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Articles

Gay Marriage in Rhode Island: A Big Issue in a Small State

Joan Catherine Bohl*

INTRODUCTION

In the 2003 opinion of *Goodridge v. Department of Public Health*,¹ a plurality of the justices² on the Massachusetts Supreme Judicial Court held that denying a marriage license to a same-sex couple violated the state constitution.³ Three dissenting members of the court, each writing separately, attacked, among other things, the plurality's very premise.⁴ Some scholars and pundits heralded the opinion as an unprecedented victory for civil rights,⁵ some condemned it as a destructive aberration.⁶ But, as a

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

2. Chief Justice Marshall wrote the plurality opinion, *id.* at 948, and was joined by Justices Cowin and Ireland. Justice Greaney filed a concurring opinion, *id.* at 970; Justice Spina filed a dissenting opinion, *id.* at 974, and was joined by Justices Sosman and Cordy.

3. *Id.* at 969.

4. *Id.* at 974.

5. See, e.g., Lisa Keen, *Battle Brews Over Marriage Lawsuits, Strategies Questioned*, BETWEEN THE LINES, May 18, 2006, at 8, available at <http://www.pridesource.com/download/1420-May-18.pdf>; Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87 (2004).

6. See, e.g., Michael Gaynor, *Values: Why Republicans Generally Remain Far Preferable* (May 18, 2006), <http://www.renewamerica.us>

practical matter, was the opinion such an extraordinary departure from a foundation of statutes, case law and public policy laid down over years, both in Massachusetts and in other states? Or simply the natural and logical, if unanticipated, extension of what had come before? For example, could the members of the Rhode Island Supreme Court examine Rhode Island's legal landscape in light of the decisional framework the *Goodridge* plurality supplied and conclude that gay marriage is a constitutional necessity in Rhode Island as well? This Article takes the position that it could. The same legal building blocks on which the *Goodridge* plurality rested each have a Rhode Island corollary. This Article will locate and assemble them, demonstrating how and why the Rhode Island Supreme Court could choose to join the *Goodridge* plurality.

This Article is in five parts. Part I gives the factual and procedural background to *Goodridge*. It also provides a brief overview of the plaintiff couples' legal arguments. My goal in this last regard is very modest. Numerous learned pieces have already explored the intricacies of the constitutional arguments on both sides of the issue.⁷ I seek only to give the reader a sense of the constitutional arguments plaintiffs invoked as they relate to the specific outcome of this – and any similar – legal challenge. Part II outlines the *Goodridge* plurality decision itself, isolating and highlighting the components of its analysis. Part III discusses the nature of marriage and family law in Rhode Island. Marriage obviously has virtually the same far reaching social significance in any state. Rhode Island law affecting marriage and family life, however, has already demonstrated a capacity to adapt to changing family configurations that seems a short step removed from recognizing gay marriage. Indeed, Rhode Island's legal recognition of the changing face of the American family may already exceed the level of analogous recognition found in pre-*Goodridge* Massachusetts law. Part IV examines how judicial review of Rhode Island's marriage law could unfold, if the *Goodridge* plurality's approach were followed. Finally, in

/columns/gaynor/060518; Lynn D. Wardle, *The Curious Case of the Missing Legal Analysis*, 18 *BYU J. PUB. L.* 309 (2004).

7. See, e.g., Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 *BYU L. REV.* 1 (1996); Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 *FORDHAM L. REV.* 1699 (1998).

conclusion, Part V touches briefly on the dissenting justices' position in *Goodridge*, while summarizing the established law that could logically lead to recognition of gay marriage in Rhode Island.

I. THE BACKSTORY⁸

During March and early April of 2001, seven same-sex couples in five different Massachusetts counties applied for marriage licenses from the appropriate city or town clerk's office.⁹ Each couple completed the required forms¹⁰ and paid the license fee. In each case the clerk either refused to accept the notice of intention to marry form or refused to issue a marriage license.¹¹

In Massachusetts, the Department of Public Health has statutory responsibility for the issuance of marriage licenses and oversees the registry of vital records and statistics which "enforces all laws" relating to the issuance of marriage licenses.¹² A Commissioner of Public Health retains ultimate supervisory authority.¹³ On April 11, the couples sued the Department of Public Health and the Commissioner of Public Health alleging that the denial of marriage licenses violated the Massachusetts state constitution.¹⁴

The Superior Court judge granted summary judgment in favor of the Department of Health and the Commissioner,¹⁵ holding that the "plain wording" of the marriage laws precluded an interpretation that marriage was permitted between same-sex couples.¹⁶ Although the marriage law provisions did not specifically limit marriage to opposite-sex couples,¹⁷ the definition of marriage derived from the common-law concept of a union between one man and one woman.¹⁸ The consanguinity

8. Backstory: "1. The experiences of a character or the circumstances of an event that occur before the action or narrative of a literary, cinematic or dramatic work. 2. A prequel." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 131 (4th ed. 2000).

9. *Goodridge*, 798 N.E.2d at 949.

10. *Id.*

11. *Id.* at 950.

12. *Id.* at 949.

13. *Id.* at 950 n.4.

14. *Id.* at 950.

15. *Id.* at 951.

16. *Id.*

17. *Id.* at 952.

18. *Id.* at 953.

provisions, furthermore, support this interpretation.¹⁹ The Superior Court also concluded that the state constitution did not guarantee “the fundamental right to marry a person of the same sex,”²⁰ and that such a restriction was rationally related to a legislative goal of protecting and promoting procreation.²¹ The plaintiffs appealed and the Supreme Judicial Court granted direct appellate review.²²

The plaintiffs first argued that the language of the Massachusetts marriage licensing law is actually gender neutral, both in terms of the minimal qualifications it sets and in terms of its record keeping requirements.²³ Massachusetts marriage law restricts the circumstances under which people less than eighteen years of age may marry.²⁴ It prohibits marriage between people with certain communicable diseases and prohibits polygamous marriages.²⁵ It also restricts marriages between men and women who are related by certain degrees of consanguinity.²⁶ None of these restrictions or requirements literally prevent a Massachusetts clerk from issuing a marriage license to a same-sex couple. All plaintiffs were at least eighteen years of age, none had the specified diseases or were seeking polygamous unions, and so on; thus, the plaintiffs argued, the court could resolve the case in their favor without addressing any constitutional questions at all.²⁷

In the alternative, the plaintiffs advanced arguments focusing on the nature of marriage itself rather than on the terms of the governing statutes. The plaintiffs invoked their substantive due process right to be free from government intrusion in decisions relating to family life.²⁸ The United States Supreme Court has

19. *Id.* at 951.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 952.

24. *Id.* (citing MASS. GEN. LAWS ch. 207, §§ 7, 25, 27 (2003)).

25. *Id.* at 951 (citing MASS. GEN. LAWS ch. 207, §§ 4, 8, 28A (2003)).

26. *Id.* (citing MASS. GEN. LAWS ch. 207, §§ 1, 2 (2003)).

27. *Id.* at 949 (describing the plaintiffs).

28. *See, e.g.*, Brief of Plaintiffs-Appellants at 21, 24, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Moore v. E. Cleveland*, 431 U.S. 494 (1977)). The plaintiffs also argued that the statutory limitation on marital partners constituted sex discrimination, a point the Supreme Judicial Court apparently did not consider sufficiently

recognized that the state may not intrude on this protected sphere of life to prohibit interracial marriage,²⁹ the use of birth control by married couples,³⁰ or abortion at early stages of pregnancy.³¹ These rights are within the same zone of privacy protecting all other aspects of family life and childrearing.³² In essence, the plaintiffs argued that the liberty interest in the creation and management of one's family applies to the choice of one's spouse. The plaintiffs thus framed the issue as a facet of the right to marry, *not* as the right to marry a person of the same sex.³³ Furthermore, if the choice of one's partner, including a same-sex partner, is thus protected then the state may interfere with the choice only in order to further a compelling state interest, and only by means narrowly tailored to achieve that end.³⁴

In addition to the substantive argument that the decision to marry a person of the same sex is part of one's liberty interest in the self-definition of family, the plaintiffs made a related procedural argument. Since marriage is a fundamental right, they argued, the marriage statutes must apply equally to all individuals who otherwise qualify, whether they want to marry a same-sex partner or an opposite-sex partner.³⁵ This equal protection argument draws heavily on decisions that invalidate restrictions on interracial marriage.

persuasive to merit discussion. *Id.* at 8.

29. *Id. passim* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

30. *Id.* at 25, 83 n.61 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

31. *Id.* at 12, 22, 27, 40 (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

32. *Id.* at 42-48.

33. This seemingly semantic distinction was critical to the Superior Court's rejection of the plaintiffs' argument. The Superior Court held that although opposite-sex marriage is a fundamental right "deeply rooted in the nation's history and tradition," a right to "same sex marriage" was not. *Goodridge v. Department of Public Health*, No. 20011647A, 2002 WL 1299135, at *9, *11 (Mass. Super. Ct. May 7, 2002) (citations omitted).

34. Brief of Plaintiffs-Appellants, *supra* note 28, at 28-29 (citing *Zablocki v. Redhail*, 434 U.S. 374, 387-88 (1978); *Marcoux v. Att'y Gen.*, 375 Mass. 63, 66 (1978)).

35. *Id.* at 33-34.

II. THE *GOODRIDGE* PLURALITY DECISION

The *Goodridge* plurality first set the stage for its decision by introducing each individual member of the plaintiff couples.³⁶ The court was addressing whether the state can constitutionally ban same-sex partners – *any* same-sex partners – from marrying.³⁷ The details of *these* plaintiffs' lives – length of their relationships, their professions and the ages of their children, for example – were technically irrelevant.³⁸ Yet by beginning with this litany of human detail, the plurality shifted the focus away from any broad or general formulation of the issue. Clearly, the state's ban on gay marriage must be justifiable, if at all, when seen in the context of specific human experiences.

The *Goodridge* plurality held, of course, that the ban on gay marriage was unconstitutional. Its holding rests on three basic points. First, *Goodridge* affirmed the importance of marriage as an institution,³⁹ and noted the general state policy favoring marriage.⁴⁰ In this regard, the court noted that marital status is a significant source of social, financial, and legal benefits for those who marry and for marital children.⁴¹ It noted that the state facilitates bringing children into families, whether by "traditional" means, assisted reproduction or adoption, and does so without regard to parents' marital status.⁴² State policy is to provide all children with an opportunity to flourish.⁴³ By exploring the diverse range of practical benefits that flow from marriage,

36. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949-50 (Mass. 2003).

37. *Id.* at 948.

38. Facial invalidation of a statute means that it is unconstitutional no matter how it is applied. In contrast, invalidating a statute "as applied" strikes down the statute only as it was applied to the individuals petitioning the court. See, e.g., Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1323 (2000); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 237-38 (1994).

39. 798 N.E.2d at 957.

40. *Id.* at 955-57.

41. *Id.* at 956-57.

42. *Id.* at 962 n.24.

43. *Id.* at 963.

Goodridge essentially set the ground rules for judicial review. Logically, if the practical implications of marriage are so far reaching, then any defense of current limitations on who may marry must be practical and comprehensive as well.

Second, *Goodridge* noted that the United States Supreme Court affirmed the essential dignity of private, consensual sexual relationships in *Lawrence v. Texas*.⁴⁴ *Lawrence* thus expressly overruled the High Court's prior decision in *Bowers v. Hardwick*,⁴⁵ and found intimate homosexual relationships entitled to the same privacy under the Federal Constitution⁴⁶ formerly accorded only to intimate heterosexual relationships.

Finally, *Goodridge* addressed the nature and level of appropriate judicial review. It did not conclude that the Massachusetts constitution offers *more* protection than the Federal Constitution,⁴⁷ but did observe that the liberty and equality guarantees of the Massachusetts constitution both protect citizens from unwarranted government intrusion into protected spheres of life and guarantees "freedom to' partake in benefits created by the state for the common good."⁴⁸ It then applied a form of rational basis review that incorporated both social science data and logic to conclude that restricting marriage to opposite-sex couples is irrational.⁴⁹ Under ordinary circumstances this approach alone would pose quite a formidable barrier to the defense. In Massachusetts such heightened rational basis is not "toothless"⁵⁰ and requires far more than unsupported

44. *Id.* at 948 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

45. 478 U.S. 186 (1986).

46. *Lawrence*, 539 U.S. at 578.

47. *Goodridge*, 798 N.E.2d at 948 (stating, without further qualification, that "[t]he Massachusetts Constitution is, *if anything*, more protective of individual liberty and equality than the Federal Constitution") (emphasis added); see also *Commonwealth v. Ellis*, 708 N.E.2d 644, 650 (Mass. 1999) (noting that the Massachusetts Constitution generally provides due process protection that is coextensive with the protection afforded by the United States Constitution); *Trigones v. Att'y Gen.*, 652 N.E.2d 893, 896 (Mass. 1995) (holding that "[f]or the purpose of due process analysis, our standard of review under the cognate provisions of the Massachusetts Declaration of Rights usually is comparable to that under the Fourteenth Amendment to the United States Constitution").

48. *Goodridge*, 798 N.E.2d at 959.

49. *Id.* at 961.

50. *Id.* at 960 n.20.

assumptions⁵¹ that prove sufficient to satisfy classic rational basis review.⁵² Furthermore, since the court also framed its inquiry around the *specific* tangible benefits marriage provides family members, it easily found no specific rational bases for denying them to same-sex couples.⁵³

To a limited extent, *Goodridge* rests on logic, unsupported and unupportable by hard data. For example, the court responded to the argument that same-sex marriage would destroy the institution of marriage itself by commenting that a same-sex couple's desire to marry is a testament to the institution's continued viability.⁵⁴ It is impossible to evaluate whether the justices on the Rhode Island Supreme Court would follow the same logic. Most of *Goodridge*, however, rests on types of precedent and policy found in Rhode Island as well as in Massachusetts. Considered in this light, no significant barrier currently exists in Rhode Island law that would prevent the *Goodridge* analysis from unfolding there.

III. THE NATURE OF MARRIAGE

In Rhode Island, as in all states, marriage represents not only a profound personal commitment but access to a far reaching array of important and even lucrative benefits.⁵⁵ In Rhode Island,

51. *Id.* at 960 (citing *English v. New England Med. Ctr.*, 541 N.E.2d 329, 333 (Mass. 1989)).

52. *Lindsley v. Nat'l Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (noting that a law will withstand rational basis review "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed"). For a more recent statement of the rational basis standard in a factually relevant context, see *Lofton v. Secretary of Department of Children and Family Services*, 377 F.3d 1275, 1277 (11th Cir. 2004) (noting that under typical rational basis review, "[t]he question is simply whether the challenged legislation is rationally related to a legitimate state interest"). Under this deferential standard, a legislative classification "is accorded a strong presumption of validity," *Heller v. Doe*, 509 U.S. 312, 319 (1993), and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *id.* at 320 (citation omitted). This holds true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

53. *Goodridge*, 798 N.E.2d at 960-66.

54. *Id.* at 965.

55. See, e.g., Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same Sex Marriage*, 68 S. CAL. L. REV. 745,

as in Massachusetts, entry into marriage is controlled by licensing statutes which clearly contemplate a union between one man and one woman.⁵⁶ But, as the Supreme Judicial Court noted, this conception of marriage is rooted in common law.⁵⁷ In Rhode Island, as in Massachusetts, however, the common-law restriction does not necessarily mean that a challenge to the marriage licensing laws is doomed to fail.

Rhode Island case law, even more clearly than Massachusetts case law, explicitly recognizes that the institution of marriage must evolve to keep pace with society. For instance, in *Landmark Medical Center v. Gauthier*,⁵⁸ a medical center sought payment for medical services provided to the defendant's deceased husband,⁵⁹ arguing that the defendant was liable under the doctrine of necessities.⁶⁰ The trial court certified a question to the Rhode Island Supreme Court, asking whether the doctrine of necessities obligated a wife to pay for services provided to her husband,⁶¹ given that, at common law, such an obligation was imposed on the husband only.⁶²

The Rhode Island Supreme Court unhesitatingly rejected a literal interpretation of the common-law doctrine,⁶³ and required the defendant wife to pay.⁶⁴ The court noted that, originally, the doctrine of necessities was simply a recognition of the fact that, at common law, a woman lost all property rights upon marriage.⁶⁵ One who provided services to a married woman would have had no choice but to look to the husband for payment.⁶⁶ Modern marriage, on the other hand, is "a shared enterprise, a joint undertaking that in many ways * * * is akin to a partnership."⁶⁷

782-86 (1994) (listing benefits flowing from marriage).

56. R.I. GEN. LAWS § 15-1-1 to -6 (2003).

57. *Goodridge*, 798 N.E.2d at 952.

58. 635 A.2d 1145 (R.I. 1994).

59. *Id.* at 1146.

60. *Id.* at 1152 (noting that "*Landmark* [sought] an evenhanded approach to the necessities doctrine").

61. *Id.* at 1147.

62. *Id.* at 1149.

63. *Id.* at 1152.

64. *Id.* at 1149.

65. *Id.*

66. *Id.* at 1149-50.

67. *Id.* at 1152 (quoting *Jersey Shore Med. Ctr.-Filkin Hosp. v. Baum's Estate*, 417 A.2d 1003, 1010 (N.J. 1980)).

Women were no longer limited to the role of homemaker, and to continue to adhere to “outdated policy” would be “utterly unfair.”⁶⁸ Thus, the court held that the doctrine of necessities applied equally to either the husband or wife, rendering either financially liable for necessary goods or services provided to the other.⁶⁹ Furthermore, the court concluded that its holding could be properly applied retroactively to the defendant widow in the case before it because profound social change had so clearly “foreshadowed” such a reinterpretation.⁷⁰ In this respect, the court concluded, the institution of marriage had evolved, and so must the law.

Furthermore, Rhode Island state policy favoring marriage is expressed, as in Massachusetts, through state laws that confer a variety of benefits on married couples simply because they are married. Some examples illustrate these policies. Spouses enjoy a marital privilege in civil trials; one may not testify against the other except in a proceeding intended to dissolve the marital relationship itself.⁷¹ A decedent’s spouse is the beneficiary under the state’s wrongful death act.⁷² A married person is entitled to recover damages for loss of consortium caused by tortuous injury to his or her spouse.⁷³ Additionally, access to some property rights and state benefits would not exist but for marriage. For example, surviving spouses receive a vested life estate in real property owned by the decedent at death.⁷⁴ Also, a “Community Spouse Resource Allowance” (CSRA) is available to the “spouse remaining in the community when one member of a married couple must be institutionalized for medical reasons.”⁷⁵

68. *Id.*

69. *Id.*

70. *Id.* at 1153.

71. R.I. GEN. LAWS § 9-17-13 (1997); *Baker v. Traudt*, WC No. 88-46, 1988 R.I. Super. LEXIS 9 (R.I. Super. Nov. 16, 1998).

72. R.I. GEN. LAWS § 10-7-2 (1997 & Supp. 2005); *Commercial Union Ins. Co. v. Pelchat*, 727 A.2d 676, 680-81 (R.I. 1999).

73. R.I. GEN. LAWS § 10-7-1.2; *Egan v. Ashley*, C.A. No. 93-545, 1994 R.I. Super. LEXIS 100 (R.I. Super. June 21, 1994).

74. *See Carr v. Carr*, C.A. No. PP 88-4085, 1993 R.I. Super. LEXIS 7 (R.I. Super. Apr. 22, 1993) (citing R.I. GEN. LAWS § 33-25-2 (1995)).

75. *See Laporte v. R.I. Dep’t of Human Servs.*, C.A. No. PC 05-0077, 2005 R.I. Super. LEXIS 163, at *1-8 (R.I. Super. Nov. 9, 2005) (describing the Department of Health Services’ assessment that takes place prior to a determination of medical assistance eligibility).

For children, the marital status of their parents is so crucial to their well being that Rhode Island, like Massachusetts, has taken affirmative steps to ensure that non-marital children enjoy legal rights equivalent to the rights of marital children. At common law, children whose parents were married had an automatic right to support and a right to inherit from their fathers. Illegitimate children, in contrast, were “nullius filius” at common law – literally “no one’s son.”⁷⁶ By statute, Rhode Island has provided that illegitimate children may inherit from a deceased parent “as if born in lawful wedlock.”⁷⁷ Similarly, portions of the Uniform Paternity Act were enacted to provide a means of obtaining support for illegitimate children.⁷⁸ These attempts to ensure illegitimate children’s rights cannot substitute, of course, for the full panoply of intangible benefits that marital children enjoy through their parents. Attempts to equalize children’s status do demonstrate, however, both the significance of marriage and a corresponding state policy of eliminating the penalty of illegitimacy insofar as it affects innocent children.

Accordingly, under Rhode Island as well as Massachusetts law, marriage must be understood as a wellspring of many specific and tangible benefits.

IV. PRIVACY FOR INTIMATE, CONSENSUAL ADULT RELATIONSHIPS

In 2003, the United States Supreme Court swept away long-standing barriers to official state acceptance of consensual adult homosexual intimacy. In *Lawrence v. Texas*⁷⁹ the Court reviewed a challenge to a Texas criminal statute prohibiting “deviate sexual intercourse”⁸⁰ and brought by two men who were apprehended while engaged in private, consensual sexual activity within the home. In ruling that the statute was unconstitutional, the *Lawrence* Court noted that a core concept of human dignity⁸¹

76. See Ronald J. Resmini, *The Law of Domestic Relations in Rhode Island*, 29 SUFFOLK UNIV. L. REV. 379, 464 (1995) (citing *Trimble v. Gordon*, 430 U.S. 762, 768 (1977); *In re Estate of Cherkas*, 506 A.2d 1029, 1029-30 (R.I. 1986); *R.I. Hosp. Trust Co. v. Hodgkin*, 137 A. 381, 383 (R.I. 1927)).

77. R.I. GEN. LAWS § 33-1-8 (1995).

78. See *Waldick v. Piner*, 488 A.2d 1218, 1220 (R.I. 1985).

79. 539 U.S. 558 (2003).

80. *Id.* at 563 (citing TEX. PENAL CODE ANN. § 21.06(a) (2003)).

81. See *id.* at 567.

embodied in the substantive guarantees of the Fourteenth Amendment precluded government intrusion “into deeply personal realms of consensual adult sexual intimacy and one’s choice of an intimate partner.”⁸² Prior to *Lawrence*, a state seeking to sanction gay marriage by any means would have run afoul of the United States Supreme Court’s conclusion in *Bowers v. Hardwick*.⁸³ In that case, the Court concluded that the question presented to it was whether “the Federal Constitution confers a fundamental right on homosexuals to engage in sodomy,”⁸⁴ and answered the question in the negative.⁸⁵ *Lawrence* overruled *Bowers*,⁸⁶ noting that this narrow formulation of the issue demonstrated the *Bowers* Court’s flawed understanding of the expansive liberty issue at stake.⁸⁷ In fact, *Lawrence* held, all intimate adult consensual activity was protected within the same zone of constitutional privacy.⁸⁸ Homosexual activity that formerly could be disapproved of or criminalized could now receive the official sanction of marriage, as a matter of law.

Judicial Review of Rhode Island’s Marriage Law – Strict Scrutiny or Rational Basis?

If the fundamental right to marry includes the right to marry a person of the same sex, then marriage laws which do not allow such marriages should be strictly scrutinized in the courts – and probably would not survive such scrutiny.⁸⁹ Yet *Goodridge* avoided the political “hot potato” of labeling the right to enter into a homosexual marriage as a fundamental right. It did so by asserting that the statutory classification created by the Massachusetts marriage law harmed same-sex households so

82. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (describing the U.S. Supreme Court’s holding in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

83. 478 U.S. 186 (1986).

84. *Id.* at 190.

85. *Id.* at 195-96.

86. *Lawrence*, 539 U.S. at 578.

87. *Id.* at 567.

88. *Id.* at 567, 574.

89. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 981-82 (Sosman, J., dissenting) (describing the plurality’s citation to cases addressing fundamental rights analyzed under strict scrutiny while avoiding such a label in the case before it).

seriously and in so many ways that it could not even be considered a legitimate exercise of the state's authority to regulate conduct; thus, it could not even satisfy rational basis review.⁹⁰ In Massachusetts, the state argued that existing marriage laws had a rational basis because they limited the right to marry to opposite-sex couples and thus promoted procreation and provided the "optimum environment for childrearing."⁹¹

The *Goodridge* plurality rejected these arguments in terms that would transplant easily into the soil of Rhode Island law. *Goodridge* noted that neither procreation nor the capacity to procreate were requirements for a valid marriage under Massachusetts law;⁹² people seeking a marriage license are not asked if they plan to – or are capable of – conceiving children.⁹³ The same is true in Rhode Island.⁹⁴ Moreover, *Goodridge* added that at common law even an absolute inability to engage in sexual relations did not automatically void a marriage;⁹⁵ the common law underpinnings of marriage law are, of course, the same in Rhode Island. *Goodridge* noted, further, that state law did not demonstrate a preference that children grow up in families headed by two opposite-sex parents.⁹⁶ In fact, Massachusetts had taken explicit steps to eliminate legal distinctions between children based on family status.⁹⁷ As outlined earlier, Rhode Island has

90. The court concluded that the plaintiffs' constitutional challenge can be analyzed either in terms of the classification it creates – an equal protection analysis – or in terms of the interest affected – a substantive due process analysis. *Id.* at 953. It elected to follow U.S. Supreme Court precedent and disregard any theoretical analytical distinctions, noting the "convergence of due process and equal protection principles in cases concerning parent-child relationship," *id.* (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996)), and that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects...." *Id.* (quoting *Lawrence*, 539 U.S. at 575).

91. *Goodridge*, 798 N.E.2d at 961. Although the state argued these points separately, the court noted that the first "shades imperceptibly into its second." *Id.* at 962.

92. *Goodridge*, 798 N.E.2d at 961 (explaining MASS. GEN. LAWS ch. 207 § 28A (2003)).

93. *Id.*

94. R.I. GEN. LAWS § 15-1-1 to -6 (2003).

95. *Goodridge*, 798 N.E.2d at 961 n.22 (citing *Martin v. Otis*, 124 N.E. 294 (Mass. 1919)).

96. *Id.* at 962.

97. *Id.* at 963 (citing MASS. GEN. LAWS ch. 209C (2003) (paternity

taken analogous steps, both legislatively and judicially, with the same goal explicitly stated. Finally, *Goodridge* noted, generally, that the U.S. Supreme Court rejected any notion of a typical American family;⁹⁸ one family configuration should not be elevated over another.

Goodridge's rational basis review departed from "typical" rational basis review by asking whether the legislative justifications for limitations on marriage are persuasive rather than merely rational.⁹⁹ In a typical case in which plaintiffs challenge a statute, plaintiffs must show that the legislation cannot even "satisfy a minimum threshold of rationality."¹⁰⁰ The *Goodridge* plurality, however, incorporated a version of rational basis often associated with analysis of statutes that may harm a disadvantaged class of people.¹⁰¹ In the hands of the *Goodridge* plurality, rational basis review extended far beyond identifying plausible legislative assumptions.¹⁰² Instead, it used rational basis review to explore and apply the logic of related state laws and the significance of social science data.¹⁰³ Without such an approach – the dissenters were quick to point out¹⁰⁴ – the plaintiff couples would have been unsuccessful. Any court, then, that was unwilling to expand its interpretation of rational basis could not follow *Goodridge's* lead.

Rhode Island courts have already recognized such "searching" rational basis review in other contexts, however, and so would logically reach the same conclusion *Goodridge* reached using the same approach. For example, the Rhode Island Supreme Court has acknowledged that a more searching level of rational basis review is appropriate when legislation singles out a group that has suffered discrimination or stereotyping.¹⁰⁵ One need look no

statute); *Powers v. Wilkerson*, 506 N.E.2d 842 (Mass. 1987)).

98. *Id.* at 963 (citing *Troxel v. Granville*, 530 U.S. 57, 63 (2000)).

99. *Id.* at 980 (Sosman, J., dissenting).

100. *See id.* at 978; *see also supra* note 52 and cases cited therein.

101. *Id.* at 960 (citing *English v. New England Med. Ctr.*, 541 N.E.2d 329 (Mass. 1989)).

102. The *Goodridge* plurality did not specifically establish precedential support for this choice of standards, electing, instead, to state generally that in Massachusetts, rational basis is not "toothless." *Id.* at 960 (citations omitted).

103. *See id.* at 980-81 (Sosman, J., dissenting).

104. *See id.* at 980; *see also id.* at 984 (Cordy, J., dissenting).

105. *See, e.g., In re Advisory Opinion to the House of Representatives*, 519

farther than Rhode Island's Fair Housing Act for independent legislative recognition that homosexual people are such a group.¹⁰⁶ Similarly, in *Mackie v. State*, a Rhode Island Superior Court used medical and social science data to conclude that distinctions embodied in the Rhode Island Lead Hazard Mitigation Act were irrational.¹⁰⁷ The Act was designed to reduce the presence of lead-based paint in residential rental property and so to reduce the incidence of lead poisoning in young children.¹⁰⁸ Landlords who lived on premises in buildings consisting of three units or fewer were exempted, however, and did not have to remove lead-based paint.¹⁰⁹ The court found that young children in three-unit dwellings with a landlord living on the premises were as likely to be poisoned by lead paint as those in larger dwellings with absentee landlords – plausible legislative assumptions concerning property maintenance notwithstanding.¹¹⁰

Viewed through the lens of this stronger rational basis review, justifications for limiting marriage in Rhode Island to opposite-sex couples based on the bearing and rearing of children could easily be rejected. In *Goodridge*, the state asserted that the marriage license law was rational because confining marriage to opposite-sex couples promotes procreation and ensures that children are raised in an optimal setting.¹¹¹ *Goodridge's* general reasons for rejecting this justification would apply in most states. Noting that the United States Supreme Court has expressly rejected the idea of a “typical” American family,¹¹² *Goodridge* detailed the increase in assisted reproduction¹¹³ and commented that childbearing is neither a prerequisite to – nor a consequence of – many modern marriages.¹¹⁴ Furthermore, *Goodridge* noted

A.2d 578 (R.I. 1987).

106. See R.I. GEN. LAWS § 34-37-4(a) (1995 & Supp. 2005).

107. C. A. No. PC05-5144, 2006 R.I. Super. LEXIS 3 (R.I. Super. Jan. 10, 2006).

108. *Id.*

109. *Id.* at *2 (noting that the class of landlords who filed suit, challenging the Act's classifications were “owners of residential apartment buildings and units subject to the strictures of the Rhode Island Lead Hazard Mitigation Act”).

110. *Id.* at *21-22.

111. 798 N.E.2d at 961.

112. *Id.* at 963 (citing *Troxel v. Granville*, 530 U.S. 1 (2000)).

113. *Id.* at 962 n.24.

114. *Id.* at 961 n.23 (quoting Cordy, J., dissenting: “heterosexual

that the state conceded same-sex parents could be excellent parents, and had not produced any evidence that same-sex parenting was contrary to the best interests of the child.¹¹⁵

Rhode Island law also supports the idea that not only can same-sex parenting be consistent with the best interests of the child but that existing statutes can and should accommodate same-sex parenting. In fact, in *Rubano v. DiCenzo*,¹¹⁶ the Rhode Island Supreme Court may already have gone a step farther than pre-*Goodridge* Massachusetts law in this regard. The *Rubano* court simply accepted the idea that same-sex parenting is consistent with the best interests of the child.¹¹⁷ Further, the court interpreted the existing legal framework to resolve the childrearing issues that arose between the same-sex partners in the case.

Rubano v. DiCenzo involved a lesbian couple who arranged for a child to be born through artificial insemination.¹¹⁸ The couple lived together “as domestic partners in the same household”¹¹⁹ until the child, a boy, was four. At that point, differences arose between the women and they separated.¹²⁰ The boy continued to live with Ms. DiCenzo, his biological mother, and had informal visitation with Ms. Rubano, his “heart mom.”¹²¹ After this informal arrangement broke down, Ms. Rubano filed a miscellaneous petition in Rhode Island Family Court to establish de facto parental status and visitation.¹²² The parties settled the matter prior to trial through a “private agreement” which the Chief Justice of the Family Court reviewed, approved, and entered as an order of the court.¹²³ The agreement included provisions for visitation to promote “the best interests of the minor child,”¹²⁴ as

intercourse, procreation and childcare are not necessarily conjoined”).

115. *Id.* at 963 (noting that the state readily conceded that same-sex parents may be “excellent” parents).

116. 759 A.2d 959 (R.I. 2000).

117. *Id.* at 977.

118. *Id.* at 961.

119. *Id.*

120. *Id.*

121. *Id.* at 971.

122. *Id.* at 962.

123. *Id.*; see also *id.* at n.2 (explaining the legal significance of a consent order or private agreement under Rhode Island law).

124. *Id.* at 962.

an agreement might in attempting to resolve a dispute between opposite-sex parents. It was only after this agreement broke down that anyone thought to contest the Family Court's jurisdiction.¹²⁵ At that point, three questions were certified to the Rhode Island Supreme Court, asking, in essence, whether Ms. Rubano qualified as a parent.¹²⁶

Collectively, the Rhode Island Supreme Court's resolution of these questions appears to validate the same-sex configuration of family life before it. The court found it unnecessary to rule directly on the first question, which asked whether a child, mother and same-sex partner constituted a "family relationship" for purposes of family court jurisdiction.¹²⁷ The court noted that the key term for purposes of determining jurisdiction was not simply "family relationship," but rather was "equitable matters arising out of the family relationship *wherein jurisdiction is acquired by the court by the filing of [a] petition[] for divorce*" or related matter.¹²⁸ Since Rubano and DiCenzo had obviously filed no such petition, the first question need not be answered at all.

The second certified question was linked to the first. If the court concluded that the family court did *not* have jurisdiction by virtue of a family relationship, did this conclusion violate the state constitutional guarantee that every person "hav[e] recourse to the laws for all injuries or wrongs?"¹²⁹ The court concluded that the

125. *Id.* at 963.

126. The questions were: "Question I: Does a child, biological mother, and same sex partner, who have been involved in a committed relationship constitute a 'family relationship' within the meaning of G.L. 8-10-3, such that the Family Court has jurisdiction to entertain a miscellaneous petition for visitation by the former same sex partner when the same sex partner is no longer engaged in the committed relationship?" *Id.* at 963; Question II: "If the answer to the above question is in the negative, does such a conclusion violate Article I Section 5 of the Rhode Island Constitution?" *Id.* at 965; Question III: "If the answer to question I is in the affirmative, then does a non-biological partner, who has been a same sex partner with a biological mother have standing to petition the Rhode Island Family Court for visitation pursuant to G.L. 15-5-1 et al. [sic]?" *Id.* at 976-77.

127. *Id.* at 963.

128. *Id.* at 964 (quoting R.I. GEN. LAWS § 8-10-3) (emphasis added by court). Rhode Island law also allows a suit for divorce from bed and board, and an action for separate maintenance, as noted in the text of the statute. *Id.*

129. *Id.* at 966.

constitutional guarantee was satisfied because Ms. Rubano actually had several possible remedies for the “injury or wrong” of being denied visitation.¹³⁰

First, Ms. Rubano had a statutory right under Rhode Island General Laws § 15-8-26 to ask the Family Court to determine “the existence or nonexistence” of a mother and child relationship between herself and the child.¹³¹ The court noted that any “interested party” could bring an action seeking such a determination under the Uniform Law on Paternity.¹³² The terms of this law specified that provisions applicable to the father and child relationship would apply to the mother and child relationship “insofar as practicable.”¹³³ Further, the court noted, Rhode Island case law had established that a putative parent could seek redress under this provision without alleging a biological relationship with the child in question.¹³⁴ Thus, Ms. Rubano’s “close involvement with the child’s conception,”¹³⁵ her participation in his upbringing, and the parties’ alleged visitation agreement, taken together, constituted a parent-like relationship.¹³⁶ This parent-like relationship gave Ms. Rubano standing to bring a parental rights claim.¹³⁷

The court identified another remedy available to Ms. Rubano and arising out of the Rhode Island Uniform Law on Paternity;¹³⁸ this remedy further emphasized its willingness to recognize and support same-sex family relationships. Although Ms. Rubano was obviously not a biological father, she was “involved” in the joint decision with DiCenzo to have DiCenzo conceive a child through artificial insemination.¹³⁹ She also assumed primary financial responsibility for the procedure and was included on the child’s birth announcement and baptismal certificate.¹⁴⁰ The court

130. *Id.*

131. *Id.* at 977.

132. *Id.* at 966. Rhode Island adopted a hybrid version of the Uniform Law on Paternity. *Id.* (citing P.L. 1979, ch. 185 § 2).

133. *Id.* (quoting R.I. GEN. LAWS § 15-8-26).

134. *Id.* at 967 (citing *Pettinato v. Pettinato*, 582 A.2d 909 (R.I. 1990)).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 970.

139. *Id.* at 971.

140. *Id.*

explained that Ms. Rubano had a right to seek a visitation order in the Family Court pursuant to its jurisdiction over “those matters relating to adults who shall be involved with paternity of children born out of wedlock.”¹⁴¹ The court conceded that the term “paternity” ordinarily suggests “fatherhood,” but noted that the legislature has specifically rejected such a rigid limitation.¹⁴² Rhode Island General Laws § 43-3-3 provides that “[e]very word importing the masculine gender only may be construed to extend to and to include females as well as males.”¹⁴³ Thus, if Ms. Rubano’s basic factual allegations proved true, she would have been able to establish that she had been “‘involved with [the] paternity’ of this child born out of wedlock within the meaning of this discrete jurisdictional provision of § 8-10-3.”¹⁴⁴ With Family Court jurisdiction thus established,¹⁴⁵ the court could have concluded that Rubano, as a *de facto* parent, was entitled to visitation.¹⁴⁶

The *Rubano* court further supported this position by noting that the idea of finding parental rights in the absence of either adoption or the traditional biological relationship found support in other authorities.¹⁴⁷ In *Troxel v. Granville*,¹⁴⁸ the United States Supreme Court affirmed the principle that a child’s parent has a fundamental right to make decisions regarding visitation. The *Rubano* court noted, however, that *Troxel* recognized that “persons outside the nuclear family” may become involved in childrearing.¹⁴⁹ Further, the *Rubano* court noted that the High Court’s own precedent has described familial rights as relational – arising out of the intimacies of daily association as well as from a blood relationship.¹⁵⁰ Indeed, the High Court has noted the “clear

141. *Id.* (citing R.I. GEN. LAWS § 8-10-3).

142. *Id.* at 970 n.13.

143. *Id.* (citing R.I. GEN. LAWS § 43-3-3 (1956)).

144. *Id.* at 971.

145. *Id.* at 971 n.14.

146. The court noted that Rubano was also entitled to seek a remedy in the superior court pursuant to its general equitable powers, but that the superior court would have abstained, as a matter of comity, since suit was initiated in the family court. *Id.* at 972.

147. *Id.* at 973-74.

148. 530 U.S. 57 (2000).

149. 759 A.2d at 973 (quoting *Troxel*, 530 U.S. 57).

150. *Id.*

distinction between a *mere* biological relationship and an actual relationship of parental responsibility.”¹⁵¹ Moreover, the United States Supreme Court considered the relational rights formed through life shared in a common home so crucial that they may sometimes trump the rights of a biological parent whose only relationship with the child is formed outside the family unit.¹⁵²

The *Rubano* court also voiced its agreement with states that have looked beyond biological ties to find that some care giving adults may become psychological parents. In *V.C. v. M.J.B.*,¹⁵³ the New Jersey Supreme Court found that the same-sex partner of a child’s biological mother had become a psychological parent with legally cognizable rights, when four criteria were met.¹⁵⁴ First, the legal parent must consent to the relationship between the third party and the child. Second, the third party must have lived with the child.¹⁵⁵ Third, the third party must have performed parental functions for the child “to a significant degree.”¹⁵⁶ Fourth, “a parent-child bond must be formed.”¹⁵⁷ The *Rubano* court noted that these criteria underlie its own analysis.¹⁵⁸ It also commented on the connection between these criteria and the principles underlying the American Law Institute’s most recent statement on the law of family dissolution.¹⁵⁹ The bonds children form with the adults who care for them are important, and must be protected under the limited circumstances all authorities seem to embrace. In light of Rhode Island’s recognition of searching rational basis review and the *Rubano* majority’s affirmation of same-sex parenting, an attempt to defend the existing limits of Rhode Island’s marriage law seems even more clearly doomed to fail than the unsuccessful defense in *Goodridge*. Indeed, to argue that marriage must be limited to opposite-sex couples to promote

151. *Id.* (emphasis added) (citing *Lehr v. Robertson*, 463 U.S. 248, 261 (1983)).

152. *Id.* at 974 (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989)).

153. 748 A.2d 539 (N.J. 2000).

154. *Id.* at 551.

155. *Id.*

156. *Id.*

157. *Id.*

158. 759 A.2d at 974.

159. *Id.* at 974-75 (citing the American Law Institute, *Principles of Family Dissolution: Analysis and Recommendations*, ch 2 §§ 2.03 – 2.21 (Tent. Dr. No.4, Apr. 10, 2000 & May 16, 2000)).

child bearing and rearing seems not only irrational, but also contrary to Rhode Island's existing precedent and policy.

CONCLUSION: IS THE PAST PROLOGUE?¹⁶⁰

Focusing on the *Goodridge* plurality opinion suggests that recognition of gay marriage is completely consistent with existing Rhode Island law. And so it is. But a discussion of the *Goodridge* approach as a whole requires recognition that the dissenting opinion outlined an alternative route that the Rhode Island Supreme Court could also, conceivably, take. Although this alternative route would lead a court to affirm existing restrictions in the marriage law, it actually diverges from the criteria laid out by the plurality only with regard to the standard of review.

The *Goodridge* dissent took issue with the plurality's formulation of the standard of review by offering two alternative perspectives. In the hands of the plurality, rational basis required more than plausible assumptions – it incorporates medical advancements, social science data and logic. The *Goodridge* dissent suggested, first, that the plurality's rational basis review was so searching that it distorted traditional rational basis beyond recognition.¹⁶¹ Traditional rational basis requires only that legislators have some plausible justification for a given law. It need not be persuasive. It must simply satisfy a "minimal threshold of rationality."¹⁶²

Alternatively, the *Goodridge* dissenters suggested that the plurality's use of rational basis review was flawed not because it was too willing to go beyond basic plausible rationales, but because once one goes beyond basic, plausible rationales, two contrary conclusions are possible. First, the *Goodridge* dissent pointed out that people are free to raise their children in a variety of family structures as long as the children are not harmed.¹⁶³ The state cannot interfere, but nor must it officially support every option chosen.¹⁶⁴ Second, although some data suggests that the

160. With apologies to WILLIAM SHAKESPEARE, *THE TEMPEST*, Act II, Sc. I, l.261.

161. 798 N.E.2d at 980 (Sosman, J., dissenting) (describing the plurality's standard of review as "some undefined stricter standard").

162. *Id.* at 978.

163. *Id.* at 979.

164. *Id.*

children of same-sex parents flourish, other data is not so clear. Given that openly homosexual parents are a fairly recent phenomenon, no longitudinal study can conclusively demonstrate the effect of such a family structure.¹⁶⁵ Thus, in the dissenter's view, it was not irrational to offer the preferred status of marriage to a family configuration that has enjoyed centuries of acceptance.¹⁶⁶ Stripped of the gloss of political rhetoric, the limitations on who may marry could be considered simply the result of a preference for a time-tested formula over a new formula.¹⁶⁷

Despite the *Goodridge* dissenters' view, under Rhode Island law, marriage is a fundamental right that confers diverse benefits on couples who marry, and significantly, on marital children. Further, Rhode Island case law has affirmed the principle that marriage, as an institution, can and should evolve. Also, under *Lawrence*, the substantive guarantees of the Fourteenth Amendment now protect intimate homosexual activity. Rhode Island courts have acknowledged that same-sex parenting can be consistent with the best interests of the child, and existing legal structures can be adapted to address the problems of families headed by same-sex couples. Finally, Rhode Island courts have already used logic, evidence of past discrimination, and social science data in applying rational basis review. In short, the stepping stones that led a plurality of the Massachusetts Supreme Judicial Court to rule that gay marriage is a constitutional necessity are firmly in place in Rhode Island.

165. *Id.* at 980.

166. *Id.* at 981-82.

167. *Id.*

