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**GOODRIDGE AND THE RULE OF LAW
SAME-SEX MARRIAGE IN MASSACHUSETTS:
THE MEANING AND IMPLICATIONS OF
GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH**

WILLIAM C. DUNCAN*

“Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.”¹

I. INTRODUCTION

Few people would argue with the proposition that the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*² is a monumental event. The decision's effect on marriage in the United States is unprecedented, of course, but its significance may prove to be more groundbreaking as it relates to the legal concept of the rule of law. Controversies surrounding this concept are not novel; overweening representative bodies and grasping executives have threatened the rule of law. *Goodridge* and similar cases³ represent and accelerate a trend of judicial overreaching that threatens to spread to the other branches of government. This development is particularly troublesome given that, by intent and design, the judiciary is partially shielded from political pressures and popular accountability.

This article will first examine the concept of the rule of law and its characteristic principles. Next, it will assess the *Goodridge* decision by reference to these principles. Finally, it will speculate on future implications of *Goodridge* for the rule of law, drawing on some preliminary data from Massachusetts and other states.

* Visiting Professor, J. Reuben Clark Law School, Brigham Young University and Director of the Marriage Law Foundation.

¹ *Olmstead v. U.S.*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

² 798 N.E.2d 941 (Mass. 2003).

³ See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

II. THE RULE OF LAW

Ironically, the Massachusetts Constitution contains perhaps the most famous (and admirably succinct) statement of the broad concept of the rule of law:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: 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.*⁴

As expressed here, the core principle of the rule of law is that constraints on the exercise of governmental power must exist. Constraints on power, in effect, elevate government actions above the desires and inclinations of those wielding power. Chief among these constraints in the United States are the constitutions of the various states and the Federal Constitution.

Since the drafting of Massachusetts's constitutional provision, commentators have written at length about the exact nature of the rule of law. For instance, Professor Forrest McDonald describes the rule of law as "uniform and predictable rules of conduct within a jurisdiction."⁵ In *The Morality of Law*, Professor Lon Fuller provides the most cogent description of the elements of the rule of law.⁶ Professor Robert George summarized Fuller's elements:

(1) the prospectivity (i.e., non-retroactivity) of legal rules, (2) the absence of impediments to compliance with the rules by those subject to them, (3) the promulgation of the rules, (4) their clarity, (5) their coherence with one another, (6) their constancy over time, (7) their generality of application, and (8) the congruence between official action and declared rules.⁷

Professor George notes that these "elements are exemplified to a greater or lesser extent by actual legal systems or bodies of law."⁸ The rule of law has limitations of course: "respect for the rule of law does not exhaust the moral obligations of rulers or officials towards those subject to their governance."⁹ Additionally, respect for the rule of law does not "guarantee that the substance of the law will be just."¹⁰ Professor George offers a "modest thesis" though: "[a]n unjust regime's adherence to the procedural requirements of legality, so long as it lasts, has the virtue of

⁴ MASS. CONST. Pt. I, Art. XXX (emphasis added).

⁵ FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 291 (1985).

⁶ LON FULLER, *THE MORALITY OF LAW* 39 (1964).

⁷ Robert P. George, *Reason, Freedom, and the Rule of Law: Their Significance in Western Thought*, 15 REGENT U. L. REV. 187, 188 (2002-2003).

⁸ *Id.*

⁹ *Id.* at 191.

¹⁰ *Id.*

limiting the rulers' freedom of maneuver in ways that will generally reduce, to some extent, at least, their capacity for evil-doing.¹¹

III. ASSESSING *GOODRIDGE*

Does the Supreme Judicial Court's decision in *Goodridge* conform to the rule of law when assessed against Fuller's elements? This section will analyze the decision in regards to five of Fuller's elements of the rule of law.

A. Promulgation

The Massachusetts Constitution's link between the principle of the rule of law and the principle of separation of powers is hardly accidental.¹² As the Massachusetts provision notes, the principle of separation of powers prospectively increases respect for the rule of law by ensuring that all governmental power was not in the hands of one person or one government body who could then exercise it without constraints.¹³ Thus, the question of who should make a law becomes important in determining whether the promulgation of that law comports with the principle of the rule of law. If a branch of government breaches the separation of powers in governmental decision making, undue power can shift to an unauthorized branch of government and threaten this important limitation.

For evaluating *Goodridge*, the question is whether constitutional principles authorize the court to redefine marriage? In other words, did the court perform a judicial function in redefining marriage or one that is legislative? An examination of the majority opinion would lead to the conclusion that the decision seems to be more legislative than judicial.¹⁴ For instance, the majority opinion contains a passage which reads like legislative findings; it describes the state interests in marriage without citation to any facts or legal authorities.¹⁵ While the court concedes that it owes "great deference to the legislature to decide social and policy issues," it evades granting this deference by invoking "the traditional and settled role of courts to decide constitutional issues."¹⁶ Not surprisingly, the court classifies the definition of marriage in this second class of issues.¹⁷ Nowhere is the legislative nature of the decision more evident than in the majority's remedy. The

¹¹ *Id.*

¹² See MASS. CONST. Pt. I, Art XXX.

¹³ See Walter Berns, *TAKING THE CONSTITUTION SERIOUSLY* 134 (1987).

¹⁴ See *infra* Part IIIB for a discussion of the lack of a legal standard in the decision.

¹⁵ *Goodridge*, N.E.2d at 954 ((1) encouraging stable relationships over transient ones, (2) providing for orderly property distribution, (3) decreasing the state's obligation to provide for the needy, and (4) providing a way to track "important epidemiological and demographic data.").

¹⁶ *Id.* at 966.

¹⁷ *Id.*

Court's claim that it "refin[es] a common law principle"¹⁸ hardly rings true when refinement results in a definition opposite to the existing common law definition. In fact, the court issues a new definition of marriage that sounds very much like a statute: "We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."¹⁹

The dissenting opinions note the legislative nature of the majority opinion. Justice Spina notes that the central issue in the case is "the power of the Legislature to effectuate social change without interference from the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights."²⁰ He also recognizes that "using the rubric of due process, [the majority] has redefined marriage" in contravention of the principle that "the power to create novel rights is reserved for the people through the democratic and legislative processes."²¹ Interestingly, the court recently declined to expand health insurance coverage to domestic partners because it recognized that "such an expansion was within the province of the Legislature, where policy affecting family relationships is most appropriate and frequently considered."²²

In the later *Opinions of the Justices to the Senate*, the Court offers guidance as to the constitutionality of the Senate President's scheme to offer the benefits of marriage to same-sex couples by creating a new status of civil unions.²³ The court rejected this option out of hand.²⁴ In doing so, the court explained the nature of the remedy it had supplied in the initial *Goodridge* decision, specifically providing for a 180-day stay in the implementation of its ruling: "The purpose of the stay was to afford the Legislature an opportunity to conform the existing statutes to the provisions of the *Goodridge* decision."²⁵ This makes clear that the court was not deferring to the legislature in any way, but merely asking for a legislative ratification of the decision. However, it also implicitly recognizes that what the *Goodridge* decision had attempted — changing the definition of marriage — is generally accomplished through legislation. Thus, it would seem that the SJC hoped the legislature would formally collude in its project of redefining marriage by enacting a bill to codify the decision. If the legislature had done so, the SJC's decision would have seemed less *ultra vires*.²⁶ The separation of powers problem

¹⁸ *Id.* at 969. (One dissent notes this: "[t]he remedy that construes gender-specific language as gender-neutral amounts to a statutory revision that replaces the intent of the Legislature with that of the court. . . . Such a dramatic change in social institutions must remain at the behest of the people through the democratic process." *Id.* at 977 (Spina, J., dissenting)).

¹⁹ *Id.* at 969.

²⁰ *Id.* at 974 (Spina, J., dissenting).

²¹ *Goodridge*, 798 N.E.2d at 976, 978.

²² *Id.* at 977.

²³ In re *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

²⁴ *Id.* at 572.

²⁵ *Id.* at 568.

²⁶ However, one would have to ask whether the legislature would have enacted the bill absent the order.

is clearly evident where, as here, the Senate feels that it cannot enact legislation without first seeking permission from the court.

Of course, arguments in favor of allowing courts to do this kind of work exist. Specifically, some urge that an "independent judiciary" is the key to the defense of constitutional freedoms.²⁷ In this view, the need to satisfy the constituents who elect the legislators and the executive presumptively hampers them in their ability to make just laws. Unelected judges, however, have the latitude to protect the rights of the minorities or advance unpopular, but correct, ideas. Nevertheless, as Professor Viet Dinh notes, "judges are not simply the platonic guardians of the rule of law but are themselves subject to the rule of law in their judicial function."²⁸ Further, he argues:

Judicial independence, however, is a two-edged sword that can be as threatening to the rule of law as it is necessary to upholding the rule of law. Once judges have attained independence, they are free not only from political influences but also from political checks. Because the rule of law applies as forcefully to judges, the danger is that the independent guardians will use their independence not only to check abuses by those performing legislative and executive functions, but to usurp those functions from those with the legitimate mandate to exercise them. In such cases a converse restraint on those exercising judicial power may be needed to ensure some level of accountability--to restrain the judiciary from exercising power according to its whims and preferences instead of according to law.²⁹

In *Goodridge*, the SJC majority seems to have used its independence to perform the legislative function of creating a new definition of marriage for Massachusetts. As one dissent noted, though, "[t]here is no reason to believe that legislative processes are inadequate to effectuate legal changes in response to evolving evidence, social values, and views of fairness on the subject of same-sex relationships."³⁰ The court's promulgation of this law, then, does not comport with respect for the rule of law.

²⁷ See Steve Urbon, *Chief Justice Champions Judicial Independence*, SOUTH COAST STANDARD-TIMES, May 25, 2004, at A1.

²⁸ Viet D. Dinh, *What is the Law in Law & Development?*, 3 GREEN BAG 2d 19, 24 (1999).

²⁹ *Id.* at 26.

³⁰ *Goodridge*, 798 N.E.2d at 1003-04 (Cordy, J., dissenting).

B. Clarity

Properly promulgated laws that are clear and understandable enhance respect for the rule of law. When this principle is true, little doubt remains as to how to comply with those laws and how to square personal or official conduct with the legal regime.

By contrast, the *Goodridge* decision is extremely opaque. It is difficult to discern any legal rules which would provide guidance for future litigants. The decision begins by invoking the principles of “respect for individual autonomy and equality under law.”³¹ While this may be an appropriate starting point, the decision fails to address these principles in greater detail. The court specifically applies a combination of due process and equal protection standards.³² Interestingly, while the decision expressly invokes the greater protection for individual liberties afforded by the Massachusetts Constitution (as compared to the federal constitution), the introduction to the court’s constitutional analysis relies almost exclusively on U.S. Supreme Court precedent.³³ In fact, the court never applies any tests for the constitutionality of the legislation. Instead it introduces and then rebuts the proffered state interests in the marriage law.³⁴ In doing so, the court ignores any presumption of constitutionality and effectively shifts the burden of the proof to the state to justify what the court clearly considers presumptively unconstitutional legislation.³⁵ In describing the constitutional infirmity in the marriage law, the court uses such phrases as “the State’s action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.”³⁶ Thus, when the court later disavows any effect of its decision on consanguinity or polygamy,³⁷ one is left wondering how this is true. On what bases are these situations distinguishable? In summary, the opinion is long on result and short on reasoning.

The failure of the court to employ any legal standard in making its decision even leads the concurrence to offer an alternative explanation – sex discrimination – to justify the decision.³⁸ The dissenting opinions offer far better examples of constitutional analysis, measuring the plaintiffs’ claims against specific standards for weighing due process and equal protection claims.³⁹ Justice Sosman’s dissent clearly describes the problems with the court’s constitutional analysis. She notes that “rather than apply [the rational basis] test, the court announces that, because it is persuaded that there are no differences between same-sex and opposite-sex

³¹ *Id.* at 949.

³² *Id.* at 953.

³³ *Id.*

³⁴ *Id.* at 961.

³⁵ See *Goodridge*, 798 N.E.2d at 968.

³⁶ *Id.* at 962.

³⁷ See *id.* at 969 n.34.

³⁸ *Id.* at 970 (Greaney, J., concurring).

³⁹ See, e.g. *id.* at 974 -77 (Spina, J., dissenting); *id.* at 983-93 (Cordy, J., dissenting).

couples, the Legislature has no rational basis for treating them differently with respect to the granting of marriage licenses."⁴⁰ She further states that "[a]lthough ostensibly applying the rational basis test . . . the court is in fact applying some undefined stricter standard to assess the constitutionality" of the marriage law.⁴¹ Justice Sosman also notes that "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 this head of steam will generate enough momentum to propel the opinion across the yawning chasm of the deferential rational basis test."⁴²

In the *Goodridge* opinion, a long passage itemizing various legal benefits afforded to married people, exemplifies the difficulty in discerning any standard outlined by the majority.⁴³ In a later note, the court says, "[w]e are concerned only with the withholding of the benefits, protections and obligations of civil marriage from a certain class of persons for invalid reasons."⁴⁴ On the strength of this language, and assuming it had a role to play in establishing state marriage policy, the Senate submitted to the Supreme Judicial Court a bill that would extend "all 'benefits, protections, rights and responsibilities' of marriage"⁴⁵ to same-sex couples. The court rejected the legislation. In doing so, it summarized the *Goodridge* holding: "group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution."⁴⁶ The court never explained how this principle could be limited and it would seem to offer almost total discretion to the reviewing court. In an illuminating passage, the court says that the dissent "so clearly misses the point that further discussion appears to be useless."⁴⁷ The court having decided that explaining its rationale is not worth the effort, an observer could be excused for despairing of ever determining what the support for the holding of these two cases really is. Justice Sosman's dissent notes that the majority opinion does not create a test that others can rely on and urges the court to:

identify the new test they have apparently adopted for determining that a classification ranks as "suspect"—other types of persons making claims of a denial of equal protection will need to know whether they, too, can qualify as a "suspect" classification under that new test and thereby obtain strict scrutiny analysis of any statute, regulation, or program that uses that classification.⁴⁸

⁴⁰ *Goodridge*, 798 N.E.2d at 978-79 (Sosman, J., dissenting).

⁴¹ *Id.* at 980.

⁴² *Id.* at 981.

⁴³ *Id.* at 955-57.

⁴⁴ *Id.* at 965 n.29.

⁴⁵ *Opinions of the Justices to the Senate*, 802 N.E.2d at 566.

⁴⁶ *Id.* at 569.

⁴⁷ *Id.* at 570.

⁴⁸ *Id.* at 580 (Sosman, J., dissenting).

C. Coherence

Another element of the rule of law is the congruence of a decision with other legal provisions or principles. One problem with the *Goodridge* decision is the lack of coherence of its holding with other areas of law.

At the beginning of the opinion, the court notes that a gender neutral marriage law would be inconsistent with the state's gender specific consanguinity laws.⁴⁹ In the *Opinions of the Justices to the Senate*, the Supreme Judicial Court breezily notes the incongruity of its mandate with other laws in a footnote.⁵⁰ Justice Sosman's dissenting opinion, though, notes the problems in more detail. In her opinion, she notes that the new Massachusetts law is inconsistent with that of every other state and the federal government.⁵¹ A mere variation of laws between states does not necessarily implicate coherence concerns, but the dramatic difference between Massachusetts and all other U.S. jurisdictions on marriage "will result in many substantive differences between what it would mean for a same-sex couple to receive a Massachusetts 'marriage' license and what it means for an opposite-sex couple to receive a Massachusetts 'marriage' license. Those differences are real and, in some cases, quite stark."⁵² In addition, there are other inconsistencies between the new court-enacted marriage law and other Massachusetts' laws. Justice Sosman offers the example of the presumption of paternity which:

reflects reality with respect to an overwhelming majority of those children born of a woman who is married to a man. As to same-sex couples, however, who cannot conceive and bear children without the aid of a third party, the presumption is, in every case, a physical and biological impossibility. It is also expressly gender based: if a married man impregnates a woman who is not his wife, the law contains no presumption that overrides the biological mother's status and presumes the child to be that of the biological father's wife. By comparison, if a married woman becomes impregnated by a man who is not her husband, the presumption makes her husband the legal father of the child, depriving the biological father of what would otherwise be his parental rights. Applying these concepts to same-sex couples results in some troubling anomalies: applied literally, the presumption would mean very different things based on whether the same-sex couple was comprised of two women as opposed to two men. For the women, despite the necessary involvement of a third party, the law would recognize the rights of the "mother" who bore the child and presume that the mother's female spouse was the child's "father" or legal "parent." For the men, the necessary involvement of a third party would produce the exact opposite result--the biological mother

⁴⁹ *Goodridge*, 798 N.E.2d at 953.

⁵⁰ 802 N.E.3d at 571 n.5 ("Nor are we unaware that revisions will be necessary to effectuate the administrative details of our decision.").

⁵¹ *Id.* at 574 (Sosman, J., dissenting).

⁵² *Id.*

of the child would retain all her rights, while one (but not both) of the male spouses could claim parental rights as the child's father. Would it not make sense to rethink precisely how this biologically impossible presumption of paternity ought to apply to same-sex couples, and perhaps make some modification that would clarify its operation in this novel context?⁵³

While it is theoretically possible to work these anomalies out, the legislature would have been much better situated to consider all of these changes and enact them as part of an omnibus bill.

D. Constancy

The constancy of a legal principle is yet another element of the rule of law. If fundamental legal changes are made with great frequency, the law cannot be relied on to provide guidance or confidence. Obviously, the *Goodridge* decision has serious implications for this notion. The majority opinion notes at the outset that it is "mindful that our decision marks a change in the history of our marriage law."⁵⁴ In fact the court traces the origin of Massachusetts' marriage law to "pre-Colonial days."⁵⁵ This fact alone would not be enough to show that the decision is devoid of any constancy unless the result were also lacking in any support from constant or longstanding legal principles. However, the legal analysis in *Goodridge* makes no attempt to show that same-sex marriage is consistent with the history or tradition of the state. Justice Spina's dissent notes: "Same-sex marriage is not 'deeply rooted in this Nation's history,' and the court does not suggest that it is."⁵⁶

The *Goodridge* opinion raises the obvious question of whether a right can be discovered in a constitutional text after more than 200 years. It also raises the problem of the law meaning one thing one day and the polar opposite the next. Obviously there are times when a constitution might be wrongly interpreted and that interpretation must be corrected; however, that would generally seem to be appropriate in regards to an unsettled question that has been the subject of disagreement and dispute for some time, such as slavery, which was the subject of debate and contention from the drafting of the federal Constitution. The Supreme Judicial Court's redefinition of marriage could not possibly have been predicted even 15 years before the decision.

⁵³ *Id.* at 577 n.3 (citations omitted).

⁵⁴ *Goodridge*, 798 N.E.2d at 948, 953.

⁵⁵ *Id.* at 954. As an aside, the court does not cite to any authority for its assertion that marriage was "a wholly secular institution" in pre-Colonial times. As Professor Charles Reid of St. Thomas University Law School remarked, one is left to wonder whether the court is suggesting that Native American law recognized civil marriage as non-religious in nature. Similarly, the court makes the historically unlikely claim that the decision does not mark a change from the law of marriage as "understood by many societies" without citing to any incidence of a society that defined marriage as a relationship between persons of the same-sex. *Id.* at 965 (emphasis added).

⁵⁶ *Id.* at 976 (Spina, J., dissenting).

E. Generality

In the short time from the issuance of the *Goodridge* opinion to this writing, the opinion has been cited twice for legal propositions. In the first instance it was cited for its restatement of the rational basis test.⁵⁷ More recently it was cited as establishing public policy supporting a claim that a couple who had contracted a Vermont civil union should be allowed to divorce in Massachusetts.⁵⁸ The relevance of these citations goes to the next element of the rule of law: whether the rules thus established are generally applicable. Rules capable of general application create predictability for future controversies. If a rule is not capable of generalization, it is open to the charge of being merely a results-oriented decision.

The two decisions cited above may indicate one reality of the *Goodridge* decision – that it is not likely to have a general application to other scenarios. That it has only been followed in one subsequent case is telling since that case involved a factual scenario extremely similar to the facts in *Goodridge* (a same-sex couple seeking to be recognized as married). A decision that establishes rules that are capable of generalization would be able to be applied to many other contexts. As noted above, the *Goodridge* opinion does not establish clear principles that are capable of being used in other settings or with other factual scenarios. Justice Sosman's dissent notes that the majority's holding that "the Legislature is acting irrationally when it grants benefits to a proven successful family structure while denying the same benefits to a recent, perhaps promising, but essentially untested alternate family structure" cannot be generalized.⁵⁹ Stated simply, "[p]laced in a more neutral context, the court would never find any irrationality in such an approach."⁶⁰

Of course, mere generalizability is not the only element of the rule of law. If the generalization of a rule would create bizarre or unjust results, this isolated element might still undercut the principle. This is the nature of the critique of arguments for same-sex marriage which holds that if the arguments for same-sex marriage were applied in other situations, then X result would follow (i.e. polygamy or group marriage). Proponents of same-sex marriage ridicule this argument by creating a substitute straw man by which their adversaries are characterized as arguing that if X occurs then Y will definitely occur, rather than the actual argument which is that if the logic of X were applied consistently, it could not prevent the result of Y. While Y may not actually result (for prudential or political reasons) it would not be because it is not compelled by the logic of X but rather because of inconsistency in the application of that logic.

⁵⁷ *Machado v. Leahy*, No. BRCV200200514, 2004 WL 233335, *10 (Mass. Super. Ct. Jan. 3, 2004).

⁵⁸ *Salucco v. Alldredge*, No. 02E0087GC1, 2004 WL 864459, *3-4 (Mass. Super. Ct. Mar. 19, 2004).

⁵⁹ *Goodridge*, 798 N.E.2d at 981 (Sosman, J., dissenting).

⁶⁰ *Id.* Justice Sosman offers the analogy of the state giving tax breaks for an established technology but not for an emerging technology.

One of the *Goodridge* dissents identifies this problem in the majority opinion. Justice Cordy points out that before weighing the marriage law the court had to assume that the definition of marriage includes same-sex couples or there could have been no discrimination in not allowing these couples to marry.⁶¹ In a footnote, he points out the result of generalizing on this principle: "if one assumes that a group of mature, consenting, committed adults can form a 'marriage,' the prohibition on polygamy, infringes on their 'right' to 'marry.'"⁶² As noted above, the majority tries to argue with this by saying "[n]othing in our opinion today should be construed as relaxing or abrogating the . . . polygamy prohibitions of our marriage laws" but does not explain why not.⁶³

IV. RULE OF LAW AFTER *GOODRIDGE*

There is already reason to believe that the *Goodridge* decision will contribute to a weakening of the commitment to the rule of law both in Massachusetts and other jurisdictions.

A. *Massachusetts*

The discussion above already analyzed the *Opinions of the Justices to the Senate* case which suggests that the rule of law has declined to the point that the Legislature has begun to feel that, at least on this issue, it is not competent to legislate without first submitting bills to the SJC for vetting.

Executive officials also questioned the rule of law at the local level. After the state began issuing marriage licenses to same-sex couples on May 17, 2004 at least three towns specifically declined to follow state law⁶⁴ which required recipients of licenses to be residents of the state.⁶⁵ Only after being specifically ordered to do so by the Attorney General did Provincetown stop issuing licenses to out-of-state couples.⁶⁶

B. *California*

In the wake of the *Goodridge* decision the mayor of San Francisco issued marriage licenses to same-sex couples in contravention of state law in February 2004.⁶⁷ Two local courts refused to enjoin the action, and the mayor continued to issue the licenses after one of the courts issued a nonbinding request to cease and

⁶¹ *Id.* at 984 (Cordy, J., dissenting).

⁶² *Id.* at 984 n.2 (Cordy, J., dissenting) (citations omitted).

⁶³ *Id.* at 969 n.34.

⁶⁴ MASS. GEN. LAWS ch. 207, § 11 (2004).

⁶⁵ *Cape Cod Town Retracts Gay Marriage Stance*, FT. WAYNE J. GAZETTE, May 27, 2004, at 3A.

⁶⁶ *Id.*

⁶⁷ Cheryl Wetzstein, *Licenses to Gays Top 2,000*, WASH. TIMES, Feb. 17, 2004, at A1.

desist.⁶⁸ Finally, the California Supreme Court enjoined the city officials on March 11, 2004.⁶⁹ The court recently heard oral arguments on the matter.⁷⁰ Interestingly, a portion of the arguments focused on elements of the rule of law such as the authority of the city officials to determine state marriage law and whether other officials could ignore other state laws, such as zoning regulations or gun licensing schemes, with which they disagree.⁷¹

Perhaps emboldened by San Francisco's example, the California Legislature examined a measure to redefine marriage in California as a "personal relation arising out of a civil contract between two persons."⁷² In March of 2000, however, California citizens approved a ballot initiative that defined marriage as the union of a man and a woman.⁷³ The legislature had no authority to repeal the ballot initiative, as the California Constitution stipulates that a ballot measure requires another ballot initiative to repeal or adjust it.⁷⁴ Since the measure eventually failed, hopefully cooler heads have prevailed.⁷⁵

C. Oregon

In Oregon, Multnomah County officials also issued marriage licenses to same-sex couples. County officials cited the opinion of the county attorney, bolstered by a letter from a local attorney as justification, absent any legislative authority or court decision.⁷⁶ After a month, an Oregon circuit court enjoined the county from issuing the licenses.⁷⁷ However, following the *Goodridge* opinion, an Oregon Circuit Court ruled the current marriage law most likely unconstitutional and ordered the legislature to redefine marriage or create a comprehensive civil union status within ninety days of the opening of the next legislative session.⁷⁸ The court ordered the state to register the marriages performed pursuant to the illegally issued

⁶⁸ Cheryl Wetzstein, *Pro-Family Groups Set Back in Bid to End Gay 'Marriage'*, WASH. TIMES, Feb. 18, 2004, at A3.

⁶⁹ *Lewis v. Alfaro*, No. S122865, 2004 WL 473258, at *1 (Cal. Mar. 11, 2004), *writ of mandate issued by Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. Aug. 12 2004).

⁷⁰ Bob Egelko, *Hearing Suggests Top Court Will Rule Against S.F. Mayor*, S. F. CHRON., May 26, 2004, at A1.

⁷¹ See *id.* (noting question asked by Chief Justice).

⁷² AB 1967, 2003-04 Gen. Assem., Reg. Sess. (Cal. 2004).

⁷³ CAL. FAM. CODE § 308.5. (West 2004).

⁷⁴ CAL. CONST., art. II, § 10(c).

⁷⁵ Kate Folmar, *Gay Nuptials Bill Dies in Assembly*, SAN JOSE MERCURY NEWS, May 20, 2004, at 10.

⁷⁶ William McCall, *Multnomah Gay Marriage Halted*, THE COLUMBIAN, Apr. 21, 2004, at A1.

⁷⁷ *Li v. Oregon*, No. 0403-03057, slip op at 1 (Or. Cir. Ct. Apr. 20, 2004).

⁷⁸ *Id.* at 16.

licenses.⁷⁹ Only recently, an Oregon appeals court enjoined that portion of the decision.⁸⁰

D. Other Jurisdictions

The unlawful issuance of marriage licenses became something of a trend. In New Paltz, New York, the mayor began issuing marriage licenses to same-sex couples.⁸¹ In an opinion that enjoined the issuance of licenses a supreme court judge noted the irreparable harm inherent in the example of a duly elected public official sworn to uphold the laws who decides to obey and/or enforce only those laws that he or she agrees with.⁸² In Sandoval County, New Mexico, the county clerk issued marriage licenses to same-sex couples.⁸³ In contrast to the events in San Francisco, the Attorney General of New Mexico immediately ordered a halt to the practice.⁸⁴ Injunctions from a local court and the State Supreme Court helped to bolster that order.⁸⁵ Finally, Asbury Park, New Jersey briefly offered licenses to same-sex couples (ignoring a recent superior court decision upholding the state marriage law⁸⁶) until an order from the New Jersey Attorney General stopped the practice.⁸⁷

E. Civil Disobedience?

Supporters of these illegal actions attempted to appropriate the moral force of the effort to gain basic civil rights for all races in our country by referring to these actions as a form of "civil disobedience." However, these actions resemble publicity stunts more than refusals to comply with unjust laws in an attempt to help their fellow citizens recognize the injustice of the law.⁸⁸ In obvious distinction, state and local officials (who are specifically in place to uphold the law) carried out these recent actions in conflict with the law using their governmental powers. The

⁷⁹ *Id.* at 15.

⁸⁰ Ashbel S. Green, *Court Halts Judges Order to Register Gay Marriage Licenses*, THE OREGONIAN, June 3, 2004, at B4.

⁸¹ See *Hebel v. West*, No. 04-0642 (N.Y. Sup. Ct. 2004).

⁸² *Id.* at 3.

⁸³ Elizabeth Aguilera, *N.M. Puts Quick Halt to Gay Marriage Nuptials*, DENVER POST, Feb. 22, 2004, at B1.

⁸⁴ *Id.*

⁸⁵ Joshua Akers, *Sandoval May Hear Gay-Wedding Vows Again*, ALBUQUERQUE JOURNAL, June 5, 2004, at A1.

⁸⁶ *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at *1 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

⁸⁷ Tom Feeney *Gay Marriage Licenses Halted*, STAR-LEDGER, Mar. 11, 2004, at 21.

⁸⁸ Cf. 2 JAMES BOSWELL, LIFE OF JOHNSON 250 (1887) ("Sir, the only method by which religious truth can be established is by martyrdom. The magistrate has a right to enforce what he thinks; and he who is conscious of the truth has a right to suffer. I am afraid there is no other way of ascertaining the truth but by persecution on one hand and enduring it on the other.").

recent refusal of the Chief Justice of the Alabama Supreme Court to remove a monument of the Ten Commandments pursuant to a federal court order stands as a relevant analogy.⁸⁹ Cumulatively, these actions point to a trend of disrespect for the rule of law. Only time will tell whether the trend will continue.

V. CONCLUSION

Some suggest that the great emotional benefit gained by the recipients of marriage licenses in Massachusetts, California and elsewhere makes the criticism of *Goodridge*'s detractors merely petty. In this argument inheres the message that regardless of how it came to happen, the ends justify the means. However, as Justice Brandeis said in his dissent in *Olmstead v. United States*:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁹⁰

If damage befalls the principle of the rule of law, for however noble a purpose, such damage decreases the protection of liberty afforded by respect for that principle.

To the degree the *Goodridge* decision fails to comply with the constitutive elements of the rule of law, the decision undercuts that rule. While some will doubtless not mind because of their substantive victory, such a diminution of respect for a core principle of civilization will affect us all.

⁸⁹ See Alec MacGillis, 'Roy's Rock' Still a Force in Alabama Politics, *BALT. SUN*, June 9, 2004, at 4A.

⁹⁰ 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

