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IN CELEBRATION OF ROBERT F. WILLIAMS*

*Mary L. Bonauto**

This is a wonderful gathering and celebration of Bob. It's great to be here with you and hear your recollections about how Bob has mentored you and contributed to such a phenomenal body of scholarship and case law.

I am here with enduring gratitude to Bob for his focusing on and growing the field of state constitutional law and as one of legions of people he has helped with litigation.

I first heard Bob speak at a public lecture of the Supreme Judicial Court Historical Society in Boston in November 2000, about a recently concluded case in Vermont in which the high court held that the "common benefits clause" of the constitution meant that same-sex couples must be provided with the same protections and obligations of marriage as different-sex couples, leaving it to the legislature whether to amend the marriage laws or craft a new set of laws.[1] Along with (now Justice) Beth Robinson and Susan M. Murray, two Vermont lawyers at Langrock, Sperry & Wool, I was co-counsel for GLAD in the case.[2]

* These are edited remarks from a celebration of Robert F. Williams delivered at Rutgers Law School on March 5, 2020.

1. Baker v. State, 744 A.2d 864, 867 (Vt. 1999). For a published version of the remarks, see generally 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).

2. *Baker*, 744 A.2d at 866. With the enduring efforts of Robinson, Murray, and the Vermont Freedom to Marry Task Force, in 2009, Vermont became the first state to legislate equal access to marriage and did so by overriding a gubernatorial veto. Beth Robinson, *Same-Sex Marriage in Law and Society: Dartmouth College's Law Day Program 2009*, 34 VT. L. REV. 231, 239 (2009); *see also* James Thilman, *'The State of Marriage': How Vermont Paved the Way for LGBT Equality*, HUFFINGTON POST (June 12, 2015, 8:12 PM), https://www.huffpost.com/entry/state-of-marriage-vermont-documentary_n_7545936. *See generally* THE STATE OF MARRIAGE (FLOATING WORLD PICTURES 2015), https://www.floatingworldpictures.com/the-state-of-marriage-home (providing a historical account of co-counsel's contributions to the marriage equality movement in Vermont).

After the lecture, I looked him up and began to discover what a treasure he is. His embrace of state constitutional law was not instrumental, as some may read Justice William J. Brennan's famed 1977 law review article urging a turn to state constitutional law.[3] *Instead, his writing demonstrated then, as it does now, the integrity of the field, grounded as it is in constitutional text, historical context, and particular structural features of the various state constitutions and their institutional concerns.*[4]

At GLAD, we were already at work preparing our state constitutional challenge to the exclusion of same-sex couples from marriage in Massachusetts. When that case, known as Goodridge v. Department of Public Health,[5] *went up to the high court on direct appellate review from a loss in the trial court, I reached out to Bob about whether he and colleagues might be interested in writing an amici curiae brief for the court. He readily agreed even though he did not know me, and this was a time when most people thought our chances were remote at best.*

With time, I learned that he and Professor Lawrence Friedman, of the New England School of Law, were collaborating on a brief with other scholars in the field. In addition to Bob and Lawrence, I credit the other signatories—Vincent M. Bonventre, Christian G. Fritz, Daniel Gordon, Joseph R. Grodin, Ann Lousin, Neil Colman McCabe, and James G. Pope—for an amici brief with decided resonance with the court's ruling.[6] *The integrity of its methodology makes it a model of state constitutional law advocacy and is reproduced here. This short tribute cannot do justice to Professor Williams nor to the powerfully reasoned and historic majority opinion in Goodridge, authored by Chief Justice Margaret H. Marshall, which broke*

3. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

4. *See generally, e.g.*, Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimate Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983).

5. 798 N.E.2d 941 (Mass. 2003).

6. Brief for Professors of State Constitutional Law: Robert F. Williams et al. as Amici Curiae Supporting Plaintiffs, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (No. 08860) [hereinafter Scholars Brief]. This brief was filed by the Boston law firm Foley Hoag LLP. *Id.*

the historical barrier of exclusion on same-sex couples legally marrying.

The first two paragraphs of the majority opinion evinced a court attuned to its constitutional duty to decide the case with the full force of the commonwealth's constitutional legacy of inherent equality for all persons:

> *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 benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. We are mindful that our decision marks a change in the history of our marriage law. . . .*
>
> *. . . Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.*[7]

Of course, it was the supreme judicial court justices who rendered and remain responsible for the Goodridge decision, including the thoughtful concurring opinions of Justice John Greaney[8] *and the dissenting opinions.*[9] *No one can know the precise influence of any particular brief on their opinions. That said, the State Constitutional Scholars Brief hewed to the same constitutional themes and same rich command of two centuries of case law that characterize the remarkable Goodridge ruling and the concurring opinion.*

For example, the Scholars Brief demonstrated how the marriage prohibition implicated both individual decision-making about "family and intimate relationships" and

7. *Goodridge*, 798 N.E.2d at 948.

8. *Id.* at 970–74 (Greaney, J., concurring).

9. *Id.* at 974–78 (Spina, J., dissenting); *id.* at 978–82 (Sosman, J., dissenting); *id.* at 983–1005 (Cordy, J., dissenting).

"restrict[ed] . . . completely" the protections afforded by the marriage laws.[10] *By "entirely abridg[ing]" for only some persons both "self-determination" and excluding "utterly" those same individuals "from the benefits and privileges that other[s] enjoy," the marriage prohibition was "antithetical to the most basic conception of the equality and liberty values reflected in the Declaration of Rights."*[11]

The Scholars Brief subdued the heat generated by a marriage case at that time with the light of expert command of the origins of the constitution and 200 years of precedent. To the Scholars, this was simply another case calling for constitutional review under familiar and settled principles where a ruling for the couples "fit[] comfortably among the [c]ourt's prior decisions."[12] *Indeed,*

> *A contrary decision would undermine the inherent equality and the concomitant anti-discrimination and inclusion principles, as well as the value of equality claims as a means by which the community may regulate governmental action. Not least, it would deny the freedom to make self-determining choices to a large number of individuals in the Commonwealth, thereby subverting the self-autonomy upon which the framers' view of constitutional government was founded.*[13]

In other words, it was "precisely this kind of discrimination that the framers sought to preclude" and that the court should declare unconstitutional.[14] *Of course, that is precisely what the court did.*

10. *See* Scholars Brief, *supra* note 6, at 49.
11. *Id.* at 49–50.
12. *Id.* at 49.
13. *Id.*
14. *Id.* at 50.

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I. THE JUDICIAL ROLE IN A SYSTEM OF CHECKS AND BALANCES

Who decides whether the state's marriage laws must include same-sex couples? As advocates seeking the first ever state high court invalidation of a marriage ban, we knew that democratic process arguments would tug at the court. We were thrilled to see the State Constitutional Scholars Brief address this issue at the outset. It emphasized the high court's unique role and "duty" to address issues in which governmental action is or may be "plainly inconsistent" with constitutional provisions.[15] Beyond this venerable separation of powers principle, the brief addressed the court's "long embrace [of] its responsibility to interpret the constitution."[16]

The *Goodridge* majority directly refuted the assertion that only the legislature could "control and define [marriage's] boundaries."[17] The constitution

> "[R]equires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded. . . . The Legislature in the first instance, and the courts in the last instance, must ascertain whether . . . a rational basis exists."[18]

15. *Id.* at 4–5 (quoting Commonwealth v. Blackington, 41 Mass. (24 Pick.) 352, 356 (1837); Colo v. Treasurer & Receiver General, 392 N.E.2d 1195, 1197 (1979)) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.)).

16. *Id.* at 2.

17. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003).

18. *Id.* at 966. Justice Greaney also addressed this issue, responding to the argument that marriage is definitionally the legal union of a man and a woman. *Id.* at 973 (Greaney,

Accordingly, the court also rejected even more extreme arguments for "total deference" to legislative determinations about marriage which would have "stripped" the judiciary "of its constitutional authority to decide challenges" in the areas of child rearing, family relationships, forced sterilization, and more.[19]

II. ESTABLISHED METHODS OF CONSTITUTIONAL INTERPRETATION

The Scholars Brief set forth the court's historic acknowledgement of the state constitution as "a source of unique guarantees in respect to individual rights and liberties."[20] Given the supreme judicial court's body of precedent, the *Goodridge* majority readily affirmed the Massachusetts Constitution as "more protective" of individual rights than the Federal Constitution,[21] and "less tolerant of government intrusion into the protected spheres of private life."[22] Its decision rested solely on state grounds "to accord greater protection to individual rights than do similar provisions of the United States Constitution," as anticipated in our federal system.[23]

As the amici brief explained, the court's typical modes of interpretation focus on a few factors.

1. History: History can reveal "the conditions under which" a provision was framed, the ends it was "designed to accomplish" and the "evils under which it was hoped to remedy."[24]

2. Text: Text is obviously a central focus, and interpretation "[looks] to the language and structure of [a] provision so that it is

J., concurring). Not only can marriage not be defined by those to whom it has been inaccessible, but in the Justice's view, "the case requires that we confront ingrained assumptions" regarding marriage and historical roles of men and women "in light of the unequivocal language of art. 1," requiring that governmental conduct "conform[] to the supreme charter of our Commonwealth." *Id.*

19. *Id.* at 966 n.31 (majority opinion).

20. Scholars Brief, *supra* note 6, at 6.

21. *Goodridge*, 798 N.E.2d at 959 & n.18.

22. *Id.* at 949, 959 (observing that the Massachusetts Constitution protects individual rights more "zealously" than the Federal Constitution, even when they both use "essentially the same language").

23. *See id.* at 959 (quoting Arizona v. Evans, 514 U.S. 1, 8 (1995)).

24. Scholars Brief, *supra* note 6, at 8 (citing Cohen v. Attorney General, 259 N.E.2d 539, 543 (Mass. 1970)).

construed . . . to accomplish a reasonable result and to achieve its dominating purpose."[25]

3. Structural and Institutional Considerations: These considerations work together to "situate [the] understanding" of any particular provision "within the fabric of the Constitution as a whole," that is, as a framework "establish[ing] an enduring system of government in which the agencies of the state respect the importance of individual rights and liberties" and with appreciation of institutional concerns such as allocation of powers and checks and balances.[26]

4. Other Constitutional Jurisprudence: The court is open to being "guided by aspects of federal and other states' constitutional jurisprudence," as appropriate, to examine construction of similar provisions or insights gained from recurring issues.[27]

The Scholars Brief discussed relevant history and the textual provisions at issue in *Goodridge*. The original 1780 Constitution was penned by John Adams after "[b]oth radicals and conservatives rejected the proposed Constitution of 1778 for its failure to include a bill of rights, and, in particular, provisions guaranteeing the equality of citizens."[28] What modern readers might view as redundant "rights" provisions were instead revealed by the brief as comprehensively enumerating aspects of equality and "elucidat[ing] the animating underpinnings of the Revolution itself."[29]

The constitutional commitment to equality extends beyond a "right of all individuals to equal participation in the political process," the amici brief argued, and also to "its logical corollary, the revolutionary notion of inherent equality: that all individuals possess the same unalienable rights and, as to the exercise of those rights and the pursuit of their personal interests, none shall be favored above others."[30] By prioritizing inherent equality in article I of the Declaration of Rights, the constitution

25. *Id.* (citing McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 523 (Mass. 1993) (quotation omitted)).
26. *Id.* at 9–10.
27. *Id.* at 6, 10.
28. *Id.* at 17–18.
29. *Id.* at 18–19.
30. *Id.* at 19.

promises that no one is born to rights that are not otherwise shared by all.[31]

Complementing this commitment to inherent equality are specific provisions elaborating antidiscrimination and inclusion principles—article VI; assurances that government is for the common good, rather than favoritism to any class—article VII; and a "right to be protected" for "[e]ach individual of the society" in "enjoyment of his . . . liberty. . ."—article X.[32] These constitutional principles "command[] a recognition that individuals are inherently equal" such that the commonwealth "cannot declare an individual or group less worthy than any other to participate fully and equally in the life of the community."[33]

From an institutional and structural perspective, the Scholars Brief argued the "primacy" of equality and liberty as constitutional values from their placement in the forefront in the Massachusetts Declaration of Rights.[34] Thus, where the legislature's regulatory power extended "to nearly every aspect of the lives of citizens, the commitment to equality" served as a check on governmental authority, "to prevent arbitrary discrimination against particular individuals or groups."[35] Consequently, inequality claims required the government to explain "*how* . . . governmental line-drawing in respect to benefits and burdens enhances the public welfare in a given instance."[36] Institutionally, this imposes a duty on the court "to look carefully" at both the purpose served and "the degree of harm to the affected [individuals]."[37]

Finally, the Scholars Brief pointed to other constitutional jurisprudence, and particularly Vermont's *Baker v. State*, discussed above, as "[t]he most comprehensive state constitutional analysis of the

31. *See* MASS. CONST. art. I (amended 1976). The Massachusetts high court relied on this article to declare that enslaving persons was forbidden in Massachusetts. 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). However, at a later time, the court found article I to be no impediment to segregation of the Boston public schools. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 209–10 (1849); *see also* Mary Bonauto, *Equality and the Impossible–State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1503 & nn.120, 123 (2016).

32. The text of articles I, VI, VII and X of the Declaration of Rights are set forth in Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 950 n.7 (Mass. 2003), and were discussed in the Scholars Brief. Scholars Brief, *supra* note 6, at 22–28 (quoting Holden v. James, 11 Mass. (1 Tyng) 396, 401 (1814)). As the Brief observed, article X was long understood to protect the "'first principles' of liberty and equality." *Id.* at 28.

33. Scholars Brief, *supra* note 6, at 29.

34. *Id.* at 31.

35. *Id.* at 32.

36. *Id.* (emphasis added).

37. *Id.* at 33 (quoting English v. New England Med. Ctr., Inc., 541 N.E.2d 329, 333 (Mass. 1989) (internal quotations omitted)).

issues."[38] Particularly noteworthy in the *Goodridge* majority opinion was its holistic analysis of the unequal treatment claim in light of the interests implicated by the protections, benefits and obligations of marriage, while the Court also examined whether a competing government interest justified the exclusion.[39]

While this fulsome discussion of the historical architecture of the equality and liberty guarantees was not addressed in the *Goodridge* majority opinion, the majority and concurring opinions keenly analyzed the many facets of the equality and individual liberty implicated by cases about marriage and families.

III. ANALYSIS IN THE GOODRIDGE MAJORITY OPINION

Speaking at a high level of generality, once the court declared its obligation to decide the case, its analysis proceeded in three overlapping parts. First, it acknowledged the central question: whether the historic limitation on marriage was a legitimate regulation of marriage or an unconstitutional exclusion from it. It explored that question by "considering the nature of civil marriage itself."[40] Second, it discussed the other historical regulations of marriage in light of distinct but interwoven equality and liberty guarantees, as well as the standard of review.[41] Finally, it addressed the analyses of other courts and considered justifications for the laws advanced by the commonwealth and its amici, and then the remedy.[42]

A. "Civil Marriage Itself"

First, the court reasserted the obvious: it was reviewing a law. As the court observed, "the government creates civil marriage" and there are "three partners" to each marriage, the third of which is the state, which sets the terms of who may marry and the "obligations, benefits, and liabilities attach[ed]."[43] As a "wholly secular institution" that was "created and regulated through" the lawmaking power, it is "bounded" by the state constitution.[44] The court wryly observed, "for all the joy and

38. *Id.*

39. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003); *see also id.* at 34.

40. *See Goodridge*, 798 N.E.2d at 954–58.

41. *See id.* at 958–61.

42. *See id.* at 961–70.

43. *Id.* at 954.

44. *Id.* (explaining that marriage laws evince the legislative power to create laws "secur[ing] the health . . . or general welfare of the community" (citing Op. of the Justices, 168 N.E.2d 858, 873 (Mass. 1960); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85

solemnity that normally attend a marriage," the law "governing entrance to marriage[] is a licensing law."[45]

The court examined marriage's indisputable significance both for residents within its jurisdiction and as an institution for the commonwealth to illuminate the significance of a legally married status. To individuals, marriage is "a deeply personal commitment to another human being," while it is also "a social institution of the highest importance."[46] It enjoys a "paradoxical status" as a "State-conferred benefit (with its attendant obligations) and a multi-faceted personal interest of 'fundamental importance,'"[47] with "the decision whether and whom to marry . . . among life's momentous acts of self-definition."[48]

Beyond the transformative effect of legal and societal protection for "commitment to an intimate and lasting human relationship" or status,[49] it addressed the concrete significance of obtaining a legally certified marriage. Marriage conveys "enormous" benefits, "tangible as well as intangible," and obligations, that "touch[] nearly every aspect of life and death."[50] This stable framework of protections and responsibilities not only affects the marrying couple, but can also provide increased economic benefits to their children based on the parents' marital status.[51] In light of its many dimensions, marriage "has long been termed 'a civil right.'"[52]

The court looked to the iconic legal precedents about marriage to situate the significance of the present moment. In *Perez v. Sharp*, California's high court became the first in the nation to invalidate a race-based ban in marriage on equal protection and due process grounds.[53] Nineteen years later, the U.S. Supreme Court invalidated all remaining interracial marriage bans in *Loving v. Virginia* on those same grounds.[54] To the *Goodridge* majority, "the right to marry means little if it does not include the right to marry the person of one's choice."[55] The fact of a long

(1851))). The court referenced those with "deep-seated religious moral and ethical convictions," both those who would deny marriage and those who would support it, but set aside those views as not answering "the question before us" which concerned only "the Massachusetts Constitution as a charter of governance for every person properly within its reach." *Id.* at 948.

45. *Id.* at 952.
46. *Id.* at 954 (quoting French v. McAnarney, 195 N.E. 714, 715 (Mass. 1935)).
47. *Id.* at 957 n.14. (quoting Zablocki v. Redhail, 434 U.S. 374 (1978)).
48. *Id.* at 955.
49. *Id.* at 957 (quoting Baker v. State, 744 A.2d 864, 889 (Vt. 1999)).
50. *Id.* at 954–55.
51. *Id.* at 956–57.
52. *Id.* at 957 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).
53. *Id.* at 958 (citing Perez v. Sharp, 198 P.2d 17 (Cal. 1948)).
54. *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967)).
55. *Id.*

exclusion cannot itself justify continued exclusion. Instead, historical practice "must yield to a more fully developed understanding of the invidious quality of the discrimination," even when the remedy to that invidious exclusion, inclusion in civil marriage, "might not reflect a broad social consensus."[56]

The court reinforced its opinion with the lessons of history. It discussed other instances where core features of marriage were challenged as unjust and recurring "[a]larms" sounded about the "imminent erosion of the 'natural' order."[57] With the instructive example of the interracial marriage bans, as well as challenges to women's legal subordination in marriage under the once-ubiquitous coverture system, and the restrictions on ending failed marriages, the court took a cue from Justice Ruth Bader Ginsburg's U.S. Supreme Court opinion in *United States v. Virginia*, finding that "[t]he history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded.'"[58] That, of course, was what the couples in *Goodridge* were seeking.

B. Freedoms Protected by the Massachusetts Liberty and Equality Safeguards

The supreme judicial court framed up the possible questions to be answered as whether there is an *equal right* to marry, or the *right to marry* one's chosen partner.[59] The court answered its question by looking to the linkage between equal protection and due process in this context. The court explained that the "individual liberty and equality safeguards" protect both an individual's "freedom from" government intrusion in protected decision making and "freedom to" join in "benefits created by the State for the common good."[60]

These interlocking protections apply to "every individual[]" when deciding on the "basic" rights of "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family."[61] Moreover, these rights must be applied to every individual under the Massachusetts Constitution because "assurance that the laws will apply equally to persons in similar situations" is "central to personal freedom and security."[62]

56. *Id.* at 958 & n.16.
57. *Id.* at 965–67.
58. *Id.* at 966–67 (quoting United States v. Virginia, 518 U.S. 515, 557 (1996)).
59. *Id.* at 953.
60. *Id.* at 959 (citations omitted).
61. *Id.*
62. *Id.*

Justice Greaney's concurrence agreed with the majority opinion that equality and liberty both apply to the restrictions here. His account started with article I of the Declaration of Rights as guaranteeing "to all people in the commonwealth—equally—the enjoyment of rights that are deemed important or fundamental."[63] The sex-based limitation on marriage for otherwise qualified persons thus constituted a "categorical restriction of a fundamental right" and "disqualifies an entire group of . . . citizens and their families from participation in an institution of paramount legal and social importance."[64] Further, the laws created a statutory classification based on the sex of the persons who wish to marry since "an individual's choice of marital partner is constrained because of his or her own sex."[65]

The court decided the case under rational basis review without reaching questions about heightened review.[66] However, this was not the toothless version of rational basis advanced by the commonwealth, but a real means–ends analysis as had been applied in cases ranging from nonmarital children to fee mandates to rate setting.[67] Thus, for due process claims, rational basis analysis required a "real and substantial relation" to the public welfare, not a conjectured one.[68] For equal protection claims, rational basis review "required that 'an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.'"[69]

63. *Id.* at 970 (Greaney, J., concurring).

64. *Id.*

65. *Id.* at 971. Justice Greaney wrote separately to analyze the constitutional defects, similar to those identified in Vermont's marriage statutes in the *Baker* concurrence, as including sex discrimination. *Id.* at 271 & n.2; cf. Baker v. State, 744 A.2d 864, 904–12 (Vt. 1999) (Johnson, J., concurring and dissenting). Where the right to be free from discrimination based on sex extends to individuals, Hillary Goodridge is prevented from marrying Julie Goodridge because of her sex, not her sexual orientation. *Goodridge*, 798 N.E.2d at 971 & n.2. The Scholars Brief argued for strict scrutiny of the marriage ban because marriage implicates a fundamental liberty interest and because sexual orientation classifications are suspect, which it framed in terms of class-based mistreatment due to "historical or social prejudices." *See* Scholars Brief, *supra* note 6, at 35–42. It also argued that the marriage could not survive rational basis review. *See id.* at 43–48.

66. *Goodridge*, 798 N.E.2d at 961 & n.21 (majority opinion) (stating that the court need not decide whether sexual orientation is a suspect classification to resolve the case).

67. *Id.* at 960 & n.20.

68. *Id.* at 960 (citations omitted).

69. *Id.* (quoting English v. New England Med. Ctr., 541 N.E.2d 329, 333 (Mass. 1989) (quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring))). In concurrence, Justice Greaney applied strict scrutiny, such that the law could not be enforced absent a compelling purpose "that can be accomplished in no other reasonable manner." *Id.* at 972 (Greaney, J., concurring).

C. "The Marriage Ban Works a Deep and Scarring Hardship on a Very Real Segment of the Community for No Rational Reason."[70]

Evaluating the rationales offered for the marriage prohibition, the court concluded the justifications "fail[] to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex."[71]

First, the court considered the trial court's rationale and commonwealth's claim that the primary purpose of marriage is procreation. The court relied on the State's own laws and legal history to reject this assertion. The marriage licensing regime requires no "ability or intention to conceive children by coitus," and, for well over 100 years, people who have never consummated their marriage "may be and stay married."[72] Even "[p]eople who cannot stir from their deathbed may marry."[73] This claimed justification also directly conflicted with numerous state policies that "affirmatively facilitate[]" bringing children into a family without regard to marital status or sexual orientation of the individuals and regardless of whether the child comes to a family through adoption, birth, or with "assistive technology" to conceive the child.[74] Isolating procreation as the source of the right to marry was also too "narrow" a focus in light of the "overlapping realms of personal autonomy, marriage, family life, and child rearing" implicated by marriage.[75] The "marriage is procreation" argument from the commonwealth instead "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect."[76]

The court then considered the second justification, that is, the "paramount State policy" of "[p]rotecting the welfare of children."[77] The court accepted this interest but concluded the marriage ban "cannot plausibly further this policy."[78] State law foreclosed these arguments by protecting "variations" of the "modern family" in parentage and paternity

70. *Id.* at 968 (majority opinion).
71. *Id.*
72. *Id.* at 961. Even in the long-ago era of fault-based divorce, the court noted that inability to engage in sexual relations could be a basis for terminating a marriage at the election of a disaffected spouse who had no knowledge of any impediment to sexual relations, but such incapacity did not automatically void a marriage. *Id.* at 961 n.22.
73. *Id.* at 961.
74. *Id.* at 962.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

proceedings and through adoption, de facto parenthood and more, and all without regard to marital status or sexual orientation.[79] To the contrary, the marriage ban irrationally undermined the asserted child welfare interest insofar as it denies "an important source of security and stability" to same-sex couples and their children, while doing nothing to "make the children of opposite-sex couples more secure."[80] By crediting the state's existing policies facilitating and recognizing parentage by same-sex couples, the court rejected any claimed need for a "battle of the experts" about the long term effect on children from being raised by same-sex parents as an issue already decided, because the legislature must have already concluded that "a child's best interests is not harmed by being raised and nurtured by same-sex parents."[81]

The court then considered and rejected the commonwealth's argument that "limiting marriage to opposite-sex couples furthered the legislature's interest in conserving scarce State and private financial resources."[82] As with the child welfare argument, the interest was valid, but the marriage ban "bears no rational relationship to the goal of economy."[83] In light of the number of LGBTQ people raising children or caring for elderly family members, including among the plaintiffs, it rejected the "conclusory generalization" that same-sex couples were less financially dependent on each other.[84] Moreover, the state marriage laws did not condition public and private benefits "on a demonstration of financial dependence," and in any event, "marriage creates legal dependency between spouses."[85]

Justifications raised by amici, such as the possibility of trivializing or destroying marriage, were met with an explanation of the *Goodridge* plaintiffs' claims:

> [T]he plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not attack . . . the other gate-keeping provisions of the marriage licensing law. . . . If anything, extending civil marriage to same-sex couples reinforces

79. *Id.* at 963.

80. *Id.* at 963–64 ("It cannot be rational" to deny protections to children "because the State disapproves of their parents' sexual orientation").

81. *Id.* at 965 n.30. ("We give full credit to the Legislature for enacting a statutory scheme of child-related laws that is coherent, consistent and harmonious."). Finally, the court rejected as lacking in foundation the argument that the marriage ban "will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children." *Id.* at 963.

82. *Id.* at 964.

83. *Id.*

84. *Id.*

85. *Id.* at 964 & n.27.

> the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring places of marriage in our laws and in the human spirit.[86]

Turning then to remedy, the court refined the common law meaning of civil marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others," while retaining the other marriage qualifications, and stayed the judgment for a time to allow the legislature to take any appropriate action.[87]

* * *

The Scholars Amici Brief is a masterwork of advocacy scholarship that resonates deeply with the majority and concurring opinions. In emphasizing that the commonwealth had "failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex," the majority and concurring opinions, like the Scholars Brief, take cognizance of the commonwealth's LGBTQ inhabitants and deemed them inherently equal to others and meriting the same community protections, on the same terms as applied to others.[88] To the majority, the exclusion of LGBTQ people worked "a deep and scarring hardship on a very real segment of the community," just as the Scholars Brief argued the Declaration of Rights "continues to guarantee all citizens full membership in the community created by the Massachusetts Constitution of 1780."[89]

While I am here in gratitude for the heart and expertise in the *Goodridge* Scholars Brief, I am also here to celebrate all of Bob's co-counseling, advising, and amici brief writing on a rich array of cases with colleagues across the nation and the world. He has shared his enthusiasm and prodigious intellect to inspire generations of students, lawyers and scholars to appreciate the relevance, power and possibility

86. *Id.* at 964–65.

87. *Id.* at 969–70. After *Goodridge*, the State Senate asked for an advisory opinion on the constitutionality of a marriage ban along with a civil union scheme. Op. of the Justices to Senate, 440 Mass. 1201, 1202–03 (2004). In the course of opining that such a bill would "maintain[] and foster[] a stigma of exclusion that the Constitution prohibits," it also noted that the reason for the stay of the mandate was to "afford the Legislature an opportunity to conform the existing statutes to the provisions of the *Goodridge* decision." *Id.* at 1208, 1204.

88. *Goodridge*, 798 N.E.2d at 968, 970 (majority opinion and Greaney, J., concurring); Scholars Brief, *supra* note 6, at 3.

89. *Goodridge*, 798 N.E.2d at 968 (majority opinion); Scholars Brief, *supra* note 6, at 3.

of state constitutions and state constitutional adjudication.[90] In a piece published on the internet with Rutgers Law Professor Katie Eyer—a one class lesson on state constitutional law that can easily be incorporated into other classes—he keeps getting the word out.[91] Thankfully, he keeps on writing, updating, and collaborating with others of us.

There is a saying of Mahatma Gandhi we've all heard—"Be the change you wish to see in the world." By saying "yes" in all of the ways Bob has, he has made such a difference for this field and certainly for more justice in the world.

90. *See, e.g.*, ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, STATE CONSTITUTIONAL LAW: CASES & MATERIALS (5th ed. 2015); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (2009).

91. Robert F. Williams & Katie R. Eyer, *State Constitutional Law Teaching Materials for 1L Constitutional Law Classes (Supplement)*, SOC. SCI. RES. NETWORK (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418938.