

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Suffolk County

No. SJC-08860

HILLARY GOODRIDGE, JULIE GOODRIDGE,
DAVID WILSON, ROBERT COMPTON,
MICHAEL HORGAN, EDWARD BALMELLI,
MAUREEN BRODOFF, ELLEN WADE,
GARY CHALMERS, RICHARD LINNELL,
HEIDI NORTON, GINA SMITH,
GLORIA BAILEY and LINDA DAVIES,

Plaintiffs-Appellants,

v.

DEPARTMENT OF PUBLIC HEALTH and
HOWARD KOH, COMMISSIONER
OF THE DEPT. OF PUBLIC HEALTH

Defendants-Appellees.

On Appeal from a Judgment
From the Superior Court, Suffolk County

**BRIEF OF AMICUS CURIAE
MARRIAGE LAW PROJECT**

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Marriage Law Project has been involved since 1994 in the effort to reaffirm marriage as the union of one man and one woman. Amicus has drafted briefs in related cases in Hawaii, Vermont, and Alaska. Amicus has also done extensive writing on the significance of state marriage recognition acts and on constitutional challenges to existing legal distinctions between homosexual and opposite-sex couples.¹ Amicus is also author of a forthcoming article in the Boston University Law Review providing a historical perspective on whether the Massachusetts Constitution requires recognition of same-sex

¹ See David Orgon Coolidge & William C. Duncan, Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate, 32 Creighton L. Rev. 3 (1998); David Orgon Coolidge and William C. Duncan, Beyond Baker: The Case for a Vermont Marriage Amendment, 25 Vt. L. Rev. 61 (2000); and David Orgon Coolidge, The Hawaii Marriage Amendment: Its Origins, Meaning and Fate, 22 U. Haw. L. Rev. 1 (forthcoming 2001).

"marriage."² This brief draws on Amicus' knowledge in the hope of assisting the Court in its deliberations.

**STATEMENT OF THE ISSUE, CASE
AND FACTS PRESENTED FOR REVIEW**

Amicus adopt the Statement of the Issue, Case and Facts as set forth in the brief of the Defendants-Appellees.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is not a case in which Plaintiffs-Appellants seek to avoid state intervention into their private affairs. It is rather about their inclination to see the most fundamental of social institutions refashioned to their liking. This case asks whether there should be accomplished the transmogrification of the traditional recognition of marriage, whether unions historically subject to legal, social, and moral condemnation are to now receive the blessing of the Commonwealth, and whether this all is a mandate of the Constitution.

The alleged right to same-sex "marriage" is not now, and has never been recognized in our society.

² Wendy J. Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-sex "Marriage"?*, 12 B.U. Pub. Int. L.J. _____(forthcoming, 2003).

The material that Plaintiffs and their amici have presented in support of their proposal that there is a constitutional imperative for this Court to create such a right fails to demonstrate the propriety of their petition. Condensed to its barest, their argument is ultimately a policy proposal, rather than a legal one, although dressed in the trappings of the latter. That policy argument is enveloped in jurisprudential terms in the course of suggesting that certain of the provisions of the Declaration of Rights have evolved to mean what the Appellants now seek them to mean.

A dominating characteristic of Plaintiffs' presentation is an absence of simple intellectual coherence. The fallacious methodology used throughout their discussion merits analysis. Plaintiffs' method of constitutional interpretation is confused and contrary to the nature of a constitution. (pp. 4-20). They appeal to the strength of broad legal categories that have no application to their particular claim. (pp. 20-29). They rest on arguments that assume what they are to prove. (pp. 29-37). In addition, Plaintiffs' effort is driven by a problematic philosophical perspective which they have refused to

state explicitly, but which is nonetheless obvious, and is an indispensable component of the legal proposition they place before this Court. (pp.37-43).

The Plaintiffs have asked this Court to declare that the conception of marriage that has informed the understanding and legal enactments not only of this Commonwealth, but of humankind throughout recorded history, must be redesigned. This, they suggest, is compelled by the Massachusetts Constitution. That such an imaginative proposal is bereft of sound justification should not surprise. It is the purpose of amicus to give particular emphasis to a critical examination of whether logical validity is to be found in the methods of argument presented in favor of this radical departure from uniform historical consensus.

ARGUMENT

- I. Evolutionary jurisprudence is incompatible with the enduring nature of constitutional guarantees, and Plaintiffs' resort to that legal methodology is indicative both of the logical difficulty they face in appealing to historic legal concepts to justify the anti-historical imperative they seek to impose on the Commonwealth, and of the contrived nature of their proposal, which is quite simply an invitation to arbitrariness.

Never in the long history of our legal tradition, with its multitude of variations and developments, has

marriage been conceived to encompass same-sex unions.³ Quite to the contrary, the very behavior which forms the basis for such unions has consistently been the subject of criminal prohibition throughout our history.⁴ The United States Supreme Court has recently ruled that constitutional due process is not offended by the criminalization of consensual homosexual sodomy, Bowers v. Hardwick, 478 U.S. 186 (1986), and this Court has never held that the Massachusetts Constitution is to be interpreted differently on that matter. Commonwealth v. Balthazar, 366 Mass. 298 (1974).⁵ Not only is it the uniform practice of all states of our union and its federal government to recognize marriage as an opposite-sex relation, a substantial majority of states and the federal government have taken the affirmative step of enacting

³ See Adams v. Howerton, 486 F. Supp. 1119, 1122-23 (C.D. Cal. 1980).

⁴ The lengthy history of legislative and judicial enforcement of the criminal prohibition of homosexual sodomy in Massachusetts is catalogued in detail in <http://www.sodomylaws.org/sensibilities/Massachusetts.htm>. The U.S. Supreme Court in Bowers v. Hardwick, 478 U.S. 186, 193-94, and n. 5-7 (1986) recited the extensive history and specific criminal statutes prohibiting homosexual sodomy in the various states of the Union.

⁵ "We do not decide whether a statute which explicitly prohibits specific sexual conduct, even if consensual and private, would be constitutionally infirm." Balthazar, 366 Mass., at 302.

through legislation or constitutional amendment the ordinarily superfluous but now responsive declaration that marriage does not encompass same-sex couples.⁶ Because of the long and universal recognition by our legislatures, courts, and citizenry of the opposite-sex nature of marriage, and the concurrent opprobrium directed by them to same-sex liaisons, it is a defying audacity that would suggest that the legally unprecedented construct of "marriage" that entertains same-sex couples is the clear mandate of the Massachusetts Constitution, for that Constitution is itself a product of -- not a radical departure from -- the historic legal legacy which contains and justifies the tradition discussed above. This derivative and dependent nature of the Constitution was explained by this Court in Commonwealth v. Blackington, 41 Mass. (24 Pick.) 352, 356 (1833):

Another general consideration is perhaps not of less importance in understanding the genius and spirit of our constitution, and it is this; that this declaration of rights, and frame of government, composing together the constitution, was not first prepared and drawn up by and for a people who were then, for the first time, establishing political

⁶ <http://www.marriagewatch.org/states/doma.htm> contains the list of states with Defense of Marriage Acts. The two components of the federal version are found in 28 U.S.C. S 1738C and 1 U.S.C. S 7.

and civil institutions, for their security and government; it was rather a slight remodelling of a social system, by a people who had long enjoyed the protection of law, and the security of social order, under a government, nearly as free, and practically nearly as popular, as the lot of humanity would admit. The constitution itself recognises this condition of law and social order, and provides that all laws, before adopted, used and approved, in the Colony, Province or State, should remain and continue in force, such parts only excepted, as were repugnant to the rights and liberties contained in the constitution itself. Each particular clause and provision of the constitution therefore, and especially in the declaration of rights, is to be expounded under the broad light thrown upon it by this constant reference, tacit or express, to established laws and institutions, and to the principles and maxims of civil liberty, secured and regulated by mild, equal and efficient laws.

(Emphasis added.)

When faced with the venerable and compelling cloud of witnesses standing in opposition to their cause, it is very little wonder that the method of constitutional interpretation that is proposed by those seeking the imposition of a reconfigured marriage scheme is one which entails the denial of enduring content to the Constitution, and which seeks to impose new content fashioned from modern enlightened opinion. By this method, brand new "rights" with no historic precedent can magically

spring from ancient constitutional provisions which, as a historical matter, never have been even wildly imagined to authorize a social revolution like that Plaintiffs seek. This practice is both at odds with the nature of a constitution, and is a shameless petition for judicial usurpation of legislative prerogative.

While Plaintiffs' Trial Memorandum contained numerous suggestions of the "non-static" nature of constitutional provisions,⁷ the "evolutionary philosophy" argument is taken up most energetically by Amici Professors of Constitutional Law ("Professors") in their submission to this Court.

"Particularly in respect to the 'great ordinances' of a constitution - those provisions that protect values such as due process, equality, and freedom of expression - the task of interpretation should be understood as part of 'an evolving and ongoing process' that responds to the 'felt needs' of the times."⁸

The "felt needs" instruction is more appropriately directed to a shaman than a court. It identifies well with their methodology, however, which is ultimately one that appeals to visceral direction. The Court is

⁷ E.g., See PLAINTIFFS' TRIAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, at 8, 28.

⁸ AMICUS BRIEF OF PROFESSORS OF CONSTITUTIONAL LAW ("Brief of Professors"), p. 11-12 (citation omitted.)

apparently to rule by imputing content to terms and phrases in the Declaration of Rights that have never before held such content, under the guidance of "felt needs." As that source of guidance is of questionable existence, let alone assistance, the exercise is a rather arbitrary one. But this it must be, for the Court to grant the wish of Plaintiffs.

The Professors further explain the evolutionary imperative as follows.

The interpretation of the "great ordinances" necessarily must evolve as the Court confronts circumstances beyond the framers' imagining, and it is only through such evolutionary interpretation that the values comprising the great ordinances will continue to have meaning.⁹

As a justification for the evolutionary approach, this fails decidedly. While it is suggested that the liberty and equality provisions must change as the Court confronts "circumstances beyond the framers imagining," marriage is certainly not such a circumstance. Marriage is "older than our Bill of Rights—older than our political parties, older than our school system." Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Homosexual relations have quite a vintage as well, and were rather familiar to 18th

⁹ Id., at 12.

century statesmen, who had legislated against them.¹⁰ The meaning and exclusions of marriage are not late appearing subjects, and thus do not serve well to explain why the "great ordinances" must be altered.

Moreover, the Professors are outright counterintuitive in suggesting that this Court's interpretation of liberty and equality must "evolve" in order for those terms to "continue to have meaning." "Evolve," after all, is a euphemism for "change." It is difficult to comprehend how changing the meaning of constitutional terms ensures the continuation of meaning of those terms. The counterproposal has a far greater claim to rationality: if the great ordinances are to continue to have meaning, and operate as enduring constitutional protections, their definition must be maintained consistently. If the content of the Declaration of Rights has the quality of Heraclitus' stream, then it only pretends as a protection of historic freedoms.

In addition to the "felt needs" standard, characterizations of the framers' philosophical inclinations are also presented by the Professors as

¹⁰ See footnote 2, supra.

indicators of the proper reading of the Constitution. A review of material from various historical treatises on the ideas of Thomas Paine and John Adams led them along to the conclusion that:

The Revolutionary egalitarian philosophy, with its rejection of arbitrary societal distinctions and its endorsement of individual freedoms, yet endures, and should be taken into account when interpreting the Constitution today.¹¹

Positing egalitarianism as the broad canopy under which the Constitution should be understood might indeed have an impact on the determination of precisely what would qualify as an "arbitrary societal distinction." It is not altogether clear, however, that egalitarianism - at least as conceived by the modern observer - is what the framers truly had in mind. If we are to adopt the method of the Professors, but use an alternative textual approach that examines the Constitution of 1780 provides some insight into the "philosophy" of the framers, which may allow us to balance the Professors' suggestions on what sort of legislation should receive constitutional reprimand.

¹¹ BRIEF OF PROFESSORS, at 22.

In the 1780 Declaration of Rights after the assertion in Article II that it is the duty of all men in society to publicly worship the great Creator and Preserver of the Universe, the immediately following Article III reckons that "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and ... these cannot be generally diffused through a community but by the restitution of the public worship of GOD, and of public instructions in piety, religion, and morality" and that tax funds shall therefore be directed to the public worship of God and for "the support and maintenance of public Protestant teachers of piety, religion and morality."

If the Framers' philosophy is truly to be used as a means to understand the great doctrines of the Declaration of Rights, a more textually consistent option than egalitarianism¹² would be an appeal to 18th

¹² "Egalitarian" is a word the English language has adopted from the French. John Adams was an ardent opponent to the bloody French Revolution and its atheistic philosophy. In the blank page beside the contents of his copy of Mary Wollstonecrafts' French Revolution, Adams wrote in part: "If [the] empire of superstition and hypocrisy should be overthrown, happy indeed will it be for the world; but if all religion and all morality should be over-thrown with it, what advantage will be gained? The doctrine of human

century Protestant Christianity. While the Professors imply the opposite-sex marriage law should be struck as inconsistent with their understanding of revolutionary egalitarianism, the same methodology could insist that it be upheld as consistent with Protestant Christianity.

The proper legal process, however, is not to deduce a philosophy and then judge legislation thereby. It is rather to appeal to the historic and textual meaning of the relevant constitutional provisions and determine if those provisions are offended by the legislation. As this Court has explained, it is a

fundamental principle of constitutional construction that every word and phrase in the Constitution was intended and has meaning, and such words and phrases must be presumed to have been chosen advisedly. They must be given their ordinary meaning, and construed to accomplish a reasonable result.

Opinion of the Justices, 429 Mass. 1201, 1205 (1999)

(internal quotation marks and citations omitted.)

equality is founded entirely in the Christian doctrine that we are all children of the same Father, all accountable to Him for our conduct to one another, all equally bound to respect each other's self love." David McCullough, John Adams, p. 619 (2001). Adams conception of equality is neither radical nor unleashed from historic moral standards.

"Its words are to be given their natural and obvious sense according to common and approved useage at the time of its adoption." Mazzone v. Attorney General, 432 Mass. 515 (2000) (citation omitted). If the intended meaning of every word and phrase of the Constitution is to be a significant consideration, that prohibits a designer approach to interpretation. It is the task of this Court to seek that textual meaning, not create it.

II. Opposing the capricious non-standard of evolutionary construction is the established practice of using history and tradition to guide the interpretation of constitutionally protected liberties.

Persuasive is the U.S. Supreme Court's observation of the need for caution which was expressed in Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977), wherein the Court stated that "[s]ubstantive due process has at times been a treacherous field for this court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of more specific provisions of the Bill of Rights." The Court in Moore proceeded to explain the proper method of approach, given its concern for judicial boundaries. The limits on substantive due process are

not to be established by arbitrary line-drawing, but by respecting the teachings of history and the foundational values of society. *Id.* at 503. See also Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

As that Court has interpreted the due process liberty standard, it has insisted that the liberty in that category not only be "fundamental," but also that it be one "traditionally protected by our society" or "rooted in history and tradition." Michael H. v. Gerald D., 490 U.S. 110, 122-23 (1989) (plurality opinion). The oft-referred-to standard for those substantive liberties which are constitutionally protected includes those "so rooted in the traditions and conscience of our people to be ranked as fundamental." Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105 (1934). In another setting the Court stated that these liberties include those "long recognized at common law as essential to the orderly pursuit of happiness of free men." Meyer v. Nebraska, 262 U.S. at 399. This method is particularly evident in the marriage and family rights cases. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the

institution of the family is deeply rooted in this Nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. at 503. (Emphasis added.)

What is significant about the methodology that is used in these federal cases, beyond its compelling intrinsic merit, is the fact that this Court incorporates these cases containing this methodology in support of its own marriage and family decisions. See e.g., Tarin v. Com'r of the Div. of Med. Assistance, 424 Mass. 743, 756 (1997), citing Meyer v. Nebraska, supra, Moore v. City of East Cleveland, supra, Pierce v. Society of Sisters, 268 U.S. 510 (1925), among others; A.Z. v. B.Z., 431 Mass. 150, 162 (2000), citing Moore v. City of East Cleveland, supra; Sec'y of Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 185 (1977), citing Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 842-47 (1977).

Moreover, this Court has explained its reason for so doing. The federal and Massachusetts due process standards are cognate provisions, and consequently of the like nature and operation. "The rights relied upon under the Fourteenth Amendment to the Constitution of the United States, and under the

Declaration of Rights in the Constitution of Massachusetts, are substantially the same[.]” Commonwealth v. Strauss, 191 Mass. 545, 550 (1906). “In short, the words ‘the law of the land’ in art. 12 which were taken from Magna Charta embrace all that is comprehended in the words ‘due process of law’ in the Fourteenth Amendment.” Pugliese v. Commonwealth, 335 Mass. 471, 475 (1957) (citation omitted).

In Commonwealth v. Ellis, 429 Mass. 362 (1999) this Court explained that

[a]lthough there are situations in which this court has interpreted art. 12 of our Declaration of Rights as extending greater protection than parallel provisions in the United States Constitution..., our treatment of due process challenges to legislation has adhered to the same standards as those applied in Federal due process analysis.

Id. at 371. (Citation and quotation marks omitted.)

This analysis which interprets constitutional liberties through the lens of history and tradition is one which indeed demonstrates that the Commonwealth’s marriage law in no manner offends the Constitution. This Court in Commonwealth v. Blackington, 41 Mass.(24 Pick.) 352 (1833), had the occasion to evaluate the constitutionality of a statute that, like the marriage law, predated the constitution, was well known to the

framers thereof, and was widely accepted in the law at that time and since; of additional similarity to the marriage law, the laws contained in that statute at issue in Blackington had affected "large classes of persons, and extensive interests and branches of business, they have been steadily and constantly practiced upon and carried into operation and effect." Blackington, 41 Mass. at 355. The significance of that historical character of the challenged law was then expounded by this Court:

It has generally been considered, that when an act has been passed soon after the adoption of the constitution, and by a legislature, many of the members of which may be presumed to have been members of the convention which adopted the constitution, and who had well weighed its objects and provisions, such act may be viewed somewhat in the light of contemporaneous construction of the provisions of the constitution. It may well be considered by those who come later to the construction and exposition of the constitution, as affording some light in regard to the views and intentions of its founders.

Id.¹³

¹³ The U.S. Supreme Court, through Justice Holmes, made this same point when speaking of the federal due process cognate, in Louisville & N.R. Co. v. Barber Asphalt Paving Co., 197 U.S. 430 (1905): "It is dangerous to tie down legislatures too closely by judicial construction not necessarily arising from the words of the Constitution. * * * [I]t is important for this court to avoid extracting from the very general

Plaintiffs, in diverting attention from the negative regard that would ordinarily accompany an assault on an historic standard, cite dictum from this Court's decision in Colo v. Treas. & Receiv. Gen., 378 Mass. 550, 557 (1979) (a case wherein this Court affirmed the constitutionality of tax-funded legislative chaplains) as follows:

The mere fact that a certain practice has gone unchallenged for a long period of time cannot alone immunize it from constitutional invalidity, even when that span of time covers our entire national existence and indeed predates it.¹⁴

While that is certainly true, raising that point hardly establishes the converse, to wit, that history and tradition are irrelevant considerations. They most certainly are relevant, and indeed are the crucial components in the process by which substantive liberties are defined. Moore, 431 U.S. at 503. As this Court went on to say in the text of the opinion immediately following that portion quoted by Plaintiffs,

language of the Fourteenth Amendment a system of delusive exactness in order to destroy [legislative enactments] which were well known when that Amendment was adopted and which it is safe to say that no one then supposed would be disturbed."

¹⁴ BRIEF OF PLAINTIFFS-APPELLANTS, at 38, n. 19.

[t]he long history of a certain practice, however, and its acceptance as an uncontroversial part of our national and State tradition do suggest that we should reflect carefully before striking it down.

Id. This consideration is well in keeping with the judicial role:

It is however hardly possible too often to repeat the familiar sentiment, that although this power of deciding on the constitutionality of legal enactments, is one clearly vested in the judicial department, it is to be resorted to and exercised with great caution and deliberation, and it is always to be presumed that a coordinate branch of the government has acted within the limits of its constitutional authority, until the contrary shall clearly and satisfactorily appear.

Blackington, 41 Mass., at 355-56. The Commonwealth's marriage law, being a continuation of the multi-millenia uninterrupted and persevering juridical recognition of the nature of marriage, is of unquestionable propriety, and no plausible constitutional doctrine would compel its judicial remanufacture.

III. The alleged right to same-sex "marriage" is not demonstrated through appeals to content-elusive slogans.

"[U]nless we wish to suffer ourselves to be led astray by the charm of high-sounding words, instead of adhering to the principles of reason and sound

sense,"¹⁵ this Court should give careful attention to the use by Plaintiffs of equivocal phrases which are fashioned to appeal to all, yet lack the specificity in content that is required to make them of genuine service to the analysis required by this case. As Justice Holmes critically opined years ago, "[s]uch words as 'right' are a constant solicitation to fallacy." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922). That concern is one this Court should heed, for the presentation of Plaintiffs and their amici is extravagantly dependent on appeals to the intoxicating and general language of "rights," "liberties," and the attendant constitutional catchphrases. Absent from the Plaintiffs' analysis, however, is a rendering of how these lofty phrases find proper application to their goal of compelling this Court to redefine marriage so as to have it embrace homosexual unions.

When Plaintiffs have appealed to, for instance, the legal interest in "not being treated by government as a second-class person,"¹⁶ it is difficult to know what this legal interest is to protect against. The quoted language could conceivably be seized upon by

¹⁵ State v. Nieto, 130 N.E. 663, 665 (Ohio 1920).

¹⁶ BRIEF OF PLAINTIFFS-APPELLANTS, at 12.

any aggrieved individual whatsoever that is displeased that his or her conduct is subject to criminal prohibition, for instance. As all state prohibitions may be characterized as imposing "second class status" on individuals who choose to act in the prohibited way, does this mean that these prohibitions are all unconstitutional impositions? If not, then we would need to know the extent of the jurisprudential power and reach of this appealing phrase. How that extent is to be discovered is a mystery. When dictum like the phrase quoted above is divorced from the context in which it arose, and used in isolation as a banner phrase for a unique new proposed right, the absence of precision in the language diminishes its utility. Without identifiable content, the "second class" phrase and those like it are of no analytical benefit to this Court. It is this intractable problem that attends to most all portions of the "rights" argument tendered by Plaintiffs and their amici.

As additional examples, we are told by Plaintiffs that the "sanctity of individual free choice and self determination,"¹⁷ the ability to "independently... define one's identity that is central to any concept

¹⁷ Id., at 21.

of liberty,"¹⁸ the "right of choice" and of "individual autonomy,"¹⁹ and "defining one's own concept of existence and meaning,"²⁰ all lead to the inexorable conclusion that Massachusetts must convert marriage into a relation that accommodates same-sex couples. The logical steps that would take us from those phrases to their conclusion of the same-sex "marriage" right are left entirely unelaborated. That omission is immensely important, for it entails the undoing of their entire argument for the right they insist.

For these phrases to have any literary (let alone legal) value, they must have some definite meaning and application. A constitution containing provisions without fixed meaning cannot function as a constitution, nor can elucidating phrases serve their purpose without definitional content. This defining exercise inevitably must entail not only determining the embrace of the terms, but also the exclusion of certain categories and substance from them. Else, any inventive social reformer could make appeal to these broad and lovely shibboleths to compel state ratification of his or her personal social or

¹⁸ Id.

¹⁹ Id., at 35.

²⁰ Id., at 45.

behavioral inclinations, historic legislative and social castigation notwithstanding. If one need merely declare ipse dixit that his particular expression of existential self-authentication is a protected constitutional "liberty," because "liberty" is supposed to give one the right to "define one's own concept of existence and meaning," then structured jurisprudence is lost, and the Commonwealth's police power is theoretically subject to total abolition. Yet this is essentially the nature of Plaintiffs' argument. They do not ever reduce their discussion to the appropriate level of specificity so as to convincingly demonstrate that their crusade is one encompassed by the constitutional provisions at issue.

The fundamental rights discussion in the brief submitted by Amici Professors suffers from this same conceptual deficiency. A few examples may be illustrative. The Professors aim to expound on the meaning of "liberty" in the Declaration of Rights by explaining that it has come to mean "those things necessary to safeguard the preservation of individual autonomy, dignity, and choice against government

interference."²¹ As it is hard to imagine any government legislation that does not impact individual autonomy and choice, it is for that reason difficult to know what this phrase intends, if it is not to be read in its most obvious sense as an invitation to anarchy. The Professors further suggest that the framers of the Constitution "sought nothing less than the ability of each individual to determine his or her own social, economic and political identity."²² The contours of the treasured ability to determine one's own identity similarly elude us. If this "identity determination" is to imply a right to marry a person of the same sex, does it also imply the right to marry a sibling, if that is involved in one's chosen social identity? If the protection that the framers purportedly desired to extend to the right of "identity determination" does not protect such a sibling-marriage right, what in that "identity determination" notion, as stated, guides us to know it does not have such an implication? What in these concepts would allow a court to draw lines of demarcation? The Professors lend us no guidance here,

²¹ BRIEF OF PROFESSORS, at 20.

²² Id., at 21.

resting instead in the ipse dixit method. They additionally submit that Article I of the Declaration of Rights embraces what the Framers understood to include the "right to enjoy one's liberty and to seek and enjoy happiness."²³ Happiness is sought and obtained by some through child pornography and mescaline ingestion. It is not clear whether those pursuits are therefore protected by Article I. If they are not, then it would seem that there is a limit to the immunity from state regulation of one's happiness-seeking. But if there are limits, a legally informed observer might suspect that those limits accord with our long-standing legal and social traditions, and so be led to doubt that this right to happiness indeed contains the component right of same-sex "marriage." The phrases appealed to do not evidence the necessity of such an idea, and no precedent exists that would show otherwise.

So the realm of broad generalities is of assistance only apparently. No matter how adamant the insistence, the mere appeal to various general rights and liberties which have never before stood for the purpose for which Plaintiffs seek their use, is a

²³ Id., at 24.

method that ought not inure to Plaintiffs' benefit. While they have insisted that certainly encompassed within the meaning of "liberty" and "equality" is a mandate to the Commonwealth that it remanufacture the marriage relation, the mechanics of that application are never explained. The specificity requisite to any sustained analysis of rights claims is utterly unattainable in their method because of the substantively elusive means of argumentation engaged.

Some wisdom on this matter can be gained by observing the corrective issued by the U.S. Supreme Court, in Washington v. Glucksberg, 521 U.S. 702 (1997), to those who would divorce from context a statement which generally describes well-recognized rights and insist that general statement be used to generate a new right. The misused dictum therein at issue was that found in Planned Parenthood v. Casey, 505 U.S. 833 (1992), and is very similar to those statements produced herein on in support of Plaintiffs.

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Glucksberg, 521 U.S., at 726, quoting Casey, 505 U.S. at 851. The Supreme Court, recognizing what an unwieldy tool such abstract language could serve to be, reigned it in by explaining its proper role.

By choosing this language, the Court's opinion in Casey described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment. * * * That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected... and Casey did not suggest otherwise.

Glucksberg, at 727-28. (Emphasis added.)

If the liberty the Constitution protects is to be expounded as a concept which requires state legislative obeisance to the whims of individuals who claim to be defining their own conception of the universe, on such a standard, there is quite necessarily no legal prohibition that could conceivably avoid criticism. While Plaintiffs undoubtedly would not seek such an extension to the constitutional doctrine of liberty, the appeal to the lofty phrases in themselves - divorced as they are

from their descriptive content - contains no internal restriction on such an extension, by virtue of their hopeless generality. As the phrases are incapable of generating legally useable criteria, they, when put to this improper use, remain ever and only invitations to arbitrariness. They can only serve as rallying cries for those already inclined toward the policy position suggested; the phrases themselves are of no assistance in proving anything. For this cause, the only compliment we may extend to these expressions is that they sound lovely.

IV. As the fundamental right to marry is one that applies only to opposite sex couples, its existence is of no assistance to Plaintiffs' cause.

A related flaw found in abundance in Plaintiffs' argument is the consistent tendency to assume the very thing they are burdened to prove, viz., that marriage encompasses homosexual unions. There is no historical or legal precedent for such a notion, which is why theirs is such a novel suggestion. The innovative nature of their proposal is the very reason that the continual appeal to the "fundamental right of marriage" in support of their claim is so peculiar. The fact that opposite-sex marriage is a right of

fundamental standing under the law would seem to lend no legal or logical support for the proposal that this Court should stipulate a different conception of marriage than that which now exists as a fundamental right, and impose it on the Commonwealth. Apart from this prima facie implausibility of Plaintiffs' use of opposite-sex marriage jurisprudence as tools for their demand, there is their more committed failure to interact with that surface implausibility so as to dispatch the concern and present an explanatory bridge from these cases to their own cause. But Plaintiffs proceed as if the problem does not exist.

Plaintiffs criticize the trial court's announcement that they are seeking a "new" fundamental right,²⁴ calling that court's characterization of their claim a "semantic dodge" because they "seek to marry the person of their choice, a right that already exists for 'all individuals.'"²⁵ The dodge, however, properly characterizes the Plaintiffs petition, although theirs is far more substantial in its diversionary character than that resulting from a mere subtlety in semantics. No case they cite provides for

²⁴ BRIEF OF PLAINTIFFS-APPELLANTS, at 37, n. 19.

²⁵ Id.

a right "to marry the person of your choice," as Plaintiffs conceive that phrase. There are and always have been restrictions on the categories of those available for one to marry. One such unrelenting and self-evident restriction is that a person seeking to be a husband must marry one who is capable of being classified as a wife, and vice versa.²⁶

Yet the Plaintiffs insist that the right to marry is "no right at all" if they cannot choose whomever they wish as a marriage partner. Must then those who are already married to another be available as a

²⁶ It is a salient omission from all Plaintiffs' filings in this case of any mention of the words "husband" and "wife," although these two terms be inescapably companion elements to the constitution of marriage, as continually demonstrated in nearly any legal discussion of marriage and its incidents. See, e.g., Davis v. Misiano, 373 Mass. 261, 262 (1977) ("marriage... the relationship of husband and wife"); Maynard v. Hill, 125 U.S. 190, 212 (1888) (marriage "signifies the relation of husband and wife"); Mass. G.L. c. 273, § 7; Mass. G.L. c. 233, § 20; Cavanagh v. Cavanagh, 396 Mass. 836, 839 n. 2 (1986); Ankenbrandt v. Richards, 504 U.S. 689, 696 (1992); Michael H. v. Gerald D., 491 U.S. 110, 115 (1989); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 154 (1980) (Stevens, J., concurring); Hisquierdo v. Hisquierdo, 439 U.S. 572, 591 (1979) (Stewart, J., dissenting); Carey v. Population Services International, 431 U.S. 678, 707-08 (1977); Stanley v. Illinois, 405 U.S. 645, 664 (1972); United States v. Mitchell, 403 U.S. 190, 198 (1971); Labine v. Vincent, 401 U.S. 532, 552-53 (1971); Griswold v. Connecticut, 381 U.S. 479, 481-82, 495 (1965); Lutwak v. United States, 344 U.S. 604, 614-15 (1953).

spousal choice when one wishes to marry them? Plaintiffs' rhetoric would require this. But of course this is wrong. It simply does not follow that because the marriage relation is not susceptible to enterprising configurations that it is "not a right at all." The right to marry as properly conceived, and as recognized in the law of fundamental constitutional rights, remains very much of a right even if aberrant couplings are prohibited, for the exceedingly simple reason that marriage is not a category open to any and all comers.

While Plaintiffs insist the right they seek recognized is not new, signally absent from their discussion is even one precedent from any section of American jurisprudence which demonstrates that the "established right" they assert exists. The numerous citations to cases heralding a right to marry an opposite-sex partner only reinforce the propriety of the exclusion the law now reflects. In not a single "marriage case" to which Plaintiffs cite is marriage and its revered position availed to any arrangement other than that of an opposite-sex couple.²⁷

²⁷ For instance, Loving v. Virginia, 388 U.S. 1 (1967), Zablocki v. Redhail, 434 U.S. 374 (1978), Turner v.

Consequently, no value can accrue to Plaintiffs in carrying on about the exalted and protected status of marriage. The toil they expend on pointing out the fundamental nature of the right to marry, because expended while concurrently ignoring the exclusively opposite-sex nature of the right they discuss, is a wasted effort.

In instances of marriage prohibitions which were struck as constitutionally infirm, such as those based on miscegenation laws, Loving v. Virginia, 388 U.S. 1 (1967), incarceration of the betrothed, Turner v. Safley, 482 U.S. 78 (1987), and unmet child-support obligations, Zablocki v. Redhail, 434 U.S. 374 (1978), all parties therein could find proper appeal to the fundamental right of marriage, because no element in those relationships - race, incarceration, indebtedness - implicate factors that struck at the definition of the right at issue. This important distinction was well in mind by the Court in Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. 157, 161 (1819), when it explained that an anti-miscegenation law is one of "political expediency,"

Safley, 482 U.S. 78 (1987), each of which affirms the fundamental right to marriage, involve opposite-sex couples only.

whereas the prohibition on incestuous marriage is one whose absence would "outrage the principles and feelings of all civilized nations." This distinction is what separates the Plaintiffs' request from those in the Loving line of cases. More than child support arrears and race are implicated in Plaintiffs' claim. The profound and complementary nature of the union of man and woman that constitutes a marriage is at issue.

For this purpose the Kentucky Appeals Court in Jones v. Hallahan, 501 S.W.2d 588, 589 (1973) was not "circular" in its reasoning,²⁸ but rather identified something fundamental when it pointed out that the appellants in that case which sought the right to marry someone of the same sex "are prevented from marrying, not by the statutes of Kentucky... but rather by their own incapability of entering into a marriage as that term is defined." That fundamental issue missed by Plaintiffs involves

the critical point that the very concept and reality of the relationship between man and woman that we call marriage fundamentally differs from the nature of the relationship between two persons of the same sex. The marriage license, certificate, or legal status does not make the heterosexual marital relationship unique, nor does the

²⁸ As was suggested by Plaintiffs, BRIEF OF PLAINTIFFS-APPELLANTS, at 66.

marriage label make committed heterosexual relations valuable. Instead, because the relations themselves are uniquely valuable they are given the preferred status and label of marriage. * * * Thus the definition of marriage as a cross-gender union is not merely a matter of arbitrary definition or semantic wordplay; it is fundamental to the concept and nature of marriage itself.

The heterosexual dimension of the relationship is at the very core of what makes marriage a unique union and is the reason why marriage is so valuable to individuals and to society. The concept of marriage is founded on the fact that the union of two persons of different genders creates a relationship of unique potential strength and inimitable potential value to society. The essence of marriage is the integration of a universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity.

Lynn D. Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, 1996 B.Y.U.L. Rev. 1, 38-39 (1996).

Marriage cannot be altered in the dramatic fashion that Plaintiffs petition without it losing its very ontological character. The Constitution provides no warrant for such an upheaval.

Whereas Plaintiffs have appealed to the existence of a right that excludes them as reason for why the right ought not exclude them, a similarly imaginative (and similarly unreasonable) approach is put to use by

amici supporting their cause. The entire foundation of the argument of amici Historians of Marriage ("Historians") submitted to this Court in support of the proposed same-sex "marriage" right rests on a logical leap. Their extensive presentation on the changes in the substantive law that relates to the legal rights of a husband and wife makes for an absorbing read, but contributes nothing to their conclusion.

As demonstrated from their recitation of the repeal of the laws of coverture and those forbidding interracial marriages, as well as the development of a contract theory of marriage²⁹ and a liberalized divorce regime, there has been quite some substantive change in the rights of those who join as husband and wife in

²⁹ However, as contracts go, there is quite some difference between those of a commercial and those of a marital nature. See Boddie v. Connecticut, 401 U.S. 371, 376 (1971): "Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery."

the marriage relation. What this history does not do is justify the conclusion the Historians suggest, which is that there should be an abolition of the husband-and-wife model from marriage itself. None of the alterations in the marital legal landscape which they catalogue remotely relate to a change in the male-female composition of the marriage union. Thus, when the Historians, with nary a curtsy to rational exposition, speak of same-sex marriage as the "logical next step" for this Court to take, they are simply engaging untenable and muddled thinking. Impulse is not logic, and policy preferences are not converted to legal imperatives through fallacy.

V. The morals of the community are susceptible to regulation under the police power authority of the Commonwealth, and Plaintiffs' veiled ethical theory presents no rationale for dispensing with the regulations that maintain the integrity of the marital relation.

When Plaintiffs with great fervor inveigh against the perceived injustice of the Commonwealth's historic marriage law, they are motivated by an unstated moral sense, based on a particular view of the nature of the world. While they allow themselves the privilege of such an ideological perspective, they do not permit it to their contenders. While Plaintiffs object to all

philosophical outlooks with a favorable view of the traditional marriage laws, Plaintiffs conspicuously fail to counter with an explicit recitation of their alternative perspective, though it is insinuated to be more legally palatable.³⁰

One implicit proposal in the Plaintiffs' lawsuit that is a manifestation of their particular worldview is that the social institution of opposite-sex marriage is nothing beyond the arbitrary formulation of those wielding power, and does not reflect a real correspondence to the essence of reality. The question of whether Plaintiffs' perspective is sturdy enough to bear the load it portends, is one to which this Court should give its attention.

What is very much at stake in this lawsuit is the nature and purpose of human distinctions and relations, and whether the Commonwealth may take a position on such matters, thereby safeguarding a venerable social institution which has served as the

³⁰ For example, in the court below, Plaintiffs had criticized the "ideological perspective based on 'pragmatism' that maintains, as the Commonwealth tries to, that unpopularity alone is the basis for defeating gay people's challenges to discriminatory marriage laws. That ideological perspective, without a legal basis, is hardly grounds upon which to base a state interest." MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY, at 26, n. 25.

foundation of civilization throughout recorded history. Maynard v. Hill, 125 U.S. at 211-212. If the Commonwealth may not so act, why may it not? What proper ideology demonstrates that to be the case, and why should this Court assign legitimacy to that perspective over those which announce the contrary?

The marriage structure is contained within that category of affairs that qualifies for regulation under the police power, which unquestionably extends to the public morals. Commonwealth v. Strauss, 191 Mass. 545, 550 (1906). As Justice Brennan explained in dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 108-09 (1973), while the state cannot control a person's thoughts,

[t]hat is not to say, of course, that a State must remain utterly indifferent to -- and take no action bearing on -- the morality of the community. The traditional description of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry. See, e. g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). And much legislation -- compulsory public education laws, civil rights laws, even the abolition of capital punishment -- is grounded, at least in part, on a concern with the morality of the community.

As similarly explained by Justice Harlan,

Yet the very inclusion of the category of morality among state concerns indicates that

society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

Marriage without doubt implicates the moral concerns of the community. As explained by this Court in Inhab. of Milford v. Inhab. of Worcester, 7 Mass. 48, 52 (1810),

Marriage, being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well regulated governments, among the first attentions of the civil magistrate to regulate marriages; by defining the characters and relations of parties who may marry, so as to prevent a conflict of duties, and to preserve the purity of families[.]

And as propounded in Maynard v. Hill, 125 U.S. at 205,
211:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.

* * *

It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

It is inescapable that a position on the indisputably important social institution of marriage will be taken by the state. The immediate question is why must the Commonwealth of Massachusetts be considered to be constitutionally compelled to metamorphose the marriage relation that has heretofore seen its steadfast protection? In contending that no state interest justifies the Commonwealth's marriage law, Plaintiffs never address the important state interest in legislating in a fashion to regulate the public morals. Nor do Plaintiffs demonstrate that their own moral vision must necessarily trump that vision which has informed the public conscience of our civilization since the record of history began. Ignoring the wisdom contained in that heritage

received from our forbears is unmitigated folly, and Plaintiffs give no cause why the legislature must be forbidden to act on that consideration.

The "ordered liberty" we have seen practiced heretofore in Western, American, and Massachusetts history has never know a concern with its exclusive recognition and protection of the opposite-sex marriage right, "a relation as old and as fundamental as our entire civilization." Griswold v. Connecticut, 381 U.S., at 496 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring). There is not a legislature in this country, even in our super-enlightened age, that has seen fit to transmute marriage so as to abandon the recognition of the opposite-sex nature of that union. Must the Declaration of Rights then, grounded as it is in our collective legal history, deviate from that history and become a tool for avant-garde social reconstruction?

Plaintiffs have demoted to irrelevance the notion that marriage contains a meaning and design that transcends the positive legislation of temporal governments, such that would justify the marriage law herein challenged. But more than insisting that the

legislature is simply mistaken, Plaintiffs assert that this Court must replace the legislature's view of marriage with Plaintiffs' own view, founded as it is on their conspicuously ill-defined but ostensibly authoritative and constitutionally mandated perspective, which dispenses with the moral traditions of our civilization.

The implicit philosophical course charted by Plaintiffs that is evident from their proposals gives the Commonwealth legitimate ground to raise the concern it has over the potential that Plaintiffs' proposal would lead to inclusion of incestuous and polygamous unions in the proposed brave new world of marriage. If the hallowed and venerable institution of marriage is now susceptible to reformulation by judicial officers, what is to keep it from even further innovation, beyond Plaintiffs' specific request? Once our inherited institutions and moral restraints are consigned to the ash heap, all the fences are gone. The policy arguments and legal analysis presented by Plaintiffs in this action would, without a scintilla of modification, serve the purposes of all manner of the perversely creative.

CONCLUSION

The Plaintiffs-Appellants seek to recreate the Constitution to suit their program, instilling it with meaning it has never possessed, insisting it contains imperatives and instructions never before known, yet are asking this Court to honor that design with its judicial imprimatur. The flawed character of the arguments presented in favor of that petition are testimonies to the propriety of the lower court's judgment, which should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wendy J. Herdlein, attorney for Amicus Curiae Marriage Law Project hereby certify that on December 20, 2002, I served the foregoing Brief Amicus Curiae by causing a copy to be mailed, first-class postage prepaid, to counsel for the plaintiffs, Mary L. Bonauto, Gay and Lesbian Advocates and Defenders, 294 Washington Street, Suite 301, Boston, Massachusetts 02108-4608, and counsel for the defendants, Judith S. Yogman, Assistant Attorney General, One Ashburton Place, Boston, Massachusetts 02108-1698.
