CASE NOTES

Cote-Whitacre v. Department of Public Health: Disproving the Misconception that Massachusetts Created a National Loophole for Same-Sex Marriage

I. INTRODUCTION 169
II. BACKGROUND 170
III. THE COURT'S DECISION 174
IV. ANALYSIS 178

I. INTRODUCTION

The plaintiffs, eight same-sex couples who are nonresidents of Massachusetts, claimed that the defendants, the Department of Public Health and the Registry of Vital Records and Statistics (Department), denied them their right to marry in Massachusetts.[1] Plaintiffs claimed that the "domicile evasion" provision[2] of the state's marriage law was unconstitutionally enforced against same-sex couples.[3] They also alleged that even if a rational basis existed for such enforcement, it would run afoul of the Privileges and Immunities Clause under the heightened scrutiny test.[4] Plaintiffs sought an injunction to prohibit the Department from enforcing the law against same-sex couples and to direct the Department to grant marriage licenses to nonresident same-sex couples.[5]

The plaintiffs failed to show a likelihood of success on the merits, which is a prerequisite for injunctive relief.[6] The Superior Court of Massachusetts, sitting at Suffolk, *held* that the domicile evasion section of the marriage statute was constitutional because: it applied equally to both same-sex and opposite-sex couples, was rationally related to a legitimate state interest, and did not invoke fundamental right scrutiny

1. *See* Cote-Whitacre v. Dep't of Pub. Health, No. 04-2656-G, 2004 Mass. Super. LEXIS 341, at *1 (Mass. Super. Ct. Aug. 18, 2004).

2. *See id.* at *12. The provision states: "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." *Id.* (citing MASS. GEN. LAWS ch. 207, § 11 (2004)).

3. *See id.* at *18. The plaintiffs claimed that "the defendants [were] selectively enforcing this law to bar only same-sex marriages." *Id.*

4. *See id.*

5. *See id.* at *19-*20.

6. *See id.* at *20.

under the Privileges and Immunities Clause. *Cote-Whitacre v. Department of Public Health*, No. 04-2656-G, 2004 Mass. Super. LEXIS 341, at *34, *43-*45 (Mass. Super. Ct. Aug. 18, 2004).

II. BACKGROUND

The Supreme Court first declared marriage a fundamental right in *Loving v. Virginia*.[7] The Virginia law under review prohibited whites from marrying outside of their race, but the state argued that the law did not discriminate against nonwhites because it applied equally to both whites and nonwhites.[8] In applying strict scrutiny, the Court found that the statute violated the Equal Protection Clause of the Fourteenth Amendment because the application of the law was based solely on racial classification.[9] Strict judicial scrutiny is the framework for analysis triggered when a plaintiff challenges a *recognized fundamental right* or the plaintiff is a member of a *suspect classification*.[10] The *Loving* opinion *upheld* that the freedom to marry is one of the most essential civil rights afforded to individuals, "fundamental to our very existence and survival."[11]

As early as the dawn of the twentieth century, the Massachusetts Supreme Judicial Court acknowledged the benefits, obligations, and protections conferred upon a couple who enters into a civil marriage.[12] A little over a century later, the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health* held that barring an individual from civil marriage merely because he or she would marry somebody of the same sex violates the Massachusetts Constitution.[13] The *Goodridge* court reconstrued the definition of marriage as "the voluntary union of two persons as spouses, to the exclusion of all others."[14] This

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7. *See* 388 U.S. 1, 8 (1967).

8. *See id.* at 6-8.

9. *See id.* at 11-12. Race is a suspect classification. *See also* Perez v. Lippold, 198 P.2d 17, 20-21, 27 (Cal. 1948) (holding that prohibition against interracial marriage violated the equal protection guarantees of the Fourteenth Amendment).

10. *See Loving*, 388 U.S. at 11-12.

11. *Id.* at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

12. *See* DeMatteo v. DeMatteo, 762 N.E.2d 797, 809 (Mass. 2002) (reaffirming that marriage is a "legal status from which certain rights and obligations arise"); French v. McAnarney, 195 N.E. 714, 715 (Mass. 1935) (declaring that marriage is an important relation between the parties themselves and the state, with appurtenant rights and duties); Smith v. Smith, 50 N.E. 933, 935 (Mass. 1898) (stating that persons who enter into legal marriage assume "new relations to each other and to the state").

13. *See* 798 N.E.2d 941, 969 (Mass. 2003).

14. *Id.*

reformulation leaves the marriage statute intact, while furthering the Legislature's legitimate interests in providing a stable setting for child rearing and conserving state resources.[15] Although the *Goodridge* court recognized the importance of the right to marry the partner of one's choice, it did not reach the issue of whether the right to marry a person of the same sex is a fundamental right under the Massachusetts Constitution, nor did it reach the issue of whether sexual orientation is a suspect classification.[16] Instead, the *Goodridge* court employed the highly deferential rational basis test, under which it found that the prohibition on civil marriage between persons of the same sex bore no rational relation to the purported state interests in ensuring a stable setting for child rearing and the conservation of state resources.[17]

In light of the *Goodridge* decision, the Massachusetts Senate asked the Supreme Judicial Court whether its proposed bill, which would bar same-sex marriage but permit same-sex couples to form "civil unions, with all benefits, protections, rights and responsibilities of marriage," complied with the equal protection and due process provisions of the Massachusetts Constitution.[18] The Justices replied that establishing two separate classifications would not advance the legitimate state goals expressed in *Goodridge*.[19] The *Opinion of the Justices* stated that the proposed bill would delegate homosexuals to a second class status and perpetuate the type of invidious discrimination prohibited by the Massachusetts Constitution.[20]

Although *Goodridge* made clear that the court was concerned only with the rights afforded to citizens of Massachusetts, the Justices elaborated further on their rejection of the notion that a rational basis for laws prohibiting same-sex marriage could be located in the policy of comity.[21] The Justices addressed concerns over deference to federal law and the laws of other states that do not recognize same-sex marriage by declaring:

> That such prejudice exists is not a reason to insist on less than the Constitution requires. We do not abrogate the fullest measure of protection

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15. *See id.*

16. *See id.* at 961 n.21. In finding that the marriage statute in question did not survive rational basis review, the court did not find it necessary to analyze it under strict scrutiny. *See id.*

17. *See id.* at 961, 968-69.

18. Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004) (citations omitted).

19. *See id.* at 569. The Justices stated that given our American history, separate has rarely, if ever, been equal. *See id.*

20. *See id.* at 570.

21. *See id.* at 571. Comity is the practice of recognizing and respecting the laws and judicial rulings of another jurisdiction. *See* BLACK'S LAW DICTIONARY 284 (8th ed. 2004).

> to which residents of the Commonwealth are entitled under the Massachusetts Constitution. Indeed, we would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights may not be acknowledged elsewhere. We do not resolve, nor would we attempt to, the consequences of our holding in other jurisdictions. . . . But as the court held in *Goodridge*, under our Federal system of dual sovereignty, and subject to the minimum requirements of the Fourteenth Amendment to the United States Constitution, 'each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.'[22]

The Justices concluded that the Senate's proposed bill would violate the equal protection and due process provisions of the Massachusetts Constitution.[23]

Regardless of the nature of a violation, a plaintiff making a constitutional challenge must meet certain basic requirements before a court will evaluate the merits of his claim. The first of these requirements is that claims must not be based on a mere semantic argument or an overly narrow interpretation of a particular statutory section.[24] Claims of this nature will not succeed because courts examine the constitutionality of a statute in the context of its broader statutory scheme, rather than in the confines of each individual provision.[25] A plaintiff must also show that the defendant state acted unlawfully.[26] Further, a plaintiff claiming that selective enforcement of a discriminatory law violated his or her constitutional rights will have

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22. *Opinions of the Justices to the Senate*, 802 N.E.2d at 571 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 967 (Mass. 2003) (internal citations omitted)).

23. *See id.* at 572.

24. *See generally* Gillette Co. v. Comm'r of Revenue, 683 N.E.2d 270, 274 (Mass. 1997) (quoting Polaroid Corp. v. Comm'r of Revenue, 472 N.E.2d 259, 264 (Mass. 1984)) (stating a general rule of statutory construction is that "words of a statute must be construed in association with other statutory language and the general plan"); LeClair v. Town of Norwell, 719 N.E.2d 464, 469 (Mass. 1999) (affirming that statutory language is not read in isolation).

25. *See Gillette*, 683 N.E.2d at 274 (citing *Polaroid*, 472 N.E.2d at 264); *LeClair*, 719 N.E.2d at 469.

26. *See* Wilson v. Comm'r of Transitional Assistance, 809 N.E.2d 524, 533 (Mass. 2004) (stating the plaintiff failed to show the defendant acted unlawfully, making it unnecessary to address the issue of irreparable harm); Healey v. Comm'r of Pub. Welfare, 605 N.E.2d 279, 284-85 (Mass. 1992) (holding that the harm from a reduction in public resources does not invalidate lawful state action); Packing Indus. Group v. Cheney, 405 N.E.2d 106, 112 (Mass. 1980) (stating that what matters is not the raw amount of irreparable harm that each party might suffer but the risk of such harm when balanced against the party's probability of prevailing on the merits).

standing, provided that they show actual or likely injury.[27] The Appeals Court of Massachusetts held that to prove a claim of selective enforcement the plaintiff must show that: (1) the plaintiff was treated differently when compared with others similarly situated, and (2) this selective treatment was based on impermissible grounds such as race, religion, intentional infringement of constitutional rights, or malicious intent to injure.[28] It is settled law that a statute is given the presumption of constitutionality; thus, the plaintiff bears the burden of proving that it bears no rational relationship to any legitimate state interest.[29] Finally, *Packaging Industries Group v. Cheney* sets forth the Massachusetts standard for preliminary injunction relief: the moving party must (1) prove the likelihood of prevailing on the merits, and (2) show that he or she might suffer from irreparable harm even if he or she ultimately prevails on the merits after a full hearing.[30] In making a decision,

> the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party.[31]

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27. *See* Ginther v. Comm'r of Ins., 693 N.E.2d 153, 156 (Mass. 1998) (stating that it is an established principle of the standing doctrine that only persons who have suffered or are in danger of suffering a legal harm have the right to sue).

28. *See* Daddario v. Cape Cod Comm'n, 780 N.E.2d 124, 131 (Mass. App. Ct. 2002); Snowden v. Hughes, 321 U.S. 1, 8 (1944) (holding that when a facially neutral statute is applied unequally no equal protection violation results unless intentional discrimination is shown).

29. *See* Pielech v. Massasoit Greyhound Inc., 804 N.E.2d 894, 898 (Mass. 2004) (noting that a reviewing court does not judge whether a statute is wise or efficient but only that the legislature had the power to enact it); Prudential Ins. Co. v. Comm'r of Revenue, 709 N.E.2d 1096, 1102 (Mass. 1999) (stating that without a showing that a statute either burdens a suspect group or a recognized fundamental interest, it is presumed constitutional as long as it is rationally related to a legitimate state interest); Dickerson v. Attorney Gen., 488 N.E.2d 757, 759 (Mass. 1986) (holding that a statute will not be invalidated under rational basis review where *any* legitimate state interest may be conceived to justify it).

30. *See* 405 N.E.2d at 111-12; Loyal Order of Moose Inc. v. Bd. of Health of Yarmouth, 790 N.E.2d 203, 206 (Mass. 2003) (applying the *Packaging Indus. Group* standard, requiring plaintiff to show likelihood of success on the merits and irreparable harm to obtain an injunction); Commonwealth v. Mass. CRINC, 466 N.E.2d 792, 798 (Mass. 1984) (declaring that before issuing a preliminary injunction, a judge must determine that the relief promotes the public interest or, in the alternative, will not adversely affect the public).

31. *Packing Indus. Group*, 405 N.E.2d at 112; *Mass. CRINC*, 466 N.E.2d at 798 (declaring that before issuing a preliminary injunction, a judge must determine that the relief promotes the public interest or, in the alternative, will not adversely affect the public).

The Supreme Court stated in *Hicklin v. Orbeck* that the Privileges and Immunities Clause of the United States Constitution established that the states employ a policy of comity regarding the manner in which they treat each others' residents.[32] Thus, the Supreme Judicial Court of Massachusetts struck down a law that barred nonresident lawyers admission to the Massachusetts bar based on the comity concerns of the Privileges and Immunities Clause in *In the Matter of Jadd*.[33] The court held that where a right is fundamental, discrimination against nonresidents is unconstitutional when based solely on the condition of nonresidency.[34] Furthermore, *Massachusetts Council of Construction Employers, Inc. v. Mayor of Boston* sets out the test for analyzing whether a statute violates the Privileges and Immunities Clause: Is the right at issue a recognized fundamental right? Are nonresidents a particular source of the problem the law is attempting to remedy? Or, in the alternative, is there a justification for the discrimination other than mere nonresidency?[35] Finally, the Supreme Court has held that there are some matters so intimately tied to state sovereignty that discrimination against nonresidents may sometimes be permitted, even where the right infringed upon is important.[36]

III. THE COURT'S DECISION

In the noted case, the court reviewed the constitutionality of the domicile evasion section of the marriage statute and distinguished the statute and attendant facts from *Goodridge*.[37] Following the precedent set by the Supreme Court and that of the state high court, the Superior Court held that Massachusetts Code, chapter 207, section 11 (marriage law) was constitutional because: (1) it was applied equally to same- and opposite-sex nonresident couples, (2) was rationally related to a legitimate state interest, and (3) did not merit strict scrutiny under the

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32. *See* 437 U.S. 518, 524 (1978).

33. *See* 461 N.E.2d 760, 766 (Mass. 1983). Comity is not a matter of absolute obligation on the part of one state to yield to the laws of another state, nor is it a mere act of good faith. This is the respect that one jurisdiction gives to the laws and decision of another jurisdiction in recognition of their mutual sovereignty. *See* BLACK'S LAW DICTIONARY 284 (8th ed. 2004).

34. *See* 461 N.E.2d at 762.

35. *See* 425 N.E.2d 346, 351 (Mass. 1981). For purposes of Privileges and Immunities, fundamental rights have generally been limited to the right of a citizen of one state to pass through another for trade, agriculture, professional pursuits, and the like. *See id.* at 352.

36. *See* Baldwin v. Mont. Fish & Game Comm'n, 436 U.S. 371, 383 (1977).

37. *See* Cote-Whitacre v. Dep't of Pub. Health, No. 04-2656-G, 2004 Mass. Super. LEXIS 341, at *27-*45 (Mass. Super. Ct. Aug. 18, 2004).

Privileges and Immunities Clause.[38] In other words, the court declared that the nonresidents had no "fundamental right to travel from other states in order to marry."[39]

As a preliminary matter, defendants in the noted case challenged plaintiffs' standing to sue on the basis that none of the plaintiffs lived in a jurisdiction that voided same-sex marriage, but only in jurisdictions that merely prohibited such marriages.[40] Since the domicile evasion section of the marriage statute uses the term "void," the defendants argued that the plaintiffs lacked injury, and thus, lacked standing.[41] The court rejected this isolated reading of the section under statutory construction rules which compel the reviewing court to read statutes as a whole.[42] When the court read the sections together, the facts clearly showed that the plaintiffs had been affected.[43] It is a recognized policy that plaintiffs claiming that their constitutional rights have been violated by selective enforcement of discriminatory laws have been injured or risk injury of legal harm, and thus have standing.[44]

The defendants admitted intentionally increasing enforcement of the law, which nullified any marriage between nonresidents if that marriage would not be recognized in the nonresidents' own jurisdiction, after *Goodridge* was decided because they believed that an influx of nonresidents would flock to Massachusetts in order to evade the marriage laws in their own respective states.[45] The court accepted the defendants' evidence that the law in question was originally drafted with the goal of preventing nonresidents' evasion of their home jurisdiction divorce prohibitions and rejected the plaintiffs' argument that the statute was originally drafted as an attempt to prevent interracial marriage.[46] Had the court accepted the plaintiff's argument, it would have been bound to strike down the marriage statute due to the Supreme Court's holding in *Loving v. Virginia*, which declared *all* antimiscegenation laws unconstitutional.[47] Instead, the court in the noted case acknowledged that

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38. *See id.* at *34, *43-*45.
39. *Id.* at *44.
40. *See id.* at *20-*21.
41. *See id.* at *20-*22.
42. *See id.* at *22-*24.
43. *See id.* at *21-*22.
44. *See. id.* at *23.
45. *See id.* at *13.
46. *See id.* at *16-*18.
47. *See id.* at *5, *17 (citing Loving v. Virginia, 388 U.S. 1 (1967)). The court rejected plaintiffs' interpretation of the statute's history in favor of the defendants' evidence that the statute carried no residue of antimiscegenation legislation. *See id.* at *17-*18. "It is undisputed that

the *Goodridge* court did not strike down the marriage law that was challenged based on the fundamental right to marry a person of the same sex, nor did the *Goodridge* court expressly or impliedly classify homosexuality as a suspect class.[48] Since the right to marry someone of the same sex had not been declared fundamental, nor had the status of being homosexual been assigned suspect classification, the defendants' interest in increased enforcement of the marriage law was analyzed under rational basis scrutiny.[49] Under rational basis scrutiny, the court found the marriage statute unconstitutional.

Defendant argued that the legitimate state interest, furthered by limiting same-sex marriage to residents (and those whose home jurisdictions might also recognize such marriages), was the interest in having an approving state willing to enforce the benefits, obligations, and protections granted to a couple and their families by the Commonwealth.[50] In other words, Massachusetts did not want to waste its authority and resources by granting same-sex marriages to nonresidents that will ultimately be legal nullities upon the couples' return to their home states. If Massachusetts grants such a status, it wants to ensure that it is meaningful and enforceable. Yet, Massachusetts cannot force other states to recognize a marriage status it alone confers. In order for a meaningful and enforceable same-sex marriage status to exist, at least within its own borders, Massachusetts is bound to limit conferral of the status to Massachusetts residents (and, of course, to nonresidents whose home jurisdictions also recognize same-sex marriage). Otherwise, the benefits and protections that are provided by the state of Massachusetts by virtue of the status of marriage, as well as the appearance of authority of Massachusetts marriages in general, could be severely undermined by a couples' moving to another state. The limitation that the marriage statute placed on nonresidents was found to be rationally related to this legitimate state objective.[51]

In order to prove a claim of selective enforcement, the plaintiffs had to prove that, when compared to other nonresidents, they were treated differently and that the discriminatory treatment they received was based

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Massachusetts had repealed its anti-miscegenation laws in the 1830s." *Id.* at *18. This 1913 marriage statute would not be subject to automatic invalidation under *Loving*. *See id.* at *16-*17.

48. *See id.* at *27.

49. *See id.* at *34-*35.

50. *See id.* at *35.

51. *See id.* at *36. "Safeguarding the benefits, obligations, and protections of the parties … of a marriage that the Commonwealth has helped create, is a legitimate governmental objective." *Id.*

on impermissible grounds.[52] While the court acknowledged that the marriage statute *may have appeared* to violate the "spirit of *Goodridge*" because it excluded (some) same-sex couples from marriage, the plaintiffs failed to show that the statute *actually* treated any *nonresident* same-sex couples differently than *other nonresident* couples.[53] The defendants denied marriage licenses to *all* couples who were barred from marrying by their home jurisdiction.[54] Further, the timing of increased enforcement of the domicile evasion law was rational given the purposes of the law, one of which was to avoid wasting state resources on those for whom the legal status of marriage would ultimately be rendered void.[55] The plaintiffs failed to prove that it bore no rational relation to a legitimate state interest.[56] As such, the plaintiffs could not show that they were likely to prevail on their selective enforcement claim.[57]

As their primary claim, the plaintiffs sought relief under the Privileges and Immunities Clause.[58] The Privileges and Immunities Clause declares: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[59] Thus, courts have long recognized that where a right is fundamental, states cannot discriminate against nonresidents solely on the basis of nonresidency.[60] Under the first prong of the *Massachusetts Council of Construction Employers* Privileges and Immunities claims test, plaintiffs in the noted case did not show that the right to marry someone of the same sex was fundamental or that plaintiffs were part of a suspect class, and thus did not invoke strict scrutiny analysis.[61] Further, the statute satisfies the second prong of the test because there is justification for the differential treatment of nonresidents other than mere nonresidency. That is, the exclusion of nonresidents in this case has justification in the valid state goal of protecting the interests of the public, the spouses, and the children within its own borders by limiting the legal status of marriage to

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52. *See id.* at *31.
53. *See id.*
54. *See id.*
55. *See id.* at *31-*32.
56. *See id.* at *35.
57. *See id.* at *34.
58. *See id.* at *38.
59. U.S. CONST. art. IV, § 2, cl. 1.
60. *See Cote-Whitacre*, 2004 Mass. Super. LEXIS 341, at *40-*43 (citing Baldwin v. Mont. Fish & Game Comm'n, 436 U.S. 371 (1977); *In re* Matter of Jadd, 461 N.E.2d 760 (Mass. 1983); Mass. Council Constr. Employers v. Mayor of Boston, 425 N.E.2d 346 (Mass. 1981)).
61. *See id.* at *44. Neither *Goodridge* nor any other case was cited as showing that same-sex marriage is a fundamental right or that homosexuality is a suspect classification. *See id.* at *41-*45.

those for whom the legal benefits, obligations, and protections will be recognized and enforceable.[62]

Opinions of the Justices made clear that the Fourteenth Amendment of the United States Constitution sets the floor for the individual liberties that states must provide their residents, while the states' respective Constitutions mark the ceiling.[63] Since protecting the state interests preserved by *Goodridge* is a legitimate goal that did not infringe on plaintiffs' fundamental rights, it follows that the defendants did not act unlawfully, as each state is free to determine important matters of individual liberty according to its own constitutional requirements.[64] Comity concerns will not override *all* discriminatory treatment of nonresidents.[65]

In conclusion, the plaintiffs did not qualify for injunctive relief because they did not show a likelihood of prevailing on the merits on any of their claims.[66] Moreover, the plaintiffs were unable to show that they were adversely affected by the unlawful actions of the defendant and, consequently, the court did not have to determine whether the plaintiffs suffered substantial irreparable harm.[67]

IV. ANALYSIS

While the Massachusetts Superior Court denied same-sex marriage to nonresidents, the noted case highlighted two important themes: (1) the failure of the *Goodridge* court to classify homosexuality as a suspect class and/or to declare same-sex marriage a fundamental right, and (2) corrected the misconception that *Goodridge* created a national loophole for same-sex marriage under the policy of comity.[68]

In the noted case, the Superior Court clarified the holding of *Goodridge*. In *Goodridge*, the court did not strike down the marriage laws by employing a strict scrutiny analysis.[69] Instead of invalidating the marriage statutes involved in the case, the court found the better remedy was to reform the common law definition of marriage that was contained

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62. *See id.* at *44-*45.
63. *See id.* at *11.
64. *See id.* at *45.
65. *See id.* at *40.
66. *See id.* at *45.
67. *See id.*
68. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969-79 (Mass. 2003); Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004) (quoting *Goodridge*, 798 N.E.2d at 967 ("Each state is free to address difficult issues of individual liberty in the manner its own Constitution demands.")).
69. *See Goodridge*, 798 N.E.2d at 961.

within the statutes.[70] Since the common law definition of marriage, based on gender, denied otherwise qualified persons "the protections, benefits, and obligations of marriage solely because that person would marry a person of the same sex," it was in violation of the Massachusetts Constitution under the rational basis test.[71] The *Goodridge* court was thus able to reach a decision that validated same-sex marriage without applying a strict scrutiny analysis. This is critical because employing a strict scrutiny analysis would have forced the court to resolve whether sexual orientation is a suspect classification.[72]

The *Goodridge* ruling established the right of its residents to marry a person of the same sex without resorting to declaring a new fundamental right or suspect class, which courts are reluctant to do. While securing the right of Massachusetts citizens to marry a person of the same sex is a laudable feat, the *Goodridge* court failed to secure an important civil right by only applying rational basis review. In so doing, it left the door open for laws that perpetuate exclusionary treatment of homosexuals and demote them to a second class of citizenship.[73] When examining constitutional violations involving classes of people who face strong latent prejudice, using rational basis review instead of strict scrutiny allows for that very prejudice, which may be present amongst lawmakers, to go undetected. Under rational basis review, as long as *some* legitimate goal can merely be *conceived* for a discriminatory law, the law will be deemed constitutional.[74]

As for the misguided concern that *Goodridge* created a national loophole for same-sex marriage, the noted case relied heavily on the *Opinions of the Justices to the Senate* to highlight the limitations set forth by *Goodridge*.[75] Many people both within and outside the legal field assumed that other states would have to recognize as valid the same-sex marriage contracted in Massachusetts.[76] However, the opposite of this belief is quite evident from a careful analysis of the holding.[77] By

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70. *See id.* at 961, 969.

71. *See id.* "Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny." *Id.* at 961.

72. *See id.* at 961 n.21.

73. *See Opinions of the Justices*, 802 N.E.2d at 569.

74. *See* Prudential Ins. Co. v. Comm'r of Revenue, 709 N.E.2d 1096, 1102 (Mass. 1999); Dickerson v. Attorney Gen. 488 N.E.2d 757, 758 (Mass. 1985).

75. *See Opinions of the Justices*, 802 N.E.2d at 571.

76. *See Goodridge*, 798 N.E.2d at 967 (rejecting arguments advanced by the defendants and by amici that expanding civil marriage to include same-sex couples will lead to interstate conflict).

77. *See id.* The *Goodridge* majority wrote: "The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that subject to . . . the

distinguishing *Goodridge* and excluding nonresidents from its holding, the court in the noted case ensures that the same-sex marriage will not be recognized in other jurisdictions whose laws fail to recognize such marriages.[78] The court went further than simply validating the lifting of the ban on same-sex marriage in Massachusetts and leaving it to a nonresident couple's home jurisdiction to decide whether to recognize a same-sex marriage performed in Massachusetts. This decision resolves in advance that no argument can be made for the validity of a nonresident, same-sex marriage contracted in Massachusetts that is otherwise prohibited in the nonresident couple's home jurisdiction. The court endorses a law that *ensures* that a marriage prohibited by the home jurisdiction of a nonresident couple will not be recognized *at all*—not in their home jurisdiction or even in Massachusetts—and therefore, same-sex marriage between nonresidents is null and void under Massachusetts law.[79] It appears that the Massachusetts courts are very attuned to the possibility of interstate conflicts and are hesitant to make such liberal changes too quickly for fear of resentment by other states.

Perhaps the court's decision to forego securing same-sex marriage as a fundamental civil right is a function of prudence rather than apprehension over other states' resistance and resentment. While it can certainly be argued that the failure to declare same-sex marriage as a civil right per se is attributable to deep-seated prejudice and judgments of morality seeping into the law, it can also be argued that the Massachusetts courts are consciously tackling the issue in a gradual manner. While it seems only fair that civil rights should be secured wholesale rather than piecemeal, historically, civil rights have most often been successfully acquired and more widely accepted through continued, gradual gains rather than rapid and dramatic changes.

Amanda M. Crowley*

Fourteenth Amendment, each state is free to address difficult issues of individual liberty in the manner its own Constitution demands." *Id.*

78. *See* Cote-Whitacre v. Dep't of Pub. Health, No. 04-2656-G, 2004 Mass. Super. LEXIS 341, at *28-*30 (Mass. Super. Ct. Aug. 18, 2004) (explaining that the court does not determine how other states should respond to the decision).

79. *See id.* at *21 n.7 (providing relevant sections of the marriage statute).

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