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## HOW *BROWN* IS *GOODRIDGE*? THE APPROPRIATION OF A LEGAL ICON

DWIGHT G. DUNCAN\*

“When *I* use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more or less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”<sup>1</sup>

### INTRODUCTION

The Massachusetts Supreme Judicial Court made legal history when it recently discovered that John Adams’ Massachusetts Constitution, written in 1780, entitled same-sex couples to marry. Massachusetts became the first state in the nation to legally recognize such marriages. In the process, the Supreme Judicial Court ruled that the “case before us [was not] a ‘cause...of marriage...’ within the meaning of the Massachusetts Constitution.”<sup>2</sup>

If the case was not about marriage, what was it about? Equal rights, apparently. That is why there was a rush to compare it to *Brown v. Board of Education*.<sup>3</sup> Thus, a judicial legend was hatched. Just as *Brown v. Board of Education* in 1954 broke down the walls of racial segregation and opened up public schools to children previously denied access, so *Goodridge v. Department of Public Health*<sup>4</sup> opened up civil marriage to couples that had previously been denied the right to marry, precisely fifty years after the day of the *Brown* decision.

Evan Wolfson, a leading advocate of same-sex marriage, stated:

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<sup>1</sup> LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 94 (1946).

<sup>2</sup> *Goodridge v. Dep’t of Public Health*, No. SJC-08860 (Mass. May 7, 2004) (order denying motion to intervene), available at [http://www.glad.org/marriage/ACLJ\\_decision.pdf](http://www.glad.org/marriage/ACLJ_decision.pdf). See also *infra*, section A.

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> 798 N.E.2d 941 (Mass. 2003).

It is poetic and fitting...that May 17, 2004, the day the *Goodridge* decision required that state officials begin the nondiscriminatory issuance of marriage licenses to gay and lesbian couples, marked the fiftieth anniversary of the U.S. Supreme Court's momentous decision in *Brown v. Board of Education* condemning "separate and unequal" segregation in the nation's schools.<sup>5</sup>

However, given the scant textual basis in the Massachusetts Constitution for this decision, and given the Massachusetts Constitution's express entrusting of "all causes of marriage" to the political branches and not the courts, it would be better to liken *Goodridge* to John Adams' death, occurring fifty years to the day after the fledgling America's Declaration of Independence. One can imagine him spinning in his grave, as the Declaration he sponsored and signed had excoriated government officials for "declaring themselves invested with power to legislate for us in all cases whatsoever."<sup>6</sup> After all, he had written the Declaration of Rights of the Massachusetts Constitution, which ends with these memorable words: "In the government of this commonwealth... the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."<sup>7</sup>

This article compares the two cases, *Brown* and *Goodridge*, to see in what ways they are alike and in what ways they are dissimilar – to judge how *Brown* *Goodridge* actually is. Much rides on this comparison. *Brown* is the most famous and most acclaimed court decision in American history.<sup>8</sup> The abolition of "separate but equal" was the plain meaning of the Fourteenth Amendment's promise of "equal protection of the laws," and thus correct in the legal sense. However, above all, abolishing "separate but equal" was the right thing to do morally. That doctrine's abolition played a crucial role in helping rid the country of the scourge of racism.<sup>9</sup>

If the *Goodridge* decision can wrap itself in the mantle of *Brown* successfully, *Goodridge* will go a long way towards achieving public acceptance of gay marriage

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<sup>5</sup> EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 168 (2004).

<sup>6</sup> THE DECLARATION OF INDEPENDENCE para. 24 (U.S. 1776).

<sup>7</sup> MASS. CONST. Declaration of Rights, art. XXX (1780).

<sup>8</sup> Michael M. Uhlmann, *The Road Not Taken: Brown v. Board of Education at 50*, in 4 CLAREMONT REV. OF BOOKS 41, 41 (2004) ("Brown v. Board of Education is not only the most celebrated constitutional decision of the U.S. Supreme Court but arguably its most important.").

<sup>9</sup> See *Goodridge*, 798 N.E.2d at 970 (Greaney, J. concurring) (Recognizing same-sex marriage is the "right thing to do.").

by a skeptical public<sup>10</sup> and repudiating a legal tradition that had been unanimous in its understanding that marriage is only between a man and a woman.<sup>11</sup>

No case is exactly the same as another. There are different parties, different issues, different jurisdictions, different judges, and different eras. However, the legal mind works by analogy. Some aspects of *Goodridge* invite a comparison to *Brown*. It was no accident in the mind of the opinion's author that *Goodridge* went into effect on May 17, 2004, the fiftieth anniversary to the day of *Brown v. Board of Education*. Editorials and feature articles in newspapers around the country drew the comparison between *Goodridge* and *Brown*.<sup>12</sup>

The 4-3 advisory opinion, issued months after *Goodridge*, ruled out civil unions as a possible legislative solution to the equal protection problem that *Goodridge* had identified.<sup>13</sup> In this opinion, Massachusetts Supreme Judicial Court Chief Justice Margaret Marshall stated that "[t]he history of our nation has demonstrated that separate is seldom, if ever, equal."<sup>14</sup> Citing the main lesson of *Brown* as requiring the extension of marriage to same-sex couples was done expressly to draw the historical parallel, one that also resonated with Margaret Marshall's own personal history as a critic of her native South Africa's apartheid regime.<sup>15</sup>

One illustration of the comparison between the two cases is the *New York Times*' reference to my colleague Mary Bonauto, who represented the seven gay and lesbian plaintiff-couples in *Goodridge*, as the new Thurgood Marshall, the lead attorney for the *Brown* plaintiffs, who also became the first African-American justice on the United States Supreme Court.<sup>16</sup> With all due respect to Ms. Bonauto, a skillful attorney and advocate, I will argue that the *Goodridge* case is not similar to the *Brown* case in any important respect. Indeed, I will contend that it is more like *Plessy v. Ferguson*,<sup>17</sup> which *Brown* overruled.

<sup>10</sup> In the first referendum on marriage following the Massachusetts decision, voters in Missouri voted with an overwhelming 70% majority to amend their state constitution to enshrine the traditional definition of marriage. Monica Davey, *Sharp Reactions to Missouri's Decisive Vote Against Gay Marriage*, N.Y. TIMES, Aug. 5, 2004, at A17.

<sup>11</sup> Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271, 1324 (1998).

<sup>12</sup> See, e.g., Bob Egelko, *Brown v. Board of Education: 50 Years Later*, S.F. CHRON., May 17, 2004, at A10, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/05/17/MNGMO6MJUK1.DTL>.

<sup>13</sup> In re Opinion of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).

<sup>14</sup> *Id.* at 569.

<sup>15</sup> See, e.g., Randall Kennedy et al., *Can Marriage Be Saved? A Forum*, THE NATION, July 5, 2004, at 16.

<sup>16</sup> David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES, May 9, 2004, § 6, at 52.

<sup>17</sup> 163 U.S. 537 (1896).

## I. INTERPRETING VS. NULLIFYING SPECIFIC CONSTITUTIONAL LANGUAGE

In 1954, *Brown v. Board of Education* overturned the 1896 decision of *Plessy v. Ferguson*.<sup>18</sup> In *Plessy*, the United States Supreme Court acknowledged that the Fourteenth Amendment to the United States Constitution required that people of every race be treated as equal, yet argued that people could be treated as both separate and equal, “separate but equal.”<sup>19</sup> *Brown v. Board of Education* said that “separate” is inherently “unequal.”<sup>20</sup> Most people think that the separate-but-equal *Plessy* ruling in 1896 was wrong, and that the separate-is-unequal ruling of *Brown* in 1954 is correct. I agree. It is simply a matter of deciphering the implications of the equality guarantee by interpreting the Constitution’s express provision requiring that states give everyone “equal protection of the laws.”

At first glance, it might seem that a similar process of interpretation was employed in *Goodridge*. However, one would be hard-pressed to point to any particular provision of the Massachusetts Constitution that the ban on gay marriage violates. Chief Justice Marshall’s bare majority (4-3) opinion relied on a combination of liberty and equality affecting the “evolving paradigm” of marriage.<sup>21</sup> Concurring, Justice Greaney relied on the Equal Rights Amendment to the state constitution enacted in 1976.<sup>22</sup> Nonetheless, as dissenting Justice Cordy effectively answered, that amendment was clearly understood at the time as having no implications for gay marriage.<sup>23</sup>

On the other hand, Part 2, Chapter III, Article V of the Massachusetts Constitution specifically deals with marriage:

All causes of marriage, divorce, and alimony, and all appeals from the Judges of probate shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision.<sup>24</sup>

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<sup>18</sup> 347 U.S. 483 (1954).

<sup>19</sup> 163 U.S. at 552.

<sup>20</sup> 347 U.S. at 495 (“Separate educational facilities are inherently unequal.”).

<sup>21</sup> *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 967 (Mass. 2003).

<sup>22</sup> *Id.* at 971 (Greaney, J., concurring).

<sup>23</sup> *Id.* at 993 (Cordy, J., dissenting) (“On October 19, 1976, just before the general election at which the amendment was to be considered, the commission filed its Interim Report, which focused on the effect of the Massachusetts ERA on the laws of the Commonwealth. 1976 Senate Doc. No. 1689. A section of the report, entitled ‘Areas Unaffected by the Equal Rights Amendment,’ addressed some of the legal regimes that would not be affected by the adoption of the ERA. One such area was ‘Homosexual Marriage,’ about which the commission stated: ‘An equal rights amendment will have no effect upon the allowance or denial of homosexual marriages. The equal rights amendment is not concerned with the relationship of two persons of the same sex; it only addresses those laws or public-related actions which treat persons of opposite sexes differently...’”).

<sup>24</sup> MASS. CONST., pt. 2, ch. III, art. V.

On its face, this provision would seem to withhold subject matter jurisdiction over marriage from the courts of Massachusetts unless and until the Legislature granted it to the courts. Before *Goodridge* went into effect on May 17, 2004, there was extensive litigation regarding the meaning of this provision and its potential implications for the *Goodridge* decision. The final verdict was delivered just days before May 17, when the Supreme Judicial Court stated that *Goodridge* was “not a cause of marriage.”<sup>25</sup> No authority was given for that proposition – no reasoning, no explanation. Just the court’s say-so. One could not ask for a clearer admission that the SJC was actually working in contravention of the state constitution, while purporting to follow it. If *Goodridge* is not a case about marriage, when the SJC expressly ordered that nothing short of “marriage” would satisfy the requirements of the state constitution, then words have ceased to have any meaning and simply became subject to the manipulation of those in power. Such a government is a government of men and women, but not of laws.

The SJC order denying the legislators’ request to intervene stated “the assertion that the court did not have subject matter jurisdiction is based on the erroneous premise that the case before us constituted a ‘cause[] of marriage, divorce, [or] alimony’ within the meaning of the Massachusetts Constitution.”<sup>26</sup>

The Massachusetts Constitution specifies that “[a]ll causes of marriage, divorce, and alimony...shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision.”<sup>27</sup> No one, neither the attorney general nor the Gay Lesbian Advocates and Defenders (GLAD), the organization that provided the attorneys for the Goodridges and the other plaintiffs, has ever been able to specify a legal provision granting jurisdiction to the court to redefine marriage.<sup>28</sup>

*Goodridge*, according to the court, isn’t a case about marriage after all. This is a preposterous contention, given without explanation or reason, with a straight face. Is this interpreting the constitution, or gutting it?

The legislators’ reply memorandum submitted the Wednesday before, which the court assures us it gave “careful consideration of,” stated:

*Goodridge* clearly falls within “[a]ll causes of marriage.” In *Goodridge*, th[e] Court held that the common law understanding of marriage as the union of a man and a woman, which is reflected in the marriage statutes of the

<sup>25</sup> *Goodridge v. Dep’t of Public Health*, No. SJC-08860 (Mass. May 7, 2004) (order denying motion to intervene), available at [http://www.glad.org/marriage/ACLJ\\_decision.pdf](http://www.glad.org/marriage/ACLJ_decision.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> MASS. CONST., pt. 2, ch. III, art. V.

<sup>28</sup> See Plaintiffs’ Memorandum In Opposition To Motion To Vacate The Court’s Judgment For Lack Of Subject Matter Jurisdiction at 2, *Goodridge* (No. SJC-08860), available at [http://www.glad.org/marriage/ACLJ\\_GLAD\\_memo.pdf](http://www.glad.org/marriage/ACLJ_GLAD_memo.pdf); Attorney General’s Amicus Memorandum In Opposition To Prospective Interveners’ Motion To Vacate Court’s Judgment For Lack Of Subject Matter Jurisdiction at 5, *Goodridge* (No. SJC-08860), available at [http://www.glad.org/marriage/ACLJ\\_AG\\_memo.pdf](http://www.glad.org/marriage/ACLJ_AG_memo.pdf).

Commonwealth, is unconstitutional, and that the traditional definition of marriage had to be expanded to include same-sex, as well as opposite-sex, couples. 440 Mass. at 320-42. The Court redefined marriage to mean “the voluntary union of two persons as spouses, to the exclusion of all others.” *Id.* at 343. If *Goodridge* is not a “cause of marriage” within the meaning of art. V, it would be difficult to imagine what *would* constitute a “cause of marriage.”

Any doubt on this score was laid to rest by the Court’s subsequent advisory opinion, holding that a bill to confer all of the benefits of marriage upon same-sex couples except the name “marriage” itself would not pass constitutional muster. *See Opinion of the Justices to the Senate*, 440 Mass. 1201, 1207 (2004) (“The bill’s absolute prohibition of the use of the word ‘marriage’ by ‘spouses’ who are the same sex is more than semantic” and “reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status”); *see also id.* at 1209 n. 5 (referring to “the discrimination that flows from separate nomenclature”). That advisory opinion makes it clear beyond peradventure that *Goodridge* is a “cause of marriage,” indeed, the quintessential “cause of marriage” within the meaning of art. V.<sup>29</sup>

Of course, this is the court that feels free to radically redefine marriage to mean what the court wants marriage to mean. That being the case, we should not be surprised to hear that now, when it is inconvenient for its purposes, *Goodridge* is not about “marriage” at all. That seems odd. “Marriage,” it turns out, can mean anything or nothing at all. This is precisely the problem with the court’s whole decision. Why have a written constitution, the “rule of law,” or deference to judges, when they can act in such an arbitrary fashion?

“When *I* use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more or less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”<sup>30</sup>

In marked contrast to *Goodridge*, there was no subject-matter jurisdiction problem in the *Brown* decision.

## II. STATE-MANDATED INTEGRATION VS. STATE-MANDATED SEGREGATION

The segregation laws overturned by *Brown* required that the races be educated separately. The marriage laws overturned by *Goodridge* required that marriages be male and female--sexually integrated, as it were. On this basis, had *Brown* overturned a regime of integrated public schools and allowed for racially segregated public schools, then the *Brown* opinion would be analogous to

<sup>29</sup> Legislators’ Reply Memorandum dated May 5, 2004, *Goodridge* (No. SJC-08860).

<sup>30</sup> LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 94 (Heritage Press 1941).

*Goodridge*. But this is exactly the opposite of what *Brown* did. Thus, *Goodridge* had the opposite effect of *Brown*, which found racially segregated schools to be unconstitutional, because they were inherently unequal.<sup>31</sup>

At this point, one might object that marriage is about marrying the person you love – enshrining the principle of private choice. Just as you can marry a person of a different race, or the same race; under *Goodridge*, you can marry a person of different sex, or the same sex. This would make marriage a purely private arrangement. One of marriage’s historical functions, however, has been to domesticate men by bringing them into stable relationships with women<sup>32</sup> as well as to socialize children by providing them with an intimate relationship with parents of both sexes.<sup>33</sup> A marriage license is a public recognition of the relationship with a type of “Good Housekeeping Seal of Approval.” Just as we do not allow public schools to be racially segregated, we do not allow marriages to be sexually segregated.

The law, it should be noted, does not prevent friends from living together and pooling resources.<sup>34</sup> After *Lawrence v. Texas*,<sup>35</sup> the government cannot prevent friends or even strangers from expressing sexual intimacy, provided that it is in private between consenting adults.<sup>36</sup> Marriage, however, has always been more than that.

The basic lesson of *Brown* is thus a reason to consider state-recognized same-sex couples, i.e., male pairs or female pairs, to be actually and really different from male-female couples—if, as Margaret Marshall claims, separate is seldom, if ever, equal.<sup>37</sup> If they are different, then why can’t the law treat them differently? This problem also affects attempts to analogize the same-sex marriage situation to interracial marriage. Racially integrated marriages, which could be forbidden by anti-miscegenation laws prior to *Loving v. Virginia*,<sup>38</sup> are not comparable to sexually segregated marriages, which is what state recognition of same-sex “marriage” entails. Therefore, one could assert that *Goodridge* actually represents the revival of “separate but equal,” a notion which, it turns out, originated with the Massachusetts Supreme Judicial Court in 1850.<sup>39</sup>

<sup>31</sup> *Brown*, 347 U.S. at 495.

<sup>32</sup> See, e.g., STEVE NOCK, MARRIAGE IN MEN’S LIVES (1998).

<sup>33</sup> See, e.g., DAVID POPENOE, LIFE WITHOUT FATHER (1996); STEVEN RHOADES, TAKING SEX DIFFERENCES SERIOUSLY (2004).

<sup>34</sup> The zoning regulation that was upheld in *Village of Belle Terre v. Boras*, 416 U.S. 1 (1974), prohibited “families” of more than two persons not related by blood or marriage from living together, but did not prevent two people from living together.

<sup>35</sup> 539 U.S. 558 (2003).

<sup>36</sup> *Id.* at 567.

<sup>37</sup> In re Opinion of the Justices to the Senate, 803 N.E.2d 565, 569 (Mass. 2004).

<sup>38</sup> 388 U.S. 1 (1967).

<sup>39</sup> *Brown*, 347 U.S. 483 at 491, n.6. (“The doctrine apparently originated in *Roberts v. City of Boston*, 1850, 5 Cush. 198, 59 Mass. 198, 206, upholding school segregation against attack as being violative of a state constitutional guarantee of equality.”)



III. IN CONTRAST WITH *BROWN*, *GOODRIDGE* CHANGES THE DEFINITION AT ISSUE

*Brown v. Board of Education* ensured access to the better public schools, a right that others enjoyed but blacks could not.<sup>40</sup> That is not the case in *Goodridge*. Before *Goodridge*, homosexuals had the same marriage right as everyone, as long as the other person was a member of the opposite sex. Most homosexuals may be understandably uninterested in this right, but it was available to them, just as it was for everyone else. Evan Wolfson's claim that "the *Goodridge* decision required that state officials begin the nondiscriminatory issuance of marriage license to gay and lesbian couples,"<sup>41</sup> is nonsensical; nondiscriminatory issuance of marriage licenses means that they are available on the same terms to everyone. Nondiscriminatory issuance of marriage licenses to child couples, for example, would entail denying them, since children are not legally capable of getting married.

The only way to make the discrimination argument work is to first reconfigure marriage to mean the union of two persons, regardless of sex.<sup>42</sup> Such a reconfiguration assumes precisely the point at issue. Homosexuals can marry in the traditional sense, the same as everyone else. When applying for a marriage license, no one asks about sexual orientation. Homosexuals' inability to marry is *de facto*, not *de jure*. It is an inability to marry each other, not an inability to get married pure and simple.

It is instructive to compare *Goodridge* to *Loving v. Virginia*.<sup>43</sup> The *Loving* court found Virginia's ban on interracial marriage inconsistent with the Fourteenth Amendment's equal protection guarantee.<sup>44</sup> *Loving* did not change the definition of marriage, or the core understanding of male and female sexual difference. Anti-miscegenation laws enforced racism. They did not define marriage. *Goodridge*, however, changes the definition of marriage.<sup>45</sup> Marriage is the issue in *Goodridge*. The issue in *Brown* was education. *Brown* did not purport to change the understanding of education in any way.

## IV. RACE IS NOT THE SAME AS SEXUAL ORIENTATION

Many historically African-American churches have made the point that race and homosexuality are not comparable.<sup>46</sup> If that is the case, then *Brown* and *Goodridge* are not really comparable. Race is innate, inherited, and independent of any

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<sup>40</sup> *Id.* at 495.

<sup>41</sup> EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 168 (2004).

<sup>42</sup> *Goodridge*, 798 N.E.2d at 969.

<sup>43</sup> 388 U.S. 1 (1967).

<sup>44</sup> *Id.* at 11.

<sup>45</sup> 798 N.E.2d at 952.

<sup>46</sup> See, e.g., April Beetha, *Black Protestants among the Most Ardent Opponents of Gay Marriage*, MINN.-ST. PAUL STAR TRIBUNE, Sept. 11, 2004, available at <http://www.startribune.com/stories/614/4975590.html>.

choices that may be made, whereas sexual orientation is manifested, if it is manifested at all, by behavior. Because it is behavioral, sexual conduct has traditionally been regulated by moral norms as well as legal rules. Racial identity has never been considered a matter of moral responsibility. While there has been some discrimination against them, homosexuals do not share the same bitter legacy of slavery, lynching and disenfranchisement as African-Americans.

Indeed, sexual orientation is more akin to religion than to traits like race or sex, which are generally obvious to everyone. Like religion, sexual orientation needs to be disclosed, in order to be known by others, is subject to change, and is not necessarily immutable.

There is some evidence that sexual orientation is malleable in a way that race is not.<sup>47</sup> The very existence of bisexuality highlights the extent to which sexual behavior can be the object of choice and is not simply a given. To the extent that a person can control his or her homosexuality, and its outward manifestation, it is not comparable to race.

What these differences between race and sexual orientation imply is that the law does not have to treat these characteristics in the same way. The intentional, *de jure* racial segregation laws invalidated in *Brown* bear little relationship to the marriage laws, which only discriminate *de facto* against sexual minorities.

#### V. THE HISTORICAL RECORD WAS CLEAR IN *GOODRIDGE* AND INCONCLUSIVE IN *BROWN*

*Brown* stated that, at the time of the ratification of the Fourteenth Amendment, it could not be known with certainty that public school segregation violated equal protection.<sup>48</sup> This ambiguous historical record allowed the Supreme Court to make the plausible claim that racial segregation violated the plain meaning of the Fourteenth Amendment.

*Goodridge*, on the other hand, frankly acknowledged that the SJC's decision rewrote the common law and historical definition of marriage.<sup>49</sup> Thus, the meaning of the word "marriage," which is enshrined in the Massachusetts Constitution, had a historically fixed definition, which the SJC felt free to change, viewing it as an "evolving paradigm."<sup>50</sup> However, this is far from being a requirement of the Massachusetts Constitution. Indeed, the view espoused by the majority opinion, plainly and simply, is a historical contradiction of what the Massachusetts Constitution states.

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<sup>47</sup> Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 ARCHIVES OF SEXUAL BEHAVIOR 403-17 (2003).

<sup>48</sup> *Brown*, 347 U.S. at 489. ("This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.")

<sup>49</sup> *Goodridge*, 798 N.E.2d at 969.

<sup>50</sup> *Id.* at 967. ("As a public institution, and a right of fundamental importance, civil marriage is an evolving paradigm.")

It is one thing to rule in the face of an ambiguous tradition, which is what *Brown* did. It is quite another to directly contradict the unanimous consensus of history, which is what *Goodridge* did by its own admission.

#### VI. UNANIMOUS COURT VS. A 4-3 SPLIT ON A CONTROVERSIAL SOCIAL ISSUE

In *Brown*, Chief Justice Earl Warren went to great lengths to ensure that the decision was unanimous.<sup>51</sup> Justice Frankfurter reportedly “view[ed] unanimity as necessary in a case of such grave import.”<sup>52</sup> Even *Roe v. Wade*,<sup>53</sup> another landmark decision purporting to settle a socially divisive issue, resulted in a vote of 7-2; we know how divisive that decision was.

When dealing with controversial social issues, it is important for courts to speak with one voice, at least if the decision is to be viewed as an authoritative explication of what the law and/or the Constitution requires, rather than a simple projection of the judges’ political and ideological preferences. *Brown*, of course, was unanimous.<sup>54</sup> *Goodridge* was razor-thin, 4-3.<sup>55</sup> This is an extremely significant difference, particularly because there is some evidence that the vote was originally 4-3 the other way around, given the language with which Justice Cordy concludes his dissenting opinion.<sup>56</sup> That makes the slender majority even more tenuous and debatable in the eyes of the public.

My point is not that a 4-3 decision is itself invalid or inappropriate in all cases. Rather, if courts purport to settle basic questions of the structuring of society, which are deeply controversial, they had best do so with a unanimous or near-unanimous voice. In doing so, the elected branches and the people will be more likely to accept the decision. After all, the theory of our government is that the people, not a handful of judges, are sovereign. To the extent that the decision is split, as in *Bush v. Gore*,<sup>57</sup> or *Planned Parenthood v. Casey*,<sup>58</sup> the common perception is that courts are just playing politics and deciding questions outside their purview.

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<sup>51</sup> CHARLES J. OGLETREE, ALL DELIBERATE SPEED 9 (2004) (“Warren immediately recognized the importance of the *Brown* case and began an effort to persuade all of his colleagues to reach a unanimous decision.”).

<sup>52</sup> *Id.* at 8-9.

<sup>53</sup> 410 U.S. 113 (1972).

<sup>54</sup> *Brown*, 347 U.S. at 486.

<sup>55</sup> *Goodridge*, 798 N.E.2d at 970.

<sup>56</sup> *Id.* at 1004 (Cordy, J., dissenting) (“While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.”).

<sup>57</sup> 531 U.S. 98 (2000).

<sup>58</sup> 505 U.S. 833 (1992).

VII. THE UNITED STATES SUPREME COURT V.  
A STATE SUPREME COURT RESOLVING AN ISSUE.

*Brown*, when decided, settled the question of the legality of segregation for the nation. Even if many disagreed with the decision, there was something definitive about the highest court in the nation deciding the matter that helped to eventually put the matter to rest.

*Goodridge*, however, was decided by the state supreme court in one of the nation's most liberal states. The resolution of one state supreme court is not national like the resolution of the United States Supreme Court.

Was there anything in the Massachusetts Constitution that suggested that a suit for same-sex marriage would be successful? Alternatively, was it the fact that Massachusetts is one of the most liberal states -- the one state that voted for George McGovern in 1972, for example -- that suggested the choice of forum? If that is the reason, of course, it would seem unlikely that other states would follow suit.

If the attacks on the 1913 statute<sup>59</sup> prohibiting non-residents from evading their own states' marriage laws by marrying in Massachusetts are successful, then couples may be able to export homosexual marriage to other states. Massachusetts may pioneer marriage law for the nation, but it will be analogous to the way in which California divorce law set a national trend in the early 1970s with the adoption of no-fault divorce.<sup>60</sup> In any case, it will take a Supreme Court decision on gay marriage or the Full Faith and Credit Clause's implications for the federal Defense of Marriage Act,<sup>61</sup> or enactment of a federal constitutional amendment,<sup>62</sup> to establish a national rule in this area. Unlike *Brown*, *Goodridge* can not do it alone.

Thus, the legal fight continues to other venues and other times.

VIII. DIFFERENCE BETWEEN "ALL DELIBERATE SPEED" AND 180 DAYS

The implementation of *Brown*, as decreed in *Brown v. Board of Education II*,<sup>63</sup> decided in 1955, allowed for judicial flexibility in responding to instances of

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<sup>59</sup> MASS. GEN. LAWS ch. 207 §11 (2002) ("No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.").

<sup>60</sup> See, e.g., BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 68 (1996) (California was the first state to adopt a no-fault divorce statute in 1970; now 48 states have such provisions).

<sup>61</sup> Defense of Marriage Act, 28 U.S.C. § 1738C, 1 U.S.C. § 7 (2000).

<sup>62</sup> Alan Cooperman, *Same-Sex Marriage Ban Being Retooled: Civil Unions Would Be Up to States*, WASH. POST, Mar. 23, 2004, at A4 (focusing on the attempts to draft and pass a constitutional amendment banning homosexual marriage, which details that court rulings, along with federal and state laws, cannot be construed or written to allow homosexual marriage).

<sup>63</sup> 349 U.S. 294 (1955).

segregation. The standard view is that *Brown II*, which gave federal district courts broad discretion to craft equitable decrees to remedy segregation “with all deliberate speed,” was an evasion of the court’s duty to see justice done, though the heavens should fall. As the ancients said, *fiat justitia, ruat coelum*.<sup>64</sup>

However, such criticism of the Supreme Court for its practical, prudential approach to remedying segregation overlooks the manner in which the approach promoted the necessary collaboration of citizens and the political branches. Substantial progress was made ten years after *Brown*, through the enactment of the Civil Rights Act of 1964,<sup>65</sup> followed by the Voting Rights Act of 1965.<sup>66</sup> Though there was resistance in the South, and elsewhere, to the mandate of integrating schools and public facilities, there was also a provision made allowing time for the decision to be ratified, ultimately, by the people.

In Massachusetts, by contrast, the court peremptorily gave the legislature 180 days to, in effect, implement *Goodridge*.<sup>67</sup> The legislature did not do so. Instead, it passed the first stages of a constitutional amendment that would reverse both *Goodridge* and the advisory opinion prohibiting civil unions.<sup>68</sup> Governor Mitt Romney was also opposed to *Goodridge*. *Goodridge* offended and incensed many, but elated others. Judicial inflexibility and impatience with disagreeing parties should not resolve this situation, at least if ultimate acceptance, eventual reconciliation, and social harmony are the goals of legalizing same-sex marriage. This problem of authoritativeness is exacerbated to the extent that the decision is not rooted in the text of the state constitution. This lack of textual basis, and direct flouting of the constitution’s express requirements, afflicts the *Goodridge* decision.

The intolerant tone of Chief Justice Marshall’s advisory opinion regarding the Senate’s proposed “civil union” bill illustrates the problem.

The bill’s absolute prohibition of the use of the word “marriage” by “spouses” who are the same sex is more than semantic. The dissimilitude between the terms “civil marriage” and “civil union” is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. The denomination of this difference by the separate opinion of Justice Sosman as merely a “squabble over the name to be used” so clearly misses the point that further discussion appears to be useless.<sup>69</sup>

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<sup>64</sup> JOHN GRAY, *LAWYER’S LATIN* 59 (2002) (“Let justice be done, though the heavens shall fall.”).

<sup>65</sup> 42 U.S.C. § 2000e *et seq.* (2004).

<sup>66</sup> 42 U.S.C. § 1973 (2004).

<sup>67</sup> *Goodridge*, 798 N.E.2d at 941.

<sup>68</sup> See Rick Klein, *Vote Ties Civil Union to Gay-Marriage Ban*, BOSTON GLOBE, Mar. 30, 2004, at A1.

<sup>69</sup> In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass., 2004).

The tone is “I’m right; you’re wrong. Shut up.” It sounds less magisterial than desperate. Unsurprisingly, calls for the removal of Chief Justice Marshall ensued.<sup>70</sup>

*Brown* more sensibly managed the problem of gaining public acceptance of a controversial decision by using the “all deliberate speed” approach. Once again, *Goodridge* could not be more different, illustrating the view of many that courts should not decide controversial social issues. Fittingly, the day after the SJC decided *Goodridge*, a Democratic strategist said, “We knew the Supreme Court would do anything to help re-elect Bush – we just didn’t know it would be the Supreme Court of Massachusetts.”<sup>71</sup>

#### IX. THE MORAL DIMENSION OF THE DEBATE DIFFERS

When *Brown* declared segregated public schools unconstitutional, the Court struck a blow against racism. No one thought that a black child, in attending a hitherto all-white school, was doing something immoral. There was a growing appreciation of the evils of segregation and racism in the society at large, in spite of opposition to the integration of the public schools.

Contrast this with *Goodridge*. Some see *Goodridge* as a repudiation of homophobia, much as *Brown* repudiated racism. However, one striking difference between the two cases is that many people, and most religious traditions based on the Hebrew or Christian Bible, would view sexual relations between people of the same sex as morally perplexing in a way that going to school is not. People disapprove of homosexual acts, not homosexuals themselves. Thus, granting the status of “marriage” to a homosexual relationship involves approving of it and being able to coerce approval from those who would prefer to withhold approval.

Admittedly, many advocates dismiss the moral dimension of the matter as hatred and bigotry. They see the distinction between hating the sin and loving the sinner as cant and hypocrisy. However, it is a significant distinction, one that allows for respecting people and their dignity without necessarily approving everything they do. This can be important when it comes to attacking such social evils as racism, alcoholism, drug addiction, and smoking – or even possibly dangerous sexual activity.

#### CONCLUSION

In America, the people are the ultimate sovereign. This is explicitly mentioned in the Massachusetts Constitution in no uncertain terms: “All power residing originally in the people, and being derived from them, the several magistrates and

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<sup>70</sup> Under the Massachusetts Constitution, judges can be removed, without resorting to impeachment, by a simple majority of both houses of the legislature, and the concurrence of the Governor and the governor’s council. MASS. CONST., pt. 2, ch. III, art. I. This political recourse seems intended to provide an ultimate democratic check against the possibility of judicial tyranny, judges amending the constitution or laws under pretext of interpreting them.

<sup>71</sup> Jacob M. Schlesinger, *Gay-Marriage Issue Is Lifted to New Plane*, WALL ST. J., Nov. 19, 2003, at A4.

officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.”<sup>72</sup>

America has ratified *Brown* many times over, most notably in the Civil Rights Acts of the 1960s. *Brown* is a template for our understanding of racial equality. It is too early to tell whether *Goodridge* will be ratified in a similar fashion. Will *Goodridge* ultimately be received by the people, so that 50 years from now people will wonder what all the fuss was about?

However, there are many differences between *Brown* and *Goodridge*: the lack of textual basis for *Goodridge*, its cavalier disregard of subject matter jurisdiction, the slenderness of its majority, its peremptory timeline, its departure from all historical precedent and the dictionary, and, not least, its revival of “separate but equal,” with the long-term effects of the resulting motherless or fatherless parenting a big unknown. Given these many differences, there is reason to doubt that the people will receive *Goodridge*.

*Brown*, in all these respects, is not a suitable template for evaluating or understanding gay marriage. One state’s highest court forcing the acceptance of gay marriage in Massachusetts does not begin to establish a national trend. The moral dimension of homosexual behavior, and its several dissimilarities with race, make it *sui generis*. In the end, those arguing for or against gay marriage should address the arguments on their own merits with an eye to optimizing public policy rather than shoehorning their arguments into the rhetoric of a bygone struggle for a different set of goals.

Ironically, one of the consequences of the recklessness of the *Goodridge* majority is that it may well cause the decisive repudiation of gay marriage either by a federal<sup>73</sup> or state constitutional amendment.<sup>74</sup> This brings into play another kind of law, not to be found on the books of this or any other polity: the law of unintended consequences.

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<sup>72</sup> MASS. CONST. DECL. OF RIGHTS art. V (1780).

<sup>73</sup> See *supra* note 62 and accompanying text on the proposed Federal Marriage Amendment.

<sup>74</sup> See *supra* note 68 and accompanying text on the proposed Massachusetts constitutional amendment.

