

OLD CONSTITUTIONS AND NEW ISSUES: NATIONAL LESSONS FROM VERMONT'S STATE CONSTITUTIONAL CASE ON MARRIAGE OF SAME-SEX COUPLES

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Abstract: The Vermont Supreme Court's 1999 ruling in *Baker v. State* was a watershed decision, holding that same-sex couples in Vermont were entitled to the same benefits and protections as opposite-sex married couples. While *Baker* is extremely important as a matter of substantive law, and as a contribution to the national discussion of the issues surrounding marriage of same sex-couples, it also provides an excellent lens through which to consider principles of state constitutional law and the New Judicial Federalism. This Article demonstrates how *Baker* is illustrative of major themes in state constitutional law, including the use of state constitutional history and textual analysis, distinctions between federal equal protection approaches and independent state constitutional equality doctrines, and plaintiffs' choice of state forum and state constitutional claims. The Article also shows how *Baker* highlights the application of a new, developing state constitutional rights jurisprudence.

INTRODUCTION

In December 1999, the Supreme Court of Vermont decided *Baker v. State*,¹ a decision that one of the Vermont justices referred to as "the most closely-watched opinion in this Court's history."² All five justices

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¹ 744 A.2d 864 (Vt. 1999).

² *Id.* at 889 (Dooley, J., concurring). One of the other Vermont justices noted that "This case is undoubtedly one of the most controversial ever to come before this Court." *Id.* at 912 (Johnson, J., concurring in part and dissenting in part). For a full treatment of the events leading up to *Baker*, and its aftermath, see Michael Mello, *For Today I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 Vt. L. REV. 149 (2000). For additional commentary on the *Baker* decision, see Melanie D. Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State Courts on Issues of Sexuality*, 33 IND. L. REV.

agreed that denying same-sex couples the benefits and protections accorded to opposite-sex married couples violated the Vermont state constitution.³ Chief Justice Jeffrey Amestoy, writing for the majority, found a violation of the Common Benefits Clause of the Vermont Constitution, which states:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community ⁴

The majority opinion did not require marriage licenses to be issued to same-sex couples, but rather left the question to the Vermont legislature whether to remedy the constitutional violation by expanding the marriage laws to include same-sex couples, or, as an alternative, creating a new law that mirrored all of the legal benefits and protections accorded to married opposite-sex couples.⁵ Within a matter of months the Vermont legislature passed, and the governor approved, a "Civil Union statute reaffirming the limitation of marriage to opposite-sex couples, but granting all of the benefits of marriage to same-sex couples."⁶

863, 890–91 (2000); Randall Blandin, Case Note, *Baker v. Vermont: The Vermont State Supreme Court Held That Denying Same-Sex Couples the Benefits and Privileges of Marriage Is Unconstitutional*, 9 LAW & SEXUALITY 349 (2000); Recent Cases, *Same-Sex Marriage—Vermont Supreme Court Holds State Must Extend Same-Sex Couples the Same Benefits as Married Opposite-Sex Couples—Baker v. State*, 744 A.2d 964 (Vt. 1999), 113 HARV. L. REV. 1882 (2000).

In a companion article in this Review, Professors Lawrence Friedman and Charles Baron provide a thorough and extremely thoughtful analysis of *Baker*. See Lawrence Friedman & Charles Baron, *Baker v. State and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125 (2001).

³ See *Baker*, 744 A.2d at 867, 887 (Dooley, J., concurring), 898 (Johnson, J., concurring in part and dissenting in part).

⁴ VT. CONST. ch. I, art. 7. For a brief survey of the interpretations of the Common Benefits Clause, see WILLIAM C. HILL, *THE VERMONT STATE CONSTITUTION: A REFERENCE GUIDE* 43–45 (1992). Interestingly, in 1994, this provision was made gender-neutral, without intending to "alter the sense, meaning or effect" of it. See VT. CONST. ch. II, § 76 (revising Chapters I and II to use gender-neutral language); accord *Baker*, 744 A.2d at 874 n.6.

⁵ See *Baker*, 744 A.2d at 886–88. But see *id.* at 898 (Johnson, J., concurring in part and dissenting in part) (advocating the issuance of licenses under the formal marriage law to same-sex couples).

⁶ See Ch. 91, Vermont Laws of 1999–2000 (approved April 26, 2000) (codified VT. STAT. ANN. tit. 15, §§ 1201–1212 (1989 & 2001 Supp.)); see also Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000); Recent Legislation, *Domestic Relations—Same-Sex Couples—Vermont Creates System of Civil Unions—Act Relating to Civil Unions*, No. 91, 2000 Vt. Adv. Legis. Serv. 68 (LEXIS), 114 HARV. L. REV. 1421 (2001).

Baker is extremely important as a matter of substantive law, and as a contribution to the national discussion of the issues surrounding marriage of same-sex couples. The decision was a major, national news story in much the same way as landmark decisions of the United States Supreme Court.⁷ *Baker* was only the second state constitutional law decision in the country to mandate a remedy for same-sex couples who are not seen to be included within the marriage statutes.⁸ The case also attracted the attention of interest groups, and a wide variety of *amici curiae*, both nationally and within Vermont, filed briefs in the case.⁹

Perhaps more significantly, *Baker* provides a lens through which to review a wide range of important lessons about the "battleground" of state constitutional law and the New Judicial Federalism.¹⁰ In the

⁷ See, e.g., John Cloud, *A Halfway Win for Gay Couples*, TIME, Dec. 31, 1999, at 220; David G. Savage, *Vt. Court Backs Equal Rights for Gay Couples*, LOS ANGELES TIMES, Dec. 21, 1999, at A1.

⁸ Hawaii decided the first same-sex marriage case in 1993. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). See generally WILLIAM N. ESKRIDGE, JR., FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT: THE CASE FOR SAME SEX MARRIAGE (1996); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); Lisa M. Farabee, *Marriage, Equal Protection, and the New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237 (1996); Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61 (2000); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994). For a very important, cautionary view, see Sheila Rose Foster, *The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 319 (1998).

In November 1998, the voters of Hawaii approved an amendment to Article I of the state constitution, proposed by the Legislature, providing: "The Legislature shall have the power to reserve marriage to opposite-sex couples." See Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 918-31 (1999) (analyzing the Hawaii constitutional amendment campaign as an example of "popular constitutionalism"); *infra* notes 187-189, 292-297 and accompanying text.

⁹ See *Baker*, 744 A.2d at 866-67.

¹⁰ See James A. Gardner, *Introduction to 1 STATE EXPANSION OF FEDERAL CONSTITUTIONAL CIVIL LIBERTIES* ix, xxxviii (James A. Gardner ed., 1999) ("[S]tate constitutional law [has become] something of a battleground, not only politically, but jurisprudentially."); Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143, 143 (1984) (noting that "[d]uring the past decade, law journals and other sources have devoted considerable attention to the emergence of the 'new judicial federalism,' the renewed reliance by state courts on state constitutions as independent sources of constitutional rights, often with the aim of extending greater protection to individual liberties than is available under current interpretations of the federal constitution") (internal citations omitted).

The analysis of the *Baker* case contained in this article is an example of a qualitative, rather than a quantitative, assessment of state constitutional law. See James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Qualitative Appraisal*, 63 ALB. L. REV. 1183, 1183-84 (2000).

last generation or so, state courts have, with some regularity, interpreted their state constitutions to provide more protection than the federal Constitution as interpreted by the United States Supreme Court.¹¹ Justice William J. Brennan, Jr. called this movement "[t]he most important development in constitutional jurisprudence of our times."¹² The *Baker* decision is illustrative of every important theme in the New Judicial Federalism and state constitutional rights protection.¹³ Lessons drawn from *Baker* include the use of state constitutional history and textual analysis, distinctions between federal equal protection approaches and independent state constitutional equality doctrines, and plaintiffs' choice of state forum and state constitutional claims. Additionally, *Baker* highlights the application of the new, developing state constitutional rights jurisprudence. It is to these topics that this article will now turn.

¹¹ See generally Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996); Dr. G. Alan Tarr has argued that prior to the beginning of the 1970s, the conditions were not right for the development of an expansive state constitutional rights jurisprudence. He noted:

What was missing was a model of how state judges could develop a civil liberties jurisprudence. Because Americans had not come to rely on courts to vindicate civil liberties, state courts throughout the 19th and early 20th centuries gained little experience in interpreting civil liberties guarantees. Nor could they look to federal courts for guidance in interpreting their constitutional protections. . . . Only when circumstances brought a combination of state constitutional arguments, plus an example of how a court might develop constitutional guarantees, could a state civil liberties jurisprudence emerge. Put differently, when the Burger Court's anticipated—and to some extent actual—retreat from the Warren Court activism encouraged civil liberties litigants to look elsewhere for redress, the experience of the preceding decade had laid the foundation for the development of state civil liberties law.

Paradoxically, then, the activism of the Warren Court, which has been often portrayed as detrimental to federalism, was a necessary condition for the emergence of vigorous state involvement in protecting civil liberties.

G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1111–12 (1997).

¹² Justice William J. Brennan, Jr., Special Supplement, *State Constitutional Law*, NAT'L L.J., Sept. 29, 1986, at S1; accord Justice William J. Brennan, Jr., *Symposium on the Revolution in State Constitutional Law—Foreword*, 13 VT. L. REV. 11, 11 (1988) (calling the movement "the most significant development in American constitutional jurisprudence today"); Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

¹³ See *infra* text accompanying notes 16, 23.

I. THEMES OF VERMONT'S STATE CONSTITUTIONAL DEVELOPMENT AND THE NEW JUDICIAL FEDERALISM

In 1985, the Vermont Supreme Court rendered *State v. Jewett*,¹⁴ which is probably the most explicit "teaching opinion" about state constitutional law.¹⁵ Written by the late Justice Thomas L. Hayes, *Jewett* outlined the approaches to state constitutional interpretation (historical, textual, comparison to sibling jurisdictions, and analysis of economic and social materials),¹⁶ cautioning that "[i]t would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented."¹⁷ Justice Hayes explained the reasoning behind writing an opinion aimed at the bar in connection with the court's order that counsel file supplemental briefs on the state constitutional issues in *Jewett*:

There was some discussion on the court about publishing a law review article advising lawyers to look to the state constitution, but I had the feeling that if we took that course the article would be read by nine students, nine law professors, and the janitor who was cleaning up at night at the law school. I believed an article would not get our message across. Ultimately the court agreed that if we were to tell our lawyers: "Look to your Vermont constitution and, when you

¹⁴ 500 A.2d 233 (Vt. 1985).

¹⁵ Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1020 (1997). A teaching opinion serves the function of "alerting the bar and bench to the possibilities of independent state constitutional analysis, and educating them in the techniques of making state constitutional arguments." *Id.* at 1019.

¹⁶ See *Jewett*, 500 A.2d at 235.

¹⁷ *Id.* Justice Hayes continued: "This generation of Vermont lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow." *Id.*

The Vermont court reiterated this approach in subsequent cases. See *State v. De-LaBruere*, 577 A.2d 254, 268 (Vt. 1990); see also *State v. Zumbo*, 601 A.2d 986, 988 (Vt. 1991) ("Defendant fails to provide a substantive analysis as to why the Vermont Constitution should provide a different answer for his argument than the federal constitution."); *State v. Jenne*, 591 A.2d 85, 89 (Vt. 1991) ("Vermont's constitutional guarantee to a fair cross-section . . . does not, in this case, provide any greater protection than that afforded by the federal constitution.").

do, brief it adequately," we could do so only in a judicial opinion.¹⁸

Justice Hayes also thought that if Vermont developed an independent state constitutional jurisprudence, it might "give courage" to other states to follow the Vermont lead.¹⁹ *Jewett* set forth a road map or glossary for what Professor James A. Gardner has referred to as a "discourse of distinctness . . . a language and set of conventions enabling participants in the legal system to argue that provisions in the state constitution mean something different from their federal counterparts."²⁰

A review of Chief Justice Amestoy's majority opinion in *Baker v. State* reflects the unmistakable influence of the teachings of Justice Hayes and his *Jewett* opinion.²¹ During the formative years of the New Judicial Federalism in Vermont, Chief Justice Amestoy had served as the state's attorney general and was deeply involved in these developments.²² He introduced his state constitutional analysis in *Baker* by noting: "We typically look to a variety of sources in construing our Constitution, including the language of the provision in question, historical context, case-law development, the construction of similar provisions in other state constitutions, and sociological materials."²³ His majority opinion reflects each of these elements.

¹⁸ Thomas L. Hayes, *Clio in the Courtroom*, 56 VT. HIST. 147, 149 (1988); see also Samuel B. Haud, *The Intellectual Legacy of Justice Thomas Hayes*, 56 VT. HIST. 141, 145-46 (1988).

¹⁹ Hayes, *supra* note 18, at 153.

²⁰ James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 778 (1992).

²¹ See, e.g., *Baker*, 744 A.2d at 870 (quoting *Jewett*, 500 A.2d at 235).

²² Two commentators reported: "Acting in response to the *Jewett* court's declaration, the office of the attorney general of Vermont set up a constitutional law committee specifically to research the history and legal precedents connected with the Vermont Constitution." Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Rights Decisions*, 55 U. CIN. L. REV. 317, 335 (1986). For views of the then-Attorney General on the reemergence of state constitutional law, see Jeffrey L. Amestoy & Julie Brill, *State Constitutions from the Attorney General's Perspective: An Institutional Schizophrenia*, 1 EMERGING ISSUES IN STATE CONST. L. 229 (1988); Jeffrey L. Amestoy, *State Constitutional Law: An Attorney General's Perspective*, 13 VT. L. REV. 337 (1988). Then-Attorney General Amestoy noted:

The increasing reliance on state constitutions presents interesting and at times exasperating problems for attorneys general. For if—as more than one writer has put it—"a state constitution can be used as a sword," one's enthusiasm for it depends on whether one is swinging the sword or catching the blade.

Amestoy & Brill, *supra*, at 230.

²³ *Baker*, 744 A.2d at 873; see also *Jewett*, 500 A.2d at 235.

A. State Constitutional History

In *Baker*, after analyzing the historical context of the Common Benefits Clause, Chief Justice Amestoy concluded: "[I]n the faith that a case *beyond the imagining of the framers* of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefits, protection, and security that Vermont law provides opposite-sex couples."²⁴ As suggested by the *Jewett* decision, the state constitutional analysis in *Baker* included a searching analysis of the state constitutional history of the Common Benefits Clause.²⁵ This analysis covered both state-specific Vermont constitutional history and a wider review of constitution-making during the Revolution.²⁶

As legal historian Stephen Gottlieb has observed, analysis of state constitutional history "is valuable whether or not one subscribes to a jurisprudence of original intent."²⁷ He continued:

For those who reject a jurisprudence of original intent, constitutional history nevertheless helps us to preserve the lessons embodied in the drafting of the provisions at issue and to explore the consequences of the language chosen. State constitutional history has become more important as the United States Supreme Court has become less protective of individual rights.²⁸

Chief Justice Amestoy's use of state constitutional history in *Baker* seems clearly to be of the latter sort—not an attempt to discover original intent in its strict sense.²⁹ He admitted as much by his acknowledgment that the issues were "beyond the imagining of the framers of our Constitution."³⁰ Chief Justice Amestoy's historical

²⁴ *Baker*, 744 A.2d at 886 (emphasis added).

²⁵ See *id.* at 875–77; cf. *Jewett*, 500 A.2d at 236.

²⁶ See *Baker*, 744 A.2d at 875–77.

²⁷ Stephen E. Gottlieb, *Foreword: Symposium on State Constitutional History: In Search of a Usable Past*, 53 ALB. L. REV. 255, 258 (1989); see also Pierre Schlag, *Framers' Intent: The Illegitimate Uses of History*, 8 U. PUGER SOUND L. REV. 283 (1985). For a review of the debate over original intent at the federal level, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

²⁸ Gottlieb, *supra* note 27, at 258.

²⁹ Cf. *id.*

³⁰ *Baker*, 744 A.2d at 886. Chief Justice Amestoy stated that "[a]lthough historical research yields little direct evidence of the framers' intentions, an examination of the ideological origins of the Common Benefits Clause casts a useful light upon the inclusionary principle at its textual core." *Id.* at 875 (emphasis added).

analysis was, rather, a wide-ranging survey of the egalitarian impulses of the Revolution.³¹ Chief Justice Amestoy described the use of state constitutional history in interpretation as follows:

[T]he responsibility of the Court . . . is distinct from that of the historian, whose interpretation of past thought and actions necessarily informs our analysis of current issues but cannot alone resolve them. . . . Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.³²

In *Baker*, Chief Justice Amestoy traced the origins and context of the Common Benefits Clause.³³ As he noted, the Revolution occurred not only against Great Britain, but also against the elite and aristocratic social, economic, and political structure in the Colonies.³⁴ Historians support his conclusion. Carl Becker wrote that the decade between 1765 and 1776 witnessed the internal political struggle over "who should rule at home" as well as the Revolutionary War struggle for "home rule."³⁵ Even the idea of written constitutions itself was an egalitarian, inclusive development.³⁶ In the decade following inde-

³¹ See *id.* at 875-77.

³² *Id.* at 874.

³³ See *id.* at 877.

³⁴ *Id.* at 875-76.

³⁵ CARL LOTUS BECKER, *THE HISTORY OF POLITICAL PARTIES IN THE PROVINCE OF NEW YORK, 1760-1776*, at 22 (1909). Becker wrote:

From 1765 to 1776, therefore, two questions, about equally prominent, determined party history. The first was whether essential colonial rights should be maintained; the second was by whom and by what methods they should be maintained. The first was the question of home rule; the second was the question, if we may so put it, of who should rule at home.

Id. In *Baker*, Chief Justice Amestoy stated: "Although aimed at Great Britain, the American Revolution—as numerous historians have noted—also tapped deep-seated domestic antagonisms. The planter elite in Virginia, the proprietors of Eastern Pennsylvania, and New Yorkers claiming Vermont lands were each the object of long-standing grievances." *Baker*, 744 A.2d at 875; see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 83 (1969).

³⁶ See Patrick H. Hutton, *The Print Revolution of the Eighteenth Century and the Drafting of Written Constitutions*, 56 VT. HIST. 154, 158 (1988). Hutton wrote:

pendence, the states, in the words of Jackson Turner Main, "became the laboratories for testing theories, trying the institutions in the various forms that presently appeared in constitutions of the United States and other countries."³⁷ Historian Elisha Douglass has noted:

Large numbers of those unable to vote or hold political office felt that the primary purpose of the struggle was to abolish the political institutions by which privilege had been maintained in the colonial governments. Thus when the question of home rule was succeeded by the question of who would rule at home, these groups of humbler rebels attempted to obtain equal consideration for themselves by demanding that democratic reforms be written into the new state constitutions.³⁸

As Chief Justice Amestoy pointed out, Vermont's first constitution from 1777 was modeled directly on Pennsylvania's.³⁹ Historians agree that Pennsylvania's constitution of 1776 was the most radical of the Revolutionary state constitutions.⁴⁰ In Pennsylvania, a number of former political outsiders, including Dr. Thomas Young, James Cannon, and George Bryan, drafted the state's "ultrademocratic" 1776 consti-

The growing importance attached to written constitutions reveals the change in mentality that had been worked by the spread of print culture between the sixteenth and the eighteenth centuries. By the eighteenth century, the middle class, then on the verge of acquiring political power, had learned to read. Reading was of fundamental importance because it promoted a transformation in the way humans learn. Reading involved a move from learning through hearing to learning through seeing, a change that had far-reaching implications for political culture.

Id.

³⁷ Jackson Turner Main, *The American States in the Revolutionary Era*, in *SOVEREIGN STATES IN AN AGE OF UNCERTAINTY* 1, 23 (Ronald Hoffman & Peter J. Albert eds., 1981). See generally MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* (1997); G. Alan Tarr, *Between Authority and Liberty: State Constitution Making in Revolutionary America*, by Mark W. Kruman, University of North Carolina Press, 1997, 28 *RUTGERS L.J.* 865 (1997) (book review).

³⁸ ELISHA P. DOUGLASS, *REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND THE MAJORITY RULE DURING THE AMERICAN REVOLUTION* vi (1955); see also GARY B. NASH, *THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION* 340 (1979) (describing the internal struggle for new social order).

³⁹ *Baker*, 744 A.2d at 875. This phenomenon of state constitutional borrowing is discussed *infra* notes 153–154 and accompanying text.

⁴⁰ See Cecelia M. Kenyon, *Constitutionalism in Revolutionary America*, in *CONSTITUTIONALISM: NOMOS* XX 84, 99 (J. Roland Pennock & John W. Chapman eds., 1979).

tution.⁴¹ Thomas Paine referred to the Pennsylvania Constitution of 1776 as "a generous Constitution . . . which considers mankind as they came from their maker's hands—a *mere* man, before it can be known what shall be his fortune or his state"⁴² It contained a separate Declaration of Rights and Frame of Government.⁴³ The Declaration of Rights, patterned after Virginia's,⁴⁴ contained a Common Benefits Clause.⁴⁵ The Pennsylvania Constitution of 1776 mirrored the extreme shift in the political structure of the state and was a reflection of an "urban variant of republicanism that fostered egalitarianism as well as economic enterprise."⁴⁶ Pennsylvania, in making a virtually complete change of its government, thus was the only colony to experience a true revolution.⁴⁷ According to Richard Ryerson, "By late 1776 the Commonwealth of Pennsylvania was perhaps the most vital participatory democracy in the world."⁴⁸

The Pennsylvania Constitution proved influential beyond the state, particularly in Vermont.⁴⁹ The drafters of the Pennsylvania Constitution of 1776 sent copies to representatives of Vermont,⁵⁰ who came to Philadelphia to lobby the Continental Congress to recognize their statehood.⁵¹ Dr. Thomas Young, a key Pennsylvania radical constitutionalist and long-time friend of Vermont's Ethan Allen, pub-

⁴¹ RICHARD ALAN RYERSON, *THE REVOLUTION IS NOW BEGUN: THE RADICAL COMMITTEES OF PHILADELPHIA, 1765-1776*, at 241, n.147 (1978).

⁴² 2 *THE COMPLETE WRITINGS OF THOMAS PAINE* 285 (Philip S. Foner ed., 1945).

⁴³ PA CONST. OF 1776, art. 1, § 1.

⁴⁴ J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY OF REVOLUTIONARY DEMOCRACY* 178 (1936).

⁴⁵ PA CONST. OF 1776, art. 1, § V.

⁴⁶ Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334, 341 (1982).

⁴⁷ The Pennsylvania experience with a real "revolution" should be contrasted with the more general view of the American Revolution, summarized by A.E. Dick Howard: "But the American revolution is a kind of oddity among revolutions. It was fought to preserve old values—indeed, to preserve values which had sprung up from the very country rebelled against, but which that country had somehow forgotten." A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 203 (1968).

⁴⁸ RYERSON, *supra* note 41, at 5; *see also id.* at 252 (The Pennsylvania Constitution of 1776 contained the "broadest franchise of any large polity in the world").

⁴⁹ *See* Kenyon, *supra* note 40, at 99; *see also* Baker, 744 A.2d at 875. Chief Justice Amestoy concluded that the egalitarianism of the Pennsylvania Constitution of 1776 "was arguably eclipsed the following year by the Vermont Constitution of 1777." Baker, 744 A.2d at 876.

⁵⁰ *See* Hill, *supra* note 4, at 4; Paul Gillies, *Not Quite à State of Nature: Derivations of Early Vermont Law*, 23 VT. L. REV. 99, 107 (1998).

⁵¹ *See* WILLIAM BREWSTER, *THE FOURTEENTH COMMONWEALTH: VERMONT AND THE STATES THAT FAILED* 27-28 (1960).

lished a letter, addressed to Vermonters, on April 11 and 12, 1777.⁵² Young offered the Pennsylvania Constitution "as a model, which, with very little alteration, will, in my opinion, come as near perfection as anything yet concocted by mankind."⁵³ He even claimed that Congress was disposed to grant Vermont statehood.⁵⁴ After concluding that the recent, more conservative New York Constitution of 1777 was a "horrible example,"⁵⁵ Vermonters proposed a constitution modeled closely after Pennsylvania's.⁵⁶

Vermont's origins as a state arose from the "authority of squatter sovereignty."⁵⁷ In rebelling against the authority of New York and New Hampshire, the state engaged in what Chief Justice Amestoy referred to as a "double revolution—a rebellion within a rebellion."⁵⁸ Vermonters' attempts at convincing the Continental Congress to grant statehood, based on many of the same self-determination arguments supporting the Revolution against England, failed because Congress was more preoccupied in preserving peace with and between New York and New Hampshire than it was in admitting a new state over their objections and potentially shifting the balance of power in New England.⁵⁹ As one historian put it, "When Vermont became independent, it became independent of all the world, and remained so until 1791

⁵² BREWSTER, *supra* note 51, at 9; MATF BUSHNELL JONES, VERMONT IN THE MAKING 1750–1777, at 379 (1939); Gary J. Aichele, *Making the Vermont Constitution: 1777–1824*, 56 VT. HIST. 166, 178–79 (1988).

⁵³ See JONES, *supra* note 52, at 380; Gillies, *supra* note 50, at 107. But see Aichele, *supra* note 52, at 175–76 (contending that the 1777 Vermont Constitution did not adhere as closely to Pennsylvania's as is commonly thought). Appended to Young's letter was a copy of the Continental Congress Resolutions of May 10 and 15, 1776. JONES, *supra* note 52, at 380. Young's letter had been the first to suggest the name "Vermont." See *id.* at 383–84.

⁵⁴ See HILL, *supra* note 4, at 4; Aichele, *supra* note 52, at 179; Gillies, *supra* note 50, at 107.

⁵⁵ BREWSTER, *supra* note 51, at 29; see also JONES, *supra* note 52, at 382 ("The straw that broke the opposition to an independent state and overcame the loyalty to New York . . . was the adoption by New York in April of a conservative state constitution.").

⁵⁶ See WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 94 (1980); JACKSON TURNER MAIN, THE SOVEREIGN STATES, 1775–1783, at 176 (1973); see also M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 140 (1967).

⁵⁷ BREWSTER, *supra* note 51, at xi.

⁵⁸ Baker, 744 A.2d at 876. See generally ROBERT E. SHALHOPE, BENNINGTON AND THE GREEN MOUNTAIN BOYS: THE EMERGENCE OF LIBERAL DEMOCRACY IN VERMONT, 1760–1850 (1996). Vermont's 1777 Constitution contained grievances against both England and New York. HILL, *supra* note 4, at 6.

⁵⁹ See ADAMS, *supra* note 56, at 103–25; see generally PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787, at 103–25 (1983).

when it was finally admitted to the union."⁶⁰ Therefore, he concluded, "Vermont was the only true American republic, for it alone had truly created itself."⁶¹

The historical events leading to the constitutions of both Pennsylvania and Vermont reflected fundamental Revolutionary debates about equality, the social contract, and the structure and purposes of government.⁶² In this light, the Common Benefits Clause in Vermont, and provisions like it in other states, can be seen as foundational recognitions of the nature of people themselves, and the basic reasons for forming governments. Therefore, equality was viewed, in Ronald Dworkin's modern term, as a "sovereign virtue" of government.⁶³ Moreover, provisions such as Vermont's Common Benefits Clause reflect important community-based concerns as well as individual rights concerns.⁶⁴

The *Baker* court's use of constitutional history is, however, not without controversy. One criticism of the *Baker* court's reliance on the Revolutionary "inclusionary principle," which arose from "deep-seated domestic antagonisms,"⁶⁵ might be that these egalitarian impulses were highly contested by elites who had been used to deference and who possessed what they considered a natural right to control

⁶⁰ See ONUF, *supra* note 59, at 127.

⁶¹ *Id.* at 145.

⁶² One well-known scholar has noted that New England state constitutions such as Vermont's, in contrast to patterns in other regions,

are basically philosophic documents designed first and foremost to set a direction for civil society and to express and institutionalize a theory of republican government. . . . These constitutions, as brief or briefer than the federal document, concentrate on setting forth the philosophic basis for popular government, guaranteeing the fundamental rights of the individual, and delineating the elements of the state's government in a few broad strokes.

Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 *PUBLIUS: THE J. OF FEDERALISM* 11, 18 (1982). On the centrality of the equality component of republican political discourse, see WOOD, *supra* note 35, at 70-75 (describing the tension between notions of equality of opportunity (accepting social differences and distinctions) and equality of condition (a social leveling, denying social differences and distinctions)). On social contract thinking during the Revolution, see *id.* at 282-91, 607-08.

⁶³ See generally RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000); see also generally John Marquez Lundin, *The Law of Equality Before Equality Was Law*, 49 *SYRACUSE L. REV.* 1137 (1999).

⁶⁴ Robert C. Palmer, *Liberties as Constitutional Provisions, 1776-1791*, in WILLIAM E. NELSON & ROBERT C. PALMER, *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 55, 55, 61, 62-64 (1987).

⁶⁵ See *infra* notes 272-276 and accompanying text.

government.⁶⁶ Much of the equality rhetoric was aimed at the British.⁶⁷ It is true that the elites compromised their objections to a wider role for the former outsiders, leading to a variety of constitutional accommodations for participation in government through office holding and voting as well as equality provisions such as the Common Benefits Clause.⁶⁸ Still, one must be careful not to view a constitutional history as providing a single truth. As H. Jefferson Powell cautioned:

We cannot assume, as a matter of *a priori* truth, that there is a unitary tradition of constitutional law across the several states or even within a single one. The existence of a meaningful tradition is an assertion to be proven rather than a premise to be assumed. This is a point of more than "mere" methodological significance. One of the most common sources of misunderstanding and anachronism in constitutional history stems from the desire to identify a common set of ideas and arguments shared by groups labeled "the founders," "framers," "'traditional' constitutional lawyers," or similar appellations. This desire easily leads one to find more agreement and intelligibility in the past than was in fact there.⁶⁹

Another criticism of *Baker's* use of history might be that the constitutional history of the Common Benefits Clause reflects majoritarian concerns about *special privileges* for an elite minority.⁷⁰ In the modern context, lesbians and gay men are not in the majority; in fact, the reverse is true. Can such a provision be invoked to protect against

⁶⁶ See, e.g., Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influence on American Constitutionalism*, 62 TEMP. L. REV. 541 (1989).

⁶⁷ Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1198-99 (1985); see ADAMS, *supra* note 56, at 165; see also JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 38-56 (1983) (discussing the philosophical roots of equality in colonial America); J.R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 14 (1978) (discussing colonists' recognition of need to assert equal rights); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 394-401 (1929) (discussing colonists' attempts to invoke social contract principles to invalidate acts of Parliament).

⁶⁸ See *supra* text accompanying note 38.

⁶⁹ H. Jefferson Powell, *The Uses of State Constitutional History: A Case Note*, 53 ALB. L. REV. 283, 283-84 (1989).

⁷⁰ Chief Justice Amesoy himself recognized this point. *Baker*, 744 A.2d at 876-77; see also *infra* notes 106, 110 and accompanying text.

discrimination aimed at minority rights? It does seem that the common benefit thrust of both the constitutional text and the judicial approach developed by Chief Justice Amestoy is broad enough to protect minority rights.⁷¹

Analysis of, and reliance on, state constitutional history has been an integral part of the New Judicial Federalism.⁷² This is partially because, in contrast to federal constitutional history, more details are available at the state level.⁷³ Additionally, as Dr. G. Alan Tarr has pointed out, a careful look at state constitutional history (in addition to textual differences) could be used to justify an interpretation of the state constitution that was more protective, or recognized greater rights, than those available at the federal level.⁷⁴ The *Baker* court's reliance on the egalitarian anti-aristocracy flavor of the first state constitutions stands in sharp contrast to the constitutional history of the federal Equal Protection Clause.⁷⁵

B. Textual Analysis in Baker

The landmark *Jewett* decision specified textual analysis as an important way to analyze the potential differences in state and federal constitutional law.⁷⁶ Dr. Tarr also has pointed out the appeal of textualism, in addition to historical analysis, as a method to support a state constitutional decision going beyond federal constitutional minimum standards.⁷⁷ Further, Chief Justice Amestoy employed a textual analy-

⁷¹ See generally *Baker*, 744 A.2d at 877-78.

⁷² See, e.g., *Jewett*, 500 A.2d at 236.

⁷³ See G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 852 (1991).

⁷⁴ *Id.* at 848 ("[I]f a divergent interpretation may be justified by reference to the distinctive origins or purpose of a provision, then state jurists must pay particular attention to the intent of the framers and to the historical circumstances out of which the constitutional provisions arose.").

⁷⁵ See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 191-93 (1998); see also *Baker*, 744 A.2d at 870.

⁷⁶ See *Jewett*, 500 A.2d at 235.

⁷⁷ Tarr, *supra* note 73, at 847-48 ("[E]ven when state and federal constitutions contained analogous provisions, the language of the provisions often differed; and where these textual differences were substantial, they seemed to call for independent interpretation. This was especially true when it could be shown that the textual differences reflected a distinctive historical experience or were designed to incorporate a particular perspective."); see also Joseph R. Grodin, *Commentary: Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 400 (1988) ("The presence of distinctive language or history obviously presents the most comfortable context for relying upon independent state grounds."); Peter Linzer, *Why Bother with State Bills of Rights?*, 68 TEX. L. REV. 1573, 1584-85, 1607-08, 1610 (1990).

sis when interpreting the text of the Common Benefits Clause in *Baker*.⁷⁸

Obviously, the Common Benefits Clause of the Vermont state constitution reads very differently from the federal Equal Protection Clause and has very different origins.⁷⁹ This should not be surprising because the state and federal governments constitute very different polities with very different governmental functions. The federal government exercises limited, delegated powers in contrast to the states' plenary, residual authority. No one would have expected the federal Constitution to provide any sort of guarantee about the "benefit, protection, and security of the people."⁸⁰ Historically, that was a function of state government.⁸¹

Chief Justice Amestoy pointed out in *Baker* that the "first point to be observed about the text is the *affirmative* and unequivocal mandate of the first section, providing that government is established for the common benefit of the people and community as a whole."⁸² This notion of affirmative rights is a very important way to distinguish state constitutional rights from the more familiar, negatively-phrased federal constitutional rights.⁸³ Chief Justice Amestoy was able to discern from the text of the clause "broad principles which usefully inform" the decision on the constitutionality of a statute. As he stated, "Chief among these is the principle of inclusion."⁸⁴

Next, Chief Justice Amestoy responded to the possible textual argument that the introductory phrase in the Common Benefits Clause—"that government is, or *ought to be*, instituted for the common benefit"—rendered the provision judicially unenforceable.⁸⁵ Scholars have pointed out the admonitory quality of the early state rights pro-

⁷⁸ See generally *Baker*, 744 A.2d 864.

⁷⁹ See TARR, *supra* note 75, at 191-93; see also *Baker*, 744 A.2d at 870.

⁸⁰ See VT. CONST. ch. I, art. 7.

⁸¹ See DANIEL J. ELAZAR, *THE AMERICAN CONSTITUTIONAL TRADITION* 169 (1988) [hereinafter ELAZAR, *TRADITION*]; Daniel J. Elazar, *Foreword: The Moral Compass of State Constitutionalism*, 30 RUTGERS L.J. 849 (1999) [hereinafter Elazar, *Foreword*].

⁸² *Baker*, 744 A.2d at 874; see also *id.* at 875 (noting the "affirmative right to the 'common benefits and protections' of government").

⁸³ For criticism of the negative rights focus of federal constitutional law, see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991). This characterization of state constitutional rights as "affirmative" has been important also in the area of free speech on private property. See, e.g., *State v. Schmid*, 423 A.2d 615, 626 (N.J. 1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982); *Commonwealth v. Tate*, 432 A.2d 1382, 1387 (Pa. 1981).

⁸⁴ *Baker*, 744 A.2d at 875.

⁸⁵ *Id.* at 874 n.7; accord VT. CONST. ch. I, art. 7.

visions as "defects,"⁸⁶ and the Vermont Supreme Court had ruled in 1994 that another provision of the declaration of rights was not judicially enforceable.⁸⁷ Chief Justice Amestoy, however, noted that the Common Benefits Clause is obligatory, and that "the State does not argue that it is merely hortatory or aspirational in effect, an argument that would not be persuasive in any event."⁸⁸

Chief Justice Amestoy deftly utilized the actual words of the Common Benefits Clause repeatedly throughout his opinion in describing the factual situation and the plaintiffs' claims based on denial

⁸⁶ E.g., BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 91 (1977). Schwartz noted:

The Virginia Declaration of Rights has the defect of being written in terms of admonition, not legal command. Most of its provisions state the different rights protected and then go on to provide that they "ought not" to be abridged. Not once is there a "shall not"—which, in legal terms, imposes an unmistakable mandatory restriction that the courts can then enforce.

The [Virginia] precedent was followed in the Pennsylvania, Delaware, Maryland, North Carolina, and Vermont Declarations of Rights.

Id.; see also Kenyon, *supra* note 40, at 96-99.

⁸⁷ See *Benning v. State*, 641 A.2d 757, 761 (Vt. 1994). In *Benning*, the Vermont Supreme Court rejected plaintiffs' argument that the Vermont motorcycle crash helmet law violated the Vermont Constitution. See *id.* at 758. The court focused on Chapter 1, Article 1, which states: "That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety . . ." VT. CONST. ch. 1, art. 1; see *Benning*, 641 A.2d at 759. According to the *Benning* court:

We find sparse help for the plaintiffs in the text of Article 1 and in our decisions construing this text. The constitutions of New England states have been described as basically philosophic documents designed first and foremost to set a direction for civil society and to express and institutionalize a theory of republican government. . . . [Article 1 reflects] the fundamental principles, not of our state only, but of Anglo-Saxon government itself, enlarging upon the axiom that when the facts are the same the law is the same, and inspired by the ideal of justice, that the law is no respecter of persons. Given the nature of Article 1, it is not surprising that we can discover no instance where this Court has struck down an act of the Vermont Legislature solely because of a violation of Article 1.

Id. at 759 (internal citations omitted). The court concluded: "[W]e are not convinced that Article 1 offers plaintiffs any special protections that are applicable to this case. . . . As a result, we reject the notion that this case can be resolved on the basis of a broad right to be let alone without government interference." *Id.* at 761.

The New Jersey Supreme Court, by contrast, has relied on a virtually identical provision to develop judicially-enforceable equality, due process, and privacy doctrines. See ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* 28-31 (1990).

⁸⁸ *Baker*, 744 A.2d at 874-75 n.7.

of the "benefits," "protection," and "security" offered by Vermont marriage law to same-sex couples.⁸⁹ He even introduced his opinion with the following question: "May the State of Vermont exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples?"⁹⁰ This is a powerful and convincing use of state constitutional text.

C. *Equality Without Equal Protection*

The Vermont Constitution does not contain an equal protection clause.⁹¹ Like many states with similar constitutions, the Vermont judicial interpretations of its equality provision, the Common Benefits Clause, nevertheless have been deeply influenced by, and sometimes seemingly dependent upon, federal equal protection analysis.⁹² Consequently, in the *Baker* decision, both Chief Justice Amestoy and Justice Dooley expended significant effort attempting to unravel Vermont's equality doctrine and determining whether to treat it as independent from the federal Equal Protection Clause.⁹³

Justice Dooley, in fact, asserted in his concurrence that Vermont was bound by precedent to apply the federal equal protection ap-

⁸⁹ *Id.* at 867, 870, 871, 878, 879, 880, 881, 882, 883, 884, 886.

⁹⁰ *Id.* at 867.

⁹¹ See generally Robert F. Williams, *supra* note 67, at 1196 ("Most state constitutions do not contain an 'equal protection' clause. But they do contain a variety of equality protections."). For further elaboration of the differences between federal equal protection and state equality provisions, see Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343 (1993); Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675 (1992). *Contra* Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209 (1998). For an excellent treatment of equality provisions in state constitutions, see JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* 3-1 to 3-55 (3d ed. 2000).

⁹² Williams, *supra* note 67, at 1197. Part of this is attributable to lawyers, the lay understanding of constitutional law, and the dominance of federal constitutional analysis. As Justice Hans A. Linde has noted:

People do not claim rights against self-incrimination; they "take the fifth" and expect "*Miranda*" warnings. Unlawful searches are equated with fourth amendment violations. Journalists do not invoke freedom of the press; they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the laws.

Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 174-75 (1984) (emphasis added).

⁹³ See *Baker*, 744 A.2d at 870, 893.

proach to the Common Benefits Clause.⁹⁴ The question of whether a state court's earlier decisions adopting one methodology or another are actually precedent-setting, and therefore binding, is a very important matter.⁹⁵ As Justice Robert Utter of the Washington Supreme Court pointed out, state courts should carefully scrutinize older cases using federal analysis "to determine whether [their pronouncements] constitute actual holdings, and if not, whether they were based on assumptions that are no longer valid."⁹⁶ This is particularly important with respect to equality provisions, where there has been so much misplaced reliance on federal analysis.⁹⁷ In many states including Vermont, whose courts have said on occasion that state equality provisions are no different from the equal protection clause of the Fourteenth Amendment,⁹⁸ there is at least a conflict of authority.

Justice Dooley therefore advocated resolving the case by applying the familiar, "rigid" three-tiered suspect class/fundamental rights approach used in federal courts,⁹⁹ but with a result different from the likely federal outcome because of the different and smaller "legal climate" in Vermont.¹⁰⁰ For his assessment of the Vermont legal climate, Justice Dooley relied on Vermont statutes that decriminalized homosexual conduct and prohibited discrimination based on sexual orientation.¹⁰¹ Justice Dooley concluded that lesbians and gay men were a suspect class and applied strict scrutiny.¹⁰² He therefore maintained the distinction between "civil rights" and "economic discrimination" cases,¹⁰³ imposing in the former a more searching judicial inquiry and a much greater burden on the government to justify the

⁹⁴ *Id.* at 893. See Williams, *supra* note 67, at 1219 (describing situations where "the state court adopts the federal frame of analysis but applies those constructs independently"). For an assessment of *Baker's* equality analysis, see Friedman & Baron, *supra* note 2, at 129-49; Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935 (2000).

⁹⁵ See TARR, *supra* note 75, at 197.

⁹⁶ Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 507 (1984). For a strong critique of the Oregon Supreme Court's failure to follow a methodology it set out, see Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000).

⁹⁷ Williams, *supra* note 67, at 1219.

⁹⁸ *Id.*

⁹⁹ *Baker*, 744 A.2d at 896-97.

¹⁰⁰ See *id.* at 891 ("My point here is simply that the rationale in federal decisions for withholding a more searching scrutiny does not apply in Vermont.").

¹⁰¹ *Id.*

¹⁰² *Id.* at 890-91.

¹⁰³ *Id.* at 890.

classification.¹⁰⁴ Justice Dooley's analysis followed the Oregon approach, based on that state's similar constitutional provision.¹⁰⁵ The Oregon Supreme Court described its equality clause as follows:

Article I, section 20, of the Oregon Constitution has been said to be the "antithesis" of the equal protection clause of the fourteenth amendment. While the fourteenth amendment forbids curtailment of rights belonging to a particular group or individual, article I, section 20, prevents the enlargement of rights. There is an historical basis for this distinction. The Reconstruction Congress, which adopted the fourteenth amendment in 1868, was concerned with discrimination against disfavored groups or individuals, specifically, former slaves. When article I, section 20 was adopted as a part of the Oregon Constitution nine years earlier, in 1859, the concern of its drafters was with favoritism and the granting of special privileges for a select few.¹⁰⁶

Chief Justice Amestoy, by contrast, distinguished the Vermont Common Benefits Clause from the federal Equal Protection Clause,¹⁰⁷ articulating and applying a standard different from the federal approach. He concluded that although the "federal amendment may

¹⁰⁴ *Baker*, 744 A.2d at 893-94.

¹⁰⁵ *Id.* at 892-93.

¹⁰⁶ *Matter of Compensation of Williams*, 653 P.2d 970, 975 (Or. 1982) (citations omitted). On Oregon's provision, see generally David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 Vt. L. Rev. 221 (1988). Schuman asserted that fifteen states have provisions like Oregon's. *Id.* at 223. He noted the differences between these types of provisions and an equal protection clause:

An "equal protection" guarantee typically emanates from the privileged as a self-limiting gesture of largess toward the burdened: "*we* hereby grant equal treatment to *you*." It is a *promise* to adhere to the equality principle. . . .

Conversely, state "equal privileges and immunities" provisions typically emanate from the non-privileged as a gesture of warning to those who have or seek special benefits; they are an implied *threat* to adhere to the equality principle.

Id. at 224-25; see also David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES IN ST. CONST. L. 275, 281-82 (1989) (discussing the Oregon provision). Schuman concluded: "If a state's equality guarantee requires all citizens to have equal privileges and immunities, then an approach that extends equality with respect only to rights the court decides are 'fundamental' is analytically bankrupt, because the text itself precludes ranking or prioritizing rights." *Id.* at 285.

¹⁰⁷ *Baker*, 744 A.2d at 870-79. Another state court that recently confronted the problem of untangling its seemingly interdependent federal and state constitutional equality doctrines is the Indiana Supreme Court. See *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

supplement" the Vermont Constitution, it could not "supplant" it.¹⁰⁸ As noted earlier, he relied on the egalitarian impulses of the social and political revolution within the Revolution generally, as well as the principle of inclusion at the core of the text of the Common Benefits Clause.¹⁰⁹ He cautioned 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."¹¹⁰ He did note that the Vermont Constitution of 1777 was the only Revolutionary constitution to abolish slavery,¹¹¹ which certainly reflected some concern for African-Americans. The Vermont anti-slavery clause was an important symbolic statement, but as one historian noted, the provision "may have freed a few score persons."¹¹²

Chief Justice Amestoy's assessment of Vermont equality jurisprudence, stripped of reliance on federal equal protection constructs, was a standard that he said exhibited deference to "the legislative prerogative to define and advance governmental *ends*, while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective."¹¹³ This is, of course, an independent state constitutional doctrine and the point on which Justice Dooley disagreed.¹¹⁴ Chief Justice Amestoy continued, rejecting the "rigid, multi-tiered" federal equal protection analysis and stating that the first issue was to define which "part of the community" was disadvantaged by the statute.¹¹⁵ Then the inquiry moved to the "statutory basis," distinguishing those protected from those excluded.¹¹⁶ He cautioned that the court's "concern here is with delineating, not with labeling the excluded class" for purposes of tiers of scrutiny.¹¹⁷ The next focus of the court's equality analysis was on the "government's purpose in drawing a classification," including some within the statute's protections and excluding others.¹¹⁸ Then, the court determined whether

¹⁰⁸ *Baker*, 744 A.2d at 870.

¹⁰⁹ See *supra* notes 34-38 and 82-84 and accompanying text.

¹¹⁰ *Baker*, 744 A.2d at 870, 876.

¹¹¹ *Id.*; see ADAMS, *supra* note 56, at 6, 158; BREWSTER, *supra* note 51, at 29.

¹¹² MAIN, *supra* note 56, at 337.

¹¹³ *Baker*, 744 A.2d at 871.

¹¹⁴ See *supra* notes 99-100 and accompanying text; see also Friedman & Baron, *supra* note 2, at 136-37.

¹¹⁵ *Baker*, 744 A.2d at 878.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

the omission bore a "reasonable and just relation to the governmental purpose."¹¹⁹ Chief Justice Amestoy concluded that this approach would necessitate some weighing of interests, but that this could remain "grounded and objective, and not based upon the private sensitivities or values of individual judges" by looking to the history and traditions of the state.¹²⁰ He conceded, however, that judges' "reasoned judgments" would have to be applied.¹²¹

The key to application of Chief Justice Amestoy's analysis is, of course, to identify the governmental purpose for the exclusion and then to evaluate whether it is just and reasonable. The state of Vermont advanced the main purpose for excluding same-sex couples from the benefits and protections of the marriage laws as "furthering the link between procreation and child rearing."¹²² While acknowledging that this was a valid governmental purpose, Chief Justice Amestoy was able to show that, based on the fact that many married opposite-sex couples do not procreate, and that advances in assisted-reproductive techniques and liberalized adoption policies seemed inconsistent with the government's stated purpose, the exclusion was not reasonably related to the purpose.¹²³ Characterizing the benefits of marriage as "vital personal rights,"¹²⁴ he concluded that the state purposes did not meet the heavy burden to justify the exclusion.¹²⁵

Interestingly, much of the evidence Chief Justice Amestoy used to demonstrate the "extreme logical disjunction" between the classification and the stated purpose of the law¹²⁶ consisted of statutes enacted by the State of Vermont itself to ease restrictions on homosexual conduct, to ban discrimination and hate crimes against gays and lesbians, and to permit same-sex couples to adopt children.¹²⁷ This is similar to the reasoning of the Florida Supreme Court in its landmark abortion ruling in 1989, striking down a parental consent statute.¹²⁸ That court cited statutes permitting pregnant minors to

¹¹⁹ *Id.* at 879.

¹²⁰ *Baker*, 744 A.2d at 879 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

¹²¹ *Id.*

¹²² *Id.* at 881.

¹²³ *Id.* at 881-82.

¹²⁴ *Id.* at 883.

¹²⁵ *Baker*, 744 A.2d at 884.

¹²⁶ *Id.*

¹²⁷ *Id.* at 882, 885-86.

¹²⁸ *In re T.W.*, 551 So. 2d 1186, 1195 (Fla. 1989); see also *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 636 (N.J. 2000).

consent to all forms of medical treatment, except abortion, associated with pregnancy to counter the state's asserted interest in protecting young women.¹²⁹ In Vermont, the state additionally relied on other purposes for the exclusion, such as promoting child rearing in a male-female model, discouraging marriages solely for tax and other benefits, maintaining uniformity with marriage laws in other states, and historical intolerance for same-sex relationships.¹³⁰ These also did not pass muster under the court's analysis.¹³¹

The disagreement between Chief Justice Amestoy and Justice Dooley is one that has arisen in many states.¹³² Critics of the federal equal protection approach point to a number of reasons for developing an independent approach to interpreting equality provisions. For example, Professor Lawrence Sager has pointed out that the federal Equal Protection Clause is among the most "underenforced" of federal constitutional provisions.¹³³ This underenforcement pattern is due to the deference to states because of concerns for federalism, the rigid application of the state-action requirement, and the tiered "suspect class/levels of scrutiny" constructs imposed by the United States Supreme Court.¹³⁴ Thus, federal equal protection decisions should hardly be viewed as limiting the interpretation of state constitutional equality provisions.

In addition, several years after Professor Sager offered his underenforcement thesis, he described another important reason why state courts should not blindly follow federal constitutional interpretations.¹³⁵ Describing the substantial role of "strategic" considerations in

¹²⁹ See *In re T.W.*, 551 So. 2d at 1195.

¹³⁰ *Baker*, 744 A.2d at 884-85.

¹³¹ See *id.* at 885.

¹³² See, e.g., *Collins*, 644 N.E.2d at 72; *Doe v. Dept. of Soc. Servs.*, 487 N.W.2d 166 (Mich. 1992); *In re Estate of Turner*, 391 N.W.2d 767, 771-73 (Minn. 1986) (Wahl, J. concurring).

¹³³ Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-20 (1978); see Williams, *supra* note 67, at 1222.

¹³⁴ Professor Sager stated:

While there is no litmus test for distinguishing these norms, there are indicia of underenforcement. These include a disparity between the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives, the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct, and other anomalies

Sager, *supra* note 133, at 1218-19.

¹³⁵ Professor Sager asked, "[T]o what extent, if any, should state judges faced with claims under provisions of their state constitutions feel themselves bound to defer to Supreme Court interpretations of equivalent federal constitutional provisions?" Lawrence G.

judicial enforcement of constitutional norms, Professor Sager identified the possibility of state and federal courts employing different strategies in constitutional interpretation: "Like other legal rules, constitutional rules bear a pragmatic, *strategic* relationship to the concerns that animate them. Norms of political morality comprise the targets of constitutional law, but not the necessary or exclusive content of its rules."¹³⁶ He noted that strategic concerns account, in part, for the Supreme Court's limiting equal protection doctrines.¹³⁷ State courts, interpreting their own constitutions, may see the need to employ different strategies, even though they are applying a similar "norm of political morality"—equality.¹³⁸ Sager concluded:

State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges' instrumental impulses and judgments differ.

....

In light of the substantial strategic element in the composition of constitutional rules, the sensitivity of strategic concerns to variations in the political and social climate, the differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed.¹³⁹

Chief Justice Amestoy implicitly recognized this potential underenforcement of the federal Equal Protection Clause when he discussed the Vermont Supreme Court's well-known 1982 decision, *State v. Ludlow Supermarkets, Inc.*,¹⁴⁰ in *Baker*. Describing *Ludlow*, he noted:

Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 *TEX. L. REV.* 959, 959 (1985); see also Linzer, *supra* note 77, at 1580 ("The gut issue, though, is how closely the state courts should follow federal precedents in applying their states' provisions.").

¹³⁶ Sager, *supra* note 135, at 962.

¹³⁷ *Id.* at 974.

¹³⁸ *Id.* at 967.

¹³⁹ *Id.* at 975-76; see also Lawrence G. Sager, *Some Observations About Race, Sex, and Equal Protection*, 59 *TUL. L. REV.* 928, 936-37 (1985).

¹⁴⁰ 448 A.2d 791 (Vt. 1982) (invalidating Sunday closing law on equality grounds).

After noting that this Court, unlike its federal counterpart, was not constrained by considerations of federalism and the impact of its decision on fifty varying jurisdictions, the Court declared that Article 7 "only allows the statutory classifications . . . if a case of necessity can be established overriding the prohibition of Article 7 by reference to the 'common benefit, protection, and security of the people.'"¹⁴¹

It remains to be seen whether *Baker* will resolve the confused state of Vermont equality jurisprudence.¹⁴² The court should treat the matter as resolved by the majority opinion because the Common Benefits Clause cannot be both an independent, vital clause and a disguised federal Equal Protection Clause at the same time. Chief Justice Ames-toy's majority opinion demonstrates clearly that it is independent in text and history, and therefore should be independent in judicial interpretation.

D. Plaintiffs' Choice of State Forum and State Constitutional Cause of Action

Choosing the state forum, and relying on state constitutional claims rather than federal constitutional claims, reflects an important strategic choice in current civil liberties litigation.¹⁴³ Professor Jennifer Friesen observed, earlier in the development of the New Judicial Federalism:

Without question, the rebirth of reliance on state bills of rights is one of the most fascinating developments in civil rights law of the last two decades. . . .

It is no accident that the best-publicized uses of state constitutions have been as defenses to criminal or civil liability or as grounds for injunctive relief, rather than as grounds for recovering damages. . . . Injunctive relief under state constitutions is most often sought by plaintiffs bringing class action

¹⁴¹ *Baker*, 744 A.2d at 871 (quoting *Ludlow*, 448 A.2d at 795).

¹⁴² Professors Friedman and Baron provide extensive treatment of this question. See Friedman & Baron, *supra* note 2, at 151-53.

¹⁴³ See generally MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM (1999) (discussing choice of forum and "parity" between state and federal courts, albeit primarily in the context of state courts enforcing federal rights).

or public interest litigation, for which privately or publicly funded counsel may be available.¹⁴⁴

Because *Baker* was a civil case, the plaintiffs were able to exercise their choice of a cause of action and forum.¹⁴⁵ Chief Justice Amestoy's majority opinion concluded that having resolved the matter under the Common Benefits Clause, it was unnecessary to address the other state constitutional claims.¹⁴⁶ The Common Benefits Clause therefore provided an "adequate and independent state ground" that the United States Supreme Court could not review.¹⁴⁷ The insulation of state constitutional interpretations from the United States Supreme Court review is a central feature of the New Judicial Federalism.¹⁴⁸

The unlikely chances of prevailing on a federal claim undoubtedly influenced the plaintiffs' choice of forum and state constitutional claims in *Baker*. The plaintiffs' decision to employ the state forum, however, can also be attributed to Vermont's responsiveness to state

¹⁴⁴ Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1269-70 (1985); see also 1 FRIESEN, *supra* note 91, at 7-1 to 7-42. *Baker* was filed by three same-sex couples, not as a class action, and sought only the declaratory and injunctive remedy of an order requiring marriage licenses to be issued. See *Baker*, 744 A.2d at 867-68, 886; Brief for Appellant at 2, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-032).

¹⁴⁵ See *Baker*, 744 A.2d at 870 n.2.

¹⁴⁶ *Id.* The plaintiffs, had also wisely, although unsuccessfully, added a state statutory claim under the Vermont marriage statute. *Id.* at 868-69. Brief for Appellants at 6-16, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-032); Brief for Appellees, at 5-28, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-032); see also Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 400-01 (1999) (discussing statutory interpretation arguments). Plaintiffs in *Baker* therefore avoided the mistake often made by constitutional litigators—ignoring subconstitutional statutory or common-law claims. As Justice Hans A. Linde has noted:

Eager legal aid lawyers once came to our court trying to fit a woman's right to operate a day care center within the due process analysis of *Goldberg v. Kelly*. Only after the argument did our own examination show that she was entitled to prevail under the state administrative procedure act, which counsel apparently had not read.

Justice Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 390 (1980); see also Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727 (1992).

¹⁴⁷ *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (explaining the principle that the Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds). See generally Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985); Eric B. Schnurer, *The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine*, 18 HASTINGS CONST. L.Q. 371 (1991).

¹⁴⁸ See *Jewett*, 500 A.2d at 235; see also *supra* notes 14-23 and accompanying text.

constitutional claims.¹⁴⁹ For example, in 1982 the Vermont Supreme Court boldly declared:

[O]ur constitution is not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, as it extends back to Vermont's days as an independent republic. It is an independent authority, and Vermont's fundamental law.¹⁵⁰

The state of Vermont has been a leader in the development of the New Judicial Federalism,¹⁵¹ with a state bar that is more conscious of state constitutional law than many other states.¹⁵² By the time the *Baker* litigation was filed, the State of Vermont possessed a legal culture amenable to, if not actually encouraging of, such claims being asserted in state court under the state constitution.

E. State Constitutional Borrowing and Horizontal Federalism

As noted earlier, Chief Justice Amestoy placed substantial reliance on the fact that Vermont's Common Benefits Clause "was borrowed verbatim from the Pennsylvania Constitution of 1776, which was based, in turn, upon a similar provision in the Virginia Declara-

¹⁴⁹ See generally *supra* notes 14-23 and accompanying text; see also *infra* note 152.

¹⁵⁰ *State v. Badger*, 450 A.2d 336, 347 (Vt. 1982).

¹⁵¹ See text accompanying *supra* notes 15-20.

¹⁵² The Vermont Supreme Court adopted a dual analysis approach in *Badger*. The *Badger* court first analyzed the federal Constitution's treatment of evidence seized and a confession made after interrogation but prior to a *Miranda* warning. *Badger*, 450 A.2d at 341. The court went on to consider the same issues under the Vermont Constitution, observing that:

Our first concern is comity between this Court and the United States Supreme Court. We stand on a different footing when we evaluate federal constitutional claims. On federal issues, we are no more than an intermediate court, attempting to apply the "supreme law of the land," as pronounced by the United States Supreme Court. . . . Yet, if our ruling is based upon an adequate and independent state ground, federal review is limited to a determination of whether Vermont law violates some provision of federal law.

Id. at 346 (internal citations omitted).

A survey of over 500 decisions, from all 50 states, between the time of the *Michigan v. Long* decision and the beginning of 1988, concluded that "few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions." Felicia A. Rosenfield, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 *FORDHAM L. REV.* 1041, 1068 (1988).

tion of Rights of 1776.”¹⁵³ This process of state constitutional borrowing, which began with the first state constitutions, continues today.¹⁵⁴

Alternatively, state courts look for guidance from other state courts interpreting similar or identical *state* constitutional provisions, rather than looking vertically to United States Supreme Court decisions interpreting *federal* constitutional provisions.¹⁵⁵ Labeled “horizontal federalism” by G. Alan Tarr and M.C. Porter,¹⁵⁶ this was one of the techniques suggested by Justice Hayes in the *State v. Jewett* opinion.¹⁵⁷ In *Baker*, Chief Justice Amestoy surveyed other states’ interpretations of common benefits clauses and similar provisions in a long footnote.¹⁵⁸ He concluded, however, that such decisions were “scarce” and not very instructive.¹⁵⁹

F. Remedy

Chief Justice Amestoy’s majority opinion crafted a remedy that deferred to the legislature the question whether to authorize formal marriage for same-sex couples or, rather, to enact “a parallel ‘domestic partnership’ system or some equivalent statutory alternative.”¹⁶⁰ He noted that the court did not “purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate.”¹⁶¹ In effect, the court “remanded” the case to the legislative branch, with instructions to act.¹⁶² Chief Justice Amestoy acknowledged that it was possible that some future case might allege that denial of a marriage license based on the domestic partnership alternative was a *per se* violation of the Common Benefits Clause, but that was not the claim addressed in *Baker*.¹⁶³ Finally, the court suspended its judgment to give the legislature a reasonable pe-

¹⁵³ *Baker*, 744 A.2d at 875; see also *supra* notes 40–56 and accompanying text.

¹⁵⁴ TARR, *supra* note 75, at 50–51, 98.

¹⁵⁵ STATE SUPREME COURT’S xxi–xxii (M.C. Porter & G. Alan Tarr eds., 1982).

¹⁵⁶ *Id.*

¹⁵⁷ See *Jewett*, 500 A.2d at 237; see also *Benning*, 641 A.2d at 759.

¹⁵⁸ See *Baker*, 744 A.2d at 877 n.9.

¹⁵⁹ See *id.*

¹⁶⁰ *Id.* at 867; see also *id.* at 886. Professor Robert Schapiro has examined judicial deference in an exhaustive study in Robert A. Schapiro, *Judicial Deference and Interpretative Coordination in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000).

¹⁶¹ *Baker*, 744 A.2d at 886.

¹⁶² See *id.*

¹⁶³ See *id.*; see generally Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate but (Un)equal*, 25 VT. L. REV. 113 (2000); Mark Strasser, *Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma*, 9 WM. & MARY BILL RTS. J. 1 (2000).

riod of time in which to act, inviting plaintiffs to return if it refused to act.¹⁶⁴

Almost immediately after the court's decision, the Vermont Legislature took up the Civil Union act. In April 2000, the bill was adopted and approved by the governor.¹⁶⁵ The Civil Union act reaffirmed the limitation of civil marriage itself to "a union between a man and a woman,"¹⁶⁶ a victory for opponents of same-sex marriage. The bill, however, contained extensive legislative findings (and specific references to the *Baker* decision) concerning the unfairness of denying the benefits and protections of marriage to same-sex couples.¹⁶⁷ The Civil Union act also provided an exhaustive statutory equalization of the position of opposite-sex couples in the marriage relationship and same-sex couples in the civil-union relationship, beginning with the following provision: "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 a marriage."¹⁶⁸

Justice Denise Johnson dissented from the remedy portion of the *Baker* decision, concluding that it "abdicates this Court's constitutional duty to redress violations of constitutional rights."¹⁶⁹ She would have preferred an injunctive remedy forbidding the denial of marriage licenses.¹⁷⁰ Chief Justice Amestoy had devoted a significant portion of his opinion to refuting this claim, asserting that it was "predicated upon a fundamental misinterpretation of our opinion."¹⁷¹

The remedial approach taken by the court flowed rather naturally from the legal theory applied by both Chief Justice Amestoy and Justice Dooley. Both opinions addressed the claim as seeking, in Chief Justice Amestoy's words, "the secular benefits and protections of a singularly human relationship," rather than, specifically, marriage li-

¹⁶⁴ See *Baker*, 744 A.2d at 887.

¹⁶⁵ Ch. 91, Vermont Laws of 1999-2000 (approved April 26, 2000) (codified VT. STAT. ANN. tit. 15, ch. 23, history § 1212 (1989 & 2001 Supp.)).

¹⁶⁶ VT. STAT. ANN. tit. 15, ch. 23, history (1) (1989 & 2001 Supp.)).

¹⁶⁷ See *id.* at (4)-(11).

¹⁶⁸ See *id.* at § 1204(a)-(f).

¹⁶⁹ *Baker*, 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part).

¹⁷⁰ *Id.* For support of her position, see generally Cox, *supra* note 163; William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001); Mae Kuykendall, *Gay Marriages and Civil Unions: Democracy, The Judiciary and Discursive Space in the Liberal Society*, 52 MERCER L. REV. 1003 (2001); Strasser, *supra* note 163.

¹⁷¹ *Baker*, 744 A.2d at 887.

censes.¹⁷² Chief Justice Amestoy acknowledged that the plaintiffs' complaint was "designed to secure a marriage license," but noted that their "arguments here have focused primarily upon the consequences of official exclusion from the statutory benefits, protections and security incident to marriage under Vermont law."¹⁷³ Characterizing the claim in this way supported the alternative "legislative remand" remedy crafted in *Baker*.¹⁷⁴ These calculations in framing a remedy for a constitutional violation seem to reflect, in Professor Sager's terms, significant "strategic elements" at work in the court's decisionmaking process.¹⁷⁵

The Vermont court's remedial approach to the marriage of same-sex couples/legislative remand issue differed in a very important way from that adopted earlier by the Hawaii Supreme Court. That court, in *Baehr v. Lewin*,¹⁷⁶ rejected a state constitutional privacy claim to the right to marriage of same-sex couples,¹⁷⁷ but held that under state equal protection analysis the state would have to show a compelling interest to justify denying them marriage licenses.¹⁷⁸ It is not clear whether the court considered a civil union remedy. Before the case could make it back to the Hawaii Supreme Court after remand and an extensive trial on the compelling state interest question, the people of Hawaii approved a 1998 amendment to the state constitution providing: "The legislature shall have the power to reserve marriage to opposite-sex couples."¹⁷⁹ In December 1999, about a week before the Vermont *Baker* decision, the Hawaii Supreme Court recognized that any state constitutional basis for ordering access to marriage for same-sex couples had been eliminated.¹⁸⁰

Chief Justice Amestoy acknowledged the "instructive" events in Hawaii, including the state constitutional amendment overruling the Hawaii Supreme Court's decision, as well as a similar amendment in Alaska.¹⁸¹ It seems likely that this information played a significant role

¹⁷² *Id.* at 889.

¹⁷³ *Id.* at 886.

¹⁷⁴ *See id.* at 888.

¹⁷⁵ *See supra* notes 135–139 and accompanying text.

¹⁷⁶ 852 P.2d 44 (Haw. 1993), *reconsideration and clarification granted in part*, 875 P.2d 225 (Haw. 1993), *reversed and remanded sub nom.* *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (mem.) (after constitutional amendment overruling earlier decision).

¹⁷⁷ *See id.* at 55–57.

¹⁷⁸ *See id.* at 59–68.

¹⁷⁹ HAW. CONST. art. 1, § 23.

¹⁸⁰ *See Baehr v. Miike*, 994 P.2d 566, 566 (Haw. 1999) (mem.).

¹⁸¹ *See Baker*, 744 A.2d at 888. Alaska Constitution, article 1, section 25 reversed an Alaskan trial court decision that held, on state constitutional privacy and equal protection

in the decision to provide an alternative remedy, deferring to the legislature.¹⁸² Justice Johnson had stated that her preferred remedy—mandating issuance of marriage licenses to same-sex couples—would avoid the “political caldron” of a remand to the legislature.¹⁸³ Chief Justice Amestoy, referring explicitly to the Hawaii and Alaska amendments, described Justice Johnson’s view as “significantly insulated from reality.”¹⁸⁴ In fact, an unsuccessful move to amend the Vermont constitution did follow the *Baker* decision.¹⁸⁵

Chief Justice Amestoy acknowledged the fact that state constitutions present somewhat of a paradox when guaranteeing rights, because judicial rights interpretation can be overturned by a mere majority vote through state constitutional amendment.¹⁸⁶ Dr. Douglas Reed has called this element of state constitutional law (which he distinguishes from federal constitutional law) “popular constitutionalism,” concluding that “[t]he interpreter of state constitutions, under popular constitutionalism, is less likely to be a judge and more likely to be a mobilized and politically active citizenry.”¹⁸⁷ In fact, the events in Vermont seem to bear out his description of effective “legal mobilization”:

A key test of popular constitutionalism’s capacity to resolve the claims of gays and lesbians lies in the political majority’s ability to reconstruct the language of a constitutional *right* to equal marriage as a negotiable *interest* that can be traded

grounds, that unless the state could demonstrate a compelling interest, same-sex couples were entitled to obtain marriage licenses. See ALASKA CONST. art. 1, § 25 (stating “a marriage may exist only between one man and one woman”); *Brouse v. Bureau of Vital Statistics*, No. 3AN-95-6562 Cl, slip op. at 1 (Alaska Super. Ct., 3d Dist., Feb. 27, 1998).

¹⁸² See Reed, *supra* note 8, at 871 (“[I]t is clear that the Vermont Supreme Court learned from Hawaii’s example, noting that a decision which mandated same-sex marriage outright might face intense opposition.”). The State of Vermont had pointed out the Hawaii amendment in its brief. Brief for Appellee at 92, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-032).

¹⁸³ *Baker*, 744 A.2d at 898.

¹⁸⁴ *Id.*

¹⁸⁵ See David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61, 80 (2000); Gil Kujovich, *In Opposition to Amending the Vermont Constitution*, 25 VT. L. REV. 277, 283 (2000). For an assessment of federal constitutional challenges to such an amendment, see Mark Strasser, *Same-Sex Marriage Referenda and the Constitution: On Hunter, Romer and Electoral Process Guarantees*, 64 ALB. L. REV. 949, 975-79 (2001).

¹⁸⁶ See *Baker*, 744 A.2d at 888. See generally Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 384 (1993).

¹⁸⁷ Reed, *supra* note 8, at 875.

within a framework of majoritarian policy-making. The political trajectory of the struggle indicates that this has already happened.¹⁸⁸

The compromise Civil Union act passed by the Vermont Legislature represents the translation of judicially-determined rights into an "interest" subject to negotiation and compromise.¹⁸⁹ The court's decision clearly facilitated this outcome.¹⁹⁰

Of course, some critics would not characterize the court's ruling as deferential in any way toward the legislature.¹⁹¹ After all, the Vermont legislature had not, prior to the court's decision, chosen to provide for either marriage of same-sex couples or for civil union status. Professor Bill Eskridge characterized the *Baker* court as a "norm entrepreneur,"¹⁹² which, by the use of a "savvy . . . aggressive trial balloon" forced the issue of marriage of same-sex couples onto the legislative agenda.¹⁹³ The legislature responded with its Civil Union statute, referred to by Professor Eskridge as a "face-saving pseudonym."¹⁹⁴

The *Baker* decision can also be seen as an example of "agenda setting policymaking" judicial decisionmaking, where the court acts by "identifying problems for political resolution rather than prescribing detailed policies of its own."¹⁹⁵ It can also be seen as a form of judicial "affirmative activism."¹⁹⁶ This kind of judicial intervention in social policy questions, at the invitation of the plaintiffs to be sure, always raises separation of powers concerns and criticism based on a more passive model of judicial power. In *Baker*, Chief Justice Amestoy answered these predictable criticisms. Acknowledging the controversial nature of the case but asserting that it raised a question that the court

¹⁸⁸ *Id.* at 919.

¹⁸⁹ *See id.*

¹⁹⁰ *See generally* Gil Kujovich, *An Essay on the Passive Virtue of Baker v. State*, 25 Vt. L. REV. 93 (2000).

¹⁹¹ *See, e.g.*, William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1405 (2000); Kuykendall, *supra* note 170, at 1031-32.

¹⁹² Eskridge, *supra* note 191, at 1405.

¹⁹³ *See id.* at 1404; *see also* Kuykendall, *supra* note 170, at 1031-32.

¹⁹⁴ Eskridge, *supra* note 191, at 1349 (citing William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Regulation*, 31 McGEORGE L. REV. 641 (2000)).

¹⁹⁵ G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 566 (1984) (quoting RICHARD LEHNE, *THE QUEST FOR JUSTICE* 200-01 (1978)).

¹⁹⁶ *Cf. id.* at 516.

well knew arouses deeply-felt religious, moral, and political beliefs, he noted: "Our constitutional responsibility to consider the legal merits of issues properly before us provides no exception for the controversial case."¹⁹⁷

It has been argued that *state* courts are perhaps less subject to criticism for "affirmative activism" than *federal* courts. As one commentator noted: "[t]hese institutional differences between the federal and state courts suggest that active judicial review of public law issues at the state level is not as troublesome theoretically as it is at the federal level."¹⁹⁸ Still, cases like *Baker* certainly stimulate criticisms of the court's "activism" and raise questions about the legitimacy of such forms of state constitutional decisionmaking.¹⁹⁹

II. *BAKER* AND STATE CONSTITUTIONAL RIGHTS JURISPRUDENCE

Not until about ten years ago, well into the development of the New Judicial Federalism,²⁰⁰ could one describe the topic of state constitutional rights *jurisprudence*. For example, in 1988, two commentators pointed out that "most of the literature, like many of the state cases themselves, offers more in terms of approval and encouragement than of analytical insight and innovation. . . . More attention must be devoted to *new* conceptualizations in constitutional doctrine."²⁰¹ Several years later, Dr. G. Alan Tarr noted that "one might have expected a lively dialogue between constitutional theorists and state constitutional scholars. However, no such dialogue has developed. Indeed, what is striking is how little attention scholars and jurists have paid to the relationship between constitutional theory and state constitutional law."²⁰²

¹⁹⁷ *Baker*, 744 A.2d at 867.

¹⁹⁸ Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527, 535 (1986); see also Tarr & Harrison, *supra* note 195, at 539-40.

¹⁹⁹ See generally DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Tarr & Harrison, *supra* note 195, at 542-47.

²⁰⁰ See *supra* notes 10-12 and accompanying text.

²⁰¹ Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 217-18 (1988). There were, in fact, several excellent pre-1988 contributions to state constitutional theory. See, e.g., A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Keiter, *supra* note 198, at 527; David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 TEX. L. REV. 1051 (1985); Linde, *supra* note 92; Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Symposium, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

²⁰² Tarr, *supra* note 73, at 842. But see Daniel B. Rodriguez, *State Constitutionalism and the Domain of Normative Theory*, 37 SAN DIEGO L. REV. 523, 531 (2000) (questioning whether

In the 1990s this situation began to change. Matters of constitutional theory began to be brought to bear on state constitutional rights questions. Much of the state constitutional jurisprudence of the 1990s can actually be attributed to a 1992 critique of the New Judicial Federalism.²⁰³ Professor James A. Gardner argued that "state constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements"²⁰⁴ and that "state constitutional discourse is impoverished and inadequate to the tasks that any constitutional discourse is designed to accomplish."²⁰⁵ He criticized state constitutional decisions for not utilizing a "'discourse of distinctness' . . . a language and set of conventions enabling participants in the legal system to argue that provisions in the state constitution *mean something different from their federal counterparts*."²⁰⁶

After having concluded that state constitutional discourse was impoverished, Professor Gardner asserted that this is caused by the failure of state constitutionalism generally.²⁰⁷ He pointed to the inclusion of mere statutory detail in state constitutions (which reflect political compromise), and the frequency with which constitutions are amended or revised to conclude that state constitutionalism was a failed enterprise.²⁰⁸ According to Professor Gardner, the "poverty of state constitutional discourse merely reflects the limited narrative possibilities that state constitutions offer to erstwhile interpreters."²⁰⁹ A truly diverse set of independent constitutional values, at least in rights cases, was even said to be dangerous to the national community.²¹⁰ Ultimately, Professor Gardner contended that "the communities in theory defined by state constitutions simply do not exist, and debating the meaning of a state constitution does not involve defining an identity that any group would recognize as its own."²¹¹ A true constitution, according to his view, would do much more: "The content of a consti-

the focus on the "high lawcraft" in constitutional adjudication is as important in state constitutional law as in federal constitutional law).

²⁰³ See generally Gardner, *supra* note 20, at 20.

²⁰⁴ *Id.* at 763.

²⁰⁵ *Id.* at 766.

²⁰⁶ *Id.* at 778 (emphasis added); see also *id.* at 804 ("[A] discourse of distinctiveness [is] . . . a way of explaining differences between the state and federal constitutions.").

²⁰⁷ See *id.* at 812 (noting "the failure of state constitutionalism itself to provide a workable model for the contemporary practice of constitutional law and discourse on the state level").

²⁰⁸ See Gardner, *supra* note 20, at 818-22.

²⁰⁹ *Id.* at 822.

²¹⁰ *Id.* at 827.

²¹¹ *Id.* at 837.

tution can thus reflect some of the most essential and intimate aspects of the character of the people who adopted it, a feature that courts occasionally can exploit in order to assist them in construing the constitution in difficult cases."²¹²

Professor Gardner's strong and provocative conclusions have stimulated useful discussions of what state constitutional law is about.²¹³ Much of that discussion continues to analyze state constitutional law as it relates to federal constitutional law, in comparative or relational terms, or, in Professor Gardner's terms, debating the merits of a "discourse of distinctness."²¹⁴ The *Baker v. State* decision provides an excellent vehicle for analyzing Gardner's critique as well as competing jurisprudential views of state constitutional law.²¹⁵

A. Critiques of the "Discourse of Distinctiveness"

One critic of Professor Gardner, Professor Paul Kahn, argued that state constitutional rights cases should not necessarily "rely on unique state sources of law. Those sources include the text of the state constitution, the history of its adoption and application, and the unique, historically identifiable qualities of the state community."²¹⁶ Kahn described constitutionalism, including state constitutional law, as not a "single set of truths" but rather as an ongoing national discourse about "ideas of liberty, equality, and due process."²¹⁷ Professor Kahn illustrated his point using the doctrine of equality:

²¹² *Id.* at 815-16; see also James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1221-22 (1998).

²¹³ Professor Gardner's article has generated a wide response. See, e.g., Neil H. Cogan, *In Praise of Diverse Discourse*, 5 ST. THOMAS L. REV. 173 (1992); Jeffrey A. Parness, *Failed or Uneven Discourse of State Constitutionalism?: Governmental Structure and State Constitutions*, 5 ST. THOMAS L. REV. 155 (1992); David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992); Roundtable, *Responses to James A. Gardner, The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. (1992), 24 RUTGERS L.J. 927 (1993). Professor Gardner replied in *What Is a State Constitution?*, 24 RUTGERS L.J. 1025 (1993) [hereinafter Gardner, *What Is?*]; see also James A. Gardner, *Discourse and Difference—A Reply to Parness and Cogan*, 5 ST. THOMAS L. REV. 193 (1992); Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1 (1995).

²¹⁴ See Gardner, *supra* note 20, at 778.

²¹⁵ 744 A.2d 864 (Vt. 1999).

²¹⁶ Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147 (1993).

²¹⁷ See *id.* at 1147-48.

The object of interpretation might, for example, be the meaning of the constitutional value of equality. Equality does not have a single, definite meaning in any community prior to the process of interpretation. It is not a thing waiting to be discovered by a judge. It only has an identifiable shape after the judge articulates the conclusion of an interpretive inquiry. Even that conclusion is only a momentary stopping point in an ongoing debate.²¹⁸

Thus, Professor Kahn argued that state courts and federal courts should work together, using both state constitutions and the federal Constitution to pursue the "common enterprise" of providing interpretive answers to great constitutional questions.²¹⁹ He seemed to reject the necessity of Professor Gardner's "discourse of distinctness."²²⁰

Professor Kahn used a landmark state constitutional decision to support his thesis.²²¹ He referred to *Kentucky v. Wasson*,²²² a case in which the Kentucky Supreme Court rejected the United States Supreme Court's decision in *Bowers v. Hardwick*²²³ and struck down Kentucky's sodomy laws. The *Baker* decision seems equally illustrative of a state court's contribution, interpreting its own state constitution, to

²¹⁸ *Id.* at 1161.

²¹⁹ *Id.* at 1168.

²²⁰ See Gardner, *supra* note 20, at 778.

²²¹ See Kahn, *supra* note 216, at 1153.

²²² 842 S.W.2d 487 (Ky. 1992). Interestingly, the Kentucky state constitutional provision at issue in *Wasson* was also borrowed from the Pennsylvania Constitution of 1776. *Id.* at 492 (citing Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 Ky. L.J. 1 (1990-91)). *Wasson* is commented on in Recent Case, *State Constitutions—Homosexual Sodomy—Kentucky Supreme Court Finds that Criminalization of Homosexual Sodomy Violates State Constitutional Guarantees of Privacy and Equal Protection—Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), 106 HARV. L. REV. 1370 (1993); see also Thomas P. Lewis, Special Feature, *Commonwealth v. Wasson: Invalidating Kentucky's Sodomy Statute*, 81 Ky. L. REV. 423 (1992-93). See generally Susan Ayres, *Coming Out: Decision-Making in State and Federal Sodomy Cases*, 62 ALB. L. REV. 355 (1998); Larry Catá Backer, *Narrative and Jurisprudence in State Courts: The Example of Constitutional Challenges to Sex Conduct Regulation*, 60 ALB. L. REV. 1633 (1997); Paula A. Brantner, *Removing Bricks From the Wall of Discrimination: State Constitutional Changes to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495 (1992); Nan Feyler, *The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973 (1986); Michael James Confusione, Note, *Sexual Conduct, Sexual Orientation, and State Constitutional Law*, 25 RUTGERS L.J. 1004 (1994); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1534-36 (1989).

Montana reached a conclusion similar to Kentucky's in *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997) (explicit privacy provision). In 1998, the Georgia Supreme Court declared Georgia's sodomy law unconstitutional in a heterosexual context. See *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

²²³ 478 U.S. 186 (1986).

the national constitutional dialogue about the meaning of equality in the context of marriage of same-sex couples. Chief Justice Amestoy concluded his majority opinion in *Baker* with the following observation:

The past provides many instances where the law refused to see a human being when it should have. . . . The challenge for future generations will be to define what is most essentially human. The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.²²⁴

Despite his state-specific reference to "Vermonters," it seems clear that Chief Justice Amestoy was referring to the "common enterprise" of a universal, generalizable, human-rights *question* that transcends the State of Vermont, and even the United States, to encompass the entire world. It was to state-specific Vermont legal sources, however, both textual and historical, that he turned to formulate an *answer* to the universal question.²²⁵

Chief Justice Amestoy's references to Vermonters and to the Common Benefits Clause of the Vermont state constitution do suggest a state-specific inquiry, based on unique state sources or a "discourse of distinctness."²²⁶ This textual focus is an important way to distinguish the interpretation of a state constitution from the United States Supreme Court's interpretations of the federal Constitution.²²⁷ This point was emphasized by Justice Hans Linde of Oregon, one of the most influential scholars and judges in the rise of New Judicial Federalism, when he cautioned that state constitutions are not "common law."²²⁸ He noted that:

[S]tate courts find themselves pulled between fidelity to the state's own charter and the sense that constitutional law is a

²²⁴ *Baker*, 744 A.2d at 889.

²²⁵ See *id.* at 886-87.

²²⁶ See Gardner, *supra* note 20, at 778.

²²⁷ See Tarr, *supra* note 73, at 847-48.

²²⁸ See Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 956 (1993) [hereinafter Linde, *Comments*]; Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 226-29 (1992) [hereinafter Linde, *Common Law?*].

shared enterprise. Fidelity to a constitution need not mean narrow literalism. Most state bills of rights leave adequate room for modern applications, as well as for comparing similar guarantees elsewhere. But fidelity to a constitution means at least to identify what clause is said to invalidate the challenged law, to read what one interprets, and to explain it in terms that will apply beyond the case at issue, not to substitute phrases that have no analogue in the state's charter. . . . A demand that each state's court reach whatever desired result courts in other states have reached, in the common law manner of generic judge-made formulas, denies significance to the lawmaking act of choosing and adopting the constitutional provisions on which claims of unconstitutionality rest.²²⁹

Chief Justice Amestoy's focus on the Common Benefits Clause itself, together with its historic origins, judicial interpretation, and differences from the federal Equal Protection Clause, illustrates Professor Gardner's and Justice Linde's theories just as it reflects Professor Kahn's.²³⁰ In other words, the majority decision in *Baker* both contributes to the national dialogue about equality and is anchored in state-specific, relatively unique Vermont constitutional law sources.²³¹

²²⁹ Linde, *Common Law?*, *supra* note 228, at 228–29. Some years earlier Justice Linde had made a similar point:

Courts, of course, are quite accustomed to seeing differences in state laws without attributing these to different values or beliefs of the state's inhabitants. The values or beliefs that count are those that have been translated into law, often by people with different views from the present generation's. This is true of important differences in people's rights under state statutes and common law; it also is true of state constitutions. . . . The presence or absence of a clause in a constitution—an equal rights amendment, for instance, or a right of privacy—may or may not be evidence of social values, but it is unmistakable evidence of societal action, of the choice whether to enact an idea into law. To bury such choices under a theory of noninterpretive adjudication deprives political action of its constitutional significance.

Linde, *supra* note 92, at 195.

²³⁰ See *supra* text accompanying notes 204–212, 216–220, 228–229.

²³¹ Put differently, using Professor Gardner's terms, the opinion has both positivist and universalist characteristics. See generally James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109 (1998). Professor Gardner distinguished constitutional universalism: "the belief that all American constitutions are drawn from the same set of universal principles of justice and good government," from the positivist approach: "looking to the state constitution's text, history and structure and the underlying values of the state polity that the constitution reflects—in other words, the kinds of sources that would be relevant under a positivist approach to

Professor Lawrence Friedman, building on the work of Professor Kahn and others, has elaborated carefully on the elements and benefits of a true constitutional dialogue between state courts and the United States Supreme Court on shared constitutional issues.²³² Professor Friedman argued that "insofar as the new judicial federalism reflects attempts by state courts independently to interpret the meaning of cognate textual provisions, its legitimacy is buoyed by the federal constitutional value of dialogue—that is, the value that attaches to discourse about law and governance that occurs between and among the different organs of the federal and state governments."²³³ State constitutional decisions on provisions similar to federal constitutional rights guarantees would provide "an interpretative counterpoint to the U.S. Supreme Court."²³⁴ Professor Friedman took issue with Professor Gardner:

Recall Gardner's skepticism about the depth of state constitutionalism as a reflection of state, as opposed to national, values, and his contention that this lack of depth militates against independent interpretation. Because the value of dialogue reflects a *federal* constitutional concern, its vindication vis-à-vis state constitutionalism does not necessarily depend upon differences in the fundamental character and values of the people of the states. In other words, assuming Gardner is correct that state constitutions may reflect variations of a *national* identity, a state court still would not be disabled or precluded from contributing to the larger project of interpreting shared constitutional text, for the dialogic

n other words, the kinds of sources that would be relevant under a positivist approach to constitutional adjudication." *Id.* at 110, 128 (footnote omitted).

Professor Lawrence Friedman concludes that the national contribution will be blunted by reliance on unique state sources. See Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HAST. CONST. L. Q. 93, 143–44 (2000).

²³² See Friedman, *supra* note 231, at 112–23.

²³³ *Id.* at 97.

²³⁴ *Id.* at 129. Professor Friedman elaborated:

The exchange encourages the evolutionary development of constitutional interpretation on the part of each of the participants, to a greater extent in the state court. But this need not be the case: no jurisprudential rule requires the U.S. Supreme Court to ignore state court interpretations of cognate provisions as respectable authority, and the Supreme Court has on occasion relied upon state constitutional decisions for guidance in characterizing federal constitutional obligations.

Id. at 127–28.

approach (to paraphrase Jennifer Friesen) encourages state courts to make *good* constitutional law, using accepted constitutional argument; it does not mandate that state courts make *unique* constitutional law.²³⁵

Thus, Professor Friedman agreed with Professor Kahn and took issue with Professor Gardner, over the need for unique state constitutional sources as an underpinning for independent, legitimate state constitutional law.²³⁶ Like Professor Gardner, though, he called for dialogue, but not a dialogue of "distinctiveness."²³⁷ Although the Vermont *Baker* decision does not necessarily fit Professor Friedman's model,²³⁸ because it was based on the Common Benefits Clause, which has no federal cognate,²³⁹ it seems clear that *Baker* contributes to Professor Friedman's national dialogue model.

The concurrent state and federal responsibility for constitutional decisionmaking, albeit under different constitutions, is a manifestation of American constitutional federalism's "jurisdictional redundancy"²⁴⁰—a term coined by the late Professor Robert Cover by analogy to the use of redundant systems to protect against technological malfunction and ensure reliability.²⁴¹ Redundancy in constitutional interpretation can be, in Professor Cover's terms, either confirmatory, where all authorities are in agreement, or nonconfirmatory, where authorities are in conflict.²⁴² Put into state constitutional terms, state courts can either adopt (agree with) or reject (disagree with) earlier federal constitutional analysis.²⁴³

Professor Cover identified this redundancy in federal and state jurisdiction as providing a variety of positive influences.²⁴⁴ Given the dual goals of courts both to resolve disputes and articulate norms, federal courts may balance these goals differently in interpreting the federal Constitution from the way some state courts balance them in

²³⁵ *Id.* at 137 (internal citation omitted).

²³⁶ *See id.* at 138.

²³⁷ *See* Friedman, *supra* note 231, at 138; *see also* Gardner, *supra* note 20, at 778.

²³⁸ *See* Friedman, *supra* note 231, at 137–43.

²³⁹ *But see infra* note 255 and accompanying text.

²⁴⁰ Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 649 (1981).

²⁴¹ *See id.*

²⁴² *See id.* at 674–75.

²⁴³ *See id.* at 679–80; *see also supra* notes 155–159.

²⁴⁴ *See* Cover, *supra* note 240, at 642. *But see generally* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

interpreting state constitutions.²⁴⁵ Professor Cover noted that "the jurisdictional structure frequently permits recourse to the courts of another system after one system has adjudicated and reached a result. This diachronic or sequential redundancy is comparatively common."²⁴⁶ He identified three areas in which this federal-state jurisdictional redundancy would provide a beneficial influence: interest,²⁴⁷ ideology,²⁴⁸ and innovation.²⁴⁹

Clearly, state judges such as those on the Vermont Supreme Court might, and seemingly did in *Baker*, have a world-view (interest), construction of reality (ideology), and view of the issue of marriage of same-sex couples (innovation) that differed substantially from the predicted views of members of the United States Supreme Court.²⁵⁰ Although there has not yet been a definitive decision by that Court on marriage of same-sex couples, the *Baker* case illustrates nicely Cover's concept of jurisdictional redundancy with the Vermont Supreme Court's norm articulation most likely representing a different, "non-confirmatory" result from that expected from the United States Supreme Court.²⁵¹

Professor Louis Bilonis pointed out another difference between state and federal constitutional interpretation: "[T]he *constitutionally significant facts* may be different at the state and federal levels. . . . Indeed, whenever a constitutional methodology admits a need to accommodate institutional considerations, the possibility for different yet equally correct state and federal results exists."²⁵² A state court's view of "constitutionally significant facts" in equality analysis could certainly differ from the United States Supreme Court's view, thus yielding a different outcome. This seems clearly to have been the case

²⁴⁵ Cover, *supra* note 240, at 643-44.

²⁴⁶ *Id.* at 648.

²⁴⁷ *Id.* at 657, 660-61 (applying to "the judge . . . who simply shares a world-view with the dominant elite").

²⁴⁸ *Id.* at 657, 664 (influencing the "decisionmaker's construction of reality was distorted by the social determinants of his mental world").

²⁴⁹ *Id.* at 657, 673 (interpreting Justice Holmes to argue that "innovation in norm articulation is healthier in a federal system").

²⁵⁰ *Cf.* Cover, *supra* note 240, at 657.

²⁵¹ *Cf. id.* at 674-75.

²⁵² Louis D. Bilonis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1808-09 (1992). Professor Bilonis used the reasonable expectation of privacy in search and seizure cases to illustrate differing views of "constitutionally significant facts." See *id.* at 1809.

in *Baker*, and relates to Professor Sager's point about strategic concerns.²⁵³

Professor Thomas Morawetz has analyzed state constitutional rights decisions and concluded that they either represent an exercise of state deviation from federal constitutional principles, or rather, represent a state judicial exercise of autonomy, without specific reference to related federal constitutional norms.²⁵⁴ He explained:

In understanding the role of judges who must interpret provisions of state constitutions that are identical or very similar to provisions of the federal Constitution, one must distinguish questions of power and authority from questions of interpretive responsibility. Questions of power and authority are answered by the doctrines of federal supremacy and federalism. Accordingly, federal law establishes a minimal national standard for the exercise of individual rights and state judges, under state constitutions, may recognize higher levels of protection for such rights.

But the logic of interpretive responsibility commits judges to offering the best justification they can devise for the rights at issue. That justification may not simply describe a *higher level* of protection but may involve a different way of conceiving the right, using factors that may or may not be idiosyncratic to the state context. The logical implications of that way of conceiving the right may create conceptual tension with the way in which federal courts have conceived the right. Of course, if the scope of the former conception is narrower than the scope of the latter, its practical implications are nil.

Thus, from the standpoint of power and authority, it is appropriate to see state courts as needing to justify *deviation* from the federal norm, to justify expanding a right. But from the standpoint of interpretive responsibility, state courts are necessarily autonomous, committed by the very nature of the judicial task to offering a compelling account of the rights in

²⁵³ See *supra* text accompanying notes 135–139.

²⁵⁴ See Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 657 (1994). This is related to, but with less emphasis on, the *relation* between federal and state constitutional decision, Cover's "confirmatory and nonconfirmatory" categories. See Cover, *supra* note 240, at 674–75.

question, an account that may or may not dovetail with the federal understanding.²⁵⁵

Professor Morawetz's view seems to contrast with Professor Gardner's, whose "discourse of distinctness" thesis was based on justifications for deviation involving issues of power and authority,²⁵⁶ rather than on autonomy based on "interpretive responsibility."²⁵⁷ Professor Morawetz's emphasis on interpretive responsibility is more consistent with Justice Linde's view,²⁵⁸ albeit with less emphasis on specific text, as well as with Professor Kahn's view.²⁵⁹

Although Professor Morawetz indicated that sometimes it is difficult to distinguish an opinion relying on the deviation approach from an opinion relying on the autonomy approach,²⁶⁰ the *Baker* decision presents a clear example of an autonomy opinion. *Baker* sets out specifically to interpret the Common Benefits Clause of the Vermont constitution and does not labor excessively to justify deviation from the likely federal constitutional answer to the claim.²⁶¹ It does, however, justify a different equality doctrine, and judicial approach, from that contained in federal Equal Protection Clause doctrine.²⁶² This is true as well for Justice Dooley's concurring opinion.²⁶³ The Vermont Supreme Court approached the *Baker* case as a matter of "interpretive responsibility" rather than a matter of "power and authority."²⁶⁴

Professor Robert Schapiro has challenged the existing legal theories about state constitutional rights protection, particularly Professor Gardner's idea that for truly independent interpretation of a state constitution there must be "an identifiable state community, an entity whose inhabitants share distinctive ideals, customs, and traditions."²⁶⁵ Professor Schapiro argued that it is not the identity of the people of the state, but rather the ideals defined by the constitution itself that form the underpinning for a vibrant, independent state constitutional

²⁵⁵ See Morawetz, *supra* note 254, at 656-57 (internal citation omitted).

²⁵⁶ See *supra* text accompanying notes 207-212.

²⁵⁷ See Morawetz, *supra* note 254, at 656.

²⁵⁸ See *supra* text accompanying notes 228-229.

²⁵⁹ See *supra* text accompanying notes 216-220.

²⁶⁰ See Morawetz, *supra* note 254, at 639.

²⁶¹ See *Baker*, 744 A.2d at 878.

²⁶² See *id.* at 877-79.

²⁶³ See *id.* at 890-91.

²⁶⁴ See Morawetz, *supra* note 254, at 656-57.

²⁶⁵ Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va. L. Rev. 389, 391 (1998) (footnote omitted).

discourse.²⁶⁶ He contended that what is at issue is really a debate over judicial review itself, and that Professor Gardner's requirement of a demonstrated state community served as a condition precedent to the exercise of independent state constitutional judicial review.²⁶⁷ He proposed, as an alternative, the form of "ethical" argument proposed by Philip Bobbitt.²⁶⁸ Professor Schapiro concluded:

The text and structure of the Constitution provide the materials for deriving ethical arguments. The ethical modality does not understand constitutional interpretation as an exercise in deriving fundamental values directly from an examination of a community. Rather, by studying the text and structure of the Constitution, one comes to understand the deeply held beliefs that the polity has enshrined in its fundamental charter. For our purposes, Bobbitt's key insight is that fundamental values may be derived from the structure and relationships embodied in the Constitution. The people speak and their underlying commitments give meaning to their brief and suggestive words; however, judges do not seek to divine these commitments directly, but through the medium of the Constitution. By identifying an ethos through an examination of the values placed in a constitution, courts may avoid various supposed obstacles to independent interpretation.²⁶⁹

To illustrate the ethical approach, Professor Schapiro, like Professor Kahn, examined equality doctrine.²⁷⁰ The Vermont *Baker* decision reflects a judicial inquiry into the "ethos" of the Common Benefits Clause of the Vermont state constitution rather than any attempt to access the values of the current Vermont community.²⁷¹ Chief Justice

²⁶⁶ See *id.* at 393.

²⁶⁷ *Id.* at 393-94.

²⁶⁸ *Id.* at 441-42 (citing PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 94-95, 137-56 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 20-21, 137 (1991)). Interestingly, the landmark Vermont *State v. Jewett* opinion cited Bobbitt's approach with approval. See 500 A.2d 233, 237 (Vt. 1985). For discussion of *Jewett*, see *supra* notes 14-20 and accompanying text.

²⁶⁹ See Schapiro, *supra* note 265, at 442-43.

²⁷⁰ See *id.* at 444 ("Reading the particular constitution and understanding the values that it expresses might well provide additional information relevant to answering the interpretive inquiry. Equality may have different meanings and its particular expression may be informed by other values of constitutional magnitude.").

²⁷¹ See generally *Baker*, 744 A.2d at 864 (basing the holding on the Common Benefits Clause's historical and textual meaning).

Amestoy examined the "ideological origins" of the clause, which he found to provide a "useful light upon the inclusionary principle at its textual core."²⁷² He provided a searching and deep analysis of the revolutionary "deep-seated domestic antagonisms,"²⁷³ concluding that "[t]he powerful movement for 'social equivalence' unleashed by the Revolution ultimately found its most complete expression in the first state constitutions adopted in the early years of the rebellion."²⁷⁴ Chief Justice Amestoy did not attempt to analyze the "inclusionary" instincts of the current population or community of Vermont, but rather relied on the general, American, 220-year-old egalitarian philosophy which, in Professor Schapiro's terms, demonstrates that "by studying the text and structure of the Constitution, one comes to understand the deeply held beliefs that the polity has enshrined in its fundamental charter."²⁷⁵ From this point of view, Chief Justice Amestoy's majority decision in *Baker* reflects Justice Linde's and Professor Schapiro's argument that the state constitutional text and its animating political origins must be the touchstones of state constitutional interpretation.²⁷⁶

Dean Daniel Rodriguez has pointed out that now, as a result of the "devolution revolution," many important questions of public policy are no longer being decided at the federal level, but are left to the states.²⁷⁷ He asked whether there is "anything theoretically special about state constitutionalism beyond the availability of state constitutions as a source of rights and liberties?"²⁷⁸ He answered:

While it follows that each state is to be left to its own devices in shaping its own constitutional discourse, it does not follow that each state ought to fashion its independent, separate theory of state constitutionalism. On the contrary, there are sound reasons for developing a comprehensive—let us call it "trans-state"—constitutional theory which can help orient constitutional discourse throughout the United States. What is called for in the end is a balance: States can

²⁷² *Id.* at 875.

²⁷³ *Id.*

²⁷⁴ *Id.* at 876.

²⁷⁵ Schapiro, *supra* note 265, at 442.

²⁷⁶ *Cf. supra* text accompanying notes 228–229, 266–269.

²⁷⁷ Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N. MEX. L. REV. 271, 272–73 (1998).

²⁷⁸ *Id.* at 273. Dean Rodriguez reminds us that "[m]odern constitutional theory is, in the main, national constitutional theory." *Id.*

develop independent discourse to account for their own, distinct constitutional traditions; at the same time, states can build upon a more general, trans-state constitutional discourse. After all, states share in common a set of constitutional objectives.²⁷⁹

Dean Rodriguez was primarily discussing the institutional structure set forth in state constitutions.²⁸⁰ Nonetheless, at least in states that have common benefits or similar clauses, the Vermont *Baker* decision does provide the basis for a "trans-state" constitutional theory, particularly if one remembers that family and personal relationships are, generally, uniquely within the competence of states to regulate.²⁸¹

One of the criticisms of state constitutions, including Professor Gardner's,²⁸² has been that they contain a wealth of non-fundamental policy matters that would be better relegated to statutory law. Professor James Pope made this point in the following way:

At bottom, the problem with state constitutionalism is—as James Gardner has thoroughly, ruthlessly, and humorously shown—that state constitutions just aren't all that *constitutional*. How can anyone expect judges to develop independent *constitutional* jurisprudence on a textual foundation that changes with every legislative or popular whim, obsesses in excruciating detail over pecuniary matters, and declares the law on such fundamentals as golf course tax exemptions and bingo regulation?²⁸³

Professor Pope, though, went on to contend that there have been, in fact, a number of very important "vital provisions" that are "of sufficient constitutional weight to alter the field of state constitutional interpretation."²⁸⁴ Professor Pope differentiated the *constitutional* provisions of state constitutions from those that are merely constitutional

²⁷⁹ *Id.* at 290–91.

²⁸⁰ See generally *id.* at 288–91.

²⁸¹ See *id.* at 300 ("Each state in our union ought to be seriously responsible for addressing systematically and efficiently the needs and demands of its citizens."). The late Dr. Daniel J. Elazar has indicated that the structure of American constitutionalism has almost always left such matters to the states and to state constitutions, rather than to the federal Constitution. See Elazar, *Foreword*, *supra* note 81, at 859; see also ELAZAR, *TRADITION*, *supra* note 81, at 170.

²⁸² See Gardner, *supra* note 20, at 761; see also Kalin, *supra* note 216, at 1159 n.52.

²⁸³ James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 *RUTGERS L.J.* 985, 985 (1993).

²⁸⁴ *Id.* at 1007.

because they have been included in the state constitution.²⁸⁵ He derived this distinction from the 1977 New Jersey case, *Vreeland v. Byrne*.²⁸⁶ The *Vreeland* court observed:

Not all constitutional provisions are of equal majesty. Justice Holmes once referred to the "great ordinances of the Constitution." Within this category would be included the due process clause, the equal protection clause, the free speech clause, all or most of the other sections of the Bill of Rights, as well as certain other provisions. The task of interpreting most if not all of these "great ordinances" is an evolving and on-going process. . . .

But there are other articles in the Constitution of a different and less exalted quality. Such provisions generally set forth—rather simply—those details of governmental administration as are deemed worthy of a place in the organic document. . . .

Such constitutional provisions as these, and others like them, important as they doubtless may be, are entirely set apart from the "great ordinances" mentioned above, and as a matter of constitutional interpretation should receive entirely different treatment. Where in the one case the underlying spirit, intent and purpose of the Article must be sought and applied as it may have relevance to the problems of the day, in the other a literal adherence to the words of the clause is the only way that the expressed will of the people can be assured fulfillment.²⁸⁷

Professor Pope proposed a similar distinction, with "vital" state constitutional provisions receiving the Holmesian "great ordinance" approach.²⁸⁸

²⁸⁵ See at 988.

²⁸⁶ See *id.*; see also *Vreeland v. Byrne*, 370 A.2d 825 (N.J. 1977).

²⁸⁷ *Vreeland*, 370 A.2d at 831-32 (internal citation omitted).

²⁸⁸ See Pope, *supra* note 283, at 1002-04. Professor Gardner, although conceding that Professor Pope's analysis had "undeniable appeal," disagreed, concluding, "What makes something a constitution is not its content or its pedigree, but the current attitude of the people toward it." Gardner, *What Is?*, *supra* note 213, at 1031, 1032; see also TARR, *supra* note 75, at 190 ("For one thing, dispensing with 'lesser' provisions in building a state constitutional jurisprudence is highly questionable, because what a state chooses to include in its constitution is important evidence of the vision underlying the document. In addition, the sharp bifurcation of constitutional provisions reintroduces in another context Gardner's dubious distinction between what is truly constitutional and what is not.")

As examples of truly constitutional provisions, Professor Pope cited Jacksonian democracy, the populist-progressive movement for direct democracy, and the guarantees of free public schools.²⁸⁹ The Vermont *Baker* decision focuses on another category of truly constitutional provisions: equality provisions such as the Common Benefits Clause. These kinds of provisions in state constitutions reflect vital constitutional moments. The Vermont Common Benefits Clause certainly appears to be a rather majestic, vital "great ordinance" of the state constitution. The Vermont Supreme Court treated it in a manner befitting such a constitutional clause, as one of the "flexible pronouncements constantly evolving responsively to the felt needs of the times."²⁹⁰ In other words, the provision was considered to be *constitutional* and was interpreted accordingly.²⁹¹

Dr. Douglas Reed has described a new theory of state constitutional meaning that emanates not exclusively from courts, but rather from an "exchange between popular mobilization and judicial interpretation."²⁹² One form of this he refers to as "legal mobilization through public interest litigation."²⁹³ Dr. Reed has reviewed the so-called "down and out" scholarship by those who seek to "de-center" the courts as the exclusive source of constitutional meanings, and applied those theories to the movement for recognition of marriage of same-sex couples or civil union.²⁹⁴ As he stated:

Legal mobilization is a political and strategic practice that seeks to redefine legal rights and to transform the interests that are claimed or perceived as legal rights. The transformation occurs both at the level of individual consciousness and institutional recognition. Thus, legal mobilization is a regularized political practice that strives to reallocate power within a regime or political order. It does so by asking rank and file members to reconceive their grievances as rights

²⁸⁹ See Pope, *supra* note 283, at 1004.

²⁹⁰ See *id.* at 987; see also *Baker*, 744 A.2d at 875–76.

²⁹¹ See Pope, *supra* note 283, at 987; see also *Baker*, 744 A.2d at 874–76.

²⁹² Reed, *supra* note 8, at 875; see also Rodriguez, *supra* note 202, at 530 ("[I]f the centrality—or, at least the exclusivity—of constitutional adjudication as a method for framing constitutional discourse is replaced by legislative, administrative, and citizen/grass-roots action, then the pressure groups who regularly participate in state constitutional politics will organize their strategies accordingly.").

²⁹³ Reed, *supra* note 8, at 875.

²⁹⁴ *Id.* at 881; see also Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–1995*, 26 LAW & SOC. INQUIRY 631 (2001) (using a similar approach).

and then by seeking legal legitimization of that reconceptualization. From the perspective of down and out legal scholarship, the practice and struggle over the allocation of rights is effectively a process of constitutional definition. The value of down and out scholarship is that it enables us to see these episodes not merely as recurring legal contests, but as fundamental fights over the meaning and content of state constitutional provisions.²⁹⁵

Under this view, even the federal and state cases that failed to authorize marriage of same-sex couples or civil union rights worked to fuel the legal mobilization through transforming people's consciousness about their entitlement to rights.²⁹⁶ This seems to be an accurate account of what happened in Hawaii (although it was met with another form of popular constitutionalism)²⁹⁷ and can certainly account for the litigation in Vermont.

B. Other Perspectives

Dr. G. Alan Tarr has noted that in contrast to the great question in federal constitutional law about the legitimacy of judicial review itself, the central question in state constitutional law has concerned the legitimacy of state constitutional rulings that diverge from, or "go beyond," federal constitutional minimum standards.²⁹⁸ This was also the focus of Professor Gardner's concern, as well as a central element of Professor Morawetz's analysis.²⁹⁹ Dr. Tarr had indicated that constitutional theory had not been brought to bear on state constitutionalism and that textualism and originalism had represented the most

²⁹⁵ Reed, *supra* note 8, at 893-94. Elsewhere Dr. Reed notes that:

The meanings of state constitutions are frequently forged outside judicial confines because state constitutions give great credence and power to democratic majorities, which invites political contestation and dispute. This political responsiveness of state constitutions, in conjunction with the expansion of the state judicial agenda under the "new judicial federalism," has made state constitutional politics an increasingly dynamic and energetic form of political contestation in recent times.

Id. at 885.

²⁹⁶ See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

²⁹⁷ See *supra* notes 176-180, and accompanying text.

²⁹⁸ See TARR, *supra* note 75, at 174-75; see also Rodriguez, *supra* note 202, at 531.

²⁹⁹ See *supra* notes 202, 251 and accompanying text.

appealing first steps toward an independent state constitutional approach.³⁰⁰ Recently, he has grown more optimistic, concluding:

Doubts about the viability of state constitutional jurisprudence have not prevented its development. . . .

....

This is not to deny the difficulty of the enterprise of state constitutional interpretation. State constitutions are distinctive documents, and the approach to their interpretation must take account of that distinctiveness. Contemporary constitutional theory can assist in the development of a state constitutional jurisprudence, but state interpreters nevertheless confront a host of problems for which constitutional theorists supply no solutions. Yet these problems are not insuperable. Through attention to the text of state provisions, to their generating history, to their place in the state's overall constitutional design, and to their relation to earlier state provisions as well as provisions in other states, state interpreters can develop a body of law that reflects the distinctive traditions of state constitutionalism.³⁰¹

Dr. Tarr has identified an important perspective on state constitutional interpretation and jurisprudence: No single theory will explain, justify or account for the developments of the New Judicial Federalism.³⁰² Outcomes will depend on the clarity as well as the distinctness of the state constitutional text (both in contrast to the federal and other state texts),³⁰³ its character as an open-textured or "great ordinance,"³⁰⁴ the presence of either general or specific state constitutional history,³⁰⁵ precedents and judicial doctrines that have been developed within the state in interpreting the state constitutional provision at issue,³⁰⁶ precedents and judicial doctrines from other states (particularly those from which the provision was copied) with similar or identical provisions,³⁰⁷ judges' assessments of "strategic concerns,"³⁰⁸ as well as, of course, judges' attitudes and "reasoned

³⁰⁰ See *supra* notes 77, 202.

³⁰¹ TARR, *supra* note 75, at 208-09.

³⁰² See *id.*

³⁰³ See *id.* at 185.

³⁰⁴ See *id.* at 187.

³⁰⁵ See *id.* at 192.

³⁰⁶ See TARR, *supra* note 75, at 197.

³⁰⁷ See *id.* at 199.

³⁰⁸ Sager, *supra* note 135, at 974.

judgment."³⁰⁹ Each of these factors must be assessed and weighed separately, and in relation to each other, leading to different approaches in different kinds of cases.³¹⁰ This is at least a partial answer for those scholars who search for a single constitutional theory to explain the New Judicial Federalism, or who call on courts to follow a single methodology.³¹¹

Whether one agrees with the outcome of *Baker* or not, it must be conceded that the decision engages in a serious state constitutional "discourse of distinctness,"³¹² albeit without resort to the values of the current Vermont community. Interestingly the opinion reflects many of the other state constitutional theories set forth by scholars and discussed here: Professor Kahn's "common enterprise,"³¹³ Justice Linde's "fidelity to a constitution,"³¹⁴ Professor Friedman's "dialogue,"³¹⁵ Professor Cover's "jurisdictional redundancy,"³¹⁶ Professor Sager's "strategic concerns,"³¹⁷ Professor Morawetz's "autonomy rather than deviation,"³¹⁸ Professor Schapiro's "ideals defined by the constitution itself,"³¹⁹ Dean Rodriguez's "trans-state constitutional theory,"³²⁰ and Professor Pope's "great ordinances."³²¹ As Dr. Tarr suggests, it appears that no single theory can account for the complexities of state constitutional interpretation within the New Judicial Federalism.³²²

CONCLUSION

Oregon Justice Hans A. Linde said that in order "to make an independent argument under the state clause [it] takes homework—in texts, in history, in alternative approaches to analysis."³²³ The Vermont *Baker* decision is one of the better examples of working with the advice given by Justice Linde a generation ago. *Baker* demonstrates the application of virtually all of the lessons of the New Judicial Federal-

³⁰⁹ *Baker*, 744 A.2d at 879.

³¹⁰ See TARR, *supra* note 75, at 209.

³¹¹ See, e.g., Landau, *supra* note 96. See generally Williams, *supra* note 15.

³¹² Gardner, *supra* note 20, at 788.

³¹³ Kahn, *supra* note 216, at 1168.

³¹⁴ Linde, *Common Law?*, *supra* note 228, at 228.

³¹⁵ Friedman, *supra* note 231, at 137.

³¹⁶ Cover, *supra* note 240, at 649.

³¹⁷ Sager, *supra* note 135, at 974.

³¹⁸ Morawetz, *supra* note 254, at 656.

³¹⁹ Schapiro, *supra* note 265, at 393.

³²⁰ Rodriguez, *supra* note 277, at 291.

³²¹ Pope, *supra* note 283, at 831.

³²² TARR, *supra* note 75, at 209.

³²³ Linde, *supra* note 146, at 392.

ism. The case provides a methodological primer with application far beyond the merits of its substantive outcome. It is not merely a provincial, state-specific decision. *Baker* possibly will live up to the late Justice Thomas Hayes' hope that "decisions taken under Vermont's constitution may give courage to another state to come to the same or similar resolution under its constitution."³²⁴ *Baker* may prove to be not only a source of courage, but also of some of the political and legal tools necessary to accomplish legal change.

Eugene Rostow made a famous observation about the United States Supreme Court in 1952: "The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar."³²⁵ Toward the end of the twentieth century, and at the beginning of the twenty-first, state justices are taking their seats at the head of the seminar table.

³²⁴ Hayes, *supra* note 18, at 153.

³²⁵ Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).