

SAME-SEX MARRIAGE IN LAW AND SOCIETY: DARTMOUTH COLLEGE'S LAW DAY PROGRAM 2009

GENERAL INTRODUCTION

The Legal Studies Program at Dartmouth College, with support from the Dartmouth Lawyers Association, among other sponsors, hosted a three day program organized around the subject of same-sex marriage. The program was offered in recognition of Law Day and took place on the afternoons of April 28, 29, and 30, 2009.

On April 30, 2009, the program featured a panel of jurists from three state Supreme Courts. The panel members included Associate Justice Robert Cordy from the Massachusetts Supreme Judicial Court, Associate Justice Joette Katz of the Connecticut Supreme Court, and former Associate Justice James Morse of the Vermont Supreme Court. These justices each participated in the landmark rulings from their respective courts on same-sex marriage. Vermont Attorney Beth Robinson moderated the panel and College Counsel Robert Donin gave introductory remarks and a formal welcome on behalf of the college.

INTRODUCTION BY MODERATOR BETH ROBINSON*

The top floor of the law library at the Vermont Supreme Court was dark, chilly, and uncannily quiet. Staring out the window at the Statehouse lawn gathering my thoughts before the oral argument, I had no sense of the anxious, over-capacity crowd packing the courtroom two floors below or of the bright lights of the television cameras in the growing press pool. But I felt the significance of the moment, and treasured our opportunity to join so many brave and thoughtful citizens—past, present, and future—in our movement to expand civil rights and advance social justice.

Who would have guessed on that gray day in November 1998, as we prepared to argue the case of *Baker v. Vermont*,¹ just how far the freedom to marry movement would progress in the ensuing 11 years?

This “Dartmouth Lawyers Association Law Day” panel of

* Ms. Robinson is a partner at the law firm of Langrock Sperry & Wool in Middlebury and Burlington, Vermont. She served as co-counsel to the plaintiffs in Vermont's groundbreaking marriage case, *Baker v. Vermont*, and co-founded the Vermont Freedom to Marry Task Force. Her publications include: Susan M. Murray and Beth Robinson, *Laying the Groundwork: Early Organizing in Vermont*, in *Defending Same-Sex Marriage: The Freedom-to-Marry Movement: Education, Advocacy, Culture, and the Media* (Martin Dupuis and William A. Thompson eds., 2007) and Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L.J. 237 (2001).

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

distinguished state Supreme Court justices offers us an opportunity to take in the past decade of legal debate and evolution with respect to marriage laws from a variety of perspectives. Each of these jurists faced questions about the constitutional right of same-sex couples to legally marry pursuant to their respective state constitutions at a very different point in the movement's trajectory. Between the three of them, the Justices on this panel also represent the diverse range of legal opinions judges have offered in response to state constitutional challenges to laws excluding same-sex couples from civil marriage.

*A. Associate Justice James Morse and
Baker v. State of Vermont*

Former Vermont Supreme Court Associate Justice James Morse was the first of this trio to confront the constitutional question in the case of *Baker v. Vermont* (the case we argued on the late autumn morning referenced above).

When the Vermont Supreme Court took up the *Baker* case, the concept of civil marriage for same-sex couples was still novel in the broader public consciousness. Here in Vermont we had spent several years trying to raise awareness about the issue—reaching out to clergy and faith communities, producing a video featuring Vermonters telling their stories, talking with any audience willing to engage, and building coalitions with supportive organizations. But in retrospect, the overall discussion was still in its infancy.

The Court's primary contemporary *legal* touchstone was the Hawaii case of *Baehr v. Lewin*.² Faced with a state constitutional claim by several same-sex couples who had been denied marriage licenses, the Hawaii Supreme Court recognized that the sex-based classification in Hawaii's marriage laws potentially ran afoul of Hawaii's constitutional equal protection requirements.³ The court remanded the case for a trial to determine whether the state could show that the classification was narrowly tailored to serve a compelling state interest, thereby surmounting the presumption of unconstitutionality that attached to such discriminatory laws.⁴

After a trial featuring a litany of experts testifying about the state's proffered justifications, in December 1996 the lower court concluded that the state had not demonstrated a sufficiently compelling interest and

2. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

3. *Id.* at 57–58.

4. *Id.* at 68–69.

enjoined the State of Hawaii from denying marriage licenses solely because the applicants were of the same sex.⁵ That court's mandate was stayed pending appeal back to the Hawaii Supreme Court.⁶

In the meantime, the political winds in Hawaii grew hostile to the cause of marriage for same-sex couples, and opponents of legal equality for same-sex couples initiated a drive to amend the Hawaii Constitution to trump or preempt the high court's anticipated affirmance. The Hawaii Supreme Court sat on the appeal for nearly two years. In the meantime, on November 3, 1998—about two weeks before the Vermont Supreme Court heard oral arguments in *Baker*—Hawaiiians voted by an overwhelming margin to amend that state's constitution to withdraw their courts' authority to intervene with respect to Hawaii's marriage laws.⁷ That same election day, faced with a lower court decision that would open the door to marriage for same-sex couples, voters in Alaska also voted overwhelmingly to amend their constitution to recognize only marriages between one man and one woman.⁸ Vermont's Supreme Court justices were no doubt mindful of the unfolding events in Hawaii and Alaska as they framed their response to the plaintiffs' claims, and the dynamics of this particular moment in the national discussion about marriage equality no doubt inspired the Vermont Supreme Court's innovative resolution of the case. In its December 1999 decision, the Vermont Court concluded—unanimously (though based on three different rationales)—that Vermont's allocation of a wide range of legal protections associated with civil marriage to heterosexual couples, but not same-sex couples, was unconstitutional.⁹

Rather than remedy the constitutional violation by ordering the state to issue the plaintiff couples (and by implication other same-sex couples) marriage licenses, the Court reframed the case more narrowly than the parties had advocated, focusing exclusively on the *benefits* associated with civil marriage *other than* the legal status of *being married*.¹⁰ Over a vigorous dissent by Justice Denise Johnson,¹¹ the Court stayed its decision—simply did nothing—for an indeterminate period of time in order to give the Legislature the opportunity to pass a law satisfying the Court's constitutional analysis.¹² Finally, the Court suggested that the Legislature

5. *Baehr v. Miike*, CIV. No. 91-1394 (Haw. Cir. Ct. Dec. 3, 1996).

6. *See Baehrer v. Miike*, 950 P.2d 1234 (Haw. 1997) (affirming decision below after staying decision).

7. HAW. CONST. art. I, § 23 (1999).

8. ALASKA CONST. art. I, § 25 (1998).

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

10. *Id.* at 202–06; 744 A.2d at 869–73.

11. *Id.* at 241; 744 A.2d at 897 (Johnson, J., concurring in part and dissenting in part).

12. *Id.* at 229; 744 A.2d at 889.

might be able to meet the requirements of *Baker* by creating a parallel institution that afforded same-sex couples the “same” legal benefits as civil marriage—although the Court reserved for some future case the question of whether such a parallel institution would meet the requirements of the Vermont Constitution.¹³

Justice Morse describes the Court’s opinion and underlying rationale in more detail in his comments that follow.

*B. Associate Justice Robert Cordy and
Goodridge v. Department of Health*

The debate about equal access to civil marriage for same-sex couples progressed considerably between the *Baker* decision and the Massachusetts Supreme Court’s consideration of the *Goodridge* case.¹⁴ In 2000, in response to the *Baker* decision, the Vermont Legislature created a separate “marriage-like” institution for same-sex couples, making all of the state-law benefits of civil marriage—except the ability to *be legally married*—available to same-sex couples through a new marital status known as “civil union.”¹⁵ The legal status of “civil union” was reserved exclusively for same-sex couples. The initial backlash in Vermont was fierce, and many pro-civil union legislators in Vermont lost their bids for re-election in 2000. But the intense opposition subsided almost as quickly as it arose, and Vermonters quickly came to accept, if not embrace the civil union law.

From 2001 to 2003, the Netherlands, Belgium, and, most significantly, Canada, all began allowing same-sex couples to legally marry. The conversation about the freedom to marry within the United States went national, playing out in the mainstream media and around workplace water coolers and family dinner tables around the country. The concept was no longer new and unfamiliar.

In April 2001, seven couples in Massachusetts filed a lawsuit that would become *Goodridge v. Department of Health*.¹⁶ Advocates in the Massachusetts case, having learned from the Vermont experience, made a point of alleging in their legal pleadings that the plaintiffs sought not only access to legal protections such as automatic inheritance rights and the ability to make medical decisions if their partners were incapacitated, but

13. *Id.* at 224–25; 744 A.2d at 888–89.

14. *Goodridge v. Dep’t of Health*, 798 N.E.2d 941 (Mass. 2003).

15. VT. STAT. ANN. tit. 15, § 1202 (2000).

16. *Goodridge*, 798 N.E.2d at 950.

also the ability to *be legally married*.¹⁷ They focused on the personal and social significance of the legal status of marriage, and the communicative value of that designation—all in an attempt to ensure that the Massachusetts court would not follow the Vermont court's lead and focus exclusively on the legal benefits of civil marriage *other than* marriage itself.

While the *Goodridge* case was working its way through the court system, plaintiffs in New Jersey filed a challenge of their own.¹⁸ The New Jersey action was on a slower track, however, and the Massachusetts Supreme Court was the next to tackle the issue, delivering its judgment in November 2003.¹⁹ In a divided four-to-three decision, the Court concluded that the Massachusetts Constitution did not countenance that state's denial of marriage licenses to same-sex couples.²⁰ The dissents rejected plaintiffs' constitutional claims altogether.²¹ The majority and dissenting opinions define the two poles of the constitutional interpretation spectrum—disparate views bridged to some extent by the Vermont Supreme Court's approach in *Baker*.

A quick but significant post-script to the Massachusetts story: Following the *Goodridge* decision, the Massachusetts Legislature initiated a constitutional amendment process to overrule *Goodridge*. In the context of that debate, the Legislature asked the high court for an advisory opinion on the question of whether a civil-union style law would meet the requirements of the Massachusetts Constitution. In *Opinions of the Justices to the Senate*,²² the Massachusetts Supreme Court, again divided, concluded that it would not. The Court explained:

Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or “preserve” . . . the Commonwealth's legitimate interests in procreation, child rearing, and the conservation of resources. Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. . . . The history of our nation has demonstrated that separate is seldom, if ever, equal.²³

17. *Id.* at 951.

18. *Lewis v. Harris*, 908 A.2d 196, 202 n.4 (N.J. 2006).

19. *Goodridge*, 798 N.E.2d at 941.

20. *Id.*

21. *Id.* at 974–1005 (Spina, J., Sosman, J., and Cordy, J., dissenting).

22. *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

23. *Id.* at 569 (citation omitted).

Justice Cordy describes the Massachusetts court's majority and dissenting opinions in *Goodridge* and the surrounding political debate in more detail in the remarks that follow.

*C. Associate Justice Joette Katz and
Kerrigan v. Commissioner of Public Health*

Between the time the Massachusetts Supreme Court took the plunge in 2003 and the Connecticut Supreme Court's own foray into these waters in 2008, the floodgates opened and the ground shifted—to mix elemental metaphors.

My own view is that the torrent of activity that followed *Goodridge* was not first and foremost a product of longstanding planning and orchestration by our movement's national leaders. The collective strategy of lesbian, gay, bisexual, and transgender national advocacy organizations with respect to the freedom to marry up to that point had been—appropriately—incremental and cautious. Then *Goodridge* happened, unlocking possibilities many had not previously dared to contemplate. For the first time, countless gay, lesbian, bisexual, and transgender Americans realized that we could aspire to genuine equality in the eyes of the law. Our enthusiasm could not be contained.

Within a few months of the *Goodridge* decision, San Francisco Mayor Gavin Newsom began issuing marriage licenses to same-sex couples as an act of civil disobedience.²⁴ In doing so, he tapped into the growing fervor among gay, lesbian, bisexual, and transgender Americans and our allies who were no longer willing to acquiesce to our second-class status. Other mayors around the country began to follow suit, and the media covered the news, enabling us to tell our stories to a national audience. Even if they had been inclined to try to slow the growing momentum, no attempts by our regional and national advocacy groups could have held back the tide.

Riding the wave, advocates began filing marriage cases around the country. The class of 2004 included cases filed in California, Washington, New York, Oregon, Maryland, and Connecticut. The Iowa case began in

24. See Dean E. Murphy, *San Francisco Mayor Exults in Move on Gay Marriage*, N.Y. TIMES, Feb. 19, 2004, at A14 (“Mayor Gavin Newsom, the man behind San Francisco’s week-old policy allowing same-sex marriages, sported a wide grin on Wednesday. Opponents of the policy had fared poorly in the courts, and the line of gay and lesbian couples waiting for marriage licenses at City Hall remained long and boisterous.”).

2005. Suddenly the social and legal landscape surrounding the next batch of marriage cases looked quite different.

The headiness of that period gave way to some setbacks. In 2004 and 2005, a dozen states passed constitutional amendments prohibiting same-sex couples from legally marrying; some of these amendments were more draconian, also prohibiting recognition of civil unions and in some cases even domestic partnerships. In 2006, several more states jumped on board with restrictive constitutional amendments.

That year was also disappointing for civil rights advocates in the courts. The Washington Supreme Court upheld that state's restriction against same-sex couples marrying.²⁵ The New York Court of Appeals did the same.²⁶ The citizens of Oregon stopped that state's litigation in its tracks with a vote at the ballot box.²⁷ And the New Jersey Supreme Court issued a *Baker*-style decision requiring that state to extend the legal incidents of marriage, other than marriage itself, to same-sex couples.²⁸ It was a result that felt like a loss in the context of life as we knew it in 2006. Then, in 2007, the Maryland Supreme Court rejected the plaintiffs' constitutional challenges to that state's marriage laws.²⁹ Four of the six cases filed in 2004 were off the table with no progress, and the outcome in New Jersey was mixed, at best.

The pendulum swung back in 2008 when the California Supreme Court applied heightened scrutiny to the various plaintiffs' claims and joined Massachusetts in affirming the state constitutional right of same-sex couples to marry.³⁰ That court's May 15 decision took effect on June 16, and same-sex couples promptly began marrying by the thousands. The tide had turned again.

In the meantime, legislatures in Oregon and Washington had passed comprehensive domestic partnership bills, and three states adopted Vermont-style civil union laws: New Jersey, in response to the Court's decision in the *Lewis* case, P.L. 2006, c.103 (Dec. 21, 2006); New Hampshire with no judicial prodding at all, Chapter 58 (May 31, 2007); and Connecticut, while the *Kerrigan* case³¹ was pending, Public Act 05-10 (April 20, 2005). Also during this period, the nations of Spain, South

25. *Anderson v. King County*, 138 P.3d 963 (Wa. 2006).

26. *Hernandez v. Robles*, 855 N.E.2d 1 (C.A.N.Y. 2006).

27. OR. CONST. art. XV, § 5(a) (2004).

28. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

29. *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

30. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

31. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

Africa, and Norway joined the ranks of those allowing same-sex couples to legally marry.³²

In that setting, in the fall of 2008, after nearly five years of dramatic changes in the freedom to marry landscape, both favorable and unfavorable, the Connecticut Supreme Court weighed in. Because the Connecticut Legislature passed a Vermont-style civil union law while the *Kerrigan* case was pending, the Court did not have to decide whether Connecticut could deny inheritance rights or hospital visitation or a whole range of other legal incidents of civil marriage to same-sex couples because those were now available through the institution of civil union. However, the Court was asked to decide 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.

In its decision in *Kerrigan v. Commissioner of Public Health*, a divided Connecticut Supreme Court concluded that, civil union law notwithstanding, the denial of marriage licenses to same-sex couples ran afoul of the Connecticut Constitution.³³ Like the California Court the preceding spring, the Connecticut Court applied “heightened scrutiny” to the discrimination built into the marriage laws and concluded that the State of Connecticut could not meet the burden incident to such scrutiny.³⁴

Justice Katz describes her court’s process and decision in the following discussion.

D. More Recent Developments

From the time of the *Kerrigan* decision to this Law Day panel, we have seen more game-changing events. Election Day 2008 brought California’s Proposition 8—a constitutional ballot measure in the State of California that effectively reversed California’s high court’s *In re Marriage Cases* edict, putting a halt to marriages between same-sex partners in California. The ballot measure’s passage triggered heartfelt protests around the nation, soul-searching within the national movement, and a widespread recognition that progress in this civil rights struggle is far from inevitable. The California Supreme Court upheld the constitutionality of Proposition 8 in the case of *Strauss v. Horton*,³⁵

32. See Meraiah Foley, *Australian Legislators Back Gay Rights*, N.Y. TIMES, Nov. 26, 2008 (“Only a handful of countries around the world recognize same-sex marriages, including Belgium, Canada, the Netherlands, Norway, South Africa and Spain.”).

33. *Kerrigan*, 957 A.2d at 260–63.

34. *Id.*

35. *Strauss v. Horton*, 93 Cal.Rptr.3d 591 (Cal. 2009).

though it affirmed the continuing validity of the 18,000-plus marriages between same-sex partners prior to Election Day.

We have also seen some good news—lots of it—and most of it quite recent, and right here in New England. First, a unanimous Iowa Supreme Court joined the courts of Massachusetts, California, and Connecticut in upholding the right to marry for same-sex couples under the Iowa Constitution.³⁶

Then, four days later, Vermont made history by being the first state to effectively legislate equal access to civil marriage for same-sex couples.³⁷ To add to the drama, Vermont's Legislature accomplished this feat over a gubernatorial veto, in a dramatic override without a vote to spare. To add a personal note, when the last vote was cast to override the Governor's veto, I felt an instant sense of relief, and an almost immediate dissipation of the weight I had felt on my shoulders since the day in 2000 when we advocates in Vermont had reluctantly agreed to support the civil union bill—a decision that had extensive ramifications, both positive and negative, with respect to our national movement.

On May 6, a week *after* this Law Day panel, Maine, too, enacted a law ending the exclusion of same-sex couples from civil marriage.³⁸ In November, 2009, by a narrow margin, and before Maine's law went into effect, voters rejected the law at the ballot box. Two steps forward, one step back. Maine's not over the goal line, but the public conversation in 2009 unquestionably moved the ball way down the field.

Finally, on June 3, 2009, Governor Lynch of New Hampshire signed into law a bill allowing same-sex couples to legally marry in that state.³⁹ That law takes effect January 1, 2010.

The cycle of ebbs and flows with respect to the movement for equal access to civil marriage continues, but 2009 will no doubt be remembered as a time when advocates successfully ventured beyond the courts and, for the first time, found receptive legislators and governors. (Well, advocates in Vermont did not actually find a receptive Governor. Thankfully, our

36. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

37. See Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1 ("The step makes Vermont the first state to allow same-sex marriage through legislative action instead of a court ruling, and comes less than a week after the Iowa Supreme Court legalized same-sex marriages in that state.").

38. See John Schwartz et al., *Ruling Upholds California's Ban on Gay Marriage*, N.Y. TIMES, May 27, 2009, at A1 ("Then, on May 6, Maine's legislature, too, passed a bill allowing same-sex marriage, and Gov. John Baldacci promptly signed it.").

39. See Abby Goodnough, *New Hampshire Approves Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A1 ("The New Hampshire legislature approved revisions to a same-sex marriage bill on Wednesday, and Gov. John Lynch promptly signed the legislation, making the state the sixth to let gay couples wed.").

overwhelming support among legislators made up for that missing link.) Victory at the ballot box still eludes—a fact that should not be surprising given that we are struggling to overcome centuries of discrimination. But the margins are shrinking, and it is only a matter of time and continued diligent effort.

E. Final Thoughts

As a lawyer, I sometimes focus too much on the legal issues. As an organizer and advocate, I sometimes get caught up in the politics and the dynamics of our broader movement. In the end, we cannot forget that this struggle is about real people, real love, and real families. Let me share several stories that have motivated me as we have worked for full legal equality here in Vermont.

In 2001, Bennett and Tom joined in civil union, gathered in front of a crowd of friends who came to celebrate with them. Bennett's father declined to attend. His mother, out of deference to his father, likewise stayed home. Bennett's siblings felt they should do the same. So Bennett shared one of the most important events of his life with many dear friends, but no immediate family. In 2007, his father not only attended Bennett's brother's marriage to a man in Massachusetts, but he offered a toast at the wedding. When Bennett asked what had changed, his father explained the inconsistency: "I never knew exactly what a civil union was, other than that it was a 'gay' thing that didn't include me, and that I didn't want to be part of. But I know what a marriage is—I've been married to your mom most of my life. I would not miss my own son's marriage and the chance to welcome a new son-in-law into the family." Bennett's story continues to reinforce to me that the word "marriage" *means* something that no newly-coined term like "civil union" can possibly convey. It is a lesson we should keep in mind as we advocate for our rights in other states.

Christina and Judith were raising their child in Orange County, Vermont. Christina stayed home with their infant son while Judith worked outside the home as the family's breadwinner. Judith was driving her truck to the dump one day, and a large bird swooped in front of her windshield, causing her to drive off the road and down the embankment. She died, leaving Christina and their child grief-stricken and financially destitute. Christina did not even bother to file a survivor's claim—even though a heterosexual, married spouse in the same situation would clearly be entitled to benefits. Since Social Security is federally regulated, and is only available to married couples, Christina was not in a position to try to

get those benefits. Unable to support herself and her son, Christina had to give up the home she and Judith had made together, and she moved out of state.

In Vermont, we have fixed the first of two problems Christina faced: now couples like Christina and Judith can legally marry in our state, bringing them a step closer to the vital federal protections their families need and deserve. But this story also reminds me how far we have to go. Our families will not *truly* be secure, and our relationships will not be equally protected, until the federal government's so-called "Defense of Marriage Act" (DOMA) is gone—whether by repeal, or by a court decision. We have much work to do.

In 1997, Nina and Stacy joined two other couples seeking the freedom to marry as plaintiffs in the *Baker* case. When asked why they wanted to join the case, they did not hesitate: it was for their son, Noah. If marriage is good for children, if it provides a more stable and secure environment in which to raise them, then Noah deserved that added measure of security as much as any other child. He deserved to grow up knowing that his family was recognized and respected by the laws as any other family. Tragically, Noah died of a congenital heart condition later that year. With their other beautiful son, Seth, born in November 1999, Nina and Stacy have continued to speak out about the importance to children—all children—of laws that respect our families. They understood that when our laws marginalize gay couples, they do not just hurt the adults who form families together; those laws damage the children raised by same-sex couples.

Finally, in 1999, a 21 year-old single gay man named Scott volunteered for Vermont Freedom to Marry. When asked why he was drawn to our cause, he described his adolescent years, when he kept a bottle of Nyquil in his nightstand, and sometimes considered drinking the whole thing. He explained that he came to realize that he was not considering taking his life because he did not want to be gay; he was contemplating ending it all because he did not want to come of age in a world that told him he was a second-class citizen. Scott understood that discrimination in our marriage laws does not just affect committed gay and lesbian couples who want to legally marry. It affects every person in our community.

And that is hopefully another take-home message from this fascinating forum. As we debate the role of courts, the applicability of heightened scrutiny, and the persuasiveness of state rationales for excluding same-sex couples from legal marriage, let us not lose sight of the fact that our constitution and laws, as passed by voters and legislatures

and interpreted by courts, both shape and reflect who we are as a people. Laws that separate us and our relationships on the basis of sexual orientation send a message of division and exclusion that affects every American, and laws that deny critical legal protections to some have ripple effects far beyond the couples immediately impacted. In the end, this debate's about people.