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EQUALITY AND THE IMPOSSIBLE--STATE CONSTITUTIONS AND MARRIAGE

INTRODUCTION

I primarily practice in New England, where the state constitutions are some of the oldest in the nation. A number of the state high courts have developed an authentic state constitutional jurisprudence based on the text of those constitutions as understood in the context of history and the values infusing them. Time and again, state constitutional guarantees bear on the issues of the day, whether a right to basic support, educational opportunity, student and employee speech, police practices, due process safeguards in civil and criminal settings, reproductive justice, or equality issues, to name a few.

In the marriage context, state constitutional law is a great fit. “Marriage” is generally regulated by state law.¹ To challenge state marriage laws foreclosing same-sex couples from an equal opportunity to marry, movement lawyers had to make a choice: do we make claims under the state or federal constitution, or both? At GLBTQ Legal ***1482** Advocates & Defenders (GLAD), my employer for the last twenty-six years, we chose state constitutions.

State constitutions are ratified by local voters and then applied by lawmakers and courts to all manner of emerging issues over the years, creating a body of principles and precedents.² State courts, applying state constitutional provisions, can apply those principles without constraint from federalism concerns. Those concerns sometimes lead to under enforcement of federal equal protection guarantees.³ Moreover, cases decided on independent state grounds are not reviewable by the U.S. Supreme Court, thereby providing an opportunity for experimentation in the states without forcing the question of national policy.⁴ For these and other reasons, state constitutions provided the better vehicle for seeking to end marriage discrimination.

It was in-between two of GLAD's cases--those in Vermont⁵ and Massachusetts⁶--that I heard Professor Bob Williams speak in Massachusetts.⁷ As I came to know more of his work and this field, I asked him and other state constitutional law colleagues to file an amicus brief in *Goodridge v. Department of Public Health*.⁸

I cannot give you a full recounting of GLAD's long-term thinking about how to address marriage discrimination, but the following is a brief summary of the highlights. In Vermont, with our three incredible plaintiff couples and attorneys Beth Robinson and Susan M. Murray, we won a 1999 ruling requiring the legislature to provide the state- ***1483** based protections and responsibilities of marriage to same-sex couples otherwise eligible to marry.⁹ In 2000, the Vermont legislature enacted, and Governor Howard Dean signed, the nation's first civil union law.¹⁰ Massachusetts followed Vermont, where GLAD, with seven plaintiff couples, broke the historic barrier against allowing same-sex couples to marry with the Supreme Judicial Court's 2003 *Goodridge* decision.¹¹ In the Connecticut *Kerrigan* case, with our eight plaintiff couples and cocounsel,¹² we won marriage in a state that had already legislatively granted civil unions to same-sex couples, demonstrating that separation was

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still unequal.¹³ In addition, as part of GLAD's "6x12 Campaign" for marriage in all six New England states by 2012,¹⁴ we worked with state and national partners to achieve the first marriage legislation in the nation in 2009 and following. GLAD was part of the Maine legislative team and ballot executive committees in 2009, where our legislative victory was "vetoed" by the people,¹⁵ and in 2012, when we affirmatively passed marriage legislation by ballot.¹⁶ In 2009, in *Gill v. Office of Personnel Management*,¹⁷ GLAD and co-counsel brought (and won in 2010) the first strategic challenge to the Federal Defense of Marriage Act (DOMA).¹⁸ After DOMA's demise in *United States v. Windsor*,¹⁹ *1484 GLAD assisted in marriage litigation in state and federal courts far from New England, including representing April DeBoer and Jayne Rowse from Michigan and arguing before the U.S. Supreme Court.²⁰

This triumph took the labors and love of millions. I will always be grateful to our clients, our co-counsel, and the amici and their attorneys, as well as the LGBTQ legal groups.²¹ Last but not least, this triumph was possible because of those who, in their personal, spiritual, community, and work lives, made a difference by opening themselves up to others and claiming their inherent dignity or that of their LGBTQ family members and friends. The ideas, strategies, and victories leading to nationwide marriage equality²² truly had many authors.

In this Article, I will be discussing "Equality and the Impossible," with a focus on the role of state constitutions in the marriage litigation *1485 from my personal vantage point. I will address four broad topics:

1. The origins of the state constitutional litigation strategy on marriage for same-sex couples--the lay of the land when we started;
2. The choice of fora;
3. The progression of the litigation; and
4. The eventual move to federal litigation.

I. ORIGINS OF STATE CONSTITUTIONAL LITIGATION STRATEGY

I have already referred to the ability of state courts to experiment on the state level based on the precedents under unique state constitutions.

Unusual as it may sound in a discussion about strategy, one of the most important elements for originating state constitutional cases is the aspirations of human beings. Quite simply, there have always been LGBTQ people who simply loved one another and sought to stand up and take responsibility for one another in that unique cultural, legal, and social institution of marriage. Regardless of their devotion, however, they were deemed legally unfit to marry. In fact, not a country in the world allowed same-sex couples to marry until the Netherlands in 2001.²³

I have long believed something that U.S. Supreme Court Justice Ruth Bader Ginsburg wrote in 1996 in a case about the all-male Virginia Military Institute admitting women. "[T]he history of our Constitution," she said, "is the story of the extension of

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constitutional rights and protections to people once ignored or excluded.”²⁴ That is how I see the journey for LGBTQ people, as one of extending rights and protections long walled off because of who we are.

GLAD believed we needed to build up basic protections for LGBTQ people and families and overturn or neutralize discriminatory laws and practices before we could challenge the marriage exclusion in a particular state. In other words, we needed to clear the underbrush, if *1486 you will, so that a court or legislature could focus on the marriage exclusion and see it for the harmful, stigmatizing double standard that it was.

Clearing away discriminatory laws and practices has been a principal focus of the LGBTQ movement for many decades. In brilliant work, George Chauncey and other historians have brought to the fore an architecture of anti-LGBTQ laws that devastated lives and have now been overcome, even as their legacy lingers.²⁵ Among the national policies singling out LGBTQ people were the 1953 federal executive order barring gay people from working in the civil service or as government contractors,²⁶ the immigration exclusion imposed on gay people entering the United States,²⁷ and later the HIV ban,²⁸ as well as *1487 the long-running exclusions of openly LGBTQ people from military service,²⁹ each of which took years to overcome.

Organizations and professions in the private sphere, as creatures of their times, also pathologized or discriminated against gay people. For example, “homosexuality” was listed as a “mental disorder” in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders until more information led the organization to update its view in 1973.³⁰ Gay people were both unseemly and toxic, so much so that Hollywood titans imposed a ban on gay representation from the 1930s until the 1960s.³¹ And around the nation, local officials used vague criminal laws to harass or arrest LGBTQ people on both public streets and at clubs and bars.³² My own organization was founded to protest arrests of gay men who congregated at the Boston Public Library.³³

There were also times when courts reflected the culture's suboptimal understanding of gay people. In 1986, the U.S. Supreme Court upheld state power to criminalize same-sex sexual relations in *1488 the Georgia case of *Bowers v. Hardwick*.³⁴ It cast the plaintiffs' arguments about family privacy as, “at best, facetious.”³⁵ This colossal statement of disrespect and stain of criminality reverberated nationwide in everything from public employment to child custody decisions. In fact, when I started at GLAD, I was often asked “isn't it illegal to be gay?”

Amidst the official and societal hostility toward LGBTQ people, many “survived” and even formed enduring relationships.³⁶ LGBTQ people formed families of affinity, made our own rituals, and pieced together legal protections where we could, as through wills and partnership agreements. Later, advocates created the concept of a “domestic partnership” to provide limited protections in the workplace and from local and state governments,³⁷ although these were controversial in many places.

The affirmative legal journey for marriage--and its profound personal, legal, and social protections--began in the 1970s, when couples from Kentucky, Minnesota, and Washington took the courageous step of challenging their state laws when they were denied marriage licenses.³⁸ These were federal constitutional cases, each inspired by the case known as *Loving v. Virginia*, which was decided by the Supreme Court in 1967.³⁹

In *Loving*, the best named Supreme Court case ever, a black woman and a white man fell in love.⁴⁰ They could not marry in their home state of Virginia, so they went to Washington, D.C. to get married, then came *1489 home.⁴¹ Virginia officials arrested them in the middle of the night, charging them with violating the criminal ban on mixed-race marriages.⁴² Only if they would leave Virginia could they escape a penalty of twenty-five years in jail.⁴³ A trial judge held that the state ban was justified based on God's supposed separation of the races onto different continents.⁴⁴

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The Lovings went back to D.C., and to court.⁴⁵ The U.S. Supreme Court struck down Virginia's law, and the laws of fifteen other states, holding that (1) the freedom to marry is "one of the vital personal rights" of all Americans, part of our "liberty" protected by the Due Process Clause and (2) as a matter of equal protection, states could not deny equal access to marriage based on the race of those who wanted to marry.⁴⁶

After *Loving*, those litigating same-sex couples thought: "Are we not among those Americans who should be able to share in this 'vital personal right'?"⁴⁷ State courts treated their claims as preposterous or, as some commentators put it, as though a man was seeking the marriage to become pregnant.⁴⁸ In the Minnesota case, the state supreme court said race was "fundamental[ly] differen[t]" from sex and that "[t]he institution of marriage as a union of man and woman, uniquely involving procreation and rearing of children within a family, *1490 was as old as the book of Genesis."⁴⁹ When the couple petitioned for certiorari, the U.S. Supreme Court dismissed the petition *for failing to state a substantial question under the Federal Constitution*.⁵⁰ In other words, even though the couple met all the state's other requirements for marriage, the petition did not present a question of discrimination at all because they sought a license to marry someone of the same sex. That's how entirely "other" our nation's high court saw gay people and our relationships. As with the *Hardwick* ruling, the Court failed to see any connection between LGBTQ people and "family."

We had to change the understanding of who we were as LGBTQ people before we could expect a different outcome. There were three pivotal changes between the 1970s and 1990s that moved the ball forward. For one, a number of municipalities enacted nondiscrimination measures addressing sexual orientation, many of which were subject to repeal by popular referendum. It feels rotten to be voted on, but on the positive side, referenda require continued political organizing, public education, and grassroots and grassroots mobilization, albeit in the maelstrom of a ballot campaign. Building off of municipal victories, several states also enacted such laws, effecting a sea change in norms around fair and equal treatment.⁵¹ The statewide legislative campaigns helped build political experience in the LGBTQ movement.

Second, beginning in the early 1980s, the AIDS epidemic made the lives of gay people far more visible than previously.⁵² People saw behavior that was counter to stereotype,⁵³ including men caring for each other and staying by each other's side in the midst of a devastating *1491 illness, government indifference,⁵⁴ public fear, and discrimination. They saw "family" and an LGBTQ community taking care of each other. And, through countless and searing examples of discrimination, our community learned that it mattered enormously that we were not "family" in the law.⁵⁵

Third, in roughly the same period as the emergence of the AIDS epidemic came the advent of planned lesbian families with children.⁵⁶ A 1983 book coached lesbians through the process of deciding to have children.⁵⁷ Same-sex couples, particularly women, were able to use the same medically-assisted modes of reproduction as so many heterosexual couples.⁵⁸ Of course, individuals and same-sex couples were also adopting and fostering children.⁵⁹ We were now visible as part of the PTA and on the playground and needed to find and use our voices to support our children.

Then there was 1993: a momentous year for our movement. In the *Baehr* case, the Hawaii Supreme Court gave us a new chance in a new generation to fight for that "vital personal right[]" to marry.⁶⁰ As a matter of state constitutional law, that court ruled that denying the three same-sex couples who sought licenses to marry was a form of sex discrimination, and the State had to justify that discrimination on remand.⁶¹ At that point, I was shocked that a court could "get it," so to speak. It was a turning point for me. I believed that the battle for *1492 marriage was "on" and we had to win or we might never have another chance in my lifetime.

Dan Foley in Hawaii, now joined on appeal by Evan Wolfson from Lambda Legal, was working toward a trial on the State's justifications in the state courts. Many of us were optimistic for the ultimate outcome.

During this time period, GLAD urgently engaged in marriage-related public education in all six New England states, as well as organizing and preparing to litigate issues of marriage recognition. Many in the movement anticipated that couples would

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go to Hawaii and return home. But unlike others who married elsewhere, we assumed we would have to challenge public and private discrimination against those marriages. As part of a national research project involving the LGBTQ legal groups and lawyers, GLAD collaborated with attorneys in the six New England states to examine the legal and policy landscape in each state and determine how to tee up a recognition case. GLAD, and some of those attorneys, also took a deeper look that included state constitutional analyses and history. It is fair to say that I fell seriously in love with the Massachusetts Constitution at that point. The big picture from some of the New England states was encouraging.

Opponents sought to block the way forward in Hawaii. With presidential year politics at work and questions about which party would “defend” marriage, they seized on the specter of the Hawaii decision to get Congress to pressure the states and itself to pass anti-marriage laws,⁶² like DOMA in 1996.⁶³ DOMA did two things: *first*, it permitted states to deny recognition to a same-sex couple's valid marriage from another state;⁶⁴ *second*, it defined “marriage” for purposes of all federal laws as marriage between one man and one woman.⁶⁵ As a consequence, if a state ever allowed same-sex couples to marry, those married couples would be considered unmarried--as single--for purposes of over eleven-hundred protections and responsibilities of marriage under federal law.⁶⁶ And with DOMA's *1493 second section-- the non-recognition provision--states began their own campaigns of “defending” marriage by enacting statutes to limit marriage and foreclose recognition of same-sex couples' marriages only.⁶⁷

II. THE CHOICE OF FORA--WHICH STATES AND WHY?

After the initial victory in the *Baehr* case in 1993, the right wing essentially moved to Hawaii. It soon became clear the movement needed a plan B. The Hawaii State Legislature defined marriage as a male-female relationship and approved a proposed amendment to confer exclusive authority on the legislature to define marriage, thus removing the issue from the state courts.⁶⁸

With the turn of events in Hawaii, DOMA's federal assertion of a state public policy exception to the commands of the Full Faith and Credit Clause,⁶⁹ and a steady barrage of state “mini-DOMAs” barring marriage and respect for marriages of same-sex couples, we needed to proceed affirmatively in the ever-narrowing number of states where we could.

This was a decision point. Like others at GLAD, I believed marriage equality for same-sex couples was required under our state and federal constitutions. But I had earlier turned away cases, believing it was the wrong time to make such arguments and that we would be stuck with bad precedents for decades if we moved prematurely.⁷⁰ Fortunately, from our meetings on state recognition, I had been talking with Vermonters Susan Murray and Beth Robinson at Langrock Sperry & Wool.⁷¹ As I will discuss in more detail shortly, they were committed to *1494 doing the groundwork to help a case succeed and, for that reason, had already dissuaded a couple from filing a marriage case. In GLAD's view, the movement's only real option, although it felt bold or even perilous at the time, was to file a carefully chosen case, or cases, premised on state constitutional claims. This would allow us to cabin the litigation to a particular state where we had the best chance of success, and then this “breakthrough” would show the rest of the nation what it looked like when same-sex couples were able to join in marriage.

At this time, less than a third of the U.S. population supported same-sex couples marrying, and there was no legal support for same-sex couples marrying anywhere in the world. But GLAD was already familiar with important state constitutional cases about the rights of criminal defendants, abortion funding, and school financing, among others. State constitutional litigation was also central in dismantling state sodomy laws after *Bowers v. Hardwick*.⁷² There were twenty-five states with such laws at the time of *Bowers*, but thirteen⁷³ in 2003 when the U.S. Supreme Court reversed *Bowers* in *Lawrence v. Texas*.⁷⁴

*1495 We were also inspired because it was a state supreme court-- California's--that became the first to strike down a race-based ban on marriage, albeit on federal grounds, in 1948.⁷⁵ Before the *Perez* case, there had been over a dozen state supreme court decisions upholding bans, and the U.S. Supreme Court appeared to some to have dodged the issue.⁷⁶ Thirty states-- including California--still had race-based bans.⁷⁷

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Nineteen years after *Perez*, the Supreme Court decided *Loving v. Virginia*.⁷⁸ At that point, sixteen states, including Virginia, had race-based bans. We believed we needed a first win to change the dynamic and put us on a path to win in more states before seeking a national resolution in the Supreme Court.

State-specific analysis had to accompany these more general points. Where did we have the best chance to win in court, gain public support, and block any negative legislation or ballot measure? Even before filing, what public education capacity could we develop and with whom?

A. Early Public Education Efforts

Lawyers educate juries about the facts of a case at trial. We were orchestrating something broader: a teach-in across particular states. From the beginning, we had to unpack all that marriage is and introduce our families and the many reasons why marriage also mattered to them. Vermont made an early start on this work. More than once, I heard Beth Robinson remind one of our plaintiff couples that people should learn upfront about their twenty-three years together and that Lois Farnham is a seventh-generation Vermonter. That advice was spot on. There was great power in the authenticity and vulnerability of the plaintiffs in Hawaii, Vermont, Massachusetts, and all the early cases. Their honesty compelled others to begin grappling with their ideas of marriage and gay people at the same time. The lawyers contributed the larger context and information about our binding principles of equality and liberty, and why the arguments against marriage just did not work, along with more real-life examples *1496 of why marriage mattered. The questions seem simple now but were novel and even exotic to the broader public: Why couldn't a same-sex couple be a "married family"? Why should any particular faith doctrine decide who gets a government marriage license? Is the sole purpose of marriage really the procreation of children when some same-sex couples have and raise children and some different-sex couples do not? Are same-sex couples good parents, and even if they are, will society be harmed by more of those families? If couples love one another and want to commit to a marriage, why should society stand in the way? As if we needed any reminders, Hawaii stood as an example of the need for time to engage hearts and minds.

Of course, not all LGBTQ people seek to marry, just as not all persons in the wider community seek to marry. There was genuine pushback from parts of the LGBTQ community about pursuing marriage, either because of pessimism, feared backlash, perceived disarray of the institution, marriage's association with male domination, or because of a belief that we could have committed families without waging that fight.⁷⁹

Ultimately, each of the three states in which we filed litigation had an effective grassroots organization on the ground to conduct public education and, along with GLAD, to resist any attempts to foreclose marriage by statute or constitutional amendment while a lawsuit was pending. At least initially, these were shoestring operations run largely by volunteers which later evolved to include a few paid staff with private fundraising and grants from the Civil Marriage Collaborative and Gill Foundation.

Beth and Susan formed the Vermont Freedom to Marry Task Force (Task Force) nearly two years before the litigation commenced, and it grew naturally out of "what's next?" discussions of the Vermont Coalition for Lesbian and Gay Civil Rights as well as the desire of some couples to marry. Task Force volunteers met with community groups of all sorts to talk about marriage.⁸⁰ Bringing attention to the issue in a *1497 rural state also meant attending county fairs every summer and fall with a now legendary trifold poster in tow, as volunteers engaged passersby to talk about marriage. To put a human face on the issue and to counter a video depicting gay people as sinister and dangerous to children, some came out very publicly and allowed themselves to be profiled both in news media and in the organization's own video.⁸¹ In addition to LGBTQ people and their extended families, the Task Force's early outreach to faith communities and legislators both built support and helped prevent passage of the anti-marriage legislation sweeping the rest of the country.⁸²

GLAD's home office is in Boston, where there was also an infrastructure of small LGBTQ and allied organizations. A grassroots group called Boston Freedom to Marry formed in 1997 and joined the effort within and beyond the LGBTQ community to raise the visibility of gay people's families and the marriage issue.⁸³ Renamed a year later as Freedom to Marry Massachusetts, the group inaugurated an annual Prayer Breakfast, which led to the creation of the Religious Coalition for the Freedom to Marry and Valentine's Day dances.⁸⁴ Both GLAD and the Coalition focused on storytelling and, early on, used online and web-based

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resources to expand our reach, while GLAD provided much of the content for framing up the “head” part of the debate, such as explaining the protections and responsibilities of marriage through stages of life, like childrearing and retirement years, or by focusing on why marriage matters to particular constituencies, like elders, parents, children, public safety officers, and working people. With the stories of clients and callers to our helpline, we were able to demonstrate the real-life consequences of being denied marriage, and those stories allowed us to raise other points, too, such as how marriage had changed many times to become a more equal institution with respect to race and gender, and to reach organizations that could become allies in the effort, such as lawyers and bar associations, medical and child welfare *1498 groups, and civil rights groups. More allies joined the effort with time, helping to advance marriage and defeat anti-marriage bills. Their credibility validated us as “Children of God” and morally good, for example, and framed up research in helpful ways, such as noting that nothing about sexual orientation or gender in itself matters to children's health and outcomes.⁸⁵

Connecticut's Love Makes a Family (LMF), a coalition of five groups-- Connecticut Coalition for LGBTQ Civil Rights, PFLAG, ACLU, Connecticut Women's Education and Legal Fund, and the state UCC Conference--with the astute and experienced political leader, Anne Stanback, became the preeminent voice of marriage equality in that state. LMF initially formed to reverse a state supreme court ruling foreclosing second-parent adoptions but, after obtaining that objective in 2000, decided to continue its legislative work with the goal of achieving marriage equality.⁸⁶ It already had a respected lobbyist in place, Betty Gallo, and strong relationships with legislators. It engaged effectively in the same types of activities described above, while adding a focus on local organizing to ensure legislators would hear powerful stories from their own constituents by initiating well-orchestrated in-district meetings with legislators over dinner at a constituent's home. LMF also worked closely with the legislature, including key allies in legislative leadership, Senator Andrew McDonald--now Associate Justice McDonald of the Connecticut Supreme Court--and Representative Michael Lawlor. Together they accomplished discrete relationship recognition bills, supported by robust public hearings, as well as several high-profile hearings on marriage bills.⁸⁷

In short, in New England, we used the human resources we had to make our case for marriage legally, politically, and in the court of public opinion. With time, successes, and more resources from national funders who were part of the Civil Marriage Collaborative, along with *1499 Tim Gill's Gill Foundation, the organizations grew, added capabilities such as electoral work, and new organizations were spun off as well.⁸⁸

B. Early Analyses of the Litigation Environment

Litigation, like public education, was built upon the edifice of past endeavors to end discrimination against LGBTQ people. The legal and policy framework within each state, including LGBTQ-specific litigation, was another key factor for deciding whether to litigate. At GLAD, we identified, analyzed, and answered every issue we thought could conceivably matter, because even though a case would be brought in court, the legislature could step in with a bill or a restrictive measure could proceed to the ballot as well. In addition, in each of these three states, the LGBTQ community had also spent years in court and the state legislatures clearing away potentially harmful laws, such as the Massachusetts sodomy law, and building positive precedents, such as authority for co-parent adoptions.

Consider Vermont: policy-wise, in 1992, it was the fourth state nationally to pass a nondiscrimination law. This was a normative judgment and also made it possible for individuals to speak more openly about their families with less fear about losing their jobs. In 1993, at a time of widespread ignorance about gay people as parents, Vermont's Supreme Court decided the first appellate case approving of second-parent adoption, allowing unmarried same-sex couples to both be legal parents of their children.⁸⁹ When the ruling was later threatened during a recodification of the adoption laws, Susan Murray led the efforts to cement the ruling into law, further demonstrating support for same-sex couples as parents.⁹⁰ Beginning in 1994, the State provided domestic partnership benefits to state employees, an early acknowledgment of the familial relationships.⁹¹ In 1990, Vermont enacted hate crimes law inclusive of sexual orientation.⁹² In 1977, it repealed sodomy laws⁹³ that criminalized “the right to love.”⁹⁴ Despite *1500 opposition efforts, no anti-marriage bill passed into law before or after DOMA's enactment.

We examined the court's jurisprudence before filing suit and focused the litigation on the state constitution. Dating to 1777, Vermont's constitution assured the “common benefit, protection, and security” to all members of the community, which we

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saw as an affirmative commitment to inclusion.⁹⁵ The constitution also mentioned inclusion of families in its promise that the common benefits were not “for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.”⁹⁶ That provision, and much of Vermont's constitution, was based on the Pennsylvania Constitution, which was considered one of the most radical in its time. Notably, for a case about equality of persons, the Vermont Constitution abolished slavery.⁹⁷

Over the years, Vermont had established a method for state constitutional interpretation set forth in a case known as *State v. Jewett*.⁹⁸ This methodology requires examination of the constitution's text, historical context, case law development, construction of similar provisions in other state constitutions, and sociological materials.⁹⁹ Years earlier, in a case called *State v. Badger*, the court declared the state constitution was Vermont's fundamental law; it was adopted earlier than the U.S. Constitution and was different, both textually and historically.¹⁰⁰ In the year before GLAD joined Beth and Susan in filing *Baker*, the court also decided a school funding case known as *Brigham v. State*, in which the court spoke of the state constitution as a living document not bound by so-called original intent.¹⁰¹ Although the *Brigham* case relied on the 1777 common benefits provision, the court pointedly noted that “equal protection of the laws cannot be limited by eighteenth-century standards.”¹⁰²

Nothing suggested the Vermont legislature would be implacably opposed to marriage, and Beth and Susan concentrated early efforts on *1501 the Vermont Senate, two-thirds of whom would have to approve of any constitutional amendment proposal. Adding to the difficulty of amending the state constitution, proposed amendments could be offered only every four years and, after Senate and House approval, a new legislature had to re-approve of the measure before it would go to voters for possible ratification.¹⁰³ That would give us time to complete the litigation before facing any possible amendment proposal.

Massachusetts was also a promising venue for litigation. In 1989, after a seventeen-year effort, it passed a comprehensive sexual orientation non-discrimination law¹⁰⁴ --the second nationally after Wisconsin in 1982 and the first in New England. Republican Governor William Weld established the Executive Commission on Gay & Lesbian Youth in 1992 and instituted by executive order the first domestic partnership benefits for state employees in the Commonwealth.¹⁰⁵ The legislature, responding to LGBTQ youth advocacy and the Governor's Commission's report, amended laws addressing equal educational access to include sexual orientation in 1993.¹⁰⁶ In 1996, it also amended the hate crimes law to include sexual orientation.¹⁰⁷ As we moved into the late 1990s, legislative leadership resisted pro-LGBTQ bills, such as sodomy repeal or broader domestic partnership benefits, but our collective advocacy efforts had succeeded in blocking anti-marriage bills.¹⁰⁸

*1502 The Supreme Judicial Court (SJC) had long addressed issues relevant to LGBTQ peoples' lives. Although the legislature failed to repeal a constellation of criminal-sex laws, the courts construed those laws to comport with constitutional liberty guarantees of consenting adults in private.¹⁰⁹ In a case brought by GLAD, the court also acknowledged that the sodomy laws could not reach adult, private, consensual sexual activity.¹¹⁰ As to families and children, the SJC ruled in 1980 that a parent's sexual orientation in itself had no bearing on assessing parental fitness.¹¹¹ Still, after a *Boston Globe* story years later highlighted a male couple who were fostering three children, then-Governor Michael Dukakis inaugurated a foster care policy that effectively screened out gay people.¹¹² Challenged by GLAD and the ACLU, that case settled in 1990 with a revision of the policy to focus on parenting experience rather than sexual orientation or marital status.¹¹³ Through the 1990s, the SJC approved of second-parent adoption and created “de facto parenting,” which allowed visitation after an unmarried couple separated.¹¹⁴ The court also sensitively handled matters including same-sex sexual harassment on the job¹¹⁵ and the limiting of sex offender laws involving consent or undercover police operations.¹¹⁶

Textually, the Massachusetts Constitution affirmatively guarantees rights through its broad Declaration of Rights. It provides, among other *1503 things, that “[a]ll people are born free and equal and have certain natural, essential and unalienable rights; among which [include] ... enjoying and defending their lives and liberties” and “seeking and obtaining their safety and happiness.”¹¹⁷ A later amendment added the “negative” protections akin to the U.S. Constitution's Fourteenth Amendment that

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“[n]o person shall be denied” equal protection and due process along with the affirmative guarantees dating back to 1780.¹¹⁸ The text also specifies some of the characteristics upon which discrimination is forbidden: “Equality under law shall not be denied or abridged because of sex, race, color, creed or national origin.”¹¹⁹ Several other provisions also speak to equality, anti-privileging, liberty, and due process.

At the dawn of the nineteenth century, the Declaration of Rights was invoked to find that slavery was forbidden in Massachusetts.¹²⁰ Massachusetts also has a proud history of abolition and resistance to the Fugitive Slave Act.¹²¹ Certainly, there were “times [that] blind[ed]”--to quote from the *Lawrence* decision¹²²--as when the SJC upheld racial segregation in Boston's public schools in 1849.¹²³ But overall, the SJC has interpreted the Declaration of Rights robustly, including in criminal defense, jury selection, free speech, effective assistance of counsel, sex discrimination, and reproductive justice contexts.¹²⁴ The Massachusetts Constitution of 1780 is where “the *1504 principle of constitutional democracy first gained institutional and practical form,” leading with its “ringing promise” from the Declaration of Rights.¹²⁵

There were strong foundations for choosing to litigate in Connecticut, too. The Connecticut General Assembly's track record in addressing discrimination against gay and lesbian people dated to the decriminalization of sodomy in 1969.¹²⁶ In 1991, Connecticut became the third state in the country to pass a comprehensive law prohibiting sexual orientation discrimination.¹²⁷ In 2000, it enhanced penalties for anti-gay and other hate crimes and also passed amendments to the adoption law to provide for second-parent adoptions.¹²⁸ The judiciary committee conducted respectful hearings on marriage bills in 2002 (and later) and, in that same year, enacted a measure allowing an individual to designate another person for purposes like vehicle transfer and anatomical gifts upon death, for reduced decision-making after incapacity, and inclusion of the designee in the patient's bill of rights, among others.

Textually, the first article and section of the Connecticut Constitution provides: “All men when they form the social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.”¹²⁹ This declaration of equality and rejection of governmental privileges was complemented by a more specific equal protection clause in 1984: “No person shall be denied the equal protection of the law *nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights* because of religion, race, color, ancestry, national *1505 origin, sex or physical or mental disability.”¹³⁰ This later iteration of equal protection is unusual in explicitly barring segregation and discrimination in the exercise of civil and political rights.

Overall, the Connecticut Supreme Court had robustly applied its Constitution-- and the equality and due process/liberty provisions in particular--in myriad contexts according to a defined methodology known as the *Geisler* factors.¹³¹ “The Connecticut [C]onstitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens.”¹³² The Connecticut Supreme Court's precedent also included cases rejecting the notion of equality-by-separation in the context of sex segregation, including help-wanted advertising,¹³³ holding that the military could not recruit at the state law school because of the military's then antigay policies, and included cases advancing longstanding constitutional protections for fundamental rights.¹³⁴ In the military recruiting case, the Connecticut Supreme Court had already acknowledged longstanding discrimination and contrived bias against gay people.¹³⁵

All of these cases, and more, established the court's fidelity to stated principles, even in controversial matters.

Finally, Connecticut's Constitution could not be amended through the initiative process.¹³⁶

III. THE PROGRESSION OF STATE LITIGATION

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I will now turn to the progression of the litigation. Before I get specific as to states, let me note a few overarching points common to each of the three states.

***1506** First, litigation intensified public education. The plaintiffs were the heart and soul of the three cases, and their stories drew the larger public into increasingly personal discussions about marriage. We knew that we had to demonstrate the profound harms caused by denying marriage and the urgent need to rectify them.¹³⁷ States argued that the legislature was best suited to make the “policy” decisions about marriage so that the courts could defer to the status quo and democratic process. For example, the trial court judge in *Goodridge*, granting summary judgment to the Commonwealth, urged the plaintiffs to take their case to Beacon Hill, and the Massachusetts Attorney General wove this theme throughout every section of the Commonwealth’s brief on appeal.¹³⁸ To us, this was not a policy issue, but a profound constitutional violation affecting people in the most personal ways, but invisible to the larger community. Our educational efforts helped to make that case in the public domain.

Second, we put enormous effort into ensuring a robust filing of amici curiae, “friend of the court,” briefs. Each legal team and the friends of the court-- the experts and organizations with valuable information and perspective for the court--aided us. For example, the authors of the leading treatise on family law addressed the lack of connection between procreation and marriage, while leading historians of marriage and the family discussed how our nation overcame other inequalities in marriage, both with respect to access and the treatment of women.¹³⁹ Faith leaders spoke of the differences between religious and civil marriage.¹⁴⁰ Pediatricians and child welfare professionals asserted that good parenting depends on the parent, not the individual’s sexual orientation, and debunked contrary claims.¹⁴¹ Still, others made legal arguments, such as law professors who argued that an unconstitutional exclusion must be remedied by inclusion of the omitted class, civil rights groups who agreed that gay people’s claim for heightened judicial scrutiny of the marriage laws was correct under the applicable test, and women’s groups and scholars who backed the argument that marriage bans were unlawful sex discrimination, among ***1507** others.¹⁴² If the court was concerned about any of these issues, it would have informative and authoritative briefs at the ready. The amicus effort was also an organizing tool, since we had to identify those who might be interested in supporting us, and they, in turn, presented the issue to their boards and memberships. These organizations were inevitably public about their support.

A. Vermont

This brings me to the litigation. As with our public education efforts, the Vermont lawsuit sought to illustrate how the State’s denial of marriage affected our three plaintiff couples. Nina Beck and Stacy Jolles, one of the couples, described how during their son Noah’s birth, hospital staff had challenged Stacy’s right to be there, even with her documents in hand.¹⁴³ Tragically, early in the litigation, Noah’s heart failed and a donor heart never came.¹⁴⁴ After a period of grieving, Nina and Stacy returned, determined to make this a case for the benefit of all children of LGBTQ parents.¹⁴⁵ Holly Puterbaugh and Lois Farnham--then together twenty-five years and parents of a daughter that they adopted--as well as Stan Baker and Peter Harrigan--then together four years--were the other two plaintiff couples, and they repeatedly shared their lives throughout the litigation.¹⁴⁶

On the State’s motion to dismiss our claims for a fundamental right to marry and equal rights to marry, the trial court ruled against us on the “common benefits” claim without oral argument. The State had an interest in “furthering the link between procreation and child rearing,” ***1508** the judge reasoned, even as she rejected six other rationales.¹⁴⁷ By December of 1997, we had appealed to the Vermont Supreme Court.

Our opening brief on appeal led with the equality argument, rather than the “fundamental right to marry” argument. On the equality claim, we argued that our clients should win even under the “minimal scrutiny” (akin to rational basis review) required for many cases under the “common benefits” clause.¹⁴⁸ Was this leading with our chin? We did not think so because we thought we could demolish *any* justification under *any* standard of review. Of course, we also argued for the kind of heightened judicial scrutiny that attends claims for deprivation of fundamental rights, or for laws classifying along suspect lines, like sex and race, but we believed there was no credible legal argument whatsoever.

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"Minimum scrutiny" had real bite depending on the context. Economic regulations might receive a more deferential form of review, but when important rights were at stake, or when there were reasons to suspect the State had acted non-neutrally toward a group of people, the courts took a closer look.¹⁴⁹ And, in fact, the Vermont Supreme Court's opinion on December 20, 1999 explicitly noted the importance of marriage in requiring weighty interests from the State to justify that deprivation: "The legal benefits and protections flowing from a marriage license are of such significance that [the exclusion] must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."¹⁵⁰ Of the State's proffered justifications on appeal, they focused on one that has been a feature of all marriage arguments ever since: marriage's purpose, its *raison d'être*, is the government's interest in "furthering the link" between biological procreation and childrearing.¹⁵¹ If same-sex couples marry, the State argued, that would "diminish society's *1509 perception of the link between procreation and child rearing," leading to fewer different-sex marriages and more non-marital children.¹⁵²

We made the same arguments as in the public domain: procreation and childrearing were not required for a valid marriage and, in any event, this rationale was vastly under-inclusive since many opposite-sex couples marry without intending to or possessing the ability to have children. Further, the State's argument was contrary to Vermont law, where both the high court and legislature had already approved of second-parent adoption precisely because same-sex couples were having and raising children. Accordingly, the high court rejected the State's rationale as an "extreme logical disjunction between the classification and state law."¹⁵³ That court asserted the similarity of same-sex and different-sex couples, providing that, "to the extent that the State's purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives."¹⁵⁴

Chief Justice Amestoy's opinion for the court¹⁵⁵ gave full treatment of the history, values, and context of the common benefits clause in finding a constitutional violation.¹⁵⁶ In a striking conclusion, the court wrote that acknowledging "plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity."¹⁵⁷ The powerful "common humanity" message was muddled by the remedy ordered, which turned the matter over to the legislature.¹⁵⁸ It could pass marriage legislation or some alternative as long as it provided the state-level benefits that come with marriage.¹⁵⁹ Justice Johnson was the only justice to concur on the merits, making the ruling unanimous, but also *1510 dissenting as to remedy because she believed the judiciary was compelled to provide marriage once the court found a constitutional violation.¹⁶⁰ Constitutional rights are for "the here and now,"¹⁶¹ she wrote, and the role of courts in our constitutional system is to "redress violations of constitutional rights."¹⁶² She would have enjoined the State from denying marriage licenses based on the sex of partner.¹⁶³

We can debate forever whether the court's ruling was a wise move or not. Professor Bill Eskridge has referred to this kind of incrementalism as "equality practice" and a constructive prerequisite to further progress, and many agree.¹⁶⁴ Events elsewhere may have influenced the court's choice of remedy, since Alaska and Hawaii amended their constitutions in November of 1998, which was about two weeks before Beth Robinson made her brilliant oral argument before the court.¹⁶⁵ But we were obviously disappointed by what we saw as an artificial splitting of "marriage" into two components, tangible benefits on the one hand, and the dignity and status of marriage on the other. The dignity of married status was itself one of the benefits of marriage. I cannot here convey the drama and details of the legislative and public response to the ruling. Conservative Gary Bauer, for example, called the ruling "worse than terrorism."¹⁶⁶ After intensive hearings over two months with state and national experts from both sides and anti-marriage activists working with (some) local faith leaders and the group Take It to the People, the legislature decided to pursue an alternative to marriage.¹⁶⁷ House Judiciary Committee Chairman Thomas Little conceptualized a system by which those joined in civil unions would have every right, protection, and responsibility as imposed or enjoyed by a married couple, but without amending every statute.¹⁶⁸ Leaders *1511 like Beth and Susan advocated for marriage as the better and required choice, but we were pessimistic about returning to court at that juncture since the legislature was seeking to act in accord with the court's mandate.¹⁶⁹ They, and Vermont Freedom to Marry, forged ahead in supporting civil unions--and I

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agreed--in what became an unprecedented and fraught legislative campaign.¹⁷⁰ It required genuine courage for legislators to join in with the court's ruling and bring some same-sex couples' relationships into the bounds of government recognition of marriage for the first time.¹⁷¹

During the legislative process, the senate also convened to vote on two amendments offered to change the constitution and undo the court ruling.¹⁷² Over two days, the senators discussed, debated, and dug deeply.¹⁷³ I remember one senator standing up and reading a constituent letter, later identified as from Helena Blair:

I am a 78 year old Catholic mother of 8. This is not about statistics or Biblical interpretation. It is about a farm family and a son who announced 26 years ago that he is gay. What could we do? Cast him out or accept him instantly? Patronize him or love him? We brought up our 8 children with the same value system. Did we do something wrong? Our son would not choose emotional and cultural persecution. He was just plain born gay. I can only say that God blessed us with eight children. And God made no mistake when he gave us our gay son.¹⁷⁴

*1512 The letter silenced the chamber, and ultimately the senate defeated both amendments. And I saw that for all of the emotions and issues swirling in the debate, raw and plain-spoken honesty and common sense like Mrs. Blair's could make all the difference. After the bill passed and civil unions commenced in July 2000, the Take Back Vermont movement sought to unseat civil union supporters.¹⁷⁵ In the 2000 elections, several house members lost their seats, and that chamber flipped from Democrat to Republican control, although Democratic Governor Howard Dean retained his seat and the Senate remained Democratic.¹⁷⁶ For some time, legislators around the nation pointed to the Vermont House elections as a reason they could not afford to take on this issue. After nine more years of incredibly hard and loving work by Robinson, Murray, the Vermont Freedom to Marry Task Force, and other allies, the Vermont Legislature in April 2009 overrode a governor's veto to become the first state in the United States to allow marriage for same-sex couples via legislation.¹⁷⁷

B. Massachusetts

GLAD filed the *Goodridge* case in April 2001,¹⁷⁸ while Vermont was still in its first heady year of issuing civil union licenses.¹⁷⁹ Civil unions provided real protections for couples and they also engaged some in the larger community who opposed allowing same-sex couples to marry but believed the status quo was unacceptable. I heard some people say Vermont had "solved the problem."

Our opponents reviled civil unions as much as "gay marriage," so, in 2001, we were also fighting a proposed ballot measure to amend the Massachusetts Constitution by barring marriage of same-sex couples as well as access to other protections. A wealthy detractor of gay people, who had formed a "citizens" group after Vermont's *Baker* ruling, went *1513 ahead with his announced plans and financed the signature gathering and public education efforts for a citizen initiative.¹⁸⁰ Assuming the signatures were gathered, it would take a mere twenty-five percent of legislative approval in two consecutive legislatures to force a ballot measure vote in November of 2004.¹⁸¹ We were determined to move the case along as quickly as we could. If we won and the amendment proposal proceeded to the ballot, voters would know "what it looked like" when same-sex couples married before they voted on taking marriage away in 2004. Likewise, if we lost the case, we would minimize any perceived "need" to amend the constitution, thus keeping the door open for a legislative change to the marriage laws.

At GLAD, we were proud of Vermont and Vermonters for the struggle to get to civil unions and the ongoing advocacy for marriage led by our co-counsel, Beth and Susan. We could see how civil unions positively affected people's lives and had taken us out of the wilderness of being legal strangers to one another. But even so, we worried that civil unions would derail the marriage movement. As Professor Williams and Roderick Baltimore have discussed, the "separate but equal" doctrine was not born in *Plessy*, but in *Roberts v. City of Boston*, in which the Massachusetts high court deferred to Boston's judgment to segregate racially the public schools.¹⁸² Vermont's civil union system created an analogous situation: separate institutions for

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people based on who they were. So from the first announcement of the case in April 2001 and the oral argument in March 2003, to the interpretation of *Goodridge* after it was decided in November 2003, GLAD said equality has to mean same-sex couples have access to marriage.¹⁸³

I have previously written at length about the *Goodridge* plaintiffs, litigation, and the aftermath, including attempts to undo the ruling in the six-month period before it took effect.¹⁸⁴ Briefly, in the litigation, we argued that denying marriage infringed on protected liberty, the *1514 fundamental right to marry under the state constitution, and that gay people must have an equal right to marry.¹⁸⁵ As in Vermont, we argued that we should win under a rational basis standard and also that the required heightened scrutiny for sexual-orientation and sex-based classifications in the marriage laws rendered them unconstitutional.¹⁸⁶ Under intense scrutiny, *Goodridge* plaintiff couples were magnificently generous and courageous in sharing their lives and thereby enhanced public understanding of the issues and the stakes.¹⁸⁷

The Massachusetts Office of the Attorney General fought us hard on the merits before the trial court and before the Supreme Judicial Court. They argued repeatedly that such a fundamental and controversial change should be made by the legislature and not the courts.¹⁸⁸ They clung to the notion that the central purpose of marriage was “linking marriage and procreation per se,” while claiming “real and statistically significant differences” in child outcomes between same-sex and different-sex parents.¹⁸⁹ The trial court agreed with these rationales, saying marriage's central purpose is procreation and different-sex couples are at least theoretically capable of procreation while same-sex couples are not.¹⁹⁰

On appeal, our brief conveyed the urgency of this issue and how personally profound the stakes were for the seven couples, and all same-sex couples, who wished to marry: “The right to marry the person you love and with whom you share your life is one of the most fundamental of all of our human and civil rights. The desire to marry is grounded in the intangibles of love, an enduring commitment, and a shared journey through life.”¹⁹¹ Given all that marriage is and represents, we continued, denying marriage is “a denial of the equal *1515 citizenship of gay and lesbian people who make their homes in communities across this Commonwealth” and “enshrines a second class status upon the plaintiffs, their families, and their children.”¹⁹² The harms generated by the exclusion extended far beyond material protections, we argued, since “[i]t takes no citation to acknowledge that the opportunity to marry one's soulmate, one's closest confidante and most steadfast ally, easily ranks as one of the most joyful experiences in many people's lives.”¹⁹³ I kept the plaintiffs front and center during oral arguments in March 2003, as well.

On November 18, 2003, the majority opinion, authored by Chief Justice Margaret H. Marshall, broke a historic barrier and forever changed the standards by which we measure equality. The opinion's first paragraph states:

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial and social benefits. In return it imposes weighty legal, financial, and social obligations The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens [The Commonwealth] has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.¹⁹⁴

This was it. The court ruled the exclusion from marriage was incompatible with both respect for individual autonomy, a “liberty” concept, and equality under law.¹⁹⁵ The two legal frames overlapped since the guarantees protected both “‘freedom from’ unwarranted government intrusion into protected spheres of life and ‘freedom to’ partake in benefits created ... for the common good.”¹⁹⁶ The court also cited *Lawrence v. Texas*, which recognized the interlocking nature of equal protection and liberty in invalidating all state “sodomy” laws involving consensual, adult sexual activity.¹⁹⁷ The Massachusetts Constitution is “more protective of individual liberty and equality than *1516 the federal constitution,” the Supreme Judicial Court noted, and thus “may demand broader protection for fundamental rights [] and ... [less tolerance] of government intrusion into the protected spheres of private life.”¹⁹⁸

The court connected the dots between these two freedoms and that these freedoms had before been restricted because of the identity of those seeking to exercise them. Citing *Perez v. Lippold*, from California, and *Loving v. Virginia*, from the Supreme Court, the Massachusetts high court said: “The right to marry means little if it does not include the right to marry the person of one’s choice, subject to appropriate government restrictions”¹⁹⁹ In those cases, the issue was skin color, and here, the trait was sexual orientation. A past history of discrimination did not foreclose the constitutional analysis; instead “history must yield to a more fully developed understanding of the invidious quality of the discrimination.”²⁰⁰

The court also acknowledged the personal and cultural significance of marriage: “Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.”²⁰¹ Likewise and importantly, with marriage come “enormous” legal protections “touching nearly every aspect of life and death” that also assists children by easing their parents’ way to family-based legal protections and mutual responsibilities.²⁰² Denying marriage thus caused “a deep and scarring hardship” founded in “prejudice[.]”²⁰³

The court did not reach our arguments for heightened scrutiny because the marriage exclusion did not satisfy even rational basis review.²⁰⁴ The State’s interests in advancing procreation fell flat. Stated bluntly, a person could marry “from their deathbed.”²⁰⁵ Based on long-established precedents in the contexts of fault-based divorce and annulment, acceptance of a partner’s capacity for intimacy was what mattered in marriage, not having children.²⁰⁶ As to the State’s interest in promoting “optimal childrearing,” that interest applied to all children *1517 no matter who their parents were.²⁰⁷ Ending the marriage exclusion would increase material benefits to children through their parents’ marriage, and same-sex couples marrying would remove the ongoing stigma of illegitimacy on same-sex couples’ children.²⁰⁸

The dissents were sharp, criticizing the majority for everything from making up rights to failing to grasp the inherent connection between marriage and procreation.²⁰⁹ Justice Robert Cordy’s dissent invigorated the procreation defense with arguments that would be relied on through the end of the marriage-equality litigation at the U.S. Supreme Court. In the dissenting justice’s opinion, marriage was the “mechanism” an orderly society uses to “cop [e] with the fact that sexual intercourse commonly results in pregnancy and childbirth” and “normalizes, stabilizes, and links the act of procreation and child rearing.”²¹⁰ As long as marriage remained a norm for potentially procreative sexual activity, men would experience a “formal [] binding” to the “wife and child,” thereby “imposing on him the responsibilities of fatherhood.”²¹¹ In other words, limiting marriage to different-sex couples encouraged men—who otherwise might abandon their responsibilities to the children they helped create—to marry the child’s mother. I remember joking with GLAD’s Legal Director, Gary Buseck, who had just given a talk at a law school, and he joked that it was the fault of the supposedly irresponsible heterosexuals in the audience that same-sex couples could not marry.

After a tumultuous six months before the decision went into effect--involving legislation to downgrade *Goodridge* to civil unions²¹² and several lawsuits to stop implementation altogether, along with multiple constitutional convention sessions--the nation’s first legal marriages of same-sex couples began on May 17, 2004.²¹³ As I said shortly before midnight that night, Dr. King has spoken of the moral arc of the universe bending toward justice, but in Massachusetts, it was about “to take a sharp turn.” What no one could anticipate was the sheer joy that swept over the State from the marriages, including people who had been denied marriage for decades. Not only had we won the right to marry, but now others could see for themselves the love of the couples *1518 marrying and the familiar rituals, all of which made an enormous difference going forward. By June 2007, the Massachusetts Legislature overwhelmingly defeated a third attempt to amend the constitution to undo *Goodridge*, and it was clear that marriages of same-sex couples were here to stay.²¹⁴

C. Connecticut

Shortly after *Goodridge* took effect in May 2004, GLAD and co-counsel filed *Kerrigan & Mock v. Commissioner of Public Health*²¹⁵ in New Haven Superior Court. We had been working in partnership with LMF and those who joined us as co-counsel

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for many years.²¹⁶ It was not a question of *if* we would file, but *when*. We did so in August of 2004--ultimately with eight plaintiff couples²¹⁷--just three months after Massachusetts began licensing marriages of same-sex couples. Cases were then pending in New York, Washington, and Maryland, as well.²¹⁸

By this time there was a new dimension to the litigation. As my GLAD colleague Ben Klein has observed, Connecticut's *Kerrigan & Mock* was the first case to be litigated in the context of an existing civil union law, where same-sex couples had the state-based rights and protections of marriage but were denied marriage itself.²¹⁹ With legislative passage of a civil union bill in 2005, signed that same day by Governor Jodi Rell, Connecticut was the first state to create civil unions *1519 without a judicial mandate.²²⁰ LMF's Anne Stanback drew a line in the sand during the legislative proceedings, and while she and LMF did not stand in the way of civil unions, they insisted that our communities should not have to choose between protections and equality, between civil unions and marriage.²²¹

GLAD's litigation on behalf of the eight plaintiff couples did not seek to dismantle civil unions, but to require access to marriage. Some of our clients felt compelled to join in civil union because they could not afford to forsake the protections provided. But LMF's public stand and ongoing advocacy for marriage helped us make the point that the two were simply not the same thing. We pursued two tracks to get to marriage: an LMF-driven legislative campaign and a GLAD-driven lawsuit, with close communication between us.

At first, it looked like enactment of civil unions--a quantum leap compared to the earlier legal regime--had hurt the lawsuit. A superior court judge dismissed the *Kerrigan* case for lack of legally cognizable harm on cross motions for summary judgment.²²² Some said we were dead in the water, but we thought there had to be a way for people to see the difference between marriage and the newly minted, gay-only device of civil unions. Going forward with an appeal, we wondered if there was anything else we could do to make a point that we regarded as settled for decades. Public opinion research solicited by GLAD and LMF affirmed that we should keep the love and commitment of our eight plaintiff couples in the forefront and ask why their love should be treated differently from others.²²³

Point one in our opening appellate brief took on that view, arguing that it constitutes different treatment when marriage itself was denied to the plaintiffs and that marriage is "a unique legal, social and cultural status."²²⁴ Even with the "remarkable" journey of Connecticut lawmakers in "confronting and eliminating aspects of discrimination against lesbian and gay people," we believed they had "failed with respect to ending marriage discrimination."²²⁵ Other than a reflexive *1520 sense of difference, what could justify "an explicit policy judgment that same-sex couples deserve and squarely fit within the existing structure of marriages" but then relegate them to a different status?²²⁶ The key question was not whether there was a difference between civil unions and marriage, but *why* the legislature created a separate status for one minority group.²²⁷

In addition to our sex discrimination argument, as we also argued in the Vermont and Massachusetts cases, we made the argument for heightened equal protection scrutiny based on sexual orientation.²²⁸ By expanding on the discrimination and oppression experienced by LGBTQ people in our culture over the last century,²²⁹ the court could contextualize the civil union law in a larger landscape. Civil unions must be considered, we argued, in light of both the pernicious history of discrimination faced by LGBTQ people and marriage's status as an institution of transcendent historical, cultural, and social significance.²³⁰ For sure, civil unions were designed to benefit same-sex couples, but the intended effect was also to treat politically unpopular or historically disfavored minorities differently from persons in the majority.²³¹ Creation of a different but parallel system, we argued, was analogous to the discriminatory regime of *Plessy v. Ferguson*.²³² Opponents claimed we were seeking a constitutional right to a word and that nomenclature was irrelevant where the same substantive rights existed.

But the civil union law helped to *make our case*. Its very existence conveyed that same-sex and different-sex couples are similarly situated with respect to the protections and obligations of marriage. If so, why would the State treat similarly, even identically situated persons, differently? The Supreme Court's decision in *Lawrence* in June 2003 also helped to connect the dots as to why policy advances could still be discriminatory.²³³ That case spoke of an "emerging recognition" that what was

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acceptable at one time could later be understood as discriminatory.²³⁴ *Lawrence* did not only hold that gay people share in the same liberty as others to engage in private sexual conduct without *1521 government intervention, but it also held that “persons in a homosexual relationship may seek autonomy for the[] purposes” of deciding on marriage, procreation, and childrearing, “just as heterosexual persons do.”²³⁵ This fortified our fundamental right to marry and various equal protection claims.

The history and emerging recognition of discrimination clearly moved the court. Questions at oral argument, handled beautifully by GLAD attorney Ben Klein, included a thorough examination of whether sexual orientation classifications meet the factors for heightened scrutiny. The two essential factors were a history of unwarranted discrimination and a characteristic that actually affects an individual's ability to function in society.²³⁶

In October of 2008, in a 4-3 decision, the court ruled for our clients on equal protection grounds.²³⁷ First, it found legally cognizable harm:

[I]n light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm.²³⁸

Second, analogizing the situation of gay people to that of women when the Supreme Court found sex to be a quasi-suspect class, the court became the second in the nation to rule that sexual orientation classifications merit heightened judicial scrutiny.²³⁹ In conclusion, the *1522 court ruled that a separate civil union system only for same-sex couples created harm of a constitutional magnitude, that sexual orientation classifications are quasi-suspect under the Connecticut Constitution, and that the State failed to justify its discrimination.²⁴⁰

IV. THE MOVE TO FEDERAL LITIGATION

Massachusetts was the sole state with marriage equality for nearly five years, beginning in November 2003 until June 2008, when the California high court ruled for marriage,²⁴¹ with Connecticut following in October.²⁴² Our opponents expected the “Massachusetts experiment” to be singular and short-lived. Due to the coordinated political, legal, and public relations onslaught, even we sometimes wondered if there would there ever be a second state or if we could hold on to marriage. Much was expected from those to whom much had been given, I reminded people frequently. Despite threats and attempts to unseat legislative supporters of marriage, in an acid test of our support, all were reelected in the November 2004 elections, an unprecedented victory for MassEquality and those who supported its efforts from around the nation.²⁴³ No longer could our opponents spin the Vermont-based narrative that voters would not tolerate legislative support for marriage.²⁴⁴ In September 2005, we defeated the amendment proposal first approved in the winter of 2004, thus avoiding what would certainly have been a wildly contentious campaign and vote in November 2006.²⁴⁵ In June 2007, facing a do-or-die second vote on an initiated constitutional amendment proposal, the Massachusetts Constitutional Convention did the impossible and garnered more than seventy-five percent of the convention votes *against* the amendment.²⁴⁶ With the *1523 massive victory, marriage in Massachusetts was clearly here to stay.²⁴⁷ In my view, it was also a turning point nationally, and we won judicial victories in Connecticut and California the next year.²⁴⁸ The following year, with Beth, Susan, and the Task Force's continued efforts, Vermont became the first state in the nation to approve marriage legislatively, overriding a governor's veto to do so, in a watershed moment.²⁴⁹ Maine and New Hampshire also approved of marriage that spring.²⁵⁰ Another judicial win in Iowa made 2009 an extraordinary year.²⁵¹

But by 2008 and 2009, many states had already blocked themselves off from democratic consideration of LGBTQ people's families through litigation or legislation because of anti-marriage statutes, amendments, or both. The 1996 DOMA was an initial impetus to anti-marriage legislation.²⁵² By the time GLAD won *Goodridge* in November 2003, thirty-six states had already

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passed statutes, and four (Nebraska, Nevada, Alaska, and Hawaii) had amended their constitutions, to prohibit or disrespect marriages of same-sex couples, and the vast majority had been approved before we even filed the case.²⁵³ After *Goodridge*, politicians and rightwing groups took the next step available and commenced a constitutional amendment strategy, many of which blocked any favorable legislation of LGBTQ families. Thirteen such amendments were passed in 2004 alone.²⁵⁴

In 2005, in part out of a concern about the amendments, Tim Gill, founder of the Gill Foundation and a savvy strategic funder in the *1524 LGBTQ movement, set up a strategy discussion among a dozen stakeholder organizations about how to go forward. I was there for GLAD. Suffice it to say, we were divided. Some wanted to stop fighting for marriage equality, others wanted to change the topic, and others thought we had to press forward. To break the log jam, we decided to imagine a future Supreme Court win on marriage and conceptualize what would need to be in place for the Court to play its role as final arbiter in our federalist system.

We knew the pattern for past landmark victories. At the time of *Loving v. Virginia*,²⁵⁵ there were only sixteen states that still barred interracial marriage.²⁵⁶ At the time of *Brown v. Board of Education*,²⁵⁷ only seventeen states still mandated separate schools based on “race.”²⁵⁸ And at the time of *Lawrence v. Texas*,²⁵⁹ when the Supreme Court invalidated laws criminalizing some types of sexual intimacy under the Federal Constitution, there were only thirteen states with such laws on the books.²⁶⁰ The Supreme Court, in other words, is not so much a consensus builder as a consensus confirmer. It would not get too far ahead of the states, and we therefore needed to win in more states.

Soon, our discussion led to a rough plan of building a super-majority group of positive-leaning states. We would continue trying to win marriage equality in some states; we would aim for civil unions or domestic partnerships in others; and, finally, we would aim for more modest protections in yet others. We brainstormed which states might fit into each category and came up with a rough cut of at least thirty states where we could make progress of *some* kind. That would bring us to the super-majority of states we felt the Supreme Court needed to play its role as final arbiter in our federalist system. That strategy also allowed each of us to work in different lanes, all with the goal of increasing relationship recognition. You could call this a form of intra-group federalism, and it became our path forward from *Goodridge* to a hoped-for national resolution.

To accomplish these goals, and also to show that we could win within the conventional democratic process, GLAD and other LGBTQ groups embraced the legislative process *proactively*. In Hawaii, *1525 Vermont, and Massachusetts, we had been on defense after judicial victories. As referenced earlier, our first legislative wins on marriage came in 2009 in the New England states of Vermont, Maine, and New Hampshire.²⁶¹ Vermont overcame a governor's veto with a bipartisan vote in the democratic process, Maine and New Hampshire, again with bipartisan votes, also approved marriage and saw those bills signed into law by their governors. In a close vote, Maine voters repealed the law at referendum in November 2009. Legislative wins on marriage followed in Washington, D.C. in 2010²⁶² and New York in 2011.²⁶³

Nationwide, the stark fact remained that democratic action was blocked off in most states by constitutional amendments, and those amendments could be interpreted aggressively. The Nebraska Attorney General, for example, interrupted the legislative process on a bill that would have allowed a domestic partner to dispose of his or her partner's remains and make anatomical gifts.²⁶⁴ In his view, such a bill violated the state constitutional amendment, and the State prevailed in the Eighth Circuit on a challenge to the amendment.²⁶⁵ Other states, like Michigan, used the state anti-marriage amendment to cut off preexisting workplace domestic partnership benefits for same-sex couples.²⁶⁶

We had to stay on offense where we could. In November 2008, GLAD announced its 6x12 Campaign to win marriage in all of the New England states by 2012.²⁶⁷ We believed we could do so, and that we would also win in enough other jurisdictions to take the fight beyond *1526 state courts and legislatures to federal court and the Federal Constitution.

A. The First Move to Federal Court

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In March 2009, GLAD filed the first case challenging DOMA by persons lawfully married in their home state--Massachusetts--and denied protections available to others. Remember, part of DOMA provided that the federal government would not treat a same-sex couple as married for purposes of any federal law or program.²⁶⁸ With seven couples and three widowers, we made a simple equal protection argument against the law. DOMA's limited definitions of "marriage" and "spouse" created two classes of married people. One group was treated as married and the other group--married same-sex couples--was treated as single for all 1138 federal laws where marital status is a factor. But we do not have two classes of married people in this country. What rationale could there be for such selectivity, for this colossal disadvantaging of a small minority of married persons? It sounds easy now, but there was a lot of fear about raising these arguments in federal court. Raising a claim under the Federal Constitution meant the U.S. Supreme Court was the last stop. The stakes there-- making a national rule--could not be higher.

Some of our colleagues and law professors worried that a challenge to DOMA would seem indistinguishable to the courts from a challenge to the state bans on same-sex couples marrying. In March 2009, when we filed the DOMA case-- *Gill v. Office of Personnel Management*²⁶⁹--only two states allowed same-sex couples to marry. We believed the courts and public would understand the plaintiffs were *already married* in their state of residence and were not seeking *to marry*. Rather, they were being mistreated by the federal government, thus keeping attention on the specific and narrower issue of DOMA's *federal* non-recognition. Our goal was to take down DOMA, getting people the protections they were due, and establishing a federal precedent of equal protection for families and marriages that would help in the next round of litigation on marriage equality. And in July 2010, we won our case, as did the Commonwealth of Massachusetts in a separate federalism *1527 challenge to DOMA--the first federal district court rulings to strike down DOMA.²⁷⁰

But as with all social movements, there are ups and downs, steps forward and steps backward. As previously mentioned, California voters approved Proposition 8 in November 2008, amending their state constitution to undo the California Supreme Court's ruling in favor of marriage equality.²⁷¹ This was a gut punch.

In May 2009, about two months after GLAD filed its first case challenging DOMA, superstar lawyers Ted Olson and David Boies filed their case challenging California's Proposition 8, *Perry v. Schwarzenegger*.²⁷² At that time, they believed someone else would challenge Proposition 8 if they did not, and they sought to use this litigation as a vehicle to win marriage for *everyone* at the Supreme Court. Their initial goal was to get to the Supreme Court as quickly as possible--even within a year--but the judge ordered a trial.

The *Perry* case was controversial in some quarters. The opponents hated it, in part because of one of the things I admire about Ted Olson. He made what he called "the conservative case for gay marriage" and stuck up for "gay Americans."²⁷³ But some proponents of marriage equality had concerns as well. As a strategic matter, some of us believed the Supreme Court would not tell the states that their amendments and statutes banning marriage of same-sex couples were unconstitutional when there was not even a handful of states allowing marriage of same-sex couples. Of course, we were heading for that goal ourselves, but we were planning some additional steps first--winning more states and establishing a crucial building block by bringing down DOMA.

At GLAD, we had already decided to push as hard as we could for marriage with our 6x12 Campaign,²⁷⁴ and now we saw it as critical to set up the best circumstances possible for Supreme Court review. We also needed to keep our wins intact and worked in coalition to defeat *1528 attempts to repeal New Hampshire's marriage law in 2011 and to amend its constitution in 2012.²⁷⁵ President Obama announced he would not defend DOMA in February 2011²⁷⁶ and then came out in favor of marriage for same-sex couples in May 2012.²⁷⁷ In November 2012, we had an election night like no others, winning marriage for same-sex couples by initiative in Maine--vindicating our 2009 loss at the ballot--and successfully defending against repeal efforts in Maryland and Washington.²⁷⁸ For the first time, a constitutional amendment on marriage for same-sex couples--in Minnesota--went down to defeat.²⁷⁹

Then in December 2012, the Supreme Court granted review in the *Windsor* case, making it our vehicle for challenging DOMA before the Supreme Court.²⁸⁰ We at GLAD continued our close working relationship with Robbie Kaplan, Edie Windsor's

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superlative attorney at the Paul, Weiss law firm. At Robbie's request, and in conjunction with her team at Paul, Weiss; the ACLU; and Pam Karlan at the Stanford Law Supreme Court Litigation Clinic, GLAD rolled up its sleeves to coordinate all of the amici filings.²⁸¹ Edie Windsor's brief was incredibly powerful and Robbie Kaplan powerfully argued her case.

As you know--Edie Windsor won, and we all won! The Supreme Court's rulings on June 26, 2013 were nothing short of thrilling.

First, the Court held 5-4 that DOMA was unconstitutional. It concluded that states providing for marriage of same-sex couples conferred a "lawful status" on "lawful conduct," as well as "dignity and *1529 status of immense import."²⁸² States that allowed same-sex couples to marry were recognizing the "intimacy" and "bond" of those couples, providing that bond with "further protection and dignity."²⁸³

In contrast, the "essence" of DOMA was "interference with the equal dignity of same-sex marriages."²⁸⁴ This federal discrimination "impos[ed] a disadvantage, a separate status, and so a stigma" on married same-sex couples.²⁸⁵ It denied such couples both responsibilities and rights, creating financial penalties and insecurity.²⁸⁶ DOMA also demeaned such couples, "whose moral and sexual choices the Constitution protects," and created second-tier marriages that violated the Federal Constitution.²⁸⁷ Second, the Supreme Court made a procedural ruling in *Perry* that restored marriage equality in California, making it the twelfth state with marriage equality.²⁸⁸ While the Court did not reach the underlying constitutional question of marriage equality--because it ruled that *Perry* was not properly before it, as no party properly represented the State²⁸⁹--the final result in *Perry* was a significant victory. The *Perry* team, along with the intervenors at the City of San Francisco led by Therese Stewart, had put Proposition 8 on trial, serving as a truth commission of sorts, and had spread a vision of marriage equality as crossing party lines.²⁹⁰

Of course, a ruling that DOMA was unconstitutional did not mean marriage equality now existed across the whole country. But in addition to ridding the country of a noxious law, it served the purpose of a stepping stone toward nationwide marriage. A state's denying access to marriage was also denying the marital status which could lead to federal marital protections and responsibilities.²⁹¹ The broader stakes were now clearer: states that denied marriage were denying LGBTQ people so much in terms of personhood, dignity, and protections inclusive of, but far beyond, government benefits. In briefing, we had *1530 demolished the federal government's justifications for DOMA, and those arguments did not make any more sense when coming from the states themselves to justify denying marriage.

Nationwide, people were fired up and had no interest in waiting any longer before pursuing marriage. A wave of lawsuits followed the *Windsor* decision--ultimately over one hundred lawsuits were filed in states across the country.²⁹² At the same time, the federal government was vigorously implementing the *Windsor* decision so that married couples, wherever they lived, could enjoy *federal* protections and responsibilities.²⁹³ In other words, couples were treated as the married people they were by the federal government for taxes and pensions (but not for Social Security or veteran's benefits), even if the states in which the couples lived did not recognize those marriages. That put a further spotlight on those states still engaging in marriage discrimination.

Finally, the end of the road was looming. Wins in marriage equality cases began to come in from across the country--wins in federal district courts in Utah, Oklahoma, Virginia, Wisconsin, Indiana, Idaho, and then from the courts of appeals covering those states as well.²⁹⁴ When the states that had lost later sought review in the Supreme Court, the Supreme Court denied review in October 2014, leaving those positive rulings intact.²⁹⁵ Soon, however, there was a Sixth Circuit ruling reversing wins on marriage and recognition of marriages in Michigan, *1531 Kentucky, Tennessee, and Ohio.²⁹⁶ The Supreme Court accepted review.²⁹⁷

I had been helping plaintiffs April DeBoer and Jayne Rouse in Michigan since their attorneys asked for GLAD's assistance with contacting experts after the district court denied summary judgement and ordered a trial in 2013.²⁹⁸ Michigan and Kentucky's

petitions raised the question of marriage equality, which the Court designated as question one.²⁹⁹ The Court also added a second question about marriage recognition, raised by Ohio, Tennessee, and Kentucky.³⁰⁰ To my surprise, I was picked to be the oralist on the cases raising the fundamental issue of marriage equality, while Douglas Hallward- *1532 Driemeier from the Tennessee team argued the second question. The decision for me to argue was made less than a month out from the oral argument. As people said to reassure me, “you’ve been preparing for this moment for 20 years.” And that is certainly true, although I was grateful for the support and insights from the large combined team of the four states. The *Obergefell* decision, decided by a 5-4 vote, is strong on both liberty and equality grounds.³⁰¹ It is like an uber-*Loving*, explaining *why* marriage is a fundamental right and holding that marriage bans violate equal protection guarantees as well.³⁰² The U.S. Supreme Court viewed developments in the states as essential to its ruling.³⁰³ It specifically discussed the litigation in Hawaii and Massachusetts, noting that “[t]he highest courts of many States have contributed to this ongoing dialogue” about the relevant principles and analysis,³⁰⁴ and described *Goodridge*’s insight about marriage as a “momentous act[] of self-definition.”³⁰⁵ It swatted away claims about child outcomes by noting that all states allow gay people to foster and adopt children.³⁰⁶ As to the “leave-it-to-the-democratic-process” argument, the majority noted that there has been extensive deliberation nationwide, noting the extensive litigation in state and federal courts, the referenda, legislative debates and grassroots campaigns, along with countless studies and reports and discussions over the past decades.³⁰⁷ Over one hundred amici filed with the Court, representing the “central institutions in American life.”³⁰⁸ The Court also appended a list of state and federal court judicial rulings to its opinion.³⁰⁹

CONCLUSION

We are living participants and witnesses to the journey of LGBTQ people becoming part of “we the people,” as Massachusetts State Representative Byron Rushing put it long ago.³¹⁰ State constitutional *1533 rulings led the way to the U.S. Supreme Court finally making it possible for people to marry the person they love wherever they live. *Obergefell* is also the fourth ruling on LGBTQ-related issues from the Supreme Court, following *Romer v. Evans* (1996),³¹¹ *Lawrence v. Texas* (2003),³¹² and *U.S. v. Windsor* (2013).³¹³ More broadly, each of these is an equality case: that laws distinguishing between people based on their sex and sexual orientation cannot stand.

I do not expect all prejudice against LGBTQ people to disappear now any more than it did on the basis of race after *Loving*³¹⁴ or *Brown*,³¹⁵ or on gender after *Frontiero*³¹⁶ and *Craig v. Boren*.³¹⁷ We can safely predict, however, that state constitutions will be with us on the journey ahead.

Footnotes

a1 Civil Rights Project Director for GLBTQ Legal Advocates & Defenders (GLAD).

This is an expanded version of the twenty-seventh Annual State Constitutional Law Lecture on February 2, 2016, at Rutgers Law School in Camden, New Jersey. It also draws in part from the Frank Coffin lecture delivered by the author on October 29, 2015 at the University of Maine School of Law and earlier writings. See Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005); Mary Bonauto, *Ending Marriage Discrimination: A Work in Progress*, 40 SUFFOLK U. L. REV. 813 (2007). The author thanks Jaclyn M. Palmerson and Samuel Bordoni-Cowley, successive Editors-in-Chief of the *Rutgers University Law Review*, for their assistance, as well as Michelle Wiener and Annie Sloan of GLAD. The author additionally thanks Rutgers Law School and Distinguished Professor Robert F. Williams for his pioneering and continuing work in lifting up the importance of state constitutions. With the steady hand lent by the *Rutgers University Law Review* and the Center for State Constitutional Studies in Camden, the state of the field is robust.

¹ See *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004), *abrogated on other grounds by* *Lexmark Int’l v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). See

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generally DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 169 (1988); Daniel J. Elazar, *Foreword: The Moral Compass of State Constitutionalism*, 30 RUTGERS L.J. 849 (1999).

- 2 Cf. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-20 (1978) (discussing the “limits [of] the federal judiciary ... in interpreting and enforcing” certain areas of the law due to “institutional concerns”). See generally Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).
- 3 Cf. Sager, *Fair Measure*, *supra* note 2, at 1218 (recognizing that the Supreme Court, in *Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), “acknowledged that institutional concerns significantly informed the Court’s view that the equal protection clause was not violated by Texas’ system of financing public schools largely through local property taxation”).
- 4 *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).
- 5 *Baker v. State*, 744 A.2d 864 (Vt. 1999).
- 6 *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).
- 7 Professor Williams’ lecture was published in Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73 (2001).
- 8 Brief of *Amici Curiae* Professors of State Constitutional Law: Robert F. Williams et al., *Goodridge*, 798 N.E.2d 941 (No. SJC-08860) (highlighting the Massachusetts Constitution’s establishment of equality and liberty as enduring values and connecting the high court’s jurisprudence to those values).
- 9 *Baker*, 744 A.2d at 886; see Lawrence Friedman & Charles H. Baron, *Baker v. State and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125 (2001); Cheryl Hanna, *State Constitutional Decision-Making and Principles of Equality: Revisiting Baker v. State and the Question of Gender in the Marriage Equality Debate*, 74 ALB. L. REV. 1683 (2010); Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L.J. 237 (2001); THE STATE OF MARRIAGE (Floating World Pictures 2015).
- 10 An Act Relating to Civil Unions, No. 91, 2000 Vt. Acts & Resolves 72, 72-73 (repealed 2009).
- 11 *Goodridge*, 798 N.E.2d 941.
- 12 Our co-counsel in *Kerrigan* were Kenneth Bartschi and Maureen Dowd of Horton, Shields & Knox; Maureen Murphy, a longtime practitioner and now a family court judge; and various staff attorneys at the Connecticut Civil Liberties Union.
- 13 *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).
- 14 Press Release, GLBTQ Legal Advocates & Defenders, 5 Years After *Goodridge*, GLAD Announces “6x12” (Nov. 18, 2008), <http://www.glad.org/current/pr-detail/5-years-after-goodridge-glad-announces-6x12>.

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- 15 Devin Dwyer, *Maine Gay Marriage Law Repealed*, ABC NEWS (Nov. 4, 2009), <http://abcnews.go.com/Politics/maine-gay-marriage-law-repealed/story?id=8992720> (discussing Maine Same-Sex Marriage People's Vote Question 1).
- 16 Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN (Nov. 7, 2012), <http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage> (discussing Maine Same-Sex Marriage People's Vote Question 1).
- 17 699 F. Supp. 2d 374 (D. Mass. 2010).
- 18 Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2012), *invalidated by United States v. Windsor*, 133 S. Ct. 2675 (2013).
- 19 133 S. Ct. 2675. *Windsor* was filed by Roberta Kaplan and her team at Paul, Weiss, Rifkind, Wharton & Garrison, along with the American Civil Liberties Union (ACLU) in November 2010. Press Release, Am. Civil Liberties Union, Bereaved Spouse Challenges “Defense of Marriage Act” as Unconstitutional (Nov. 8, 2000), <https://www.aclu.org/news/bereaved-spouse-challenges-defense-marriage-act-unconstitutional>. GLAD and co-counsel filed a multi-plaintiff case in Connecticut District Court on the same day, *Pedersen v. Office of Personnel Management*, 881 F. Supp. 2d 294 (D. Conn. 2012). Both cases were within the jurisdiction of the U.S. Court of Appeals for the Second Circuit. GLAD assisted *Windsor*'s team in the Supreme Court by coordinating the extensive amici filings. Kaplan's account of the *Windsor* litigation is in ROBERTA KAPLAN & LISA DICKEY, THEN COMES MARRIAGE: *UNITED STATES V. WINDSOR* AND THE DEFEAT OF DOMA (2015).
- 20 *See infra* note 271 and accompanying text.
- 21 The litigating groups were Lambda Legal, National Center for Lesbian Rights, the ACLU, and GLAD. My GLAD colleagues, including our Legal Director Gary Buseck, were there every step of the way.
- 22 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (holding that same-sex couples have a right to marry under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment). Many have made the case for marriage of same-sex couples over the decades. Some of the more recent publications include WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996); E.J. GRAFF, *WHAT IS MARRIAGE FOR?: THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION* (1999); EVAN WOLFSON, *WHYYY MARRIAGE MATTERS: AMERICAN, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* (2004); and Andrew Sullivan, *Here Comes the Groom*, SLATE (June 26, 2015), http://www.slate.com/articles/news_and_politics/politics/2012/11/gay_marriage_votes_and_andrew_sullivan_his_landmark_1989_essay_making_a.html.
- 23 Gw. art. I, sub 2. (“Een huwelijk kan worden aangegaan door twee personen van verschillend of van gelijk geslacht.”). Roughly translated, the Netherlands Civil Code now states: “A marriage can be contracted by two persons of different sex or of the same sex.” Robert Wintemute, *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 1* (Robert Wintemute & Mads Andenas eds., 2001).
- 24 *United States v. Virginia*, 518 U.S. 515, 557 (1996) (citing RICHARD B. MORRIS, *THE FORGING OF THE UNION 1781-1789*, at 191, 193 (1987)).

- 25 See generally GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY (2004); JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983); WILLIAM N... ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993); Rhonda Rivera, *Our Strait Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979); Rhonda Rivera, *Our Strait Laced Judges: Twenty Years Later*, 50 HASTINGS L.J. 1179 (1999).
- 26 Exec. Order No. 10,450, 3 C.F.R. 936, 938 (1953), *reprinted in* 5 U.S.C. § 7311 (2012).
- 27 The Immigration and Nationality Act excluded “[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect.” Immigration and Nationality Act of 1952, § 212(a)(4), Pub. L. No. 82-414, § 349, 66 Stat. 163, 182 (codified as amended at 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990)). This section was subsequently amended to replace “epilepsy” with “sexual deviation.” Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990)). However, even before the amendment, gay people were excluded “under the general category of ‘aliens afflicted with a psychopathic personality, epilepsy, or a mental defect,’ ... reflect[ing] the contemporary dominant view that homosexuality was a mental illness.” Shannon Minter, Note, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT’L L.J. 771, 776-77 (1993); see *Boutilier v. INS*, 387 U.S. 118, 121-22 (1967) (construing “psychopathic personality” to include “homosexuals”). Former Congressman Barney Frank was instrumental in the repeal of this provision, first obtaining an amendment allowing the Commissioner of Immigration to waive the exclusion. BARNEY FRANK, FRANK: A LIFE IN POLITICS FROM THE GREAT SOCIETY TO SAME-SEX MARRIAGE 115-18 (2015). In 1990, what Frank coined “the worst anti-LGBT provision ever put into American law” was officially repealed. *Id.* at 118.
- 28 Beginning in 1987, the United States excluded immigrants who were HIV-positive from entering the country. Peter A. Barta, Note, *Lambskin Borders: An Argument for the Abolition of the United States Exclusion of HIV-Positive Immigrants*, 12 GEO. IMMIGR. L.J. 323, 323, 327-28 (1998) (“[T]he regulation jeopardized international scientific cooperation, embarrassed the United States in the international health community, and invited retaliation against HIV positive Americans traveling abroad.”). This ban was lifted in 2009. *Medical Examination of Aliens--Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance*, 74 Fed. Reg. 56,547 (Nov. 2, 2009) (codified at 42 C.F.R. pt. 34 (2016)).
- 29 Laura R. Kesler, *Serving with Integrity: The Rationale for the Repeal of “Don’t Ask, Don’t Tell” and Its Ban on Acknowledged Homosexuals in the Armed Forces*, 203 MIL. L. REV. 284, 291-92 (2010). Don’t Ask, Don’t Tell was repealed in 2010. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. For background on “Don’t Ask, Don’t Tell,” see generally JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY (1999). The United States has also inaugurated a process for including transgender persons in the armed forces. See DEPT OF DEF., SUPPORT PLAN FOR IMPLEMENTATION: REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” (2010), [http://archive.defense.gov/home/features/2010/0610_dadt/DADTReport-SPI_FINAL_20101130\(secure-hires\).pdf](http://archive.defense.gov/home/features/2010/0610_dadt/DADTReport-SPI_FINAL_20101130(secure-hires).pdf).
- 30 Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. TIMES, Dec. 16, 1973, at A1, http://www.nytimes.com/1973/12/16/archives/psychiatrists-in-a-shift-declare-homosexuality-no-mental-illness.html?_r=0; see also Brief for *Amici Curiae* American Psychological Association et al., in Support of Petitioners at 11, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152338, at *11.
- 31 CHAUNCEY, *supra* note 25, at 5-6, 52-53.

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- 32 *Id.* at 78; Brief of the Organization of American Historians as *Amicus Curiae* in Support of Petitioners at 19-27, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574); Brief of the Organization of American Historians and the American Studies Association as *Amici Curiae* in Support of Respondent Edith Windsor at 20-35, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).
- 33 *GLAD Is Founded in 1978 in Response to a Sting Operation at the Boston Public Library*, GLBTQ LEGAL ADVOCES. & DEFENDERS, <http://www.glad.org/about/history/glad-is-founded> (last visited Nov. 2, 2016).
- 34 478 U.S. 186, 196 (1986), *overruled by* *Lawrence*, 539 U.S. 558.
- 35 *Id.* at 194.
- 36 The durability of same-sex couples was documented by social scientists before same-sex relationships were widely acknowledged. *See* Brief of *Amici Curiae* Massachusetts Psychiatric Society et al. at 5-7, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2002) (No. SJC-08860); Brief of *Amici Curiae* American Public Health Association & Whitman-Walker Health in Support of Petitioners at 31-32, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574); Brief of the American Psychological Association et al. as *Amici Curiae* in Support of Petitioners at 12, 17, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) (“Given ... the legal and prejudicial obstacles that same-sex partners face, the prevalence and durability of same-sex relationships are striking.”).
- 37 MATTHEW A. COLES, TRY THIS AT HOME: AN ACLU GUIDEBOOK 231-37 (1996) (discussing early types of domestic partnership systems).
- 38 *See generally* William N. Eskridge, Jr., *The First Marriage Cases, 1970-74*, in LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).
- 39 388 U.S. 1 (1967).
- 40 *Id.* at 2.
- 41 *Id.*
- 42 *See id.*; Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 677 (2010).
- 43 *Loving*, 388 U.S. at 3.
- 44 *Id.* (“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”).
- 45 *Id.*

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- 46 *Id.* at 12 (“To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”).
- 47 *See, e.g., Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). Later cases included *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980); *In re Krantz*, 645 N.Y.S.2d 296 (App. Div. 1996); and *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984).
- 48 David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 525 (1999) (“[I]t was as preposterous for a man to argue that he had a right to marry another man as it would be for him to argue that he had a right to get pregnant.”); *see also* CHAUNCEY, *supra* note 25, at 64-66.
- 49 *Baker*, 191 N.W.2d at 186, 187.
- 50 *Baker v. Nelson*, 409 U.S. 810 (1972).
- 51 Political scientists have documented more referenda directed at LGBTQ people than at any other minority group. *See, e.g.,* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 257-58 (1997); Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 312-13 (2007) (“[G]ays and lesbians do emphatically lose more often than they win when the issue is decided at the ballot box.”). These include HIV, school, and marriage-related referenda, as well as preemption measures, to require nondiscrimination measures to be effected at the state level. *See also Romer v. Evans*, 517 U.S. 620, 623-26 (1996) (regarding a Colorado constitutional amendment barring any measure against anti-gay discrimination that violated the Fourteenth Amendment).
- 52 CHAUNCEY, *supra* note 25, at 44, 96-104.
- 53 *Id.* at 40 (“The enduring conviction that homosexuals stood outside the moral boundaries of the nation profoundly shaped the earliest responses to AIDS in the United States.”); *Id.* at 97 (“[Those] who had led more solitary lives, ... suddenly found themselves abandoned when they became sick. But thousands of gay men, as well as other men and women, gay and straight, rallied around them, volunteering to serve as their ‘buddies’ and advocates.”).
- 54 *Id.* at 42 (“The rapid expansion of existing organizations and the creation of new ones were extraordinary, but the very need for them reflected the government’s refusal to take a ‘homosexual disease’ seriously”).
- 55 *Id.* at 96 (“Couples whose relationships were fully acknowledged and respected by their friends suddenly had to deal with powerful institutions--hospitals, funeral homes, and state agencies--that refused to recognize them at all.”); *id.* at 99 (“[A] hospital ... usually felt it had no choice but to follow the wishes of the biological family when it came to the funeral, even when the family’s plans went against the expressed wishes of the deceased.”).
- 56 *Id.* at 105-10.
- 57 CHERI PIES, *CONSIDERING PARENTHOOD: A WORKBOOK FOR LESBIANS* 77-93 (1985).

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- 58 See, e.g., Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 466 (1990).
- 59 Controversies arose regarding gay people fostering and adopting children, as when Massachusetts all but forbade gay people from becoming foster parents. See WENDELL RICKETTS, LESBIANS AND GAY MEN AS FOSTER PARENTS 67-87 (1991); Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 13-14 (2005).
- 60 *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
- 61 *Id.* at 68.
- 62 Mary Bonauto, *Ending Marriage Discrimination: A Work in Progress*, 40 SUFFOLK U. L. REV. 813, 835 (2007).
- 63 Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2012), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).
- 64 28 U.S.C. § 1738C (2012).
- 65 1 U.S.C. § 7.
- 66 U.S. GOV'T ACCOUNTABILITY OFF., GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT (1997), <http://www.gao.gov/archive/1997/og97016.pdf>. A follow-up study in 2004 found that 1138 federal laws tied benefits, protections, or responsibilities to marital status. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), <http://www.gao.gov/new.items/d04353r.pdf>.
- 67 See, e.g., Bonauto, *supra* note 63, at 835 n.135.
- 68 HAW. CONST. art. 1, § 23 (“The Legislature shall have the power to reserve marriage to opposite-sex couples.”). Some scholars describe the statutory and amendment response in political process terms. See, e.g., Douglas R. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 918-31 (1999) (describing the Hawaii experience as an example of “legal mobilization,” reflecting “popular constitutionalism”).
- 69 U.S. CONST. art. IV, § 1.
- 70 See Bonauto, *Goodridge in Context*, *supra* note 60, at 22-23, for another example of GLAD's strategic decision making in appealing cases that could implicate marriage.
- 71 Beth is now an Associate Justice of the Vermont Supreme Court and Susan continues a high-level family law and appellate practice. For further information about them and the Vermont experience, see, for example, DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE (2004); Susan M. Murray & Beth Robinson, *Laying the Groundwork: Early Organizing in Vermont*, in 3 DEFENDING SAME-SEX MARRIAGE: THE FREEDOM-TO-MARRY MOVEMENT (Martin Dupuis & William A. Thompson eds., 2007); Robinson, *supra* note 9, at 243-50; Ken Picard, *Here's to You, Ms. Robinson*, SEVEN DAYS (Mar. 25, 2009), <http://www.sevendaysvt.com/vermont/heres-to-you-ms-robinson/Content?oid=2136651>; James Thilman, *'The State of Marriage': How Vermont Paved the Way for*

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LGBT Equality, HUFFINGTON POST (June 12, 2015), http://www.huffingtonpost.com/2015/06/12/state-of-marriage-vermont-documentary_n_7545936.html; THE STATE OF MARRIAGE, *supra* note 9.

72 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

73 However, as the petitioners in *Lawrence* indicated, “In the 13 States that still proscribe[d] sodomy [at the time], the laws [were] almost never enforced in criminal proceedings against private consensual intimacy.” Brief for Petitioners, at 25, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152352.

74 539 U.S. 558. Indeed, petitioners in *Lawrence* referenced the “steady stream of repeals and state judicial invalidations of laws criminalizing consensual sodomy and fornication.” Brief for Petitioners, *supra* note 73, at 20. “The ‘consistency of the direction of change’ among the States is indicative of a strong national consensus reflecting profound judgments about the limits of government’s intrusive powers in a civilized society.” *Id.* at 24 (citation omitted). The petitioners continued to rely on victories in individual states in their argument before the Supreme Court:

[S]ince *Bowers*, the Nation has steadily moved toward rejecting second-class-citizen status for gay and lesbian Americans Thirteen States and the District of Columbia ... have now added sexual orientation to laws barring discrimination in housing, employment, public accommodations, and other areas. More than half the States now have enhanced penalties for hate crimes motivated by the victim’s sexual orientation.

Id. at 30-31 (footnote omitted). In highlighting the “consistency of the direction of change” in the states, the petitioners referenced many state court decisions. *Id.* at 23-24 (citing *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *State v. Ciuffini*, 395 A.2d 904 (N.J. Super. Ct. App. Div. 1978); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996)).

75 *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948) (in bank).

76 In 1883, the Supreme Court upheld Alabama’s greater penalties on different race cohabitation and adultery, although it did not discuss the marriage ban. *Pace v. Alabama*, 106 U.S. 583 (1883), *overruled by* *Loving v. Virginia*, 388 U.S. 1 (1967); *see also* *Naim v. Naim*, 87 S.E.2d 749 (Va.), *vacated*, 350 U.S. 891 (1955) (dismissing appeal for lack of a properly presented federal question).

77 *Perez*, 198 P.2d at 38 (Shenk, J., dissenting).

78 388 U.S. 1.

79 *See, e.g.*, *Murray & Robinson*, *supra* note 71, at 33-36.

80 *Id.* at 33-41; *see also* *Robinson*, *supra* note 9, at 241-42 (“Task Force volunteers took every opportunity to speak to churches, civic associations, gay and lesbian organizations, community leaders, and anyone else willing to offer us an open mind and a chance to engage.”); *id.* at 242-43 (“[W]e addressed the myth that marriage has always existed in its present form, unchanging and uniform across cultures and throughout time We talked about the shameful history of interracial marriage in this country We talked to these groups about the distinction between civil and religious marriage--a distinction that is no doubt obvious to lawyers, but which is lost on many people Far more important were our stories--real stories about real people and the reality of our lives.”); Susan Murray, *Freedom Achieved*, RUTLAND HERALD (Jan. 17, 2016), <http://www.rutlandherald.com/article/20160117/OPINION06/160119646/0/SEARCH>.

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- 81 Murray & Robinson, *supra* note 71, at 38-41, 43-45. This 1996 video, “Freedom to Marry: A Green Mountain View,” was a widely distributed video of individuals and couples telling their stories and was also used as an icebreaker at educational events. Vermont Freedom to Marry, *Freedom to Marry: A Green Mountain View*, YOUTUBE (Sept. 18, 2012), <https://www.youtube.com/watch?v=CcYrDgHRIYM>.
- 82 *Id.* at 42-48.
- 83 See, e.g., Joshua Friedes, *The Beginning of the Movement*, HUMAN RIGHTS CAMPAIGN (May 17, 2014), <http://www.hrc.org/blog/the-beginning-of-the-movement>.
- 84 *Id.*
- 85 Other organizations contributed early on, as well. Most notably, the Massachusetts Lesbian and Gay Political Caucus, led by Arline Isaacson, played an important role at the State House. Together, with allies like the Massachusetts Association of Hispanic Attorneys, NOW, clergy leaders, and more, we were able to defeat all anti-marriage bills despite formidable organizing by our opponents in the faith communities and at the Massachusetts Family Institute.
- 86 See Anne Stanback, *Love Makes a Family in Connecticut*, in LOVE UNITES US: WINNING THE FREEDOMTOMARRY IN AMERICA, *supra* note 38, at 92-93.
- 87 *Id.* at 92-99. As Anne states, LMF's lobbyist, Betty Gallo, and legislative leaders, Representative Michael Lawlor and Senator Andrew MacDonald, were key partners in this effort.
- 88 After the *Goodridge* decision in 2003, many of the organizations working on the ground formed a new organization known as Mass Equality, which then led the political and electoral efforts to defend *Goodridge*.
- 89 *In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).
- 90 VT. STAT. ANN. tit. 15A, § 1-102 (West 2016).
- 91 See, e.g., *Vermont Workers Win Health Benefits*, N.Y. TIMES, June 13, 1994, at A13.
- 92 VT. STAT. ANN. tit. 13, § 1455.
- 93 Act of Apr. 23, 1977, Vt. Pub. L. No. 51, § 3 (1977) (repealing VT. STAT. ANN. tit. 13, § 2603 (1974)).
- 94 Larry Kramer coined the term in relation to sodomy laws. LARRY KRAMER, REPORTS FROM THE HOLOCAUST: THE MAKING OF AN AIDS ACTIVIST 178 (St. Martin's Press ed. 1989).
- 95 VT. CONST. ch. I, art. 7.
- 96 *Id.*

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- 97 *Id.* ch. I, art. 1.
- 98 500 A.2d 233 (Vt. 1985).
- 99 *Id.* at 236-38.
- 100 450 A.2d 336 (Vt. 1982).
- 101 692 A.2d 384, 396-97 (Vt. 1997).
- 102 *Id.* at 396.
- 103 VT. CONST. ch. 2, art. 73.
- 104 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, and services); [MASS. GEN. LAWS ch. 272, §§ 92A, 98](#) (non-discrimination protections in public accommodations)). In 2011, Massachusetts amended its laws to address gender identity discrimination, An Act Relative to Gender Identity, ch. 199, 2011 Mass. Acts 199, and in 2016 completed that work by amending the public accommodations nondiscrimination laws as well. An Act Relative to Transgender Anti-Discrimination, ch. 134, 2016 Mass. Acts 124.
- 105 Exec. Order No. 340, Mass. Reg. 697 (Sept. 23, 1992). For context, see Bonauto, *supra* note 59, at 11, 15-18.
- 106 An Act Relative to Discrimination Against Students in Public Schools on the Basis of Sexual Orientation, H.B. 3353, 1993 Gen. Court, Reg. Sess. (Mass. 1993), 1993 Mass. Acts 282.
- 107 An Act Relative to Certain Crimes Committed for the Purpose of Intimidation, H.B. 5191, 1996 Gen. Court, Reg. Sess. (Mass. 1996), 1996 Mass. Acts 163, § 2.
- 108 Without action by the Massachusetts Legislature, cities and towns began enacting ordinances to extend health benefits to municipal employees with domestic partners, beginning with Cambridge. However, in *Connors v. City of Boston*, the Massachusetts Supreme Judicial Court invalidated Boston's Executive Order on Domestic Partnership Benefits on state law preemption grounds. 714 N.E.2d 335, 340 (Mass. 1999); *see also* Bonauto, *supra* note 59, at 18-19.
- 109 *E.g.*, *Commonwealth v. Ferguson*, 422 N.E.2d 1365, 1367 (Mass. 1981) (citing *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974)); *Balthazar*, 318 N.E.2d at 481 (“In light of these changes and in light of our own awareness that community values on the subject of permissible sexual conduct no longer are as monolithic as ... they were in 1954, we conclude that [the law] must be construed to be inapplicable to private, consensual conduct of adults.”).
- 110 *See Gay & Lesbian Advocates & Defs. v. Attorney Gen.*, 763 N.E.2d 38, 40 (Mass. 2002).

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- 111 [Bezio v. Patenaude](#), 410 N.E.2d 1207, 1216 (Mass. 1980) (“In the total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without basis in the record.”).
- 112 *See Bonauto*, *supra* note 59, at 13-14.
- 113 *Id.*
- 114 For second-parent adoptions, see [Adoption of Tammy](#), 619 N.E.2d 315, 316 (Mass. 1993) and [Adoption of Susan](#), 619 N.E.2d 323, 324 (Mass. 1993). For more information on visitation by “de-facto” parents, see [E.N.O. v. L.M.M.](#), 711 N.E.2d 886, 893 (Mass. 1999) (“[T]he best interests of the child require that the plaintiff, as the child's de facto parent, be allowed temporary visitation with the child.”).
- 115 [Melnychenko v. 84 Lumber Co.](#), 676 N.E.2d 45, 48 (Mass. 1997) (“[N]owhere is discrimination because of a victim's sex made an essential element of a sexual harassment claim in Massachusetts.”).
- 116 *See Doe v. Attorney Gen.*, 686 N.E.2d 1007, 1009 (Mass. 1997).
- 117 MASS. CONST., pt. 1, art. I (amended by amend. art. CVI) (repeating guarantees with gender neutral terms and also adding a specific equal protection guarantee based on specific characteristics).
- 118 *Id.* amend. art. CVI.
- 119 *Id.*
- 120 John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the “Quock Walker Case,”* 5 AM. J. LEGAL HIST. 118, 119 (1961).
- 121 *Id.*; see RICHARD D. BROWN & JACK TAGER, MASSACHUSETTS: A CONCISE HISTORY 183-99 (2000); Bonauto, *supra* note 59, at 6-7; see also MASS. CONST. amend. art. CVI; [Finch v. Commonwealth Health Ins. Connector Auth.](#), 946 N.E.2d 1262, 1271-72 (Mass. 2011).
- 122 [Lawrence v. Texas](#), 539 U.S. 558, 579 (2003).
- 123 [Roberts v. Boston](#), 59 Mass. (5 Cush.) 198, 209-10 (1849).
- 124 *E.g.*, [Commonwealth v. Conkey](#), 714 N.E.2d 343, 347 (Mass. 1999) (self-incrimination); *Op. of the Justices to the Senate*, 591 N.E.2d 1073, 1076-77 (Mass. 1992) (self-incrimination; breathalyzer test); [Commonwealth v. Aponte](#), 462 N.E.2d 284, 508-09 (Mass. 1984) (jury selection); [Batchelder v. Allied Stores Int'l](#), 445 N.E.2d 590, 595 (Mass. 1983) (speech); [Commonwealth v. Hodge](#), 434 N.E.2d 1246, 1249 (Mass. 1982) (effective assistance of counsel); [Moe v. Sec'y of Admin. & Fin.](#), 417 N.E.2d 387, 402 (Mass. 1981) (Medicaid funding for abortions); *Op. of the Justices to the House of Representatives*, 371 N.E.2d 426, 430 (Mass. 1977) (holding the State's equal rights act broader in scope than federal equal protection guarantees against sex discrimination).

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- 125 Margaret H. Marshall, *Threats to the Rule of Law: State Courts, Public Expectations & Political Attitudes*, 137 DAEDALUS 122, 123 (2008).
- 126 An Act Concerning Revision and Codification of the Substantive Criminal Law, Pub. Act. No. 69-828, 1969 Conn. Pub. Acts 1554 (Reg. Sess.).
- 127 An Act Concerning Discrimination on the Basis of Sexual Orientation, Pub. Act No. 91-58, 1991 Conn. Acts 7133 (Reg. Sess.) (codified at [CONN. GEN. STAT. ANN. §§ 46a-81a to 81r](#) (West 2016)).
- 128 An Act Concerning the Best Interest of Children in Adoption Matters, Pub. Act. No. 00-228, 2000 Conn. Acts 5830 (Reg. Sess.) (codified at [CONN. GEN. STAT. ANN. §§ 45a-724, 45a-731](#) (2016)); An Act Concerning Intimidation Based on Bigotry or Bias, Pub. Act No. 00-72, 2000 Conn. Acts 5710 (codified at [CONN. GEN. STAT. ANN. §§ 29-7m, 52-571c, 53a-30, 53a-40a, 54-56e](#) (West 2016)). As to the adoption bill, LMF, GLAD, and others expended much effort to avoid a “DOMA-like” provision in the adoption bills. In order to pass the bill, some legislators insisted on language that the “current” public policy of Connecticut limited marriage to a man and a woman. Although this simply stated the status quo, some interpreted that language as a legislative endorsement of the restriction.
- 129 [CONN. CONST. art. I, § 1](#).
- 130 *Id.* art. I, § 20 (1984 amendment) (emphasis added). *See generally* Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675, 692-96 (1992).
- 131 *See State v. Geisler*, 610 A.2d 1225, 1232-34 (Conn. 1992), *abrogated by State v. Brocuglio*, 826 A.2d 145 (Conn. 2003). Geisler is discussed in Robert F. Williams, THE LAW OF AMERICAN STATE CONSTITUTIONS 160-63 (2009).
- 132 *State v. Dukes*, 547 A.2d 10, 19 (Conn. 1988).
- 133 *Evening Sentinel v. Nat'l Org. for Women*, 357 A.2d 498, 503-04 (Conn. 1975).
- 134 *See, e.g., Gould v. Gould*, 61 A. 604, 605 (Conn. 1905).
- 135 *Gay & Lesbian Law Students Ass'n v. Bd. of Trs.*, 673 A.2d 484, 498-500 (Conn. 1996).
- 136 [CONN. CONST. art. XIII, §§ 1-4](#); *see also* WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION: A REFERENCE GUIDE 86 (1993). Every twenty years, however, voters were asked to decide if there should be a constitutional convention. That question, we later learned, was slated for November 2008.
- 137 *See, e.g., Bonauto, supra* note 59, at 2-8; Robinson, *supra* note 9, at 237-41.
- 138 *See* Brief for Respondents at 23-26, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC 08860).

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- 139 See Brief of *Amici Curiae* Urban League of Eastern Mass. et al., [Goodridge](#), 798 N.E.2d 941 (No. SJC 08860).
- 140 See Brief of *Amici Curiae* The Religious Coalition for the Freedom to Marry et al., [Goodridge](#), 798 N.E.2d 941 (No. SJC 08860).
- 141 See Brief of *Amici Curiae* Massachusetts Psychiatric Society et al., *supra* note 36, at 5-7.
- 142 See Bonauto, *supra* note 59, at 34-37; *see also* Robinson, *supra* note 9, at 245.
- 143 See Robinson, *supra* note 9, at 238.
- 144 *Id.* at 244.
- 145 *Id.*
- 146 *Id.* at 243. Stan, then a therapist, and Peter, a theater professor, often spoke about falling in love and living ordinary lives. *See, e.g.*, Bill Delaney, Reuters, *Vermont Gay Couples Tell Court Why They Should Be Allowed to Marry*, CNN (Nov. 18, 1998), <http://www.cnn.com/US/9811/18/gay.marriage.03>. Nor was it lost on Vermonters that Stan descended from Remember Baker, one of the Vermont Green Mountain Boys of the American Revolution. Michael Conniff, *The 'Others' Who Made History*, CHI. TRIB. (July 27, 2003), http://articles.chicagotribune.com/2003-07-27/news/0307270289_1_lesbian-couples-openly-gay-member-vermont-supreme-court. Farnham, a school nurse, and Puterbaugh, a math professor, had fallen in love and become a couple in the 1970s. Elizabeth Mehren, *New Firestorm Erupts over Vermont's Domestic Partner Plan*, L.A. TIMES (Feb. 13, 2000), <http://articles.latimes.com/2000/feb/13/news/mn-63999>. Farnham, from a Vermont farm family and a seventh generation Vermonter, and Puterbaugh were raising a daughter but focused their public statements on their own relationship. *Id.*
- 147 Baker v. Vermont, No. S1009-97 CnC, 16-17 (Chittenden (Vt.) Super. Ct. Dec. 19, 1997). *See* Mary Bonauto et al., Brief, *The Freedom to Marry for Same-Sex Couples: The Reply Brief of Plaintiffs Stan Baker et al. in Baker et al. v. State of Vermont*, 6 MICH. J. GENDER & L. 1, 28 n.83 (1999) (addressing the trial court's opinion in *Baker*, No. S1009-97 CnC).
- 148 Bonauto, *supra* note 147, at 431-32.
- 149 *Id.* at 433-35.
- 150 Baker v. State, 744 A.2d 864, 884 (Vt. 1999).
- 151 See Brief for Respondents at 17, *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015) (No. 14-571) (“Marriage has traditionally been defined as only between opposite-sex couples because the state's interest in marriage has always been to encourage individuals with the inherent capacity to bear children to enter a union that supports raising children.”).
- 152 *Baker*, 744 A.2d at 881.

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- 153 *Id.* at 884.
- 154 *Id.* at 882.
- 155 Chief Justice Jeffrey L. Amestoy wrote several fairly candid articles about the Vermont Supreme Court's decision. *See, e.g.,* Jeffrey L. Amestoy, *Foreword: State Constitutional Law Lecture: Pragmatic Constitutionalism--Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249 (2004).
- 156 *Baker*, 744 A.2d at 886.
- 157 *Id.* at 889.
- 158 *Id.* at 886-88.
- 159 *Id.* at 887. Justice Dooley, concurring, would have used the federal equal-protection framework and applied its criteria for determining when a classification is accorded heightened scrutiny to find that strict scrutiny applied here. *See id.* at 892-93 (Dooley, J., concurring).
- 160 *Id.* at 897-912 (Johnson, J., concurring in part and dissenting in part).
- 161 *Id.* at 897 (quoting *Watson v. Memphis*, 272 U.S. 526, 533 (1963)).
- 162 *Id.* at 898.
- 163 *Id.*
- 164 WILLIAM N. ESKRIDGE, *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* ix-xiii (2002) (discussing gay rights in Hawaii and Vermont).
- 165 *Baker*, 744 A.2d at 888; *see also* Beth Robinson, *Same-Sex Marriage in Law and Society: Dartmouth College's Law Day Program 2009*, 34 VT. L. REV. 231, 231-32 (2009).
- 166 Patrick Rogers, *Love And ...*, PEOPLE (Feb. 14, 2000), <http://people.com/archive/love-and-vol-53-no-6> (quoting Gary Bauer and discussing the influence of Judaism and their mothers' experiences as Holocaust survivors on Beck and Jolles).
- 167 *See* MOATS, *supra* note 71, at 147-244 (describing the legislative process post-*Baker*).
- 168 *Id.*; Kevin J. Kelley, *Little, Big Man*, SEVEN DAYS (Aug. 9, 2000), <http://www.sevendaysvt.com/vermont/little-big-man/Content?oid=2295667> (describing the genius in Representative Little's proposal).
- 169 *Baker*, 744 A.2d at 887.

- 170 For highlights of this campaign, see generally MOATS, *supra* note 71.
- 171 See Robinson, *supra* note 9, at 250-56; Allen Gilbert, *Marion Milne, Civil Liberties Hero*, ACLU OF VERMONT (Aug. 15, 2014), <https://acluvt.org/blog/?p=2176>. In creating our nation's first civil union law, there were many heroes in addition to Beth and Susan, including Representative and Judiciary Committee Vice Chair Bill Lippert, who brought his own reality and experiences into the proceedings as an openly gay man. See generally MOATS, *supra* note 71, at 147-244; Liz Halloran, *How Vermont's 'Civil' War Fueled the Gay Marriage Movement*, NPR (Mar. 23, 2013), <http://www.npr.org/2013/03/27/174651233/how-vermonts-civil-war-fueled-the-gay-marriage-movement> ("Ultimately, it was Lippert and moderate Republican Rep. Thomas Little, House Judiciary chairman at the time, who emerged as catalysts for not only the law's creation, but also its passage.").
- 172 E.g., Carey Goldberg, *Vermont Moves Step Closer to Same-Sex Civil Unions*, N.Y. TIMES (Apr. 19, 2000), http://www.nytimes.com/2000/04/19/us/vermont-moves-step-closer-to-same-sex-civil-unions.html?_r=1.
- 173 E.g., *id.*
- 174 Robinson, *supra* note 9; see Symposium, *Marriage Law: Obsolete or Cutting Edge?*, 10 MICH. J. GENDER & L. 21, 85-86 (2003).
- 175 See Carey Goldberg, *Vermont Residents Split over Civil Unions Law*, N.Y. TIMES (Sept. 3, 2000), <http://www.nytimes.com/2000/09/03/us/vermont-residents-split-over-civil-unions-law.html>.
- 176 Elizabeth Mehren, *Voters Oust 5 Who Backed Vt. Civil Union Law*, L.A. TIMES (Sept. 14, 2000), <http://articles.latimes.com/2000/sep/14/news/mn-20942>.
- 177 An Act Relating to Civil Marriage, No. 3, § 5, 2009 Vt. Acts & Resolves 33 (codified at 15 VT. STAT. ANN. § 8 (West 2016)); see also Picard, *supra* note 71.
- 178 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). For another candid discussion of a marriage equality decision by a participating justice, see Roderick L. Ireland, *In Goodridge's Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases*, 85 N.Y.U. L. REV. 1417 (2010).
- 179 See *supra* note 125 and accompanying text.
- 180 Bonauto, *supra* note 62, at 826 n.79.
- 181 See Op. of the Justices, 780 N.E.2d 1232, 1234 (Mass. 2002).
- 182 Roderick T. Baltimore & Robert F. Williams, *The State Constitutional Roots of the "Separate but Equal" Doctrine*: Roberts v. City of Boston, 17 RUTGERS L.J. 537 (1986); see also Mary L. Bonauto, *The Litigation: First Judicial Victories in Vermont, Massachusetts, and Connecticut*, in LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA, *supra* note 38, at 80.

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- 183 Bonauto, *supra* note 182, at 80 (“When we announced the filing of *Goodridge*, ... we ensured there would be no mistaking our intentions. We were seeking marriage for same-sex couples as required by the Massachusetts Constitution, not civil unions.”); *see also* Bonauto, *supra* note 59, at 44-59.
- 184 Bonauto, *supra* note 59; Mary L. Bonauto, *Massachusetts: Cradle of Liberty*, in DEFENDING SAME-SEX MARRIAGE 1-28 (Mark Strasser et al. eds., 2007).
- 185 *See generally* Brief of Plaintiffs-Appellants, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860); Reply Brief of Plaintiffs-Appellants, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860).
- 186 Brief of Plaintiffs-Appellants, *supra* note 185 at 61-94; *see supra* notes 146-47 and accompanying text.
- 187 The seven plaintiff couples in *Goodridge* were Hillary Goodridge and Julie Goodridge; David Wilson and Robert Compton; Michael Horgan and Edward Balmelli; Maureen Brodoff and Ellen Wade; Gary Chalmers and Richard Linnell; Heidi Norton and Gina Smith; and Gloria Bailey and Linda Davies. Brief of Plaintiffs-Appellants, *supra* note 185, at 2-7; *see also* Bonauto, *Goodridge in Context*, *supra* note 59, at 31-33; Bonauto, *Massachusetts: Cradle of Liberty*, *supra* note 184, at 7-8.
- 188 Brief of Defendants-Appellees at 117, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860).
- 189 *Id.* at 117, 119.
- 190 *Goodridge v. Dep’t of Pub. Health*, No. 20011647A, 2002 WL 1299135, at *48 (Mass. Super. Ct. May 7, 2002).
- 191 Brief of Plaintiffs-Appellants, *supra* note 185, at 10-11.
- 192 *Id.* at 11-13.
- 193 *Id.* at 11.
- 194 *Goodridge*, 798 N.E.2d at 948.
- 195 *Id.* at 959.
- 196 *Id.*
- 197 *Id.* at 953, 959 (discussing *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)).
- 198 *Id.* at 948-49.
- 199 *Id.* at 958 (citing *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948); *Loving v. Virginia*, 388 U.S. 1 (1967)).

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- 200 *Id.*
- 201 *Id.* at 954.
- 202 *Id.* at 955, 956-57.
- 203 *Id.* at 968.
- 204 *Id.* at 961.
- 205 *Id.*
- 206 *Id.*
- 207 *Id.* at 962.
- 208 *Id.* at 962-63.
- 209 *Id.* at 974 (Spina, J., dissenting); *id.* at 978 (Sosman, J., dissenting); *id.* at 985 (Cordy, J., dissenting).
- 210 *Id.* at 995, 1001-02 (Cordy, J., dissenting).
- 211 *Id.* at 996.
- 212 *Ops. of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004).
- 213 Bonauto, *supra* note 59, at 44-45.
- 214 *See, e.g.*, MARC SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS--AND WON 3-146 (2014) (recounting the state legislative battle in Massachusetts). Solomon worked with the Massachusetts Freedom to Marry group and later joined MassEquality as its political director. *Id.* at xiii to xiv.
- 215 909 A.2d 89 (Conn. Super. Ct. 2006), *rev'd*, 957 A.2d 407 (Conn. 2008).
- 216 In addition to GLAD lawyers, the team of Connecticut co-counsel included Maureen M. Murphy, Kenneth Bartschi, and Karen Dowd of Horton, Shields & Knox, and different staff attorneys at the Connecticut ACLU. *Id.* at 90.
- 217 The eight plaintiff couples in *Kerrigan* were Elizabeth Kerrigan and Joanne Mock; Janet Peck and Carol Conklin; Geraldine Artis and Suzanne Artis; Jeffrey Busch and Stephen Davis; Jane Ellen Martin and Denise Howard; John

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Anderson and Garrett Stack; Barbara Levine-Ritterman and Robin Levine-Ritterman; and Damaris Navarro and Gloria Searson. *Id.* at 94.

- 218 These cases were later decided against the plaintiffs. *Conaway v. Deane*, 932 A.2d 571 (Md. 2007), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005), *rev'd and vacated*, 805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006), *abrogated by* *Obergefell*, 135 S. Ct. 2584.
- 219 Bennett Klein & Daniel Redman, *From Separate to Equal: Litigating Marriage Equality in a Civil Union State*, 41 CONN. L. REV. 1381, 1383 (2009).
- 220 An Act Concerning Civil Unions, Pub. Act Nos. 05-10, 2005 Conn. Acts 963 (2005) (codified at CONN. GEN. STAT. ANN. § 46b-38aa (2005), *invalidated by* *Kerrigan*, 957 A.2d 407).
- 221 Klein & Redman, *supra* note 219, at 1391-92; Stanback, *supra* note 86, at 95-96.
- 222 *Kerrigan*, 909 A.2d at 94-95; *see also* Stanback, *supra* note 86, at 96.
- 223 Peter D. Hart et al., Connecticut Voters' Attitudes Towards Civil Unions and Same-Sex Marriage (Sept. 1, 2006) (on file with author).
- 224 Brief for Plaintiffs-Appellants with Separate Appendix at 15, *Kerrigan*, 957 A.2d 407 (S.C. 17716).
- 225 *Id.* at 9-13.
- 226 *Id.* at 11.
- 227 *Id.* at 10-12.
- 228 *Id.* at 32-33.
- 229 Klein & Redman, *supra* note 219, at 1395-96.
- 230 Brief for Plaintiffs-Appellants with Separate Appendix, *supra* note 224, at 7-10.
- 231 *Id.* at 13.
- 232 *Id.* at 18-19; *see also* Klein & Redman, *supra* note 219, at 1393-94.
- 233 *Lawrence v. Texas*, 539 U.S. 558 (2003).

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- 234 *Id.* at 572.
- 235 *Id.* at 574.
- 236 See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).
- 237 *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008).
- 238 *Id.*
- 239 Looking to the breadth of constitutional text and case law at the state and federal levels, the court found that gay people, like women who were accorded intermediate scrutiny in the mid-1970s, had faced historical discrimination. *Id.* at 432-34. The court effectively assumed the second factor, the ability to contribute to society. *Id.* at 434-36. As to the discretionary factors for heightened scrutiny, the court considered the political power along with pervasive and sustained discrimination, with an eye toward the risk that discrimination would not be rectified sooner rather than later through the democratic process. *Id.* at 444-54. Finally, it also found sexual orientation is “immutable,” in the sense that it is a deeply held characteristic that a person should not be forced to change to avoid discrimination. *Id.* at 438-39. California made such a ruling four months earlier. *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (“[W]e conclude that sexual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision.”).
- 240 *Kerrigan*, 957 A.2d at 412. Dissenting, Chief Justice Borden, joined by one other justice, would have rejected the challenge across the board, including heightened scrutiny for sexual orientation, thereby upholding the civil union scheme and deferring to the legislative process. *Id.* at 482-514 (Borden, C.J., dissenting).
- 241 *Id.* at 412 (majority opinion).
- 242 *In re Marriage Cases*, 183 P.3d at 453.
- 243 Bonauto, *supra* note 184, at 17.
- 244 See *supra* notes 175-77 and accompanying text.
- 245 Bonauto, *supra* note 184, at 17-18.
- 246 Pam Belluck, *Massachusetts Gay Marriage to Remain Legal*, N.Y. TIMES (June 15, 2007), <http://www.nytimes.com/2007/06/15/us/15gay.html>.
- 247 Frank Phillips & Andrea Estes, *Right of Gays to Marry Set for Years to Come*, BOS. GLOBE (June 15, 2007), http://archive.boston.com/news/local/articles/2007/06/15/right_of_gays_to_marry_set_for_years_to_come/.

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- 248 See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).
- 249 Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES (Apr. 7, 2009), <http://www.nytimes.com/2009/04/08/us/08vermont.html> (describing the Vermont vote as a “watershed”).
- 250 Glenn Adams, *Maine Legalizes Gay Marriage; N.H. Legislature Votes in Favor*, SEACOASTONLINE.COM (May 6, 2009), <http://www.seacoastonline.com/article/20090506/NEWS/90506051>.
- 251 *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009).
- 252 See *supra* note 63 and accompanying text.
- 253 Bonauto, *supra* note 62, at 835 n.135.
- 254 *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state> (follow interactive site featuring map and adjustable dates). Eleven of the amendments passed during the November elections. Associated Press, *Voters Pass All 11 Bans on Gay Marriage*, NBCNEWS.COM (Nov. 3, 2004), <http://www.nbcnews.com/id/6383353/ns/politics/t/voters-pass-all-bans-gay-marriage/#.WAwW6-grLcs>.
- 255 388 U.S. 1 (1967).
- 256 *Id.* at 6, 6 n.5.
- 257 347 U.S. 483 (1954).
- 258 Luther A. Huston, *On this Day, High Court Bans School Segregation; 9-to-0 Decision Grants Time to Comply*, N.Y. TIMES LEARNING NETWORK (May 17, 1954), <http://www.nytimes.com/learning/general/onthisday/big/0517.html>.
- 259 539 U.S. 558 (2003).
- 260 *Id.* at 573.
- 261 An Act Relating to Civil Marriage, No. 3, § 5, 2009 Vt. Acts & Resolves 33 (codified at 15 VT. STAT. ANN. § 8 (West 2016)); An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Laws 150 (repealed Nov. 3, 2009, by a people's veto referendum); An Act Relative to Civil Marriage and Civil Unions, 2009 N.H. Laws ch. 59 (codified as amended in N.H. REV. STAT. ANN. § 457, 457-A (2016)). California's legislature also passed marriage bills twice, only to be vetoed by Governor Schwarzenegger. Religious Freedom and Civil Marriage Protection Act, Assemb. B. 43, 2007 State Assemb., Reg. Sess. (Cal. 2007) (vetoed Oct. 12, 2007); Religious Freedom and Civil Marriage Protection Act, Assemb. B. 849, 2005-06 State Assemb., Reg. Sess. (Cal. 2005) (vetoed Sept. 9, 2005).
- 262 Religious Freedom and Civil Marriage Equality Amendment Act of 2009, ch. 854, 1283, 312 Stat. 1391 (2009) (codified at D.C. CODE § 46-401 (West 2016)).

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- 263 Marriage Equality Act, ch. 95, 2011 N.Y. Laws 749 (codified at NY DOM. REL. LAW §§ 10-a, 10-b, 13 (McKinney 2016)).
- 264 Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
- 265 *Id.* at 871.
- 266 Nat'l Pride at Work, Inc. v. Governor of Mich., 748 N.W.2d 524, 543 (Mich. 2008).
- 267 Press Release, *supra* note 14.
- 268 *See supra* notes 62-64 and accompanying text. *See generally* Mary L. Bonauto, *DOMA Damages Same-Sex Families and Their Children*, 32 FAM. ADVOC. 10 (2010) (describing DOMA and the *Gill* litigation).
- 269 699 F. Supp. 2d 374 (D. Mass. 2010).
- 270 *Id.* at 396-97; Massachusetts v. U.S. Dep't of Human & Health Servs., 698 F. Supp. 2d 234, 253 (D. Mass. 2010), *aff'd*, 682 F.3d 1, *cert. denied* 133 S. Ct. 2887 (*Gill* and *Massachusetts* were coordinated on appeal).
- 271 In *Strauss v. Horton*, the California Supreme Court rejected a challenge to Proposition 8 as an impermissible revision of the state constitution, rather than an amendment. 207 P.3d 48, 122 (Cal. 2009), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see* CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDES: NOV. 4, 2008--PRESIDENTIAL ELECTION 128 (2008), <http://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>.
- 272 591 F.3d 1126 (9th Cir. 2010).
- 273 Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK (Jan. 8, 2010), <http://www.newsweek.com/conservative-case-gay-marriage-70923>.
- 274 Press Release, *supra* note 14.
- 275 *New Hampshire House Rejects Marriage and Personhood Questions in Same Day*, BALLOTPEDIA (Feb. 19, 2010), https://ballotpedia.org/New_Hampshire_House_rejects_marriage_and_personhood_questions_in_same_day; Abby Goodnough, *Challenge to Gay Marriage Fails in New Hampshire*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/22/us/politics/new-hampshire-refuses-to-repeal-gay-marriage-right.html>.
- 276 Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act>.

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- 277 Josh Earnest, *President Obama Supports Same-Sex Marriage*, WHITE HOUSE BLOG (May 10, 2012, 7:31 PM), <https://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>.
- 278 Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN (Nov. 7, 2012), <http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage>.
- 279 *Id.*
- 280 *United States v. Windsor*, 133 S. Ct. 786 (2012) (granting certiorari).
- 281 KAPLAN & DICKEY, *supra* note 19, at 201. We assisted the *Perry* team with their amici effort too.
- 282 *United States v. Windsor*, 133 S. Ct. 2675, 2681, 2692, 2695 (2013).
- 283 *Id.* at 2692.
- 284 *Id.* at 2693.
- 285 *Id.*
- 286 *See supra* note 63 and accompanying text.
- 287 *Windsor*, 133 S. Ct. at 2694.
- 288 *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).
- 289 *Id.*
- 290 Among the books about *Perry* are JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* (2014); DAVID BOIES & THEODORE B. OLSON, *REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY* (2014); and KENJI YOSHINO, *SPEAK NOW: MARRIAGE EQUALITY ON TRIAL* (2015).
- 291 *See supra* note 63 and accompanying text.
- 292 *See, e.g.*, Matt Foreman, *A Year After Windsor: Progress and Pitfalls for Gay Rights*, HUFFINGTON POST (June 27, 2014), http://www.huffingtonpost.com/matt-foreman/a-year-after-windsor-prog_b_5534990.html (describing “a flood of litigation around the country” following *Windsor*, amounting to over seventy cases in thirty-one states and Puerto Rico by June 2014). Following the decision, “every single state where gay and lesbian couples [were] not able to marry [was] facing a lawsuit.” *Id.*

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- 293 Memorandum from Attorney Gen. Eric Holder to President Barak Obama (June 20, 2014), <https://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf>.
- 294 *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla.), *aff'd on other grounds sub nom. Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va.), *amended and superseded by* Civil No. 2:13cv395, 2014 WL 10022686 (E.D. Va. Feb. 14, 2014), *aff'd sub nom. Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1163-64 (S.D. Ind.), *aff'd*, 766 F.3d 648 (7th Cir. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014), *aff'd sub nom. Baskin*, 766 F.3d 648; *Latta v. Otter*, 19 F. Supp. 3d 1054, 1086-87 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir.), *vacated*, 135 S. Ct. 345 (2014).
- 295 *Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Smith v. Bishop*, 135 S. Ct. 271 (2014); *Rainey v. Bostic*, 135 S. Ct. 286 (2014); *McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Schaefer v. Bostic*, 135 S. Ct. 308 (2014); *Bogan v. Baskin*, 135 S. Ct. 316 (2014); *Walker v. Wolf*, 135 S. Ct. 316 (2014).
- 296 *DeBoer v. Snyder*, 772 F.3d 388, 420-21 (6th Cir. 2014), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
- 297 *Obergefell*, 135 S. Ct. at 2587.
- 298 April and Jayne, both nurses, sought to marry so they could both be legal parents of the children one or the other had adopted. Tresa Baldas, *Nurses Take Michigan Gay Marriage Case to High Court*, DETROIT FREE PRESS (Nov. 17, 2014), <http://www.freep.com/story/news/local/michigan/2014/11/17/gay-marriage-michigan-supreme-court/19158651/>; Cassandra Spratling, *Same-Sex Couples Brace for Supreme Court Decision*, DETROIT FREE PRESS (Apr. 27, 2015), <http://www.freep.com/story/news/local/michigan/2015/04/25/gay-couples-await-supreme-court-decision/26372481/>. Attorneys from private practice, Carole Stanyar, Ken Mogill, and Dana Nessel, brought the case and saw it through. See *Obergefell*, 135 S. Ct. at 2592.
- 299 *Obergefell*, 135 S. Ct. at 2593.
- 300 *Id.* There were two recognition cases from Ohio. One was Jim Obergefell's, litigated by Alphonse Gerhardtstein with the ACLU joining on appeal. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 972 (S.D. Ohio 2013), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. The second was *Henry v. Himes*, litigated by Attorney Gerhardtstein and Lambda Legal lawyers Susan Sommer, Paul Castillo, and Marshall Cook. 14 F. Supp. 3d 1036, 1038 (S.D. Ohio 2014), *rev'd sub nom. DeBoer*, 772 F.3d 388, *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. This second case focused on recognition for purposes of amending children's birth certificates to reflect who their legal parents are. *Id.* at 1040. For more on Jim Obergefell's story, see DEBBIE CENZIPER & JIM OBERGEFELL, LOVE WINS: THE LOVERS AND LAWYERS WHO FOUGHT THE LANDMARK CASE FOR MARRIAGE EQUALITY (2016). The Tennessee case also focused on recognition. *Tanco v. Haslam*, 7 F. Supp. 3d 759, 762 (M.D. Tenn.), *rev'd sub nom. DeBoer*, 772 F.3d 388, *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. It was originally brought by attorneys Shannon Minter, David Codell, and Chris Stoll from the National Center for Lesbian Rights, with a team from Nashville, including long-time advocate Abby R. Rubinfeld, and William L. Harbison and J. Scott Hickman, as well as Regina M. Lambert from Knoxville. *Id.* at 761. A Ropes & Gray team, led by Douglas Hallward-Driemeier, joined at the Supreme Court stage. The Kentucky cases addressed both the right to marry and marriage recognition. *Id.* at 770. They were initially brought by two Louisville firms, including attorneys Daniel J. Canon, Laura Landenwich, and L. Joe Dunman, Shannon Fauver and Dawn Elliott. The ACLU team, led by James Esseks, joined at the Sixth Circuit, while Jeffrey Fisher and Brian Wolfman from the Stanford Supreme Court Clinic joined at the Supreme Court, as did then-ACLU Legal Director, Steven Shapiro.

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301 *Obergefell*, 135 S. Ct. at 2591.

302 *Id.* at 2598, 2602-04.

303 *Id.* at 2596-97.

304 *Id.* at 2597.

305 *Id.* at 2599.

306 *Id.* at 2600.

307 *Id.* at 2605.

308 *Id.*

309 *Id.* at 2606, 2608-11.

310 N.H. STUDY COMM., MINORITY REPORT FOR THE COMMISSION ESTABLISHED BY SB 427 TO STUDY SAME SEX MARRIAGE AND ITS LEGAL EQUIVALENTS 13 (2005), https://www.glad.org/uploads/docs/advocacy/NH_minority_report.pdf (testimony of Representative Byron Rushing on Sept. 19, 2005).

311 517 U.S. 620, 631-36 (1996).

312 539 U.S. 558, 578-79 (2003).

313 133 S. Ct. 2675, 2695-96 (2013).

314 *Loving v. Virginia*, 388 U.S. 1 (1967).

315 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

316 *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

317 429 U.S. 190 (1976).

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