

# Goodridge in Context

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## INTRODUCTION

As the lead attorney for Gay & Lesbian Advocates & Defenders (“GLAD”) in *Goodridge v. Department of Public Health*,<sup>1</sup> where the Massachusetts high court ended government discrimination against same-sex couples in marriage, I have watched the reactions to the case with keen interest. Too often, the reactions lose sight of the heart and soul of the matter. At its core, *Goodridge* is a case about real people and real families who asked their government to treat them equally and fairly. The case told a story about individual lesbian, gay, bisexual, and transgender (“LGBT”)<sup>2</sup> people—as partners, parents, Little League coaches, and literacy volunteers—and their families in Massachusetts. The case revealed them to be people who wanted to assume the obligations of marriage to express their deep and abiding love for one another, to secure protections for their families, to make sure that the familial nature of their relationships could not be disparaged, and to ensure that their children did not have second-class parents. Simply put, GLAD filed the *Goodridge* case (and the Vermont *Baker v. State*<sup>3</sup> case before it) seeking an end to marriage discrimination against same-sex couples: first and foremost, to achieve the clients’ goals, i.e., relationship recognition and legal protections for their families; second, to end

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

<sup>2</sup> As a matter of convenience, I use the acronym LGBT to encompass the variety of persons within the broader gay, lesbian, bisexual, and transgender communities. This and any approach has its limitations given the diversity within each of these communities. *See, e.g.*, Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 597 n.9 (2004).

<sup>3</sup> 744 A.2d 885 (Vt. 1999). This decision led to enactment of 2000 Vt. Acts & Resolves 91, the Vermont civil union law codified at title 25, sections 1201–07 and title 18, sections 5160–69 of the Vermont Code.

the existence of privileged places of law based on sexual orientation; and finally, because we believed it was the right time and place to do so.

The first Part of this Essay discusses the legal, political, and cultural landscape in Massachusetts to show that *Goodridge* was the logical next step of a decades-long process of securing legal and cultural respect for LGBT people and families. I discuss some of the factors my colleagues and I at GLAD considered in deciding to bring the *Goodridge* case, including the limits of non-marriage litigation, the ongoing public education campaign for marriage, Vermont's civil unions law, and a planned constitutional amendment on marriage in Massachusetts. I also discuss select aspects of the case, including the powerful amici curiae briefs filed in the Supreme Judicial Court ("SJC"), and respond to the judicial activism and substantive critiques of *Goodridge*. In the second Part, I address the six-month period in which the court's mandate was stayed. In the first phase, powerful officials recast the decision as one allowing for civil unions rather than marriage. In the second phase, the legislature took center stage during three constitutional conventions spanning four days to consider measures overruling *Goodridge*. In the third phase, after the conventions, GLAD faced a coordinated legal assault by a variety of public and private parties to stop marriages from happening as scheduled on May 17, 2004. In the third Part of this Essay, thinking ahead to the future and canvassing recent political and legal developments, I recommend staying the course because people will move toward fairness over time only when they understand the harsh human consequences stemming from the government's denial of relationship recognition and marriage rights.

## I. HOW *GOODRIDGE* CAME TO BE

At GLAD and other LGBT movement organizations, we see ending marriage discrimination as enormously valuable to many LGBT people—both those who are harmed by the denial of relationship recognition and the legal protections that recognition would bring, and those who may not marry but believe they are diminished by a state that does not accord them the choice to do so. As a tactical matter, it is also clear that our political opponents have seized this issue, framing it as a "threat" to "the family" in order to push the enactment of discriminatory laws and constitutional amendments before their supporters realize there is no threat and change their minds. Consistent with our belief that the LGBT people and families of America must speak in their own voices in every venue, GLAD decided to file the *Goodridge* case in Boston in April 2001.

### A. *The LGBT Community and the Cultural Landscape of Marriage*

The current national discussions amply illustrate that marriage is profoundly significant to LGBT and non-LGBT people on personal, le-

gal, cultural, and for some, religious levels. Many people also care about building stronger families and stronger communities, but disagree about how to do so. The vibrancy of the discussions stems from marriage's familiarity, making everyone into an expert,<sup>4</sup> as well as its role as a cultural proxy for differing values about equality, family, and religion.

As a lawyer who has talked to thousands of gay people from all walks of life and spent years with colleagues at GLAD who have done the same, I know LGBT people and families defy easy categorization. LGBT people run the gamut of material circumstances, racial and ethnic groups, and political affiliations.<sup>5</sup> Both inside and outside the LGBT communities, there are differing views about the desirability of marriage—either in any given individual's personal life<sup>6</sup> or as to government policies that use marriage

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<sup>4</sup> As E. J. Graff observes in her extraordinarily helpful book:

Marriage . . . turns out to be a kind of Jerusalem, an archaeological site on which the present is constantly building over the past, letting history's many layers twist and tilt into today's walls and floors . . . . While marriage, like Jerusalem, may retain its ancient name, very little else in this city has remained the same—not its boundaries, boulevards, or daily habits—except the fact that it is inhabited by human beings.

E. J. GRAFF, *WHAT IS MARRIAGE FOR?* xix (2d ed. 2004).

The work of historians has been critical to understanding the civil as opposed to ecclesiastical nature of marriage in the United States and the dynamism of the institution. *See, e.g.*, NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* (1983); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996); *see also* EVAN WOLFSON, *WHY MARRIAGE MATTERS* 53–72 (2004); RANDALL KENNEDY, *INTERRACIAL INTIMACIES* (2003).

<sup>5</sup> The 2000 Census reported that same-sex couples headed more than 594,000 households in the United States. U.S. CENSUS BUREAU, *CENSUS 2000 SPECIAL REPORT CENSR-5, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000*, at 2 tbl.1 (2003), available at <http://factfinder.census.gov>. Additionally, at least one cohabiting same-sex couple can be found in 99% of the nation's counties. *See Households Headed by Gays Rose in the 90's, Data Shows*, N.Y. TIMES, Aug. 22, 2001, at A17. A recent report shows that same-sex couples in Massachusetts are raising more than 8000 children and that those families, despite comparable work in the labor market, are less well off with respect to household income and home ownership. MICHAEL ASH ET AL., *BY THE NUMBERS: SAME-SEX COUPLES AND THEIR CHILDREN IN MASSACHUSETTS 1* (2004), at [http://www.iglss.org/media/files/Numbers2\\_04.pdf](http://www.iglss.org/media/files/Numbers2_04.pdf). The Report also shows that same-sex couples are more racially diverse than married couples in Massachusetts, with twice as many couples in interracial relationships or speaking Spanish in the household, and that couples in same-sex relationships are more likely to be Hispanic or African American than their married, non-LGBT counterparts. *Id.* at 2–3.

<sup>6</sup> However, we know that many LGBT people desire to marry. *See, e.g.*, HENRY J. KAISER, FAMILY FOUND., *PUB. NO. 3194, INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION* 31 (2001) (finding that, in a 2000 poll with a random sample of 405 lesbians, gay men, and bisexuals from fifteen major U.S. metropolitan areas, 74% responded affirmatively to the question, "If you could get legally married to someone of the same sex, would you like to do that someday or not?"), available at <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13875>. Most strikingly, LGBT people have been marrying in religious and other private ceremo-

as a condition for a wide range of benefits.<sup>7</sup> But the de jure exclusion of same-sex couples from marriage is a massive affront to the dignity of all LGBT Americans.

For many years at GLAD, we have been hearing from members of same-sex couples who love one another and happily take on responsibilities for one another and their children. Many wished to make those commitments legally binding and to share in the community of those who have made marriage vows. This should not be surprising, because LGBT people are part of the larger culture in which marriage represents the ideal institution of connection and commitment. This understanding transcends the bounds of sexual orientation, as does the belief that the choice of a marital partner is one of life's most important personal decisions, one over which others, particularly the state, should have no control. What the United States Supreme Court said in *Loving v. Virginia*<sup>8</sup> resonates with the experiences of many people across the nation: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness . . . ." As the Supreme Judicial Court recognized in *Goodridge*, "Civil marriage is at once a deeply personal commitment to another human being and a highly public celebra-

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nies for years even though these ceremonies have no legal effect. GEORGE CHAUNCEY, *WHY MARRIAGE: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 92 (2004) (noting 85,000 marriages performed in last thirty-six years by Metropolitan Community Church); e-mail from Richard McCoy, Director of Public Health Statistics, Vermont Department of Health, to Daniel R. Redman, Legal Assistant, GLAD (Oct. 14, 2004) (on file with author) (noting 7201 couples had entered into civil unions in Vermont between July 1, 2000 and October 8, 2004).

<sup>7</sup> See, e.g., AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 1-90 (2002) (overview of principles for dissolving "domestic partnerships"); MARTHA A. FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (most pressing family policy questions today revolve around caretaker-dependent relationships, not marriage); Michael Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291 (2001) (marriage should be open to same-sex couples because their relationships fulfill the policies underlying marriage). But see Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 219 (2003) (no evidence that "alternative relationships provide social benefits equivalent to marriage"). LGBT movement lawyers have helped bring these ideas to life. See, e.g., *Braschi v. Stahl Assocs., Inc.*, 74 N.Y.2d 201 (1989) (creating a functional definition of "family" for purposes of New York City rent control ordinance); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999), *cert. denied*, 528 U.S. 1005 (1999) (acknowledging rights of de facto parent to continued contact with child with whom she had no biological or legal relationship); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (acknowledging adoption rights of the "second parent"). The acknowledgement of "second parent" adoption rights is now endorsed by organizations such as the American Academy of Pediatrics, see *Statement of Policy: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339, 339-40 (2002), available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics%3b109/2/339>, and the American Medical Association, see *Science Drives AMA Adoption Policy*, AMEDNEWS.COM, July 5, 2004, at <http://www.ama-ssn.org/amednews/2004/07/05/prbf0705.htm#2>.

<sup>8</sup> 388 U.S. 1 (1967).

<sup>9</sup> *Id.* at 12.

tion of the ideals of mutuality, companionship, intimacy, fidelity and family.”<sup>10</sup>

Apart from the meaning an individual or the larger culture ascribes to the institution of matrimony, we live in a world where real LGBT people and families are categorically denied enormous rights and protections because they are denied marriage. The harm from that denial may fall more heavily on some than others,<sup>11</sup> but the denial of marriage-related rights affects almost every couple (and their children) at some time, and sometimes catastrophically. As the Supreme Judicial Court succinctly observed in *Goodridge*, “The benefits accessible only by way of a marriage license are enormous, touching nearly every area of life and death.”<sup>12</sup>

While my opponents sometimes tell me they do not want to get “bogged down in the details,” the “details” are critical. As the historian George Chauncey explains in *Why Marriage: The History Shaping Today’s Debate over Gay Equality*, during the twentieth century in the United States, the simple fact is that “[m]arriage acquired a unique status . . . as the nexus for the allocation of a host of public and private benefits.”<sup>13</sup> For the real people we talk to on a day-to-day basis, this means exclusion from several hundred state laws and 1138 federal laws that use marital status as a factor.<sup>14</sup> The decision about whether to marry is per-

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<sup>10</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

<sup>11</sup> One recent policy paper suggests that black same-sex households are disproportionately harmed by the denial of marriage, in part because black same-sex couples are more likely to be raising children than white same-sex couple families. ALAIN DANG & SOMJEN FRAZER, NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE AND NATIONAL BLACK JUSTICE COALITION, BLACK SAME-SEX HOUSEHOLDS IN THE UNITED STATES 5–6 (2004), available at <http://www.thetaskforce.org/ourprojects/pi/blackcensus.cfm>.

<sup>12</sup> *Goodridge*, 798 N.E.2d at 955.

<sup>13</sup> CHAUNCEY, *supra* note 6, at 71. See, e.g., *id.* at 71–77 (discussing social security, ERISA, and federal income tax); see generally David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996) (describing the ways in which law supports the family relationships of married persons).

<sup>14</sup> A Westlaw search of Massachusetts statutes using terms or roots for marriage, spouse, husband, wife, widow, and widower shows that at the state law level in Massachusetts there are over 700 statutes in which marital status is a factor. See GLAD, PROTECTIONS, BENEFITS AND OBLIGATIONS OF MARRIAGE UNDER MASSACHUSETTS AND FEDERAL LAW: SOME KEY PROVISIONS OF A WORK IN PROGRESS (2001), available at <http://www.glad.org/rights/PBOsOfMarriage.pdf>; see also SUSAN PRICE-LIVINGSTON, OFFICE FOR LEGISLATIVE RESEARCH, RESEARCH REPORT NO. 2001-R-0606: CONNECTICUT LAWS INVOLVING MARITAL STATUS (2002) (reporting that 588 Connecticut statutes turn on marital status), available at <http://www.cga.ct.gov/2001/rpt/olr/htm/2001-r-0606.htm>; NEW YORK STATE BAR ASSOCIATION, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE TO STUDY ISSUES AFFECTING SAME-SEX COUPLES 9–146 (2004), available at [http://nysba.org/content/content-groups/reports3/same-sex\\_marriage\\_report/same-sexissuesreport2004.pdf](http://nysba.org/content/content-groups/reports3/same-sex_marriage_report/same-sexissuesreport2004.pdf) (reporting New York statutes). The GAO developed the federal numbers, and classified the laws into thirteen broad categories ranging from social security to taxation, employment benefits, and immigration. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT 1–3 (1997), available at <http://www.gao.gov/archive/1997/og97016.pdf>; see also U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

sonal,<sup>15</sup> but in the typical case, the fifty dollars a couple spends on a marriage license will buy them more protection than any set of lawyers' documents ever will.<sup>16</sup>

Absent marriage, there is not much lawyers can do for the Martin Friedmans of the world. Martin is the surviving partner of a Boston firefighter who died in 1998 after forty years together. No one could abate his agony in losing the love of his life. As a spouse for forty years, Martin cared for his partner during a long battle with throat cancer and related surgeries, swabbing out his throat so he would not choke on mucus plugs. But as a non-spouse, he lost the family's major source of income when John died and the pension died with him. Not only would Martin have retained his economic security had he been eligible for survivor benefits, but he would have had access to health insurance (a major expense paid from the monthly pension) and been spared the high taxes that came from inheriting the home they shared.<sup>17</sup>

Marriage is not just about recognition of loving and committed relationships, nor is it just about legal protections. For some, it is also about equal citizenship. During the constitutional conventions in Massachusetts that considered *Goodridge*, both LGBT and non-LGBT people joined together to fight ferociously a plan to substitute civil unions for the marriage ruling in *Goodridge*, even though at the level of *state* law the bundle of rights would have been largely the same under marriage or the civil unions proposal.<sup>18</sup> While I believe the dilution of rights would still have been tangible, others who could not engage with that legal analysis felt this explicit proposal for a government-approved separate and unequal institution was an affront to their citizenship. As the historian Nancy Cott has cogently explained:

Lesbians and gay men seek legal marriage for some of the same reasons ex-slaves did so after the Civil War, to show that they have access to basic civil rights. The exclusion of same-sex partners

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<sup>15</sup> There are some people for whom marriage is disadvantageous, for example, LGBT people in the military who face discharge for a marriage to someone of the same sex, or people disqualified from means-tested government programs if their spouse's income is calculated into benefit eligibility. See GLAD, *Tips & Traps for the Unwary*, at <http://www.glad.org/marriage/tips+traps.html>.

<sup>16</sup> Private ordering is not a substitute for marriage for LGBT people any more than it is for others. One of the practical advantages of marriage is its default nature: whether or not a person prepared a will, he or she can be sure to share in a deceased spouse's estate; whether or not a person prepared a medical directive, a spouse will always be able to visit in intensive care. See, e.g., Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265 (2000); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299 (1997).

<sup>17</sup> Martin Friedman, Testimony before Joint Committee on the Judiciary on H. 3677, H. 1149, S. 935 and S. 1045 (Oct. 23, 2003) (transcript at [http://www.glad.org/GLAD\\_Cases/testimony\\_10\\_23\\_03.shtml](http://www.glad.org/GLAD_Cases/testimony_10_23_03.shtml)).

<sup>18</sup> See discussion *infra* Part II.B.

from free choice in marriage stigmatizes their relationship, and reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy.<sup>19</sup>

No one is suggesting that LGBT Americans are in the position of newly freed slaves, but the commentary on citizenship stands clear. It is impossible to pretend that being denied the right to marry the person of your choice is anything but a massive affront to the human dignity and equality of LGBT people in a culture where that choice is cherished as a fundamental freedom essential to the pursuit of happiness.<sup>20</sup>

Now that May 17, 2004—the day same-sex couples could begin marrying legally in Massachusetts—has come and gone, we know just how personally meaningful the “public celebration” aspect of marriage can be. For the plaintiff couples in the *Goodridge* case, May 17 was the most important day of their lives, except, perhaps, for the day their children were born.<sup>21</sup> Others, too, were overwhelmed by the power of the government to acknowledge our humanity and our citizenship.<sup>22</sup>

A number of factors contributed to marriage becoming an increasing priority for the LGBT movement: the weight that society gives to the decision to marry combined with the flat prohibition on making that choice; the enormous architecture of marriage-related rights that were overwhelmingly denied; and the various other social and cultural changes that impacted LGBT people. Yet until relatively recently, no matter how much many LGBT people wanted to marry, they could not ever imagine a world in which that right would be available to them as it was to non-LGBT people. This has changed. As feminists in the 1970s rightly noted, and other civil rights and social justice movements found out, the personal is political, or at least it can become so. In the last twenty-five years, the LGBT community as a whole has lived through the crucible of AIDS and the massive disrespect shown to our families during the early part of that crisis.<sup>23</sup> As a lawyer in private practice in the late 1980s and in my early years at GLAD, the most searing calls I received came from men who had just been turned out of their own homes by a deceased partner’s biological family, or were left with nothing because their partner had died without a will,

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<sup>19</sup> NANCY F. COTT, *supra* note 4, at 216.

<sup>20</sup> Insisting that it is an affront to deny the choice to marry is not to say that marriage is now mandatory for LGBT people in committed relationships.

<sup>21</sup> See, e.g., Yvonne Abraham & Michael Paulson, *Wedding Day: First Gays Marry; Many Seek Licenses*, BOSTON GLOBE, May 18, 2004, at A1 (“‘Next to the birth of our daughter Annie, this is the happiest day of our lives,’ said Julie Goodridge, holding back tears.”).

<sup>22</sup> See, e.g., Yvonne Abraham & Rick Klein, *Free to Marry: Historic Date Arrives for Same-Sex Couples in Massachusetts*, BOSTON GLOBE, May 17, 2004, at A1 (“‘This is like winning the World Series and the Stanley Cup on the same day,’ said Susan Shepherd, 52, who, with her partner Marcia Hams, 56, was the first to apply for a marriage license in Massachusetts. ‘I’m trying not to lose it. We just really feel awesome. It’s awesome.’”).

<sup>23</sup> See, e.g., CHAUNCEY, *supra* note 6, at 96–104.

or were not permitted to say their final goodbyes at a hospital once the “real family” showed up. In another vein, the de-ghettoization of LGBT people culturally, and the increasing numbers of LGBT people choosing to have children and build a family, as well as the aging of the baby boomers, have made marriage a priority issue.<sup>24</sup> As Chauncey explains, “the mass experience of childrearing and death in the 1980s pushed lesbian and gay politics and culture in new directions. These experiences made people realize that no matter how accepted they were by their families, friends, and workmates, their relationships were still dangerously vulnerable.”<sup>25</sup>

As LGBT people have tried to solve their legal problems and have talked to their communities of neighbors, co-workers, and congregations, inevitably more non-LGBT people have begun to appreciate their perspectives. As LGBT people and the legal and political organizations representing them have confronted institutionalized discrimination, they have engaged state and local governments and private institutions, requiring more and more non-LGBT people to take notice and wrestle with the reflexive treatment of LGBT people in light of our governments’ pledges of equal laws.<sup>26</sup>

### *B. The Specific Massachusetts Context: Legally, Politically, and Culturally*

One of the great misconceptions about *Goodridge* is that four justices shocked the state with their recognition, out of the blue, of marriage equality for same-sex couples. The reality is far more nuanced. The *Goodridge* lawsuit was begun after several decades of growing recognition of equality in the legislature as well as in the courts. Moreover, GLAD and many other allied organizations worked carefully and closely with a broad range of community groups in the state, generating public discussion about

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<sup>24</sup> See, e.g., *id.* at 105–10 (discussing the lesbian baby boom); *id.* at 111–16 (discussing increased awareness of the legal vulnerability of relationships); *id.* at 116–19 (discussing limits of domestic partnership plans). See also, e.g., WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW*, at xxiv–xxvi (2d ed. 1997) (discussing the evolution of the law in regards to LGBT families); GRAFF, *supra* note 4, at 128–30 (describing the lesbian baby boom); PATRICIA CAIN, *RAINBOW RIGHTS* 244–76 (2000) (describing the history of LGBT family litigation).

<sup>25</sup> CHAUNCEY, *supra* note 6, at 95.

<sup>26</sup> This Essay will not canvass the literature about whether the struggle for equal rights for LGBT people is a legitimate “civil rights” enterprise since others have already done so. As William Rubenstein details, there has also been a veritable explosion of legal literature and attention to gay issues in law schools. WILLIAM B. RUBENSTEIN, *SEXUAL ORIENTATION AND THE LAW* v–xi (2d ed. 1997). Rhonda Rivera, who has done pioneering work in this area, has been joined by many others. Rhonda Rivera, *Our Straight Laced Judges*, 30 *HASTINGS L.J.* 799 (1979); see, e.g., *Developments in the Law—Sexual Orientation and the Law*, 102 *HARV. L. REV.* 1508 (1989); Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 *VA. L. REV.* 1551 (1993). Arthur Leonard’s *Lesbian/Gay Law Notes* has provided monthly updates on legal and political issues on LGBT and AIDS issues for ten years. LESBIAN/GAY LAW NOTES (Lesbian & Gay Law Ass’n of Greater N.Y.), at <http://www.qrd.org/qrd/www/usa/legal/lgn>.



the unfairness of denying marriage rights to LGBT people, both before we filed the case and while we litigated it.

*Goodridge* was, of course, a historic and path-breaking decision. In the context of this richer understanding of its origins, however, it was not so much a sharp and abrupt break with the past as it was the logical, if brave, next step.

This Essay cannot provide anything close to a full history of the evolution of rights for the LGBT communities in Massachusetts. What is important is that non-LGBT people have borne witness to the gradual and evolving movement for the rights of LGBT people as individuals, and then as families, and also have increasingly participated in this evolution—as neighbors, families, co-workers, employers, and co-religionists.<sup>27</sup> It is fair to say that the lives of LGBT people have come into sharper focus for others over the last thirty years and that many people now acknowledge knowing someone who is LGBT and his or her family.<sup>28</sup> This is not surprising given that in the 2000 Census same-sex couples identified as households in nearly every community in the state.<sup>29</sup> Even more importantly, major media in Massachusetts have increasingly, and with greater regularity, viewed the legal and policy issues confronting LGBT people and families in society as legitimate and newsworthy issues.<sup>30</sup> Often beyond

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<sup>27</sup> Among the many organizations that could be cited as non-LGBT and as allies are: Parents, Families and Friends of Lesbians and Gays (“PFLAG”); the American Civil Liberties Union; The Anti-Defamation League of B’nai B’rith, Northeast Chapter; The National Organization for Women; People For the American Way; the Unitarian Universalist Association; and the Religious Society of Friends. Over 450 supportive clergy joined the Religious Coalition for the Freedom to Marry. Signers of the Massachusetts Declaration of Religious Support for Same-Sex Marriage are listed online at <http://www.ftm-mass.org/rcfm/signers.htm>.

<sup>28</sup> U.S. Representatives Gerry Studds and Barney Frank, both openly gay, hailed from Massachusetts. Representative Frank has served continuously in the House since 1980. Representative Studds served from 1972 until his retirement in 1996.

<sup>29</sup> The data demonstrates that there are at least 17,099 same-sex couple households in Massachusetts. See JUDITH BRADFORD ET AL., THE NAT’L GAY AND LESBIAN TASK FORCE POL’Y INST., THE 2000 CENSUS AND SAME-SEX HOUSEHOLDS 78 (2002), available at <http://www.thetaskforce.org/downloads/census/censusfull.pdf>. See also Michael Ash et al., *Same-Sex Couples and Their Children in Massachusetts: A View from Census 2000*, BY THE NUMBERS (Inst. for Gay and Lesbian Strategic Studies, Amherst, Mass.), Feb. 2004, at 2, available at <http://www.iglss.org> (table of same-sex couples in Massachusetts by county).

<sup>30</sup> I reviewed the Editorial and Op-Ed sections of the Boston Globe from 1980 through 2004 and the amount of coverage of LGBT and AIDS issues increased dramatically over those years. Prior to the *Goodridge* decision, at least seven newspapers in Massachusetts editorialized in favor of ending marriage discrimination against same-sex couples. See *Another Gay Marriage Landmark*, BERKSHIRE EAGLE, Sept. 29, 2003, at A4; *Civil Marriage is a Civil Right*, NEW BEDFORD STANDARD-TIMES, June 22, 2003, at B2; *For Gay Marriage*, BOSTON GLOBE, July 8, 2003, at A18; *Massachusetts and Gay Marriage*, CAPE CODDER, July 3, 2003, at 46; *Matters of Matrimony About Love, Not Gender*, SPRINGFIELD REPUBLICAN, July 10, 2003, at A14, available at [http://glad.org/marriage/marriage\\_news.shtml](http://glad.org/marriage/marriage_news.shtml); Ned Bristol, *Gay Marriage Should Be Made Legal*, ATTLEBORO SUN-CHRON., July 13, 2003, at D5; *On To Gay Equality*, BERKSHIRE EAGLE, July 28, 2003, at A4; *Remedying Injustice*, BOSTON PHOENIX, July 4–10, 2003, at 5. Among the many Massachusetts editorials published after the *Goodridge* decision, see *A Gay-Marriage Tide*, BERKSHIRE EAGLE, Mar. 28, 2004, at A8; *Equal Under the Law*, BOSTON GLOBE, Feb. 5, 2004, at A14; *Equality on*

the media, GLAD attorneys and our allies made marriage a topic by sharing the stories of families harmed by the denial of marriage rights and developing educational materials for distribution to non-lawyers. In short, the Commonwealth of Massachusetts was as ready as any place in the country to struggle fairly with the question of whether LGBT people should be denied marriage rights.<sup>31</sup>

Moreover, just canvassing the high points demonstrates that Massachusetts is a place where each branch of state and local government had already waded deeply into issues of discrimination against LGBT people as individuals and as families. With respect to the right to work and equal treatment for individuals, 1989 was a landmark year. After seventeen years of consideration, the Massachusetts legislature took the then-bold step of enacting a sexual orientation non-discrimination law.<sup>32</sup> Massachusetts became the second state in the country to do so, and other states soon followed suit.<sup>33</sup> In reality, local communities had paved the way for the state by holding hearings, enacting ordinances as early as 1976,<sup>34</sup> and showing that non-discrimination was good and sound public policy.<sup>35</sup> The Supreme

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*Beacon Hill*, BOSTON GLOBE, Feb. 12, 2004, at A18; *High Court Issues Bold Decision To Allow Marriage*, NEW BEDFORD STANDARD TIMES, Nov. 19, 2003, at A16; *Reject the Gay Marriage Amendment*, MILFORD DAILY NEWS, Feb. 8, 2004, at H4; *Same-Sex Marriage About Love, Not Gender*, SPRINGFIELD REPUBLICAN, Nov. 19, 2003, at A14; *Voters Will Ultimately Back Marriage Rights*, ATTLEBORO SUN-CHRON., Apr. 1, 2004, at A6.

<sup>31</sup> Polling conducted in the month before the *Goodridge* decision was issued showed 59% support for equal marriage rights for same-sex couples. Memorandum from Bob Meadow and Steven Van Tassel, Decision Research to Freedom to Marry Coalition of Massachusetts 1 (Oct. 30, 2004) (on file with author) (based on random sample of 600 registered voters in October 2004, with support among most demographic groups). These numbers were not unprecedented in the State. See, e.g., Frank Phillips, *Support for Gay Marriage Mass Poll Finds Half in Favor*, BOSTON GLOBE, Apr. 8, 2003, at A1 (citing 50% support for marriage of same-sex couples).

As to other states, see, for example, Memorandum from Susan M. Murray, to Mary Bonauto, History of the Work on the Marriage Issue in Vermont (Aug. 26, 1997) (on file with author); Betty Gallo, History of Securing Rights for Gay, Lesbian, Bisexual and Transgender People in Connecticut (detailing legislative work from 1990 to 2003) (on file with author).

<sup>32</sup> Act of Nov. 5, 1989, ch. 516, 1989 Mass. Acts 796 (amending, inter alia, MASS. GEN. LAWS ch. 151B, §§ 3, 4 (non-discrimination protections in employment, housing, credit, services), MASS. GEN. LAWS ch. 272, §§ 92A, 98 (non-discrimination protections in public accommodations)). After enactment, the fact that the religious exemption under the law had been expanded to accommodate concerns of religious faiths served to make the new law an inappropriate subject for voter repeal under Massachusetts laws governing initiative and referendum. *Collins v. Secretary of the Commonwealth*, 556 N.E.2d 348 (Mass. 1990). GLAD intervened in *Collins* on behalf of legislators who voted in favor of the law.

<sup>33</sup> Connecticut, for example, passed such a law in 1991, CONN. GEN. STAT. § 46a-81c-m (2001), as did Vermont in 1992, VT. STAT. ANN., tit. 21, § 495 (2001); VT. STAT. ANN., tit. 9, § 4503 (2001); VT. STAT. ANN., tit. 8, § 10403 (2001); VT. STAT. ANN., tit. 8, § 4724 (2001); VT. STAT. ANN., tit. 3, § 963 (2001).

<sup>34</sup> A Citizen's Commission established legal protections in Amherst in 1976. Boston (1984), Cambridge (1984), Malden (1984), Worcester (1986), and Somerville (1993) later followed. See Lambda Legal, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=217> (last modified June 24, 2004).

<sup>35</sup> During this period, legal cases affected the nature of the debate. Christine Madsen

Judicial Court had also weighed in during those seventeen years, once to say that “sexual preference” was not within the scope of existing prohibitions on “sex” discrimination,<sup>36</sup> and later to say that a bill which would punish discrimination based on “sexual preference” but failed to define the term did not offend standards of definiteness under the state constitution.<sup>37</sup>

Leveling the playing field regarding employment, housing, public accommodations, credit, and services was enormously important for increasing people’s sense that they could be who they were in the ordinary business of life and be more open about their families.<sup>38</sup> The private bar as well as the state enforcement agency took note, devoting resources to integrating sexual orientation discrimination into the larger arena of discrimination law.<sup>39</sup>

In 1993, the legislature enacted another landmark piece of legislation, this time recognizing the vulnerability of young people who were questioning their sexual orientation and including “sexual orientation” within the non-discrimination laws applicable to schools.<sup>40</sup> Governor William Weld created an Executive Commission on Gay & Lesbian Youth in February

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was discharged by the Christian Science Monitor because she is a lesbian, and the Supreme Judicial Court ultimately held that she had no recourse. *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985).

<sup>36</sup> *Macaulay v. Mass. Comm’n Against Discrimination*, 397 N.E.2d 670 (Mass. 1979). GLAD founder John Ward submitted an amicus brief on behalf of GLAD. In later years, GLAD brought a federal sex discrimination claim in a credit case for a transgender person. *See Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *see also* Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 31 (2000) (discussing *Rosa*).

<sup>37</sup> Opinion of the Justices to the Senate, 458 N.E.2d 1192 (Mass. 1984). GLAD briefed this issue to the Supreme Judicial Court.

<sup>38</sup> *See* Peter M. Cicchino et al., *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549 (1991) (detailing the seventeen-year history of the law’s enactment). Significantly, the statute contained a proviso stating that it should not be construed to authorize homosexual marriage. Acts of Nov. 15, 1989, ch. 516, § 19, 1989 Mass. Acts 796, 803.

After the measure passed, I was hired by GLAD in early 1990 as its first full-time attorney to litigate cases under that law, the second such statewide law in the country.

<sup>39</sup> *See, e.g.*, MASS. CONTINUING LEGAL EDUC., INC., NO. 90-413, UTILIZING THE NEW MASSACHUSETTS LESBIAN AND GAY RIGHTS LAW AND THE STATE CIVIL RIGHTS ACTS (1990). One long-running controversy concerned the participation of an openly LGBT group of Irish ancestry who wished to march in Boston’s annual St. Patrick’s Day parade. They marched one year because of facts showing the parade was publicly sponsored, *see* Don Aucoin, *Judge Lets Gays March in Parade: South Boston Group Won’t Appeal*, BOSTON GLOBE, Mar. 12, 1992, at 1, and again the next year on the grounds that the parade was a civic event, *see Collisions on the Parade Route*, BOSTON GLOBE, Mar. 8, 1993, at 10 (commenting on the controversy and three court rulings in favor of the marchers). *See also* Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston, 418 Mass. 238, 251 (1993). Eventually, the U.S. Supreme Court ended the controversy by finding that the reconstituted private parade could exclude any group it wished. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). For a thoughtful discussion of *Hurley*, *see* Nan D. Hunter, *Expressive Identity, Recuperating Dissent For Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 18–20 (2000).

<sup>40</sup> Act of Dec. 10, 1993, ch. 282, 1993 Mass. Acts 282.

1992 to examine the high rate of suicide by gay and lesbian youth.<sup>41</sup> The Commission's recommendations a few months later called for teacher training and stiffer non-discrimination protections.<sup>42</sup> On the heels of the Commission's work, an unprecedented lobbying campaign by high school students across the state led the legislature to amend the law.<sup>43</sup> In connection with that bill's passage, a long-time teacher at Brookline High School came out to her students as a lesbian because she had been interviewed by local television. A student in the class felt harassed by the disclosure, but when her family demanded money damages from the school, there was an outpouring of support for the teacher.<sup>44</sup>

Equally important, LGBT communities in Massachusetts have been able to overcome what was once a persistent fear of violence or harassment.<sup>45</sup> GLAD itself was founded as a defense organization in 1978 because the Suffolk County (Greater Boston) district attorney had set up a tip line for people to report on the alleged activities of gay men.<sup>46</sup> In 1988, a gay man named Jim Brinning was brutally attacked and then fired from his job when he notified his employer that he needed time off to deal with his injuries.<sup>47</sup> The first bill to expand the state hate crimes laws to include sexual orientation was filed in 1991. After a period in which hate crimes rose year by year,<sup>48</sup> an expanded law was enacted in 1996 for both disability and sexual orientation, targeting bias-motivated assaults for significant penalties.<sup>49</sup>

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<sup>41</sup> Toni Locy, *Weld Creates Panel on Gay Youth Issues*, BOSTON GLOBE, Feb. 11, 1992, at 18.

<sup>42</sup> *Recommendations on the Support and Safety of Gay and Lesbian Students*, Mass. Dep't of Education, at <http://www.doe.mass.edu/hssss/GSA/safegl.html>; see also *Gov. Weld Asks Schools to Aid Gay Students*, N.Y. TIMES, July 4, 1992, at A15.

<sup>43</sup> Even with the law in place, LGBT youth remained at high risk for physical fights, threats from and injuries by weapons, and truancy because of safety concerns. See MASS. DEP'T OF EDUC., 1999 MASSACHUSETTS YOUTH RISK BEHAVIOR SURVEY 20 (2000), available at <http://www.doe.mass.edu/hssss/yrbs99/toc.html>.

<sup>44</sup> See Patricia Smith, *Brookline Suit Looks Silly On*, BOSTON GLOBE, Mar. 15, 1996, at B25; *Students Gauge Their Tolerance for . . . Intolerance: These Ninth Graders Expect Schools and Teachers to Show Them How to Live in a World of Difference*, BOSTON GLOBE, June 16, 1996, Focus Section, at 67.

<sup>45</sup> In the early 1990s I, working through GLAD and with advocates from the Fenway Community Health Center, attempted in some gay-bashing cases (particularly in Suffolk County where the Boston bashings occurred) to have criminal civil rights charges brought against assailants, even though there was no specifically enumerated protection for LGBT people, on the grounds that such attacks interfered with rights otherwise secured under the state and federal constitutions. See MASS. GEN. LAWS ch. 265, § 37 (2002).

<sup>46</sup> See GLAD, 1993 ANNUAL REPORT 2 (1993) (detailing GLAD's history since its founding in 1978) (on file with author).

<sup>47</sup> Pamela Ferdinand, *Reports Show Rise in Attacks on Gays*, BOSTON GLOBE, Aug. 7, 1994, at 1, 6 (discussing Brinning story).

<sup>48</sup> See, e.g., *id.* (discussing data from 1990–1994).

<sup>49</sup> Act of July 12, 1996, ch. 163, 1996 Mass. Acts 163, § 2 (amending chapter 265, section 39 of the Massachusetts General Laws to include “sexual orientation” and “disability” among enumerated characteristics).

Building on the spirit of those laws, in the fall of 1997, the chief of the Massachusetts Bay Transportation Authority (“MBTA”) Police Department, a quasi-state agency, took the unprecedented step of contacting LGBT community organizations, including GLAD, about developing fair policing protocols in light of concerns about alleged public sexual conduct by gay men.<sup>50</sup> The resulting protocol, addressing entrapment and other types of improper police conduct, was widely disseminated by the MBTA.<sup>51</sup>

Similarly, after years of complaints by the LGBT community and advocacy organizations about entrapment,<sup>52</sup> the State Police appointed its first liaison to the gay and lesbian community in 1999, a major who later commanded the entire force.<sup>53</sup> Under his leadership, the State Police developed policies intended to ensure non-discriminatory patrolling practices and aggressive investigation of hate crimes.<sup>54</sup>

Finally, the LGBT legal community took many steps to secure parents’ relationships with their children. Nothing is as threatening to a parent as the threat to remove his or her child. As a result, some of the first LGBT civil rights cases were custody cases.<sup>55</sup> With statutes directing the courts to apply the best interests of the child standard to custody disputes, Massachusetts long ago established precedents confirming that sexual orientation by itself is not a basis for denying custody or visitation to a parent.<sup>56</sup>

Massachusetts eventually took that principle into the foster care context, too. In response to a 1987 newspaper report that three children were in foster care with a gay couple, the governor instructed the Executive Office of Human Services to issue regulations declaring that gay people were not ideal candidates for foster care placements.<sup>57</sup> The policy decision came after nearly two months of rancorous public debate that spilled into the

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<sup>50</sup> Press Release, MBTA Police (Sept. 15, 1998) (on file with author).

<sup>51</sup> *Id.*; MBTA Police General Order No. 98-01 (July 21, 1998) (on file with author).

<sup>52</sup> *See, e.g.*, *Commonwealth v. Nicholas*, 663 N.E.2d 266, 267 (Mass. App. Ct. 1996) (showing police entrapment of men looking for sex); *Doe v. DiFava*, No. 99-4037 (Mass. Super. Ct. filed Oct. 27, 1999) (order granting preliminary injunction, based on rousting a gay man from a public area) (GLAD case).

<sup>53</sup> Then-Major DiFava met with GLAD and other LGBT community representatives in 1999 and identified himself as the liaison.

<sup>54</sup> Judith Gaines, *Tough Love Superintendent John DiFava is Bringing Sensitivity, Diversity, and Outreach to the Tradition-Minded Massachusetts State Police*, BOSTON GLOBE MAG., Jan. 7, 2001, at 10. The State Police also settled a case in March 2001, brought by GLAD, on behalf of a man who claimed he had been roused from a rest area simply because he was gay, and not because of anything he had done. A Superior Court issued an injunction against the State Police for its actions toward this individual, and the case settled in part due to the agreement of the Police to enact policy changes and a new general order addressing sexual activity in public places. The general order is available online at [http://www.glad.org/GLAD\\_Cases/generalorder.shtml](http://www.glad.org/GLAD_Cases/generalorder.shtml).

<sup>55</sup> *See, e.g.*, Nancy D. Polikoff & David L. Chambers, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 532 (1999).

<sup>56</sup> *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215–16 (Mass. 1980) (GLAD submitted an amicus brief in this case); *Doe v. Doe*, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983).

<sup>57</sup> For helpful background, see Cicchino, *supra* note 38; WENDELL RICKETTS, LESBIANS AND GAY MEN AS FOSTER PARENTS 67–87 (1991).

legislature.<sup>58</sup> To many, this suggested that if gay people were not fit to be foster parents, then they were not fit to be parents at all. In later litigation,<sup>59</sup> the Commonwealth's position was criticized by a variety of mainstream voices, including two sitting attorneys general who refused to defend the state's position.<sup>60</sup> Finally, in 1990, the Commonwealth settled the case by returning to the previous standard of making placements based on the best interests of children and by prioritizing parenting experience rather than simply heterosexual orientation.<sup>61</sup>

Moving from the fitness of individual parents to the integrity of a planned lesbian family, in the fall of 1993 the Supreme Judicial Court approved of a lower court's decision to allow two women to adopt jointly the biological child of one of them.<sup>62</sup> Each woman was a "person" under the standing laws, the court ruled, and there was no rationale in the adoption statute for insisting on the termination of the biological mother's parental rights in order to give the same rights to her partner.<sup>63</sup> In this major legal development, the court effectively acknowledged that it could be in the best interests of a child to have two legal parents of the same sex. If the parents later separated, each would stand equally in terms of any actions for custody, visitation, or child support.<sup>64</sup> A few years later, the court clarified that all joint applicants for adoption, including same-sex couples, must be subject to the same screening standards.<sup>65</sup>

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<sup>58</sup> See, e.g., Kenneth J. Cooper, *House Votes to Ban Gay Foster Parents, State to Announce New Placement Policy*, BOSTON GLOBE, May 24, 1985, at B1 (reporting on House vote on budget amendment to bar placement of foster children with those with a "homosexual preference," i.e., a preference that "threatens the psychological or physical well-being of a child").

<sup>59</sup> GLAD litigated on behalf of the foster parents and prospective foster parents along with the Civil Liberties Union of Massachusetts. A Superior Court judge ruling on a motion to dismiss stated that "[a]ny exclusion of homosexuals from consideration as foster parents, all things being equal, is blatantly irrational." See Peter J. How, *Judge Hits Rules on Gay Foster Parents*, BOSTON GLOBE, Sept. 12, 1986, at B17.

<sup>60</sup> *Bellotti Hits Foster Care Policy*, BOSTON GLOBE, July 12, 1985, at B23 (Attorney General Francis Bellotti refused to defend the policy because "it's discriminatory"); Joan Vennoch, *Shannon Says He Will Run for Attorney General Post*, BOSTON GLOBE, May 6, 1986, at B21 (while a candidate, Attorney General James Shannon vowed not to defend the state in the foster care litigation).

There were several impassioned public protests against the new policy. See, e.g., Associated Press, *Gays Hide Dukakis on Foster Parents Issue*, BOSTON GLOBE, Oct. 16, 1986, at B41; Richard Ryan, *Gay Group Sits Down in State House in Protest of Foster Parenthood Curb*, BOSTON GLOBE, June 20, 1985, at B28; *13 Arrested at Sit-In Staged Over Gay Foster-Care Policy*, BOSTON GLOBE, Jan. 3, 1986, at B20.

<sup>61</sup> Kay Longcope, *Foster-Care Ban on Gays is Reversed*, BOSTON GLOBE, Apr. 5, 1990, at B1.

<sup>62</sup> Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Adoption of Susan, 619 N.E.2d 323 (Mass. 1993). GLAD was amicus in *Tammy* and counsel in *Susan*. For a further discussion of these issues, see Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHL.-KENT L. REV. 933 (2000).

<sup>63</sup> *Adoption of Tammy*, 619 N.E.2d at 321.

<sup>64</sup> *Id.* at 320-21.

<sup>65</sup> Adoption of Galen, 680 N.E.2d 70, 73 (Mass. 1997).

Notably, even as the legislature amended the standing provisions of the adoption laws—an effort led by Representative John Rogers, an opponent of marriage for same-sex couples<sup>66</sup>—it stopped short of reversing adoption protections for children of same-sex couples.<sup>67</sup> By leaving the interpretation of “person” intact and further expanding the classes of people eligible to adopt, the legislature in 1999 acknowledged same-sex families were parenting children.

In 1999, the Supreme Judicial Court confronted its first dissolution of a planned lesbian family.<sup>68</sup> It was asked to rule on the rights of the child to continued access to both parents, both of whom had long planned for his birth and raised him for more than three years.<sup>69</sup> This was a major crossroads for Massachusetts: would it hew to a notion of family defined solely by birth, marriage, and adoption or, based on the conduct of the parties and the child’s interests, would it acknowledge the parental nature of the relationship between this little boy and his other mother? Over a strong dissent, the court used its conventional equity powers to uphold a temporary order of visitation between the “de facto” parent and the child.<sup>70</sup> The court ruled that the family deserving respect was that of the biological mother, the de facto parent, and the child.<sup>71</sup> Cases such as this were front-page news.<sup>72</sup>

Because of couples living outside of marriage, either by choice or by compulsion, more cases and policy issues arose about whether unmarried people could ever access the benefits and protections accorded to married people. The early 1990s saw the Supreme Judicial Court issue the first of several decisions holding that “marriage” does not control benefits that

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<sup>66</sup> This same legislator was honored by the Massachusetts Bar Association as “Legislator of the Year” in 2001, sparking highly public protests. See Eric Convey, *Marriage Law Likely Cause of Boycott*, BOSTON HERALD, Jan. 23, 2002, at 30 (noting that Tipper Gore and several Boston law firms had withdrawn from participation in the Massachusetts Bar Association annual awards dinner).

<sup>67</sup> In 1999, the legislature amended chapter 210, section 1 of the Massachusetts General Laws, by expanding the classes of people who could adopt, but left intact the decisions premised on the definition of “person” upon which the second parent adoption court decisions in *Tammy* and *Susan* relied. See Act of March 31, 1999, ch. 3, 1999 Mass. Acts 3, § 15.

<sup>68</sup> E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999).

<sup>69</sup> *Id.* at 889.

<sup>70</sup> *Id.* at 891. The court defined a de facto parent as one who

resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent . . . . The de facto parent shapes the child’s daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide.

*Id.*

<sup>71</sup> *Id.* at 891–92.

<sup>72</sup> J. M. Lawrence, *SJC Ruling Favors Unrelated Gay “Parents,”* BOSTON HERALD, June 30, 1999, at 1; Doris Sue Wong, *Lesbian Couple Allowed To Adopt*, BOSTON GLOBE, Sept. 11, 1993, at B1.

are not explicitly premised on the marital relationship. In *Reep v. Commissioner of Department of Employment and Training*,<sup>73</sup> the Supreme Judicial Court held, four to three, that an unmarried woman who quit her job to follow her male partner of fourteen years when he relocated did so for “urgent, compelling and necessitous” reasons and was therefore entitled to unemployment benefits.<sup>74</sup> In a number of cases involving heterosexual couples, the court also held that non-marital partners could seek equitable or contractual relief upon the dissolution of the relationship.<sup>75</sup> These cases culminated in a 1998 decision holding that unmarried cohabitants could enter into enforceable agreements with one another as long as the agreements met ordinary contract rules.<sup>76</sup> The court added,

With the prevalence of nonmarital relationships today, a considerable number of persons live together without the benefit of the rules of law that govern property, financial, and other matters in a marital relationship. Thus, we do well to recognize the benefits to be gained by encouraging unmarried cohabitants to enter into written agreements respecting these matters, as the consequences for each partner may be considerable on termination of the relationship or, in particular, in the event of the death of one of the partners.<sup>77</sup>

But contracting is a different matter from using marital rules in a non-marital relationship. In *Collins v. Guggenheim*,<sup>78</sup> the Supreme Judicial Court refused to allow an unmarried heterosexual couple to divide their property equitably upon separation, holding that divorce-type remedies were appropriate only for married families.<sup>79</sup>

Parallel discussions about rights and responsibilities for non-marital couples occurred in other branches of state government and in the private sector. In 1991, Lotus Development Corporation in Cambridge implemented the first private domestic partnership plan in Massachusetts.<sup>80</sup> Later that year, Governor Weld extended by executive order similar benefits to em-

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<sup>73</sup> 593 N.E.2d 1297 (Mass. 1992).

<sup>74</sup> *Id.* at 1301.

<sup>75</sup> *See, e.g.*, *Green v. Richmond*, 337 N.E.2d 691, 697 (Mass. 1975) (allowing recovery for fair market value of services rendered in personal relationship); *Sullivan v. Rooney*, 553 N.E.2d 1372, 1374 (Mass. 1989) (imposing constructive trust on one-half interest in a house that had been held solely by a man in a seven-year relationship with a woman).

<sup>76</sup> *See Wilcox v. Trautz*, 693 N.E.2d 141, 147 (Mass. 1998).

<sup>77</sup> *Id.* at 145.

<sup>78</sup> 631 N.E.2d 1016 (Mass. 1994).

<sup>79</sup> *Id.* at 1017.

<sup>80</sup> *See* Barbara Presley Noble, *Benefits for Domestic Partners*, N.Y. TIMES, June 28, 1992, F23 (noting Lotus policy in place since the previous fall).



ployees of the Commonwealth.<sup>81</sup> A wide range of private institutions followed suit.<sup>82</sup>

The progress of domestic partnership benefits legislation for state and municipal employees, however, was much slower in the legislature.<sup>83</sup> The goal of the proposed legislation was to extend explicit powers to the Commonwealth and to municipalities so that they could provide domestic partner health insurance coverage to their employees. Although the first bill was filed in 1992,<sup>84</sup> it and subsequent bills were blocked by House legislative leadership, which refused to allow a vote despite repeated passage in the Senate.<sup>85</sup> Nonetheless, several Massachusetts cities began extending benefits anyway, starting with Cambridge in 1992.<sup>86</sup> When Boston sought permission from the legislature to enact an ordinance, legislative opponents asked the Supreme Judicial Court for an advisory opinion about the permissibility of the proposed legislation.<sup>87</sup> When the Supreme Judicial Court opined

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<sup>81</sup> Exec. Order No. 340, Comm. of Mass. (Nov. 19, 1993).

<sup>82</sup> See, e.g., Letter from Thomas Reilly, Attorney General of Massachusetts, to Senator Brian Joyce and Representative Brian S. Dempsey 3 (June 27, 2001) (regarding An Act Providing Equal Employment Benefits for Public Sector Employees, S. 1344 and H. 2613) (on file with author). The letter states:

Enacting this legislation would bring the state up to par with many Massachusetts private companies—including Blue Cross/Blue Shield; Lotus Development (the first publicly-held U.S. company to offer domestic partnership benefits); Reebok; Polaroid; most major Boston law firms; and most Boston hospitals—as well as many colleges and universities, including Harvard, Tufts, MIT, and Northeastern universities; Wellesley, Smith, Amherst and Williams colleges.

*Id.*

<sup>83</sup> See, e.g., Pamela H. Sacks, *Groups Focus on Keeping Gay Marriages Off Ballot*, WORCESTER TELEGRAPH & GAZETTE, June 30, 2002, at A2 (noting that a domestic partnership bill had stalled in the legislature for the last ten years).

<sup>84</sup> A timeline of major initiatives of the Massachusetts Gay and Lesbian Political Caucus can be found at <http://www.mglpc.org/past.php>. This organization led the legislative effort for many years, including supporting bills to address inequities in the public employee retirement system. See Jennifer Wriggins, *Kinship and Marriage in Massachusetts Public Employee Retirement Law: An Analysis of the Beneficiary Provisions, and Proposals for Change*, 28 NEW ENG. L. REV. 991 (1994) (describing structural unfairness for LGBT employees).

<sup>85</sup> Bills passed in the Senate in 1998, 2000, and 2001. See Anthony Flint, *Court Clears Way For Gay-Partners Benefits In City*, BOSTON GLOBE, June 16, 1998, at A1 (noting that the Senate had approved a statewide law earlier in the year and that it would pass if House could vote); Editorial, *Government Held Hostage*, BOSTON GLOBE, July 10, 2000, at A14 (noting that domestic partnership measure passed in Senate and “enjoy[s] broad support in the House, but [is] being held up by Finneran.”); Rick Klein, *Backers Seek Vote on Partners Bill Letter Drafted to Finneran*, BOSTON GLOBE, Dec. 28, 2001, at B4 (noting bill had passed in Senate).

<sup>86</sup> See, e.g., BROOKLINE, MASS., BYLAWS ART. XLIV, Sec. 1-8 (1993) (no employee benefits); CAMBRIDGE, MASS. MUN. CODE ch. 2.119 (1992); NANTUCKET, MASS., BYLAWS ch. 32 (1996); PROVINCETOWN, MASS., BYLAWS ch. 2.4 (1993); Exec. Order of Mayor Mary L. Ford, Human Resources Dep’t, Northampton, Mass., Policy & Procedure No. 800-4A (Dec. 15, 1997).

<sup>87</sup> See Geeta Anand, *Domestic Partner Benefits Revived; Finneran, Rushing Agree SJC Should Rule*, BOSTON GLOBE, Mar. 4, 1998, at B1.

that the legislation was constitutional,<sup>88</sup> it passed both the House and Senate only to be vetoed by then-Governor Paul Cellucci.<sup>89</sup> Boston's mayor, Thomas Menino, then issued an executive order in the summer of 1998 to provide benefits to employees.<sup>90</sup>

But Boston's effort faced a major setback in 1999 when, in *Connors v. City of Boston*,<sup>91</sup> the Supreme Judicial Court, in a ten-taxpayer challenge, held as a matter of statutory construction that the term "dependent" in the state insurance statutes forbade Boston and other cities from extending domestic partnership health insurance benefits.<sup>92</sup> Even though workers began to lose benefits, including those in Cambridge who had family health insurance for nearly ten years, the legislature refused to ameliorate their distress by extending to cities the power to grant these benefits.<sup>93</sup>

Just as important as what does happen is what does not happen. In 1999 and every year thereafter, legislators in the State House of Representatives began filing anti-gay, anti-marriage bills.<sup>94</sup> Each proposal was described as a marriage ban, but in fact would have gone further than banning marriage.<sup>95</sup> Every bill received a hearing, but none were ever advanced to the House floor for consideration.<sup>96</sup> Groups such as the Freedom to Marry Coa-

<sup>88</sup> Opinions of the Justices, 696 N.E.2d 502, 508 (Mass. 1998). GLAD briefed the issues to the court.

<sup>89</sup> See Adrian Walker & Tina Cassidy, *Cellucci Rejects City's Partners Bill; Says Measure Lacks Limits, Undermines Family Unit*, BOSTON GLOBE, July 31, 1998, at A1.

<sup>90</sup> See *Connors v. Boston*, 714 N.E.2d 335, 336 (Mass. 1999) (discussing the executive order); Tatsha Robertson, *Edict Expected on Partner Benefits; Mayor's Order Would Bypass Critics, Expand Coverage for Gay Families*, BOSTON GLOBE, Aug. 4, 1998, at B1 (anticipating Mayor Menino's executive order).

<sup>91</sup> 714 N.E.2d 335 (Mass. 1999).

<sup>92</sup> See *id.* at 342-43. GLAD intervened in *Connors* on behalf of a Boston Emergency Medical Technician with a partner and two small children. *Id.* at 336. The taxpayer challenge was spearheaded by the Catholic Action League of Massachusetts with counsel from the American Center for Law and Justice. Associated Press, *Mass. Court Rejects Boston Plan to Cover Domestic Partners*, PROVIDENCE J.-BULL., July 9, 1999, at A18. Chief Justice Marshall's opinion for a unanimous court matter-of-factly noted that "a 'family' may no longer be constituted simply of a wage-earning father, his dependent wife, and the couple's children" and that the consequence of the decision was that "some household members of Boston's employees may be without a critical social necessity, health insurance." See *Connors*, 714 N.E.2d at 341-42.

<sup>93</sup> See, e.g., Sacha Pfeiffer, *SJC Nullifies City Domestic Benefits Plans; Says State Law Does Not Provide For Aid To Non-Spousal Partners*, BOSTON GLOBE, July 9, 1999, at A1 (noting effect of ruling on ordinances in Cambridge, Springfield and Northampton). Cambridge was also later enjoined from providing benefits. David Weber & Laurel Sweet, *Judge KO's Cambridge Domestic Partner Ordinance*, BOSTON HERALD, Nov. 3, 2000, at 1.

<sup>94</sup> In the 1999-2000 session, a proposed bill provided: "A purported marriage contracted between persons of the same sex shall be neither valid nor recognized in the Commonwealth of Massachusetts." H.B. 472, 181st Gen. Ct., Reg. Sess. (Mass. 1999). In the 2001-2002 legislative session, a broader bill would have defined marriage "as a legal relationship between one man and one woman," and also barred legal protections for any other relationship: "Any other relationship shall not be recognized as a marriage or its legal equivalent, or receive the benefits exclusive to marriage . . ." H.B. 3375, 182d Gen. Ct., Reg. Sess. (Mass. 2001).

<sup>95</sup> See Mass. H.B. 3375, Mass. H.B. 472.

<sup>96</sup> See Chuck Colbert, *Gala Focuses on Marriage Rights for Same-Sex Couples*, IN

lition of Massachusetts started grassroots organizing in 1996. Membership grew with each anti-LGBT bill filed as the stakes became higher and people began to understand that the legislature could close the door to marriage, civil unions, domestic partnership, or other protective measures for unmarried families.<sup>97</sup> The legislature stalemated: no bills advanced.

The legislative stasis, along with civil unions in Vermont, upset some opponents of family rights for LGBT people who then took measures into their own hands. In the spring of 2000, a newly formed organization called the Massachusetts Citizens Alliance began to promote “family values” in the legislature.<sup>98</sup> On May 1, 2000, a right-wing newspaper announced that organizations had been formed to advance two marriage-related referenda: the first for a law to “limit marriage to one man and one woman” for the November 2002 ballot and the second “to put the same provision in the state Constitution” for the 2004 ballot.<sup>99</sup>

These activities—particularly the threat of a citizen-initiated attempt to amend the constitution—obviously attracted GLAD’s attention. The Citizens Alliance’s fundraising had started in earnest. A spring 2000 letter to donors warned, “Marriage is under attack by militant forces who want to turn Massachusetts upside down and inside out,” citing proposed domestic partner legislation as the culprit.<sup>100</sup> The letter continued, “Mark my words, what happened in Vermont will happen in Massachusetts unless we act now and draw a line in the sand.”<sup>101</sup> Petitions supporting a “definition of marriage” went out with the Citizens Alliance’s appeals, presumably to start building supportive voter lists since the petition itself would have no legal effect. In August 2000, the Citizens Alliance’s political action committee polled legislators about marriage and adoption rights for LGBT people and asked about needle exchange programs.<sup>102</sup>

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NEWSWEEKLY, Feb. 21, 2002 (reporting that H.B. 3375 “stalled in committee”); Scott A. Giordano, *Anti-Gay Marriage Measure Is Sidetracked—For Now*, BAY WINDOWS, June 17, 1999 at 5 (stating that H.B. 472 was “referred for further study, which means that it is dead—temporarily at least”).

<sup>97</sup> While the sophistication of both sides grew over the years, a good example of the kinds of testimony marshaled against these types of bills can be found at [http://www.glad.org/GLAD\\_Cases/testimony\\_10\\_23\\_03.html](http://www.glad.org/GLAD_Cases/testimony_10_23_03.html), or [http://www.equalmarriage.org/h4840\\_testimony\\_index.php](http://www.equalmarriage.org/h4840_testimony_index.php).

<sup>98</sup> See Statement of Organization of Political Action Committee for the “Massachusetts Citizens Alliance Political Action Committee,” Aug. 8, 2000 (Form CPF 101 PC: filed by Sarah Ann Pawlick and Richard J. Gaffey).

<sup>99</sup> *Citizen Referendums Planned About “Gay Marriage,”* MASS. NEWS (May 1, 2000), at [http://www.massnews.com/past\\_issues/2000/5\\_May/mayref.htm](http://www.massnews.com/past_issues/2000/5_May/mayref.htm).

<sup>100</sup> Letter from Bryan Rudnick, Executive Director, Massachusetts Citizens Alliance, to donors (date not specified) (on file with author).

<sup>101</sup> *Id.* Another solicitation letter sent out before *Goodridge* was filed in the Superior Court asked people to support one of the proposed anti-gay, anti-marriage bills and to oppose the domestic partnership legislation, which it viewed as equivalent to civil unions. Letter from Bryan Rudnick, Executive Director of Massachusetts Citizens Alliance, to Old Cambridge Baptist Church 1 (Mar. 26, 2001) (on file with author).

<sup>102</sup> Memorandum from Bryan Rudnick, Executive Director, Massachusetts Citizens Alliance, to all candidates seeking State House and Senate offices (Aug. 10, 2000) (on file

It was then clear that an amendment proposal would be forthcoming, a process that begins with the signatures of just ten registered voters.<sup>103</sup> GLAD filed the *Goodridge* case in Suffolk County Superior Court in Boston in April 2001, and, as expected, the Massachusetts Citizens Alliance announced its planned initiative amendment in July 2001. The amendment, which came to be known as H.B. 4840, provided that:

It being the public policy of this Commonwealth to protect the unique relationship of marriage in order to promote, among other goals, the stability and welfare of society and the best interests of children, only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts. Any other relationship shall not be recognized as a marriage or its legal equivalent, nor shall it receive the benefits or incidents exclusive to marriage from the Commonwealth, its agencies, departments, authorities, commissions, offices, officials and political subdivisions. Nothing herein shall be construed to effect an impairment of a contract in existence on the effective date of this amendment.<sup>104</sup>

After the constitutional amendment proposal was filed, a contentious signature gathering process ensued, with charges of petition swapping on the one hand and intimidation by LGBT protesters on the other.<sup>105</sup> In April 2002, the Joint Committee on Public Service held a hearing during which it heard testimony from over 100 opponents of the initiative who were concerned that H.B. 4840 would preclude both marriage and other forms of legal protection.<sup>106</sup> The Committee later voted 15-0 to recommend that the legislature reject the measure as discriminatory and out of step with the state constitution's guarantees of equality.<sup>107</sup>

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with author).

<sup>103</sup> MASS. CONST., amend. XLVIII, pt. II, § 3. The secretary of state's website also contains information about the procedures for voters to initiate a referendum either on a law or on a constitutional amendment.

<sup>104</sup> H.B. 4840, 182d Leg., Reg. Sess. (Mass. 2002).

<sup>105</sup> See Amicus Memorandum in opposition to H.B. 4840 for MassEquality.org at 9-14 and exhibits v-z, AA-HH, Opinion of the Justices to the Acting Governor, 780 N.E.2d 1232 (Mass. 2002) (No. SJC-08916) (on file with author) [hereinafter Amicus Memorandum] (arguing that the paid signature gatherers had engaged in a massive "bait and switch" campaign substituting the anti-gay amendment when people may have intended to sign a measure banning the sale of horsemeat. The latter measure failed to gather enough signatures for the ballot.).

<sup>106</sup> Those testifying in opposition included the Massachusetts AFL-CIO, the Urban League of Eastern Massachusetts, the Anti-Defamation League, the Boston Bar Association, and the Massachusetts Bar Association. Amicus Memorandum, *supra* note 105, at exhibit G.

<sup>107</sup> Amicus Memorandum, *supra* note 105, at exhibit R (presenting Report of Public Service Committee (Apr. 25, 2002)).

As required by the Massachusetts Constitution,<sup>108</sup> the legislature convened in joint session for a constitutional convention several times to consider this initiative.<sup>109</sup> Led by Senate President Thomas Birmingham, the convention took a roll call vote to adjourn on July 17, 2002, by recorded votes of 137 yeas and 53 nays, effectively killing the amendment.<sup>110</sup>

While there was further litigation to force the legislature to take up the measure immediately or to force it upon the next constitutional convention, none of these efforts was successful.<sup>111</sup> As a result, no anti-LGBT marriage amendment would appear on the ballot in 2004.

This cursory history shows that the marriage issue was not sprung upon the people of Massachusetts by a conspiring judiciary, but that it has instead come upon the people of Massachusetts gradually, just as they have been getting to know their LGBT family members, neighbors, colleagues, and co-religionists. Casting *Goodridge* as a mandate on an unwilling populace is a caricature, not a reality-based analysis of life in the Commonwealth. Indeed, on Sunday, November 23, 2003, just days after the *Goodridge* ruling, two statewide polls showed that Massachusetts was ready for the decision. The front page of the *Boston Herald* said it best: "Gays A-OK in Bay State."<sup>112</sup>

### C. GLAD's Decision-Making

At GLAD, we had assumed that some day we would have to litigate the denial of marriage. My own experience with GLAD's intake calls demonstrated over and over again that many of the people who called us with legal problems could trace their problems to nonrecognition of their relationships. I had turned down requests for representation in such cases several times. The real question was when would LGBT people denied marriage rights get a fair hearing in court, in the legislature, and in public opinion in Massachusetts. As the above history shows, with each passing year, the increase in support for ending discrimination against LGBT people by non-LGBT people became phenomenal.<sup>113</sup> This increase was essential

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<sup>108</sup> MASS. CONST., amend. XLVIII, pt. IV, §§ 2–5.

<sup>109</sup> Yvonne Abraham, *Gay Marriage Ban Thwarted, Legislators Kill Ballot Question*, BOSTON GLOBE, July 18, 2002, at A1.

<sup>110</sup> *How They Voted On Adjournment Proposal*, BOSTON GLOBE, July 18, 2002, at A25.

<sup>111</sup> See, e.g., Opinion of the Justices to the Acting Governor, 780 N.E.2d 1232 (Mass. 2003); Mass. Citizens for Marriage v. Secretary of the Commonwealth, 800 N.E.2d 1030 (Mass. 2003).

<sup>112</sup> See also David R. Guarino, *Poll Finds Massive Backing for Gay Unions; Narrow Marriage Support*, BOSTON HERALD, Nov. 23, 2003, at 7 (finding 76% supported gay unions, and 49% supported gay marriage, while 38% opposed gay marriage); Frank Phillips & Rick Klein, *50% in Poll Back SJC Ruling on Gay Marriage*, BOSTON GLOBE, Nov. 23, 2003, at A1 (finding 50% agreeing and 38% disagreeing with the decision, and 53% opposing a constitutional amendment).

<sup>113</sup> The legislative battles on anti-gay, anti-marriage bills provide some insight. See, e.g., Amicus Memorandum, *supra* note 105, at exhibit E (showing groups in opposition to

because, as Rev. Dr. Martin Luther King, Jr. explained, no minority can succeed without the assistance of the majority.<sup>114</sup> For this and other reasons, some of which are discussed below, we thought the answer was, “In 2001.”

### 1. *The Limits of Non-Marriage Litigation*

GLAD did not litigate the marriage issue in Massachusetts precipitously. Short of constitutional litigation, we had made concerted efforts to secure rights and protections for LGBT families through other means, but knew those tools could not address the enormous architecture of protections provided by marriage. For example, as described above, GLAD used statutory construction principles to include LGBT families within the meanings of words like “person” in the adoption context.<sup>115</sup> We worked within the equitable powers of the courts to address the needs of LGBT families when the legislature had not spoken, as in the de facto parenting case.<sup>116</sup> We tried to secure a rule of even-handedness—that LGBT people should be able to contract regarding their affairs under ordinary rules of contract.<sup>117</sup> We were unable to persuade the court that the term “dependent” could include same-sex domestic partners, a failure that effectively nullified governmental domestic partner programs for health insurance.<sup>118</sup>

The bottom line was that most state laws providing protections and responsibilities used marital status as a factor and the private sector often imitated what it saw in the state government.<sup>119</sup> GLAD could and did litigate around the edges, but many important protections were simply off-limits to LGBT families without marriage and without the appellation of “spouse.”

We also believed we needed to be extremely cautious about litigating marriage discrimination through the side door. Decisions around the country seeking spousal protections, often concerning employer health insurance or other workplace benefits, told the losing plaintiffs that they should change or challenge the marriage laws and often contained harmful dicta about the legitimacy of those bans.<sup>120</sup> GLAD and its client in a workplace benefits dis-

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H.B. 3375); *id.* at exhibit G (showing groups in opposition to H.B. 4840); *Messages of Equality*, MassEquality, at <http://www.massequality.org/truth.php> (showing list of groups in opposition to H. 3190).

<sup>114</sup> Martin Luther King, Jr., *I Have a Dream*, Address at the Lincoln Memorial, Washington, D.C. (Aug. 28, 1963) (transcript available at <http://www.americanrhetoric.com/speeches/ihaveadream.htm>).

<sup>115</sup> *See* *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

<sup>116</sup> *See* *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

<sup>117</sup> *See* *Wilcox v. Trautz*, 693 N.E.2d 141, 147 (Mass. 1998).

<sup>118</sup> *See* *Connors v. Boston*, 714 N.E.2d 335, 336 (Mass. 1999).

<sup>119</sup> *See* GLAD, PROTECTIONS, BENEFITS AND OBLIGATIONS OF MARRIAGE UNDER MASSACHUSETTS AND FEDERAL LAW, *supra* note 14.

<sup>120</sup> *See, e.g.,* *Hinman v. Dep't of Pers. Admin.*, 213 Cal. Rptr. 410, 419 (Cal. Ct. App. 1985); *Phillips v. Wisconsin Pers. Comm'n*, 482 N.W.2d 121, 127 (Wis. Ct. App. 1992).

crimination case even decided not to appeal an administrative agency ruling in 1995 out of concern about muddying the waters for a possible marriage case some day.<sup>121</sup> The complainant, an employee at a boarding school who was required to live on campus, was essentially told to choose between her job and her partner because the school would not allow unmarried couples to live together on campus. The Massachusetts Commission Against Discrimination rejected the employee's claim of disparate impact based on sexual orientation on the grounds that the gay and lesbian civil rights law was not to be construed "to legitimize or validate a 'homosexual marriage,' so-called" and that allowing her to live in on-campus housing would be treating her as though she were married.<sup>122</sup> It further ruled on the disparate treatment claim that the real culprits were the marriage laws since all unmarried couples—same-sex and opposite-sex—were treated the same way by the respondent's policy.<sup>123</sup> In 1995, I believed we were not ready for a marriage case—either directly or indirectly—in Massachusetts.

## 2. Vermont's Great Leap Forward

GLAD believed we were ready in Vermont just a few short years later. In July 1997, together with Beth Robinson and Susan M. Murray of the Vermont firm Langrock, Sperry & Wool, we at long last agreed to couples' requests to challenge the denial of marriage rights in Vermont for the same reasons we did later in Massachusetts: the human needs and the long track record of legal, political, and cultural support for LGBT people and families.<sup>124</sup> Because I was part of the litigation and GLAD regularly consulted with Murray, Robinson, and others in Vermont during the political process after the *Baker v. State* decision, some of the riveting developments there affected our thinking about Massachusetts.<sup>125</sup>

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Later cases were similar. *See, e.g.*, Estate of Hall, 707 N.E.2d 201, 204–05 (Ill. App. Ct. 1998); Rutgers Council of AAUP Chapters v. Rutgers Univ., 689 A.2d 828, 831 (N.J. Super. Ct. App. Div. 1997).

<sup>121</sup> Huff v. Chapel Hill Chauncy Hall Sch., 16 Mass. Discrim. Law Rptr. 1605 (1994); Huff v. Chapel Hill Chauncy Hall Sch., 17 Mass. Discrim. Law Rptr. 1247 (1995) (decision of the full Commission).

<sup>122</sup> Huff, 16 Mass. Discrim. Law Rptr. at 1613 (citing 1989 Mass. Acts ch. 516, § 19).

<sup>123</sup> *Id.* at 1615–16.

<sup>124</sup> *See supra* Part I.B and accompanying notes.

<sup>125</sup> For perspectives on the Vermont experience, see, for example, Mary Bonauto, *The Freedom to Marry for Same-Sex Couples in the United States of America*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 177, 184–202 (Robert Wintemute & Mads Andenaes eds., 2001); WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002); DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE (2004); David Chambers, *The Baker Case, Civil Unions, and the Recognition of Our Common Humanity: An Introduction and a Speculation*, 25 VT. L. REV. 5 (2000); Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons From Vermont*, 11 SETON HALL CONST. L.J. 237 (2001). The Hawaii litigation and political developments were also very influential in our thinking. *See, e.g.*, Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE

First, from our perspective on the ground, we thought the conventional wisdom that a civil union “compromise” would be more palatable than marriage was overstated. Much of the public debate in Vermont in the early months of 2000 had to do with the fundamental humanity and equal citizenship of LGBT people, i.e., the same issues involved in seeking marriage. Thus, any alleged advantage of civil unions seemed de minimis and certainly outweighed by the enormous legal disadvantages of civil unions vis-à-vis marriage for couples. Although this is too crude a formulation, we expected that those who opposed any rights for LGBT people would reject both marriage and civil unions and that those who accepted civil unions could come to see marriage as the fairer and simpler alternative over time. Those who protested most vociferously opposed marriage, civil unions, and any legal protections whatsoever. In short, we considered and rejected the idea of litigating for civil unions as opposed to marriage.

Second, we believed that the public education accompanying the case as well as the Vermont court ruling enormously advanced the standing of LGBT families and people in Vermont. We hoped that a case in Massachusetts, along with public education and legislative involvement, would make relationship recognition and access to legal protections an increasingly urgent priority in all branches of government.

Third, we anticipated political fallout in both states and expected (with enormous work) we could weather it. We saw that significant numbers of non-LGBT people came to the fore when the courts finally rejected discrimination in Vermont and anticipated that would be true in Massachusetts as well. Despite some legislators being turned out of office for their civil union votes, there was no undoing of the court decision in Vermont: the legislature refused to advance for electoral consideration any amendment to the state constitution that would have either reversed the *Baker* decision or amended the constitution to add a restriction on marriage.<sup>126</sup>

Vermont and the *Baker* ruling also showed us that some people will always criticize the courts on process grounds,<sup>127</sup> even when, as in *Baker*,

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567 (1994).

<sup>126</sup> Nancy Remsen, *Riveted Spectators Feel Enormity of Vote*, BURLINGTON FREE PRESS, Apr. 20, 2000, at 1A (reporting that Senate rebuffed push by group “Take It To the People” for statewide vote on constitutional amendment restricting marriage). Based on my personal conversations with people who had polled the Vermont Senate in 1997 and in later years, we believed there was inadequate support in the Vermont Senate to pass a constitutional amendment overruling a favorable court decision. Although there was an effort to repeal the civil unions law after the 2000 elections, it was defeated in the Senate. See Tom Zolper, *Little Will Not Seek Re-Election to the House*, BURLINGTON FREE PRESS, June 19, 2002, at 1B. See also *infra* Part III.

<sup>127</sup> See, e.g., Joseph A. Reinert, *The Myth of Judicial Activism*, 29 VT. B.J. & L. DIG. 35 (2004) (discussing “judicial activism” critique of Baker); David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61 (2000).



the court left to the legislature the question of how to remedy the constitutional violation.<sup>128</sup>

### 3. *The Legal Landscape*

GLAD believed in the Massachusetts Constitution as a strong guarantee of individual rights and privacy.<sup>129</sup> We believed the consensus in Massachusetts was that the state was at its best when it lived up to the principles in the constitution and embarrassed itself when it did not adhere to those principles.<sup>130</sup> The state constitution was penned by John Adams and ratified in 1780.<sup>131</sup> The Declaration of Rights, the predecessor to the federal Bill of Rights, was deemed to “announce great and fundamental principles”<sup>132</sup> that could weather “radical changes in social, economic and industrial conditions.”<sup>133</sup> In areas ranging from individual rights to criminal procedure to the death penalty, the Massachusetts Constitution was long regarded by the Supreme Judicial Court as a freestanding and vibrant source of protections for individuals against the power of the state.<sup>134</sup>

<sup>128</sup> *Baker*, 744 A.2d at 886–89.

<sup>129</sup> Fundamental interests under the Massachusetts Constitution include procreative decisions, *Matter of Moe*, 432 N.E.2d 712, 719 (Mass. 1982), decisions about how to raise children, *Care and Protection of Robert*, 556 N.E.2d 993, 997 (Mass. 1990), and decisions about medical treatment, *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 633 (Mass. 1986); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 426 (Mass. 1977). Massachusetts allowed Medicaid funding of abortions when the U.S. Supreme Court held otherwise. *Compare Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981), *with Harris v. McRae*, 448 U.S. 297 (1980). Massachusetts also found the death penalty unconstitutional under the State Constitution. *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984). Although the voters authorized the legislature to re-institute the death penalty, it has not done so.

<sup>130</sup> In *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), Massachusetts conceived of the “separate but equal” doctrine later articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), but in the 1970s stood strong against racial segregation and sex discrimination. *See, e.g., School Comm. of Springfield v. Bd. of Educ.*, 319 N.E.2d 427 (Mass. 1974), *cert. denied*, 421 U.S. 947 (1975) (school desegregation); *Att’y Gen. v. Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d 284 (Mass. 1979) (sex discrimination).

<sup>131</sup> *See, e.g., WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS* 83 (2001) (describing process of adopting state constitution); Edward W. Hennessey, *The Extraordinary Massachusetts Constitution of 1780*, 14 SUFFOLK U. L. REV. 873, 880 (1980) (describing history of adopting state constitution); Arthur Lord, *The Massachusetts Constitution and the Constitutional Conventions: An Address Before the Massachusetts Association*, 2 MASS. L. Q. 1, 8 (1916) (describing 1779 Convention and roles of various participants).

<sup>132</sup> *Foster v. Morse*, 132 Mass. 354, 355 (1882).

<sup>133</sup> *Cohen v. Att’y Gen.*, 259 N.E.2d 539, 542 (Mass. 1970) (quoting *Trefey v. Putnam*, 116 N.E. 904, 906 (Mass. 1917)).

<sup>134</sup> *See generally* Brief of Amici Curiae Professors of State Constitutional Law: Robert F. Williams, Lawrence Friedman, Vincent M. Bonventre, Christian G. Fritz, Daniel Gordon, Joseph R. Grodin, Ann Lousin, Neil Colman McCabe, and James G. Pope, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC 08860) (supporting appellants), available at [http://www.glad.org/marriage/goodridge\\_amici.shtml](http://www.glad.org/marriage/goodridge_amici.shtml); 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); Margaret H. Marshall, *Foreword*, 44 BOSTON BAR J. 4, 4

While we thought that heightened judicial scrutiny based both on fundamental rights and suspect class grounds should apply, we also believed it was likely that we would fight out the case on rational basis grounds.<sup>135</sup> We would not have filed the case unless we thought we could win on rational basis. Rational basis in Massachusetts is not an empty exercise: to determine whether a law is arbitrary or capricious, or has become so, requires reviewing courts to “look carefully at the purpose to be served”<sup>136</sup> by challenged laws and to sustain those laws only when “an impartial lawmaker could logically believe that the classification would serve a legitimate purpose that transcends the harm to members of the disadvantaged class.”<sup>137</sup> Pegging rational basis review to an “impartial lawmaker” and “careful” and “logical” review means setting aside more fanciful or speculative notions of a law’s purposes and its connection to state interests.<sup>138</sup> We hoped that explaining the breadth of harm visited on couples from the state’s denial of marriage would resonate with precedents requiring an examination of both the importance of the right and the real-life impact of the law.<sup>139</sup>

#### 4. *The Public Showdown Was Coming*

Another factor sped the timing of the decision to litigate: we knew we would soon be on the defense in a constitutional amendment campaign. The Massachusetts Citizens Alliance, later known as Massachusetts Citizens for Marriage, was planning to come straight at the marriage issue with a citizen initiative to place an anti-LGBT marriage amendment on the ballot by November 2004.<sup>140</sup> In order for the measure to advance, it needed the support of 50 of 200 legislators in a joint session.<sup>141</sup> At GLAD, we knew no ballot campaign on marriage had yet been won and we assumed the issues would be framed in a way favorable to our opponents, putting

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(2000) (“The genius of both [the Massachusetts and United States] constitutions resides in the applicability of their principles to the challenges of an evolving society.”); Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to the Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887 (1980).

<sup>135</sup> The rational basis analysis of the plaintiffs is set out in the *Goodridge* briefing. Appellants’ Brief at 79–96, *Goodridge* (No. SJC-08860); Appellants’ Reply Brief at 3–16, 32–38, *Goodridge* (No. SJC-08860); see also Lawrence Friedman, *The (Relative) Passivity of Goodridge v. Dep’t of Public Health*, 13 B.U. PUB. INT. L.J. (forthcoming 2004) (discussing rational basis precedents in Massachusetts).

<sup>136</sup> *English v. New Eng. Med. Ctr.*, 541 N.E.2d 329, 333 (Mass. 1989).

<sup>137</sup> *Id.* (quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring)).

<sup>138</sup> See, e.g., *Coffee-Rich v. Commissioner of Pub. Health*, 204 N.E.2d 281, 288–89 (Mass. 1965) (finding connection between classification and state interest more imagined than real).

<sup>139</sup> See, e.g., *English*, 541 N.E.2d at 333; *Murphy v. Commissioner of Dep’t of Indus. Accidents*, 612 N.E.2d 1149, 1156–57 (Mass. 1993) (nature of right affected influences rational basis analysis).

<sup>140</sup> See *supra* note 98 (describing Citizens Alliance).

<sup>141</sup> MASS. CONST., amend. XLVIII, pt. IV, § 5.

LGBT people and families on the defense. In short, we calculated that the signature gathering process would succeed, that 50 or more legislators would support it, and that we would likely be facing a ballot measure in 2004.

Knowing that the legislature and public would be embroiled in the marriage and amendment discussions in any event, and aware of the generally favorable momentum toward relationship recognition, we viewed an affirmative marriage case as an opportunity to frame the issues positively and in the voices of LGBT people. We also thought the best defense was the same thing that had moved us forward so far: shining a light (this time through a lawsuit) on the lives of the real people affected and the bedrock American principles of fairness and equality. We knew we had a window of opportunity: a constitutional amendment must be approved by two legislatures before it can be put out to the voters for ratification at a general election.

If the case were resolved successfully, then Massachusetts voters would have the chance to see for themselves that relationship recognition and marriage rights for LGBT people were fair before they voted on the question of taking away those rights. If we lost the case, there would be less impetus to vote in favor of an amendment. Even more importantly, many more people in the electorate would understand the harms to our communities from being denied relationship recognition and marriage rights, thus increasing pressure on the Massachusetts legislature to take steps to ameliorate the discrimination.

In sum, we were well aware of the political and cultural difficulties in bringing the *Goodridge* case, but we were also convinced that the case was well-timed: people had long wanted and needed marriage rights. Fairness to families was a bedrock value, and we had a strong constitution and a court that took it seriously. It was the logical next step legally, politically, and culturally and non-LGBT people were increasingly joining to support us. Vermont had shown that same-sex couples could have a legal status and all would still be well in the world. We needed to frame the issues in human terms before our opponents could get a constitutional amendment to the ballot box.

#### *D. The Critique of Movement Lawyers*

At times, as a GLAD attorney, I am criticized for being too slow to respond to inequities, and indeed, I repeatedly turned down requests from couples who wanted to bring marriage cases. Our reasons have always centered on a mix of factors, including the need to build a base legally, politically, and culturally, before such an effort could be winnable in court or sustainable in public opinion. Much needed to change before the equality and liberty claims of LGBT people could be heard fairly in the context of a marriage case and understood, even if begrudgingly, in the larger cul-

ture. As with any social justice movement, the LGBT rights movement has moved forward incrementally—too little too late for some, and too much too soon for opponents.

Other times, the criticism is that GLAD litigated this case at all, because some critics prefer to leave any debate about rights to the legislative context. This has been a long-running conversation in this country's history.<sup>142</sup> While GLAD would be the first to acknowledge the importance of legislative and cultural discussions, judicial actions can proceed simultaneously. Moreover, in our system of government, courts are charged with saying when a law offends constitutional guarantees. No social justice movement can afford to abandon one of its tools, especially one that tells the stories of real people in a setting where someone (the judiciary) has to say whether the plaintiff's experience conflicts with our principles of fairness, justice, and equality.<sup>143</sup> GLAD placed its clients front and center because how the government treated them was the very issue being litigated and their stories could transform opinion. We hoped that people would increasingly view the status quo of discrimination against these couples as unfair and needing change.

The Supreme Judicial Court did not hear arguments in the *Goodridge* case in a cultural vacuum. The power of the courts was on the mind of the Supreme Judicial Court at oral argument. The first question posed to me asked why the courts should step into this matter.<sup>144</sup> Another justice followed up with a realpolitik question: had not the favorable decisions in court cases in Alaska and Hawaii been undone by constitutional amendments?<sup>145</sup> This allowed me to answer that the earliest a constitutional amendment could go into effect in Massachusetts would be 2006, allowing three full years of same-sex marriages in the Commonwealth, at the end of which non-LGBT people would see that nothing had been taken away from their marriages.

Beacon Hill was also part of the discussion. The legislature remained active on relationship recognition issues during this time, considering both pro- and anti-marriage bills, several versions of civil unions bills, proposed constitutional amendments on marriage,<sup>146</sup> and bills to extend author-

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<sup>142</sup> See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

<sup>143</sup> See, e.g., Thelton Henderson, *The Social Responsibility of Lawyers: Social Change, Judicial Activism, and the Public Interest Lawyer*, 12 WASH. U. J.L. & POL'Y 33 (2003) (addressing judicial activism charge); Michael A. Millemann, Comment, *The Role of the Supreme Court: Judicial Activism or Self-Restraint*, 47 MD. L. REV. 155 (1987) (same).

<sup>144</sup> Unofficial Transcript of Oral Argument at 1, *Goodridge* (No. SJC-08860) (on file with author). I answered Justice Ireland by citing the institutional obligation of the court to engage in the process of reviewing a statute and deciding whether or not that statute is constitutional, and I pointed out that both state and federal courts have reviewed limitations on marriage in the past.

<sup>145</sup> *Id.* at 2 (question of Greaney, J.).

<sup>146</sup> H.R. 3677, 183d Gen. Ct., Reg. Sess. (Mass. 2003) (to extend marriage rights to

ity to the state and municipalities for domestic partner benefits.<sup>147</sup> The campaigns on both sides sharpened, but the legislature took final action on none of them.<sup>148</sup>

Since Massachusetts appeared to be the first state potentially to end marriage discrimination for same-sex couples, there was enormous national press interest in the story and the plaintiff couples. For example, ABC News followed David Wilson and Rob Compton's moves for months leading up to May 17, 2004, and the local all-news channel tagged along with the Brodoff-Wade family. The Goodridges, because they were the lead plaintiffs, were literally on every major news program throughout this period.

Marriage and the citizenship rights of LGBT people were also in the news for other reasons. On June 10, 2003, an Ontario appellate court ended that province's ban on marriage discrimination.<sup>149</sup> Couples started marrying immediately,<sup>150</sup> providing a crucial image of what it actually looks like when LGBT people marry.

At the end of June 2003, the United States Supreme Court decided *Lawrence v. Texas*,<sup>151</sup> holding that LGBT people are entitled to respect in their private lives and voiding all remaining state bans on "sodomy."<sup>152</sup> The claim in *Lawrence* resonated deeply with that made by the plaintiff couples in *Goodridge*: equal citizenship for LGBT people. Without reviewing the thoughtful scholarship on *Lawrence*,<sup>153</sup> it is enough to say that the Court acknowledged that there is such a thing as a "homosexual person" and, thus, that being LGBT is something intrinsic to people's identity, thereby folding LGBT people as LGBT people into the citizenry.<sup>154</sup> The Court held that LGBT people, as part of the citizenry, had a fundamental right to make decisions about their lives, including with respect to sexual inti-

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same-sex couples); H.R. 1149, 183d Gen. Ct., Reg. Sess. (Mass. 2003) (civil union bill); S. 935, 183d Gen. Ct., Reg. Sess. (Mass. 2003) (civil union bill); S. 1045, 183d Gen. Ct., Reg. Sess. (Mass. 2003) (civil union bill); H.R. 3190, 183d Gen. Ct., Reg. Sess. (Mass. 2003) (anti-gay constitutional amendment on marriage).

<sup>147</sup> S. 2048, 181st Gen. Ct., Reg. Sess. (Mass. 1999) (to require state and municipalities to extend domestic partner workplace benefits to qualified employees).

<sup>148</sup> See, e.g., Steve Marantz, *Same-Sex Marriage Battle, Critics Speak Out Against Finneran's Tactics*, BOSTON HERALD, Feb. 13, 2004, at 7 ("Some lawmakers hold Finneran responsible for creating the gay marriage political crucible by squashing three domestic partnership measures in prior years. Some are angered that Finneran blamed gay rights advocates for holding up the legislation.").

<sup>149</sup> Halpern v. Toronto, [2003] O.A.C. 276 (Can).

<sup>150</sup> Tracey Tyler & Tracy Huffman, *Gay Men Get Married After Appeal Court Ruling*, TORONTO STAR, June 11, 2003, at A4. For further developments, see Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985–2005) and Its Limits*, 49 MCGILL L.J. 1143 (2004).

<sup>151</sup> 539 U.S. 558 (2003).

<sup>152</sup> *Id.* at 575.

<sup>153</sup> See generally Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Symposium, *Gay Rights After Lawrence v. Texas*, 88 MINN. L. REV. 1017 (2004) (articles by various scholars).

<sup>154</sup> *Lawrence*, 539 U.S. at 578.

macy.<sup>155</sup> Not only did this erase double standards—what is a protected liberty interest for others is also one for LGBT people—but it also dismantled the notion that LGBT people can be subject to discriminatory treatment on the basis that their conduct can be criminalized.<sup>156</sup> At the broadest level, the ruling in *Lawrence* declared that the time had come for a new chapter in American law.

Most Americans support the principle of *Lawrence* that government should not interfere in people's intimate lives.<sup>157</sup> Yet "family values" groups labeled *Lawrence* a crisis, accusing the Supreme Court of endorsing a homosexual agenda and issuing a call to arms<sup>158</sup> with the canard of "judicial activism." Starting with *Lawrence* and building on *Goodridge*, "family values" groups countered our narrative about real people, families, and fairness with one of judicial activism and a national political crisis.<sup>159</sup>

Alarmed at legal developments protecting LGBT families, including the advent of marriage in both Canada and the Netherlands,<sup>160</sup> the Vatican also issued a strongly worded statement that the only legitimate families are those of a married man and woman and their children.<sup>161</sup> The Vatican's admonition to lawmakers to adhere to its strictures, however, was met with skepticism by many Catholic legislators in Massachusetts.<sup>162</sup>

In my view, *Goodridge* would not have occurred but for litigation and legislative activity working in tandem with public education for many

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<sup>155</sup> *Id.* at 571.

<sup>156</sup> *Id.* at 579.

<sup>157</sup> President Bush, for example, stated during the 2004 Presidential Debates that consenting adults can live the way they want to live. President George W. Bush, Remarks at the 2004 Presidential Debate (Oct. 13, 2004) (transcript available at <http://wid.ap.org/transcripts/debates/prez3.html>).

<sup>158</sup> See, e.g., Lyle Denniston, *High Court's Course Debated After Rulings: Two Key Civil Rights Decisions Mark Shift From Conservatism*, BOSTON GLOBE, June 30, 2003, at A3 (reporting that Concerned Women for America referred to U.S. Supreme Court as "'an extreme activist court'" in part because of *Lawrence*); Steven W. Fitschen, *Letters to Donors*, National Legal Foundation (July 18, 2003), available at <http://www.nlf.net/fundraising%20letters/0306.htm> ("[T]he United States Supreme Court has given the homosexual agenda a huge boost!").

<sup>159</sup> See, e.g., Fitschen, *supra* note 158 (predicting the Massachusetts Supreme Judicial Court would use *Lawrence* to find a right to marriage for same-sex couples).

<sup>160</sup> See Parliament of the Netherlands, *Act of 21 December 2000 Amending Book 1 of the Civil Code, Concerning the Opening Up of Marriage for Persons of the Same Sex (Act on the Opening Up of Marriage)*, Stb. 2001, No. 9, available at <http://athena.leidenuniv.nl/rechten/meijers/index> (unofficial English translation).

<sup>161</sup> Congregation for the Doctrine of the Faith, the Vatican, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (July 31, 2003), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/doc\\_doc\\_index.htm](http://www.vatican.va/roman_curia/congregations/cfaith/doc_doc_index.htm) (equating adoption of children by same-sex couples with "doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development").

<sup>162</sup> See, e.g., Yvonne Abraham, *Lawmakers See Shades of Gray*, BOSTON GLOBE, Aug. 15, 2003, at A12 (quoting State Senator Mark Montigny: "We need to be a bit more tolerant. I do believe strongly in a bright line of separation between church and state, and my fellow Catholics are only part of my constituency.").

years.<sup>163</sup> This level of activity and synergy separated Massachusetts from the mine run of states.<sup>164</sup> Despite a backdrop of dissenting voices in the American right wing and certain religious faiths, *Goodridge* wove together the fabric of the lives lived by LGBT people—as represented by the clients, both as themselves and as surrogates for the larger LGBT communities—into the larger political, legal, and cultural landscape of evolving respect for LGBT people and families. We hoped that people would come to see this issue as part of America’s ongoing process of including more and more people into full equality under the law. As Justice Ginsburg stated in *U.S. v. Virginia*, “A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”<sup>165</sup>

#### E. *The Role of the Plaintiffs in the Goodridge Case*

Where the plaintiffs are the heart and soul of the case, the job of plaintiff selection is critical. Deciding among the many potential couples is at least as much a function of the lawyer’s gut as a function of objective measures. If we applied a litmus test, it centered more on the core strength of the individuals and couples than anything else. Starting with those who had contacted GLAD about marriage over the years, and after warning that lawyers ask lots of nosy questions, I asked the potential plaintiffs the obvious: how did they meet and commit, and how long had they been together? Why marriage and not some other legal protection? What kinds of problems had they faced from being denied marriage? Had it affected their children? What kinds of stresses had they endured as a couple?

Often, I met people in their homes, assuming that the media would be interviewing them there and wanting to know what that would look like. I knew they would get their “fifteen minutes” of fame, but that could not be part of their motivation for joining, nor could they have anything particularly embarrassing in their backgrounds.

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<sup>163</sup> For example, when the Supreme Judicial Court analyzed the state’s justifications for discrimination, it started in each case by pointing to the full landscape of legislative action or inaction in the areas of justification offered. Over time, that legal landscape was largely favorable to the claims of LGBT people and families. *Goodridge*, 798 N.E.2d at 961–68.

<sup>164</sup> Even today, only fourteen states and the District of Columbia have laws protecting against discrimination based on gender identity and/or sexual orientation: California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New York, New Jersey, New Mexico, Rhode Island, Vermont, and Wisconsin. Human Rights Campaign, *Non-Discrimination Laws: State by State*, at <http://www.hrc.org>.

Only eight states and the District of Columbia have appellate rulings or legislation authorizing second-parent adoption: California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont. Human Rights Campaign, *Second-Parent Adoption*, at <http://www.hrc.org>. Only four states and the District of Columbia have domestic partnership laws that provide some limited rights to same-sex couples: California, Hawaii, Maine, and New Jersey. Human Rights Campaign, *Marriage/Relationship Laws: State by State*, at <http://www.hrc.org>.

<sup>165</sup> 518 U.S. 515, 557 (1996).

The plaintiff couples made their homes from one end of the state to the other—from Cape Cod to Boston and its suburbs to the Worcester area and western Massachusetts.<sup>166</sup> Several were born and raised in small towns around the state even though they later moved to a city. Geographic diversity was important because we wanted people across the Commonwealth to acknowledge that this was an issue in their own communities and not just in Boston. There were no economic or similar criteria, although it was simply easier for people to participate when they had predictable, daytime work schedules and fewer children. Ultimately, the seven plaintiff couples had different material circumstances, different backgrounds, different types of lives, and four of the seven couples were raising young children.

Their job as plaintiffs was simply to be themselves. We knew they would have to explain, again and again, why they had taken the extraordinary step of becoming plaintiffs in a case challenging the government's marriage discrimination. They would need to speak from their hearts about why marriage matters so much to them. A Washington State trial court judge recently remarked that the plaintiffs in that marriage case were "hand-picked" and questioned whether it was fair to decide a case with "parties who may rise above the median in so many respects."<sup>167</sup> While LGBT people as a whole have the same warts as non-LGBT people, my experience over many years is that the plaintiffs in these cases are ordinary people with what would be considered fairly ordinary aspirations, i.e., honoring and protecting their love, commitment, and family, except that their families are same-sex families. What sets the plaintiff couples apart is that they were willing to step forward.

Each of the seven couples who were the *Goodridge* plaintiffs made the case for marriage in their own way. They stated their perspective in the verified complaint filed on their behalf.<sup>168</sup> For all of the plaintiffs, there was the sense that marriage is the most accurate expression of their abiding love and commitment.<sup>169</sup> That love is always the first thing spoken of by Linda Davies and Gloria Bailey, now together thirty-three years, who will be as charmed by each other if they live to be 100 years old as they are now. But without marriage, they knew they faced a future without critical legal protections in place for aging married couples.<sup>170</sup>

For Maureen Brodoff and Ellen Wade, their faith in the goodness of themselves and their family, as well as the concrete legal protections marriage would provide as they coped through Ellen's breast cancer, propelled

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<sup>166</sup> Verified Complaint at 2, *Goodridge v. Dep't of Public Health*, No. 011647A, 2002 WL 1299135 (Mass. Super. Ct. May 7, 2001) (No. 01-1647-A), available at [http://www.glad.org/marriage/goodridge\\_documents.shtml](http://www.glad.org/marriage/goodridge_documents.shtml).

<sup>167</sup> *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at \*12 (Wash. Super. Ct. Aug. 4, 2004).

<sup>168</sup> Verified Complaint at 6, 9, 11, 15, 18, 21, 24, *Goodridge* (No. 01-1647-A).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 23.



them to seek a license to marry even after twenty years together.<sup>171</sup> David Wilson and Rob Compton, both previously married to women, knew the other side of the coin.<sup>172</sup> David knew to fear that he would be treated as a nobody if Rob needed him during a medical emergency, just as emergency medical technicians regarded him as a potential assailant when his previous partner of thirteen years dropped dead in the driveway while raking leaves.<sup>173</sup>

The plaintiffs did not need to have been previously married to know what they were missing. Their experiences of discrimination, both large and small, played a part in them stepping forward. For Gary Chalmers and Richard Linnell, the fact that they could not buy a family health insurance policy and were unable to take joint legal title to their home without paying taxes put them at risk financially.<sup>174</sup> The Goodridge family never again wanted a nurse to bar either of them from the hospital room of the other.<sup>175</sup>

The determination to forge a more secure life for their children was critical for those plaintiffs who are parents. For Gina Smith and Heidi Norton (now the Nortonsmith family), it was critical to live as they believe, and to show their two young sons that they were doing everything they could as parents to make sure their family was legally respected.<sup>176</sup> The Goodridges decided they needed to do something when their then-five-year-old daughter questioned whether her parents really loved one another since they were not married.<sup>177</sup>

All of the plaintiffs hoped that the wider community would understand—in the shared language of love and commitment that is reserved for marriage—that they are a “family.” Edward Balmelli and Michael Horgan, for example, just wanted their many siblings, nieces, and nephews in their large Irish Catholic families from small town Massachusetts to see that their relationship was legally recognized.<sup>178</sup>

The seven plaintiff couples in *Goodridge* signed up for more scrutiny than anyone could have imagined back in 2001 when GLAD filed the case. David Wilson, one of the Boston-area plaintiffs, recently brought down the house in a crowd of well-wishers, noting that I had told him that he would be able to maintain much of his privacy during the case, and contrasting that assurance with the repeated reality of reporters and television crews in his and Rob’s home.

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<sup>171</sup> *Id.* at 11.

<sup>172</sup> *Id.* at 7.

<sup>173</sup> *Id.* at 8.

<sup>174</sup> *Id.* at 16.

<sup>175</sup> *Id.* at 5.

<sup>176</sup> *Id.* at 21.

<sup>177</sup> When Annie Goodridge was five, she said that her parents did not love each other, adding, “If you love each other, you’d be married.” Theo Emery, *Gay Marriage Plaintiffs Are Reluctant Celebrities*, PORTSMOUTH HERALD, Mar. 31, 2004, available at [http://www.seacoastonline.com/news/03312004/south\\_of/8148.htm](http://www.seacoastonline.com/news/03312004/south_of/8148.htm).

<sup>178</sup> Verified Complaint at 10, *Goodridge* (No. 01-1647-A).

*F. The Role of Amicus Curiae Briefs in Goodridge*

In the fall of 2002, the Supreme Judicial Court publicly solicited “friend of the court” briefs in *Goodridge*, stating, “The issue presented is whether the Commonwealth is required statutorily or constitutionally to recognize same-sex marriages.”<sup>179</sup> To my knowledge, the Supreme Judicial Court received more friend of the court briefs in *Goodridge* than in any other case in its history: eleven supporting the plaintiffs and fifteen supporting the Commonwealth.<sup>180</sup>

Although only the court itself can tell us what role the amicus briefs had in their decision, I suspect the role of amici curiae in *Goodridge* was significant both substantively and symbolically.

As to substance, the amicus briefs supporting the plaintiffs ensured there was the fullest airing possible of all the myriad of issues potentially involved in the case. The attorney general’s office, defending the case vigorously for the Commonwealth, advanced separation of powers, procreation, child rearing, and conservation of resources as reasons why the court should leave the status quo in place.<sup>181</sup> The amici for the Commonwealth pressed these same issues and more.

For example, certain faiths deeply object to marriages for same-sex couples, and those faiths made their views known.<sup>182</sup> But two separate briefs submitted on behalf of the couples, one by historians and another by clergy, showed that marriage licensing has always been a civil matter in Massachusetts<sup>183</sup> and further, that faiths are not unanimous in their views about the acceptability of marriage for same-sex couples.<sup>184</sup> These briefs may have influenced the court’s framing of the issue as “[w]hether the Commonwealth may use its formidable regulatory authority to bar

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<sup>179</sup> Notice to Interested Parties, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860).

<sup>180</sup> Briefs in support of the plaintiff can be found at *Hillary and Julie Goodridge et al. v. Department of Public Health, Plaintiff’s Filings*, GLAD, at [http://www.glad.org/marriage/goodridge\\_amici.shtml](http://www.glad.org/marriage/goodridge_amici.shtml). Briefs in support of the Commonwealth can be found at *Goodridge v. Dept. of Public Health Case Materials*, Marriage Law Project, at <http://marriagelaw.cua.edu/Law/cases/ma/goodridge/goodridgefiles.cfm> (last updated Aug. 19, 2004). A complete list can also be found at [http://www.ma-appellatecourts.org/search\\_number.php?dno=SJC-08860&get=Search](http://www.ma-appellatecourts.org/search_number.php?dno=SJC-08860&get=Search).

<sup>181</sup> See *Goodridge*, 798 N.E.2d at 962–65.

<sup>182</sup> See Brief of Amici Curiae Agudath Israel of America et al., *Goodridge* (No. SJC-08860); Amicus Curiae Brief of the Catholic Action League of Massachusetts, *Goodridge* (No. SJC-08860); Brief of Amici Curiae The Common Good Foundation et al., *Goodridge* (No. SJC-08860); Amici Curiae Brief of Religious Groups et al., *Goodridge* (No. SJC-08860).

<sup>183</sup> Brief of Amici Curiae of the Religious Coalition for the Freedom to Marry, and Others at 2–6, 8–13, *Goodridge* (No. SJC-08860); Amici Curiae Brief of the Professors of the History of Marriage, Families and the Law at 3–5, *Goodridge* (No. SJC-08860). These briefs are available at [http://www.glad.org/marriage/goodridge\\_amici.shtml](http://www.glad.org/marriage/goodridge_amici.shtml).

<sup>184</sup> Brief of Amici Curiae of The Religious Coalition for the Freedom to Marry et al. at 4, 15–24, *Goodridge* (No. SJC-08860).

same-sex couples from civil marriage”<sup>185</sup> and the court’s other repeated references to “civil marriage.”<sup>186</sup> In addition, the briefs may have been helpful in clarifying that the Massachusetts Constitution was the only proper frame of reference for deciding on access to a government-created and regulated institution. As the court stated in the second paragraph of its opinion:

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charger of governance for every person properly within its reach. “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>187</sup>

The Commonwealth and its amici repeatedly advanced biological procreation as the purpose of marriage,<sup>188</sup> but these arguments were rebutted forcefully by an amicus curiae brief of the authors of the leading treatise on Massachusetts family law who showed that neither the Commonwealth’s contemporary marriage law nor its traditional marriage law had procreation as one of its primary purposes and, further, that marriage is available to individuals regardless of their procreative choices.<sup>189</sup>

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<sup>185</sup> *Goodridge*, 798 N.E.2d at 948.

<sup>186</sup> *Id.* at 954 (“Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. No religious ceremony has ever been required to validate a Massachusetts marriage.” (citation omitted)). See also *id.* at 948, 950–59, 961–70.

<sup>187</sup> *Id.* at 948 (citation omitted). See also Brief of Amici Curiae Professors of State Constitutional Law, *Goodridge* (No. SJC-08860) (brief about state constitutional interpretation field on the plaintiff’s side); Brief Amicus Curiae on Behalf of Professors of Law, *Goodridge* (No. SJC-08860); EVAN WOLFSON, WHY MARRIAGE MATTERS, *supra* note 4, at 105–22.

<sup>188</sup> See, e.g., Brief of Defendants-Appellees at 110–17, *Goodridge* (No. SJC-08860); Amicus Curiae Brief of the Catholic Action League of Massachusetts at 13–14, *Goodridge* (No. SJC-08860); Brief of Amici Curiae Massachusetts Family Institute, Inc. et al. at 3–10, 16–21, 23, *Goodridge* (No. SJC-08860); Amici Curiae Brief of Religious Groups et al. at 19–20, *Goodridge* (No. SJC-08860).

<sup>189</sup> Brief for Monroe Inker and Charles Kindregan Amici Curiae at 5–32, *Goodridge* (No. SJC-08860). Concerns for the welfare of children raised by same-sex parents, a corollary of the procreation argument, were addressed in dueling amici briefs, though the court does not appear to have relied on those briefs in its decision. Compare Brief of the Massachusetts Psychiatric Society et al. at 17–39, *Goodridge* (SJC-08860), with Brief in Support of Appellees of Amici Curiae National Association for Research and Therapy of Homosexuality et al. at 22–28, *Goodridge* (No. SJC-08860).

In contrast to those who saw marriage as having a fixed definition,<sup>190</sup> a brief of prominent family law historians documented that far from being static, marriage laws had changed enormously with respect to eligibility to marry, the rights and responsibilities of the married pair, and the ability to terminate marriage.<sup>191</sup>

The Commonwealth and many of its amici attempted to distinguish the landmark cases of *Perez v. Sharp*<sup>192</sup> and *Loving v. Virginia*,<sup>193</sup> in which courts struck bans on marriages between people of different races, as cases only “about race.”<sup>194</sup> But twenty-five local and national civil rights groups—mostly representing women and people of color—disagreed, and argued that discrimination against same-sex couples was just as legally indefensible as marriage laws that forbade people of different races from marrying or that deprived women of legal rights upon marriage, and that the courts must not refrain from saying so.<sup>195</sup> The Supreme Judicial Court clearly saw the denial of rights at issue in *Goodridge* as one of civil rights:

In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.<sup>196</sup>

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<sup>190</sup> See, e.g., Brief of Amici Curiae Massachusetts Citizens Alliance and Massachusetts Citizens for Marriage at 2–3, *Goodridge* (No. SJC-08860) (citing “long-standing understanding of marriage as reserved to a single man and single woman”); Brief of Amicus Curiae Marriage Law Project at 35, *Goodridge* (No. SJC-08860) (“Marriage cannot be altered in the dramatic fashion that Plaintiffs petition without it [sic] losing its very ontological character.”).

<sup>191</sup> See Amici Curiae Brief of the Professors of the History of Marriage, Families, and the Law at 1, *Goodridge* (No. SJC-08860) (“Throughout the history of Massachusetts, marriage has been in a state of change.”); *id.* at 22–28 (anti-miscegenation laws and their repeal); *id.* at 28–30 (divorce); *id.* at 30–31 (gender-neutral and equal status relationships).

<sup>192</sup> 198 P.2d 17 (Cal. 1948).

<sup>193</sup> 388 U.S. 1 (1967).

<sup>194</sup> E.g., Brief of Defendants-Appellees at 86–89, *Goodridge* (No. SJC-08860); Brief of Amici Curiae the Common Good Foundation et al. at 20, *Goodridge* (No. SJC-08860); Brief of Amicus Curiae Marriage Law Project at 32–34, *Goodridge* (No. SJC-08860); Brief Amicus Curiae on Behalf of Professors of Law at 43–49, *Goodridge* (No. SJC-08860).

<sup>195</sup> See Brief in Support of Appellants of Amici Curiae Urban League of Eastern Massachusetts et al. at 1, *Goodridge* (No. SJC-08860).

<sup>196</sup> *Goodridge*, 798 N.E.2d at 958. See also *id.* at 957 (“[C]ivil marriage has long been termed a ‘civil right.’”); *id.* at 966; *id.* at 970.

Amici curiae briefs by human rights organizations and law professors may have been influential here. Compare Brief of Amici Curiae International Human Rights Organizations et al., *Goodridge* (No. SJC-08860), and Brief of Amicus Curiae Professors of Expression and Constitutional Law, *Goodridge* (No. SJC-08860) (supporting couples), with Brief Amicus Curiae on Behalf of Professors of Law, *Goodridge* (No. SJC-08860), and Brief Amicus Curiae of the National Legal Foundation, *Goodridge* (No. SJC-08860) (supporting Com-

Symbolically, the amicus briefs showed that the Massachusetts mainstream was with the plaintiffs and not the Commonwealth. The two largest bar associations in the state—the Massachusetts Bar Association and the Boston Bar Association—filed briefs in support of the plaintiffs.<sup>197</sup> All of the amici filing briefs in support of the plaintiffs were represented by mainstream firms, including many of the largest in Massachusetts.<sup>198</sup> The amici for the *Goodridge* couples were quite conventional; they were child welfare professionals, historians, social scientists, and civil rights groups.<sup>199</sup> By contrast, many of the amici for the Commonwealth were religious institutions, religiously affiliated organizations,<sup>200</sup> and “family values” organizations.<sup>201</sup>

### G. The Goodridge Decision

I stand with those who predict that the *Goodridge* decision will come to be regarded as a triumph of freedom.<sup>202</sup> It will increasingly be seen as some people already experience it: a beacon of hope, fairness, and equality—America at a crossroads and choosing the path of fairness.<sup>203</sup>

While some of the *Goodridge* dissenters would have left the issue to legislative resolution,<sup>204</sup> the better argument is that there has never been a marriage exception to the power of courts to decide constitutional questions. There is no justiciability exception for state marriage restrictions based on race, based on a parent’s inability to pay child support, or based on the fact of incarceration,<sup>205</sup> nor should there be for same-sex couples. The

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monwealth).

<sup>197</sup> Brief of Amicus Curiae Massachusetts Bar Association at 5–6, *Goodridge* (No. SJC-08860); Brief of Amici Curiae Boston Bar Association et al. at 3–5, *Goodridge* (No. SJC-08860) (summarizing argument that marriage is a gateway to hundreds of legal protections and responsibilities for couples and their children and that the overwhelming majority of these legal protections are unavailable unless a couple is married).

<sup>198</sup> These firms include Ropes & Gray LLP; Goodwin Procter LLP; Hale & Dorr LLP (now Wilmer Cutler Pickering Hale & Dorr LLP); Bingham McCutchen LLP; Palmer & Dodge LLP; Hill & Barlow PC; Peabody & Arnold LLP; Foley Hoag LLP; Krokidas & Bluestein; Choate, Hall & Stewart; and Kimball, Brousseau & Michon LLP.

<sup>199</sup> For example, amici for the plaintiffs include, among many others, the American Psychoanalytic Association, the National Association of Social Workers, and the Greater Boston Civil Rights Coalition.

<sup>200</sup> Commonwealth amici included, among others, Agudath Israel of America, the Union of Orthodox Jewish Congregations of America, and Catholic Action League of Massachusetts.

<sup>201</sup> See *supra* note 182.

<sup>202</sup> See, e.g., Cass R. Sunstein, *Massachusetts Gets It Right*, NEW REPUBLIC, Dec. 22, 2003, at 21.

<sup>203</sup> Among the virtues of the decision is that it is plain-spoken, making it possible for non-lawyers to read and understand the legal nature of marriage and the larger legal context for the claims, the principles at issue, the arguments raised, and why they were accepted or rejected.

<sup>204</sup> 798 N.E.2d at 974 (Spina, J., dissenting).

<sup>205</sup> See *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (race); *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (child support debt); *Turner v.*

Supreme Judicial Court of Massachusetts did not bring this case; the *Goodridge* plaintiffs and GLAD did so. The constitutional issues were squarely raised, and it is the role of the judiciary in our system of government to say when a basic right is denied.<sup>206</sup> While acknowledging that the state creates civil marriage, the court also noted that the Commonwealth's lawmaking authority is "bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government."<sup>207</sup>

Others may concede the justiciability point but question the wisdom of the court's decision in light of the Vermont Supreme Court's seemingly more conciliatory approach in *Baker* or the ongoing efforts to amend the United States Constitution and state constitutions to bar marriage and other rights for LGBT people.<sup>208</sup> At oral argument, several justices asked about Vermont: how that state's constitution differed from that of Massachusetts; the backlash to civil unions; and why Massachusetts should do something that Vermont had not done.<sup>209</sup> But it must be acknowledged that the court was asked to make a decision based on constitutional principle, not the direction or ferocity of the political winds. In doing exactly that, the court built upon a vibrant state constitutional jurisprudence already well entrenched in the areas of privacy and the rights of criminal defendants.<sup>210</sup> The court also lived up to its role as an independent and coequal

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Safley, 482 U.S. 78 (1987) (incarceration).

<sup>206</sup> In response to the dissenters' claim that the court had usurped the power of the legislature, the court stated,

The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded. In most instances, these limits are defined by whether a rational basis exists to conclude that legislation will bring about a rational result. The Legislature in the first instance, and the courts in the last instance, must ascertain whether such a rational basis exists . . . . We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.

*Goodridge*, 798 N.E.2d at 966.

<sup>207</sup> *Id.* at 954.

<sup>208</sup> A proposed amendment to the U.S. Constitution failed on procedural votes in both the Senate and House of Representatives in 2004. Helen Dewar, *House Rejects Same-Sex Marriage Ban*, WASH. POST, Oct. 1, 2004, at A27. The amendment under consideration provided that:

[m]arriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

H.J. Res. 106, 108th Cong. (2004). See also *infra* Part III.

<sup>209</sup> Unofficial Transcript of Oral Argument, *Goodridge* (No. SJC-08860), *supra* note 144 (questions of Chief Justice Marshall, Justice Greaney, and Justice Cowin, respectively).

<sup>210</sup> See *supra* note 129.

branch of government setting the parameters of fairness for all citizens.<sup>211</sup> As the court stated, “Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.”<sup>212</sup>

Marriage has long been recognized as a fundamental right<sup>213</sup> and courts can and should find that same-sex couples cannot be singled out for denial of that right.<sup>214</sup> Yet there are virtues in the *Goodridge* court recognizing the fundamental nature of the right at stake<sup>215</sup> but choosing to work within a more deferential standard of review. In finding that the exclusion could not satisfy even rational basis review,<sup>216</sup> the court examined the conventional reasons for marriage discrimination in light of the reality of what legal marriage is and is not, revealing them to be either special rules for or improper stereotypes about LGBT people.<sup>217</sup>

As articulated by the *Goodridge* court, rational basis under the Massachusetts Constitution is a real test:

For due process claims, rational basis analysis requires that statutes bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. For equal protection challenges, the rational basis test requires that an impartial lawmaker could logically believe that the classification would

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<sup>211</sup> Since *Goodridge*, two trial courts in Washington state and one in Oregon have ruled their state marriage bans unconstitutional under the privilege and immunities clause of their respective state constitutions. See *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004); *Castle v. Washington*, 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004); *Li v. Oregon*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004).

<sup>212</sup> *Goodridge*, 798 N.E.2d at 948 (citations and quotations omitted).

<sup>213</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>214</sup> The hesitancy to rule on this basis apparently stems from fear of the “slippery slope” and especially the misplaced apprehension that polygamy could not be distinguished from marriage for same-sex couples. Justice Sosman pressed this issue with me at oral argument. See Unofficial Transcript of Oral Argument, *Goodridge* (No. SJC-08860), *supra* note 144. My answer then was that taking sex out of the equation is very different from taking numerosity out of the equation. In other words, by looking at the rights and responsibilities associated with it, marriage is already a gender-neutral institution into which same-sex couples easily fit, but multiple party unions do not. The state has an interest in eradicating distinctions based on personal characteristics, but not based on numerosity.

<sup>215</sup> See, e.g., *Goodridge*, 798 N.E.2d at 957 n.14 (describing marriage as both a state-conferred benefit and “multi-faceted personal interest of ‘fundamental importance’”); *id.* at 958 (referring to marriage ban as denying access “to an institution of fundamental legal, personal, and social significance”); *id.* at 962 (referring to marriage as one of the “fundamentally private areas of life”); *id.* at 957 (marriage as a right “of fundamental importance”).

<sup>216</sup> *Id.* at 961.

<sup>217</sup> The court was careful not to foreclose the other arguments GLAD advanced. See *id.* at 961 (“Because the statute does not survive rational basis review, we do not consider the plaintiffs’ arguments that this case merits strict judicial scrutiny.”).

serve a legitimate public interest that transcends the harm to the members of the disadvantaged class.<sup>218</sup>

In other words, can one logically believe that the challenged law or classification genuinely advances a legitimate state interest?

For those who fear the specter of *Lochner*<sup>219</sup> and judges substituting their views for those of the legislature, it is essential to note that the court did not quibble with the legitimacy of any of the Commonwealth's asserted interests.<sup>220</sup> Procreation, child rearing, and conserving resources were all assumed to be legitimate interests. While taking the Commonwealth at its word, the court looked to the state's related policies and laws about procreation, child rearing, and resource conservation. It then examined whether the Commonwealth's denial of marriage rights actually advanced the interests state policies protected, concluding in essence that the state interests advanced and the exclusion of same-sex couples were ships passing in the night with no real and substantial connection to one another.

### 1. Procreation

Regarding the notion that civil marriage exists in order to facilitate and regulate procreation, the court noted that any connection between the two is not mandated by law and has not been part of the legal history of what makes a valid marriage.<sup>221</sup> The lower court in *Goodridge* advanced procreation as a rational basis, while conceding that LGBT people could procreate, albeit with the process being more "cumbersome."<sup>222</sup> The Supreme Judicial Court examined the text of the marriage licensing statute and the case law under it to conclude that "General Laws chapter 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus."<sup>223</sup> Moreover, extensive analysis of the state's other statutes relating to bringing a child into a family flatly contradicted the notion that procreation was a necessary component of civil marriage since "the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to create the child, and whether the parent

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<sup>218</sup> *Id.* at 960 (citations and quotations omitted). *See also id.* at 960 n.20 (citing statutes struck on rational basis grounds).

<sup>219</sup> *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a New York labor law for falling outside the purview of the state's legitimate police power).

<sup>220</sup> *Goodridge*, 798 N.E.2d at 961–64.

<sup>221</sup> *Id.* at 961–62. *See also* Amici Curiae Brief of Kindregan & Inker, *Goodridge* (No. SJC-08860), *supra* note 189, at 5–10.

<sup>222</sup> *Goodridge v. Dep't of Public Health*, No. 20011647A, 2002 WL 1299135, at \*13 (Mass. Super. Ct. May 7, 2002), *vacated by* 798 N.E.2d 941 (Mass. 2003) (opining that opposite-sex couples are at least "theoretically" capable of procreation whereas same-sex couples "must rely on inherently more cumbersome means of having children").

<sup>223</sup> *Goodridge*, 798 N.E.2d at 961.



or her partner is heterosexual, homosexual or bisexual.”<sup>224</sup> Given that the Commonwealth’s position was so at odds with the statutory and regulatory framework of Massachusetts law, the court concluded that procreation was simply being used to magnify the one difference between same-sex couples and many different-sex couples, i.e., the ability of the latter to procreate on their own, in order to deny LGBT people protections across the board.<sup>225</sup> Citing *Romer v. Evans*, a case in which the justifications for discrimination were too “discontinuous” with the type of discrimination enacted,<sup>226</sup> the court added that the State’s action “identifies persons by a single trait and then denies them protection across the board,” thereby conferring “an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.”<sup>227</sup>

## 2. *Optimal Child Rearing*

The court analyzed the child rearing justification in the same way. Reviewing the landscape of Massachusetts law on the rights of children, the court rebuffed the Commonwealth’s arguments on child rearing *without* addressing the social science briefs and other information offered about the welfare of children growing up in LGBT families.<sup>228</sup> The court stated the issue as follows:

The department’s first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the “optimal” setting. Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy.<sup>229</sup>

Responding to the notion of law mandating an “optimal” family structure, the court immediately pointed to the paternity and grandparent visitation statutes in which the legislature “moved vigorously to strengthen the modern family in its many variations,”<sup>230</sup> as well as the ways in which the legislature and courts “repudiated the common-law power of the State to provide varying levels of protection to children based on the circum-

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<sup>224</sup> *Id.* at 962. *See also id.* at 962 n.24 (citing statutes and cases at odds with Commonwealth’s position on procreation).

<sup>225</sup> *Id.* at 962.

<sup>226</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>227</sup> *Goodridge*, 798 N.E.2d at 962.

<sup>228</sup> *Id.* at 964–65. Two of the dissents explored the debate about social science results. *Id.* at 979–80 (Sosman, J., dissenting); *id.* at 998–1000 (Cordy, J., dissenting).

<sup>229</sup> *Id.* at 962.

<sup>230</sup> *Id.* at 963.

stances of birth.”<sup>231</sup> Again, the Commonwealth’s argument was flatly contradicted by the framework of family-supportive statutes, policies, and cases built over the years in areas relating to adoption, paternity, grandparent visitation, and de facto parenting, and condemning distinctions among parents based on sexual orientation, marital status, and gender.<sup>232</sup>

That denying only same-sex couples the right to marry would further the purpose of creating “optimal” family units was also sheer speculation. As to non-LGBT people, there was “no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children.”<sup>233</sup> Movingly, the court also viewed the issue from the perspective of same-sex families and the children in those families who were going to have two parents of the same sex regardless of the law. “Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated and socialized.”<sup>234</sup> In the end, the court reasoned that if marriage is a good setting for raising children, then it is good for the children of same-sex couples as well.<sup>235</sup> It summarized:

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.<sup>236</sup>

### 3. *Conservation of Scarce Resources*

Finally, the court dismantled the Commonwealth’s last proffered justification, the notion that the marriage ban “furthers the Legislature’s interest in conserving scarce State and private financial resources” with the same logic.<sup>237</sup> Noting that many same-sex couples have dependents, including plaintiffs in the case who are caring for children and aged parents, the court rejected the stereotype of same-sex couples as less financially depend-

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<sup>231</sup> *Id.*

<sup>232</sup> *See id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 964 (internal quotations omitted).

<sup>235</sup> *See id.* at 964.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

ent on each other and less in need of public marital benefits.<sup>238</sup> Moreover, the protections associated with marriage, the court noted, are available to married couples “regardless of whether they mingle their finances or actually depend upon each other for support.”<sup>239</sup>

Part of the integrity of the *Goodridge* decision, and part of why it will age well in the coming years, derives from its close examination of the Commonwealth’s rationales for treating this one group of citizens unfavorably in light of what the Massachusetts government has said and done. Rather than hewing to the justices’ policy preferences, it hewed to Massachusetts law as a whole.<sup>240</sup> It is a paradigm of a reasoned decision rather than a conclusory one. If asked, there is no reason why a federal court applying federal standards could not reach the same conclusions.<sup>241</sup>

Another reason the decision will age well is the reason for which some now decry it: because it so fully embraces the humanity of LGBT people. From the first paragraph, the court declared that the Massachusetts Constitution “affirms the dignity and equality of all individuals” and “forbids the creation of second-class citizens.”<sup>242</sup> The decision goes on to make it clear that this means LGBT people are simply citizens and restrictions against them cannot be justified by imposing different rules on them than

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<sup>238</sup> *See id.*

<sup>239</sup> *Id.*

<sup>240</sup> *See* Sunstein, *supra* note 202, at 21.

<sup>241</sup> As with Massachusetts law, federal rational basis law cannot be summarized by any one case. The Supreme Judicial Court’s application of rational basis in *Goodridge* is akin to the United States Supreme Court’s application of rational basis in cases like *Romer v. Evans*, 517 U.S. 620, 635 (1996) (the breadth of exclusion of LGBT people from legal protections was not credible given its distance from the state’s asserted justifications); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 619 (1985) (no rational relationship between limitation and purported state interest); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985) (same); *Carey v. Populations Serv. Int’l*, 431 U.S. 678, 690 (1977) (same); and *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (challenged definition of household was irrelevant to purposes stated in law). Even the more “deferential” rational basis cases teach that rationality “must find some footing in the realities of the subject addressed.” *Heller v. Doe*, 509 U.S. 312, 322 (1993).

Moreover, cases like these do not trigger the judiciary’s reluctance to second-guess the legislature in developing blunt classifications in economic, tax, and cash benefit programs, all of which need such classifications to operate efficiently. *See, e.g.*, *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) (rejecting challenge to distinction between two types of cable television facilities and requiring challenger to negate every conceivable reason for the distinction).

Some courts have all but abandoned their reviewing roles by accepting policy justifications that may admittedly be no more than “hypothetical.” *See, e.g.*, *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1383–84 (S.D. Fla. 2001) (accepting that Florida’s ban on adoption by LGBT people would promote interests of children by getting them placed with married couples who could “arguabl[y]” provide a “more stable home environment, proper gender identification, and less social stigmatization”); *Lofton v. Secretary of Dep’t of Children & Family Servs.*, 358 F.3d 804, 819–20 (11th Cir. 2004) (accepting “unprovable assumptions” about LGBT people and their children to justify adoption ban), *reh’g denied* by 377 F.3d 1275 (2004) (by evenly divided court), *petition for cert. filed*, 73 U.S.L.W. 3247 (Oct. 13, 2004) (No. 04-478).

<sup>242</sup> *Goodridge*, 798 N.E.2d at 948.

on the non-LGBT public. After discussing the enormous legal and social consequences of marriage,<sup>243</sup> and how the choice to marry is at the heart of liberty,<sup>244</sup> the court acknowledged that denying marriage to LGBT people is a “deep and scarring hardship.”<sup>245</sup> Someone had to be the first to say that it is simply illogical to suggest any real connection between the Commonwealth’s alleged goals and the denial of marriage rights to LGBT people. I believe that many will later look gratefully upon the Supreme Judicial Court for correctly and courageously applying the clear principles of fairness to the tired canards condemning LGBT people to relationships without recognition or legal rights. While this is not the end of marriage discrimination in the United States, it is the beginning of the end.

## II. THE STAY OF DECISION: NOVEMBER 18, 2003 TO MAY 17, 2004

The Supreme Judicial Court’s ruling on November 18, 2003 was exhilarating for our clients and for us at GLAD. I went to the courthouse alone, stood in line for a copy of the decision, and left to read it on the windy courthouse plaza. State Senator Jarrett Barrios called my cell phone. “You won,” he said. I kept reading. It was true.

Or so I thought. And so did everyone back at the GLAD office. But by the time of our noon press conference, it was clear the opposition had spun the decision into something we believed it was not: an opportunity for the legislature to enact civil unions. While I said I thought the decision meant that LGBT families were now equal families in the Commonwealth, the questions from the press focused on the 180-day stay “to permit the Legislature to take such action as it may deem appropriate in light of this opinion.”<sup>246</sup> In a private conversation later that day, a senior staff member at the attorney general’s office acknowledged that they, too, questioned what the court had ruled.

This began the first of three phases of attacks on the *Goodridge* decision during the six months before May 17, 2004, the date on which the stay expired, none of which can be fully captured in this Essay. The first phase was an attempt to reinterpret the ruling as authorizing the legislature to enact a Vermont-style civil union scheme with the hope that the court, when asked for an advisory opinion, would ratify that approach.<sup>247</sup>

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<sup>243</sup> *Id.* at 954–57.

<sup>244</sup> *Id.* at 959.

<sup>245</sup> *Id.* at 968.

<sup>246</sup> *Id.* at 970.

<sup>247</sup> There was open speculation that one of the justices was a “weak” fourth vote who could be persuaded to approve of civil unions in lieu of marriage rights. *See, e.g.*, Frank Phillips, *SJC Solicits Briefs on Civil Unions Mulls Request By Senate for Advisory Opinion*, BOSTON GLOBE, Dec. 17, 2003, at A1 (quoting Ron Crews, President of the Massachusetts Family Institute, as saying, “We believe this majority opinion is a weak majority. I don’t think it is strong in its absolute conviction that the Legislature does not have the right to define marriage.”).

The second phase was to pursue the pre-existing constitutional amendment proposal and overrule the decision. The third phase was to delay implementation altogether, or at least to deny marriage rights to as many people as possible. Thankfully, May 17, 2004 came and went. In the first six months, over 4000 couples wed.<sup>248</sup> This led to an outbreak of happiness, as well as the chance to witness firsthand what happens when same-sex couples marry.

#### A. Phase I: Re-Write Goodridge

The opposition to *Goodridge* set in immediately after the Supreme Judicial Court issued its November ruling. Governor Mitt Romney used his bully pulpit to declare emphatic support for a constitutional amendment overruling *Goodridge* while allowing same-sex couples three legal protections: hospital visitation, health care benefits, and the right to pass property on to their children.<sup>249</sup> Within seventy-two hours of the *Goodridge* decision, the attorney general announced that he believed the decision allowed for civil unions instead of marriage and promised to work with the legislature in crafting a measure that would provide rights to LGBT people but in a different institution.<sup>250</sup> Senate President Robert Travaglini came to the same position.<sup>251</sup> By mid-December, the State Senate forwarded to the Supreme Judicial Court a request for an advisory opinion on the constitutionality of a civil union law in light of *Goodridge* and the equality, liberty, and due process provisions of the Massachusetts Constitution.<sup>252</sup>

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<sup>248</sup> Associated Press, *List of gay marriages registered with state, by residence*, Nov. 17, 2004 (noting that 4266 marriage certificates of same-sex couples had been sent to the state but that only 2980 had been recorded to date).

<sup>249</sup> See, e.g., Frank Phillips & Rick Klein, *Lawmakers are Divided on Response*, BOSTON GLOBE, Nov. 19, 2003, at A1 (noting support of Governor Romney and House Speaker Thomas Finneran for a proposed constitutional amendment to overrule the decision).

<sup>250</sup> Frank Phillips, *AG Suggests Bill: Same-Sex Benefits Without Marriage*, BOSTON GLOBE, Nov. 21, 2003, at A1.

<sup>251</sup> See, e.g., Frank Phillips, *Senate Eyes Civil Union Bill for SJC*, BOSTON GLOBE, Dec. 11, 2003, at A1 (Senate leadership convinced that civil unions would comply with *Goodridge* ruling).

<sup>252</sup> Senate Bill No. 2175 would have reinstated a ban on marriage for same-sex couples by virtue of establishing a new chapter of the General Laws entitled "Chapter 207A—Civil Unions." S. 2175, 183d Gen. Ct., Reg. Sess. (Mass. 2003) at § 5(2)–(3). Chapter 207A would have allowed only same-sex couples to join in civil union on the same terms that all other couples are allowed to join in a marriage. See *id.* at § 5(2)–(2)(i). The bill provided:

- (a) A civil union shall provide those joined in it with a legal status equivalent to marriage and shall be treated under law as a marriage. All laws applicable to marriage shall also apply to civil unions.
- (b) Spouses in a civil union shall have all the same benefits, protections, rights and responsibilities under law as are granted to spouses in a marriage.
- (c) Spouses in a civil union shall be included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," "husband," "wife," and other terms that denote the spousal relationship, as those terms are used

While House Speaker Thomas Finneran stayed silent, some of his closest legislative colleagues suggested that the legislature simply needed to articulate rational bases in the text of a newly drafted marriage statute in order to sidestep the *Goodridge* ruling entirely.<sup>253</sup> However, just before the New Year, all legislators received a letter from Harvard Law School professor Laurence Tribe, along with two former attorneys general, former Governor William Weld and the Boston Bar Association president, stating that *Goodridge* meant marriage for same-sex couples.<sup>254</sup>

We had our views, but since the question had been asked, we briefed the issues, arguing that civil unions could not comply with the Massachusetts Constitution. Since the civil union measure also banned marriage for same-sex couples, how could that latter restriction be constitutional in light of *Goodridge*?<sup>255</sup> Where the *Goodridge* court was so clear about the tangible and intangible protections of marriage, how could marriage be reduced to the sum of its legal parts?<sup>256</sup> Where the majority had been so definite about the social and status-based protections that attend participating in marriage as a commonly recognized legal institution, how could a newly minted institution only for same-sex relationships possibly suffice?<sup>257</sup> If LGBT people were locked into a separate institution, Massachusetts couples would be disadvantaged with respect to claims for legal respect from other states and the federal government as well.<sup>258</sup> In short, how could the Massachusetts Constitution tolerate segregation *mandated by law*?<sup>259</sup> In a strong stand with LGBT people and against tiered justice, even more non-LGBT civil rights organizations and leaders, including Georgia Congressman John Lewis,<sup>260</sup> joined a brief opposing the civil unions op-

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in any law.

Mass. S. 2175 at § 5(4)(a)–(c).

The Senate then transmitted to the justices the question of whether a bill that would bar marriage but allow for civil unions would comply with the constitution. S. 2176, 183d Gen. Ct., Reg. Sess. (2003); see also Frank Phillips, *SJC Solicits Briefs on Civil Unions, Mulls Request By Senate for Advisory Opinion*, BOSTON GLOBE, Dec. 17, 2003, at A1.

<sup>253</sup> See, e.g., Elisabeth J. Beardsley, *Pols Seeking “Rational” Way Around Gay Marriage Ruling*, BOSTON HERALD, Jan. 14, 2004, at 14. See also Mary Ann Glendon & Hadley Arkes, *Goodridge Case Has Alternative To Gay Marriage*, BOSTON HERALD, Jan. 8, 2004, at 13 (stating that the legislature could limit marriage to one man and one woman as long as it expressed legislative findings stating clearly the rational basis for this re-enactment).

<sup>254</sup> Letter from Scott Harshbarger et al., former Attorneys General, to Senate President Robert Travaglini and House Speaker Thomas Finneran (Dec. 31, 2003) (on file with author).

<sup>255</sup> See Brief of Amicus Curiae GLAD at 20–21, *Goodridge* (No. SJC-09163), at [http://www.glad.org/marriage/Advisory\\_Opinion\\_Brief\\_GLAD.pdf](http://www.glad.org/marriage/Advisory_Opinion_Brief_GLAD.pdf).

<sup>256</sup> See *id.* at 22.

<sup>257</sup> See *id.* at 23. An amicus brief of gay organizations drawing on the lessons of the Vermont experience with civil unions expanded on these points. See Brief of Amici Curiae Human Rights Campaign at 25–30, *Goodridge* (No. SJC-09163), at [http://www.glad.org/marriage/Advisory\\_Opinion\\_Brief\\_Civil\\_Unions.pdf](http://www.glad.org/marriage/Advisory_Opinion_Brief_Civil_Unions.pdf).

<sup>258</sup> See Brief of Amicus Curiae GLAD at 27–35, *Goodridge* (No. SJC-09163).

<sup>259</sup> *Id.* at 36.

<sup>260</sup> See Brief of Amici Curiae Civil Rights Leaders at 3, *Goodridge* (No. SJC-09163),

tion than had joined the plaintiff couples in *Goodridge*. The brief argued that even if civil unions could imitate marriage, a proposition with which the amici disagreed, “such a system would still make second-class citizens of the couples who had no choice but to enter into this separate institution because marriage was forbidden to them.”<sup>261</sup> Ninety of the nation’s leading constitutional law professors, in a brief authored by Laurence Tribe, stated that civil unions were foreclosed by the rationale and holding in *Goodridge*.<sup>262</sup>

On the other side, opponents of marriage either supported the civil union “compromise,” or, in the case of the extremist groups, chided the court for its *Goodridge* decision and pledged to defy it in any number of ways.<sup>263</sup> Neither the governor’s legal counsel nor the attorney general’s office briefed the advisory question.

On February 4, 2004, one week before the scheduled date of the constitutional convention, the court issued another ruling, by four to three, that the question had already been answered in *Goodridge*:

The same defects of rationality evident in the marriage ban considered in *Goodridge* are evident in, if not exaggerated by, Senate No. 2175 . . . . The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid

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at [http://www.glad.org/marriage/Advisory\\_Opinion\\_Brief\\_Civil\\_Rights.pdf](http://www.glad.org/marriage/Advisory_Opinion_Brief_Civil_Rights.pdf) (arguing that creating a separate legal status for a group of people where there is no legitimate basis for doing so is inherently unequal and therefore unconstitutional). See also Brief of Amici Curiae International Human Rights Organizations and Law Professors at 32–36, *Goodridge* (No. SJC-09163), at [http://www.glad.org/marriage/Advisory\\_Opinion\\_Brief\\_International.pdf](http://www.glad.org/marriage/Advisory_Opinion_Brief_International.pdf) (arguing that evolving trends around the world show that only marriage provides true equality and that courts applying comparable equality principles have repeatedly rejected alternative separate regimes).

<sup>261</sup> Brief of Amici Curiae Civil Rights Leaders at 12, *Goodridge* (No. SJC-09163).

<sup>262</sup> See Brief of Amici Curiae Professors of Constitutional Law and American Legal History at 31–37, *Goodridge* (No. SJC-09163), at [http://www.glad.org/marriage/Advisory\\_Opinion\\_Brief\\_Constitutional.pdf](http://www.glad.org/marriage/Advisory_Opinion_Brief_Constitutional.pdf) (arguing that on the basis of the opinion and judgment in *Goodridge*, the court must answer the Senate’s question by concluding the Senate Bill does not satisfy the equal protection and due process protections of the Massachusetts Constitution). The brief also noted that the court is obliged to adhere to binding precedent when it acts in its advisory role and by doing so avoids involvement in political calculations that would wound the court’s credibility and thereby threaten its independence and the rule of law.

<sup>263</sup> See, e.g., Brief of Amici Curiae Alliance Defense Fund and Center for Marriage Law at 14 n.4, *Goodridge* (No. SJC-09163), at [http://www.glad.org/marriage/Alliance\\_Defense\\_Fund\\_brief.pdf](http://www.glad.org/marriage/Alliance_Defense_Fund_brief.pdf) (stating its disagreement with the Supreme Judicial Court’s decision as well as civil unions or the extension of marital benefits to anyone other than opposite sex couples); see also Brief of Amicus Curiae Massachusetts Family Institute, Inc. at 6, *Goodridge* (No. SJC-09163), at [http://www.glad.org/marriage/MFI\\_brief.pdf](http://www.glad.org/marriage/MFI_brief.pdf) (“The court’s decision in *Goodridge* should be interpreted only to require the Legislature to clarify the rational basis for the Commonwealth’s marriage laws.”).

under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.<sup>264</sup>

The court added:

The dissimilitude between the terms “civil marriage” and “civil union” is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to a second-class status . . . . For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain. The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. It would deny to same-sex “spouses” only a status that is specially recognized in society and has significant social and other advantages. The Massachusetts Constitution, as was explained in the *Goodridge* opinion, does not permit such invidious discrimination, no matter how well intentioned.<sup>265</sup>

The dissenting justices would have either upheld the proposed law<sup>266</sup> or applied anew a rational basis test to the scheme once enacted.<sup>267</sup> Calling the case “a squabble over the name to be used,”<sup>268</sup> Justice Sosman pressed that same-sex couples presently face a different legal situation from different-sex married couples—particularly because of anti-LGBT legislation enacted at the state and federal levels—which thus makes it rational for the legislature to give different names to the licenses accorded to these two groups.<sup>269</sup> Addressing Justice Sosman’s dissent, the majority answered:

Courts define what is constitutionally permissible, and the Massachusetts Constitution does not permit this kind of labeling . . . . That such prejudice [against same-sex couples] exists is not a reason to insist on less than the Constitution requires. We do not abrogate the fullest measure of protection to which residents of the Commonwealth are entitled under the Massachusetts Constitution. . . . because those rights might not be acknowledged elsewhere.<sup>270</sup>

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<sup>264</sup> Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

<sup>265</sup> *Id.* at 570–71.

<sup>266</sup> *Id.* at 572 (Sosman, J., dissenting); *id.* at 580 (Spina, J., dissenting).

<sup>267</sup> *Id.* at 580–81 (Cordy, J., dissenting).

<sup>268</sup> *Id.* at 572–73 (Sosman, J., dissenting).

<sup>269</sup> *Id.* at 574–76 (Sosman, J., dissenting).

<sup>270</sup> *Id.* at 571. GLAD’s brief and the Vermont brief also addressed these issues. *See also* WOLFSON, WHY MARRIAGE MATTERS, *supra* note 4, at 123–44.



*B. Phase II. The Constitutional Conventions*

The three dissenting justices bolstered those who were eager to steamroll over the court decisions in the constitutional convention. GLAD's view was that there was no need to rush the convention since the legislature had the entire calendar year to consider the matter, and nothing they passed could stop marriages from happening starting on May 17. We also believed that once people actually married, skeptical legislators and citizens would have more information and exposure that might cause them to re-evaluate their positions.

With members of the legislature describing a pro and con lobbying effort of historic proportions,<sup>271</sup> on February 10, 2004, Senate President Travaglini, flanked by individuals in both parties, publicly offered his own version of a substitute amendment that would provide for civil unions through the constitution but deny marriage to LGBT people.<sup>272</sup> He then convened the convention on February 11, 2004. Offered the courtesy of making a few introductory comments, House Speaker Finneran surprised the Senate President with his own version of an amendment reversing *Goodridge* and authorizing the legislature to enact civil unions; he forced a vote within the first hour of the convention.<sup>273</sup> By the end of the night, both Speaker Finneran's and Senate President Travaglini's proposals had been rejected, leaving Speaker Finneran to comment: "We're as divided as the Supreme Judicial Court. We're as divided as the people of Massachusetts."<sup>274</sup>

The Massachusetts Legislature met in constitutional convention three times on the issue, with two sessions lasting until midnight.<sup>275</sup> For those who cherish the legislative process, this was representative government at its fullest. There was widespread citizen participation via contact with legislators and television coverage of the conventions. Thousands of people bore witness by their physical presence in the State House. At several points, the massive State House had to be closed because the building was

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<sup>271</sup> Yvonne Abraham, *National and Local Lobbying Efforts Ratcheted Up*, BOSTON GLOBE, Feb. 11, 2004, at B6 (quoting legislator saying, "There are more citizen activists lobbying the legislature than I've ever seen in my history here"); Frank Phillips & Raphael Lewis, *Two Marriage Amendments Fail*, BOSTON GLOBE, Feb. 12, 2004, at A1 (quoting longest-serving member of legislature who described lobbying as "the number one firestorm by far").

<sup>272</sup> See Letter from Robert Travaglini, Senate President, to Brian Lees, Senate Minority Leader (Feb. 10, 2004) (on file with author). The proposed amendment took the form of a short bill, with five sections, including a statement of public policy limiting marriage, creating civil unions for same-sex couples, defining eligibility for and the rights of persons joined in civil unions, and most controversially, converting marriages of same-sex couples to civil unions if the Article became effective.

<sup>273</sup> See Phillips & Lewis, *supra* note 271 (describing narrow defeat of surprise move by Finneran).

<sup>274</sup> *Id.*

<sup>275</sup> See Pam Belluck, *Setback is Dealt to Gay Marriage*, N.Y. TIMES, Mar. 30, 2004, at A1.

full. Passions ran high on both sides: church groups from Massachusetts and outside the state descended on the State House. LGBT and non-LGBT supporters of the ruling sang patriotic songs beneath an enormous American flag in the hallways while, outside, they sang and held signs in the freezing winter weather.

Nearly all legislators spoke on the issue and their thoughts were clearly heartfelt. Openly gay state senator Jarrett Barrios<sup>276</sup> and openly lesbian House member Liz Malia<sup>277</sup> were able to speak from personal experience about how their families had been disadvantaged by lack of recognition. Personal experience with LGBT people was critical, prompting one suburban House member to move to adjourn the convention.<sup>278</sup> Starting with, “Liz, this is for you,” Representative Shaun Kelly, a Republican, challenged his colleagues to apply the standards used in their own chamber to what they would do with the constitution. He quietly but firmly asked, if no member would ever accord Representative Malia any lesser protection in the House, why would they vote to “amend the Constitution to keep Liz and others as nine-tenths of a citizen?”<sup>279</sup>

Many drew on their own experiences of discrimination. Senator Dianne Wilkerson of Boston, in an emotional speech, stated,

Protection of rights must include the most basic of civil rights, the right to marry. I was born in my grandmother’s house in a shotgun shack in Arkansas. The public hospital did not allow blacks to deliver children. We lived in constant fear of the Ku Klux Klan. . . . I can’t send anyone to that place from where my family fled. My grandmother would never forgive me.<sup>280</sup>

Many analyzed the history of the constitutions of Massachusetts and of the United States in rejecting calls to amend the constitution. In remarks that brought legislators to a standing ovation, Representative Byron Rushing of Boston showed how once-small minorities like Roman Catho-

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<sup>276</sup> Sen. Barrios, Remarks during Constitutional Convention (Feb. 12, 2004), at 4–5 (transcript available at [http://www.anderkoo.com/ma\\_constitutional\\_convention](http://www.anderkoo.com/ma_constitutional_convention)).

<sup>277</sup> Rep. Liz Malia, Remarks during Constitutional Convention (Mar. 29, 2004), at 17 (transcript available at [http://www.anderkoo.com/ma\\_constitutional\\_convention](http://www.anderkoo.com/ma_constitutional_convention)).

<sup>278</sup> Rep. Shaun Kelly, Remarks during Constitutional Convention (Feb. 12, 2004), at 3 (transcript available at [http://www.anderkoo.com/ma\\_constitutional\\_convention](http://www.anderkoo.com/ma_constitutional_convention)).

<sup>279</sup> *Id.*

<sup>280</sup> Sen. Wilkerson, Remarks during Constitutional Convention (Feb. 11, 2004), at 11 (transcript available at [http://www.anderkoo.com/ma\\_constitutional\\_convention](http://www.anderkoo.com/ma_constitutional_convention)). There was strong support from the African American community. *See also* Rep. Marie St. Fleur, Remarks during Constitutional Convention (Feb. 11, 2004), at 18 (transcript available at [http://www.anderkoo.com/ma\\_constitutional\\_convention](http://www.anderkoo.com/ma_constitutional_convention)). Others drew on their life experiences in analyzing the amendment. *See, e.g.*, Rep. Alice Wolf, Remarks during Constitutional Convention (Feb. 12, 2004), at 13 (transcript available at [http://www.anderkoo.com/ma\\_constitutional\\_convention](http://www.anderkoo.com/ma_constitutional_convention)) (drawing on her family’s experiences with Nazi-era persecution).

lics had found refuge in the Constitution from anti-Catholic Know-Nothings, and the Catholic Church had thereby come to be the large and respected faith it is in Massachusetts.<sup>281</sup>

Many struggled with the conflicting views they heard from their constituents. One state senator, well known as a conservative Catholic, acknowledged those views in her remarks, but went on to say that what the Supreme Judicial Court had done was correct.<sup>282</sup> Even though the decision was ahead of where her constituents were, she reasoned that the constitution mandates equality for all, not everyone “except gays and lesbians.”<sup>283</sup> As she put it, her comfort level was “not the measure” of another person’s civil rights.<sup>284</sup>

I will make only limited observations about the conventions given the confines of this Essay. First, while much attention was paid to the Catholic Church’s lobbying efforts and mobilization of its members,<sup>285</sup> Catholic people were not monolithic in their views.<sup>286</sup> Just as Catholics were divided, other faiths were supportive of the court’s ruling.<sup>287</sup> As someone who was

<sup>281</sup> Rep. Byron Rushing, Remarks during Constitutional Convention (Feb. 12, 2004), at 7–9 (transcript available at [http://www.anderkoo.com/ma\\_constitutional\\_convention](http://www.anderkoo.com/ma_constitutional_convention)).

<sup>282</sup> Sen. Marian Walsh, Remarks during Constitutional Convention (Mar. 29, 2004), at 11–12 (transcript available at [http://www.anderkoo.com/ma\\_constitutional\\_convention](http://www.anderkoo.com/ma_constitutional_convention)).

<sup>283</sup> *Id.* at 11.

<sup>284</sup> *Id.* at 12.

<sup>285</sup> The positions of the Catholic Church are set out in *Marriage in Massachusetts: Crisis and Challenge, A Leadership Guide for Roman Catholics in the Commonwealth*, Massachusetts Catholic Conference (Jan. 2004), at [http://www.macathconf.org/03-Marriage%20in%20MA\\_Crisis\\_&\\_ChallengeA.pdf](http://www.macathconf.org/03-Marriage%20in%20MA_Crisis_&_ChallengeA.pdf).

The Catholic Church sent one million letters to parishioners in advance of the conventions. Raphael Lewis, *Unions Lend Voice, Might to Back Gay Marriage*, BOSTON GLOBE, Jan. 27, 2004, at A1. At the annual Red Mass on January 11, 2003, attended by prominent legislative leaders, Archbishop Sean Patrick O’Malley urged lay Church members to use their “baptismal commitment” to “defend marriage.” Ralph Ranalli & John McElhenny, *Catholics Urged to Fight Gay Marriage Bishop, Bork Try to Mobilize Lawyers*, BOSTON GLOBE, Jan. 12, 2004, at B1. Prominent Catholic law professors lobbied against any civil union compromise. *Massachusetts Catholic Conference Memorandum*, Massachusetts Catholics Conference (Mar. 5, 2004) at <http://www.cwfa.org/images/content/MCCOpinion.pdf>. Before the final convention, all parishes were sent an eight-minute video, claiming that marriage for same-sex couples would cause “young children in school to explore their sexual identity, to question normal friendships as being sexual, and to learn the mechanics of homosexual sex . . . which lead to 55% of all AIDS cases.” See John M. Kelly, *Letter: Bishop O’Malley: Come Clean on Scurrilous Videotape*, WEST ROXBURY TRANSCRIPT, May 13, 2004, available at [http://www.townonline.com/westroxbury/news/opinion/wrt\\_letpwlettersams05132004.htm](http://www.townonline.com/westroxbury/news/opinion/wrt_letpwlettersams05132004.htm) (describing contents of tape).

<sup>286</sup> See, e.g., Letter from Catholic Alliance for Social Justice Members and Friends, to State Senator Jaret Barrios (Feb. 9, 2004) (discussing opposition to amendment) (on file with author); *Ruling on Same-Sex Civil Marriage a Positive Step for Human Rights*, NAT’L CATH. REP. (Feb. 20, 2004), at 24, at [http://www.natcath.com/NCR\\_Online/archives2/2004a/022004/022004r.htm](http://www.natcath.com/NCR_Online/archives2/2004a/022004/022004r.htm) (supporting ruling as a “beneficial step along the path of human understanding and human rights” and distinguishing Catholic sacramental marriage from civil marriage).

<sup>287</sup> See, e.g., Rabbi Devon Lerner, *Why We Support Same-Sex Marriage: A Response From Over 450 Clergy*, 38 NEW ENG. L. REV. 527 (2004) (describing faith leaders’ support for same-sex couples). See also Religious Institute on Sexual Morality, Justice, and Healing, *An Open Letter to Religious Leaders on Marriage Equality* (2004), at <http://www>.

at the State House during the conventions, I can say that many people supporting *Goodridge* were not LGBT themselves. MassEquality, the coalition dedicated to upholding *Goodridge* and opposing any amendment to the state constitution, included labor groups, religious faiths, and civil rights groups.<sup>288</sup> Support was also strong among non-LGBT organizations who were not part of MassEquality.<sup>289</sup>

Second, both sides were faced with vexing tactical issues and language choices in order to win a majority, which in this case meant garnering at least 101 votes (out of 200 possible) in favor of a proposal.<sup>290</sup> Any measure that succeeded would require passage again in the 2005-2006 legislative session before it could go to voters in a public referendum.

Opponents of extending any recognition or rights for familial relationships had to deal with the fact that they simply sounded mean. For example, the proposed amendment prompting the convention would have barred marriage, civil unions, and domestic partnerships and was so vehement in its support for mother-father families that it could have disadvantaged single parents.<sup>291</sup> Was there a way to accomplish much of the same result, but at least make the language sound kinder? That was the approach of House Speaker Thomas Finneran, whose surprise substitute amendment provided in part:

This article [limiting marriage] is self-executing, but the General Court may enact laws not inconsistent with anything herein contained to carry out the purpose of this article, including but not limited to, the enactment of laws establishing civil unions as may be defined by the General Court from time to time.

In effect, this banned marriage and offered the carrot that the legislature could create and define civil unions in the future, a power it already pos-

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religiousinstitute.org/marriage\_open\_letter.pdf (listing several religious denominations that have endorsed clergy performing ceremonies for same-sex couples).

<sup>288</sup> For a list of MassEquality members, consult the organization's website at <http://www.massequality.org>.

<sup>289</sup> See, e.g., Letter from Massachusetts Psychological Association to Robert Travaglini, Senate President; Thomas Finneran, House Speaker; and Members of the General Court of Massachusetts (Mar. 5, 2004) (opposing any amendment) (on file with author); Letter of Julian Bond, Chairman, NAACP, to Robert Travaglini, Senate President (Mar. 8, 2004) (opposing amendment) (on file with author); Letter from Massachusetts Congressional Delegation, to State Legislators (Jan. 28, 2004) (opposing any amendment) (on file with author); Letter from Richard M. Rogers, Executive Secretary-Treasurer, Greater Boston Labor Council, AFL-CIO, to Representative/Senator (Feb. 6, 2004) (in opposition to H. 3190) (on file with author); Letter from Celia Wcislo, President, SEIU Local 2020, to Massachusetts Legislators (Feb. 9, 2004) (opposing H. 3190) (on file with author); Letter from UAW CAP Council, to Senator Jarrett Barrios (Feb. 10, 2004) (on file with author).

<sup>290</sup> MASS. CONST. amend. XLVIII, pt. IV, § 4.

<sup>291</sup> See *Amending H.3190 Doesn't Change a Thing*, MassEquality, at <http://www.mlgba.org/AmendFacts.pdf>; see also *Testimony of GLAD in Opposition to H. 3190*, GLAD (Apr. 28, 2003), available at [http://www.massequality.org/truth\\_glad.php](http://www.massequality.org/truth_glad.php).

sessed and had failed to exercise under Speaker Finneran's leadership for many years.<sup>292</sup>

The *Goodridge* decision, the enormous relief and self-respect it generated in LGBT communities, and its support among many non-LGBT people changed the discussion on Beacon Hill. The question was no longer whether same-sex families should have relationship recognition and rights, but what rights they should have and how those rights could be assured without leaving the legislature unbridled discretion, or depriving "the people" of their right to make a decision through the ballot box.

On the LGBT side, there was opposition to any discriminatory amendment whatsoever. People felt like they were equal, they had already gained equal access to marriage, and their right to marry should not be stripped away. But there were vexing questions on this side, too. On the one hand, envisioning a scenario in which a proposed amendment might be forwarded to the next legislature, LGBT advocates could imagine it would be preferable to have the next convention considering only the extreme measure barring both marriage and more limited protections. The thinking was that support for this position would become increasingly marginal by then and that the measure might perhaps fail to advance or be ratified. On the other hand, would the anti-amendment forces be better off with an amendment that gave LGBT people something significant, calculating that legislators who supported civil unions might come to support marriage once they had direct experiences of it after May 17?

Ultimately, MassEquality chose to ask supportive legislators to take procedural votes for a combined pro-civil union and anti-marriage measure solely to advance it for consideration and block any other amendment from consideration, but then to vote against it on the merits and try to send it to defeat. It was possible that the anti-amendment forces might win the substantive vote on the merits, although many legislators of all persuasions wanted to be able to say to constituents that they voted to put something—perhaps anything—on the ballot. Further, if the substantive vote were lost and the amendment advanced to the next legislature, or even to the ballot box in 2006, then the civil union portion would be unattractive to those who opposed any substantive recognition of LGBT families. There was also some hope that the anti-marriage portion of the amendment would offend those voters who—after seeing same-sex couples marry in Massachusetts for two and a half years—would not want to take away from their fellow citizens something so obviously important. Lacking the votes to kill a measure outright meant that some maneuvering was necessary. Offensive as this combination measure was to many anti-amendment forces,

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<sup>292</sup> It was well known that Speaker Finneran had blocked even modest domestic partner health insurance for many years. Joan Vennoch, *Finneran's Fall*, BOSTON GLOBE, Sept. 28, 2004, at A15 (citing Finneran's maneuver as one of the last straws for the Speaker's credibility as a leader, precipitating his resignation from his position and the legislature in September 2004).

it was also clear that any other proposal that advanced would most likely be a straightforward denial of rights with nothing in return.

One of the most important lessons of the conventions, and one which bodes well for the future of this issue nationally, is that legislators increasingly moved toward the equality camp during the course of the deliberations.<sup>293</sup> With constituent meetings and calls from both sides, it is hard not to conclude that as legislators wrestled with the issues and heard from LGBT families, they could not in their hearts justify writing a discriminatory measure into the constitution. Senator Steven Tolman, a suburban legislator and lifelong Catholic, initially supported the broad anti-gay amendment overruling *Goodridge* and denying other family rights to same-sex couples. But after meeting with LGBT constituents several times, he ultimately opposed “taking civil rights away from any class or group.”<sup>294</sup> Even past foes of modest domestic partner measures like Speaker Finneran cast their final votes in favor of a “Leadership Compromise”—a stripped down version of the original Travaglini amendment with a civil union component and marriage limitation.<sup>295</sup> The final tally is most telling: the amendment needed 101 votes to advance and garnered 105.<sup>296</sup> Had the anti-amendment

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<sup>293</sup> Raphael Lewis, *Same-Sex Marriage Ban Loses Ground*, BOSTON GLOBE, Nov. 5, 2004, at B1, B4 (quoting MassEquality Campaign Coordinator Marty Rouse as saying that MassEquality doubled its legislative support in the six weeks between the first and last days of the conventions).

<sup>294</sup> Raphael Lewis, *Facing a Difficult Decision*, BOSTON GLOBE, Feb. 8, 2004, at B4. He ultimately voted against the final amendment. A hand-written vote tally is available at <http://www.mass.gov/legis/journal/rcG.gif>.

<sup>295</sup> Associated Press, *How Lawmakers Cast Their Final Vote on the Gay Marriage Amendment* (Mar. 29, 2004), available at [http://www.boston.com/news/specials/gay\\_mariage/articles/2004/03/29/how\\_lawmakers\\_cast\\_their\\_final\\_vote\\_on\\_the\\_gay\\_marriage\\_amendment](http://www.boston.com/news/specials/gay_mariage/articles/2004/03/29/how_lawmakers_cast_their_final_vote_on_the_gay_marriage_amendment) (recording votes). The final version, approved on March 29, 2004, provides:

The unified purpose of this Article is both to define the institution of civil marriage and to establish civil unions to provide same-sex persons with entirely the same benefits, protections, rights, privileges and obligations as are afforded to married persons, while recognizing that under present federal law same-sex persons in civil unions will be denied federal benefits available to married persons.

It being the public policy of this commonwealth to protect the unique relationship of marriage, only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth. Two persons of the same sex shall have the right to form a civil union if they otherwise meet the requirements set forth by law for marriage. Civil unions for same-sex persons are established by this Article and shall provide entirely the same benefits, protections, rights, privileges and obligations that are afforded to persons married under the law of the commonwealth. All laws applicable to marriage shall also apply to civil unions.

This Article is self-executing, but the general court may enact laws not inconsistent with anything herein contained to carry out the purpose of this Article.

*Id.* See generally *March 29th Con-Con Vote: A Short Debriefing*, Massachusetts Catholic Conference (Mar. 29, 2004), at [http://www.macathconf.org/04where\\_we\\_stand\\_with\\_mapa.htm](http://www.macathconf.org/04where_we_stand_with_mapa.htm) (developments preceding the final vote).

<sup>296</sup> Associated Press, *How Lawmakers Cast Their Final Vote on the Gay Marriage Amendment*, *supra* note 295.

forces won five more votes, the convention would have ended with no measure being forwarded to the next convention. That handful of votes could easily change to oppose any amendment in the next convention for many reasons, including the fact that more legislators and more of the public have seen that the marriages of same-sex couples have been seamlessly woven into the fabric of family life in Massachusetts.

Finally, the debate spawned by *Goodridge* enlivened a previously academic discussion about the legislature's role in the marriage business. For example, Representative Paul Loscocco pursued the idea, proposed by Harvard Law School professor Alan Dershowitz, to confine marriage to religious faiths and have a separately named secular institution for everyone else.<sup>297</sup> This idea drew fire, including from a prominent Massachusetts Republican who did not want her marriage taken away simply because, as part of an interfaith couple, she was not able to secure a religious ceremony.<sup>298</sup>

### C. Phase III: Denying Marriage

Within a few hours of the legislature's bare approval of the "Leadership Compromise" on March 29, 2004, Governor Romney issued a statement and appeared before the television cameras to request that the attorney general proceed to court to seek a stay of *Goodridge* until after voters could ratify the compromise in November 2006.<sup>299</sup>

While GLAD was fully prepared to counter this maneuver, we were surprised to learn that the attorney general refused to represent the gov-

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<sup>297</sup> Scott S. Greenberger & Raphael Lewis, *Mulling Way to Stop Gay Weddings as SJC Appeal Ruled Out, Romney Eyes His Options*, BOSTON GLOBE, Apr. 2, 2004, at A1 (discussing Rep. Loscocco's proposal to split civil and religious aspects of marriage); Alan M. Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES, Dec. 3, 2003, at B15. The Supreme Judicial Court also hinted that this could be possible, in both *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) and in the Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 n.4 (Mass. 2004).

<sup>298</sup> See Virginia Buckingham, *Civil Marriage Mustn't Be Annulled*, BOSTON HERALD, Apr. 3, 2004, at 21.

<sup>299</sup> See Elisabeth J. Beardsley, *Same-Sex Marriage Debate; Chaos Reigns as Wedding Ban OK'd*, BOSTON HERALD, Mar. 30, 2004, at 6 (describing Governor Romney's rushing back from Washington, D.C. to tell a live TV audience that he would ask the attorney general to seek a stay).

Governor Romney's opposition had remained constant. Even before the conventions commenced in February, he penned an op-ed in the *Wall Street Journal* encouraging states to pass constitutional amendments on marriage and compared his personal opposition to the *Goodridge* decision to President Lincoln's opposition to the *Dred Scott* decision, as though the two rulings were equivalently offensive. In *Dred Scott*, the United States Supreme Court denied the full citizenship of descendants of slaves, finding that they had no rights that the white man was bound to respect. *Dred Scott v. Sanford*, 60 U.S. 393, 403 (1857). *Goodridge*, by contrast, recognized the full humanity and citizenship of LGBT people. Mitt Romney, *A Citizen's Guide to Protecting Marriage*, WALL ST. J., Feb. 5, 2004, at A3.

ernor or appoint a special assistant to do so because, in his view, the case was over and there were no grounds for a stay.<sup>300</sup>

On April 15, 2004, people awoke to the news that House Speaker Finneran would not attempt to stop marriages by any legislative maneuver, including by a hidden amendment in the voluminous state budget.<sup>301</sup> Governor Romney stepped forward, however, and announced at a press conference that he was seeking legislative authorization to select counsel to represent him in pursuing an extension of the stay in *Goodridge*.<sup>302</sup> In his view, it was necessary to “delay the issuance of marriage licenses to same-sex [sic] couples until the people have a chance to decide this issue. This will allow me to protect the integrity of the constitutional process, a process that you [legislators] have endorsed and set in motion.”<sup>303</sup>

While the governor pursued a stay, organizations active as amici in the *Goodridge* case began a series of collateral attacks designed to delay implementation. On April 20, 2004, C. Joseph Doyle,<sup>304</sup> president of the Catholic Action League of Massachusetts, filed a petition with the single justice session of the Supreme Judicial Court seeking an extension of the stay of judgment in *Goodridge* until after a potential ratification vote on the constitutional amendment in November 2006, and naming as defendants the *Goodridge* plaintiffs and the individual members of the Supreme Judicial Court.<sup>305</sup> Should licenses issue to qualified same-sex couples on May 17, he feared a dilution of his right to participate in the constitutional amendment process.<sup>306</sup> After expedited briefing, on May 3, 2004, Justice Ireland declined to issue relief because a single justice lacks authority to alter a specific directive already issued by the full court, as occurred in *Goodridge*.<sup>307</sup> But in any event, Justice Ireland would have denied relief because the petitioner lacked standing and his request for a

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<sup>300</sup> Frank Phillips & Kathleen Burge, *Reilly Gives Governor A Hurdle, Reilly Rebuffs Romney on Possible SJC Appeal*, BOSTON GLOBE, Mar. 30, 2004, at A1.

<sup>301</sup> House Speaker Finneran appears to have conceded that marriages would proceed on May 17 because the Senate had “no appetite” for the approach of a new rational basis bill. See Raphael Lewis & Frank Phillips, *Finneran Signals He Won’t Try to Block Start of Gay Marriages*, BOSTON GLOBE, Apr. 15, 2004, at B1. GLAD attorneys reviewed the entire budget anyway.

<sup>302</sup> Letter from Mitt Romney, Governor, to the Honorable Members of the Senate and House of Representatives (Apr. 15, 2004) (on file with author).

<sup>303</sup> *Id.*

<sup>304</sup> Petitioner Doyle’s attorneys were the Thomas More Law Center, the American Family Association (“AFA”) Center for Law and Policy, and Liberty Counsel, each of which has anti-LGBT work as a primary part of their caseload.

<sup>305</sup> Plaintiff’s Petition for Stay of Entry of Judgment and Request for Hearing Before Single Justice at 1, *Doyle v. Goodridge*, No. SJC-2004-0169 (Mass. May 3, 2004) (relief denied).

<sup>306</sup> *Id.* at 10.

<sup>307</sup> *Doyle v. Goodridge*, No. SJ-2004-0169, slip op. at 2 (Mass. May 3, 2004) (memorandum and order denying petition to intervene).



stay of over two years was “simply unreasonable” where same-sex couples have the right to marry “in the here and now.”<sup>308</sup>

The remaining collateral attacks all argued that the Supreme Judicial Court lacked subject matter jurisdiction to decide *Goodridge* in the first place. On April 27, the American Center for Law and Justice<sup>309</sup> on behalf of 13 Legislators filed a motion to intervene in the *Goodridge* case based on that premise.<sup>310</sup> Their claim was that Part 2, c. III, art. V of the Massachusetts Constitution, which provides that “[a]ll causes of marriage, divorce, and alimony, and all appeals from the judges of probate shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision,” forbade the court from “redefining marriage and establishing new eligibility requirements for obtaining a marriage license” because that prerogative remained with the legislature.<sup>311</sup>

After expedited briefing in the Supreme Judicial Court, that court on May 7 denied the petition because *Goodridge* was not within the scope of the constitutional provision cited, but was instead a conventional claim involving the “interpretation of the Constitution and a determination of the validity of our laws.”<sup>312</sup>

On May 4, former Vatican ambassador and former Boston mayor Raymond Flynn<sup>313</sup> and the chairman of the “Coalition to Preserve Traditional Marriage” Thomas A. Shields filed an emergency motion to intervene in *Goodridge* in Suffolk Superior Court (the “Flynn-Shields intervention”), where the *Goodridge* case had commenced, and to dismiss that case for lack of subject matter jurisdiction.<sup>314</sup> Citing the same constitutional pro-

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<sup>308</sup> *Id.* at 2–4. The case is presently on appeal to the full Supreme Judicial Court. Doyle v. *Goodridge*, No. SJC-09254 (Mass. filed Sept. 22, 2004).

<sup>309</sup> The ACLJ attorney, Vincent McCarthy, was counsel for the “Coalition For Marriage,” the consortium of state and national right-wing groups lobbying against marriage in Massachusetts. See Press Release, Family Research Council, The Coalition for Marriage Formed to Advocate for One Man and One Woman Marriage in Massachusetts (Jan. 6, 2004), at <http://www.frc.org/get.cfm?i=PR04A01&f=PR04E03>.

<sup>310</sup> Motion to Intervene of Representatives Christopher P. Asselin, Mark J. Carron, Robert Correia, Viriato M. deMacedo, Robert S. Hargraves, William Lantigua, Peter J. Larkin, John A. Lepper, James R. Miceli, Elizabeth A. Poirier, Angelo M. Scaccia, Joyce A. Spiliotis, and Philip Travis at 1, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860).

<sup>311</sup> Order of May 7, 2004, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (denying Apr. 27 2004, motion to intervene).

<sup>312</sup> *Id.* at 3.

<sup>313</sup> His attorneys were the Ohio-based Law & Liberty Institute and the Arizona-based Alliance Defense Fund, both of which had submitted briefs in *Goodridge*. See Brief Amici Curiae National Association for Research and Treatment of Homosexuality, filed by Alliance Defense Fund, *Goodridge* (No. SJC-08860), at <http://www.marriagelaw.cua.edu/Law/cases/ma/goodridge/goodridgefiles.cfm>; Brief of Amicus Curiae Marriage Law Project, filed by Law & Liberty Institute, *Goodridge* (No. SJC-08860), at <http://marriagelaw.cua.edu/Law/cases/ma/goodridgefiles.cfm>; see also Brief Amici Curiae Alliance Defense Fund and Center for Marriage Law, filed by Law & Liberty Institute, *Goodridge* (No. SJC-08860).

<sup>314</sup> Emergency Motion to Intervene of Ambassador Ray Flynn and Thomas A. Shields at 6–7, *Goodridge v. Dep’t of Pub. Health*, No. 20011647A, 2002 WL 1299135 (Mass. Super. Ct. May 7, 2002) (No. 2001-1647-A) (motion filed May 4, 2004).

vision as the thirteen legislators, they claimed that the definition of “marriage” had been fixed by the ratification of the original Massachusetts Constitution of 1780 and could not be changed absent a constitutional amendment.<sup>315</sup> The Superior Court effectively denied relief by referring to Justice Ireland’s Order of May 4,<sup>316</sup> but by May 13 they had taken an appeal to a single justice of the Supreme Judicial Court seeking to dismiss *Goodridge* as an *ultra vires* decision.<sup>317</sup> The next day, the Friday before the Monday on which marriages were to begin, briefing concluded before Justice Spina, one of the dissenters in *Goodridge*. By late afternoon, he ruled against the petitioners, pointing out that marriage had no fixed meaning in the 1780 constitution and that a consequence of the petitioners’ argument was that “any impediment to marriage, such as affinity, age, or mental incompetence, could not be determined by the Legislature, but would require a constitutional amendment.”<sup>318</sup>

Foiled in the state courts, opponents took their claims to federal court. On Monday, May 10, one week before the scheduled issuance of licenses, Robert Largess, the vice president of the Catholic Action League of Massachusetts,<sup>319</sup> filed in federal District Court a Motion for a Temporary Restraining Order and Preliminary Injunction against the Supreme Judicial Court justices as well as the Department of Public Health, its commissioner, and the city and town clerks of Massachusetts.<sup>320</sup> He argued that the *Goodridge* decision violated the federal constitutional guarantee of a republican form of government in article IV, sec. 4 of the United States Constitution.<sup>321</sup> The claim was premised on the notion that the Supreme Judicial Court improperly exercised judicial review in *Goodridge* in violation of the separation of powers provision of the Massachusetts Constitution<sup>322</sup> and also in violation of its marriage provision.<sup>323</sup>

<sup>315</sup> Defendant-Intervenors’ Memorandum in Support of Emergency Motion to Dismiss for Lack of Subject Matter Jurisdiction at 2, *Goodridge v. Dep’t of Pub. Health*, No. 20011647A, 2002 WL 1299135 (Mass. Super. Ct. May 7, 2002) (No. 2001-1647-A) (memorandum filed May 4, 2004).

<sup>316</sup> *Goodridge v. Dep’t of Pub. Health*, No. 20011647A, 2002 WL 1299135 (Mass. Super. Ct. May 7, 2002) (No. 2001-1647-A) (order on May 11, 2004 declining to take action on motion to dismiss).

<sup>317</sup> Proposed Defendant-Intervenors’ Emergency Petition for Review, Pursuant to M.G.L. 211 § 3, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2004) (No. SJC-08860).

<sup>318</sup> *Goodridge v. Dep’t of Pub. Health*, No. SJC-2004-0214, slip op. at 2 (Mass. 2004). Technically, the court held the petitioners were not entitled to extraordinary relief and that they had no substantive right that could not be protected through the ordinary appellate process.

<sup>319</sup> He was represented by Liberty Counsel from Florida, along with the AFA Center for Law and Policy of Mississippi, and the Thomas More Law Center of Michigan.

<sup>320</sup> Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, Declaratory Relief, *Largess v. Supreme Judicial Ct.*, 317 F. Supp. 2d 77 (D. Mass. filed May 10, 2004) (No. 04-10921 JLT).

<sup>321</sup> *Id.* at ¶¶ 37–39. See also Memorandum of Law in Support of Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction at 2, *Largess* (No. 04-10921 JLT).

<sup>322</sup> MASS. CONST. pt. 1, art. 30.

<sup>323</sup> Memorandum of Law in Support of Plaintiffs’ Motion for T.R.O. and Preliminary

Over objection, GLAD intervened on behalf of the couples and argued the next day at the hearing that the Supreme Judicial Court's exercise of jurisdiction to review the constitutionality of a marriage licensing scheme could not amount to the implementation of a non-republican form of government.<sup>324</sup> On May 13, District Court Judge Tauro denied relief in a written opinion,<sup>325</sup> as did the First Circuit Court of Appeals,<sup>326</sup> prompting an emergency petition to the United States Supreme Court. Sometime after 6:00 P.M. on Friday, May 14, we received word that Justice Souter, the single Justice for the First Circuit, had referred the petition to the entire Court, which denied relief.<sup>327</sup>

May 17 was now firmly on track, but only for same-sex couples residing in Massachusetts. Foiled in his request to seek a stay, Governor Romney had announced in late April that only resident same-sex couples could marry because of his choice to start enforcing a moribund state law dating from 1913 providing that a couple may not marry in Massachusetts if their marriage would be "void if contracted" in their home state.<sup>328</sup>

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Injunction at 12, *Largess* (No. 04-10921 JLT).

<sup>324</sup> Later, a number of the same legislators as in the ACLJ case also intervened in order to shore up the claims of harm for standing purposes since *Largess* was no more harmed than any member of the public by the alleged violation. See Amended Complaint for T.R.O., Preliminary and Permanent Injunctive Relief and Declaratory Relief, *Largess* (No. 04-10921 JLT).

<sup>325</sup> *Largess v. Supreme Judicial Court*, 317 F. Supp. 2d 77 (D. Mass. 2004).

<sup>326</sup> *Largess*, 373 F.3d at 219. After questioning the justiciability of guarantee clause claims, the court reasoned:

Further, appellants would also have to show not only that the state's highest court had in this instance misconstrued state law but, in addition, that a federal court should disregard the long-standing practice of federal courts to treat the decisions of the highest state courts as controlling interpretations of state law.

Finally, assuming that this barrier too were overcome, *Goodridge* does not establish permanent martial law or declare the Commonwealth a monarchy; and it cannot plausibly be argued that every disagreement about the allocation of power within a state government—even a very important disagreement—raises a question under article IV, sec. 4. That *this* disagreement is important is obvious; but, at least so far, it is not obvious why its resolution one way rather than another threatens a republican form of government.

*Id.* at 2 (citations omitted).

The case itself, rather than just the appeal of the denial of the injunction, was later heard and rejected again by the First Circuit. *Largess v. Supreme Judicial Ct.*, 373 F.3d 219 (1st Cir. 2004), *cert. denied*, 124 S. Ct. 2157 (Nov. 29, 2004).

<sup>327</sup> *Largess v. Supreme Judicial Ct.*, 124 S. Ct. 2157 (2004) ("The application for an injunction pending appeal presented to Justice Souter and by him referred to the Court is denied.").

<sup>328</sup> He made his widely expected announcement in the *New York Times*. Pam Belluck, *Romney Won't Let Gay Outsiders Wed in Massachusetts*, N.Y. TIMES, Apr. 25, 2004, at A1.

The statutes at issue are MASS. GEN. LAWS, ch. 207 §§ 11–12. Section 11, provides:

No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this

Enforcement had the patina of even-handedness, but the intent and impact were clear: to deny marriage to same-sex couples.<sup>329</sup> Professing concern for same-sex couples who might mistakenly rely on the legal protections of marriage when their marriage might not be recognized by others,<sup>330</sup> the executive branch created and issued to clerks a “list of impediments” to marriage in each state.<sup>331</sup>

This time the governor and attorney general saw eye-to-eye. The attorney general had earlier stated his own belief that only couples from states with so-called Defense of Marriage Act (“DOMA”) laws could not marry in Massachusetts, meaning that couples from at least ten or eleven other states could marry in Massachusetts. But he retreated from that position.<sup>332</sup> Cities and towns were forced to decide whether or not to comply with the previously unenforced 1913 law.<sup>333</sup> As this Essay goes to print, the issue of whether or not Massachusetts may erect a fence of discrimination around its borders has yet to be finally determined by the Supreme Judicial Court or the legislature.<sup>334</sup>

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commonwealth in violation hereof shall be null and void.

Section 12, provides:

Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.

<sup>329</sup> Belluck, *supra* note 328, at A1. For this reason and because they believe the law is incapable of non-discriminatory enforcement, thirteen different municipal clerks also filed suit to enjoin application of these laws. See Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction at 7–8, *Johnstone v. Reilly*, No. 04-2655-G (Mass. Super. Ct. filed June 21, 2004) (referencing instructions given to clerks regarding non-enforcement).

<sup>330</sup> See Scott S. Greenberger & Yvonne Abraham, *Gay-Marriage Rule Eased; Romney Aide Says Clerks Have Discretion on Residency Proof*, BOSTON GLOBE, May 5, 2004, at A1 (describing the May 4 training and PowerPoint presentation made by governor’s counsel to clerks on new marriage procedures); see also *Instructions to Town Clerks*, Massachusetts Dep’t of Pub. Health, at 25, at [http://www.glad.org/marriage/town\\_clerk\\_instructions.pdf](http://www.glad.org/marriage/town_clerk_instructions.pdf) (section 11 matters because rights of children and spouses may be different from what is expected, and might not be raised for years, such as in matters of divorce, child support, or estate challenge).

<sup>331</sup> *Guide to Legal Impediments to Marriage for 57 Registration Jurisdictions*, Mass. Dep’t of Pub. Health (July 30, 2004), at <http://www.mass.gov/dph/bhsre/rvr/impediments1%20.pdf>.

<sup>332</sup> Yvonne Abraham, *AG Asks End of Out-Of-State Marriage Licenses*, BOSTON GLOBE, May 22, 2004 at A1 (noting that Attorney General Reilly had now aligned himself with the governor’s position).

<sup>333</sup> GLAD filed suit on behalf of eight same-sex couples from other states on June 18, 2004, seeking a preliminary injunction. See Complaint, *Cote-Whitacre v. Dep’t of Pub. Health*, No. 04-2656-G (Mass. Super. Ct. 2004) (arguing that the statute is unconstitutional as applied to same-sex couples after *Goodridge*, is enforced invidiously to disadvantage same-sex couples, and is unconstitutional under the federal Privileges and Immunities Clause). For copies of the pleadings, see <http://www.glad.org/marriage/cote-documents.shtml>. An appeal of a trial court’s denial of a preliminary injunction in this case is now pending. *Cote-Whitacre v. Dep’t of Pub. Health* (Mass. App. Ct. filed Sept. 2004).

<sup>334</sup> The State Senate already voted to repeal the 1913 law, and such repeal measures are

## III. THE FUTURE

If there is no struggle, there is no progress. Those who profess to favor freedom and yet deprecate agitation, are men who want crops without plowing the ground, they want rain without thunder and lightning. They want the ocean without the terrible roar of its waters . . . . Power concedes nothing without a demand. It never did and it never will . . . . Men might not get all they work for in this world, but they must certainly work for all they get.

—Frederick Douglass<sup>335</sup>

Actually, time itself is neutral; it can be used either destructively or constructively. More and more I feel that the people of ill will have used time much more effectively than have the people of good will. We will have to repent in this generation not merely for the hateful words and actions of the bad people, but for the appalling silence of the good people. Human progress never rolls in on wheels of inevitability; it comes through the tireless efforts of men willing to be co-workers with God and without this hard work time itself becomes an ally of the forces of social stagnation.

—Rev. Dr. Martin Luther King, Jr.<sup>336</sup>

No struggle for justice is won or lost in a single day, with a single court decision, or with a single election. It is only by staying the course on the many roads we must travel that this equality movement can succeed; everything else is capitulation to those who would amend our fundamental state and federal charters to deny LGBT people and families the American promises of fairness, liberty, equality, and justice under law.

Even with a sitting President who is supporting an amendment to the federal Constitution to deny rights to a group of Americans,<sup>337</sup> and even with eleven more states ratifying constitutional amendments to deny marriage and other partnership rights to same-sex families,<sup>338</sup> and even with more of the same to come, the best way out is through.

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likely to surface again in the 2005–2006 legislative session. See Associated Press, *Romney Threatens Veto of Repeal Effort*, BOSTON GLOBE, May 7, 2004, at B2.

<sup>335</sup> Frederick Douglass, *West India Emancipation Speech*, Delivered at Canandaigua, New York (Aug. 4, 1857), in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 437 (Philip S. Foner ed., 1950).

<sup>336</sup> Letter from Rev. Martin Luther King, Jr. from Birmingham Jail (Apr. 16, 1963), available at <http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf>.

<sup>337</sup> See, e.g., President George W. Bush, Remarks at 2004 Presidential Debate (Oct. 13, 2004) (transcript available at <http://wid.ap.org/transcripts/debates/prez3.html>) (“I proposed a constitutional amendment . . . to protect marriage between a man and a woman . . .”).

<sup>338</sup> See, e.g., Press Release, National Gay and Lesbian Task Force, *Anti-Gay Marriage Amendments Pass in 11 States* (Nov. 3, 2004), available at <http://www.thetaskforce.org/media/release/cfm.?releaseID=756>.

Staying the course means keeping the light shining on the real people and human stakes of this issue in every branch of government and at the local, state, and federal levels as well as in the cultural court. Simply put, whether in one-on-one conversations with families, neighbors, co-workers, co-religionists, or legislators, in a lawsuit, in an attempt to pass or to defeat a bill, or in an election campaign, those who support equality and fairness must help make visible the heavy price paid by real people for the government's denial of relationship recognition. With the problem understood, it is not a terribly hard case to make that marriage, not civil unions or some other system, is the fairest and best way to rectify those problems. It is primarily with that kind of conversation, over time, that our society can reach a consensus that there is much to gain and nothing to fear from recognizing that LGBT people and families are fully part of our civil society.

Is there any basis to believe such a campaign could succeed? Conventional wisdom notwithstanding, it is already succeeding. I am not alone in thinking that most Americans believe in fairness and that the government should not be in the business of denying rights to ordinary citizens. How else can one explain President Bush's statements in the last two weeks of his 2004 election campaign against Senator John Kerry that he did not oppose civil unions and that the Republican platform on which he was running was wrong on that point?<sup>339</sup> The "moderate" sentiment to which the President was appealing was evident in the American electorate in November 2004, with exit polls showing that 60% supported either marriage or civil unions for same-sex couples.<sup>340</sup>

Moreover, state races where the issues of marriage and relationship recognition have been brewing for some time were very favorable to LGBT people. In Vermont, not only did Democrats regain the State House after a backlash that defeated seventeen pro-civil union incumbents in 2000,<sup>341</sup> but also exit polls showed 77% of voters favoring marriage (40%) or civil unions (37%).<sup>342</sup>

In Connecticut, the "Family Institute of Connecticut" sought to oust Representative Michael Lawlor of East Haven, one of the assembly's strongest supporters of marriage equality.<sup>343</sup> Lawlor retained his seat by his largest

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<sup>339</sup> See, e.g., Editorial, *A Vote for Inequality*, WASH. POST, Nov. 5, 2004, at A24 (referencing President Bush's comments to Charles Gibson of ABC News, distinguishing marriage from "legal arrangements that enable people to have rights," including civil unions, on Oct. 24, 2004).

<sup>340</sup> David Brooks, *The Values-Vote Myth*, N.Y. TIMES, Nov. 6, 2004, at A31 (concluding that President Bush won because most approved of the way he handled terrorism and his job as President, and approved of his decision to go to war in Iraq).

<sup>341</sup> David Gram, *Gay Unions gaining acceptance in Vermont*, Associated Press, Nov. 6, 2004.

<sup>342</sup> *Id.*

<sup>343</sup> Press Release, Love Makes A Family, PAC Flexes Muscle in Connecticut Elections, Nov. 3, 2004, available at <http://lmfct.org>. See also Memorandum from Betty Gallo, LMF PAC, LMF Wins Big (Nov. 3, 2004) (on file with author) (citing campaign against Lawlor

margin ever: five to one.<sup>344</sup> Moreover, two anti-gay incumbents were defeated,<sup>345</sup> suggesting that voters had lost patience with a message of discrimination.

In Massachusetts, the Vermont-type backlash never materialized even though legislators had voted in support of or opposition to *marriage* during the preceding session. All fifty pro-equality incumbents won reelection, and six of eight open seats were won by candidates who oppose a discriminatory constitutional amendment.<sup>346</sup> In Massachusetts, voters have had the opportunity to live beside their newly married LGBT neighbors and, by and large, they have come to realize that marriage equality does not threaten them while others have come to appreciate how profound it is to be treated fairly and equally under the law.

With these bright lights emerging from what many viewed as a disastrous election cycle for LGBT people and with the fairness issues already percolating nationally, it should be clear that much more can be accomplished in short order with “more education, not less; more conversation, not less; and a dialogue that stresses the value and importance of fairness and equality.”<sup>347</sup> As George Chauncey so cogently explains, there is nothing about anti-LGBT prejudice that is inevitable, and much of what we accept as the anti-LGBT status quo was created within the last fifty to sixty years.<sup>348</sup> Summarizing polling data collected by the American Enterprise Institute over the last thirty years, the *New York Times* noted “a profound change in attitudes” and “enormous strides made in tolerance,” suggesting that “[t]he trend gives some reason to hope that gay marriage will eventually be deemed acceptable and no threat to heterosexual Americans.”<sup>349</sup>

Some would reject these analyses on the grounds that the 2004 national exit polls showed “moral issues” to be the primary reason 22% of voters cast their ballot for a particular presidential candidate.<sup>350</sup> While mar-

and analyzing data) [hereinafter Gallo Memorandum].

<sup>344</sup> Gallo Memorandum, *supra* note 343.

<sup>345</sup> *Id.*

<sup>346</sup> Press Release, MassEquality, Election Results Show Marriage Equality Incumbents Re-Elected (Nov. 3, 2004), available at <http://www.massequality.org>; see also Raphael Lewis, *A Rift on Gay Unions Fuels a Coup at Polls—How Somerville Activist Ousted a Fixture*, BOSTON GLOBE, Sept. 26, 2004, at B1 (anti-LGBT incumbent ousted by challenger in legislative primaries).

<sup>347</sup> Mary L. Bonauto & Marty Rouse, *Gay marriage is not to blame*, BOSTON GLOBE, Nov. 9, 2004, at A15.

<sup>348</sup> CHAUNCEY, *supra* note 6, at 5–22.

<sup>349</sup> Editorial, *Gay Soldiers and Teachers*, N.Y. TIMES, Apr. 2, 2004, at A18. The American Enterprise Institute collection can be found on their website at <http://www.aei.org>.

<sup>350</sup> While the “moral values” choice had never before been presented in exit polls, in the 1996 and 2000 elections, 49% of presidential voters chose either “abortion” or “family values” as their top issues in voting for President, dwarfing the selection of “moral issues.” *The Triumph of the Religious Right*, ECONOMIST, Nov. 13, 2004, at 29.

Notably, evangelical voters were 23% of the electorate in both 2000 and 2004. *Id.* In any event, it is unfair to paint with too broad a brush about conservative Christian groups.

riage for same-sex couples was in the mix, significantly, neither pollsters nor seasoned political observers know what that figure means since “moral issues” was not defined.<sup>351</sup> According to the Center for American Progress, 42% of voters said the war in Iraq was the most important moral issue influencing their vote, compared to 13% who chose abortion and less than 10% who chose “gay marriage.”<sup>352</sup> Contrary to the conventional wisdom, Senator Kerry’s pollster said that his candidate had the majority of the “abortion” and “gay marriage” voters.<sup>353</sup> As President Bush’s chief strategist sees it, “moral issues” are third to Americans’ concerns about Iraq and terrorism (34%), and the economy and taxes (25%).<sup>354</sup> For all of these reasons, *Time* magazine dubbed the focus on “gay marriage” as one of the “myths” of the 2004 Presidential elections.<sup>355</sup>

Others would counter by pointing to the eleven states ratifying constitutional amendments in November 2004, eight of which went beyond banning marriage to extend to other rights.<sup>356</sup> This is a weak argument. Anti-LGBT groups have been using referenda as a tool to deny rights for over thirty years, starting with Anita Bryant’s crusade to repeal a Dade County, Florida, ordinance banning employment discrimination.<sup>357</sup> In some states, people can bypass the gate-keeping mechanisms of the state legislature and directly initiate an amendment and force a vote on it within a few months.<sup>358</sup>

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*See, e.g.*, Alan Cooperman, *Foes Confounded by Limited Outcry Against Gay Marriage*, WASH. POST, June 20, 2004, at A3. At the Baptist Baylor University, the student paper editorialized in favor of allowing “gay couples to enjoy the benefits and happiness of marriage.” *San Francisco Should Pursue Gay Marriage Suit*, LARIAT (Baylor U.), Feb. 27, 2004, available at <http://www.baylor.edu/Lariat/news.php?action+story&story=19983>.

<sup>351</sup> *E.g.*, Gary Langer, *A Question of Values*, N.Y. TIMES, Nov. 6, 2004, at A31 (ABC News director of polling argued against including moral values question because it was vague and undefined).

<sup>352</sup> Karen Tumulty, *The Folklore of Election '04: Debunking the Falsehoods Springing from This November's Contest*, TIME, Nov. 22, 2004, at 23 (reporting survey findings).

<sup>353</sup> Mark Mellman, *Values Role Easily Simplified*, THE HILL, Nov. 10, 2004, available at <http://www.thehill.com/mellman/111004.aspx>.

<sup>354</sup> *NBC News' Meet the Press* (NBC television broadcast, Nov. 7, 2004) (comments of Karl Rove to Tim Russert) (transcript available at <http://www.msnbc.com/id/6430019>). *See also* Paul Freedman, *The Gay Marriage Myth: Terrorism, Not Values, Drove Bush's Re-election*, SLATE, Nov. 5, 2004, at <http://www.slate.msn.com/id/2109275> (analyzing data); Dick Meyer, *Moral Values Malarkey, CBSNews.com Against the Grain Commentary* (Nov. 5, 2004), at <http://www.cbsnews.com/stories/2004/11/05/opinion/meyer/main653931.shtml> (more analysis).

<sup>355</sup> Tumulty, *supra* note 352.

<sup>356</sup> Press Release, National Gay & Lesbian Task Force, *supra* note 338. For example, beyond barring marriage, Ohio’s amendment provides that government “shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” OHIO CONST., art. XV, § 11.

<sup>357</sup> *See, e.g.*, CHAUNCEY, *supra* note 6, at 38–39, 46.

<sup>358</sup> *See* THE BOOK OF THE STATES 34 (Council of State Governments, ed., 2004) at 14 (amendment procedures in each state). Six of the eleven state constitutional amendments ratified in November 2004 were popularly initiated. Family Research Council, *2004 State Constitutional Amendments* (Sept. 14, 2004), at <http://www.frc.org/get.cfm?I=DX04H02&v=PRINT> (citizen initiatives in Arkansas, Michigan, Montana, North Dakota, Ohio, and Oregon). The Family Research Council has noted its participation in some of these cam-



The LGBT community rarely wins a referendum question at the state level, and that is not likely to change absent massive and expensive public educational campaigns focused on the human stakes of discrimination.

Even beyond the difficulty of a minority group winning a referendum question on any issue, excepting Oregon, the remaining ten states already had anti-LGBT, anti-marriage laws on their books.<sup>359</sup> None of the states had a statewide non-discrimination law or any protections for same-sex families that would have provided any context for understanding the impact of denying marriage and other rights to same-sex families.<sup>360</sup> In short, they were easy targets. In Oregon, the one state that did provide any legal protections for same-sex couples, the vote margin was the closest, and the amendment was rejected by a majority of voters in the one county where marriages had been performed for a few weeks in the winter of 2004.<sup>361</sup>

Of course the amendments are a painful setback, but they are also a predictable phenomenon in the patchwork process that is any equal rights struggle in which a few states can ultimately set new standards of fairness that lift all. State and federal amendment processes were used to thwart the move to racial equality, as with attempts to amend the federal Constitution to ban marriage of different race couples,<sup>362</sup> and post-*Brown*, to nullify state and local race discrimination laws.<sup>363</sup>

Is all of this legislative activity a “backlash” to *Goodridge*, or to San Francisco Mayor Gavin Newsome’s move to issue marriage licenses starting in February?<sup>364</sup> On balance, it is more “lash” than “backlash.”<sup>365</sup> Without a doubt, these developments have agitated some and spurred others to take

paings, *see, e.g.*, Kristin Smith, *Citizen Petitions Yield Overwhelming Numbers to Protect Marriage* (July 13, 2004), at <http://www.frc.org/get.cfm?I=LH04G03&v=PRINT> (mentioning links between petitioners and “family groups” in Michigan).

<sup>359</sup> *See* Editorial, *A Vote for Inequality*, *supra* note 339 (noting existence of discriminatory laws in those ten states).

<sup>360</sup> *See*, Human Rights Campaign, *What’s Happening in Your State and in Your Community*, at <http://www.hrc.org>.

<sup>361</sup> Bill Graves & Ashbel S. Green, *Election 2004: Measure 36 Win Returns Marriage Fight to Courts*, OREGONIAN, Nov. 4, 2004, at D4 (noting margin of 57% to 43% and that measure failed in Multnomah County where officials had performed over 3000 marriages in the spring).

<sup>362</sup> *See, e.g.*, KENNEDY, *supra* note 4, at 83; Edward Stein, *Past and Present Proposed Amendments to the U.S. Constitution Regarding Marriage*, *bepress* (Sept. 9, 2004), at <http://www.bepress.com/ils/iss5/art1>.

<sup>363</sup> *See, e.g.*, *Hunter v. Erickson*, 393 U.S. 385 (1969) (charter amendment struck); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (state constitutional amendment struck).

<sup>364</sup> Dean Murphy, *San Francisco Married 4,037 Same-Sex Pairs From 46 States*, N.Y. TIMES, Mar. 18, 2004, at 26 (reporting numbers from city officials). The California Supreme Court later ruled that the City lacked authority to issue the licenses and voided the marriages. *Lockyer v. San Francisco*, 17 Cal. Rptr. 3d 225, 231 (2004).

<sup>365</sup> The Rev. Martin Luther King, Jr. noted how the concept of “backlash” was a misnomer: “The backlash is merely the surfacing of prejudices . . . that already existed and . . . are just now starting to open.” Rev. Martin Luther King, Jr., Seventh Annual Gandhi Memorial Lecture, Howard Univ., Washington, D.C. (Nov. 6, 1966), *quoted in* Evan Wolfson, *What do the election results mean for the move toward marriage equality?* (Nov. 3, 2004) at [http://www.freedomtomy.org/document.asp?doc\\_id=2030](http://www.freedomtomy.org/document.asp?doc_id=2030).

more drastic steps to preempt the otherwise natural course of events. Thirty-seven states enacted laws or constitutional amendments denying marriage to LGBT people before *Goodridge* was even decided.<sup>366</sup> The proposed federal amendment was drafted in 2000–2001,<sup>367</sup> and Congress passed the Defense of Marriage Act in 1996, both long *before* any state ended the exclusion of same-sex couples from marriage. The new marriage restrictions and amendments are not spontaneous developments, but the result of a premeditated campaign. George Chauncey's overview shows how marriage has been an obsession of the radical right,<sup>368</sup> and Evan Wolfson notes, on the eve of the 1996 Presidential Caucuses in Iowa, leading "family values" groups—the same ones active in Massachusetts and around the country today—forced the candidates to take a position on a so-called Marriage Protection Pledge,<sup>369</sup> the sole purpose of which was to deny marriage rights to LGBT people without "protecting" marriage in any other way.

To me, this overview suggests that anything other than staying the course is to play into the divide and conquer strategy of family values groups, whose *raison d'être* is to deny protections to LGBT people and families.

Beyond accelerating the conversation about fairness, staying the course means allowing legal systems and private entities to take measure of these new legal developments. In Massachusetts, some employers and trusts initially withheld employment benefits but then changed course to explicitly include same-sex married couples within their benefit plans.<sup>370</sup> Even in the initial flurry after marriages began, one-third of 216 companies surveyed nationwide said they would include same-sex couples in health plans, with nearly another third still undecided.<sup>371</sup> New York's solicitor gen-

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<sup>366</sup> There were thirty-six such laws at the time *Goodridge* was filed in April 2001. Opinions of the Justices to the Senate, 802 N.E.2d 565, 574–76 (Mass. 2004) (Sosman, J., dissenting).

<sup>367</sup> See Karen S. Peterson, *Man Behind the Amendment; Matt Daniels is a force in the marriage debate*, USA TODAY, Apr. 13, 2004, at D1; Jacob M. Shlesinger, *How Gay Marriage Thrust 2 Outsiders Onto Center Stage*, WALL ST. J., Feb. 23, 2004, at A1.

<sup>368</sup> CHAUNCEY, *supra* note 6, at 144–45.

<sup>369</sup> See WOLFSON, *supra* note 4, at 34.

<sup>370</sup> See Donovan Slack, *Union Denies Benefits To Gay Couples*, BOSTON GLOBE, May 11, 2004 (reporting that IBEW 103 amended trust documents to include only opposite-sex married spouses). The union later reversed course and now includes married spouses of the same-sex in both its health and pension coverage. Memorandum from Trustees and Administrators to Participants of the Local 103, I.B.E.W. Health Benefit Plan (July 2004) (on file with author) (A spouse is evidenced by "a marriage certificate that is recognized in the Commonwealth of Massachusetts as legal and valid . . ."). Moreover, employers offering domestic partnership benefits have overwhelmingly chosen to retain those benefits. See Kimberly Blanton, *Benefits for Domestic Partners Maintained*, BOSTON GLOBE, Aug. 22, 2004, at G1 (91% of New England-based human resource professionals indicating they were maintaining their domestic partner benefits).

<sup>371</sup> Jay Fitzgerald, *Cos. Resist Gay Benefits*, BOSTON HERALD, June 25, 2004, at 30 (40% indicated they would deny a request for health benefits). This is significant since self-insured plans have more discretion in how they administer plans than those directly regulated in Massachusetts. See GLAD and Health Law Advocates, *Same-Sex Spousal Benefits in Mas-*

eral has offered an informal opinion that same-sex spouses from other jurisdictions must be respected as spouses under New York law,<sup>372</sup> and the New York state pension system announced it would treat same-sex couples with marriage licenses from Canada (and logically, from any state), the same as other married couples.<sup>373</sup> Rhode Island's attorney general similarly opined that married retirees under the state and municipal pension plans must be treated in the same way.<sup>374</sup>

The public policy discussions are advancing as well and will continue.<sup>375</sup> Already, some states have begun ameliorating the harsh consequences of the total exclusion of LGBT people from marriage. While the steps taken toward statewide domestic partnership registries in Maine<sup>376</sup> and New Jersey<sup>377</sup> are modest, they are particularly notable because Maine's follows a legislative enactment of a state anti-LGBT marriage law,<sup>378</sup> and New Jersey's accompanies pending marriage litigation.<sup>379</sup> California's newest law, effective January 1, 2005, provides registered domestic partners with almost every state-conferred right and responsibility of married persons and may soon be superseded by marriage.<sup>380</sup>

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*sachusetts After Goodridge* (forthcoming), at <http://www.glad.org>.

<sup>372</sup> Opinion of Caitlin Halligan, N.Y. Solicitor General, to Darrin B. Derosia, Counsel City of Cohoes, and Peter Case Graham, Attorney Town of Olive (Mar. 3, 2004), at [http://www.oag.state.ny.us/lawyers/opinions/2004/informal/2004\\_1.html](http://www.oag.state.ny.us/lawyers/opinions/2004/informal/2004_1.html).

<sup>373</sup> Michael Cooper, *Hevesi Extends Pension Rights To Gay Spouses*, N.Y. TIMES, Oct. 14, 2004, at B1 (reporting that in case where New York employee obtained marriage in Canada, the state comptroller ruled that the law requires the state pension fund—the second largest in the country—to respect the marriage).

<sup>374</sup> Letter from Patrick C. Lynch, to Hon. Paul J. Tavares, General Treasurer (Oct. 19, 2004) (on file with author).

<sup>375</sup> See, e.g., Fred Lucas, *Same-sex civil union bill likely: State legislators support expanding gay rights*, NEWS-TIMES (Danbury, Conn.), Nov. 14, 2004, available at <http://newstimes.com/story.php?id=6641> (predicting passage of civil union law in Connecticut's 2005-2006 legislative session).

<sup>376</sup> 2004 Me. Legis. Serv. 672 (West) (signed Apr. 28, 2004). Upon completion of an affidavit, qualified domestic partners may inherit from each other without a will, elect against a will, make funeral and burial arrangements, receive victim's compensation, and receive preference for appointment as a conservator or guardian of his or her domestic partner.

<sup>377</sup> 2003 N.J. Sess. Law Serv. 246 (West). Qualified domestic partners, upon filing the proper affidavit, may make certain medical decisions, visit in hospitals, receive more equitable tax treatment, and receive certain state-administered employment benefits.

<sup>378</sup> ME. REV. STAT. ANN. tit. 19-A, § 701 (1997). The history of this law is discussed in Jennifer Wriggins, *Maine's "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages": Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345 (1998). Despite Maine's DOMA, the legislature has also enacted measures providing for domestic partner health and retirement benefits for state employees. 2001 Me. Pub. L. ch. 347, sec. 2.5; ME. REV. STAT. ANN., tit. 24-A, §§ 2741A, 2832-A.

<sup>379</sup> *Lewis v. Harris*, No. A-2244-03T5 (N.J. Ct. App. filed 2003).

<sup>380</sup> 2003 Cal. Legis. Serv. 421 (West). For a description of the legislative journey toward this bill, see Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004); see also William Wan & Lee Romney, *Marriage Debate In New Arena; Democrats might try to pass a bill in the legislature legalizing same-sex unions, but would face a possible veto*,

Selective litigation must continue because courts say what our constitutional guarantees mean. Several cases are pending,<sup>381</sup> with three different trial court judges post-*Goodridge* having found the denial of marriage rights to same-sex couples unconstitutional.<sup>382</sup> While litigation cannot be and has not been the only venue to pursue ending marriage discrimination, court rulings have helped bring us to the point where significant relationship recognition is now supported by nearly two-thirds of the American electorate.<sup>383</sup>

Many in the LGBT community feel lifted up by the *Goodridge* decision, just as the *Brown* decision had a “powerfully inspirational effect” on politically minded African Americans.<sup>384</sup> We need this spirit, just as we need urgency because the harms to families and their children demand it. We must not be self-abnegating, but we also need the tempering influence of a longer term perspective: the nearly sixty years it took to dismantle the “separate but equal” doctrine,<sup>385</sup> and the even longer fight for women to win the right to vote—plus the fact that it took a constitutional amendment to do so.<sup>386</sup> While the path of LGBT people will be different from those in other justice movements, I draw solace from California’s *Perez*<sup>387</sup> case where that state’s high court, in a four-to-three decision with a bitter dissent, ended race discrimination in marriage in that state. It was the first state supreme court to do so, and the existing legal precedents around the country were contrary,<sup>388</sup> and the cultural landscape was inauspicious.<sup>389</sup> Yet, many of us are now grateful that the court saw the issue as one of human equality and dignity and broke what had been a logjam of discrimination. A large number of states repealed their bans on interracial

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L.A. TIMES, Aug. 14, 2004, at B1.

<sup>381</sup> See *Woo & Chung v. Lockyer*, No. CPF-04-504-038 (Cal. Super. Ct. Aug. 5, 2004); *Kerrigan v. Conn. Dep’t of Pub. Health*, No. CV-04-4001813-S (Conn. Super. Ct. Oct. 27, 2004); *Morrison v. Sadler*, No. 49D13-0211-PL-001946, 2003 WL 23119998 (Ind. Super. Ct. May 7, 2003); *Deane v. Conaway*, No. 24-C-04-005390 (Md. Cir. Ct. Nov. 3, 2004); *Hernandez v. Robles*, No. 103434/2004, 2004 WL 2334289 (N.Y. Sup. Ct. Aug. 20, 2004); *Samuels v. N.Y. State Dep’t of Health*, No. 1967/2004 (N.Y. Sup. Ct. Sept. 10, 2004).

<sup>382</sup> *Li v. State*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct., Apr. 20, 2004), *appeal docketed*, No. S51612 (Or. 2004); *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004), *appeal docketed*, No. 75934-1 (Wash. 2004); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *appeal docketed*, No. 75934-1 (Wash. 2004).

<sup>383</sup> See David Brooks, *supra* note 340.

<sup>384</sup> David J. Garrow, *Give Brown v. Board of Education Its Due*, HUMAN RIGHTS (Am. Bar Ass’n Journal), Summer 2004, at 2, 3.

<sup>385</sup> *Brown v. Bd. of Education*, 347 U.S. 483 (1954), *overruling* *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>386</sup> Women were disenfranchised until the Nineteenth Amendment to the U.S. Constitution was ratified in 1920. U.S. CONST., amend. XIX.

<sup>387</sup> *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

<sup>388</sup> *Id.* at 35 (Shenk, J., dissenting). Every state supreme court had upheld the bans, *Brown v. Board of Ed.* had not yet been decided, and *Plessy v. Ferguson* was still good law. *Id.* at 31–32.

<sup>389</sup> Thirty states had discriminatory laws or state constitutional amendments in place, and polls showed that more than nine out of ten Americans supported the bans. See *id.*

marriage by the time the U.S. Supreme Court decided *Loving v. Virginia* nineteen years later. While Dr. King was correct that progress is anything but inevitable, it is certainly a better bet that with determined time and effort, LGBT people will be part of constitutional history in this country, a story of the “extension of constitutional rights and protections to people once formerly ignored or excluded.”<sup>390</sup>

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<sup>390</sup> United States v. Virginia, 518 U.S. 515, 557 (1996).

