The Curious Case of the Missing Legal Analysis - Baker v. State

by Lynn D. Wardle

I. Introduction

The decision of the Vermont Supreme Court in Baker v. State, may be one of the most celebrated judicial decisions in recent history. It has been only two years and eight months since that decision was rendered, yet it has been cited in at least 272 law review or journal articles, comments, notes, and essays. <Lest any be misled, I have not personally read all 272, but I have read a sample of them and my excellent research assistant Justin Starr has read the relevant parts of all of them, and I have reviewed his research. If Justin looks slightly dazed, you know why.> Over sixty percent (60%) of those publications (168 pieces) can be described as supporting, lauding or endorsing the result, while just over ten percent of those publications (30 items) express any significant negative criticism of the decision (mostly raising separation of powers concerns). By any standard, nearly six-to-one is a very successful approval ratio.

1Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, UT. Presented at the Symposium on The Future of Same-Sex Marriage Claims: the Third Generation and Beyond, held at the Brigham Young University Law School on August 29, 2003. I am indebted to Justin W. Starr and Spencer McDonald for their excellent research assistance.

2744 A.2d 864 (Vt. 1999).

3Search of ***. By comparison, a search in Westlaw’s “JLR” (Journals and Law Reviews) database on August 21, 2003, for search: baker and “744 A.2d 864” identified 258 articles.

4Nearly all of the remaining 30% of published pieces that cited Baker were neutral, citing the case for some unrelated principle or merely describing the case without any significant commentary endorsing or criticism the decision, but there were a couple of publications hard to categorize, such as one recommending the abolition of marriage entirely. I am indebted to the excellent research of Justin W. Starr for most of this information.
Unquestionably, *Baker* has been very popular with the literati of the law profession – mostly law professors and law students who write in law journals.

But on closer examination, there are several curiosities about the citations to and legal commentary on the *Baker* decision. Those clues point to the strikingly paltry legal analysis in *Baker*. Upon close examination, the *Baker* opinion is lacking in credible legal analysis. Despite numerous party and amicus briefs offered by some outstanding legal talent, when it comes down to legal analysis (to borrow a description from a justice well-known for his impatience with feeble judicial reasoning) “the best the [c]ourt can do to explain [its result] is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”

In this paper I first review the citation to and use of *Baker* in the courts. I note that the *Baker* analysis has had virtually no impact upon legal analysis in other jurisdictions, and I further note, surprisingly, that the legal analysis in *Baker* has had only de minimus impact even in Vermont. In Vermont, *Baker* is virtually sui generis.

Next, I review the limited consideration of the crucial legal analysis in *Baker* by legal commentators, and the even more limited reliance upon the *Baker* analysis by other courts. I point out that most of the supportive legal literature has been celebratory, rather than analytical, focusing on the policy outcome rather than upon the legal analysis upon which that outcome is based.

Third, I return to *Baker* and provide a critical analysis of the rationale of the Vermont Supreme Court for its holding that the “Common Benefits” Clause requires that same-sex couples be allowed to marry, or to enter into equivalent legal relationship unions. I note that it is

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internally self-contradictory, is inconsistent with precedent, and inconsistent with the history and context of the origins of the “Common Benefits” Clause. Thus, I assert that Baker is severely deficient in credible, disciplined legal analysis. It is a prime example of an opinion in which simplistic slogans and poetic (emotional) language are substituted for credible legal analysis. I note how Baker can (and should) be distinguished and limited.

Fourth, I caution that despite those factors, and despite its major analytical scantiness and deficiencies, Baker is likely to be the direction the movement for same-sex marriage takes in the near future. I note 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 quest for same-sex marriage. I also note that the recent U.S. Supreme court decision in Lawrence v. Texas, 539 U.S. __ (2003) 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 credible, disciplined legal analysis.

Finally, I note how Baker can (and should) be distinguished and limited. I suggest several reasons why rationally it should not have significant persuasive influence. I further suggest that state constitutional amendments may be the most prudent and effective ways to prevent the spread of Baker-type rulings by activist state courts. I conclude by suggesting 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

A second clue that something may be amiss is reflected in the fact that in the 32 months since it was decided, only ten reported state and federal court cases cite Baker.6 A very quick and superficial Shepherds search reveals that at least four other cases reported in the same volume 744 of the Atlantic, Second reporter 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 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


7Commonwealth v. Basemore, 744 A.2d 717 (Penn. 2000). This Shepherd’s research was last searched August 22, 2003.

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

by at least 18 other courts. 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.

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. Queche Lakes
Landowners Ass ’n.* a tort case concerning indemnification, has been cited by nine other cases,
compared to ten case citations for *Baker*, and *Stickney v. Stickney*, a reduction of spousal
compensation case cited in eight other cases. Thus, for all the celebration, *Baker* barely even
stands out compared to several other Vermont cases decided the same year.

Another 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.

*Republican Party of Minn. v. White,* the U.S. Supreme Court held (by a 5-4 vote) that a
Minnesota prohibition on judicial candidates’ announcing their legal views is an

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10Shelton v. Woods, 744 A.2d 465 (Del. 1999). This information comes from a Westlaw

11742 A.2d 734 (Vt. 1999) (decided two months before *Baker*). Shepherds and Westlaw

12742 A.2d 1228 (Vt. 1999) (reduction of spousal maintenance) (Westlaw search August
22, 2003).

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

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 shape the States' constitutions as well.”

There is no discussion (much less endorsement) of the legal analysis in *Baker*.

In *Levin v. Yeshiva University*, 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.

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. Thus, *Baker* was cited for the fact of the policy adopted by the court and

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15 *Id.* at 784.


17 *Levin*, 730 N.Y.S.2d at 25 (citations omitted).

18 *Id.* at 25, n.4.
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 Spicehandler v. St Vincent’s Hosp. of N.Y.*,\(^{19}\) two gay men from New York registered their same-sex “civil unions” 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. On the cross-motions was whether the gay couples had the status of “spouses” in Vermont, and, if so, whether New York’s public policy barred recognition of same-sex “spouses.” To answer the first question, the Supreme Court (trial judge) in Nassau County twice cited *Baker* to show the judicial order and principle which the Vermont Civil Union statute was designed to effectuate. So the citation clearly is to the fact (what the Vermont Supreme Court ordered, and why) of the *Baker* decision, not to endorse its analysis. Yet it must be acknowledged that the New York court cited with approval the following language from *Baker*:

> 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. Policy 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

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\(^{19}\)2003 WL 21294889 (N.Y.Sup. 2003).
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. (Baker v. State, 170 Vt. 194, 229, 744 A.2d 864, supra).  

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 Supreme Court in Langan endorsed and embraced this viewpoint from the Baker decision. However, he does not cite it for its legal analysis, only for its expression of a policy against which a Vermont statute must be interpreted (and with which the New York court impliedly agrees). Nor does the Baker quote contain any legal analysis; rather, it expresses a mere conclusion, a position on a matter of public policy, as a matter of a priori value or opinion.

Goodridge v. Dept. of Pub. Health, a Massachusetts trial court rejected the claim of seven same-sex couples seeking marriage licenses, and granted the defendant’s motion for summary judgment. Baker is cited three times. The first two references are citations to the many courts that “have interpreted their marriage statutes to apply only to one man and one woman.” The other reference to Baker notes that the Baker decision was based solely on the “Common Benefits” clause of the Vermont Constitution, and that there is no analogous provision in the Massachusetts Constitution. The Massachusetts court makes no reference to any internal

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20 Id. at *6.


22 Goodridge, 14 Mass.L.Rptr. at *2; id. at *3.

23 Id. at *6.
analysis of the *Baker* decision.

In *Rosengarten v. Downes*, 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 adoption law change 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*. 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.” The *Rosengarten* case does note one point of legal analysis in the *Baker* decision, but it explicitly declines to follow that rationale because the Connecticut legislature expressed rejected the connection between adoption and same-sex unions that the *Baker* court had inferred and relied upon.

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25 *Id.* at 181.

26 *Id.*

27 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 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.* at 181.
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* has been cited only five times in reported Vermont decisions (printed in the Atlantic, Second, Reporter series) since the case was decided 32 months ago.

In two cases *Baker* is cited for the principle of statutory construction, of discerning and following legislative intent. In *Cantin v. Young*, 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.” There is no discussion or analysis of the *Baker* decision itself. Similarly, in *Colwell v. Allstate Ins. Co.*, 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.

There is no further discussion or analysis of the *Baker* decision itself. These cases reveal that the one actual holding of the Court in *Baker* that has been actually cited and used comes from the

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28770 A.2d 449 (Vt. 2000).


30819 A.2d 727 (Vt. 2003).

31819 A.2d at 730.
part of the opinion that interpreted the Vermont marriage statute as not allowing same-sex couples to marry.

In *Daye v. State of Vermont*, 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. The Vermont Supreme Court affirmed and also noted that even if the parties had standing, their claims would fail. As to the “visible punishments” provision of the Constitution, the court reviewed the history of that provision of the state constitution, and quotes *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.” 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. What plaintiffs have failed to demonstrate is any violation of that motivating ideal.”

*Baker* was cited once solely for historical fact to provide the context for the issue. In

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32769 A.2d 630 (Vt. 2000).

33As 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 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 633-636.

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

35*Id.*
Brady v. Dean, 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 refers to Baker when explaining the origins of the civil union law. There is no discussion or analysis of the Baker decision itself. However, the Brady case is worth mentioning further because it seems to support underscores 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 a face value for purposes of the motion, was 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 closes 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.”

The Speaker of the House expressed disapproval but did not disqualify the fourteen nor did any of them disqualify themselves, nor was the legislative vote retaken or reconsidered. 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 v. State ruling), and statutes criminalizing running of lotteries, games of

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37 Brady, 790 A.2d at 429.
chance and bookmaking. 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.

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. The court said: “The prudent exercise of judicial self-restraint and deference to the independence of a coordinate governal branch” 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” required the court to ignore the charges because “no branch [may] usurp the ‘core functions’ . . . or impair the ‘independent institutional integrity’ of another.”

*Brady* 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 reveals the double-standard of the Vermont Supreme Court which brushed aside the challenges to the alleged legislative corruption. Apparently, the court’s commitment to “the constitutional

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38 *Id.* at 430.

39 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.

40 *Id.* at 431.

41 *Id.* at 432.

42 *Id.*
imperative to afford all Vermonters the common benefit, protection, and security of the law,”43 does not extend to protecting the rights of opponents of the pet policy of the court, or to enforcing the anti-gambling and legislative integrity laws against legislators who do the bidding of the court. Apparently, legislators who cooperate to implement controversial judicial preferences in Vermont are not held to the common standards applicable to mere “common humanity.”44 In Baker, the Vermont Supreme Court ended its landmark decision 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.”45 In light of the dismissive Brady decision two years later (almost to the day), this famous language from Brady appears to be nothing but cheap rhetoric, and not to indicate a true commitment to equal treatment of all citizens under law. 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 impact of Baker in Vermont upon interpretation of that clause of the Vermont Constitution. The “Common Benefits” (sic) Clause of the Vermont Constitution (so-called by the Vermont Supreme Court in Baker) 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 of that community . . . .”46 Since Baker was decided, the Vermont Supreme Court has interpreted the “Common Benefits” clause in only one case.47 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,48 the owner of a quarry appealed the decision of the Vermont Environmental Board rejecting its request to double the number of round trips the quarry’s trucks could make through a small village located between the quarry and the quarry’s processing plant.49 After brushing aside other constitutional claims,50

46Vt. Const., ch. I, art. 7.

47In another cases, 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. Id. at 375-76.) In a second case, Town of Killington v. State, 776 A.2d 395, 397 (Vt. 2001), the Common Benefit Clause is mentioned in passing 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 400-401. Likewise, in Brady, supra, the Vermont Supreme Court declined to reach the merits of a “Common Benefits” Clause claim challenging the legislative betting on the outcome of the Civil Union bill.

48758 A.2d 777 (Vt. 2000).

49The 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. 758 A.2d at 779.

50The Vermont Supreme Court first rejected OMYA’s claim that the decision exceeded the jurisdiction and authority of the Board, id. at 779-780; violated substantive due process, id. at 780; and constituted an impermissible moratorium. Id.
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. The court cited three cases, including Baker, to support the proposition that “the legislature may choose to address problems incrementally.” 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.” 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.” 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, and since the quarry had not shown that the Board acted arbitrarily or fancifully, the court upheld the Board decision. Thus, the OMYA court cited Baker for a principle that had been noted in dicta in Baker, a principle supporting 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 interpretation of the “Common Benefits Clause” had been

51 Id. at 780.
52 Id. at 781.
53 Id.
54 Id.
55 Id.
applied in *OMYA*, on first blush it seems that it could have led the court to overturn the decision of the Environmental Board. There certainly is a discrepancy in outcome between *Baker* and *OMYA* insofar as upholding legislation that has disparate impact upon separate groups, differentially restricting the rights enjoyed by one class of persons. So the failure to distinguish 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*, as lawyers say. 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* principle.

By comparison, in the three years before *Baker* was decided, the Vermont Supreme Court interpreted the “Common Benefits Clause” in four cases. In three of the four cases, the “Common Benefits” Clause claim was rejected. In *L'Esperance v. Town of Charlotte*, Justice Dooley, writing for the court, held that a trial court ruling requiring the selectment 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

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56 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 Benefit 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) (in case in which majority rules 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).

57 704 A.2d 760 (Vt. 1997).
benefits.”58 Parker v. Gorczyk,59 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,60 per Justice Dooley, rejected a “Common Benefits Clause” claim by employer of
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.’ MacCallum v. Seymour's
Adm'r, 165 Vt. 452, 457, 686 A.2d 935, 937 (1996); . . . .”61

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,62 decided more
than two years before Baker, 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. 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 the 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

58 Id. at 763.
59 744 A.2d 410 (Vt. 1999).
60 739 A.2d 1201 (Vt. 1999).
61 Id. at 1207.
62 692 A.2d 384 (Vt. 1997).
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 jurisdiction have cited Baker for the fact of its existence and the fact of its judgment, but have not endorsed that judgment. Particularly, courts in other jurisdictions have not cited, followed, or used the legal rationale at the core of Baker – the interpretation equality principles – at all. The Baker interpretation has been noted as a matter of fact, but has not been followed in other equality cases in other jurisdictions, and the logic and rationale of Baker have not been imitated or followed at all. In Vermont, Baker has been cited 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. But as to the scope and meaning and application of the “Common Benefits” Clause, three years after its sensational decision, it remains sui generis even in the Vermont Supreme Court.

III. The Silence in the Celebration - What the “Legal Literati” Does Not Say about Baker

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
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, 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.”).
IV. A Critical Analysis 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. 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 from the remedy part of the majority opinion.

The majority opinion contains four main parts, analyzing the statutory question, determining constitutional standard, applying constitutional standard, and 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, the Vermont Supreme Court rejected the assertion that the state marriage statute could be construed to require marriage

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64 The caption is at 744 A.2d 864, but the majority opinion begins on page 866 and ends on page 889; Justice Dooley’s opinion runs from 889-897; and Justice Johnson’s opinion runs from 897-912.

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license officials to allow same-sex couples to marry. 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 . . . .” Referring to dictionaries, “the understanding of the term [that] is well-rooted in Vermont common law,” the meaning indicated by numerous related statutes, 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.” That the marriage statutes allowed only male-female couples to marry.

That clear and particular legislative intent also distinguishing a case cited by plaintiffs in which the court had interpreted the term “spouse” in an adoption statute to include same-sex partners.

The five-paragraph statutory interpretation is simple, straightforward, and unremarkable. The very generic summary statements of basic principles of statutory construction are the legal principles for which Baker is most frequently cited.

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

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66 Baker, 744 A.2d at 868.

67 Id.

68 Id.

69 Id. at 868-869.

70 744 A.2d at 869.

71 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.

72 *[x-ref to cases above]
many benefits violates Vermont’s “counterpart” to the federal Equal Protection Clause, the “Common Benefits” Clause, and the court asserts 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. From the outset, the court also focuses on the state’s claim that marriage links procreation and childrearing, and the plaintiffs’ challenge to it.

In the section on “Historical Development,” 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” cases, and “have been less than consistent in their application” of the “Common Benefits” Clause jurisprudence. 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.” Denial of public benefits to some persons must be justified under the “Common Benefits” Clause by “an appropriate and overriding public interest.”

73 Id. at 870.
74 Id. at 870 (noting plaintiff’s claim about “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.”).
75 744 A.2d at 870-873.
76 744 A.2d at 872.
77 Id.
78 744 at 873.
79 Id.
The review of the Vermont “Common Benefits” Clause jurisprudence is informative and directive. Many cases are cited and discussed. However, the asserted reason for rejecting a structured, standard, multi-tiered approach is weak and unpersuasive. 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.*[^81] which it reads as departing from the traditional, structured “Common Benefits” Clause analysis, and adopting a pure “balancing” approach. But closer examination of both *Ludlow* and of the cases decided in the seventeen years-plus 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 nonpreferential, legitimate legislative purpose. Quoting but not resting on 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

[^80]: 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. 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. So the absence of such analysis in the “early case law” of Vermont is hardly surprising.

[^81]: 448 A.2d 791 (1982).

[^82]: 744 A.2d at 871-873.

[^83]: *Ludlow*, 448 A.2d at 794-796. “The purpose of the preferential legislation must be to further a goal independent of the preference awarded . . . .” *Id.* at 795.
“common sense,”\(^8\) (a rudder-less standard somewhat akin to that used in \textit{Baker}), the \textit{Ludlow} 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. While distinguishing the federalism constraints upon federal Equal Protection analysis from the local expertise of state courts, \textit{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. \textit{State v. Auclair}, 110 Vt. 147, 160, 4 A.2d 107, 113 (1939).\(^5\)

The 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.”\(^6\) The “unbalanced impact” refers to the disparate impact on different groups, not

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\(^5\)448 A.2d 791, 179 (Vt. 1982).

\(^6\)\textit{State v. Auclair}, 4 A.2d 107, 113 (Vt. 1939).
the courts 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, none of the twenty cases that have cited *Ludlow* in the intervening twenty-plus years, except *Baker*, has read *Ludlow* as signaling a change in the standard of “Common Benefits” Clause analysis, or for adoption of a “balancing” test.

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

88 *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 of Towns of Hartland, Windsor and West Windsor*, 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, 1371 (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 “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);
have cited *Ludlow* often for the proposition that the purpose of the “Common Benefits” Clause is to avoid preference to one group,89 for the proposition that provisions of the Vermont Constitution (including the “Common Benefits” Clause) may be interpreted differently than

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*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, (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 v. Perrault*, 475 A.2d 1078, (Vt. 1984) (*Ludlow* cited for principle that a statute is presumptively constitution 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).

89See, e.g., *In re Reapportionment of Towns of Hartland, Windsor and West Windsor*, 624 A.2d 323, 337 (Vt. 1993) (*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.”)}
counterpart provisions of the U.S. Constitution,\(^\text{90}\) that economic regulation usually has some
disparate impact,\(^\text{91}\) and for the principle of deference to the legislature,\(^\text{92}\) but \textit{never} for the
“balancing approach” which the \textit{Baker} majority discovers in the same cases. The \textit{Baker} court
simply misstated or misread the precedents. There is no support whatever in the “Common
Benefits” Clause cases citing \textit{Ludlow} for the \textit{Baker} majority’s reading of \textit{Ludlow} or its
interpretation of the standard or analysis under the “Common Benefits” Clause.

Just two years before \textit{Baker}, in \textit{Brigham v. State}, arguably the most significant
“Common Benefits” Clause decision in the decade before \textit{Baker}, the court overturned the state

\begin{itemize}
\item[\textit{See, e.g.}, \textit{Hodgeman v. Jard Co.}, 599 A.2d 1371, 1371 (Vt. 1991) (\textit{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.”);
\textit{State v. Brunelle}, 534 A.2d 198, 201-02 (Vt. 1987) (\textit{Ludlow} set up stricter standard of review under
“Common Benefits” Clause than applies under federal Equal Protection analysis);
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and confession \textit{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.”);
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than U.S. Constitution).

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\textit{Ludlow} as selective Sunday Closing law “did not serve ‘an appropriate and overriding public
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statute is not unreasonable, arbitrary or capricious, nor is it devoid of a public purpose.”);
\textit{Langle v. Kurkul}, 510 A.2d 1301, 1310 (Vt. 1986) (\textit{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”).
\end{itemize}
scheme for funding public education which resulted in wide differences in per-pupil educational spending. The court then 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. Lorrain v. Ryan, 160 Vt. 202, 212, 628 A.2d 543, 550 (1993); State v. George, 157 Vt. 580, 588, 602 A.2d 953, 957 (1991).” For the court just two years later to declare that for the past seventeen years (since Ludlow) it had really not been following the structured, multi-tiered federal equal protection standard of review simply defies credulity.

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. He began by stating that he feared that the rationale of the majority opinion might be “ignored” in the future, a prediction which my research of the caselaw 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. He noted that throughout the twentieth century “the jurisprudence in Vermont is similar to that of most states.” 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

93692 A.2d 384 (Vt. 1997).
94692 A.2d 395.
95744 A.2d at 889-897 (Dooley, J., concurring).
96744 A.2d at 889.
97744 A.2d at 890.
contrary to our existing Article 7 jurisprudence.”

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. He criticizes the court’s description of one case as “neither fair nor accurate,” 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.”

He finds “great irony” that the court adopts a higher standard of review which will result less deference to the legislature. 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.

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. The majority’s statement that the new activist standard has been consistently applied in the past is simply “incredible.”

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98 A.2d at 893 (emphasis added).
99 A.2d at 893 (emphasis added), citing nine cases.
100 A.2d at 894, n.1 (emphasis added).
101 A.2d at 894 (emphasis added).
102 A.2d at 894.
103 A.2d at 894.
104 A.2d at 895 (emphasis added).
105 A.2d at 895, n.3 (emphasis added).
To bolster its analytical approach, the majority discusses the text of the “Common Benefits” Clause, concluding that “chief” among the principles expressed “is the principle of inclusion.” Unfortunately, while Chief Justice Amestoy has much to say about the philosophy, purpose and importance of textual analysis, he seems to be at a total loss when it comes to actually engaging in textual analysis. Thus, he provides no comparison with how the critical terms of the “Common Benefits” Clause were used in other documents of the founding era, no elucidation of the etymology of the terms, etc. 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, seems aimless, and contributes little to the analysis of the question before the court, although it seems to satisfy some academic pretension of the opinion-writer. It provides only a very superficial examination of the purpose of the “Common Benefits” Clause, and fails in any depth to relate that purpose to the

106 744 A.2d at 875.

107 744 A.2d -877.

108 The conclusion is that the “Common Benefits” Clause was aimed at “the elimination of artificial governmental preferments and advantages.” 744 A.2d at 877.

109 “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).
in the section on “Analysis Under Article 7” the court primarily summarizes the analysis it has distilled in the previous sections. A “relative 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. 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. The government’s statutory purpose must be examined to determine whether the discrimination “is reasonably necessary to accomplish the State’s 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. Because that process involves imprecise “reasoned judgment,” the court is compelled to exercise restraint and to show respect for tradition.

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 [108x230]110

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[108x230]110

For an example of 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 9-23 (2000).

[114x709]111

744 A.2d at 878.

[113x681]112

744 A.2d at 878, n. 10.

[114x653]113

744 A.2d at 878. Id. at 879 (whether the discrimination “bears a reasonable and just relation to the government purpose.”).

[114x625]114

744 A.2d at 879.
judges disliked, and he laments the adoption of such an activist standard of review.\textsuperscript{115} 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 imprecise they may be.”\textsuperscript{116} It “is not at all predictable. In 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.”\textsuperscript{117} 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.”\textsuperscript{118} 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.”\textsuperscript{119} She agreee 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.”\textsuperscript{120}

\textit{C. Application of “Common Benefits” Clause Standard}

The two justices who wrote separate opinions in \textit{Baker} criticized the analytical approach of the majority because of its potential for subjectivity, and the actual application of that standard

\textsuperscript{115} 744 A.2d at 896. “We have wisely, in the past, avoided the path the majority now chooses, a path worn and abandoned in many other states.” 744 A.2d at 895.

\textsuperscript{116} 744 A.2d at 897.

\textsuperscript{117} 744 A.2d at 897.

\textsuperscript{118} 744 A.2d at 897.

\textsuperscript{119} 744 A.2d at 907-08, n.13 (Johnson, J., dissenting in part).

by the majority clearly validates that criticism.

It first noted that the category excluded from marriage was same-sex couples.\textsuperscript{121} Then it addressed the major justification for the exclusion.

However, 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.’”\textsuperscript{122} The court then state that the State “has a legitimate and longstanding interest in promoting a permanent commitment between couples for the security of their children.”\textsuperscript{123} 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,”\textsuperscript{124} again missing the critical procreation element in the marriage-childrearing link. It only returned to the critical marriage-procreation-childbearing link when stating it’s conclusion that there was “\textit{extreme logical disjunction} between the classification and the stated purposes of the law – protecting children and ‘furthering the link between procreation and child rearing’ . . . .”\textsuperscript{125} 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 . . .

\textsuperscript{121}744 A.2d at 880.
\textsuperscript{122}774 A.2d at 881.
\textsuperscript{123}774 A.2d at 881.
\textsuperscript{124}774 A.2d at 882.
\textsuperscript{125}744 A.2d 884.
But it summarily added that “[p]romoting a link between procreation and childrearing similarly fails to support the exclusion.” 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.”

Next, the court cited sensational estimates that between six and fourteen million children are being raised by gay father or lesbian mothers, and that between 1.5 million and five million lesbian mothers resided with their children in the US in 1990. While there are no doubt many same-sex couples who are 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,” is no excuse for citing two of the most inflated reports and not any of the more responsible estimates. And while “there is no dispute that a significant number of children” are being raised by same-sex partners, there is a huge difference between a few thousand “significant” and a few million “significant,” and that difference apparently matters to the court’s analysis because it felt compelled to cited the few million 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 that year (the year beginning just three days after the Baker decision) there were a total of just under

\[^{126}\text{744 A.2d 884.}\]
\[^{127}\text{744 A.2d 884.}\]
\[^{128}\text{Id.}\]
\[^{129}\text{Id.}\]
\[^{130}\text{Id.}\]
\[^{131}\text{Id.}\]
5,500,000 adult couples living together unmarried (5,475,768 unmarried partner households). 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 under 11% of the total population of nonmarital cohabitants.

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 2,880,000 children being raised by a parent and a nonmarital partner. Applying the proportion of heterosexual and same-sex nonmarital cohabitant couples (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, included 2,101,000 POSSLQs

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133 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 by same-sex and heterosexual cohabitants, constituted only 5% of all households in USA in the 2000 Census, compared to 52% for married couple households. 2000 Census, *

(Persons of the Opposite Sex Sharing Living Quarters) and 469,000 others.\textsuperscript{135} Even if \textit{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\% of gay couples and about one-third of lesbian couples are raising children.\textsuperscript{136}

The latest Census Bureau report on adopted children, \textit{Adopted Children and Stepchildren: 2000},\textsuperscript{137} 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.\textsuperscript{138} Applying the generous 11\% ratio found by the 2000 Census to estimate how many of these children are living with same-sex couples, that would mean that less than 6,350 adopted children are being raised by same-sex partners.

The point is that the Vermont court in \textit{Baker} egregiously stretched to insert highly inflated data to try to support its point. That is neither good legal analysis nor good judicial judgment.

The court returned to the “reality” of child-rearing by same-sex couples when it asserted


\textsuperscript{137}cited in William L. Pierce, \textit{Adoption Numbers}, NRO, Guest Comment, August 27, 2003

\textsuperscript{138}
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.”\textsuperscript{139} That point is certainly relevant and worth considering 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.”\textsuperscript{140} 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.”\textsuperscript{141} Again, it noted that “the marriage exclusion treats persons who are similarly situated for purposes of the law differently.”\textsuperscript{142} It held that there was “extreme logical disjunction between the classification and the stated purposes of the law . . . .”\textsuperscript{143} These statements are bald conclusions unsupported by fact or 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

\textsuperscript{139}Id.

\textsuperscript{140}Id. at 884 (citing the State’s brief).

\textsuperscript{141}774 A.2d at 882.

\textsuperscript{142}774 A.2d at 882. See also id.

\textsuperscript{143}744 A.2d 884.
welfare just as well as did male-female couples (a separate and very dubious proposition), \footnote{144} on the issue of furthering the state’s interest in establishing linkage between procreation and childrearing that point is irrelevant, because same-sex couples cannot procreate at all, and because they cannot procreate, permitting them to marry will not establish significant linkage between procreation and childrearing. \footnote{145}

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 perception of parenthood.” \footnote{146} 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 \textit{couple} to procreate a child that is the genetic offspring of both partners. It still takes a man and a woman to procreate.

\footnote{144} 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.

\footnote{145} It can 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 also undermines the state interest in linking procreation and child-rearing only partially, because it involves the deliberate exclusion of the other biological parent from the marriage. Thus, the degree to which it furthers the linkage is significantly less than that of male-female 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.

\footnote{146} 774 A.2d at 882.
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 “the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children.” 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 as couples conceive a child. They cannot as a couple procreate. They may contract with a person of the opposite sex, and with that person one 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

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147 Id. at 882.
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.

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’ . . . .” 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, 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 state’s 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 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

148 Id.

149 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.
rather than address the critical claim the State propounded.

The majority 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*. 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. Of course, all same-sex couples are not capable of procreating — period — so including them in marriage could not further the link between procreation and child-rearing.

Likewise, the state did not assert that the purpose of the marriage restriction (to male-female couples) was that every married couple procreate. 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.

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.

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150Thus, the court incorrectly criticized the exclusion of same-sex couples from marriage for being "underinclusive" (not overinclusive). 744 A.2d 881. It would only be underinclusive if the purpose of the law was to exclude non-procreative couples.

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

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. 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 because “[t]here is no reason in law, logic or social philosophy to obstruct” same-sex couples from adopting, and to do so is “inconsistent with the children's best interests . . . .” The court’s concealment of the judicial “nudge” behind the policy extension at least taints the reference to the adoption laws as manifestation a bona fide indication of Vermont citizens’ public policy. Nor does the court acknowledge that the policy issue concerning whether to allow same-sex

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152 744 A.2d at 883.
153 744 A.2d at 884.
154 744 A.2d at 884.
155 744 A.2d at 882; id. at 885; id. at 886.
157 628 A.2d at 1276. *See also id.* at 1273 (the court must “avoid results that are irrational, unreasonable or absurd.”).
couples to adopt children who are missing and in need of one or both parents is quite different that 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 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 doesn’t 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 childrearing. 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 laws 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).

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 analysis). The court dutifully lists some of the State’s arguments, but then consistently refuses to engage those arguments, and subtly recast the state one interest it tries to evaluate instead of 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 repealing fellatio laws, prohibiting discrimination on the basis of sexual orientation, and barring “hate crimes.” 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.

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

\[\text{1584 A.2d at 885-86.}\]

\[\text{1594 A.2d at 886.}\]
declined to endorse the majority rationale. Justice Johnson, concurring in part and dissenting in part, based her conclusion that the Vermont marriage was violated the Vermont Constitution on sex discrimination grounds instead of the majority’s analysis.

The majority failed to apply one critical elements of the standard of analysis they set: to exercise restraint and to show respect for established tradition.

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.” Noting that a number of statutory schemes might be enacted which would provide plaintiffs the equal 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. 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. Decisiveness should not be confused with wisdom, nor is the court the only repository of wisdom; courts “do best by proceeding in a way

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744 A.2d at 896. “We have wisely, in the past, avoided the path the majority now chooses, a path worn and abandoned in many other states.” 744 A.2d at 895.

744 A.2d at 907-08, n.13 (Johnson, J., dissenting in part).

744 A.2d at 879.

744 A.2d at 886.

744 A.2d at 887.

744 A.2d at 887.
that is catalytic rather than preclusive . . . .”

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 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 to not issue a decree to permit same-sex marriages. 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, and of issuing a mere “advisory opinion” instead of fulfilling its judicial responsibility to obey the “commands of the constitution.”

The court concluded with a stirring rhetorical flourish. “The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonter 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.” Interestingly, this could have been said by 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 status, benefits and protections afforded marriage.

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166744 A.2d at 888.
167744 A.2d at 899-904.
168744 A.2d at 901-04.
169744 A.2d at 904.
170744 A.2d at 889.
V. How Baker Can be Limited, and Why Future Claims for Same-Sex Marriage in the USA Are Likely to Imitate Baker

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 other states have a “Common Benefits” clause in the state constitution.171

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.”172 Yet the dramatically expansive construction of the 222-year-old “Common Benefits” Clause of the Vermont Constitution by the

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171 Check AZ, GA, IL, KS, OH, MI, See 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.”); Virginia 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.Virgina Consti., 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.”)

172 Baker, 744 A.2d at 875.
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.”\textsuperscript{173} Cases interpreting the “Common Benefits” Clause, it declared, “reflect a very different approach from current federal jurisprudence.”\textsuperscript{174} 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.”\textsuperscript{175} 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.\textsuperscript{176} 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

\textsuperscript{173}44 A.2d 870 (emphasis added).

\textsuperscript{174}44 A.2d at 871 (emphasis added).

\textsuperscript{175}44 A.2d at 870, quoting State v. Badger, 450 A.2d 336, 347 (Vt. 1982).

\textsuperscript{176}Latin for “he himself has said (it); hence, an arbitrary or dogmatic statement.” Webster’s New World Dictionary of the American Language 772 (1964).
analysis.\textsuperscript{177} Rather, the collapse of analysis in the \textit{Baker} opinion resulted from judicial over-reaching, 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.\textsuperscript{178}

\textbf{B. Why \textit{Baker} Is the Probable Shape of the Future in Some States}

While \textit{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 \textit{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.

\textsuperscript{177}For instance, the statutory analysis in the court’s opinion was careful, well-supported, and consistent with precedent and theory. 744 A.2d at 868-69; see infra notes ___ through ___ 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. 744 A.2d 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 criticising “[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. 744 A.2d 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 \textit{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).

\textsuperscript{178}See \textit{Casey}, 505 U.S. at __, at 2876 (Scalia, J., dissenting) (“It is not reasoned judgment that supports the Court's decision; only personal predilection.”)
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* (2002). He 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.”179 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 wo without a long process of education and personal experience.”180 The Vermont marriage-equivalent “civil unions statute is not equality,” notes Eskridge, but “it is at least *equality practice*.181 This “incremental” process is much more likely to produce permanent transformation of society’s attitudes about same-sex relationships.182

A compromise approach is also recommended by respected conservative Judge Richard Posner. Instead of legalizing same-sex marriage, he opines that same-sex domestic partnership should be created to give a marriage-like status to same-sex unions while preserving the status of


180 *Id.* at xv.

181 *Id.* at 148.

182 *Id.* at 148.
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 intermediate solution that would give homosexuals most of what they want but at the same time meet the three objections I have advanced.

Denmark and Sweden, not surprisingly, provide the model.183

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.184 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 noone 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 was careful to explicitly note several times that the issue before the Court in *Lawrence* did not involve marriage and the Court was not mandating same-sex marriage,\(^{185}\) 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.\(^{186}\) 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, the dissenting opinion of Justice Scalia bluntly warned: “Do not believe it.”\(^{187}\) 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

\(^{185}\) *Lawrence*, 539 U.S. __, ___ S.Ct. __, at 17-18 (slip op.) (“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* 539 U.S. at __, (*).

\(^{186}\) *Lawrence*, ___ S.Ct. ___ (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.”)

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.?\(^{188}\)

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,\(^{189}\) whose position has been described by distinguished pro-gay-marriage Professor William Eskridge as “friendly to decriminalizing consensual private sodomy,”\(^{190}\) but opposing “same-sex marriage, antidiscrimination laws, and other public stamps of approval for homosexuality.”\(^{191}\)

\(^{188}\)Lawrence, ___ S.Ct. ___ (Scalia, J.,dissenting, joined by Rehnquist, C.J., and Thomas, J.), at 20-21.


\(^{191}\)Eskridge, No Promo, id. at 1346.
The distinction between prohibiting sodomy and legalizing same-sex marriage is made by arch-economic-analyst Richard Posner in his book, *Sex and Reason*,192 – a source that was cited prominently in the majority opinion in *Lawrence*.193 Just as the *Lawrence* decision tracks the 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.194 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 in 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

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193*Lawrence*, __ S.Ct. at __, slip op. at 15.

because of such rulings in other states. Hawaii, Alaska, Nebraska, and Nevada votes overwhelmingly approved constitutional amendments to prevent a Baker ruling in their state (by at least 60-40 margins).

The Nebraska constitutional amendment is particularly interesting because it is comprehensive. It bars same-sex civil unions as well as same-sex marriage.*

The people of Vermont have tried to amend their constitution, but the constitutional amendment 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.199

Constitutionalization of family law can occur at the state level by constitutional amendment as well as by judicial decision. For several reasons, there are advantages to constitutionalizing family law at the state level rather than at the national level. There are some reasons not to address many family law issues in the constitution of a union of states.

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