LIBERTY UNIVERSITY

Liberty University Law Review

Volume 1 | Issue 1 Article 7

2001

Rational Basis Review Irrationally Applied: The Legalization of Same-Sex Marriage by the Supreme Judicial Court of Massachusetts in Goodridge v. Department of Public Health

Thomas Ryan Lane

RATIONAL BASIS REVIEW IRRATIONALLY APPLIED: THE LEGALIZATION OF SAME-SEX MARRIAGE BY THE SUPREME JUDICIAL COURT OF MASSACHUSETTS IN *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*

Thomas Ryan Lane[†]

I. INTRODUCTION

In its 2003 decision, *Goodridge v. Department of Public Health,*[1] the Supreme Judicial Court of Massachusetts disregarded a core tenet of the western legal tradition by subverting the rule of law to achieve its desired social end.[2] In *Goodridge*, the majority purportedly applied a rational basis test in holding that prohibitions against same-sex marriage violate the Massachusetts Constitution.[3] The Massachusetts Constitution provides: "In the government of this commonwealth, . . . the judicial [branch] shall never exercise the legislative and executive powers, or either of them: *to the end it may be a government of laws and not of men.*"[4] This case is a concerning instance of a court distorting the rule of law by replacing it with the rule of man in order to satisfy the justices' personal or political perspectives.[5]

In the western legal tradition, the rule of law has served as the foundation for the development of the common law.[6] Implicit in the rule of law is the requirement that courts apply a standard of review appropriate to the circumstances. Justices act capriciously in their rulings when they disregard the applicable standard of review in order to achieve a conclusion that is consistent with their own personal or political viewpoints.[7]

This Note argues that courts must maintain their commitment to the rule of law by applying the correct standard of review even when their own personal or political views move them to do otherwise. It develops this argument in four steps. The Note first discusses the decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health.*[8] Second, it addresses what the applicable standard of review should be in cases addressing

---

† Editor-in-Chief, *Liberty University Law Review*, 2006–07; J.D. Candidate, May 2007, Liberty University School of Law; B.A. in Mathematics, 2004, Dordt College.

1. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
2. *See* discussion *infra* Parts IV, V.
3. *See* discussion *infra* Parts II, IV.
4. MASS. CONST. art. XXX (emphasis added).
5. *See* discussion *infra* Part V.
6. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 9–10 (1983).
7. *See* discussion *infra* Parts I, III, IV.
8. *See* discussion *infra* Part II.

alleged discrimination based on sexual orientation.[9] Third, it analyzes the standard of review that the majority in *Goodridge* actually applied while purportedly applying a "rational basis" test.[10] Finally, this Note discusses the overall impact of the *Goodridge* decision and the repercussions of distorting the rule of law.[11]

II. GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH

In March and April of 2001, several same-sex couples attempted to obtain a marriage license from a city or town clerk's office.[12] Each of the couples completed the requisite health forms and the required "notice of intention to marry" forms.[13] "In each case, the city clerk either refused to accept the notice of intention to marry or denied a marriage license to the couple on the ground that Massachusetts does not recognize same-sex marriage."[14]

On April 11, 2001, seven same-sex couples from five Massachusetts counties filed a single complaint in the Superior Court against the Massachusetts Department of Public Health ("Department"). In their complaint, the plaintiffs alleged that they "and other qualified same-sex couples" were denied equal "access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage."[15] The plaintiffs alleged that the Department's policy and practice of denying marriage licenses to same-sex couples violated their rights under articles I, VI, VII, X, XII, and XVI of the Massachusetts Constitution.[16]

---

9. *See* discussion *infra* Part III.
10. *See* discussion *infra* Part IV.
11. *See* discussion *infra* Part V.
12. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).
13. *Id. See also* MASS. GEN. LAWS ANN. ch. 207, § 19 (West 1998).
14. *Goodridge*, 798 N.E.2d at 950.
15. *Id.*
16. *Id.* MASS. CONST. art. I provides:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

MASS. CONST. art. VI provides: "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public . . . ."

On May 7, 2002, the Superior Court Department, Suffolk County, dismissed the plaintiffs' claim that the marriage statutes should be construed to permit marriage between persons of the same sex, holding that the only reasonable construction of chapter 207 of the General Laws of Massachusetts precludes such an interpretation.[17] The court further held that "the marriage exclusion does not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the Massachusetts Declaration of Rights does not guarantee 'the fundamental right to marry a person of the same sex.'"[18] The court reasoned that "prohibiting same-sex marriage rationally furthers the Legislature's legitimate interest in safeguarding the 'primary purpose' of marriage, [which is] 'procreation.'"[19] The court dismissed the complaint and entered summary judgment for the Department. The couples appealed, and the Supreme Judicial Court of Massachusetts granted plaintiffs direct appellate review.[20]

The plaintiffs first argued that the Supreme Judicial Court could interpret the statute to permit same-sex couples to obtain marriage licenses because nothing in the statute itself specifically prohibits marriage between persons of the same sex. Thus, the couples argued, the court could afford same-sex couples the

---

MASS. CONST. art. VII provides:

> Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

MASS. CONST. art. X provides, in relevant part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws . . . ."

MASS. CONST. art. XII provides, in relevant part: "[N]o subject shall be . . . deprived of his property, immunities, or privileges, put out of the protection of the law . . . or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

MASS. CONST. art. XVI provides, in relevant part: "The right of free speech shall not be abridged."

17. *Goodridge*, 798 N.E.2d at 951.
18. *Id.*
19. *Id.*
20. *Id.*

same opportunity to obtain a marriage license as opposite-sex couples without ever having to decide whether the statute is constitutional.[21]

In addressing the plaintiffs' first argument, the court indicated that it was attempting to "carry out the Legislature's intent" by determining the words of the statute "according to 'the ordinary and approved usage of the language.'"[22] Accordingly, the court applied an "everyday meaning" in interpreting the term "marriage."[23] In relying upon the common law definition of marriage, the court declared that marriage is the "legal union of a man and a woman as husband and wife."[24] Thus, the court reasoned that since the interpretation of marriage should be construed according to the common law understanding of marriage, the only reasonable explanation for the statute's silence is that the legislature did not intend that same-sex couples should be allowed to obtain a license to marry.[25]

In writing the majority opinion for the court, Chief Justice Marshall claimed that the right to marry, without the right to choose one's partner, signifies little in the form of an actual right.[26] Further, one's right to express sexual intimacy, and one's right to establish a family are among some of the "most basic of every individual's liberty and due process rights."[27] Notwithstanding its declaration of those rights, the court properly recognized that even the right to marry is subject to "appropriate government restrictions in the interests of public health, safety, and welfare."[28]

The court next addressed the plaintiffs' second contention, namely that denying same-sex couples the opportunity to marry violated the Massachusetts Constitution.[29] The court framed plaintiffs' claim not merely as the right to marry, but "the right to *choose* to marry."[30] Thus, as the court reasoned, if one does not have the right to *choose* whom he or she may marry, then one is denied the full protection of the laws.[31] In bolstering this alleged right to

---

21. *Id.* at 952.
22. *Id.*
23. *Id.*
24. *Id.* However, in Part IV of the court's opinion, the majority abandons the common law definition of marriage in favor of a more "stable" definition of marriage. That is, the court adopted a definition of marriage that is more tolerant "in light of evolving constitutional standards." *See id.* at 969.
25. *Id.* at 953.
26. *Id.* at 958.
27. *Id.* at 959.
28. *Id.* at 958.
29. *Id.* at 953.
30. *Id.* at 957 (emphasis added).
31. *Id.*

choose one's spouse, the court analogized to antiquated laws that prohibited marriage between whites and blacks.[32]

The plaintiffs attacked the statute on substantive due process and equal protection grounds. The Department argued that no fundamental liberty interest or suspect class was at stake, contending that the rational basis test should be the proper standard of review. The Department then articulated three reasons why the legislature had a rational basis for enacting the statute. First, the Department argued that prohibiting same-sex couples from marrying provided a "favorable setting for procreation." Second, the Department reasoned that by restricting marriage to only opposite-sex couples, the legislature was "ensuring the optimal setting for child rearing," namely, a "two-parent family with one parent of each sex." Finally, the Department claimed that by limiting marriage to only opposite-sex couples, the statute "preserv[ed] scarce state and private financial resources."[33] The court addressed each of the Department's justifications.

The court rejected the Department's first legislative rationale.[34] According to the court, the primary purpose of marriage is not procreation.[35] As the court noted, the marriage statute in question does not contain any requirement that

---

32. *Id.* at 958. The court analogized from a United States Supreme Court case which held that a statutory bar to interracial marriage violated the Fourteenth Amendment of the Constitution. *See* Loving v. Virginia, 388 U.S. 1 (1967) (holding that a ban on interracial marriage violates the Fourteenth Amendment).

However, in Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), the Minnesota Supreme Court held that a ban on same-sex marriages did not violate the Fourteenth Amendment. In so doing, the court rejected the plaintiffs' argument that *Loving* required the issuance of marriage licenses to same-sex couples. The court stated that *Loving* was decided "solely on the grounds of the patent racial discrimination" of such statutes. *Baker*, 191 N.W.2d at 187. The court in *Baker* went on to state that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.*

The couple then appealed to the United States Supreme Court, which dismissed the plaintiffs' appeal without opinion "for want of a substantial federal question." Baker v. Nelson, 409 U.S. 810 (1972). Unlike a denial of certiorari, such a dismissal represents a decision on the merits by the Supreme Court that the constitutional challenge presented by the plaintiffs is not valid, a decision which is binding on lower courts. *See* Hicks v. Miranda, 422 U.S. 332, 344 (1975). Thus, the Supreme Court, five years after it decided *Loving*, determined that denying same-sex couples the right to marry does not raise the same federal constitutional issues as denial based upon race.

33. *Goodridge*, 798 N.E.2d at 961.

34. *Id.* at 962.

35. *Id.* at 961. The judge in the Superior Court accepted the Department's first rationale, reasoning that "the state's interest in regulating the marriage is based on the traditional concept that marriage's primary purpose is procreation." *Id.*

the marriage applicants demonstrate their ability or intention to conceive children.[36] The court declared that the foundation of marriage was not the "begetting of children," but rather the "exclusive and permanent commitment of the marriage partners to one another."[37] Consequently, the court determined that prohibiting same-sex couples from marrying in order to provide a favorable setting for procreation was not a legitimate governmental purpose.[38]

In turning to the Department's second stated rationale, the court admitted that "[p]rotecting the welfare of children is a paramount State policy."[39] However, the court rejected the assertion that by restricting marriage to opposite-sex couples, the legislature was attempting to further the well-being of children.[40] As the court suggested, in our modern society, the traditional American family is only a distant echo, and today's family structure is anything but traditional.[41] Further, the court pronounced that in considering the best interests of a child, a parent's sexual orientation or marital status is not an important factor to consider.[42] In the eyes of the court, no rational basis exists for penalizing children by "depriving them of State benefits because the State disapproves of their parents' sexual orientation."[43] Thus, the court determined that there is "no rational relationship between the marriage statute" and the legislature's goal of "protecting the 'optimal' child rearing unit."[44]

---

36. *Id.*

37. *Id.* at 961.

38. *Id.* at 962.

39. *Id.*

40. *Id.*

41. *Id.* at 963.

42. *Id.* In order to support its claim, the court made no attempt to justify such an assertion through well-articulated judicial reasoning. The court composedly assumes that a parent's sexual orientation is not a real factor to be considered, given our modern strides in the realm of tolerance towards alternative lifestyles. In fact, the court did not even set forth an argument to justify its asserted conclusion, nor did it attempt to manipulate empirical data to achieve its end. Rather, the court lackadaisically cited a few loosely connected cases that deal with child custody issues. *See* Doe v. Doe, 452 N.E.2d 293, 296 (Mass. 1983) (holding that a parent's sexual orientation is an insufficient ground to deny custody of a child in a divorce action). However, *Doe* simply stands for the proposition that a parent's sexual orientation should not be the *sole* reason for denying custody of a child to an otherwise fit parent. It is a significant leap to assert that a parent's sexual orientation should receive little consideration when contemplating the child's best interest.

43. *Goodridge*, 798 N.E.2d at 964.

44. *Id.* at 963. At this juncture, the court essentially discards the legislature's ideal of the optimal child-rearing unit in favor of a judicial ideal of what is an optimal child-rearing unit, namely a same-sex couple environment in addition to the traditional opposite-sex environment.

The court wholly rejected the third rationale advanced by the Department. A ban on same-sex marriage, the court believed, sustains "no rational relationship to the goal of economy."[45] The Department argued that same-sex couples are "less financially dependent on each other than opposite-sex couples." However, the court determined that a demonstration of financial dependence upon one's spouse is not a prerequisite for receiving financial benefits under Massachusetts marriage laws.[46]

The Department also argued in the alternative that by expanding marriage to include same-sex couples, Massachusetts will be creating interstate conflict.[47] The court, however, held that such a consideration should not preclude Massachusetts from affording its citizens the full protection guaranteed under the Massachusetts Constitution.[48] As the court stated, "each State is free to address difficult issues of individual liberty in the manner its own Constitution demands," subject only to the Fourteenth Amendment of the United States Constitution.[49]

The court concluded by considering the plaintiffs' requested relief. The plaintiffs sought only a declaration that the exclusion of same-sex couples from access to civil marriage violates Massachusetts law.[50] In light of plaintiffs' requested relief and its desire to preserve as much of the statute as possible, the *court* chose to *redefine* marriage.[51] The court redefined marriage to mean the "voluntary union of two persons as spouses, to the exclusion of all others."[52] The court looked to the Court of Appeal for Ontario, the highest court of the

---

45. *Id.* at 964.

46. *Id.*

47. *Id.* at 967. The argument that expanding marriage to include same-sex couples will lead to interstate conflict is, unfortunately, grounded in reality. *See, e.g.*, Miller-Jenkins v. Miller-Jenkins, No. 2654 04 4 (Va. Ct. App. filed Nov. 10, 2004). In *Miller*, a same-sex couple, both of whom were citizens of Virginia, went to Vermont for the purposes of entering into a civil union and then returned to Virginia, which does not recognize same-sex marriages or civil unions. Subsequently, the couple became pregnant through artificial insemination. Eventually the couple split, and they filed proceedings in Vermont for the dissolution of their civil union. Thereafter, pursuant to the civil union, Vermont granted parentage rights over the child to each partner. However, the partner that gave birth to the child remained in Virginia. Since Virginia does not recognize civil unions, it also does not recognize parentage rights created pursuant to civil unions. Thus, because of Vermont's granting of civil unions, the Vermont and Virginia state courts rendered conflicting rulings—Vermont ordered a visitation right that Virginia does not recognize.

48. *Goodridge*, 798 N.E.2d at 967.

49. *Id.*

50. *Id.* at 969.

51. *Id.*

52. *Id.*

province of Ontario, to provide persuasive authority in redefining the common-law meaning of marriage.[53]

The court declared that barring same-sex couples from the protections, benefits, and obligations of civil marriage violated the Massachusetts Constitution.[54] Consequently, the court vacated the summary judgment entered by the trial court in favor of the Department.[55]

III. HOMOSEXUALITY AND RATIONAL BASIS REVIEW

Courts apply three generally accepted standards of review when determining the constitutionality of legislation under an equal protection challenge. In determining the applicable standard of review, courts look at the classifications the statute makes and the rights the statute implicates.[56] After settling on the appropriate standard of review, courts then analyze the legislative purpose of the statute. Courts also consider the connection between the legislative purpose and the classification made under the given statute. The appropriate level of scrutiny that is applied to this connection depends upon which standard of review is being applied.[57]

The highest standard of review employed by courts is the "strict scrutiny" test.[58] Statutes that command strict scrutiny seldom survive the stringent requirements that are the hallmarks of this test.[59] In order to survive a challenge

---

53. *Id.* The court borrowed from Halpern v. Toronto *(City)*, 172 O.A.C. 276 (2003), a Canadian case that addressed a similar problem to that which confronted the *Goodridge* court. The *Goodridge* court chose to rely upon foreign law to justify its "reforming" of the common law, clearly the role of the legislature, rather than referencing authority from the various states that have refused to redefine the common law definition of marriage. *See, e.g.*, Standhardt v. Super. Ct., 77 P.3d 451 (Ariz. Ct. App. 2003) (holding marriage statutes rationally related to a State's legitimate interest in encouraging procreation and child rearing within marriage); Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) ("[E]qual protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry."); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) ("There can be no doubt that there exists a rational basis for the state to limit the definition of marriage to exclude same-sex relationships.").

54. *Goodridge*, 798 N.E.2d at 969.

55. *Id.*

56. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

57. *Id.* at 272 ("[I]n assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification.").

58. *See id.* at 272 ("[R]acial classification[s], regardless of purported motivation, [are] presumptively invalid and can be upheld only upon an extraordinary justification.").

59. *See* Hunt v. Cromartie, 526 U.S. 541 (1999) (North Carolina residents brought action against various state officials challenging North Carolina's congressional redistricting plan as racially motivated in violation of the Equal Protection Clause).

under the strict scrutiny test, the legislature must demonstrate that it has a "compelling governmental interest" for enacting the statute.[60] For example, times of war and national security have furnished compelling governmental interests that satisfied the requirements of strict scrutiny.[61]

If the government manages to demonstrate a compelling governmental interest, the court will then examine the connection between the classification and the legislative purpose.[62] This classification must be "narrowly tailored" to further the compelling governmental interest. The classification must be necessary—not merely rationally related to the governmental interest.[63]

Generally, a statute will elicit strict scrutiny review only if the statute infringes upon a fundamental right or creates a suspect classification.[64] The Supreme Court in *Washington v. Glucksberg* defined a "fundamental right" as "only those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[65] Statutes that have historically incurred strict scrutiny are those that create suspect classifications.[66] Generally, suspect classifications are classifications that are based on race or national origin.[67] Courts have uniformly condemned statutes that disadvantage racial minorities by making classifications based solely on race.[68]

---

60. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that government may treat people differently because of their race only for the most compelling reasons).

61. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 217 (1944) (a highly controversial case which held that national security constitutes a "pressing public necessity," though the government's use of race to advance such an objective must be narrowly tailored).

62. *See* Hamm v. Va. State Bd. of Elections, 230 F. Supp. 156, 158 (1964) (holding that a state may, for statistical purposes, require designation of parties' race on divorce decrees).

63. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (invalidating a Florida criminal statute prohibiting interracial cohabitation).

64. *See* Paro v. Longwood Hosp., 369 N.E.2d 985, 988 (1977) ("Where there is no infringement of fundamental rights or any suspect class, a statutory discrimination will be upheld if it is "rationally related to a legitimate State interest.").

65. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

66. *See, e.g.*, Anderson v. Martin, 375 U.S. 399 (1964) (invalidating a state law requiring that a candidate's race be designated on the election ballot).

67. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879) (West Virginia jury selection statute that discriminated on the basis of race held unconstitutional).

68. However, statutes that make race specific classifications that benefit racial minorities have been upheld in limited circumstances. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) (holding that race may be one of a number of factors considered by a school in passing on applications), *and* Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that a state university law school's race-conscious admissions policy was sufficiently narrowly-tailored to constitutionally meet the state's compelling interest in a diverse student body), *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (holding that the city failed to

The second standard of review is the "heightened scrutiny" or "intermediate scrutiny" test. It lies "between [the] extremes of a rational basis review and strict scrutiny" and "generally has been applied to discriminatory classifications based on sex or illegitimacy." [69] In order to survive a challenge under the heightened scrutiny test, the state must show an "important governmental interest" in enacting the statute and creating the given classification. If the government manages to demonstrate an important governmental interest, the court will then examine the connection between the classification and the legislative purpose. This classification must be "substantially related" to the achievement of the governmental interest. [70]

The third standard of review is the "rational basis" test.[71] The rational basis test is employed in all other cases where the statute does not merit strict scrutiny or heightened scrutiny assessment. Given that strict scrutiny and heightened scrutiny tests only apply in limited contexts, courts most often exercise rational basis review.[72]

In order to survive a challenge under the rational basis test, a court need only find that the legislature had a "legitimate governmental purpose" for enacting the statute and creating the given classification.[73] Typically under rational-basis review, the statute is given a strong presumption of validity and the burden of proving the statute unconstitutional rests solely with the party challenging it.[74] Generally, any reasonably conceivable purpose for enacting the statute will suffice for the purposes of rational basis review. Furthermore, it is irrelevant

---

demonstrate a compelling governmental interest justifying its "Minority Business Enterprises" plan and that the plan was not narrowly tailored to remedy effects of prior discrimination).

69. Clark v. Jeter, 486 U.S. 456, 461 (1988).

70. *See* Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 60 (2001) (holding that the statute, making it more difficult for a child born abroad and out of wedlock to claim citizenship through that parent if the citizen parent was the father, did not violate the equal protection guarantee of the Fifth Amendment).

71. *See, e.g.*, N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding a rule denying employment compensation to persons receiving methadone treatment).

72. *See* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 291 (1984).

73. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976) ("[T]he relationship between gender and traffic safety becomes far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective.").

74. Prudential Ins. Co. of Am. v. Comm'r of Revenue, 709 N.E.2d 1096, 1102 (1999) (quoting Aloha Freightways, Inc. v. Comm'r of Revenue, 701 N.E.2d 961 (1998)). *See also* Paro v. Longwood Hosp., 369 N.E.2d 985, 988 (1977) ("A party challenging the constitutionality of a legislative enactment bears the burden of proving that the proper standard of review is not satisfied. . . . In order to prevail . . . a challenger must affirmatively show that no factual situation can be conceived that will support the reasonableness of the enactment.").

for constitutional analysis whether a reason now advanced in support of a statutory classification is one that actually motivated the legislature.[75]

If the court determines that there is a legitimate governmental purpose for the statute, it will then examine the connection between the classification and the legislative purpose.[76] The classification must bear a "rational relation to some legitimate end."[77]

The rational basis test should properly apply to marriage statutes that make classifications based upon sexual preference.[78] Because marriage statutes, like the one at issue in *Goodridge*, do not concern a suspect classification such as race, strict scrutiny would only apply if homosexual marriage is a fundamental right.[79] However, to demonstrate that homosexual marriage is a fundamental right, one would have to show that homosexual marriage is "objectively, deeply rooted in this Nation's history and tradition."[80] Thus, a statute limiting marriage to opposite-sex couples should never merit strict scrutiny review.[81]

---

75. *See* F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307 (1993). In *Beach Communications*, respondents claimed that there was no rational basis for the exemption in the Communications Policy Act of 1984. The Court emphatically rejected this challenge and stated that "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315.

76. *See* Vacco v. Quill, 521 U.S. 793 (1997) (holding that New York's prohibition on assisting suicide does not violate Equal Protection Clause of the Fourteenth Amendment).

77. *Id.* at 799.

78. *See* Woodward v. United States, 871 F.2d 1068, 1075–76 (Fed. Cir.), *cert. denied*, 494 U.S. 1003 (1990) (holding that an admittedly homosexual naval reserve officer was not a member of a class to which heightened scrutiny had to be afforded or for which the Navy needed compelling interests to justify discrimination). *See also* Hrynda v. U.S., 933 F. Supp. 1047, 1051–53 (M.D. Fla. 1996); Rutgers Council of AAUP Chapters v. Rutgers, The State Univ., 689 A.2d 828, 835 (App. Div. 1997) (both holding that classifications based on sexual preferences are ordinarily not suspect for equal protection purposes).

79. *See* Selland v. Perry, 905 F.Supp. 260, 265–66 (D. Md. 1995) (holding that the Navy's "Don't Ask, Don't Tell" policy as applied to a homosexual naval officer does not infringe a fundamental right or create a suspect classification, thus applying a rational basis test); Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049 (5th Cir. 1984) (holding that a statutory classification based on a choice of sexual partners is not a "suspect classification," and is thus subject to less than a "strict scrutiny" equal protection analysis).

80. *See supra* note 65.

81. The majority in *Goodridge* framed the plaintiffs' assertion not merely as the right to marry, but the right to *choose* to marry. *See supra* notes 30–32 and accompanying text. Nevertheless, even if the alleged right is couched in terms of "the right to choose to marry" rather than the right of homosexual marriage, one's right to choose one's spouse is not a fundamental right as defined by *Glucksberg*. That is, the right to choose one's spouse is not so rooted in our nation's history and tradition as to warrant strict scrutiny review.

Likewise, statutes that limit marriage to opposite sex couples should not receive heightened scrutiny.[82] Heightened scrutiny is generally reserved for gender-based classifications.[83] However, marriage statutes that preclude marriage by same-sex couples are based on sexual preference, not gender.[84] In addition, marriage statutes that restrict marriage to opposite-sex couples do not discriminate based on gender because males and females are treated equally.

Therefore, because neither the strict scrutiny test nor the heightened scrutiny test is applicable in the realm of marriage statutes, courts—as Massachusetts purported to do—should apply a rational basis test in determining the constitutionality of such statutes. Accordingly, in order to survive a constitutional challenge, the court would only have to determine that at least one reasonably conceivable purpose exists for enacting the marriage statute and that this purpose is logically connected to the wording of the statute.[85] Depending upon the wording of the statute, marriage statutes should generally survive constitutional claims, given that rational basis is the lowest standard of review.

IV. GOODRIDGE'S TWISTED RATIONAL BASIS STANDARD

The court in *Goodridge* purported to apply the rational basis test[86] to the Massachusetts ban on same-sex marriage.[87] In application, however, the court used a much more stringent test. The court rejected all three asserted legislative purposes posited by the Department.[88] In fact, the court stated that the rational basis test under a substantive due process challenge "requires that statutes 'bear[ ] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.'"[89] As for an equal protection challenge, the rational basis test "requires that 'an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.'"[90]

---

82. *See supra* note 78.

83. *See supra* note 73.

84. *See supra* note 79.

85. *See supra* notes 76–77.

86. *See* Dickerson v. Att'y Gen., 488 N.E.2d 757, 759 (1985) ("For the purpose of equal protection analysis, our standard of review . . . is the same as under the Fourteenth Amendment to the Federal Constitution."). *See also* Commonwealth v. Franklin Fruit Co., 446 N.E.2d 63, 67 (1983).

87. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

88. *Id.*

89. *Id.* at 960.

90. *Id.*

However, after stating the applicable tests, the court never applied or revisited these statements.

The court considered each of the Department's rationales for the legislative prohibition on same-sex marriage.[91] However, rather than examining whether any of these alleged state interests were legitimate or reasonable, the court looked at whether the alleged purposes were a "*necessary* component of civil marriage."[92] This subtle difference turns the rational basis test upon its head.[93] The shift in focus from legitimate or reasonable to *necessary* places a laborious burden on the state; it turns the rational basis test into something more akin to a strict scrutiny test. The strict scrutiny test not only requires that the classification be narrowly tailored but also that it be the least restrictive means possible. That is, under the strict scrutiny test, the classification must be *necessary* with no other alternatives.[94] Further, this shift in focus requires the *government* to demonstrate that the legislative end is necessary.[95] However, under traditional rational basis review, the *litigant* has the burden of proving that the legislative end is not legitimate.[96]

Generally, under rational basis review, courts give deference to the judgment of the legislature.[97] States are also not required to convince the courts of the correctness of their legislative judgments.[98] Generally, if there was evidence before the legislature that reasonably supported the classification in the statute, litigants cannot procure invalidation of the legislation by introducing evidence in court that the legislature was in fact mistaken.[99] However, the *Goodridge* court rejected the evidence that had been presented to the Massachusetts legislature, evidence that indicated that "alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries."[100]

---

91. *Id.* at 961–64.

92. *Id.* at 962 (emphasis added).

93. *See* Paro v. Longwood Hosp., 369 N.E.2d 985, 988 (1977) ("[T]he burden is an onerous one; a reviewing court will *presume* a statute's validity, and make all rational inferences in favor of it.") (emphasis added).

94. *See* McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (holding statute "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy").

95. *Goodridge*, 798 N.E.2d at 962.

96. *See* Prudential Ins. Co. of Am. v. Comm'r of Revenue, 709 N.E.2d 1096, 1102 (1999) ("[T]he burden of proving the measure invalid rests with the party challenging it.").

97. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

98. *Id.*

99. *Id.*

100. *Goodridge*, 798 N.E.2d at 979 (Sosman, J., dissenting).

Thus, the *Goodridge* court commenced a legislative commission from its judicial bench.

Although the court recognized that "[p]rotecting the welfare of children is a paramount State policy," the court again ignored the boundaries under the rational basis test.[101] In order to satisfy the rational basis test, the court need only find a conceivable, legitimate purpose for denying same-sex couples marriage.[102] The Massachusetts legislature had already determined that opposite-sex couples were the optimal setting for raising children, and that based on the health, safety, and wellbeing of children raised in an opposite-sex environment, such an environment has proven to be a stable and optimal way to raise children.[103] The legislature had also observed that children raised in same-sex environments have not withstood the test of time to determine the efficacy and stability of such an environment for the children raised therein.[104] These reasons of the legislature are legitimate purposes involving the health, safety, and wellbeing of children in Massachusetts.

The legislature's legitimate purpose is also rationally connected to the classification of same-sex versus opposite-sex couples. Thus, the government satisfied the rational basis test. Consequently, under a properly administered rational basis test, the court should have upheld Massachusetts' ban on same-sex marriage.[105]

V. IMPLICATIONS OF DEPARTING FROM THE RULE OF LAW

The *Goodridge* court compels both legal scholars and lay persons to confront the reality of the court's decision.[106] Abandoning the rule of law eventually leads to the replacement of well-settled legal principles with the current and temporary social view of the prevailing private interest group.[107] Abandoning

---

101. *Id.* at 962.

102. *See Clover Leaf Creamery Co.*, 449 U.S. at 464.

103. *Goodridge*, 798 N.E.2d at 979 (Sosman, J., dissenting).

104. *Id.*

105. *See id.* at 1004 (Cordy, J., dissenting).

106. Since the Supreme Judicial Court of Massachusetts published its 2003 decision, at least one court has unequivocally disagreed with the majority's rationale. *See* Hernandez v. Robles, 26 A.D.3d 98 (N.Y. App. Div. 2005). Three courts have declined to follow *Goodridge*. *See* Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005); Seymour v. Holcomb, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005); Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005). At least one court has distinguished the *Goodridge* majority's rationale. *See In re* Kandu, 315 B.R. 123, (Bankr. W.D. Wash. 2004).

107. *See* McCreary County, Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005) (Scalia, J., dissenting) ("What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be

the rule of law ultimately leads to no law at all. Once courts are free to forsake the underlying principles upon which our Western legal tradition has developed, law may develop into an unfortunate power struggle.[108] However, if the legal community adheres to the rule of law and the fundamental principles upon which our jurisprudence has developed, then the American people will be assured impartiality, consistency, and the justice our nation so desires.

By twisting the proper standard of review, the majority in the *Goodridge* decision effectively replaced the legislature's judgment and factual findings with their own assessment of what the status of marriage should be in Massachusetts. Under the mask of "evolving constitutional standards," the court completely redefined marriage, a task that is undoubtedly suited only for the Massachusetts legislature.[109] The court, however, ignored these jurisdictional boundaries[110] by redefining marriage to include same-sex couples.[111]

Historically, under the rational basis test, which the *Goodridge* court purportedly employed, courts give due deference to the findings of the legislature.[112] The *Goodridge* court, however, ignored this important principle. In fact, the court paradoxically stated that its new marriage definition "leaves intact the Legislature's broad discretion to regulate marriage."[113] However, the impact of the court's decision accomplishes the complete opposite. The court has not left the Massachusetts legislature with "broad discretion to regulate marriage." The court has in fact replaced broad legislative discretion with that of its own broad judicial discretion. Rather than the court giving due deference to the legislature's decision to confine marriage to opposite-sex couples, the legislature must now give due deference to the court's decision to expand marriage to same-sex couples.[114] Such a result contradicts our republican form

---

grounded in consistently applied principle. That is what prevents judges from ruling . . . as their personal preferences dictate.")

108. *See generally* FRIEDRICH NIETZSCHE, THE WILL TO POWER (Walter Kaufmann trans., Vintage 1968).

109. *Goodridge*, 798 N.E.2d at 969.

110. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.").

111. *Goodridge*, 798 N.E.2d at 969.

112. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

113. *Goodridge*, 798 N.E.2d at 969.

114. *See* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004). In light of the *Goodridge* decision, the Massachusetts legislature requested an opinion from the Supreme Judicial Court of Massachusetts concerning the constitutionality of a bill which prohibited same-sex couples from entering into marriage, but allows them to form civil unions with all the benefits, protections, rights, and responsibilities of marriage. The court held as a matter of first

of government and is an immediate repercussion of abandoning the proper standard of review.[115] When courts are confronted with legal issues that tend to be emotionally charged, such as homosexual marriage or abortion, it is imperative that courts maintain a commitment to the rule of law by applying the proper standard of review.[116]

A clear illustration of a case where a court properly adhered to the rule of law by applying the applicable standard of review is *Morrison v. Sadler*.[117] In *Morrison*, three same-sex couples filed suit to compel county clerks in the state of Indiana to issue marriage licenses to same-sex couples.[118] Unlike the *Goodridge* court, the *Morrison* court held that the limitation of marriage to opposite-sex was not a violation of the Indiana Constitution.[119] In reaching its conclusion, the court in *Morrison* correctly applied the rational basis test.[120] Three purposes were offered in support of the legislative classification.[121] As to the adequacy of these purposes, the *Morrison* court properly deferred to the discretion of the legislature.[122] In addressing the classification made under the statute in question—opposite-sex couples and same-sex couples—the court again deferred to the discretion of the legislature in making such a classification.[123] Consequently, the *Morrison* court reached only the first justification for the legislative classification, which was to promote procreation by the natural parents.[124] In so finding, the court determined that the

---

impression that the bill violated the equal protection and due process requirements of the Massachusetts Constitution. *Id.* at 572. *See also* MASS. GEN. LAWS ANN. Ch. 207A, §§ 2–3 (West 2003).

115. *See* Alden v. Maine, 527 U.S. 706, 751 (1999) ("The asserted authority would blur . . . the separate duties of the judicial and political branches of the state governments, displacing state decisions that 'go to the heart of representative government.'" (quoting Gregory v. Ashcroft, 501 U.S. 452 (1991))).

116. *See supra* note 108.

117. *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).

118. *Id.* at 19.

119. *Id.* at 35.

120. *Id.* at 22 ("[S]tatutes will survive . . . scrutiny if they pass the most basic rational relationship test.").

121. *Id.* at 23 ("The Plaintiffs assert that there are three possible, but ultimately unreasonable, reasons for the legislative classification: to promote procreation and child-rearing by both natural parents, to promote the traditional family unit, and to promote the integrity of traditional marriage.").

122. *Id.* at 21 ("[C]ourts must exercise substantial deference to legislative discretion.").

123. *Id.* at 22.

124. *Id.* at 23.

classification of same-sex couples versus opposite-sex couples was rationally related to the state's legitimate purpose.[125]

VI. CONCLUSION

This Note has argued that the Supreme Judicial Court of Massachusetts violated a core tenet of law in the Western legal tradition by distorting the rule of law to achieve its desired social end. This Note further argued that courts must commit themselves to the rule of law. Implicit in this commitment is the requirement that courts apply the proper standard of review even when the result is contrary to their personal or political view. The temptation to subvert the rule of law goes well beyond the narrow confines of same-sex marriage issues. The invitation to replace the rule of law with the rule of man is an ongoing snare for courts. Therefore, courts must maintain their commitment to the rule of law in order to sustain our American system of law and government.

125. *Id.* at 25 ("[T]herefore, the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by 'natural' means.").