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Foreword from the Editors

Preface

Ten years ago today, in Goodridge et al. v. Department of Public Health, the Massachusetts Supreme Judicial Court came to what seemed then a stunning conclusion: the state's constitution forbid discrimination against same-sex couples who wanted to marry. It takes a leap of imagination to think back to that time; a decade has wrought change so profound and extensive that one can almost forget how bold the decision was. Ten years on, fifteen states, from Vermont to Hawaii, now recognize same-sex marriage. This year, the United States Supreme Court ruled that the federal government cannot discriminate against lawfully married same-sex couples. The legal changes have spurred cultural changes; an internet search for "Goodridge decision" yields, among other things, an option for "Goodridge decision wedding reading." To the Song of Solomon, Shakespeare, Browning, and Neruda, now add Chief Justice Marshall. A decade later, we reflect on Goodridge with this special issue.

- The Boston Bar Journal Board of Editors

The Written Word: Reflections on Composing a Major Civil Rights Decision



by Michael J. Streit

Note from the Editors: In 2009, the Iowa Supreme Court in Varnum v. Brien held that Iowa's statute limiting marriage to a man and a woman violates the equal protection clause of the Iowa Constitution. In 2010, three of the judges responsible for the decision were defeated in retention elections, including Justice Michael J. Streit, the author of this article.

The Iowa Supreme Court decided its marriage equality case, Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009), [http://www.iowacourts.gov/wfData/files/Varnum/07-1499\(1\).pdf](http://www.iowacourts.gov/wfData/files/Varnum/07-1499(1).pdf), six years after the decision in Goodridge v. Department of Public Health. We were thus not the first court to assess the constitutional question of marriage equality. Nonetheless, we were in many ways writing on a clean slate. It was very important to us that our opinion be not only analytically sound, but make emotional sense to its readers as well. The court sought to talk directly to the minds and hearts of Iowa's citizens. Communication on an emotional level was important for our message – heaven knows we saw what detractors did after Goodridge (and what we later saw happen in our own retention election).

Although the Varnum opinion is analytical in every legal sense, we sought to engage our readers with its analytical process and with the issue of marriage equality. In this sense, the decision bears some similarity to the Goodridge decision. Even though the Goodridge court clearly approached its case with a systematic and precise method of analysis, Justice Sosman's dissent complained about its emotional underpinnings, decrying the use of "emotion-laden ... rhetoric" as a "means of heightening the degree of scrutiny to be applied." Both courts realized that to have credibility with the citizens of their states, the decisions had to speak in a way they could understand. As we wrote our decision (Justice Mark Cady was the primary author – having drawn the case out of a hat) we were always asking ourselves: "Who is our audience?" As we did this, we were pulled back – or dragged back – from our instincts to write more "legal." The style and grace provided by Justice Cady spoke directly to everyday people – those with or without a law degree. This directness can be seen towards the end of the decision:

In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage—religious or otherwise—by giving respect to our constitutional principles. ... The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated

in the past. The only difference is civil marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires.

Varnum, 763 N.W.2d at 905.

Indeed, one of the most striking aspects of Varnum is the powerful and robust language used to talk about our constitutional heritage and the historical context of the decision. In California, Chief Justice Ronald M. George referred to a number of “stirring passages” from the Iowa case used by a dissenter. Strauss v. Horton, 207 P.3d 48, 114 (Cal. 2009). Justice Moreno’s first words in his dissent quoted the Iowa court: “[T]he ‘absolute equality of all’ persons before the law [is] ‘the very foundation principle of our government.’ ” *Id.* at 129, quoting Varnum, 763 N.W.2d at 877. In tracing our history, for example, we pointed out that in the first reported case of the Iowa court in 1839, “we refused to treat a human being as property to enforce a contract for slavery” and held our laws must extend equal protection to all people. We began the opinion by talking about Iowans’ heritage, constitution, and how the court approaches these types of legal questions. We used the pronoun “we” while discussing the court’s prior decisions or the court’s reasoning on certain legal principles. “We” signaled to our readers that the recognition of civil rights is a collective effort. (Ironically, detractors of the opinion subsequently criticized our use of “we” as an imperial gesture and as an example of judges “imposing” our law on the people.)

We deliberately wrote in an inclusionary way, asking our readers to join in our legal analysis, travelling down a road well-traveled, but new to most:

In fulfilling this mandate under the Iowa Constitution, we look to the past and to precedent. We look backwards, not because citizens’ rights are constrained to those previously recognized, but because historical constitutional principles provide the framework to define our future as we confront the challenges of today.

Varnum, 763 N.W.2d at 876.

We also carefully laid out the rich Iowa history of judicial review, civil rights, and the nature of the constitution authority under the United States and Iowa constitutions. This history included rulings dealing with slaves in the Iowa territory, segregated schools, women practicing law, and segregated lunch counters. The Court did not always shine, having failed in 1910 to strike down a statute upholding a law that effectively denied women pharmacists the right to sell alcohol, stating:

discrimination between the sexes is neither arbitrary nor capricious, and the fact that *in many instances individuals of one sex are in general better fitted than those of the other sex for a given occupation or*

business is one of such common knowledge and observation that the Legislature may properly recognize it in enacting regulations. (emphasis added)

In re Carragher, 149 Iowa 225, 229-30 (1910).

After acknowledging our lapse, we went on to say:

The framers of the Iowa Constitution knew, as did the drafters of the United States Constitution, that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress,” and as our constitution “endures, persons in every generation can invoke its principles in their own search for greater freedom” and equality.

Varnum, 763 N.W.2d at 876, quoting from Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

The result of our careful attention to language resulted in a decision that many consider a *sine qua non* or fulcrum in equal rights. The decision has captured the minds and emotions of people who have read or thought about marriage equality. A few weeks after our court decided Varnum, I walked into my dentist’s office for an appointment. The receptionist effusively declared that she read our decision and liked it ... and it was so good, she “read it twice.” At the time I asked myself what caused this response to a decision issued by a state supreme court in a controversial case. The logic and quiet elegance of the decision spoke volumes of the essential measure of constitutional protections for those in our society who are unique or without a voice. It also seemingly connected to those who read the decision.

Credibility is the stock-in-trade of the courts and is dependent on effective communication. The written word is our primary means of communication. As politics swirl around our courts, with many of our detractors speaking to ignorance and prejudice, the written word is the most accurate means of discussing highly-charged legal issues – especially those with nuance. Our courts seldom engage the public in a discussion about the essence of cases or their meanings – and have left it to political forces to shape and define the debate of the court’s work. Judicial ethics restrict a judge’s ability to discuss a pending case – even if decided. We as judges and lawyers have always retreated to the maxim that “The decision speaks for itself.” If it does – then our courts must strive to have the written word speak effectively. The way we write, to be effective, has to be more focused and immediate. Tough cases need to be less nuanced in the sense that our citizens demand we tell them now and we tell them clearly – like you would be telling your mother over Saturday coffee.

This case and Iowa’s history reflect that the Iowa Supreme Court has, “for the most part, been at the forefront in recognizing individuals’ civil rights. The path we have taken as a state has not been by accident, but has been navigated with the compass of equality firmly in hand, constructed with a pointer

balanced carefully on the pivot of equal protection.” Varnum, 763 N.W.2d at 877 n.4. With such a compass, the decision wrote itself.

Former Justice Michael Streit served Iowa as a trial court judge and an Iowa Supreme Court Justice for over 27 years. He received the John F. Kennedy Profiles in Courage award for his role in the Iowa Supreme Court decision recognizing marriage equality. Justice Streit practices in Des Moines and lectures in arbitration, mediation, ethics, contracts, judicial independence, and teaches at Drake University Law.

From Goodridge to Gill



by Mary Bonauto

Ten years ago, invoking our state constitution and the core promise of the “dignity and equality of all individuals,” the Supreme Judicial Court broke an historic barrier and Massachusetts became the first U.S. state to declare that same-sex couples share in the freedom to marry.

As Massachusetts celebrates the 10th anniversary of the Goodridge ruling this November, and the outpouring of joy that accompanied the marriages beginning on May 17, 2004, the U.S. Supreme Court’s reflections about marriage in the recent Windsor v. U.S. ruling ring true. In Justice Kennedy’s words, by allowing same-sex couples to marry, Massachusetts gave same-sex couples’ “lawful conduct a lawful status” and provided “a far-reaching acknowledgement” of their “intimate relationships,” which are now “deemed by the State worthy of dignity in the community with all other marriages.”

The effect has been nothing short of transformative for LGBT citizens of the Commonwealth – married or not – whose state now treats them as full citizens, and who now can stand up before family and friends to make those vows of commitment and responsibility to one another if they so choose. Even as we faced down fierce and repeated attempts to undo the Goodridge ruling by litigation and constitutional amendments, ultimately involving every branch of government, that affirmation of “dignity and equality” has lifted up so many here and across the nation. We can also celebrate that our fellow citizens of Massachusetts – including the vast majority of lawmakers and Governor Deval Patrick – either always agreed or came to believe that the Supreme Judicial Court was right.

But even after Goodridge, we at **Gay & Lesbian Advocates & Defenders (GLAD)** knew that lawfully married same-sex couples in Massachusetts still would be treated by the federal government as though they were single. What the Commonwealth gave in dignity and worth, the 1996 federal “**Defense of Marriage Act**” (DOMA) took away. Married couples would be denied Social Security, pension, tax, veterans and employment protections – all the rights and benefits afforded to married persons – only because of DOMA. So the question was not *if* we would challenge that federal discrimination, but *when*. Filing suit immediately was not an option. Even though couples were marrying in Massachusetts, the political battle to prevent Goodridge from being overturned by a constitutional ballot measure was still ongoing and was not resolved until June 2007. We also needed time for this culture-shifting milestone to settle into the fabric of life in Massachusetts so others would see that these marriages weren’t so alien or threatening after all.

The legal analysis started in 2004. Then, in 2007, we took on our first client (Dean Hara, the surviving spouse of former Congressman Gerry Studds) and litigated on his behalf before the **Merit Systems Protection Board**. We subsequently began to help other clients to seek income tax refunds or wend their way through lengthy Social Security processes. At the same time, we approached Attorney General Martha Coakley to ask her office to consider challenging DOMA for invalidating marriages that the Commonwealth saw fit to license. GLAD also teamed up with impressive talent, including Foley Hoag and Sullivan & Worcester in Boston, Supreme Court litigators at Jenner & Block in DC, and Kator Parks in DC for Dean Hara’s claim.

In March 2009, we filed **Gill v Office of Personnel Management** in the District of Massachusetts on behalf of seven married couples and three surviving spouses. On equal protection grounds, we challenged DOMA’s discrimination against *already married* same-sex couples who were treated differently by the federal government from other married people in Massachusetts. To emphasize that this was not another case about the constitutional right to marry, but about the federal government’s mistreatment of married same-sex couples, we infused our equal protection claim with facts about federalism. After all, the federal government does not marry people and had always deferred to state determinations of marital status, abandoning that neutral rule only when it looked like states might allow same-sex couples to marry someday.

A few months later, Attorney General Coakley **filed a DOMA challenge on behalf of the Commonwealth**, and the cases proceeded in tandem to become the first-ever successful challenges to DOMA. Then, after a delay occasioned by the President declining to defend DOMA in February 2011, the First Circuit in May 2012 issued the **first appellate ruling striking down DOMA** on the same bases as the Supreme Court later did in Windsor.

Like **Romer v. Evans** (1996) and **Lawrence v. Texas** (2003), Windsor reminds the country that constitutional promises apply equally to gay people. Beyond those portions of the opinion holding DOMA

unconstitutional as “a deprivation of the liberty of the person” under the 5th Amendment, there is also, as one commentator put it, the “music” in the decision fusing liberty and equality into a principle of “equal dignity.” The Supreme Court ruled that DOMA made the marriages of same-sex couples “unequal” and “second class,” forcing them to live as married for state law purposes but unmarried for the purposes of federal law. This discrimination affected “many aspects of family life, from the mundane to the profound,” and “instruct[ed] all federal officials, and ... all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.”

Federal agencies are now implementing the Windsor ruling, and respecting the valid marriages of same-sex couples, wherever they reside, *for federal purposes*, including immigration benefits, civilian and military employee benefits, and income tax, among others. While we are still some distance from a ruling ensuring the freedom to marry nationwide, other states now need to deal with “federally married” same sex couples and examine whether they want to continue discrimination against those couples for state purposes. There is so much more to come, but without the beacon of equality from Goodridge, we could not have filed Gill and we would not be celebrating the end of federal marriage discrimination today.

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A State’s Fight For Marriage Equality: Advancing Goodridge’s Promise by Ending DOMA



by Maura Healey

Five years after Goodridge, over 20,000 same-sex couples had been married in Massachusetts, and attempts to overturn the decision had been decisively defeated. Despite these significant victories, it had become clear that, because of the Defense of Marriage Act (“DOMA”), state recognition of same-sex

marriage could achieve only so much. Because of DOMA, these couples – despite being lawfully married – were denied access to over 1,100 marriage-based rights and benefits under Federal law, and Massachusetts was forced to treat them as unmarried for purposes of Federal laws and programs. The promise of equality and liberty articulated and recognized in Goodridge had brought into stark relief an unjust and discriminatory Federal law.

On July 8, 2009, Massachusetts became the first state to challenge the constitutionality of DOMA, and to this date, Massachusetts remains the only state to have appeared as a plaintiff in a lawsuit related to marriage equality. How did the Attorney General take this step? As a purely legal matter, the Attorney General could have brought suit as soon as the first same-sex couple was married. The Attorney General represents the state, its agencies and its officials in many types of litigation, and enforces and safeguards constitutional and statutory civil rights and liberties in furtherance of the public interest. She “shall institute or cause to be instituted such criminal or civil proceedings before the appropriate state and federal courts, tribunals and commissions as [s]he may deem to be for the public interest.” M.G.L. c. 12, § 10. The Attorney General has a general duty to take action to protect the interests of the state, the rights of its residents, and the public interest. As a strategic matter, however, it made sense to have allowed the novelty of Goodridge to wear off somewhat before challenging DOMA. Five years after the Goodridge decision, after equal marriage rights had been decided – by the court, by the legislature, and in the court of public opinion in Massachusetts as more and more residents had come to know, work and live alongside married people whose spouses happened to be of the same sex – the time was ripe.

Massachusetts’ interest in challenging DOMA was clear. DOMA harmed the public interest of Massachusetts residents in many ways. Social Security, Medicare, Medicaid, retirement benefits and pensions, military and veterans benefits, Supplemental Security Income for people with disabilities, Family Medical Leave Act protections, estate, gift and income tax benefits, and even immigration – to name just a few – were all off limits to same-sex couples who were legally married in Massachusetts. Beyond that, DOMA harmed Massachusetts by forcing it to discriminate against a subset of lawfully-married couples by treating them as unmarried for certain purposes. For example, in carrying out jointly funded state-federal programs like Medicaid, Massachusetts was given the choice either to perpetuate discrimination by treating married same-sex couples differently or to forego billions of dollars of federal funding each year. The state, like other employers, was compelled to impute additional income to employees who added their spouse to their health care plan if that spouse was of the same sex. In this and other ways, the state found itself an involuntary participant in DOMA’s machinery of discrimination.

As unjust as DOMA was, the odds against a successful challenge appeared daunting. At the time Massachusetts filed its suit: only two other states allowed same-sex couples to marry; over forty states had laws or constitutional amendments banning same-sex couples from marriage; polls consistently showed support for equal marriage rights to be less than fifty percent; all prior DOMA challenges had failed; and the U.S. Department of Justice was defending DOMA vigorously. There was little legal

precedent for our claims. Never before had a state used principles of federalism to advance civil rights, let alone done so successfully. While there were helpful guiding principles, those principles had never been tested successfully in court. Assessing all of this, our office optimistically put the odds of surviving dispositive motions at thirty percent. But given the significant harm DOMA caused to the public interest, there was no question but to pursue the case.

The Attorney General's decision to file suit was significant not only in and of itself; together with the compelling Gill suit brought by Gay & Lesbian Advocates & Defenders on behalf of individual married couples, it informed the direction of subsequent DOMA litigation around the country. Massachusetts was able to advance unique arguments that were unavailable to private plaintiffs. The Attorney General's case was framed in two ways: (1) to stop the federal government from declaring that an entire category of lawfully-married Massachusetts citizens were, for all federal purposes, "single;" and (2) to ensure equal protection of Massachusetts residents, free from unlawful intrusion by a discriminatory Federal law that required Massachusetts to treat similarly situated married couples differently.

The first was an argument based on federalism. By enacting DOMA, Congress intruded into an area that has for centuries been the exclusive province of the states. Throughout the history of our country, states (and prior to that the American colonies) determined marital status for purposes of both state and federal law. Even in times of significant controversy – such as the debate over interracial marriage – and despite significant differences among states' rules on marriage relating to age, consanguinity, and disability, state-issued marriage licenses were respected under Federal law. That changed with DOMA, which for the first time interfered with the states' power to issue marriage licenses that qualify the recipient as "married" under both state and Federal law. The Attorney General's argument was that Congress couldn't simply reject a subset of marriages it didn't like. Ending the exclusion of same-sex couples from marriage advanced state interests in promoting marriage, stability and security in families, efficient allocation of household resources, the clear definition of legal relationships, and supportive environments for raising children. All of these were furthered by extending marriage to more couples willing to assume its obligations, including couples of the same sex, and it was wrong for the federal government to deny them the same respect it gave to other state marriages.

The Attorney General's second claim was that DOMA required Massachusetts to discriminate against its own residents. By forcing Massachusetts to choose between discriminating against its own citizens and risking its eligibility for federal funds in connection with jointly administered federal-state programs, DOMA imposed an unconstitutional condition on the state's receipt of federal funds in violation of the Spending Clause of the U.S. Constitution. The clearest example was in the context of veterans funding. The federal government gave Massachusetts funding to construct state cemeteries for the burial of veterans and their spouses and family members. After Goodridge, the Federal Veterans Administration informed the state that it could not authorize the burial of a same-sex spouse in a veterans' cemetery and that if Massachusetts did so, the federal government would seek to recapture federal funding for veterans services. The only way Massachusetts could maintain federal funding and honor the service of those

veterans would be to establish a “separate but equal” cemetery for them through the exclusive use of state funds. This condition of unequal treatment violated the Equal Protection Clause and therefore was an unconstitutional condition of federal funding.

On July 9, 2010, a year to the day after Massachusetts filed its lawsuit in the United States District Court for the District of Massachusetts, Judge Tauro ruled DOMA unconstitutional, and Massachusetts prevailed on both counts of its complaint. Individual plaintiffs in Gill also prevailed on their Equal Protection claim. Following Judge Tauro’s decision, individual plaintiff couples filed DOMA challenges in Federal District Courts in Connecticut, New York, and California. All of them relied on the same arguments and testimony originally presented by Massachusetts and the individual Gill plaintiffs. Judge Tauro’s decision was upheld by the First Circuit, and similar decisions later issued from the Second and Ninth Circuits.

As we all know, the legal challenge that began here in Massachusetts ultimately ended when the U.S. Supreme Court declared DOMA unconstitutional. But more than that has changed. Since the time the Attorney General’s case and Gill were filed: the number of states allowing same-sex couples to marry has grown from 3 to 15 plus the District of Columbia; the President has turned from opposing to supporting equal marriage rights; the U.S. Department of Justice has gone from defending DOMA to having the U.S. Solicitor General argue against DOMA in the Supreme Court; our military has been integrated with the repeal of Don’t Ask Don’t Tell; and public support for marriage equality has grown from a minority to a majority view nationally.

While there is much left to do to protect civil rights and ensure equal treatment for LGBT people, it’s heartening to know that for families in Massachusetts and across the country, Goodridge, and its promise, is not only alive but thriving.

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All in the Family



by Richard Yurko

Marriage equality actually is not about individual liberty at all. What has come to be known as marriage equality is actually all about the public acknowledgement that, like it or not, LGBT families exist and that those families are entitled to the same respect and support as more traditional families. It is the acknowledgement that these families exist and will continue to exist that is the defining, essential building block of the most significant marriage equality decisions.

While some commentators today seem to subscribe to the notion that marriage equality is and always has been inevitable, the fight for LGBT rights was never easy and never a certainty. Indeed, there were times, very recent times, when it seemed a long-shot, if not hopeless.

The landmarks for marriage equality are relatively easy to identify. How the courts, the legislatures, and the public moved from point to point to point is a bit less obvious.

Bowers

In 1986, a majority of the United States Supreme Court rejected the argument that LGBT persons had a right to privacy that protected them from prosecution for sodomy in approximately half of the states of the nation and in the District of Columbia. Justice White wrote that it was “at best, facetious” to argue, as the private plaintiff did in **Bowers v. Hardwick**, 478 U.S. 186, 194 (1986), that the previously recognized right to privacy included such immoral conduct. *Id.* at 196 (Burger, C.J., concurring) (the ban on sodomy “is firmly rooted in Judeo-Christian moral and ethical standards”). Justice White wrote that all of the Court’s prior privacy decisions had concerned child-rearing and education, procreation, marriage, contraceptives, and abortion. *Id.* at 190. White went on to write that “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.” *Id.* at 191. Inadvertently, for sure, the **Bowers** decision gave LGBT advocates a roadmap on how to get **Bowers** overturned and how to get LGBT equality recognized.

In 1986, LGBT relationships and families existed, albeit typically in the closet and outside the traditional mainstream view of the law. As of 1986, no out LGBT advocate had ever appeared to argue in the United States Supreme Court. See generally, Adam Liptak, **Exhibit A for a Major Shift – Justices’ Gay Clerks**, N.Y. Times, June 9, 2013, at A1 (“At the time, it was often professionally hazardous for gay

lawyers to come out”). It is generally acknowledged that GLAD’s John Ward, who argued **Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston**, 515 U.S. 557 (1995), was the first out gay lawyer to argue in the Supreme Court.

Thus, in 1986, perhaps many of the sitting, elderly justices had never actually known anyone who was open about being LGBT. It was easy in 1986 to perceive and write about gays as outsiders, persons unlike the justices themselves, and to ignore that LGBT families existed, as Justice White did.

As a result of Bowers, from 1986 to 2003, long-time LGBT partners living not only in Atlanta but also in the District’s Dupont Circle or in Chicago’s Boystown, who had been together, raised a family, and supported each other in relationships that may have weathered decades, could have been criminally prosecuted for what they did intimately behind closed doors with the curtains closed. That was because their connections and their families had been invisible in 1986 and had been therefore easy to ignore. Because of the closet, there was no “demonstrated” connection to family.

AIDS

The AIDS epidemic that began several years before Bowers had two beneficial consequences. First, it radicalized the LGBT community. Second, it involuntarily outed many gay men. It also showed, to those who looked, that there were many long-time partners who cared for each other through the most difficult and excruciating of crises, the terminal illness of a loved one. Borne of that period was a Gay Rights advocacy that perceived the struggle for rights as truly one of life or death. Coming out of the closet and self-identifying became a political act of protest, survival, and courage. During the height of the AIDS crisis, certainly the focus was on comforting the ill and saving lives, but these difficult times also demonstrated that there were many LGBT-based relationships and, indeed, families.

Local Action

Shut down on the federal constitutional front by Bowers, those seeking equality for LGBT persons turned locally and to the states. Here and there, real rights were won. Nondiscrimination laws were enacted in some states and locales. Gays were allowed to adopt in some states. Second parent adoption was recognized in some states. Progress — spotty, difficult, and often controversial — was made here and there.

Such progress produced a backlash. In Colorado, state voters enacted a state constitutional amendment barring any laws that sought to benefit LGBT residents or include LGBT nondiscrimination provisions at the state and local level. In 1996, in **Romer v. Evans**, 517 U.S. 620, 631-32 (1996), just ten years after Bowers, the Supreme Court struck down the Colorado constitutional amendment, seeing it as a

means of disenfranchising LGBT persons that could not survive even “rational basis” equal protection scrutiny.

Romer is seen, quite properly, as an initial watershed moment in achieving LGBT rights. What it did was preserve the right for change to come for LGBT citizens. Preservation of that ability to provide nondiscrimination laws to protect LGBT individuals also preserved the ability of LGBT families to be recognized and supported at the local level, if not the federal level.

Lawrence and Goodridge

Like bookends, **Lawrence v. Texas**, 539 U.S. 558 (2003), and **Goodridge v. Dept. of Public Health**, 440 Mass. 309 (2003), made 2003 a turning point for LGBT rights. In Lawrence, the U.S. Supreme Court majority opinion overturned Bowers. Although the Lawrence opinion focuses on a question of personal liberty protected by the constitution, it contains brief, explicit recognition of the existence of LGBT relationships:

Persons in a homosexual relationship may seek autonomy for these purposes [of personal freedom], just as heterosexual persons do.

Lawrence, 539 U.S. at 574.

Goodridge picked up where Lawrence left off. Whereas Lawrence was based on the Supreme Court’s concept of *individual* freedom and merely gave a nod to same sex relationships, Goodridge was a state constitutional decision all about LGBT relationships and families. In the years between Bowers and Goodridge, more and more LGBT families had been formed and, even more importantly, more and more LGBT families had come out of the closet and declared their need to be recognized. In Goodridge, the Supreme Judicial Court wrote:

[E]xtending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.

Goodridge, 440 Mass. at 337. Many have described Goodridge as a singular turning point in not only marriage equality but also more generally in LGBT equality. In Goodridge, the LGBT community found its voice, told the Court that the LGBT community had families too, which warranted equal treatment under the Massachusetts Constitution. It is as though the LGBT community finally found the courage and the

voice to speak about their own families and relationships. And, the Court had the courage to listen and to respond.

Having found its familial voice in Goodridge, the LGBT movement realized that this same familial voice could eventually lead to equality at the federal level as well. In **United States v. Windsor**, 133 S. Ct. 2675 (2013), decided this year, almost a full ten years after Lawrence and Goodridge, the Court writes extensively about the negative impact that the Defense of Marriage Act had on LGBT *families*, including the children of such families:

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound.

. . . .

DOMA . . . brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. . . . And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.

Windsor, 133 S. Ct. at 2694-95 (citations omitted). As eloquent as the words of Justice Kennedy are in Windsor, these words could not have been spoken if LGBT families had not self-identified and sought their rights in the last two decades. The LGBT community saw the challenge laid down by Bowers in 1986, when the Court dismissed the community's privacy argument with the comment: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." 478 U.S. at 190. Actually, LGBT families did exist. Many of them. And because these families existed in reality and came out of the closet, gay marriages now exist in all New England states and the U.S. Constitution will not let the federal government discriminate against such state-sanctioned relationships.

Richard Yurko is the founding shareholder of the business litigation boutique, Yurko, Salvesen & Remz, P.C. Mr. Yurko also serves as a Board member and Treasurer of Gay & Lesbian Advocates and Defenders (GLAD).

Goodridge Lights A Nation's Way to Civic Equality



by Eric Alan Isaacson

Two decades ago, few imagined our government might recognize that gay and lesbian citizens, as human beings, are entitled to enjoy what most people take for granted as a fundamental right – the right to marry. With Goodridge, what few imagined possible became reality in the Commonwealth of Massachusetts, with real consequences for the entire nation.

If LGBTQ people enjoyed the most basic rights of human beings in Massachusetts – why not in other states? Same-sex couples and civil-rights attorneys naturally strategized to replicate Goodridge elsewhere. Massachusetts' decision provided a focal point of their briefs, and a guiding precedent for other courts. Goodridge also answered social conservatives' objections that recognizing same-sex marriages somehow threatened their religious traditions. For as Goodridge declared: "No religious ceremony has ever been required to validate a Massachusetts marriage."

Indeed, William Bradford's *Of Plymouth Plantation* recounts how on May 12, 1621, the Pilgrims celebrated "the first marriage in this place," which they "thought most requisite to be performed by a magistrate, as being a civil thing." Governor Bradford explained that "those of any religion (after lawful and open publication) coming before the magistrates in the Town, or State House, were to be orderly (by them) married one to another." Thus began, in Massachusetts, America's tradition of civil marriage accessible to all, placed beyond ecclesiastical jurisdiction and canon law.

With Goodridge, Massachusetts again took the lead by applying her principle that civil marriage should be universally accessible. Her founding churches – those of the Pilgrims and Puritans who centuries before had placed civil marriage beyond the power of ecclesiastical institutions – lent fervent support, demanding full civic equality for LGBTQ people.

In California marriage-equality litigation, I represented religious *amici* supporting marriage equality, including two denominations comprising those congregations: the Unitarian Universalist Association and the General Synod of the United Church of Christ. Our January 2006 *amicus* brief before California's intermediate Court of Appeal naturally began by quoting Goodridge:

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman,

and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors “Our obligation is to define the liberty of all, not to mandate our own moral code.”

Although California’s intermediate Court of Appeal ruled against marriage equality, a concurring opinion acknowledged our “report that some religious denominations that wish to solemnize marriages for same-sex couples are prevented from doing so by the current law.” Justice Kline’s dissent quoted our brief, and relied heavily on Goodridge itself. And when the Marriage Cases got to California’s Supreme Court, Goodridge provided the foundational precedent for its May 2008 decision sustaining same-sex couples’ right to marry under California’s constitution.

Connecticut’s Supreme Court followed suit in October of that year, and Iowa’s Supreme Court did so – unanimously – in 2009. Both followed Goodridge’s precedential example.

Harrowing setbacks swiftly befell our cause. California’s May 2008 Marriage Cases decision lasted only to November, when Proposition 8 narrowly passed. Three justices were voted off Iowa’s Supreme Court for daring to join a unanimous opinion sustaining equal access to a fundamental right. And there were losses at the ballot box in other states, as frightened voters rushed to protect the institution of marriage from a threat they perceived in recognizing equal rights for all.

Social conservatives’ ballot campaigns engendered such fear, suggesting that same-sex couples’ marriages threatened the very foundation and fabric of a free society. Television ads in California and other states warned that lawyers were ready to sue churches and clergy who withheld religious rites of marriage from same-sex couples. If same-sex couples may lawfully wed, they said, churches can expect to lose tax-exempt status, and their clergy to face criminal hate-crime prosecutions.

Yet the tide turned, thanks to Goodridge and Massachusetts – whose civic society obviously did not collapse, and whose people enjoyed a remarkably low divorce rate. Family values remained alive and well in the Commonwealth. Her churches were open and tax exempt, whether or not they offered religious nuptials to same-sex couples. Their clergy remained free, as always, to decide whose marriages they would officiate, and on what terms. And many Massachusetts churches have joyfully thrown open their doors for same-sex couples desiring religious rites.

By happy coincidence, the iconic churches in social conservatives’ narratives of American history are Massachusetts churches. Those narratives often start with Pilgrims, whose religious convictions moved them to set sail in 1620, and who upon arriving in a New World framed the Mayflower Compact, providing a model for American democracy. Those Pilgrims soon were followed by Puritans whose leader John

Winthrop, Ronald Reagan often reminded us, described a shining “city upon a hill” where they would build the First Church in Boston. America, the social conservatives insist, should not forget her religious roots.

Yet the Pilgrims and Puritans made marriage a secular **civil** institution from the very beginning. And the churches figuring so prominently in social conservatives’ narratives of American tradition and values go beyond supporting civil marriage as a civil right – same-sex couples today are welcome to marry in **religious** rites at the Pilgrims’ First Parish Church in Plymouth and at John Winthrop’s First Church in Boston, as they are in many other churches and synagogues throughout the Commonwealth. That, of course, gives the lie to contentions that honoring same-sex couples’ right to marry somehow restricts religious freedom. Quite the opposite is true.

Thanks to Goodridge, Proposition 8 ultimately was overturned in a case called Perry with the district-court opinion focusing specifically on Massachusetts’ happy experience with same-sex marriages. Since then, the federal Defense of Marriage Act has fallen, and same-sex couples now may marry in fifteen states and the District of Columbia.

Thanks to Goodridge and the example of Massachusetts, moreover, most Americans now support same-sex couples’ right to marry, which I believe will soon be honored in all fifty states.

From California’s Marriage Cases through Hollingsworth v. Perry, Eric Alan Isaacson has represented religious organizations and faith leaders as amici curiae supporting marriage equality, including California Faith for Equality, the California Council of Churches, and the Unitarian Universalist Legislative Ministry California.