

BREAKING DOWN BARRIERS: THE *GOODRIDGE* DECISION  
AND MODERN CIVIL RIGHTS

*John M. Greaney\**

Thank you for having me. I did not realize that the instructions were to talk about our hardest case, because I was led to believe that you wanted me to talk about our decision in *Goodridge*,<sup>1</sup> the same-sex marriage case, and then if I did not talk about that, I would be led from this room by the sheriff pretty promptly. *Goodridge* was neither my hardest case, nor was it my easiest, but I will talk about the case nonetheless.

Before I get to *Goodridge*, however, let me say that the Massachusetts Constitution is a document that my court protects, and considers to be a constitutional template that must be interpreted and applied to meet with changing social and economic conditions.

Our justices do not for the most part subscribe to an originalist point of view, and there's good reason for that. First of all, the Massachusetts Constitution was drafted by John Adams as its principal draftsman in 1780, and precedes the United States Constitution by seven years. It is the oldest extant constitution in the western hemisphere.<sup>2</sup> And the decisions of the United States Supreme Court, as you well know, establish a federal standard, a kind of a minimum basis for what occurs throughout the whole country. This creates a floor, not a ceiling, leaving the states and the state courts to fashion other rules—other constitutional rules under their state constitutions. And that's very important on the part of the United States Supreme Court, because it recognizes principles of federalism, and the import of the Tenth Amendment that allocates a certain reservoir of power to the states. I am sure

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<sup>1</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>2</sup> Robert K. Fitzpatrick, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1834 (2004).

this is familiar to the students who have studied constitutional law.

So, with that in mind, let me turn and walk you through what occurred in the *Goodridge* case, which was decided a little over five years ago.<sup>3</sup> It seems more recent than that, but the decision was made five years ago.

The facts are fairly straightforward. We had seven same-sex couples who had been living in committed relationships for many years raising children—some biological children, some adopted children—who challenged the marriage laws on the basis that the laws violated certain provisions of our state constitution.<sup>4</sup> The defendant was the Department of Public Health who administers those laws.

The court wrote five opinions: two in support of same-sex marriage and three in dissent. The decision I joined, which was written by the chief justice to create a four-judge majority, analyzed the problem this way:

We recognized first that the marriage laws—and we are talking here about secular marriage, not, obviously, about religious marriage—were licensing statutes that perform a gate-keeper function ascertaining who meets the requirements necessary to receive a marriage certificate.<sup>5</sup>

We realized further that we were dealing with the police power of the state when we talk about whether we could alter the arrangement that these statutes created.<sup>6</sup>

And we further pointed out the countless benefits—in the hundreds, too numerous to mention—flowing from the fact that a person is married, so that the plaintiffs were being shut off from a number of state benefits and also a number of federal benefits.<sup>7</sup>

With that in mind, the decision that four of us signed onto began with what is the usual constitutional analysis: the nature of the right at issue. And then if a classification is involved, what is the classification? And what kind of review are you going to apply to that classification?

There were two Massachusetts constitutional provisions that we looked at. The first was substantive due process rights, and the second, of course, were equal protection concerns.

Now, the United States Supreme Court, as far as I know, has not

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<sup>3</sup> *Goodridge*, 798 N.E.2d at 941.

<sup>4</sup> *Id.* at 949–50.

<sup>5</sup> *Id.* at 951.

<sup>6</sup> *Id.* at 954.

<sup>7</sup> *Id.* at 954–57.

classified the right to marry a person of your choice as a fundamental right. I think they have—but there is some disagreement over that—but they’ve called it a vital right. They’ve actually used the word “fundamental” in some important decisions, one of which was *Loving v. Virginia* where they struck down miscegenation.<sup>8</sup>

The majority decision in our case took the tack that it was not a fundamental right, but which was a very important right that implicated equal protection concerns. The majority decision decided to analyze the classification under the rational basis test.

We noted, however, that we would not use the traditional rational basis test where almost anything survives with any conceivable reason that you can hypothecate that the Legislature may have intended. We applied a rational basis test that was stricter, as the opinion said—a rational basis test that was not toothless. And if you have studied constitutional law, you know that what has emerged is a stricter rational basis test called “rational basis with bite” or “rational basis plus.”<sup>9</sup> We called it “not toothless.”<sup>10</sup>

With that in place, we began to look at the reasons that were advanced—why the marriage laws should be kept the way they were—and we looked principally at five reasons and discussed each in turn.<sup>11</sup> I will not go into great detail, because the discussion gets technical.

The first reason offered by the Attorney General to turn the plaintiffs down was that marriage—heterosexual marriage—fosters procreation, and same-sex marriage would not. We noted that that was not really the case and discussed that at some considerable length.<sup>12</sup>

It was also argued that children would be raised in the most optimal setting if they were raised in a heterosexual arrangement. We pointed out that that wasn’t really true.<sup>13</sup>

A few years ago, I gave a talk at New York University School of Law about family law, and I identified that there exists at least twelve different kinds of families now that are recognized by the law: single-parent families, biological parents, adoptive parents, *de*

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<sup>8</sup> 388 U.S. 1, 12 (1967).

<sup>9</sup> *Murphy v. Dep’t of Corr.*, 711 N.E.2d 149, 153 n.4 (Mass. 1999).

<sup>10</sup> *Goodridge*, 798 N.E.2d at 960.

<sup>11</sup> *Id.* at 961–68.

<sup>12</sup> *Id.* at 961–62.

<sup>13</sup> *Id.* at 961, 962–64.

*facto* parents.<sup>14</sup> You can go on and on and on. And I even mentioned that we had a Red Sox pitcher a few years ago, Pedro Martinez, do you remember him? Well, he kept losing to the Yankees. He could never beat them, and he called the Yankees his daddy, so I called that the Pedro family. Do you remember that?

(Laughter)

So anyway, we analyzed the reason pertaining to raising children, and decided that it met the “rational basis with bite” test.<sup>15</sup>

The next argument against the plaintiffs was that traditional marriage preserves scarce state resources by preserving benefits. We discussed and rejected that argument as well.<sup>16</sup>

The next argument was that same sex marriage would trivialize the institution. We found that argument not to have much force.<sup>17</sup>

And finally the argument was put forward that same sex marriage would create interstate conflict. We indicated it would not because, under the Full Faith and Credit Clause, no other state would have to recognize Massachusetts marriages. Your court properly decided, three-to-two, that New York did not have to recognize what we had done in Massachusetts if they did not want to.<sup>18</sup>

So that was the decision that four of us signed onto.

I wrote a concurring opinion. I felt that the cleaner analysis here would be under the Equal Protection Clause: that the right to marriage, at least for state constitutional purposes, was the fundamental right to marry a person of one’s choice.<sup>19</sup> I cited a number of United States Supreme Court cases that seem to hold that what we were dealing with was not a sexual orientation issue, but a gender issue, and I talked about that.<sup>20</sup> And once you put those factors together, the more proper analysis would be to look at the marriage laws under strict scrutiny.

Now, I do know, at least on the federal side, that you analyze gender problems under intermediate scrutiny. We were working, however, in the state constitutional law area, and I thought it was

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<sup>14</sup> See New York University School of Law, News, Events and Calendars, Nov. 19, 2004, [http://www1.law.nyu.edu/news/calendars/2004\\_2005/RTKseries/greaney.html](http://www1.law.nyu.edu/news/calendars/2004_2005/RTKseries/greaney.html) (last visited May 12, 2009).

<sup>15</sup> *Goodridge*, 798 N.E.2d at 964.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 965.

<sup>18</sup> *Id.* at 967; see also *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

<sup>19</sup> *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring).

<sup>20</sup> *Id.* at 970–71 (Greaney, J., concurring).

appropriate to analyze the issue under strict scrutiny.<sup>21</sup> And under strict scrutiny, as you well know, most of these laws cannot survive, and I found the ban on same sex marriage could not survive either.

Now, the professor mentioned the following passage, and I'll read it to you. I don't often do this, and I think this was the only decision where I've done it. Usually we—all of us, I think—analyze the issues strictly from a legal point of view with the kind of dry language you're hearing now, and the analytical formats you've studied and the numerous citations to cases with the parentheticals and all the other things that make up the normal apparatus of an appellate opinion.

I put all that aside, and the last paragraph of my decision stated a plea for acceptance on the part of the citizens of Massachusetts asking them to accept our decision and to accept the plaintiffs who now would have marital rights as their co-equals. So I'll quote:

I am hopeful that our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgement of the court's authority to adjudicate the matter. My hope is more liberating. The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher, therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do.<sup>22</sup>

So, I added that as a postscript—as a coda to what I said in the concurrence.

We had three subsequent cases. We gave the Legislature six months to decide how it was going to implement the decision; that was more or less of a courtesy, because we could have implemented the mandate immediately. There were very few changes that had to

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<sup>21</sup> *Id.* at 972 (Greaney, J., concurring).

<sup>22</sup> *Id.* at 973 (Greaney, J., concurring).

be made in the marriage laws; you would just have to rewrite some of the forms. But as a courtesy we gave them that.

Under the advisory opinion provision of our constitution, the Legislature came back and asked, if we adopt civil marriages, is that good enough to satisfy you people? And we wrote an opinion saying “no.”<sup>23</sup>

The next major opinion after that was when the people instituted the initiative petition process to put the issue on the ballot—much like they did in California—so it could be voted on. The initiative proponents had to get twenty-five percent of the Legislature to sign on in the House and the Senate to put it on the ballot. The Legislature didn’t want to vote, because legislators were caught in the middle. If they voted to put the issue on the ballot, their gay constituents would argue with them and run a candidate against them, and so forth. If they voted to not put it on the ballot, those who were opposed to gay marriage would do the same thing. So, they made the choice not to vote. They were sued again, and the dispute came back to our court. I wrote yet another opinion telling the Legislature that they had taken an oath to vote and they should vote.<sup>24</sup> And that’s about all we could do in that case. I mean, you can’t put the Speaker of the House or the President of the Senate in jail for not voting, and you can’t go over there and hold a gun to their heads and tell them to vote. To their credit, they voted the initiative down, and it never made the ballot.

My final word on the case concerns the three dissents. They were very good dissents by three judges,<sup>25</sup> which really touch on what is the seismic fault in state constitutional law decisions of this sort. That fault is this: who should be making this decision? Should it be unelected judges, or should the Legislature, which is elected, be making the decision?<sup>26</sup>

A second point in the dissents was that the rationale and arguments that were being advanced by the Attorney General were certainly good enough to support the existing statutes under a rational basis test.<sup>27</sup>

On the whole, *Goodridge* was a difficult decision—not the hardest

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<sup>23</sup> *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 571–72 (Mass. 2004).

<sup>24</sup> *Doyle v. Sec’y of Commonwealth*, 858 N.E.2d 1090, 1093 (Mass. 2006).

<sup>25</sup> *Goodridge*, 798 N.E.2d at 974 (Spina, J., dissenting); *id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting).

<sup>26</sup> *Id.* at 982 (Sosman, J., dissenting); *see also id.* at 1004 (Cordy, J., dissenting) (noting that this issue should be decided by the Legislature).

<sup>27</sup> *Id.* at 999–1000 (Cordy, J., dissenting).

I've done, but certainly an important one from my point of view.

I'll conclude with this: high courts, just by reason of what we do, do not get everything right. You remember, I'm sure, *Brown v. Board of Education*, that very important constitutional case.<sup>28</sup> Few people realize that the same day that *Brown* was decided, there was a second case called *Bowling v. Sharpe*, which desegregated the schools in Washington, D.C.<sup>29</sup> That opinion was written by Chief Justice Warren as well. He decided in that opinion that "separate but equal" should be struck down, and that the Equal Protection Clause of the Fourteenth Amendment applied to the District of Columbia because it had been incorporated through the Due Process Clause.<sup>30</sup> He wrote a marvelous opinion. But his law clerk, who was a law professor of mine at New York University, Bernard Schwartz, came in and said to him that the opinion was wrong. The Equal Protection Clause cannot apply to the District of Columbia because it's not a state; the District of Columbia is a federal enclave, and the Fourteenth Amendment only applies to states. So, he had to rewrite the opinion to base the result on the Fifth Amendment.<sup>31</sup>

My point is, we don't get everything right all the time, but we try as hard as we can to do so.

Thank you.

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<sup>28</sup> 347 U.S. 483 (1954).

<sup>29</sup> 347 U.S. 497, 500 (1954).

<sup>30</sup> *Id.* at 499–500.

<sup>31</sup> BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 98–99 (1983).