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Verdict

May 27, 2014

Joanna L. Grossman

A Decade of Change: The Tenth Anniversary of Same-Sex Marriage in the United States



Ten years ago this month, marriage licenses were issued to same-sex couples for the first time in the United States. Those licenses, and the marriages that ensued, were the product of a ruling by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health* (<http://law.justia.com/cases/massachusetts/supreme-court/volumes/440/440mass309.html>), in which it held that banning marriages by same-sex couples ran afoul of the guarantees of due process and equal protection in the state constitution. The ruling was issued in November 2003, but the court gave the legislature 180 days to conform state marriage laws to the ruling. The legislature did not amend its marriage laws in time to meet the deadline—and still hasn't 10 years later—but marriage licenses began to issue anyway on May 17, 2004. That day fell on the 50th anniversary of the Supreme Court's landmark decision in *Brown v. Board of Education*, which put an end to state-enforced racial segregation in schools—a coincidence that was surely intentional on the court's part. There aren't words to describe the dramatic change that has taken place in just a decade. The controversial ruling in one state, which initially allowed marriages only of its own residents, began a trend that would affect the whole nation. As of now, nineteen states and the District of Columbia allow same-sex couples to marry, and a rapid-fire set of recent federal court rulings suggests that there is no end in sight. (The National Gay and Lesbian Task Force maintains a current marriage map [here](http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_5_20_14_color.pdf)

http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_5_20_14_color.pdf.) **Before *Goodridge v. Department of Public Health*: Trying to Ward Off the Legalization of Marriage by Same-Sex Couples**

When the Massachusetts court paved the way for marriage licenses to issue to same-sex couples in 2004, it was not working with a clean national slate. Quite the contrary. Over the course of a decade, most states had been busily shoring up their statutes and constitutions to prevent marriages by same-sex couples, in response to the threat in the early 1990s that Hawaii may legalize it (which didn't end up happening until 20 years later). Congress was among the first to act, with its adoption of the Defense of Marriage Act in 1996, which provided that marriages by same-sex couples would not be recognized for federal law purposes. By the time of the ruling in *Goodridge*, thirty-seven states had passed laws banning the celebration or recognition of marriages by same-sex couples. Advocates for same-sex marriage had achieved only one state-level victory prior to *Goodridge*. Four years earlier, in *Baker v. State*, the highest court in Vermont issued a ruling similar to *Goodridge* that gays and lesbians could not be denied the benefits of marriage. It also gave the legislature 180 days to pass conforming laws, but unlike in Massachusetts, Vermont ended up with civil unions—a marriage-equivalent status invented by the Vermont legislature to satisfy the state constitutional requirement that all citizens have equal access to “common benefits,” but without opening up marriage to same-sex couples. (Vermont later moved to full marriage equality in 2009.) **The Ruling in *Goodridge*: A Watershed Moment** In its ruling, the Massachusetts

Supreme Judicial Court held that a ban on marriages by people of the same sex violates the state constitution's guarantees of equality and due process. Denial of the right to marry, the court explained, "works a deep and scarring hardship on a very real segment of the community for no rational reason." Moreover, the harm to gays and lesbians, the court said, is not only the harm that comes from the denial of the benefits of marriage. It is also the harm of being deemed "second-class citizens" in the process. These may seem like familiar concepts now—there have been dozens of state and federal rulings in favor of marriage equality—but at the time this was all new. The opinion ended with the instruction to the legislature to, within 180 days, "take such action as it may deem appropriate in light of this opinion." The obvious implication of this language, given the holding and reasoning of the opinion on the whole, was that the legislature was to amend its statutes to permit same-sex couples to marry. But the state senate tried to avoid that endpoint, rushing to pass a civil union bill instead. But when the senate asked the court for an advisory opinion about the constitutionality of its civil union law, it was harshly rebuked. The *Goodridge* decision had been quite clear that only a right to enter civil marriage would cure the constitutional infirmity in the state's laws. Only with the same status could same-sex couples share the "intangible benefits [that] flow from marriage." **After *Goodridge*: A Changed World** Although Massachusetts was the only state with marriage for same-sex couples for four years, 2008 saw a cascade of court rulings and legislative enactments that brought marriage equality to four additional states, including the first out of the northeastern United States, Iowa. (Marriage equality came to Iowa via a ruling of the state's highest court, for which three of the justices lost their seats in a recall election.) The anti-same-sex-marriage developments continued apace, with forty-four states ultimately adopting laws or constitutional amendments (or sometimes both) to ban same-sex marriage. For many years, every referendum and amendment that went to the voters passed with strong majority support. But slowly, the winds changed, as states that had acted quickly to ban these marriages changed their stance and began, through voluntary legislative enactment, to allow them. This shift in Washington State, as discussed [here \(http://verdict.justia.com/2012/02/07/the-beginning-of-the-end-of-the-anti-same-sex-marriage-movement\)](http://verdict.justia.com/2012/02/07/the-beginning-of-the-end-of-the-anti-same-sex-marriage-movement), marked the beginning of the end. States like New York and Rhode Island, which had never taken a position, also adopted laws to allow same-sex marriage. (The path to marriage equality in New York is explained [here \(http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications\)](http://verdict.justia.com/2011/06/27/same-sex-marriage-is-legal-in-new-york-the-in-state-and-national-ramifications).) The states banning same-sex marriage still greatly outnumbered states allowing it, but there seemed to be a steady, if small creep towards a more even count. The landscape changed dramatically, however, in 2013, with the Supreme Court's ruling in *United States v. Windsor* (<http://supreme.justia.com/cases/federal/us/570/12-307/>). As I explain in more detail [here \(http://verdict.justia.com/2013/06/26/doma-is-dead\)](http://verdict.justia.com/2013/06/26/doma-is-dead), the Court held that the federal-law provision of the Defense of Marriage Act violated the federal constitutional guarantees of due process and equal protection. Justice Kennedy's opinion reads much like his opinion in *Lawrence v. Texas* (<http://supreme.justia.com/cases/federal/us/539/558/case.html>) (2003), in which the Court ruled 6-3 that state criminal bans on same-sex sexual behavior violate the right to privacy protected in the Due Process Clause of the Fourteenth Amendment. The majority opinion in that case was sensitive to the developing social norms about gay rights and relationships and nuanced in its analysis of relevant constitutional principles. The crux of the holding in *Windsor* is that the federal government's sudden refusal to give effect to marriages by same-sex couples, despite its longstanding history of deferring to state-law determinations of marital status for most federal-law purposes, constituted a discrimination "of an unusual character." That type of discrimination invites suspicion that the law was the product of bare animus, which is not a sufficient reason for the government to single out a group for disadvantageous treatment. And without evidence of a weightier reason for its passage, the federal-law provision of DOMA could not survive. The core ruling has had enormous impact on federal laws, many of which provide benefits or assign burdens based on marital status. (The initial impact is discussed [here \(http://verdict.justia.com/2013/09/03/falling-dominoes-same-sex-spouses-gain-more-recognition-rights\)](http://verdict.justia.com/2013/09/03/falling-dominoes-same-sex-spouses-gain-more-recognition-rights).) *Windsor* did not consider the question whether all state laws banning the celebration or recognition of marriage by same-sex couples are unconstitutional. On its face, it only ruled that if a state chooses to license same-sex marriages, the federal government must give them effect if it otherwise recognizes validly celebrated marriages. In a companion case, *Hollingsworth v. Perry*, the Court could have ruled that California's voter-passed ban on marriages by same-sex couples was unconstitutional. But it dismissed the case on standing grounds, which meant that California would have same-sex marriage because the ruling below invalidating the ban could not be appealed, but other state bans were left intact. Despite leaving the validity of state marriage bans an open question, the *Windsor* opinion has become a powerful force in challenges to those laws. In less than one year, federal courts in several states have applied *Windsor* to invalidate state laws banning the celebration and/or the recognition of

marriages by same-sex couples. The reasoning in these cases is relatively simple: if, in passing laws to preclude recognition of marriages by same-sex couples, states departed from their own longstanding traditions of giving effect to out-of-state marriages as long as they were valid where celebrated, they, too, have enacted discriminations of an “unusual character” that merit suspicion under the Equal Protection Clause. (One such ruling is analyzed [here \(http://verdict.justia.com/2014/02/18/kentucky-become-second-paradise-sex-married-couples\)](http://verdict.justia.com/2014/02/18/kentucky-become-second-paradise-sex-married-couples).) Moreover, in many of these same cases, courts have ruled that states have no legitimate reason to ban same-sex marriage at all, which means they cannot do so consistently with constitutional principles. (Several recent rulings are discussed [here \(http://verdict.justia.com/2014/03/04/red-state-scare-federal-court-texas-invalidates-ban-marriages-sex-couples\)](http://verdict.justia.com/2014/03/04/red-state-scare-federal-court-texas-invalidates-ban-marriages-sex-couples).) The combined force of these recent rulings cannot be overstated. It’s not just that they have brought the total number of states now issuing marriage licenses to same-sex couples to nineteen, with several more waiting in the wings as favorable rulings are stayed pending appeal. It’s that half of those states adopted marriage equality in 2013. It’s the bringing of same-sex marriage to the red states. It’s the writing of opinions, in favor of marriage by same-sex couples, by Republican-appointed, conservative judges. It’s the fact that, since *Windsor*, every single ruling in a same-sex marriage case has been a win for the challengers—bans on celebration or recognition have been struck down in eleven states. It’s that state officials are refusing to appeal when they lose because the likelihood of successfully defending a ban after *Windsor* is so small. It’s that in just the past few weeks, courts have invalidated state bans in Pennsylvania, Oregon, Arkansas, and Idaho. It’s that the rulings are both poetic and unapologetic. As Judge John E. Jones wrote in the recent ruling on Pennsylvania’s ban, “We are a better people than what these laws represent, and it is time to discard them into the ash heap of history.”



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