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In Search of Tradition: Goodridge v. Department of Public Health

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IN SEARCH OF TRADITION: *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*

INTRODUCTION

On November 18, 1863, Abraham Lincoln sat in his train on the way to Gettysburg.[1] As he contemplated the speech he was about to give, he surely realized that he was "giving people a new past to live with" when he "altered [the Constitution] from within, by appeal from its letter to the spirit."[2] Yet the lawyer in Lincoln might have been surprised to see the ways in which he was about to change the nation beyond the immediate struggle for union and emancipation.[3] The Gettysburg Address would be in large part the foundation of the Fourteenth Amendment.[4] From that text, much of the Bill of Rights was applied to the states.[5] A right to contract would be discovered, and then discarded.[6] A right to privacy would be found, limiting the states' abilities to interfere with a person's choices of contraception, abortion, and marriage.[7]

This Comment addresses *Goodridge v. Department of Public Health*,[8] the Supreme Judicial Court of Massachusetts' response to same-sex couples seeking marriage licenses. Part I gives the facts and procedural history of the case, and Part II provides background to put *Goodridge* in its historical context. Part III summarizes the majority, concurring, and dissenting opinions. Part IV suggests that the court did not address the true issue presented by the case, which is whether laws prohibiting same-sex marriage should receive the strict judicial scrutiny that accompanies a fundamental right, and argues that strict scrutiny is the proper standard.[9] This Comment concludes that protecting same-sex marriage as a fundamental right is in fact consistent with American history and tradition.

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1. GARRY WILLS, LINCOLN AT GETTYSBURG, 29-30 (Simon & Schuster 1992).
2. *Id.* at 38.
3. For an in-depth analysis of the Gettysburg Address, see WILLS, *supra* note 1.
4. *Id.*; *see generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 414-15 (Foundation Press 2001) (discussing the origins of the Civil War Amendments).
5. Adamson v. California, 332 U.S. 46 (1947) (Frankfurter, J., concurring).
6. Lochner v. New York, 198 U.S. 45 (1905).
7. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Zablocki v. Redhail, 434 U.S. 374 (1978).
8. 798 N.E.2d 941 (Mass. 2003).
9. *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring).

I. FACTS OF *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*

During a five-week period beginning in March 2001, numerous same-sex couples applied for marriage certificates in the Commonwealth of Massachusetts.[10] As required by General Laws c. 207 (hereinafter "G.L. c. 207"), the couples presented their "completed notices of intention to marry . . . forms to a Massachusetts town or city clerk, together with the required health forms and marriage license fees."[11] The parties agreed that all of the facial requirements necessary to receive the licenses were met.[12]

In all cases, the marriage licenses were denied "on the ground[s] that Massachusetts does not recognize same-sex marriage."[13] In response, plaintiffs filed a complaint on April 11, 2001, alleging "the exclusion of the [p]laintiff 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, violate[d] Massachusetts law."[14] Each side sought summary judgment.[15]

The Superior Court granted summary judgment for the Commonwealth.[16] The judge held that there was no fundamental right to same-sex marriage and accordingly applied rational basis review.[17] He found that plaintiffs' constitutional rights were not violated under such a standard.[18] Plaintiffs appealed, and the Supreme Judicial Court considered the consolidated case of *Goodridge v. Department of Public Health.*[19]

II. BACKGROUND

A. The Evolution of the Fundamental Rights Doctrine

Goodridge v. Department of Public Health unfolds in the context of the debate that has continued since the nation's inception: does the Constitution offer only the protections that it specifically states, or are there rights not enumerated that enjoy similar protections?[20] The early discussion is well captured in the 1798 case of *Calder v. Bull.*[21] Justice Chase wrote: "There are certain vital principles in our free Republican Government, which will determine and overrule an apparent and flagrant abuse of legislative power . . . an ACT . . . (for I cannot call it a law)

10. Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941, 949 (Mass. 2003).
11. *Goodridge*, 798 N.E. 2d at 949-50.
12. *Id.* at 950.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 951.
18. *Id.*
19. *Id.* at 960.
20. SULLIVAN & GUNTHER, *supra* note 4, at 452.
21. 3 U.S. 386 (1798).

contrary to [this] principle . . . cannot be considered a rightful exercise of legislative authority."[22] Justice Chase's position drew on the idea of natural law, viewing "a written constitution not as the initial source [of a law] but as a reaffirmation of a social compact preserving pre-existing fundamental rights—rights entitled to protection whether or not they were explicitly stated in the document."[23] Dissenting in *Calder*, Justice Iredell stated: "Some speculative jurists have held, that a legislative act against natural justice must, in itself, be void . . . , [however] the ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed on the subject . . . ."[24]

Justice Chase's ideas had origins within the highest tradition of English Law.[25] Sir William Blackstone had written: "Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter . . . so, when he created man . . . he laid down certain immutable laws . . . and gave him the faculty of reason to discover the purport of those laws."[26] Winston Churchill described the views of Chief Justice Sir Edward Coke in a similar way: "Coke himself was reluctant to admit that law could be made, or even changed. It existed already, merely awaiting revelation and expostulation."[27]

The debate continued upon enactment of the Fourteenth Amendment in 1868. The initial case law took a narrow approach similar to Justice Iredell's, viewing the Fourteenth Amendment as merely having a purpose to end slavery and ensure racial equality.[28] For example, initial attempts at the Incorporation Doctrine, whereby the Bill of Rights was applied to the states, failed.[29] In *The Slaughter-House Cases*, Justice Miller wrote:

> When the effect [of the Fourteenth Amendment] is to fetter and degrade the state governments by subjecting them to control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when it in fact radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people; the argument [opposing such a view] has a force that is irresistible, *in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results*

22. *Calder*, 3 U.S. at 388.
23. SULLIVAN & GUNTHER, *supra* note 4, at 452.
24. *Calder*, 3 U.S. at 398-99 (Iredell, J., dissenting).
25. JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 216 (Little, Brown and Co. 1943).
26. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE ENGLISH LAW § II, at 38-40 (Grigg Duyckink Long Collins, Chitty ed., 1827).
27. 2 WINSTON CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES 125 (Dodd, Mead & Co. 1956).
28. Slaughter-House Cases, 83 U.S. 36 (1872).
29. *Slaughter-House*, 83 U.S. at 36.

> *were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.*[30]

An examination of the plain language of the Fourteenth Amendment supports Justice Miller:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[31]

There is no language contained in this amendment that expresses a purpose of changing the relationship between State and Federal government "too clearly to admit of doubt."[32]

Yet as time passed, law not in the text would be discovered "by appeal from its letter to the spirit."[33] In *Lochner v. New York*,[34] the Court indicated a willingness to move past a literal interpretation of the word "liberty" in the Due Process Clause.[35] The Court held that liberty created a fundamental right to contract, and the state of New York was not allowed to interfere with labor contracts.[36] Justice Holmes' dissenting comment that "The Fourteenth Amendment did not enact Mr. Herbert Spencer's Social Statics"[37] would eventually prevail, and the right to contract is no longer considered fundamental.[38] However, other cases would emerge that applied *Lochner's* broad concept of liberty to other rights that were considered fundamental.[39] In *Skinner v. Oklahoma*,[40] the court invalidated a mandatory sterilization law, holding that the right to procreate was fundamental.[41] In *Meyer v. Nebraska*,[42] the Court expanded on these rights, stating: "[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according

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30. *Id.* at 78 (emphasis added).
31. U.S. CONST. amend. XIV.
32. *Slaughter-House*, 83 U.S. at 78.
33. WILLS, *supra* note 1, at 38; Lawrence H. Tribe, Lawrence v. Texas*: The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1938 (2004); *see generally* SULLIVAN & GUNTHER, *supra* note 4, at 452 (discussing the rise of substantive due process).
34. 198 U.S. 45 (1905).
35. *Lochner*, 198 U.S. at 64; Tribe, *supra* note 33, at 1938.
36. *Id.*; Tribe, *supra* note 33, at 1938.
37. *Id.* at 75 (Holmes, J., dissenting). Mr. Herbert Spencer's Social Statics was an economic treatise advocating a laissez-faire approach that was popular at the turn of the century. *Id.*
38. *See generally* SULLIVAN & GUNTHER, *supra* note 4 (detailing the end of the *Lochner* regime); Tribe, *supra* note 33, at 1938.
39. *See generally* SULLIVAN & GUNTHER, *supra* note 4, at 508-594 (discussing the evolution of the fundamental rights doctrine); Tribe, *supra* note 33, at 1938.
40. 316 U.S. 535 (1942).
41. *Skinner*, 316 U.S. at 541-43.
42. 262 U.S. 390 (1923).

to the dictates of his own conscience . . . ."[43] Justice Goldberg stated the evolving view in his concurring opinion in *Griswold v. Connecticut*:[44] "[T]he concept of liberty protects those personal rights which are fundamental, and is not confined to the specific terms of the Bill of Rights . . . there are additional fundamental rights which exist alongside those . . . specifically mentioned."[45] As this line of jurisprudence developed, the Court would hold that fundamental rights included the right to control one's body[46] and mind,[47] the right to travel,[48] to marry,[49] to vote,[50] and perhaps most controversially, the right to privacy.[51]

In 1973, the Supreme Court decided *Roe v. Wade*,[52] which used this privacy right, "founded in the Fourteenth Amendment's concept of personal liberty," to protect a woman's right to an abortion. Although limited to abortion, "*Roe* has proved to be key to subsequent decisions not limited to reproductive rights."[53] Nineteen years later, the Court expanded on *Roe* in *Planned Parenthood v. Casey*,[54] holding that traditions "afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[55]

In 2003, the Court indicated the broadest protection yet, holding in *Lawrence v. Texas*[56] that a state may not criminalize same-sex sodomy and that the constitutional guarantees of personal liberty and privacy protect "freedom of thought, belief, expression, and certain intimate conduct . . . beyond spatial bounds [of the home]."[57] In dissent, Justice Scalia noted that as a result of the holding, "laws against . . . same-sex marriage . . . [are] called into question."[58] The *Goodridge* plaintiffs agreed.[59]

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43. *Meyer*, 262 U.S. at 399.
44. 381 U.S. 479 (1965).
45. *Griswold*, 381 U.S. at 486-88 (Goldberg, J., concurring).
46. *Skinner*, 316 U.S. at 535.
47. *Meyer*, 262 U.S. at 390.
48. Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964).
49. Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 384 (1978).
50. Shaw v. Reno, 509 U.S. 630, 639 (1993).
51. *Griswold*, 381 U.S. at 479; Roe v. Wade, 410 U.S. 113, 153 (1973).
52. *Roe*, 410 U.S. at 113.
53. Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights Not Moral Opinions*, 27 HARV. WOMEN'S L.J. 345, 345 (2004).
54. 505 U.S. 833 (1992).
55. *Casey*, 505 U.S. at 851.
56. 123 S. Ct. 2472 (2003).
57. *Lawrence*, 539 U.S. at 562.
58. *Id.* at 2490 (Scalia, J., dissenting).
59. *Goodridge*, 798 N.E.2d at 960.

B. The Impact of the Fundamental Rights Doctrine on Legislation

A judicial by-product of the fundamental rights doctrine is the varying standards of review by which the Court reviews legislation.[60] When a fundamental right is present, the Court uses "strict judicial scrutiny"; a law must have a "compelling goal" and be "narrowly tailored" toward that goal.[61] Absent a fundamental right, the Court uses "rational basis" or "minimum rationality" review; a law must only have a "legitimate goal" and be "rationally related" toward that goal.[62] The naming of a standard, "a point somewhere on the spectrum from minimum rationality to per se prohibition in order to signal the appropriate level of judicial deference . . . the legislature should expect,"[63] is a recent addition to the Court's methodology.[64] It is often criticized as being more "conclusory than informative,"[65] leaving commentators to suggest that it "has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis."[66]

Worthy or not, varying levels of judicial scrutiny might be here to stay; sometimes it is harder to put jurisprudential genies back in the bottles whence they came than the more magical kind.[67] Clearly, an entire case can turn on the presence of a fundamental right.[68] *Goodridge* should have.[69]

III. *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*[70]

A sharply divided court issued the opinion.[71] The majority held that there was no rational reason to treat same-sex couples differently than opposite-sex couples.[72] Accordingly, the majority held that Massachusetts could not exclude same-sex partners from receiving marriage licenses.[73] Justice Greaney concurred with the result but wrote separately to indicate that he believed the decision should have been reached by applying a higher level of judicial scrutiny.[74] Justices Spina, Sosman, and

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60. Tribe, *supra* note 33, at 1916; *see generally* Lynn Wardle, *A Critical Analysis of Constitutional Claims for Same Sex Marriage*, 1996 BYU L. REV. 1, 14, 28 (discussing the impact of strict scrutiny).

61. *Goodridge*, 798 N.E.2d at 960, 976.

62. *Id.* at 983.

63. Tribe, *supra* note 33, at 1916.

64. *Id.* at 1916-17.

65. *Id.*

66. *Id.*

67. *See generally id.* (commenting on the merits of varying levels of judicial review).

68. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); *see generally* Wardle, *supra* note 60 (discussing the impact of strict scrutiny).

69. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); *see generally* Wardle, *supra* note 60.

70. 798 N.E.2d 941 (Mass. 2003).

71. *Goodridge*, 798 N.E.2d at 941.

72. *Id.* at 948.

73. *Id.*

74. *Id.* at 970 (Greaney, J., concurring).

Cordy each wrote separate dissents.[75] Justice Spina argued that the court had taken on a legislative role.[76] Justice Sosman suggested that the court had misapplied the minimum rationality standard.[77] Justice Cordy wrote that the opinion ignored the fact that the traditional definition of marriage was "between a man and a woman."[78] Each dissenting justice joined the dissents of the other two.[79]

A. The Majority Opinion: Applying Rational Basis Review

Chief Justice Marshall announced the opinion of the court, which was joined by Justices Ireland and Cowin.[80] The court recognized that legislative intent, along with history and tradition, defined marriage as a "union between a man and woman."[81] Nevertheless, noting the importance of marriage in a community, and the many benefits that flow only to married couples, the court held that to deny same-sex partners a marriage license violated their rights under the Massachusetts Constitution.[82] As Articles 1, 7, 10, and 12 of the Massachusetts Constitution draw language from the Fourteenth Amendment of the United States Constitution, the opinion relied heavily on federal Constitutional case law.[83]

In reaching its conclusion, the court examined the legislative rationales offered by the state: "(1) providing a favorable setting for procreation; (2) ensuring the optimal setting for child rearing, which the department defines as a two-parent family with one parent of each sex; and (3) preserving scarce State and private financial resources."[84] Ultimately, the court found that there was no rational relationship between these goals and the policy of excluding same-sex partners from receiving a marriage license.[85] Therefore, the majority declined to reach the issue of whether

75. *Id.* at 979 (Sosman, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 983 (Cordy, J., dissenting).

76. *Goodridge*, 798 N.E.2d at 975 (Spina, J., dissenting).

77. *Id.* at 979 (Sosman, J., dissenting).

78. *Id.* at 983 (Cordy, J., dissenting).

79. *Id.* at 983 (Cordy, J., dissenting); *id.* at 979 (Sosman, J., dissenting); *id.* at 975 (Spina, J., dissenting).

80. *Id.* at 948.

81. *Id.* at 952.

82. *Id.* at 968-70.

83. *Id.*

84. *Id.* at 961.

85. *Id.* at 948. Pointing out that the rationality review is not "toothless," *id.* at 960, the court noted:

> If total deference to the Legislature were the case, the judiciary would be stripped of its constitutional authority to decide challenges to statutes pertaining to marriage, child rearing, and family relationships, and, conceivably, unconstitutional laws that provided for the forced sterilization of habitual criminals; prohibited miscegenation; required court approval for the marriage of persons with child support obligations; compelled a pregnant unmarried minor to obtain the consent of both parents before undergoing an abortion; and made sodomy a criminal offense, to name just a few, would stand.

Id. at 966 n.31.

same-sex marriage was a fundamental right demanding strict scrutiny.[86] The decision of the Superior Court was vacated.[87]

B. Justice Greaney's Concurrence: Laws Prohibiting Same-Sex Marriage Should Receive Heightened Scrutiny

Justice Greaney filed a concurring opinion, agreeing with both the outcome and the remedy.[88] However, he suggested that a fundamental rights analysis was the correct approach to the case: "The withholding of relief from the plaintiffs, who wish to marry, and are otherwise eligible to marry, on the ground that the couples are of the same gender, constitutes a categorical restriction of a fundamental right."[89] Accordingly, he advocated the strict scrutiny that accompanies such a right.[90] He further noted that given the fact that marriage is "the cornerstone of our social structure, as well as the defining relationship in our personal lives,"[91] none of the state's rationales for interpreting G.L. c. 207 to exclude same-sex partners were sufficiently compelling to withstand strict scrutiny.[92]

Justice Greaney also argued that interpreting G.L. c. 207 to exclude same-sex partners was an equal protection violation of both the federal and state Constitutions based on sex.[93] He disagreed with those who suggested that there was no gender discrimination at all, pointing out: "Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man."[94]

C. The Dissents: Courts Should Not Act As A Legislative Body

The dissents attempted to discredit the majority opinion by pointing out its lack of deference to the legislature, the total lack of scientific evidence considered, and the majority's misapplication of the minimum rationality standard.[95] These justices also suggested that there was no right to same-sex marriage, fundamental or not.[96]

Justice Spina dissented on the grounds that the court had usurped the responsibilities of the legislature.[97] He wrote "What is at stake in this

86. *Id.* at 961.
87. *Id.* at 969.
88. *Id.* at 970 (Greaney, J., concurring).
89. *Id.* (Greaney, J., concurring).
90. *Id.* (Greaney, J., concurring).
91. *Id.* at 973 n.5 (Greaney, J., concurring).
92. *Id.* at 972 (Greaney, J., concurring).
93. *Id.* (Greaney, J., concurring).
94. *Id.* at 971 (Greaney, J., concurring).
95. *Id.* at 979 (Sosman, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 983 (Cordy, J., dissenting).
96. *Goodridge*, 798 N.E.2d at 979 (Sosman, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 983 (Cordy, J., dissenting).
97. *Goodridge*, 798 N.E.2d at 975 (Spina, J., dissenting).

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."[98]

Justice Sosman dissented, arguing that the majority had misapplied the rational basis standard.[99] He additionally objected to the lack of attention given to scientific study, noting that "studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples."[100]

Finally, Justice Cordy dissented on the grounds that the very definition of marriage was "a union between a man and woman," and that when the majority held this to be "merely conclusory," it was a "semantic sleight of hand."[101] While acknowledging that a classification based on sex should receive heightened review, he disagreed with Justice Greaney that this was such a case, based on the idea that people of neither sex were prohibited from marrying a person of the opposite sex.[102]

IV. ANALYSIS

This analysis suggests that the *Goodridge v. Department of Public Health* court did not address the true issue presented by the case, which is whether laws prohibiting same-sex marriage should receive the strict judicial scrutiny that accompanies a fundamental right.[103] Section (A) explains why the court was incorrect when it chose the rational basis standard of review.[104] Section (B) maintains that this standard was incorrectly applied.[105] Section (C) argues that same-sex marriage should be analyzed as a fundamental right,[106] by demonstrating that the true tradition at issue is the fundamental right of controlling "choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment."[107] Section (D) concludes by applying the strict scrutiny that would accompany such a right.

A. Choosing Rational Basis Review

By choosing rational basis review, the *Goodridge* court used the wrong standard.[108] In *Skinner v. Oklahoma*,[109] the United States Supreme

98. *Id.* at 974 (Spina, J., dissenting).
99. *Id.* at 979 (Sosman, J., dissenting).
100. *Id.* (Sosman, J., dissenting).
101. *Id.* at 984 (Cordy, J., dissenting).
102. *Id.* (Cordy, J., dissenting).
103. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring).
104. *Goodridge*, 798 N.E. 2d at 970 (Greaney, J., concurring).
105. *Id.* at 978 (Sosman, J., dissenting).
106. Tribe, *supra* note 33, at 1945.
107. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
108. *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring); *id.* at 983 (Cordy, J., dissenting); *id.* at 976 (Spina, J., dissenting); *see* Karen Loewy, *The Unconstitutionality Of Excluding Same-Sex Couples From Marriage*, 38 NEW ENG. L. REV. 555, 560-61 (2004).

Court held that "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival."[110] The Court confirmed in *Loving v. Virginia*[111] that marriage is a fundamental right, "one of the vital personal rights essential to the orderly pursuit of happiness."[112] And in *Zablocki v. Redhail*,[113] the Court held that marriage is "part of the 'fundamental right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[114] Yet the *Goodridge* court held that because "no fundamental right or 'suspect' class is at issue here . . . rational basis is the appropriate standard of review."[115] Despite citing language that confirms that marriage is a fundamental right, it proceeded to hold: "The right to marry is different from rights deemed fundamental for equal protection and due process purposes . . . ."[116] If the court is referring to traditional marriage, this is an incorrect statement of the law.[117] If the court is referring to same-sex marriage, it is undermining the legal foundation of its conclusion.[118] The opinion is replete with language, and rests on the principle, that same-sex partners applying for marriage licenses should be treated no differently than opposite-sex partners.[119] *Loving*, *Zablocki* and *Skinner* dictate that laws restricting opposite-sex marriage receive strict scrutiny.[120]

Certainly, state law may provide greater protection to its citizens than does the federal Constitution.[121] The *Goodridge* court noted that "Fundamental to the vigor of our Federal system of government 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.'"[122] However, a state may not provide less protection than the federal Constitution mandates.[123] In other words, federal cases "set the floor . . . but not the ceiling."[124] Since the court held that same-sex and opposite-sex couples should be treated the same, it was bound by federalism to apply strict scrutiny.[125]

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109. 316 U.S. 535 (1942).
110. Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)) (internal citations omitted).
111. 388 U.S. 1 (1967).
112. *Loving*, 388 U.S. at 12.
113. 434 U.S. 374 (1978).
114. *Goodridge*, 798 N.E.2d at 957 (citing Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).
115. *Id.* at 961.
116. *Id.* at 957.
117. Zablocki v. Redhail, 434 U.S. 374, 386 (1978); *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring).
118. *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring); *id.* at 983 (Cordy, J, dissenting).
119. *Goodridge*, 798 N.E.2d at 948.
120. *Loving*, 388 U.S. 1 (1967); *Skinner*, 316 U.S. 535 (1942); *Zablocki*, 434 U.S. 374 (1978).
121. Arizona v. Evans, 514 U.S. 1, 30 (1995).
122. *Goodridge*, 798 N.E.2d 941 (citing *Arizona v. Evans*, 514 U.S. at 7).
123. Loewy, *supra* note 108, at 556.
124. *Id.* at 558.
125. *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring).

The *Goodridge* court concluded that Massachusetts' ban did not survive rational basis review for either due process or equal protection.[126] Accordingly, the court did not consider plaintiffs' arguments that the case merited strict judicial scrutiny.[127] Undoubtedly, if a law fails rational basis review, *a fortiori* it fails strict scrutiny.[128] If G.L. c. 207 truly failed rational basis review, the choice of the wrong standard would be irrelevant.[129] However, as demonstrated below, G.L. c. 207 should in fact withstand rational basis review, leaving the question of whether it would survive strict scrutiny unanswered.[130]

B. Applying Rational Basis Review

The court asked the wrong question when it applied the rational basis test.[131] The real question under that test is not whether excluding same-sex marriages *will* achieve the goals set forth by the state, but whether it *might*.[132] While it is true that the rational basis test is "not toothless,"[133] it is the lowest standard of judicial review; a statute will survive if it addresses a legitimate state goal, and a rational legislator could think that the statute might advance the goal.[134]

Since "[t]he rational basis standard applied under the Massachusetts Constitution and the Fourteenth Amendment to the United States Constitution is the same," federal case law illustrates the point well.[135] In *Williamson v. Lee Optical*,[136] Justice Douglas confirmed that the mere theoretical possibility that a law would advance a goal was sufficient to withstand rational basis review.[137] He wrote:

> The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation . . . . The legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical . . . that every change should be accompanied by a prescription from a medical ex-

126. *Id.* at 941.
127. *Id.* at 961.
128. *Id.* at 972 (Greaney, J., concurring).
129. *Id.* (Greaney, J., concurring).
130. *Id.* (Greaney, J., concurring).
131. *Goodridge*, 798 N.E. 2d at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 972 (Greaney, J., concurring).
132. *Goodridge*, 798 N.E. 2d at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 972 (Greaney, J., concurring).
133. *Goodridge*, 798 N.E. 2d at 960.
134. Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955); *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 972 (Greaney, J., concurring).
135. *Goodridge*, 798 N.E. 2d at 983 (Cordy, J., dissenting).
136. 348 U.S. 483 (1955).
137. *Williamson*, 348 U.S. at 487.

> pert. *The law need not be in every respect logically consistent with its aims to be constitutional.*[138]

The first legislative rationale in *Goodridge* is that marriage provides a "favorable setting for procreation."[139] The majority held that it failed minimum rationality because "[t]he consummation of a marriage by coition is not necessary to its validity," and "impotency does not render a marriage void, but only voidable at the suit of the party conceiving himself or herself to be wronged."[140] This argument misses the point.[141] Just because some married people may not have children does not mean that marriage is not a "favorable setting for procreation."[142] If it *might* be such a setting, G.L. c. 207 survives rational basis review.[143]

The second legislative rationale is "ensuring the optimal setting for child rearing."[144] The court simply stated: "The 'best interests of the child standard' does not turn on a parent's sexual orientation or marital status."[145] Yet, as noted in Justice Sosman's dissent, for several thousand years, there has been a popular opinion that living in a home with a mother and father is in fact the optimal setting for a child.[146] This does not mean that this belief is necessarily true, but it does mean that it would not be irrational for a legislator to think that it is true.[147] That is all that the standard requires.[148]

The third legislative rationale is "preserving scarce State and private financial resources."[149] The court's contention that "an absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy"[150] is somewhat undermined by the extensive list of state benefits that are denied single people:

> [J]oint Massachusetts income tax filing; entitlement to wages owed to a deceased employee [public employees]; preferential options under the Commonwealth's pension system; preferential benefits in the Commonwealth's medical program; access to veterans' spousal benefits and preferences; financial protections for spouses of certain

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138. *Id.* (emphasis added).
139. *Goodridge*, 798 N.E.2d at 961; Loewy, *supra* note 108, at 559.
140. *Goodridge*, 798 N.E.2d at 961 (citing Franklin v. Franklin, 28 N.E. 681 (Mass. 1891) and Martin v. Otis, 124 N.E. 294 (Mass. 1919)); Loewy, *supra* note 108, at 559.
141. Loewy, *supra* note 108, at 559.
142. *Goodridge*, 798 N.E.2d at 961.
143. *Id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); *id.* at 972 (Greaney, J., concurring); Loewy, *supra* note 108, at 559.
144. *Goodridge*, 798 N.E.2d at 961.
145. *Id.* at 963.
146. *Id.* at 979 (Sosman, J., dissenting); *id.* at 996 (Cordy, J., dissenting); William C. Duncan, *The State Interests In Marriage*, 2 AVE MARIA L. REV. 153, 158 (2004).
147. *Goodridge*, 798 N.E.2d at 1000 (Cordy, J., dissenting); *see* Duncan, *supra* note 146, at 157.
148. *Goodridge*, 798 N.E.2d at 1000 (Cordy, J., dissenting).
149. *Id.* at 961.
150. *Id.* at 964.

> Commonwealth employees (fire fighters, police officers, and prosecutors, among others) killed in the performance of duty).[151]

It is arguably bad, mean-spirited policy to save money by denying certain people the right to marry, but it is not irrational to think that it *will* save money.[152]

C. Considering Fundamental Rights

1. In Search of Tradition

The true issue of this case is the question the *Goodridge* court left unanswered: whether marriage is a fundamental right for same-sex as well as opposite-sex couples.[153] A right is considered fundamental if it is "deeply rooted in this Nation's history and tradition."[154] Discerning such tradition is a treacherous endeavor.[155] In the history of marriage, many practices have been sustained over long periods of time, later to be rejected as wrong.[156] Although the practices became traditions, they have no place in a fundamental rights analysis.[157]

The ancient common law Right of Coverture stated that a husband had the sole right to control his wife's real property, and that he was the true owner of his wife's personal property.[158] For centuries, a wife could not sue her husband based on the common law idea that "a husband and wife are one, and he is the one."[159] The *Goodridge* court noted the traditional inequity between husband and wife:

> Thus, one early Nineteenth Century jurist could observe matter of factly that, prior to the abolition of slavery in Massachusetts, 'the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them, and they cannot be separated from him.'[160]

John Winthrop confirmed this view, stating a "husband is [a wife's] lord, and she is to be subject to him . . . a true wife would not think her condition safe and free but in her subjection to her husband's author-

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151. *Id.* at 955; Loewy, *supra* note 108, at 559.

152. *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting); *id.* at 972 (Greaney, J., concurring).

153. *Id.* at 972 (Greaney, J., concurring).

154. Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

155. Tribe, *supra* note 33, at 1937; *see generally* Mark Strasser, *Sodomy, Adultery and Same-sex Marriage: On Legal Analysis and Fundamental Rights*, 8 UCLA WOMEN'S L.J. 313 (1998) (discussing traditions in relation to a fundamental rights analysis).

156. *Goodridge*, 798 N.E.2d at 968; *see generally* Strasser, *supra* note 155.

157. *See generally* Strasser, *supra* note 155.

158. *Goodridge*, 798 N.E.2d at 968.

159. Chief Justice Joseph R. Greenhill, Remarks at the memorial service for Justice James P. Hart, Texas Supreme Court (Apr. 25, 1988) (commenting on Worden v. Worden, 224 S.W.2d 187 (Tex. 1949)); *see also Goodridge*, 798 N.E.2d at 968.

160. *Goodridge* 798 N.E.2d at 967 (citing Winchendon v. Hatfield, 4 Mass. 123, 129 (1808)).

ity."[161] The law did not allow interracial marriage in many states before *Loving*.[162] Yet in 1780 the law allowed future Chief Justice John Marshall to marry 14-year-old Mary Ambler.[163]

Each of the unfortunate practices above has been "deeply rooted in this Nation's history,"[164] but is not a fundamental right.[165] Perhaps the most distilled expression of the folly of blindly relying on tradition was observed by Oliver Wendell Holmes in 1897: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[166]

If the task of weeding out practices not properly part of a search for fundamental rights is difficult, harder yet is the task of conceiving the whole of what is left; to avoid seeing the "dots but not the path that passes through them."[167] Various members of the Court have insisted on the dots only, finding a fundamental right by determining which "activities belong to the historically venerated catalog of privileged acts and which do not."[168] In *Washington v. Glucksberg*,[169] Justice Rehnquist wrote that a fundamental right existed only if it could be found in a "careful description" of "concrete example[s]" throughout history.[170] In *Michael H. v. Gerald D.*,[171] Justice Scalia stated that "we refer to the most specific level at which a[n] . . . asserted right can be identified. General traditions provide imprecise guidance . . . [and] a rule of law that binds neither by text nor any particular, identifiable tradition, is no rule of law at all."[172]

Many voices fall into this trap over same-sex marriage; they search in vain for a specific tradition of same-sex marriage, missing the true tradition that is right in front of them.[173] Dissenting in *Lawrence v. Texas*, in which he noted that the door to same-sex marriage was now open, Justice Scalia observed that surely a thing that was once criminal cannot be considered a fundamental right:

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161. JOHN WINTHROP, THE HISTORY OF NEW ENGLAND FROM 1630-1649 228-30 (Boston: Little, Brown and Co. 1853).

162. 388 U.S. 1 (1967).

163. 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 151 (Houghton Mifflin Co. 1916).

164. *Moore*, 431 U.S. at 503; *Goodridge*, 798 N.E.2d at 990 (Cordy, J., dissenting).

165. *Goodridge*, 798 N.E.2d at 991 (Cordy, J., dissenting); *see generally* Strasser, *supra* note 155 (discussing traditions in relation to a fundamental rights analysis).

166. Greg Bailey, *Blackstone in America: Lectures by an English Lawyer Become a Blueprint for a New Nation's Laws and Leaders*, The Early American Review, *at* http://earlyamerica.com/review/spring97/blackstone.html (March 8, 2005).

167. Tribe, *supra* note 33, at 1936-37.

168. Tribe, *supra* note 33, at 1924.

169. 521 U.S. 702 (1997).

170. *Glucksberg*, 521 U.S. at 722-23; *see also* Tribe, *supra* note 33, at 1924.

171. 491 U.S. 110 (1989).

172. *Michael H.*, 491 U.S. at 127.

173. Tribe, *supra* note 33, at 1937.

> Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.[174]

This misses the rather obvious point that in 1868, it was also illegal for whites and African-Americans to marry, illegal for women to vote, and for all but three years of the nation's history, African-Americans were property.[175] Each of these examples today would violate a fundamental right.[176] Dissenting in *Goodridge*, Justice Spina followed the example of Justice Scalia: "Same-sex marriage is not 'deeply rooted in this Nation's history,' . . . same-sex marriage is not a right, fundamental or otherwise, recognized in this country."[177] Finding same-sex marriage absent from the history books, Justices Spina and Scalia declared it not a part of our tradition.[178]

Sir William Blackstone taught that a judge reveals, rather than makes the law.[179] In revealing a tradition, it is more important to consider the principles that emerge, rather than the combination of facts of individual cases.[180] To view traditions as a list of specific acts is to endanger "not just . . . substantive due process but also . . . the nature of liberty itself."[181] Justice Harlan noted this truth in his concurrence in *Griswold v. Connecticut*:[182] "[T]radition is a living thing. The full scope of liberty . . . cannot be found in or limited by the precise terms of specific guarantees . . . . Liberty is not a set of isolated points . . . but a rational continuum."[183] Lawrence Tribe provides the example that "[i]f the liberty

174. Lawrence v. Texas, 539 U.S. 558, 596 (2003) (citing Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986)).

175. *Goodridge*, 798 N.E.2d at 958, 967; John G. Culhane, *Uprooting The Arguments Against Same Sex Marriage*, 20 CARDOZO L. REV. 1119, 1165 (1999); Strasser, *supra* note 155, at 319 (discussing Justice Scalia's test for a fundamental rights analysis).

176. *See Goodridge*, 798 N.E.2d at 990 (Cordy, J., dissenting); Culhane, *supra* note 175, at 1165; Strasser, *supra* note 155, at 319; *Lawrence*, 539 U.S. 558 (2003).

177. *Goodridge*, 798 N.E.2d at 976 (Spina, J., dissenting).

178. *Id.* (Spina, J., dissenting); *Lawrence*, 539 U.S. at 596; *see generally* Tribe, *supra* note 33 (arguing against viewing fundamental rights as a set of specific acts).

179. BLACKSTONE, *supra* note 26, § II, at 38-40.

180. *See* Tribe, *supra* note 33, at 1937. The article offers a detailed discussion of the importance of seeing the principles that connect the cases rather than facts that make up the individual cases. *Id.*

181. Tribe, *supra* note 33, at 1923.

182. 381 U.S. 479 (1965).

183. *Griswold*, 381 U.S. at 479.

claimed by the dying patients in *Glucksberg*[184] could be flattened into an ostensible 'right' to an overdose of some barbiturate, then the claim in the flag-burning cases . . . could be flattened into a putative right to set fire to a painted cloth."[185] Reduced to its basic facts, a fundamental right can be read out of any act.[186]

Each case that supports the plaintiffs in *Goodridge* can be distinguished.[187] *Meyer v. Nebraska* was about education,[188] and *Skinner* dealt with sterilization.[189] *Griswold* was about contraception,[190] and *Roe v. Wade* about abortion.[191] *Zablocki*[192] and *Loving*[193] concerned the right to marry, not redefining it.[194] *Lawrence* was a case about private acts, not a demand for a government issued license.[195]

But the principle that unifies these precedents is the true tradition at issue; the inherent right of people to control "choices central to personal dignity and autonomy."[196] This idea is stated ably by Justice O'Connor in *Planned Parenthood v. Casey*:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[197]

Goodridge is "no more a case about a fundamental right" to same-sex marriage than *Loving* "was a case about a fundamental right" to interracial marriage, or *Bowers* "was a case about a 'fundamental right to sodomy.'"[198] Laws restricting same-sex marriage deserve to be held to strict judicial scrutiny, because they implicate the fundamental right of

184. *Glucksberg*, 521 U.S. at 702 (holding that Washington's prohibition against assisted suicide does not offend the Fourteenth Amendment).
185. Tribe, *supra* note 33, at 1923-24.
186. *Id.*
187. *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
188. Meyer v. Nebraska, 262 U.S. 390 (1923).
189. *Skinner*, 316 U.S. at 535.
190. 381 U.S. 479 (1965); *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
191. 410 U.S. 113 (1973); *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
192. 434 U.S. 374 (1978); *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
193. 388 U.S. 1 (1967); *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
194. *Loving*, 388 U.S. at 1; *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
195. 539 U.S. 558 (2003); *Goodridge*, 798 N.E.2d at 986 (Cordy, J., dissenting).
196. *Casey*, 505 U.S. at 851.
197. *Id.*
198. Wardle, *supra* note 60, at 43 (quoting Bowers v. Hardwick, 478 U.S. 186 at 192-94 (1986)); *see generally* Tribe, *supra* note 33 (arguing against viewing fundamental rights as a set of specific acts).

controlling "choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment."[199]

2. The Traditions from which America Broke

The right to define one's own concept of life, free from the compulsion of the state, is not only "deeply rooted in this nation's history and tradition."[200] It is the defining characteristic of the American experience.[201] This becomes evident when one examines "the traditions from which [America] developed as well as the traditions from which it broke."[202] Neither tradition can be understood without the presence of the other.[203] The European tradition from which the American settlers broke used the compulsion of a person's identity as an organizing principle.[204] This principle was so pervasive that it could be found in the religious, intellectual, social and economic realities of Seventeenth Century European life.[205] In every way, people's identities were dictated to them the moment they were born.[206]

a. Religious and Intellectual Compulsion

The right to control one's identity by way of religious and intellectual freedom was not granted to Seventeenth Century Europeans.[207] In England, James I and Charles I carried on the persecution of Catholics that had started the moment Henry VIII withdrew from the church.[208] The Test Act provided that no Catholic could hold office.[209] James I had Unitarians burned alive for doubting the divinity of Christ.[210] William Prynne had his ears cut off for publishing *Histriomatrix*, a series of blasphemous plays.[211] Jews had not been allowed in the country since the time of Edward I.[212] After the ascension of Oliver Cromwell in 1642, the control of the Puritans substituted itself for the control of the Church of England.[213] Gambling and betting were outlawed, and adultery was pun-

199. *Casey*, 505 U.S. at 851; Tribe, *supra* note 33, at 1951.
200. *Moore*, 431 U.S. at 503.
201. *Id.* at 503-04.
202. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
203. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).
204. *See generally* WILL & ARIEL DURANT, THE AGE OF REASON (Simon & Schuster 1961) [hereinafter DURANT I] (offering an in depth analysis of the relationship between government policies and private life in seventeenth century Europe).
205. *Id.*
206. *Id.*
207. CHURCHILL, *supra* note 27, at 150-51.
208. *Id.* at 151-52.
209. WILL & ARIEL DURANT, THE AGE OF LOUIS XIV 291 (Simon & Schuster 1963) [hereinafter DURANT II].
210. DURANT I, *supra* note 204, at 140.
211. *Id.* at 193.
212. CHURCHILL, *supra* note 27, at 315.
213. *Id.* at 312.

ishable by death.[214] Drinking, swearing, walking on the Sabbath, and athletic sports were also banned.[215]

If things improved under William and the Glorious Revolution of 1688, it was not as much as is popularly believed.[216] The Toleration Act was passed in 1689, but tolerance did not extend to Catholics, Unitarians, Jews, and Pagans.[217] Dissenters were not allowed to attend university and could not seek elective office.[218] In 1697, the strengthened legislature passed a law against blasphemy mandating prison for criticism of the church.[219] In 1699, laws were passed imposing life imprisonment for saying mass, and rewards were waiting for those who turned in violators.[220] A person not taking a loyalty oath to the Church of England lost the right to purchase or devise land.[221] Even Locke's *Epistola de Tolerantia*, urging tolerance as a principle, excluded atheists, Moslems, Catholics and Unitarians.[222] On the continent, the same situation existed.[223] Jews had been expelled from Spain and Portugal,[224] the Huguenots compelled to leave France, and the Pietists unwelcome in Germany.[225]

If a person were fortunate enough to find a secular government that would tolerate dissent, the church, which often acted as a sacred government, may not have been so understanding.[226] The parents of the philosopher Spinoza, expelled from Spain and Portugal, found refuge in Holland.[227] Spinoza's heretical beliefs were tolerated by the Dutch government.[228] Yet that which the government allowed, the church elders would not; Spinoza was expelled from the synagogue for his beliefs.[229] Other churches were equally intolerant. On February 26, 1616, Galileo was forced to appear before Urban VIII to recant his Copernican theories published in *De Revolutionibus Orbium Coelestium*.[230] Feeling that the connection between his head and body was but tenuous, he spoke the words: "With a sincere heart and unfeigned faith I abjure, curse, and detest the said errors and heresies . . . ."[231] The idea of defining one's con-

214. *Id.* at 311-12.
215. *Id.*
216. DURANT II, *supra* note 209, at 301-02.
217. *Id.* at 301, 589.
218. *Id.* at 301-02.
219. *Id.* at 302.
220. *Id.*
221. *Id.*
222. *Id.* at 589-90.
223. LOUIS M. HACKER, THE SHAPING OF THE AMERICAN TRADITION 17 (Columbia University Press 1947).
224. WILL DURANT, THE STORY OF PHILOSOPHY 162 (Simon & Schuster 1926) [hereinafter DURANT III].
225. HACKER, *supra* note 223, at 17.
226. *See* DURANT III, *supra* note 224 at 167 (recounting the excommunication of Spinoza).
227. *Id.* at 162.
228. *Id.* at 167.
229. *Id.*
230. DURANT I, *supra* note 204, at 607-08.
231. *Id.* at 610.

cept of life free from government compulsion must have seemed very far away.

b. Economic Compulsion

Economic life offered no greater freedom.[232] The economic world into which people were born was the world where they lived and died, and where their children lived and died.[233] In England, wages were stagnant by law, fixed since 1585 by the Statute of Apprentices.[234] The wages averaged around one shilling a day, yet life's essentials were as expensive in 1685 as they would be 200 years later.[235] Any attempt to increase pay would result in harsh penalties for employers and employees alike.[236] Not only how much a person was paid, but also who worked, was dictated by government policy; the freedom to make employment decisions was restricted by the Statute of Laborers.[237]

The situation elsewhere in Europe was no better.[238] In France, remnants of the feudal system remained as late as the mid-18th Century.[239] As little as two percent of landowners outside of the noble class or the church owned land *franc-alleu*, or "free from feudal dues."[240] Up to one million people were still bound in literal serfdom.[241] These peasants were "*adscripti glebae* (bound to the soil)."[242] They had no legal rights to devise or sell land—one of the primary ways of building wealth for a family over generations.[243] So onerous were the taxes owed that survival was lucky; improvement was impossible.[244] These "legal, feudal and guild hindrances" controlled people's economic identities.[245] Will Durant notes that "It was in this clamor of entrepreneurs to be freed from legal and moral restraints that the modern ideology of liberty began."[246]

232. DURANT II, *supra* note 209, at 257-58.
233. *Id.* at 258.
234. *Id.* at 257-58.
235. *Id.* at 258.
236. *Id.* at 257-58.
237. WILLIAM HARLAN HALE, THE MARCH OF FREEDOM 37 (Harper & Brothers 1947).
238. WILL & ARIEL DURANT, THE AGE OF VOLTAIRE 259 (Simon & Schuster 1965) [hereinafter DURANT IV].
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 259-60.
245. DURANT II, *supra* note 209, at 258.
246. *Id.*

c. Social Compulsion

The ability to shape one's identity by social class was equally limited.[247] The family into which a person was born defined his social class for life.[248] Regardless of how much talent a person might possess, or how hard a person might work, a lower class crib meant a lower class coffin. In addition, such accidents of birth were determinative in the professional options open to a person.[249] Access to office was determined not by talent, but according to the identity of one's parents.[250] James VI of Scotland had nothing more to recommend him as Elizabeth's successor than bloodline.[251] The House of Lords was (and is) equally blind to merit. Even faculty appointments at universities were determined by parentage.[252] At the anatomical division of the University of Edinburgh, the hereditary reign of the Monro dynasty lasted 126 years.[253] No one who had a different name needed to apply.[254] Inevitably, talent was dissipated over subsequent generations, and it was noted that in comparison to Professors Monro *primus* and *secondus*, Professor Monro *tertius* was "also, but not likewise."[255]

3. The Tradition from which America Developed

From all this the settlers fled.[256] The specific reasons were different, covering the spectrum from religious to economic, from social to political, but in common was the freedom they sought to define their lives free from government compulsion.[257] In almost every way, the old world had said 'this is who you are;' the new world would allow people to say 'this is who I am.'[258]

a. Legal Foundations

The natural law theories of John Locke provided an intellectual and legal framework.[259] Although Locke's *Two Treatises on Government*[260] had been intended as a defense of the Glorious Revolution of 1688, generations of settlers drew on his ideas freely.[261] In this view of the world,

247. *See generally* CHURCHILL, *supra* note 27 (providing a detailed discussion of English society and history).
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. WILLIAM ROUGHEAD, NOTABLE BRITISH TRIALS 3 (The John Day Co. 1927).
253. *Id.*
254. *Id.*
255. *Id.*
256. DURANT I, *supra* note 204, at 158.
257. *Id.*
258. *See generally* DAVID MCCULLOUGH, JOHN ADAMS (2001) (discussing the attitudes of colonial Americans).
259. MILLER, *supra* note 25, at 170.
260. JOHN LOCKE, TWO TREATISES ON GOVERNMENT (George Routledge & Sons 1884).
261. MILLER, *supra* note 25, at 170.

"there was a state of nature in which men enjoyed complete liberty."[262] Government existed only to ensure that people be free to control their own lives.[263] Created by "God and Nature," these natural freedoms of mankind to control his own life could not be restricted by governments.[264] These ideas drew heavily from the philosophy of Coke and Blackstone, which later supplied authority for Justice Chase in *Calder v. Bull*.[265] Upon this solid footing, the unifying principle of the colonies was that people had a natural right to make decisions defining their lives free from government compulsion.[266]

That the ideas of Locke, Coke and Blackstone are in fact "deeply rooted in this Nation's history" is further evidenced by an examination of political rhetoric over the years. Locke's ideas on the limited nature of government were echoed by Charles Pinckney, who believed that government existed to ensure that citizens received the "blessings of civil and religious liberty" that were their due.[267] The notion of pre-existing law espoused by Blackstone and Coke was confirmed by notable voices at the Constitutional Convention.[268] Thomas Jefferson wrote: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[269] George Mason suggested that "all men are born equally free and independent, and have certain inherent natural rights . . . among which are the enjoyment of life and liberty."[270] Pennsylvania delegate James Wilson agreed that "All men are, by nature equal and free . . . ."[271] One hundred and eighty five years later, John F. Kennedy confirmed that "[T]he rights of man come not from the generosity of the state, but from the hand of God."[272] Within this framework, the American nation evolved.

b. Religious and Intellectual Freedom

One manifestation of the idea that people were free to define their own concept of life free from the compulsion of the state was that colonial Americans were free to form their own religious identity without government compulsion.[273] To be sure, it was not an instant success; the settlers brought strains of the virus with the antidote.[274] The Puritans of

262. *Id.*
263. *Id.* at 170-71.
264. *Id.* at 171.
265. 3 U.S. 386 (1798).
266. MILLER, *supra* note 25, at 171.
267. PAGE SMITH, THE SHAPING OF AMERICA 78 (1980).
268. MCCULLOUGH, *supra* note 258, at 121.
269. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
270. MCCULLOUGH, *supra* note 258, at 121.
271. *Id.*
272. President John F. Kennedy, Inaugural Address (Jan. 20, 1961).
273. WINSTON CHURCHILL, THE GREAT REPUBLIC 31-32 (Random House 1956).
274. *Id.* at 31.

Massachusetts were as oppressive as their English counterparts.[275] The Salem witch trials were onerous by European medieval standards. Baptists were persecuted in Virginia and North Carolina.[276] But the historical line that culminated in the separation of church and state and freedom of speech reached back to 1636, when Roger Williams set up the colony of Rhode Island.[277] Winston Churchill notes that Rhode Island was "the only centre at that time in the world where there was complete religious toleration."[278] This historical path traveled through Jefferson's *Virginia Statute of Religious Liberty*, stating in part:

> Be it enacted by the general assembly, that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess . . . their opinion in matters of religion . . . .[279]

This historical trend culminated in the First Amendment, ensuring freedom of both religion and speech.[280] People would be free to hold and express sacred and secular views free from government compulsion.[281]

c. Social Freedoms

A second manifestation of the idea that people should define their own concept of life free from the compulsion of the state was that colonial Americans were free from the hereditary constraints of Europe.[282] The idea that a person's social identity was formed, and professional identity limited, at the moment of birth was anathema to the idea of America.[283] Jefferson believed in a "natural aristocracy" based on "merit and talent" rather than a hereditary one based on "connections and influence."[284] John Adams used the phrase "natural aristocracy" in a similar way in his *Defence of the Constitutions*.[285] The founders believed these ideas so strongly that Article I of the Constitution forbids citizens from receiving titles of nobility.[286] Even the title by which the President would be addressed received close attention; most members thought it impor-

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275. *Id.*
276. MILLER, *supra* note 25, at 194.
277. CHURCHILL, *supra* note 273, at 31-32.
278. *Id.* at 32.
279. HACKER, *supra* note 223, at 218.
280. U.S. CONST. amend. I.
281. *Id.*
282. Isaac Kramnik, *Introduction to* THE FEDERALIST PAPERS 21 (Isaac Kramnik ed., Penguin Books 1987).
283. *Id.* at 21-22.
284. *Id.* at 21.
285. MCCULLOUGH, *supra* note 258, at 406 (discussing JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS (Boston Pub. 1788)).
286. U.S. CONST. art. I, § 9, cl. 8.

tant to remove any notion of royalty.[287] In 1784, John Adams attended a production of *The Marriage of Figaro* at the Comedie-Francaise in Paris.[288] Adams undoubtedly appreciated Figaro's outburst in act V: "Because you are a great noble, you think you are a great genius! Nobility, a fortune, a rank, appointments to office: all this makes a man so proud! What did you do to earn all this? You took the trouble to get born—nothing more."[289] Figaro spoke for the new nation.[290] So did Senator John Edwards 220 years later, accepting the vice presidential nomination: "[In America,] the family you're born into won't control your destiny."[291] People would be able to define themselves free from the hereditary social compulsions of the old world.[292]

d. Constitutional Protections

The manifestation that most clearly establishes that making choices free from government compulsion is a tradition deeply rooted in the nation's history is the form of government the new nation chose.[293] The framers formed a government in which power was highly diffused in order to ensure against incursion of these rights.[294] In Federalist 51, James Madison wrote about the "double security"[295] of having "vertical separation of powers between the nation and the states, along with the horizontal separation of powers between the federal branches."[296] Attempts by one branch to invade the natural rights of people would be checked by another.[297] Restraints on the federal government were found in the fact that it would have only those powers that were specifically granted.[298] Amendment IX stated that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[299]Amendment X stated that all powers that were not mentioned were reserved for the people.[300] Amendments I through IV placed specific prohibitions on federal action.[301] It is noteworthy that the

287. MCCULLOUGH, *supra* note 258, at 406. It is amusing to remember that when John Adams suggested that the title of 'His Majesty the President,' Ralph Izard suggested the title of 'His Rotundity' would be an appropriate sobriquet for Adams. *Id.*

288. MCCULLOUGH, *supra* note 258, at 307.

289. *Id.*

290. *Id.*

291. Senator John Edwards, Address at the Democratic Convention, July 2004 (transcript available from the Kerry/Edwards campaign).

292. Kramnik, *supra* note 282, at 21.

293. *See generally* SULLIVAN & GUNTHER, *supra* note 4 (offering an overview of the structures of American government).

294. *Id.* at 85.

295. *Id.* at 85 (citing JAMES MADISON, FEDERALIST 51).

296. *Id.*

297. *Id.*

298. *Id.*

299. U.S. CONST. amend. IX.

300. U.S. CONST. amend. X.

301. U.S. CONST. amend. I-IV.

framers rejected a general grant of power as proposed (ironically) by the Virginia delegation, reading:

> That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases, to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by exercise of individual legislation.[302]

Such a grant would be too easy to stretch, and the framers wanted the limits clear.[303]

Although states were given plenary powers, specific limits on state power were found in Article I, section 10.[304] States would be barred from "entering into treaties, coining money, granting titles of nobility, passing bills of attainder, ex post facto laws, laws impairing contracts."[305] States would need congressional approval in order to "impose custom duties, enter interstate compacts, or engage in war."[306] In addition, federalism principles imposed other limits on state action, such as the dormant commerce clause.[307]

To be sure, there were heated differences in the framers' visions.[308] James Madison and Alexander Hamilton had famous disagreements on the strength of the federal government. Thomas Jefferson felt that the security of people's rights lay in reserving power in the hands of the populace.[309] Alexander Hamilton had less confidence in the populace, and felt that protection of people's rights lay in guarding against the "twin specters of despotism and anarchy."[310] Yet when compared with the world of George III and Urban VIII, these differences seem to be of degree rather than of kind.

In addition, the arguments were about means, not ends.[311] Jefferson felt that preserving liberties rested in a strong legislature.[312] Adams wrote "*people's rights and liberties* . . . can never be preserved without a strong executive. If the executive power, or any considerable part of it, is left in the hands of an aristocratical or democratical assembly, it will corrupt the legislature . . . and when the legislature is corrupted, *people are un-*

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302. SULLIVAN & GUNTHER, *supra* note 4, at 97.
303. *Id.*
304. *Id.* at 86.
305. *Id.*
306. *Id.*
307. *Id.* at 233.
308. *Id.* at 85.
309. *See generally* DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN (Little, Brown & Co. 1951) (discussing Jefferson's views on liberty).
310. RON CHERNOW, ALEXANDER HAMILTON 33 (The Penguin Press 2004).
311. MCCULLOUGH, *supra* note 258, at 375.
312. *See generally* MALONE, *supra* note 309 (discussing Jefferson's views on liberty).

done."[313] (emphasis added.) Yet both were concerned about protecting people's liberties. The common goal of the framers was ensuring the inherent right of people to make decisions that "define one's own concept of existence"[314] free from government compulsion.[315]

It is, of course, too simple to write that the Old World was bad and the New World was good.[316] The realities of European life that caused the settlers to leave also gave rise to reform in Europe.[317] The Age of Enlightenment crossed the Atlantic; it is perhaps no coincidence that Jefferson, Franklin, Voltaire and Mozart were contemporaries.[318] In addition, the failings of American democracy fill volumes, and rightly so. Yet the fact that a tradition is neither perfect nor exclusive does not deny its reality.[319] Making "choices central to personal dignity and autonomy" is the defining characteristic of the American experience, and is therefore "deeply rooted in this Nation's history and tradition."[320]

e. The American Tradition Applied to Same-Sex Marriage

Treating same-sex marriage as a fundamental right is in this uniquely American tradition of letting people make "choices central to personal dignity and autonomy" free from government compulsion.[321] Undoubtedly, some of the sources that may be used to sustain this argument would have been appalled to lend their name to the endeavor.[322] Blackstone famously referred to sodomy as "a heinous act not fit to be named."[323] Justice Harlan explicitly excluded homosexuality from protection in *Poe*.[324] But legal sources that acknowledge rights of freedoms create a thing that is beyond their control.[325] The fact that their ideas can be used in ways of which they would not approve is perhaps the greatest testament to their wisdom.[326] It is no answer to say that same-sex couples are free to be with each other, just not to marry.[327] Being married

313. MCCULLOUGH, *supra* note 258, at 375 (emphasis added).

314. *Casey*, 505 U.S. at 851.

315. *See generally* MCCULLOUGH, *supra* note 258 (offering an in depth discussion of the attitudes and goals of the framers of the Constitution).

316. *See generally* DURANT IV, *supra* note 238 (offering a detailed description of Eighteenth century European life).

317. *Id.*

318. *Id.*

319. *See generally Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (discussing both discarded and accepted traditions).

320. *Moore*, 431 U.S. at 503 (1977).

321. Tribe, *supra* note 33, at 1951; *see generally* Feigen, *supra* note 53 (advocating a constitutional right to same-sex marriage).

322. Tribe, *supra* note 33, at 1894.

323. *Id.*

324. *Poe*, 367 U.S. at 542 (1961) (Harlan, J., dissenting) ("Thus, I would not suggest that adultery, homosexuality, fornication, and incest are immune from criminal inquiry . . . .").

325. *See generally* Tribe, *supra* note 33 (discussing the meaning of freedom as it related to a fundamental rights analysis); *see generally* Loewy, *supra* note 108 (arguing that same-sex marriage is consistent with American notions of freedom).

326. *See generally* Tribe, *supra* note 33; Loewy, *supra* note 108.

327. *See generally* Tribe, *supra* note 33; Loewy, *supra* note 108.

changes how people view themselves, their relationship to each other, and their relationship as to the rest of the world.[328] To deny a marriage license is to shape an identity.[329]

Without a doubt, broad views of liberty need limiting principles.[330] In a sense, every action we take in life defines our meaning of existence; laws against drunk driving need not be judged by strict scrutiny because they might compel a person's identity.[331] But experience and instinct tell us that the thoughts we have, the words that we speak, the God to whom we pray, and the people we choose to love and cast our lot in life with surely are among the "choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment."[332]

D. Applying Strict Scrutiny

Accordingly, same-sex marriage should be viewed as a fundamental right.[333] However, that does not decide the question in and of itself.[334] A fundamental right is not an absolute right; its presence merely determines the proper standard of review.[335] Justice Cordy worried that allowing same-sex marriage would open the floodgates: "If one assumes that a group of mature, consenting, committed adults can form a marriage, the prohibition on polygamy (G.L. c. 207, § 4), infringes on their right to marry [and a law prohibiting it would not be allowed]."[336] It *would* infringe on their right; laws against the marriage of siblings or minors infringe on their rights as well, but are constitutional.[337] Strict scrutiny does not command that a right may not be infringed, just that it may only be infringed for a compelling reason.[338]

If strict scrutiny is applied to same-sex marriage, some of the rationales clearly fail.[339] If the rationale is "providing a favorable setting for procreation" then the law is both under- and over-inclusive; some people who have children are not married, and not all married couples

328. *See generally* Tribe, *supra* note 33; Loewy, *supra* note 108.
329. *See generally* Tribe, *supra* note 33; Loewy, *supra* note 108.
330. *Michael H.*, 491 U.S. at 127.
331. *Id.*
332. *Casey*, 505 U.S. at 851 (1992); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
333. *See generally* Loewy, *supra* note 108 (arguing that same-sex marriage is a fundamental right).
334. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); Strasser, *supra* note 155, at 329; Wardle, *supra* note 60, at 60.
335. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); Strasser, *supra* note 155, at 329; Wardle, *supra* note 60, at 60.
336. *Goodridge*, 798 N.E.2d at 984 n.2 (Cordy, J., dissenting).
337. *Id.*; Strasser, *supra* note 155, at 32; Wardle, *supra* note 60, at 60.
338. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); Strasser, *supra* note 155, at 329; Wardle, *supra* note 60, at 60.
339. *Goodridge*, 798 N.E.2d at 996, 1004 n.35 (Cordy, J., dissenting); Loewy, *supra* note 108, at 558.

have children.[340] The rationale of "preserving scarce State and private financial resources" fails for the same reason; not all married couples are a drain on the state budget, and some single people are such a drain.[341]

Other rationales take more careful consideration.[342] The rationale of "ensuring the optimal setting for child rearing" is perhaps the most important and controversial.[343] As Justice Sosman indicated, we are for all practical purposes in the first generation of same-sex couples raising children.[344] Although there are adamant beliefs on both sides, the effect on these children as they mature into adults is still by definition unknown.[345] Perhaps in the end, the constitutionality of a law prohibiting same-sex marriage will turn on the answer.[346] But the time to admit that the plaintiffs in *Goodridge* deserve the strict constitutional protection of a fundamental right is now.[347]

CONCLUSION

There is a natural tension between two truths in American life.[348] Law is by definition a conservative institution; it necessarily relies on precedent, history and tradition, so that people can know what it is and understand its meaning.[349] The law does not easily accept change.[350]

But the story of constitutional rights is the story of change.[351] In *United States v. Virginia*,[352] Justice Ginsburg quoted the historian Richard Morris: "A prime part of the history of our Constitution is the story of the extension of constitutional rights and protections to people once ignored or excluded."[353] Condoleezza Rice has said that "when the framers wrote the Constitution, they didn't mean me."[354] Today we mean her.[355]

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340. *Goodridge*, 798 N.E.2d at 996, 1004 n.35 (Cordy, J., dissenting).
341. *Id.* (Cordy, J., dissenting).
342. Duncan, *supra* note 146, at 164; *Goodridge*, 798 N.E.2d at 996 (Cordy, J., dissenting).
343. *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting); *id.* at 996 (Cordy, J., dissenting); Duncan, *supra* note 146, at 164; *see generally* Culhane, *supra* note 175, at 1194 (discussing the impact of same-sex marriage on children).
344. *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting); *id.* at 996 (Cordy, J., dissenting); *see* Duncan, *supra* note 146, at 164; *see generally* Culhane, *supra* note 175 at 1194.
345. *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting).
346. *Id.*
347. Tribe, *supra* note 33, at 1951; *see generally* Feigen, *supra* note 53 (advocating a constitutional right to same-sex marriage).
348. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 990, 1003 (Mass. 2003) (Cordy, J., dissenting).
349. *Goodridge*, 798 N.E. at 990, 1003 (Cordy, J., dissenting).
350. *Id.* (Cordy, J., dissenting).
351. United States v. Virginia, 518 U.S. 515 (1996).
352. 518 U.S. 515.
353. Loewy, *supra* note 108, at 556 (citing *Virginia*, 518 U.S. at 557).
354. Testimony of Condoleezza Rice before the 9/11 Commission (April 8, 2004) (transcript available from New York Times).
355. *Id.*

If, in the search for fundamental rights, one looks to specific past traditions rather than principles, constitutional rights would never have been expanded.[356] In 1865 there was no tradition of free African-Americans in the south. In 1955 there was no tradition of inter-racial seating on buses and in theatres. In 1975 (in a battle that is still not won) there was no tradition of women getting paid as much as men. Today there is no tradition of same-sex marriage. To insist on looking at yesterday to see who needs protection today is to ensure a static society.[357]

The answer to the fundamental rights question left unresolved in *Goodridge v. Department of Public Health* will be found in this tension.[358] All of American history points towards answering the question in favor of the *Goodridge* plaintiffs.[359] The individual cases that make up the Supreme Court's jurisprudence for fundamental rights are bright stars indeed.[360] These cases have recognized protection for one's body[361] and mind,[362] the right to travel,[363] to marry,[364] to vote,[365] and the right to privacy.[366] Yet it is the constellation that these stars combine to create that has lit American history.[367] When one considers "the traditions from which [America] developed as well as the traditions from which it broke,"[368] Justice O'Connor's idea that we have the inherent right to control "choices central to personal dignity and autonomy"[369] free from government compulsion is not *an* American tradition, it is *the* American tradition.[370] Viewed as such, treating same-sex marriage as a fundamental right is simply one more contiguous chapter in the American story.[371]

The Supreme Judicial Court of Massachusetts chose to sidestep the issue of fundamental rights.[372] As such, it put off the real question for another court and another day.[373] Yet, by properly holding for the plaintiffs, the *Goodridge* court forces us to address issues that "constitute the

356. *See generally* Tribe, *supra* note 33 (arguing against viewing fundamental rights as a set of specific acts).
357. *Id.*
358. *Goodridge*, 798 N.E.2d at 990, 1003 (Cordy, J., dissenting); *see* Culhane, *supra* note 175.
359. Tribe, *supra* note 33, at 1937.
360. *Id.*
361. Skinner v. Oklahoma, 316 U.S. 535 (1942).
362. Meyer v. Nebraska, 262 U.S. 390 (1923).
363. Aptheker v. Secretary of State, 378 U.S. 500 (1964).
364. Loving v. Virginia, 388 U.S. 1 (1967); *Zablocki*, 434 U.S. 374 (1978).
365. Shaw v. Reno, 509 U.S. 630 (1993).
366. Roe v. Wade, 410 U.S. at 153 (1973).
367. Tribe, *supra* note 33, at 1937.
368. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
369. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); *see generally* Tribe, *supra* note 33 (discussing the meaning of freedom as it relates to a fundamental rights analysis).
370. Tribe, *supra* note 33, at 1937.
371. *Id.*
372. *Goodridge*, 798 N.E.2d at 990, 1003.
373. *Id.*

essential core of constitutionalism and the cornerstone of American liberty."[374] That is no small accomplishment.[375]

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374. Tribe, *supra* note 33, at 1899.

375. *Id.*

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