personal stories were used by many legislators. Some, which linked directly with other recurring themes, were discussed above. Two legislators, however, told personal stories that did not fit with the larger themes. Both of these legislators are members of the GLBT community and are directly affected by the Goodridge decision and the attempts to overturn it in a way that the other members of the legislature are not.

Senator Barrios, speaking on the second day of the Constitutional Convention, told one of the few personal stories. In addition to making the arguments about not amending the constitution to enshrine a “two-tiered structure” for citizens, he told a personal story about his children and his need for the protections of marriage. One of his children was sick and ultimately needed a visit to the hospital. Because he and his partner are not able to marry, he was forced to fight with hospital staff about his relationship with his son (State House News Service 2004c). Senator Barrios’s story shows much of the structure Amsterdam and Bruner (2000). The steady state, the expected state, is the ability of a parent to be recognized as a parent when seeking medical attention for his or her children. That steady state is upset when an existing relationship is not recognized. To resolve the conflict the proposal to limit marriage must be defeated and all families must be recognized.

Representative Malia also tried to personalize the amendment and its effects. In response to criticism about the “personal references” earlier in the debate, Rep. Malia argued that “there is no other way for those of us in the gay and lesbian community to convey the needs and the reality of
our lives unless we tell you about them” (State House News Service 2004g). The debate must be personal because the issue is personal. She mentions the huge crowd converging on the State House because the “profoundly affects their lives” (Ibid.) Echoing the healthcare concerns raised by Sen. Barrios, Rep. Malia argued that nobody in the legislature would argue, should she fall ill, that her partner of 30 years should not be allowed to visit her. She told of how her partner would lack financial protections in the event of her death, to point of possibly even losing their joint home. Like Sen. Barrios, this story hinges on the tension between the expected laws that protect families and the current, and possibly continuing, framework where some families are left without protection. Rep. Malia also makes a direct appeal to emotion, urging the members of the legislature to “look into your hearts” when deciding the issue. After telling of the fears her family faces, the appeal to emotion is particularly useful. She has personalized the issue in a way that encourages empathy for her situation and the unfairness she argues applies to her.

These personal stories include much of the same information from the initial complaint filed in the Goodridge case. Like that case, these stories are efforts to humanize gay and lesbian families and illustrate why they need the relationship recognition that comes with marriage. Stories like these, particularly Senator Barrios’s story involving his children, are also helpful in rebutting one of the common themes of those opposed to same-sex marriage: protecting children.

**Final Vote – The End of the First Constitutional Convention**

On March 29, 2004, with a 105-92 vote, the Constitutional Convention advanced the ban on same-sex marriage for consideration by the next legislature. The version of the amendment finally advanced included a ban on same-sex marriages. It also, however, included language that provided some relationship recognition for same-sex couples under a Vermont-like civil unions system (State House News Service 2004g). Before the amendment could be sent to the voters for adoption, it
needed to pass one more legislative hurdle. The debate during that Constitutional Convention are discussed in the next section.

**Constitutional Convention 2004-2005 Session – Amendment Rejected**

On September 14, 2005 the Constitutional Convention convened again to consider the ban on same-sex marriage from 2004. The debate in this session was shorter than the previous one. During the 2003-2004 session, the convention spanned several days, with debate extending one day until the midnight deadline. This session, by contrast, the debate lasted only two hours. At the end, the amendment failed 39 – 157. Some of the opposition, like that of Rep. Travis, came not from those in favor of marriage equality for gays and lesbians but, instead, from those opposed to civil unions. The amendment both banned same-sex marriage and established civil unions. Some opponents wanted a vote on the marriage ban without the civil union compromise language.

Others opposed to the amendment supported same-sex marriage. Sen. Lees, one of the sponsors of the proposed amendment in the previous session, was the first speaker during the 2004-2005 session. He argued against adopting the amendment at this time. His reason for switching his vote focused on the change in circumstances since the last convention. At the last convention, same-sex marriages had not yet begun. Attempts were underway to delay the implementation of the Goodridge decision. By the time this convention began, however, same-sex marriages had been underway for over a year. Outlawing same-sex marriage at this time would actively deny real, rather than hypothetical couples, civil rights. His argument is, however, framed very much in logical terms. He cites the volume of support from his constituents and the change in circumstances. He does not rely on overt emotional appeals or on specific storytelling elements to make his case. Senator Lees does, however, reference the larger trend toward greater recognition of civil rights that seems to underlie all of the supporters arguments.
The references to this history were more clearly made by Senator Augustus and Representative Rushing. Senator Augustus, focusing on discrimination, said “At every turn in history when we have faced the question of discrimination it has not come without a fight and without debate” (State House News Service 2005). He also places Massachusetts as a leader in making change, saying “We [Massachusetts] are out of step today as we were when Boston was the center of the abolitionist movement, or when Worcester hosted the first women’s right convention” (Ibid.) These examples show that being ahead of the rest of the country on social issues is nothing new and, in fact, should be celebrated as one of Massachusetts’s strong points. Rep. Rushing echoed these points. He argued that the day was not historic because of the “unique” debate, but instead, because the debate is part of the larger tradition of expanding the “We of ‘We the People’” (Ibid.). He goes on, “we have always seen our constitution as a body of law that would be interpreted to increase the number and kinds of people who should be included” (Ibid.) Rep. Rushing then compares the Goodridge decision to one from the Supreme Judicial Court in the early 1780s outlawing slavery. “Over and over and over again, we had the history of expansive definitions of who belongs in a democracy. In the Goodridge case, our Supreme Court was simply speaking in that tradition” (Ibid.). The trend, again, is clear. The country moves to expand rights once denied. Massachusetts was always, and is now, setting the trend. The story of ever growing recognition of rights continues.

Senator Barrios and Representative Sciortino, both gay men, used more personal stories in their appeals to their fellow legislators. Senator Barrios asked if his marriage to his husband “threaten” the marriages of his heterosexual colleagues. He also argues that, with 6,500 married same-sex couples, no “apocalypse” has come to Massachusetts (State House News Service 2005). “The sun still shines” even with same-sex marriages taking place (Ibid.). But it is his story about his
son that is most unique in the Constitutional Convention. Sen. Barrios tells how his son asked why some people feel that his family isn’t as good as other families. Sen. Barrios then posits that the belief comes from “the notion that we must separate families and treat them differently” (Ibid.) By referring to his son, Sen. Barrios also addresses, subtly, the argument often raised against same-sex marriage. In his story, Sen. Barrios is helping his son with his math homework, then enjoying a family dinner. They are the model, All-American family. Questioning his ability, and his devotion, to his son becomes harder with this backdrop. It also reinforces the point made earlier in the debates that gay and lesbian couples are raising families and need the protections that come with marriage.

Representative Sciortino, who was elected on a marriage equality platform after the first Constitutional Convention, used history, both of the gay and lesbian movement as a whole and his personal history, to argue in favor of defeating the amendment. The history of the gay and lesbian civil rights movement is one of discrimination moving toward tolerance and ultimately acceptance and equality. That trend continues with Goodridge. He also talks about his own coming out experience and how his family accepted him and will be there when he chooses to marry. He then asks, “if it was your brother or daughter, would you not attend their wedding on their day of joy and love?” (State House News Service 2005). He attempts to personalize the issue to show that same-sex marriages are no different than heterosexual ones. Rep. Sciortino ends with a personalized emotional appeal: “look into your hearts to consider whether you would vote to take away the right of your mother, father, sister, brother to marry the one they love” (Ibid.) Same-sex marriages are marked by the same celebration of “joy and love” that mark any marriage (Ibid.)

Again, like the previous Constitutional Convention, the major theme here is one of trends toward acceptance and greater civil rights. The speakers addressed this theme in a variety of ways, but they almost all touched on it. Placing this issue in the context of on-going civil rights progress
fits with the larger national story of growth. This is just one chapter in a much bigger story. This is particularly important to illustrate now that many couples have begun to take advantage of their right to marriage equality. Adopting this amendment would now actually be a step backward, taking real rights away from a group. Taking away rights is in opposition to the national story that the advocates are referencing.

After Representative Sciortino’s speech, the convention voted to reject the proposed amendment by 39-157. This ended the first attempt to overturn the Goodridge decision. But, as shown below, the efforts to stop same-sex marriage in Massachusetts were not over.

**Constitutional Convention 2006-2007 Session – Legislative & Citizens’ Initiative**

Two attempts to ban same-sex marriage were considered during this particular Constitutional Convention. One, a legislative proposal, was rejected. The second, proposed under the citizens’ initiative process, was advanced to the next session. The vote on the citizen’s petition only required 50 votes in favor to move to the next Convention. It passed with a vote of 62-134. There was no debate on the citizens’ initiative specifically. Some members, in the debate on the legislatively produced amendment, mentioned the citizens’ initiative amendment as well. The two items, both dealing with same-sex marriage, were addressed in quick succession. This, in part, could explain the lack of debate on the second proposed amendment. The citizens’ petition was also the third proposed amendment attempting to restrict same-sex marriage in a very short period of time. The legislators were clearly familiar with the issues raised and this could have also reduced the need for another extended debate on this specific version of the proposal.

Some of the debate at this Constitutional Convention was focused on the role of history and the judgment of future generations. This echoes concerns raised by many at the earlier conventions. Sen. Augustus again forcefully made the case for the trend toward greater acceptance in society. He
also uses many emotional appeals throughout his speech. He says, “this amendment is about the past. It is about fear and intolerance” (State House News Service 2006). He then talks about the expansion of rights to African Americans and other racial minorities. “Arguments against equality in each case were based on fear. Massachusetts is a state built on hope, not fear.” Again, noting Massachusetts’s long history of leading on many issues, Sen. Augustus says that “We [Massachusetts] are as out of step today as on that village green in Lexington and Concord. Massachusetts has always been the conscience of the nation. That is our role” (Ibid.) The quest for liberty reaches back as far as the birth of the country. Sen. Augustus is invoking that tradition of liberty for all again. This theme has recurred each time the legislature has debated the issue. It was also present in the Goodridge case itself, as well as the MassEquality campaign discussed in the next chapter.

Representative Rushing, another frequent speaker on the larger tradition toward equality, once again invoked the founders and the growth of equality in his speech. Invoking the equality language of the Declaration of Independence and the preamble to the Constitution, Rep. Rushing says “what is remarkable about those words is once they are expressed and written, they no longer belong to those who wrote them or said them but to those who hear them” (State House News Service 2006). Throughout history, more and more groups have heard those words and said that they are part of society entitled to the protection of those words. “It’s always been that the definition of freedom and justice and civil rights has been people understanding that they were included in those words” (Ibid.). Now, thanks to Goodridge, Rep. Rushing says we can recognize that gays and lesbians are included in those words. He ends by invoking Martin Luther King. He says “our history of public policy has been a struggle bending toward justice. Vote and oppose the amendment before us. Let us once and for all bend this Constitutional Convention toward justice” (Ibid.). The moral
arc of history has always bent toward justice, Rep. Rushing argues. That includes, and must include, the gay and lesbian residents of Massachusetts.

Representative O’Brien and Representative Reinstein use the same theme but focus speech directly on the judgment of future generations. Those voting on this issue will be remembered by what they do today. Rejecting the trend toward greater recognition of civil rights invites future condemnation. Rep. O’Brien implores his colleagues to “think about your children and your grandchildren and how you would like to be remembered.” Rep. Reinstein “hope[s] to be remembered as someone who stood for equal rights and defended the freedom of others” (State House News Service 2006).

Rep. Reinstein goes on to talk about the changes over time. Too young to remember the civil rights movement, she says she “can’t comprehend there was so much controversy over who could vote or that people had to drink from different water fountains” (State House News Service 2006). Most people of her generation and younger “can’t contemplate things like Irish Need Not Apply” and most importantly “they can’t comprehend that we in 2006 can deny people the right to love” (Ibid.). Interestingly, she frames it as the right to love and not the right to marriage. The two concepts have become identical. But the issue is once again the trend toward greater access to justice and greater understanding of fairness.

Supporters of marriage equality also had to counter the opposition’s use of the democracy frame. By now, particularly in light of the citizens’ petition, those who support advancing the proposed amendments have begun more strongly emphasizing the right of the people to vote on public policy issues. This was evidence in the earlier conventions, but is particularly clear here. Those who support same-sex marriage, and oppose advancing the amendments, must counter the argument that the people should be permitted to vote on the proposed amendments.
Representative Kaufman addresses this issue by invoking the founding fathers of Massachusetts. His focus is on rebutting the democracy frame. The founders, he argued, would not have given the legislature such an involved role in the amendment process if they were simply to act as a rubber stamp for citizens’ petitions. The founders “created for us and left us a complex deliberative process so we are forced to exercise judgement [sic] before putting a matter before our constituents to amend the constitution” (State House News Service 2006). There are issues that do not belong before the public. Senator Barrios also argued against sending the issue to the voters. He focused on predicting what would happen if the proposed amendment reached the public for a vote. He told a story of that possible campaign, and how ugly and hurtful, it would be. He cautions that “we will have nothing to be proud of with two years of nasty debate” (Ibid.). In his argument, he does make one passing reference to children. If the campaign to overturn marriage equality is successful, Sen. Barrios says, same-sex couples would lose protections for their children. But compared with his speeches in earlier Conventions, this one focuses more on procedure than on story and emotion (Ibid.).

The final result for this session of the Constitutional Convention was to reject the legislative petition and to advance the citizens’ initiative petition. The citizens’ petition needed 50 votes to advance to consideration in the next legislature; the final vote was 55 – 102.

**Constitutional Convention 2007-2008 Session – The End of the Debate**

On June 14, 2007, after several years of debate on the issue, the Constitutional Convention addressed same-sex marriage for the last time. Under consideration was the citizens’ initiative petition adopted by the previous legislature, sitting in Constitutional Convention. At this session, there was no debate. Immediately after calling the convention to order, Senator Murray, presiding over the convention, ordered the issue to vote. Only 50 votes, 25% of the legislature, were needed
to advance the proposed amendment to the ballot for possible adoption by the voters. The motion failed, 45 to 151. After the vote as announced, “many lawmakers erupted into loud applause” (State House News Service 2007b). A motion to reconsider failed. The convention adjourned.

**General Discussion**

One of the major changes in the debate over time is the existence of same-sex marriage itself. When the first Constitutional Convention convened in February 2004, the stay in the *Goodridge* case was still in place. No same-sex marriages had yet taken place. Attempts were being made to extend the stay to allow the amendment process time to play out before the first same-sex couples wed. As the process continued, more and more same-sex couples married. And, as many of the members of the legislature noted in the later debates, nothing negative really happened. The sky did not fall down on Massachusetts. The existence of same-sex marriages, without complication, provided another story for the members to use in their debates. By the time the final convention voted against placing same-sex marriage on the ballot, other states had joined Massachusetts in recognizing same-sex marriages. Massachusetts was no longer alone in recognizing these marriages, further helping to weaken many of the arguments used against same-sex marriage during the constitutional convention.

The existence, and spread, of same-sex marriage helps fit same-sex marriage into the larger narrative that the advocates were using during the Constitutional Convention debates and the different cases in the Massachusetts court system. In both arenas, the overarching story is one of progress and increased understanding of civil rights. Both the advocates in *Goodridge* and the legislators in the Constitutional Convention linked the quest for same-sex marriage other movements that successfully sought increased rights. The abolitionist, suffrage, women’s and civil
rights movements all provide support for the gay and lesbian movement and for marriage in particular.

The stories told by the legislators used the same themes as were used in the courts but were formed differently. Because the nature of legislative debate is different than legal advocacy, the stories told during the Constitutional Conventions were not as formal as those told in court. But the same elements that define stories are present. The legislators used the same structural features that Chestek (2010), Haven (2007), Amsterdam and Bruner (2000) argue are essential for storytelling. There is a steady state, complicated by a trouble, that then must be overcome to return to a steady state.

The steady state is one of protected families, equality of citizens, and ever growing recognition of greater civil rights protections. The Goodridge Court extended this steady state to gay and lesbian couples and their families. This is shown throughout the debates as the expected norm. There are many references to what families can and should expect from the government in terms of protections. Senator Barrios’s and Representative Malia’s personal stories rely on understanding the normal expectations inherent in marriage and family recognition. Other speakers talked of the tradition of recognizing and incorporating new groups into the protections of the social contract. Attempts to limit Goodridge or to overturn it completely are the Trouble that creates the tension that starts a story. By attempting to limit the rights of gay and lesbians the tradition of growing civil rights protections is thwarted. Only by rejecting these attempts can the steady state of ever growing equality be re-established.

Chestek (2010), relied on Lakoff’s concept of deep frames when crafting the story briefs for his study on persuasion. A “deep frame” is a way of looking at the world that is ingrained as part of a person’s self-identity. Deep frames are accessed without conscious thought (Chestek 2010). They
are built around a core, uncontested concept. Deep frames are evident in the themes used by proponents of same-sex marriage in crafting their stories. Equality is the most clearly evident deep frame. By linking marriage equality to the civil rights movement, the equality issue is highlighted. Another deep frame is family and the importance of protecting the family unit. Marriage is central to family life and ensuring families are protected. Allowing same-sex couples access to these protects fits the frame.

The stories told also work to counter the narrative themes used by the opposition discussed above. One of the central arguments used by those against same-sex marriage is the need to protect children. The stories told here, however, clearly illustrate how children gain protections when their same-sex parents are allowed the benefits of marriage. Other arguments against recognizing this change in marriage law are countered by the stories about the abolition of slavery. Slavery in Massachusetts was originally outlawed by a judicial decision. Massachusetts was the only state to end slavery at the time. This situation parallels the one after Goodridge. The abolition of slavery, particularly Massachusetts’s place as a leader in the abolitionist movement, is celebrated. The same, advocates of marriage equality argue, will be true for Massachusetts’s leadership here.

One difference between the legislative stories and the judicial ones is the emphasis on emotion. Emotional advocacy was certainly used in both but it is much more prominent in the political arena. Direct invocations of emotion were absent from the judicial pleadings. The emotional advocacy there came from including specific details about the litigants and their families in an effort to invite empathy. In the political arena, legislators were urged to think and vote emotionally.

In the next section, I look at the stories used in the popular press and in commercials aired by marriage equality advocates to persuade the public.
CHAPTER SIX: THE PEOPLE

While the Constitutional Conventions discussed in the preceding chapter were debating the various attempts to restrict same-sex marriage, advocates of marriage equality took the issue directly to the people. MassEquality, the organization that was leading the fight to preserve marriage for same-sex couples, had a staff of canvassers going door to door in targeted districts to find same-sex marriage supporters. These supporters were encouraged to contact their legislators — who were on record as opposing marriage equality — and let their representatives know that support exists in the district. Post cards were collected and delivered to legislatures. When constituents indicated they wanted a more active role, meetings were arranged with their elected officials. All of this was in an effort to prevent the proposed amendments from being advanced to the general election ballot.

MassEquality also aired a series of television commercials to gain popular support for the issue. These commercials were the first in what could have been a lengthy ballot campaign. But even more important than that, the commercials were useful in shifting popular opinion during the period that the legislature was meeting to consider constitutional amendments. If popular support shifted in favor of same-sex marriage, as it ultimately did, legislators who were initially opposed would have been open to persuasion and possibly changing their vote, as many ultimately did. Although the legislature never advanced an amendment to the ballot, and thus the people of Massachusetts never voted directly on same-sex marriage, understanding the efforts to persuade the Massachusetts electorate are still important to understanding the rhetoric around same-sex marriage in Massachusetts. This chapter will look at the frames used by MassEquality to determine how they were used and whether they were similar to the previous themes used by movement activists in the judiciary and the in legislature during the Constitutional Conventions.
MassEquality Commercials

In May of 2007, MassEquality launched an advertising campaign designed to highlight why the proposed constitutional amendment should not be advanced to the voters. The campaign, called “It's Wrong to Vote on Rights”, consisted of three videos. These videos aired both on television and online in the time before the final Constitutional Convention vote on the issue, scheduled for June 14, 2007. The videos are currently archived on MassEquality’s YouTube page. As throughout the policy debate, these commercials invoke both a substantive argument and a procedural one. Turning first to the substantive argument, we again see the importance of recognizing gay and lesbian families.

Each video clearly and definitively emphasizes family and community. This is done in a number of ways. First, the focus is on specific families. Each video features a single family talking about their lives. Family is further emphasized with visual elements. Throughout the videos, the camera pans over family photographs and other pictures. The videos appear to have been shot in the family’s homes, in their living rooms or kitchens. The same-sex couples’ children are also featured in each video, either through photographs and dialogue or in the video directly. The family is also introduced through on-screen text that gives the family members’ names and the city or town they are connected to. This emphasizes the idea that these families are part of the larger, shared community.

The videos are also multigenerational. One, “The Godleys”, is narrated by grandparents (MassEquality 2008). They talk about their grandson and his relationship with his mothers and the rest of the extended family. Another is narrated by Peter Hams (MassEquality 2008). There, he talks about his relationship with his mothers and the excitement he felt when they were finally able to
marry. The last, “The Toneys”, is narrated by the married couple, who are joined by their daughter (MassEquality 2008). Viewed together, the videos emphasize the extended family and the importance of marriage equality for the entire family. Children, however, are particularly central to this framing. In all three videos, the importance of marriage equality for the children of same-sex couples is highlighted.

In all three videos, the families describe themselves in ways that invoke their normalcy. This can be most clearly seen when Toneys start their video by stating they are “everyday people.” The videos develop their characters, these real families, through both the visual elements and the words spoken by the families. Visually, we are presented with photographs of the families. These include baby pictures, wedding pictures, sports memorabilia, news clippings, and other examples of family life. The Godleys talk as proud grandparents about how Leo is “no different” from the rest of the grandchildren even though he has two mothers. Peter Hams talks about how he, like every other child, thought his parents were heroes. In his case, the only difference is that he had two moms. He also talked about how “amazing” the day was when his parents could finally, legally wed. The Toneys’ video talks about the mundane facts of family life: “we go to work, we pay taxes, we mow the lawn, we have birthday parties.” Explicitly, they say “Everything is the same as any other family.” This reinforces both the family frame and the equality frame that other activists have used in other forums. The families are taken as a family and framed as equal to any other family. This is different from framing the issue as one of individual rights to marry. Instead, the focus is on each family unit and that unit’s importance and right to exist as a unit. Framed as families, instead of individuals, the family collectively becomes the main character in these short stories. Moreover, the families are portrayed as the typical All-American family. This reinforces the broader narrative of American progress that is present throughout the debate on same-sex marriage.
In addition to the emphasis on family, the videos all share the same tagline: “Voting on Rights is Wrong.” Each video ends with the same white screen with text showing the tagline and the MassEquality logo. This framing is also incorporated into the main video as well. Mrs. Godley says that “there is no way people should be allowed to vote on whether one family is better than another family.” Peter Hams says “I think it’s wrong to vote on other people’s rights. It’s not American to do that.” The Toneys’ video ends by saying that “No other families have to worry about being put up to a vote.” This recalls the debate from the Constitutional Convention about the proper forum to decide the issue of marriage equality discussed previously. This serves two purposes. It reintroduces the procedural argument. Rights are not up for majority vote. And putting marriage equality on the ballot is counter to this important value. Moreover, it reaffirms the ongoing narrative of increasing rights recognition. Throughout history, minority rights have become more protected, largely through judicial means. Voting on rights, and potentially undoing this progress, is again counter to the story of our nation and our progress that proponents of same-sex marriage are telling.

Storytelling elements are present in the videos, although not as clearly as in the judicial and legislative arenas. The commercials work hard to establish the steady state that starts a story. Each family is almost boring in its normalcy. Their lives as families, acting as families with the protections that come from that status, represent the ideal state that should be preserved. Each video emphasizes different aspects of this steady state. The Godley’s focus on the extended family and the support it brings. Peter Hams talks about the joy of the wedding day and the excitement that comes from becoming a fully recognized family. The Toneys talk of everyday matters, work and school and chores. Together, the three videos paint a picture of a standard family, the foundation of society. This takes the framing used by the opposition and makes it applicable to same-sex couples. As discussed in Chapter 4, those opposed to marriage often invoke children and traditional family
values in their arguments against same-sex marriage. These videos work to take those values, acknowledge their importance, and show how same-sex couples fit into that system.

Character development alone, however, does not make a story. Stories require tension. Here, the tension, or using Amsterdam and Bruner’s (2000) language, the Trouble, comes from the threat these families are facing. Their steady state is under siege by those trying to take away their right to exist as a family. Defeating the proposed constitutional amendment, without it reaching a vote, becomes the goal necessary to preserve the steady state. The cause of the tension is not specified in detail. Those trying to put the question on the ballot, to put the validity of the steady state to a vote, are unidentified. There is an opposition, but it is referred to solely in general terms. The Godleys, for example, question why “people” should vote on the issue. The Toneys talk about being judged less than by “some people.” Peter Hams states that voting on other people’s rights is “not American” implying that those who would seek to do so are an undefined other. By keeping the opposition undefined, the videos suggest a universality that is in keeping with the general themes seen throughout the policy debate.

Unlike in the other branches, the videos do not specifically reference the larger themes of civil rights and the evolution of marriage. No mention is made of earlier civil rights fights or similar cases, like Loving v. Virginia. These families are fighting, like the plaintiff couples, to be recognized and preserved as full and equal members of society. But they do not overly link their struggle for recognition to earlier struggles in the same way that the attorneys in Goodridge or the legislators in the constitutional debates did. This, of course, could be because of the limited time available for a political advertisement. Television commercials are almost universally short, generally less than a minute. This does not leave significant time for lengthy discourses about history and the changing
nature of marriage. The focus, instead, stays squarely on the family in the commercial and their quest to become full members of the community.

There are, however, ways that this larger narrative of progress could have been made more explicit. The campaign in California against Proposition 8, for example, emphasized the discrimination theme over the family. This strategy ultimately proved unsuccessful. A major critique of the No on 8 campaign was centered on these commercials and their lack of emotional connection with actual gay and lesbian families (Rauch 2008; Weisberg 2008). Since the Massachusetts campaign never reached the voters, and the populations of Massachusetts and California are different, it's unclear if the Massachusetts campaign was more effective because of the framing chosen or for other reasons. It is clear that the two campaigns were different in ways that potentially could have an impact. This is an area where future comparative research would be useful.

The public did, however, participate in the process through the public demonstrations held outside of the State House during each Constitutional Convention. While the legislators debated in the chamber, supporters and opponents of marriage equality gathered outside to express their view on the issue. Popular protests like these serve to inform the legislature about the public’s assessment of the importance of an issue. By bringing this information to the attention of legislators, movement actors hope to influence the policy outcome.

In Massachusetts, the themes used by the advocates in support of marriage equality were the same that have been seen throughout the debate. Signs reading “No Discrimination in the Constitution” were common. During key votes, supporters of same-sex marriage chanted “Separate is not Equal” sang “God Bless America” and “We Shall Overcome” (Klein 2004). References are again made to previous civil rights movements and the tradition of American progress. While these
are not clearly framed as stories, they fit the overarching narrative being shown throughout the entire policy debate.
CHAPTER SEVEN: CONCLUSIONS AND FUTURE RESEARCH

The policy debate over same-sex marriage will likely be resolved in the fairly near future. Current trends, both in popular opinion and in judicial decision making, heavily favor the expansion of marriage rights to all couples regardless of sexual orientation. Recent federal court decisions, discussed below, indicate that the United States Supreme Court may be called on to settle the issue as a matter of constitutional interpretation in the 2014 Term. The arc of this story is, clearly, bending toward justice. But, as I stated at the beginning, the specific example of same-sex marriage is not the most important topic of study. Instead, the emphasis has been on exploring a technique of policy communication as applied to a specific policy example. How stories get told, and which stories are told, is the important point. Throughout the policy debate on same-sex marriage in Massachusetts, storytelling played a significant role.

Across each branch of government, stories were used to persuade and advocate for a particular policy decision. Even in the judicial branch, where logic and reason are presumed to reign supreme, stories were used to support positions and frame issues. Beyond government, activists used storytelling to engage the public in the policy debate. As Massachusetts struggled with the issue of marriage equality for gay and lesbian couples, stories were everywhere. Persuasion and advocacy relied, not on logic and reason, but on story and emotion.

Throughout the policy debate, the stories told were similar. Even in the judicial context, where the Supreme Judicial Court was called on to rectify a harm felt by specific plaintiffs, the story was broader. Individuals mattered, of course, in the court cases and the larger policy debate. In the litigation, the plaintiffs and their families feature prominently in the pleadings. While present in the Court’s decision, they fade more into the background as the story becomes one about History and Progress. During the Constitutional Convention, many legislators told their own stories about
overcoming discrimination. They spoke from personal and family experience. But, more importantly, they linked these stories to the larger story of progress, both for Massachusetts and for America more broadly. The same themes appear in the media campaign launched by MassEquality. There, families talk about their own concerns and emotions, but again, link their stories to what it means to be American and the ideals of equality and democracy.

This theme of American progress was also seen in other same-sex marriage decisions. The Iowa Supreme Court, in *Varnum v. Brien*, spoke of the lead that Iowa has taken in this story. Iowa, the Court said, has a long history of advancing rights before the rest of the country. Slavery was outlawed by the Court while Iowa was still a territory (*Varnum v. Brien* p. 877). After statehood, Iowa continued to expand rights recognition. It granted women the right to practice law while other states’ prohibitions were upheld by the federal courts (Ibid.). Iowa’s Court “struck blows to the concept of segregation” in the late 1800s, long before *Brown v. Board of Education* was decided by the United States Supreme Court. Same-sex marriage, the Court reasons, is the next step in this process.

Like in Massachusetts, the Iowa court decision triggered attempts to amend the state constitution to overturn the decision. And like in Massachusetts they failed. One of the opponents of the amendment, Zach Wahls, spoke at a hearing on the bill. Like in Massachusetts, the story was again one of the all-American family. He testified, “I guess the point is that my family [with two, married lesbian mothers] isn’t really so different from any other Iowa family (Wahls 2011). His speech makes many of the same references seen in both the MassEquality campaigns and in the Constitutional Convention debates discussed above: “we go to church together. We eat dinner, we go on vacations” (Ibid.). In Iowa and in Massachusetts, the story is the same. Gay and lesbian
couples, and their families, are simply part of the fabric of society. They really aren’t any different from any other family.

The story of same-sex marriage, truly, is the story of America. It is the story of progress. Each branch confronted, and ultimately celebrated, the American ideal of progress and equality. The story of same-sex marriage is, in reality, the story of America. This provides the beginning of the story for same-sex couples. America’s history of attempting to better itself, to overcome and correct past injustices, is the steady state that defines the beginning of a story. Throughout its history, America has consistently challenged itself to improve. While progress has not always been universal, or steady, it has been present. The times when America has failed to live up to its ideals are known. Infamous court decisions, like Dred Scott v. Sandford, Korematsu v. United States and Plessy v. Ferguson stand as examples of this failure. But each has been repudiated, either with a subsequent court decision or through the political process. The ideal, eventually, wins out over the failure.

In the policy debate in Massachusetts, the storytelling specifically invoked past movements with similar experiences. Throughout, those supporting marriage equality retold the story of the women’s rights and civil rights movements. Each group has, as it fought for recognition of its own rights, made appeals to the grand American narrative. Both the women’s rights movement and the civil rights movement specifically referenced the Declaration of Independence’s guarantee of equality. The Seneca Falls Convention drafted its Declaration of Sentiments in the same style, with the same structure as the Declaration of Independence. Martin Luther King, Jr. invoked Declaration of Independence in his “I Have a Dream” speech, the most famous speech of the Civil Rights movement. He called on the country to “live out the true meaning of its creed” (King 1963). The call to recognize and rectify inequality is central to the advancement of minority rights. Using the Declaration of Independence links that recognition to the very founding of the country.
While the Declaration of Independence speaks of equality in absolute terms, it has always been understood more as a call to action. For the founders, equality was self-evident but not self-executing. Work was needed to realize the equality that the Declaration enshrined. That work continues, well over 200 years after the goal was announced. Progress is slow but not absent. Gains are sometimes lost. But progress is eventually regained. The story goes on, retold by new generations and new movements as new injustices are confronted and, eventually, rectified.

**Same Sex Marriage Today**

The number of states currently recognize same-sex marriages continues to grow. Most, however, still have explicit prohibitions against same-sex marriage, either statutorily or in constitutional amendments (Human Rights Campaign 2014). While the 2012 ballot initiatives discussed above favored marriage equality, that year also saw victories for the opponents of same-sex marriage. In May 2012, North Carolina voters approved a constitutional amendment banning same-sex marriage by more than a 20-point margin (Robertson 2012). Legislators in New Jersey passed a bill legalizing same-sex marriage, but it was vetoed by the governor (Lopez 2012). New Jersey’s ban on same-sex marriage ended in October 2013 after the governor declined to appeal a state court decision finding the ban unconstitutional (Zernike and Santora 2013). North Carolina’s remains in effect. During this period, many other states legalized same-sex marriage. These include Illinois, New Mexico, Maryland, Minnesota, and Rhode Island. California’s constitutional ban on same-sex marriage, Proposition 8, was overturned by federal courts, once again making same-sex marriage legal there. As of March 2014, 17 states plus the District of Columbia have full marriage equality.

There has also been policy movement at the federal level. In 2012, President Barack Obama became the first sitting United States president to endorse same-sex marriage rights. He did,
however, state that he felt the states should remain supreme in this area. This is, perhaps, an attempt to have it both ways. He supports legalization, but only if the state in question also supports legalization. This, of course, creates significant problems for couples that move or travel across state lines. It also does not address how the federal government should treat same-sex marriages valid under state law, a problem in part due to the federal Defense of Marriage Act. President Obama had long said that he opposed the Defense of Marriage Act, but wanted legislative repeal rather than judicial invalidation.

In 2013, the United States Supreme Court provided an answer to some of these questions. In United States v. Windsor, the Supreme Court found Section 3 of the Defense of Marriage Act unconstitutional. Section 3 defined a marriage for federal purposes as the union of one man and one woman, regardless of contrary state definitions. Edith Windsor, the plaintiff in the case, was forced to pay estate taxes after the death of her wife. The marriage was recognized under state law but not federal. She sought a refund and a declaration DOMA’s federal definition of marriage was unconstitutional. The Supreme Court agreed. Windsor’s holding, however, is narrow. Only same-sex marriages authorized under state law are recognized. The Supreme Court did not find a broader right to same-sex marriage. States that banned those marriages are, under the holding in Windsor, free to continue banning same-sex marriages.

The logic of Windsor, however, may require more. After the Supreme Court’s decision, federal district courts in several states have used the decision to find state same-sex marriage bans unconstitutional (Gonzales 2014). Federal District Courts in Virginia, Kentucky, Texas, Utah, Oklahoma have all held bans on same-sex marriage unconstitutional. The decisions are based on equal protection and due process arguments. The Utah decision, ironically, relies heavily on Justice Scalia’s Windsor dissent. Justice Scalia said that the logic of Windsor makes it “inevitable” that state
bans on same-sex marriage will be held unconstitutional. The Utah Court credits Justice Scalia's reading of *Windsor* and adopts it (*Kitchen v. Herbert*). Many of these court decisions have been scheduled for expedited appeals with decisions expected late this spring. Ultimately, resolution of the constitutional question will need to be addressed by the Supreme Court, like it did with anti-miscegenation law in *Loving v. Virginia*. When that will happen, however, remains to be seen.

**Future Research**

Applied legal storytelling is a new field of study. The insights generated in that field have many policy implications. Advocates who understand the importance of storytelling and framing will be better positioned to advance their issues than those who ignore storytelling entirely. This study’s description of the storytelling used throughout the same-sex marriage debate is, however, only the beginning. Follow up studies should address the question from a comparative viewpoint. Stories are clearly being used, but how effective are they? A analysis comparing the framing and storytelling used in the Massachusetts and California same-sex marriage debates would prove useful in furthering this area.

If more advocates utilize storytelling frames to advance their issues, it is likely that competing stories will appear in the same issue debate. Research into how competing stories work will also prove useful. Druckman (2001) examined this issue with framing generally. He found that frames were dependent on a pre-existing determination of the source’s credibility. Framing effects were greater when the frame originated from a trusted source. This is likely to hold true for storytelling as a particular type of framing strategy. All stories depend on verisimilitude. The question, however, becomes where that verisimilitude comes from. How does the storyteller change the story and the story’s believability?
Throughout this particular policy debate, same-sex marriage, stories more often than not centered on the all-American family and the story of American progress. Does this hold true for other policy debates? If so, how? An analysis of storytelling across issues would further illuminate the role of storytelling in the policy process. What narratives are effective for which issues? How can movement activists craft stories for specific policy positions? There remains room for significant further research.
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10 In addition to the published decision, citations were made to each of the amicus briefs filed in this
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