

The Curious Case of the Missing Legal Analysis

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I. INTRODUCTION

The decision of the Vermont Supreme Court in *Baker v. State*,¹ may be one of the most celebrated judicial decisions in recent history. In *Baker* the court held that the Vermont marriage law allowing only male-female couples to marry violated the “Common Benefits” Clause of the state constitution, and that same-sex couples must either be allowed to enter marriage or some alternative union with legal status and benefits substantially equivalent to marriage. In the first two years and eight months since that decision was rendered in December 1999 until the week of this symposium, *Baker* was cited in at least 266 law review or journal articles.² Nearly two-thirds of those publications (167 articles, 63 percent of the total) can be described as supporting, lauding or endorsing the result, while just ten percent of the articles (27 pieces, 10 percent of the total) express any significant negative criticism of the decision (mostly raising separation of powers concerns).³ By any standard, six-to-one is a very successful approval ratio. Unquestionably, *Baker* has been very popular with the *literati* of the law profession – mostly law professors and law students who write in law journals and law reviews. While *Baker* has been cited an extraordinary number of times in law reviews and journals, it has also been cited in ten cases in the first thirty-

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1. 744 A.2d 864 (Vt. 1999).

2. See Appendix A, at the end of this article. I have not personally read all 266 articles, but I have read a sample of them. My excellent research assistant Justin Starr has read the relevant parts of all of them, and I have reviewed his research.

3. See *infra* Section III.

two months following its decision, which is not an insignificant number of subsequent citations.

However, there are several curiosities about the case citations to and legal commentaries about the *Baker* decision. Most of the cases do not cite *Baker* for its analysis, and little attention is given to the court's legal rationale. There is very little use or critical discussion of the legal analysis in either the cases or the commentary, and no court has followed its reasoning. These clues suggest that the legal analysis in *Baker* may be less than impressive. Indeed, upon close examination, the *Baker* majority opinion especially is seriously deficient in credible legal analysis. Despite numerous party and *amicus* briefs offered by some outstanding legal talent, one looks in vain in the majority opinion (and one of the concurring opinions) for sustained, credible legal analysis. Thus, *Baker* truly is the curious case of the missing legal analysis.⁴

Part II of this paper reviews the citation to and use of *Baker* in the courts. It is noted that the *Baker* analysis has had virtually no impact upon legal analysis in other jurisdictions. Further, surprisingly, the legal analysis in *Baker* has had only *de minimis* impact even in Vermont, where so far *Baker* is virtually *sui generis*.

Next, in Part III the limited consideration of the crucial legal analysis in *Baker* by legal commentators is briefly noted. Most of the supportive legal literature has been celebratory, rather than analytical, focusing on the policy outcome rather than the legal analysis upon which that outcome is based.

Part IV undertakes a careful, critical analysis of the rationale of the Vermont Supreme Court in *Baker* for its holding that the "Common Benefits" Clause requires that same-sex couples be allowed to marry, or to enter into equivalent legal unions. The majority analysis is internally self-contradictory, inconsistent with precedent, and inconsistent with the history and context of the origins of the "Common Benefits" Clause. While the majority opinion contains some eloquent passages and emotional rhetoric, that rhetoric is not matched by any consistent, credible, disciplined legal analysis.

Part V suggests, however, that despite its analytical scantiness and deficiencies, *Baker* is likely to be the direction the movement for same-sex marriage takes in the near future. The endorsement of some leading gay advocates who laud the *Baker* approach and who encourage the movement for same-sex marriage to first embrace "civil unions" or similar kinds of marriage-by-another-name as goals in the incremental

4. In this respect, *Baker* might be compared to other political decisions in which decorative adjectives replaced legal analysis. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 983 (1992) (Scalia J. dissenting in part, concurring in part).

quest for same-sex marriage is noted. The result in the recent U.S. Supreme court decision in *Lawrence v. Texas*,⁵ steps toward the Vermont system of legally recognized same-sex unions apart from but equivalent to marriage, while it also embraces and imitates *Baker's* substitution of emotional rhetoric for coherent, disciplined legal analysis.

Part VI contains some suggestions about how *Baker* can (and should) be distinguished and limited. Several reasons why *Baker* should not have significant persuasive influence are suggested. It is noted that state constitutional amendments may be the most prudent and effective ways to prevent the spread of *Baker*-type rulings by activist state courts. In conclusion, it is argued that the real issue raised by *Baker* concerns the role of the courts in creating and defining fundamental constitutional rights, institutions, and policy. That question goes to the very heart of the theory (known 225 years ago as “republican” theory) upon which the American experiment in self-government is predicated.

II. *BAKER* IN THE COURTS – NOTED AS A FACT OR CITED FOR BOILERPLATE, BUT NOT FOLLOWED IN CONSTITUTIONAL ANALYSIS

The first clue that something may be amiss in the *Baker* analysis is in the fact that in the first 32 months after it was decided, only *ten* reported state and federal court cases cited *Baker*.⁶ While this is a respectable body of precedent, it is far less than the astounding volume of legal literature and disproportionately less than that explosion of celebratory literature would lead one to expect. A very quick *Shepard's* search revealed that at least four other cases reported in the same volume of the *Atlantic, Second* reporter (volume 744) have been cited much more frequently than *Baker* has been cited. One case decided four weeks *after Baker*, but reported in the same volume, has been cited by more than twice as many courts as *Baker* has – in 20 reported cases and in at least five other cases with Lexis citations but without a printed reporter citation yet.⁷ Another case also decided four weeks *after Baker* and reported in the same volume has been cited in 18 other cases, not

5. 539 U.S. 558 (2003).

6. Westlaw search in “allstates, allfeds” databases for “744 A.2d 864”, last searched August 22, 2003. *Baker* has also been cited in two opinions of state attorneys general. See *Marriages—Marriage Licenses*, 2000 Op. Ala. Att’y Gen. No. 129 (April 20, 2000) (concluding that if Vermont passed the Civil Unions bill, neither full faith and credit nor other sources of law would require that Vermont civil unions be recognized in Alabama), and *Recognition of Vermont Same-Sex Civil Unions By Illinois*, 2000 Op. Ill. Att’y Gen. 017 (Dec. 29, 2000) (concluding that Illinois is not required to recognize Vermont Civil Unions).

7. *Commonwealth v. Basemore*, 744 A.2d 717 (Pa. 2000). This *Shepard's* research was last searched August 22, 2003.

counting multiple Lexis citations without printed reporter citations yet.⁸ Another case decided six weeks *after Baker* but reported in 744 A.2d has been cited in 17 other cases (not counting a couple of Lexis citations without printed reporter citations yet).⁹ A Delaware case decided six months earlier, but reported in the same reported volume (744 A.2d), has been cited by at least 18 other courts.¹⁰ Thus, even compared to these other state court cases reported in the same volume of the *Atlantic, Second* – not to mention comparison to the decisions reported in a dozen other state and federal reporter series, the influence of *Baker* in other courts seems to have been rather modest, especially in comparison to the hype in the legal commentaries.

Moreover, a quick search shows that several other Vermont cases decided the same year as *Baker* (1999) have been cited nearly as often as *Baker*. For example, *White v. Quechee Lakes Landowners' Ass'n., Inc.*,¹¹ a tort case concerning indemnification, has been cited by nine other cases, compared to ten case citations for *Baker*. Likewise, *Stickney v. Stickney*,¹² a case involving reduction of spousal compensation, is cited in eight other cases.¹³ Thus, for all the celebration, *Baker* barely stands out compared to several other Vermont cases decided the same year. An even more significant clue that *Baker* may not be quite the “heavyweight” legal decision that all of the celebrating would lead one to believe comes from the fact that most of the citations to *Baker* are to or for mere fact-of-existence matters, not to the court’s legal analysis. A review of the ten court decisions that cite *Baker* underscores this point.

In *Republican Party of Minn. v. White*,¹⁴ the U.S. Supreme Court held (by a 5-4 vote) that a Minnesota prohibition on judicial candidates announcing their legal views is an unconstitutional violation of the freedom of speech. The majority opinion cited *Baker* in passing to illustrate the proposition that “[n]ot only do state-court judges possess the power to ‘make’ common law, but they have the immense power to

8. *Commonwealth v. Widmer*, 744 A.2d 745 (Pa. 2000). This Shepard’s research was last searched August 22, 2003.

9. *Aponte-Correa v. Allstate Ins. Co.*, 744 A.2d 175 (N.J. 2000). This Shepard’s research was last searched August 22, 2003.

10. *Shelton v. State*, 744 A.2d 465 (Del. 1999). This information comes from a Westlaw search on August 22, 2003.

11. 742 A.2d 734 (Vt. 1999) (decided two months before *Baker*). Shepard’s and Westlaw searches last done August 22, 2003.

12. 742 A.2d 1228 (Vt. 1999) (reduction of spousal maintenance) (Westlaw search August 22, 2003).

13. *See also Sagar v. Warren Selectboard*, 744 A.2d 422 (Vt. 1999) (cited in at least six other cases as of Westlaw search, August 22, 2003).

14. 536 U.S. 765 (2002).

shape the States' constitutions as well."¹⁵ There is no discussion (much less endorsement) of the legal analysis in *Baker*.

In *Levin v. Yeshiva University*,¹⁶ lesbian medical students filed suit under the State Human Rights Law and New York City Civil Rights Law against a private university whose medical school refused to permit them to reside in school-owned married student housing with their partners. Overturning in part the lower court's grant of the university's motion to dismiss, the New York Court of Appeals interpreted the New York City law as

designed to secure for unmarried, committed couples the same benefits as those enjoyed by married persons. Thus, under the legislation, same-sex couples who are in committed relationships would be able to secure housing and other benefits on the same basis as married couples Thus, the action should not be dismissed, and defendants should be given the opportunity to prove that the University's policy "bears a significant relationship to a significant business objective" or that there is no disparate impact.¹⁷

Following this, the court cited *Baker* noting that the Vermont Court had held that "same-sex couples were entitled to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples," and that that decision had been effectuated by the enactment of the Civil Unions law.¹⁸ Thus, *Baker* was cited for the fact of the policy adopted by the court and implemented by the legislature. There is no analysis of the *Baker* decision itself, nor is any legal analysis in *Baker* cited or discussed.

In *Langan Est. of Spiceland v. St Vincent's Hosp. of N.Y.*,¹⁹ two gay men residing in New York registered their same-sex "civil union" in Vermont, after which one of the men was hit by an automobile in New York and died, allegedly as a result of improper medical treatment in a New York hospital. The surviving partner filed a wrongful death suit in New York against the hospital.²⁰ On the cross-motions the issue was whether the gay couple had the status of "spouses" in Vermont, and, if so, whether New York's public policy barred recognition of same-sex "spouses."²¹ To answer the first question, the Supreme Court (trial judge) in Nassau County twice cited *Baker* to show the judicial order and

15. *Id.* at 784.

16. 730 N.Y.S.2d 15 (N.Y. 2001).

17. *Id.* at 25 (citations omitted).

18. *Id.* at 25, n.4.

19. 765 N.Y.S.2d 411 (N.Y.Sup. 2003).

20. *Id.* at 412.

21. *Id.*

principle which the Vermont Civil Union statute was designed to effectuate.²² So the citation clearly is to the fact and the policy (what the Vermont Supreme Court ordered, and why) of the *Baker* decision. However, it must be acknowledged that the New York court cited with approval the following rationale for the *Baker* decision:

The past provides many instances where the law refused to see a human being when it should have. *See, e.g., Dred Scott*, 60 U.S. at 407 (concluding that African slaves and their descendants had “no rights which the white man was bound to respect”). The future may provide instances where the law will be asked to see a human when it should not. *See, e.g., G. Smith, Judicial Decisionmaking in the Age of Biotechnology*, 13 Notre Dame J. Ethics & Pub. Pol’y 93, 114 (1999) (noting concerns that genetically engineering humans may threaten very nature of human individuality and identity). The challenge for future generations will be to define what is most essentially human. The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.²³

By holding that the New York public policy would not be offended by recognizing civil union partners as “spouses” for purpose of the New York wrongful death law, it can be inferred that the Nassau County trial judge in *Langan* endorsed and embraced this policy analysis from the *Baker* decision. However, he did not cite any other legal analysis, and cites *Baker* only for its expression of a policy in light of which a Vermont statute must be interpreted, with which the New York court impliedly agreed and found not to violate New York public policy. Moreover, the *Baker* quote used in *Langan* primarily expressed a public policy conclusion based upon *a priori* value or opinion. It is only peripherally “legal” analysis.

In *Goodridge v. Dep’t. of Pub. Health*,²⁴ a Massachusetts trial court rejected the claim of seven same-sex couples seeking marriage licenses,

22. *Id.* at 415, 416-17.

23. *Id.* at 417 (quoting *Baker*, 744 A.2d at 864). This “common humanity” language is the most quoted language from *Baker*, fully quoted at least 26 times in the law reviews (and quoted in one of the ten cases).

24. 14 Mass.L.Rptr. 591, 2002 WL 1299135 (Mass. Super. 2002), *rev’d*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Massachusetts Supreme Judicial Court concluded that the Commonwealth had failed to articulate a rational basis for denying civil marriage to same-sex couples, that the Massachusetts Constitution “affirms the dignity and equality of all individuals,” *Goodridge*, 798 N.E.2d at 948, and “forbids the creation of second-class citizens,” *id.*, and that in “[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples,” *id.* at 968, Massachusetts marriage licensing law, “violate[d] the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.” *Id.* Three

and granted the defendant's motion for summary judgment. *Baker* is cited three times. The first two references were citations to the many courts that "have interpreted their marriage statutes to apply only to one man and one woman."²⁵ The other reference noted that the *Baker* decision was based solely on the "Common Benefits" Clause of the Vermont Constitution, and that there was no analogous provision in the Massachusetts Constitution.²⁶ The Massachusetts court made no reference to any legal analysis of the *Baker* decision.

In *Rosengarten v. Downes*,²⁷ the Connecticut Court of Appeals affirmed a lower court dismissal for lack of subject matter jurisdiction of a suit for dissolution filed by a party to a Vermont same-sex civil union. The plaintiff argued that by allowing same-sex partners to adopt, the Connecticut legislature had shown a willingness to recognize civil unions, just as the Vermont Supreme Court in *Baker* had relied on a similar change in Vermont adoption law to justify its decision. The Connecticut court disagreed, noting that the legislative history clearly showed "that a number of legislators were opposed to adoption of this legislation if it were to be used later in any way as a wedge by appellate or trial courts to require recognition of civil unions in Connecticut in the manner they ascribed to the Vermont Supreme Court in *Baker*."²⁸ This concern had ample justification, because the *Baker* court had arrived at its decision by using amendments to adoption laws "as a wedge" to show "there was no proper governmental purpose under the common benefits clause of the Vermont constitution to restrict marriage to unions between a man and a woman."²⁹ Thus, the *Rosengarten* case did cite one point of legal analysis in the *Baker* decision, but it explicitly declines to follow that rationale because the Connecticut legislature expressly rejected the connection between adoption and same-sex unions that the *Baker* court had inferred and relied upon.³⁰

months later, in *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004), the same court rendered an "advisory opinion" to the state Senate indicating that creation of Vermont-style Civil Unions would also violate the Massachusetts Constitution because

[t]he same defects of rationality evident in the marriage ban considered in *Goodridge* are evident in, if not exaggerated by, Senate No. 2175 [the proposed Civil Union bill] 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.

802 N.E.2d at 569.

25. *Goodridge*, 14 Mass.L.Rptr. at *2, *3.

26. *Id.* at *6.

27. 802 A.2d 170 (Conn. App. 2002).

28. *Id.* at 181.

29. *Id.*

30. The Connecticut court may have signaled its own disapproval of the *Baker* logic on this point when it put "reality" in quotes: "After discussing what it termed the 'reality' that some persons

The lack of use of the legal analysis in *Baker* is even more startling in the subsequent references to *Baker* in decisions of the Vermont Supreme Court. *Baker* was cited only five times in reported Vermont decisions (printed in the *Atlantic, Second*, reporter series) in the first 32 months after the case was decided, and for innocuous points.

In two cases *Baker* is cited for the principle of statutory construction that courts must discern and follow legislative intent. In *Cantin v. Young*,³¹ the plaintiff moved for modification of child support to include her former husband's workers' compensation benefits as income in determining the guideline amount. The court cited *Baker* when noting "[o]ur intent in construing a statutory provision is to discern the intent of the Legislature."³² There is no other discussion or analysis of the *Baker* decision itself. Similarly, in *Colwell v. Allstate Ins. Co.*,³³ insured parties brought declaratory judgment actions against their automobile insurers and self-insured employer to recover underinsured motorist benefits. The court noted,

In construing a statutory provision, our paramount goal is to discern and implement the intent of the Legislature. *Baker v. State*, 744 A.2d 864, 868 (1999) When the language of a statute is plain and unambiguous, we presume that the Legislature intended the meaning expressed by that language. *Baker*, 744 A.2d at 868.³⁴

There is no further discussion or analysis of the *Baker* decision itself. These cases reveal that the one legal holding in *Baker* that has actually been cited and used by other courts comes from the part of the opinion that interpreted the Vermont marriage statute as not allowing same-sex couples to marry.

In *Daye v. State of Vermont*,³⁵ a prisoner advocacy group filed suit challenging the validity of contracts for transfer of Vermont prisoners to prisons in other states alleging violations of the Interstate Corrections Compact and of the Vermont Constitution's "visible punishments" clause. The trial court dismissed for lack of standing.³⁶ The Vermont Supreme Court affirmed and also noted that even if the parties had standing, their claims would fail.³⁷ As to the "visible punishments"

in same-sex relationships were conceiving children by artificial means, the Vermont court so used the enactment by the Vermont legislature of that change in the law" *Id.*

31. 770 A.2d 449 (Vt. 2000).

32. *Id.* at 451 (citing *Baker*, 744 A.2d at 868).

33. 819 A.2d 727 (Vt. 2003).

34. *Id.* at 730.

35. 769 A.2d 630 (Vt. 2000).

36. *Id.* at 632.

37. *Id.* As to the ICC claims, the court held that the Corrections Commissioner had authority to enter into a transfer agreement with a New Jersey County (not just a state), to allow Virginia

provision, the court reviewed the history of that provision of the state constitution and quoted *Baker* for the propositions that “our state constitution provides the ‘first and primary safeguard of the rights and liberties of all Vermonters,’” and that “‘the motivating ideal of the framers’ must continually inform our analysis of contemporary issues.”³⁸ Applying that standard, the court concluded that “the fundamental purpose—the ‘motivating ideal’—of the framers was to replace brutal punishments with visible labor for the people to observe and ‘and be instructed by’ is largely persuasive.³⁹ What plaintiffs have failed to demonstrate is any *violation* of that motivating ideal.”⁴⁰ *Baker* was cited once solely for historical fact to provide the “primary safeguard” context for the issue before the court.⁴¹

In *Brady v. Dean*,⁴² several members of Vermont House of Representatives, three town clerks, and some taxpayers filed suit against the governor of Vermont and other state officials to enjoin implementation of same-sex civil union law. The court referred to *Baker* when explaining the origins of the civil union law.⁴³ There was no discussion or analysis of the *Baker* decision itself. However, the *Brady* case is worth mentioning further because it seems to support the idea that *Baker* is *sui generis*.

In *Brady* the plaintiffs challenged the enactment of the Vermont Civil Union law because of, *inter alia*, alleged serious misconduct by fourteen legislators that voted for the civil union law. Their allegations, which were accepted at face value for purposes of the motion, were

that fourteen members of the [Vermont] House of Representatives participated in a “dollar-a-question” betting pool in connection with a preliminary vote on the civil unions bill. The money went to the participant coming closest to predicting the number of “yes” votes. The vote was seventy-six to sixty-nine in favor of having the bill read a third time. All fourteen participants in the pool voted “yes.”⁴⁴

The Speaker of the House expressed disapproval but did not disqualify the fourteen nor did any of them disqualify themselves, nor was the

prison officials to select the prison where the Vermont prisoners would be kept, and to apply stricter visitation rules than apply in Vermont prisons. *Id.* at 633-36.

38. *Id.* at 638 (quoting *Baker*, 744 A.2d at 870).

39. *Id.*

40. *Id.*

41. *Id.*

42. 790 A.2d 428 (Vt. 2001). See generally Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401, 426-428 (2002).

43. *Id.* at 429.

44. *Id.*

legislative vote retaken or reconsidered.⁴⁵ Plaintiffs alleged violation of state constitutional prohibition on accepting “any fee or reward” for advocating a bill, from “tak[ing] greater fees than the law allows,” the “Common Benefits” Clause (basis for the *Baker* ruling), and statutes criminalizing the “running of lotteries, games of chance and bookmaking.”⁴⁶ The trial court ruled that the plaintiffs lacked standing, the issue was a political issue, and separation of powers would prevent the court from adjudicating those claims.⁴⁷

The Vermont Supreme Court, which in *Baker* had effectively ordered the state legislature to legalize same-sex marriage or create an equivalent legal union for same-sex couples, affirmed on the ground that plaintiffs lacked standing because of the principle of judicial noninterference with legislative functions and political questions.⁴⁸ The court said: “The prudent exercise of judicial self-restraint and deference to the independence of a coordinate governmental branch”⁴⁹ prevented the court from investigating charges that the democratic process was compromised by the unethical conduct, and that “a proper regard for the independence of the Legislature”⁵⁰ required the court to ignore the charges because “no branch [may] usurp the ‘core functions’ . . . or impair the ‘independent institutional integrity’ of another.”⁵¹

Brady revealed behavior that not only indicts the leaders of the Vermont legislature who simply looked the other way and failed to take any action to rectify the abuse of legislative process, but it revealed the double-standard of the Vermont Supreme Court which brushed aside the challenges to the alleged legislative corruption. One wonders why the court’s commitment to “the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law,”⁵² did not extend to protecting the rights of opponents of the court’s own favored policy, or to enforcing the anti-gambling and legislative integrity laws against legislators who support that judicially-preferred policy. In *Baker*, the Vermont Supreme Court ended its landmark decision

45. *Id.* at 430 (“[Speaker] Metzger stated that he was ‘appalled’ and ‘ashamed’ by the conduct of the participants and ‘concerned [about] the impact on the final vote’ but otherwise no objection . . .”).

46. *Id.*

47. *Id.* at 429.

48. The town clerks asserted that it violated their religious liberty to be required to register same-sex civil unions. The trial court rejected this claim on the merits, and the supreme court agreed that as the civil union law allowed assistants to issue the civil union license, the religious liberty of the town clerks was adequately accommodated. *Id.* at 434-35.

49. *Id.* at 431.

50. *Id.* at 432.

51. *Id.*

52. *Baker*, 744 A.2d at 867.

mandating equal legal status and benefits for same-sex couples with the ringing declaration: “The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.”⁵³ Yet *Brady* could be read as demonstrating that legislators who cooperate to implement controversial judicial preferences in Vermont are not held to the common standards applicable to mere “common humanity.”⁵⁴ At the very least, *Brady* suggests that the *Baker* decision really is *sui generis*.

The fifth reported Vermont case to cite *Baker* involved the “Common Benefits” Clause, the basis for the *Baker* ruling, and brings us to consider the impact of *Baker* in Vermont upon interpretation of that clause of the Vermont Constitution. The Clause provides: “That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community”⁵⁵ In the first 32 months since *Baker* was decided, the Vermont Supreme Court interpreted the “Common Benefits” clause in only one case.⁵⁶ It cited *Baker* in that case, but, in stark contrast to *Baker*, it declined to interfere with or overrule the legislative policy, expressing strong deference to the legislature (ironically quoting *Baker* for that principle). In *OMYA, Inc. v. Town of Middlebury*,⁵⁷ the owner of a quarry appealed the decision of the Vermont Environmental Board rejecting its request to double the number

53. *Id.* at 889.

54. *Id.*

55. VT. CONST., ch. I, art. 7. While the provision refers to “the common benefit . . . of the people” (singular) the Vermont Supreme Court calls this the “Common Benefits Clause” (plural), and so that grammatically questionable form is used herein.

56. In another case, the Vermont Supreme Court declined to reach the “Common Benefits” Clause issue because the appellant had not raised the issue in the trial court. *In re Picket Fence Preview*, 795 A.2d 1242 (Vt. 2002) (affirming Vermont Tax Commissioner and Superior Court determination that a for-sale-by-owner guide was not exempt from the state use tax as a “newspaper,” and rejecting the taxpayer’s federal equal protection and free speech claims, and declining to reach the “Common Benefits” Clause and other Vermont Constitution claims). In a second case, *Town of Killington v. State*, 776 A.2d 395, 397 (Vt. 2001), the “Common Benefits” Clause is mentioned in an explanation of the factual background of a dispute over interpretation of a tax statute which had been enacted in response to a decision by the Vermont Supreme Court interpreting the “Common Benefits” Clause as requiring equalization of education spending among different Vermont towns. The mention of the “Common Benefits” Clause was purely for historical case context and did not bear upon the issue, and interpretation of statute, which turned on effectuating the intent of the legislature, the court rejecting the Town’s interpretation and accepting the state’s. *Id.* at 400-01. Likewise, in *Brady*, 790 A.2d 428, the Vermont Supreme Court declined to reach the merits of a “Common Benefits” Clause claim challenging legislative betting on the outcome of the Civil Union bill.

57. 758 A.2d 777 (Vt. 2000).

of round trips the quarry's trucks could make through a small village located between the quarry and the quarry's processing plant.⁵⁸ After brushing aside other constitutional claims,⁵⁹ the Vermont Supreme Court considered the quarry operator's argument that the Board's decision violated the "Common Benefits" Clause of the Vermont Constitution because other quarry operators were not similarly restricted under the state's land use law.⁶⁰ The court cited three cases, including *Baker*, to support the proposition that "the legislature may choose to address problems incrementally."⁶¹ The court quoted dicta from *Baker* to make the point that: "It is . . . well settled that statutes are not necessarily unconstitutional because they fail to extend legal protection to all who are similarly situated."⁶² The court reasoned that because the land use law requiring permits "does not apply to all in-state developments or out-of-state enterprises does not render it constitutionally infirm."⁶³ The quarry cited cases where increased automobile traffic had been approved by the Board, but the court distinguished the environmental impact of increased car traffic from increased truck traffic. Since the quarry had not shown that the Board acted arbitrarily or fancifully, the court upheld the Board decision.⁶⁴ Thus, the *OMYA* court cited *Baker* for a principle that had been noted in *dicta* (but not followed) in *Baker*, a principle used to uphold legislation. *OMYA* did *not* cite *Baker* for the holding of *Baker*, or for the interpretation of the "Common Benefits" Clause that overcame or circumvented the deference to legislation principle, or for the rationale or logic behind that interpretation in *Baker*. Interestingly, the court in *OMYA* did not even try to distinguish the interpretation of the "Common Benefits" Clause in *Baker*. That is significant, for if the *Baker* standard of interpretation of the "Common Benefits" Clause had been applied in *OMYA*, it seems that it would have led the court to overturn the decision of the Environmental Board. There certainly is a discrepancy between the outcome in *Baker* and in *OMYA* insofar as upholding legislation that has disparate impact upon separate groups, differentially affecting the rights enjoyed by one class of persons. So the failure to fully distinguish

58. The quarry had permission to make 85 round trips through Brandon per day; it sought permission to make 170 round trips; the Environmental Board granted permission to make 115 roundtrips per day. *Id.* at 779.

59. The Vermont Supreme Court first rejected *OMYA*'s claim that the decision exceeded the jurisdiction and authority of the Board, *id.* at 779-80; violated substantive due process, *id.* at 780; and constituted an impermissible moratorium. *Id.*

60. *Id.* at 780.

61. *Id.* at 781. The holding in *Baker* would seem to contradict this principle.

62. *Id.*

63. *Id.*

64. *Id.*

or reconcile the cases is noteworthy. It suggests that the Vermont Supreme Court considers *Baker* to have established a rule or principle that is not of general applicability. It is *sui generis*. And as such, it is self-contradictory. As it seems to have been applied by the Vermont Supreme Court, the *Baker* interpretation of the Vermont “Common Benefits” Clause (creating a special exception to the “Common Benefits” Clause interpretation for same-sex couples only) seems to violate the *Baker* commonality principle.

By comparison, in the three years before *Baker* was decided, the Vermont Supreme Court interpreted the “Common Benefits” Clause in four cases.⁶⁵ In three of the four cases, the “Common Benefits” Clause claim was rejected. In *L’Esperance v. Town of Charlotte*,⁶⁶ Justice Dooley, writing for the court, held that a trial court ruling requiring the selectmen of a town to renew a lease for lakefront property for the rent set in the original lease did not violate the “Common Benefits” Clause because it provided the town with “adequate and reasonable benefits.”⁶⁷ *Parker v. Gorczyk*,⁶⁸ held that a policy that would make prisoners convicted of violent felonies ineligible for furlough until the expiration of their minimum sentences does not violate state due process of equal protection (“Common Benefits” Clause) with only passing reference to the Clause, but incorporating much due process analysis. In *Wood v. Fletcher Allen Health Care*,⁶⁹ the court, per Justice Dooley, rejected a “Common Benefits” Clause claim by the employer of a pregnant woman allowed disability benefits. “The ‘inquiry under Article 7 is whether the statute is reasonably related to the promotion of a valid public purpose.’”⁷⁰

In one case, however, the “Common Benefits” Clause claim was accepted and resulted in a significant change in state education funding policy. In *Brigham v. State*,⁷¹ decided more than two years before *Baker*,

65. The court has noted, but avoided interpreting, the “Common Benefits” Clause in several other cases. See *In re A.J.*, 733 A.2d 36 (Vt. 1999) (subordinating “Common Benefits” Clause claims to federal Equal Protection claims—which were rejected—where a mother was challenging the federal Indian Child Welfare Act exclusion of unrecognized tribes); *Mello v. Cohen*, 724 A.2d 471, 473 (Vt. 1998) (noting but not evaluating plaintiff’s claim that an expert testimony requirement violated several provisions including the “Common Benefits” Clause); *Tarrant v. Dep’t of Taxes*, 733 A.2d 733, 747 (Vt. 1999) (holding that taxpayer is entitled to tax credit for pro rata share of taxes paid by their Subchapter S corporation on statutory grounds, dissenting opinion disagrees and summarily concludes that claim that tax rule violates, *inter alia*, the “Common Benefits” Clause is without merit).

66. 704 A.2d 760 (Vt. 1997).

67. *Id.* at 763.

68. 744 A.2d 410 (Vt. 1999).

69. 739 A.2d 1201 (Vt. 1999).

70. *Id.* at 1207 (quoting *MacCallum v. Seymour’s Adm’r*, 686 A.2d 935, 937 (Vt. 1996)).

71. 692 A.2d 384 (Vt. 1997). See *infra* notes 103-104 and accompanying text.

the court held that the state scheme for funding public education which resulted in huge disparities in per-pupil educational spending (ranging from \$2979 to \$7726) fell “well short of achieving reasonable educational equality of opportunity,” and violated the “Common Benefits” Clause and the “Education and Virtue” Clause of the Vermont Constitution.⁷²

Given the small number of “Common Benefits” Clause cases and the relatively short period of time, it is not possible to make a definitive statement about the impact of *Baker* on Vermont “Common Benefits” Clause jurisprudence. But this much can be said: the unique construction of the “Common Benefits” Clause in *Baker* and the court’s creative rationale for that interpretation have not been used, much less followed, in any reported cases decided in Vermont in the 32 months since *Baker* was decided. Only one case cites *Baker* for any constitutional analysis, and that is for a proposition relating to a generic principle concerning the importance of finding and following the original intent and purpose of the founders. The radical construction of the “Common Benefits” Clause in *Baker* appears to be *sui generis* in Vermont so far.

Thus, courts in other jurisdictions have cited *Baker* for the fact of its existence and the fact of its judgment. While a few hint approval, there has been only one clear endorsement of the judgment. Most significantly, courts in other jurisdictions have not cited, followed, or used the legal rationale at the core of *Baker*—the interpretation of equality principles—at all. The *Baker* interpretation has been noted as a matter of fact, but has not been followed in equality cases in other jurisdictions, and the logic and rationale of *Baker* have not been imitated or followed at all in interpreting equality principles. Even in Vermont, *Baker* has been cited only for routine statutory interpretation principles and for the principle that finding the original intent and purpose of the founders is important in interpreting the state constitution. As to the scope and meaning and application of the “Common Benefits” Clause, nearly three years after its sensational decision, *Baker* remains *sui generis* even in the Vermont Supreme Court.

Thus, of the ten cases that cited *Baker*, three cite *Baker* for the principles of statutory interpretation it stated. Three cite *Baker* solely or primarily for the fact of the policy that was adopted, not to follow or endorse it but to note that it was adopted. As for the other cases, one distinguishes the “Common Benefits” Clause basis of *Baker*, one distinguishes *Baker*’s interpretation of the implication of the Vermont adoption statute to permit same-sex couples to adopt, one cites *Baker* to

72. *Id.* at 397.

explain the factual context in which the other case arose, one cites *Baker* for the general policy of giving liberal interpretation to the Vermont Constitution, and one cites *Baker* for the proposition of the importance of deferring to the legislature.

III. THE SILENCE IN THE CELEBRATION—WHAT THE LEGAL LITERATURE DOES NOT SAY ABOUT *BAKER*

The articles reviewed by my research assistant, Justin Starr, in Appendix A, total 266 pieces, and they are categorized into five categories. One hundred thirty-nine (139) articles are positive—supportive of *Baker*. Another twenty-eight (28) articles support *Baker* as a step in the right direction but are critical of the court for not going far enough, for allowing the creation of a separate-but-equal regime and not ordering the outright legalization of same-sex marriage. That makes a total of 167 articles that are positive about *Baker*. Seventy-one (71) other articles took a neutral position, describing and reporting but neither endorsing nor criticizing the decision. Twenty-seven (27) articles were negative—critical of some aspect of the *Baker* decision; the most common criticism was for disregarding, supplanting or usurping, the role of the legislature, that is, for judicial legislation. Finally, one article challenged the notion that *Baker* was positive, but could not be called neutral or negative because the article author argued that marriage is an inherently dysfunctional institution, and called for abolition of marriage altogether.

While most law review writing about recent cases focuses on understanding, explaining and either criticizing or supporting the legal analysis of the court, a different pattern characterizes most of the law review writing about *Baker*. Virtually all of the legal writing about *Baker* focuses on the result, and largely ignores the legal analysis. The legal literature supportive of *Baker* tends to be celebratory rather than analytical. At first blush, one might brush aside that phenomenon. After all, before *Baker* not a single American state accorded same-sex couples any status or legal relationship rights significantly comparable to marriage,⁷³ but *Baker* declared that same-sex couples had a constitutional

73. Two years before the *Baker* decision, the Hawaii legislature enacted a law allowing any two persons unable to marry to register as “reciprocal beneficiaries.” HAW. REV. STAT. ANN. § 431:10-234 (Michie 2001). However, that law emphasizes that the relationship is not equal to or comparable to marriage, nor was it designed for or limited to same-sex couples. See Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a ‘Simulacrum of Marriage’*, 66 FORDHAM L. REV. 1699, 1739-40 (1998) (“Underscoring that the status is not meant to confer special symbolic recognition on gay relationships, the law specifies that it is as open to ‘a widowed mother and her unmarried son’ as to ‘two individuals who are of the same gender.’”). Compared to civil unions, relatively few benefits are conferred upon Hawaii reciprocal beneficiaries,

right under the Vermont Constitution to the same or equivalent legal status and benefits as married couples. So, some celebration is to be expected. However, it is not the presence of celebratory writing about *Baker* that is curious; it is the absence of analytical writing. Indeed, given the precedential potential of the ground-breaking decision, one would expect enthusiasts of same-sex unions to have produced a geysir of legal analysis devotedly dissecting the court's rationale in delicious detail, enthusiastically elucidating the logic of the court's interpretation of the Vermont Constitution, and elaborately explaining why the analysis of the Court in *Baker* is irrefutable. In context, the paucity of reference to the Vermont Supreme Court's legal analysis in the voluminous writing endorsing *Baker* seems curious.

Most of the supportive law review articles on *Baker* do not attempt to defend the decision—they fete, celebrate, and lionize *Baker* but they do not examine or analyze. Greg Johnson sets the tone in his article, *In Praise of Civil Unions*: “Let us celebrate Vermont! Let us praise civil unions!”⁷⁴ Several candidly (or tacitly) admit that *Baker* does not contain significant legal analysis. Michael Mello, for example, states that the *Baker* opinion “did not contain civil rights doctrine.”⁷⁵ Rather, they frequently direct the focus of consideration of *Baker* to the importance of larger, non-technical, non-analytical factors. Beth Robinson, one of the plaintiff's attorneys in *Baker*, wrote: “I think some of the most valuable lessons we, as lawyers, can draw from the Vermont experience aren't strictly legal, or academic, and can't be gleaned by simply reading the *Baker v. State* decision or reviewing the civil union law.”⁷⁶ The negative pregnant in that statement is significant. Some articles praise the *Baker* court for its political wisdom—advancing the cause of same-sex marriage agenda without going so far as to cause an overwhelming backlash. For example, William Eskridge makes this point, describing what he calls the “nightmare scenario.”

Legislative adoption of same-sex marriage might have polarized the electorate and yielded a traditionalist backlash even more than civil unions have done. In that event, not only would the next legislature and

and very few same-sex (or other) couples have registered as reciprocal beneficiaries. Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315, 334 n.142 (2002) (only 592 couples registered as Hawaii reciprocal beneficiaries in the first four years, compared to 2,479 couples who registered for Vermont civil unions in the first year, and Professor Johnson calls the Hawaii reciprocal beneficiary law “a stigmatizing law.”)

74. Johnson, *supra* note 73.

75. Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-sex Marriage in Vermont*, 25 VT. L. REV. 149, 172 (2000).

76. Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L. J. 237, 237 (2001).

governor have been able to repeal the civil unions law, but they might have had enough votes to propose a constitutional amendment overriding Baker. In this nightmare scenario, pushing for option A, the best choice, would not only have resulted in option C, the worst choice, but would have run the risk of hard-wiring option C into Vermont constitutional law.

The nightmare scenario is also the reason the Vermont Supreme Court pulled its punches in Baker. The justices on that court were aware of the fate of earlier same-sex marriage rulings in other states.⁷⁷

About ten percent (10%) of the articles listed in Appendix A criticize *Baker* and portray it as a negative decision. Most of the criticisms of *Baker* in the law review literature focus on the judicial activism of the court. They assert that the court usurped a function that is not judicial, but either legislative or constitutive (to create or amend the constitution).⁷⁸

IV. A CRITICAL EXAMINATION OF THE LEGAL ANALYSIS IN *BAKER*

The history of how commentators who support *Baker* for policy reasons have been silent about the legal reasoning, and of how other courts and even the Vermont Supreme Court in other cases have largely ignored the crucial legal reasoning in *Baker* invites a critical analysis of the *Baker* opinion.

The Vermont Supreme Court issued three opinions in *Baker* totaling 46 pages in volume 744 of the *Atlantic, Second* reporter.⁷⁹ The majority opinion by Chief Justice Jeffrey L. Amestoy represented the views of three justices completely, and of two other justices partially. Justice John A. Dooley's concurring opinion rejected the court's constitutional analysis, but reached the same conclusion by another approach. Justice Denise R. Johnson's separate opinion concurred in the court's constitutional analysis, suggesting an additional rationale, and dissented

77. William N. Eskridge, *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 873-74 (2001). See also, Gil Kujovich, *An Essay on the Passive Virtue of Baker v. State*, 25 VT. L. REV. 93, 101 (2000) ("This recent history did not go unnoticed by the Baker court. Chief Justice Amestoy's opinion for the majority expressly acknowledged the 'political cauldron of public debate' that had produced state constitutional amendment's in Alaska and Hawaii . . .").

78. See, e.g., Lino Graglia, *Single-Sex "Marriage": The Role of the Courts*, 2001 BYU L. REV. 1013, 1014 (2001); Francis Cardinal George, O.M.I., *Law and Culture*, 1 AVE MARIA L. REV. 1, 16 (2003); Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 26 (2003).

79. The caption is at 744 A.2d 864, but the majority opinion begins on page 867 and ends on page 889; Justice Dooley's opinion runs from 889-897; and Justice Johnson's opinion runs from 897-912.

from the remedy part of the majority opinion. Only one of the opinions, Justice Dooley's, contains sustained, credible, legal analysis.

The majority opinion contains four main parts, (a) analyzing the statutory question, (b) determining the constitutional standard, (c) applying the constitutional standard, and (d) deciding the appropriate remedy. Three of them are seriously defective in legal analysis.

A. *Statutory Interpretation*

The only part of the majority opinion that was supported unanimously by all five justices (apart from the mandate reversing the lower court) was the statutory analysis. Like every other court in the country that has faced similar statutory claims,⁸⁰ the Vermont Supreme Court rejected the assertion that the state marriage statute could be construed to require marriage license officials to allow same-sex couples to marry.⁸¹ The court noted that the objective in deciding contested statutory construction is "to discern the legislative intent," and to do that the court relied "on the plain and ordinary meaning of the words"⁸² Referring to dictionaries,⁸³ "the understanding of the term [that] is well-rooted in Vermont common law,"⁸⁴ and the meaning indicated by numerous related statutes,⁸⁵ the court held that "the evidence demonstrates a clear legislative assumption that marriage under our statutory scheme consists of a union between a man and a woman."⁸⁶ That clear and particular legislative intent also distinguished a case cited by plaintiffs in which the court had interpreted the term "spouse" in an adoption statute to include same-sex partners.⁸⁷

The five-paragraph statutory interpretation is simple, straightforward, and unremarkable. It exemplifies ordinary, credible, legal analysis, correctly states established legal principles, cites

80. *See, e.g.*, *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Weaver v. G.D. Searle & Co.*, 558 F. Supp. 720 (N.D. Ala. 1983); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Al. Super. Ct. 1998); *Dean v. Dist. of Colum.*, 653 A.2d 307 (D.C. 1995); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *In re Estate of Hall*, 707 N.E.2d 201 (Ill. Ct. App. 1998); *Jennings v. Jennings*, 315 A.2d 816 (Md. Ct. App. 1974). *See also*, Robin Cheryl Miller & Jason Binimow, *Marriage Between Persons of Same-Sex: United States and Canadian Cases*, 2003 A.L.R. FED. 2 (2003) (listing cases interpreting state statutes to prevent same-sex marriages in Section 3).

81. *Baker*, 744 A.2d at 869.

82. *Id.* at 868.

83. *Id.*

84. *Id.*

85. *Id.* at 868-69.

86. *Id.* at 869.

87. *In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993), distinguished in *Baker* at 744 A.2d at 869 because the *B.L.V.B.* case involved "a narrow statutory exception" which had to be interpreted broadly to effectuate what the court decided was the legislature's real "intent and spirit." *Id.*

precedents that actually support those principles, and applies those principles in a direct, coherent fashion. This analytical approach stands in stark contrast to the kind and quality of analysis in the remaining sections of the majority opinion (and most of Justice Johnson's opinion). As noted above, the court's summary statements of basic principles of statutory construction are the legal principles for which *Baker* is most frequently cited.⁸⁸

B. Standard of Review Under the "Common Benefits" Clause

The court's analysis of the constitutional issues, by contrast, fills seventeen (17) pages. The ultimate constitutional issue is whether excluding same-sex couples from marriage and its many benefits violates Vermont's "counterpart" to the federal Equal Protection Clause, the "Common Benefits" Clause. The court asserted that the "Common Benefits" Clause predates, is independent from, and reflects somewhat different values than (is "not a mere reflection of") the federal Constitution's equality rule.⁸⁹ From the outset, the court also focuses on the state's claim that marriage links procreation and childrearing, and the plaintiffs' challenge to it.⁹⁰

In the section on "Historical Development,"⁹¹ the court thoroughly reviewed the standards and tests under the "Common Benefits" Clause, and how they differ from federal Equal Protection standards and analysis, noting that Vermont cases apply a "more stringent" reasonableness inquiry than federal "rational basis" cases⁹² and "have been less than consistent in their application" of the "Common Benefits" Clause jurisprudence.⁹³ The court concluded that "[t]he rigid categories utilized . . . under the Fourteenth Amendment [Equal Protection analysis] find no support in our early case law and, while routinely cited, are often effectively ignored in our more recent cases."⁹⁴ Denial of public benefits

88. *See infra* Section II.

89. *Baker*, 744 A.2d at 870.

90. *Id.* (noting plaintiff's claim that:

the large number of married couples without children, and the increasing incidence of same-sex couples with children, undermines the State's rationale [that marriage links procreation and child rearing]. They note that Vermont law affirmatively guarantees the right to adopt and raise children regardless of the sex of the parents . . . and challenge the logic of the legislative scheme that recognizes the rights of same-sex partners as parents, yet denies them—and their children—the same security as spouses.)

91. *Id.* at 870-73.

92. *Id.* at 872.

93. *Id.*

94. *Id.* at 873.

to some persons must be justified under the “Common Benefits” Clause by “an appropriate and overriding public interest.”⁹⁵

The review of the Vermont “Common Benefits” Clause jurisprudence is informative and directive. Many cases are cited and discussed. However, by contrast, the asserted reasons for rejecting a structured, standard, multi-tiered approach are weak and unpersuasive.⁹⁶ More importantly, the articulated basis for adopting the new “balancing” approach for “Common Benefits” Clause analysis is utterly without support. The court cites one case, *State v. Ludlow Supermarkets, Inc.*,⁹⁷ which it reads as departing from the traditional, structured “Common Benefits” Clause analysis, and adopting a pure “balancing” approach.⁹⁸ But closer examination of both *Ludlow* and of the cases decided during more than seventeen years between *Ludlow* and *Baker* contradicts the *Baker* court’s reading of *Ludlow*. First, nothing in *Ludlow* supports the claim that the Vermont Supreme Court in that case changed the standard of “Common Benefits” Clause analysis. In *Ludlow*, the court invalidated a Sunday closing law that applied only to large retailers, but not to small retailers, finding the law to give an improper preference to small businesses unrelated to any non-preferential, legitimate legislative purpose.⁹⁹ The *Ludlow* court quoted, but did not rest upon, a case in which the New Jersey Supreme Court had invalidated a Sunday closing law applicable to some specific goods, but not applicable to many others because, regardless of “rational basis” it violated “common sense”¹⁰⁰ (a rudder-less standard somewhat akin to that used in *Baker*). The *Ludlow* court found “the core purpose” of the selective Sunday closing law “confirmed by legislative language is the special protection of the economic health of small, locally owned, retail stores” which could “be achieved without this particular” discrimination between large and small businesses.¹⁰¹ While distinguishing the federalism constraints upon

95. *Id.*

96. For example, the court’s reliance on the fact that the use of different categories linked to different (sliding scale) standards of Equal Protection (or “Common Benefits” Clause) analysis “find[s] no support in our early case law” to justify rejection of such categories and different standards of review is unpersuasive. *Id.* The use of different categories and standards is a relatively new development in the history of federal Equal Protection jurisprudence as well as in Vermont “Common Benefits” Clause jurisprudence; that structured (multi-tiered) approach blossomed in federal jurisprudence primarily in the last half of the twentieth century. See, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 999-1001 (1978). So the absence of such analysis in the “early case law” of Vermont is hardly surprising.

97. 448 A.2d 791 (1982).

98. *Baker*, 744 A.2d at 871-73.

99. *Ludlow*, 448 A.2d at 794-96. (“The purpose of the preferential legislation must be to further a goal independent of the preference awarded . . .”). *Id.* at 795.

100. *Vornado, Inc. v. Hyland*, 390 A.2d 606, 615-16 (N.J. 1978).

101. *Ludlow*, 448 A.2d at 796.

federal Equal Protection analysis from the local expertise of state courts,¹⁰² *Ludlow* did not purport to modify the standard of analysis under the “Common Benefits” Clause, but simply summarized and restated it. The only reference to balance was when the court noted:

Almost all regulatory legislation, particularly when the concern is economic, tends to be uneven in its impact. Such inequalities are not fatal with respect to constitutional standards if the underlying policy supporting the regulation is a compelling one, and the unbalanced impact is, as a practical matter, a necessary consequence of the most reasonable way of implementing that policy.¹⁰³

This sole reference to “balance” is made in connection with the well-known standard of “compelling interest” and classification “necessary” to implement that interest, a standard that has been around in Vermont since at least 1939 when the Vermont Supreme Court admitted that under the “Common Benefits” Clause “it has been repeatedly recognized that in the exercise of the police power of the State, a legislative classification that is not arbitrary or irrational may be established.”¹⁰⁴ The “unbalanced impact” refers to the disparate impact on different groups, not the court’s analytical test. *Ludlow* simply does not adopt or support the malleable “balancing” standard of “Common Benefits” Clause analysis utilized by the court in *Baker* to hold that the Vermont marriage law allowing only male-female couples to marry was unconstitutional.

Moreover, contrary to the *Baker* majority’s indication,¹⁰⁵ none of the twenty cases that cited *Ludlow* during the intervening twenty-plus years, except *Baker*, read *Ludlow* as signaling a change in the standard of “Common Benefits” Clause analysis, or for adoption of a “balancing” test.¹⁰⁶ Rather, the subsequent decisions cited *Ludlow* often for the

102. *Id.* at 795.

103. *Id.* at 793 (citing *State v. Auclair*, 4 A.2d 107, 113 (1939)).

104. *Auclair*, 4 A.2d at 113.

105. *Baker*, 744 A.2d at 873. (“The balancing approach utilized in *Ludlow* and implicit in our recent decisions . . .”). (emphasis added).

106. *J.L. v. Miller*, 817 A.2d 1, 5 (Vt. 2002) (*Ludlow* shows that “[c]ourts have a duty to refrain from interfering with the sovereign powers of the legislature as allocated by the state constitution.”); *In re Reapportionment*, 624 A.2d 323, 337 (Vt. 1993) (*Ludlow* held that preferential legislation must further a goal independent of the preference awarded); *Hodgeman v. Jard Co.*, 599 A.2d 1371, 1373 (Vt. 1991) (*Ludlow* established that “the Vermont Constitution is freestanding and may require this Court to examine more closely distinctions drawn by state government than would the Fourteenth Amendment.”); *Town of Sandgate v. Colehamer*, 589 A.2d 1205, 1211 (Vt. 1990) (*Ludlow* shows that legislation that prefers one group above another may be unconstitutional); *Choquette v. Perrault*, 569 A.2d 455, 459 (Vt. 1989) (summarizing holding of *Ludlow* as selective Sunday closing law “did not serve ‘an appropriate and overriding public interest,’ nor did the State establish that the infringement of the rights of the citizens was merely incidental and that the objectives of the law could be reached in no other way”) and *id.* at 460 (*Ludlow* stated that “virtually all regulatory statutes have disparate effects on various sectors of the public”); *State v. Saari*, 568 A.2d 344, 348 (Vt. 1989) (*Ludlow* indicated that regulatory legislation is not unconstitutional where

proposition that the purpose of the “Common Benefits” Clause is to avoid preference for one group,¹⁰⁷ for the proposition that provisions of the Vermont Constitution (including the “Common Benefits” Clause) may be interpreted differently than counterpart provisions of the U.S. Constitution,¹⁰⁸ that economic regulation usually has some disparate

“unbalanced impact is . . . a necessary consequence of the most reasonable way of implementing that policy”); *In re Property of One Church Street City of Burlington*, 565 A.2d 1349, 1350-51 (Vt. 1989) (agreeing that the purpose of Equal Protection Clause is to protect individual, but the purpose of the “Common Benefits” Clause is to protect the polity from granting special privileges to the few; under *Ludlow* “[t]he purpose of the preferential legislation must be to further a goal independent of the preference awarded, sufficient to withstand constitutional scrutiny;” almost any legislation has disparate impact; such is sustainable “if the underlying policy supporting the regulation is a compelling one, and the unbalanced impact is, as a practical matter, a necessary consequence of the most reasonable way of implementing that policy.”); *Bryant v. Town of Essex*, 564 A.2d 1052, 1057 (Vt. 1989) (under *Ludlow* the “Common Benefits” Clause requires party challenging law to show “that the classifications failed to rest on a rational basis serving a legitimate public policy objective”); *Wolfe v. Yudichak*, 571 A.2d 592, 602 (Vt. 1989) (*Ludlow* says almost all economic legislation tends to have disparate impact); *Smith v. Town of St. Johnsbury*, 554 A.2d 233, 239 (Vt. 1988) (rejecting plaintiffs’ challenge to different voting rules for rural and urban areas based on *Ludlow* because in this area the “Common Benefits” Clause provides no greater protection than the federal Equal Protection Clause); *In re Hill*, 545 A.2d 1019, 1024 (Vt. 1988) (*Ludlow* cited for principles of separation of powers and judicial self-restraint); *State v. Brunelle*, 534 A.2d 198, 201-02 (Vt. 1987) (*Ludlow* set up stricter standard of review under “Common Benefits” Clause than applies under federal Equal Protection analysis); *Langle v. Kurkul*, 510 A.2d 1301, 1310 (Vt. 1986) (*Ludlow* held that “[s]tate courts . . . have a duty of judicial restraint which encompasses . . . deference to legislative exercise of the sovereign power allocated to that body by the state constitution,” but dissenting judge says it is judicial responsibility “to balance competing interests and allocate losses,” so a new cause of action should be recognized in tort, *id.* at 1313); *Choquette*, 475 A.2d at 1081 (*Ludlow* cited for principle that a statute is presumptively constitutional if “[o]n its face, the statute is not unreasonable, arbitrary or capricious, nor is it devoid of a public purpose.”); *State v. Badger*, 450 A.2d 336, 347 (Vt. 1982) (in criminal case involving questions of search, seizure, and confession *Ludlow* is cited for the principle that “the meaning of the Vermont Constitution is [not] identical to the federal document,” and sometimes has been construed “as protecting rights which were explicitly excluded from federal protection.”); *In re E.T.C.*, 449 A.2d 937, 939 (Vt. 1982) (*Ludlow* cited for proposition that Vermont Constitution may be interpreted differently than U.S. Constitution); *see further State v. Ames Big N Department Store*, 449 A.2d 984 (Vt. 1982) (*Ludlow* controls this case decided the same day); *State v. Grand Union Co.*, 449 A.2d 984 (Vt. 1982) (*Ludlow* controls this case decided the same day).

107. *See, e.g., In re Reapportionment*, 624 A.2d at 337 (*Ludlow* held that preferential legislation must further a goal independent of the preference awarded); *Town of Sandgate v. Colehamer*, 589 A.2d 1205, 1211 (Vt. 1990) (*Ludlow* shows that legislation that prefers one group above another may be unconstitutional); *In re Property of One Church Street City of Burlington*, 565 A.2d 1349, 1350-51 (Vt. 1989) (agreeing that the purpose of Equal Protection Clause is to protect individual, but the purpose of the “Common Benefits” Clause is to protect the polity from granting special privileges to the few; under *Ludlow* “[t]he purpose of the preferential legislation must be to further a goal independent of the preference awarded, sufficient to withstand constitutional scrutiny;” almost any legislation has disparate impact; such is sustainable “if the underlying policy supporting the regulation is a compelling one, and the unbalanced impact is, as a practical matter, a necessary consequence of the most reasonable way of implementing that policy.”).

108. *See, e.g., Hodgeman v. Jard Co.*, 599 A.2d 1371, 1373 (Vt. 1991) (*Ludlow* established that “the Vermont Constitution is freestanding and may require this Court to examine more closely distinctions drawn by state government than would the Fourteenth Amendment.”); *State v. Brunelle*, 534 A.2d 198, 201-02 (Vt. 1987) (*Ludlow* set up stricter standard of review under “Common Benefits” Clause than applies under federal Equal Protection analysis); *State v. Badger*, 450 A.2d

impact,¹⁰⁹ and for the principle of deference to the legislature,¹¹⁰ but *never* for the “balancing approach” which the *Baker* majority discovers in the same cases. The *Baker* court simply misstated or misread the precedents. There is no support whatever in the “Common Benefits” Clause cases citing *Ludlow* for the *Baker* majority’s reading of *Ludlow* or its interpretation of the standard or analysis under the “Common Benefits” Clause.

Just two years before *Baker*, in *Brigham v. State*, arguably the most significant “Common Benefits” Clause decision in the decade before *Baker*, the court overturned the state scheme for funding public education which resulted in wide differences in per-pupil educational spending.¹¹¹ The court unequivocally stated: “We have held that the Common Benefits Clause in the Vermont Constitution, see ch. I, art. 7, is generally coextensive with the equivalent guarantee in the United States Constitution, and imports similar methods of analysis.”¹¹² The court’s statement just two years later, in *Baker*, that for the past seventeen years (since *Ludlow*) it had really not been following the structured, multi-tiered federal equal protection standard of review is obviously erroneous.

Justice Dooley, who declined to join the majority opinion, noted this defect and took the majority to task for it in his separate concurring opinion.¹¹³ He began by stating that he feared that the rationale of the majority opinion might be “ignored” in the future,¹¹⁴ a prediction which

336, 347 (Vt. 1982) (in criminal case involving questions of search, seizure, and confession *Ludlow* is cited for the principle that “the meaning of the Vermont Constitution is [not] identical to the federal document,” and sometimes has been construed “as protecting rights which were explicitly excluded from federal protection.”); *In re E.T.C.*, 449 A.2d 937, 939 (Vt. 1982) (*Ludlow* cited for proposition that Vermont Constitution may be interpreted differently than U.S. Constitution).

109. *See, e.g.*, *Choquette v. Perrault*, 569 A.2d 455, 459 (Vt. 1989) (summarizing holding of *Ludlow* as selective Sunday Closing law “did not serve ‘an appropriate and overriding public interest,’ nor did the State establish that the infringement of the rights of the citizens was merely incidental and that the objectives of the law could be reached in no other way”) and *id.* at 460 (*Ludlow* stated that “virtually all regulatory statutes have disparate effects on various sectors of the public”); *Wolfe v. Yudichak*, 571 A.2d 592, 602 (Vt. 1989) (*Ludlow* says almost all economic legislation tends to have disparate impact).

110. *See, e.g.*, *J.L. v. Miller*, 817 A.2d 1, 5 (Vt. 2002) (*Ludlow* shows that “[c]ourts have a duty to refrain from interfering with the sovereign powers of the legislature as allocated by the state constitution.”); *In re Hill*, 545 A.2d 1019, 1024 (Vt. 1988) (*Ludlow* cited for principles of separation of powers and judicial self-restraint); *Choquette*, 475 A.2d at (Vt. 1984) (*Ludlow* cited for principle that a statute is presumptively constitutional if “[o]n its face, the statute is not unreasonable, arbitrary or capricious, nor is it devoid of a public purpose.”); *Langle v. Kurkul*, 510 A.2d 1301, 1310 (Vt. 1986) (*Ludlow* held that “[s]tate courts . . . have a duty of judicial restraint which encompasses . . . deference to legislative exercise of the sovereign power allocated to that body by the state constitution”).

111. 692 A.2d 384 (Vt. 1997).

112. *Id.* at 395 (emphasis added) (citing *Lorrain v. Ryan*, 628 A.2d 543, 550 (Vt. 1993) and *State v. George*, 602 A.2d 953, 957 (Vt. 1991).

113. *Baker*, 744 A.2d at 889-97 (Dooley, J., concurring).

114. *Id.* at 889.

my research of the case law citing *Baker* fully validates. He noted that “[u]ntil this decision” Vermont cases had recognized a distinction in the standard of “Common Benefits” Clause analysis applied to claims for protection of basic civil rights triggered a higher level of scrutiny than mere economic regulation.¹¹⁵ He noted that throughout the twentieth century “the jurisprudence in Vermont is similar to that of most states.”¹¹⁶ He faults the majority’s collapsing the “Common Benefits” Clause analysis into one standard higher than generally applied under the Equal Protection Clause because in so doing “the majority *makes statements entirely contrary to our existing Article 7 jurisprudence.*”¹¹⁷ Again, my research fully confirms this criticism. Justice Dooley notes that by so doing, the majority “*overrul[es] a long series of precedents*” that used multi-tiered, structured “Common Benefits” Clause analysis.¹¹⁸ He criticizes the court’s description of one case as “*neither fair nor accurate,*”¹¹⁹ and because it means that there is “no higher burden to justify” racial discrimination than discrimination against large retail stores, “the *new* standard” of analysis is not “required by, or *even consistent with,* the history on which the court bases it.”¹²⁰ He finds “great irony” that the court adopts a higher standard of review which will result in less deference to the legislature.¹²¹ He also asserts that the majority mischaracterized the “Common Benefits” Clause precedents by stating that they “reflect a very different approach” from federal equality jurisprudence (noting several recent cases where the court said the standard of review “is the same” as under federal precedents.)¹²² He chides the majority for relying on “*isolated* statements” from *Ludlow* and squarely accuses the *Baker* majority of creating “a *new, more active*” standard of “Common Benefits” Clause review, rather than applying the established standard.¹²³ The majority’s statement that the new activist standard has been consistently applied in the past is simply “incredible.”¹²⁴

To bolster its analytical approach, the majority discusses the text of the “Common Benefits” Clause. Although Chief Justice Amestoy has much to say about the philosophy, purpose and importance of textual

115. *Id.* at 890.

116. *Id.* at 891.

117. *Id.* at 893 (emphasis added).

118. *Id.* at 893 (emphasis added) (citing nine cases).

119. *Id.* at 894, n.1 (emphasis added).

120. *Id.* at 894 (emphasis added).

121. *Id.* at 894.

122. *Id.* at 894.

123. *Id.* at 895 (emphasis added).

124. *Id.* at 895, n.3 (emphasis added).

analysis, he seems to be at a total loss when it comes to actually engaging in textual analysis. He concludes that “chief” among the principles expressed “is the principle of inclusion.”¹²⁵ However, he provides no comparison with how the critical terms of the “Common Benefits” Clause were used in other documents of the period when the “Common Benefits” Clause was adopted, and no elucidation of the etymology of the terms. The majority’s plentiful ruminations are a poor substitute for meaningful textual analysis. The abstract generality of the principle (inclusion) discerned as the “core value” of the “Common Benefits” Clause adds little value to legal analysis, though it lays the foundation for several subsequent rhetorical flourishes the majority relishes. Likewise, the majority’s review of the “historical context,” while providing a very interesting review of the history of the “Common Benefits” Clause, and of the egalitarian impulses unleashed by the War of Independence,¹²⁶ seems aimless and contributes little to the analysis of the question before the court.¹²⁷ It provides only a very superficial examination of the purpose of the “Common Benefits” Clause¹²⁸ and fails in any depth to relate that purpose to the institution of marriage.¹²⁹

In the section on “Analysis Under Article 7,” the court primarily summarizes the analysis it has distilled in the previous sections. A “relatively uniform standard, reflective of the inclusionary principle at its core, must govern” and “the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment” is rejected.¹³⁰ The group claiming exclusion must be defined, but not classified (such as “suspect”) because classification of the group “has never provided a stable mooring” for the “Common Benefits” Clause, and because such labeling is inherently subjective and unpredictable.¹³¹ The government’s statutory purpose must be examined to determine whether the discrimination “is reasonably necessary to accomplish the State’s

125. *Id.* at 875 (majority opinion).

126. *Id.* at 877 n.3.

127. The conclusion is that the “Common Benefits” Clause was aimed at “the elimination of artificial governmental preferments and advantages.” *Id.* at 877.

128. “No phrase except ‘liberty’ was invoked more often by the Revolutionaries than ‘the public good.’ It expressed the colonists’ deepest hatreds of the old order and their most visionary hopes for the new. . . . [They believed] that ‘all government . . . is or ought to be, calculated for the general good and safety of the community’ The word *republic*’ said Thomas Paine, ‘means the *public good*, or the good of the whole’” GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 55 (1969).

129. For an example of a how the history of marriage related to republic theories of the founding era (which the *Baker* opinion fails to grasp), see NANCY F. COTT, *PUBLIC VOWS, A HISTORY OF MARRIAGE AND THE NATION*, at 9-23 (2000).

130. *Baker*, 744 A.2d at 878.

131. *Id.* at 878, n.10.

claimed objectives,” in light of “the significance of the benefits and protections of the challenged law,” the promotion of the government’s goals, and the under or over-inclusiveness of the classification.¹³² Because that process involves imprecise “reasoned judgment,” the court is compelled to exercise restraint and to show respect for tradition.¹³³

Justice Dooley’s separate opinion notes that the one-high-standard approach for many years allowed courts in other jurisdictions to strike down social and economic legislation the judges disliked, and he laments the adoption of such an activist standard of review.¹³⁴ He also condemned the subjectivity of the new standard of review “that relies wholly on factors and balancing, with no mooring in any criteria or guidelines, however imperfect they may be.”¹³⁵ The new standard “is not at all predictable [and] [i]n the end, the approach the majority has developed relies too much on the identities and personal philosophies of the men and women who fill the chairs at the [Vermont] Supreme Court, too little on ascertainable standards . . . , and very little, if any, on deference to the legislative branch.”¹³⁶ The “final irony” of the new test “is that the balancing and weighing process . . . describes exactly the process we would expect legislators to go through We are judges, not legislators.”¹³⁷ Likewise, Justice Johnson, in her partially dissenting opinion, noted her “concerns about the test that the majority devises to review equal protection challenges under the Common Benefits Clause.”¹³⁸ Justice Johnson agrees with Justice Dooley’s criticisms of the new standard of “Common Benefits” Clause analysis because “[t]he Chancellor’s foot is not a promising basis for antidiscrimination law.”¹³⁹

C. Application of “Common Benefits” Clause Standard

The two justices who wrote separate opinions in *Baker* criticized the analytical approach of the majority because of its potential for subjectivity, and the actual application of that standard by the majority clearly validates that criticism. The majority opinion first noted that the

132. *Id.* at 878-79 (whether the discrimination “bears a reasonable and just relation to the government purpose”).

133. *Id.* at 879.

134. *Id.* at 896 (Dooley, J. concurring) (“We have wisely, in the past, avoided the path the majority now chooses, a path worn and abandoned in many other states.”). *Id.* at 895.

135. *Id.* at 897.

136. *Id.*

137. *Id.*

138. *Id.* at 907-08, n.13 (Johnson, J., dissenting in part).

139. *Id.* (citing Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 478 (1996)).

category excluded from marriage was same-sex couples.¹⁴⁰ Then it addressed the major justification for the exclusion, the link between marriage, procreation, and childrearing. The court rejected the marriage-procreation-childrearing link for four reasons: infertile male-female marriages, artificial reproduction technology and practices, legalized adoption by gay couples, and substantial child-rearing by same-sex couples. However, these assertions evade rather than address the critical claim the State propounded.

The majority had trouble remembering (perhaps understanding) the primary government justification for limiting marriage to male-female couples. It constantly switched that interest. The court first identified the “principle purpose” offered by the State for this discrimination as “furthering the link between procreation and childrearing.”¹⁴¹ The court then stated that the State “has a legitimate and longstanding interest in promoting a permanent commitment between couples for the security of their children.”¹⁴² In so doing, the court subtly (perhaps unwittingly rather than deviously) revised the state’s interest changing it from linking *procreation* and childrearing, to linking *couples* and childrearing. Still later, it *again* restated the state’s interest as to “legitimate children and provide for their security,”¹⁴³ again missing the critical *procreation* element in the marriage-childrearing link. It only returned to the critical marriage-procreation-childbearing link when stating its conclusion that there was “*extreme logical disjunction* between the classification and the stated purposes of the law – protecting children and ‘furthering the link between procreation and child rearing’”¹⁴⁴ It immediately slipped off target again stating that the state’s goal was “promoting a commitment between married couples and to promote the security of their children and the community as a whole”¹⁴⁵ But it summarily added that “[p]romoting a link between procreation and childrearing similarly fails to support the exclusion.”¹⁴⁶ The court also asserted that the marriage classification was “significantly underinclusive” because many married couples never intend to procreate and they have “no logical connection to the stated government goal.”¹⁴⁷

Next, the court cited sensational estimates that between six and fourteen million children are being raised by gay fathers or lesbian

140. *Baker*, 744 A.2d at 880 (majority opinion).

141. *Id.* at 881.

142. *Id.*

143. *Id.* at 882.

144. *Id.* at 884.

145. *Id.*

146. *Id.*

147. *Id.* at 881.

mothers, and that between 1.5 million and five million lesbian mothers resided with their children in the US in 1990.¹⁴⁸ While there are no doubt many same-sex couples raising children, the reference to such grossly inflated data only undermines the credibility of the court's opinion. The court's admission that "accurate statistics are difficult to obtain"¹⁴⁹ is no excuse for citing two of the most inflated reports and not any of the more responsible estimates. While "there is no dispute that a significant number of children" are being raised by same-sex partners,¹⁵⁰ there is a *huge* difference between a significant number in the thousands and a significant number in the millions, and that difference apparently matters to the court's analysis because it felt compelled to cite the *millions* estimates to make its point.

The court must have felt desperate to even mention such exaggerated numbers. The exaggeration is shown by several census reports. The 2000 Census Report revealed that in 2000 (the year beginning just three days after the *Baker* decision) there were a total of just under 5,500,000 adult couples living together unmarried (5,475,768 unmarried partner households).¹⁵¹ Of that number, only 301,026 were male householders with male partners, and 293,366 were female householders with female partners; in total, there were 594,392 same-sex couples reported by the 2000 Census, just fewer than 11 percent of the total population of nonmarital cohabitants.¹⁵² To reach the *minimal* number of children estimated as being raised in one irresponsible study cited by the Vermont Supreme Court, *all* of the same-sex couples reported in the 2000 Census would have to be raising children, and they would have to be raising *more than 10 children per couple*; and they would have to be *all* raising *nearly thirty children per couple* to reach the highest estimate of children being raised by same-sex couples in that same study!

The most recent Census Report on the number of children living with a parent and an unmarried partner reveals that 1,799,000 children are living with their mother and her unmarried partner (both heterosexual and homosexual), and 1,081,000 children are living with their father and his unmarried partner (both heterosexual and homosexual), for a total of

148. *Id.*

149. *Id.*

150. *Id.*

151. 2002 STATISTICAL ABSTRACT OF THE UNITED STATES 48, table 49.

152. 2000 Census <<http://www.census.gov>> cited in WORLD CONGRESS OF FAMILIES UPDATE, ONLINE! Vol. 03, Iss. 02 (15 Jan 2002). Likewise, the total nonmarital cohabitant householder population including same-sex and heterosexual cohabitants, constituted only 5 percent of all households in the United States in the 2000 Census, compared to 52 percent for married couple households. 2000 Census. *Id.*

2,880,000 children being raised by a parent and a nonmarital partner.¹⁵³ Applying the proportion of heterosexual and same-sex nonmarital cohabitant couples, eleven percent (11 %), suggests that only 317,000 children are being raised by same-sex couples. The Census Bureau also reports that 2,570,000 children under 15 are living with a single parent and his or her unmarried partner, including 2,101,000 POSSLQs (Persons of the Opposite Sex Sharing Living Quarters) and 469,000 others.¹⁵⁴ Even if *all* of these others were same-sex couples (and the study explicitly rejects that because roommates, housemates and other non-partners are included in that number), that would still amount to less than 1/10th of the two middle estimates the Vermont Supreme Court mentioned and 1/30th of the high estimate they stated. The 2000 Census reportedly indicates that about 20 percent of gay couples and about one-third of lesbian couples are raising children.¹⁵⁵

The latest Census Bureau report on adopted children, *Adopted Children and Stepchildren: 2000*,¹⁵⁶ shows that a total of 57,693 adopted children are living with men or women with an unmarried partner. That includes heterosexual nonmarital partners (who greatly outnumber same-sex partners in the population) as well as same-sex partners.¹⁵⁷ Applying the generous 11 percent ratio found by the 2000 Census to estimate how many of these children are living with same-sex couples, less than 6,350 adopted children are being raised by same-sex partners. The point is that the Vermont Supreme Court in *Baker* egregiously stretched to insert highly inflated data to try to support its point. That is neither good statistical analysis, nor good legal analysis.

The court returned to the “reality” of child-rearing by same-sex couples when it asserted that “the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against.”¹⁵⁸ That point is certainly relevant and worth considering

153. Jason Fields, *Children's Living Arrangements and Characteristics*: March 2002, in Current Population Reports (June 2003), at 2, Table 1, *Children by Age and Family Structure, March 2002*, at <<http://www.census.gov/prod/2003pubs/p20-547.pdf>> (last visited August 28, 2003).

154. Fields, *supra* note 153 at 4, Table 2, *Children under 15 Living With Mothers and Fathers in Cohabiting-Couple Households: 2002*, at <<http://www.census.gov/prod/2003pubs/p20-547.pdf>> (last visited August 28, 2003).

155. Christopher Seeley, *Gay Parents face back-to-school jitters*, Southernvoice.com at <http://www.sovo.com/2003/8-8/news/localnews/gayparents.cfm> (last visited August 28, 2003).

156. Census Bureau, *Adopted Children and Stepchildren: 2000* <<http://adoption.about.com/gi/dynamic/offsite.htm?site=http://www.census.gov/prod/2003pubs/censr%2D6.pdf>> and <<http://adoption.about.com/cs/resstatrends/a/census2000.htm>> (seen Sept. 16, 2003), cited in William L. Pierce, *Adoption Numbers*, NRO, Guest Comment, August 27, 2003.

157. *Id.*

158. *Baker*, 744 A.2d at 882.

with respect to *another* state interest — the interest in optimal child-rearing or, as the State put it, “promoting child rearing in a setting that provides both male and female role models.”¹⁵⁹ But it is not relevant to assessing the propriety of restricting marriage to male-female couples to promote the procreation-childrearing link.

The court concluded from these considerations that the marriage statute “plainly excludes many same-sex couples who are *no different from opposite-sex couples* with respect to these objectives.”¹⁶⁰ Again, it noted that “the marriage exclusion treats persons who are *similarly situated* for purposes of the law differently.”¹⁶¹ It held that there was “*extreme logical disjunction* between the classification and the stated purposes of the law”¹⁶² These statements are bald conclusions unsupported by facts, precedents, or analysis. Moreover, the purpose of the law as to which the court sees male-female and same-sex couples having no difference is not the purpose or state interest the court purports to be discussing (the state’s interest in furthering the linkage between procreation and child-rearing) but another interest (child welfare). Even if same-sex couples satisfied the state’s interest in child-rearing and child welfare just as well as did male-female couples (a separate and very dubious proposition),¹⁶³ on the issue of furthering the state’s interest in establishing linkage between procreation and child-rearing that point is irrelevant. Because same-sex couples cannot procreate at all, permitting them to marry will not establish significant linkage between procreation and childrearing.¹⁶⁴

The procreation link was brushed aside because married couples can use artificial reproductive technologies to generate children and “there is no reasonable basis to conclude that a same-sex couple’s use of the same technologies would undermine the bonds of parenthood, or society’s

159. *Id.* at 884 (quoting the State’s brief).

160. *Id.* at 882 (emphasis added).

161. *Id.*

162. *Id.* at 884 (emphasis added).

163. That basis for the court’s “no difference” conclusion with respect to the separate interest of providing for the welfare of children is also very feeble, but that is a topic for another article.

164. It might be argued that allowing same-sex couples to marry would partially foster this linkage because, for example, some lesbians might never undertake to bear and rear a child by themselves, but with a same-sex marriage partner they would; so same-sex marriage would foster the partial linkage because it would encourage such a lesbian to procreate and rear a child who is related to her. However, this approach partially undermines the state interest in linking procreation and child-rearing because it involves the deliberate exclusion of the other biological parent from the marriage. The resulting child-rearing is distinguishable because the child is reared in a relationship from which the other procreative parent has been deliberately excluded, denying the child the benefit of dual-gender child-rearing. See Lynn D. Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL’Y 771, 806-13 (2001) (discussing the *Baker* procreation analysis in similar terms).

perception of parenthood.”¹⁶⁵ But the court evaded the fact that often an assisted reproduction technique is employed by married couples to assist the couple to procreate—to have a child that is the genetic offspring of both partners. Assisted reproduction never allows a same-sex *couple* to procreate a child that is the genetic offspring of both partners. It still takes a man and a woman to procreate.

The use of ART by married couples to imitate natural procreation presents a dramatically different issue than the use of ART by same-sex couples to obtain a child to raise. From the perspective of responsible procreation, the attempt to bring children into a relationship that is in form and kind and gender union the same as the procreative union can be distinguished from the attempt to bring children into a homosexual relationship of two men or two women. The court noted that “the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children.”¹⁶⁶ However, this misstates the point and the mistake is more than semantic. While same-sex couples may *rear* a child as a couple, they cannot *conceive* a child as a couple. They cannot procreate as a couple. They may contract with a person of the opposite sex, and with that person one member of the same-sex couple may procreate for the purpose of producing a child that both partners plan to raise together; but the same-sex couple cannot *as a couple* procreate—with or without assisted reproduction technology. Some ART may help married couples to procreate (artificial insemination using the husband’s sperm, in vitro fertilization using the wife’s egg and husband’s sperm, etc.). In those cases, ART furthers the linkage between procreation and child-rearing. The fact that some nonmarital male-female couples may also procreate using ART tells us nothing about marriage law or whether an exception should be made to marriage laws that historically have furthered that state interest; it only tells us that in the context of dealing with childlessness and infertility, lawmakers have determined that the state interest in linking child-rearing and procreation is partially subordinate to other important interests (e.g., allowing responsible persons to bear and rear children who are at least partially related genetically to them or their spouse or partner). It provides no guidance regarding whether, in the marriage context, the state’s possible interest in promoting or favoring same-sex unions outweighs the state’s interest in preserving marriage as an institution that fosters the linkage between procreation and child-rearing.

165. *Baker*, 744 A.2d at 882.

166. *Id.*

The court noted that there is no indication that married couples' use of ART technologies has "undermine[d] a married couple's sense of parental responsibility, or foster[ed] the perception that they are 'mere surplusage'" ¹⁶⁷ But the issue before the court was not whether allowing same-sex couples to use *assisted reproduction technology* undermines the bonds of parenthood, or society's perception of parenthood, ¹⁶⁸ but whether allowing same-sex couples to marry undermines the linkage between procreation and child-rearing. However, the fact that state lawmakers may have chosen to partially subordinate the state interest in linking child-rearing and procreation in order to promote another state interest (allowing the procreation of children who are partially related to the parents) hardly compels the conclusion that the State must always subordinate its primary interest, or that the states may not preserve marriage as the institution which best fosters the linkage between procreation and child-rearing. The contexts are different (as marriage differs from ART) and the strength of the competing policies differ.

The majority, again, apparently misunderstood the real state interest. The court apparently believed the goal of the law was to *exclude from marriage all those who cannot procreate*. ¹⁶⁹ However, the State never said that the purpose of its law was to exclude non-procreative couples; rather its purpose was inclusive, to "further[] the link between procreation and child rearing" by extending the benefits and status of marriage to those who are capable or may be capable of *both* procreation and child-rearing. ¹⁷⁰ Of course, since no same-sex couple is capable of procreating, including same-sex couples in marriage could not further the link between procreation and child-rearing. ¹⁷¹

Likewise, the state did not assert that the purpose of the marriage restriction (to male-female couples) was that every married couple procreates. Rather, the purpose of the law restricting marriage to male-female couples was to further the linkage between procreation and child-rearing. It does that by restricting marriage to couples in categories capable of doing both.

167. *Id.*

168. They already can and do use ART; whether as a matter of policy that should be allowed or may be prohibited is an issue for another case and another day.

169. Thus, the court incorrectly criticized the exclusion of same-sex couples from marriage for being "underinclusive" (not overinclusive). *Baker*, 744 A.2d at 881. It would only be underinclusive if the purpose of the law was to exclude non-procreative couples.

170. *Id.*

171. See generally Wardle, "Multiply and Replenish," *supra* note 164, at 811-13 (2001) (similar analysis).

Allowing male-female couples to marry, even those who cannot or will not procreate, conveys a message that links marriage with procreation because, as a general category of unions (contrasted with same-sex unions), male-female unions are capable of human procreation (and most do procreate). Same-sex couples cannot ever procreate. Allowing same-sex couples to marry would not further the state's interests in linking procreation and child-rearing because same-sex couples are categorically incapable of procreation as couples.

The majority also discussed "the history and significance" of marriage, concluding that its main significance was in providing the parties with "significant public benefits and protections,"¹⁷² listing more than a dozen statutory benefits extended to married couples.¹⁷³ It summarily concluded without analysis that limiting those benefits to male-female couples did not further any of the states' seven asserted justifications.¹⁷⁴

Three times the *Baker* majority refers to the fact that the Vermont legislature has legalized adoptions by gay and lesbian couples, and extended child contact and child support laws to cover same-sex couples, to support its conclusion that limiting marriage to male-female couples violates the "Common Benefits" Clause.¹⁷⁵ This seems more than a little disingenuous inasmuch as the legislature did not act to authorize same-sex couples to adopt until after the Vermont Supreme Court had ruled that the former statute needed to be interpreted that way because "[t]here is no reason in law, logic or social philosophy to obstruct" same-sex couples from adopting,¹⁷⁶ and to do so is "inconsistent with the children's best interests . . ."¹⁷⁷ The court's concealment of the judicial "nudge" behind the policy extension at least taints the reference to the adoption laws as manifestation of a bona fide indication of Vermont citizens' public policy. Nor does the court acknowledge that the policy issue concerning whether to allow same-sex couples to adopt children who are missing and in need of one or both parents is quite different than the policy issue whether to allow same-sex couples to marry. As a method of addressing the needs of children, to allow same-sex adoption provides a significantly different and potentially more prudent deviation from

172. *Baker*, 744 A.2d at 883.

173. *Id.* at 884.

174. *Id.*

175. *Id.* at 882, 885, and 886.

176. *In re B.L.V.B.*, 628 A.2d 1271, 1275 (Vt. 1993) (quoting *In re Evan*, 583 N.Y.S.2d 997, 1002 (Sur.Ct.1992)).

177. *In re B.L.V.B.* 628 A.2d at 1276. *See also id.* at 1273 (the court must "avoid results that are irrational, unreasonable or absurd").

history and social mores than to more broadly legalize same-sex marriage.

The modification of the Vermont adoption law certainly is a relevant point because allowing same-sex couples to adopt shows that inclusion of same-sex couples in child-rearing does not necessarily damage irreparably the state interest in promoting the connection between procreation and child-rearing. Moreover, the fact that for over a hundred years Vermont has permitted adoption to occur and that it has not irreparably damaged the linkage between procreation and child-rearing—many people still procreate to produce the children they rear, and there is no evidence that substantial numbers of fertile couples forego procreation because they can adopt instead—shows that some exception to the policy linking procreation and child-rearing is possible that does not significantly undermine the policy. Unfortunately, it does not help us discern whether *legalizing same-sex marriage* would, similarly, fail to undermine the state's interest in linking procreation and child-rearing. That same-sex couples may adopt tells us something about adoption but very little about marriage. Adoption is for the benefit of children for whom the linkage of procreation to child-rearing has already failed, so it makes no sense to evaluate any adoption law in terms of the state interest in fostering that linkage. All adoptions (regardless of the sexual preferences of the adopter) defy this linkage by allowing an adult or adults who did not procreate a child to formalize a child-rearing relationship and legal parental status. Thus, it is senseless to use adoption law—which operates when the linkage has failed—as a tool to evaluate whether to revise marriage law—which operates to support the linkage—to permit marriage by same-sex couples who are categorically incapable of procreation. Perhaps one reason that adoption (even by gay couples) has not eroded the linkage is that the law limiting marriage to male-female couples still reinforces that link by preserving a powerful cultural and social institution that perpetuates the linkage. The fact that adoption laws may allow same-sex couples to adopt in order to assist some children who are in need of adoption tells us very little about marriage or marriage policy, which exists to further different state purposes (at least one of which, the linkage of procreation to child-rearing, *no* adoption can further).¹⁷⁸

The main problem with the court's "analysis" of the interest in linking procreation and child-rearing is that it contains virtually no analysis of that state interest (unless evasion and redundancy count as

178. See generally, *Lofton v. Sec'y, Dep't of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004).

analysis). The court dutifully listed some of the State's arguments, but then consistently failed to engage those arguments, and recast and distorted the one state interest it tried to evaluate instead of engaging and confronting it.

Finally, the court rejected the history of criminal prohibition of same-sex relations suggesting that it was "motivated by an animus against a class," reflected outmoded "eighteenth-century standards," and because (more significantly) recent Vermont legislation repealed fellatio laws, prohibited discrimination on the basis of sexual orientation, and barred "hate crimes."¹⁷⁹ The court concluded this section noting that there was "no reasonable and just basis" for exclusion of same-sex couples from the benefits of marriage.¹⁸⁰ However, those reforms reflect the movement to tolerate private, consensual homosexual conduct, rather than to give homosexual unions preferred (marital) status.

Two justices agreed with the result of the majority's analysis, but declined to endorse the analysis. Justice Dooley insisted that suspect classification analysis was appropriate and declined to endorse the majority rationale.¹⁸¹ Justice Johnson, concurring in part and dissenting in part, based her conclusion that Vermont marriage law violated the Vermont Constitution on sex discrimination grounds instead of the majority's analysis.¹⁸²

Crucially, the majority failed to apply one critical element of the standard of analysis they purported to set: to exercise restraint and to show respect for established legal institutions and thousands of years of social tradition.¹⁸³

D. Remedy

While the plaintiffs sought marriage licenses by declaratory and injunctive relief, the court held only that the plaintiffs were entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."¹⁸⁴ Noting that a number of statutory schemes might be enacted which would provide plaintiffs the equal

179. *Baker*, 744 A.2d at 885-86.

180. *Id.* at 886.

181. *Id.* at 896 (Dooley, J. concurring). "We have wisely, in the past, avoided the path the majority now chooses, a path worn and abandoned in many other states." *Id.* at 895. Justice Dooley's opinion exemplified solid legal analysis, but it proceeded from a flawed assumption about suspect classification.

182. *Id.* at 907-08, n.13 (Johnson, J., dissenting in part). Justice Johnson's feminist gender discrimination analysis of marriage as a repressive, male-favoring institution panders to the radical feminist audience, but is more notable for its ideological stance than its credible legal analysis.

183. *Id.* at 879 (majority opinion).

184. *Id.* at 886.

protection to which the court concluded they were entitled, the court left it to the legislature to craft appropriate remedial legislation in order to avoid “disruptive and unforeseen consequences” and “uncertainty and confusion” that might flow from a judicial decree.¹⁸⁵ It rejected the dissenter’s charge of abdication, reemphasizing that the court did not hold that plaintiffs were entitled to a marriage license, only to equal benefits and protections.¹⁸⁶ Decisiveness should not be confused with wisdom, nor is the court the only repository of wisdom; courts “do best by proceeding in a way that is catalytic rather than preclusive”¹⁸⁷

The majority’s discussion of the remedy is interesting because, rather than granting a remedy, it identified the range of remedies that would be constitutional and turned the crafting of a remedy over to the legislature which then provided a remedy the plaintiffs did not seek. Only Justice Johnson dissented from this remedial approach. She concluded that the court was abdicating its responsibility by not issuing a decree to permit same-sex marriages.¹⁸⁸ She compared the need to provide prompt redress for denial of the right to marry to the need for prompt action to protect racial minorities’ civil rights,¹⁸⁹ and of issuing a mere “advisory opinion” instead of fulfilling its judicial responsibility to obey the “commands of our constitution.”¹⁹⁰

The court concluded with a stirring rhetorical flourish. “The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.”¹⁹¹ Interestingly, this could have been said by a court rejecting plaintiffs’ claims. That is, if it were only a matter of recognizing common humanity, there surely are many ways to accomplish that without legalizing and extending to same-sex unions the highly unique and preferred status, benefits, and protections afforded marriage.

185. *Id.* at 887.

186. *Id.*

187. *Id.* at 888.

188. *Id.* at 899-904 (Johnson, J. dissenting in part).

189. *Id.* at 901-04.

190. *Id.* at 904.

191. *Id.* at 889 (majority opinion).

V. HOW *BAKER* MAY BE LIMITED AND AVOIDED, AND WHY FUTURE CLAIMS FOR SAME-SEX MARRIAGE IN THE UNITED STATES ARE LIKELY TO IMITATE *BAKER*

A. *How Baker May Be Distinguished*

There are a number of bases for distinguishing and limiting *Baker* that would lead one to rationally conclude that *Baker* is likely to have little influence in other courts. First, textually, very few other states have a “Common Benefits” Clause in their constitutions.¹⁹² Second, the *Baker* court notes that its “Common Benefits” Clause “was borrowed verbatim from the Pennsylvania Constitution of 1776, which was based, in turn, upon a similar provision in the Virginia Declarations of Rights of 1776.”¹⁹³ Yet the dramatically expansive construction of the 222-year-old “Common Benefits” Clause of the Vermont Constitution by the *Baker* court stands in stark contrast to the interpretation of “Common Benefits” clauses in other state Constitutions.

Third, the Vermont Supreme Court emphasized that the Vermont “Common Benefits” Clause “differs markedly from the federal Equal Protection Clause” not only in its origins, history and language, but also in its “purpose and development.”¹⁹⁴ Cases interpreting the “Common Benefits” Clause, it declared, “reflect a very different approach from

192. See, e.g., N.H. CONST. pt. 1, art. 10 (“Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.”); TENN. CONST. art. 1, § 2 (“That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.”); VA. CONST. art. 1, § 3 (“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”); W.VA. CONST. art. 3, § 3 (“Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal.”).

193. *Baker*, 744 A.2d at 875.

194. *Id.* at 870 (emphasis added).

current federal jurisprudence.”¹⁹⁵ The court emphasized that the “Common Benefits” Clause could be (and had been) interpreted to “provide more generous protection to rights . . . than afforded by the federal charter.”¹⁹⁶ Thus, attempts to import the *Baker* rationale into Equal Protection Clause analysis under the Fourteenth Amendment, or under similar equality provisions of state constitutions, will find it difficult to bridge the uniqueness and distinctiveness gap which the Vermont Supreme Court emphasized and heavily relied upon in *Baker*.

Fourth, the weakness of the critical analysis in *Baker* certainly should limit (and to this point apparently has limited) the precedential influence of the decision. The majority analysis is, as Judge Dooley predicted, little more than an *ipse dixit*.¹⁹⁷ The feeble legal analysis of the majority opinion was not the result of incompetence of the justices. Indeed, several parts of the *Baker* opinions show that the court was clearly capable of disciplined, legitimate legal analysis.¹⁹⁸ Rather, the collapse of analysis in the *Baker* opinion resulted from judicial overreaching, haste, trying too hard to get to a predetermined political end (and perhaps the desire to get there first), and perhaps trying to show off. It was a defect of will, not skill, resulting from the triumph of personal preference over the chafing restraints of the discipline of legal analysis.¹⁹⁹

195. *Id.* at 871 (emphasis added).

196. *Id.* at 870 (quoting *State v. Badger*, 450 A.2d 336, 347 (Vt. 1982)).

197. Latin for “he himself has said (it); hence, an arbitrary or dogmatic statement.” WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 772 (1964).

198. For instance, the statutory analysis in the court’s opinion was careful, well-supported, and consistent with precedent and theory. *Baker*, 744 A.2d at 868-69; see *infra* notes 81 through 89 and accompanying text. Likewise, the majority’s rejection of the assertion (embraced by Justice Dooley) that lesbians and gay men are a suspect class, if quite brief, was logical, appropriately cited and followed numerous cases, distinguished others, and identified the practical inconsistency of that approach. *Id.* at 878, n.10 (noting that it is a “‘less than exacting standard’ by which to measure the prudence of a court’s exercise of its powers,” there is “less predictability in the outcome of future cases,” and criticizing “[t]he artificiality of suspect-class labeling . . .”). Similarly, the majority’s rejection of the claim (embraced by Justice Johnson) that not allowing same-sex couples to marry constitutes sex discrimination was incisive, well-supported, and logical, albeit very abbreviated. *Id.* at 880, n.13 (noting that “marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying persons of the same sex,” distinguishing *Loving v. Virginia*, 388 U.S. 1 (1969) because the purpose of antimiscegenation laws was to maintain racially discriminatory white supremacy, and distinguishing discriminatory elements of long-repealed marriage-related statutes from evidence of discriminatory purpose of surviving marriage laws).

199. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 984 (Scalia, J., dissenting) (“It is not reasoned judgment that supports the Court’s decision; only personal predilection.”).

B. Why Baker Is the Probable Shape of the Future in Some States

While *Baker* can and should have (and to date has had) very little impact on legal analysis generally, and the analysis of same-sex marriage claims in particular, there are implications that the *Baker* result is the new direction of the movement for legalization of same-sex marriage. It is the likely outcome of same-sex marriage litigation in at least a few other states.

First, some of the leading advocates of same-sex marriage endorse establishment of same-sex civil unions or domestic partnership instead of marriage as an incremental step toward ultimately legalizing same-sex marriage. For example, Professor William N. Eskridge, in his book *Equality Practice, Civil Unions and the Future of Gay Rights*, recommends a strategy that he calls *equality practice*—“equality for lesbians, gay men, bisexuals, and their relationships is a liberal right for which there is no sufficient justification for state denial—but it is not a right that ought to be delivered immediately, if it would unsettle the community.”²⁰⁰ Thus, like the Vermont Supreme Court in *Baker*, Professor Eskridge distinguishes between immediate recognition of *rights* for same-sex couples, and provision of specific *remedies*, such as same-sex marriage. He sees this approach as having the advantage of “recogniz[ing] the need to accommodate new ideas and the inability of human beings and their communities to do so without a long process of education and personal experience.”²⁰¹ The Vermont marriage-equivalent “civil unions statute is not equality,” notes Eskridge, but “it is at least *equality practice*.”²⁰² This “incremental” process is much more likely to produce permanent transformation of society’s attitudes about same-sex relationships.²⁰³

A compromise approach is also recommended by respected conservative Judge Richard Posner. Instead of legalizing same-sex marriage, he opines that same-sex domestic partnerships should be created to give a marriage-like status to same-sex unions while preserving the status of marriage for male-female couples. Several years before *Baker* he suggested:

[S]ince the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal even if it is on the balance cost-justified, maybe the focus should be shifted to an

200. WILLIAM N. ESKRIDGE, *EQUALITY PRACTICE, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* at xiii (2002).

201. *Id.* at xv.

202. *Id.* at 148.

203. *Id.*

intermediate solution that would give homosexuals most of what they wantDenmark and Sweden, not surprisingly, provide the model.²⁰⁴

With the combined support of leading liberal intellectuals, like Professor Eskridge, and conservative intellectuals, like Judge Posner, it is not unlikely that most individual intellectuals as well as the institutions in which intellectuals have significant influence, will exert increasing pressure to legalize same-sex unions and giving them essentially the same legal rights and benefits as marriage, but calling them by some other label.

Second, the distinction between marriage and some marriage-like status is one of the subtexts that can be found in the recent holding of the Supreme Court in *Lawrence v. Texas*.²⁰⁵ There, the Supreme Court by 6-3 vote held that a Texas sodomy statute that criminally prohibited homosexual (but not heterosexual) sodomy violated an unwritten constitutional liberty of consenting adults to engage in private sexual relationships. There were four opinions in the case; Justice Kennedy wrote the majority opinion for five justices holding that the Texas sodomy law violated substantive due process; Justice O'Connor wrote a separate concurring opinion (which no one joined) arguing that the law violated equal protection; Justice Scalia filed a dissenting opinion (joined by Chief Justice Rehnquist and Justice Thomas); and Justice Thomas filed a short separate dissenting opinion.

The majority opinion in *Lawrence* was careful to explicitly note that the issue before the Court did not involve marriage and the Court was not mandating same-sex marriage,²⁰⁶ and the concurring opinion of Justice O'Connor in dicta clearly indicated that the state had a valid basis for limiting marriage to male-female couples.²⁰⁷ However, unlike O'Connor's concurring opinion, the majority opinion in *Lawrence* did not clearly declare (in dicta) that the limitation of marriage to male-female couples was justifiable under the *Lawrence* rationale, and to the hints of the majority that the marriage issue could be viewed differently,

204. RICHARD A. POSNER, *SEX AND REASON* 313-314 (1992).

205. 539 U.S. 558, 123 S. Ct. 2472 (2003).

206. *Lawrence*, 123 S. Ct. at 2484 ("The present case does not involve minors It does not involve whether the government must give formal recognition to any relationships that homosexual persons seek to enter."). See also 123 S. Ct. at 2484 (O'Connor, J., concurring).

207. *Lawrence*, 123 S. Ct. at 2488 (O'Connor, J., concurring), at 7 (slip op.) (*Lawrence* "does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex unions – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.")

the dissenting opinion of Justice Scalia bluntly warned: “Do not believe it.”²⁰⁸ He noted that the rationale of the majority opinion

dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no longer a legitimate state interest” for purpose of proscribing that conduct . . . and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution,” *ibid.*?²⁰⁹

Doctrinally, Justice Kennedy’s approach in *Lawrence* was predictable from an extra-judicial philosophical perspective. He essentially suggests that there is a distinction between the state regulation (prohibition and punishment) of private sexual behavior and state recognition or promotion of public status or benefits. His opinion specifically holds that the State may not criminally punish private homosexual behavior between consenting adults, and explicitly distinguishes a number of situations in which public acts, benefits or interests may be involved. This is the position taken by distinguished Oxford and Notre Dame Natural Law philosopher, John Finnis,²¹⁰ whose position has been described by distinguished pro-gay-marriage Professor William Eskridge as “friendly to decriminalizing consensual private sodomy,”²¹¹ but opposing “same-sex marriage, antidiscrimination laws, and other public stamps of approval for homosexuality.”²¹²

The distinction between prohibiting sodomy and legalizing same-sex marriage is made by arch-economic-analyst Richard Posner in his book, *Sex and Reason*,²¹³ a source that was cited prominently in the majority opinion in *Lawrence*.²¹⁴ Just as the *Lawrence* decision tracks the

208. *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.).

209. *Id.*

210. See generally John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1052-76 (1994) (decriminalization and privatization of homosexual behavior justified but not public acceptance or promotion of nonmarital including homosexual sex); John M. Finnis, *Law, Morality and “Sexual Orientation,”* 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, 28 (1995); See also John Finnis, *Liberalism and Natural Law Theory*, 45 MERCER L REV. 687, 697-98 (1994).

211. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of AntiGay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1349 (2000).

212. *Id.* at 1346.

213. *Id.* at 1346, 1349 (citing POSNER, *supra* n. 203 at 311-12).

214. *Lawrence*, 123 S. Ct. at 1283. See also, *id.* at 2489 (Scalia, J., dissenting).

distinction between private sexual conduct and public marriage drawn by Judge Posner, the end result of *Lawrence* is also indicated by Judge Posner who (as above-noted) suggests in *Sex and Reason* that instead of legalizing same-sex marriage, same-sex domestic partnership should be created to give a marriage-like status to same-sex unions while preserving the status of marriage for male-female couples.²¹⁵ Thus, more likely than laying the foundation for same-sex marriage, *Lawrence* seems to lay the foundation for a ruling like the Vermont Supreme Court decision in *Baker v. State* mandating the legalization of (at least) a marriage-equivalent same-sex domestic partnership or civil union.

C. Avoiding Baker In Other States By Amending the State Constitution

The *Baker* decision could have been avoided if the Vermont Constitution had been amended to protect the unique status and benefits of marriage and the extension of them only to married male-female couples. In at least four states, constitutional amendments have been passed either in reaction to judicial rulings that seemed headed in the direction of *Baker* or because of such rulings in other states. Voters in Hawaii,²¹⁶ Alaska,²¹⁷ Nebraska,²¹⁸ and Nevada²¹⁹ overwhelmingly approved constitutional amendments to prevent a *Baker* ruling in their state (by nearly 70-30 margins). The people of Vermont have tried to amend their constitution after *Baker*, but the constitutional amendment

215. POSNER, *supra* note 203 at 312-14.

216. The people of Hawaii repudiated same-sex marriage and approved a constitutional amendment authorizing the legislature to limit marriage to the union of a man and a woman by a vote of 69 percent to 29 percent. See David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 HAWAII L. REV. 19, 20 (2000) (citing See Mike Yuen, *Same-Sex Marriage Strongly Rejected*, HONOLULU STAR-BULL., Nov. 4, 1998, at A1; Complete, *Uncertified Results of Hawaii's General Election: State Constitution*, HONOLULU ADVERTISER, Nov. 5, 1998, at B3).

217. The people of Alaska repudiated same-sex marriage and approved a constitutional amendment defining marriage as the union of a man and a woman by 68 percent to 32 percent. <<http://www.gov.state.ak.us/ltgov/elections/elect98/general/results.htm>>. See generally Kevin G. Clarkson, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999).

218. The people of Nebraska repudiated same-sex marriage and approved a constitutional amendment defining marriage as the union of a man and a woman, and rejecting same-sex civil unions or domestic partnerships in 2000 by 70 percent to 30 percent. Nebraska Secretary of State, *Statewide General Election 2000 Results*, Number 416, For 477,571 [70.10%], Against 203667 [29.89%].

219. The people of Nevada repudiated same-sex marriage and approved a constitutional amendment defining marriage as the union of a man and a woman twice, in two separate ballot votes (required to ratify the constitutional amendment) by 70 percent to 30 percent in 2000. See ABC News, 2000 The Vote, Nevada Real-Time Vote Results, <<http://abcnews.go.com/sections/politics/2000vote/general/nv.html>> (seen 2 April 2002). See also Nevada Secretary of State Dean Heller, *Election Coverage and Reports, General Election, Nov. 7, 2000* at <<http://sos.state.nv.us/nvelection/nvelection.htm>>; NEV. CONST. art. 1 § 21 (Michie Supp. 2003).

process in Vermont is very anti-populist. It requires that a proposed amendment be passed by majorities in *both* houses of the state legislature in *two* successive sessions.²²⁰

Probably the most important lesson of the *Baker* decision is that our courts are not immune from the temptation to engage in political policy-making in the guise of interpreting state constitutions. The founders of our nation relied upon the constraints of precedent, legal analysis and judicial integrity to keep the courts from becoming political instruments.²²¹ While those barriers have a pretty good track record overall during the past two centuries, we live in different times, and the pressures on the judiciary brought by advocates of same-sex marriage are formidable. As *Baker* shows, the genteel constraints of professionalism, tradition, process, and personal integrity may not suffice to prevent the political abuse of judicial constitutional policy-making under such pressures.

Constitutionalization of family law can occur by constitutional amendment as well as by judicial decision. Protection for basic family institutions in constitutions is not uncommon in the western world.²²² For

220. Gil Kujovich, *An Essay on the Passive Virtue of Baker v. State*, 25 VT. L. REV. 93, 111 (2000) (“under the Vermont Constitution, the amendment process could not begin until 2003, would require two votes of the General Assembly with an intervening election, and could not be completed before 2005”).

221. THE FEDERALIST PAPERS No. 78 (Hamilton) at 471; *id.*, No. 81 (Hamilton) at 484-85 (Clinton Rossiter ed. 1961).

222. For example, the German Constitution provides: “Marriage and the family shall enjoy the protection of the state.” GG Art. 6(1) (F.R.G). *See also* Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1166 (1998) (noting that at the time

several reasons, there are advantages to constitutionalizing family law at the state level. A fundamental social institution like marriage should be given constitutional protection at the level of the state constitution (where the polis is more likely to develop a consensus, and where minority voices can be accommodated better than at a national level). While a baseline may need to be established in national constitutional law, there are good reasons for states to enact constitutional protection for the institution of conjugal marriage. An explicit state constitutional amendment defining marriage as the union of one man and one woman could prevent judicial excesses like the *Baker* decision from being repeated in other states.

of the Universal Declaration, “[t]he idea that the family ‘is entitled to protection by society and the State . . . had already appeared in several constitutions [noting France and Germany], and would shortly appear in many others.’”); Sarah Andrews, *Protecting Privacy Through Government Regulation*, 2 SEDONA CONF. J. 1, 1 (2001) (“At the national level, the legal right to privacy is included in the constitution of most countries. In many this is framed as a right to respect for the home, family life and private correspondence.”); Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. INT’L L. & POL’Y. 695, 701 (1996) (“We also found it quite striking, in going through the constitutions of various countries of the world, that some include the right to family life and others do not. Pakistan has it; India does not. China has it; Taiwan does not; Singapore does not. Germany has it; Austria does not. Belgium has a very indirect form of protection—privacy of the family; the Netherlands has nothing at all.”).

Appendix A Law Review Articles Citing *Baker v. Vermont*

Compiled and reviewed by Justin W. Starr*

This reviewer examined a total of 266 law review articles to determine how they treated the Vermont Supreme Court's decision in *Baker v. Vermont*. The articles were selected by "Keycite"-ing *Baker v. State* using Westlaw and limiting the references to law review articles. This was done for the last time in the first week of September, 2003. The articles listed as positive either explicitly praised the decision, or made arguments supportive of or in sympathy with those made in *Baker*. For example, if the article was arguing in favor of same-sex marriage and cited to *Baker*, regardless of the exact proposition which *Baker* is cited for, it was counted as positive. The articles were classified solely upon their internal content, and some articles were listed as neutral even though other writings of the article author suggested that the author had a positive or negative view of *Baker*. The overall results are:

Positive, Support <i>Baker</i>	- 139 articles
Positive, but not far enough	- 28 articles
Neutral	- 71 articles
Negative, Criticize <i>Baker</i>	- 27 articles
<u>Abolish Marriage</u>	- 1 article
TOTAL	- 266 articles

I. POSITIVE ABOUT *BAKER* – 139 ARTICLES

Patrick J. Dooley, Note, *I Am Who I Am, Or Am I? A Comparison of the Equal Protection of Sexual Minorities in Canadian and U.S. Courts: Immutability Has Only Found a Home North of the Border*, 17 ARIZ. J. INT'L & COMP. L. 371 (2000).

Mark Strasser, *Equal Protection at The Crossroads: On Baker, Common Benefits and Facial Neutrality*, 42 ARIZ. L. REV. 935 (2000).

Natalie Brown Michalek, Note, *Littleton v. Prange: How Voiding Transsexual Marriage Affects the Fundamental Right of Marriage*, 52 BAYLOR L. REV. 727 (2000).

Lawrence Friedman & Charles H. Baron, *Baker v. State and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125 (2001).

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Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73 (2001).

Debra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883 (2000).

Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence and Couples of the Same Gender*, 41 B.C. L. REV. 265 (2000).

Ryan Nishimoto, *Marriage Makes Cents: How Law & Economics Justifies Same-Sex Marriage*, 23 B.C. THIRD WORLD L.J. 379 (2003) (reviewing ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002)).

William D. Araiza, *ENDA Before It Starts: Section 5 Of The Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1 (2002).

Kara S. Suffredini, Note, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279 (2001).

Sharmila Roy Grossman, Comment, *The Illusory Rights of Marvin V. Marvin for the Same-Sex Couple Versus the Preferable Canadian Alternative-M. V. H.*, 38 CAL. W. L. REV. 547 (2002).

Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017 (2000).

Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439 (2003).

Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363 (2002).

Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315 (2002).

Laurie A. Rompala, Note, *Abandoned Equity and the Best Interests of the Child: Why Illinois Courts Must Recognize Same-Sex Parents Seeking Visitation*, 76 CHI.-KENT L. REV. 1933 (2001).

Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301 (2000).

Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. J. GENDER & L. 392 (2001).

Dale Carpenter, *The Limits Of Gaylaw*, 17 CONST. COMMENT. 603 (2000) (reviewing WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999)).

Julie Jones, *Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075 (2002).

Mark Wolinsky, *Stereotypes, Tolerance and Acceptance: Gay Rights in Courts of Law and Public Opinion*, 19 DEL. LAWYER 13 (2001).

Linda J. Lacey, *The "Take Back Vermont Campaign": A Classic Case of Media Manipulation*, 19 DICK. J. INT'L L. 435 (2001).

Scott C. Seufert, *Going Dutch?: A Comparison of the Vermont Civil Union Law to the Same-Sex Marriage Law of the Netherlands*, 19 DICK. J. INT'L L. 449 (2001).

Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled Bowers v. Hardwick, Even Though Romer v. Evans Didn't*, 49 DUKE L.J. 1559 (2000).

David B. Wexler, *Lowering the Volume Through Legal Doctrine: A Promising Path for Therapeutic Jurisprudence Scholarship*, 3 FLA. COASTAL L.J. 123 (2002).

Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745 (2000).

James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 FORDHAM L. REV. 2285 (2001).

William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721 (2001).

Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 GEO. L.J. 2297 (2001) (reviewing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999)).

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