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## Studying the Massachusetts *Goodridge* Decision on Same-Sex Marriage as an Antidote to Mutual Misunderstanding and a Lesson in Civics and Law

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STUDYING THE MASSACHUSETTS *GOODRIDGE*  
DECISION ON SAME-SEX MARRIAGE AS AN ANTIDOTE  
TO MUTUAL MISUNDERSTANDING AND A LESSON IN  
CIVICS AND LAW

*David Schimmel\**

I. INTRODUCTION

How do most public schools deal with the most controversial, current issues of politics and religion? They don't. They avoid them. This paper argues that avoidance is the wrong approach—that the wiser way is to teach about the controversy; and that doing so decreases irrational polarization and extreme misunderstanding and can promote tolerance and mutual respect. This is especially true about the controversial question of same-sex marriage.

If public high schools avoid discussing important political issues rationally and respectfully among their diverse students, then when these students graduate, they are likely to associate in like-minded communities of friends and family who reinforce similar views and often see those with opposing beliefs as dangerous opponents—as ignorant and bigoted and/or evil and immoral. Such polarized positions make thoughtful dialogue and mutual respect extremely difficult and sometimes impossible.

On the other hand, one way to decrease mutual misunderstanding about contentious questions is to discuss them in a structured educational setting. There is extensive research in the field of social studies about the civic benefits of learning to discuss controversial issues in a classroom where teachers emphasize reasoned analysis and mutual respect. Such discussions help students develop the skills that are

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important for citizens to make reasoned and informed decisions about public policy issues.

The 2003 Massachusetts Supreme Judicial Court's groundbreaking decision in *Goodridge v. Department of Public Health*,<sup>1</sup> is an excellent vehicle for teaching these citizenship skills. In *Goodridge*, the majority held that denying marriage licenses to same-sex couples violated the state constitution and lacked a reasonable basis. Dissenting justices argued that there were reasonable grounds for the existing marriage laws and that any change should be made by the legislature, not the courts.

Studying, analyzing, and understanding the majority and dissenting opinions in *Goodridge* can remove most of the emotional and inflammatory rhetoric about same-sex marriage. This is because the legal framework of the opinions provides a rational arena for civil discussion of differing views. That is why incorporating the teaching of *Goodridge* into the high school social studies or civics curriculum would be a most appropriate way to teach about same-sex marriage. In addition, *Goodridge* provides a lively and compelling vehicle for teaching about the differing ways judges approach the important questions of judicial review and constitutional interpretation.

The goal of teaching about *Goodridge* would not be to seek agreement or to have students abandon their religious or moral beliefs. Instead it would help students be better able to explain their legal views about the same-sex marriage dispute *and* be able to understand and respect the opinions with which they disagreed. Furthermore, studying *Goodridge* would not encourage students to view high court opinions as deciding right against wrong or good against evil, but instead to see those decisions as one way our constitutional democracy tries to balance and resolve legitimate values and rights in conflict.

This paper first summarizes the research findings about the educational goals and civic benefits of teaching controversial issues. Second, it explains how the study of *Goodridge* can enable students to learn about some of the major constitutional questions being debated in state and federal courts, in Congress and state legislatures, and in blogs and in the mainstream media. Finally the paper summarizes the multiple opinions in *Goodridge* in a format that could be used to teach

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1. 798 N.E.2d 941 (2003).

secondary students about the legal issues surrounding same-sex marriage litigation. The controversial issues that can achieve these benefits are issues that can divide society and for which significant groups offer conflicting explanations and solutions and are not capable of being settled by scientific evidence.

## II. CITIZENSHIP BENEFITS

In the article *Teaching Controversial Issues in the Social Studies*, Jeff Byford, Sean Lennon, and William Russell write that “a primary goal of public education is to prepare students to be engaged and effective citizens.”<sup>2</sup> The article points out that an effective way to achieve this goal is to discuss controversial issues through “reflective dialogue among students or between students and teachers about an issue on which there is disagreement.”<sup>3</sup> The authors also note that the examination of multiple perspectives can be an antidote to the tendency of many students to simply echo their parents’ views and “to gravitate to information on Web sites that merely reflect their own beliefs.”<sup>4</sup>

Similarly Professor John Allen Rossi writes that the discussion of controversial public issues “lies at the core of democracy.”<sup>5</sup> In his article, *The Dialogue of Democracy*, Rossi summarizes some of the research findings on the civic benefits of teaching controversial issues. One important finding is that “classrooms in which students discuss both sides of issues and feel free to express their opinions” positively correlate with “political efficacy, interest, and participation.”<sup>6</sup> In addition, discussing controversial issues allows “students to practice higher order thinking such as making decisions from an array of options, using reasoning to justify positions on an issue, and using evidence to support reasoning.”<sup>7</sup> Furthermore, teaching

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2. Jeff Byford, Sean Lennon & William Russell III, *Teaching Controversial Issues in the Social Studies*, 82 THE CLEARING HOUSE 165, 165 (2009) (quoting Position Statement, National Council for Social Studies, *Creating Effective Citizens* (May 2001), <http://www.socialstudies.org/positions/effectivecitizens>).

3. *Id.*

4. *Id.* at 166.

5. John Allen Rossi, *The Dialogue of Democracy*, THE SOCIAL STUDIES, May-June 2006, at 112.

6. *Id.*

7. *Id.* at 113.

about controversial issues in a rational and respectful manner can help students learn to deal with conflict, become thoughtful listeners to diverse opinions, improve interpersonal skills, and develop critical decision-making abilities that are essential to an informed electorate.

When dealing with controversial questions in the classroom, teachers should approach such issues “in a spirit of critical inquiry exposing the students to a variety of ideas, even if they are different from their own.”<sup>8</sup> Such teachers would not impose their own views but would encourage students to think for themselves. In addition, teachers should approach the discussion of controversial issues “from a perspective that demonstrates respect for the multiplicity of views and opinions that inescapably evolve out of the dynamic process that is at the heart of a pluralistic democracy.”<sup>9</sup> Among the benefits of this approach, writes Michael Simpson, is providing students with “the ability to understand the points of view expressed by others even while disagreeing with them and the realization that multi-faceted issues cannot be dealt with in black and white terms.”<sup>10</sup>

Same-sex marriage is exactly the kind of topic that meets the criteria for and promotes the goals of teaching controversial issues recommended by the social studies scholars. It is a timely, significant, and intensely debated public policy issue that divides society and can be examined from multiple perspectives. Therefore, reading, analyzing, understanding, and discussing the majority and dissenting opinions in *Goodridge* should enable high school students to develop and practice higher-order thinking skills using reasoning to justify their positions and using evidence to support their reasons.

Teachers and students (and perhaps parents), should be clear about what the goals of discussing *Goodridge* are and are not. The goals are not to reach consensus or seek agreement about same-sex marriage, not to try to change students’ moral or religious beliefs, and not to debate students’ religious or moral views. Instead the goals for students are to understand, analyze, and discuss the *legal* issues raised by the justices in

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8. Byford, Lennon & Russell, *supra* note 2, at 165.

9. David Martenson, *Using the Jehovah’s Witness Cases to Stimulate Student Thinking*, 99 THE SOCIAL STUDIES 77, 78 (2008).

10. Michael Simpson, *Teaching Controversial Issues*, SOCIAL EDUCATION, January 1996, at 5.

the multiple *Goodridge* opinions, to be able to articulate and justify the legal reasons supporting their views and, equally important, to understand and be able to explain the views with which they disagree. In addition, studying *Goodridge* is an effective way to teach about appellate jurisprudence.

### III. LEGAL LEARNING

The strong opposing opinions in *Goodridge* clearly raise some of the most contentious and important jurisprudential questions confronting appeals courts in the United States today. These are questions that should be included in every secondary history, civics, or social studies curriculum. They include the following:

- *Constitutional Interpretation.* How should appeals court justices interpret the state and federal constitutions? Should they base their interpretation strictly on the original intention of those who wrote the constitution? Or should they view their constitution as a living document that should be interpreted to meet our changing times and evolving views about civil rights?

- *Judicial Review.* What should be the scope and limits of judicial review? When should courts be able to declare laws unconstitutional? And when should judges exercise judicial restraint and defer to the authority of the legislature to decide issues of public policy?

- *Criteria for Review.* When reviewing acts of the legislature, what criteria should be used by courts? Should justices declare laws unconstitutional only if there is no rational basis for the law? Or if fundamental rights are involved, should the government have to prove that the laws serve a compelling state interest? And what constitutes a “rational basis” or a “compelling state interest”?

- *Roles of Different Courts.* What are the respective roles of the federal and state courts concerning the interpretations of their different constitutions in matters of individual rights? Should state courts always defer to the federal courts in resolving these issues? Or can state courts provide greater protection for individual rights?

Learning about issues such as judicial review, separation of powers, or original intent can sometimes seem theoretical, distant, or irrelevant to high school teenagers. But analyzing and discussing these issues in the context of the conflicting

*Goodridge* opinions can make those issues come alive and help students understand them and why they are important.

For many students, the *Goodridge* case can illustrate and clarify the different roles of the trial courts and appeals courts. And the Supreme Judicial Court's decision can be used to explain the purpose and potential impact of a majority, concurring and dissenting opinion.

The four to three decision in *Goodridge* resulted in five opinions covering fifty-seven pages in the Northeast Reporter. Chief Justice Margaret Marshall wrote the opinion of the court with a concurring opinion by Justice John Greaney, and three justices wrote dissenting opinions. The substantial summary that follows attempts to capture the tone and substance of the key arguments of the various opinions. The question and answer format is used to help teachers and students focus on the major legal issues in dispute.<sup>11</sup>

#### IV. GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH<sup>12</sup>

The Massachusetts Supreme Judicial Court announced its decision in *Goodridge* on November 18, 2003. *Newsweek* magazine characterized this decision as "a shot heard round the world."<sup>13</sup> While it may not have been heard "round the world," it was certainly a judicial and political bombshell that reverberated throughout the United States. Supporters of the decision saw the ruling as a monumental victory. Opponents called for a constitutional amendment to define marriage as a union of a man and a woman. This debate continues over the August 2010 federal trial court decision to overturn California's ban on same-sex marriage. And it will continue among Americans for years to come, even in the unlikely event that the U.S. Supreme Court upholds the trial court decision.

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11. There are, of course, other ways to teach about *Goodridge*. Teachers could assign advanced students to read all of the opinions, report on some of the critical and supporting journal articles written about the case, or compare the court's opinion in *Goodridge* with Judge Vaughn Walker's controversial federal trial court opinion overturning California's ban on same-sex marriage in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

12. 798 N.E.2d 941 (2003).

13. Howard Fineman & T. Trent Gegax, *My Mommies Can Marry*, NEWSWEEK, December 1, 2003, at 34.

### A. *The Opinion of the Court*

Chief Justice Marshall begins her opinion by framing the issue before the court this way: Can Massachusetts “deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry?”<sup>14</sup>

#### 1. *Should Religious or Moral Beliefs be Considered by the Court?*

No. The Court acknowledged that “many people hold deep-seated religious, moral, and ethical convictions” about marriage.<sup>15</sup> Some strongly believe that “marriage should be limited to the union of one man and one woman and that homosexual conduct is immoral.”<sup>16</sup> Others hold equally strong beliefs that “same-sex couples are entitled to be married and that homosexual persons should be treated no differently than their heterosexual neighbors.”<sup>17</sup> However, Justice Marshall explained that neither of these religious or moral views is relevant to the legal question of whether the prohibition of same-sex marriage violates our state constitution?

#### 2. *Who Brought This Case to Court?*

The plaintiffs are fourteen individuals of different ages (from thirty-five to sixty) who have been in committed relationships from four to thirty years, most of whom have children. Their occupations include business executives, lawyers, teachers, therapists and engineers. Many are active in church, community, and school groups. Each of the plaintiffs attested to “a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children.”<sup>18</sup> The defendant is the department of Public Health, responsible for enforcing the state’s marriage laws.

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14. All direct quotations in this summary are from *Goodridge*. Specific page references are included in the footnotes following the quotations.

15. *Goodridge*, 798 N.E.2d at 948.

16. *Id.*

17. *Id.*

18. *Id.* at 949.

The plaintiffs sued alleging that denying them marriage licenses violated Article 1 of the Massachusetts Constitution that says that “all people” have certain “unalienable rights” among which are “the right of enjoying and defending their lives and liberties. . . [and] that of seeking and obtaining their safety and happiness.”<sup>19</sup>

### 3. *How Did the Trial Court Rule?*

The trial court judge ruled against the plaintiffs because he held that there is no “fundamental right to marry a person of the same sex.”<sup>20</sup> The plaintiffs then appealed to the Massachusetts Supreme Judicial Court that agreed to hear the case.

### 4. *What is the Nature of Civil Marriage?*

After outlining the background of the case, Justice Marshall discussed the nature of civil marriage (as contrasted with religious marriage) and concluded that it is and always has been “a wholly secular institution.” The court explained that “there are three partners to every civil marriage, two very willing spouses and an approving state” that sets the terms of the marriage.<sup>21</sup>

### 5. *What are the Benefits of Civil Marriage?*

There are multiple benefits of civil marriage to the community and the couple. Civil marriage enhances the community by “encouraging stable relationships” and ensuring that “children and adults are cared for and supported whenever possible from private rather than public funds.” It is a “public celebration of the ideals of mutuality, companionship, intimacy, fidelity and family.”<sup>22</sup> Civil marriage also provides many tangible benefits including filing joint income tax returns, the right to inherit the property of a deceased spouse, the right to share a spouse’s medical benefits, alimony rights, and predictable rules concerning child custody and support. For

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19. *Id.* at 951.

20. *Id.*

21. *Id.* at 954.

22. *Id.*

these reasons, “civil marriage has long been termed a ‘civil right.’”<sup>23</sup>

6. *Is Prohibiting Same-Sex Marriage Like Prohibiting Interracial Marriage?*

According to the court, prohibiting marriage because of a single trait such as sexual orientation is similar to the historic prohibition of interracial marriage in the U. S. Moreover, Justice Marshall noted that when the California Supreme Court declared its state’s anti-miscegenation laws unconstitutional in 1948, there was no popular support for its groundbreaking decision at the time.

7. *Can State Constitutions Provide More Rights than the U.S. Constitution?*

Yes. As the U.S. Supreme Court has explained, fundamental to our federal system is that “state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.”<sup>24</sup> Thus, Justice Marshall explained that even if the U.S. Supreme Court fails to hold that the federal Constitution gives same-sex couples the right to marry, the Massachusetts Constitution may grant such a right since the state’s constitution is “more protective of individual liberty and equality than the Federal Constitution.”<sup>25</sup> Furthermore, the Massachusetts Constitution protects freedom to partake in benefits created by the state including “whether and when to marry” and “whether and how to establish a family.”<sup>26</sup>

8. *How Should Courts Judge Whether the Prohibition Against Same-Sex Marriage is Constitutional?*

By using a “rational basis” or “reasonableness” test. The court explained that “any law failing to satisfy the basic standards of rationality is void.”<sup>27</sup> Therefore, Justice Marshall

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23. *Id.* at 957.

24. *Id.* at 959.

25. *Id.* at 948.

26. *Id.* at 959.

27. *Id.* at 960.

examined the following justifications for prohibiting same-sex marriage to see if they pass the rationality test.

*a. The primary purpose of marriage is procreation.*

The court rejected this justification because the state's marriage law "contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children."<sup>28</sup> In fact, people on their deathbed may marry. While most married couples do have children, "it is the exclusive and permanent commitment of the married couples to one another, not the begetting of children," that is the essential element of civil marriage.<sup>29</sup> Although marriage has historically been a heterosexual institution, it is circular reasoning, not analysis, to maintain that it must remain so.

Furthermore, state adoption laws encourage bringing children into a family, whether the intended parent is married or unmarried and whether the parent or her partner is heterosexual or not. According to Justice Marshall, the "marriage is procreation argument singles out the one unbridgeable difference between same-sex and opposite sex couples and transforms that difference into the essence of legal marriage."<sup>30</sup> In so doing, the State "confers an official stamp of approval on the destructive stereotype that same-sex relations are inherently unstable and inferior to opposite-sex relations."<sup>31</sup> Because state laws allow so many kinds of opposite-sex marriage that will never result in reproduction, it is erroneous to claim that the capacity to have children "justifies excluding from civil marriage same-sex couples who actually have children."<sup>32</sup>

*b. Marriage should be restricted to opposite-sex couples to insure that children are raised in optimal settings.*

The court also rejected this justification since the composition of families today varies greatly, and the best interest of the child no longer is based on a parent's sexual orientation or marital status. Thus there is no rational

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28. *Id.* at 961.

29. *Id.*

30. *Id.* at 962.

31. *Id.*

32. *Id.*

relationship between banning same-sex marriage and the goal of protecting the optimal child-rearing unit. It was conceded by the State that same-sex couples “may be excellent parents” and these couples, (including four of the plaintiff couples) “have children for the same reasons others do—to love them, to care for them, to nurture them.”<sup>33</sup> But their child-rearing task is “infinitely harder by their status as outliers to the marriage laws”;<sup>34</sup> they are denied the enhanced income the law provides to married couples and their children, and the laws of divorce do not provide their children the predictable guidelines for child support and custody. Therefore, the court wrote: “It cannot be rational under our laws . . . to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.”<sup>35</sup>

*c. Permitting same-sex marriage would undermine traditional marriage.*

According to the court, “recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of the same race.”<sup>36</sup> Instead of undermining marriage, extending civil marriage to same-sex couples “who are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws” and thus reinforces the importance of marriage in our society.<sup>37</sup>

*d. It is the role of the legislature, not the courts, to decide the laws about marriage.*

This, wrote Justice Marshall, “is to misunderstand the nature and purpose of judicial review.”<sup>38</sup> It is the role of the legislature to decide policy issues, “but it is the traditional and settled role of the courts to decide constitutional issues” such as

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33. *Id.* at 963.

34. *Id.*

35. *Id.* at 964.

36. *Id.* at 965.

37. *Id.*

38. *Id.*

those prohibiting interracial marriage, restricting the rights of married women, or permitting school segregation.<sup>39</sup> As the U.S. Supreme Court has written, the history of constitutional law “is the story of the extension of constitutional rights and protections to people once ignored or excluded.”<sup>40</sup>

### *9. Is There Any Rational Basis for Banning Same-Sex Marriage?*

No. On the contrary, the ban on same-sex marriage works a “scarring hardship on a very real segment of the community for no rational reason.”<sup>41</sup> The absence of any reasonable relation between the ban and the general welfare suggests that the marriage restriction “is rooted in persistent prejudices against persons who are homosexuals.”<sup>42</sup> Our constitution “cannot control such prejudices, but neither can it tolerate them.”<sup>43</sup> Therefore, the court ruled that henceforth civil marriage means “the voluntary union of two persons as spouses to the exclusion of all others.”<sup>44</sup> This “reformulation” furthers the aim of marriage to promote exclusive relationships and a stable setting for raising children. Justice Marshall concluded that “limiting the protections, benefits and obligations of civil marriage to same-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”<sup>45</sup>

### *B. Justice John Greaney Concurrence*

#### *1. Why Did Justice Greaney Write a Separate Opinion?*

Justice Greaney wrote his concurring opinion to indicate that he agreed with the results of the court, but would base his decision on other grounds—solely on the Massachusetts Declaration of Rights that states that “all people” have a fundamental right to seek and obtain happiness under law. Because marriage is a fundamental right, not a privilege,

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39. *Id.* at 966.

40. *Id.*

41. *Id.* at 968.

42. *Id.*

43. *Id.*

44. *Id.* at 969.

45. *Id.* at 968.

courts should not use the “reasonableness” standard to judge the marriage law but the stricter “compelling interest” test. Under this test the state cannot restrict a fundamental right unless it shows a “compelling” reason. Since the state has not done so, the ban on same-sex marriage is clearly unconstitutional.

### *2. Why Does the Constitution Override Popular Opinion or Current Law?*

This is because “a written constitution is the fundamental law for a government . . . it is the final statement of the rights, privileges and obligations of the citizens” and thus is superior to legislative enactments.<sup>46</sup> Therefore, as a matter of constitutional law, neither moral or religious beliefs nor historic tradition can justify legal discrimination against same-sex couples who wish to marry.

### *3. Will Opponents Accept the Court’s Decision?*

Justice Greaney hopes they will and appeals to “those thoughtful citizens” who oppose same-sex marriage to recognize that “simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance and respect.”<sup>47</sup> We should do so, concludes Justice Greaney, “because it is the right thing to do.”<sup>48</sup>

### *4. Should Judges Base Their Decisions on the Original Meaning of the Constitution?*

Not according to Justice Greaney. He rejects the opinions of the dissenters who base their view on the “original intent school of constitutional interpretation.”<sup>49</sup> In contrast, Greaney identifies with the “living constitution” school of interpretation. This is because he believes that the Massachusetts Constitution “was never meant to create dogma that adopts inflexible views of one time to deny lawful rights to those who

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46. *Id.* at 973.

47. *Id.*

48. *Id.*

49. *Id.* at 974.

live in another.”<sup>50</sup> Instead, the provisions of the constitution “must be adaptable to changing circumstances and new social phenomena . . . and conformable in their concepts of liberty and equality to what is fair, right and just.”<sup>51</sup>

## V. DISSENTING OPINIONS

This section briefly summarizes the opinions of the three dissenting justices. Not surprisingly, these justices answered the key questions raised by this case very differently than the majority.

### A. *Justice Francis Spina*

#### 1. *Does the Current marriage law Violate Equal Protection?*

Not according to Justice Spina, who wrote that the law “does not unconstitutionally discriminate on the basis of gender” because the law applies to men and women in the same way and creates no gender disadvantage. Similarly the laws “do not discriminate on the basis of sexual orientation” since they “do not disqualify individuals on the basis of sexual orientation from entering into marriage.”<sup>52</sup> Therefore, there is no equal protection violation.

#### 2. *Is Same-Sex Marriage a Constitutional Right?*

No. Instead of protecting established constitutional rights, the court is using the rubric of the constitution to redefine marriage. Despite the court’s assertion, “same-sex marriage is not a right . . . recognized in this country.”<sup>53</sup> On the contrary, the roots of marriage are “deeply set in history as a civil union of a single man and a single woman.”<sup>54</sup>

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50. *Id.* at 974 n.6.

51. *Id.*

52. *Id.* at 974.

53. *Id.* at 977.

54. *Id.*

3. *Does the Majority Exceed the Bounds of Judicial Restraint in Violation of the Separation of Powers?*

Yes, because the court overturns the unambiguous intent of the legislature “beyond the limits of our judicial function.”<sup>55</sup> Courts only have authority “to recognize rights that are supported by the Constitution and history, but the power to create novel rights is reserved for the people through the democratic and legislative process.”<sup>56</sup> Unfortunately the court has “extruded a new right” from constitutional principles intended to “protect existing rights, not to create new ones.”<sup>57</sup>

B. *Justice Martha Sosman*

1. *Was the Majority Wrong in its Application of the Rational Basis test?*

Definitely. The question under this test is not whether the legislature’s reasons for its marriage law “is persuasive to us, but only whether it satisfies a minimal threshold of rationality.”<sup>58</sup> And that it certainly does because “it is rational for the legislature to postpone any redefinition of marriage that would include same-sex couples until such time that it is certain that the redefinition will not have unintended and undesirable social consequences.”<sup>59</sup> Therefore, it is inappropriate for judges to arrogate to themselves the power to redefine marriage “merely because we are confident that ‘it is the right thing to do.’”<sup>60</sup>

Justice Sosman acknowledged that excluding same-sex couples from civil marriage might be “cruelly unfair and hopelessly outdated.”<sup>61</sup> However, as a matter of constitutional law, “the court has tortured the rational basis test beyond recognition.”<sup>62</sup> Focusing “on the rationality, not the persuasiveness” of the marriage laws, the exclusion of same-sex couples clearly “passes constitutional muster.”<sup>63</sup>

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55. *Id.*

56. *Id.* at 978.

57. *Id.*

58. *Id.*

59. *Id.* at 982.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

C. *Justice Robert Cordy*

Justice Cordy reinforces and expands on the opinions of the other dissenters.

1. *Do Same-Sex Couples Have a Fundamental Right to Marry?*

No. Even if the right to marry is fundamental, it does not follow that there is a fundamental right to marry a member of the same sex. To reach such a conclusion, wrote Justice Cordy, “the court has transmuted the ‘right’ to marry into a right to change the institution of marriage.”<sup>64</sup> Both federal and state courts have recognized as fundamental only rights which are “deeply rooted in this nation’s history and tradition.”<sup>65</sup> And same-sex marriage clearly is not an American tradition. Under the circumstances, marriage laws must be left to the legislature or the justices will be merely enforcing their “own views regarding better social policy”—a role prohibited to the courts by our constitution’s separation of powers principle.<sup>66</sup>

2. *Does the Marriage Law Satisfy the Rational Basis Standard?*

Yes. It does for several reasons. First, the traditional institution of marriage has for centuries “ensured a stable family structure” for raising children. Second, there may be negative consequences for children raised without a father and a mother, and children develop best “when mothers and fathers are partners in parenting.”<sup>67</sup> Third, same-sex couples “cannot provide children with a parental authority figure of each gender.”<sup>68</sup> Fourth, the fact that same-sex couples can adopt does not mean that being raised by such couples is the “equivalent of being raised by one’s married biological parents” or that the state should encourage same-sex couples to marry.

3. *Can Same-Sex Couples Be Good Parents?*

Yes. But that, explained Justice Cordy, does not answer the question before the court. Instead, the question the justices

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64. *Id.* at 984.

65. *Id.* at 988.

66. *Id.* at 991.

67. *Id.* at 998–99.

68. *Id.* at 1000.

should decide is whether there is any proof that permitting same-sex marriages will be “as stable and successful a model as the one that has formed a cornerstone of our society since colonial time” or whether it will result in unforeseen adverse consequences.<sup>69</sup> Given the critical importance of the institution of marriage, “it is eminently rational for the legislature to postpone making fundamental changes to it until such time as there is unanimous scientific evidence or popular consensus, or both, that such changes can be safely made.”<sup>70</sup>

#### *4. Is This Case About the Rights of Same-Sex Couples to Live Together or Raise Children?*

No, they already have those rights. Instead, Justice Cordy emphasized that this case is about whether the state must support their choice by changing civil marriage to make its benefits and responsibilities applicable to them. He noted that the “courageous efforts of many have resulted in increased dignity, rights and respect for gay and lesbian members of our community.”<sup>71</sup> Nevertheless, Justice Cordy concluded that the issue of same-sex marriage “must, for now, be the subject of legislative, not judicial action.”<sup>72</sup>

## VI. CONCLUSION

After studying the majority and dissenting opinions in *Goodridge*, students should have a deeper appreciation of the legal and policy issues surrounding the same-sex marriage debate. This should help them understand how and why judges sometimes differ in their opinions about difficult cases. Furthermore, by analyzing and discussing the various opinions, the constitutional debates about judicial review and separation of powers would become immediate, lively and relevant rather than dry, abstract, and historic concepts in civics textbooks. More important, by studying the way appellate judges rationally explain their conflicting views about same-sex marriage, students could learn to discuss their deeply held differences without mutual hostility or emotional rancor.

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69. *Id.* at 1003.

70. *Id.*

71. *Id.* at 1005.

72. *Id.*

As a result students could gain the essential skills of respectful and reasoned debate that are critically needed to promote thoughtful and wise decision-making in our pluralistic constitutional democracy.