"We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions."—Chief Justice AMESTOY

"I concur with the majority's holding, but I respectfully dissent from its novel and truncated remedy, which in my view abdicates this Court's constitutional duty to redress violations of constitutional rights. . . . We should simply enjoin the State from denying marriage licenses to plaintiffs based on sex or sexual orientation."—Justice JOHNSON

Baker v. State of Vermont

170 Vt. 194, 744 A.2d 864 (Supreme Court of Vermont, 1999)

■ **AMESTOY, C.J.**

May the State of Vermont exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples? That is the fundamental question we address in this appeal, a question that the Court well knows arouses deeply-felt religious, moral, and political beliefs. Our constitutional responsibility to consider the legal merits of issues properly before us provides no exception for the controversial case. The issue before the Court, moreover, does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.

We conclude that under the Common Benefits Clause of the Vermont Constitution, which, in pertinent part, reads,

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

Vt. Const., ch. I, art 7., plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.

Plaintiffs are three same-sex couples who have lived together in committed relationships for periods ranging from four to twenty-five years. Two of the couples have raised children together. Each couple applied for a marriage license from their respective town clerk, and each was refused a license as ineligible under the applicable state marriage laws. Plaintiffs thereupon filed this lawsuit against defendants—the State of Vermont, the Towns of Milton and Shelburne, and the City of South Burlington—seeking a declaratory judgment that the refusal to issue them a license violated the marriage statutes and the Vermont Constitution.

. . . The [trial] court ruled that the marriage statutes could not be construed to permit the issuance of a license to same-sex couples. The court further ruled that the marriage statutes were

constitutional because they rationally furthered the State's interest in promoting "the link between procreation and child rearing." This appeal followed. . . .

II. The Constitutional Claim

. . . [P]laintiffs contend that the exclusion violates their right to the common benefit and protection of the law guaranteed by Chapter I, Article 7 of the Vermont Constitution. They note that in denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse's medical, life, and disability insurance, hospital visitation and other medical decisionmaking privileges, spousal support, intestate succession, homestead protections, and many other statutory protections. They claim the trial court erred in upholding the law on the basis that it reasonably served the State's interest in promoting the "link between procreation and child rearing." They argue that the large number of married couples without children, and the increasing incidence of same-sex couples with children, undermines the State's rationale. They note that Vermont law affirmatively guarantees the right to adopt and raise children regardless of the sex of the parents, see 15A V.S.A. § 1–102, and challenge the logic of a legislative scheme that recognizes the rights of same-sex partners as parents, yet denies them—and their children—the same security as spouses. . . .

In considering this issue, it is important to emphasize at the outset that it is the Common Benefits Clause of the Vermont Constitution we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. . . . As we explain in the discussion that follows, the Common Benefits Clause of the Vermont Constitution differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development. While the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters. See *id.* (Court is free to "provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter"); see generally H. Linde, First Things First, Rediscovering the States' Bill of Rights, 9 *U. Balt. L.Rev.* 379, 381–82 (1980); S. Pollock, State Constitutions as Separate Sources of Fundamental Rights, 35 *Rutgers L.Rev.* 707, 717–19 (1983).

A. *Historical Development*

In understanding the import of the Common Benefits Clause, this Court has often referred to principles developed by the federal courts in applying the Equal Protection Clause. At the same time, however, we have recognized that "[a]lthough the provisions have some similarity of purpose, they are not identical." Indeed, 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 governmental objective.

Although our decisions over the last few decades have routinely invoked the rhetoric of suspect class favored by the federal courts, there are notable exceptions. The principal decision in this regard is the landmark case of State v. Ludlow Supermarkets, Inc. (1982) . . . *Ludlow* . . . did not alter the traditional requirement under Article 7 that legislative classifications must "reasonably relate to a legitimate public purpose." . . . It did establish that Article 7 would require a "more stringent" reasonableness inquiry than was generally associated with rational basis review under the federal constitution. *Ludlow* . . . signaled that Vermont courts—having "access to specific legislative history and all other proper resources" to evaluate the object and effect of state laws—would engage in a meaningful, case-specific analysis to ensure that any exclusion from the general benefit and protection of the law would bear a just and reasonable relation to the legislative goals. . . .

B. *Text*

We typically look to a variety of sources in construing our Constitution, including the language of the provision in question, historical context, case-law development, the construction of similar provisions in other state constitutions, and sociological materials. The Vermont Constitution was adopted with little recorded debate and has undergone remarkably little revision in its 200–year history. Recapturing the meaning of a particular word or phrase as understood by a generation more than two centuries removed from our own requires, in some respects, an immersion in the culture and materials of the past more suited to the work of professional historians than courts and lawyers. See generally H. Powell, Rules for Originalists, 73 *Va. L.Rev.* 659, 659–61 (1987); P. Brest, The Misconceived Quest for the Original Understanding, 60 *B.U. L.Rev.* 204, 204–09 (1980). The responsibility of the Court, however, is distinct from that of the historian, whose interpretation of past thought and actions necessarily informs our analysis of current issues but cannot alone resolve them. See Powell, *supra*, at 662–68; Brest, *supra*, at 237. As we observed in State v. Kirchoff (1991), "our duty is to discover . . . the *core value* that gave life to Article [7]." (Emphasis added.) Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.

We first focus on the words of the Constitution themselves, for, as Chief Justice Marshall observed, "although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words." Sturges v. Crowninshield (1819). One of the fundamental rights included in Chapter I of the Vermont Constitution of 1777, entitled "A Declaration of Rights of the Inhabitants of the State of Vermont," the Common Benefits Clause as originally written provided:

> 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 a part only 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. Vt. Const. of 1777, ch. I, art. VI.

The first point to be observed about the text is the affirmative and unequivocal mandate of the first section, providing that government is established for the common benefit of the people and community as a whole. Unlike the Fourteenth Amendment, whose origin and language reflect the solicitude of a dominant white society for an historically-oppressed African–American minority (no state shall "deny" the equal protection of the laws), the Common Benefits Clause mirrors 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. The same assumption that all the people should be afforded all the benefits and protections bestowed by government is also reflected in the second section, which prohibits not the denial of rights to the oppressed, but rather the conferral of advantages or emoluments upon the privileged.

. . . The affirmative right to the "common benefits and protections" of government and the corollary proscription of favoritism in the distribution of public "emoluments and advantages" reflect the framers' overarching objective "not only that everyone enjoy equality before the law or have an equal voice in government but also that everyone have *an equal share in the fruits of the common enterprise*." W. Adams, *The First American Constitutions* 188 (1980) (emphasis added). Thus, at its core the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage.

C. *Historical Context*

Although historical research yields little direct evidence of the framers' intentions, an examination of the ideological origins of the Common Benefits Clause casts a useful light upon the inclusionary principle at its textual core. . . .

The historical origins of the Vermont Constitution . . . reveal that the framers, although enlightened for their day, were not principally concerned with civil rights for African–Americans and other minorities, but with equal access to public benefits and protections for the community as a whole. 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. The Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege.

D. *Analysis Under Article 7*

The language and history of the Common Benefits Clause thus reinforce the conclusion that a relatively uniform standard, reflective of the inclusionary principle at its core, must govern our analysis of laws challenged under the Clause. Accordingly, we conclude that this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7. As noted, Article 7 is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons "who are a part only of that community." When a statute is challenged under Article 7, we first define that "part of the community" disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the state's protection. Our concern here is with delineating, not with labelling the excluded class as "suspect," "quasi-suspect," or "non-suspect" for purposes of determining different levels of judicial scrutiny.

We look next to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others. Consistent with Article 7's guiding principle of affording the protection and benefit of the law to all members of the Vermont community, we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives.

We must ultimately 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. Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (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. 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." Washington v. Glucksberg (1997) (Souter, J., concurring). 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,' " *id.* (quoting Poe v. Ullman (1961) (Harlan, J., dissenting)), and not to merely personal notions. Moreover, the process of review is necessarily "one of close criticism going to the *details* of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value." *Id.* (emphasis added). . . .

Ultimately, the answers to these questions, however useful, cannot substitute for " '[t]he inescapable fact . . . that adjudication of . . . claims may call upon the Court in interpreting the

Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.' " *Id.* (quoting Planned Parenthood of Southeastern Pa. v. Casey (1992)). The balance between individual liberty and organized society which courts are continually called upon to weigh does not lend itself to the precision of a scale. It is, indeed, a recognition of the imprecision of "reasoned judgment" that compels both judicial restraint and respect for tradition in constitutional interpretation.

E. *The Standard Applied*

With these general precepts in mind, we turn to the question of whether the exclusion of same-sex couples from the benefits and protections incident to marriage under Vermont law contravenes Article 7. The first step in our analysis is to identify the nature of the statutory classification. As noted, the marriage statutes apply expressly to opposite-sex couples. Thus, the statutes exclude anyone who wishes to marry someone of the same sex.[1]

Next, we must identify the governmental purpose or purposes to be served by the statutory classification. The principal purpose the State advances in support of the excluding same-sex couples from the legal benefits of marriage is the government's interest in "furthering the link between procreation and child rearing." The State has a strong interest, it argues, in promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support. The State contends, further, that the Legislature could reasonably believe that sanctioning same-sex unions "would diminish society's perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surplusage to the functions of procreation and child rearing." . . .

It is . . . undisputed that many *opposite*-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children. Therefore, if the purpose of the statutory exclusion of same-sex couples is to "further [ ] the link between procreation and child rearing," it is significantly underinclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal.

Furthermore, . . . a significant number of children today are actually being raised by same-sex parents, and increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques. . . .

. . . The Vermont Legislature has not only recognized this reality, but has acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the children

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[1] Relying largely on federal precedents, our colleague in her concurring and dissenting opinion suggests that the statutory exclusion of same-sex couples from the benefits and protections of marriage should be subject to heightened scrutiny as a "suspect" or "quasi-suspect" classification based on sex. All of the seminal sex-discrimination decisions, however, have invalidated statutes that single out men or women as a discrete class for unequal treatment. See, e.g., United States v. Virginia (1996); Mississippi Univ. for Women v. Hogan (1982); Craig v. Boren (1976); Frontiero v. Richardson (1973). . . . The difficulty here is that the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex. . . . Indeed, most appellate courts that have addressed the issue have rejected the claim that defining marriage as the union of one man and one woman discriminates on the basis of sex. But see Baehr v. Lewin (Haw. 1993) (plurality opinion holding that state's marriage laws discriminated on basis of sex).

Although the concurring and dissenting opinion invokes the United States Supreme Court decision in Loving v. Virginia (1967), the reliance is misplaced. There the high court had little difficulty in looking behind the superficial neutrality of Virginia's anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy. Our colleague argues, by analogy, that the effect, if not the purpose, of the exclusion of same-sex partners from the marriage laws is to maintain certain male and female stereotypes to the detriment of both. To support the claim, she cites a number of antiquated statutes that denied married women a variety of freedoms, including the right to enter into contracts and hold property. The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law "can be traced to a discriminatory purpose." The evidence does not demonstrate such a purpose. It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us. Accordingly, we are not persuaded that sex discrimination offers a useful analytic framework for determining plaintiffs' rights under the Common Benefits Clause. [Footnote by the Court.]

conceived through such efforts. See 15A V.S.A. § 1–102(b) (allowing partner of biological parent to adopt if in child's best interest without reference to sex). The state has also acted to expand the domestic relations laws to safeguard the interests of same-sex parents and their children when such couples terminate their domestic relationship. See 15A V.S.A. § 1–112 (vesting family court with jurisdiction over parental rights and responsibilities, parent-child contact, and child support when unmarried persons who have adopted minor child "terminate their domestic relationship").

Therefore, to the extent that the state's purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives. . . .

The State also argues that because same-sex couples cannot conceive a child on their own, their exclusion promotes "a perception of the link between procreation and child rearing," and that to discard it would "advance the notion that mothers and fathers . . . are mere surplusage to the functions of procreation and child rearing." Apart from the bare assertion, the State offers no persuasive reasoning to support these claims. Indeed, it is undisputed that most of those who utilize nontraditional means of conception are infertile *married* couples, and that many assisted-reproductive techniques involve only one of the married partner's genetic material, the other being supplied by a third party through sperm, egg, or embryo donation. The State does not suggest that the use of these technologies undermines a married couple's sense of parental responsibility, or fosters the perception that they are "mere surplusage" to the conception and parenting of the child so conceived. Nor does it even remotely suggest that access to such techniques ought to be restricted as a matter of public policy to "send a public message that procreation and child rearing are intertwined." Accordingly, there is no reasonable basis to conclude that a same-sex couple's use of the same technologies would undermine the bonds of parenthood, or society's perception of parenthood. . . .

The State asserts that a number of additional rationales could support a legislative decision to exclude same-sex partners from the statutory benefits and protections of marriage. The most substantive of the State's remaining claims relates to the issue of childrearing. It is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in this area, although we note that child-development experts disagree and the answer is decidedly uncertain. The argument, however, contains a more fundamental flaw, and that is the Legislature's endorsement of a policy diametrically at odds with the State's claim. In 1996, the Vermont General Assembly enacted, and the Governor signed, a law removing all prior legal barriers to the adoption of children by same-sex couples. See 15A V.S.A. § 1–102. At the same time, the Legislature provided additional legal protections in the form of court-ordered child support and parent-child contact in the event that same-sex parents dissolved their "domestic relationship." *Id.* § 1–112. . . .

Similarly, the State's argument that Vermont's marriage laws serve a substantial governmental interest in maintaining uniformity with other jurisdictions cannot be reconciled with Vermont's recognition of unions, such as first-cousin marriages, not uniformly sanctioned in other states. In an analogous context, Vermont has sanctioned adoptions by same-sex partners, see 15A V.S.A. § 1–102, notwithstanding the fact that many states have not.

Finally, it is suggested 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. We find the argument to be unpersuasive. . . . [T]o the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law. . . .

Thus . . . none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law. Accordingly, in the faith that a case beyond the imagining of the framers of

our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples. It remains only to determine the appropriate means and scope of relief compelled by this constitutional mandate.

F. *Remedy*

It is important to state clearly the parameters of today's ruling. . . .

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

Further, while the State's prediction of "destabilization" cannot be a ground for denying relief, it is not altogether irrelevant. A sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences. Absent legislative guidelines defining the status and rights of same-sex couples, consistent with constitutional requirements, uncertainty and confusion could result. Therefore, we hold that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion. In the event that the benefits and protections in question are not statutorily granted, plaintiffs may petition this Court to order the remedy they originally sought.

Our colleague asserts that granting the relief requested by plaintiffs—an injunction prohibiting defendants from withholding a marriage license—is our "constitutional duty." (Johnson, J., concurring in part and dissenting in part). We believe the argument is predicated upon a fundamental misinterpretation of our opinion. It appears to assume that we hold plaintiffs are entitled to a marriage license. We do not. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so, and the mandate proposed by our colleague is inconsistent with the Court's holding. . . .

The concurring and dissenting opinion further claims that our mandate represents an "abdicat[ion]" of the constitutional duty to decide, and an inexplicable failure to implement "the most straightforward and effective remedy." First, our opinion provides greater recognition of—and protection for—same sex relationships than has been recognized by any court of final jurisdiction in this country with the instructive exception of the Hawaii Supreme Court in *Baehr*. See Hawaii Const., art. I, § 23 (state constitutional amendment overturned same-sex marriage decision in *Baehr* by returning power to legislature "to reserve marriage to opposite-sex couples"). Second, the dissent's suggestion that her mandate would avoid the "political caldron" of public debate is—even allowing for the welcome lack of political sophistication of the judiciary—significantly insulated from reality. See Hawaii Const., art. I, § 23; see also Alaska Const., art. I, § 25 (state constitutional amendment reversed trial court decision in favor of same-sex marriage, Brause v. Bureau of Vital Statistics (Alaska Super.Ct. Feb. 27, 1998), by providing that "a marriage may exist only between one man and one woman").

The concurring and dissenting opinion confuses decisiveness with wisdom and judicial authority with finality. Our mandate is predicated upon a fundamental respect for the ultimate source of constitutional authority, not a fear of decisiveness. No court was ever more decisive than the United States Supreme Court in Dred Scott v. Sandford (1857). Nor more wrong. Ironically it was a Vermonter, Stephen Douglas, who in defending the decision said—as the dissent in essence does here—"I never heard before of an appeal being taken from the Supreme Court." See A. Bickel, *The Morality of Consent* 101 (1975). But it was a profound understanding of the law and the "unruliness of the human condition," *id.* at 11, that prompted Abraham Lincoln to respond that the Court does not issue Holy Writ. See *id.* at 101.* Our colleague may be correct that a mandate intended to provide the Legislature with the opportunity to implement the holding of this Court in an orderly and expeditious fashion will have precisely the opposite effect. Yet it cannot be doubted that judicial authority is not ultimate authority. It is certainly not the only repository of wisdom.

> When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation. C. Sunstein, Foreword: Leaving Things Undecided, 110 *Harv. L.Rev.* 4, 101 (1996).

The implementation by the Vermont Legislature of a constitutional right expounded by this Court pursuant to the Vermont Constitution for the common benefit and protection of the Vermont community is not an abdication of judicial duty, it is the fulfillment of constitutional responsibility.

III. Conclusion

While many have noted the symbolic or spiritual significance of the marital relation, it is plaintiffs' claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case. The State's interest in extending official recognition and legal protection to the professed commitment of two individuals to a lasting relationship of mutual affection is predicated on the belief that legal support of a couple's commitment provides stability for the individuals, their family, and the broader community. Although plaintiffs' interest in seeking state recognition and protection of their mutual commitment may—in view of divorce statistics—represent "the triumph of hope over experience," the essential aspect of their claim is simply and fundamentally for inclusion in the family of state-sanctioned human relations.

The past provides many instances where the law refused to see a human being when it should have. See, e.g., *Dred Scott* (concluding that African slaves and their descendants had "no rights which the white man was bound to respect"). . . . The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.

The judgment of the superior court upholding the constitutionality of the Vermont marriage statutes under Chapter I, Article 7 of the Vermont Constitution is reversed. The effect of the Court's decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein.

■ **DOOLEY, J.,** concurring.

I concur in Part I of the majority opinion, the holding of Part II, and the mandate. I do not, however, concur in the reasoning of Part II. . . .

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* See Abraham Lincoln's First Inaugural Address, reprinted above, p. 311.—**Eds.**

■ **JOHNSON, J.,** concurring in part and dissenting in part.

. . . I concur with the majority's holding, but I respectfully dissent from its novel and truncated remedy, which in my view abdicates this Court's constitutional duty to redress violations of constitutional rights. . . . We should simply enjoin the State from denying marriage licenses to plaintiffs based on sex or sexual orientation. That remedy would provide prompt and complete relief to plaintiffs and create reliable expectations that would stabilize the legal rights and duties of all couples.

I

. . . [A]bsent "compelling" reasons that dictate otherwise, it is not only the prerogative but the duty of courts to provide prompt relief for violations of individual civil rights. This basic principle is designed to assure that laws enacted through the will of the majority do not unconstitutionally infringe upon the rights of a disfavored minority. . . .

The majority declines to provide plaintiffs with a marriage license, however, because a sudden change in the marriage laws "may have disruptive and unforeseen consequences," and "uncertainty and confusion could result." Thus, within a few pages of rejecting the State's doomsday speculations as a basis for upholding the unconstitutionally discriminatory classification, the majority relies upon those same speculations to deny plaintiffs the relief to which they are entitled as the result of the discrimination.

During the civil rights movement of the 1960's, state and local governments defended segregation or gradual desegregation on the grounds that mixing the races would lead to interracial disturbances. The Supreme Court's "compelling answer" to that contention was "that constitutional rights may not be denied simply because of hostility to their assertion or exercise." See Watson v. City of Memphis (1963). Here, too, we should not relinquish our duty to redress the unconstitutional discrimination that we have found merely because of "personal speculations" or "vague disquietudes." While the laudatory goals of preserving institutional credibility and public confidence in our government may require elected bodies to wait for changing attitudes concerning public morals, those same goals require courts to act independently and decisively to protect civil rights guaranteed by our Constitution. . . .

Today's decision, which is little more than a declaration of rights, abdicates that responsibility. The majority declares that plaintiffs have been unconstitutionally deprived of the benefits of marriage, but does not hold that the marriage laws are unconstitutional, does not hold that plaintiffs are entitled to the license that triggers those benefits, and does not provide plaintiffs with any other specific or direct remedy for the constitutional violation that the Court has found to exist. By suspending its judgment and allowing the Legislature to choose a remedy, the majority, in effect, issues an advisory opinion that leaves plaintiffs without redress and sends the matter to an uncertain fate in the Legislature. . . .

No decision of this Court will abate the moral and political debate over same-sex marriage. My view as to the appropriateness of granting plaintiffs the license they seek is not based on any overestimate (or *any* estimate) of its effectiveness, nor on a miscalculation (or *any* calculation) as to its likely permanence, were it to have received the support of a majority of this Court. Rather, it is based on what I believe are the commands of our Constitution.

II

Although I concur with the majority's conclusion that Vermont law unconstitutionally excludes same-sex couples from the benefits of marriage, I write separately to state my belief that this is a straightforward case of sex discrimination.

As the majority states, the marriage "statutes, read as a whole, reflect the common understanding that marriage under Vermont law consists of a union between a man and a woman." Thus, the statutes impose a sex-based classification. A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. Similarly, a man is denied the right to marry another man because his would-be partner is a man, not because one or both are gay. Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a license.

The State advances two arguments in support of its position that Vermont's marriage laws do not establish a sex-based classification. The State first contends that the marriage statutes merely acknowledge that marriage, by its very nature, cannot be comprised of two persons of the same sex. Thus, in the State's view, it is the *definition* of marriage, not the statutes, that restricts marriage to two people of the opposite sex. This argument is circular. It is the State that defines civil marriage under its statute. The issue before us today is whether the State may continue to deprive same-sex couples of the benefits of marriage. This question is not resolved by resorting to a historical definition of marriage; it is that very definition that is being challenged in this case.

The State's second argument, also propounded by the majority, is that the marriage statutes do not discriminate on the basis of sex because they treat similarly situated males the same as similarly situated females. Under this argument, there can be no sex discrimination here because "[i]f a man wants to marry a man, he is barred; a woman seeking to marry a woman is barred in precisely the same way. For this reason, women and men are not treated differently." C. Sunstein, Homosexuality and the Constitution, 70 *Ind. L.J.* 1, 19 (1994). But consider the following example. Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. This is sex discrimination.

I recognize, of course, that although the classification here is sex-based on its face, its most direct impact is on lesbians and gay men, the class of individuals most likely to seek same-sex marriage. Viewing the discrimination as sex-based, however, is important. Although the *original* purpose of the marriage statutes was not to exclude same-sex couples, for the simple reason that same-sex marriage was very likely not on the minds of the Legislature when it passed the licensing statute, the *preservation* of the sex-based classification deprives lesbians and gay men of the right to marry the life partner of their choice. If . . . the sex-based classification contained in the marriage laws is unrelated to any valid purpose, but rather is a vestige of sex-role stereotyping that applies to both men and women, the classification is still unlawful sex discrimination even if it applies equally to men and women. See MacCallum v. Seymour's Adm'r (1996) (Constitution does not permit law to give effect, either directly or indirectly, to private biases; when government itself makes the classification, it is obliged to afford all persons equal protection of the law); Loving v. Virginia (1967) (statute prohibiting racial intermarriage violates Equal Protection Clause although it applies equally to Whites and Blacks because classification was designed to maintain White Supremacy.) . . .

EDITORS' NOTES

(1) **Query:** What are the Vermont Supreme Court's conceptions of WHAT is the (Vermont) Constitution and HOW to interpret? What are the main differences between those conceptions and the corresponding conceptions of WHAT and HOW that we have seen in the opinions and writings of justices of the United States Supreme Court concerning the United States Constitution?

(2) **Query:** How does the Vermont Supreme Court's interpretation of the Common Benefits Clause of the Vermont Constitution differ from the United States Supreme Court's interpretation of the Equal Protection Clause of the United States Constitution? In particular, how does the former compare with the approaches to the latter long advocated by Justices Stevens (see, e.g., his concurring opinions in Craig v. Boren [1976; reprinted above, p. **Error! Bookmark not defined.**] and Cleburne v. Cleburne Living Center [1985; reprinted above, p. **Error! Bookmark not defined.**]), and previously advocated by Justice Marshall (see, e.g., his dissenting opinion in San Antonio v. Rodriguez [1973; reprinted above, p. **Error! Bookmark not defined.**])? How does the Vermont Supreme Court's form of scrutiny compare with the rational basis scrutiny "with bite" that we have seen, e.g., in *Cleburne* and Romer v. Evans (1996; reprinted above, p. **Error! Bookmark not defined.**)?

(3) **Query:** Who has the better argument concerning whether laws denying marriage to same-sex couples discriminate on the basis of sex, Chief Justice Amestoy (rejecting the argument) or Justice Johnson (accepting the argument)? Is the analogy to Loving v. Virginia (1967: reprinted above, p. **Error! Bookmark not defined.**) "misplaced" or cogent?

(4) **Query:** Is the majority's disposition regarding the remedy—leaving it to the Vermont Legislature to implement the constitutional mandate by choosing a statutory scheme that will afford common benefits to same-sex couples—a "fulfillment of constitutional responsibility," as Chief Justice Amestoy claims, or an "abdication of judicial duty," as Justice Johnson claims? Put another way, should it be celebrated as a prudential act of judicial statesmanship or condemned for declaring a right without recognizing a remedy? How do their positions reflect different understandings of WHO may interpret?

(5) Presumably one of the prudential reasons for Chief Justice Amestoy's decision to leave it to the Vermont Legislature to implement a statutory scheme was his aim to avoid what he saw as the fate of the Hawaii Supreme Court in Baehr v. Lewin (1993). In that case, a plurality opinion held that the state's marriage laws denying marriage to same-sex couples discriminated on the basis of sex, only to be overturned by a state constitutional amendment returning the power to the legislature "to reserve marriage to opposite-sex couples." Hawaii Const., art. I, § 23.

(6) **Query:** At the beginning of the majority opinion, Chief Justice Amestoy purports to bracket the "religious or moral debate over intimate same-sex relationships." Does he succeed in doing so? Should he seek to do so?

(7) Soon after the decision, the Vermont Legislature enacted a statute recognizing same-sex civil unions while not recognizing same-sex marriage. Nonetheless, it afforded all of the benefits of marriage (except the name "marriage") to such civil unions. In 2009, the Vermont Legislature enacted a statute recognizing same-sex marriage. **Query:** What might have prompted Vermont to move from civil unions to marriage?

(8) In Canada, the highest court of the province of Ontario unanimously ruled that the definition of marriage in the common law of Canada—limiting marriage to a union between a man and a woman—was discriminatory and unconstitutional. The court ruled that under the Charter of Rights and Freedoms (roughly the Canadian equivalent of the Bill of Rights), "the existing common-law definition of marriage violates the couple's equality rights on the basis of sexual orientation." The court added: "In doing so, it offends the dignity of persons in same-sex relationships." Halpern v. Toronto (City) (2003). In 2005, Canada passed the Civil Marriage Act opening marriage to same-sex couples.

(9) In what ways does this opinion differ from Obergefell v. Hodges (2015; reprinted below,_____)?