

BAKER V. STATE AND THE PROMISE OF THE NEW JUDICIAL FEDERALISM

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Abstract: In *Baker v. State*, the Supreme Court of Vermont ruled that the state constitution's Common Benefits Clause prohibits the exclusion of same-sex couples from the benefits and protections of marriage. *Baker* has been praised by constitutional law scholars as a prototypical example of the New Judicial Federalism. The authors agree, asserting that the decision sets a standard for constitutional discourse by dint of the manner in which each of the opinions connects and responds to the others, pulls together arguments from other state and federal constitutional authorities, and provides a clear basis for subsequent development of constitutional principle. This Article explores the ways the Vermont justices employed doctrinal threads from these authorities, analyzes and critiques perceived shortcomings in the reasoning of each opinion, and then addresses the important contribution that independent state constitutional jurisprudence can make to constitutional discourse. The Article further encourages law schools to implement curricular changes that will expose students to state constitutional law.

INTRODUCTION

In *Baker v. State*,¹ the Supreme Court of Vermont ruled that the state constitution's Common Benefits Clause prohibits the exclusion of same-sex couples from the benefits and protections of marriage.² The decision has been hailed by some commentators for what they see as its progressive understanding of sexual orientation in the con-

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¹ 744 A.2d 864 (Vt. 1999).

² See *id.* at 867.

text of the constitutional commitment to equal treatment.³ *Baker* has also been praised by state constitutional scholars,⁴ who have welcomed the decision as a prototypical example of the New Judicial Federalism—that is, of decisions based upon state constitutional provisions that “have served either as independent and adequate bases, or as the only bases, for ruling on questions of individual rights and liberties.”⁵ Robert Williams, for example, has suggested that *Baker* “provides a methodological primer [for state constitutional interpretation] with application far beyond the merits of its substantive outcome.”⁶

We agree that *Baker* represents an important development in state constitutional jurisprudence, though not simply because it validates the possibility of legal same-sex unions, or because it “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.”⁷ Our interest in *Baker* derives chiefly from the majority and concurring justices’ approaches to the task of interpreting the Common Benefits Clause: rather than accounting for the decision simply by citing to the opinions of other courts, or by choosing to follow one or another of the competing lines of development in federal cases—between, say, the majority and dissenting views in *Bowers v. Hardwick*⁸—the Vermont justices assumed the responsibility for explicating the principles they adopted as part of Vermont constitutional law.

This is not a trivial point. While numerous state courts today invoke their sovereign authority to interpret their states’ constitutions independently of the federal constitution in cases involving correla-

³ 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, 1404–05 (2000) (endorsing *Baker*’s progressive stance); Michael Mello, *For Today I’m Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 149 (2000) (discussing the context of the *Baker* decision and the consequences of the decision in the law of sexual orientation).

⁴ See, e.g., Daniel Gordon, *Brennan’s State Constitutional Era Twenty-Five Years Later—The History, the Present, and the State Constitutional Wall*, 72 TEMP. L. REV. 1031, 1056–58 (2000) (discussing *Baker*); Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Same-Sex Marriage Case*, 42 B.C. L. REV. 73 *passim* (2002) (discussing *Baker v. State* as a model of state constitutional jurisprudence).

⁵ John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 913 n.1 (1995) (defining the “New Judicial Federalism”).

⁶ Williams, *supra* note 4, at 122.

⁷ *Id.* at 75 (quotation omitted).

⁸ 478 U.S. 186, 191 (1986) (upholding conviction for homosexual sodomy against substantive due process challenge); *id.* at 199–200 (Blackmun, J., dissenting) (arguing that abridgment of the “right to be let alone” requires state to demonstrate a compelling interest).

tive provisions of the state and federal constitutions,⁹ many continue to rely upon past and present federal precedents as the analytical beginning and end for state constitutional interpretation. Indeed, it is often the case that a state constitutional decision may reflect little in the way of substantive examination of a state constitutional provision beyond a discussion of the most nearly apposite U.S. Supreme Court opinion, whether it be a majority, concurrence, or dissent.¹⁰ Citation to a federal opinion, in other words, too often serves as a substitute for the considered reasoning that should accompany a particular interpretation of a state's constitution.¹¹

Consider a recent—and vivid—example. In *Lopez v. Director, New Hampshire Division of Motor Vehicles*, the New Hampshire Supreme Court addressed the question whether, under the state constitution, the exclusionary rule should be applied in an administrative license revocation proceeding to exclude inculpatory evidence obtained as a result of police misconduct.¹² Notwithstanding that the New Hampshire Supreme Court, in a 1995 decision, expressly rejected the U.S. Supreme Court's understanding of the exclusionary rule as a matter of judicial policy, rather than a constitutional mandate,¹³ the *Lopez* court held, without further explanation, that the U.S. Supreme Court's determination that the exclusionary rule applies only in criminal proceedings also should control in New Hampshire.¹⁴ Indeed, the court's "analysis" consisted almost entirely of a citation to federal precedent and an indication of the court's agreement with that decision.¹⁵

⁹ See 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, 1017–18 (1997) (noting that most commentators "have stopped counting" the number of cases in which state courts have interpreted their states' constitutions differently than the federal constitution).

¹⁰ See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 208 (1998) (observing that too many state courts "frame their analysis in federal doctrinal categories, making state constitutional law merely a poor relation, stuck with ill-fitting hand-me-downs").

¹¹ See Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 657 (1994) (observing that, "from the standpoint of interpretive responsibility," the nature of the judicial task commits state courts to offering "a compelling account" of the state constitution, "an account that may or may not dovetail with the federal understanding").

¹² 761 A.2d 448, 450 (N.H. 2000).

¹³ See *State v. Canelo*, 653 A.2d 1097, 1103 (N.H. 1995).

¹⁴ See *Lopez*, 761 A.2d at 451.

¹⁵ See *id.* (citing *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363–64 (1998)).

A genuinely independent state constitutional jurisprudence demands a more reasoned explanation for the adoption of constitutional principles than mere citation to a decision of the U.S. Supreme Court.¹⁶ This is not to say that state courts should turn a blind eye to decisions of the federal courts, or any other court; to the contrary, state courts should feel obliged to review the best and most relevant decisions of all courts in resolving questions involving individual rights and liberties under their states' constitutions. There is nothing inherently wrong, moreover, with a state court taking the time to explain why certain precedents should be rejected and others followed in a particular instance, so long as that court endeavors to explain why a given principle warrants consideration as a matter of state constitutional law.¹⁷

Importantly, a state court that commits itself to explaining the basis for adopting a state constitutional rule does more than fulfill the judicial obligation to articulate reasons for the immediate result; such a decision also connects that court to a larger discourse among judges and jurists on the meaning of the "great ordinances" of the state and federal constitutions—those inherently vague constitutional provisions that secure individual rights and liberties like equality, due process, and free expression.¹⁸ *Baker* exemplifies such decisionmaking. In drawing upon, discussing, and refining an array of state and federal equal protection doctrines and precedents, the majority and concurring opinions in *Baker* each connect to an ongoing discourse on the meaning of equal protection and the proper understanding of judicial review in the equal protection context.

In this Article, we examine the efforts of the justices in *Baker* to make sense of the Common Benefits Clause, as well as some of the

¹⁶ See, e.g., Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981) (questioning the assumption "that state constitutional law is simply 'available' to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory" by state court judges); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1015 (1985) (criticizing state constitutional analysis as based simply upon "disagreement with the Supreme Court's conclusion").

¹⁷ As Judith Kaye, of the New York Court of Appeals, has observed, when it is apparent that the U.S. Supreme Court has, in a particular area, "diluted constitutional principles," a state court does not act improperly in "discharging [a] responsibility to support the State Constitution" by examining whether it is wise to "follow along as a matter of state law." *People v. Scott & People v. Keta*, 593 N.E.2d 1328, 1347 (N.Y. 1992) (Kaye, J., concurring).

¹⁸ The "great ordinances do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other." *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., concurring).

larger constitutional questions those efforts raise. We begin, in Part I, by reviewing the majority and concurring opinions and the differing approaches taken by the justices regarding the central issue in the case—the constitutionality of the Vermont marriage laws' exclusion for same-sex couples.¹⁹ In Part II, we explore the different ways in which the justices profitably employed doctrinal threads from prior state and federal equal protection cases in their interpretations of the Common Benefits Clause, as well as the logical and prudential shortcomings of the justices' approaches.²⁰ In addition, we survey some paradigmatic issues of judicial review in respect to the great ordinances that the *Baker* opinions illuminate.²¹ Finally, in Part III, we address the importance of the contribution that genuinely independent state constitutional jurisprudence can make to constitutional discourse about the great ordinances, as well as the roles that lawyers and law schools can play in enhancing the quality of that contribution.²²

I. *BAKER V. STATE*: THE OPINIONS

The plaintiffs in *Baker* were three same-sex couples who had been living together for some time in committed relationships.²³ The state had refused each couple a marriage license on the ground that, under the applicable state marriage laws, they were ineligible for such licenses.²⁴ The plaintiffs sought a declaratory judgment that the refusal to issue them marriage licenses violated, among other things, the marriage statutes and the Vermont Constitution.²⁵ The trial court ruled that the marriage statutes did not permit the issuance of licenses to same-sex couples, and found the statutes themselves constitutional "because they rationally furthered the state's interest in promoting the link between procreation and child rearing."²⁶

Chief Justice Jeffrey Amestoy authored the majority opinion. After rejecting the plaintiffs' statutory claim,²⁷ he turned to the argu-

¹⁹ See *infra* notes 23–87 and accompanying text.

²⁰ See *infra* notes 88–147 and accompanying text.

²¹ See *infra* notes 148–161 and accompanying text.

²² See *infra* notes 162–179 and accompanying text.

²³ *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

²⁴ See *id.*

²⁵ See *id.* at 868.

²⁶ *Id.* (quotation omitted).

²⁷ In their statutory claim, the plaintiffs asserted that the trial court erroneously construed the marriage statutes to render the plaintiffs ineligible for marriage licenses. See *id.* at 868. Vermont's marriage statutes define the requirements and eligibility for entering into a marriage, see VT. STAT. ANN. tit. 15, c. 1 (2001), and the forms and procedures for

ment that the exclusion of same-sex couples from eligibility for a marriage license violated their "right to the common benefits and protection of the law guaranteed by Chapter I, Article 7 of the Vermont Constitution."²⁸ The plaintiffs maintained that, in denying them access to a marriage license, Vermont law effectively excluded them from the benefits and protections attendant to marriage, such as access to health insurance, hospital visitation and medical decisionmaking privileges, spousal support, intestate succession, and homestead protections.²⁹ The plaintiffs challenged the trial court's determination that the exclusion of same-sex couples "reasonably served the State's interest in promoting the link between procreation and child rearing."³⁰

The majority began its analysis by suggesting that the court's reliance upon federal equal protection precedent in prior Common Benefits Clause cases was a qualified one.³¹ Though the court had frequently employed in this context the federal three-tiered framework pursuant to which courts seek a rational basis for the challenged law or apply heightened scrutiny if the law implicates a fundamental right or suspect class,³² the majority maintained that "recent Vermont decisions reflect a very different approach from current federal jurisprudence. That approach may be described as broadly deferential 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 government objective."³³ The Chief Justice pointed to *State v. Ludlow Supermarkets, Inc.*, a 1982 case involving a Sunday clos-

obtaining a license and "solemnizing" a marriage. See VT. STAT. ANN. tit. 18, § 5131 (1999). Looking to the "plain and ordinary meaning of the statutory language, the court concluded that "there is no doubt" that the term "marriage" refers to "the union of one man and one woman as husband and wife." *Baker*, 744 A.2d at 868. The plaintiffs also argued that the law should be construed to include same-sex couples, so as to further the underlying purpose of marriage: "to protect and encourage the union of committed couples." *Id.* at 869. The court rejected this argument as well, reasoning that limiting marriage to opposite-sex couples did not violate the underlying purpose of the statutes. See *id.* "Rather," the court concluded, "the evidence demonstrates a clear legislative assumption that marriage under the [Vermont] statutory scheme consists of a union between a man and a woman." *Id.*

²⁸ *Id.* at 869-70. The plaintiffs also raised additional arguments under the United States and Vermont Constitutions; the court did not reach those issues in light of its resolution of the Common Benefits claim. See *id.* at 870 n.2.

²⁹ See *id.* at 870.

³⁰ *Id.* (quotation omitted).

³¹ See *Baker*, 744 A.2d at 870.

³² See *id.* at 870-71 & n.3.

³³ *Id.* at 871.

ing law that allegedly discriminated among classes of commercial establishments on the basis of their size.³⁴ The *Ludlow Supermarkets* court held that the Common Benefits Clause requires courts to engage in case-specific analysis to ensure that there is a just and reasonable relation to legislative goals for each instance of exclusion from the general benefit and protection of the law.³⁵ The *Baker* majority likewise sought to cast aside both labels and "[t]he rigid categories utilized by the federal courts under the Fourteenth Amendment."³⁶

The majority next reviewed the text of the Common Benefits Clause, announcing an intention to rely upon an interpretation of "past thought and actions" to inform its analysis of the Common Benefits Clause in the instant case—to use history as a guide to the distillation of "the essence, the motivating ideal of the framers."³⁷ As originally drafted, the text of the Common Benefits Clause read:

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 man, family or set of men, who are only a part of that community; and that the community hath an indubitable, unalienable and indefeasible right, to reform, alter or abolish government, in such manner as shall be, by that community, judged most conducive to the public weal.³⁸

The first section of the Common Benefits Clause, the majority concluded, "provid[es] that government is established for the common benefit of the people and community as a whole," thus reflecting "the confidence of a homogeneous, eighteenth-century group of men aggressively laying claim to the same rights as their peers in Great Britain or, for that matter, New York, New Hampshire, or the upper Connecticut River Valley."³⁹ The second section also assumes "that all the people should be afforded the benefits and protections bestowed by

³⁴ 448 A.2d 791, 792 (Vt. 1982).

³⁵ *Baker*, 744 A.2d at 872 (citing *Ludlow*, 448 A.2d at 795).

³⁶ *Id.* at 873. The approach articulated in the *Ludlow Supermarkets* opinion, the *Baker* majority concluded, reflected "the language, history and values at the core of the Common Benefits Clause." *Id.*

³⁷ *Id.* at 874. As the court stated in *State v. Kirchoff*: "[O]ur duty is to discover . . . the core value" at stake. 587 A.2d 988, 992 (Vt. 1991).

³⁸ Vt. CONST. of 1777, art. VI, ch. 1. The modern version of the Common Benefits Clause substitutes the gender-neutral terms "person" and "persons" for "man" and "men." See *Baker*, 744 A.2d at 874 n.6.

³⁹ *Id.* at 874.

government," thus prohibiting "not the denial of rights to the oppressed, but rather the conferral of advantages or emoluments upon the privileged."⁴⁰ In the majority's view, the Common Benefits Clause, "at its core . . . expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage."⁴¹

Tracing the historical origins of the Common Benefits Clause,⁴² the majority recounted revolutionary-era events in Vermont and "Vermont's double revolution"—the "successful revolt against both Great Britain and New York by the yeoman farmers, small-scale proprietors, and moderate land speculators who comprised the bulk of the Green Mountain Boys."⁴³ The majority concluded that:

[T]he 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. The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages.⁴⁴

Based on its review of the text and history of the Common Benefits Clause, the majority adopted "a relatively uniform standard, reflective of the inclusionary principle," to govern judicial analysis of laws challenged under the Clause, as opposed to the sort of "rigid, multi-tiered analysis" that applies under the Equal Protection Clause.⁴⁵ This standard requires that a court first define that "part of the community" purportedly "disadvantaged by the law."⁴⁶ The task is simply to delineate a class, not to label it as "suspect," "quasi-suspect," or "non-suspect."⁴⁷ Next, the court looks to the governmental purpose in drawing a classification that includes some members of the com-

⁴⁰ *Id.*

⁴¹ *Id.* at 875.

⁴² See *id.* at 875-76. The majority relied upon the scholarship of Bernard Bailyn and Gordon Wood. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 307 (1967); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 75-82 (1969).

⁴³ *Baker*, 744 A.2d at 876.

⁴⁴ *Id.*

⁴⁵ *Id.* at 878.

⁴⁶ *Id.*

⁴⁷ *Id.*

munity but excludes others, by examining "the nature of the classification to determine whether it is reasonably necessary to accomplish the state's claimed objectives."⁴⁸ In the end, the court must "ascertain whether the omission of a part of the community from the benefit, protection, and security of the challenged law bears a reasonable and just relation to the governmental purpose."⁴⁹

Relying on federal cases in the substantive due process context, the majority stressed that its Common Benefits Clause standard would not be rudderless:

As Justice Souter has observed in a different context, this approach necessarily calls for a court to assess the relative "weights" or dignities of the contending interests. What keeps that assessment grounded and objective, and not based upon the private sensitivities or values of individual judges, is that in assessing the relative weights of competing interests courts must look to the history and traditions from which the State developed, as well as those from which it broke, and not to merely personal notions.⁵⁰

Ultimately, the majority observed, it would fall to "reasoned judgment" to evaluate the interests implicated by a Common Benefits Clause claim, recognizing that the imprecision of "reasoned judgment" compels "both judicial restraint and respect for tradition in constitutional interpretation."⁵¹

The majority next turned to the question of the exclusion of same-sex couples from the benefits and protections incident to marriage. First, the majority identified the statutory classification: the Vermont marriage statutes apply only to opposite-sex couples.⁵² Second, the majority identified the purported governmental purposes served by this classification, which included a legitimate and long-standing "interest in promoting a permanent commitment between

⁴⁸ *Baker*, 744 A.2d at 876.

⁴⁹ *Id.* at 878–79. Among the factors to be considered in this analysis are "(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive." *Id.* at 879.

⁵⁰ *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997) (Souter, J., concurring)) (internal quotations and citations omitted).

⁵¹ *Id.* at 879 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992)) (footnote omitted).

⁵² *See id.* at 880.

couples for the security of their children," an interest "advanced by extending formal public sanction and protection to the union, or marriage, of those couples considered capable of having children, i.e., men and women."⁵³

The majority noted this classification's underinclusiveness: many opposite-sex couples marry for reasons unrelated to procreation; they may choose not to have children or are incapable of doing so.⁵⁴ Further, same-sex parents raise a significant number of children today, and "increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques."⁵⁵ "Thus," the majority observed, "with or without the marriage sanction, the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children."⁵⁶ Indeed, the Vermont legislature recognized this reality by acting affirmatively to remove legal barriers to adoption of children conceived through these techniques by same-sex couples,⁵⁷ and additionally passing legislation to safeguard the interests of same-sex couples and their children when such couples end their relationships.⁵⁸

Concluding that "the marital exclusion treats persons who are *similarly* situated for purposes of the law, *differently*," the majority addressed the interests asserted by the plaintiffs, with attention to "the history and significance of the benefits denied."⁵⁹ The majority noted that, in terms of its history and significance, the freedom to marry has been deemed "one of the vital personal rights,"⁶⁰ in Vermont and elsewhere,⁶¹ and that "the benefits and protections incident to a mar-

⁵³ See *Baker*, 744 A.2d at 881.

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 882.

⁵⁷ See VT. STAT. ANN. tit. 15A, § 1-102(b) (1995) (permitting partner of biological parent to adopt child if in child's best interest).

⁵⁸ See *id.* at § 1-112 (creating family court jurisdiction over parental rights and responsibilities, parent-child contact, and child support for unmarried persons who have adopted minor children and choose to end their domestic relationship).

⁵⁹ *Baker*, 744 A.2d at 882, 883. In support of looking to these factors, the majority cited to *Glucksberg*, a federal substantive due process case concerning a constitutional right to physician-assisted suicide.

⁶⁰ *Baker*, 744 A.2d at 883 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

⁶¹ See *Baker*, 744 A.2d at 883. The majority noted that, 137 years prior to the U.S. Supreme Court's decision in *Loving*, the Supreme Court of Vermont had "characterized the reciprocal rights and responsibilities flowing from the marriage laws as the 'natural rights of human nature.'" *Baker*, 744 A.2d at 883 (quoting *Overseers of the Poor of Newbury v. Overseers of the Poor of Brunswick*, 2 Vt. 151, 159 (1829)).

riage license under Vermont law have never been greater.”⁶² In light of the benefits and protections attendant to a state-sanctioned marriage, the majority concluded that the exclusion of same-sex couples had to be based upon “public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned.”⁶³ The goal of promoting a commitment between married couples for the sake of their children and the community did not meet this standard, given the majority’s determination that same-sex couples were situated no differently than opposite-sex couples in respect to this goal.⁶⁴

The majority concluded that “none of the interests asserted by the State provide[d] a reasonable basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law.”⁶⁵ Buoyed by “the faith that a case beyond the imagining of the framers of the [Vermont] Constitution may, nevertheless, be safely anchored in the values that infused it,” the majority held that there exists under the Common Benefits Clause “a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples.”⁶⁶ This holding did not necessarily require that the state provide same-sex couples marriage licenses; the majority deferred to the

⁶² *Baker*, 744 A.2d at 883. Among the benefits and protections listed by the majority: the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance, *see* VT. STAT. ANN. tit. 14, §§ 401–404, 551 (1985); preference in appointment as the personal representative of a spouse who dies intestate, *see* VT. STAT. ANN. tit. 14, § 903 (1953); the right to bring a wrongful death lawsuit in relation to a spouse, *see* VT. STAT. ANN. tit. 14, § 1492 (1995); and the right to bring an action for loss of consortium, *see* VT. STAT. ANN. tit. 12, § 5431 (1977).

⁶³ *Baker*, 744 A.2d at 884.

⁶⁴ *See id.* The majority also rejected the state’s other purported justifications for the exclusion of same-sex couples from the benefits and protections of marriage, including the contention that opposite-sex partners offer some advantage in childrearing; the existence of laws that removed legal barriers to the adoption of children by same-sex couples, and laws that provided new and additional legal protections for same-sex parents whose relationships dissolve undermined this justification for the marriage exclusion. *See id.* at 884–85. The majority rejected the argument that the exclusion served a substantial interest in maintaining uniformity with other jurisdictions, a speculative proposition refuted by legislative choices regarding legal protections for same-sex couples. *See id.* at 885. And the majority rejected the suggestion that “the long history of official intolerance of intimate same-sex relationships cannot be reconciled with an interpretation of Article 7 that would give state-sanctioned benefits and protection to individuals of the same sex who commit to a permanent domestic relationship,” because state action historically motivated by animus could not justify continued unequal treatment. *Id.*

⁶⁵ *Id.* at 886.

⁶⁶ *Id.*

legislature to devise the appropriate means of effecting the mandate that same-sex couples not be denied the same benefits and protections enjoyed by opposite-sex married couples.⁶⁷

In the second of the three opinions in the case, Associate Justice John Dooley concurred in the mandate but expressed doubt about the majority's analysis, suggesting that the decision's "acceptability" should be based "on whether its reasoning and result are clearly commanded by the Vermont Constitution and [Vermont courts'] precedents, and whether it is a careful and necessary exercise of the court's limited powers."⁶⁸ Noting that the requirement that marriage be between opposite-sex couples discriminates against persons "unable to marry the life partners of their choice," Dooley addressed the question whether the statutory scheme at issue implicated a suspect class warranting heightened equal protection scrutiny.⁶⁹ He observed that "Vermont's legal climate differs considerably from that in other jurisdictions where courts have held that lesbians and gay men are not a suspect classification,"⁷⁰ and, therefore, that the court need not necessarily rely upon *Bowers v. Hardwick*,⁷¹ in which the U.S. Supreme Court concluded that, for due process purposes, individuals have no fundamental right to engage in homosexual sodomy.⁷² That decision, and the numerous state and federal decisions relying on it had little relevance in Vermont, where homosexual conduct between adults is prohibited only on the same terms that prohibit heterosexual conduct.⁷³

Tying these observations to his analysis of the Common Benefits Clause, Dooley relied upon Oregon state court decisions interpreting similar constitutional language,⁷⁴ in which the Oregon Supreme Court approved the federal equal protection framework under the state constitution,⁷⁵ but vowed to adhere to "federal analysis only

⁶⁷ See *id.* The majority noted, but did not expressly endorse, such alternative arrangements as "domestic partnerships" and "registered partnerships." *Id.*

⁶⁸ *Baker*, 744 A.2d. at 889 (Dooley, J., concurring).

⁶⁹ *Id.* at 890 (Dooley, J., concurring).

⁷⁰ *Id.* (Dooley, J., concurring).

⁷¹ 478 U.S. 186 (1986).

⁷² See *id.* at 191.

⁷³ See *Baker*, 744 A.2d at 891 (Dooley, J., concurring). Indeed, in 1992, the state prohibited discrimination based upon sexual orientation. See *id.* (Dooley, J., concurring).

⁷⁴ See OREGON CONST. art. I, § 20 (providing that no law shall "grant[] to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens").

⁷⁵ See *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 976 (Or. 1982) (adopting federal equal protection analysis).

where the court finds [that analysis] persuasive."⁷⁶ Indeed, the Oregon Court of Appeals modified that approach in *Tanner v. Oregon Health Sciences University*, determining that homosexual couples exhibited the characteristics of a suspect class: they were defined in terms of their stereotypical personal and social characteristics; they were widely recognized as a distinct, socially recognized group; and they were subjected to adverse social and political prejudice.⁷⁷

Dooley viewed *Tanner* as consistent with the Vermont court's Common Benefits Clause jurisprudence; he found the Oregon decision "far more persuasive than the majority's decision, which backtracks from the established legal framework under Article 7 and fails to provide any guidelines whatsoever for the Legislature, the trial courts, or Vermonters in general to predict the outcome of future cases."⁷⁸ He viewed the majority's Article 7 framework as contrary to established Vermont jurisprudence and essentially standardless, maintaining that the majority decision implicitly heralded judicial activism in future cases.⁷⁹ Dooley questioned the abandonment of a framework that served to "discipline[] judicial discretion and promote[] predictability,"⁸⁰ observing that the Oregon courts have expressly avoided tests involving "pragmatic considerations about which reasonable people may differ over time."⁸¹

In the third of the three opinions, Associate Justice Denise Johnson concurred in part and dissented in part. She differed in her substantive analysis of the Common Benefits Clause, characterizing *Baker* as "a straightforward case of sex discrimination":

[T]he marriage statutes establish a classification based on sex. Whether such classification is legally justified should be analyzed under [Vermont's] common-benefits jurisprudence, which [until this decision] has been closely akin to the federal equal-protection analysis under the Fourteenth Amendment. Therefore, the State must show that the classification is narrowly tailored to further important, if not compelling interests. Not only do the rationalizations advanced by the State fail to pass constitutional muster under this or any other form of heightened scrutiny, they fail to sat-

⁷⁶ *Baker*, 744 A.2d at 892 (Dooley, J., concurring).

⁷⁷ 971 P.2d 435, 447 (Or. Ct. App. 1998).

⁷⁸ *Baker*, 744 A.2d at 893 (Dooley, J., concurring).

⁷⁹ See *id.* at 893-95 (Dooley, J., concurring).

⁸⁰ *Id.* at 896 (Dooley, J., concurring).

⁸¹ *Id.* (Dooley, J., concurring) (quotation omitted).

isfy the rational-basis test as articulated under the Common Benefits Clause.⁸²

In Johnson's view, the Vermont statutory scheme governing marriage imposed a sex-based classification: men and women alike are denied the right to marry when their proposed spouses are, respectively, men and women; consequently, "an individual's right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation."⁸³ Declining to reach the issue whether such alleged gender discrimination should receive heightened scrutiny under the Common Benefits Clause, she concluded that the state could not satisfy even a rational-basis standard;⁸⁴ "[t]he protections conferred . . . by the Common Benefits Clause," she stated, "cannot be restricted by the outmoded conception that marriage requires one man and one woman."⁸⁵

Johnson also took issue with the majority's failure to craft a remedy for the state's denial of the benefits of marriage to same-sex couples. Concluding that the state's interest in licensing marriages was narrow as compared to "the judiciary's obligation to remedy constitutional violations,"⁸⁶ she criticized the majority for failing to enjoin the state from denying plaintiffs a marriage license, which would "designate" the plaintiffs and similarly situated individuals as entitled to the benefits and protections of marriage.⁸⁷

II. MODELING INDEPENDENT STATE CONSTITUTIONALISM

In their analyses of the state constitutional commitment to equality, the justices in *Baker v. State* relied upon federal precedent as something more than a surrogate for the considered elaboration of principle under the state constitution. The *Baker* justices sought to articulate reasoned bases for understanding and applying the Common Benefits

⁸² *Id.* at 905 (Johnson, J., concurring in part and dissenting in part).

⁸³ *Baker*, 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part).

⁸⁴ *See id.* at 907-11 (Johnson, J., concurring in part and dissenting in part) (reviewing and rejecting the state's proffered justifications for denying the benefits and protections of marriage to same-sex couples). Notably, Justice Johnson also suggested in that part of her opinion addressing a remedy that the marriage laws' exclusion could not survive rational basis scrutiny because the state could not establish a connection between the exclusion and the purpose of marriage licensing, which itself raised no legitimate health or safety concern related to same-sex couples. *See id.* at 899 (Johnson, J., concurring in part and dissenting in part).

⁸⁵ *Baker*, 744 A.2d at 912 (Johnson, J., concurring in part and dissenting in part).

⁸⁶ *Id.* at 899-900 (Johnson, J., concurring in part and dissenting in part).

⁸⁷ *See id.* at 901 (Johnson, J., concurring in part and dissenting in part).

Clause by utilizing "great ordinance" doctrines developed under the equal protection and due process clauses of the U.S. Constitution, as well as prior Vermont cases addressing equal protection issues under state law. In this Part, we examine the different ways in which the Vermont justices succeeded or failed in their interpretive endeavors. In addition, we discuss fundamental jurisprudential questions illustrated by their struggles with the meaning and application of the Common Benefits Clause.

A. *Exploring New Paths and Valuing Persuasive Guidance*

The *Baker* opinions represent a significant effort to rely upon and refine doctrinal threads from a variety of state and federal sources in explicating state constitutional principles. The majority, for instance, articulated a framework that requires a court faced with a Common Benefits Clause claim to ascertain whether the law in question is "reasonable and just" by examining the fit between the legislative ends and means in light of such factors as the magnitude of the benefits and protections adversely affected by the law.⁸⁸ The import of this inquiry is that when a Common Benefits claim is asserted, Vermont courts will seek to determine whether asserted legislative means relate to and promote a particular state interest.⁸⁹ This analysis comprehends a more probing rationality inquiry into legislation than might occur under the federal framework, as the court is pledged in each case to weigh the interests on each side and, when the legislation affects certain interests adversely, to rule against the state unless it satisfies a stricter rationality requirement. The pressure of this rationality requirement will depend upon the "relative weights or dignities of the contending interests."⁹⁰

Thus the intensity of judicial review will run along a continuum, as informed by the particular circumstances of the case—in contrast to a categorical analysis propelled by the formal classification of suspect classes and protected interests. This framework recalls Justice Thurgood Marshall's approach to equal protection, which he elaborated in *City of Cleburne v. Cleburne Living Center*.⁹¹ In that case, the U.S. Supreme Court invalidated zoning restrictions on housing for the

⁸⁸ See *Baker*, 744 A.2d at 878–79 (Vt. 1999) (in determining whether exclusion of individuals from benefits and protections of the law is reasonable and just, factors to be considered include "the significance of the benefits and protections of the challenged law").

⁸⁹ See *id.* at 878.

⁹⁰ *Id.* at 879 (quotation omitted).

⁹¹ 473 U.S. 432 (1985).

mentally retarded under minimum rationality review because those restrictions were based upon "irrational prejudice."⁹² Concurring in the judgment but dissenting from the majority's reasoning, Marshall advocated review under the equal protection clause that varies "with the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."⁹³ In applying this standard, he urged the court to account for shifting cultural, political and social patterns in recognizing and reviewing equal protection claims.⁹⁴ Both the *Baker* majority's approach and Marshall's approach share an emphasis on judicial review that varies in force depending upon the nature of the competing interests involved, and that anticipates flexibility in identifying the interests that warrant greater judicial attention.

In explaining its approach, the majority notably did not dwell upon federal precedents concerning challenges to laws that implicate sexual orientation; the majority elected to focus, at bottom, upon the questions of what the Common Benefits Clause analysis should look like, and how it should be applied in this case.⁹⁵ Though he began his analysis with *Bowers v. Hardwick*,⁹⁶ Justice Dooley also favored a path independent of reliance upon federal caselaw, looking instead to Oregon decisions interpreting that state's counterpart to the Common Benefits Clause,⁹⁷ and particularly the Oregon courts' modified hierarchical equal protection framework with respect to the criteria for identifying suspect classes.⁹⁸ In approving that framework, Dooley rightly embraced extra-jurisdictional precedent as persuasive guidance, to be evaluated, accepted or rejected on its own terms.⁹⁹

⁹² See *id.* at 450.

⁹³ *Id.* at 460 (Marshall, J., concurring in part and dissenting in part) (quotation omitted).

⁹⁴ See *id.* at 466 (Marshall, J., concurring in part and dissenting in part). Justice John Paul Stevens endorsed a similar approach. See *id.* at 451 (Stevens, J., concurring) (arguing that federal equal protection cases "reflect a continuum of judgmental responses to differing classifications").

⁹⁵ See *Baker*, 744 A.2d at 878 n.10 (noting only that the "overwhelming majority" of federal decisions have rejected the characterization of gays and lesbians as a suspect class).

⁹⁶ 478 U.S. 186 (1986).

⁹⁷ See *id.* at 890, 892 (Dooley, J., concurring).

⁹⁸ See *Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998) (discussing characteristics of a suspect class for equal protection purposes).

⁹⁹ See Jerome B. Falk, Jr., *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273, 283 (1973) (observing that, "[f]or a state court interpreting a state constitution, opinions of the United States Supreme Court are like opinions of sister state courts"); Lawrence Friedman, *The Constitutional Value of Dialogue and the New*

For her part, Justice Johnson drew upon federal equal protection jurisprudence in explaining a Common Benefits standard, yet counseled skepticism toward a legal regime that adversely affected interests not traditionally protected under a tiered equal protection analysis.¹⁰⁰ In arguing that the court should have enjoined the state from denying the plaintiffs marriage licenses, she maintained that the state's interest in licensing marriages—to create and maintain records for the orderly allocation of benefits, imposition of obligations, and distribution of property through inheritance—bore no rational relation to any legitimate health or safety justification for excluding opposite-sex couples from such licenses.¹⁰¹ Thus, she suggested a framework that respects the structure of the traditional hierarchical approach but would require an actual and definite link between ends and means even under rational basis scrutiny. In contrast, federal rationality review requires merely any imaginable justification for the law.¹⁰² Like Dooley, moreover, Johnson found support for her approach in constitutional principles developed by another state court.¹⁰³

B. *The Interpretive Challenges Raised in Baker*

Because the Vermont justices endeavored to explain the principles underlying their opinions, the quality of their analyses may be criticized substantively—perhaps the hallmark of a state constitutional jurisprudence that reflects a judicial commitment to take seriously the obligation to provide a reasoned basis for the adoption of particular state constitutional rules. Substantive criticism of the reasoning un-

Judicial Federalism, 28 HASTINGS CONST. L.Q. 93, 135–36 (2000) (arguing that the U.S. Supreme Court holds no monopoly on constitutional interpretation and “there is nothing about [its] institutional position that immunizes it from the hazards of interpretive difficulties”).

¹⁰⁰ Helen Hershkoff has suggested that skepticism about importing federal rationality review into state constitutional law may well be appropriate, as the concerns that animate the federal test, such as “doubts concerning democratic legitimacy, federalism, and separation of powers” may not obtain in the state constitutional context. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999).

¹⁰¹ *Baker*, 744 A.2d at 899 (Johnson, J., concurring in part and dissenting in part).

¹⁰² See, e.g., *United States v. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (upholding law regarding dual retirement benefits on basis of justifications Congress could have found to exist).

¹⁰³ See *Baker*, 744 A.2d at 899 (Johnson, J., concurring in part and dissenting in part) (citing *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) (stating that, in respect to the regulation of morals, the police power should not be employed to “enforce a majority morality on persons whose conduct does not harm others”).

derlying each of the *Baker* opinions, moreover, may point to doctrinal threads relating to equal protection law that simply warrant further attention. To illustrate, in this section we detail some of the interpretive challenges the *Baker* opinions raise in respect to both Vermont law and constitutional jurisprudence generally.

1. The Majority's "Inclusionary Principle" and Its Limitations

As Robert Williams has noted, state courts need not search for distinctions from federal law as the basis for independent state constitutional decisionmaking in respect to the great ordinances, for, so far as the interpretation of the state constitution by a state court is concerned, federal law is no more persuasive than the authority of any other extra-jurisdictional court.¹⁰⁴ To its credit, the *Baker* majority did not begin its discussion with federal law; nonetheless, the majority apparently believed it had to articulate some basis upon which to justify a Common Benefits Clause framework that did not parallel federal equal protection jurisprudence. To this end, the majority looked to the text and history of the Clause "to distill the essence, the motivating ideal of the framers," and to determine the applicability of that motivating ideal in the present context.¹⁰⁵

The majority's desire to brace its Common Benefits Clause framework with historical support required an ironic bit of judicial legerdemain to justify the assertion that Article 7 should be understood as respecting an "inclusionary principle." Although the majority's historical exegesis suggested that Article 7's drafters likely viewed the Common Benefits Clause as a check on elite factions who might corrupt the democratic process rather than a protection for minorities against exclusionary lawmaking,¹⁰⁶ the majority ultimately concluded that Article 7 expresses a concern for inclusion pursuant to which the court should seek to determine whether a "part of the community" is "disadvantaged by [a] law."¹⁰⁷ In its abstract form, then, this anti-discrimination principle evokes the very federal equal protec-

¹⁰⁴ See Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. Rev. 353, 359-61 (1984) (discussing why federal precedent need only be regarded as persuasive authority); see also Friedman, *supra* note 99, at 134-36 (same).

¹⁰⁵ *Baker*, 744 A.2d at 874.

¹⁰⁶ See *id.* at 876 (discussing historical reports indicating that Article 7's framers may have been more concerned with controlling elites than with a Fourteenth Amendment-type concern for protecting minorities from exclusionary lawmaking).

¹⁰⁷ *Id.* at 878 (emphasis added).

tion rationale that the justices mistakenly felt a need to distinguish, and not the purported historical context of Article 7's framing.¹⁰⁸

With an anti-discrimination principle at the core of the Common Benefits Clause, the majority proceeded to elaborate its continuum-based analytical framework—an effort only modestly successful. On one hand, the majority stated that, under its framework, a court's application of heightened scrutiny in a given case would depend upon the significance of the benefits and protections at issue.¹⁰⁹ On the other, it stated that the Common Benefits Clause should provide protection from discrimination based upon "artificial governmental preferments and advantages" to *all* Vermonters equally.¹¹⁰ Such a standard reasonably could be construed to involve the courts in scrutinizing all manner of legislative enactment. Its ambiguity, moreover, does little to aid members of the political branches of government or the lower courts in discerning how the court would regard the constitutional validity of a wide variety of lawmaking efforts under the Common Benefits Clause.

To deflect concerns about potential judicial overreaching, the majority suggested that the determination of whether ends and means share a reasonable and just relation ultimately would be restricted by the "reasoned judgment" of the reviewing court.¹¹¹ Yet the majority failed to address how this reasoned judgment will or should be exercised, other than to note that the very imprecision of such judgment will encourage judicial restraint.¹¹² Indeed, such a loose limitation on the legitimate scope of a court's inquiry invites the sort of anxiety about uncabined judicial review that still marks debate about federal substantive due process doctrine, causing jurists and commentators to

¹⁰⁸ Robert Williams has suggested that the majority's historical analysis may well have been erroneous. See Williams, *supra* note 4, at 84-85 (criticizing the majority's reliance on historical "inclusionary principles"). Notably, even assuming the majority's historical understanding of Article 7 was correct, the argument that Article 7's purpose should be characterized at a higher level of abstraction could still be valid; as Carol Steiker has noted in regard to the federal constitution, "[a]t some point, all but the most absolutist originalists formulate notions of the Framers' intent at some higher level of abstraction [than the text in its historical context], a move that necessarily renders less significant even highly persuasive historical claims about more specific intentions." Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994).

¹⁰⁹ See Baker, 744 A.2d at 882.

¹¹⁰ See *id.* at 876.

¹¹¹ *Id.* at 879.

¹¹² See *id.*

rattle the chains of *Lochner v. New York*,¹¹³ the oft-cited proxy for any and all misgivings about unstructured judicial review.¹¹⁴

To be sure, the majority stressed the importance of the traditional judicial deference afforded to legislation having a reasonable relation to a legitimate public purpose; further, the majority asserted that a Vermont court's "access to specific legislative history and all the proper resources to evaluate the object and effect of state laws" will allow for the disciplined application of its Common Benefits Clause test "to ensure that any exclusion from the general benefit and protection of the law . . . bear[s] a just and reasonable relation to the legislative goals."¹¹⁵ But the majority did not explain what this means; its opinion offers no guidance as to how Vermont courts should use supposedly accessible legislative history, or what therein would serve to trigger a more searching review by the court. For example, would a court be looking for evidence of the actual motives the legislature entertained at the time of passage, as opposed to whatever ad hoc or post hoc claims might be made as to what should be viewed as legitimate legislative goals and rational means? This question goes unanswered in *Baker*, where the court did not review the history of any one piece of legislation that reflected an intention to exclude same-sex couples from the benefits and protections of marriage—for no such history existed.

The majority nonetheless applied a more stringent Common Benefits analysis in this case, concluding that the marriage laws exclude anyone who desires to marry a person of the same gender.¹¹⁶ Rejecting the state's argument that the exclusion had a valid purpose—to "further[] the link between procreation and child rear-

¹¹³ 198 U.S. 45 (1905).

¹¹⁴ Justice Dooley, for example, cited to *Lochner* in accusing the majority of "adopt[ing] an activist stance in reviewing economic and social welfare legislation." *Baker*, 744 A.2d at 896 (Dooley, J., concurring). Notably, the origins of the substantive due process that Dooley so feared, as epitomized by *Lochner*, may be traced to state courts: "Long before the adoption of the Fourteenth Amendment, state courts had begun to develop a body of substantive due process law, drawing on state constitutional due process or 'law of the land' provisions." A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 881-82 (1976).

¹¹⁵ *Baker*, 744 A.2d at 872 (quotation omitted).

¹¹⁶ See *id.* at 880. Here again, the majority adhered to its inclusionary principle, rather than to the narrower historical understanding of the origins of the Common Benefits Clause, which would have required an inquiry into whether a minority of citizens had received special benefits under the marriage laws. See *supra* notes 42-44 and accompanying text (discussing narrow interpretation of history of Common Benefits Clause).

ing"¹¹⁷—the majority noted that the state allowed marriage between opposite-sex couples who never intend to have children. If strengthening that link really was the purpose behind the marriage laws, the means chosen to achieve that end—the exclusion of opposite-sex couples from marriage—could only be regarded as irrational. And representatives of the state, outside the litigation context, might concede as much, for the real problem with the marriage laws derived not from their original purpose, which probably had nothing to do with thwarting the desire of same-sex couples to marry, but rather from the modern failure to include same-sex couples within their ambit.¹¹⁸

The court could have addressed this underlying problem simply by construing the marriage laws to include same-sex couples, as the plaintiffs contended. Surely the statutory language was opaque enough that such a construction would not have been outside the bounds of reason.¹¹⁹ Indeed, the plaintiffs expressly argued that the marriage laws could be construed to include same-sex couples in light of the underlying purposes of marriage—the protection and support of lasting commitments between individuals.¹²⁰

Support exists for such an approach. In the New Jersey Supreme Court's 1979 decision in *State v. Baker*, the court invalidated, under the state constitution, a municipal zoning restriction.¹²¹ The dissenting justice asserted that the same result could have been achieved by concluding that the objectionable part of the restriction did not meet certain statutory requirements, a result that the legislature then could have addressed "had it seen fit to do so."¹²² Had the *Baker* court followed a similar course, the legislature could have addressed the court's construction of the marriage laws to include same-sex couples if the political will to do so existed. Further, resolution of the case on statutory construction grounds would have delayed judicial consideration of the constitutional question until some point in the future, when the court could review a more fully developed record on the

¹¹⁷ *Baker*, 744 A.2d at 881 (quotation omitted).

¹¹⁸ See *id.* at 887 (noting the lack of evidence that "the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men").

¹¹⁹ See *id.* at 868–69 (relying upon dictionary definitions of such terms as "marriage" in construing the Vermont marriage laws).

¹²⁰ See *id.* at 869.

¹²¹ 405 A.2d 368, 375 (N.J. 1979).

¹²² *Id.* at 377 (Mountain, J., dissenting).

state's justification for what would be, at that point, a formal exclusion of same-sex couples from the marriage laws.¹²³

But the *Baker* court chose the constitutional path, reasoning that none of the state's asserted interests provided a "reasonable and just" basis for excluding same-sex couples from the benefits and protections of marriage,¹²⁴ and referring to the legislature the task of implementing the court's mandate.¹²⁵ In electing to defer the question of remedy, the *Baker* majority recognized the potentially "destabilizing" effect of its mandate.¹²⁶ And it is in crediting that concern that the majority revealed its transcendent interest—the central importance not of allowing the benefits and protections of marriage to all couples, but of recognizing in same-sex couples the basic humanity they share with all who seek to enjoy the protection and security of a commitment to one another.¹²⁷

If the interest in protecting basic humanity against exclusionary laws in fact motivated the majority to rule as it did, then one may rightly question whether the majority's equal protection analysis, which purports to depend upon deprivations of benefits and protections, represents anything more than elaborate dicta, to be set aside in future cases implicating Common Benefits Clause issues that affect more prosaic commercial and economic concerns. Certainly, this was Justice Dooley's fear. He wondered whether, with this "controversial decision" behind it, the court would end up with two versions of the decision:

¹²³ But see Gil Kujovich, *An Essay on the Passive Virtues of Baker v. State*, 25 VT. L. REV. 93, 102–03 (2000) (arguing that court did not resolve *Baker* on statutory grounds because in the future "the political environment would [have been] even less receptive to a constitutional decision in favor of the plaintiffs").

¹²⁴ *Baker*, 744 A.2d at 886.

¹²⁵ See *id.* This approach recalls that taken in the school funding context, in which certain state courts have left to the legislature the task of creating a constitutional solution to the problem identified by the court. See, e.g., *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (concluding that state constitutional duty to provide adequate education exists, and leaving it to the legislature and the governor, in the first instance, to "define the parameters of the education mandated by the constitution"); *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516, 554–56 (Mass. 1993) (articulating standard of constitutionally required education, but referring to political branches the task of revising state finance mechanisms to conform to state constitutional requirements).

¹²⁶ *Baker*, 744 A.2d at 887.

¹²⁷ *Id.* at 889. "The extension of the Common Benefits Clause," the majority concluded, "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." *Id.*

Will we go back to minimalist review when we get a claim of discrimination, for example, between large stores and small ones, or will the more activist review promised by this decision prevail? Our history . . . says that we will do the former, which I find to be the more desirable, but a serious blow will have been dealt to our ability to develop neutral constitutional doctrine.¹²⁸

2. Hierarchical Standards and Constitutional Remedies

The reasoning of the concurring opinions in *Baker* may be subjected to like examination. Recall that Justice Dooley characterized the case as one of straightforward discrimination.¹²⁹ Though he did not undertake an exhaustive traditional equal protection analysis, he would have applied strict scrutiny and put the burden on the state to demonstrate a compelling purpose for the exclusion and the necessity of the means chosen to achieve that purpose, such that even an appearance of invidious discrimination would have to be tolerated.¹³⁰ His opinion criticizes the majority's re-interpretation of the *State v. Ludlow Supermarkets, Inc.* case; Dooley would have adhered more closely to the hierarchical equal protection analysis followed in prior Vermont cases,¹³¹ which derives from, but is not beholden to, its federal counterpart, drawing its animating principles from the unique nature of Vermont's "legal climate."¹³²

In Dooley's view, the use of a hierarchical equal protection analysis serves to discipline a court by creating standards that may be objectively viewed as applicable in a given case.¹³³ Though this remains an unexamined proposition in his opinion, a case can be made for such an argument. A hierarchical approach presses a court to explain what it is doing in terms of the weight of the factors that compose the stan-

¹²⁸ *Id.* at 895 n.3 (Dooley, J., concurring).

¹²⁹ *See id.* at 890 (Dooley, J., concurring).

¹³⁰ *See id.* at 893 (Dooley, J., concurring).

¹³¹ *See Choquette v. Perrault*, 569 A.2d 455, 459 (Vt. 1999) (analysis requires court to apply more searching scrutiny when statutory scheme affects fundamental constitutional rights or involves suspect classifications); *L'Esperance v. Charlotte*, 704 A.2d 760, 762 (Vt. 1997) (same); *MacCallum v. Seymour's Adm'r*, 686 A.2d 935, 939 (Vt. 1996) (same); *see also Lorrain v. Ryan*, 628 A.2d 543, 550 (Vt. 1993) (declaring that, when no fundamental right or suspect class is involved, the Common Benefits Clause analysis is the same as the equal protection analysis under the Fourteenth Amendment).

¹³² *See Baker*, 744 A.2d at 890 (Dooley, J., concurring).

¹³³ *See id.* at 896 ("The strength of the [hierarchical] approach is that it disciplines judicial discretion and promotes predictability.")

dard of analysis.¹³⁴ These factors typically relate to interests important in and to a constitutional democracy—as emphasized, for example, by the footnote four dictum in *United States v. Carolene Products Co.*,¹³⁵ which directs a court's attention in the equal protection context to protecting classes of individuals who may be, for one reason or another, at risk in the democratic process.¹³⁶ In addition, use of a hierarchical framework places some pressure on the court to favor the gradual development of principles that have true explanatory and predictive power,¹³⁷ as opposed to proceeding on a more ad hoc basis, which may follow from reliance upon, say, a framework that approaches equal protection claims on a continuum.

Avoiding real discussion of these nuances, Dooley simply accepted the conclusion that a hierarchical framework will better prevent a rudderless Common Benefits Clause jurisprudence than the approach favored by the majority, with its faith in the judicial capacity for "reasoned judgment." But Dooley's approval of a hierarchical framework as a general matter begs the question of why gays and lesbians warrant protection as a suspect class on the facts of *this* case, a point he addressed initially in respect to the U.S. Supreme Court's decision in *Bowers*.¹³⁸ He argued that, unlike the circumstances in *Bowers*, Vermont no longer criminalizes sodomy and has passed laws aimed at ending discrimination against homosexuals. On their face, however, these facts logically undermine the argument that gays and lesbians are a suspect class, or at least that an animus against homosexuals makes them so.

Dooley nonetheless concluded that gays and lesbians are a suspect class under the rationale of the strict scrutiny analysis of the Oregon cases.¹³⁹ To avoid the inconsistency created by his treatment of *Bowers*, he need only have noted that *Bowers* is not persuasive authority in this case, much less controlling: that case concerned the question whether it was unconstitutional to make certain conduct a crime—a different question than whether a basis exists upon which to

¹³⁴ See *City of Cleburne*, 473 U.S. at 406 (Marshall, J., concurring in part and dissenting in part) (discussing the obligation of a court to explain its choice of classifications).

¹³⁵ 304 U.S. 144 (1938).

¹³⁶ See *id.* at 152–53 n.4.

¹³⁷ See Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 78 (1996) (asserting that hierarchical approach promotes "planning and predictability for future cases" because "[w]ithout tiers, it would be difficult to predict judicial judgments").

¹³⁸ 478 U.S. 186.

¹³⁹ See *Baker*, 744 A.2d at 893 (Dooley, J., concurring) and *supra* notes 74–78 and accompanying text.

treat homosexuals differently than heterosexuals in other, non-criminal contexts in a jurisdiction that does not criminalize the conduct at issue in *Bowers*. In addition, *Bowers* is not authority for the proposition that there is *not* an animus against gays and lesbians that warrants judicial attention—an animus that Dooley apparently believed did exist.¹⁴⁰

Like Dooley, Justice Johnson rejected the majority's approach to Common Benefits Clause claims and endorsed the three-tiered federal framework.¹⁴¹ At the same time, she asserted that the failure of the marriage laws' exclusion to pass muster under that test required the court to craft a remedy for the violation.¹⁴² As a prudential matter, such a position reflects a failure to appreciate that, as with the channeling of judicial discretion that the tiered framework aims to promote, a circumspect approach to remedy recognizes that "courts are participants in the system of democratic deliberation."¹⁴³ It is, after all, one thing to conclude that a constitutional mandate has not been met, quite another to devise and impose a particular response upon the public when equally possible alternatives present themselves.¹⁴⁴ While the former conclusion functions to set certain boundaries on the scope of legislation, the latter may subvert the legislative process.¹⁴⁵ As in the school funding context,¹⁴⁶ then, prudence counsels respect for a discernible limit on the court's reach and, in cases in which several policy options present themselves as appropriate remedial measures, referring in the first instance to the political branches the balancing of those alternatives.¹⁴⁷

¹⁴⁰ See *Baker*, 744 A.2d at 893 (Dooley, J., concurring) (citing with approval conclusion in *Tanner v. Ore. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998), that gays and lesbians have been and continue to be "the subject of adverse social and political stereotyping and prejudice").

¹⁴¹ See, e.g., *id.* at 905 (Johnson, J., concurring in part and dissenting in part).

¹⁴² See *id.* at 898, 905 (Johnson, J., concurring in part and dissenting in part).

¹⁴³ Sunstein, *supra* note 137, at 101.

¹⁴⁴ See *Baker*, 744 A.2d at 886–87 (discussing the "number of potentially constitutional statutory schemes" available to afford same-sex couples the same benefits and protections Vermont law affords opposite-sex couples).

¹⁴⁵ See Sunstein, *supra* note 137, at 19 (arguing that judicial self-restraint "grants a certain latitude to other branches of government by allowing the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems").

¹⁴⁶ See *supra* note 125 and accompanying text (discussing school funding cases).

¹⁴⁷ On the viability of Johnson's position, consider *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993), in which the Hawaii Supreme Court determined that the state constitution prohibited the exclusion of same-sex couples from state-sanctioned marriage. Following the decision, a state constitutional amendment passed which granted the state legislature

C. Baker and Fundamental Questions of Judicial Review

The Vermont justices' respective interpretations of the Common Benefits Clause illuminate some of the fundamental questions related to judicial review that surface in connection with interpretation of the great ordinances. In light of the scope of the majority's Common Benefits Clause analysis, for example, one may rightly inquire whether courts can ever exercise judicial review without usurping some control over matters traditionally located within the domain of the political branches of government. Because, as John Hart Ely has observed, "ins have a way of wanting to make sure the outs stay out," some judicial intervention to protect individual rights and liberties may be regarded as a structural necessity in our constitutional democracy.¹⁴⁸ At the same time, nearly every case involving one of the great ordinances may provoke criticism about a court's negotiation of the rough line that separates such judicial tasks as the resolution of the legal controversy at hand from such political tasks as the creation of forward-looking public policy. This is particularly true of cases touching on matters that implicate social mores, like same-sex marriage.¹⁴⁹ The controversy surrounding such cases evidences the Bickelian proposition that the citizenry's interest in self-government will seek to deny a court the power to "govern all that it touches."¹⁵⁰

To an extent, the majority opinion may be regarded as an effort to chart a general course for the court's exercise of judicial review that seeks to skirt the domain of the legislative branches. With its ends-means test, the majority sought to honor both the judicial role in resolving controversies involving individual rights and liberties, and

the authority "to reserve marriage to opposite-sex couples." HAW. CONST. art I, § 23 (Michie 1997). Had the court followed Johnson's lead and declared marriage licenses available both to opposite- and same-sex couples, similar efforts to amend the Vermont Constitution would have been launched and perhaps succeeded. Even before the court decided *Baker*, more than a third of the Vermont House of Representatives voiced support to amend the marriage statutes to expressly exclude same-sex marriage. See 744 A.2d at 898 n.1 (Johnson, J., concurring in part and dissenting in part). This effort easily could have become a movement to amend the Vermont Constitution. On the procedural requirements for amending the Vermont Constitution, see Kujovich, *supra* note 123, at 111 n.83.

¹⁴⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 106 (1980).

¹⁴⁹ In respect to *Baker*, for example, Lino Graglia has argued that the court's decision represents "conventional rigamarole meant to obfuscate the fact that the court [was] effectively writing into law a policy decision the legislature did not make and would not make." Lino Graglia, *Equality and Domestic Partnership* 6 (June 5, 2001) (unpublished manuscript, on file with authors).

¹⁵⁰ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 200 (1962).

the obligation not to overstep the bounds of its legitimate authority. Perhaps recognizing concerns about the capacity of its ends-means Common Benefits test to ensure that the court does not overstep its bounds, the majority expressly left it to the legislature initially to devise a remedy for the constitutional violation, thereby limning for future use a distinction between the resolution of a dispute over constitutional principles, which lies within the court's competence, and the declaration of a remedial policy, which lies within the legislature's.¹⁵¹ Still, as Justice Dooley pointedly observed, in another light the majority's analysis looks like "the process [the court] would expect legislators to go through if they were facing the question [of the same-sex marriage exclusion] free from the political pressures necessarily created by deeply held moral convictions, in both directions, of substantial members of their constituents."¹⁵²

Assuming both the validity of judicial review in respect to the operation of the great ordinances and the need for some limitations on that review, there is a question whether review should be more or less limited depending upon the subject matter of the legislation, the kinds of rights the constitution seeks to protect, or the kinds of governmental purposes allegedly promoted by the legislation. All matters a court could resolve need not trigger the same level of judicial attention. The U.S. Supreme Court has identified a limited number of classes of individuals whose interests cannot be abridged by the government absent a demonstration of a compelling justification for that abridgment.¹⁵³

So far as the *Baker* majority is concerned, the potential classes whose interests may qualify for the protection afforded by more searching judicial review under the Common Benefits Clause may well extend beyond those identified by the U.S. Supreme Court.¹⁵⁴ The

¹⁵¹ In this way, the majority implicitly subscribed to the view that rights and remedies each "occupy distinct space," with judges having "primary jurisdiction over rights," and legislatures having "corresponding jurisdiction over remedies." Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 97 (2000); see also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 870-72 (1999) (discussing rights-remedies distinction in terms of judicial and legislative roles).

¹⁵² *Baker*, 744 A.2d at 897 (Dooley, J., concurring).

¹⁵³ The court will require such a demonstration in respect to laws that discriminate against individuals based upon characteristics like race, alienage and nationality. See generally *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Oyama v. California*, 332 U.S. 633 (1948) (nationality).

¹⁵⁴ See *Baker*, 744 A.2d at 878 n.10 (maintaining "the plaintiffs are afforded the common benefits and protections of Article 7, not because they are part of a 'suspect class,' but because they are part of the Vermont community").

determination will depend, in an individual case, upon the characteristics of the allegedly excluded group of citizens, as informed by "the history and traditions from which [Vermont] developed as well as those from which it broke."¹⁵⁵ That analytical framework underscores a willingness to comprehend new interests that merit particularized judicial attention; on the other hand, that framework is likely to create new tensions between legislative ends and means—and to try the limits of the court's ability to police a political process whose product frequently discriminates between citizens in respect to benefits and privileges.¹⁵⁶

When a court in fact recognizes a need to cabin the exercise of judicial review, there is a question whether it is preferable to achieve control by developing analytical algorithms under which different levels of scrutiny are applied to differing kinds of legislation based upon such criteria as the interest involved or the governmental purpose at issue. The U.S. Supreme Court has often adhered to doctrinal tests like its hierarchical equal protection framework. Among the justices of the Supreme Court of Vermont, at least Dooley would appear to subscribe to this view, in the interest of disciplining judges and ensuring that the court's decisionmaking appropriately defers to the legislative will.¹⁵⁷

Setting aside estimations of the relative strengths of algorithmic tests,¹⁵⁸ it is, as Chief Justice Amestoy remarked, an open question whether allegiance to a hierarchical analysis is the uncompromising limitation on judicial review that its supporters claim it to be.¹⁵⁹ In particular cases, the U.S. Supreme Court has tacitly departed from its tripartite equal protection framework and the requirements of minimum rationality by crediting individual interests and critically regarding governmental purposes, thereby engaging in analysis that at least in its operation echoes the *Baker* majority's approach.¹⁶⁰ If, as Cass Sunstein has argued, "[t]he hard edges of the tripartite division have

¹⁵⁵ *Id.* at 879 (internal quotations omitted).

¹⁵⁶ As the Vermont court itself observed, "virtually all regulatory statutes have disparate effects on various sectors of the public." *Choquette v. Perrault*, 569 A.2d 455, 460 (Vt. 1999).

¹⁵⁷ See *Baker*, 744 A.2d. at 897 (Dooley, J., concurring).

¹⁵⁸ See *supra* notes 132–137 and accompanying text (discussing strengths of hierarchical approach to equal protection analysis).

¹⁵⁹ See *Baker*, 744 A.2d at 872 n.5.

¹⁶⁰ See, e.g., *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (concluding that Colorado statute banning laws forbidding sexual-orientation discrimination was not rationally related to legitimate government purpose).

[indeed] softened,"¹⁶¹ then the *Baker* majority opinion may reflect not so much a rejection of algorithmic equal protection frameworks as an acknowledgment—or expression—of their true character.

In the direct and indirect attention they drew to these and like issues in *Baker*, the justices of the Supreme Court of Vermont provided new perspectives on the unfolding nature of judicial review in the context of interpreting the constitutional commitment to equal treatment. It remains for the next court addressing a Common Benefits Clause claim to determine whether the majority's equal protection framework in *Baker* will amount to an ephemeron, or whether it will withstand issues more (or less) complicated than the marriage laws' exclusion while also appropriately channeling judicial discretion. Those future decisions can be expected to contribute additional insights into these fundamental issues, hopefully by expressly or implicitly addressing the reasoning of the *Baker* analyses. As the reasoning of those decisions is discussed and evaluated by lawyers and judges in still other cases, both within and without Vermont, the constitutional discourse on these issues will grow richer. That potentiality hints at the promise of the New Judicial Federalism.

III. REALIZING THE PROMISE OF THE NEW JUDICIAL FEDERALISM

The promise of the New Judicial Federalism is the contribution that independent state constitutional analysis can make to discourse on the meaning and application of the individual rights and liberties embraced by the great ordinances. As discussion of the opinions in *Baker v. State* demonstrates, at its best the New Judicial Federalism is not simply about improving the quality of state constitutional decisionmaking and the reasoned analyses of state constitutional issues; it is about improving the quality of constitutional decisionmaking generally. To the extent that constitutional doctrine is continually being developed and refined by fifty-one courts of last resort, the depth of constitutional lawmaking in both the state and federal courts is likely only to improve, as those courts can seek guidance from numerous authorities in their efforts to understand constitutional commitments to the protection of individual rights and liberties.¹⁶²

¹⁶¹ Sunstein, *supra* note 137, at 77.

¹⁶² "Constitutionalism" may be regarded, after all, "not [as] a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order." Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147-48 (1993).

Such continual refinement of constitutional principles by many judges in many courts reflects the vision of the common law contemplated by Sir Edward Coke, "the poet of judicial wisdom."¹⁶³ Coke adhered to a belief in the law's potential to achieve an "artificial perfection of reason" through the discursive contributions of geographically and temporally disparate minds attuned to the complexities of a particular legal issue. In his judgment, such perfection may only be "gotten by long study, observation and experience, and not of every man's natural reason;" indeed,

[I]f all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law in England is; because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule may be justly verified of it, *Neminem oportet esse sapientiores legibus*. No man out of his own private reason ought to be wiser than the law, which is the perfection of reason.¹⁶⁴

So, too, constitutional discourse should not be viewed as the exclusive purview of the nine justices of the U.S. Supreme Court or the five justices of the Supreme Court of Vermont, but the valid domain of each of the courts of the state and the federal governments.

In a kind of legal synecdoche, *Baker's* state constitutionally based exploration of equal protection—flaws and all—is a paragon of constitutional discourse in itself. Each of the opinions in *Baker* connects and responds in some way to the others, primarily by playing off the majority's elaboration of its Common Benefits Clause analysis, with discussion ranging from the propriety and validity of that test to concerns about appropriate remedial measures.¹⁶⁵ Further, the justices pursued a Common Benefits Clause jurisprudence by pulling together doctrinal arguments from many state and federal constitutional authorities—from prior Vermont decisions,¹⁶⁶ equal protection

¹⁶³ Allen Dillard Boyce, "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review, 39 B.C. L. REV. 43, 43 (1997).

¹⁶⁴ SIR EDWARD COKE, COMMENTARY UPON LITTLETON 97b (Charles Butler ed., 18th ed., Legal Classics Library 1985) (1628).

¹⁶⁵ See, e.g., 744 A.2d at 887-88 (discussing Justice Johnson's proposed remedy for the Common Benefits Clause violation).

¹⁶⁶ See, e.g., *id.* at 872 (discussing *State v. Ludlow Supermarkets, Inc.*, 448 A.2d 791 (Vt. 1982)).

decisions from other state courts,¹⁶⁷ and from federal equal protection and substantive due process cases¹⁶⁸—in an attempt to make sense of Article 7's guarantee of equal treatment under law. The resulting decision, as augmented by each of the opinions, is richer for this effort.

Such engagement in constitutional discourse is not strictly an American jurisprudential phenomenon. As Anne-Marie Slaughter has observed, constitutional "cross-fertilization" is a reality in many international courts.¹⁶⁹ She notes that, "[w]hile opinions rendered by the courts of other national legal systems are never binding, national constitutional courts [now] turn to foreign decisions for different perspectives on similar issues."¹⁷⁰ In a recent South African case, for example, one justice drew on decisions from United States, Canadian and German courts in discussing the meaning of "liberty" under the South African Constitution.¹⁷¹

Of course, there are practical problems to achieving the promise of the New Judicial Federalism. The greatest may be the difficulty judges face in keeping apprised of the vast amount of persuasive authority being generated by their brethren in state and federal courts in the United States, and in finding the time to study that authority while struggling to address the constitutional issues before them fully and completely. State court judges, in particular, face both the press of a crowded docket and the absence of the sort of resources, like extensive law clerk support, that the federal judiciary enjoys. One answer is to rely upon counsel to bring such authority to the attention of the courts, thereby compelling courts to confront these issues. Should lawyers learn that victory in a particular case depends upon a mastery of these materials and the constitutional arguments contained therein, they may be more likely to make the effort. On the other hand, there is a tremendous amount of inertia in the practice of law; lawyers may be as hard-pressed to find time to locate, analyze and argue from new sources of doctrine, and the trend toward arguing

¹⁶⁷ See *Baker*, 744 A.2d at 892 (Dooley, J., concurring) (discussing *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970 (Or. 1982)).

¹⁶⁸ See *Baker*, 744 A.2d at 879 (relying upon federal substantive due process doctrine).

¹⁶⁹ See Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1116–19 (2000).

¹⁷⁰ *Id.* at 1116.

¹⁷¹ See *Ferreira v. Levin*, 1996 (1) SALR 984, 1022–23, para. 66(CC) (S. Afr.) (Opinion of Ackermann, J.); see also Lawrence Friedman, *Turning to the Courts: Human Rights Before the Bench*, 13 HARV. HUM. RTS. J. 315, 317–19 (2000) (book review) (discussing judicial globalization of human rights principles).

state constitutional issues at all, though expressly encouraged by some state courts,¹⁷² has been slow to emerge.¹⁷³

Still, an interest in the development of state constitutional arguments should be encouraged. That encouragement should begin in law schools. Much of what lawyers think to do or to argue, or do not think to do or argue, is a function of the habits of mind they develop during the legal training they receive in law school. Robert Williams has noted that lawyers and judges do not think in terms of state constitutional law because constitutional law courses in American law schools focus almost exclusively upon *federal* constitutional law.¹⁷⁴ Consequently, new lawyers typically graduate from law school having been exposed only to federal constitutional law, and to the belief that federal constitutional law should be the exclusive basis for constitutional arguments in practice.

Ideally, law schools should be exposing students to state constitutional law in a basic constitutional law course—which might also include foreign constitutional law and human rights law, much of which relates to the continuing struggle to appreciate the full nature of fundamental commitments to freedom and liberty.¹⁷⁵ In addition, courses in legal research and writing—particularly those that involve appellate advocacy—should reference state constitutional law. To a great extent, it is the research and citation habits that students learn in those courses that stay with them throughout their lives in practice. Thus it

¹⁷² See, e.g., *State v. Jewett*, 500 A.2d 233, 239 (Vt. 1985) (exhorting advocates to raise and adequately brief state constitutional issues before the court).

¹⁷³ An exception is criminal procedure, an area in which advocates before state courts have diligently raised, and state courts have responded to, arguments under state constitutions. By way of illustration, consider jurisprudence in this area under the Massachusetts Declaration of Rights. See Herbert P. Wilkins, *The State Constitution Matters*, BOSTON B.J., November–December 2000, at 4, 15 (discussing development of search and seizure jurisprudence by the Massachusetts Supreme Judicial Court under Massachusetts Declaration of Rights); see also Charles H. Baron, *The Supreme Judicial Court in Its Fourth Century: Meeting the Challenge of the "New Constitutional Revolution,"* 77 MASS. L. REV. 35, 40–41 (1992) (same).

¹⁷⁴ See ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* xiii (3d ed. 1999) (observing that "the study of American constitutional law has been dominated by a virtually exclusive focus on the federal Constitution and its judicial interpretation"); Charles G. Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1147 (1978) (noting that law clerks working for state judges who are familiar only with federal cases "bring[] a federal bias" with them).

¹⁷⁵ While the U.S. Supreme Court has disdained the use of international law in interpreting the federal constitution, see *Slaughter*, *supra* note 169, at 1118, state courts have invoked international legal principles when interpreting their states' constitutions. See Scott T. Johnson, *The Influence of International Human Rights Law on State Courts and State Constitutions*, 90 AM. SOC'Y INT'L L. PROC. 259 (1996).

is in those courses that students can develop an appreciation for the rich diversity and wealth of state (and foreign) constitutional jurisprudence.

The implementation of such curricular changes inevitably faces the inertia that afflicts the legal academy. Indeed, because law schools are less driven to change by competition than lawyers are, that inertia may possess even greater strength. A potential response would be the establishment and funding of a facilitator position at interested law schools. The facilitator would work with legal research and writing faculty, as well as constitutional law faculty, to supplement existing courses with state constitutional and comparative perspectives.¹⁷⁶ The incorporation of clinical education into the law school curriculum may provide a model in this regard. Spurred by an interest in enriching and reforming legal education, in 1968 the Ford Foundation funded a new, independent foundation, the Council on Legal Education for Professional Responsibility (CLEPR), with \$11 million to devote to the development of clinical programs.¹⁷⁷ Thanks to CLEPR's grants, more than half of the nation's 147 ABA-approved law schools were in the process of developing programs by the fall of 1971.¹⁷⁸

The establishment of a state constitutional law facilitator naturally would not require a similar level of financial support; a facilitator's work at even a few law schools, moreover, could serve to inspire others to revisit their own curricula.¹⁷⁹ A result of such efforts would be more lawyers who are at least prepared to assert state constitutional arguments in appropriate cases. The lawyers who make such arguments will aid judges in their struggles with the complexities of constitutional interpretation in the context of the great ordinances, and those decisions that ultimately draw upon both state and federal constitutional cases in addressing those complexities will move us incre-

¹⁷⁶ Certainly, the need to add a global perspective to the traditional law school curriculum finds support in the increasing globalization of law and lawyering in their many forms. See Slaughter, *supra* note 169, *passim*.

¹⁷⁷ See PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 5 (1998).

¹⁷⁸ See *id.* at 6. Within fifteen years, ninety-eight percent of ABA-approved law schools would offer students a clinical experience of some kind. See *id.* at 7. In the years since its introduction, clinical legal education has helped numerous young lawyers to develop advocacy and counseling skills and to gain a better understanding of "how social institutions really work, . . . with greatly heightened awareness of ethical issues and how to address them." *Id.* at 9.

¹⁷⁹ The Ford grants started "a clinical bandwagon," which led other schools to create clinical programs with their own funds or with support from governments or foundations other than CLEPR. *Id.* at 6.

mentally closer to realizing the promise of the New Judicial Federalism: a rich and varied constitutional discourse in which state and federal courts alike play a part.