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## *BRENNAN LECTURE*

### IN *GOODRIDGE*'S WAKE: REFLECTIONS ON THE POLITICAL, PUBLIC, AND PERSONAL REPERCUSSIONS OF THE MASSACHUSETTS SAME-SEX MARRIAGE CASES

THE HONORABLE RODERICK L. IRELAND\*

*In the Sixteenth Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice, Roderick L. Ireland, Senior Associate Justice of the Massachusetts Supreme Judicial Court, discusses the seminal case Goodridge v. Department of Public Health and a judge's role in controversial decisions. Justice Ireland explains the rationale behind his majority vote in Goodridge, as well as his dissent in Cote-Whitacre v. Department of Public Health, and the extreme public backlash that followed the same-sex marriage cases. Through the personal lens of his own experience dealing with the extreme reaction to Goodridge, Justice Ireland addresses how judges should handle such controversial cases while remaining true to the role of the judiciary.*

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## INTRODUCTION

I am honored to have been chosen to deliver the Sixteenth Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice.

The basis of my remarks this evening is provided by two of the same-sex marriage cases in Massachusetts that I consider seminal in this evolving area of law: *Goodridge v. Department of Public Health*<sup>1</sup> and *Cote-Whitacre v. Department of Public Health*.<sup>2</sup> I was in the 4-3 majority in *Goodridge*. That 2003 decision of the Massachusetts Supreme Judicial Court held that, under our state constitution, same-sex couples could not be prohibited from marrying. Three years later, I was the sole dissenting justice in *Cote-Whitacre*, in which I maintained that the state should not construe and selectively apply a moribund statute as authority for denying out-of-state same-sex couples the right to marry in Massachusetts.

I am going to draw on my experience with these cases to talk about dealing with difficult social issues as both a jurist and a private citizen. It is axiomatic to say that all cases are more than academic exercises. They involve real people, and judges must deal with cases at arms' length, no matter how controversial they may be. However, as I found out in the wake of *Goodridge*, a case may add a personal dimension to our lives. Although I will begin by providing some background and context to the same-sex marriage cases, the focus of my remarks will be on the legal and political issues that subsequently arose and the impact that these events had on me personally.<sup>3</sup>

## I

*GOODRIDGE: POLITICAL AND LEGAL AFTERMATH*

Same-sex marriage raises perhaps some of the most challenging social and legal questions confronting us today. It involves issues of civil rights and social justice for a minority group with a largely invisible "difference," yet it generates enormous controversy because of social traditions that are rooted in religion, law, culture, and politics. Although legal issues concerning homosexuality were not new to my court, the question whether same-sex couples had the right to marry was new.<sup>4</sup>

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<sup>1</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>2</sup> 844 N.E.2d 623 (Mass. 2006).

<sup>3</sup> I note that the scope of my discussion of the same-sex marriage cases, including the political and legal issues they present, is not exhaustive, nor is it intended to be.

<sup>4</sup> See, e.g., *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (affirming adoption of child by same-sex partners); see also *Goodridge*, 798 N.E.2d at 963 (discussing cases implicating homosexuality).

The *Goodridge* case began in 2001, when seven same-sex couples who had been denied marriage licenses filed a complaint charging that their rights under the Massachusetts Constitution had been violated.<sup>5</sup> The lower court ruled against them, holding that “the marriage exclusion [did] not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the Massachusetts Declaration of Rights [did] not guarantee the fundamental right to marry a person of the same sex.”<sup>6</sup>

The plaintiffs appealed, and the *Goodridge* case was argued before our court in March 2003.<sup>7</sup> In addition to the usual submissions

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<sup>5</sup> *Goodridge*, 798 N.E.2d at 949–50. The plaintiffs argued that the denial of marriage licenses to same-sex couples violated articles 1, 6, 7, 10, 12, and 16 and part II, chapter 1, section 1, article 4 of the Massachusetts Constitution. *Id.* at 950 & n.7.

<sup>6</sup> *Id.* at 951 (internal quotation marks omitted).

<sup>7</sup> Before the appeal in *Goodridge* reached our court, another case that presented a potentially larger question arose. It involved a lower court challenge to the Massachusetts Attorney General’s certification of an initiative petition to amend our state constitution to limit marriage to the “union of one man and one woman.” *Albano v. Att’y Gen.*, 769 N.E.2d 1242, 1244 (Mass. 2002) (noting that some matters may be excluded from initiative petitions under MASS. CONST. art. 48, pt. 2, § 3, as amended by article 74 of Amendments). In addition to limiting marriage to opposite-sex couples, the amendment would have made same-sex couples ineligible to receive any “benefits or incidents exclusive to marriage.” *Id.* at 1245. The plaintiffs had argued that the petition violated provisions of article 48 that “exclud[e] measures that relate to the power of the courts” and that the petition “contain[ed] subject matter that is not related or mutually dependent, as required by art. 48.” *Id.* at 1244. The court rejected these arguments, stating that the petition did not interfere with the court’s power to “affirm and annul marriages, grant equitable relief, or decide the constitutionality of statutes; it merely change[d] the underlying definition of a valid marriage.” *Id.* at 1246. It also stated that although many statutes would be affected by the terms of the petition, the statutes were related because “each statute affected creates a benefit or responsibility that arises from married status.” *Id.* at 1247.

Once the Attorney General certifies a petition, and the proponents file a sufficient number of signatures with the Secretary of the Commonwealth, the Secretary must transmit the measure to the General Court (the official name of the State Legislature).

Should a joint session of the General Court approve the measure by a one-fourth vote, it will be referred to the next General Court [for a constitutional convention]. If it once again receives the affirmative vote of one-fourth of the members, the Secretary will submit the amendment to the people at the next State election.

*Id.* at 1244 n.3 (citing MASS. CONST. art. 48, pt. 4, §§ 4–5).

Although the court upheld the certification in the *Albano* case, it had no bearing on the *Goodridge* case. The petition was briefly raised in the Legislature at a constitutional convention. However, before any discussion could take place, a motion to recess the convention passed, terminating the petition’s legislative life. Several reasons have been offered for the quick dismissal. Some believe that Senate President Thomas Birmingham felt pressure to prove his democratic values for his upcoming election campaign. See Rick Klein, *Birmingham Pressured To Block Same-Sex Marriage Ban*, BOS. GLOBE, May 2, 2002, at B8. Others believe the quick adjournment was related to unsavory tactics that proponents of the petition allegedly used to gather signatures. See Stephanie Ebbert, *Horse Lovers Say They Were Duped*, BOS. GLOBE, Mar. 26, 2002, at B2 (stating that people alleged they were told that they were signing petition to prevent horses from being sent to slaughter). For

by the parties, we received twenty-six amicus briefs.<sup>8</sup> A majority of justices, including me, concluded that “[l]imiting . . . civil marriage to opposite-sex couples [lacked a rational basis and] violate[d] the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”<sup>9</sup> The case did not nullify any marriage laws but rather redefined the common law to construe marriage as a “voluntary union of two persons as spouses, to the exclusion of all others.”<sup>10</sup>

My colleagues and I were aware that this decision was likely to receive a greater amount of public scrutiny than the average case, and we attempted to prepare for it. Controversial issues tend to amplify the problem of confidentiality precisely because controversies invite public attention. People are far more eager to know the outcome of a case before the opinion’s official release, which heightens the need for confidentiality.<sup>11</sup> With this in mind, we kept our schedule to discuss *Goodridge* secret. We did not include it on an internal agenda, which lists the cases that we are deciding, even though this agenda is not available to the public. We also did not inform our court officers when we were discussing the case and, although we generally have the help of several administrative assistants in preparing our decisions, only one was allowed to assist us throughout this case.

In addition, we impressed upon everyone the heightened need for secrecy. Our law clerks and staff were warned in advance that the media might try to contact them directly, and they knew to refer these and other public inquiries to the court’s Public Information Office. At least one law clerk was contacted by a reporter from a local newspaper shortly after the *Goodridge* decision was released. The reporter claimed a former clerk had spoken about the case and asked whether this clerk would care to comment as well. Had we not anticipated this level of interest, confidentiality could have been compromised.

We also changed our protocol when we finally released this opinion to the public. At our court, opinions usually are released from the office of the Reporter of Decisions located within our courthouse. However, in order to deal with crowd control, as well as the safety of

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further discussion of the fate of the petition in the Legislature, see DANIEL R. PINELLO, AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE 35–41 (2006).

<sup>8</sup> *Goodridge*, 798 N.E.2d at 946–47.

<sup>9</sup> *Id.* at 968.

<sup>10</sup> *Id.* at 969.

<sup>11</sup> See, e.g., *Lawyers Weekly USA*, which published an article on its website speculating as to how each justice would vote. Paul J. Martinek, *The Justices*, LAW. WKLY. USA (2003) (on file with the New York University Law Review).

the justices and our staff, *Goodridge* was released at a more secure courthouse that was several blocks away from ours.

Knowing on an intellectual level that any judge may be the target of public ire is one thing; actually being made a target is quite another. I recall that when Federal District Court Judge W. Arthur Garrity ordered the desegregation of schools in Boston in the 1970s,<sup>12</sup> citizens picketed his house, and he had to be protected by bodyguards.<sup>13</sup> This knowledge, however, did not prepare me adequately for the magnitude of public protest in response to our decision.<sup>14</sup>

Our court received hundreds of emails and letters on both sides of the issue. My own unscientific estimate is that approximately ninety percent of the feedback that I personally received was negative. We received death threats, and public reaction was not limited to those within Massachusetts.<sup>15</sup> We (and our decision) were called every name imaginable: “dumb,” “nuts,” “deplorable,” “shameful,” “sick,” “an abomination,” “traitors,” “communists,” and “atheist liberals” who had “lost our minds” and who were bringing ruin on the United States, especially because “God destroyed Sodom and Gomorrah.” One person wrote, “We pray every day that you all get cancer and rought [sic] in HELL.” Many, including a person who claimed to be a political science professor, talked about how there was no authority under any constitution for what we had decided; others argued that we were legislating from the bench, or that the decision was against the will of our Founders. Not content with all of that, one group hired

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<sup>12</sup> See, e.g., *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975) (ordering desegregation of Boston schools), *aff'd*, 530 F.2d 401 (1st Cir. 1976); *Morgan v. Kerrigan*, 409 F. Supp. 1141 (D. Mass. 1975) (placing school in receivership due to racial tensions and school administration’s unwillingness to supplement desegregation program).

<sup>13</sup> The *New York Times* reported, “Judge Garrity became the target of death threats and at least two attempts on his life. He remained under guard 24 hours a day from 1974 to 1978. He was scorned and snubbed by many; his name appeared in profane city graffiti; he was hanged in effigy, and demonstrators came to his home.” Carey Goldberg, *Judge W. Arthur Garrity Is Dead at 79*, N.Y. TIMES, Sept. 18, 1999, at A15. The *Los Angeles Times* noted that “[h]e was accompanied by armed guards when he went to court and was protected by federal marshals and the FBI at home.” Elaine Woo, *W.A. Garrity; Judge Desegregated Boston Schools*, L.A. TIMES, Sept. 18, 1999, at 17. The *Boston Globe* reported that he was hanged in effigy, threatened, and referred to as “the most hated man in Boston.” R.S. Kindleberger, *The New Heat on Garrity*, BOS. GLOBE, Apr. 9, 1980, at 1; see also J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* 244–45 (1985) (reciting details of protests, death threats, and social ostracism endured by Judge Garrity).

<sup>14</sup> See Raphael Lewis, *Groups Muster To Fight Gay Marriage in Mass.*, BOS. GLOBE, Nov. 20, 2003, at A1 (recounting public reaction to *Goodridge* decision).

<sup>15</sup> Many people did not reveal where they lived, but emails were sent to the court from at least the following states: California, Colorado, Connecticut, Florida, Georgia, Indiana, Michigan, Minnesota, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin.

airplanes to fly over the communities where we lived for many months afterward, carrying banners condemning us.<sup>16</sup> Some members of the media vilified the majority, and one group ran radio ads suggesting that the four so-called “activist” justices should resign or face removal.<sup>17</sup>

In Massachusetts, judges are appointed and generally serve until age seventy as long as there is, as my appointment certificate states, “good behavior.”<sup>18</sup> Judges can be removed, but the process itself is structured to protect judges from the heat of the moment.<sup>19</sup> Considering the vehemence of the public reaction to the *Goodridge* case, it was not surprising that there was a call for the election of judges in Massachusetts, and one bill was repeatedly filed in the Legislature for the removal of the four justices in the majority.<sup>20</sup>

I have often wondered whether I would have voted the same way in the *Goodridge* case had I been elected rather than appointed.

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<sup>16</sup> The airplanes flew over other communities as well. For example, my law clerk saw an airplane with a banner condemning Chief Justice Marshall flying over her neighborhood.

<sup>17</sup> The group, Massachusetts Citizens for Marriage, ran the following ad on Boston radio stations which began and ended with the sound of a telephone ringing:

I'm Sally Pawlick, President of Mass Citizens for Marriage, ringing bells all over the state.

When will the politicians finally wake-up and understand that we citizens do not want gay marriage? . . .

We're in an intense effort to remove [Chief Justice] Marshall and the three associate judges who made it a three-three tie. They made Marshall's plan possible.

If Marshall and those three judges resign now, each will keep all their [sic] retirement benefits. If we citizens are forced to remove them through a vote of the legislature, those benefits will be gone.

The politicians tricked us all in 2001 when we gathered 130,000 signatures for our amendment. We will not be fooled again. Let's heal and unify our state NOW, not wait until 2008. Help us ring more bells all over the state.

The text of the ad was posted on MassNews.com, a now defunct website. *Countdown to the Firing of the SJC Judges: Massachusetts Citizens for Marriage in New Radio Blitz To Remove Judges*, MASSNEWS, <http://www.massnews.com> (on file with the New York University Law Review).

Another group, the Declaration Alliance, ran a radio ad in Boston calling on then-Governor Romney to speak in favor of removing the justices. Governor Romney declined to call for our removal. Yvonne Abraham, *Ads Hit Romney Effort in Gay Marriage Fight*, BOS. GLOBE, May 11, 2004, at B4.

<sup>18</sup> MASS. CONST. ch. III, art. I; *see also* Opinion of the Justices to the Senate, 284 N.E.2d 908, 911–12 (Mass. 1972) (discussing state constitutional amendment making age seventy mandatory retirement age for judges).

<sup>19</sup> *See* MASS. CONST. ch. III, art. I.

<sup>20</sup> *See, e.g.*, H.B. 652, 184th Sess. (Mass. 2005); H.B. 4944, 184th Sess. (Mass. 2005); *see also* Elise Castelli, *Gay Marriage Ruling Still in Crosshairs*, BOS. GLOBE, Aug. 27, 2004, at B3 (recounting protests by citizens and filing of bill by state legislator calling for removal of four justices); Matthew Rodriguez, *Protesters Urge Removal of SJC Justices*, BOS. GLOBE, Feb. 19, 2004, at B2 (recounting protest by citizens outside Supreme Judicial Court offices calling for removal of four justices).

Although I think I would have, the one thing I can say with certainty is that, given all the legal complexity and implications of the *Goodridge* decision and its progeny, I am grateful that the structure of the Massachusetts judiciary created an environment free of the pressure of reelection considerations.

It was in this heated climate that we had to respond, almost immediately, to an array of procedural and legal issues that the *Goodridge* case generated. Following the issuance of our opinion in late 2003, we stayed the entry of judgment for 180 days in order to allow the Legislature time to take the administrative and legal action necessary to implement it.<sup>21</sup> This made its effective date May 17, 2004. As you might expect, there were several attempts to postpone, limit, or overrule the decision before it could take effect.

Less than one month after the *Goodridge* decision was issued, the Massachusetts Senate asked our court for an advisory opinion. It wanted us to determine whether a proposed bill that would prohibit same-sex marriages but allow same-sex civil unions would comply with the Massachusetts Constitution and the Massachusetts Declaration of Rights.<sup>22</sup> In another 4-3 decision, issued in February 2004, we found that such a law would be void because it would create second-class status for same-sex couples, which we determined was prohibited by the Massachusetts Constitution.<sup>23</sup>

Faced with these decisions, the Legislature then considered amending the Massachusetts Constitution.<sup>24</sup> The proposed amendment would have banned same-sex couples from entering into marriages but provided civil unions as an alternative.<sup>25</sup>

The Legislature's deliberations raised a procedural issue in our court. One month before the effective date permitting same-sex couples to marry, C. Joseph Doyle, the executive director of the Catholic Action League of Massachusetts, filed a petition asking that

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<sup>21</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003).

<sup>22</sup> Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004). Pursuant to Part II, chapter 3, article 2 of the Massachusetts Constitution, as amended by article 85 of the Amendments, the branches of the Legislature, as well as the Governor and others, may "require" opinions of the justices. *Id.* at 566-67. Here, the Senate asked the court whether its proposed bill "compl[ie]d with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights." *Id.* at 566.

<sup>23</sup> *Id.* at 570-71.

<sup>24</sup> See *Doyle v. Goodridge*, 827 N.E.2d 1255, 1256 n.2 (Mass. 2005) (noting that efforts to amend state constitution began in February 2004).

<sup>25</sup> Legislators approved the amendment in 2004. Rick Klein, *Vote Ties Civil Union to Gay-Marriage Ban*, BOS. GLOBE, Mar. 30, 2004, at A1. The next year, the amendment was defeated. Raphael Lewis, *After Vote, Both Sides in Debate Energized*, BOS. GLOBE, Sept. 15, 2005, at A1.

the stay in *Goodridge* be extended “pending the outcome of the process to amend the [state] Constitution.”<sup>26</sup> The petition was to be heard by a single justice who, in our court, functions on a rotating basis as an emergency appellate judge to provide extraordinary relief when no other avenue is available to a petitioner.<sup>27</sup> As fate would have it, the rotation called for me to serve as Single Justice at the hearing on this petition.

I denied the petition on several grounds. First and foremost, I concluded that a single justice did not have the authority to change a specific directive issued by the full court.<sup>28</sup> I also took the occasion to explain why I would deny the petition even if I had the power to stay a full court directive. Given the formal process for amending the state constitution in Massachusetts, any stay would necessarily have to last a minimum of two years.<sup>29</sup> In my Memorandum and Order, I concluded that this was unreasonable. I posed the question:

Why should same-sex couples, who have been determined to have the right to marry under the Massachusetts Constitution as it exists here and now, be required to wait to exercise that right simply because the petitioner and others hope . . . to be able to amend the Constitution and take away that right at some point in the future?<sup>30</sup>

Mr. Doyle appealed my decision to the full court, as was his right.<sup>31</sup> His request for an expedited appeal was denied, and argument was held in the spring of 2005, nearly one year after the initial 180-day stay had expired.<sup>32</sup> In reviewing my decision as Single Justice, my colleagues held, in a unanimous decision, that Doyle’s appeal was moot. However, they went on to observe that “[e]ven if we were to consider the point on the merits, we would conclude that the single justice was

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<sup>26</sup> Petition for Stay of Entry of Judgment and Request for Hearing Before Single Justice at 1–2, *Doyle v. Marshall, recaptioned as Doyle v. Goodridge*, No. SJ-2004-0169 (Mass. Apr. 20, 2004).

<sup>27</sup> See MASS. GEN. LAWS ANN. ch. 211, § 3 (West 2005) (describing court’s power of superintendence).

<sup>28</sup> *Doyle v. Goodridge*, 827 N.E.2d 1255, 1256 (Mass. 2005).

<sup>29</sup> *Id.* Any amendment, whether introduced by a legislator or by initiative petition, must be approved by a certain number of legislators in two consecutive legislative sessions, after which the citizens of Massachusetts would vote on the measure in the next general election. See MASS. CONST. art. 48, pt. 4, §§ 4–5 (describing amendment process); see also *supra* note 7 (discussing process for amending state constitution by initiative petition).

<sup>30</sup> *Doyle v. Goodridge*, SJ-2004-0169, Memorandum and Order, at 4–5. A copy of the full Order is in the Appendix to this Lecture. The other grounds on which I stated that I would deny the petition were that it was improper for a nonparty to attempt to amend, alter, or stay an appellate court’s rescript; that Doyle’s claim that his ability to participate in the constitutional amendment process would be diluted if a stay were not granted was speculative and remote; and that he lacked standing. *Doyle*, 827 N.E.2d at 1256.

<sup>31</sup> *Doyle*, 827 N.E.2d at 1256.

<sup>32</sup> *Id.* at 1256 & n.4.

correct and well within his discretion in denying Doyle's request for the reasons given."<sup>33</sup>

In the spring of 2004, at about the same time as Mr. Doyle's petition to the Single Justice was filed, eleven members of the Massachusetts Legislature and a private Massachusetts citizen filed suit in federal court seeking to enjoin the implementation of the *Goodridge* decision.<sup>34</sup> They argued that the decision violated their rights under the U.S. Constitution, including their right to a republican form of government. Their argument was premised on the assumption that the *Goodridge* decision violated the separation of powers principles of the Massachusetts Constitution and, thus, the Federal Constitution.<sup>35</sup>

The Court of Appeals for the First Circuit rejected the separation of powers argument. It stated, "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."<sup>36</sup> The U.S. Supreme Court denied a petition for certiorari.<sup>37</sup> The federal courts' recognition that same-sex marriage was an appropriate issue for our court to consider seemed to have put to rest, at least legally, any notions that our court had exceeded its power.

In 2006, a group of Massachusetts citizens responded again to our *Goodridge* decision by sponsoring an initiative petition to amend the Massachusetts Constitution to ban same-sex marriage. The Attorney General certified the amendment, a procedure required when citizens petition to amend our Constitution. Almost immediately, proponents of same-sex marriage challenged the Attorney General's certification.<sup>38</sup> They argued that, in this instance, the procedure was constitu-

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<sup>33</sup> *Id.* at 1256.

<sup>34</sup> *Largess v. Supreme Judicial Court of Mass.*, 373 F.3d 219, 222 (1st Cir. 2004), *cert. denied*, 543 U.S. 1002 (2004). The initial complaint was filed in federal district court, which denied the plaintiffs' requested relief. *Largess v. Supreme Judicial Court of Mass.*, 317 F. Supp. 2d 77 (D. Mass. 2004).

<sup>35</sup> *Largess*, 373 F.3d at 223. The plaintiffs argued that by defining marriage to include same-sex couples, the *Goodridge* court had impermissibly altered the state constitution. In addition, they argued that it is the prerogative of the legislature to define the term "marriage." *Id.* The district court denied the plaintiffs' request for injunctive and other relief, which the Court of Appeals for the First Circuit affirmed. The plaintiffs also sought an injunction from the Court of Appeals for the First Circuit pending their appeal from the district court's denial of their request for relief, which also was denied. *Id.* at 223–24.

<sup>36</sup> *Id.* at 229.

<sup>37</sup> *Largess*, 543 U.S. at 1002.

<sup>38</sup> The proponents of same-sex marriage filed a petition, and a single justice of the court reported the issue to the full court. *Schulman v. Att'y Gen.*, 850 N.E.2d 505, 506 (Mass. 2006) (citing MASS. CONST. art. 48, pt. 2, § 3, as amended by article 74 of Amendments).

tionally prohibited because a provision in our state Constitution disallows initiative petitions if they are used, in effect, to reverse judicial decisions.<sup>39</sup> When we heard the appeal, we concluded that, in this instance, the attempt to amend the Massachusetts Constitution in response to *Goodridge* did not constitute a prohibited “reversal” of that decision.<sup>40</sup>

Although I agreed with the decision, given the narrow grounds on which it was based, I joined a concurring opinion, authored by the now-retired Justice John M. Greaney. That opinion stated that if the amendment were to be enacted, the court

may then give careful consideration . . . to the legal tenability and implications of embodying a provision into our Constitution that would look so starkly out of place in the Adams Constitution, when compared with the document’s elegantly stated, and constitutionally defined, protections of liberty, equality, tolerance, and the access of all citizens to equal rights and benefits.<sup>41</sup>

The importance of our decision affirming the certification of the initiative petition was that the proposed constitutional amendment to ban same-sex marriage could be sent to the Legislature for action, which it was. However, when it seemed that no action was going to be taken on the initiative amendment, there was yet another suit asking our court to order the Legislature to vote on it.<sup>42</sup> We dismissed that complaint unanimously because we could not grant relief against the Legislature for inaction on an initiative amendment.<sup>43</sup> We observed, nevertheless, that elected legislators had a duty to vote on the merits of the initiative amendment.<sup>44</sup>

The Legislature waited to vote on the proposed initiative amendment until the last day of the 2006 legislative session.<sup>45</sup> There was intense media coverage of the hundreds of demonstrators on both sides of the issue who rallied outside the State House each time the

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See *supra* note 7 for a discussion of the first initiative petition that was filed concerning same-sex marriage.

<sup>39</sup> *Id.* at 506–07 (citing MASS. CONST. art. 48, pt. 2, § 2).

<sup>40</sup> *Id.* at 511.

<sup>41</sup> *Id.* at 512–13 (Greaney, J., concurring). In a footnote, Justice Greaney further pointed out that such an amendment could be vulnerable on federal constitutional grounds as well, in light of *Romer v. Evans*, 517 U.S. 620 (1996). *Id.* at 513 n.3.

<sup>42</sup> *Doyle v. Sec’y of the Commonwealth*, 858 N.E.2d 1090 (Mass. 2006). One of the plaintiffs in this case was then-Governor Mitt Romney. *Id.* at 1090 n.1. The plaintiffs filed a petition with the Single Justice who reported the matter to the full court. *Id.* at 1092.

<sup>43</sup> *Id.* at 1095–96.

<sup>44</sup> *Id.*

<sup>45</sup> See Frank Phillips & Lisa Wangsness, *Same-Sex Marriage Ban Advances*, BOS. GLOBE, Jan. 3, 2007, at A1 (discussing events surrounding vote).

Legislature was considering an amendment.<sup>46</sup> The 2006 initiative amendment passed, setting the stage for a required second vote in 2007. The amendment ultimately failed in 2007, when the second vote was taken.<sup>47</sup> Although petitions may be brought in the future, the defeat of the amendment seemed to quiet the public reaction.

The legal issues our court had to address did not end with the implementation of *Goodridge*. Within one month of same-sex couples being allowed to marry, two lower court actions were filed against the Department of Health and others in *Cote-Whitacre v. Department of Public Health*.<sup>48</sup> The parties challenged part of a Massachusetts marriage statute which provided that, if a couple planned to marry in Massachusetts but intended to reside in another state, their Massachusetts marriage would be “null and void” if the marriage would be void in the other jurisdiction.<sup>49</sup>

Although on the books since 1913, the statute in question<sup>50</sup> had not been enforced routinely over the intervening years.<sup>51</sup> Traditionally, municipal clerks had enforced the provisions only by asking applicants to take an oath affirming that the information on their marriage license was true.<sup>52</sup> Then, after directing the applicants’ attention to a list of specific legal impediments, the applicants were asked to answer whether any legal impediment was applicable.<sup>53</sup> After *Goodridge*, clerks were notified that they had to request proof of resi-

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<sup>46</sup> See, e.g., Scott Allen, *Romney Seeks To Force Gay Marriage Vote*, BOS. GLOBE, Nov. 20, 2006, at A1; Alfonso Serrano, *Mass. Lawmakers Block Gay Marriage Vote*, CBS NEWS, June 14, 2007, <http://www.cbsnews.com/stories/2007/06/14/national/main2929492.shtml>; *Gay Marriage Stays Legal in Bay State* (WCVB television broadcast June 14, 2007).

I watched a televised legislative debate on one of the amendments, where a number of legislators spoke for and against it. Some legislators reported that how they voted would determine whether or not they were reelected.

<sup>47</sup> See *supra* notes 7 and 29 (discussing process for amending state constitution by initiative petition); see also Frank Phillips & Andrea Estes, *Right of Gays To Marry Set for Years To Come*, BOS. GLOBE, June 15, 2007, at A1 (discussing defeat of constitutional amendment that would ban same-sex marriage).

<sup>48</sup> 844 N.E.2d 623, 631 (Mass. 2006). The actions were consolidated on appeal. The parties in one case were eight nonresident same-sex couples who were denied marriage licenses. The parties in the other case were thirteen municipal clerks who were challenging a new directive concerning the process of issuing marriage licenses to nonresidents. *Id.*

<sup>49</sup> *Id.* at 632 (citing MASS. GEN. LAWS ch. 207, § 11 (1913)).

<sup>50</sup> *Id.* (citing MASS. GEN. LAWS ch. 201, §§ 11, 12 (1913)).

<sup>51</sup> *Id.* at 660 (Ireland, J., dissenting).

<sup>52</sup> *Id.* at 669.

<sup>53</sup> *Id.* Other legal impediments that would prevent couples from obtaining a marriage license in Massachusetts included “age, consanguinity or affinity, [and] mental incompetence.” *Id.* at 636 & n.9 (Spina, J., concurring). Before *Goodridge*, clerks were instructed not to ask for documentation of impediments such as proof of citizenship, age, or divorce. *Id.* at 669 (Ireland, J., dissenting).

dence.<sup>54</sup> Although this request for proof of residence was asked of everyone, it had repercussions only for same-sex couples.<sup>55</sup>

Six of the seven Justices agreed that nonresident, same-sex couples could be denied a marriage license if their state of residence prohibited same-sex marriage.<sup>56</sup> I dissented.

My dissent was constructed as follows: (1) a neutral, principled approach had to be used by appellate courts to decide cases; (2) my court had articulated such an approach in *Goodridge* when we held that the liberty and equality provisions of the Massachusetts Constitution prohibited gender distinction with respect to marriage; (3) principles of gender equality applied to the entire marriage statute; (4) principles of comity did not require rejection of marriage applications from nonresident, same-sex couples; and (5) resurrecting and selectively enforcing a moribund statute to bar such marriages offended notions of equal protection and fundamental fairness.<sup>57</sup>

I also was aware that this 1913 statute had been enacted at a time when some states were trying to prohibit interracial marriage. Although there was nothing in the available record to prove that racial animus was behind its passage in Massachusetts, I was cognizant of it as an undercurrent.<sup>58</sup>

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<sup>54</sup> Elizabeth Mehren, *Massachusetts Governor Wants 1913 Law Invoked*, L.A. TIMES, May 22, 2004, at A13.

<sup>55</sup> See *Cote-Whitacre*, 844 N.E.2d at 669 (Ireland, J., dissenting).

<sup>56</sup> *Id.* at 631. Same-sex plaintiff couples from two states, New York and Rhode Island, had their cases remanded to a Massachusetts Superior Court for a determination as to whether those states prohibited same-sex marriage. *Id.* Ultimately, same-sex couples from Rhode Island and New Mexico were allowed to wed in Massachusetts. David Abel, *Same-Sex Couples from N.M. Allowed To Marry in Mass.*, BOS. GLOBE, July 27, 2007, at B3. The Massachusetts Legislature overruled our court's decision. See *infra* note 71 and accompanying text; cf. *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006) (holding that New York Constitution did not "compel recognition" of same-sex marriages and that issue should be addressed by Legislature).

<sup>57</sup> See *Cote-Whitacre*, 844 N.E.2d at 660–61 (Ireland, J., dissenting).

<sup>58</sup> See Editorial, *Marriage Rites and Wrongs*, BOS. GLOBE, Apr. 1, 2006, at A10 (noting that 1913 statute was enacted during time when many states prohibited interracial marriage).

In her book, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* (2009), Professor Peggy Pascoe chronicles the proliferation of miscegenation laws arising in the wake of the defeat of Jim Jeffries, the "Great White Hope," by the African American prizefighter Jack Johnson for the 1910 heavyweight championship. *Id.* at 164. Controversy surrounded Johnson's escapades with white women, including his two marriages in 1911 and 1912, the first of which ended in his wife's suicide. *Id.* at 164–65. His conduct was decried nationally, and at a 1912 state governors meeting in Richmond, Virginia, the sentiment was that miscegenation laws were an absolute necessity:

The governor of Utah referred to interracial marriage as "one of the most disgraceful crimes of modern times." Not to be outdone, the governors of New York, Ohio, Connecticut, *Massachusetts*, and Pennsylvania, northern states with no miscegenation laws on their books, proclaimed their willingness to

In any event, there was precedent in Massachusetts that, when a state constitutional right was at stake, the court should recognize that right for nonresidents.<sup>59</sup> In 1836, our court held that the liberty afforded to residents under the Massachusetts Constitution extended to a nonresident, child slave from Louisiana named Med, who had traveled to Massachusetts.<sup>60</sup> At the time of this decision, slavery was sanctioned by the Constitution of the United States.<sup>61</sup> Although the court acknowledged that if Med had returned to Louisiana, her freedom would no longer be protected by the Massachusetts Constitution, it still granted her protection while she was present in Massachusetts.<sup>62</sup> I concluded that the case “established the principle that a liberty or right under the Constitution of Massachusetts . . . [could] be extended to others who travel here from other States, regardless whether their home States deny them those same rights.”<sup>63</sup>

In addition, I pointed out that the change in procedure for the statute’s enforcement had occurred in a heated political climate.<sup>64</sup> Then-Governor Mitt Romney had made numerous pronouncements through local and national media, expressing strong disagreement with the *Goodridge* decision.<sup>65</sup> Indeed, he wrote an opinion piece in the *Wall Street Journal* on February 5, 2004, “urging readers to support ‘defense of marriage’ legislation; ‘[b]eware of activist judges’; and support the passage of a federal constitutional amendment to prevent gay marriage.”<sup>66</sup> He also “wrote a letter to the Governors and Attorneys General of every State declaring that [Massachusetts] would not issue a marriage license to a nonresident same-sex couple without an ‘authoritative statement’ from the couple’s [s]tate.”<sup>67</sup> He even filed emergency legislation that would allow him to personally address our court “to seek a stay of *Goodridge* pending the resolution of a pro-

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enact them. As [the governor] of Pennsylvania declared, “Any law to prevent the mixture of races of different colors has my hearty approval.”

*Id.* at 166 (emphasis added). Pascoe’s information was taken, in part, from Proceedings of the Fifth Meeting of the Governors of the States of the Union Held at Richmond, Virginia, Dec. 3–7, 1912. *Id.* at 166 n.14.

<sup>59</sup> *Cote-Whitacre*, 844 N.E.2d at 667–68 (Ireland, J., dissenting).

<sup>60</sup> *Id.* at 668 (citing *Commonwealth v. Aves*, 18 Mass. (1 Pick.) 193 (1836)).

<sup>61</sup> *Id.* at 667.

<sup>62</sup> *Id.* at 668.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 670.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (quoting Mitt Romney, *A Citizen’s Guide to Protecting Marriage*, WALL ST. J., Feb. 5, 2004, at A12); see also Raphael Lewis, *Romney Urges Federal Ban on Gay-Marriage ‘Experiment,’* BOS. GLOBE, June 23, 2004, at A1 (discussing Governor Romney’s testimony concerning proposed constitutional amendment at hearing of Judiciary Committee of United States Senate).

<sup>67</sup> *Cote-Whitacre*, 844 N.E.2d at 670.

posed constitutional amendment to limit marriage to one man and one woman.”<sup>68</sup> In a statement advocating the amendment of the Massachusetts Constitution, he said that the matter was “too important to leave to a one-vote majority of the SJC.”<sup>69</sup> I concluded in my dissent that the animus behind the resurrection of the statute was “deeply rooted in discriminatory notions of marriage,” which had been “soundly rejected” by our court.<sup>70</sup>

As it turned out, the Massachusetts Legislature effectively overturned the *Cote-Whitacre* case in July 2008, when it repealed the 1913 law that had prevented nonresident same-sex couples from marrying in Massachusetts, and Governor Deval Patrick signed it.<sup>71</sup> Although the Legislature had considered repealing this law in 2005,<sup>72</sup> I would like to think that my dissent in *Cote-Whitacre* was a factor in its 2008 decision to do so.

## II

### THE PERSONAL DIMENSION

Thus far, I have chronicled the political and legal aftermath of the *Goodridge* case. To characterize its wake as turbulent would not be inconsistent with the reality of the public reaction to it. I thought I would now share some details about the manner in which the case spilled over into my personal life and discuss the challenges that judges face in deciding difficult cases.

First, from the time the public became aware that *Goodridge* was going to be argued before our court, many, many people felt free to tell me what they thought. We are not allowed to discuss cases that are likely to come before us,<sup>73</sup> so these expressions of opinion were always one-sided. I heard from family, friends, members of my church, lawyers, my barber, cabdrivers, and even complete strangers. Everyone had an opinion and, once the decision was issued, I heard even more from them about the way I had voted. I had to explain to

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<sup>68</sup> *Id.* The Senate rejected this bill. See GEN. COURT ASSEM., JOURNAL OF THE SENATE, May 13, 2004, at 10, available at <http://www.mass.gov/legis/journal/sj051304.htm>.

<sup>69</sup> Press Release, Mitt Romney, Governor of Mass., Statement from Governor Mitt Romney on SJC Opinion (Feb. 4, 2004) (on file with the New York University Law Review).

<sup>70</sup> *Cote-Whitacre*, 844 N.E.2d at 671.

<sup>71</sup> See 2008 Mass. Acts ch. 216 (repealing MASS. GEN. LAWS ch. 207, §§ 11–13, 50), available at <http://www.mass.gov/legis/laws/seslaw08/sl080216.htm>.

<sup>72</sup> See H.B. 806, 184th Sess. (Mass. 2005), available at <http://www.mass.gov/legis/bills/house/184/ht00pdf/ht00806.pdf>.

<sup>73</sup> RULES OF THE SUPREME JUDICIAL COURT Canon 3(B)(9), 440 Mass. 1301, 1311 (2003).

my elderly mother, and even to my father-in-law, a retired state court judge, why I had voted the way I did.

Name-calling abounded, as already discussed. I received hundreds of letters and emails, some containing death threats not only against me, but also against my family. Because of these threats, when I spoke at Boston University for its 2004 Martin Luther King, Jr. Day program, a car service with an armed guard was sent to pick me up.

Later that spring, my home mailbox, including the post, mysteriously disappeared. As a result, the State Police installed a surveillance camera in a bedroom window, trained on my driveway, which stayed for many months thereafter.

Of course, some individuals were not satisfied by simply writing letters or engaging in public demonstrations. One group of people came to my church on back-to-back Sundays and disrupted the service.<sup>74</sup> My church is located in the heart of a black community in Boston, and its members are almost all African Americans. I have attended this church, and have been an active member of it, for almost forty years. My children were raised in this church. I have participated in most aspects of its communal life, from singing in the choir to serving as president of the men's group. I was sworn into the Massachusetts Appeals Court in this church, and my wife, Alice, and I were married there. I attend services almost every week for spiritual nurture and fellowship. Until these intrusions, I had always considered my church as sacred ground.

The group that came sought to have the church rescind my membership and to obtain the congregation's assistance in petitioning to remove me from the bench. After their first visit, I talked with the State Police but declined an offer to have an officer stationed in the church. When the group returned the next week with more of their supporters, they disrupted the service again. This nearly started a riot in the church. Although no physical violence actually erupted, the group's presence was disconcerting. I have often wondered about the group's sense of entitlement and privilege in coming to a black church, in the heart of a black community, and whether it would have done the same in a white church, in an upper-income community. I am not aware that my colleagues in the *Goodridge* majority had to endure a similar intrusion into their personal space, but that is a topic for another day.

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<sup>74</sup> The group was headed by J. Edward Pawlick, the founder of *Massachusetts Lawyers Weekly*, and his wife. See *supra* note 17 (discussing this group's radio campaign calling on four justices to resign or be removed). See generally Steve Bailey, *View from the Fringe*, BOS. GLOBE, Apr. 14, 2004, at D1 (describing Pawlick's activities).

It took a long time for the furor over the *Goodridge* decision to die down. The Legislature, so far, has defeated numerous proposed amendments to the Massachusetts Constitution that would curtail the rights of same-sex couples to marry.<sup>75</sup> We now have a governor who supports same-sex marriage. And, as I stand here today, several states have legalized same-sex marriage, either through legislation or by court decision, including Vermont, Connecticut, New Hampshire, and Iowa.<sup>76</sup> Washington, D.C. allows same-sex marriage as well.<sup>77</sup> California, New York, and Washington, D.C., have acted to recognize same-sex marriages performed elsewhere.<sup>78</sup> To my relief, these devel-

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<sup>75</sup> In July 2008 the Massachusetts Attorney General filed a suit in federal district court for the District of Massachusetts challenging the constitutionality of section 3 of the 1996 Federal Defense of Marriage Act (DOMA). The complaint alleged, inter alia, that DOMA interferes with the sovereign authority of Massachusetts to define and regulate the marital status of its residents. Press Release, Martha Coakley, Att’y Gen., Massachusetts Attorney General Martha Coakley Files Constitutional Challenge to Federal Defense of Marriage Act (July 8, 2008) (on file with the New York University Law Review). In February 2010, she filed a motion asking the judge to deem the law unconstitutional without holding a trial. Denise Lavoie, *Coakley Challenges Federal Marriage Act*, BOS. GLOBE, Feb. 20, 2010, at B3.

On July 8, 2010, United States District Judge Joseph L. Tauro held that DOMA was unconstitutional, stating, inter alia, that it “induces [Massachusetts] to violate the equal protection rights of its citizens” and “plainly intrudes on a core area of state sovereignty, the ability to define the marital status of its citizens.” Michael Levenson, *Judge Rejects Gay Marriage Curb*, BOS. GLOBE, July 9, 2010, at A1 (quoting *Massachusetts v. Dep’t of Health & Human Servs.*, No. 1:09-11156-JLT, 2010 WL 2695668, at \*10–11 (D. Mass. July 8, 2010)).

<sup>76</sup> New Hampshire and Vermont enacted legislation to allow for same-sex marriage. N.H. REV. STAT. ANN. § 457:1-a (Supp. 2009); VT. STAT. ANN. tit. 15, § 8 (Supp. 2009). See generally David Abel, *Vermont Legalizes Same-Sex Marriage*, BOS. GLOBE, Apr. 8, 2009, at B1; John Curran, *In Vt., Same-Sex Couples Rush To Wed*, BOS. GLOBE, Sept. 2, 2009, at B2; Eric Moskowitz, *N.H. Ties Gay-Marriage Knot*, BOS. GLOBE, June 4, 2009, at B1.

The courts of Connecticut and Iowa recognized the right of same-sex couples to marry. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

<sup>77</sup> Jessica Gresko, *Gay Couples Ready To Tie Knot in D.C.*, BOS. GLOBE, Mar. 4, 2010, at A8.

<sup>78</sup> The Washington, D.C. law went into effect on July 7, 2009. D.C. CODE ANN. § 46-405.01 (LexisNexis Supp. 2010); *D.C. Recognizes Gay Marriages Elsewhere*, BOS. GLOBE, July 8, 2009, at A2; see also *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 744 (2008) (recognizing in New York same-sex couple’s marriage in Canada), *appeal denied*, 889 N.E.2d 496 (N.Y. 2010). In November 2009, the New York Court of Appeals affirmed a policy that granted same-sex couples legally married elsewhere entitlement to certain government benefits. *Godfrey v. Spano*, 920 N.E.2d 328 (N.Y. 2009); see also Michael Gormley, *Court Gives Gay Spouses Benefits*, BOS. GLOBE, Nov. 20, 2009, at A8 (discussing *Godfrey*).

Although the citizens of California amended their state constitution to define marriage as the union of one man and one woman, the state supreme court ruled that this amendment could not be used to invalidate marriages that were performed prior to the amendment’s enactment. *Strauss v. Horton*, 207 P.3d 48, 64 (Cal. 2009). On October 11, 2009, Governor Arnold Schwarzenegger signed a bill recognizing marriages performed in

opments have taken the focus off Massachusetts and the SJC as the exclusive seat of the same-sex marriage debate.

Reflecting on all of this, I have developed a keener appreciation of the kinds of challenges judges face when they are considering controversial issues that are before them. The same-sex marriage cases amplified these challenges, which I would like to address briefly before concluding my remarks.

### III

#### TACTICAL APPROACH TO CONTROVERSIAL DECISIONS

##### *A. Dealing with Hostile Public Reaction*

Our opinions do not always meet with public approval but, of course, such approval is not a goal we seek when deciding a case, particularly one involving highly controversial issues. Although some of the threats that I personally endured were disconcerting, to say the least, I viewed most of the public and private actions and comments as democracy in action. This mindset helped me to focus on the actual issues in the cases, and not on the spin ascribed to them by the media and others. While this mindset did not alleviate every aspect of the discomfort I felt, it made me appreciate more fully my unique role as a jurist, as well as that of the judiciary in our larger democratic process.

##### *B. Protecting the Integrity of the Court*

No matter how difficult the case, no matter how controversial the issue, and no matter how intense the scrutiny of the media, the integrity of the court as an institution must remain a judge's paramount concern. Our actions as jurists must be consistent with this principle.

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other states between June 16 and November 5, 2008, the period when California performed same-sex marriages (i.e., before the passage of the constitutional amendment banning same-sex marriage). CAL. FAM. CODE § 308 (West Supp. 2010); see also *California Bill To Recognize Some Same-Sex Marriages*, CNN, Oct. 12, 2009, <http://www.cnn.com/2009/US/10/12/california.samesex.marriage/index.html>. I also note that Maine's legislature enacted legislation to allow same-sex marriage, but the law was repealed in November 2009 by referendum. Maria Sacchetti, *Maine Voters Overturn State's New Same-Sex Marriage Law*, BOS. GLOBE, Nov. 4, 2009, at B10.

Although not addressing same-sex marriage, I note that in November 2009, the city council of Salt Lake City, Utah unanimously voted for ordinances to protect homosexual and transgendered residents from discrimination in housing and employment, the first such laws in Utah. The ordinances were openly supported by the Church of Jesus Christ of Latter Day Saints (LDS), whose spokesperson stated that they "are fair and reasonable and do not do violence to the institution of marriage." Matt Canham, Derrick P. Jensen & Rosemary Winters, *Salt Lake City Adopts Pro-Gay Statutes—With LDS Church Support*, SALT LAKE TRIB., Nov. 11, 2009 (on file with the New York University Law Review). The LDS Church had backed California's Proposition 8. *Id.*

My court interprets the Massachusetts Constitution—that is what we are sworn to do, to the best of our abilities.<sup>79</sup> As judges, we must learn not to take criticism from the public, media, litigants, or politicians personally. Keeping my focus on protecting the integrity of my court helped me to do the job expected of a person in my position.

### C. *Maintaining Impartiality*

Judges ordinarily do not make public statements about cases before them, as those statements may suggest a predisposition to a particular outcome, even when it is not intended. During the process of analyzing this case, I tried to be true to the law and how I interpreted it. I kept in mind that my duty was to discover and apply the law that I believed governed the issue. This helped me keep my personal feelings out of my analysis and helped me to have the open-mindedness that is so necessary for maintaining impartiality.

Written articles sometimes pose a potential problem. As an example, I was a little nervous about a law review article that I had written on how our court interprets the Massachusetts Constitution.<sup>80</sup> Even though it focused on a criminal case, and even though I had written it long before the *Goodridge* case came before us, I became concerned about the timing of its release relative to *Goodridge*, and in particular that someone might misquote it to show that I had some sort of predisposition. Fortunately, it was released several months after *Goodridge* and did not cause any stir. Yet, this still gave me pause—I could see how easy it is for even the most innocuous event to become an unwitting part of the debate at hand.

### D. *Preserving Relationships with Colleagues Despite Disagreements*

I have always understood that my relationships with my colleagues will continue after each case we decide. So, no matter how strongly I may feel about a case or issue, I am careful not to burn any bridges. I am fond of saying that the judge with whom I disagree today may be the judge who agrees with me tomorrow. I kept all of this in mind while working on the same-sex marriage cases.

I also was careful, as I always try to be, to understand and consider all viewpoints before drawing my conclusions and rejecting those contrary to mine. Indeed, grappling with opposing viewpoints helped

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<sup>79</sup> See, e.g., *Horton v. Att’y Gen.*, 169 N.E. 552, 554 (Mass. 1930) (interpreting state constitution).

<sup>80</sup> Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution To Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405 (2004).

me to sharpen and strengthen my own analysis. Nevertheless, there were times when disagreements could not be resolved, and in these instances, I had to “call them the way I saw them,” legally speaking, in order for our system to function properly. In the end, however, mutual respect and collegiality—that is, knowing how to disagree without being disagreeable—benefit the court and, ultimately, the public whom we serve.

### *E. Moving On After the Decision*

To quote one of my former colleagues at the Massachusetts Appeals Court, “Lay the egg and then move on.” This means that after due reflection, you make a decision to the best of your ability, and then move on to the next case on the docket. It may be hard to believe, but I really did move on, not only after *Goodridge*, but also after each case that arose in its wake. The “egg rule” is a good one that is born of necessity. Judges really do not have time to dwell on cases once they are decided. Other parties who have legal issues that may not be as publicly controversial also need—and deserve—the court’s attention and guidance.

### CONCLUSION

It is axiomatic to say that difficult social issues make their way to courts precisely because they are difficult. At this time in our country’s history, when forty-one out of fifty states have either defense of marriage laws or constitutional amendments banning same-sex marriage,<sup>81</sup> I think everyone can agree that same-sex marriage is one of those “difficult social issues.” In terms of the reaction by the public, politicians, and media, it reminds me of the prolonged struggle for civil rights that I have witnessed during my lifetime.

When I was born in December 1944, segregation was legal. I was nine when the first *Brown* decision desegregating schools was handed down.<sup>82</sup> I grew up in the climate of violent resistance to desegregation and racial equality.<sup>83</sup> I was ten, visiting my grandparents in South Carolina during the summer that Emmett Till, a fourteen-year-old boy from Chicago, was murdered for reportedly whistling at a white

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<sup>81</sup> HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2010), available at [www.hrc.org/documents/marriage\\_prohibitions\\_2009.pdf](http://www.hrc.org/documents/marriage_prohibitions_2009.pdf).

<sup>82</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896), and holding that racial segregation in public schools violated Equal Protection Clause of Fourteenth Amendment).

<sup>83</sup> Even in Massachusetts I was told, as a high school student, that the best I could hope for was to be an auto mechanic. To this day, I shudder to think of what would have happened to the people whose vehicles I worked on.

woman in Mississippi.<sup>84</sup> To say that those summer visits to the South were worrisome to my parents would be an understatement. I was a young adult before Congress passed the most important civil rights bills in our country.<sup>85</sup> I was twenty-three, in law school, and married to a woman whose mother was white and whose father was black, before the U.S. Supreme Court declared bans on interracial marriage unconstitutional in the *Loving* case.<sup>86</sup>

The justices of the U.S. Supreme Court, including Justice Brennan, withstood passionate public resistance to desegregation. Relying on authority rooted in history, they read the U.S. Constitution to ensure that all citizens were treated equally, so that the promise of its protections would become a reality for everyone. I believe that the constitutionality of same-sex marriage at issue in *Goodridge* and its progeny also would have rung true for Justice Brennan who applied the principle of equality for all in the many decisions that he authored.<sup>87</sup> Discussing the U.S. Constitution, Justice Brennan once wrote:

For the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.<sup>88</sup>

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<sup>84</sup> See generally Richard Rubin, *The Ghosts of Emmett Till*, N.Y. TIMES, July 31, 2005, at F30 (stating that Till supposedly said something “fresh,” asked the woman for a date, or “wolf-whistled at her”). The men who were tried for Till’s murder were found not guilty by an all-white jury. *Id.*; see also STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* 16–17 (1988) (stating that exact interaction between Till and white woman was “a matter of continuing disagreement”).

<sup>85</sup> See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>86</sup> *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that miscegenation statute violated Equal Protection and Due Process Clauses of Fourteenth Amendment).

<sup>87</sup> See, e.g., *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968) (invalidating Virginia school district’s “freedom of choice” plan that was instituted eleven years after first *Brown* decision and years of resistance to desegregation of Virginia schools); *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding that Arkansas schools were bound by *Brown* cases because Court’s interpretation of Constitution is supreme law). According to Richard S. Arnold, Chief Justice of the United States Court of Appeals for the Eighth Circuit, who clerked for Justice Brennan, although *Cooper* was signed by all the Justices, Justice Brennan wrote most of it. Richard S. Arnold et al., *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 1, 6–7 (1997).

<sup>88</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

I think this concept of adapting the rights granted and protected by the Federal Constitution to new and emerging issues we face applies equally to state constitutions. Thus, I close with the words of Justice Brennan, as he spoke eloquently to the power of state constitutions, when he wrote:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.<sup>89</sup>

And with that thought, I will end. I thank you for the privilege and high honor of speaking here this evening. I appreciate the opportunity to share with you my experience with and reflections on the *Goodridge* case and its wake.

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<sup>89</sup> *Id.* at 491.

## APPENDIX

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
No. SJ-2004-0169

C. JOSEPH DOYLE

vs.

HILLARY GOODRIDGE et als.

MEMORANDUM AND ORDER

This matter came before me on the petition of C. Joseph Doyle requesting "an extension of the stay of entry of judgment in Goodridge v. Department of Pub. Health, 440 Mass. 309 (2003)." The petitioner also requested a hearing and a waiver of notice and timing requirements, or, in the alternative, a hearing before the full court. I have carefully considered the petition, oppositions, and reply submitted to me, noting that all of the parties in the Goodridge litigation oppose the petition on various procedural and substantive grounds.

The Goodridge decision was a decision of the full court, and the rescript in that case has already issued to the Superior Court. See Mass. R. A. P. 23, as amended, 367 Mass. 921 (1975) and Mass. R. A. P. 28, as amended, 378 Mass. 925 (1979). The

rescript sets forth the full court's directive to the Superior Court as to the judgment that shall be entered in this case and the specific timing of the entry of that judgment. The petitioner is asking, essentially, that I, as a single justice, alter the directive that has been given by the full court to the Superior Court. With the case in this posture -- the appeal already having been decided by the full court and the rescript having issued to the Superior Court -- I, as a single justice, do not have the authority to change the specific directive that is contained in the full court's rescript. Even if I had this authority, I would exercise my discretion to deny the relief sought for at least the following reasons.

First, as a matter of Massachusetts law, the petitioner cannot collaterally attempt to alter the full court's rescript in this fashion. He points to no authority, and I am aware of none, that permits an individual who is not a party in a case to attempt to alter, amend, or stay an appellate court's rescript in the case. The petitioner cites S.J.C. Rules 2:01 through 2:22, as amended, as the basis for his petition. He states that his "petition is brought pursuant to" these rules. These are simply the rules governing single justice practice in this court. Nothing in these rules purports to permit a petitioner to proceed in this fashion, attempting essentially to affect the outcome of a case in which he is not a party. I agree with the Department

of Public Health and its commissioner's assessment stated in their opposition to the petition, i.e., that this is, at base, an improper collateral attempt by a nonparty to alter the full court's rescript and to affect the outcome.

Second, the petitioner's claim that his right to participate in the constitutional amendment process will be diluted unless the judgment is stayed until that process has been completed, is insufficient as a matter of Massachusetts law to give him standing. "Not every person whose interests might conceivably be adversely affected is entitled to judicial review." Group Ins. Comm'n v. Labor Relations Comm'n, 381 Mass. 199, 204 (1980). "To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury." Slama v. Attorney Gen., 384 Mass. 620, 624 (1981). "Injuries that are speculative, remote, and indirect are insufficient to confer standing." Ginther v. Commissioner of Ins., 427 Mass. 319, 323 (1998). The petitioner's claim of injury in this case rests on his assumption that the constitutional amendment process currently underway will conclude with a given result. Because the process has only recently moved past the initial stage, because it must proceed through other stages over the course of years, and since the outcome at any stage is not certain, the petitioner's alleged injury can properly be described as both speculative and remote. See Slama v. Attorney Gen., *supra* at 625

(holding that city's claim of injury was insufficient to create standing, where its claim was premised on assumption that initiative petition would ultimately be approved by voters; reasoning that court could not speculate as to results of election). He therefore lacks standing under Massachusetts law. See also Barbara F. v. Bristol Div. of the Juvenile Court Dep't, 432 Mass. 1024 (2000).

Third, the petitioner's request for a stay that would endure for more than two years is simply unreasonable. The State constitutional amendment process, which began with the Legislature's consideration of proposed constitutional amendments in February, 2004, will not end until November, 2006, at the earliest.<sup>1</sup> If the Legislature does not approve the proposed amendment for a second time in its next session, what would be the fate of the stay; would the petitioner request additional stays? Why should same-sex couples, who have been determined to

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<sup>1</sup> Many of the petitioner's arguments for a stay seem to be predicated on an assumption that the full court was somehow unaware of the possibility that the Legislature could respond to the decision by proposing a constitutional amendment and, thus, that the court needs to reconsider or stay its decision in light of new developments. Amending the Constitution in response to a decision of the court is not new, and, therefore, the assumption is not only without merit, but also demonstrates a lack of understanding of this court's case history. See, e.g., Commonwealth v. Colon-Cruz, 393 Mass. 150, 151-152 (1984) (court declared death penalty impermissibly cruel under art. 26 of the Massachusetts Declaration of Rights and voters subsequently approved a constitutional amendment authorizing Legislature to impose death penalty for certain crimes).

have the right to marry under the Massachusetts Constitution as it exists here and now, be required to wait to exercise that right simply because the petitioner and others hope -- again, it is speculative at this point whether they will be successful -- to be able to amend the Constitution and take away that right at some point in the future?

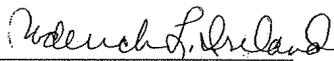
In sum, I conclude that a single justice does not have authority to alter a rescript of the full court. But even if I had the authority to alter the rescript and stay further the entry of the judgment in the Superior Court, I would decline to do so as a matter of my discretion because the petitioner has not demonstrated that he has any proper basis to be before this court, and, even if he had demonstrated that he has a basis to be before the court, his request for a stay for more than two years is unreasonable in these circumstances.

I also conclude that the petitioner improperly named the Supreme Judicial Court and the individual Justices of the court as parties in his petition. The court and the individual Justices are hereby designated as nominal parties only.

Cf. S.J.C. Rule 2:22.

Accordingly, it is ORDERED as follows:

1. The petition is DENIED; and
2. As the Justices and the court are nominal parties only, the case shall be recaptioned on the docket to reflect the real parties in interest, namely, C. Joseph Doyle vs. Hillary Goodridge, et als., and any future filings in this matter shall be so captioned.

  
Roderick L. Ireland  
Associate Justice

ENTERED: May 3, 2004