

## Case Comment

### Divorcing Marriage from Procreation

*Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

Public debate about same-sex marriage has spectacularly intensified in the wake of the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*.<sup>1</sup> But amid the twisted faces, shouts, and murmurs surrounding that decision, a bit of old-fashioned common-lawmaking has been lost. Some have criticized the *Goodridge* court for its apparently result-oriented approach to the question of whether, consistent with the Massachusetts Constitution, the commonwealth may deny marriage licenses to same-sex couples.<sup>2</sup> Others have defended the decision, both on the court's own rational basis terms and on other grounds, including sex discrimination and substantive due process.<sup>3</sup> This Comment contends that both sides are partly right.

I join those commentators who find *Goodridge*'s reasoning flawed but its outcome correct.<sup>4</sup> Where I part ways is in recognizing the vital importance but untapped potential of the Supreme Court's decision in *Turner v. Safley*.<sup>5</sup> The *Turner* Court held unconstitutional a Missouri prison regulation denying inmates the right to marry except for "compelling reasons."<sup>6</sup> It is a familiar case, frequently invoked in legal arguments over same-sex marriage to support the proposition that marriage is a fundamental

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1. 798 N.E.2d 941 (Mass. 2003).

2. See, e.g., Recent Case, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), 117 HARV. L. REV. 2441 (2004); Douglas W. Kmiec & Mark S. Scarberry, *Massachusetts Alternatives*, NAT'L REV. ONLINE, Feb. 11, 2004, [http://nationalreview.com/comment/kmiec\\_scarberry200402110925.asp](http://nationalreview.com/comment/kmiec_scarberry200402110925.asp).

3. See, e.g., Sarah Carlson-Wallrath, *Why the Civil Institution of Marriage Must Be Extended to Same-Sex Couples*, 26 HAMLINE J. PUB. L. & POL'Y 73 (2004); John G. Culhane, *The Heterosexual Agenda*, 13 WIDENER L.J. 759 (2004).

4. See, e.g., Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 985-86 (2004); Jeffrey Rosen, *Immodest Proposal: Massachusetts Gets It Wrong on Gay Marriage*, NEW REPUBLIC, Dec. 22, 2003, at 19.

5. 482 U.S. 78 (1987).

6. *Id.* at 82 (internal quotation marks omitted).

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right under our federal constitutional jurisprudence.<sup>7</sup> Too often, however, these arguments miss the totality of what *Turner* tells us about exactly why marriage is a fundamental right. Because the *Turner* Court struck down a marriage ban that applied to a population with no legal right to procreate and that provided an exception for pregnancy, the decision undermines any claim that marriage is fundamental because of an inexorable connection to procreation.

Part I of this Comment scrutinizes and ultimately rejects the *Goodridge* court's rational basis analysis. Part II explores the road not taken in *Goodridge*—the fundamental rights approach of cases such as *Loving v. Virginia*,<sup>8</sup> *Zablocki v. Redhail*,<sup>9</sup> and *Turner*. I argue that for marriage to comport with our fundamental rights jurisprudence, the source of its constitutional definition must be constitutional common law, not individual state statutes. Part III rediscovers *Turner* as a source of that constitutional definition, concluding that the case is irreconcilable with the view that the possibility of procreation is a necessary affluent of marriage's fundamentality. With *Bowers v. Hardwick*<sup>10</sup> officially dead, *Turner* insists that same-sex marriage bans answer to strict, and therefore fatal, scrutiny.

## I

Although the *Goodridge* court decided the case under the Massachusetts Constitution, the reasoning invoked under that document parallels that of its federal counterpart: Each jurisprudence applies heightened scrutiny to statutes that draw a suspect classification or implicate a fundamental right and applies rational basis review to all other statutes.<sup>11</sup> Because the *Goodridge* court determined that the Massachusetts marriage-licensing statute did not satisfy rational basis review, it did not have to reach the question of whether and how to apply heightened scrutiny.<sup>12</sup> In her rational basis review, Chief Justice Marshall considered three asserted rationales for the commonwealth's prohibition on same-sex marriage: first, that it "provid[es] a favorable setting for procreation"; second, that it "ensur[es] the optimal setting for child rearing"; and third,

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7. See, e.g., *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); see also Standhardt v. Superior Court, 77 P.3d 451, 458 (Ariz. Ct. App. 2003); Carlos A. Ball, *The Positive in the Fundamental Right To Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1200 (2004).

8. 388 U.S. 1 (1967).

9. 434 U.S. 374 (1978).

10. 478 U.S. 1039 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

11. See *Goodridge*, 798 N.E.2d at 948-49, 960.

12. *Id.* at 961. Chief Justice Marshall may have had her reasons for sidestepping strict scrutiny. For example, relying on *Turner* to decide *Goodridge* on federal constitutional grounds would have raised the possibility of U.S. Supreme Court review. See generally DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 105-17 (2003) (making an empirical argument that federal courts are systematically more hostile than state courts to gay rights claims).

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that it “preserv[es] scarce State and private financial resources.”<sup>13</sup> The ban on same-sex marriage need be rationally related to only one of these goals to survive review under the deferential rational basis standard.

We need go no further than the first. Marshall rehearsed familiar arguments for why, if a stable procreative setting is the goal, same-sex marriage bans are both over- and underinclusive. Many same-sex couples are permitted and even encouraged to adopt or conceive through artificial insemination and subsequently raise children, Marshall argued, while many opposite-sex couples freely marry without any desire or even ability to procreate.<sup>14</sup> Attempting to ground the right to marry in procreation thus smells suspiciously post hoc. But rational basis review is hardly so searching. Consider an analogy: Are laws that restrict unemployment benefits to people who lose their jobs rationally related to the goal of ensuring that people who are laid off have soft landings? Like traditional marriage laws, unemployment benefits are both over- and underinclusive. Many individuals who receive unemployment benefits do not need them, while many who are employed desperately need a financial cushion. Yet unemployment benefits programs would easily survive rational basis review, which permits the use of the roughest of proxies. Just as the state may draw the line at “unemployment” in a social welfare program, it may draw the line at “opposite sex” in the enjoyment of the marriage benefits that it confers as a civil entitlement.<sup>15</sup> If same-sex marriage bans are to fail, they must fail under heightened scrutiny.<sup>16</sup>

## II

Those in sympathy with the *Goodridge* result might instead rely on a far stronger federal constitutional argument.<sup>17</sup> *Loving v. Virginia*, which

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13. *Goodridge*, 798 N.E.2d at 961 (internal quotation marks omitted).

14. *Id.* at 961-62.

15. It is not obvious how allowing same-sex couples to marry hinders the goal of providing a favorable setting for procreation. *See, e.g.*, *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at \*10 (Wash. Super. Ct. Aug. 4, 2004). Neither is it obvious, however, how allowing employed persons to receive unemployment insurance would hinder the government in assisting the unemployed. *See generally* *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913) (“The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.”).

16. *See, e.g.*, *Standhardt v. Superior Court*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003) (“The fact that the line [defining marriage] could be drawn differently is a matter for legislative, rather than judicial, consideration, as long as *plausible* reasons exist for placement of the current line.” (emphasis added)); *Morrison v. Sadler*, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005) (defending Indiana’s same-sex marriage prohibition by arguing that “[t]here was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not”).

17. Justice Greaney, concurring in *Goodridge*, took up the heightened scrutiny challenge by arguing that the marriage statutes discriminated on the basis of sex. *Goodridge*, 798 N.E.2d at 970-74 (Greaney, J., concurring). This argument garnered a majority in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which temporarily struck down Hawaii’s civil marriage law, but it is

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held Virginia's antimiscegenation laws unconstitutional, was decided on two independent and equally adequate grounds.<sup>18</sup> The first was the Equal Protection Clause: The racial classification at issue could not be justified by any state interest other than white supremacy, which was hardly legitimate, much less compelling. The second was that the freedom to marry is "fundamental," among the "vital personal rights essential to the orderly pursuit of happiness by free men" that the "substantive" component of the Due Process Clause protects against government infringement.<sup>19</sup> Eleven years after *Loving*, in *Zablocki v. Redhail*, the Court confirmed that state impediments to marriage are subject to strict scrutiny because the right is "of fundamental importance for all individuals."<sup>20</sup> If strict scrutiny does attend prohibitions on same-sex marriage, this argument goes, their unconstitutionality is settled.<sup>21</sup>

The counterargument is that the right to marry, though fundamental, does not contemplate the right to marry members of one's own sex.<sup>22</sup> That is, same-sex marriage is not "marriage" in any constitutionally relevant sense. A ban on same-sex marriage thus does not encroach on any fundamental right and, correspondingly, does not trigger strict scrutiny.

It has become popular to state without elaboration that legislatures, not judges, define marriage.<sup>23</sup> But if this is so, then marriage is an odd

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constitutionally awkward. Though obviously invoking a sex-based classification, the Massachusetts marriage laws just as obviously treated the two sexes identically. *See Goodridge*, 798 N.E.2d at 991 (Cordy, J., dissenting); *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) ("The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law 'can be traced to a [sex] discriminatory purpose.'" (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979))). Thus, the argument forces us to consider whether sex classifications that concededly visit disfavor upon neither sex are presumptively unconstitutional. This cannot be so. Because any statute that discriminates on the basis of sexual orientation necessarily recognizes differences between sexes, Greaney's approach elevates sexual orientation to a suspect classification. Neither the Supreme Court nor the Supreme Judicial Court has been willing to take this step. *See generally Romer v. Evans*, 517 U.S. 620 (1996) (declining to apply heightened scrutiny to a Colorado constitutional amendment forbidding antidiscrimination laws from protecting gays). Although it has been argued that tiers-of-scrutiny analysis is dying a quiet death at the hands of gay rights cases, *see, e.g., Pamela S. Karlan, Loving Lawrence*, 102 MICH. L. REV. 1447 (2004), an argument from doctrine that the distinction between sex discrimination and sexual orientation discrimination is constitutionally irrelevant would be a stretch, *see Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (employing rational basis review in upholding Florida's prohibition on adoption by same-sex couples), *cert. denied*, 125 S. Ct. 869 (2005).

18. 388 U.S. 1 (1967); *see* Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right To Marry, 1790-1990*, 41 *How. L.J.* 289, 304 (1998) ("The brief discussion of the freedom to marry in *Loving* . . . is legally binding, not mere *dicta*.").

19. *Loving*, 388 U.S. at 12.

20. 434 U.S. 374, 384 (1978).

21. *See Hernandez v. Robles*, No. 103434/2004, 2005 WL 363778, at \*14-20 (N.Y. Sup. Ct. Feb. 4, 2005) (applying strict scrutiny to strike down New York's prohibition on same-sex marriage).

22. *See, e.g., Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. 1995); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at \*4-8 (N.J. Super. Ct. Nov. 5, 2003).

23. *See, e.g., Goodridge*, 798 N.E.2d at 974 (Spina, J., dissenting).

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fundamental right.<sup>24</sup> The jurisprudential purpose of calling a right “fundamental” is to remove it from the vagaries of the ordinary political process.<sup>25</sup> In *Loving*, the Virginia legislature was conspicuously denied the opportunity to supply its own definition of marriage. In *Zablocki*, the State of Wisconsin was not permitted to “define” marriage as being restricted to those without outstanding child support obligations.<sup>26</sup> The doctrinal question of whether same-sex marriage is “marriage” is not for legislatures or interest groups, but rather for those constitutionally charged with defining the scope of fundamental rights.<sup>27</sup>

Some will object that the definition of marriage as the union of a man and a woman is no mere statutory drafting trick, but rather instantiates a dominant historical understanding that accords with marriage’s role as an engine of civilization. The state’s interest in marriage stems from a transcendent interest in cultural continuity and extends beyond any individual’s particular relationship.<sup>28</sup> The effect of labeling marriage a fundamental right, however, is to transfer presumptive protection from the community’s to the individual’s side of the constitutional ledger. While the state is free to assert a range of communitarian interests in attempting to justify a ban on same-sex marriage, these interests do not in themselves inform the question of whether marriage is fundamental. For the purposes of strict scrutiny analysis, that is, the definition of marriage must answer not merely to popular convention but to what our common law constitutional tradition regards as fundamental about the institution.

To answer the crucial question of *why* marriage is fundamental under the Court’s jurisprudence, we must look to the Court’s own words. If its definition of marriage stands independent of any connection either to procreation or to some other feature of marriage that excludes same-sex couples, a naked assertion that there is no fundamental right to same-sex marriage remains conclusory.

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24. See Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIPIAC L. REV. 27, 32 (1996).

25. See *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring in the judgment) (suggesting a tension between declaring a constitutional “right to marry” and leaving its definition to state legislatures).

26. *Id.* at 383-91 (majority opinion).

27. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

28. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring in the judgment) (citing “preserving the traditional institution of marriage” as a legitimate state interest); David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 29 (1997) (describing marriage as “a unique community defined by sexual complementarity”).

## III

The Supreme Court has offered numerous explanations for the fundamentality of marriage, none of which establishes procreation as a necessary or even important element. Proponents of same-sex marriage prohibitions point to *Skinner v. Oklahoma*, in which the Court wrote that “marriage and procreation are fundamental to the very existence and survival of the race.”<sup>29</sup> As a strict interpretive matter, the conjunctive construction used in this passage suggests independence, not confluence, between marriage and procreation. In any event, *Skinner* invalidated an Oklahoma compulsory-sterilization statute, and so its discussion of marriage was incidental to its discussion of the importance of procreation. In *Griswold v. Connecticut*, the Court revisited the rationale behind the fundamentality of marriage and seemed to settle on a form of associative freedom.<sup>30</sup> Marriage, Justice Douglas wrote, “is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”<sup>31</sup>

*Griswold* fails to establish decisively, however, whether values like “bilateral loyalty” are not merely important but are in fact sufficient to confer fundamental status upon marriage. This is *Turner*’s contribution. Under the Missouri prison regulation challenged in *Turner*, an inmate could marry “only with the permission of the superintendent of the prison,” with approval to be given only “when there are compelling reasons to do so.”<sup>32</sup> Crucially for our purposes, “generally only pregnancy or birth of a child [was] considered a ‘compelling reason’ to approve a marriage.”<sup>33</sup> *Turner* thus permits a test of the hypothesis that some biological nexus is a necessary part of the constitutional definition of marriage. Procreation involves, potentially, three elements: conception, pregnancy, and childbirth. The “conception” variable was eliminated by the restrictions of prison life; the regulation further isolated the “pregnancy” and “childbirth” variables. If prisoners who can neither conceive nor become parents still have a fundamental right to marry, then the fundamental right must attach to features of the institution of marriage that are unrelated to procreation.

The Court so held. Even applying the deferential standard of review typically afforded to prison regulations,<sup>34</sup> the Court reiterated that marriage

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29. 316 U.S. 535, 541 (1942).

30. 381 U.S. 479, 486 (1965).

31. *Id.*

32. *Turner v. Safley*, 482 U.S. 78, 82 (1987) (internal quotation marks omitted).

33. *Id.* at 96-97.

34. *See id.* at 90-91 (asking whether the regulation was reasonably related to legitimate penological objectives).

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is a fundamental right,<sup>35</sup> which the Missouri regulation “impermissibly burden[ed].”<sup>36</sup> Speaking for a unanimous Court, Justice O’Connor wrote,

Many important attributes of marriage remain . . . after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. . . . In addition, many religions recognize marriage as having spiritual significance . . . . Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits . . . , property rights . . . , and other, less tangible benefits . . . .<sup>37</sup>

In short, marriage is fundamental for many reasons, none of which is tantamount to procreation nor to any other factor potentially absent in a same-sex marriage. “Taken together,” O’Connor wrote, “we conclude that *these remaining elements are sufficient* to form a constitutionally protected marital relationship in the prison context.”<sup>38</sup>

The burden for same-sex marriage opponents is to articulate how, from the individual’s perspective, these remaining elements apply with any less force to gay Americans than to imprisoned ones. Same-sex marriages are no less expressions of emotional support or public commitment than opposite-sex marriages. (Given the social stigma attached to coming out, they are arguably more so.) Although many religions do not recognize same-sex marriage, many others do, and marriage may nonetheless have substantial spiritual significance for same-sex couples.<sup>39</sup> Same-sex couples, like opposite-sex couples, usually marry in the expectation that the marriage will be consummated.<sup>40</sup> And same-sex couples, if permitted to marry, would presumably qualify for attendant government benefits.

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35. *Id.* at 95.

36. *Id.* at 97.

37. *Id.* at 95-96.

38. *Id.* at 96 (emphasis added).

39. See generally WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 193 app. (1996) (collecting letters in support of same-sex marriage from a wide range of religious leaders).

40. Writing in dissent in *Goodridge*, Justice Cordy suggested that the words “will be fully consummated” are evidence that the possibility of procreation is “essential to the Supreme Court’s denomination of the right to marry as fundamental.” *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting). Consummation of a marriage ordinarily refers to sexual relations or cohabitation, however, not to procreation. See, e.g., *Conner ex rel. Curry v. Schweiker*, No. C81-281A, 1981 U.S. Dist. LEXIS 18399, at \*5-6 (N.D. Ga. Nov. 30, 1981) (“A marriage is consummated according to law when the parties co-habitate and hold themselves out as husband and wife . . . .”); see also WEBSTER’S NEW COLLEGIATE DICTIONARY 242 (9th ed. 1981) (defining “consummate” as “to make (marital union) complete by sexual intercourse”); Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1109 (2002) (noting that impotence as a ground for divorce does not typically encompass “those who have the capacity to copulate but are infertile”).

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Now recall the three interests that the Massachusetts Department of Public Health asserted as justifying its prohibition on same-sex marriage: that the ban provided a favorable setting for procreation, ensured an optimal setting for child rearing, and preserved scarce state and private financial resources.<sup>41</sup> That none of these interests satisfies strict scrutiny requires little elaboration. Familiar principles of constitutional fit instruct us that prohibiting same-sex couples from marrying is hardly narrowly tailored to an interest in providing either a favorable setting for procreation or an optimal setting for child rearing. As for preserving financial resources, this interest does not speak to why same-sex couples may be singled out. As Judge Ferren wrote of Justice O'Connor's list in his dissent in *Dean v. District of Columbia*, "If these attributes of marriage are relevant to the needs and aspirations of gays and lesbians . . . we have the basis for inquiring whether a marriage statute that excludes homosexuals from the right to marry one another meets equal protection requirements."<sup>42</sup>

## IV

Common law constitutionalism is most fundamentally an exercise in analogical reasoning. Judges, lawyers, and legal scholars interrogate and impeach doctrine by demonstrating inconsistencies across the spectrum of constitutional experience. Controlled experiments, the weapon of choice for practitioners and academics in other fields, can be a powerful tool in legal argument as well. This Comment has argued that *Turner* is an underappreciated opportunity for controlled experiment in same-sex marriage cases. The *Turner* Court had to evaluate whether prisoners—prisoners!—with no procreative justification still have a fundamental right to marry, and it held unanimously that they do. The case demonstrates, therefore, that marriage is fundamental under the U.S. Constitution not because it provides a setting for heterosexual procreation but because it solemnizes a social relationship that individuals regard as fundamentally important. Employing *Turner* for this proposition might have added the legitimacy of doctrinal argument to *Goodridge*'s revolutionary outcome.

—*Jamal Greene*

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41. See *supra* note 13 and accompanying text.

42. 653 A.2d 307, 336 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part). Judge Ferren's opinion comes as close as any to recognizing *Turner*'s doctrinal potential. William Eskridge, who argued *Dean*, is the most prominent of several academic voices in favor of a broad reading of *Turner*, see ESKRIDGE, *supra* note 39, at 129, though the continuing validity of *Bowers v. Hardwick* had, until recently, complicated his position considerably, see *id.* at 134-37.