Rhetoric, Rationality, and Judicial Activism: The Case of Hillary Goodridge v. Department of Public Health

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This article considers the relationship between rhetoric and judicial activism. A term first coined by Arthur Schlesinger Jr. in 1947, the charge of judicial activism has become ubiquitous in modern political and legal discourse, frequently leveled at judicial opinions with which one disagrees. Despite focused attention from legal scholars in recent years, the term continues to defy easy definition. After surveying the relevant legal scholarship on judicial activism, this article considers a widely decried example of activism in action. Taking the 2003 case of Hillary Goodridge v. Department of Public Health as a case study, the authors examine the five judicial opinions, paying particular attention to how each justice justifies his or her decision with recourse to one of three rhetorical forms (legal analysis, the discourse of science, and public consensus). We conclude that the legitimacy of judicial activism is a function of particular rhetorical forms (and not others).

On November 18, 2003, the Massachusetts Supreme Court ruled that the state may not “deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry” (Hillary Goodridge v. Department of Public Health, 2003, 312). Titled Hillary Goodridge v. Department of Public Health, the case declared that Massachusetts General Law chapter 207 (G. L. c. 207), which contained a statute barring same-sex marriage, was unconstitutional. All told,
the four-to-three decision consisted of five separate opinions. Chief Justice Margaret H. Marshall penned the plurality opinion, or the opinion of the court. Justice John M. Greaney wrote a concurring opinion, in which he agreed with the decision of the court but for different reasons. Justices Francis X. Spina, Martha B. Sosman, and Robert J. Cordy each wrote separate dissenting opinions. Despite the bitter arguments dividing the justices, the court ultimately ruled for the plaintiffs and the case marked an important advance in the history of same-sex marriage. The extent of this advance might be measured by political scientist Alan Wolfe’s comment that the decision marked a political “earthquake,” ripe “material for a backlash” (Belluck 2003). The backlash came, and it came in a very particular form. From George W. Bush to Tony Perkins of the Family Research Council, the conservative response to Goodridge was couched primarily in terms of judicial activism. According to Perkins, Massachusetts conservatives were now the victims of a “tyrannical judiciary.” Given the fact that conservative anxieties over judicial activism have been nurtured with care since the 1965 Griswold v. Connecticut, it is perhaps not surprising that the Goodridge controversy took this form.

Unlike Griswold, Roe v. Wade, or Lawrence v. Texas, however, in which questions of judicial interference were introduced by protestors, malcontents, and others outside the judicial establishment, the Goodridge court explicitly thematized such questions. In a dissenting opinion joined by Spina and Sosman, Justice Cordy argued that the Goodridge court used “the liberty and due process clauses as vehicles merely to enforce its own views regarding better social policies, a role that the strongly worded separation of powers principle in art. 30 of the Declaration of Right of our Constitution forbids” (375). These were fighting words. Abrogating the separation of powers is often interpreted as the sine qua non of judicial activism. As Yale’s short-lived but widely celebrated Legal Affairs put it, “separation-of-powers activism” is today the “most powerful form of judicial activism” (Kerr 2003). Often called “legislating from the bench,” such activism is defined by the judicial appropriation of the lawmaking powers of the legislature.

Chief Justice Marshall got the point. In a direct reply to Cordy’s invocation of article 30, she shot back, “To label the court’s role as usurping that of the Legislature ... is to misunderstand the nature of judicial review” (338–339). To her mind, judicial intervention into legislative processes is hardly activism. Rather, it is the “traditional and settled role of the courts” and the very “purpose of judicial review” (339). Whether or not judicial intervention constitutes prima facie activism is a matter of some debate. What is beyond debate, however, is that the justices of Goodridge understood clearly that, in addition to the legality of same-sex marriage, at stake in the case was the reach of article 30, the jurisdiction of the court vis-à-vis the legislature, the relevance of the justices’ own conceptions of right and wrong, and, ultimately, the very “nature of judicial review.” Indeed, the primary—if
Rhetoric, Rationality, and Judicial Activism

not the only—issue separating the justices was a constitutional one: did the judiciary have the constitutional right to overturn Massachusetts G. L. c. 207, a statute created by a popularly elected legislature? In other words, at issue in Goodridge was the scope of judicial power. How far may it venture into the modification of public affairs without offending what (dissenting) Justice Spina called “judicial restraint” (355)? With the dissenting justices complaining that the court disregarded the separation of powers and substituted “its [own] notions of correct policy for that of a popularly elected Legislature” (364), it is easy to see why Hillary Goodridge v. Department of Public Health was received in terms of judicial activism.

Constitutionally speaking, Massachusetts G. L. c. 207 could be overturned only on one of two conditions. Chief Justice Marshall explained that the court evaluates the constitutionality of any given statute with recourse to one of two legal standards. To stand, a statute must first pass the “rational basis” test and then, if the statute involves a “fundamental right,” it also must pass “strict judicial scrutiny,” the more severe test. Although there was a good deal of argument about whether same-sex marriage constituted a “fundamental right,” the court ultimately decided that G. L. c. 207 needed to satisfy only the rational basis test (330–331, 354, 363, 379). This is a deferential test and, compared with “strict scrutiny,” it provides a slender and obstacle-ridden path to judicial intervention. As even the plurality acknowledged, the rational basis test requires only that “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose” (330).5 If the contested statute can thus be shown to have a “conceivable rational basis” (379) then it passes constitutional muster and judicial intervention is unwarranted. It is precisely because dissenting justices Sosman and Cordy identified a “conceivable rational basis” for G. L. c. 207 that they condemned the plurality opinion in terms that smacked of judicial activism: an unfair arrogation of legislative power (Sosman, 362), and a wholesale transformation of the judiciary (Cordy, 351).

Readers of this journal will be particularly interested in the modes of argumentation by which the various justices ascertained whether G. L. c. 207 served “a legitimate public purpose.” Significantly, the justices disagreed about more than whether the statute had a “conceivable rational basis.” More interesting rhetorically, they disagreed over the methods by which the rational basis of a statute (or lack thereof) could be demonstrated. At this level of inquiry, legal precedent was of little help. Although such precedent clearly stipulated the necessary application of (at least) the rational basis test, it provided far more leeway at the level of methodology. As it happened, each justice figured the rationality of G. L. c. 207 with recourse to the resources of particular rhetorical forms. Justices Marshall and Greaney invoked “legal analysis,” Justice Sosman relied on scientific knowledge, and Justice Cordy invoked public opinion. For each of these, the rationality of the statute, and thus the legitimacy (or illegitimacy) of judicial intervention,
was determined by the strengths and weaknesses of their chosen rhetorical forms.

What is a rhetorical form? For our purposes, a rhetorical form is best thought of in terms of Richard Rorty’s “vocabularies.” Comparing the competing rhetorical practices of Aristotle, Jefferson, Newton, and Freud (among others), Rorty insists that these competing rhetorical forms constitute discrete “language games” and therefore cannot be adjudicated with reference to the world itself: “The fact that Newton’s vocabulary lets us predict the world more easily than Aristotle’s does not mean that world speaks Newtonian.” More important for our purposes, Rorty argues that social change requires new vocabularies rather than simply new arguments. A “talent for speaking differently, rather than arguing well,” he wrote, “is the chief instrument of social change” (Rorty 1989, 5–6, 7).

Whether or not the justices had read Rorty, it seems that each knew the desired social change was predicated upon the court’s ability to, in Rorty’s words, “speak differently.” In our view, the justices of the Marshall Court did not simply advance competing arguments, they advanced competing vocabularies, or rhetorical forms. For example, justices Marshall and Greaney argued that legal analysis demonstrated the irrationality of the statute and thereby justified judicial intervention. Justices Sosman and Cordy, by contrast, argued that their chosen rhetorical forms—the discourses of science and public opinion, respectively—indicated a “conceivable rational basis” according to which the statute should be preserved. In sum, because the Goodridge case was a referendum on judicial intervention, and because the constitutionality of intervention was figured vis-à-vis the capacities of particular rhetorical forms, we suggest that, in a very concrete sense, *Hillary Goodridge v. Department of Public Health* can be read as a primer on the intersections of rhetoric, rationality, and judicial activism.

Understood as such a primer, the *Goodridge* opinions contain two valuable lessons for scholars of rhetoric and legal theory. First, they are a powerful reminder that rationality is not a disembodied characteristic of a legal statute. The rational basis of a statute is, at least in part, a function of the rhetorical mode by which it is described. And, if this much is true, then the *Goodridge* opinions also provide rhetorical scholars a second, broader lesson: in the vast majority of legal cases (all those not bearing on a “fundamental right”) judicial intervention is, in fundamental ways, a rhetorical practice. This is so not because justices who would intervene deploy arguments or seek to persuade (although these things are obviously true) but because the legitimacy of intervention has, in the *Goodridge* opinion, become a function of particular rhetorical forms. It was precisely—and only—the justices who disregarded the discourses of science and public opinion and who vested their entire arguments in legal analysis who called for an activism sufficient to overturn chapter 207.
JUDICIAL ACTIVISM, RATIONALITY, AND RHETORIC

As a means of explaining, critiquing, or commending the social role of the judicial branch of government, the term judicial activism dates to a 1947 Fortune magazine article by Arthur Schlesinger Jr. In it, Schlesinger categorized the members of the Supreme Court as “Judicial Activists” (justices Black, Douglas, Murphy, and Rutledge), “Champions of Self-Restraint” (Frankfurter, Jackson, and Burton), or a combination of the two (Reed and Vinson):

The Black-Douglas group believes that the Supreme Court can play an affirmative role in promoting the social welfare; the Frankfurter-Jackson group advocates a policy of judicial self-restraint. One group is more concerned with the employment of the judicial power for their own conception of the social good; the other with expanding the range of allowable judgment for legislatures, even if it means upholding conclusions they privately condemn. One group regards the Court as an instrument to achieve desired social results; the second as an instrument to permit the other branches of government to achieve the results the people want for better or worse. In brief, the Black-Douglas wing appears to be more concerned with settling particular cases in accordance with their own social preconceptions; the Frankfurter-Jackson wing with preserving the judiciary in its established but limited place in the American system. (Schlesinger 1947, 201)

Schlesinger did a particularly good job of providing a sympathetic characterization of each camp. In his view, advocates of both restraint and activism were motivated by moral and political concerns for the health of democracy. Schlesinger recognized—as rhetorical scholar Katie Gibson has recently made plain—that the apolitical justice was a fiction. Because “constitutional interpretation is a political enterprise,” Gibson noted, champions of restraint were just as engaged in political work as judicial activists (Gibson 2006, 161). This is Schlesinger:

Self-denial has thus said: the legislature gave the law; let the legislature take it away. The answer of judicial activism is: in actual practice the legislature will not take it away—at least until harm, possibly irreparable, is done to defenseless persons; therefore the Court itself must act. Self-denial replies: you are doing what we all used to condemn the old Court for doing; you are practicing judicial usurpation. Activism responds: we cannot rely on an increasingly conservative electorate to protect the underdog or to safeguard basic human rights; we betray the very spirit and purpose of the Constitution if we ourselves do not intervene. (Schlesinger 1947, 206)
In Schlesinger’s account, the judicial activist was neither a villain nor a hero but an important and requisite force that must be counterbalanced—and, in Schlesinger’s opinion, overbalanced—by principles of judicial restraint.

Over time, however, the charge of judicial activism has become an accusation. Legal scholar Keenan D. Kmiec noted that, in the final decade of the twentieth century, “the terms ‘judicial activism’ and ‘judicial activist’ appeared in an astounding 3,815 journal and law review articles.” Between 2000 and 2004, they “appeared in another 1,817 articles, averaging more than 450 per year” (Kmiec 2004, 1442–1443). Indeed, with the conspicuous exception of communication studies—which has barely touched the issue of judicial activism—scholarly attention has been riveted to issues of judicial intervention in the public sphere. The explosion in scholarly interest is reflective of increasing public interest. Between 1994 and 2004, Kmiec wrote, “‘judicial activism’ and its cognates have appeared 163 times in the Washington Post, and another 135 times in the New York Times (2004, 1442–1443). As the term has become more ubiquitous, it has also lost its careful, Schlesinger-endorsed definition. Frank B. Cross and Stephanie A. Lindquist wrote in 2007 that too often the charge of activism has become “devoid of meaningful content,” reflecting “nothing more than an ideological harangue” (1752). Only three years ago, Craig Green complained that “despite frequent objections to its overuse, no scholar has adequately explained what (if anything) the term ought to mean” (2009, 1197–1198). With evident frustration, Green noted that charges of judicial activism now describe one of four possibilities: “(i) any serious legal error, (ii) any controversial or undesirable result, (iii) any decision that nullifies a statute, or (iv) a smorgasbord of these and other factors.” Given this imprecision, Green was sympathetic to those who would rather do away with the term altogether. But, given the public investment in the term, dismissal is not a viable option: “[S]o long as judicial activism remains the public’s dominant means of evaluating judges,” he wrote, “legal experts who dismiss the term may be misread as endorsing limitless, freewheeling judging” (2009, 1217, 1221).

Given the recent, affectively charged history of judicial activism, it is hardly surprising that the justices of Goodridge tethered the propriety of activism to the rationality of the same-sex marriage statute. By doing so, they were, in effect, deploying activism in such a way that it could be condemned neither as an instrument for personal gain nor as a meaningless ideological harangue. With the Black-Douglas group described by Schlesinger, the Goodridge plurality understood intervention as an instrument for the protection of the electorate. With Green, however, they recognized the possibilities of abuse inherent in the instrument. To evade the possibility of abuse, the justices returned continually to whether the statute met the rational basis test. On both sides of the issue the justices went out of their way to claim the irrelevance of their own opinions and their strict adherence to constitutional procedure. Quoting Lawrence v. Texas, Marshall began her opinion by
insisting that she was not mandating her “own moral code” (312). Indeed, as a form of stressing their allegiance to the rational basis test, all of the justices either insisted that they were not simply following their own moral code (the plurality, 312, 349) or condemned the court for doing just that (the dissent, 354, 362, 375).

Rhetorically speaking, this explicit and persistent pursuit of rationality is fascinating. It foregrounds the fact that, even within the well-regulated confines of law, rationality is neither self-evident nor an apolitical baseline against which statutes may be judged. Rather, it is the end result of arguments that could have been cast in different terms. It is provisional; it is a victory won rather than an objectivity achieved. In a conspicuous manner, each of the Goodridge justices recognized that the evaluation of G. L. c. 207 vis-à-vis the rational basis test required not simply rhetorical arguments but a rhetorical approach to rationality. They recognized, in other words, that before they could speak to the statute’s rationality, they needed to win the ground on which they could do so. It is in this context that the justices deployed the competing rhetorics of legal analysis, scientific discourse, and public opinion. The fate of G. L. c. 207 hung on which of these rhetorical forms won the right to establish what counted as rationality.

HILLARY GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH

Forty-four-year-old Hillary Goodridge had been in a committed relationship with Julie Goodridge for thirteen years when, on April 11, 2001, they filed their complaint in a superior court against the Massachusetts Department of Public Health whose statute prohibited their marriage. The superior court ruled in favor of the department, opining that the prohibition of same-sex marriage “rationally furthers the Legislature’s legitimate interest in safeguarding the ‘primary purpose’ of marriage, ‘procreation’” (317). The plaintiffs appealed and, more than two years later, on November 18, 2003, the Massachusetts Supreme Court overturned the decision of the superior court and determined that the ban on same-sex marriage offended the constitution of the state.

From these five opinions we have identified three discursive practices employed to evaluate the rationality of the same-sex marriage statute and whether judicial intervention in this case amounts to judicial activism: legal analysis, the language of science, and community consensus. We consider each in turn.

Marshall and Greaney: Legal Analysis

Rhetorically speaking, justices Marshall and Greaney might be considered “judicial exceptionalists.” They argued that judicial intervention was justified
by the fact that the judiciary had at its disposal a rhetorical form that was unavailable to the wider public (they equated the public with anything other than the court). That form was legal analysis.

Within this rhetorical form, legal precedent functioned as a trump card, carrying more power than tradition, science, or public opinion. For Justices Marshall and Greaney, legal analysis was not simply one more rhetorical form. Rather, it was a form uniquely suited to the needs of a democracy and within its terms they argued for the irrationality of G. L. c. 207 and the democratic necessity of judicial intervention.9

To make a case for such intervention, Justices Marshall and Greaney began by arguing that various historical forms of disempowerment had been facilitated by particular rhetorical practices. For Justice Marshall, the case of miscegenation was exemplary. For “decades, indeed centuries,” interracial marriage was legally disallowed and, as Marshall told the story, the accumulated historical force of these centuries was blindly perpetuating inequalities. The Court, however, provided hope: “That long history availed not when the Supreme Court of California held in 1948 that a legislative prohibition against interracial marriage violated due process and equality guarantees” (327). Progress was here figured as the forces of history yielding to the intervention of the courts. The same logic held in the case of slavery. Marshall cited the racist opinion of one nineteenth-century jurist to suggest that, before the intervention of the courts, inequalities were axiomatically true. Before the courts ruled on slavery, she suggested, this jurist “could observe matter of factly” on the natural legitimations of servitude. Just as the Court interrupted decades of accumulated historical force in the case of miscegenation, it was again the court that interrupted the self-evident rightness of slavery: “But at least since the middle of the nineteenth century, both the Courts and the Legislature have acted to ameliorate the harshness of the common-law regime” (340). In each case, Marshall’s conclusion was that “history must yield to a more fully developed understanding” (328). History, then, functioned for Marshall only as an index of legal advances, an ever-changing topos that posits judicial activism as the condition of social progress. It was this relationship between the judiciary and the public that connected the historical cases of miscegenation and slavery to the issue of same-sex marriage. Marshall wrote that while the Court’s decision in Goodridge may mark “a change in the history of our marriage law” (312), it did not mark a change in the history of constitutional law—this being “the story of the extension of constitutional rights and protections to people once ignored or excluded” (339).

To understand why Marshall repeatedly emphasized the necessity of an intervening court, it is helpful to understand her distrust of public discourse. Although she repeatedly articulated the shortcomings and prejudices of common law—that legal system that the United States inherited from England—it was not these failures that necessitated judicial intervention.
On a deeper level, it was the failure of the discursive practice assumed by the very idea of a common law that required an intervening court. Common law, in theory, grows out of natural law; it claims to articulate the self-evident statutes of nature, statutes so axiomatic that they literally go without saying. Richard A. Posner, judge at the U.S. Court of Appeals for the Seventh Circuit, described natural law as a “body of bedrock beliefs that guide [judicial] decision[s]” (243). For Marshall, however, “bedrock beliefs” were just the sort of unreflective thinking that demands judicial intervention. Her example of the dated and nonchalant racist juror demonstrated the problems with truths that claim to be self-evident: the axiomatic never remains so, for it is itself culturally produced. Marshall was keenly aware that such problems attend axiomatic discursive practices and she was rightfully suspect of any decontextualized truth claims.

What was most important to Marshall, however, and what explains her insistence on judicial intervention, was her belief that the cultural products called axiomatic truths are the result of specific discursive practices. She wrote,

Punitive notions of illegitimacy . . . and of homosexual identity . . . further cemented the common and legal understanding of marriage as an unquestionably heterosexual institution. But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in “the modern age,” “heterosexual intercourse, procreation, and childcare are not necessarily conjoined.” (332, n23)

Marshall was describing what Michael Warner describes as heteronormativity, or that “sense of rightness and normalcy” that attends heterosexual arrangements (Warner 2002, 194). Her point was this: heteronormativity is not a thing of the past; it is reproduced through a particular rhetorical form: circular reasoning. The last sentence of the previous quotation, however, demonstrates the potential of different rhetorical forms (such as analysis) to question heteronormativity. In her example, a legal dissent was able to disassociate intercourse from procreation and thus counter engrained conceptions of the normal.

Exposing the ideological investments of supposedly innocent discursive practices is, of course, not news. The significance here is that Marshall proceeded to suggest that the Court traffics in linguistic practices capable of undermining the perpetuation of heteronormativity. Indeed, it was exactly the Court’s ability to think in its own particular idiom—“analysis”—that allowed it to expose the shortcomings of an ideologically invested history. The concurring opinion of Justice Greaney makes this explicit:
To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it has never been accessible is conclusory and bypasses the core question we are asked to decide. This case calls for a higher level of legal analysis. Precisely, the case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage and requires that we re-examine these assumptions in light of the unequivocal language of [the Constitution]. (348–349; emphasis added)

Although Justice Greaney differed from Justice Marshall in his belief that G. L. c. 207 should be submitted to “strict scrutiny” rather than the rational basis test, he agreed with her insistence that “legal analysis” offers an exit from the ever-reproduced structures of heteronormativity. As Marshall had done in her opinion, Justice Greaney dismissed the claims of history on rhetorical grounds. The historical argument assumes the circularity of an axiomatic discursive form and must give way to a “higher level” of discourse. The implication is this: the higher the discursive practice, the greater the possibility of undermining heteronormative social practices—the highest (legal) practice being capable of arguing unequivocally.

With the circular reasoning of history opposed to the legal analysis of the courts and with same-sex marriage cast as the twenty-first-century counterpart of slavery and miscegenation, the plurality proceeded to evaluate the rationality of G. L. c. 207. It did so by considering in turn the three rationales advanced by the Department of Public Health for restricting the institution of marriage: a suitable environment for procreation, an “optimal setting for child rearing,” and the preservation of state money (331). Submitting each of these rationales to legal analysis, the plurality concluded, “The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason” (341).

Marshall noted that the Court’s ruling might well be charged with acting counter to “community consensus.” She responded not by arguing for a different understanding of community consensus but by dismissing it altogether. She was bound only to the logic of the legal analysis and, given these commitments, could muster only this nonresponse to the charge: “Yet Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation” (341). The suggestion here is that whatever the strength or merits of this so-called community consensus, it is irrelevant because Massachusetts has policies. This categorical rejection of public knowledge is the only response that could follow from her Archimedean commitment to legal reasoning.

Moreover, Marshall argued that “many hold deep-seated religious, moral, and ethical convictions” on both sides of the issue, but these convictions were inconsequential, for their substance was eclipsed by their method—they were the products of axiomatic discourse and thus could not
be “constitutionally adequate reasons” (312). Marshall was suggesting, in other words, the rhetorical forms that circulated outside the Court were unfit for deciding legal issues or combating heteronormativity. Justice Greaney concurred: “As a matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy” (349). Neither mantras nor convictions could match the authority of legal analysis. Thus Greaney too explicitly dismissed the authority of the public. He admitted that if the “voter’s intent” was his guide he “would be reluctant to construe it favorably to the plaintiffs. . . . The court’s opinion, however, rests in part on well-established principles of equal protection that are independent of [voter intention]” (350).

It is easy to critique justices Marshall and Greaney. Insofar as they appealed to a rhetorical form that was conspicuously exceptional, capable of being deployed only by those institutionalized in the legal system, their opinions might be decried as constituting something akin to what Jürgen Habermas called representational publicity—a publicity that is displayed for the populace rather than enacted by them (Habermas 2001, 9). While such a critique is certainly valid, we think it is important to also recognize that it was precisely (and only) these justices—using an exceptional rhetorical form—who justified judicial intervention and thereby extended more rights to more people. Believing with Robert Asen (2009) that rhetorical practices must be judged by their capacity for political intervention as much as their textual features, we think it would be a mistake to simply dismiss the opinions of Marshall and Greaney as theoretically misguided. Too much is at stake.

Justice Sosman: The Discourse of Science

Justice Martha B. Sosman dissented because she believed the “legal analysis” deployed in the plurality opinion was flawed by subjectivity and as such incapable of properly ascertaining the rationality of G. L. c. 207. As did each of the justices, Sosman understood that the constitutional path to judicial intervention went through the rational basis test. Her commitment to the rational basis test was demonstrated in her explicit dismissal of her own personal sympathies with the plaintiffs. She foregrounded her personal agreement with the Court’s decision and declared it “understandable that the court might view the traditional definition of marriage as an unnecessary anachronism, rooted in historical prejudices that modern society has in large measure overcome” (358). However, implicitly invoking article 30, she insisted on the irrelevance of her own opinions: “It is not, however, our assessment that matters” (358). By delinking social/political progress from juridical procedure, Justice Sosman registered both her sympathies with the plaintiffs and her regret that the Court had struck down a law that significantly restricted their freedom. “As a matter of social history, today’s opinion may represent a great turning point that many will hail as a tremendous
step toward a more just society. As a matter of constitutional jurisprudence, however, the case stands as an aberration” (362–363).

As a means of focusing solely on constitutional jurisprudence, Justice Sosman’s argument targeted what she saw as the plurality’s misapplication of the rational basis test. Quoting liberally from the opinions of Marshall and (especially) Greaney, she argued that while the plurality invoked the rational basis test, they were “in fact applying some undefined stricter standard to assess the constitutionality” of G. L. c. 207 (359). She cited eleven instances in which Marshall and Greaney suggest, implicitly or explicitly, that same-sex marriage is a fundamental right deserving the strictest measure of judicial protection (359–361). To her mind, these insinuations hid the fact that the statute needed only to pass the rational basis test:

In short, while claiming to apply a mere rational basis test, the court’s opinion works up an enormous head of steam by repeated invocations of avenues by which to subject the statute to strict scrutiny, apparently hoping that that head of steam will generate momentum sufficient to propel the opinion across the yawning chasm of the very deferential rational basis test. (361)

The rational basis test was supposed to be deferential—polite, reverent, respectful. The emotional fervor, however, generated “under the intense glare of national and international publicity” and insinuations of a fundamental right, undermined the plurality’s application of the rational basis test. She regretted that “this is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions” (359). This formed the foundation of her dissent. Had the Court not been contaminated by publicity it would have properly applied the rational basis test and reached a different decision: “Placed in a more neutral context the court would never find any irrationality in [the same-sex marriage ban]” (361).

Against the plurality’s alleged misapplication of the rational basis test, Justice Sosman posited her own preferred mode of establishing rationality: the discourse of science. Immediately after chiding the plurality for giving in to their own politics and compromising the separation of powers, Justice Sosman regretted that “scientific study” was “conspicuously absent” from the court’s decision (358). To redress this shortcoming, she argued that science was undecided on at least one of the rationales advanced by the Department of Public Health: the optimal setting of child rearing. “Studies reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples” (358). Because of these differences, same-sex child-rearing arrangements, while “promising,” remain an “essentially untested alternate family structure” (361). For Sosman the scientific uncertainty was decisive. If the results of
scientific studies were mixed and the new structures “untested,” it could not possibly be “irrational” for the legislature to restrict marriage. In fact, scientific uncertainty provided an “eminently rational” basis for the restriction of marriage: the “proffered change affects not just a load-bearing wall of our social structure but the very cornerstone of that structure” (362). With so much at stake and so much unknown, Sosman found the legislature’s restriction perfectly reasonable:

Absent consensus on the issue (which obviously does not exist), or unanimity amongst scientists (which also does not exist), or a more prolonged period of observation of this new family structure (which has not yet been possible), it is rational for the Legislature to postpone any redefinition of marriage that would include same-sex couples until such time as it is certain that that redefinition will not have any unintended and undesirable social consequences. (362)

Unless and until science could decisively pronounce the effects of same-sex marriage on the existing social structure, the issue must be remanded to the people. “It is not up to us,” she concluded, “to decide what risks society must run . . . merely because we are confident that it is the right thing to do” (362). For Sosman, then, the discourse of science replaces legal analysis as the ultimate form of argument. Moreover, unlike legal analysis, which Sosman suggested was particularly liable to emotional distortion, the discourse of science provided a purportedly unbiased index of rationality: absent scientific consensus, a wide variety of legislative policies could be considered rational.

Justice Cordy: Public Opinion

With a careful review of *Griswold v. Connecticut* and *Lawrence v. Texas*—the same cases Greaney used to argue that same-sex marriage was a fundamental right—Justice Robert J. Cordy argued that these precedents established as fundamental rights only those matters of sexual relations (367–368). He argued further that the regulation of who may and may not obtain a marriage license was, comparatively, a matter of bureaucratic procedure and a long way removed from the protected matters of sexual intimacy (369). On this reading, same-sex marriage was not a fundamental right and merited no more protection than that provided by the rational basis test. In Cordy’s consideration of whether G. L. c. 207 had a rational basis, the fine parsing of legal opinions faded to the background, replaced by the category of public opinion. On the question of how, precisely, to tap public opinion, Cordy was not clear. He seemed to offer two approaches—one based on extant legislation, a second based on academic literature. While these approaches to tapping public opinion are certainly in tension (a tension we consider
later in this article), they are not necessarily mutually exclusive. For our purposes, we wish to stress that however Cordy measured public opinion, it was always the ground of rationality and, accordingly, the lynchpin on which his disposition rests.

However, as we stress, Cordy’s particular, hyperconservative conception of public opinion guaranteed the rationality of the statute and, more broadly, the theoretical impossibility of judicial intervention writ large. In his view, “The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures” (374). He reasoned that since legislation waits for “some common ground, some consensus” before enacting laws, the mere existence of a statute signaled some measure of consensus: “It [is] the judge’s duty . . . to give effect to the will of the people as expressed in the statute by their representative body” (379; emphasis added). This method of tapping the “will of the people” is, to say the least, inherently conservative. It is a mode of reading the status quo as indicative of public opinion.

With this vision of public opinion, Cordy built a watertight case for judicial restraint. Because same-sex marriage is not a fundamental right (see his reading of *Loving* and *Lawrence*, mentioned previously), Cordy argued:

In such circumstances, the law with respect to same-sex marriage must be left to develop through legislative processes, subject to the constraints of rationality, lest the court be viewed as using the liberty and due process clauses as vehicles merely to enforce its own views regarding better social policies, a role that the strongly worded separation of powers principles in art. 30 of the Declaration of Rights of our Constitution forbids. (375)

A truly watertight case: because the rationality of a statute is rooted in public opinion, and because public opinion will always be reflected in extant law, the status quo will always be the measure of rationality and judicial intervention will never be needed.

In addition to documenting extant laws (which, theoretically speaking, should have been sufficient evidence of public opinion), Cordy, far more than any other justice, cited a wide range of academic studies. He drew on journals of sociology, *Black Studies*, law journals, *Marriage and Family*, and public intellectuals such as Christopher Lasch (381–388). Why this interdisciplinary inquiry? As Cordy put it, “In considering whether such a rational basis exists, we defer to the decision-making process of the Legislature, and must make deferential assumptions about the information that it might consider and on which it may rely.” Unsurprisingly, Cordy’s review of the literature supported his argument that G. L. c. 207 had a rational basis. Returning a final time to the state’s interest in the child-rearing environment, and using the aforementioned studies as evidence that marriage is the “principal weave of our social fabric” without which society would be reduced to “chaos”
Cordy concluded, “The Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children” (388).

Although Cordy’s strategy of measuring public opinion vis-à-vis a range of academic articles may not seem at first glance to provide the watertight case for judicial restraint as his earlier equation of positive law and public opinion, it does. He suggested that academic controversy is itself an indicator of a rational basis (380, 394). “It is not enough that we as Justices might be personally of the view that we have learned what is best. So long as the question is debatable, it must be the Legislature that decides. The marriage statute thus meets the requirements of the rational basis test” (394–395). Note the logic here: if rationality is possible wherever academic disagreement occurs, and if academic disagreement can be determined by a reading of any information on which a legislature “may rely,” there is virtually no possibility for judicial interference. Such interference would require everyone to agree on a hotly contested topic.

Given Cordy’s vigorous advocacy of judicial restraint, it is hardly surprising that he indicted the court, on several occasions, of overstepping its reach and violating the separation of powers. More than Sosman, Cordy gave the public the resources to level the charge of judicial activism. He accused the plurality of “substituting its notions of correct policy for that of a popularly elected legislature” (364) and concluded his opinion with what, in the entirety of the Goodridge case, came the closest to a direct accusation of judicial activism: “While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.”

CONCLUSION: RHETORIC, RATIONALITY, AND THE LAW

Perhaps the best way to measure the significance of Goodridge v. Department of Public Health is a reconsideration of the concurring opinion of Justice Greaney and the dissenting opinion of Justice Spina. In terms of constitutional procedure, justices Greaney and Spina represented the ideological extremes of the Massachusetts Supreme Court. Neither of them agreed with the court’s decision to measure the validity of G. L. c. 207 vis-à-vis the rational basis test. On the activist end of the spectrum, Justice Greaney argued that same-sex marriage is a fundamental right, analogous to the reproductive rights secured in Griswold (350), the marriage rights secured in Loving (346), and the sexual rights secured in Lawrence (349). Accordingly, he suggested that the Massachusetts marriage ban should have been submitted to strict judicial scrutiny (347). Had the court followed his lead, the statute would
have certainly been overturned. As its name suggests, “strict scrutiny” is a severe test; it presumes, Greaney explained, “arbitrary and invidious discrimination” (347). Because of the severity of the test, a court that widely applies “strict judicial scrutiny” will be an interventionist court of the first order.

At the other end of the spectrum is the dissenting opinion of Justice Francis X. Spina. Even more than Cordy, Spina made the strongest case for judicial restraint and was, accordingly, the strongest critic of the plurality’s activist disposition. Whereas Greaney argued that the rational basis test was too lenient a standard, Spina argued that it was too strict a standard. He began with the assertion that none of the plaintiffs was “denied access to the institutions of marriage” (352). This is a rather oversimplified way of putting his point. Bracketing all considerations of sexuality, personal identity, and love—indeed, bracketing the very issue being contested, same-sex marriage—Justice Spina blithely asserted: “Each is free to marry a willing person of the opposite sex” (353). Given this “freedom,” he concluded that the court “should not have invoked even the most deferential standard of review” (352). Far from meriting judicial intervention, the case did not even merit judicial review.

From this point on, Justice Spina’s decision is a long, repetitive, and stinging attack on the activism of the court: the decision constituted “unwarranted government intrusion,” it redefined marriage, it “exceeds the bounds of judicial restraint,” it compromised article 30, it constituted a “judicial enlargement of the clear statutory language beyond the limit of our judicial function,” it “trespassed on legislative territory,” it broke with a precedent of restraint, it impinged upon rights reserved for the people, it extruded a new right, it invited “government intrusion,” and “interjected government into the plaintiff’s lives” (353–357).

Between the competing extremes of Greaney and Spina rests the remainder of the Goodridge court. Divided politically, the remaining judges were united constitutionally. Unlike Spina, they believed the case merited review; unlike Greaney, they believed it merited review only via the relatively lenient demands of the rational basis test. For those invested in the right of same-sex couples to marry, the safest course seems to be the one outlined by Justice Greaney: if same-sex marriage could be counted as a fundamental right, prohibitions banning it could be struck down with ease across the country. For those invested in maintenance of the status quo—what Greaney characterized as a “caste-like system” (348)—Justice Spina represents the safest route. However, for those in both camps who, whatever their politics, find themselves invested at the intersection of rhetoric and legal studies, we suggest a continued attention to the constitutional middle ground: the rational basis test.

As we have shown, it was on this middle ground that the argument over same-sex marriage was articulated with a fight over rhetorical modes of address. While these constitutional moderates (Marshall, Sosman, and
Rhetoric, Rationality, and Judicial Activism

Cordy) agreed on the appropriate level of review, they disagreed rhetorically. Indeed, it is not too much to say that *Goodridge v. Department of Public Health* put competing modes of address in the dock. Was legal analysis the proper way to assess rationality? Scientific discourse? Public opinion? On the answers to these questions hung the marital rights of Julie Goodridge. It was only because the court ultimately sided with legal analysis over the discourses of science and public opinion that she won, however fleetingly, the right to marry.

One of the most remarkable things about *Goodridge v. The Department of Public Health* is that, within its opinions, we bear witness to the collision of three distinct rhetorical forms. To achieve a similar effect, Rorty needed to compare Aristotle and Newton. The chronological and spatial proximity of legal analysis, scientific discourse, and public opinion, however, carries its own theoretical danger. Their proximity may tempt us to adjudicate them based on their correspondence with the objective world. With Rorty, we believe that this temptation must be resisted. The three rhetorical forms we have highlighted are simply competing ways of describing the world and can be judged only by the social consequences they entail. On this matter, the lesson of *Goodridge* is clear: the legitimacy of judicial activism is a function of particular rhetorical forms. The justices of the *Goodridge* Court took Rorty’s advice to heart: to change the world, each learned to “speak differently.”

Is judicial intervention a means of repairing harm visited on defenseless persons? Or is it an abrogation of the separation of powers and a form of “judicial usurpation”? These questions may have been introduced by Schlesinger in 1947, and they may have been born of the high-profile contest between Hugo Black (advocate of judicial interference) and Felix Frankfurter (advocate of judicial restraint), but they characterize with equal poignancy the twenty-first-century contest between the justices of the Massachusetts Supreme Court. In many ways, these questions remain unsolvable, grounded as they are in competing conceptions of the very nature of the judiciary. The *Goodridge* court has, at the least, made one thing clear. Whether activism is an usurpation or an essential form of redress, its future is intricately tied up with rhetorical modes of address. Given that the vast majority of judicial decisions will not involve a fundamental right, the possibility of activism will often be a function of a statute’s perceived rationality. And this, as the *Goodridge* court made plain, is a rhetorical question in the first instance.

NOTES

1. Three dissenting justices means that the opinion of the court is referred to as the *plurality* rather than the *majority* opinion.

2. Jeffrey Bennett argues that the case “catapulted” the same-sex marriage issue into the national spotlight. See Bennett 2006.
3. For the Perkins quotation, see Belluck 2003, A1. For a review of the outrages over judicial activism, as well as Bush’s response, see Grindstaff 2008.


5. Technically, the rational basis provides distinct standards for “due process” and “equal protection” claims. The language quoted refers to challenges of “equal protection.” In the case at hand, this distinction is of limited significance. The plurality argued that, generally speaking, and in the Goodridge case specifically, “the concepts overlap.” Moreover, “Much of what we say concerning one standard applies to the other” (320, 321). The dissent also treated “due process” and “equal protection” together (354).

6. Although our intellectual debts run to Rorty, we prefer the term rhetorical form to vocabulary. Why? The vocabularies Rorty describes (and the vocabularies we describe) are not simply a collection of words. Rather, they are collections of words assembled and deployed in consistent patterns or forms.


8. There were fourteen plaintiffs in all. The others included Gloria Bailey, sixty years old, and Linda Davies, fifty-five years old; Maureen Brodoff, forty-nine years old, and Ellen Wade, fifty-two years old; Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old; Gary Chalmers, thirty-five years old, and Richard Linnell, thirty-seven years old; Heidi Norton, thirty-six years old, and Gina Smith, thirty-six years old; Michael Horgan, forty-one years old, and David Balmelli, forty-one years old; and David Wilson, fifty-seven years old, and Robert Compton, fifty-one years old.

9. There is a small but reputable (and well established) subfield of rhetorical studies dedicated to legal studies. See, in particular, White 1985. Our work differs from White (and from the subfield generally) by treating legal analysis as a rhetorical form that may or may not be invoked in legal opinions.

10. Within his relatively short opinion, Sosman seeks recourse in “modern science,” “scientific study,” “scientific method,” “scientific principles,” “scientific evidence,” and “scientists” (358–362). We have summarized this consistent recourse to science as the “discourse of science,” and we treat it as its own rhetorical form. There is a thriving interdisciplinary field of science studies (or science and technology studies). At the head of this field is Bruno Latour, from whom we derive our conviction that scientific knowledge is, like all other forms of knowledge, produced in particular places at particular times. See Latour 2007. There is also a thriving subfield within rhetorical studies often referred to as the rhetoric of science. Some of this discourse is very relevant for our project, situating science as a metadiscourse (or vocabulary) within which particular social outcomes are made possible. See, for example, Gaonkar 1997.

11. There is a distinct subfield of rhetorical studies dedicated to public opinion research. For many years J. Michael Hogan, who has argued across a number of venues that public opinion research often debilitates democratic practice, has been a leader in this subfield. For a recent example, see Hogan 2006. We focus less on the distorting character of public opinion research and more on its capacity to effect particular social changes in the context of law.

12. There is, unquestionably, a tension in Cordy’s opinion between his belief that public opinion is best expressed in extant law and, notwithstanding this fact, his otherwise broad investigation into other markers of public opinion (academic studies, etc.). This tension is at its most marked on pages 379–380, on which he cites Shell Oil Co. v. Revere to establish both points.

REFERENCES


