TRANSCRIPT OF LAW DAY PANEL

I. PANEL OF SUPREME COURT JUSTICES[1]

Robert Donin: Good afternoon, I'm Bob Donin, I'm the general counsel here at the college, and I want to welcome all of you to this final session for this year's law week series on the subject of same-sex marriage. Our program this afternoon features a panel of three state supreme court justices, all from courts that have issued decisions on the subject of same-sex marriage, as well as a practitioner who's been a major force in the effort to obtain first, civil unions, and then the right to marry for same-sex couples. I especially want to acknowledge the good work that has been done by a number of groups here at Dartmouth that make programs like this possible—the Dartmouth Lawyers Association, the legal faculty program, the Dartmouth Gay and Lesbian Alumni Association, and the Rockefeller Center—who worked so hard and so well to put these sessions this week together. I'm always struck by the fact that for an institution that doesn't have a law school, we seem to have a remarkably rich array of lectures and panel discussions on legal issues here at the college, and that's due in large measure to the efforts of these organizations.

When you have a topic this timely and a panel of presenters this distinguished, I think the best thing that I can do as your host is to introduce the moderator and then get out of the way! And that is precisely what I intend to do. Before I do that, I just thought it was noteworthy that although there have only been a few cases involving this issue that have made their way all the way to the top, to the supreme court level in the states, Dartmouth seems to be very well represented in these cases—in a variety of different capacities. We have one alumna who has been a litigator as well as dealing on the legislative front. And that, of course, is Beth Robinson. We have two judges who have been members of panels that have decided these cases, Justices Cordy and Morse, and a fourth alum who is not with us today, but who was a party in one of these cases, Hillary Goodridge, who was one of the named plaintiffs in the Massachusetts case [*Goodridge v. Department of Public Health*].[2]

Our moderator today, Beth Robinson, was one of the leaders of the efforts in Vermont, both in the courts and in the legislature, to secure same-sex marriage. Beth received her B.A. *summa* from Dartmouth and her J.D. from the University of Chicago, where she was a member of the Order of the Coif. She's a partner at the law firm of Langrock, Sperry, & Wool in

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1. Please note that the speakers from this panel reviewed and edited this transcript. New language appears in brackets, and ellipses indicate omissions of language.

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

Middlebury and Burlington, Vermont. In 1995, Beth co-founded the Vermont Freedom to Marry Task Force as a prelude to the lawsuit *Baker v. State of Vermont*,[3] which was filed in 1997 by Beth with her law partner Susan Murray and their co-counsel Mary Bonauto from the Gay & Lesbian Advocates & Defenders.

Beth argued the *Baker* case[4] in 1998 and led the lobbying effort that followed the Vermont Supreme Court's decision, which culminated in the passage of the Vermont civil unions law. She then continued to lead the freedom to marry movement in Vermont, through the Vermont legislature's passage just earlier this month over Governor Douglas's veto of the bill opening up Vermont's marriage laws to include same-sex couples. And Beth is currently co-teaching the course on sexuality, identity, and legal theory here at the college. Beth will introduce our other panelists. Beth . . .

Beth Robinson: Great, thank you so much Bob, thank you. I'm getting to that age where I have to put these on to look at you and take them off to look at my notes. So if [I] keep doing this, I apologize; I need bifocals. I'm so excited about this panel and this topic, and I'm especially excited about the timeliness. I am sure by now folks are well aware of the passage of a bill over Governor Douglas's veto in Vermont. I am sure by now everybody is aware that both the House and Senate in New Hampshire have passed versions of a bill to ensure the freedom to marry. And now the bill goes back to the House for reconciliation, and the fate of that—the ultimate fate of that bill remains in the balance at this point.

I don't know if folks know that this morning the Maine Senate voted to advance a marriage bill, there, in Maine, and I was interested to note a poll that came out yesterday that found—this was a national poll by CBS I believe—that found for the first time that on a national basis *support* for allowing gay and lesbian couples to legally marry outweighs opposition, in this country, 49% to 46%. When you compare that to the polling just about you know, five years ago and ten years ago, it's a stunning shift that we've seen in public opinion not just in the last few years, but literally in the last few weeks. So it's an exciting time to be talking about this, and I'm thrilled to share the stage with three distinguished jurists who've all had an opportunity to weigh in on the subject at various points in the conversation. I'd like to tell you a little about them first, and then we'll sort of march through in order of how events unfolded because one of the interesting things about this panel is not only do the three of them collectively

3. Baker v. Vermont, 170 Vt. 194, 744 A.2d 864 (1999).
4. *Id.*

represent the three main views that have emerged from courts on this issue and how it should be handled, but they really represent three different eras in the modern marriage, same-sex marriage litigation movement. And that may or may not inform their perspectives, but I think it's an important addition to the conversation.

To my immediate left is Associate Justice Robert J. Cordy. Born in Connecticut, received his A.B. *cum laude* from Dartmouth in 1971 and his J.D. from Harvard Law in 1974. He began his legal career as a defense attorney for the Massachusetts Defenders Committee, and from 1978 to 1979 he worked for the Department of Revenue, where he was Special Assistant to the Attorney General. He continued in state government; from 1979 to '82 he was Associate General Counsel in Charge of Enforcement at the State Ethics Commission. He served as a federal prosecutor under then U.S. Attorney Weld who went on to be Governor Weld. From 1982 to 1987—and he became Chief of the Public Corruption Unit—he was a partner in a law firm, Burns & Levinson in Boston, from '87 to '91. Then he served as Chief Legal Counsel to Governor William Weld. And prior to his appointment to the Supreme Judicial Court, he was also Managing Partner in a Boston law firm, McDermott Will & Emery, which he joined in 1993. He's had a lot of different and varied experience, all of it quite distinguished. He's also been a lecturer at Harvard Law School from '87 to '96, and in 2001 he was appointed Associate Justice of the Supreme Judicial Court in Massachusetts, where he continues to serve.

To his left is Associate Justice Joette Katz from the Connecticut Supreme Court. She was nominated for the Superior Court, which is the trial court level, by Governor William O'Neill in 1989 and then advanced to the state supreme court by nomination by Governor Lowell Weicker—some of you may remember him from Watergate days—in 1992. And she serves as administrative judge for the state appellate system, a position she also held from 1994 to 2000. Before her appointment to the bench, Justice Katz was Chief of Legal Services for the Office of Public Defender from 1983 to 1989. She was an assistant public defender from 1978 to 1983. She served on various committees and commissions including: Ad Hoc Criminal Justice Committee, the American Law Institute Sentencing Advisory Committee, Commission to Revise Connecticut Appellate Rules, Inns of Courts, Connecticut's Evidence Code Drafting Committee, which she chairs, the Law Revision Committee, the Public Defender Commission, the Connecticut Advisory Committee on Appellate Rules, which she also chaired, and the Client Security Fund, which she chairs. As you can tell, Justice Katz has been quite active in professional involvement in developing the law. She is co-author of the book *Connecticut Criminal*

Caselaw Handbook: A Practitioner's Guide, and as an Associate Justice she has authored approximately 350 majority opinions and 25 concurring and dissenting opinions. Her teaching experience includes—she serves as an instructor at Yale University School of Law—you might have heard of that, it's in New Haven—and she's an instructor of criminal law and ethics at Quinnipiac University School of Law in Hamden. She served as an instructor of legal research and writing and appellate advocacy at University of Connecticut School of Law as well, so she's hit the big law schools in Connecticut. She's received many awards and honors, including the Connecticut Women's Education and Legal Fund Maria Miller Stewart Award in 1993, the National Organization for Women's Harriet Tubman Award in 1993, the University of Connecticut School of Law's Distinguished Graduate Award in 2000, the National Council of Jewish Women's Women of Distinction Award in 2001, the Connecticut Bar Association's Henry J. Naruk Judiciary Award in 2004, as well as an Honorary Degree of Doctor of Laws from Quinnipiac University School of Law. She graduated *cum laude* from Brandeis in 1974, and her law degree is from the University—also *cum laude*—from the University of Connecticut.

Finally, to her left, I'm pleased to announce Justice James Morse, former Justice of the Vermont Supreme Court. He's a graduate of Dartmouth College, class of '62, and Boston University Law School, class of '69. He served as a law clerk to Judge Sterry Waterman on the Second Circuit of the United States Court of Appeals, followed by private practice and service as Vermont Defender General, which is the public defender system, before appointment to the Vermont Superior Court bench in 1981. He was appointed Associate Justice of the Vermont Supreme Court in [1988], where he provided leadership in the areas of judicial education, Vermont Judicial History Project, the Vermont Karelia Rule of Law Project involving international exchange, and bar admissions. In 2003, he retired from the bench and was appointed Commissioner of the Vermont agency which serves children and families in the areas of child protection, juvenile justice, and economic services. He has since retired from that job, but I can assure you from my conversations with him last night, [he] has not retired from activity on many fronts. And he's a distinguished member of the Vermont legal community. I am proud to be on this panel with him.

Let me just set the table a little bit for our first speaker. In 1994–1995 my law partner Susan Murray and I began considering the possibility of bringing a case in the State of Vermont to seek the right to marry for same-sex couples. We were inspired by the early successes of a lawsuit that sort of flew under the radar from the perspective of the national scene in the

State of [Hawaii], a case [called] *Baehr v. Lewin*.[5] And the [Hawaii] Supreme Court had ruled that [Hawaii's] law excluding same-sex couples from the right to marry implicated the equal rights amendment under the [Hawaii] Constitution. It was sex discrimination. And it sent the case back to the [Hawaii] trial court for a trial on whether the state could come up with a sufficient basis to justify that discrimination.

We saw that in response to that there was immediately a political backlash developing in the State of Hawaii, and we realized that if we were going to proceed in Vermont, we needed to take that into account and plan for it in advance. So that's—that's when we founded the Vermont Freedom to Marry Task Force rather than going straight to court. After a couple years of intensive community organizing, we did file suit in July of 1997, representing three couples. The named plaintiff was Stan Baker, hence the name *Baker v. Vermont*.[6] And we took that case to the Vermont Supreme Court. At that time—and this may be, you know, for folks who are younger especially, it may be harder to imagine—but at that time, there was not a state in the country—the state that had come the closest to the freedom to marry for same-sex couples was Hawaii, and even though we had an early judicial win there, the prognosis was beginning to look daunting in terms of the win sticking. We had had cases in Arizona and Alaska, both of which—the Arizona case was ill fated; the Alaska case was met with a voter referendum response that essentially stopped it in its tracks.

So we were really—at the point that I'm going to hand it over to Justice Morse—we were really plowing new ground. Not just in this country, but this was before any countries beyond the United States had allowed same-sex couples to legally marry, although beginning in the late '90s, some Scandinavian and European countries were beginning to explore various kinds of domestic partnership programs. In that context, we had the privilege of arguing in 1998, November 18, 1998, in front of the Vermont Supreme Court. Again, just to set the stage, two weeks earlier, voters in Hawaii had passed a constitutional amendment basically overruling the supreme court decision that we were hoping was going to open the door to marriage in Hawaii, and voters in Alaska had passed the voter initiative in that state as well.

So with that I'm going to hand it over to Justice Morse, and ask him to tell you about the Vermont case, the position he took, and some of the issues that came up in that case, and then we'll move down the line.

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5. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
6. *Baker*, 170 Vt. at 194, 744 A.2d at 864.

Justice Morse: Thank you, Beth. . . . I want to say that I'm very pleased to be with my fellow panelists, public defenders all. I remember when I went into public defense many years ago I was told, "Well if you ever want to become a judge, forget it." But, this proves them wrong.

Beth has told you what a rough climate it was in the last century . . . , and yesterday we learned what a really brutal time it was during the mid part of the last century for gay men and lesbians to be anything but loathed in our country. But I want to point out something to you—because we are going back to the last century—that there was a cultural break, a *little* bit, that pressured something good to happen along the line in 1973. I'm sure all of you in the room know who Clint Eastwood is, and some of you may have watched his "Dirty Harry" movies. Does everybody here remember the "Dirty Harry" movies—Detective Callahan of the San Francisco Police Department? Well, he was a pretty brutal guy. But there was one scene in that movie where Dirty Harry's sidekick said to Detective Callahan, who was Clint Eastwood, "Those four police academy grads stick together like flypaper. The guys think they are queer." And Clint Eastwood as Dirty Harry retorted, "I'll tell you something. If the rest of you could shoot like them, I wouldn't care if the whole damn department was queer." Now, that was probably the nicest thing said in the last century about homosexuals. With Clint Eastwood in the foreground [then], you knew something good had to happen some day.

So let's fast forward to 1999 when the [*Baker*] case was decided. It was argued, as Beth said—and it was one of the best arguments by the way I've ever heard in the court—in November of the year before, and so it had been cooking in our court for about a year. And we were coming up to Christmas—and, just think it was 1999, it was the millennium—so we wanted to get this case out because the legislature was coming in (and this new millennium) in January. We wanted them to get working on this issue just as fast as possible. But we were—as you can imagine, it being such a big case nationally—we were having a hard time getting it out of court. But we did, a week before Christmas. And Beth said that she wasn't expecting it to be announced on a Monday because we always announce our cases on a Friday. That shows you what a hurry we were in to get that case filed.

Let me start with what, in our state constitution, was the basis for the decision. I'm going to read it to you, but I'm going to leave some of the old-fashioned words out so it'll be clearer. "[G]overnment is . . . instituted for the common benefit, protection, and security of the people . . . and not

for the particular . . . advantage of any single person, family, or set of persons, who are a part only of that community . . . ."[7]

We call that the "common benefits clause," and that was the basis of the decision. It is a clause that we held was one of inclusion. In other words, if the protections and the rights of government are afforded to a group, we want to make sure that this group is [as] inclusive as possible. And if there is anybody left out, there better be a good enough reason to do it. That, put in simple words, was the basis of the decision. In other words, you had to measure the reasons [for exclusion] against the importance of the benefits that are lost to the particular group in question. You have to do that in a social context. You have to consider first: what is the extent of this group? Is this a minority that is so tiny that it's almost invisible? Or is it a significant minority? I have never heard just what percentage of Americans [are] considered to be homosexual. I've heard numbers like ten percent, 15%, but it seems to me that it would be so hard to know and it must be much larger because of the alien environment in which they had to live that many of them would keep their identity secret. And so I never know, or knew, or have been persuaded by just what that number might be, but we do know it [is] a significant minority.

What was concluded was that there really wasn't any argument [put] forward by the State, that was good enough to exclude this group from the right of marriage, and the right of marriage is not just some "ho hum" right that comes along; the right of marriage as we all know is extremely important in our society. I've served many years in the family court, and I can tell you that the importance of our divorce laws [is] huge when it comes to protecting children and the couples that are separating their ways. That right in itself is extremely important.

So, the bottom conclusion was that there wasn't any reason that could be put forward that would justify excluding these people from the community and being included in the community of people who could marry. But to me the most interesting part of the case, and which I think is the most probably controversial, looked back from this point—is the remedy that the court came up with. As I told you earlier, this case was cooking in our court for a year, or longer, and when we started out we were not—let's say—all on the same page. There were attitudes and opinions that were coming from many different points of view. And as any jurist tries to do, you want to have your court become as close together as possible when you issue your decision so it doesn't look like you're split almost right down the middle. And as we know with U.S. Supreme Court

7. VT. CONST. ch. 1, art. 7.

cases, the five to four decisions have just become sort of another "Well, there they go again." . . . [We wanted to be as unified as possible.]

And we went to school on a case that we had [decided] earlier, a school funding case. This was called the *Brigham* decision.[8] In Vermont we had disparate amounts of money that [were] spent on schoolchildren depending on what school district they were in. And we held that that was in violation of this same common benefits clause that I read to you. . . . There was quite a lot of push back by politicians about our decision, saying, "We should have kept our hands off of that and just left it up to the legislature." But you know, sometimes in our system of government, when we have three branches of government, we all can't just do our jobs easily without help from another branch. And when you start dealing with issues that are hot-button issues like abortion or race, and in recent times school funding, the legislature sometimes cannot move ahead on these issues because of the fear of its members that they will not get reelected if they grant rights and do the right thing. And so [when it's] difficult for them to come together, . . . courts can help by giving a push to the legislature, to give them some cover, so they can do the right thing.

We decided in this case, though, that due to the backlash that we had from *Brigham*[9]—and we were looking to our other states around us, especially New Hampshire, where the court there did the same thing and said, "You must provide equal educational opportunity," and the legislature just came back and said, "No." [The New Hampshire plaintiffs] would go back to court, and there would be a renewed order to—"Yes, you must do this." And the legislature said, "No, we're not going to do it." And finally they said, "We're just going to impeach your Chief Justice if you keep ruling this way." And they did! Fortunately, the Chief Justice there was not convicted in the Senate, but it was a pretty bold and dramatic reaction and no state nor the federal government wants to get into a position where the branches of government are fighting that hard against each other. [Judges] try to [find] ways so that there will be a community of effort to get the job done in governing the people.

The remedy in [*Baker*] was not—well, let's just [grant] the relief requested, [which] was issuance of a marriage license; let's just do it [and] be done with it. We knew that that would lead—we thought it would lead to a strong backlash given the temper of the times, not only nationally, but in our own state. [Consequently] we decided [to] reach out to the legislature and see if they will partner with us and pass a bill that will satisfy everyone

8. Brigham v. Vermont, 166 Vt. 246, 692 A.2d 384 (1997).
9. *Id.*

concerned. And when we did this in the school funding case, they had done that. Within three months [the legislature passed] a school funding bill. We had a certain amount of trust in [the Vermont] legislature that they wouldn't fight us like New Hampshire had fought the New Hampshire Supreme Court. We thought that they would respond. And they did. And thus came the civil union law, which meant that all of the rights, protections, and responsibilities of marriage would be included for homosexual people who wanted to marry, but it would be done under a different label. It would be done under the label of civil unions.

I was thinking at the time that we didn't really understand the issue of what the label meant as much then as the past ten years or nine years or so have taught us. When you think about it, when you say, "Well, for the rest of us we'll call it marriage, but for you we'll call it something else," that really is kind of a slap in the face, in saying, "We don't really truly think that you're worthy of this, so we're going to give you sort of a second-citizen name for it." But back then we didn't understand that issue as well as we do now, and I don't think the legislature understood that issue as much as it [does] now. As a matter of fact I know they didn't because of what they have done recently [(pass a gay marriage bill)].

So, I don't want to take up too much time because we're going to have a lively discussion up here I'm sure, so let me turn the table over to [the next speaker]. I guess we are going to go to Massachusetts who came along next and did something that shocked the nation and may have affected the election of a president, I don't know.

Beth Robinson: So, back to me. I get to do a little intervening table-setting. So in the wake of *Baker v. Vermont*,[10] at this point still no other states had filed—it's a little bit of an exaggeration—there were some cases floating around, but in terms of cases that had the backing of major organizations and were destined to move down the track, there weren't any other cases in play at that time. In the wake of the *Baker* decision,[11] as Justice Morse has indicated, we had a pretty fierce legislative battle culminating in the passage of a law that did not allow same-sex couples to legally marry and actually added some new language to our laws prohibiting—or not prohibiting, but saying that marriage is between a man and a woman but simultaneously creating a separate legal structure that sought to deliver what were described as the tangible state law benefits associated with marriage to same-sex couples. In that context, in April of

10. *Baker*, 170 Vt. at 194, 744 A.2d at 864.
11. *Id.*

2001, seven couples in the state of Massachusetts filed a lawsuit, and again, at that time there was no other marriage litigation pending. During the pendency of the Massachusetts case, one other case in New Jersey was brought; it was on a longer time track. The plaintiffs in the Massachusetts case, having learned from the experience in Vermont, in terms of the way that the pleadings were interpreted by the court, alleged in their complaint, in addition to various deprivations of "Oh, I didn't get to visit my partner in the hospital" or "I didn't get to inherit," talked about the meaning to them of being married and why that was something that was important to them in an attempt to sort of make sure the case wasn't framed as a case simply about the benefits associated with marriage. The Massachusetts Supreme Court delivered its opinion in November of 2003, and I'm going to ask Justice Cordy to talk. He's the one panelist who is actually here as a member of the dissenting panel. So I'm going to ask him to tell us both about what the court did in the case and what he did as a dissenter and why.

Justice Cordy: Sure. I am way over-prepared for this discussion. There is no way that I can discuss all of the interesting parts of, not only this decision, but its aftermath in the next three hours; so bear with me. I've got a lot of disjointed thoughts, but I'll try to respond to Beth's question.

First of all, to talk a little bit about the case. There were two arguments in the case. One was that the Massachusetts marriage statute should be interpreted to allow same-sex couples to marry. After all, the statute didn't say they couldn't. It just referred to marriage and how one got licensed to get married. And there were some qualifications and some limitations, none of which had to do with same sex or anything of that sort. And so, the argument was, "Well, why don't you just interpret the statute to permit anyone who meets these other qualifications to marry?" So the court had to struggle with a statutory question.

That is actually not bizarre. It was a very good argument in a way, because in 1993, ten years before, there had been a lawsuit involving adoption, in which a gay couple wanted to adopt a child. The probate and family court had found that the adoption was in the best interest of the child but reported the question up to the supreme court of the state: does the statute permit a gay couple to adopt a child in Massachusetts? And the court looked at the statute and said, "There's nothing in the statute that says they can't. Marriage is not a requirement of the statute. We interpret the statute that they can. There's nothing that bars them from doing that." And so, that hurdle had been crossed, purely on a matter of statutory interpretation, in 1993. The legislature could have come back and amended the statute and

said, "*But*, the following people cannot adopt." They never did. And that remained the law. So, it was an interesting and important argument.

It didn't prevail, however, because it was quite clear, [given] the way you look at statutes and interpret them, that the word "marriage" had a very specific meaning in the common law which had been adopted several hundred years, at least 200 years before, and the court couldn't just rewrite that as a matter of statutory interpretation. So, it came down to the constitution. Not the *federal* Constitution mind you, the state constitution. Much older than the federal Constitution, I might add. The state constitution of 1780, written by John Adams. And the constitutional question. I don't want to get too technical here; there's a lot of technical stuff that goes back and forth between judges and lawyers. I'll try not to fall into that trap. But the question, as Chief Justice Marshall put it, because Chief Justice Marshall authored the majority opinion—it was a four to three opinion based on the Massachusetts Constitution—she wrote, 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."[12]

The court concluded in a very elegant, beautifully written decision, that the Commonwealth could not do this because it had not identified any constitutionally adequate reason for denying civil marriage to same-sex couples. That is, in technical terms, there was no longer a rational basis upon which to exclude certain members of society from this benefit. In other words, the law limiting marriage to heterosexual couples was no longer rationally related to a legitimate state interest. If a law is rationally related to a legitimate state interest, generally it can distinguish between classes of people and types of people. Most of what our legislators do is discriminate. They decide who gets benefits and who doesn't. Whether they're tax benefits, or rights, or you name it—Medicare, Medicaid, whatever—most of what the legislature does is decide who should get certain benefits based on age, income, intelligence, etc. And they can do that perfectly consistently with the constitution so long as there is a rational relationship between a legitimate state interest and the law. It's a very low standard of review, and I'll explain why. Obviously, if a law discriminates against certain groups on the basis of race, for example, that is not permitted unless there is a *really good* reason and the law has been narrowly crafted to meet that *really good* reason. So it's a very high standard. But, generally speaking, it's a very low standard.

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12. Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

Now, the question—the court concluded that no, there was no rational reason, no longer a good reason, for this distinction, and the remedy it ordered was as follows. You would think, that, if the law is unconstitutional, the court would strike it down. This law is unconstitutional. This marriage law, which has been around for 200 plus years, is no longer valid, and the legislature is going to have to start all over again. But striking down the civil marriage law in a state would be fairly extreme, and the question is whether it's necessary. Could the court construe the law in a way that was now consistent with its constitutional view? And the court concluded that it could, simply by redefining marriage to meet the constitutional requirement to be a voluntary union of two persons as spouses to the exclusion of all others. So, we redefined marriage—the court redefined marriage—thereby making the statute constitutional under the Massachusetts Constitution. As I said, the decision was four to three.

Now, what was the debate all about inside the court? One thing the debate was not about was about the policy of gay marriage. . . . It was not about that at all. It was about who makes this decision in a constitutional democracy, this incredibly important social policy decision. It's framed as a legal issue; therefore, the courts are going to have to decide. We're not like a legislature; we can't send it to committee and make it disappear or keep it from coming up for a vote. If it's [an] issue that is properly joined, the courts are going to have to make some decision, by and large. So we have to decide. How does one decide this?

Now let me go back to the Massachusetts Constitution. . . . There are two really important principles—at least two—critical principles in the Massachusetts Constitution. Things that John Adams felt very, very strongly about. One, that there needed to be an independent judiciary, and that to protect the liberty of all of our citizens in a democracy, where the majority vote generally rules on policy making, there needed to be a declaration of rights *above* [ordinary] law . . . and an independent judiciary, a separate branch of government to enforce those rights—critical to protecting the liberty of all. That's one side of the equation. How does the court do that? It doesn't have the army. It doesn't have the power of the purse. It does it largely because the court is respected for what it does. It is accountable to the law. It is not there to make judgments about public policy. It is there to ensure that the law is properly applied. That's a very important role the court plays. And if one doesn't view the court that way, then the court isn't going to be held in the kind of high regard it needs to be when it makes controversial decisions. So anyway, that's one of the pieces out there.

The other piece—and the most important piece—is separation of powers. We all hear about separation of powers. Sounds like Civics 101, but it's *really* important. You're actually not going to see much about it in the federal Constitution, but John Adams wrote the Massachusetts Constitution in 1780 and he wasn't kidding about this. He understood that tyranny can come from any one of the branches of government and the way to avoid that is to ensure the branches did not perform each other's functions. So let me take a moment and read Article 30 of our Declaration of Rights, which goes right to this point. And I'm sure you'll have heard some of these words before:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: [and] the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[13]

Really important stuff, and courts have to think long and hard before they substitute their policy judgments for a legislative body and move into that ground.

So, where does the rubber hit the road? The rubber hits the road when this rational basis analysis is applied to a legislative decision. Where the court is saying there is no longer a rational reason for this law to distinguish between peoples. We are deciding that the legislature is, essentially, irrational. Well, maybe we have the power to do that in our constitutional analysis, but we shouldn't be doing it very often. And we shouldn't be doing it unless there's a really good reason, and we shouldn't be doing it without understanding the deference that needs to be paid to this principle. It doesn't just come up in gay marriage. Trust me, it comes up in lots of different areas. School funding is a perfect example, and there are others. And that is the context in which the court struggles with striking down a statute that [is] not . . . specifically in contravention to a right enumerated in the Constitution. This isn't that kind of statute. . . .

So, in any event, the debate on the court was about that. Who is to decide, "Was there a rational basis or not?" It doesn't have to—the legislature has no responsibility to establish its reasons. A plaintiff challenging a statute saying there's no rational basis any longer—this doesn't serve a legitimate government interest [has] the burden of

13. MASS. CONST. pt. 1, art. XXX.

establishing that there is no reason, no rational reason, why this statute serves a legitimate public purpose any longer. And the question was whether or not there was a rational basis, not in the sense that any legislator was testifying about this [as] the reason this statute still exists, but rather was there any conceivable—could a rational legislator believe that extending the institution of marriage to same-sex couples would lead to consequences currently unknown which might destabilize family, child, other things—this is a relatively new arrangement—it hasn't really been tested, there have been a lot of preliminary studies about it, shouldn't this be something that the legislature considers over time and then decides? And by the way it's not like in Massachusetts there was no possibility of change. The discrimination laws in Massachusetts had been changed in the 1980s and 1990s; sexual orientation was no *longer* a basis upon which to discriminate in employment, no *longer* a basis upon which to discriminate in housing. In fact, the governor in the early 1990s took a number of steps to reduce, if not completely eliminate, the burdens to same-sex couples in state institutions, hospitals, prisons, [and] other kinds of settings where the executive branch could dictate policy. So there was a lot going on. There was a public debate on the issue. Should the court have jumped out in front of that debate and judicially determined the issue? That really was the debate. A very honest debate and a very vigorous one.

So, I'm taking a long time to get to what I want to talk about at the end, and that is the aftermath. I was a dissenting judge. I felt that there was a rational basis. I wouldn't agree with it, but it's not my job to agree or to disagree with the legislative reasoning or whether I think it's good or bad or better or worse, but as a judge it was not something that we should decide . . . . So, what happens? First of all we know that there were real consequences. Some people have suggested a presidential election was lost because of it. We know there was a huge backlash in states—constitutional amendments. The Massachusetts judiciary was held up as "evil incarnate." "This is what's coming to your local TV stations and to your local communities! Act now!" So you had, all of a sudden, a whole series of constitutional amendments which are going to be very difficult to undo, a whole series of statutory actions, and, literally, a campaign that resulted, I think, [in] a number of [unfortunate] political consequences far beyond the opinion. . . .

But importantly the aftermath in Massachusetts, I think, is very significant. Just because the court decides a case on a constitutional ground isn't the end of the story, as we all know from California. In Massachusetts there was a petition drive to amend the constitution. We have such a process. That drive gathered enough signatures. In Massachusetts you then

have to take the petition to the Attorney General, [and] the Attorney General has to certify that in fact this is a valid petition. The Attorney General certified it. There was a lawsuit filed to stop the petition, saying that the Attorney General was wrong, this should never go on the ballot. So we had litigation about that. The court decided no, this could go on the ballot. There was nothing improper; at least the issues that were being raised didn't call into question the legitimacy of the ballot question. So, the next step in the constitutional amendment process in Massachusetts is [that] it has to go before the legislature—two consecutive sessions—and in each session it has to get 25% of the vote, which is, out of 200 legislators, 50 votes. If the ballot initiative gets twenty-five percent of the votes, two consecutive sessions, it then goes on the ballot. So this takes time. It goes before the legislature the first session, [and] it gets 59, 58 votes—not very many, but enough to go to the next session. . . . And after that there was a huge public debate—political debate. There were elections. People were elected or not elected in part based on this issue. The dynamic changed. But it wasn't clear that there would be 150 votes against the petition such that it wouldn't go on the ballot. It wasn't clear that was going to be the case, and there was a public debate about whether the majority, [those opposed to the petition], should keep this from coming to the floor—should keep this petition from coming to the floor [for any vote at all].

A lawsuit was filed, obviously by those who supported the petition who wanted to get [it] on the ballot. They filed a lawsuit against the legislature and against the Secretary of State saying to the court, "You should order them to take this vote. It's unconstitutional for them not to vote. The constitution is clear: they have to vote! And if they don't vote, you should order the Secretary of State to put it on the ballot. You should say this is deemed to be passed." . . . The court said (literally on the eve of this happening because the legislature was about to go out of business; the meeting to have this vote was scheduled on the last hour of the last day of the session) . . . , A) "We can't order the legislature to do anything because there's separation of powers—we can't order them to vote, that's not our job" [and B)] "We can't order the Secretary to put the amendment on the ballot deeming the legislative inaction to be action." . . . The only remedy really for the legislature not upholding their constitutional obligations [is] to throw them out if you want. You don't like them, throw them out. Don't reelect them. That's the remedy. There's no other remedy. But the court [also] said, "But you should know in case there's any confusion about this, legislators have an absolute constitutional obligation. They take an oath, too. It says they have to vote." So it came to a vote. [The petition] didn't get 50 votes. That was a *wonderful* moment [as] the democratic process had

played itself out. [It] is no longer an issue. The people's representatives have voted. It couldn't get 50 votes out of 200 to get on the ballot. The issue is over. . . .

It would not have been a good outcome I don't think if the legislature had successfully blocked it from coming to the floor. I think we would still be tortured by this in Massachusetts. We're not tortured by this anymore. We're on with life, and life is good. And we hope that that example . . . has continued to fuel the important public policy debate. . . .

So I celebrate the process. It was a legitimate intellectual process. It was an important one. It ran its length, and we're on with it. The debate that's going on now . . . in the Vermont legislature, New Hampshire, Maine, New York, that's where the debate belongs. So I am very pleased when I see those kinds of things happening, because in my view that's where the debate needs to be won. I worry about Iowa. I don't want to see another backlash in the Midwest. I worry about Iowa—the court saying, "We know better; we know better." So I worry about that. But, in any event, that's my long story.

Beth Robinson: Thank you, thank you. I want to add one footnote as well. During the course of the constitutional amendment discussion within the legislature, the legislature asked the court, "Hey, if we pass a Vermont-style civil union law, would that be good enough? Would that pass muster under the Massachusetts Constitution?" And the justices ruled—a divided court—"No, that would not meet our constitutional mandate." And I wanted to mention that because I think that becomes relevant as we march down the path here.

Between the Massachusetts Supreme Court's decision in 2003, November 2003, and when we get to the next chapter in our story, the flood gates really opened. My own interpretation of what happened, having been not on the inside but not completely on the outside, is that national advocacy groups were continuing to strongly discourage litigation—marriage litigation around the country. It was not a plan to suddenly file six cases in 2004. But I believe that the possibilities opened up by the *Goodridge* decision[14]—the thought for the first time for many gay and lesbian, bisexual Americans that we actually could aspire to be treated as legal equals was not something that could be easily suppressed. It wasn't long after the *Goodridge* opinion[15] that Mayor Gavin Newsom began issuing, in an act of civil disobedience, marriage licenses in San Francisco,

14. *Goodridge*, 798 N.E.2d at 941.
15. *Id.*

and other mayors around the country began following suit. No attempts by any sort of advocacy organizations to hold back the tide were going to succeed at that point, and instead folks shifted gears. And the class of 2004—the cases filed that year—included California, Washington, New York, Oregon, Maryland, and Connecticut. A dramatic change in the social and legal landscape for the next batch of cases going forward. And then in 2005 the Iowa case began.

So suddenly we went from Massachusetts—and then New Jersey was working its way through the system—and that was it, to a whole bunch of cases all around the country. In 2006, [the] Washington Supreme Court rejected the plaintiffs' claims. The New York Supreme Court rejected the plaintiffs' claims. The New Jersey Supreme Court issued a *Baker*-style decision,[16] a *Baker v. Vermont*-style decision,[17] which I don't think was experienced by the advocates as a win at that time because they were seeking the right to legally marry, but it separate[d] marriage from its legal incidents and requir[ed] the State of New Jersey to provide the legal incidents, other than being married. The citizens of Oregon, by a ballot vote, stopped the Oregon litigation in its tracks, and then in 2007, the Maryland Supreme Court rejected the plaintiffs' claims. And in the spring of 2008, the California Supreme Court embraced and affirmed the plaintiffs' claims and joined Massachusetts in affirming the legal right to marry. It was in that setting that we saw the Connecticut Supreme Court's decision [in *Kerrigan v. Commissioner of Public Health*].[18]

Now, the other complicating factor, and I'm quite sure Justice Katz will talk about this, is that while the Connecticut case was pending, the legislature of Connecticut passed a civil union law. This was the first state to pass such a law without a court telling it to do so. It broke new ground. And the passage of that law changed the character of the Connecticut case because the court was no longer asked to decide whether Connecticut could deny inheritance rights or hospital visitation or a whole bunch of other legal incidents of marriage to same-sex couples because those were now available through the institution of civil union. What the court was really asked to decide [was] whether, in that context, the State of Connecticut could continue to deny marriage licenses and the ability to be legally married to same-sex couples. So I'll turn it over to Justice Katz.

Justice Katz: I also can only see you with these—okay, can you hear me now? I feel like a Verizon commercial. I can only see you with these,

16. Baker v. Vermont, 170 Vt. 194, 744 A.2d 864 (1999).
17. *Id.*
18. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

but I can only see the papers in front of me without them. So forgive me as I do this as well.

That's exactly what happened, and the civil union statute that was passed conferred on all such unions all the rights and privileges that are granted to spouses in a marriage. The law, however, defined marriage as, quote, "[a] union of one man and one woman."[19] And this was the compromise to be able to pass this statute, and the governor said she was going to veto it unless it made that provision. So, as a consequence of that—and that statute was passed while the action was pending in the New Haven Superior Court. So, because of that statute, the parties thereafter narrowed the issue as to whether the civil union law and its prohibition of same-sex marriage passes muster under the state constitution.

Now, the very first issue we had to address—and I'm sorry if this is a little legalese, but I think it does matter—because the trial court—and my court was totally split, we were four-three—but we were unanimous on this one issue—the first issue. And the very first issue we had to address was whether there was even a cognizable claim because the trial court had concluded that it was not. Now what does that mean? Well, there has to be a constitutionally cognizable injury or actionable harm that the court could address. A cognizable constitutional claim arises whenever the government singles out a group for differential treatment. The trial court had concluded that the distinction between marriage and civil unions was merely one of nomenclature because our civil union statute had provided all the rights of marriage—all the same rights that a marriage would provide. We concluded that the legislature had subjected gay persons to precisely that kind of differential treatment by creating a separate legal classification for same-sex couples who wished to have their relationships recognized under the law. Put differently, the civil union law entitles same-sex couples to all of the same rights as married couples, except one, and that was the freedom to marry, a right. And in light of the long and undisputed history of invidious discrimination that gay persons had suffered, we concluded that we could not minimize the plaintiffs' assertion that the legislature, in establishing a statutory scheme, consigning same-sex couples to civil unions has relegated them to an inferior status—in essence declaring them to be unworthy of the institution of marriage. In other words, and I quote from the opinion:

> "[B]y excluding same-sex couples from civil marriage, the [s]tate declare[d] that it is legitimate to differentiate between their commitments and the commitments of

19. *Id.* at 413 (quoting CONN. GEN. STAT. § 46b–38nn (2005)).

> heterosexual couples." . . . [W]e reject[ed] the trial court's conclusion that marriage and civil unions are "separate" but "equal" legal entities; . . . [and accordingly we determine that there was] a constitutionally cognizable injury.[20]

So that was the first step.

Now, the defendants had contended that the plaintiffs' equal protection claim did not satisfy two threshold equal protection principles. Specifically, the defendants had contended first, that same-sex couples are not similarly situated to opposite-sex couples, and second, that the classes enumerated in our constitutional provision of Article I, Section 20, of our state constitution, as amended, constitute an exclusive list of protected groups. I will step back for a moment. Our constitution provides that: "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 origin, sex or physical or mental disability."[21] Sexual orientation is not listed in that group, and so the defendants claimed that the list was exclusive. When we examine the question of whether the plaintiffs were similarly situated for purposes of challenging the governmental action in question, which was the next inquiry we had to make, the inquiry is not whether or not—or rather the inquiry we had to answer—I'm sorry—the inquiry is not whether persons are similarly situated for all purposes; the inquiry is whether they're similarly situated for purposes of the law being challenged. The defendants had asserted that the plaintiffs were not similarly situated to opposite-sex couples, thereby obviating the need for my court to engage in an equal protection analysis, because the conduct that they seek to engage in, marrying someone of the same sex, is fundamentally different from the conduct in which opposite-sex couples seek to engage. That was the defendants' contention. We disagreed, and we concluded that both same-sex and opposite-sex couples consist of pairs of individuals who wish to enter into a formal, legally binding, and officially recognized long-term family [relationship] that affords the same rights and privileges and imposes the same obligations and responsibilities. So under the circumstances, there was no question, we concluded—the majority—that these two categories of individuals are sufficiently similar to bring into play equal protection principles that would require us to determine whether the distinctions between the two groups justify the unequal treatment.

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20. *Id.* at 417–20 (quoting Lewis v. Harris, 908 A.2d 196, 226 (2006) (Poritz, C.J., concurring and dissenting)).

21. CONN. CONST. art. I, § 20.

Now as I indicated earlier, the fundamental issue, which I haven't even gotten to yet, was four-three. We were unanimous as to the cognizable claim. As to the similarly situated, we were six-one. So, as Justice Morse was telling you, sometimes courts, and my court in particular, is not unlike the U.S. Supreme Court where we can be all over the lot, and each time the court has to decide an issue, the panel can split differently. Now, the other argument, as I indicated, had to do with Article I, Section 20 of our constitution and the eight categories that I had just read to you. And we concluded that the list of persons protected by that provision was not exhaustive. And as a fallback we said even if it were exhaustive as to what's called a suspect classification, it was not exhaustive as to a quasi-suspect classification. And therefore, the plaintiffs' claim was not going to be foreclosed by virtue of the fact that sexual orientation is not an enumerated classification under that constitutional provision. Now, you've heard about rational basis. That's the lowest threshold. Quasi-suspect class is an intermediate level, and then suspect class is the highest level of protection. So, we got those issues out of the way.

Now, we're now forced, so to speak, to address the real issue that's before us, and that is whether or not our civil union statute is constitutional. Before getting to that conclusion—before—we had to lay out what the test was. And it's a four-factor test. It's the same four-factor test that you examine for suspect as well as quasi-suspect classifications. So, what are those factors? What do we look at when we decide whether or not what status to give to a particular classification? The first thing we looked at was the history of discrimination, and we concluded, quite easily frankly, that gay persons had been subjected to and stigmatized by a long history of purposeful and invidious discrimination.

The second issue we had to look at was whether or not the characteristic that defines members of the group, namely attraction to persons of the same sex, whether that bears any logical relationship to their ability to perform or to contribute to society, either in familial relations or otherwise as productive citizens. Now, we have a wealth of statutes that ban discrimination in every economic and social institution and activity, including but not limited to our adoption laws. So that clearly, that consideration, that factor, was clearly in the plaintiffs' favor as well.

The third factor is whether or not sexual orientation is immutable, and we concluded that regardless of whether a person's sexual orientation is immutable or can be altered, because the trait identifying members of the group is so central to their identity and could be altered only at the expense of significant damage to the individual's sense of self, gay persons are no

less entitled to heightened protection than any other group that had been deemed to exhibit an immutable characteristic.

Now we get to the fourth category, and the fourth category is about political powerlessness. And that's where two of the three dissenting justices sided against the majority, concluding that gay persons were not politically powerless. The majority began noting that gay persons represent a distinct minority of the population and that although they had recently made very significant advances in obtaining equal treatment under the law, not limited to—certainly the civil union statute that had just passed during the pendency of this litigation—and so that they were not totally politically powerless, the plaintiffs in this litigation nevertheless had established that on the basis of the pervasive and sustained nature of the discrimination that they had faced as a group, that there was a risk that the discrimination would not be rectified sooner rather than later merely by resort to the democratic process.

Now in connection with this point I want to highlight something very, very significant. It played a very significant role in the opinion of the court and in our thinking frankly. I want to highlight for you the statement by the legislature when it passed much of the gay rights legislation banning discrimination in economic and social settings, adoption, etc. The legislature, despite bestowing all of these rights to equality on the one hand, with the other hand issued a statement that says, essentially, gay rights laws should not be, and I quote:

> deemed or construed [(1)] to mean the state of Connecticut condones homosexuality or bisexuality or any equivalent lifestyle, (2) to authorize the promotion of homosexuality or bisexuality in educational institutions or require the teaching in educational institutions of homosexuality or bisexuality as an [accepted] lifestyle, (3) to authorize or permit the use of numerical goals or quotas, or other types of affirmative action programs, with respect to homosexuality or bisexuality in the administration or enforcement of the [state's antidiscrimination laws], (4) to authorize the recognition of or the right of marriage between persons of the same sex, or (5) to establish sexual orientation as a specific and separate cultural classification in society.[22]

Now, when have you ever seen civil rights legislation that provides

22. *Kerrigan*, 957 A.2d at 448 (quoting CONN. GEN. STAT. § 46a–81r (2007)) (internal quotation marks omitted).

civil rights on the one hand and apologizes and slaps it down in the other? By singling out same-sex relationships in this manner—there's a principle in law, it's called *res ipsa* [*loquitor*]—the thing speaks for itself. If you ever had to question whether or not a group was politically powerless, the very statute that provided all of these rights, to me, was the very statute that demonstrated that there was a very significant political[ly] powerless problem for gay[s] and lesbians. Because again there is no such statutory disclaimer for opposite-sex relations, and by doing what it did, the legislature effectively proclaimed as a matter of state policy that same-sex relationships are disfavored. That policy—which was unprecedented—and various anti-discrimination measures enacted in Connecticut represented a kind of state-sponsored disapproval of same-sex relationships and consequently served to undermine the legitimacy of homosexual relationships, to perpetuate feelings of personal inferiority and inadequacy among gay persons, and to diminish the effect of the laws, the very laws that they were passing, barring discrimination against gay persons. We concluded, and I quote:

> Indeed, the purposeful [discrimination] of homosexuality as a "*lifestyle*" not condoned by the state stigmatizes gay persons and equates their identity with conduct that is disfavored by the state. Furthermore, although the legislature eventually enacted gay rights law[s], its enactment was preceded by nearly a decade of numerous, failed attempts at passage.[23]

So, by concluding that gays and lesbians—that sexual orientation constituted a quasi-suspect class, we then reach the final part of our analysis. And finally when we applied the heightened scrutiny standard, we noted significantly that—this is another very significant part of the decision, although it factored in one of the dissenting opinions—the defendants in this case expressly had disavowed any claim that the legislative decision to create a separate legal framework for committed same-sex couples was motivated by the belief that the preservation of marriage as a heterosexual institution is in the best interest of children or that prohibiting same-sex couples from marrying promotes responsible heterosexual procreation. These were two reasons that had been relied on by numerous other states in defending statutory provisions barring same-sex marriage. The defendant, the State of Connecticut, had expressly disavowed both of those reasons as a basis for the legislation. Instead, the defendant's sole contention in defense of the litigation as defining marriage as only being between a man

23. *Id.* at 449 (emphasis added).

and a woman, their sole contention in defense of this is that the legislature has a compelling interest in retaining the term "marriage" to describe the legal union of a man and a woman because that's the definition of marriage that has always existed in Connecticut and continues to represent the common understanding of marriage in almost all states in the country. Well, the bottom line is we rejected that argument, concluding that tradition alone is never sufficient cause to discriminate against a protected class.

Beth Robinson: Thank you. So, I'm going to assert moderator's privilege here and ask maybe one question each, and then we'll open it up.

And I guess I'll start, since we've sort of got some momentum here, with Justice Katz. Justice Cordy articulated a vision of the role of courts vis-à-vis contentious social issues and these kinds of changes. And I wondered if you could respond to the charge that, as compelling as your arguments are regarding the reasonableness of the state's position, these are decisions that were decided by the Connecticut legislature when they passed a civil union law that specifically declined to extend marriage to same-sex couples and yet the court, an unelected body, has now stepped in to set that aside.

Justice Katz: Well, I think one of the major distinctions—and Justice Cordy I think highlighted it—between our courts was the basis for review. I agree with him; anything passes rational basis. And if you can conceive of any possible reason, it suffices. So, we were not restricted in the same way that his court was, having found quasi-suspect class, and really the only argument essentially at issue is whether or not sexual orientation deserves that category or that classification. The only real dissension in our court was on that issue, and it distilled to the question of political powerlessness. The dissent—two of the justices who dissented—said gays and lesbians were not politically powerless. If they were politically powerless, or sufficiently suffered from political powerlessness, even the dissent would've agreed that sexual orientation is a quasi-suspect class. And I bring that up because what was really very interesting is women in the *Frontiero* case[24] in 1973 were given that class. Women were deemed to be deserving of a quasi-suspect classification. Well, women in 1973 by, I think, by most standards were not politically powerless. I mean, first of all, we're in the majority, and even were in 1973. There's a whole list of women who were serving as governors and senators and positions of leadership, but yet the United States Supreme Court, in this case *Frontiero*, deemed them to suffer from

24. Frontiero v. Richardson, 411 U.S. 677 (1973).

political powerlessness.[25] So, quite frankly, in light of *Frontiero*,[26] the majority felt that was—I don't want to say a slam dunk because that's a bit, that's a bit too simplistic—but if women were politically powerless in 1973, how are gays and lesbians not politically powerless in 2007?

And so that's really where I think the biggest distinction between our courts falls is what basis of review are you going to afford. And frankly because, quite frankly, almost anything passes rational basis; I think that's what really caused the, I think, the significant difference in treatment between the two of us—not so much in our philosophies, but just what standard of review we would afford.

Beth Robinson: Okay. I'm going to direct this next question to Justice Morse. Yesterday Professor Gardina[27] spoke about the concept of social context reaching a tipping point that changes the context in which a court is deciding a decision. She was talking about it in the context of a potential DOMA [(Defense of Marriage Act)] challenge, but I believe it may have applicability here. I guess the question that I'm really exploring is the extent to which the social setting may change the legal analysis. And so I'd ask you to consider the hypothetical that Vermont hadn't been the first, we hadn't litigated *Baker v. Vermont*,[28] we'd stepped back and watched Massachusetts and Connecticut and these other states, and now you are sitting on the [bench] of the Vermont Supreme Court and the *Baker* case[29] came to you today—do you believe that the same remedy, or arguably lack thereof, that the court issued, or the same deference to the legislature by stepping back, would be appropriate in today's social climate?

Justice Morse: Everything changes with time. You know, it's interesting. Judges are always put in the position of saying, "Is it white, or is it black?" And of course we all know that everything is gray, and it also depends on the context in which we're deciding the case. In *Baker*[30] we did not decide the issue of whether denying the term "marriage" would be constitutional. We left it open, and we retained jurisdiction of the case to wait until the legislature had acted and to see if the plaintiffs were satisfied with that and if they wanted to further challenge the law. That didn't happen. And I was thinking—I'm not on the court anymore—but I was

25. *Id.* at 686.
26. *Id.* at 677.
27. Associate Professor of Law, Vermont Law School.
28. Baker v. Vermont, 170 Vt. 194, 744 A.2d 864 (1999).
29. *Id.*
30. *Id.*

thinking that, "Well, what if the Governor of Vermont's veto had been sustained and the bill we now are welcomed with hadn't passed?" I thought, "Well, logically the plaintiffs will come back to court and take this last step . . . ." Now, I wouldn't say to you or anybody how I would decide that case because I haven't sat down and gone through the process which the citizens expect me to go through before I announce what I would do. I mean, as a legislator I can say, "Bravo, let's get rid of this silliness and have marriage be marriage." But as a judge, like Justice Cordy, I too am concerned about the powers that we exercise.

So, I don't know if that's answering your question. I think when yesterday when the professor was talking about the tipping point—I think she was talking about there comes a time in our society where a court feels comfortable in moving to the next step, and usually that means that the old guys are dying off or retiring. So, if she meant something more than that, and it also can be, the sense is there that a court really now should take the bull by the horns, and regardless of the separation of powers it must move towards the goal because the legislature cannot do it. . . . When I consider powerlessness of a group, it's the legislature who won't touch it with a ten-foot pole. And that means that that's a powerless group because they can't get remedies out of a legislature because it's too afraid to do it. That's when, as I talked earlier, the court needs to help in the governmental process to then either fashion the remedy completely or do it partially, and then . . . the legislature [can] finish the job.

Beth Robinson: I had hoped that your status as a former justice might give you leeway for a little more indulgence in hypotheticals, but I appreciate your discretion there. The . . .

Justice Morse: Well, you know, I might be called back as a substitute.

Beth Robinson: Oh, that's true. That's true. Okay. My last question for Justice Cordy is we heard yesterday from Professor Greg Johnson[31] a detailed analysis of all of the arguments used in the debate about interracial marriage. And he looked at every argument that's been raised in the same-sex marriage debate today and found a companion argument in the interracial marriage debate. In 1948 the California Supreme Court faced a case called *Perez v. Lippold*,[32] the first state supreme court to strike down the ban on interracial marriage, and at that time 38 states banned interracial

31. Professor of Law and Director, Legal Writing Program, Vermont Law School.
32. Perez v. Lippold, 198 P.2d 17 (Cal. 1948).

marriages. And in fact, eight states found it so odious that their constitutions prohibited it. In that setting, a decision to strike down laws banning interracial marriage [was] dramatically undemocratic—[was] far more countermajoritarian than rulings supporting the right to marriage for same-sex couples today. Is the case analogous, and if so, how can you justify the different results? Or if it's not, can you explain the distinctions that you draw?

Justice Cordy: . . . It's a good question. I guess I have a couple of responses to it. First of all, Massachusetts did away with its laws banning interracial marriage in the 1820s, I think. So we already had overcome the political burden of establishing that interracial marriage should not be illegal. One of the great things about our federalism, our system of government—which can be a real pain in the neck by the way, when you don't have a uniform set of laws that apply to everybody in the country on every issue—every state has got its own little unique niche; it's a real pain for lawyers—but one of the great things about it, as Louis Brandeis said, is the states serve as laboratories in so many respects. And they do. And sometimes that works out pretty well.

I really separate . . . race issues from these issues. . . . The United States fought a civil war over race. We enacted three constitutional amendments prohibiting discrimination essentially on the basis of race. That's a public debate about where race belongs. Now all of that was really quite tortured later on. *Plessy v. Ferguson*,[33] establishing the principle of separate but equal in public facilities,[34] was a horrible—one of the worst U.S. Supreme Court cases ever. The *Dred Scott* case,[35] *Plessy v. Ferguson*[36]—two of the top three worst-ever U.S. Supreme Court decisions. [*Plessy*[37] was] essentially reversed in *Brown v. Board of Education*[38] . . . for all the right reasons.

This issue of race has already been decided. You can't discriminate on the basis of race. Separate is not equal when it comes to matters of race. I don't think it stands on the same footing in *that* context. I think the California opinion was obviously very bold and important and eventually led to—was it *Loving v. Virginia*?[39]

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33. Plessy v. Ferguson, 163 U.S. 537 (1896).
34. *Id.* at 548.
35. Dred Scott v. Sandford, 60 U.S. 393 (1856).
36. *Plessy*, 163 U.S. at 537.
37. *Id.*
38. Brown v. Bd. of Educ., 347 U.S. 483, 493, 495 (1954).
39. Loving v. Virginia, 388 U.S. 1 (1967).

Beth Robinson: Yes.

Justice Cordy: Many years later in the U.S. Supreme Court. But if you look at *Loving v. Virginia*,[40] I mean it really said the intent of the interracial ban—ban on interracial marriage was an effort to keep the African-American race down.[41] It was purely discriminatory in intent, in purpose, and effect. And that plays right into the issue of race which we've already settled—should have already settled as a constitutional and legal matter.

So I don't find the two parallel in that regard at all. Time is important, of course. Time is very important. Context is very important in the court assessing things like, "Is there any longer a rational basis for the kind of distinction the legislature has deemed okay to make?" Time and information [are] important. Generally speaking the legislature is the appropriate body to consider advancements, developments, studies, new views, new information. That is the body that does that best. Courts are not good [at it]; they're not intended to be engines of social change—quite the contrary. That's not their role. They sometimes have to play that role—sometimes—where the political process is either completely blocked, which is something that we've just discussed, or maybe for some other extraordinary reasons.

I think the *Goodridge* case,[42] the Massachusetts case, will be remembered as an extraordinary event, and I think it will not necessarily be remembered for its legal brilliance—certainly its writing is—as I say is elegant and eloquent—but will be remembered for A) its humanity and B) that it really did shatter the ice on the pond in some very important ways. There were consequences, of course, and I think that's why it's such an important case. That's what it will be remembered for, and it ought to be remembered for that.

Let me read a paragraph from Justice Sosman, Martha Sosman, a brilliant jurist on the Massachusetts Supreme Judicial Court who passed away from cancer a couple of years ago . . . . She was a dissenting judge in the [*Goodridge*] case. She wrote the following in her dissent:

> As a matter of social history, today's opinion may represent a great turning point that many will hail as a tremendous step

40. *Id.*

41. *See id.* at 6–7 (explaining how the central features of the Virginia miscegenation law—based on the Racial Integrity Act of 1934—were based on race).

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

> toward a more just society. As a matter of constitutional jurisprudence, however, the case stands as an aberration. To reach the result it does, the court has tortured the rational basis test beyond recognition. I fully appreciate the strength of the temptation to find this particular law unconstitutional—there is much to be said for the argument that excluding gay and lesbian couples from the benefits of civil marriage is cruelly unfair and hopelessly outdated . . . .[43]

It goes on to talk about "the inability to marry [having] a profound impact on the personal lives of committed gay and lesbian" persons or friends, or coworkers, or classmates.[44] . . . Let me get to the most important part of this . . . . "Speaking metaphorically, these factors have combined to turn the case before us into a 'perfect storm' of a constitutional question. In my view, however, [once this is past we can get back to our ordinary] constitutional jurisprudence."[45] Yes, this was a moment in time, extremely important for a whole bunch of legal and nonlegal reasons. It's not an answer to your question, but it's . . .

Beth Robinson: No, it's an interesting point nonetheless. Alright, let's open it up for questions from the audience. Do you have one?

Unidentified Speaker: I'm handing out the microphone.

Beth Robinson: Well, don't be shy. You're not going to get this opportunity very often. For those of you who are going to be lawyers, you'll be on the other side of the questions with these folks in the future. Jordan.

Audience Member: I wanted to thank you all for what was a really, really interesting and exciting presentation. I wanted to ask Justice Cordy if you could respond a little bit to what Justice Katz was saying about why the Connecticut Supreme Court decided to use quasi-scrutiny and why your court did not?

Justice Cordy: One word. Votes. . . . You have an internal debate . . . . Where do you reach consensus, on what issues can you reach consensus? For reasons that are really not appropriate to explain, the court, after *months* of debate, had four votes on the application of the rational basis test . . . .

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43. *Id.* at 982 (Sosman, J., dissenting).
44. *Id.*
45. *Id.*

Audience Member: And was there any consideration about applying that four-part test of quasi-suspect class, or no?

Justice Cordy: It was certainly one of the issues raised. One of the constitutional arguments was the right to marry someone of the same sex is a fundamental right. . . . Fundamental rights are given *lots* of protection just as suspect classes are given *lots* of protection. The court didn't decide it was a fundamental right—didn't have to reach that, didn't reach that question—didn't decide that it was a suspect class, homosexuals—didn't reach that question—and decided it on another basis. But to be perfectly candid with you, that has to do with the internal arguments, discussions, and ultimately the votes of the justices. . . .

Beth Robinson: Perhaps we could reframe Jordan's question a little bit in a way that you can address more directly. You didn't opt to apply a quasi-suspect class status on the basis of sex or sexual orientation in this case. Why didn't you?

Justice Cordy: Well, for I guess a couple of reasons. First of all, I don't—all due apologies—I don't like the classification. We don't do those classifications. We have resisted doing [quasi-suspect classification and] intermediate scrutiny. I mean, as a matter of our own constitutional jurisprudence, we don't do that. So you're either a suspect class or you're not. You're not a quasi-suspect class. We have an equal rights amendment so you can't discriminate on the basis of sex based on our constitution. And the reason I didn't [view homosexuals as a quasi-suspect class] is because I had been very much involved in government. I had a real sense that this was not a powerless group—to the contrary. When I [was] in the executive branch, the governor I worked for was *very* committed to gay rights. [He] had done a tremendous amount in the area of trying to change practices, policies, and public views on the subject. And indeed there, as I had mentioned, there was a tremendous—think about this for a moment: out of 200 votes in 2007, the legislature couldn't get 50 votes to put the [petition] on the ballot. Do you think they could have gotten 101 votes to pass a gay marriage law? Well, they could have. What was the problem? Well, there was a speaker of the house (whose term expired, and he left government) who did a very good job of blocking this from coming to the floor. But then he was gone. It probably would have prevailed in the ordinary legislative process because in fact the gay rights community has done an extraordinary job in Massachusetts. The reason they didn't get 50 votes—those who wanted to get this on the ballot—

was not because seven judges told them that it was—or excuse me, four—said our view is, "You're wrong. We're right." It's because that group, those advocates, went up to legislators who were on the fence and said, "*Look at us. Look at our families*. We aren't different. You know, we are *not* different. We should *not* be treated differently." And they *won* that argument; they *won* that argument fair and square on the merits.

Audience Member: Justice Katz, you mentioned that the civil union bill passed while you were in the process of the case you were working on, yes?

Justice Katz: Yes.

Audience Member: But it's my understanding—was your case still open? Were you still hearing arguments and things like that when [the] civil unions [statute] was passed?

Justice Katz: No, no, I'm sorry. The statute was passed while the case was pending in the trial court.

Audience Member: Okay, because my question is then how much do you think external factors can play into decisions after the close of argument? You've got the briefs, you've got the arguments, and the social situation of the time, and theoretically you walk in and you make your decision. And I'm wondering about the California court which was expected to release a quick decision, and yet it's going on and on and on and nothing's appearing, and in the meantime Vermont has voted for marriage. And the Iowa court has not only ruled for marriage but has used Justice George's wording from the original California decision in the Iowa decision quite a bit. Can you speak to how much outside your little courtroom universe these kinds of factors have any weight at all?

Justice Katz: Sure. Alright, just to be clear, because it's important, what happened in this case—and I know this is not your question, but I just want to make sure that there's no confusion about this—the statute was passed while the matter was pending in the trial court. So the plaintiffs reframed the issue, and so that when the trial court made its decision, it was based on the civil union statute. As part of that, we were able to look at, because that statute was before us now, we certainly would be able to look at whatever debate surrounded the passage of that statute. Whatever apologies that I read to you, etc. So that's all, what we call legislative intent. That all goes into the mix when you're analyzing any statute. There

was a dispute amongst the court about some of the things that—for example, one of the dissenters looked at—on the issue of political powerlessness—went outside the record and started looking at some of the debates going on to help to decide for himself whether or not gays and lesbians were politically powerless. And there was a dispute with the majority as to whether or not that was really, I don't want to say fair game, but really whether that's proper. And judges have different attitudes about this in the sense—there's a baseline—you can take judicial notice of things—for example, if there's another statute, if there's an undisputed fact. The *Farmer's Almanac* is a good example. I mean you can take judicial notice of things that are beyond dispute. You can do what you want with them but they're really not—you're not finding facts and you're not going out—impermissibly going outside the record. As far as doing something that's—reading yesterday's newspaper for example, and that's probably what you're really asking me about—if you can look at yesterday's newspaper as evidence of something, of a point that you want to make in the context of your opinion, I'm not particularly in favor of that. I mean, it's one thing to read law review articles. It's another thing to read social science studies. It's another thing to read scientific journals. You know, for example, the U.S. Supreme Court does it on the issues of death penalty and juveniles. I mean that's material, that's well documented, it's well researched, and it's out there for everybody to talk about. It's another thing to pick up yesterday's newspaper and rely on what a reporter may or may not have picked up. So there's sort of a spectrum as to what I think is proper and what I think is improper. I don't know if I've answered the question to your satisfaction, but clearly the articles, the journals, the studies, to me that's all reasonable and proper for judges to be looking at. Yesterday's newspaper is not.

Beth Robinson: Steph.

Audience Member: Yeah, I have a question for Justice Morse. My question has to do with this separate but equal remedy known as the civil union. And I was reading Justice Denise Johnson's dissent, and she said that not granting marriage licenses to same-sex couples is unconstitutional. I was wondering why you didn't dissent to this. Was it just because you felt it would be easier to get this passed if you did make this remedy? Or if you felt that marriage was a moral issue and thus should be deferred, perhaps to the legislature? And just, yeah, what was your reasoning?

Justice Morse: Well, it's obvious that Justice Johnson disagreed with

the rest of the court. I think she felt that there was a default situation here that once we had decided the substantive issue, that it just followed as a matter of constitutional jurisprudence that the marriage license should issue because that's the only mechanism on the books to give relief, and if the legislature doesn't like that, it can deal with it. You can see, though, that if that [had] happened and we had issued [an order saying], "Alright, now same-sex couples can be issued marriage licenses," and the legislature did something else, it would cause a break. And I guess that's what's happened in California over those marriage licenses that were issued but then declared invalid through the ballot initiative. Well, we just disagreed with that being a default basis, and part of that is what I just told you. And the other part was that we wanted to partner with the legislature because we felt that in the long run the whole policy debate would be furthered and the rights would be more firmly established if there were two branches of government at work here rather than one.

Beth Robinson: If I can follow up on that because I think often there's an interconnection between what I call these process sorts of analyses and people's view of the underlying merits. And so I want to ask you a sort of modified version of the question I asked Justice Cordy, which is that in 1948—and I deliberately choose the *Perez* case[46] because its analysis is much more thoughtful than *Loving*[47] and because it was pre-*Brown v. Board of Education*[48] and it occurred at a time when views of race were much different from 1967—if at that time the court had said, "This is a very controversial issue, and we want to partner with the legislature in trying to find a way to address regulation of marital units of interracial couples. So we're going to ask the legislature to address it and invite the legislature to consider a remedy that might even include not allowing interracial couples to marry if the tangible benefits associated with marriage would be provided"—in that case would that have been a sort of proper exercise of deference to the legislature? And if not, again, can you explain from your perspective the substantive distinction?

Justice Morse: Well, it's hard for me to answer that without having been there. I mean we lived this drama by being a part of it and simultaneously as our state and our communities were living it. We had to make a judgment. When you're dealing with race, I agree with Justice

46. Perez v. Lippold, 198 P.2d 17 (Cal. 1948).
47. Loving v. Virginia, 388 U.S. 1 (1967).
48. Brown v. Bd. of Educ., 347 U.S. 483, (1954).

Cordy that that has a much different history and there are an awful lot of places in this world where not allowing the races to marry doesn't happen. But with this issue, it was almost universal that same-sex couples could not marry. So to break that ground sharply may have given the context that we live through. We made a judgment, and like all human beings, people come to different judgments based on what's before them. And so one of our justices on our court came to a different judgment and which I think there is much merit to what she said, but four of us came to the other one.

Timekeeper: Beth, I think we have just time for one more question.

Beth Robinson: Okay, I was going to say the same thing.

Audience Member: This is a question for Justice Katz. You mentioned that one of the things that the court talked about was the immutability of sexual orientation in deciding the case. And I guess I'm not sure I really understand why that's an issue that you're considering. I mean, would it be any different if people were able to freely choose their sexual orientation?

Justice Katz: That's why, in the sense, what I read to you was really, speaking bluntly, was sort of ducking it. You hid it because it really didn't make a difference, but what we wanted to conclude was—and the United States Supreme Court, on that factor, has always been a little wishy-washy, frankly. And we certainly didn't know the answer, and we really didn't want it to be dispositive or to have more weight than we thought it deserved. And so we basically said, look, whether somebody can change, wants to change, chooses to change, can't change, it doesn't really matter. At the point in your life that you are what you are, it is who you are. And that was our way of handling it.

Beth Robinson: Well, I want to thank Justices Morse, Cordy, and Katz for participating in the panel. And thank you all for coming. I know it was a lovely day outside, and I appreciate your coming down here into the dark auditorium to have this conversation. I think it's been worthwhile and exciting, for me, certainly. Thanks also to the Dartmouth Legal Studies faculty, the Dartmouth Lawyers Association, the Dartmouth Gay and Lesbian Alumni Association, and the Rockefeller Center for their contributions to putting this event together.

A live version of this Panel is available at: http://www.youtube.com/watch?v=T5WuukO9QG0.