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## Goodridge v. Department of Public Health, Same-Sex Marriage, and the Massachusetts Supreme Judicial Court as Critical Social Movement Ally

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***GOODRIDGE V. DEPARTMENT OF PUBLIC  
HEALTH, SAME-SEX MARRIAGE, AND THE  
MASSACHUSETTS SUPREME JUDICIAL  
COURT AS CRITICAL SOCIAL MOVEMENT  
ALLY***

*Carlo A. Pedrioli\**

*“[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.”<sup>1</sup>*

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For detailed feedback from a rhetorical scholar on an earlier version of this Article, the author recognizes Kerith M. Woodyard. The author presented a prior version of the Article at the annual conference of the Association for the Study of Law, Culture, and Humanities, held at Georgetown University in Washington, DC, U.S.A., on March 6, 2015; the author also presented portions of a prior version of the Article at the annual meeting of the Association of Law, Property, and Society, held at the University of Georgia in Athens, GA, U.S.A., on May 2, 2015. © 2021 Carlo A. Pedrioli.

1. Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 962 n.23 (Mass. 2003).

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## I. INTRODUCTION

On November 18, 2003, the Massachusetts Supreme Judicial Court, “the oldest appellate court in continuous existence in the Western Hemisphere,” charged with interpreting “the oldest, still functioning written constitution in the world,”<sup>2</sup> announced its decision in *Goodridge v. Department of Public Health*.<sup>3</sup> *Goodridge* was the first state supreme court opinion to strike down restrictions on same-sex marriage in the United States.<sup>4</sup> In asserting the right of sexual minorities to civil marriage, the Supreme Judicial Court gave the Massachusetts Legislature 180 days to bring the law into conformity with the Court’s reading of the Massachusetts Constitution.<sup>5</sup> In *Opinions of the Justices to the Senate*,<sup>6</sup> an advisory opinion issued to the Massachusetts Senate on February 3, 2004, the Court insisted that sexual minorities must have access to marriage; civil unions would not suffice.<sup>7</sup> On May 17, 2004, Massachusetts became the first state in the United States to make marriage available for same-sex couples, and many such couples took advantage of the new opportunity.<sup>8</sup>

The decision in *Goodridge* came in response to the modern social movement for same-sex marriage, which had begun in the 1990s with litigation that several same-sex couples had brought in Hawaii.<sup>9</sup> Shortly after the Hawaii litigation, organizations like Lambda Legal and the Equality Federation, a nationwide umbrella group of sexual

2. *About the Supreme Judicial Court*, MASS.GOV, <https://www.mass.gov/service-details/about-the-supreme-judicial-court> (last visited Apr. 9, 2021). The Massachusetts Constitution dates back to 1780. *Goodridge*, 798 N.E.2d at 988 n.7 (Cordy, J., dissenting).

3. 798 N.E.2d 941 (Mass. 2003).

4. Anthony Brooks, *Mass. High Court Strikes Down Gay Marriage Ban: Judges Find Law Barring Same-Sex Unions Unconstitutional*, NAT’L PUB. RADIO (Nov. 18, 2003, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=1511038>.

5. *Goodridge*, 798 N.E.2d at 969–70.

6. 802 N.E.2d 565 (Mass. 2004).

7. *Id.* at 570. Commentary noted that such a dual system that allowed heterosexual couples to have access to marriage but restricted same-sex couples to civil unions not only privileged marriage, but the system also “reproduce[d] exclusions.” Jeffrey A. Bennett, *Seriality and Multicultural Dissent in the Same-Sex Marriage Debate*, 3 COMMC’N & CRITICAL/CULTURAL STUD. 141, 149 (2006).

8. *State-Sanctioned Gay Marriages Begin in Massachusetts*, PBS NEWSHOUR (May 17, 2004, 11:17 AM), [https://www.pbs.org/newshour/politics/law-jan-june04-gaymarriage\\_05-17;How It Happened: 10 Years of Gay Marriage](https://www.pbs.org/newshour/politics/law-jan-june04-gaymarriage_05-17;How%20It%20Happened%3A%2010%20Years%20of%20Gay%20Marriage), NAT’L PUB. RADIO (May 17, 2014, 5:07 PM), <http://www.npr.org/2014/05/17/313457795/how-it-happened-10-years-of-gay-marriage>.

9. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23, *abrogated by Obergefell v. Hodges*, 576 U.S. 644 (2015).

minority rights groups, made same-sex marriage a priority.<sup>10</sup> The Plaintiffs in *Goodridge* and their legal counsel were part of this movement. Preferring to promote other matters like anti-discrimination law outside of the area of marriage, not all members of the larger social movement for sexual minority rights supported the push for same-sex marriage.<sup>11</sup> One major concern was the potential for backlash,<sup>12</sup> which had followed the litigation in Hawaii.<sup>13</sup>

*Goodridge* was controversial, and the backlash was swift and intense. Emails to the Supreme Judicial Court, including those from other states, arrived, and many authors called the justices “every name imaginable.”<sup>14</sup> A group hired planes to fly above the justices’ neighborhoods with banners critical of the members of the Court.<sup>15</sup> The justices received death threats, and, after giving a speech on King Day in 2004, one justice was picked up by an armed guard.<sup>16</sup>

President George W. Bush and his advisors took advantage of the opportunity that *Goodridge* presented. In the 2004 State of the Union Address, delivered on January 20, only two months after the Court’s decision, Bush gave the following warning to a national audience:

Activist judges . . . have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people’s voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.<sup>17</sup>

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10. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 176 (2013).

11. *See id.* at 176–77.

12. *See id.*

13. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 417 (2d ed. 2008).

14. Roderick L. Ireland, *In Goodridge’s Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases*, 85 N.Y.U. L. REV. 1417, 1421 (2010).

15. *Id.* at 1421–22.

16. *Id.* at 1421, 1431.

17. George W. Bush, Third Presidential State of the Union Address (Jan. 20, 2004), <http://www.americanrhetoric.com/speeches/stateoftheunion2004.htm>.

By the summer of 2004, the Bush reelection campaign anticipated that same-sex marriage might be the issue that would get Bush reelected that November.<sup>18</sup>

At both the federal and state levels, constitutional amendments to ban same-sex marriage were in play. In 2004 and 2006, lawmakers in Congress, with the help of President Bush, attempted to pass a federal constitutional amendment to ban same-sex marriage, but the measure failed to gain two-thirds majorities in both federal houses.<sup>19</sup> In 2004, thirteen states amended their constitutions to ban same-sex marriage.<sup>20</sup> Before 2004, only three states had such bans.<sup>21</sup> Between 2005 and 2012, fifteen more states banned same-sex marriage.<sup>22</sup> In Massachusetts, an attempt to overturn *Goodridge* via a state constitutional amendment moved forward in March 2004, although that particular attempt ultimately failed in September 2005.<sup>23</sup>

Overstating the importance of *Goodridge* would be difficult. Although the Vermont Supreme Court had stated in 1999 that sexual minorities were entitled to the benefits of marriage, the Vermont Supreme Court had allowed the Vermont Legislature to give sexual minorities the right to civil unions instead of marriage.<sup>24</sup> The Massachusetts Supreme Judicial Court went beyond civil unions. In the years that followed *Goodridge*, other state supreme courts followed the position taken by the Supreme Judicial Court, and eventually legislatures and voters in numerous other states took action that led to the right to same-sex marriage.<sup>25</sup> As difficult as it would

18. Michael J. Klarman, Brown and Lawrence (*and Goodridge*), 104 MICH. L. REV. 431, 464 (2005).

19. David Masci & Ira C. Lupu, *Overview of Same-Sex Marriage in the United States*, PEW RSCH. CTR. (Dec. 7, 2012), <http://www.pewforum.org/2012/12/07/overview-of-same-sex-marriage-in-the-united-states/>.

20. *Id.*

21. *Id.*

22. *Id.*

23. Rick Klein, *Vote Ties Civil Unions to Gay-Marriage Ban: Romney to Seek Stay of SJC Order*, BOS. GLOBE (Mar. 30, 2004), [http://www.boston.com/news/specials/gay\\_marriage/articles/2004/03/30/vote\\_ties\\_civil\\_unions\\_to\\_gay\\_marriage\\_ban/](http://www.boston.com/news/specials/gay_marriage/articles/2004/03/30/vote_ties_civil_unions_to_gay_marriage_ban/); Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES (Sept. 15, 2005), <https://www.nytimes.com/2005/09/15/us/massachusetts-rejects-bill-to-eliminate-gay-marriage.html>.

24. Masci & Lupu, *supra* note 19; see *Baker v. State*, 744 A.2d 864 (Vt. 1999).

25. See Erica Ryan, *Timeline: Gay Marriage in Law, Pop Culture and the Courts*, NAT'L PUB. RADIO (June 26, 2013, 5:00 AM), <http://www.npr.org/2013/03/21/174732431/timeline-gay-marriage-in-law-pop-culture-and-the-courts>.

have been to predict only a few years after *Goodridge*,<sup>26</sup> a decade after the decision, same-sex marriage was becoming much more available across the United States,<sup>27</sup> and a dozen years after the decision, in *Obergefell v. Hodges*,<sup>28</sup> the U.S. Supreme Court struck down, on federal constitutional grounds, several state statutes that prohibited same-sex marriage, which effectively legalized same-sex marriage across the United States.<sup>29</sup>

Although courts do interface with social movements, courts do not often contribute to leading the way for change. For example, when the U.S. Supreme Court issued the *Brown v. Board of Education*<sup>30</sup> public school desegregation decision, some states already had begun to desegregate their schools, so the Supreme Court was following the legislatures, the representatives of the people, in those states.<sup>31</sup> When, in *United States v. Windsor*,<sup>32</sup> the U.S. Supreme Court struck down the heterosexual-only federal definition of marriage in the Defense of Marriage Act of 1996 (DOMA),<sup>33</sup> same-sex marriage was already legal in twelve states,<sup>34</sup> and the national public opinion was slightly in favor of same-sex marriage.<sup>35</sup> Again, the Supreme Court followed.

To the contrary, in *Goodridge*, the Massachusetts Supreme Judicial Court, not a legislative body representative of the public, played a leading role in mandating a change in the social order before the culture, or at least significant portions of it, would accept such

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26. Peter Dickinson, *Love Is a Battlefield: The Performance and Politics of Same-Sex Marriage in North America*, 28 TEXT & PERFORMANCE Q. 277, 294 (2008).

27. *Same-Sex Marriage, State by State*, PEW RSCH. CTR. (June 26, 2015), <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/>.

28. 576 U.S. 644 (2015).

29. *Id.* at 675.

30. 347 U.S. 483 (1954).

31. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–45 (2004). The South refused to desegregate its schools for many years. A decade after *Brown*, in the eleven states in the old Confederacy, only 1.17% of Black students attended school with White students. DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 96 (2004).

32. 570 U.S. 744 (2013).

33. Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013) (striking down Section 3, which contained the heterosexual-only federal definition of marriage) and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (superseding Section 2, which allowed sibling states not to recognize same-sex marriages from other states).

34. *Windsor*, 570 U.S. at 765.

35. Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP (May 13, 2013), <http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx>.

change.<sup>36</sup> Prior to *Goodridge*, no state had legalized same-sex marriage, and, at the time of the decision, only 33% of people in the United States supported same-sex marriage, while 58% opposed it.<sup>37</sup> Although, according to one poll, 50% of Massachusetts residents supported same-sex marriage in the months prior to *Goodridge*, 44% of state residents opposed same-sex marriage at that time.<sup>38</sup> Moreover, Massachusetts Governor Mitt Romney and many members of the Massachusetts Legislature opposed same-sex marriage, and, in the wake of the decision, the Legislature was seriously contemplating avoiding same-sex marriage by offering civil unions for same-sex couples.<sup>39</sup> Governor Romney supported a state constitutional amendment to ban same-sex marriage.<sup>40</sup> Given these dynamics, *Goodridge* provides an intriguing set of texts for study.

Without attempting to discount the role of activists who led the modern movement for same-sex marriage, this Article draws upon social movement theory in the field of communication to examine how the Massachusetts Supreme Judicial Court played a leading role from within the establishment in furthering the social movement for same-sex marriage in the United States. The Article looks at the various opinions in *Goodridge v. Department of Public Health*, as well as those in *Opinions of the Justices to the Senate*, the Court's responses to the Massachusetts Senate's request for an advisory opinion on providing civil unions but not marriage to sexual minorities, to see how the members of the Court, closely divided four votes to three in both sets of opinions, constructed or refrained from constructing marriage as a right that should be available to sexual minorities. The Article proceeds by offering a brief note on social movement theory in communication; examining the various opinions in *Goodridge*, including the controlling opinion, a concurring opinion, and three dissenting opinions; and reviewing the ensuing advisory opinions, including the majority opinion and the two dissenting opinions. This discussion should contribute toward a greater understanding of state

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36. Klarman, *supra* note 18, at 477.

37. David Masci, *High Court to Hear Same-Sex Marriage Cases*, PEW RSCH. CTR. (Mar. 20, 2013), <http://www.pewforum.org/2013/03/20/high-court-to-hear-same-sex-marriage-cases/>.

38. Frank Phillips & Rick Klein, *50% in Poll Back SJC Ruling on Gay Marriage*, BOS. GLOBE (Nov. 23, 2003), [http://www.boston.com/news/local/articles/2003/11/23/50\\_in\\_poll\\_back\\_sjc\\_ruling\\_on\\_gay\\_marriage/](http://www.boston.com/news/local/articles/2003/11/23/50_in_poll_back_sjc_ruling_on_gay_marriage/).

39. *Id.*

40. *Id.*



supreme court rhetoric of social change and also offer some refinement of social movement theory, particularly regarding how a faction within a fractured establishment can further a social movement.

## II. A BRIEF NOTE ON SOCIAL MOVEMENT THEORY IN COMMUNICATION

In the field of communication, consideration of social movements became particularly intense during and shortly after the mid-1960s.<sup>41</sup> Between 1965 and 1980, communication scholars published over 200 studies of various aspects of social movements.<sup>42</sup> Such study is understandable given the great amount of social angst and the ensuing unrest that the 1960s produced. Of course, other fields such as political science and sociology have devoted great attention to social movements as well,<sup>43</sup> but the focus here will be on social movement theory in communication.

Social movements are “group action undertaken by social actors, including individuals, groups and organizations, for the purpose of affecting social and political change.”<sup>44</sup> From the perspective of traditional social movement theory in communication, social movements have unfolded in a particular manner. Initially, individuals, who are generally relatively large in number,<sup>45</sup> are concerned with some aspect of society and seek change.<sup>46</sup> Different types of media are important in furthering the message of a social movement,<sup>47</sup> and leadership provides the face of the movement that

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41. See Stephen E. Lucas, *Coming to Terms with Movement Studies*, 31 CENT. STATES SPEECH J. 255, 255 (1980).

42. *Id.*

43. Christina R. Foust & Kate Drazner Hoyt, *Social Movement 2.0: Integrating and Assessing Scholarship on Social Media and Movement*, 18 REV. COMM’N 37, 38 (2018).

44. Halim Rane & Sumra Salem, *Social Media, Social Movements and the Diffusion of Ideas in the Arab Uprisings*, 18 J. INT’L COMM’N 97, 98 (2012).

45. Lucas, *supra* note 41, at 255.

46. Leland M. Griffin, *The Rhetoric of Historical Movements*, 38 Q.J. SPEECH 184, 184 (1952).

47. Karma R. Chávez, *Counter-Public Enclaves and Understanding the Function of Rhetoric in Social Movement Coalition-Building*, 59 COMM’N Q. 1, 6 (2011). Social movements can use media to convey logical and emotional discourses, verbal and nonverbal discourses, and some combination of these types of discourse. See KEVIN MICHAEL DELUCA, *IMAGE POLITICS: THE NEW RHETORIC OF ENVIRONMENTAL ACTIVISM* 14–22 (1999). See generally Franklyn S. Haiman, *Nonverbal Communication and the First Amendment: The Rhetoric of the Streets Revisited*, 68 Q.J. SPEECH 371, 371 (1982) (discussing developments in nonverbal modes of protest). Although media concentration can be a challenge for a social movement that is trying to promote its message, more

the public recognizes.<sup>48</sup> The social movement agitates against the establishment, generally making the movement's presence known, and the establishment responds to movement activity, often in an attempt to control the social movement.<sup>49</sup> Social movements can constitute both phenomena and meaning.<sup>50</sup>

One important aspect of traditional social movement theory has been that social movements are not institutionalized.<sup>51</sup> From this perspective, a social movement organization is not part of the establishment,<sup>52</sup> and the organization often tries to form its identity in such a manner as to separate itself from the establishment.<sup>53</sup> Indeed, the line between the social movement and the establishment is clear. Established institutions that change themselves do not constitute social movements, and when a social movement becomes part of the status quo, the social movement is no longer a social movement.<sup>54</sup>

A classic example of a social movement is the civil rights movement of the 1950s and 1960s.<sup>55</sup> At that time, many African-Americans responded to racially discriminatory laws and practices,

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recent technologies can help a movement get around media concentration. See DELUCA, *supra*, at 47. See generally Elise Danielle Thorburn, *Social Media, Subjectivity, and Surveillance: Moving on from Occupy, the Rise of Live Streaming Video*, 11 COMM'C'N & CRITICAL/CULTURAL STUD. 52, 52 (2014) (discussing the use of live streaming in the 2012 Quebec student strike).

48. CHARLES J. STEWART, CRAIG ALLEN SMITH & ROBERT E. DENTON, JR., PERSUASION AND SOCIAL MOVEMENTS 111–12 (4th ed. 2001). Study of social movements has focused on public rhetorical actions such as the “oratorical, material, visual, or performative and embodied.” Chávez, *supra* note 47, at 2.

49. JOHN W. BOWERS, DONOVAN J. OCHS & RICHARD J. JENSEN, THE RHETORIC OF AGITATION AND CONTROL 4, 8 (2d ed. 1993); Erika Biddle, *Re-Animating Joseph Beuys’ “Social Sculpture”*: Artistic Interventions and the Occupy Movement, 11 COMM'C'N & CRITICAL/CULTURAL STUD. 25, 29–30 (2014). Although traditional thinking has been that physical presence is important in social movements, more recent thinking has considered the possibility that physical absence may be important in some social movements. See *id.* at 29–30 (considering the Occupy movement of fall 2011).

50. Lucas, *supra* note 41, at 258. For an argument that social movements constitute meaning as opposed to phenomena, see Michael Calvin McGee, “Social Movement”: Phenomenon or Meaning?, 31 CENT. STATES SPEECH J. 233, 233 (1980). McGee argued that, for the rhetorical study of movements to become its own domain, such study should be hermeneutic as opposed to simply behavioral in nature. *Id.* at 241–42.

51. Lucas, *supra* note 41, at 255–56; STEWART, SMITH & DENTON, *supra* note 48, at 5–6.

52. STEWART, SMITH & DENTON, *supra* note 48, at 5.

53. Jennifer Ann Peebles, *Downwind: Articulation and Appropriation of Social Movement Discourse*, 76 S. COMM'C'N J. 248, 251 (2011).

54. STEWART, SMITH & DENTON, *supra* note 48, at 5–6.

55. See Franklyn S. Haiman, *The Rhetoric of the Streets: Some Legal and Ethical Considerations*, 53 Q.J. SPEECH 99, 99–100 (1967).

such as those related to public accommodations and voting.<sup>56</sup> The civil rights movement found support in and inspiration from the Black church.<sup>57</sup> Martin Luther King, Jr., himself a pastor, was a principal face of the movement.<sup>58</sup> Leaders like King spoke out publicly, while they and their followers drew attention to their cause in the streets and elsewhere.<sup>59</sup> These developments received much-needed media coverage, particularly on television.<sup>60</sup> Meanwhile, Southern politicians tried, both rhetorically and physically, to resist the movement.<sup>61</sup>

Other examples of social movements include the movements for women's rights,<sup>62</sup> against the Vietnam War,<sup>63</sup> for Latino/a rights,<sup>64</sup> against neoliberalism,<sup>65</sup> and to address the climate crisis.<sup>66</sup> Some social movements have developed specific names. The Me Too, Occupy, and Black Lives Matter movements, which respectively have demanded change regarding sexual harassment and assault of women,<sup>67</sup> socioeconomic inequality,<sup>68</sup> and police violence against Black people,<sup>69</sup> are three examples of such movements. Movements are not necessarily mutually exclusive of each other.

The traditional perspective on social movements described above assumes a homogenous establishment that responds monolithically to the agitation of a movement. However, the establishment is not always

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56. *Id.* at 99–100, 112; Jack Nelson, *The Civil Rights Movement: A Press Perspective*, 28 HUM. RTS. 3, 4 (2001).

57. Dennis C. Dickerson, *African American Religious Intellectuals and the Theological Foundations of the Civil Rights Movement, 1930–55*, 74 CHURCH HIST. 217, 217–20 (2005).

58. *Id.* at 217.

59. *Id.*; Haiman, *supra* note 55, at 99–100, 112.

60. Nelson, *supra* note 56, at 4.

61. Dan T. Carter, *Legacy of Rage: George Wallace and the Transformation of American Politics*, 62 J. S. HIST. 3, 6–7 (1996); Nelson, *supra* note 56, at 4.

62. Chávez, *supra* note 47, at 2.

63. See Haiman, *supra* note 55, at 99.

64. See Fernando Pedro Delgado, *Chicano Movement Rhetoric: An Ideographic Interpretation*, 43 COMM'C'N Q. 446, 446 (1995).

65. See Shiv Ganesh & Cynthia Stohl, *Qualifying Engagement: A Study of Information and Communication Technology and the Global Social Justice Movement in Aotearoa New Zealand*, 77 COMM'C'N MONOGRAPHS 51, 51–52 (2010).

66. Nicholas S. Paliewicz, *Making Sense of the People's Climate March: Towards an Aesthetic Approach to the Rhetoric of Social Protest*, 83 W.J. COMM'C'N 94, 94–95 (2019).

67. See Emma Frances Bloomfield, *Rhetorical Constellations and the Inventional/Intersectional Possibilities of #MeToo*, 43 J. COMM'C'N INQUIRY 394, 400–01 (2019).

68. See Biddle, *supra* note 49, at 26–27.

69. See Chloe Banks, *Disciplining Black Activism: Post-Racial Rhetoric, Public Memory and Decorum in News Media Framing of the Black Lives Matter Movement*, 32 CONTINUUM: J. MEDIA & CULTURAL STUD. 709, 710 (2018).

homogenous and actually may be fractured in responding to agitation.<sup>70</sup> Indeed, engagement may take place within the establishment.<sup>71</sup> After the movement's initial agitation, engagement can occur between or among the factions within the power structure.<sup>72</sup> For instance, if a faction within the court system is receptive to a movement's message, the court system can be a point of entry into the system for agitators.<sup>73</sup> Presumably, if an internal faction is large or influential enough, the original agitators can do more than have their message heard, and significant social change is possible.

When, via a faction within the establishment, a social movement gains significant access to a limited part, but not all parts, of the establishment, the line between the social movement and the establishment becomes blurred. While the social movement may still exist outside the establishment, and factions of the establishment may attempt to control the social movement in response to the movement's agitation, a portion of the establishment nonetheless labors on behalf of the social movement. That pro-social movement faction of the establishment is neither the social movement itself nor the establishment that attempts to control the social movement. Thus, the pro-social movement faction of the establishment functions in a liminal rhetorical space that is theoretically provocative and suggestive of a need for some revision of traditional social movement theory in communication. This complicating dynamic of a strong pro-social movement faction of the establishment developed in the *Goodridge* case, and the consequences were profound.

### III. THE *GOODRIDGE* OPINIONS AS RESPONSES TO AGITATION AGAINST A FRACTURED ESTABLISHMENT

Although litigation over same-sex marriage in the United States dates back to the 1970s,<sup>74</sup> same-sex couples who sought access to

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70. Carlo A. Pedrioli, *A Fractured Establishment's Responses to Social Movement Agitation: The U.S. Supreme Court and the Negotiation of an Outsider Point of Entry in Walker v. City of Birmingham*, 44 FREE SPEECH Y.B. 107, 108 (2010).

71. *Id.* at 115.

72. *Id.*

73. *Id.* at 116.

74. KLARMAN, *supra* note 10, at 18–19; *see, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (mem.), *overruled by Obergefell v. Hodges*, 576 U.S. 644 (2015).

marriage were never taken seriously in court until the 1990s.<sup>75</sup> During the 1990s, in response to lawsuits that various same-sex couples brought, the supreme courts in both Hawaii and Vermont considered the possibility of same-sex marriage. The Hawaii Supreme Court indicated that the government needed to satisfy strict scrutiny, the highest level of judicial review, to limit marriage to only different-sex couples, but the public approved a constitutional amendment to allow the Hawaii Legislature to limit marriage to only different-sex couples without government satisfaction of the strict scrutiny test.<sup>76</sup> The Vermont Supreme Court struck down the exclusion of same-sex couples from the benefits of marriage but allowed the Vermont Legislature to provide for civil unions with those benefits, which it did shortly thereafter.<sup>77</sup>

The Plaintiffs who brought the *Goodridge* case were the next in a line of litigants to agitate a state supreme court for the right to marry civilly and thus to become part of the larger movement for sexual minority rights. These Plaintiffs were Julie Goodridge, David Wilson, Robert Compton, Michael Horgan, Edward Balmelli, Maureen Brodoff, Ellen Wade, Gary Chalmers, Richard Linnell, Heidi Norton, Gina Smith, Gloria Bailey, and Linda Davies.<sup>78</sup> Mary L. Bonauto, counsel for the Plaintiffs, indicated, “At its core, *Goodridge* [was] a case about real people and real families who asked their government to treat them equally and fairly.”<sup>79</sup>

In *Goodridge*, the Massachusetts Supreme Judicial Court was fractured in responding to the Plaintiffs’ agitation. Four of the seven justices were receptive to the Plaintiffs’ arguments for same-sex marriage, while three justices were not receptive to those arguments. Thus, engagement occurred among members of the Court, and the fracturing on the Court provided the point of entry for the outsiders.

Not only did a point of entry develop, but, in a wide-open case with little precedent, the majority of the Supreme Judicial Court, although not the social movement itself, played a role in furthering the

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75. JASON PIERCESON, SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT 87 (2013).

76. KLARMAN, *supra* note 10, at 56, 65–66; *see* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (plurality opinion), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23, *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

77. KLARMAN, *supra* note 10, at 76–79; *see* Baker v. State, 744 A.2d 864 (Vt. 1999).

78. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d. 941, 949 (Mass. 2003).

79. Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 1 (2005).

social movement for same-sex marriage. By virtue of the power of judicial review, via which judges can review acts of other branches of government,<sup>80</sup> the majority functioned as an agent of change on behalf of the social movement. Although partially institutionalized, the social movement for same-sex marriage had not become fully institutionalized because, in addition to the dissenting members of the Court, the Governor and many members of the Legislature did not agree with the decision of the majority of the Court.<sup>81</sup> Also, most people in the country did not support same-sex marriage.<sup>82</sup> President Bush even criticized *Goodridge* in the State of the Union Address two months after the decision.<sup>83</sup> Thus, the matter was not the case of an institution that decided to reform itself, nor was it the case of a social movement that had become the norm. Rather, the movement for same-sex marriage had gained an important ally in the majority of the Court for an ongoing struggle, and the struggle would continue in part because of the strong negative responses from other components of the establishment, including other branches, or parts of them, of the Massachusetts government and two branches of the federal government. Presumably, many of the elected officials were responding in a manner expressive of their constituents' views.

To examine how the justices on a fractured Court rhetorically engaged each other and how the majority supported the movement for same-sex marriage, this section of the Article looks at the controlling opinion by Chief Justice Margaret Marshall, which Justices Roderick Ireland and Judith Cowin joined, the concurring opinion by Justice John Greaney, and the dissenting opinions by Justices Francis Spina, Martha Sosman, and Robert Cordy. Justice Marshall's opinion only

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80. WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 1 (2000). Judicial review dates back to 1610 in England, when Edward Coke crafted his opinion in *Bonham's Case*. *Id.* at 34–35. Although judicial review did not become established in England at that time, it did eventually make its way to the Colonies. *Id.* at 35–36. In the future United States, judicial review dates back to 1761, when Massachusetts attorney James Otis argued for the principle in *Paxton v. Gray*. *Id.* During the 1780s and 1790s, state courts began to accept the concept of judicial review. *Id.* at 36–37. After having assumed, but not having decided, in two 1790s cases that it had the power of judicial review, the U.S. Supreme Court, speaking through the voice of Chief Justice John Marshall, officially accepted judicial review in 1803. *Id.* at 37; *Marbury v. Madison*, 5 U.S. 137 (1803). For better or worse, judicial review became a permanent part of the constitutional landscape in the United States. Frank I. Michelman, *Living with Judicial Supremacy*, 38 *WAKE FOREST L. REV.* 579, 593 (2003).

81. Phillips & Klein, *supra* note 38.

82. Masci, *supra* note 37.

83. *See* Bush, *supra* note 17.

had three votes, but Justice Greaney indicated in his concurrence that he “agree[d] with the result reached by the court, the remedy ordered, and much of the reasoning in the court’s opinion,”<sup>84</sup> so the result that Marshall’s opinion announced carried the day in setting precedent in Massachusetts that became available to supreme courts in states across the United States. At the heart of the conflict between the majority and the dissenters were the nature of the right at stake and the role, if any, that the Court should play in guaranteeing that right.

#### A. Chief Justice Margaret Marshall’s Controlling Opinion

As the ensuing discussion will show, Chief Justice Marshall focused her groundbreaking opinion on discrimination against sexual minorities and the Court’s power of judicial review to vindicate minority rights in constitutional cases. She refused to accept arguments that might have justified limiting the right to marriage for sexual minorities. Of note, she also attempted to humanize the Plaintiffs.

Marshall was an immigrant to the United States from South Africa.<sup>85</sup> During a high school study abroad experience in Wilmington, Delaware, she received encouragement to think for herself, which could have led to trouble in apartheid-era South Africa.<sup>86</sup> When she later returned to the States for graduate school, she became involved in opposing the Vietnam War and promoting the women’s movement.<sup>87</sup> Nonetheless, she had a traditional career for a Yale law graduate, which included the private practice of law, general counsel work for Harvard, and membership on the bench.<sup>88</sup> Thus, one might see Marshall as “a combination of the ultimate establishment figure and the ultimate anti-establishment figure.”<sup>89</sup>

In her *Goodridge* opinion, Marshall stated the key question in the case as “whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations

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84. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring).

85. Nina Totenberg, *Former Mass. Chief Justice on Life, Liberty, and Gay Marriage*, NAT’L PUB. RADIO (June 7, 2013, 3:25 AM), <http://www.npr.org/2013/06/07/189288605/former-mass-chief-justice-on-life-liberty-and-gay-marriage>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

conferred by civil marriage to two individuals of the same sex who wish to marry.”<sup>90</sup> In answering in the negative, she noted that the Massachusetts Constitution disallowed “the creation of second-class citizens.”<sup>91</sup>

The chief justice endeavored to frame the terms of the discussion in a focused manner. She recognized that many different individuals held “religious, moral, and ethical convictions” against and in favor of same sex marriage.<sup>92</sup> Nonetheless, she indicated, perhaps not entirely honestly, that the Supreme Judicial Court had to base its decision on the Massachusetts Constitution rather than on personal views.<sup>93</sup> In making this pitch for judicial credibility, she suggested that personal views somehow did not inform a justice’s reading of the relevant but vague provisions of the Constitution. For this general principle by which judges supposedly avoid bringing their views to decision-making, she cited the U.S. Supreme Court’s then-recent decision in *Lawrence v. Texas*,<sup>94</sup> which earlier that year had struck down a Texas anti-sodomy law aimed only at sexual minorities.<sup>95</sup>

Likely to address negative stereotypes of sexual minorities, Marshall made an effort to present the fourteen Plaintiffs in the most favorable light possible. She noted that, at the time the case had been filed, the individuals in the seven couples had been in committed romantic relationships for thirty, twenty, thirteen, thirteen, eleven, seven, and four years.<sup>96</sup> The Plaintiffs were also professional people in business, law, banking, education, therapy, and engineering, and the Plaintiffs were active in their communities.<sup>97</sup>

The specific statute in question was Massachusetts General Law Chapter 207, which Marshall construed to restrict civil marriage to different-sex couples.<sup>98</sup> She admitted that, traditionally in the Commonwealth, different-sex coupling had been the understanding of civil marriage.<sup>99</sup> Nonetheless, the relevant constitutional question called for consideration of the equal protection and due process

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90. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

91. *Id.*

92. *Id.*

93. *Id.*

94. 539 U.S. 558 (2003).

95. *Id.* at 578.

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

97. *Id.*

98. *Id.* at 952–53.

99. *Id.*



provisions in the Commonwealth's Constitution, which frequently overlapped.<sup>100</sup>

Marshall considered the nature of civil marriage, a “wholly secular institution” that the government created.<sup>101</sup> In effect, marriage involved the Commonwealth and two spouses.<sup>102</sup> The institution came with many benefits, including joint income filing for state taxes, tenancy by the entirety, extension of the homestead exemption to one's spouse and children, inheritance rights in the absence of a spousal will, and numerous other benefits that Marshall listed.<sup>103</sup> Calling upon the U.S. Supreme Court's opinion in *Loving v. Virginia*,<sup>104</sup> which had protected the right to marry under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution,<sup>105</sup> Marshall described marriage as “a ‘civil right.’”<sup>106</sup>

The chief justice looked at the history of discrimination in marriage laws, noting that racial discrimination had been a major ingredient in laws that had restricted marriage.<sup>107</sup> She observed that both the U.S. Supreme Court in *Loving* and the California Supreme Court nearly twenty years earlier in *Perez v. Sharp*<sup>108</sup> had struck down anti-miscegenation laws.<sup>109</sup> Analogizing sexual orientation to race, she stated, “[H]istory must yield to a more fully developed understanding of the invidious quality of the discrimination.”<sup>110</sup> The majoritarian impulse was not enough to prevent the judiciary from protecting minority rights.<sup>111</sup>

Because the reasons that the Department of Public Health and various amici curiae offered would fail rational basis review,<sup>112</sup> the most deferential of all standards of judicial review of government

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100. *Id.* at 953.

101. *Id.* at 954.

102. *Id.*

103. *Id.* at 955–57.

104. 388 U.S. 1 (1967).

105. *Id.* at 11–12.

106. *Goodridge*, 798 N.E.2d at 957.

107. *Id.* at 958.

108. 198 P.2d 17 (Cal. 1948) (also known as *Perez v. Lippold*).

109. *Goodridge*, 798 N.E.2d at 958.

110. *Id.*

111. *See id.* at 958 n.16.

112. As Justice Cordy noted, Marshall reversed the burden of proof in a case in which she claimed the standard of review was rational basis. *Id.* at 998 n.21 (Cordy, J., dissenting). In such a case, the burden of proof is on the challenger, not the government. *Id.*

action, Marshall would not subject those reasons to strict scrutiny, the most exacting standard of judicial review.<sup>113</sup> Even under the deferential standard of rational basis, state due process or equal protection rights were violated.<sup>114</sup>

The chief justice responded to the various arguments in favor of the law one at a time. First, Marshall disagreed that the main purpose of marriage was procreation.<sup>115</sup> Although she admitted that many, if not most, couples had children, she pointed out that fertility was not required for marriage.<sup>116</sup> Rather, marriage was defined by an “exclusive and permanent commitment.”<sup>117</sup>

Second, Marshall disagreed that heterosexual marriage provided the optimal setting for having children.<sup>118</sup> She observed that the family in the United States had been changing and was continuing to change.<sup>119</sup> Marshall pointed out that the Department of Public Health admitted that individuals in same-sex couples could be “‘excellent’ parents.”<sup>120</sup> Unfortunately for individuals in same-sex couples, child-rearing was made more difficult by exclusion of sexual minorities from the rights associated with marriage.<sup>121</sup>

Third, Marshall rejected the assertion that denial of marriage to same-sex couples would conserve public or private money.<sup>122</sup> She said that the Department of Public Health should not assume that individuals in same-sex relationships were any more independent from each other, and thus less in need of marital benefits like tax advantages and health care, than individuals in different-sex relationships were.<sup>123</sup>

Additionally, beyond the reasons that the Department of Public Health proffered, Marshall examined various reasons for the law that amici curiae advanced, and she rejected all of them.<sup>124</sup> Although admitting that change may have been in the air in light of the Court’s eventual vote, she denied that granting the right to same-sex marriage

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113. *Id.* at 961 (controlling opinion).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 962.

119. *Id.* at 962–63.

120. *Id.* at 963.

121. *Id.*

122. *Id.* at 964.

123. *Id.*

124. *Id.* at 964–67.

would destroy civil marriage.<sup>125</sup> Calling upon race as an analogy, she stated that the Plaintiffs were not attempting to do away with marriage for heterosexual individuals any more than individuals who sought interracial marriage had been trying to prohibit individuals of the same race from marrying each other.<sup>126</sup>

Focusing specifically on judicial review in constitutional cases, Marshall disagreed that the Massachusetts Legislature should decide the issue.<sup>127</sup> “We owe great deference to the Legislature to decide social and policy issues,” she noted, “but it is the traditional and settled role of courts to decide constitutional issues.”<sup>128</sup> Marshall indicated that, in constitutional cases, the courts should promote “the extension of constitutional rights and protections to people once ignored or excluded.”<sup>129</sup>

Finally, Marshall rejected two other amici arguments.<sup>130</sup> In terms of the interstate conflict that could result because of the legalization of same-sex marriage in Massachusetts, the chief justice said that such consideration should not prevent the Court “from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution.”<sup>131</sup> In terms of a supposed community consensus against intimate same-sex conduct, Marshall pointed to various Commonwealth laws against discrimination based on sexual orientation, including those in the areas of employment, housing, public accommodation, public education, and others.<sup>132</sup>

In short, Marshall concluded that the Department of Public Health and amici curiae had failed to present a rational basis for the denial of marriage licenses to same-sex couples.<sup>133</sup> “The marriage ban,” she commented, “works a deep and scarring hardship on a very real segment of the community for no rational reason.”<sup>134</sup> Marshall recognized that “[p]rivate biases may be outside the reach of the law,

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125. *Id.* at 965.

126. *Id.*

127. *Id.* at 965–66.

128. *Id.* at 966.

129. *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996) (addressing discrimination against women at the Virginia Military Institute, a public institution of higher education that admitted only men)).

130. *Id.* at 967.

131. *Id.*

132. *Id.*

133. *Id.* at 968.

134. *Id.*

but [that] the law [could] not, directly or indirectly, give them effect.”<sup>135</sup>

Having found no reason to deny the Plaintiffs relief, Marshall turned to the matter of remedy. She noted that the Supreme Judicial Court faced a similar problem as the Court of Appeal for Ontario had earlier that year in *Halpern v. Attorney General of Canada*,<sup>136</sup> when the latter court had reviewed a same-sex marriage ban in light of the Canadian Charter of Rights and Freedoms.<sup>137</sup> Like the members of the Court of Appeal for Ontario, Marshall opted to modify the common-law definition of marriage to include same-sex couples.<sup>138</sup> The revised definition of civil marriage in Massachusetts would be “the voluntary union of two persons as spouses, to the exclusion of all others.”<sup>139</sup> The case would be remanded to the lower court for entry of judgment in favor of the Plaintiffs, but entry would be stayed for 180 days so that the Massachusetts Legislature could “take such action as it may deem appropriate in light of this opinion.”<sup>140</sup>

### B. Justice John Greaney’s Concurrence

As noted above, Justice Greaney “agree[d] with the result reached by the court, the remedy ordered, and much of the reasoning in the court’s opinion.”<sup>141</sup> However, as the following discussion will show, he sought to place more attention on the equal protection analysis. What he saw as sex-based discrimination called for careful judicial review. Additionally, he responded to arguments based on tradition, and he rejected original intent as a means of constitutional interpretation. Finally, Greaney made an emotional plea for acceptance of the sexual minorities who sought civil marriage.

Article 1 of the Massachusetts Declaration of Rights, modified by Article 106 of the Amendments to the Commonwealth’s Constitution, protected against discrimination based on sex, race, color, religion, or

135. *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

136. (2003), 65 O.R. 3d 161 (Can. Ont. C.A.).

137. *Goodridge*, 798 N.E.2d at 969. For discussions of the history of same-sex marriage in Canada, see, for example, Christy M. Glass & Nancy Kubasek, *The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights*, 15 MICH. J. GENDER & L. 143, 160–73 (2008); R. Douglas Elliott, *The Canadian Earthquake: Same-Sex Marriage in Canada*, 38 NEW ENG. L. REV. 591, 609–19 (2004).

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

139. *Id.*

140. *Id.* at 969–70.

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

national origin.<sup>142</sup> According to Greaney, this was “a straightforward case of discrimination that disqualifie[d] an entire group of our citizens and their families from participation in an institution of paramount legal and social importance.”<sup>143</sup>

Greaney described civil marriage not as a privilege conferred by the state, but as a fundamental right.<sup>144</sup> To support this proposition, he cited several U.S. Supreme Court cases, including *Loving*, the decision that had struck down anti-miscegenation statutes.<sup>145</sup>

The concurring justice considered the classification as one based on the sex of the two individuals who sought to marry.<sup>146</sup> For example, Hillary Goodridge could not marry Julie Goodridge because the former was a woman.<sup>147</sup> In the same way, Gary Chalmers could not marry Richard Linnell because the former was a man.<sup>148</sup> For authority, Greaney cited opinions from the justices on the Hawaii Supreme Court and the Vermont Supreme Court, both of which had considered same-sex marriage in the 1990s.<sup>149</sup> Greaney expressed concern with the view that a sexual minority was not denied the right to marriage because the individual could find a different-sex partner.<sup>150</sup>

Greaney’s analysis regarding sex-based discrimination was slightly different from that of Justice Denise Johnson in *Baker v. State*,<sup>151</sup> a similar case that the Vermont Supreme Court had decided in 1999 without requiring same-sex marriage.<sup>152</sup> In her opinion, Justice Johnson had noted that a woman could not marry another woman because the prospective marital partner was a woman.<sup>153</sup>

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Greaney treated the words *sex* and *gender* as synonyms. *Id.* at 970–71. From an academic perspective, this is inaccurate. Although the terms overlap, sex is a biologically-based designation, and gender is a social construction and expression. JULIA T. WOOD, GENDERED LIVES: COMMUNICATION, GENDER, AND CULTURE 20–21 (9th ed. 2011). For a discussion of sex and gender, see *id.* at 20–27.

147. *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring).

148. *Id.*

149. *Id.* (citing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23, *abrogated by Obergefell v. Hodges*, 576 U.S. 644 (2015); *Baker v. State*, 744 A.2d 864, 897 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part)).

150. *Id.*

151. 744 A.2d 864 (Vt. 1999).

152. See generally *id.* at 867.

153. *Id.* at 905 (Johnson, J., concurring in part and dissenting in part).

Likewise, a man could not marry another man because the prospective marital partner was a man.<sup>154</sup> As Johnson had seen it, since the law did not inquire into sexual practices or identities, the discrimination was based on sex, not sexual orientation.<sup>155</sup> Still, the two justices agreed that sex-based discrimination was at play in their respective cases.

Seeing an infringement of a fundamental right and a sex-based classification, Greaney applied strict scrutiny, the highest level of judicial review of the government action.<sup>156</sup> Thus, the government had to show “a compelling purpose furthered by the statutes that [could] be accomplished in no other reasonable manner.”<sup>157</sup>

Greaney noted that couples had a right to have children, regardless of sexual orientation or marital status.<sup>158</sup> Since the Commonwealth’s policy of denying marriage to same-sex couples impacted the legal protections and benefits of children of same-sex couples, Greaney saw a “caste-like system” that was “irreconcilable with, indeed, totally repugnant to, the State’s strong interest in the welfare of all children.”<sup>159</sup>

The concurring justice addressed the arguments based on tradition. He responded to such arguments by noting the following:

To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide. This case calls for a higher level of legal analysis. Precisely, the case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage . . . .<sup>160</sup>

Citing the U.S. Supreme Court’s decision in *Lawrence v. Texas*, Greaney stated that the current case was about constitutional law, not tradition.<sup>161</sup>

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154. *Id.*

155. *Id.*

156. *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 972–73.

161. *Id.* at 973.

On a related note, Greaney considered the original intent behind revising Article I. He recognized that such an intent had not been to promote same-sex marriage.<sup>162</sup> Regardless, Greaney specifically said that he did not accept the philosophy of the original intent school of constitutional interpretation.<sup>163</sup> The views of one time, the concurring justice believed, should not be allowed to discriminate against individuals who live in another time, and equal protection principles should control.<sup>164</sup>

Greaney concluded his opinion with an emotional plea that those who opposed same-sex marriage would come to accept the Court's decision.<sup>165</sup> "The plaintiffs," he noted, "volunteer in our schools, worship beside us in our religious houses, and have children who play with our children . . . ." <sup>166</sup> He added, "We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect."<sup>167</sup>

### C. Justice Francis Spina's Dissent

Consideration of the three dissenting opinions in *Goodridge* makes apparent the Court's fracturing in response to the Plaintiffs' agitation. As the ensuing discussion will show, in his dissent, Justice Spina saw the case as one in which the Court had usurped the power of the Legislature. He believed that the Legislature had the power to regulate marriage, while the Court was supposed to protect, not create, individual rights. Social change should come from the Legislature, not the judiciary.

Spina considered both equal protection and due process grounds for the lawsuit. He did not see a case for equal protection, either based on sex or sexual orientation.<sup>168</sup> In terms of sex-based discrimination,<sup>169</sup> he did not see that the government was treating

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162. *Id.* at 974 n.6.

163. *Id.*

164. *Id.*

165. *Id.* at 973.

166. *Id.*

167. *Id.*

168. *Id.* at 974–75 (Spina, J., dissenting).

169. Like Greaney, Spina used the words *sex* and *gender* as synonyms. *Id.*

either sex differently.<sup>170</sup> Indeed, “both men and women [were] similarly limited to marrying a person of the opposite sex.”<sup>171</sup> In terms of sexual orientation, he did not see any discrimination either.<sup>172</sup> Spina said, “All individuals, with certain exceptions not relevant here, are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court.”<sup>173</sup> Apparently, it was not necessary to consider if a sexual minority would wish to marry someone of the other sex.

The dissenting justice addressed the *Loving* decision that Marshall and Greaney used in their opinions. Spina indicated that, in *Loving*, the U.S. Supreme Court had not addressed the matter of marrying a person of the same sex.<sup>174</sup> Moreover, the government in the present case had not intended to discriminate based on sexual orientation, as the Commonwealth of Virginia had intended to discriminate based on race in *Loving*.<sup>175</sup>

As with equal protection, Spina did not see a case for due process.<sup>176</sup> From Spina’s perspective, everyone, regardless of sexual orientation, was free to enter a civil marriage with someone of the other sex.<sup>177</sup> Again, it was apparently not necessary to consider if a sexual minority would wish to do so.

To develop the due process analysis, Spina considered the nature of the right to determine what level of judicial review should be applied to the government action.<sup>178</sup> If a fundamental right were involved, then strict scrutiny should apply.<sup>179</sup> If no fundamental right were involved, then rational basis would apply.<sup>180</sup> To determine if the right to same-sex marriage were fundamental, Spina called upon tradition, asking whether that right was “deeply rooted in this Nation’s history.”<sup>181</sup> Clearly, the answer was that such a right was not.<sup>182</sup> In the Commonwealth itself, the Legislature, when addressing the problem

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170. *Id.* at 974.

171. *Id.*

172. *Id.* at 975.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 976–77.

179. *Id.* at 976.

180. *Id.*

181. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

182. *Id.*



of workplace discrimination based on sexual orientation, had indicated that the Legislature had no intent to validate same-sex marriage.<sup>183</sup>

Spina believed that, in granting same-sex marriage to sexual minorities, the Court was exceeding its power.<sup>184</sup> He asserted, “Such a dramatic change in social institutions must remain at the behest of the people through the democratic process.”<sup>185</sup> The dissenting justice spoke of “judicial restraint” and “separation of powers.”<sup>186</sup> For an example of what the Court should have done, he referenced a then-recent case in which the Court had refused to extend health insurance to domestic partners because the matter was one of policy.<sup>187</sup> The creation of new rights was for the people via the Legislature.<sup>188</sup>

#### *D. Justice Martha Sosman’s Dissent*

Like the dissent of Justice Spina, the dissent of Justice Sosman helped to facilitate the Court’s fracturing in response to the agitation of the Plaintiffs. As the following discussion will show, Sosman focused on deference to the Legislature in the area of civil marriage. Still, despite her deferential legal stance, Sosman expressed her personal empathies toward sexual minorities who sought access to civil marriage.

Sosman clarified that, when the Court applied rational basis review, which she believed appropriate,<sup>189</sup> to the applicable statute, “the issue [was] not whether the Legislature’s rationale behind that scheme [was] persuasive to [the Court], but only whether it satisfie[d] a minimal threshold of rationality.”<sup>190</sup> That some parents were raising children outside the parameters of traditional civil marriage, which those parents were free to do, did not mean that the Legislature had to provide full marital benefits to all households.<sup>191</sup>

The dissenting justice suggested that she was not personally opposed to the idea that same-sex couples were raising children.<sup>192</sup> Sosman said that, for children, “a nurturing, stable, safe, consistent,

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183. *Id.* at 976–77.

184. *Id.* at 977–78.

185. *Id.* at 977.

186. *Id.*

187. *Id.*

188. *Id.* at 978.

189. *Id.* at 981 (Sosman, J., dissenting).

190. *Id.* at 978.

191. *Id.* at 979.

192. *Id.*

and supportive environment in which to mature” mattered more than “the gender, or sexual orientation, or even the number of the adults who raise them.”<sup>193</sup> She expressed understanding that the four justices who constituted the majority vote saw “the traditional definition of marriage as an unnecessary anachronism, rooted in historical prejudices that modern society has in large measure rejected and biological limitations that modern science has overcome.”<sup>194</sup>

Claiming to put aside a personal assessment, a credibility move similar to that of Chief Justice Marshall, Sosman turned to scientific studies on the impact of raising children in same-sex couple households.<sup>195</sup> She indicated that the studies were relatively new and not conclusive.<sup>196</sup> Moreover, the studies were controversial.<sup>197</sup> She noted, “This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.”<sup>198</sup> The Legislature, which had created civil marriage, was entitled to review the evidence before making a change to the institution of marriage.<sup>199</sup>

Sosman believed that Marshall’s opinion went beyond applying rational basis review to the statute and applied “some undefined stricter standard.”<sup>200</sup> She colorfully commented the following:

[W]hile claiming to apply a mere rational basis test, the court's opinion works up an enormous head of steam by repeated invocations of avenues by which to subject the statute to strict scrutiny, apparently hoping that that head of steam will generate momentum sufficient to propel the opinion across the yawning chasm of the very deferential rational basis test.<sup>201</sup>

The dissenting justice tried to divorce the rational and emotional aspects of persuasion. She suggested that the four justices in the majority had let their emotions get the better of them because of the subject matter of the case.<sup>202</sup> She drew an analogy between, on one

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 980.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 981.

202. *Id.*

hand, same-sex marriage and, on the other hand, subsidies and tax credits for use of energy-efficient heating, both of which she believed should be reviewed under the rational basis standard.<sup>203</sup> If the government provided financial incentives for using established heating methods as opposed to novel heating methods, according to Sosman, the four justices in the majority would not have seen a violation of the rational basis review standard.<sup>204</sup> Sosman claimed that the justices in the majority should have been functioning logically instead of emotionally.<sup>205</sup>

As such, the Legislature should have had the opportunity to decide the matter.<sup>206</sup> Particularly, the Legislature should have been able to determine whether a risk existed of “damaging the institution of marriage or adversely affecting the critical role it has played in our society.”<sup>207</sup> Then the Legislature could decide if “a fundamental alteration” to civil marriage were appropriate.<sup>208</sup>

In the conclusion to her opinion, Sosman made several important additional concessions. She acknowledged that the Court’s decision might “represent a great turning point that many w[ould] hail as a tremendous step toward a more just society.”<sup>209</sup> She added that there was “much to be said for the argument that excluding gay and lesbian couples from the benefits of civil marriage [was] cruelly unfair and hopelessly outdated.”<sup>210</sup> She also admitted that she and her fellow dissenting justices were close to sexual minorities who were “friends, neighbors, family members, classmates, and co-workers.”<sup>211</sup>

### *E. Justice Robert Cordy’s Dissent*

Justice Cordy’s dissent, the third and final dissent in the case, further facilitated the Court’s fracturing in response to the agitation of the Plaintiffs. As the ensuing discussion will show, Cordy felt that the Court should have deferred to the Legislature because of the lesser nature of the right at stake. He acknowledged that it may have been

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 982.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

beneficial to allow sexual minorities to marry, but he did not want the Court to make that change.

Cordy determined that no fundamental right was at issue.<sup>212</sup> According to common law tradition, marriage was an institution that the Commonwealth had created.<sup>213</sup> Although marriage in general was a fundamental right, there was not necessarily a right to marry someone of the same sex.<sup>214</sup> The contexts for famous U.S. Supreme Court cases cited for this proposition, including *Skinner v. Oklahoma ex rel. Williamson*,<sup>215</sup> *Griswold v. Connecticut*,<sup>216</sup> and *Loving*, were heterosexual in nature.<sup>217</sup> Cordy noted that U.S. Supreme Court decisions that spoke of marriage as a fundamental right had linked marriage with procreation.<sup>218</sup>

To support his conclusion that no fundamental right was at issue, Cordy focused heavily on tradition. Calling upon U.S. Supreme Court case law, he noted that fundamental rights often were “so deeply rooted in our history and traditions.”<sup>219</sup> Although marriage was so rooted in history and tradition, same-sex marriage was not.<sup>220</sup>

In light of this analysis, Cordy pondered whether the Supreme Judicial Court should recognize a new right of marriage for same-sex couples. Expressing concern over allowing judges to have their policy preferences, the dissenting justice cautioned against the judiciary’s recognizing new rights.<sup>221</sup> Again, he went back to tradition, noting that both the U.S. Supreme Court and the Supreme Judicial Court had limited their recognition of new rights.<sup>222</sup>

Cordy looked at recent legislation on same-sex marriage to determine whether “contemporary values ha[d] embraced the concept of same-sex marriage.”<sup>223</sup> He admitted that marriage in general was in a state of flux, but he did not see an indication that the public supported same-sex marriage.<sup>224</sup> He noted that, as of the early 2000s, no state

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

213. *Id.* at 984.

214. *Id.*

215. 316 U.S. 535 (1942).

216. 381 U.S. 479 (1965).

217. *Goodridge*, 798 N.E.2d at 984 (Cordy, J., dissenting).

218. *Id.* at 985.

219. *Id.* at 987 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997)).

220. *Id.*

221. *Id.* at 988–89.

222. *Id.* at 989–90.

223. *Id.* at 990.

224. *Id.*

legislature had enacted a law that allowed same-sex marriage.<sup>225</sup> However, thirty-six states had enacted statutes to prohibit recognizing same-sex marriage, as had Congress through the Defense of Marriage Act.<sup>226</sup> These legislative pronouncements, presumably the will of the people in the respective jurisdictions, did not support same-sex marriage.<sup>227</sup>

In addition to arguing that a fundamental right was not at issue, Cordy argued that, under the Equal Rights Amendment (ERA) to the Commonwealth's Constitution, no suspect classification was at issue.<sup>228</sup> Because there was no purpose to treat or effect of treating men or women differently, Cordy maintained that no sex-based discrimination was at work.<sup>229</sup>

To bolster this conclusion, Cordy looked back at the history of the Commonwealth's ERA. He noted that the commission that had studied the ERA in the 1970s had indicated that the then-proposed amendment would "have no effect upon the allowance or denial of homosexual marriages."<sup>230</sup> As indicated in the *Boston Globe* during the 1970s, the public debate that surrounded the passage of the ERA had reflected the view of the commission.<sup>231</sup> As such, Cordy cautioned the Court against "completely disregarding what appear[ed] to be the clear intent of the people recently recorded in our constitutional history."<sup>232</sup>

Not finding a fundamental right to same-sex marriage or a suspect classification, Cordy endeavored to review the marriage statute for rationality.<sup>233</sup> He noted that a heavy burden was on the Plaintiffs.<sup>234</sup> Under a rational basis review, the judiciary generally had to defer to

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225. *Id.*

226. *Id.*; see Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013) (striking down Section 3, which contained the heterosexual-only federal definition of marriage) and Obergefell v. Hodges, 576 U.S. 644 (2015) (superseding Section 2, which allowed sibling states not to recognize same-sex marriages from other states).

227. *Goodridge*, 798 N.E.2d at 990 (Cordy, J., dissenting).

228. *Id.* at 991.

229. *Id.* at 991-92. Like Greaney and Spina, Cordy treated the words *sex* and *gender* as synonyms. *Id.*

230. *Id.* at 993 (quoting COMMONWEALTH OF MASS., SPECIAL STUDY COMM'N ON THE EQUAL RTS. AMENDMENT, FIRST INTERIM REPORT, S. 1689, Reg. Sess., at 21 (1976)).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

the public's will carried out through the Legislature.<sup>235</sup> This point was a matter of separation of powers within the state government.<sup>236</sup>

In terms of the nature of the classification, Cordy claimed that the classification was based on the type of couple, whether same-sex or different-sex, and not on sex or sexual orientation.<sup>237</sup> To him, that the type of couple was a function of the sexual orientations of the two adults who constituted the couple apparently did not matter.

Cordy looked at the purposes of the marriage statute.<sup>238</sup> Civil marriage, he noted, had been “the institutional mechanism by which societies ha[d] sanctioned and recognized particular family structures, and the institution of marriage ha[d] existed as one of the fundamental organizing principles of human society.”<sup>239</sup> Cordy again emphasized that procreation had been a key component of civil marriage.<sup>240</sup> He referenced *Inhabitants of Milford v. Inhabitants of Worcester*,<sup>241</sup> a case that the Court had decided almost two hundred years earlier, for the idea that “civil marriage [had been] ‘intended to regulate, chasten, and refine, the intercourse between the sexes; and to multiply, preserve, and improve the species.’”<sup>242</sup> Society without marriage “would be chaotic,” Cordy claimed.<sup>243</sup> Despite recent changes regarding marriage, the institution still provided for “an optimal social structure within which to bear and raise children.”<sup>244</sup>

The Court, along with other courts, had recognized both “marriage as an organizing principle of society” and the state's interest in regulating marriage.<sup>245</sup> Cordy cited various opinions that ranged from the Court's *Milford v. Worcester* decision to U.S. Supreme Court decisions from the 1870s and 1880s.<sup>246</sup> In one such case from the 1870s, *Reynolds v. United States*,<sup>247</sup> the U.S. Supreme Court had

235. *Id.* at 994.

236. *Id.*

237. *Id.*

238. *See id.* at 994–97.

239. *Id.* at 995.

240. *Id.*

241. 7 Mass. 48 (1810).

242. *Goodridge*, 798 N.E.2d at 995 (Cordy, J., dissenting) (citing *Inhabitants of Milford*, 7 Mass. at 52). Cordy did admit that, in a modern world with contraception, heterosexual intercourse and procreation were not always “conjoined.” *Id.*

243. *Id.* at 996.

244. *Id.* at 997.

245. *Id.* at 996.

246. *Id.* at 996–97.

247. 98 U.S. 145 (1878).

decided that Congress could regulate plural marriage in the Utah Territory, regardless of the First Amendment free exercise of religion defense that had been raised.<sup>248</sup>

Cordy looked for a connection between the state's restriction of marriage as only different-sex in nature and the state's interest in "supporting an optimal social structure for the bearing and raising of children."<sup>249</sup> Again, he stated that the Court should defer to the Legislature.<sup>250</sup> Cordy noted that, in adopting the rational basis standard of review in her opinion, Marshall had misallocated the burden of proof by placing it on the Department of Public Health.<sup>251</sup>

The dissenting justice pointed out that various empirical studies of children raised by couples of different sexual orientations were not conclusive regarding the impact on children of different-sex versus same-sex parenting.<sup>252</sup> Also, the research methodologies of the studies had received criticism, and political preferences had impacted the studies.<sup>253</sup> Thus, he indicated that, at least for the present, the Legislature could conclude that civil marriage should remain a different-sex institution.<sup>254</sup>

On a related note, Cordy claimed that, even though the Commonwealth allowed same-sex couples to adopt children, such a policy should not require that the Commonwealth allow same-sex couples to marry.<sup>255</sup> Allowing different types of families to adopt did not necessarily mean that the Commonwealth had to "view them all as equally optimal and equally deserving of State endorsement and support."<sup>256</sup>

Furthermore, Cordy speculated that the Legislature could have concluded that allowing same-sex couples to marry might "impair the State's interest in promoting and supporting heterosexual marriage as the social institution that it has determined best normalizes, stabilizes, and links the acts of procreation and child rearing."<sup>257</sup> With the current

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248. *Id.* at 162, 166–67.

249. *Goodridge*, 798 N.E.2d at 998 (Cordy, J., dissenting).

250. *Id.*

251. *Id.* at 998 n.21.

252. *Id.* at 998–99.

253. *Id.* at 999.

254. *Id.* at 1000.

255. *Id.*

256. *Id.*

257. *Id.* at 1001–02.

policy, the Legislature communicated the following “consistent message” to the members of the Commonwealth public:

[T]hat marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes.<sup>258</sup>

Once again, Cordy insisted that “[p]rocreation ha[d] always been at the root of marriage,” and he took Marshall to task for disconnecting marriage and procreation.<sup>259</sup> Marshall, he wrote, had “turn[ed] history on its head.”<sup>260</sup>

Given the above, Cordy urged gradualism. For example, even though the Commonwealth had promoted a policy against discrimination based on sexual orientation, Massachusetts should have time to experiment with the idea of same-sex marriage.<sup>261</sup> A rush to change would allow “those who argue[d] ‘slippery slope’ [to] have more ammunition than ever to resist any effort at progressive change or social experimentation.”<sup>262</sup>

Despite his stance against judicial recognition of same-sex marriage, Cordy concluded with several concessions to sexual minorities. He admitted, “There is no question that many same-sex couples are capable of being good parents, and should be (and are) permitted to be so.”<sup>263</sup> He added, “The advancement of the rights, privileges, and protections afforded to homosexual members of our community in the last three decades has been significant, and there is no reason to believe that that evolution will not continue.”<sup>264</sup>

#### IV. THE ADVISORY OPINIONS AS JUDICIAL RESPONSES TO A LEGISLATIVE ATTEMPT AT CONTROL

Not only was the Supreme Judicial Court, the leading institution in the judicial branch of state government, fractured in responding to the Plaintiffs’ agitation, but the overall government of the

258. *Id.* at 1002.

259. *Id.* at 1002 n.34.

260. *Id.*

261. *Id.* at 1001 n.33.

262. *Id.*

263. *Id.* at 1003.

264. *Id.* at 1004.



Commonwealth was likewise fractured. While the majority of the Court supported same-sex marriage, Governor Romney supported a state constitutional ban on same-sex marriage,<sup>265</sup> and the Legislature, itself divided, would soon meet in a state constitutional convention to debate such an amendment,<sup>266</sup> which it also had done in 2002, although then without a vote.<sup>267</sup> The Governor was very much against same-sex marriage.<sup>268</sup>

Romney's wish for a constitutional amendment looked as though it might be granted, but an amendment ultimately failed to clear all of the required hurdles to changing the Constitution. In March 2004, the Legislature, sitting in a constitutional convention, passed a constitutional amendment to ban same-sex marriage but to allow civil unions for same-sex couples.<sup>269</sup> However, the proposed amendment needed to pass again during the next legislative session and then be submitted to the people for approval.<sup>270</sup> In September 2005, the amendment was defeated with both houses of the Legislature gathered for another constitutional convention.<sup>271</sup> A later attempt by the Legislature to pass a constitutional amendment, which had originated as an initiative petition instead of within the Legislature, eventually failed, but only after the amendment passed the first time.<sup>272</sup>

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265. Phillips & Klein, *supra* note 38.

266. Frank Phillips & Raphael Lewis, *Two Marriage Amendments Fail; Lawmakers to Reconvene Today: Debate Exposes Deep Divisions*, BOS. GLOBE (Feb. 12, 2004), [http://www.boston.com/news/specials/gay\\_marriage/articles/2004/02/12/two\\_marriage\\_amendments\\_fail\\_lawmakers\\_to\\_reconvene\\_today/](http://www.boston.com/news/specials/gay_marriage/articles/2004/02/12/two_marriage_amendments_fail_lawmakers_to_reconvene_today/); Scott S. Greenberger, *Vote on Travis Measure Shows Split on Gay Marriage*, BOS. GLOBE (Feb. 13, 2004), [http://www.boston.com/news/local/massachusetts/article\\_s/2004/02/13/vote\\_on\\_travis\\_measure\\_shows\\_split\\_on\\_gay\\_marriage/](http://www.boston.com/news/local/massachusetts/article_s/2004/02/13/vote_on_travis_measure_shows_split_on_gay_marriage/).

267. Denise Lavoie, *Mass. Court: Gay Marriage Question Can Move Forward*, BARRE MONTPELIER TIMES ARGUS (July 11, 2006), [https://www.timesargus.com/news/mass-court-gay-marriage-question-can-move-forward/article\\_ba2a4ba5-1019-5374-85ee-e5a09d2db7cd.html](https://www.timesargus.com/news/mass-court-gay-marriage-question-can-move-forward/article_ba2a4ba5-1019-5374-85ee-e5a09d2db7cd.html) (last updated Oct. 17, 2018).

268. Rick Klein, *Gridlock in Marriage Debate: Deeply Split Mass. Legislature to Reconvene in March Session*, BOS. GLOBE (Feb. 13, 2004), [http://archive.boston.com/news/specials/gay\\_marriage/articles/2004/02/13/gridlock\\_in\\_marriage\\_debate/](http://archive.boston.com/news/specials/gay_marriage/articles/2004/02/13/gridlock_in_marriage_debate/).

269. Klein, *supra* note 23.

270. MASS. CONST. arts. of amends. art. XLVIII, pt. IV, §§ 1–2, 4–5.

271. Belluck, *supra* note 23.

272. Frank Phillips & Lisa Wangsness, *Same-Sex Marriage Ban Advances: Lawmakers OK Item for Ballot, but Hurdle Remains*, BOS. GLOBE (Jan. 3, 2007), [http://www.boston.com/news/specials/gay\\_marriage/articles/2007/01/03/same\\_sex\\_marriage\\_ban\\_advances/](http://www.boston.com/news/specials/gay_marriage/articles/2007/01/03/same_sex_marriage_ban_advances/); Frank Phillips & Andrea Estes, *Right of Gays to Marry Set for Years to Come: Vote Keeps Proposed Ban off 2008 State Ballot*, BOS. GLOBE (June 15, 2007), [http://www.boston.com/news/local/articles/2007/06/15/right\\_of\\_gays\\_to\\_marry\\_set\\_for\\_years\\_to\\_come/](http://www.boston.com/news/local/articles/2007/06/15/right_of_gays_to_marry_set_for_years_to_come/).

In the immediate wake of the *Goodridge* decision, and prior to the Legislature's passing a constitutional amendment to ban same-sex marriage, the Massachusetts Senate responded to the fractured Supreme Judicial Court's responses to the Plaintiffs' agitation. The Senate asked the Court for an advisory opinion regarding whether a bill that offered same-sex couples civil unions, but not marriages, would be constitutional.<sup>273</sup> According to the proposed bill, Senate No. 2175, a civil union would be the legal equivalent of a marriage, although the title would be different.<sup>274</sup> Senate No. 2175 was a way of avoiding allowing sexual minorities to marry civilly.

Again, the Court was divided four justices to three, and again the majority of the Court supported full marriage rights for sexual minorities. To examine how the justices on a fractured Court rhetorically engaged each other in responding to the Senate and how the majority supported the movement for same-sex marriage, this section of the Article examines Chief Justice Marshall's majority opinion for herself and Justices Greaney, Ireland, and Cowin, as well as the dissent of Justice Sosman that Justice Spina joined and the brief dissent of Justice Cordy. Once again, the conflict between the majority and the dissenters involved assumptions about the role of the Court compared with that of the Legislature.

#### *A. Chief Justice Margaret Marshall's Majority Opinion*

In her advisory opinion, which had echoes of her opinion in *Goodridge*, Chief Justice Marshall read Senate No. 2175 as a violation of the equal protection and due process mandates of the Massachusetts Constitution.<sup>275</sup> She took issue with the government's "stated purpose to 'preserv[e] the traditional, historic nature and meaning of the institution of civil marriage.'"<sup>276</sup> Marshall cited *Goodridge* for the idea that the government's aim should be "to encourage stable adult relationships for the good of the individual and of the community, especially its children."<sup>277</sup>

Marshall contended that tradition and majority sentiment were not controlling when state action constituted discrimination.<sup>278</sup> While

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273. Ops. of the Justs. to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

274. *Id.* at 568.

275. *Id.* at 572.

276. *Id.* at 569 (quoting S.B. 2175, 183d Gen. Ct., Reg. Sess., at § 1 (Mass. 2003)).

277. *Id.*

278. *Id.* at 570.

individuals were free to have their perspectives on same-sex marriage, the government should not discriminate in light of constitutional rights.<sup>279</sup> Any action to prohibit same-sex couples from being able to marry would be unconstitutional.<sup>280</sup>

Furthermore, the chief justice described the proposed bill as an attempt at “[s]egregating same-sex unions from opposite-sex unions.”<sup>281</sup> She commented, “The history of our nation has demonstrated that separate is seldom, if ever, equal.”<sup>282</sup> Marshall looked at the different labels used for same-sex and different-sex couples, noting that the distinction between terms created “second-class status” for sexual minorities.<sup>283</sup> The problem was not the word *union* but the distinction drawn between the words *marriage* and *union*,<sup>284</sup> and “no amount of tinkering with language” would solve the problem.<sup>285</sup>

Additionally, the Court should not interpret the Massachusetts Constitution based on whether rights recognized within Massachusetts would be recognized elsewhere.<sup>286</sup> The author of the majority opinion acknowledged that federal law at that time did not recognize same-sex marriages and indeed allowed states to decline to recognize same-sex marriages obtained in other states.<sup>287</sup> Marshall was referring to the Defense of Marriage Act,<sup>288</sup> whose provision that restricted the federal definition of marriage to heterosexual marriage the U.S. Supreme Court ultimately struck down in *United States v. Windsor*.<sup>289</sup> Nonetheless, the Court had to interpret the Massachusetts Constitution, subject only to the federal minimum determined by the U.S. Supreme Court’s interpretation of the Fourteenth Amendment to the U.S. Constitution.<sup>290</sup>

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279. *Id.*

280. *Id.* at 571.

281. *Id.* at 569.

282. *Id.*

283. *Id.* at 569–70.

284. *Id.* at 570 n.4.

285. *Id.* at 570.

286. *Id.* at 571.

287. *Id.*

288. Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013) (striking down Section 3, which contained the heterosexual-only federal definition of marriage) and Obergefell v. Hodges, 576 U.S. 644 (2015) (superseding Section 2, which allowed sibling states not to recognize same-sex marriages from other states).

289. See generally *Windsor*, 570 U.S. at 744.

290. *Ops. of the Justs. to the Senate*, 802 N.E.2d at 571.

*B. Justice Martha Sosman's Dissent*

In her advisory opinion dissent, which Justice Spina joined, and which had echoes of her dissent in *Goodridge*, Justice Sosman revealed the continuing fractured nature of the Court on the matter of same-sex marriage. She determined that Senate No. 2175 would be constitutional.

Sosman described the situation before the Court as “a pitched battle over who gets to use the ‘m’ word.”<sup>291</sup> She noted that “[t]he insignificance of according a different name to the same thing ha[d] long been recognized.”<sup>292</sup> To support this principle, she quoted from Juliet Capulet in Shakespeare’s *Romeo and Juliet* as follows:

“What’s in a name? That which we call a rose  
By any other name would smell as sweet;  
So Romeo would, were he not Romeo call’d  
Retain that dear perfection which he owes  
Without that title.”<sup>293</sup>

The dissenting justice distinguished the current matter over the word *marriage* from the matter in *Goodridge*, in which “*none* of the benefits, rights, or privileges” of civil marriage had been available to sexual minorities.<sup>294</sup> By comparison, the current matter, an argument over labels, was “insignificant.”<sup>295</sup> Indeed, Sosman thought that the term *civil union* was “perfectly dignified” and “connote[d] no disrespect.”<sup>296</sup>

Sosman believed that the deferential rational basis standard of judicial review applied.<sup>297</sup> Because, at that time, other governments in the country did not recognize same-sex marriage, the Legislature had a reason for using another term for same-sex unions.<sup>298</sup> In terms of federal law, same-sex couples would not receive recognition for tax, social security, immigration, or other purposes.<sup>299</sup> In terms of state

291. *Id.* at 572 (Sosman, J., dissenting).

292. *Id.* at 572 n.1.

293. *Id.* (quoting WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2, l. 43–47). For the context of Juliet’s discussion with Romeo Montague, see, for example, *THE COMPLETE WORKS OF SHAKESPEARE* 991–94 (David Bevington ed., 4th ed. 1997).

294. *Ops. of the Justs. to the Senate*, 802 N.E.2d at 573 (Sosman, J., dissenting).

295. *Id.* at 573–74.

296. *Id.* at 578 n.5.

297. *Id.* at 573.

298. *Id.* at 575.

299. *Id.* at 574–75.

law, other states simply would not recognize same-sex marriages.<sup>300</sup> The “difference in terminology reflect[ed] the reality that, for many purposes, same-sex couples w[ould] have ‘a different status.’”<sup>301</sup> Sosman noted that, as of 2004, “no one predict[ed], even under the most optimistic scenario, that . . . widespread recognition [of marriage rights for same-sex couples would] be achieved anytime in the near future.”<sup>302</sup> The dissenting justice did acknowledge that some people would find such different treatment unfair.<sup>303</sup>

The dissenting justice argued that, even in Massachusetts, the Legislature might require time to review provisions of the law that touched on marriage and thus might have need for a different nomenclature, at least in the short term.<sup>304</sup> For instance, Massachusetts law contained a presumption of paternity, which assumed that a child born to a married woman was the child of the woman’s husband.<sup>305</sup> This presumption would not make sense in a same-sex marriage context because the presumption was “a physical and biological impossibility.”<sup>306</sup>

Additionally, Sosman took the Court, which she described as “activist . . . in support of th[e] cause” for same-sex marriage, to task for its analysis.<sup>307</sup> She claimed that the Court had turned sexual orientation into a suspect class.<sup>308</sup> Despite the result that it offered, *Goodridge* had not recognized sexual orientation as a protected class, nor had the case declared that same-sex marriage was a fundamental right.<sup>309</sup> With its current advisory opinion, the Court had “discard[ed] the fig leaf of the rational basis test” and had “rel[ie]d exclusively on the rhetoric rather than the purported reasoning of *Goodridge*.”<sup>310</sup> Sosman did not clarify how rhetoric and reasoning were mutually exclusive. Perhaps she was referring to Sophistic rhetoric rather than

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300. *Id.* at 575.

301. *Id.* at 576.

302. *Id.* at 576 n.2.

303. *Id.* at 575.

304. *Id.* at 577.

305. *Id.* at 577 n.3.

306. *Id.*

307. *Id.* at 574.

308. *Id.* at 579.

309. *Id.*

310. *Id.*

rhetoric in general.<sup>311</sup> Regardless, if the Court wanted to use the more exacting strict scrutiny standard of review, the Court should say so.<sup>312</sup>

### C. Justice Robert Cordy's Dissent

In his brief dissent, Justice Cordy contributed to the Court's fracturing. Cordy pointed out that the Senate bill provided "an identical bundle of legal rights and benefits" to same-sex and different-sex couples.<sup>313</sup> Only the name of the legal institution varied.<sup>314</sup> Accordingly, the bill might "not even raise a due process or equal protection claim."<sup>315</sup>

Nonetheless, if it were necessary to determine whether different labels required a law to satisfy the rational basis standard, Cordy preferred to withhold judgment until the conclusion of the Legislature's deliberations.<sup>316</sup> Because of the *Goodridge* opinion, the Court likely would have plenty of documentation to review regarding the Legislature's purposes for passing Senate No. 2175.<sup>317</sup> At that later time, he felt an appropriate determination could be made.<sup>318</sup>

## V. CONCLUSION

Informed by social movement theory in the field of communication, this Article has examined the rhetorics of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, as well as in *Opinions of the Justices to the Senate*. The Article has shown how the Supreme Judicial Court fractured in responding to both the Plaintiffs' movement activity in support of same-sex marriage and also to the legislative attempt at control after the original agitation and the Court's ensuing *Goodridge* decision. Taken together, the opinions of Justices Marshall and Greaney focused on discrimination against sexual minorities and the Court's power of

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311. See Robert Hariman, *Status, Marginality, and Rhetorical Theory*, 72 Q.J. SPEECH 38, 39 (1986); GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES* 66 (2d ed. 1999). For a general definition of rhetoric, see ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE* 36 (George A. Kennedy trans., Oxford Univ. Press 1991).

312. *Ops. of the Justs. to the Senate*, 802 N.E.2d at 580 (Sosman, J., dissenting).

313. *Id.* at 580–81 (Cordy, J., dissenting).

314. *Id.* at 581.

315. *Id.*

316. *Id.*

317. *Id.* Cordy commented that the holding of *Goodridge* "rested on [a] slender reed." *Id.* at 580.

318. *Id.* at 581.

judicial review to vindicate minority rights in constitutional cases. The justices who constituted the majority bloc on the Court rejected tradition as a justification for oppression of minority rights. Also, the justices attempted to humanize the agitating sexual minority Plaintiffs and employed emotion as well as reason to do so.

In contrast, taken together, the opinions of Justices Spina, Sosman, and Cordy focused on allowing the Legislature, in theory the representative of the people, to decide what the dissenting justices believed to be a public policy matter. The Legislature had, or, upon further debate, might have had, a rational basis for its action or potential action. The dissenting justices did not believe the Court should have decided such a matter. Justice Greaney later called the dispute about which branch of government should have decided the case “the seismic fault in state constitutional law decisions.”<sup>319</sup> Despite their position, the dissenters did express some empathy for the Plaintiffs.

Furthermore, the Article has shown how, in a wide-open case with limited precedent, the majority of the Court, although not the social movement itself, played a leading role from within the establishment in furthering the movement for same-sex marriage. Using the tool of judicial review, the majority acted as an agent of change on behalf of the social movement. While partially institutionalized, the social movement for same-sex marriage had not become fully institutionalized. Indeed, other actors in the state government such as Governor Romney and portions of the Legislature, along with most members of the national public and some very powerful politicians in Washington, DC, including President Bush, did not support same-sex marriage. Through the Plaintiffs, the movement for same-sex marriage had gained an important ally in the Court for an ongoing struggle, and the struggle would continue, in part because of the strong negative responses from other components of the establishment.

In so viewing *Goodridge* and the *Opinions of the Justices*, the Article has problematized traditional social movement theory in communication in several ways. Following less traditional research on social movements, the Article has provided an example of how

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319. John M. Greaney, *Breaking Down Barriers: The Goodridge Decision and Modern Civil Rights*, 72 ALB. L. REV. 609, 614 (2009).

outsiders can have a point of entry into the system when the establishment, hardly monolithic, fractures in responding to agitation. Moreover, the Article has taken the additional step of illustrating what can ensue when outsiders have a point of entry. Indeed, a social movement can gain allies important enough in number or influence who can bring about change within the system. The majority of the Court, by virtue of judicial review, proved to be an influential ally within the establishment that could allow the movement meaningful access to the establishment. Neither the social movement itself nor a reactionary part of the establishment, the majority of the Court functioned in a liminal rhetorical space. Hence, the once-clear line between a social movement and the establishment can become, at least in some circumstances, less of a line and more of a blur.

Although not the beginning of a social movement, *Goodridge* was the beginning of same-sex marriage recognized at the state supreme court level in the United States. In subsequent years, supreme courts in states like California,<sup>320</sup> Connecticut,<sup>321</sup> and Iowa<sup>322</sup> would legalize same-sex marriage, and other components of the establishment would respond negatively. The rhetorical conflict would continue.

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320. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

321. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

322. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).



