

*Baker v. Vermont: The Vermont State Supreme Court Held that Denying Same-Sex Couples the Benefits and Privileges of Marriage Is Unconstitutional**

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Three same-sex couples living in Vermont applied for marriage licenses from their respective town clerks.¹ All three couples were in long-term, committed relationships and were residents of Vermont.² The licenses were denied.³ The three couples brought suit alleging that the refusal to grant them marriage certificates violated the Vermont marriage statutes and the constitution of Vermont.⁴ The trial judge dismissed the plaintiffs' case, finding they failed to state a claim for which relief could be granted.⁵ In its decision, the trial court made two distinct rulings.⁶ First, the trial court held that the marriage statutes could not be interpreted to apply to same-sex couples.⁷ Second, the trial court held that the marriage statutes, construed to exclude same-sex unions, were constitutional because they furthered a rational state interest by "promoting the link between procreation and

* At press time, the Vermont legislature had passed and Governor Howard Dean had signed H.B. 847, 1999-2000 Adjourned Sess. (Vt. 2000), which became 2000 Vt. Acts and Resolves 91. This act established "civil unions," granting state recognition of same-sex unions and providing all state benefits afforded married couples to these unions. Most of the act's provisions will take effect July 1, 2000, barring injunction. The remaining provisions, relating primarily to tax status, will take effect January 1, 2001.

1. See *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999).
 2. See *id.*
 3. See *id.*
 4. See *id.* at 867-68.
 5. See *id.* at 868.
 6. See *id.*
 7. See *id.*

child-rearing.”⁸ The plaintiffs appealed to the supreme court of Vermont.⁹ The supreme court reversed.¹⁰ The court held that the Vermont marriage statutes do in fact exclude same-sex marriages by their language but that this exclusion violates the Common Benefits Clause of the Vermont Constitution. *Baker v. Vermont*, 744 A.2d 864, 869 (Vt. 1999).

I. BACKGROUND

Marriage licenses, and the requirements for issuing marriage licenses, are subject to state, not federal, law. However, statutes governing the issuance of marriage licenses are subject to federal judicial review. In the past, the United States Supreme Court has overturned laws regulating marriage in some states.¹¹ While the Supreme Court has not addressed the issue of same-sex marriages, the Court has looked at the denial of marriage benefits to certain groups in other contexts.¹² In addition, the Supreme Court has examined legislation affecting the rights of gays and lesbians, which provides a framework for how state courts examine legislation affecting these groups.¹³ It is within this context that the Vermont Supreme Court, other state supreme courts, and lower courts have dealt with the issue of gay marriages.¹⁴

A. *The U.S. Supreme Court's Approach*

In *Loving v. Virginia*, the plaintiffs used the Due Process Clause of the U.S. Constitution¹⁵ to challenge a Virginia law that criminalized

8. *See id.*

9. *See id.*

10. *See id.* at 867.

11. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (holding that the right to marry is a fundamental due process right and that state laws that clearly “interfere directly and substantially with the right to marry” must be scrutinized strictly under the equal protection clause); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding unconstitutional a state prohibition on interracial marriages).

12. *See Loving*, 388 U.S. at 2.

13. *See e.g., Romer v. Evans*, 517 U.S. 620, 623 (1996) (holding that under the Equal Protection Clause, legislative classifications must bear a rational relationship to a legitimate governmental purpose); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (holding that there is no constitutional right for homosexuals to engage in private consensual acts of sodomy).

14. *See, e.g., Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993); *Singer v. Hara*, 522 P.2d 1187, 1188 (Wash. Ct. App. 1994); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973).

15. *See U.S. CONST. amend. XIV, § 1.* The Due Process Clause of the United States Constitution provides that neither the federal government nor any state may “deny to any person the equal protection of the laws.” *Id.*

interracial marriages.¹⁶ The anti-miscegenation statute in Virginia made interracial marriage between whites and blacks a crime.¹⁷ The Court found that this state statute was unconstitutional and violated the Equal Protection component of the Due Process Clause.¹⁸ Virginia defended the anti-miscegenation statutes on the grounds that the laws were equally applied to all white and black individuals and therefore should be upheld as long as they furthered a rational state purpose.¹⁹ The Supreme Court rejected this rationale.²⁰ The Court concluded that a higher level of scrutiny applies whenever a statute makes racially based distinctions, whether or not they are equally enforced against all races, and that in this case “[t]here can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race.”²¹ The Court overturned the Virginia statutes, stating finally that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”²²

Another important facet of the U.S. Supreme Court decisions affecting gay and lesbian issues is the standard of review the Court employs in reviewing cases affecting these groups. This affects the standard of review used by the federal courts, and many state courts, to decide questions under the Equal Protection Clause or the state equivalents.²³ The Court has identified three standards of review: rationale basis scrutiny, intermediate scrutiny, and strict scrutiny. This three-tiered approach looks at two factors, the group affected and the legislation at issue.²⁴ The Court uses these factors to determine the level of scrutiny to be used to determine a case.²⁵ The first set of factors federal courts consider is the characteristics of the group affected by the legislation.²⁶ If the group affected by the legislation is a suspect class, a heightened level of scrutiny is applied.²⁷ Depending on the characteristics of the class, the nature of the characteristics of the group, and the historical discrimination they faced, the Court determines which of the three levels of scrutiny to use in order to

16. See *Loving*, 388 U.S. at 1.

17. See *id.* at 4.

18. See *id.* at 2.

19. See *id.* at 8.

20. See *id.* at 8-9.

21. *Id.* at 11.

22. *Id.* at 12.

23. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-41 (1985).

24. See *id.*

25. See *id.*

26. See *id.*

27. See *id.*

analyze the constitutionality of the legislation.²⁸ For example, the underlying purpose of the Equal Protection Clause is to protect racial minorities from discrimination. The Court has thus interpreted that the goal of the Equal Protection Clause is to protect a suspect class from discrimination based on these characteristics.²⁹ Thus, legislation which impacts racial minorities and similarly situated groups will be subject to the toughest level of scrutiny.³⁰ This approach first requires the courts to determine if the group affected by the legislation fits the particular characteristics of historical discrimination, political powerlessness, or immutable characteristics.³¹ Second, federal courts will look at the legislation to determine whether it furthers a governmental interest and whether there are less restrictive means to achieve the legislative goal.³²

One of the most recent Supreme Court cases that has addressed legislation targeting gays and lesbians is *Romer v. Evans*.³³ This decision came in response to a referendum in Colorado, which amended the Colorado State Constitution to make it unconstitutional for the state to pass any laws to protect gays and lesbians from discrimination. The referendum also repealed all existing statutes, laws, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation.³⁴ The Court concluded that this amendment was unconstitutional.³⁵ The state's argument was that the amendment's aim was to treat all citizens equally by prohibiting laws that favored one group, in this case gays and lesbians, by giving them special protection.³⁶ The Court rejected this argument, finding instead that the amendment singled out a particular group of people, denied them equal protection under the laws, and was not motivated by any rational state interest but rather by animosity toward a particular group of citizens.³⁷

The basis for the *Baker* court's decision was the Vermont State Constitution Common Benefits Clause, and not the Fourteenth Amendment.³⁸ The language of the clause provides, "the government

28. See *id.* at 439-41.

29. See *Baker v. Vermont*, 744 A.2d 864, 874 (Vt. 1999).

30. See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

31. See *Baker*, 744 A.2d at 871.

32. See *id.*

33. 517 U.S. 620 (1996).

34. See *id.* at 624.

35. See *id.*

36. See *id.* at 626.

37. See *id.* at 635.

38. See *Baker v. Vermont*, 744 A.2d 864, 870 (Vt. 1999); see also VT. CONST. ch. I, art. 7.

is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; and not for the particular enjoyment or advantage of any single man, family or set of men, who are a part of that community.”³⁹

B. Approach of State Supreme Courts

In *State v. Ludlow Supermarkets*, the Vermont Supreme Court distinguished the Common Benefits Clause from the Equal Protection Clause.⁴⁰ In *Ludlow*, the court said that Vermont courts did not have the same considerations and constraints imposed upon them by issues of federalism and differences in jurisdictions, and therefore did not need to rely on the suspect class analysis used by federal courts in order to determine a standard of review.⁴¹ Instead, the court spelled out a test that allows statutory classifications if necessary.⁴² This imposes a higher standard of review for all legislation that singles out any group than does the federal rational basis level of scrutiny.⁴³

However, in a later case, *Choquette v. Perrault*, the Vermont Supreme Court used the federal three-tier framework in analyzing legislation under the Common Benefits Clause.⁴⁴ In that case, the court concluded that “[a]bsent the involvement of a fundamental right or suspect class, a legislative enactment is presumed to be constitutional.”⁴⁵

Only a handful of other state supreme courts have explicitly addressed the issue of same-sex marriages.⁴⁶ In *Baker v. Nelson*, the Minnesota State Supreme Court dismissed an appeal from a decision denying a same-sex couple a marriage license.⁴⁷ The Minnesota State Supreme Court looked solely at the language of the marriage statute which used the words “bride and groom” and “husband and wife” and concluded that the statute was meant to apply to heterosexual couples only.⁴⁸

39. VT. CONST. ch. I, art. 7.

40. 448 A.2d 791, 796 (Vt. 1982).

41. *See id.*

42. *See id.* at 795.

43. *See Benning v. State*, 641 A.2d 757, 764 (Vt. 1994).

44. 569 A.2d 455, 458-59 (Vt. 1989).

45. *Id.* at 458.

46. *See Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971); *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993); *Singer v. Harq*, 522 P.2d 1187, 1188 (Wash. Ct. App. 1994); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973). Cases in other jurisdictions have only influential precedential value to the Vermont State Supreme Court and the Vermont Court did not make reference to same-sex marriage cases in other jurisdictions.

47. *See Nelson*, 191 N.W.2d at 187.

48. *See id.* at 185-86.

In *Baehr v. Lewin*, the Hawaii Supreme Court addressed the issue of gay marriage rights under the Hawaii State Constitution's equal protection clause.⁴⁹ The Hawaii Supreme Court held that gays and lesbians were not a suspect class under state equal protection laws. However, they found that the law discriminated against people because of their gender.⁵⁰ In this respect, the court found the state's marriage laws were facially discriminatory.⁵¹ The plurality in *Baehr* concluded that the denial of marriage benefits to same-sex couples was a form of sex discrimination, reasoning that

[a] woman is denied the right to marry another woman because her would be partner is a woman, not because one or both are lesbians. Similarly, a man is denied the right to marry another man, not because one or both are gay. Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation.⁵²

This conclusion allowed the court to apply strict scrutiny.⁵³ The Hawaii Supreme Court then remanded the case back to the court of appeals with instructions to find the statute unconstitutional absent a showing that the law furthered a compelling governmental interest.⁵⁴

C. Approach of Lower Courts

A handful of lower courts have also addressed the particular issue of same-sex marriages. In 1974, the Washington Appellate Court addressed a substantially similar challenge to that state's marriage statutes. In *Singer v. Hara*, the plaintiffs argued three things.⁵⁵ First, they argued that the marriage statutes did not necessarily exclude same-sex marriages.⁵⁶ Second, if they do, then the denial of a marriage license to a certain group of people is discriminatory in the same way the U.S. Supreme Court found that the anti-miscegenation statutes in Virginia discriminated against a particular class.⁵⁷ The third argument was that the ruling violated the

49. 852 P.2d at 67.

50. *See id.*

51. *See id.*

52. *Id.*

53. *See id.* at 63-64.

54. *See id.* at 68.

55. 522 P.2d 1187 (Wash. Ct. App. 1994).

56. *See id.* at 1188-89.

57. *See id.* at 1191 ("Although appellants suggest an analogy between the racial discrimination involved in *Loving* . . . and the alleged sexual classification involved in the case at bar, we do not find such an analogy.").

Eighth, Ninth, and Fourteenth Amendments of the U.S. Constitution.⁵⁸ The Washington Appellate Court rejected each of these three arguments and concluded that there was not a legal right for a same-sex couple to marry in Washington.⁵⁹

The Court of Appeals of Kentucky analyzed a similar question of statutory interpretation in *Jones v. Hallahan*.⁶⁰ In that case, the court looked at the state's marriage statutes and reached a very similar conclusion: that the state's marriage statutes were not meant to apply to same sex couples.⁶¹ The court found that the two female petitioners could not enter into a traditional marriage and that denying a marriage license was therefore not a constitutional violation.⁶²

II. THE COURT'S DECISION

In the noted case, the court held that the marriage statutes violate the Common Benefits Clause of the Vermont Constitution and did not reach any other constitutional arguments raised by the plaintiffs.⁶³

The plaintiffs' first argument was a statutory one, that the trial court's interpretation of the Vermont marriage statute was incorrect.⁶⁴ The trial court held that the plain meaning of the marriage statute allows for the issuance of marriage licenses to heterosexual couples only.⁶⁵ The plaintiffs essentially conceded that the plain meaning of the marriage statutes applied only to one man and one woman.⁶⁶ However, they argued that the underlying purpose of the marriage statutes was to promote and protect unions of committed couples. Because there was no language in the statute that prohibited same-sex marriage, the statutes should be interpreted broadly to apply to same-sex unions.⁶⁷

In an earlier case, *In re B.L.B.V.*, the Supreme Court of Vermont confronted a similar issue of statutory interpretation.⁶⁸ In that case, a mother living with her same-sex partner petitioned the state to allow her partner to adopt her child, giving both partners parental rights.⁶⁹

58. *See id.* at 1188-89.

59. *See id.* at 1197.

60. 501 S.W.2d 589, 590 (Ky. Ct. App. 1973).

61. *See id.* at 590.

62. *See id.* at 589-90.

63. *See Baker v. Vermont*, 744 A.2d 864, 870 n.2 (Vt. 1999).

64. *See id.* at 868.

65. *See id.*

66. *See id.* at 869.

67. *See id.*

68. 628 A.2d 1271, 1272-73 (Vt. 1993).

69. *See id.* at 1272.

The state adoption law provided that when a child was adopted, the natural parent's legal rights over the child were terminated unless the child was adopted by the natural parent's spouse.⁷⁰ The court in that case noted that the underlying purpose of the statute was to protect the child.⁷¹ The court interpreted the statutory language broadly to permit a same-sex partner to adopt a child as a spouse would, without terminating the natural parent's legal rights over the child.⁷² The plaintiffs in *Baker* argued that the court should interpret the marriage statutes broadly as it had previously done in *In re B.L.B.V.*, because the underlying purpose of the marriage statutes is to promote and encourage committed unions of couples.⁷³ Even so, the court distinguished *B.L.B.V.* on two grounds.⁷⁴ First, the court stated that in *B.L.B.V.* there was a narrow exception to the adoption statute that was at issue.⁷⁵ By interpreting this exception broadly, the court was able to achieve the result intended by the underlying purpose of the legislation.⁷⁶ In this case, there was no narrow exception at issue.⁷⁷ Second, the court stated that the legislature clearly assumed that marriage would apply only to heterosexual couples and that it was therefore unclear whether or not the underlying purpose of the legislation was to promote and protect unions of committed couples, or to promote and protect unions of committed *heterosexual* couples.⁷⁸

Next, the plaintiffs argued that the marriage statutes were unconstitutional if they were construed to deny same-sex couples the right to marry because they violated the Common Benefits Clause of the Vermont State Constitution.⁷⁹ In order to reach its conclusion the court proceeded in three steps. First, the court looked to see if there is an equality standard imposed by Article VII. If so, whether it applies to claims of civil rights discrimination and economic discrimination alike.⁸⁰ Second, the court concluded that the equality standard is higher than the standard imposed by the Equal Protection Clause of the Fourteenth Amendment used in analyzing claims of economic discrimination.⁸¹ Third, the court concluded that under this standard

70. See *id.* at 1273 (citing VT. STAT. ANN. Tit. 12, § 448 (1966)).

71. See *id.*

72. See *id.* at 1275-76.

73. See *Baker v. Vermont*, 744 A.2d 864, 869 (Vt. 1999).

74. See *id.*

75. See *id.*

76. See *id.*

77. See *id.*

78. See *id.*

79. See *id.* at 869-70.

80. See *id.* at 880.

81. See *id.* at 871 (noting *State v. Brunelle*, 534 A.2d 198, 201-202 (Vt. 1987)).

the denial of the benefits of marriage to lesbian and gay men violates Chapter I, Article 7 of the Vermont Constitution.⁸²

A. The Common Benefits Clause

The court first looked at the historical context and underlying purposes of the Common Benefits Clause and distinguished it from discussions of the federal Equal Protection Clause.⁸³ The Common Benefits Clause was a part of the Vermont Constitution of 1777.⁸⁴ The purpose of the Common Benefits Clause, unlike the Fourteenth Amendment, was not aimed principally at ensuring equal protection of the laws for racial minorities.⁸⁵ The court viewed this as an important distinction.⁸⁶ In 1777, the purpose of the clause was not to protect a particular class or race of people from unfair discrimination, but to protect “‘virtue,’ or talent and merit, against a perceived aristocracy.”⁸⁷ The court concluded that the underlying basis of the clause was to ensure all citizens were afforded equal protection under the law and not to safeguard the rights of minority groups facing unfair discrimination.⁸⁸ “The historical origins of the Vermont Constitution thus reveal that the framers, although enlightened for their day, were not principally concerned with civil rights for African-Americans and other minorities, but with equal access to public benefits and protections for the community as a whole.”⁸⁹ In this way, the court distinguished the Common Benefits Clause from the Equal Protection clause and thus influenced the standard of review.⁹⁰

This is important because this means the court’s decision was based on state, not federal, constitutional law and does not implicate the Equal Protection Clause of the United States Constitution.⁹¹ The court stated that:

82. *See id.* at 886.

83. *See id.* at 870-77.

84. *See id.* at 874.

85. *See id.*

86. *See id.*

87. *Id.* at 876.

88. *See id.* at 875.

89. *Id.* at 876.

90. *See id.* at 878.

91. *See id.* at 870. The court argued that:

[I]t is altogether fitting and proper that we do so. Vermont’s constitutional commitment to equal rights was the product of the successful effort to create an independent republic and a fundamental charter of the government, the Constitution of 1777, both of which preceded the adoption of the Fourteenth Amendment by nearly a century.

Id.

[W]hile the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters. The court is free to provide . . . more generous protection to the rights under the Vermont Constitution than afforded by the federal charter. . . .⁹²

This first step was important in justifying the type of analysis employed by the court to find the statute unconstitutional.

B. The Standard of Review

Second, the court looked at previous Vermont precedent to determine which standard of review should be used in deciding cases brought under the Common Benefits Clause.⁹³ The court looked at two standards of review.⁹⁴ The first approach would be analogous to the federal approach used to decide Equal Protection questions.⁹⁵ The court rejected a standard that used suspect class labeling.⁹⁶ The court instead looked to whether anyone or any group was denied the protection and the benefits of Vermont law.⁹⁷ If so, the court looked at whether or not there was a just and reasonable relation between the law and the governmental purpose behind the law.⁹⁸ In making this determination, the court stated it will consider factors such as “(1) the significance of the benefits and protections from the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government’s stated goals; and (3) whether the classification is significantly underinclusive or overinclusive.”⁹⁹ “[T]his approach necessarily calls for a court to assess the relative ‘weight’ or dignities of the contenting interests.”¹⁰⁰ In defining this standard, the court said it must look on a case-by-case basis at “the history and ‘traditions from which [the state] developed’ as well as those ‘from which it broke.’”¹⁰¹ The court must make a reasoned judgement and balance the interests of individual liberty with societal goals.¹⁰² The court

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

93. *See id.* at 870-73.

94. *See id.*

95. *See id.* at 870 n.3.

96. *See id.* at 878.

97. *See id.*

98. *See id.*

99. *Id.* at 879.

100. *Id.*

101. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961))).

102. *See id.*

concluded that the “artificiality of suspect-class labeling should be avoided where, as here, the plaintiffs are afforded the common benefit and protections of Article 7, not because they are part of a ‘suspect class,’ but because they are part of the Vermont Community.”¹⁰³ Because the Vermont Supreme Court distinguished the Common Benefits Clause from the Equal Protection Clause, the court did not have to address the question of whether lesbians and gays constitute a suspect class.¹⁰⁴

The concurrence by Justice Dooley in *Baker* argued two things. First, he argued that the federal suspect class approach should be used to determine whether or not gays and lesbians are entitled to marriage rights.¹⁰⁵ Second, he argued that under this approach and under Vermont law, gays and lesbians should be defined as a suspect class and thus legislation should be viewed under the toughest and most critical standard—strict scrutiny.¹⁰⁶

The concurring opinion argued that the majority’s case-by-case approach is incorrect because it does not set forth clear standards by which to determine future cases.¹⁰⁷ The majority argued that the case-by-case balancing approach was more flexible and allowed for more thoughtful application of the law in complex cases where important rights are at stake.¹⁰⁸ Justice Dooley’s concurring opinion criticized this approach arguing that it overturns prior Vermont case law,¹⁰⁹ allows the opportunity for judicial activism,¹¹⁰ and inserts uncertainty into the judicial decision making process due to vagueness.¹¹¹ Justice Dooley argued:

My concern about the effect of this decision as a precedent is heightened by the majority’s treatment of the *Ludlow* decision. It is fair to say that for some purposes, there have been two versions of the *Ludlow* decision. First, there is the one we have described in dicta, usually as a historical event. This one holds that Article 7 is more stringent than the federal constitutional standard which requires only a ‘rational justification.’ Second, there is the *Ludlow* decision we have actually used in deciding cases. This version of *Ludlow* holds that the Article 7 standard is the

103. *Id.* at 878 n.10.

104. *See id.* at 878.

105. *See id.* at 889-90 (Dooley, J., concurring in part).

106. *See id.* at 890-91 (Dooley, J., concurring in part).

107. *See id.* at 889 (Dooley, J., concurring in part).

108. *See id.* at 879.

109. *See id.* at 896 (Dooley, J., concurring in part).

110. *See id.* (Dooley, J., concurring in part).

111. *See id.* at 897 (Johnson, J., concurring in part and dissenting in part).

reasonable-relationship test applicable under the Fourteenth Amendment to the United States Constitution.¹¹²

Justice Dooley's concurrence agreed with Justice Johnson's concurring and dissenting opinion that the federal approach to Equal Protection should be used because "it disciplines judicial activism and promotes predictability."¹¹³

Justice Dooley argued that gays and lesbians should be classified as a suspect class and thus legislation should be subject to strict scrutiny. The concurring opinion pointed to Article I, Section 20 of the Oregon Constitution which protects against adverse discrimination as well as against favoritism, and noted that the Oregon Supreme Court uses the federal three-tiered analysis in determining equal protection cases.¹¹⁴ The concurring opinion by Justice Dooley noted that while the Oregon Supreme Court had not addressed the particular issue of gay and lesbian rights under Article I, Section 20, the Oregon Court of Appeals had.¹¹⁵ That court concluded that under the federal approach homosexuality was "clearly defined in terms of stereotyped personal and social characteristics; is widely regarded as a distinct, socially recognized group; and indisputably has 'been and continues to be the subject of adverse social and political stereotyping and prejudice.'"¹¹⁶ The concurring opinion found that the Oregon approach and interpretation of its Article I, Section 20 was consistent with how the Vermont courts had previously handled earlier cases dealing with Article I, Section VII.¹¹⁷

Justice Dooley asserted that the classification of gays and lesbians as a suspect group is consistent with the evolution of Vermont law, and that the federal classifications of gays and lesbians in cases following *Bowers v. Hardwick* are no longer applicable in Vermont.¹¹⁸ Justice Dooley noted that Vermont no longer criminalizes sodomy.¹¹⁹ Since 1992, Vermont has prohibited discrimination on the

112. *Id.* at 895 n.3 (Dooley, J., concurring in part) (quoting *State v. Brunelle*, 534 A.2d 198, 201-02 (Vt. 1987) (citations omitted)).

113. *See id.* at 896 (Johnson, J., concurring in part and dissenting in part).

114. *See id.* at 892 (Dooley, J., concurring in part).

115. *See Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 448 (Or. Ct. App. 1998).

116. *Baker*, 744 A.2d at 893 (Dooley, J., concurring in part) (quoting *Tanner*, 971 P.2d at 447).

117. *See id.* at 892 (Dooley, J., concurring in part).

118. *See id.* at 890-91 (Dooley, J., concurring in part) (stating that the Vermont Legislature overturned the state's sodomy laws in 1977). *See* VT. STAT. ANN. tit. 13, § 2603 (repealed 1977, No. 51 § 2).

119. *See id.* at 891 (Dooley, J., concurring in part). Justice Dooley stated: "Bowers upheld a Georgia conviction for sodomy based on a sex act committed by two males in the bedroom of defendant's home." *Id.*

basis of sexual orientation and has recognized the rights of same-sex couples to adopt children.¹²⁰ These legislative actions coupled with his agreement with the Oregon Court of Appeals' conclusion that gays and lesbians are a suspect class led Justice Dooley to conclude that there is no rationale for not applying strict scrutiny.¹²¹ The majority argued that past case law overwhelmingly rejects applying strict scrutiny to gays and lesbians.¹²²

The majority countered, arguing that there were conflicting precedents in Vermont that address the question of which standard of review to use in analyzing cases under the Common Benefits Clause, although historically the court tended to use the federal three-tier approach to review cases brought under that clause.¹²³ For example, in *Choquette v. Perrault*, the court used the federal three-tier analysis to invalidate a law under Article 7 requiring property owners to pay for the maintenance of division fences.¹²⁴

The majority argued in the noted case that prior Vermont case law does not necessarily require strict adherence to the exact approach taken by federal courts when deciding cases under Article 7.¹²⁵ The majority argued that the *Ludlow* decision did not change other aspects of the standard: that the legislation must reasonably relate to a legitimate interest.¹²⁶ Despite having historically used this three-tiered system to analyze the state's Common Benefits Clause, the *Baker* court rejected this approach based on the historical context of the Vermont clause.¹²⁷ The approach used by the court looked to the reasonableness of the legislation on a case-by-case basis to determine whether the harm, in this case exclusion from the benefits of marriage, bears a just and reasonable relation to the legislative goals.¹²⁸ The court characterized this approach as being more flexible and less rigid than the three-tiered analysis used to analyze the Equal Protection Clause of the Fourteenth Amendment.¹²⁹

120. *See id.* (Dooley, J., concurring in part).

121. *See id.* at 893 (Dooley, J., concurring in part).

122. *See id.* at 878 n.10.

123. *See id.* at 871.

124. 569 A.2d 455, 458 (Vt. 1989).

125. *See Baker*, 744 A.2d at 870.

126. *See id.* at 871.

127. *See id.* at 873.

128. *See id.* at 878-79.

129. *See id.* at 878.

C. *Application of the Standard to Gays and Lesbians*

In *Baker*, the Vermont Supreme Court found that the denial of the benefits and protections of marriage to gays and lesbians violated “the values that infuse[]” the Vermont State Constitution.¹³⁰ In making this determination, the court made five findings: (1) that lesbians and gays are denied marital benefits under Vermont marriage statutes as they are currently interpreted; (2) that there was no reasonable connection between the purported governmental interests and the marriage statutes; (3) that the benefits denied to gay and lesbian couples through the denial of the benefits of marital statutes were significant; (4) that it was not necessary to uphold the current interpretation of marriage statutes in order to keep Vermont law consistent with other states’ laws; and (5) that past discrimination against lesbians and gays did not provide a basis for continued discrimination.¹³¹

First, the court looked at the nature of the statutory classification employed by the marriage statutes and concluded that the statutes exclude anyone who wishes to marry someone of the same sex, based on the plain meaning of the statutes.¹³²

Second, the court concluded that the marriage statutes as interpreted did not further a governmental purpose and were not reasonable.¹³³ The state argued that the rationale behind interpreting marriage statutes to mean unions between one man and one woman was to “promot[e] a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support.”¹³⁴ The court rejected this argument and found that the marriage statutes do not further this governmental goal and stated that “if anything, 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.”¹³⁵ The court noted that the number of same-sex parents is increasing.¹³⁶ The court also noted

130. *Id.* at 886. The holding was narrow in the sense that it held that the denial of marriage benefits was unconstitutional, but not the denial of a marriage license in general. The decision reads: “We hold only that plaintiffs are entitled under Chapter 1, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite sex couples.” *Id.*

131. *See id.* at 880-86.

132. *See id.* at 880.

133. *See id.* at 881-82.

134. *Id.* at 881.

135. *Id.* at 882.

136. *See id.*

Vermont laws have extended adoption rights to same-sex couples and have safeguarded the rights of “same-sex parents and their children when such couples terminate their domestic relationship.”¹³⁷ The state also argued that the exclusion of same-sex couples from obtaining marriage licenses was necessary in order to further the link between procreation and child-rearing.¹³⁸ The court rejected this argument as well, noting the increased use of reproductive technologies and adoption.¹³⁹ The court implied that because of the increasing number of parents who are raising children acquired through alternative methods of obtaining children, there was no reasonable basis to conclude that recognition of same-sex marriages “would undermine the bonds of parenthood, or society’s perception of parenthood.”¹⁴⁰

Third, the court concluded that the exclusion of gays and lesbians from the marriage statutes was unconstitutional because, not only do the statutes bear no reasonable relation to the purported governmental interest, they also deny significant rights to gays and lesbians.¹⁴¹ The court noted the decision in *Loving v. Virginia*, where the Supreme Court stated “the freedom to marry has long been recognized as one of the vital personal rights.”¹⁴² The court concluded

137. *Id.*

138. *See id.* at 881.

139. *See id.* at 882.

140. *Id.*

141. *See id.* at 883-84. The court listed some of the many benefits associated with marriage, including:

The right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions, under 14 V.S.A. §§ 401-404, 551; preference in being appointed as the personal representative of a spouse who dies intestate, under 14 V.S.A. § 903; the right to bring a lawsuit for the wrongful death of a spouse, under 14 V.S.A. § 1492; the right to bring an action for loss of consortium, under 12 V.S.A. § 5431; the right to workers’ compensation survivor benefits under 21 V.S.A. § 632; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance, under 3 V.S.A. § 631; the opportunity to be covered as a spouse under group life insurance policies issued to an employee, under 8 V.S.A. § 3811; the opportunity to be covered as the insured’s spouse under an individual health insurance policy, under 8 V.S.A. § 4063; the right to claim an evidentiary privilege for marital communications under V.R.E. 504; homestead rights and protections, under 27 V.S.A. §§ 105-108, 141-142; the presumption of joint ownership of property and the concomitant right of survivorship, under 27 V.S.A. § 2; hospital visitation and other rights incident to the medical treatment of a family member, under 18 V.S.A. § 1852; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce, under 15 V.S.A. §§ 751-752.

Id. at 883-84. The court also pointed out that this list is not all-inclusive. *See id.* at 884.

142. *Id.* at 883 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

that the benefits of a marriage license outweigh the statutory exclusion of gays and lesbians from marriage benefits.¹⁴³

Fourth, the court rejected the state's argument that gays and lesbians should continue to be denied marriage licenses in order for Vermont state law to be consistent with other state's laws.¹⁴⁴ The court stated that the Vermont courts have granted gays and lesbians rights in the past that other states have not granted.¹⁴⁵ Moreover, the court concluded that the exclusion of gays and lesbians from marriage rights for the purpose of keeping Vermont law consistent with other states' laws was purely speculative.¹⁴⁶

Finally, the court rejected the state's arguments that a long history of discrimination against, and intolerance of, gays and lesbians justified continuing discrimination against these groups.¹⁴⁷ The court rejected this argument for several reasons. First, the court found that past discrimination against a particular class does not provide a legitimate basis for continued discrimination against that class of persons.¹⁴⁸ Second, the court found that Vermont law had evolved historically to protect same-sex relationships.¹⁴⁹ Vermont was one of the first states to prohibit discrimination on the basis of sexual orientation in housing, employment, and other services, and Vermont has also adopted hate-crime legislation that protects gays and lesbians.¹⁵⁰ Thus, while animus against gays and lesbians was not only an insufficient basis on which to continue discriminatory legislation, the legislature has indicated that lesbian and gay citizens of Vermont are deserving of legislative protection under the law.

D. Remedy: Marriage v. Domestic Partnership

The couples sought a declaratory judgment by the court that the denial of the marriage licenses was unconstitutional.¹⁵¹ The court has not yet granted the relief requested, but has retained jurisdiction over the matter.¹⁵² Instead, the court suspended its decision over the case to allow "the Legislature time to consider and enact legislation

143. *See id.* at 884.

144. *See id.* at 885.

145. *See id.* (noting Vermont has sanctioned adoptions by same-sex couples while other states have not).

146. *See id.*

147. *See id.* at 885-86.

148. *See id.* at 885.

149. *See id.*

150. *See id.* at 885-86.

151. *See id.* at 867-68.

152. *See id.* at 887.

consistent with the constitutional mandate described by the court.”¹⁵³ In effect, the court punted the issue to the legislature, allowing it to decide how to remedy the inequalities in the law that the court found were unconstitutional.¹⁵⁴ The court based its conclusion on the findings that lesbians and gays were denied the benefits of marriage, not on the fact that lesbians and gays were denied marriage licenses.¹⁵⁵ The court explicitly stated that it did not reach the issue of whether plaintiffs are entitled to marriage licenses, holding only that they are entitled to the common benefits and protections that flow from marriage.¹⁵⁶ This leaves the door open for the legislature to adopt alternative remedies such as domestic partnership, a possibility mentioned by the court.¹⁵⁷ The court explicitly stated that a domestic partnership act could provide an alternative legal remedy that would impose similar rights and requirements on same-sex couples that are imposed upon married straight couples.¹⁵⁸ The court noted several proposed domestic partnership acts that might meet the state constitutional requirements of Vermont’s Common Benefits Clause.¹⁵⁹

Justice Johnson’s concurring and dissenting opinion in *Baker* disagreed with the court’s failure to grant the relief sought, arguing that the court shirked its judicial responsibility by refusing immediate injunctive relief.¹⁶⁰ Justice Johnson cited previous court precedent granting immediate injunctive relief in analogous circumstances.¹⁶¹

153. *Id.* at 889.

154. *See id.* at 886-87.

155. *See id.* at 886.

156. *See id.*

157. *See id.*

We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogative of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to take note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as “domestic partnership” or “registered partnership” acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registrations scheme, and extend all or most of the same rights and obligations provided by the law to married partners.

Id.

158. *See id.*

159. *See id.* at 886-87. The court noted several different proposed domestic partnership acts, including the “Universal Comprehensive Domestic Partnership Act,” Denmark’s “Registered Partnership Act,” and the Norwegian “Act on Registered Partnership for Homosexual Couples.” *See id.*

160. *See id.* at 898 (Johnson, J., concurring in part and dissenting in part).

161. *See id.* (Johnson, J., concurring in part and dissenting in part) (citing *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963)).

For example, Justice Johnson noted that in *Watson v. City of Memphis*,¹⁶² the U.S. Supreme Court granted injunctive relief for the immediate desegregation of publicly owned parks and recreational facilities.¹⁶³ In Justice Johnson's view, the failure to grant immediate injunctive relief in this case, where the court found a constitutional violation, was an abdication of judicial responsibility.¹⁶⁴ Justice Johnson made two sets of arguments. First, she argued that when the court finds a constitutional violation, it is the duty of the court to provide the most expeditious remedy available.¹⁶⁵ This argument includes two sub-parts: (1) the judiciary has an obligation to remedy constitutional violations and this is essential to the judiciary's function; and (2) the majority's argument that a sudden change in marriage laws could have sudden unforeseen effects is not valid.¹⁶⁶ Second, Justice Johnson argued that the court should employ the federal, three-tier analysis that is used in Equal Protection cases and that, under this analysis, the court should find that Vermont's marriage statutes are unconstitutional because they discriminate on the basis of gender.¹⁶⁷

Justice Johnson argued that injunctive relief should be granted because the court ruled that the marriage laws single out lesbians and gays for special discrimination because of their sexual orientation by denying them the rights and benefits of marriage.¹⁶⁸ The court noted that the U.S. Supreme Court has held that laws singling out lesbians and gays for special treatment were unconstitutional because of the "inevitable inference that the disadvantage imposed is borne of animosity toward the class of persons affected."¹⁶⁹ Justice Johnson concluded that granting the plaintiffs' requests for an injunction would be the most effective and expeditious way to remedy the constitutional violation.¹⁷⁰

Justice Johnson argued that the judiciary has a duty to grant relief in cases where a constitutional violation is found.¹⁷¹ Justice Johnson cites *Plaut v. Spendthrift Farm, Inc.* for the proposition that

162. 373 U.S. 526, 532-33 (1963).

163. See *Baker* at 901 (Johnson, J., concurring in part and dissenting in part).

164. See *id.* at 898 (Johnson, J., concurring in part and dissenting in part).

165. See *id.* at 899-904 (Johnson, J., concurring in part and dissenting in part).

166. See *id.* (Johnson, J., concurring in part and dissenting in part).

167. See *id.* at 904-05 (Johnson, J., concurring in part and dissenting in part).

168. See *id.* at 897-98 (Johnson, J., concurring in part and dissenting in part).

169. *Id.* at 899 n.2 (Johnson, J., concurring in part and dissenting in part) (analyzing *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

170. See *id.* at 898 (Johnson, J., concurring in part and dissenting in part).

171. See *id.* at 899-900 (Johnson, J., concurring in part and dissenting in part).

the duty of the judiciary is “not merely to rule on cases, but to decide them.”¹⁷² Justice Johnson argued that it is “not only the prerogative but the duty of courts to provide prompt relief for violations of individual civil rights.”¹⁷³ Justice Johnson noted that in some cases, it may be necessary for the legislature to redress the violation, but found that here, “[n]o legislation is required to redress the constitutional violation that the Court *has found*.”¹⁷⁴

Justice Johnson rejected the majority’s argument that the plaintiffs’ request to receive marriage licenses would be disruptive.¹⁷⁵ Justice Johnson found this contradictory: the majority found that granting marriage licenses *would not* result in a “doomsday,” yet withholding marriage licenses from the plaintiffs would be desirable to avoid “disruptive and unforeseen consequences.”¹⁷⁶ Justice Johnson cited the Supreme Court’s language in *Watson* that “constitutional rights may not be denied simply because of hostility to their assertion or exercise.”¹⁷⁷

Justice Johnson’s opinion, like Justice Dooley’s opinion, argued that the federal three-tier analysis should be used to decide this case.¹⁷⁸ Unlike Justice Dooley, however, Justice Johnson argued that this is a case of sex discrimination.¹⁷⁹ Therefore, instead of using a heightened level of scrutiny because gays and lesbians are a “suspect class,” Justice Johnson would use a heightened level of scrutiny because the law discriminates on the basis of sex, not sexual orientation.¹⁸⁰ Her argument was that the discrimination is based on gender, not sexual orientation, when the law forbids a woman to marry a woman, but allows a man, similarly situated, to marry the same woman.¹⁸¹

III. ANALYSIS

The decision in *Baker* will have three principle effects. First, it will affect the future of committed gay and lesbian relationships in

172. *Id.* at 900 (Johnson, J., concurring in part and dissenting in part) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995)).

173. *Id.* at 901 (Johnson, J., concurring in part and dissenting in part) (citing *Watson v. City of Memphis*, 373 U.S. 526, 532-33 (1963)).

174. *Id.* (Johnson, J., concurring in part and dissenting in part).

175. *See id.* at 902 (Johnson, J., concurring in part and dissenting in part).

176. *Id.* (Johnson, J., concurring in part and dissenting in part).

177. *Id.* (Johnson, J., concurring in part and dissenting in part) (citing *Watson*, 373 U.S. at 535).

178. *See id.* at 905 (Johnson, J., concurring in part and dissenting in part).

179. *See id.* (Johnson, J., concurring in part and dissenting in part).

180. *See id.* (Johnson, J., concurring in part and dissenting in part).

181. *See id.* at 906 (Johnson, J., concurring in part and dissenting in part).

Vermont. Second, it could affect gay marriage rights in other states that have constitutional provisions similar to the Common Benefits Clause of Vermont. Finally, it could have national implications if the Vermont Legislature adopts a bill permitting gay marriages, permitting a challenge of the constitutionality of the Defense of Marriage Act (DOMA).¹⁸²

The *Baker* decision will affect the future of gay rights, including marriage rights in Vermont. First, and most importantly, it mandates that the legislature extend the benefits and protection of state marriage statutes to same-sex couples. Second, the Vermont Supreme Court clarified the (or according to the concurring opinion, created a new) basis of review for claims under Article 7.¹⁸³

The Vermont Supreme Court in the noted case mandated that the legislature extend the state benefits of marriage to same-sex couples.¹⁸⁴ This challenge to Vermont's marriage statutes was considered under the Vermont Common Benefits Clause. The ruling does not, however, mandate the extension of federal benefits, such as joint filing of federal income tax, to same-sex couples because state courts do not have power to invalidate federal statutes. Neither does it compel the state to recognize full fledged marriage to same-sex couples.¹⁸⁵ The court explicitly stated that other approaches, such as domestic partnership, would suffice.¹⁸⁶ It means only that the legislature must give same-sex couples the same rights and protections that are afforded straight couples.¹⁸⁷ It would seem the legislature now has three types of action: (1) it can extend full-fledged marriage benefits to same-sex couples; (2) it can adopt a lesser form of action via domestic partnership legislation; or (3) it can do nothing. The latter action is unlikely because the Supreme Court of Vermont retained jurisdiction over the case indicating that if the legislature does not remedy the constitutional violation, the Supreme Court will act.¹⁸⁸ In that event, the court would probably grant the relief requested by the plaintiffs: a mandate for the issuance of marriage licenses.

The legislature's first option may be to adopt legislation that gives same-sex couples all the rights, benefits, and protections as

182. See 29 U.S.C. § 1738C (1996).

183. See *Baker*, 744 A.2d at 894 (Dooley, J., concurring in part).

184. See *id.* at 867.

185. See *id.*

186. See *id.*

187. See *id.*

188. See *id.* at 887.

married heterosexual couples. This legislation must also confer all the state benefits afforded to heterosexual couples to same-sex couples, from inheritance and succession rights to spousal benefits and hospital visitation rights, in order to pass constitutional muster.¹⁸⁹ The court mainly cited the statutory and economic benefits that are afforded to opposite-sex married couples.¹⁹⁰ At the time of writing, the Vermont House of Representatives passed a Civil Union bill by a vote of 76-69.¹⁹¹ The Vermont State Judiciary Committee of the State Senate is “now conducting its own hearings on the bill passed by the House, as well as the *Baker* decision which was the impetus for legislative action.”¹⁹² Efforts to delay or kill the bill by putting the issue to a popular vote were defeated.¹⁹³ These included

efforts to: call a Constitutional Convention (not authorized under Vt. law) which lost 43 to 105; send the civil union issue to a State-wide Advisory Ballot Question in the November, 2000 election, defeated 56-91 (this was a key vote on the first day); an effort to send the bill back to committee, defeated 53-92, and another effort to mandate further hearings and place the matter on the ballot, defeated by voice vote.¹⁹⁴

189. *See id.* at 886.

190. *See id.* at 883-84. *See also* list of marital benefits *supra* note 141.

191. *See* E-mail from Mary Bonuto, Counsel, Gay and Lesbian Advocates and Defenders, to Randall Blandin, Author (February 17, 2000) (on file with author).

192. *Id.*

193. *See id.*

194. *Id.* Some of the many important details of the bill are these:

(a) the requirements for entering a civil union are virtually identical to the marriage licensing and certification process;

(b) the bill is intended to provide “a legal status with the attributes and effects of civil marriage;”

(c) the entire law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance, applies to parties in a civil union;

(d) “parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in marriage;”

(e) parties to a civil union will be fully integrated into probate laws, including being treated as legal next-of-kin for purposes of inheritance, hospital visitation and medical decisionmaking;

(f) parties to a civil union will be able to take unpaid leave from work to care for a partner who is ill (or the partner’s ill parent);

(g) parties to a civil union will be able to transfer property to one another without paying property transfer taxes, and can own property in a way which is secure from the individual debts of either partner;

(h) state taxes on married couples and parties to a civil union will be the same;

(i) causes of action related to spousal status, including wrongful death and loss of consortium, will be available to parties to a civil union;

The court acknowledged that the debate over gay marriage raises many social, philosophical, and religious issues.¹⁹⁵ However, even if a domestic partnership system extends all the economic and governmental rights and privileges of marriage, it will single out gays and lesbians for an alternative form of marriage, stigmatizing and separating them from the mainstream.¹⁹⁶ This type of “separate but equal” scheme is arguably as morally wrong as applied to gays and lesbians as *Plessy v. Ferguson* was when applied to African-Americans.¹⁹⁷

Baker clarifies the court’s standard of review in analyzing gay rights legislation under Vermont’s Common Benefits Clause.¹⁹⁸ By rejecting the “rigid” three-tier federal approach, the court was able to apply a higher standard of review than would have been applied at the federal level.¹⁹⁹ Moreover, “[t]he court went out of its way to dismiss the state’s defense in the case and to underscore the validity of gay relationships.”²⁰⁰ This supports the contention by some that “Vermont is in fact one of the most progressive states in the country for gay rights.”²⁰¹ This bodes well for proponents of gay rights legislation in Vermont. However, Justice Dooley argues that the standard adopted by the court paves the way for a more active standard of review and increased judicial activism.²⁰² The current court is progressive, but future courts may be less receptive to gay rights issues and could use the same standard to deny equal protection to gays and lesbians. The

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- (j) worker’s compensation benefits will be equalized;
 - (k) public assistance benefit rules will be equalized;
 - (l) laws relating to immunity from compelled testimony against one’s spouse and the marital communication privilege will be available to parties in a civil union;
 - (m) discrimination or different treatment of parties in a civil union would be considered discrimination based on both sexual orientation and marital status;
 - (n) broad non-discrimination prohibitions regarding insurance ensure the equal treatment of spouses and parties to a civil union; and
 - (o) the bill attempts to equalize the tax treatment of spouses and parties to a civil union.

Id.

195. See *Baker*, 744 A.2d at 867.

196. See Mark Tanney, Note, *The Defense of Marriage Act: “A Bare Desire to Harm” an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 131 (1997).

197. See *id.* at 131-32 (noting *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

198. See *Baker*, 744 A.2d at 877-878 (citing VT. CONST. ch. I, art. 7).

199. See *id.* at 878.

200. John Gallagher, *Separate But Equal*, ADVOCATE, Feb. 1, 2000, at 29.

201. *Id.*

202. See *Baker*, 744 A.2d at 896 (Dooley, J., concurring in part).

standard adopted by the majority may lead to uncertainty and unpredictability.²⁰³

The decision may have impact in other states which have constitutional clauses similar to Vermont's Common Benefits Clause. The court cites a number of states that have similar clauses.²⁰⁴ In light of this decision, additional claims may be brought in these other states and the Vermont decision may prove persuasive in other jurisdictions.

Finally, the decision may pave the way for a challenge to the Defense of Marriage Act (DOMA).²⁰⁵ DOMA was enacted in response to the Hawaii Supreme Court decision that held Hawaii's non-discrimination clause prohibited the denial of same-sex marriages.²⁰⁶ The Hawaii legislature circumvented the decision by adopting an amendment to the Hawaii State Constitution that specifically defined marriage as a union between one man and one woman while granting same-sex unions most of the benefits conferred through marriage.²⁰⁷ In light of this decision, the Hawaii Supreme Court recently ruled that the gay marriage issue had been rendered moot by the subsequent legislative enactment.²⁰⁸ This will not be possible in Vermont. It is unlikely that the legislature could amend the State constitution to eviscerate the effect of the Common Benefits Clause anytime soon, as the Vermont Constitution allows proposed constitutional amendments every four years with a vote of two-thirds of the members of the state senate.²⁰⁹ If the Vermont legislature were

203. See *id.* at 897 (Dooley, J., concurring in part). Justice Dooley asserts "I question whether the majority's new standard is ascertainable, is consistent with our limited role in constitutional review, and contains appropriate judicial discretion." *Id.* at 896.

204. The court notes several states that have variations of Vermont's Common Benefits Clause, for example, Connecticut, Ohio and West Virginia. See *id.* at 877 n.9.

205. See 29 U.S.C. § 1738C (1996). DOMA was signed into law by President Clinton on Sept. 21, 1996. See *id.*

206. See Melissa Provost, Comment, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157, 157 (1999).

207. See *id.* at 180.

208. See *id.*

209. See VT. CONST. ch. II, § 72. The Vermont State Constitution provides in pertinent part:

At the biennial session of the General Assembly of this State which convenes in A.D. 1975, and at the biennial session convening every fourth year thereafter, the Senate by a vote of two-thirds of its members, may propose amendments to this Constitution, with the concurrence of a majority of the members of the House of Representatives with the amendment as proposed by the Senate. A proposed amendment so adopted by the Senate and concurred in by the House of Representatives shall be referred to the next biennial session of the General Assembly; and if at that last session a majority of the members of the Senate and a majority of the House of Representatives concur in the proposed amendment, it shall be the duty of the General Assembly to submit the proposal directly to the voters of the state. Any proposed amendment submitted to the

to approve of gay marriages, or if a successful claim was brought before the court that gay marriage was an essential right in lieu of domestic partnership, a constitutional challenge might be made against DOMA. For example:

When VT or another state makes civil marriage available to same-sex couples, then . . . people from other states would move there or travel there in order to marry and return home. The state DOMA's differ markedly in their content. Some apply to licensing and certifying marriages in that state, some apply to "recognition" of marriages licensed and certified in other states, and some address both topics. As a general matter, these laws arguably violate guarantees of equal protection (sex) and sexual orientation discrimination, also Romer-type animus-based discrimination with no legitimate government purpose. They may also violate the full faith and credit clause, right to marry, to travel, and violate the privileges and immunities clause.²¹⁰

DOMA stipulates that states do not have to recognize other state laws that allow homosexual marriages.²¹¹ This law has not yet been challenged because no state has yet granted marriage rights to same-sex couples.

[W]hen a state, Vermont or another, makes civil marriage available to lesbians and gay men, then . . . a challenge to federal DOMA would ripen in short order [because] [s]ome married residents (the same-sex couples) of that state would be excluded from the 1049 protections and responsibilities accorded married people under federal law and would have the right to challenge that exclusion.²¹²

If Vermont were to adopt full-fledged marital rights for same-sex couples, it would become the first state to do so. A claim could then be brought before the Supreme Court, challenging the constitutionality of DOMA. DOMA carves out an exception to the Full Faith and Credit Clause of the Constitution by allowing states the option not to recognize legal unions between same sex couples in other states.²¹³ The Full Faith and Credit Clause states "Full Faith and Credit shall be given in each State to the public Acts, records, and Judicial Proceedings of every other State. And the Congress may by

voters of the state in accordance with this section which is approved by a majority of the voters voting thereon shall become part of the Constitution of this State.

Id.

210. Bonuto, *supra* note 191.

211. See Provost, *supra* note 206, at 180.

212. Bonuto, *supra* note 191.

213. See Provost, *supra* note 206, at 181-182.

general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”²¹⁴

DOMA could be challenged on several grounds.²¹⁵ First, to the extent that it amends the Full Faith and Credit Clause, it amends the spirit of the Constitution’s commitment to federalism.²¹⁶ However, the legislation did not follow the proper constitutional process for amendment.²¹⁷ Second, DOMA, like the Colorado’s constitutional referendum, singles out homosexuals for special discrimination.²¹⁸ Like Colorado’s referendum, DOMA is based on an irrational fear and animus toward a particular group. Like the referendum, DOMA should be struck down.

Finally, DOMA does not further any compelling governmental interest.²¹⁹ The rationale behind DOMA, like the flawed rationale behind the state’s arguments in *Baker*, is that states should not have to recognize same-sex unions condoned in other states in the interest of promoting the link between procreation and marriage. The Vermont Supreme Court found this rationale flawed.²²⁰ Hopefully, the United States Supreme Court, following the underlying rationale of *Romer v. Evans*, will recognize that DOMA is unconstitutional, furthers no compelling governmental interest, and is legislation that singles out a group of Americans for special discrimination solely on the basis of their sexual orientation.²²¹

214. U.S. CONST. art. IV, § 1. According to Melissa Provost:

Courts have established a narrow exception to the FFCC commonly referred to as the ‘obnoxiousness exception.’ The obnoxiousness exception permits states to choose not to recognize the public acts of other states which would be violative of that state’s public policy. The exception creates a clause which is flexible enough to allow states to retain their independence while honoring their obligations to their sister states. For example, states are not required to recognize incestuous marriages, extreme nonage marriages, bigamous and polygamous marriages, and marriages between persons who lack the mental capacity to enter into the marriage.

Provost, *supra* note 206, at 183.

215. See Provost, *supra* note 206, at 201-03.

216. See *id.* at 180.

217. See *id.*

218. See *id.* at 201-02.

219. See *id.* at 202.

220. See *Baker v. Vermont*, 744 A.2d 864, 881-82 (Vt. 1999).

221. 517 U.S. 620, 623 (1996) (holding that Colorado’s amendment imposes a “broad and undifferentiated disability on a single named group . . . [i]t’s sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable but for animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”).

IV. CONCLUSION

The Vermont decision was undoubtedly a victory for gay rights activists in a number of ways. While it does not immediately grant same-sex couples the right to marry, it paves the way for the legislature to permit lesbian and gay marriages or, at the very least, a domestic partnership system that provides all the benefits and protections afforded to married heterosexual couples by Vermont state law. Under *Baker*, Vermonters who choose to be in committed relationships with a member of the same sex still will not be entitled to marital benefits and protections afforded by federal law. The Vermont court's decision acknowledges that lesbians and gays in committed relationships have a right to all the benefits and privileges of marriage and "provides greater recognition of—and protection for—same-sex relationships than has been recognized by any court of final jurisdiction in this country with the instructive exception of the Hawaii Supreme Court in *Baehr*."²²²

The extension of federal benefits will have to wait until a challenge can be made under federal law. However, the decision may open the door for a challenge of the constitutionality of the Defense of Marriage Act under the Full Faith and Credit and Equal Protection Clauses if the Vermont legislature chooses to give gays and lesbians the right to marry, as opposed to a lesser alternative. This could result in the overturning of DOMA and finally give all Americans the right to marry whomever they choose.

Randall Blandin

222. *Baker*, 744 A.2d at 888.