SYMPOSIUM ON *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*

THE (RELATIVE) PASSIVITY OF *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*

LAWRENCE FRIEDMAN*

INTRODUCTION

State and federal constitutional provisions that establish an individual's right to due process and to equal protection of the law are not self-explanatory – they require some effort at interpretation if they are to have meaning. In practice we turn to the judiciary to say what the law of due process or equal protection is in a given instance, as well as how it should be applied, and to whom. We look to the state and federal courts, in other words, to implement these constitutional commands by clarifying norms and articulating the doctrines that will control the application of those norms in the next case.[1]

The hazard of the task reveals itself whenever a court is called upon to consider the applicability of due process or equal protection in respect to a specific set of facts: there lies the possibility that, in explaining what the law requires and ordering the government to honor those requirements, the court will invalidate a majoritarian preference.[2] Few would deny that a court has the power in its institutional capacity to do just that.[3] Yet the charge of "judicial activism" is sure to follow when the exercise of judicial review upsets a majoritarian preference – as

---

* Assistant Professor of Law, New England School of Law. This article is a substantially revised version of a presentation I made at a conference on the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), held at the Southern New England School of Law in June 2004. My thanks to Gavin McCarthy and Shaun Spencer for comments on earlier drafts, as well as to my colleagues George Dargo and David Siegel; they should not be held responsible for errors that remain.

[1] *See* RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 38 (2001).

[2] *See* Lawrence Friedman, *Public Opinion and Strict Scrutiny Equal Protection Review: Higher Education Affirmative Action and the Future of the Equal Protection Framework*, 24 B.C. THIRD WORLD L.J. 267, 271 (2004) (discussing application of the constitutional commitment to equality).

[3] *See* Frank I. Michelman, *Living With Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 593 (2003) ("Judicial review is and will remain a settled matter here, a rock-solid component of American government and political self-understanding."). Indeed, a number of state courts recognized the power of judicial review even before the ratification of the federal constitution. *See* ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW 699 (3d ed. 1999).

in the 2003 case *Goodridge v. Department of Public Health,*[4] in which the Massachusetts Supreme Judicial Court held that the denial of marriage licenses to same-sex couples violates the state constitutional commitment to equality.

It's difficult to respond to the charge that a constitutional decision like *Goodridge* is activist because it is often unclear just what "judicial activism" means. For the most part, the term seems to indicate personal disagreement with a court's decision to declare a particular government action unconstitutional.[5] For a charge of judicial activism to have weight or effect, the proponent must provide both a coherent definition of judicial activism and some persuasive explanation of why a judicial decision falls within that definition. The latter task will never be simple: inevitably, cases will arise in which one can make reasonable arguments about the meaning of a particular constitutional command and whether a court's implementation of that command transcends the legitimate bounds of the judicial function.[6]

On the other hand, if, as Professor Ernest Young has suggested, there is a "continuum between judicial passivity and hegemony," then the term "activism" has descriptive utility as a measure of where, approximately, a judicial decision falls on that continuum.[7] Activism in this sense refers to the way in which a court has, in a case or series of cases, allocated decision making authority "within the judicial system and between that system and other participants in government."[8] Judicial decision-making on the hegemonic end of the continuum correlates with a court's allocation of authority to the judiciary in relation to the coordinate branches of government – as, for example, in the area of statutory preemption, where the

---

[4] 798 N.E.2d 941 (Mass. 2003). Each of the dissenting justices in *Goodridge* charged the majority with activism. *See id.* at 974 (Spina, J., dissenting) (arguing that the *Goodridge* majority, with its decision, "transformed its role as protector of individual rights into the role of creator of rights"); *id.* at 982 (Sosman, J., dissenting) (arguing that "[t]o reach the result it does, the court ... tortured the rational basis test beyond recognition"); *id.* at 983 (Cordy, J., dissenting) ("Although it may be desirable for many reasons to extend to same-sex couples the benefits and burdens of civil marriage ... that decision must be made by the Legislature, and not the court."). And the charge has been made by numerous commentators. *See, e.g.*, Dean A. Mazzone, Goodridge: *Same-Sex Marriage and the Massachusetts Constitution*, 88 MASS. L. REV. 155, 159 (2004) (arguing, histrionically, that the decision may be viewed "as an attempt by four unelected and unaccountable judges to turn the civilizational clock back").

[5] *See, e.g.*, Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2003) (observing that the term "activism," as commonly used, "is empty, a mask for a substantive position").

[6] *See* Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1279 (2003) (recognizing that, even when attempting to find and apply the original meaning of a constitutional command, "the process of application [may] require choice and judgment").

[7] *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1163 (2003).

[8] *Id.*

U.S. Supreme Court has in recent years accrued for itself the power to make substantive judgments regarding the preemptive reach of federal statutes.[9]

Identifying those instances in which a court has effectively increased its freedom to act without due regard for other decision-makers and sources of authority requires attention to what Young calls "particularized manifestations" of activism.[10] We must attend to matters such as whether a decision respects the doctrine of *stare decisis*, and the extent to which a departure from precedent is justified;[11] whether a decision is, in light of the circumstances, unduly maximal, in that the court has used the case "as an opportunity to announce sweeping rules or to reach out and decide issues that could have been avoided or put off for another day";[12] and whether a judicial remedy is so expansive as to require judicial intrusion into the structure or running of public institutions.[13]

Whether the presence of any or all of these manifestations indicates that a court has overreached depends on the historical and situational context of the case. Indeed, the manifestations of activism may point in different directions, for "a given decision may enhance judicial authority in some ways even while cutting it

---

[9] *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 344.

[10] Young, *supra* note 7, at 1144.

[11] *See id.* at 1149-51.

[12] *Id.* at 1152.

[13] *See id.* at 1154. Young also includes among his manifestations of activism such behaviors as second-guessing the political branches of government, departing from text and/or history, and deciding cases according to partisan political preferences. *See id.* at 1144. If, by second-guessing the political branches, we mean striking down laws on constitutional grounds, then that, without more, is simply a description of judicial review as exercised in a particular instance – though such an exercise might give us pause if, for example, the reasons for striking down the law were not based upon a sound implementation of the Constitution, according to accepted standards of interpretation and application. As for departures from text and/or history, it is less of a concern when constitutional principles such as the commitment to equality are at issue – that is, when the work of wringing meaning from text and history is well advanced, and doctrinal standards for implementing that meaning are no longer in a great state of flux. By "doctrinal standards," I mean "the rules and principles of constitutional law ... that are capable of statement and that generally guide the decisions of courts, the conduct of government officials, and the arguments and counsel of lawyers." Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1140 (1994). *Goodridge*, for example, revolved primarily around the application of the doctrinal framework developed to implement the promise of equal protection, and not the text of the equality provisions of the Massachusetts Constitution. *See infra*, notes 23 - 25 and accompanying text (discussing Massachusetts equal protection cases). Finally, I do not include partisanship among the manifestations of activism because, as Professor Young notes, partisanship's value is unclear and it is notoriously difficult to detect, much less to prove. *See* Young, *supra* note 7, at 1158; *but see* William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355 (2004) (arguing that conservative justices on the U.S. Supreme Court often use judicial power to protect entrenched interests in society).

back in others."[14] Because measuring and assessing the manifestations of activism can never be more than an inexact science, Professor Young wisely counsels that we concentrate on the specific aspects of a judicial decision – for example, the court's treatment of precedent, or the court's construction of the operative rule in the case – in determining whether the decision, in the end, served to augment the judiciary's authority.[15]

Employing Professor Young's formulations, I seek to explore whether, as critics charge, the Massachusetts Supreme Judicial Court's decision in *Goodridge* is an unequivocal instance of a court enhancing its power vis-à-vis other sources of public authority. To ascertain where *Goodridge* falls on the continuum between judicial passivity and judicial hegemony, I first turn to the development of constitutional equality doctrine in Massachusetts, and the cases in which the courts have sought to implement the commitment to equality. Next, in Part II, I examine the decision's minimalist and maximalist tendencies to determine how much, if anything, *Goodridge* leaves unsaid. Part III addresses the remedy that the court proposed upon finding that denying marriage licenses to same-sex couples violates the state constitutional commitment to equality. In Part IV, I review how the decision fared on each of these analyses and compare it to another controversial judicial decision, *Bush v. Gore*,[16] in considering the charge that *Goodridge* represents the worst kind of judicial activism.

I. HONORING PRECEDENT

We expect that a court will honor precedent in addressing the legal issue before it – that, at a minimum, the principles set down in earlier cases, however broadly or narrowly construed, will provide some constraint on the court's ability to resolve the dispute at hand.[17] *Stare decisis*, as Thurgood Marshall explained in *Payne v. Tennessee*,[18] "is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of

[14] Young, *supra* note 7, at 1169.

[15] *See id.* at 1171-72.

[16] 531 U.S. 98 (2000).

[17] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 8 (1997) (distinguishing between broad understanding of *stare decisis* – in which "the holding of a case can be said to be the analytical principle that produced the judgment" – and narrow understanding – in which "the holding of a case cannot go beyond the facts that were before the court"); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (observing that, "when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by the supreme court itself").

[18] 501 U.S. 808 (1991).

judicial will, with arbitrary and unpredictable results."[19] When courts depart from precedent, we may reasonably inquire whether judges are implementing their own values preferences rather than faithfully applying the doctrine that effectuates a constitutional command.[20] By evaluating whether a court has deliberately and consciously departed from precedent, we are able to focus, as Professor Young has urged, on whether a court has declined "to place other sources of authority" – in this instance, the decisions of prior courts – "above the court's own judgment on the merits."[21]

A. The Equal Protection Framework

Though they pled both equal protection and due process claims, the plaintiffs in *Goodridge v. Department of Public Health* argued that no basis existed for a statutory classification that denied marriage licenses to same-sex couples, regardless of how the personal interest in marriage is defined.[22] This is essentially an equal protection claim. In respect to the state constitutional commitment to equality, the Massachusetts Supreme Judicial Court has adopted the federal equal protection framework, with its familiar tiers of judicial scrutiny.[23] The court has held that the several textual provisions that guarantee equal treatment under the law[24] do not "protect against burdens and disabilities as such but against their unequal imposition."[25] Equality under the Massachusetts Constitution requires that "all persons in the same category and in the same circumstances be treated alike."[26] Accordingly, when faced with an equal protection challenge to the constitutionality

---

[19] *Id.* at 849 (Marshall, J., dissenting) (quoting *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 786-787 (1986) (White, J., dissenting)).

[20] *See* Young, *supra* note 7, at 1149.

[21] *Id.* at 1150.

[22] *See* Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 960 (Mass. 2003) (noting that plaintiffs challenged the statutory classification "on both equal protection and due process grounds").

[23] *See, e.g., Dickerson v. Attorney Gen.*, 488 N.E.2d 757, 759 (Mass. 1986) ("For purposes of equal protection analysis, [the] standard of review under the cognate provisions of the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment...").

[24] *See* MASS. CONST. pt. I, art. I ("All men are born free and equal ...."); MASS. CONST. pt. I, art. VI ("No man, nor Corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the Community ...."); MASS. CONST. pt. I, art. VII ("Government is instituted for the Common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family or Class of men ...."); MASS. CONST. pt. I, art. X ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws ...."); MASS. CONST. pt. I, art. XII ("And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.").

[25] Opinion of the Justices, 668 N.E.2d 738, 755 (Mass. 1996).

[26] Opinion of the Justices, 126 N.E.2d 795, 801 (Mass. 1955).

of government action, courts in Massachusetts will determine whether that action classifies individuals or groups of persons in a particular way and whether the classification is unfair.

Government action that discriminates between or among individuals or groups on the basis of a suspect classification, or that denies a class of individuals a fundamental right, must survive strict scrutiny. As with equal protection under the Fourteenth Amendment to the U.S. Constitution, classifications subject to strict scrutiny under the Massachusetts Constitution include race, alienage, religion, and nationality.[27] The Equal Rights Amendment to Article I of the Massachusetts Constitution explicitly forbids discrimination based upon sex; gender discrimination therefore must also survive strict scrutiny.[28] Fundamental interests under the Massachusetts Constitution include the right to decide for oneself whether to beget or bear a child,[29] how to raise children,[30] and whether to accept medical treatment.[31] Massachusetts courts will uphold a regulation that implicates a suspect class or fundamental interest only upon a showing that the classification or infringement is justified by a compelling end and that the means employed to achieve that end are narrowly tailored.[32]

Government action that does not implicate a fundamental interest or a suspect classification will survive equal protection review if it advances a legitimate state interest through means that are not wholly irrational or arbitrary.[33] The courts will uphold a regulation that "furthers some legitimate, articulated state purpose,"[34] and such purposes often derive from an exercise of the police power, which encompasses the authority "to make, ordain, and to establish all manner of wholesome and reasonable laws as [the legislature] shall judge to be for the good and welfare of the Commonwealth."[35] If, however, a plaintiff can demonstrate that

---

[27] *See* Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977).

[28] *See* Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980). Amendment CXIV of the Massachusetts Constitution, ratified in 1980, presumably establishes disabled individuals as a suspect class as well. But this proposition is untested; disabled individuals have preferred to raise their claims of discrimination under the Massachusetts civil rights acts rather than under the constitution. *See generally* Marjorie Heins, *Massachusetts Civil Rights Law, Part II*, 76 MASS. L. REV. 77, 88 (1991).

[29] *See* Matter of Moe, 432 N.E.2d 712, 719 (Mass. 1982).

[30] *See* Care & Protection of Robert, 556 N.E.2d 993, 997 (Mass. 1990).

[31] *See* Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 633 (Mass. 1986); Superintendent of Belchertown St. Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977).

[32] *See* Tobin's Case, 675 N.E.2d 781, 784 (Mass 1997); Opinion of the Justices, 366 N.E.2d 733, 735 (Mass. 1977) (under strict scrutiny, governmental action "is constitutionally permissible only if it furthers a demonstrably compelling interest and limits its impact as narrowly as possible consistent with the legitimate purpose served.").

[33] *See* Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340, 344 (Mass. 1992); Marshfield Family Skateland, Inc. v. Town of Marshfield, 450 N.E.2d 605, 611 (Mass. 1983).

[34] Murphy v. Dep't of Corr., 711 N.E.2d 149, 153 (Mass. 1999) (quotation omitted).

[35] Opinion of the Justices, 79 N.E.2d 883, 887 (Mass. 1948); *see also* Opinion of the Justices, 168 N.E.2d 858, 873 (Mass. 1960) (defining the police power as the authority to

a regulation is arbitrary, capricious, or irrational in respect to either ends or means, then the court will strike down the law.[36] As a general matter, arbitrary means are those that bear no "fair and substantial relation to the object of the legislation."[37]

B. Rational Basis Review in Massachusetts

Despite the deference traditionally accorded legislative judgments under rational basis review, such review is not necessarily without force under Massachusetts precedent. Indeed, while the Massachusetts courts have long sought to apply the federal equal protection framework to address equality claims under the state constitution, the application of rational basis analysis in certain cases reveals an effort to take seriously the requirements that the regulation possess *some* basis for discriminatory treatment, and that there be a sufficiently reasonable fit between regulatory ends and means.[38] The Massachusetts courts have regarded the equal protection framework, with its tiered levels of scrutiny, as a guide rather than a formula for the mechanical exercise of judicial review – a "shorthand," as the Supreme Judicial Court put it in *English v. New England Medical Center, Inc.*,[39] that refers "to the opposite ends of a continuum of constitutional vulnerability determined at every point by the competing values involved."[40]

In *Mansfield Beauty Academy v. Board of Registration of Hairdressers*,[41] for example, the court considered a challenge to a law prohibiting hairdressing schools from charging for services or materials used in connection with hairdressing or manicuring.[42] The court held the law unconstitutional because no specific rationale for the law had been advanced, and the record revealed no "definite ground in support of the statute."[43] The *Mansfield Beauty Academy* court applied rational basis review to the regulation with the understanding that, in the absence of *any* identifiable rationale basis, the law should not survive an equal protection challenge.

In a 1948 advisory opinion, the court determined that a proposed regulation governing the sale of monuments for cemetery lots had no rational tendency "to

---

enact laws to regulate conduct through laws "necessary to secure the health, safety, good order, comfort, or general welfare of the community").

[36] *See* Murphy v. Comm'r of the Dep't. of Indus. Accidents, 612 N.E.2d 1149, 1155 (Mass. 1993).

[37] Russell v. Treasurer and Receiver Gen., 120 N.E.2d 388, 392 (Mass. 1954).

[38] A state court's authority to interpret and apply state constitutional provisions differently than the U.S. Supreme Court has interpreted and applied the cognate provisions of the federal constitution is well established. *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 100 (2000).

[39] 541 N.E.2d 329 (Mass. 1989).

[40] *Id.* at 333 (quoting *Marcoux v. Attorney Gen.*, 375 N.E. 2d 688, 689 n.4 (Mass. 1978)).

[41] 96 N.E.2d 145 (Mass. 1951).

[42] *See id.* at 145-46.

[43] *Id.* at 147.

promote the safety, health, morals and general welfare of the public."[44] The court carefully examined the rationales proffered in support of the act and concluded that, because the act bore no relation on its face to a concern for public health or safety, the only possible objective, however fanciful, would be to separate consumers' purchase of a burial site from the purchase of a monument honoring the deceased.[45] But the court found that this concern was insufficient to justify the proposed legislative classification because instances of unfair dealing could be addressed directly, without the use of sweeping regulation.[46] In this way, the court tacitly endorsed the need for a genuine connection between regulatory ends and means: means must have some real tendency to promote the state's legitimate concern, and not just a conceivable tendency to do so.

This kind of rational basis review appears again in *Coffee-Rich, Inc. v. Commissioner of Public Health*.[47] In that case, the court confronted a statute regulating the branding of foodstuffs, and the question of whether the sale of otherwise safe products may nonetheless be constitutionally prohibited upon the possibility of consumer confusion.[48] Because the product in question, a non-dairy cream substitute, was safe, the regulation could not be justified on the basis of protecting public health and safety.[49] The court noted that, on the facts, nothing about the packaging and marketing of the product indicated that a consumer would buy it under the impression it was cream or milk; even assuming a legitimate consumer protection basis for regulating non-dairy cream substitutes, the prohibition would reach too far in serving the end of preventing the public from exposure to the risk of mistaking one product for another.[50] As the court observed, a less arbitrary means of regulation might target those who actually sought to deceive, rather than those who manufactured and marketed a safe product.[51] The court thus addressed the consequences of overly broad regulatory means by establishing that a range of acceptable regulatory responses short of an absolute prohibition would be valid. Importantly, the court declined to specify which among the numerous less draconian responses would be most reasonable, referring that determination instead to the political branches.

With its decision in *Shell Oil Co. v. City of Revere*,[52] the court made clear the distinction between those cases in which a regulation would receive traditional, deferential rational basis review, and those cases in which, following *Coffee-Rich*, a less deferential rational basis review should be applied. In *Shell Oil*, the court examined the constitutionality of an ordinance banning self-service gasoline

---

[44] Opinion of the Justices, 79 N.E.2d 883, 887 (Mass. 1948).
[45] *See id.*
[46] *See id.* at 888.
[47] 204 N.E.2d 281 (Mass. 1965).
[48] *See id.* at 286.
[49] *See id.* at 287.
[50] *See id.* at 288.
[51] *See id.*
[52] 421 N.E.2d 1181 (Mass. 1981).

stations in the city of Revere.[53] In determining the validity of the ordinance, the court sought to assess "the rationality of the connection between the legislative means adopted in [the ordinance] and those permissible public ends the [legislative body] may plausibly be said to have been pursuing."[54] The court noted that, while the state constitution was held in *Coffee-Rich* to "guard more jealously against the exercise of the State's police power," such heightened review would not be applied in a case involving "economic regulation."[55] In the event, the court concluded that the prohibition of self-service filling stations was rationally related to, among other things, the city's legitimate interest in health and safety.[56]

From *Shell Oil* emerges the rule that, in cases involving economic regulation, the Massachusetts courts will hew to the deferential mode of rational basis review analysis. In those cases, the court will not require that the record support the existence of a legitimate basis for a regulation, as it did in *Mansfield Beauty*, or require a genuine fit – though not the narrowest – between regulatory ends and means, as it did in *Coffee-Rich*. Thus, in *Commonwealth v. Arment*,[57] the court employed rational basis review to invalidate a statutory amendment that distinguished between inmates serving time for offenses committed before April 6, 1986, and inmates serving time for offenses committed after April 6. In the former group, a correctional institution could initiate commitment proceedings "on the mere belief that the prisoner is sexually dangerous" while in the latter group, proceedings could only be initiated because of a sexual assault committed while under sentence.[58] Though the Commonwealth offered a justification for the differential treatment of inmates,[59] the court held the discrimination unconstitutional in view of the defendant's interest in receiving the amended law's greater due process protections in circumstances in which he risked additional restraints being placed on his already-reduced liberty.[60]

---

[53] *See id.* at 1182.

[54] *Id.* at 1184 (quotation omitted).

[55] *Id.* n.7 (quoting Coffee-Rich, Inc. v. Comm'r of Public Health, 204 N.E.2d 281 (Mass. 1965)).

[56] *See id.* at 1185-86.

[57] 587 N.E.2d 223 (Mass. 1992).

[58] *See id.* at 227-28.

[59] *Id.* at 227. The Commonwealth argued that,

> although those who committed postamendment crimes have more protection against [sexually dangerous person] proceedings being initiated against them while they are prisoners than those who committed preamendment crimes would have, that difference is compensated for by the fact that judges, recognizing that difference, will initiate proceedings pursuant to [the statute] against postamendment criminals more readily than against those who committed preamendment crimes.
>
> *Id.*

[60] *Cf.* Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming and Funeral Directing, 398 N.E.2d 471, 475 (Mass. 1979) (holding that deference to legislature is required only when "the values at issue" do not demand "heightened scrutiny").

The court also applied the teaching of *Shell Oil* in *Murphy v. Commissioner of the Department of Industrial Accidents*.[61] In that case, the court considered a statutory provision requiring employees who challenged administrative denials of certain workers' compensation benefits to pay a fee if they desired to proceed with the assistance of counsel.[62] Though the Commonwealth argued that the fee provision concerned nothing more than "economic activity,"[63] the interest involved was more than merely economic. Article XI of the Massachusetts Constitution[64] has long been regarded as providing citizens access to the courts "without discrimination."[65] While that interest has not been deemed fundamental for the purpose of equal protection review,[66] *Murphy* affirms that, when government action complicates an individual's access to the courts of the Commonwealth, "[n]o obstacles can be thrown in the way of some which are not interposed in the path of others."[67]

Because the plaintiff's asserted interest in *Murphy* was more than merely economic, the court did not simply defer to the Commonwealth's conclusions regarding the connection between the filing fee and the legislature's goals. Rather, the court held the relationship between the legislature's ends and means was "so attenuated" as to render the statutory classification "arbitrary or irrational"[68] – this despite the legislature's legitimate interests in reducing the costs of an administrative proceeding, deterring frivolous appeals, and lowering the cost of litigation for "financially disadvantaged litigants."[69] The court regarded the chosen means as essentially arbitrary because the Commonwealth had "not offered ... any rational basis to conclude that imposing an additional financial hurdle on claimants proceeding with the assistance of counsel may deter frivolous appeals."[70] In the absence of such a basis, the filing fee would as likely create an incentive for

---

[61] 612 N.E.2d 1149 (Mass. 1993).

[62] *See id.* at 1150.

[63] *Id.* at 1154.

[64] Article XI provides:

> Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; comfortably to the laws.

MASS. CONST., pt. I, art. XI.

[65] *Murphy*, 612 N.E.2d at 1158 (quotation omitted).

[66] *See* Paro v. Longwood Hosp., 369 N.E.2d 985, 991 (Mass. 1977) (applying identical rational basis review to claims arising under Articles I (equality) and XI (access to the courts)).

[67] *Murphy*, 612 N.E.2d at 1158 (quotation omitted); *see also* Daniel W. Halston, *The Meaning of the Massachusetts 'Open Courts' Clause and its Relevance to the Current Court Crisis*, 88 MASS. L. REV. 122, 129 (2004) (noting that "[t]he right of access to each and every court without delay may be of significant constitutional dimension").

[68] *Murphy*, 612 N.E.2d at 1156 (quotation omitted).

[69] *Id.*

[70] *See id.*

individuals to evaluate the decision whether to appeal without the benefit of counsel, leading to more challenges to adverse administrative decisions.[71]

Considered together, these cases establish doctrinal variations on traditional, deferential rational basis review under the Massachusetts Constitution. Following *Arment* and *Murphy*, the Massachusetts courts will apply less deferential review to government classifications that concern particular substantive interests that do not rise to the level of fundamental rights, such as the state constitutionally-based interest in unfettered access to the courts. Under this review the courts may question the Commonwealth's inability to identify a legitimate basis for a discriminatory classification, or its inability to explain why a particular fit between legislative ends and means is not tighter. While the court has not suggested that the burden of proof shifts in these cases from the individual challenging a classification to the Commonwealth, the court would seem to require, at a minimum, that the means with which the Commonwealth seeks to achieve its ends have some support in the record.

C. *Rational Basis Review in* Goodridge v. Department of Public Health

I do not contend here that the Supreme Judicial Court has applied its rational basis review precedents consistently. There is a line of cases, however, that has not been repudiated upon which the plaintiffs in *Goodridge* could rely to support their argument that the civil marriage exclusion should be struck down as irrational. In *Goodridge*, the Supreme Judicial Court considered the question "whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."[72] The Commonwealth maintained that prohibiting same-sex couples from marrying constituted a legitimate exercise of the police power.[73] The court noted that the regulation of civil marriage falls within the exercise of the police power,[74] and that such regulatory power is broad.[75] Nonetheless, the court concluded, that regulatory power is not unlimited, and the Commonwealth cannot exclude same-sex couples from civil marriage consistent with the state constitutional commitment to equality.

This decision is arguably within the bounds of the judiciary's legitimate authority as a matter of *stare decisis* under the rational basis review cases discussed above. Consider, initially, that the court characterized the freedom to marry a person of one's own choosing as "among the most basic of every individual's liberty and due process rights."[76] This freedom cannot be easily reduced to a purely economic

---

[71] *See id.*

[72] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

[73] *See id.* at 953.

[74] *Id.* at 954.

[75] *Id.* at 958.

[76] *Id.* at 959.

interest, such as an interest in operating self-service gasoline stations.[77] Indeed, the interest is at least as important as the limited liberty interest at issue in *Commonwealth v. Arment*,[78] or the interest in access to the courts at issue in *Murphy v. Department of Industrial Accidents*.[79] Those interests derive from explicit textual provisions of the Massachusetts Constitution – the due process clause of Article XII and the open courts provision of Article XI, respectively – while the interest in marriage choice lacks explicit textual grounding. Still, the interest in choosing whether and who to marry has been recognized as having a solid foundation in American law.[80]

The presence of an important – though not fundamental – interest triggers the principle of rational basis review that the government cannot advance its legitimate interests through regulatory means that sweep too broadly given the state's object, at least when nothing in the record supports the existence of a real fit between legislative ends and means.[81] In *Goodridge*, the Commonwealth argued that a prohibition on same-sex civil marriage served to establish a favorable setting for procreation,[82] and an "optimal" setting in which to raise children.[83]

In view of the web of laws governing civil marriage and domestic affairs in Massachusetts, the court concluded that the related goals of creating favorable settings for procreation and child-rearing could not justify the means chosen to achieve them – namely, the marriage exclusion. Those laws did not condition marriage on fertility or any promise by marriage license applicants that they would, in fact, procreate;[84] under Massachusetts law, even people "who cannot stir from

---

[77] *See* Shell Oil Co. v. City of Revere, 421 N.E.2d 1181, 1186 (Mass. 1981) (describing Shell Oil's interest in running self-service stations).

[78] *See supra* notes 57-60 and accompanying text.

[79] *See supra* notes 61-71 and accompanying text.

[80] *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (describing the right to marry as "of fundamental importance for all individuals"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (describing marriage as a civil right, "fundamental to our very existence and survival"). *See also* Mark Strasser, Lawrence, *Same-Sex Marriage and the Constitution: What is Protected and Why?*, 38 NEW ENG. L. REV. 667, 668-76 (2004) (discussing fundamental interest in marriage). One dissenter in *Goodridge* suggested that, if the issue in the case was a government subsidy program to promote the use of an established technology for energy efficient heating, "the court would find no equal protection or due process violation in the Legislature's decision not to grant the same benefits to an inventor or manufacturer of some new, alternative technology." *Goodridge*, 798 N.E.2d at 981 (Sosman, J., dissenting). This is of course correct, as such an interest is merely economic, *see Shell Oil Co.*, 421 N.E.2d at 1186, and would not trigger the principle of rational basis review requiring relatively more intense scrutiny of classifications affecting certain important, but not fundamental, interests.

[81] As the court concluded, "[t]he liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage." *Goodridge*, 798 N.E.2d at 959.

[82] *Id.* at 961.

[83] *See id.*

[84] *See id.*

their deathbed may marry."[85] Further, the Commonwealth failed to demonstrate that fostering a favorable setting for child rearing necessarily depends upon a parent's sexual orientation or marital status.[86] Indeed, the court noted that denying civil marriage to same-sex couples who are raising or intend to raise children effectively penalizes the children in those families by depriving them of the benefits and protections afforded through civil marriage under Massachusetts law.[87]

The rejection of the Commonwealth's rationales follows from cases like *Coffee-Rich* and *Murphy*. Though the *Goodridge* court did not question the legitimacy of the Commonwealth's policy objectives in respect to children and family,[88] the justices viewed the marriage exclusion as too broad and the asserted connection between the prohibition and the Commonwealth's ends as too tenuous. As in *Coffee-Rich*, in which an absolute prohibition on the plaintiff's product could not be justified given the availability of less severe alternative means of preventing consumer confusion,[89] means short of an absolute prohibition on same-sex civil marriage exist to prevent undermining the welfare of children in families.[90] And, as in *Murphy*, in which the court questioned the connection between the workers' compensation filing fee and, among other things, costs savings to the state,[91] the court could find nothing in the *Goodridge* record to support a genuine connection between a prohibition on same-sex civil marriage and the promotion of optimal settings in which to raise children.[92]

In addition to arguing that the marriage exclusion promoted procreation and child-rearing, the Commonwealth sought to justify the law on the basis that "limiting marriage to opposite-sex couples furthers the Legislature's interest in conserving scarce State and private financial resources."[93] A marriage restriction makes sense, the Commonwealth asserted, because the legislature "logically could assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits."[94] The court concluded that the record did not suggest that same-sex couples, as a class, were financially less dependent upon one another than opposite-sex couples, and the Commonwealth's

---

[85] *Id.*

[86] *See Goodridge* at 963. Indeed, the Commonwealth "readily concede[d] that people in same-sex couples may be 'excellent' parents." *Id.*

[87] *See id.* at 964.

[88] *See id.* at 994 (Cordy, J., dissenting) (observing that the court "concedes that the civil marriage statute serves legitimate State purposes").

[89] *See Coffee-Rich, Inc.* v. Comm'r of Public Health, 204 N.E.2d 281, 288 (Mass. 1965).

[90] *See Goodridge*, 798 N.E.2d at 963 (noting that "the 'best interests of the child' standard does not turn on a parent's sexual orientation or marital status").

[91] *See* Murphy v. Comm'r of Dep't of Ind. Accidents, 612 N.E.2d 1149, 1156 (Mass. 1993).

[92] *See Goodridge*, 798 N.E.2d at 963 (noting that the Commonwealth "offered no evidence that forbidding marriage to people of the same sex [would] increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children").

[93] *Id.* at 964.

[94] *Id.*

marriage laws do not condition the receipt of benefits by married persons upon a demonstration of financial dependence.[95] This conclusion finds support in *Murphy*, in which the court declined to accept the Commonwealth's unproved assumption that the claimants who chose to retain counsel did so because they had a greater ability to pay.[96]

The court ultimately ruled that, on the arguments presented by the Commonwealth, the denial of marriage licenses to same-sex couples could not survive rational basis equal protection review under the Massachusetts Constitution. The court did not relax the presumption of constitutionality that legislative acts enjoy;[97] rather, recalling cases like *Mansfield Beauty Academy v. Board of Registration of Hairdressers*, in which the record revealed no rational basis for a statutory classification,[98] the court concluded that the Commonwealth had "ample opportunity to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions," but had "failed to do so."[99] The rationales asserted by the Commonwealth stood in opposition to the statutory laws designed to promote "stable families and the best interests of children," and the Commonwealth could not "identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex."[100] In the end, the court elected not to speculate upon the existence of such a characteristic; as the Massachusetts rational basis review cases demonstrate, the court's choice in this regard was not without precedent.

II. THE MINIMALISM OF *GOODRIDGE*

To be sure, the court in *Goodridge* did not reference the less deferential strain of rational basis review cases, other than a brief discussion in a footnote.[101] The absence of citation does not mean the court's decision lacked rigor; rather, it is of a piece with the minimalist nature of the decision. And *Goodridge*, I believe, is best understood as an example of minimalist judicial decision-making, as this Part explains – first, by defining minimalism and maximalism, and then by applying those definitions to the court's decision.

A. Minimal and Maximal Judicial Decision-making

A judicial decision may be regarded as minimalist when it resolves the issue before the court narrowly, "leaving as much as possible undecided for

---

[95] *See id.*

[96] *See* Murphy v. Comm'r of Dep't of Indus. Accidents, 612 N.E.2d 1149, 1157 (Mass. 1993).

[97] *See id.*

[98] *See* 96 N.E.2d 145, 147 (Mass. 1951).

[99] *Goodridge*, 798 N.E.2d at 968.

[100] *Id.*

[101] *See id.* n.20 (observing that "[n]ot every asserted rational relationship is a 'conceivable' one, and rationality review is not 'toothless'" (quotation omitted)).

consideration in the next case."[102] A maximalist decision, on the other hand, heralds the adoption of bright-line rules or resolves issues that need not be decided.[103] The maximalist court prefers to state broad rules of general applicability, while the minimalist court prefers to proceed on a case-by-case basis.[104] Thus the minimalist opinion typically addresses the details and dispute presented by the case at hand, and no more – and it does so on reasoning that strives to avoid deep theoretical explorations of basic principles.[105]

Those who raise the charge of judicial activism are often referring to cases in which a court issued a maximalist decision.[106] In these cases, the adoption of a sweeping rule serves to constrain future courts, betraying little interest in deference to those courts, "in much the same way that courts departing from precedent ... refuse[] to defer to *past* tribunals."[107] Of course, a decision not to adopt a bright-line rule arguably leaves room for the exercise of judicial discretion in the next case,[108] and therefore would appear similarly to enhance judicial authority; the difference is that a bright-line rule decision effectively enhances judicial authority *today*, "at the expense of courts that may confront similar issues in the future."[109] Any increase in judicial authority as a result of a narrow decision necessarily hangs on a contingency: that the court will at some indeterminate time have an opportunity – and elect – to capitalize on the lack of precedential constraint.[110]

Because of the contingent nature of that opportunity, a minimalist approach to judicial decision-making necessarily anticipates an uncertain future, one in which lawyers, judges, and policymakers will play a part in the development of legal doctrines in light of legal claims made in response to disagreements and disputes that have yet to arise.[111] More broadly – and immediately – a minimalist decision

---

[102] Young, *supra* note 7, at 1151; *see also* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 6-7 (1996) (defining "decisional minimalism" as "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided").

[103] *See* Young, *supra* note 7, at 1152; *see also* Sunstein, *supra* note 102, at 15 (defining "maximalism" as "an effort to decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes").

[104] *See* Young, *supra* note 7, at 1152.

[105] Sunstein, *supra* note 102, at 21 (arguing that "minimalism is an effort to decide cases with the least amount necessary to justify the decision"); *see also* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1461 (2000) (describing procedural minimalism as "the idea that the Court, while fully and fairly deciding the case before it, should nonetheless limit the binding impact of that decision as closely as possible to the particular facts of the case").

[106] *See* Young, *supra* note 7, at 1152 (discussing *McCulloch v. Maryland* and *Roe v. Wade*).

[107] *Id.* at 1152-53.

[108] Scalia, *The Rule of Law*, *supra* note 17, at 1179.

[109] Young, *supra* note 7, at 1153-54.

[110] *See id.* at 1154.

[111] *Cf. id.* ("When a present court adopts a narrow rule or a flexible standard ... it allows future courts to contribute to the evolution of the law in a common law fashion.").

tends to be democracy-enhancing, as it "grants a certain latitude to other branches of government by allowing the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems."[112]

B. The Narrowness and Shallowness of Goodridge

A minimalist decision is narrow in its scope and effect.[113] *Goodridge* is a narrow decision. The court resolved only the issue before it – namely, whether the Commonwealth could, consistent with the state constitutional commitment to equality, exclude same-sex couples from civil marriage. The court ruled that it could not, expressly declaring that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[114] Civil marriage, as defined by the Commonwealth, is otherwise unchanged; it remains, in all respects, a unique, binary relationship that, following the will of the people, receives the special recognition of the state. *Goodridge* does not affect any other aspect of domestic relations law, or any other marriage exclusion.[115] Indeed, other than addressing the exclusion of same-sex couples from marriage, *Goodridge* leaves unchanged all other laws that may classify individuals on the basis of sexual orientation.

A minimalist decision is also shallow, in the sense that the authoring court has sought to avoid an abstract, theoretical analysis of the issue presented, often in favor of the adoption or application of some variation on a "reasonableness" test.[116] *Goodridge* is a relatively shallow opinion. First, the court did not hold that homosexual individuals comprise a suspect classification, which would have required that any law that discriminates against individuals on the basis of sexual orientation satisfy strict scrutiny.[117] Second, the court declined to hold that the interest in marriage choice is fundamental; instead the court applied rational basis review (in the event, less-deferential rational basis review, as explained above[118]) to the discrimination wrought by the marriage law. This is not a trivial point, for if, as one of the dissenting justices noted, "a right is found to be 'fundamental,'" it is, to a great extent, removed from "the arena of public debate and legislative action."[119]

---

[112] Sunstein, *supra* note 102, at 19.

[113] *Id.* at 15.

[114] *Goodridge*, 798 N.E.2d at 969.

[115] *See id.* n.34 (noting that nothing in the decision "should be construed as relaxing or abrogating the consanguinity or polygamy prohibitions of [the Massachusetts] marriage laws.").

[116] *See* Sunstein, *supra* note 102, at 20.

[117] *See supra* notes 27-32 and accompanying text (discussing suspect classifications and strict scrutiny).

[118] *See supra* notes 38-71 and accompanying text (discussing less deferential rational basis review under Massachusetts Constitution).

[119] *Goodridge*, 798 N.E.2d at 989 (Cordy, J., dissenting).

By resolving the issue in *Goodridge* on rational basis review, the court appropriately left to future judges, lawyers, and government actors the task of addressing the many circumstances in which *Goodridge* might be invoked in the cause of claims not expressly contemplated by the court.

Further, the *Goodridge* court's rational basis review was grounded in the particular factual-legal record of the case, an analytical choice that may be characterized as shallow because it focuses on the facts and statutory framework at hand, rather than on arguments about foundational principles. In other words, the *Goodridge* court addressed marriage not as an abstract proposition, the content of which might be derived from historical sources or notions of tradition, but rather as a function of the positive enactments related to marriage in Massachusetts – that is to say, of the various rules and requirements of marriage established by Massachusetts law. For example, in evaluating whether the same-sex marriage exclusion could be justified by the Commonwealth's interest in procreation, the court analyzes the rationality of the exclusion against the qualifications for opposite-sex couples seeking to marry, including the lack of any requirement that a person be fertile or not infirm.[120] By focusing on the aims of marriage and the means selected by lawmakers to achieve those aims, the court addressed the Commonwealth's procreation argument without the need for a more comprehensive theory of marriage – or of equality, for that matter.

By examining the statutory scheme that makes civil marriage possible, the *Goodridge* court also emphasized that the ends-means rationality of a classification need not be assessed in a vacuum. Consider, for a moment, that the means designed to facilitate the end of bringing children into families – in particular, the failure to condition one's ability to bring children into a family on the basis of marital status or sexual orientation[121] – are not inevitable. Such means resulted, rather, from the operation of the political process, and they remain subject to whatever changes the political process may constitutionally effect.[122] To rely for guidance upon the Massachusetts legislature's choice of means for promoting adoption and child-raising in assessing the rationality of a proposed justification for the marriage exclusion, then, is to rely upon a benchmark of non-discrimination supplied by the people themselves, acting through their representatives.

---

[120] *See id.* at 961 (examining marriage requirements contained in Chapter 207 of the Massachusetts General Laws, the court found no restrictions on couples that are infertile, infirm or sexually inactive).

[121] *See id.* at 962. Along the same lines, Massachusetts statutory law evidences a "strong affirmative policy of preventing discrimination on the basis of sexual orientation." *Id.* at 967.

[122] This is why the rules and requirements often differ from state to state, as they represent different policy choices made by different polities. *See id.* at 967 (noting that, "subject to the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands").

This is not to say, of course, that a statutory scheme must be wholly rational in all aspects to survive judicial scrutiny.[123] But it is to say that a court's consideration of a statutory rule that takes account of substantive determinations of ends and means by the legislature has the virtue of narrowing judicial discretion, as the legislature's policy choices may inform the court's rational basis evaluation – at least, as under Massachusetts case law, when an important interest is at stake and the government can point to no non-prejudicial characteristic to distinguish between favored and disfavored individuals regarding that interest.[124] In this way, the *Goodridge* decision's shallow dependence on the factual-legal record of the case reveals, at the same time, respect for the democratic process and the laws that process may produce.

Consider, finally, that the narrowness and shallowness of *Goodridge* may best be demonstrated by comparing the court's opinion with Justice Greaney's short concurrence. Though he agreed with the court's reasoning and conclusion, Greaney suggested the case could have been resolved on the argument that the marriage exclusion constituted a sex-based restriction on the right to marry, which no compelling purpose could justify.[125] That basis for decision would have been less narrow, because treating the classification created by the marriage exclusion as a species of sex discrimination might well have immediate consequences for other laws classifying individuals on the basis of sexual orientation. That basis also would have necessitated a deeper decision, for it would have relied not upon a case-specific determination of the rationality of the state's classification, but instead upon a more complex understanding and application of the ways in which the equality provisions of the Massachusetts constitution create binding obligations in respect to sexual orientation in much the same way that they do in respect to sex.[126] Justice Greaney's reasoning accordingly stands as a maximalist counterpoint to the approach of the court in *Goodridge*.

III. THE REMEDY IN *GOODRIDGE*

A third manifestation of judicial activism is the imposition by the courts of expansive remedies for constitutional injuries, typically "broad injunctive relief designed to restructure public institutions to conform to constitutional norms."[127]

---

[123] *See* Richard Posner, *Wedding Bell Blues*, THE NEW REPUBLIC, Dec. 22, 2003, at 35 (arguing that, "if a state's laws must compose a consistent whole, which they never do, the courts' power to invalidate laws of which they disapprove has no limits").

[124] *See Goodridge*, 798 N.E.2d at 968 (concluding that the absence of a rational relationship between the marriage exclusion and a health, safety or welfare concern "suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual").

[125] *See id.* at 970 (Greaney, J., concurring).

[126] *See* Sunstein, *supra* note 102, at 76-77 (discussing the depth of the U.S. Supreme Court's decision in U.S. v. Virginia, 518 U.S. 515 (1996), in respect to the Court's understanding of the principles of gender equality).

[127] Young, *supra* note 7, at 1154.

Such relief often requires "judicial involvement in the day-to-day running of public institutions, court-ordered expenditures amounting to millions of dollars, and continuing judicial supervision for periods of years or even decades."[128]

Upon concluding that the marriage exclusion violated the state constitutional commitment to equality, the *Goodridge* court addressed the question of remedy. Rather than strike down the marriage laws, the court modified the common law understanding of civil marriage "to mean the voluntary union of two persons as spouses, to the exclusion of all others."[129] The court remanded the case to the trial court for entry of judgment, which the court stayed for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of th[e] opinion."[130]

This remedy required no involvement by the judiciary in the day-to-day running of any public institution, unlike those cases involving the administration of such public institutions as prisons and mental health institutions.[131] In the context of prison cases, for example, courts "have issued standards concerning how many prisoners are to share each cell, the temperature of the cells, whether they will have televisions or weight-lifting facilities, what they are to eat, and what disciplinary processes are to be used."[132] In *Goodridge*, by contrast, the court expressly declared that the legislature's discretion to regulate marriage remained intact.[133] Indeed, the court did not so much as suggest any remedial plan or standards regarding the recognition, regulation or conduct of any marriage, whether it be of opposite-sex or same-sex couples.[134]

Further, the court did not order that funds be expended in support of marriage or any aspect of public life related to marriage. Neither did the remedy require any

---

[128] *Id.*

[129] *Goodridge*, 798 N.E.2d at 969.

[130] *Id.* at 970.

[131] *See* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1122 (1996) (discussing the many instances in which federal courts have invoked their inherent remedial authority to take control of state institutions, including prisons, mental institutions, and public housing).

[132] *See id.* at 1127 (footnotes omitted).

[133] *Goodridge*, 798 N.E.2d at 969.

[134] In analyzing the *Goodridge* court's remedial action I proceed on that assumption that, while we often refer to marriage as an institution, it is not an institution in the same way as a public school or a prison. *See* BLACK'S LAW DICTIONARY 800 (7th ed. 1999) (defining "institution" as "[a]n established organization, esp. one of a public character, such as a facility for the treatment of mentally disabled persons"). *See also* Scott FitzGibbon, *Marriage and the Ethics of Office*, 18 NOTRE DAME J. L., ETHICS & PUB. POL'Y 89, 121-23 (2004) (defining marriage as an office, reasoning that the relationship of marriage contains the "raw materials" of an office, as spouses shoulder ministries to one another and to the good of others in a special respect, exercised under the guidance of a system of rules and principle that impose obligations on office-holders). Even if civil marriage is viewed as an institution like a public school or a prison, it remains that the *Goodridge* court's remedy would not involve the court in the day-to-day management and supervision of marital relationships or the way in which the Commonwealth regulates those relationships.

continuing judicial supervision of a governmental entity or practice, unlike those cases in which a court's administration of a public institution required consistent judicial attention to management issues. In the school context, for example, the courts' remedial supervision has extended, in some cases, for many years.[135] In *Goodridge*, by contrast, the only continuing judicial involvement required by any court was the obligation to enter judgment 180 days from the date of the opinion.[136]

In refining the common law understanding of marriage and staying enforcement of that determination to 180 days, the *Goodridge* court notably declined to follow the remedial paths identified in *Baker v. State*,[137] in which the Supreme Court of Vermont held that under Vermont's equality guarantee exists an "obligation to extend to [same-sex couples] the common benefit, protection, and security that Vermont law provides opposite-sex married couples."[138] As to remedy, a majority of the court concluded that the legislature should be responsible for devising an appropriate means of providing to same-sex couples the benefits and protections of civil marriage.[139] In dissent, Justice Denise Johnson took issue with the majority's failure to craft a remedy for the constitutional violation; she would have immediately enjoined the state from denying the plaintiffs marriage licenses.[140]

In essence, *Goodridge* takes a middle course between complete deference to the legislature's judgment in respect to remedy and the immediate imposition of a judicially-crafted remedy, such as the admission of same-sex couples to civil marriage.[141] The court fashioned a remedy that eliminated the unconstitutional discrimination created by the marriage exclusion, but it made that remedy temporally contingent: the common law would remain unchanged for six months, time in which the legislature could consider the ruling and respond as it deemed appropriate. The court did not offer any guidance to the legislature as to how it ought to use that time, or impose limits on the form any legislative reaction might take; by the terms of *Goodridge*, the legislature could codify the court's new common law understanding of marriage, draft a substitute remedy, or do nothing at all.

In this way, the *Goodridge* court appeared to recognize a distinction between the task of resolving a dispute over constitutional meaning and the related but separate task of developing remedial policies to address a constitutional violation. The former task we prefer to entrust to courts: because of the judiciary's relative independence and custom of providing reasons for decisions, judges are well positioned to undertake principled inquiries into the meaning of our constitutional

---

[135] *See* Yoo, *supra* note 131, at 1125-26.

[136] *See Goodridge*, 798 N.E.2d at 970.

[137] 744 A.2d 864 (Vt. 1999).

[138] *Id.* at 886.

[139] *See id.* The majority noted that possible remedies included "domestic partnerships" and "registered partnerships." *Id.* The Vermont legislature ultimately established civil unions for same-sex couples seeking the benefits and protections associated with civil marriage. *See* VT. STAT. ANN. tit. 15, §§ 1202-1207 (2000).

[140] *See Baker*, 744 A.2d. at 901 (Johnson, J., concurring in part and dissenting in part).

[141] *See* Friedman, *supra* note 2, at 281.

values.[142] Depending on the circumstances, the latter task we prefer to entrust to legislatures: because they inhabit a world framed by constituents' practical problems, legislators are well positioned to undertake the process of "actualizing" constitutional values through remedial legislation.[143] The remedial action prescribed in *Goodridge* acknowledges these differing competencies by allowing the legislature to assume responsibility for crafting a permanent remedy for the constitutional wrong created by the marriage exclusion.

In retrospect, it seems the *Goodridge* court may have had something else in mind when it stayed execution of judgment for six months. Three months into the stay, the state senate requested an advisory opinion on a proposed law creating a complement to civil marriage for same-sex couples called "civil unions," which would include all the benefits and protections the Commonwealth could provide.[144] The court concluded that such a scheme would be constitutionally infirm, for though the creation of civil unions would give same-sex couples many of the same benefits and privileges as enjoyed by those opposite-sex couples who enter into civil marriage, it would nonetheless "relegate same-sex couples to a different status"[145] without a rational basis for doing so.

The court also suggested in the advisory opinion that the purpose of the stay in *Goodridge* "was to afford the Legislature an opportunity to conform the existing statutes to the provisions of the ... decision."[146] It seems from this explanation that the court envisioned a more circumscribed role for the legislature than that which could be inferred from the part of the *Goodridge* opinion addressing remedy. Importantly, the court's statement does not suggest that it believed the legislature should play no role in remedying the constitutional wrong. The business of revising existing statutes to square them with *Goodridge* would still require the legislature to devote attention, however limited, to carrying out the court's mandate – and, given the subject matter, even that kind of legislative action would be salutary to the extent it led to public discourse on the obligations created by the commitment to equality in relation to civil marriage.

It may also be that the court's advisory opinion explanation for the stay was *post hoc*, as legislatures often do not undertake the ministerial effort of conforming laws

---

[142] *See* Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 51 (1979). *See also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25 (1962) (explaining that courts have the capacities "for dealing with matters of principle that legislatures ... do not possess"); Peters, *supra* note 105, at 1499 (arguing that "[m]uch of the point of judicial review is that it is more deliberative than the political process, and thus better constituted to produce decisions that require deliberation above all else").

[143] Fiss, *supra* note 142, at 52. *See also* Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 97 (2000) (suggesting that rights and remedies each "occupy distinct space," with judges having "primary jurisdiction over rights," and legislatures having "corresponding jurisdiction over remedies").

[144] *See* Opinions of the Justices, 802 N.E.2d 565, 566 (Mass. 2004).

[145] *Id.* at 569.

[146] *Id.* at 568.

to a particular court ruling; after all, the Massachusetts legislature never did revise any other statute in the wake of *Goodridge*, and 180 days after the court issued its decision, the Commonwealth ceased to enforce the marriage exclusion. The court may simply have been frustrated by a legislative response to its ruling that "exaggerated" the "defects of rationality evident in the marriage ban considered in *Goodridge*."[147] The remedy outlined in *Goodridge* – modification of the common law understanding of marriage and a stay of execution – suggests a court seeking to act as a "participant[] in the system of democratic deliberation," rather than as its director.[148] The reason for the stay advanced in the advisory opinion, on the other hand, suggests a court seeking to direct democratic deliberation – albeit with some appreciation of the need for legislators and the people they represent to have time before a remedy takes effect in which to absorb a change in the law.

IV. CONCLUSION: IS *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH* THE WORST KIND OF JUDICIAL ACTIVISM?

The point of exploring whether *Goodridge v. Department of Public Health* displays particularized manifestations of judicial activism is to determine, as best we can, where the decision falls on the continuum between judicial passivity and judicial hegemony. Specifically, the question is whether, after examining the decision's basis in precedent, as well as the breadth and depth of the court's reasoning and the expansiveness of the remedy the court ordered, it can be said that the *Goodridge* court effectively expanded its authority at the expense of the other branches of government.[149]

To answer this question, let's review the relevant indicia of judicial activism. First, *Goodridge* does not depart from Massachusetts precedent. Rather, the decision fits with a decades-old series of cases in which the Massachusetts courts sought to animate the state constitutional commitment to equality in a way that respects both the importance of policy-making by the political branches, and the need to place some outer limits on that discretion, even when the classification at issue does not implicate a fundamental right or suspect class. Though the court did not discuss this precedent at length, it did faithfully apply the principles developed in past cases to the facts of *Goodridge*.[150]

Second, *Goodridge* is a minimalist decision. The holding of the case is narrow: it addresses only the constitutional issue before the court – whether same-sex couples may be excluded from civil marriage – and does not alter the legislature's authority to define civil marriage within constitutional boundaries or to eliminate civil marriage altogether.[151] Further, the court's reasoning in the case is shallow: the court declined to endorse a deep theory of equal protection review – such as one

---

[147] *Id.* at 569.

[148] Sunstein, *supra* note 102, at 101.

[149] *See* Young, *supra* note 7, at 1171-72.

[150] *See supra* notes 72-100 and accompanying text.

[151] *See supra* notes 113-115 and accompanying text.

dependent upon the creation of a new suspect classification or fundamental interest – in favor of applying the rational basis analysis found in existing case law.[152]

Third, *Goodridge* by its terms contemplates no remedial action that will involve judicial incursion into the structure or running of any public institution. The court's decision does not affect the way in which the Commonwealth issues civil marriage licenses or otherwise regulates marriage. In addition, the decision does not suggest a continuing role for the judiciary as monitor of either the regulation of marriage or the conduct of any particular marital relationship. In staying the execution of its decision, moreover, the court allowed the legislature an opportunity to participate, at its discretion, in effecting an end to the marriage exclusion in Massachusetts.[153]

Considering these factors singly or together, it is not clear that, as a result of *Goodridge*, the Supreme Judicial Court augmented its authority at the expense of the political branches of government. The judiciary after *Goodridge* had no greater power to hear and decide equal protection cases or to order remedial action than it did before the decision issued. Nor did the court preclude the people of Massachusetts and their representatives from responding to the decision through the democratic process of constitutional amendment.[154] To the contrary: within a short time following the decision, an effort had begun to amend the state constitution to define civil marriage as exclusively between a man and a woman, and to establish a form of civil unions for same-sex couples.[155]

Goodridge is thus unlike that paragon of questionable judgment, *Bush v. Gore*,[156] in which the U.S. Supreme court concluded that Florida's manual vote recount process in the 2000 Presidential election violated the equal protection clause of the Fourteenth Amendment.[157] In the absence of uniform rules for reviewing ballots to determine voter intent, the Court deemed the recount process "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer."[158] Because there was insufficient time in which to revise the process in a

---

[152] *See supra* notes 116-124 and accompanying text.

[153] *See supra* notes 129-143 and accompanying text.

[154] As the United States Court of Appeals for the First Circuit put it in a collateral federal constitutional challenge to *Goodridge*, the Supreme Judicial Court did not "abolish the legislature." Largess v. Supreme Judicial Court for the State of Massachusetts, 373 F.3d 219, 229 (1st Cir. 2004). The First Circuit continued: "The resolution of the same-sex marriage issue by the judicial branch of the Massachusetts government, subject to override by the voters through the state constitutional amendment process, does not plausibly constitute a threat to a republican form of government." *Id.*

[155] *See* Rick Klein, *Vote Ties Civil Unions to Gay-Marriage Ban*, THE BOSTON GLOBE, March 30, 2004, at A1.

[156] 531 U.S. 98 (2000).

[157] *Id.* at 109.

[158] *Id.*

way that would both satisfy constitutional standards and allow Florida's electors to participate in the federal electoral process, the court ordered a halt to the recount.[159]

Even assuming the correctness of the Court's equal protection analysis,[160] its remedial action – a halt to the recount – was unprecedented. Scorn for the court's remedial decision as lawless came from many quarters.[161] And yet that decision may have been justifiable: Professor Ward Farnsworth has argued that the lack of a legal basis does not necessarily mean the remedial action should be condemned, as *Bush* may have been that rare instance in which the benefits to the common good of lawless judicial action outweighed the many costs associated with such action.[162] But even if this were the case, the *Bush* court erred: among other things, the court failed to consider the need, when such an instance presents itself, to act so as to allow for a response – to allow for "the possibility that other actors will be able to respond to the Court's move with subsequent moves of their own that reflect interests or wisdom not represented in the Court's nine offices."[163]

In effectively resolving the Presidential election, the *Bush* court took action that could not be reviewed, modified, or reversed by any other governmental actor, or the people themselves; no legislative response or constitutional amendment could ever alter the result in the case. And, while the circumstances of *Bush* are unlikely to recur, the decision stands as a reminder of just how far the Court was willing to intrude into the electoral process. Notwithstanding the Court's transparent effort to undercut the case's precedential worth,[164] its remedial decision cannot but cast a long shadow – after *Bush v. Gore*, judicial involvement in the substantive

---

[159] *See id.* at 110.

[160] *But see, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001) (criticizing the per curiam majority's equal protection analysis).

[161] *See* Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227, 236-37 (2001) ("It is rare for a decision by the Court to provoke such a consensus of disapproval."). *See also* Young, *supra* note 7, at 1156 (noting that, while the *Bush* court's ruling "imposed no ongoing judicial control over the electoral process, it arguably intruded upon Florida's discretion to choose how to respond to a judicial ruling of unconstitutionality on the merits"); Louise Weinberg, *This Activist Court*, 1 GEO. J. L. & PUB. POL'Y 111, 123 (2002) (describing the *Bush* court's "selection of the President" as "the ultimate political act"); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT at 98, 117 (Cass R. Sunstein et al., eds. 2001) (arguing that the Court's decision on the merits was sound, "[b]ut the same cannot be said of the decision not to allow the lower court to attempt a recount under constitutionally appropriate standards"); Cass R. Sunstein, *Order Without Law*, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT at 205, 216 (Cass R. Sunstein et al., eds. 2001) (calling the remedy portion of *Bush v. Gore* the part of the opinion "that is most difficult to defend on conventional legal grounds").

[162] Farnsworth, *supra* note 161, at 236-37.

[163] *Id.* at 250-51.

[164] *See* Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) (stating that consideration of the issues "is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities").

resolution of disputes arguably committed to other decision makers – like the Congress[165] – is more than just a theoretical possibility.

Bush puts *Goodridge* in perspective. The *Goodridge* court held irrational a legislative classification, but it did not apply a novel rule of equal protection law in so doing. The court ordered the marriage ban lifted, but it allowed the legislature a role in addressing how and when that remedy would be achieved, and it did nothing to undermine the ability of citizens to seek to reverse the decision through constitutional amendment. *Goodridge* changed civil marriage in one respect, that much is true, but the judiciary emerged with no new authority to resolve disputes involving marriage or any other relationship, and the legislature emerged with no less authority than it had before to legislate, even when important personal interests are concerned, so long as its choice of means rationally furthers legitimate ends. Given all this, it is difficult to conclude that *Goodridge* really disturbed the basic allocation of decision-making authority between the judiciary and the legislative branch – or, at least, that it disturbed the allocation more than would any exercise of judicial review which resulted in the invalidation of a popular law.

[165] *See* Laurence H. Tribe, *Bush v. Gore and Its Disguises: Freeing* Bush v. Gore *From Its Hall of Mirrors*, 115 HARV. L. REV. 170, 277-78 (2001) ("The requisite textual commitment to a political branch could hardly be clearer." (footnotes omitted)).