# EQUAL PROTECTION AT THE CROSSROADS: ON *BAKER*, COMMON BENEFITS, AND FACIAL NEUTRALITY

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## I. INTRODUCTION

In *Baker v. State*,[1] the Vermont Supreme Court held that same-sex couples must be afforded the opportunity to receive the benefits and protections that different-sex couples can obtain through marriage. The court based its holding on the Vermont Constitution's Common Benefits Clause, which is the "counterpart" of the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution.[2]

Although the Common Benefits Clause and the Equal Protection Clause are counterparts, they do not mirror each other—something might violate the former without violating the latter.[3] Indeed, the Vermont court suggested that the refusal to accord same-sex couples the benefits of marriage violated state but not federal constitutional guarantees.[4]

The *Baker* decision represents a milestone in the movement to secure equal rights for lesbians, gays, and bisexuals and will have great legal significance in the years to come. It provides the reasoning upon which same-sex marriage bans can be challenged in other states and helps clarify why reserving marriage for different-sex couples involves an arbitrary distinction that violates state and federal constitutional guarantees. Nonetheless, the *Baker* court's federal equal protection analysis must be discussed and critically evaluated because it represents a departure from the established jurisprudence in this area,[5] which, if followed, would seriously vitiate equal protection guarantees for all individuals.

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1. 744 A.2d 864 (Vt. 1999).
2. *See id.* at 870.
3. *See id.*
4. *See id.* at 870 n.3.
5. *See infra* section III.B.

Part II of this Essay discusses the *Baker* analysis of the Vermont Constitution's Common Benefits Clause and argues that the Common Benefits Clause jurisprudence bears a close resemblance to the "rational basis with bite scrutiny" that the United States Supreme Court has sometimes employed in its federal equal protection analyses. Part III discusses the Vermont court's analysis of the federal guarantees implicated by statutes employing sex-based classifications. This Part points out both that the court has misrepresented the conditions under which heightened scrutiny is triggered and that the court's analysis would severely undermine the efficacy of equal protection guarantees if adopted in other jurisdictions. The Essay concludes by suggesting that the *Baker* decision, when combined with the correct analysis of when sex-based classifications trigger heightened scrutiny, provides a powerful set of arguments establishing that same-sex marriage bans violate both state and federal constitutional guarantees.

## II. *BAKER*'S CONSTRUCTION OF THE COMMON BENEFITS CLAUSE AND "RATIONAL BASIS WITH BITE" SCRUTINY

In 1997, three couples filed a lawsuit against the state of Vermont after being denied marriage licenses by their respective town clerks.[6] They lost at the trial level and appealed to the Vermont Supreme Court. The Vermont Supreme Court reversed the lower court, but suspended its own judgment to "permit the Legislature to consider and enact legislation consistent with the constitutional mandate described [by the court]."[7]

The *Baker* court distinguished between the rights and benefits of marriage and the ability to marry per se, holding that the Vermont Constitution required that same-sex couples be afforded the opportunity to receive the former. The *Baker* court did not address whether a separate system which accorded all of these benefits and protections[8] might fail to pass muster precisely because the state had nonetheless refused to permit to same-sex couples to enjoy the special status of marriage, deferring that issue for another day.[9]

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6. *See* Allison E. Davis, *Civil Unions Not Civil Rights*, THE DEFENDER, *available in* 2000 WL 19354008 (May 4, 2000) ("Three years ago, St. Michael's theater professor Peter Harrigan and his partner Stan Baker joined two other couples in a lawsuit against the state of Vermont after being denied marriage licenses."); *see also Baker*, 744 A.2d at 867.

7. *Baker*, 744 A.2d at 889.

8. According to the bill passed by the Vermont House and Senate that eventually became law, *see* Associated Press, *Dean Signs Nation's First Civil-Union Law*, TIMES UNION (Albany) at A4 (May 27, 2000) ("Gov. Howard Dean signed a first-in-the-nation law Wednesday granting gay couples nearly all of the benefits of marriage."), same-sex couples who meet the relevant definition, *see* 1999 VT H.B. 847 § 3 (1999), "shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." *See id.*

9. *See Baker*, 744 A.2d at 886 ("While some future case may attempt to establish that—notwithstanding equal benefits and protections under Vermont law—the

In *Baker*, the court held that the state is constitutionally required to extend to same-sex couples the "common benefits and protections" that flow from marriage under Vermont law.[10] While refusing to specify what statutes the legislature had to enact or modify in order to satisfy the requirements of the Vermont Constitution, the *Baker* court made clear that the legislative package "must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law."[11] Thus, the Vermont Legislature had to: (1) amend the marriage statute to permit same-sex couples to marry, or (2) create a parallel system for same-sex partners[12] that, among other things, included rights under intestate succession laws,[13] the right to bring an action for wrongful death[14] or loss of consortium,[15] rights incident to the medical treatment of a family member including hospital visitation,[16] and the right to receive spousal support, maintenance,[17] and a property division[18] in the event of separation or divorce.[19] The Vermont Legislature chose to do the latter, permitting same-sex couples who met the relevant definition to "have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[20]

The *Baker* court rejected the plaintiffs' claim that the current marriage statute should be construed broadly to include same-sex couples,[21] instead concluding that the Legislature had intended to reserve marriage for different-sex couples.[22] The court then examined the Vermont Constitution's Common Benefits Clause, noting that although it was the "counterpart" of the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution,[23] the former "differs markedly" from the latter in its "language, historical origins, purpose, and development."[24] The court concluded that the failure to offer the benefits and protections of marriage to same-sex couples violated the Common Benefits Clause

al of a marriage license, operates per se to deny constitutionally protected rights, [illegible]
laim we address today,").
*Id.* at 867.
*Id.*
Vermont has passed a law recognizing same-sex "civil unions." *See* Pamela
*ame-Sex Couples Take Vows As Law Takes Effect; Across Vermont, Dozens il Union*, WASH. POST at A03 (July 2, 2000).
*See* Vt. Stat. Ann. Tit. 14, § 403 (1999); Vt. Stat. Ann. Tit. 14, § 551 (1999).
*See* Vt. Stat. Ann. Tit. 14, § 1492 (1999).
*See* Vt. Stat. Ann. Tit. 12, § 5431 (1999).
*See* Vt. Stat. Ann. Tit. 18, § 1852 (1999).
*See* Vt. Stat. Ann. Tit. 15, § 752 (1999).
*See* Vt. Stat. Ann. Tit. 15, § 751 (1999).
*See Baker*, 744 A.2d at 884.
1999 VT H.B. 847 § 3 (1999).
*See Baker*, 744 A.2d at 869.
*See id.*
*See id.* at 870.
*Id.*

of the Vermont Constitution,[25] but suggested that such a failure did not offend federal equal protection guarantees.[26]

### *A. The Common Benefits Clause*

The Common Benefits Clause states that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community..."[27] The assumption underlying the clause is that "all the people should be afforded all the benefits and protections bestowed by government."[28] The *Baker* court explained that the "concept of equality at the core of the Common Benefits Clause was...the elimination of artificial governmental preferments and advantages," and held that the state constitution ensures that all Vermonters must receive the benefit, protection, and security provided by law.[29] Because the Common Benefits Clause is "the first and primary safeguard of the rights and liberties of all Vermonters"[30] and the Federal Equal Protection Clause merely supplements that safeguard,[31] the Common Benefits Clause could require that lesbian, gay, and bisexual Vermonters be extended the benefits at issue even if federal equal protection guarantees did not.[32]

The Vermont court was not suggesting that the Common Benefits Clause required that all Vermonters be offered the same benefits and protections if there were relevant factors that made the individuals dissimilar in a constitutionally significant way.[33] The court recognized that its duty was to "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."[34] If the exclusion was sufficiently closely related to the government's asserted end, then the exclusion would be upheld.[35] If the exclusion undermined rather than supported the articulated purpose, however, then the statute and the articulated goal would not be sufficiently closely related, and the statute would not pass constitutional muster.[36]

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25. *See id.* at 887.
26. *See id.* at 880 n.13.
27. VT. CONST. ch. 1, art. 7 (quoted in *Baker*, 744 A.2d at 867.).
28. *Baker*, 744 A.2d at 874.
29. *Id.* at 876.
30. *Id.* at 870.
31. *See id.*
32. *See id.* (pointing out explicitly that the Vermont Constitution may offer more generous protections than are found in the Federal Constitution).
33. *See id.* (stating the goal was to eliminate *artificial* advantages).
34. *Id.* at 878–79.
35. *See id.* at 871 (explaining that the approach "vigorously ensur[es] that the means chosen bear a just and reasonable relation to the governmental objective").
36. *See id.* at 873 (discussing the striking down of a fence-repair statute because "the policies underlying the law were outdated and failed to establish a reasonable relation to the public purpose in light of contemporary circumstances").

The *Baker* court suggested that the State's purpose in licensing civil marriages "was, and is, [at least in part,] to legitimize children and provide for their security."[37] However, the statute reserving marriage for different-sex couples would "exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives."[38] Further, "the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against."[39] Thus, the court suggested that the statute could not pass constitutional muster because it was not rationally related to the legitimate goal (protecting children) articulated by the state.[40]

### *B. "Rational Basis with Bite" Scrutiny*

The test to determine whether the guarantees of the Common Benefits Clause have been violated is "broadly deferential to the legislative prerogative to define and advance governmental ends,"[41] but "vigorously ensur[es] that the means chosen bear a just and reasonable relation to the governmental objective."[42] This test, the *Baker* court explained, is to be contrasted with the federal rational basis test under which "nearly all economic and commercial legislation...[is] presumptively constitutional and will be upheld if rationally related to any conceivable, legitimate governmental interest."[43] The *Baker* court cited *City of Cleburne v. Cleburne Living Center, Inc.*[44] as support for its claim that the federal rational basis test is extremely deferential,[45] notwithstanding that the *Cleburne* Court had struck down a zoning ordinance excluding homes for the mentally handicapped on rational basis grounds.[46]

The *Cleburne* decision merits closer examination, since zoning ordinances involve commercial legislation.[47] If such legislation will be upheld if rationally related to any conceivable, legitimate governmental purpose and if there were legitimate governmental purposes that *might* have been served by the

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37. *Id.* at 882; *see also id.* at 881 ("It is beyond dispute that the State has a legitimate and long-standing interest in promoting a permanent commitment between couples for the security of their children.").

38. *Id.* at 882.

39. *Id.*

40. *See id.* ("In short, the marital exclusion treats persons who are similarly situation for purposes of the law, differently.").

41. *Id.* at 871.

42. *Id.*

43. *Id.* at 870 n.3.

44. 473 U.S. 432 (1985).

45. *See Baker*, 744 A.2d at 870 n.3.

46. *See Cleburne*, 473 U.S. at 435.

47. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (characterizing zoning ordinance as "economic and social legislation").

Cleburne zoning ordinance,[48] then one would have expected that the ordinance would have been upheld. Nonetheless, the Court struck it down, even though "Cleburne's ordinance surely [was] valid under the traditional rational-basis test applicable to economic and commercial regulation."[49]

The *Cleburne* Court lacked candor[50] when it claimed that it was employing "minimum rationality review"[51] to strike down the ordinance at issue. A more credible explanation of the Court's analysis is that the kind of scrutiny actually used was a "'second order' rational basis review."[52] Had the *Baker* court employed the rational basis test that the *Cleburne* Court seemed in fact to have employed,[53] the court would have struck down the Vermont marital statute as a violation of both state and federal constitutional guarantees.[54]

Some commentators have suggested that the Court's rational basis test itself involves two tiers.[55] Under the more forgiving rational basis test, the Court is extremely deferential and will uphold legislation that is rationally related to almost any legitimate government purpose.[56] However, under the less forgiving rational basis standard, the Court will more closely examine the statute at issue to ensure

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48. *See Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in the judgment in part and dissenting in part) (discussing the "legitimate concerns for fire hazards or the serenity of the neighborhood" at issue).

49. *Id.* at 456 (Marshall, J., concurring in the judgment in part and dissenting in part).

50. *See id.* at 460 (Marshall, J., concurring in the judgment in part and dissenting in part) ("Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the *careful scrutiny* it today receives.") (emphasis added).

51. *Id.* at 459 (Marshall, J., concurring in the judgment in part and dissenting in part).

52. *Id.* at 458 (Marshall, J., concurring in the judgment in part and dissenting in part).

53. As Justice Marshall points out, the *Cleburne* Court never admitted that it was employing a heightened rational basis test. *See id.* at 460 (Marshall, J., concurring in the judgment in part and dissenting in part).

54. The *Baker* court noted that *Cleburne* seemed to be a departure from deferential rational basis scrutiny analysis, *see* Baker v. State, 744 A.2d 864, 872 n.5 (Vt. 1999), but did not seem to recognize that this might make the state and federal rational basis analyses quite similar. *See id.* at 870 n.3.

55. *See* Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENTARY 397, 399 (1998) (suggesting that the Court may sometimes employ "'rational basis with bite' scrutiny"); *see also* William K. Kelley, Review Essay, *Inculcating Constitutional Values*, 15 CONST. COMMENTARY 161, 170 (1998) (suggesting that both *Cleburne* and Romer v. Evans, 517 U.S. 620 (1996) would have been decided differently "if the Court had consistently applied the deferential standard of rationality review"). However, the Court has not admitted that this is being done. *See* Heller v. Doe, 509 U.S. 312, 320 (1993) (suggesting that a deferential rational basis standard was used in *Cleburne*).

56. *See* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959) ("But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary.").

that it bears a reasonable relation to the asserted state goals. Under this closer scrutiny, the Court struck down the zoning ordinance at issue in *Cleburne*[57] and also the state constitutional amendment at issue in *Romer v. Evans*.[58] That same less forgiving scrutiny would have exposed the fatal flaws of a statute reserving marriage for different-sex couples.[59]

In both *Cleburne* and *Romer*, the Court did not object to the legitimacy of the states' asserted goals,[60] but to the means chosen to effectuate those goals.[61] By the same token, the *Baker* court accepted that the state's goals were legitimate. For example, the court found "that the State has a legitimate and long-standing interest in promoting a permanent commitment between couples for the security of their children,"[62] but rejected that the state's chosen means was constitutionally permissible.[63] Thus, the kind of scrutiny employed by the court in *Baker* bore a strong resemblance to the kind of scrutiny that the court had employed in both *Cleburne* and *Romer*, protestations to the contrary notwithstanding.[64]

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57. *See Cleburne*, 473 U.S. at 450.

58. 517 U.S. 620, 635 (1996) (striking down, on equal protection grounds, an amendment prohibiting the state from affording protections to gays, lesbians, or bisexuals).

59. It might be thought that *Cleburne* and *Romer* were distinguishable from *Baker* because the former involved an ordinance or amendment that was directed against a particular group whereas the latter did not. Yet, as Justice Dooley pointed out in his *Baker* concurrence, there is "no doubt that the requirement that civil marriage be a union of one man and one woman has the effect of discriminating against lesbian and gay couples." *Baker*, 744 A.2d at 890 (Dooley, J., concurring). Further, it is not as if the ordinance at issue in *Cleburne* only picked out the mentally handicapped and subjected them to special adverse treatment, since the ordinance required a special permit for various groups including hospitals for the insane, the feebleminded, alcoholics or drug addicts, and penal or correctional institutions. *See Cleburne*, 473 U.S. at 436 n.3. As a separate point, if very deferential scrutiny is employed, the Court will not even closely examine which groups are being adversely affected by the ordinance at issue and will simply uphold it. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976) (using very deferential standard to uphold ordinance permitting only grandfathered pushcart vendors to sell in the French Quarter of New Orleans).

60. *See Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in the judgment in part and dissenting in part) (discussing the "legitimate concerns for fire hazards or the serenity of the neighborhood" at issue in *Cleburne*); *Romer*, 517 U.S. at 635 (suggesting that respect for association rights and efforts to conserve resources to fight discrimination are legitimate).

61. *See Romer*, 517 U.S. at 635 ("The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."). In *Cleburne*, the Court suggested that the record did "not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests." *Cleburne*, 473 U.S. at 448. Because the ordinance required a special use permit for a home for the mentally handicapped but not for "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums," etc., *see id.* at 447, the Court struck down the ordinance as applied in this case. *See id.* at 448.

62. *Baker*, 744 A.2d at 881.

63. *See id.* at 882; *see also supra* text accompanying note 42.

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

The *Baker* court described its own analysis as a departure from the federal test,[65] although the court noted the Supreme Court's "unacknowledged departures from the deferential rational basis standard."[66] The less deferential scrutiny required by the Common Benefits Clause seems remarkably similar to the Supreme Court's unacknowledged departures from the deferential rational basis standard. Because the Vermont statute failed to meet the more vigorous requirement regarding the connection between the asserted end and the chosen means imposed by the Common Benefits Clause, and because that standard seems remarkably similar to the second-order rational basis test, the statute would also likely have failed to meet the less deferential rational basis review that the Court sometimes seems to use.[67]

The Vermont court did not hold the existing system unconstitutional on federal rational basis grounds by applying the second order rational basis test described by Justice Marshall. On the contrary, the court clearly based its opinion on the Vermont Constitution; thus, the opinion is not subject to review by a federal court.[68] Nonetheless, the Vermont's court exposition of the requirements of the Common Benefits Clause is more easily understood in light of "rational basis with bite" scrutiny.

### *C. The Implications for Other States*

In *Baker*, the court suggested that Vermont's same-sex marriage ban implicated state but not federal constitutional protections.[69] Because the state constitutional protections are allegedly "more stringent"[70] than the analogous federal protections, the basis for the *Baker* decision might seem not to have much import for other states' laws unless, for example, those states have something comparable to the Common Benefits Clause in their own state constitutions.[71]

The *Baker* court's analysis of the federal equal protection guarantees might have important implications when other courts are interpreting federal (or, perhaps, their own state) constitutional guarantees. Consider a court in a sister state seeking guidance about how to apply the federal rational basis test in a

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65. *See id.* at 872.

66. *Id.* at 872 n.5 (citing Cass Sunstein, *Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59–61 (1996)).

67. The court suggested that the marriage statute at issue violated state but not federal guarantees, *see id.* at 880 n.13, but that is because the court was using the deferential rational basis test.

68. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.").

69. *See supra* notes 41–43 and accompanying text.

70. *Baker*, 744 A.2d at 871.

71. The *Baker* court suggested that the Vermont provision "was borrowed verbatim from the Pennsylvania Constitution of 1776, which was based, in turn, upon a similar provision in the Virginia Declaration of Rights of 1776." *Id.* at 875; *see also id.* at 877 n.9 (describing the Benefits Clauses of other state constitutions).

particular case. That court might well be misled into believing that the rational basis test must be applied in an extremely deferential manner.[72] A more accurate interpretation of rational basis scrutiny is either that it really involves a continuum[73] or that it involves at least two different tiers.[74]

The *Baker* opinion might cause additional misunderstandings of equal protection jurisprudence, for example, concerning when equal protection guarantees are triggered in cases involving race- or sex-based classifications. While the *Baker* court's analysis of that issue is not even reviewable because it is only dictum and because the "state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds,"[75] that analysis nonetheless must not be ignored. Other courts might view the dictum as persuasive unless they can be shown why it involved a misrepresentation of the law. Thus, to "preserve the integrity of federal law"[76] and to clarify why other courts would be mistaken to employ the Vermont court's federal equal protection analysis, the *Baker* court's analysis is critically examined below.

## III. SAME-SEX MARRIAGE AND EQUAL PROTECTION GUARANTEES

The *Baker* court recognized that statutes reserving marriage for different-sex couples facially classify on the basis of sex.[77] However, because males were not permitted to do something that females were prohibited from doing and females were not permitted to do something that males were prohibited from doing, the court suggested that equal protection scrutiny was not even *triggered* by the statute.[78]

The *Baker* court's analysis was flawed because it was predicated upon a misunderstanding of what triggers heightened scrutiny. Ultimately, the United

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

73. Both Justices Marshall and Stevens have suggested that the Court's equal protection scrutiny is better understood as involving a continuum. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) (focusing the Court's equal protection inquiry on "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification"); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 451 (1985) (Stevens., J., concurring) (stating the Court's equal protection "cases reflect a continuum of judgmental responses which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other").

74. For an additional example of "higher" rational basis scrutiny, *see* United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (striking down on rational basis grounds provision of Food Stamp Act which excluded non-family members from participation). *Cf. Baker*, 744 A.2d at 872 n.5 (noting that some argue that the court's scrutiny is better understood in terms of balancing).

75. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

76. *Id.*

77. *See Baker*, 744 A.2d at 880.

78. *See id.* at 880 n.13.

States Supreme Court will have to decide whether same-sex marriage bans implicate the equal protection guarantees for sex-based classifications. As the *Baker* opinion illustrates, however, that Supreme Court decision will have important implications for equal protection jurisprudence generally, because the Court will have to make clearer both what triggers heightened scrutiny and, possibly, what constitutes an "exceedingly persuasive justification."[79]

### *A. A Comparison of the Hawaii and Vermont Opinions*

The *Baker* court suggested that protections provided by the Vermont Constitution's Common Benefits Clause might be applicable even if the federal Constitution's Fourteenth Amendment protections would not be.[80] A state supreme court's holding that state constitutional protections are more robust than the analogous federal protections is not unusual—various state supreme courts have interpreted their own constitutions as offering more extensive protections than might be found in the federal Constitution.[81] Thus, the difficulty here is not that the *Baker* court suggested that the Vermont Constitution guaranteed all relevantly similar Vermonters equal benefits, protection, and security, but merely that the *Baker* court had an overly narrow understanding of the protections offered by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[82] A more careful and accurate analysis, which would have avoided the difficulties pointed to here, would have suggested that regardless of the federal Constitution's equal protection guarantees, the Vermont Constitution's Common Benefits Clause afforded the relevant protection.[83]

To understand why the Vermont court's analysis of what triggers equal protection guarantees was too narrow, it will be helpful to consider a different opinion addressing whether statutes reserving marriage for different-sex couples trigger the scrutiny reserved for sex-based classifications. In *Baehr v. Lewin*,[84] a plurality of the Hawaii Supreme Court held that Hawaii's same-sex marriage ban

79. United States v. Virginia, 518 U.S. 515, 531 (1996).

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

81. *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487 (Ken. 1992) (state constitution has more robust right to privacy protections than federal constitution); *In re* J.W.T., 872 S.W.2d 189 (Tex. 1994) (state constitution protects adulterous father's rights to have a relationship with his child who had been born into someone else's existing marriage, notwithstanding that the federal constitution does not).

82. *See infra* Part III.

83. *See, e.g., Wasson*, 842 S.W.2d at 491–92 ("[W]e hold that the statute in question violates rights of equal protection as guaranteed by our Kentucky Constitution."); *id.* at 500 ("We do not speculate on how the United States Supreme Court as presently constituted will decide whether the sexual preference of homosexuals is entitled to protection under the Equal Protection Clause of the Federal constitution."). Notwithstanding the *Baker* court's understanding that it did not have to address the federal issues because its holding was based on the Vermont Constitution, *see Baker*, 744 A.2d at 870 n.2, the court nonetheless cast doubt on the statute's violating federal guarantees. *See id.* at 870 n.3.

84. 852 P.2d 44 (Haw. 1993), reconsideration granted in part, 875 P.2d 225 (Haw. 1993).

implicated equal protection guarantees because the statute "on its face and as applied, regulate[d] access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex."[85] Because the statute "establishe[d] a sex-based classification,"[86] the statute had to be examined with strict scrutiny (because of state constitutional guarantees).[87] The case was remanded to give the state an opportunity to establish that the statute "further[ed] compelling state interests and [was] narrowly drawn to avoid unnecessary abridgements of constitutional rights."[88] On remand, a Hawaii circuit court found that the state had not met its burden,[89] although that decision was stayed pending state supreme court review.[90] Before the state supreme court had completed review of that decision, the Hawaii electorate modified the state constitution to permit the legislature to reserve marriage for different-sex couples.[91]

The plurality decision in *Baehr v. Lewin* distinguished between two different issues: (1) whether at least heightened scrutiny was triggered by the marriage statute's sex-based classification, and (2) if so, whether strict rather than heightened scrutiny should be employed to determine whether the classification at issue was constitutionally offensive.[92] The *Baehr* court noted that "by its plain language, the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex."[93] Because sex was explicitly mentioned in the Hawaii Constitution but not explicitly mentioned in the United States Constitution,[94] the plurality held that the state constitution required that classifications on the basis of sex be subjected to strict rather than heightened scrutiny.[95]

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85. *Id.* at 64.

86. *Id.*

87. *See id.* at 67.

88. *Id.* at 68.

89. *See* Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Hawaii Cir. Ct. Dec. 3, 1996).

90. *See* Joel R. Brandes & Carole L. Weidman, *Same-Sex Marriage*, 217 N.Y.L.J. 3 (Jan. 29, 1997) (noting that Judge Chang stayed his own ruling pending state supreme court review).

91. *See* Baehr v. Miike, 1999 Haw. LEXIS 391, *6 ("The passage of the marriage amendment placed HRS § 572-1 on new footing....Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, HRS § 572-1 no longer is.").

92. *See generally* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

93. *Baehr*, 852 P.2d at 60.

94. *Compare* HAW. CONST. art. 1 § 5 ("No person shall...be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.") *with* U.S. CONST. amend. XIV §1 ("No State shall...deny to any person within its jurisdiction the equal protection of the laws.").

95. *See Baehr*, 852 P.2d at 67 ("[W]e hold that sex is a 'suspect category' for purposes of equal protection analysis under article 1, section 5 of the Hawaii Constitution."). *See also* Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super.). The Alaska court suggested that the state's same-sex marriage ban implicated a fundamental right and thus had to be subjected to strict scrutiny. *See id.* at *6. The court

Certainly, the fact that sex is a suspect classification according to the Hawaii Constitution is not insignificant. In order for a statute to be found constitutional when examined with strict scrutiny, the statute must be narrowly tailored to promote a compelling state interest,[96] whereas a statute examined with heightened scrutiny will be upheld if the statute is substantially related to an important state interest.[97] Thus, a statute might survive heightened but not strict scrutiny. Nonetheless, statutes examined with "mere" heightened scrutiny are often struck down.[98] As the Court made clear in *United States v. Virginia*,[99] a statute employing a sex-based classification requires an "exceedingly persuasive justification."[100] Indeed, recent amendment to the Hawaii Constitution notwithstanding,[101] the current Hawaii marriage statute is constitutionally vulnerable on federal grounds—as a sex-based classification, it should be examined with heightened scrutiny. Establishing that such a statute is substantially related to an important state interest will be no easy task, as the *Baker* decision illustrates.

The important point to understand here is the feature of the Hawaii Constitution that makes it unusual. The *Baehr* plurality did *not* suggest that the Hawaii Constitution included a *broader* category of sex-based classifications that would trigger closer scrutiny, that is, suggest that certain sex-based classifications would receive close scrutiny because of state but *not* federal guarantees.[102] On the contrary, the *Baehr* plurality suggested that the Hawaii Constitution was similar to the federal Constitution in that both would subject all sex-based classifications to close scrutiny.[103] The real question for the court was just how close that scrutiny should be.[104] Thus, while the *Baehr* plurality admitted that the "equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one

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further suggested that it would have imposed *heightened* scrutiny because of the implicated equal protection guarantees had no fundamental right been implicated. *See id.*

96. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

97. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

98. *See* United States v. Virginia, 518 U.S. 515, 532 (1996) ("[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature.").

99. 518 U.S. 515 (1996).

100. *Id.* at 524.

101. For the suggestion that the amendment itself is constitutionally vulnerable, see Mark Strasser, *Statutory Construction, Equal Protection, and the Amendment Process: On* Romer, Hunter, *and Efforts to Tame* Baehr, 45 BUFF. L. REV. 739, 739–777 (1997).

102. *Cf.* MARK STRASSER, THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS 43 (1999) ("In the long run, it seems likely that the more important aspect of the *Baehr v. Lewin* decision is that same-sex marriage bans involve sex discrimination, not that sex is a suspect class under the Hawaii Constitution.").

103. *See* Baehr v. Lewin, 852 P.2d 44, 55–56 (Haw. 1993).

104. The plurality spent several pages discussing whether the scrutiny should be heightened or strict, *see id.* at 63-67, and devoted very little space to the discussion of why this was a sex-based classification, since "[r]udimentary principles of statutory construction" settled that question. *Id.* at 60.

another,"[105] the plurality made clear that the differences between them were whether discrimination on the basis of sex was expressly or merely impliedly prohibited and whether such classifications should be examined with strict rather than heightened scrutiny.[106] There was no suggestion in *Baehr* that a particular classification might be viewed as sex-based under the Hawaii but not the federal Constitution.

The *Baehr* plurality pointed out, "Rudimentary principles of statutory construction manifest the fact that, by its plain language, HRS § 572-1[107] restricts the marital relation to a male and a female."[108] The Vermont Supreme Court reached a similar conclusion, noting that "the marriage statutes apply expressly to opposite-sex couples"[109] and suggesting that "the statutes exclude anyone who wishes to marry someone of the same sex."[110] Thus, these two courts did not disagree about whether a statute reserving marriage for different-sex couples *classifies* on the basis of sex; rather, they disagreed about whether the statute's use of a sex-based classification was enough to trigger (at least) heightened scrutiny. Indeed, the Baker court cited *Baehr* for the proposition that the marriage statute involved a sex-based classification,[111] but nonetheless refused to impose heightened scrutiny when examining that classification.[112]

### *B. What Does Facial Neutrality Mean?*

The *Baker* court implied that the Vermont marriage law was "facially neutral,"[113] because the statute "prohibit[ed] men and women equally from marrying a person of the same sex."[114] Because of this alleged facial neutrality, the court suggested that the statute did not even trigger heightened scrutiny.[115] Yet, the *Baker* court's analysis was predicated upon a particular interpretation of *Loving v. Virginia*[116] that is neither a plausible account of the opinion itself nor of the relevant jurisprudence.[117] The *Baker* court misunderstood what constitutes "facial neutrality" within the context of equal protection jurisprudence and thus offered an overly narrow reading of the conditions under which closer scrutiny will be triggered.[118]

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105. *Id.* at 59.
106. *See id.* at 60.
107. *See* HAW. REV. STAT. §572-1 (1985) ("In order to make valid the marriage contract, which shall be only between a man and a woman...").
108. *Baehr*, 852 P.2d at 60.
109. Baker v. State, 744 A.2d 864, 880 (Vt. 1999).
110. *Id.*
111. *See id.* at 880 n.13.
112. *See id.* ("[W]e are not persuaded that sex discrimination offers a useful analytic framework for determining plaintiffs' rights.").
113. *Id.*
114. *Id.*
115. *See id.*
116. 388 U.S. 1 (1967).
117. *See supra* notes 89–113; *infra* Part III.B.
118. *See generally* Baker v. State, 744 A.2d 864 (Vt. 1999).

There are two different senses in which a statute might be thought facially neutral with respect to a particular classification: (1) the statute does not even employ the classification at issue, so it is neutral in its wording ($neutral_w$), or (2) the statute employs the classification but does not seem to treat the classes resulting from that classification unequally, so it is neutral in effect ($neutral_e$).[119] Consider the statute at issue in *Loving*, which precluded blacks from marrying whites and whites from marrying blacks.[120] The statute appeared $neutral_e$ in that it seemed to impose the same burdens on blacks and whites,[121] but not $neutral_w$, since it was explicitly relying on a racial classification.[122] The question at hand was whether strict scrutiny was triggered by a statute that classified on the basis of race but did not treat the races unequally, that is, whether a statute that was $neutral_e$ but not $neutral_w$ triggered close scrutiny.

The *Loving* Court answered that question in the affirmative. The Court rejected Virginia's claim that the appropriate standard was "whether there was any rational basis for a State to treat interracial marriages differently from other marriages,"[123] and instead pointed out that "the fact of *equal application* does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."[124] Thus, the *Loving* Court rejected the idea that apparent facial neutrality with respect to the imposition of burdens or the according of benefits would preclude the triggering of close scrutiny.

The *Baker* court understood that its own analysis might seem undermined by *Loving*.[125] Just as the statute at issue in *Loving* had to be closely examined even though it allegedly prohibited members of all of the races from marrying persons outside of their race,[126] the statute at issue in *Baker* would have to be closely examined even though it prevented all persons from marrying someone of their own sex. However, the *Baker* court distinguished *Loving* by claiming that the "high court had little difficulty in looking behind the superficial neutrality of

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119. In Washington v. Davis, 426 U.S. 229, 230 (1976), the Court distinguished between discriminatory purpose and discriminatory effect, suggesting that evidence of the latter would not necessarily be evidence of the former. Here, what is at issue is whether evidence of the former (intent to discriminate) suffices to trigger heightened scrutiny even without evidence of the latter (disparate effect).

120. *See Loving*, 388 U.S. at 4 n.3 ("All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.") (citing VA. CODE ANN. § 20-57 (1960 Repl. Vol.)).

121. *See id.* at 8 ("[T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race."). For reasons to think that the statute was unequal, see *supra* notes 98–101 and accompanying text.

122. *See Loving*, 388 U.S. at 8.

123. *Id.*

124. *Id.* at 9 (emphasis added).

125. *See* Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999).

126. *But see supra* notes 118–123 and *infra* notes 125–158 and accompanying text (explaining why this is not an accurate characterization of the statute).

Virginia's anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy."[127] Thus, the *Baker* court read *Loving* to strike down the allegedly facially neutral statute because of its invidious purpose.[128]

The *Baker* court correctly pointed out that the *Loving* Court struck down the Virginia anti-miscegenation statute because it was "designed to maintain White Supremacy."[129] The *Loving* Court noted that "Virginia prohibits only interracial marriages involving white persons,"[130] and that "Negroes, Orientals, and any other racial class may inter-marry without statutory interference."[131] Thus, the races were not being treated equally, and the statute was not neutral$_e$. Indeed, some commentators have suggested that the Virginia statute was unconstitutional because it unfairly limited white options.[132]

Various implicated issues should not be conflated. A sufficient ground for striking down the Virginia statute was that it was designed to promote white supremacy. However, that hardly establishes that a finding of invidious purpose was necessary for striking down that statute.[133] Thus, the *Loving* Court did not hold that statutes that classify on the basis of race are unconstitutional *only* if they attempt to promote white supremacist views or, for that matter, supremacist views about any particular race. Instead, the Court suggested that a race-based statute designed to promote white supremacy was unconstitutional but also suggested that race-based statutes might be struck down even if there was no hint of a supremacist purpose.[134]

The *Loving* Court pointed out that there "can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race";[135] that is, that the statutes facially classified on the basis of race and thus were not neutral$_w$. A separate question was whether that facial discrimination itself was invidious. The Court found that there was "no legitimate overriding purpose independent of invidious racial discrimination which justifies [the]

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127. *See Baker*, 744 A.2d at 880 n.13.

128. The *Baker* court failed to note that neutral statutes must involve unequal treatment and invidious purpose to be held unconstitutional. *See supra* notes 113–124 and accompanying text.

129. *Loving*, 388 U.S. at 11.

130. *Id.*

131. *Id.* at 11 n.11.

132. *See* Jay Alan Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible?* 12 BYU J. PUB. L. 309, 324 (1998) (arguing that the "Virginia statute did not treat the races equally; it more strictly limited white persons' marriage options").

133. Some commentators seem not to appreciate this point. *See, e.g.*, Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 77–78 (1996).

134. *See supra* notes 131–133 and *infra* notes 135–158 and accompanying text (suggesting that the *Loving* Court would have struck down the statue at issue even if its purpose had been to promote the purity of all the races).

135. *Loving*, 388 U.S. at 11.

classification,"[136] thereby finding that the facial discrimination did not pass constitutional muster. Thus, the Court was addressing two distinct questions: (1) Did Virginia's marriage statutes facially discriminate on the basis of race, and (2) Was that facial discrimination constitutionally permissible?

When a statute is described as facially discriminatory, the speaker might be suggesting that a statute on its face *classifies* or the speaker might instead be suggesting that the statute on its face *invidiously* classifies. The term "discriminatory" can, but need not, suggest that an impermissible classification has been effected. For example, in *Matthews v. Lucas*,[137] the Court stated, "Statutory classifications, of course, are not [p]er se unconstitutional; the matter depends upon the character of the *discrimination* and its relation to legitimate legislative aims."[138] Here, the Court used "discrimination" as a synonym for "classification." By the same token, when the Court in *City of New Orleans v. Dukes*[139] suggested that "[w]hen local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory *discriminations*,"[140] the Court also used "discrimination" as a synonym for "classification."[141]

When determining whether the Virginia statute was discriminatory on its face, the *Loving* Court sought to determine whether the statute *classified* on the basis of race, not whether the statute invidiously classified or even whether the statute affected the races differently. Indeed, the *Loving* Court explicitly stated that the fact of equal application did not prevent the Court from closely scrutinizing the statute at issue.[142]

As the *Baker* court pointed out, statutes that are not facially discriminatory may nonetheless offend constitutional guarantees.[143] However, it is by no means easy to establish the constitutional invalidity of such statutes. The United States Supreme Court has made clear that substantial hurdles must be

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136. *Id.*

137. 427 U.S. 495, 497 (1976). *Matthews* involved a challenge to a provision of the Social Security Act making it more difficult for illegitimate children to receive survivors' benefits. *See id.*

138. *Id.* at 503–04 (emphasis added).

139. 427 U.S. 297 (1976). *Dukes* involved a challenge to an ordinance prohibiting pushcart vendors from selling in the French Quarter in New Orleans and to an exception in that ordinance which permitted pushcart vendors who had been operating there the past 8 years to continue doing so. *See id.* at 298.

140. *Id.* at 303 (emphasis added) (citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)).

141. In the very next sentence, the Court continued, "Unless a *classification* trammels fundamental personal rights or is drawn upon inherently suspect distinctions....", *see id.* (emphasis added), thereby making clear that it is using "classification" and discrimination" interchangeably. *See also* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

142. *See Loving*, 388 U.S. at 9.

143. *See* Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999).

overcome to establish the unconstitutionality of a facially neutral statute. In *Personnel Administrator of Massachusetts v. Feeney*,[144] the Court considered a sex-discrimination challenge to a Massachusetts veterans' preference law.[145] In upholding the constitutionality of the statute, the Court explained that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."[146]

The *Baker* court read *Feeney* to say that 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.'"[147] Yet, the *Baker* court seemed not to understand when the *Feeney* test is to be applied, since the discriminatory purpose test is employed *only* where it can be shown that a neutral law has disproportionate adverse effects.[148] This means that if, for example, a neutral law treated the races equally, it would not matter that the purpose was discriminatory—the statute would not offend equal protection guarantees.[149]

Suppose that the *Loving* Court had adopted the *Baker* approach with respect both to what constitutes race-neutrality and to when statutes with a discriminatory purpose would be struck down. The Court would then have said that anti-miscegenation statutes that treat the races equally but are adopted to promote white supremacy are unconstitutional, but that such statutes pass constitutional muster if they are not designed to promote white supremacy but instead have the evenhanded purpose of preserving the integrity of all of the races. However, the *Loving* Court explicitly found that racial classifications in marriage statutes violate constitutional guarantees, even assuming "the fact of equal application"[150] and "even assuming an even-handed state purpose to protect the 'integrity' of all races."[151] Thus, the invocation of *Loving* by Justice Johnson in her

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144. 442 U.S. 256 (1979).

145. *See id.* at 259.

146. *Id.* at 272.

147. *See Baker*, 744 A.2d at 880 n.13 (quoting *Feeney*, 442 U.S. at 272).

148. *See Feeney*, 442 U.S. at 272. *See also infra* notes 174–175 and accompanying text (discussing what happens when the first prong of *Feeney* has not been met).

149. Indeed, the Court might reject that the purpose was discriminatory if there were no adverse effects. *See Feeney*, 442 U.S. at 270; *see also* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271–72 (1993) (suggesting that discriminatory purpose implies selecting/reaffirming a course of action because of the adverse effects upon an identifiable group). As a separate point, if there were *no* adverse effects, there would be no harm upon which a claim could be based.

150. Loving v. Virginia, 388 U.S. 1, 9 (1967).

151. *Id.* at 11 n.11.

concurring and dissenting opinion[152] was much more appropriate than the majority was willing to admit.[153]

The *Baker* court's analysis flies in the face of the established jurisprudence when suggesting that express racial classifications do not trigger strict scrutiny as long as the races are being treated equally. As the Court explained in *Washington v. Davis*,[154] "[R]acial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[155] Indeed, in *Shaw v. Reno*,[156] in which the Court examined North Carolina's reapportionment plan "creating a second, majority-black district,"[157] the Court explicitly rejected the kind of analysis offered in *Baker*. The *Shaw* Court stated that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally."[158] Thus, the *Baker* claim that a facially discriminatory statute should not receive close scrutiny if it treats the different classes equally[159] is a misreading of equal protection jurisprudence.

It was precisely because the *Loving* Court held that equal application did not preclude the imposition of close scrutiny[160] that the Court was able to uncover the invidious discrimination contained in the statutes. Had the "fact" of equal application required deferential review, the statutes at issue in *Loving* would have been upheld.

There is yet another reason that the *Baker* court's reliance on *Feeney* was misplaced: the court misunderstood why the statute at issue in that case was gender-neutral. The *Baker* court cited *Feeney* for the proposition that 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.'"[161] Yet, the *Baker* court failed to notice that unlike the Vermont statutory scheme making marriage "a union between a man and a woman,"[162] the statute at issue in *Feeney* did not facially discriminate on the basis of sex and instead used the term "veteran."[163] Thus, the *Feeney* Court found that the statute under examination was neutral

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152. *See Baker*, 744 A.2d at 906 (Johnson, J., concurring in part and dissenting in part). Justice Johnson described *Loving* as holding that a "statute prohibiting racial intermarriage violates [the] Equal Protection Clause although it applies equally to Whites and Blacks, because classification was designed to maintain White Supremacy." *Id.*

153. *See id.* at 880 n.13.

154. 426 U.S. 229 (1976). In *Washington*, the Court examined a race discrimination challenge to the tests used by the District of Columbia police department to determine who might become police officers. *See id.* at 232.

155. *Id.* at 242 (citing McLaughlin v. Florida, 379 U.S. 184 (1964)).

156. 509 U.S. 630 (1993).

157. *See id.* at 633.

158. *Id.* at 651 (citing Powers v. Ohio, 499 U.S. 400, 410 (1991)).

159. *See Baker*, 744 A.2d at 880 n.13.

160. *See Loving*, 388 U.S. at 9.

161. *Baker*, 744 A.2d at 880 n.13 (citing *Feeney*, 442 U.S. at 272).

162. *See id.* at 869.

163. *See* Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 263 n.10 (1979).

because the "definition of 'veterans' in the statute has always been neutral as to gender"[164] and because "Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military."[165] Further, the statute as applied did not preclude all women from receiving the relevant benefit.[166]

The *Feeney* Court admitted that the statute benefited an "overwhelmingly male class."[167] However, the Court pointed out that disproportionate impact is not dispositive, since a *neutral* law having a disproportionate impact "is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."[168] In *Feeney*, the Court determined that the statute at issue was facially neutral because its wording did not classify on the basis of sex (it was $\text{neutral}_w$), although the statute was not $\text{neutral}_e$, since it clearly had a disproportionate adverse impact on females.[169] In contrast, the statute at issue in *Baker* was thought to be $\text{neutral}_e$, but clearly was not $\text{neutral}_w$.

The *Feeney* Court explained that when "a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is...appropriate."[170] The first question is "whether the statutory classification is indeed neutral in the sense that it is not gender-based."[171] Where that question is answered in the negative, that is, where "the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination."[172] The Court first examines whether the classification is *based* upon gender, for example, whether the statute expressly incorporates gender as the basis of the classification. If there is no such discrimination, the Court will then examine whether there are disproportionate adverse effects and whether those disproportionate effects were invidiously motivated.[173] However, the statute at issue in *Baker* did not meet the first prong of *Feeney* because it was not gender-neutral. Thus, an examination of the second prong would not be necessary, and *Feeney* suggests that heightened scrutiny should be triggered because of the failure to meet the first prong of the test.

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164. *Id.* at 275.

165. *Id.*

166. *See id.* at 262 (noting that the preference "is available to 'any person, male or female, including a nurse,' who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during 'wartime'").

167. *Id.* at 269.

168. *Id.* at 272.

169. *Id.* at 260 ("The District Court found that the absolute preference afforded by Massachusetts to veterans has a devastating impact upon the employment opportunities of women.").

170. *Id.* at 274.

171. *Id.*

172. *Id.* (citing Arlington Heights v. Metropolitan Housing Dev. Corp, 429 U.S. 252 (1977)).

173. *See id.*

The *Baker* court's analysis of the equal protection claim was reminiscent of the analysis that courts had used in the past when upholding interracial marriage bans. For example, in *Green v. State*,[174] the Supreme Court of Alabama considered the state's anti-miscegenation law and concluded:

> What the law declares to be a punishable offense, is, marriage between a white person and a negro. And it no more tolerates it in one of the parties than the other—in a white person than in a negro or mulatto; and each of them is punishable for the offense prohibited, in precisely the same manner and to the same extent.[175]

The court concluded that there was no equal protection violation because the races were being treated equally.[176] By the same token, in *Ex parte Kinney*,[177] the court suggested that Virginia's law banning interracial marriage did not treat the races unequally—The court explained:

> [There is no] discrimination against either race in a provision of law forbidding any white or colored person from marrying another of the opposite color of skin. If it forbids a colored person from marrying a white, it equally forbids a white person from marrying a colored....[T]he law is a prohibition put upon both races alike and equally.[178]

The kind of analysis offered in *Kinney* was acceptable to the Court in *Pace v. Alabama*.[179] In *Pace*, the Court examined the constitutionality of a statute that punished interracial fornication and adultery more severely than intraracial fornication and adultery.[180] When upholding the statute, the Court pointed out that the "punishment of each offending person, whether white or black, is the same,"[181] suggesting that the races were not being treated unequally. Yet, according to the *Baker* court, if there is equal treatment of the races, then the statute is race-neutral. Further, since *Feeney* suggests that race-neutral statutes are unconstitutional only if they have a disparate impact *and* if that impact can be traced to a discriminatory purpose,[182] the *Baker* analysis would suggest that *Pace* should still be good law. Yet, in *McLaughlin v. Florida*,[183] in which the Court struck down a Florida statute punishing interracial fornication and adultery more severely than intraracial fornication and adultery, the Supreme Court made clear that "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court."[184] Indeed, such a "narrow view of the

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174. 1877 WL 1291 (Ala. 1877).
175. *Id.* at *2.
176. *See id.*
177. 14 F. Cas. 602 (E.D. Va. 1879).
178. *Id.* at 605.
179. 106 U.S. 583 (1883). *See supra* notes 119–121 and accompanying text.
180. *See id.* at 583
181. *Id.* at 585.
182. *See supra* note 117 and accompanying text.
183. 379 U.S. 184 (1964).
184. *Id.* at 188.

Equal Protection Clause"[185] has been "swept away"[186] by the subsequent jurisprudence.

In *McLaughlin*, the Court struck down Florida's statute[187] because the law "treat[ed] the interracial *couple* made up of a white person and a Negro differently than it...[did] any other couple."[188] This differential treatment violated the Constitution, notwithstanding that the Court accepted the state's contention that each member of the interracial couple was being treated the same.[189] Just as the statute at issue in *McLaughlin* treated the interracial couple differently than it treated other couples, regardless of whether it treated the races differently, the statute at issue in *Baker* treats same-sex couples differently than it treats other couples, regardless of whether it treats the sexes differently.

### *C. On Differential Treatment of Individuals and Classes of Individuals*

One potentially confusing aspect of equal protection analysis is that the criterion for differential treatment is open to misinterpretation. Consider a statute mandating that all public schools in a state be single-sex institutions. Girls would not be allowed to attend schools that boys attended, and vice versa. Such a statute might not be thought to be treating the sexes differently (bracketing for a moment a comparison of the schools' facilities), although it is clear that but for a particular child's sex he or she would be attending a different school. This example suggests that it is important to establish whether the focus for the relevant analysis is on the class or on the individual, since differential treatment might be established if the focus is on the individual even if it could not be established when focusing on the class.

The *Baker* court explained the relevant test to determine whether close scrutiny was triggered in cases involving sex-based classifications but then misapplied it, because the court failed to differentiate between discriminating against classes and discriminating against individuals. The court suggested that "to trigger equal protection analysis at all...a defendant must show that he was treated differently as a *member* of one class from treatment of members of another class similarly situated."[190] Yet, insofar as that is the relevant test, plaintiffs should not have had much difficulty in meeting their burden. A woman who wished to marry another woman would show that she was treated differently as a member of one class (females) from treatment of members of another class (males) similarly situated (since both she and the postulated male competitor would have wished to marry the same individual). When Justice Johnson offered her example of two doctors (one male and one female) who each wished to marry a particular X-ray

185. McLaughlin v. Florida, 379 U.S. 184, 190 (1964).
186. *Id.* at 190.
187. *See id.* at 196.
188. *Id.* at 188 (emphasis added).
189. *Id.*
190. *See Baker*, 744 A.2d at 880 n.13 (quoting State v. George, 602 A.2d 953, 957 (Vt. 1991) (emphasis added).

technician,[191] she was pointing out a way in which the standard for triggering equal protection analysis had been met.

When attempting to determine whether heightened scrutiny had been triggered, the *Baker* court offered its own example, pointing out that both men and women were denied the right to marry someone of the same sex and thus neither was being treated unequally. Yet, the court's example focuses on whether the *class* as a whole had been disadvantaged rather than on whether a *member* of one class has been disadvantaged.[192]

In *Orr v. Orr*,[193] the Court examined whether Alabama's statute providing spousal support for females but not for males was unconstitutional.[194] The Court noted that there was "no question but that Mr. Orr bears a burden he would not bear were he female,"[195] thus focusing on how the *individual* was affected. The point here is not that there would have been a different result in *Orr* had the effects on the class rather than on the individual been examined (since the classes were being treated differently as well),[196] but merely that the focus was on whether the *individual* was being treated differently because of his sex. By the same token, when the Court examined whether the refusal of the Mississippi University for Women School of Nursing to allow men to take courses for credit violated constitutional guarantees, the Court noted, "Without question, MUW's admissions policy worked to Hogan's disadvantage...[since a] similarly situated female would not have been required to choose between forgoing [sic] credit and bearing [the] inconvenience [of driving a considerable distance]."[197] Again, the focus was on the individual. Further, as Justice Scalia has pointed out, *Mississippi University for Women v. Hogan* would presumably have been decided the same way even had Mississippi created an all-male nursing school in a different part of the state.[198] Thus, there would have been a constitutional violation even if the sexes had been treated equally (in that women would have been barred from attending the all-male nursing school and men would have been barred from attending the all-female nursing school), because individuals would have been denied an opportunity because of their sex.

Had the *Baker* court's focus on the class rather than on the individual been used in *McLaughlin*, the case presumably would have been decided

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191. *See id.* at 906 (Johnson, J., concurring in part and dissenting in part); *see also Brause*, 1998 WL 88743 at *6 ("[I]f twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law.").

192. *See Baker*, 744 A.2d at 880 n.13.

193. 440 U.S. 268 (1979).

194. *See id.* at 278 (recognizing that the statute authorizes the "imposition of alimony obligations on husbands but not on wives").

195. *Id.* at 273.

196. Men would sometimes have to pay support whereas women never would.

197. Mississippi University for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) [hereinafter MUW].

198. *See Virginia*, 518 U.S. at 590 (Scalia, J. dissenting) (In *MUW*, the Court "attached no constitutional significance to the absence of an all-male nursing school").

differently. The *McLaughlin* Court recognized that "all whites and Negroes who engage in the forbidden conduct [non-marital intercourse] are covered by the section and each member of the interracial couple is subject to the same penalty."[199] According to the *Baker* analysis, the statute would not be treating the different races unequally[200] and therefore equal protection guarantees would not even be *triggered.* Further, because there was no suggestion in *McLaughlin* that the statute was designed to promote white supremacy, it would have been much more difficult to establish an invidious purpose. Indeed, the *McLaughlin* Court did not impugn the state's purposes, instead concluding that the instant statute was not "a necessary adjunct to the State's ban on interracial marriage,"[201] the validity of which the Court declined to consider.[202] Thus, according to its own analysis, the *Baker* court would have to have upheld the statute at issue in *McLaughlin.*

The same mistaken analysis and result might have been offered in the context of gender discrimination had the *Baker* court been forced to decide *United States v. Virginia.*[203] At issue in that case was whether Virginia Military Institute's ("VMI") refusal to admit women violated the Equal Protection Clause of the Fourteenth Amendment.[204]

Virginia had proposed a parallel program for women that would be located at Mary Baldwin College.[205] Thus, it might be argued that while women were being kept out of the VMI program, men were being kept out of the Virginia Women's Institute for Leadership ("VWIL").[206] Because each was precluded from entering the other program, the *Baker* court would presumably have held that equal protection analysis was not even triggered. Yet, the Supreme Court's focus was not on whether the *classes* were being treated differently, but on the particular women who had "the will and capacity"[207] to attend VMI and on the loss of VMI's unique "training and attendant opportunities"[208] that these women would have

199. *McLaughlin*, 379 U.S. at 188.

200. The *McLaughlin* discussion read as if there were only two races, *see McLaughlin*, 379 U.S. at 188 ("all whites and Negroes who engage in the forbidden conduct are covered by the section"). However, in Loving v. Virginia, 388 U.S. 1 (1967), the Court used the fact that Virginia was a multi-racial society but only prevented whites from intermarrying to establish the invidiousness of the statute. *See id.* at 11 n.11 ("While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference.").

201. *McLaughlin*, 379 U.S. at 196.

202. *See id.* at 195. The Court refused to reach "the question of the validity of the State's prohibition against interracial marriage." *Id.*

203. 518 U.S. 515 (1996).

204. *See id.* at 523.

205. *See id.* at 526.

206. This was the name of the parallel program. *See id.*

207. *Id.* at 542.

208. *Id.*

suffered had VMI's exclusion of women not been struck down.[209] Had the VMI program been examined with deferential review, it would have been upheld.[210]

The *Baker* court would presumably have said that the policy at issue in *Virginia* treated the sexes equally and thus was gender-neutral. While the court might have agreed that women were not receiving the same benefits that men were,[211] that fact would not have been dispositive. As the *Feeney* Court explained, even if a gender-neutral statute has a disproportionate, adverse effect upon one sex, that statute "is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."[212] Thus, according to the *Baker* court's analysis, VMI's exclusionary policy would be struck down only if it could be established, for example, "that VMI [had] elected to maintain its all-male student-body composition for some misogynistic reason."[213] Mere disparate effects would not have sufficed. However, Virginia's impermissible purposes were not established; rather, at most, the state's asserted legitimate purposes were undercut as unpersuasive.[214]

The *Virginia* Court did not have to address whether the state's purposes were impermissible because the statute involved an *explicit* sex-based classification. A "classification[] by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[215] That requirement is not waived merely because the state's impermissible purposes cannot be established.

The Supreme Court has made clear that the "heightened review standard...does not make sex a proscribed classification."[216] Explicit, sex-based classifications will be upheld if the state can make the requisite showing.[217] However, to make the requisite showing the state will have to do more than merely show that its purposes were not invidious.[218]

In *Orr*, the Court explained why it examines sex-based classifications so closely: "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women."[219] Thus, because of the possibility that the state will reinforce stereotypical notions about women and their abilities, the Court will closely examine statutes with sex-based classifications to determine whether the state can

209. *See id.*

210. *See id.* at 570 (Scalia, J., dissenting) (suggesting that the VMI policy should have been upheld under *intermediate* scrutiny).

211. *See id.* at 547.

212. *Feeney*, 442 U.S. at 272.

213. *Virginia*, 518 U.S. at 580 (Scalia, J., dissenting).

214. *See id.* at 535–37.

215. Craig v. Boren, 429 U.S. 190, 197 (1976).

216. *Virginia*, 518 U.S. at 533.

217. *See, e.g.*, Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1980) (upholding sex-based statutory rape law).

218. *See generally* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464.

219. *Orr*, 440 U.S. at 283.

achieve its legitimate purposes just as effectively without employing a sex-based classification. Where "the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."[220] This strong preference for statutes that do not employ sex-based classification is not limited to those statutes with impermissible purposes or even to those statutes that treat the sexes unequally. A statute that treats the sexes equally may nonetheless carry with it the baggage of sexual stereotypes and thus must also be examined closely to make sure that the same ends cannot be achieved with a gender-neutral statute.

## IV. CONCLUSION

The *Baker* court held that the Vermont Constitution requires the state to afford same-sex couples the opportunity to receive the kinds of benefits and protections that married couples have.[221] The opinion was courageous and should be applauded. It pointed out why and how a variety of the state's arguments in favor of the state's same-sex marriage ban were specious; thus, the opinion may be of invaluable persuasive power when other courts examine the constitutionality of their own marital statutes. Nonetheless, the *Baker* opinion inaccurately reflects certain aspects of equal protection jurisprudence; for example, the opinion suggests that close scrutiny will not be triggered unless a race- or sex-based statute allocates benefits or burdens unequally.

The *Baker* court committed at least two errors in its equal protection analysis: (1) it offered an analysis of when close scrutiny is triggered that cannot account for the Court's jurisprudence with respect to either race- or sex-based classifications, and (2) it misapplied its own test when wrongly concluding that marriage statutes classifying on the basis of sex do not implicate equal protection guarantees.[222] Had the court not made these errors, it would have indicated even more clearly why same-sex marriage bans as a general matter are constitutionally vulnerable.

Currently, all of the marriage laws in the United States classify on the basis of sex.[223] Further, with respect to the application of any of these statutes, a defendant could easily show that she had been treated differently than she would have been treated had she been male. For example, she could show that she had been prevented from marrying her life partner because of her sex.[224]

When a statute explicitly classifies on the basis of race or sex, courts must closely examine the statute to make sure that it neither causes members of particular classes to be treated unfairly nor promotes outdated stereotypes

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220. *Id.* at 283.

221. *See Baker*, 744 A.2d at 886.

222. *See id.* at 880 n.13.

223. *See* David Orgon Coolidge, *Playing the* Loving *Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 220 (1998) (pointing out that there "is no place for same-sex couples to go to get married").

224. *See supra* note 193 and accompanying text.

regarding individuals' abilities. Were the Supreme Court to have held that it would only closely examine those statutes explicitly employing those classifications which *in addition* clearly involved unequal treatment, the Court would have undermined the whole purpose of close scrutiny, namely, uncovering non-obviously invidious discrimination. A number of foundational cases would have been decided differently if the *Baker* court's analysis of equal protection were correct—the court would then not have considered the statutes at issue closely enough to uncover their invidious purposes or effects. Thus, the *Baker* court's analysis must be corrected both because of its implications for same-sex marriage in particular and for equal protection jurisprudence more generally.

To determine whether a statute discriminates on the basis of sex, the court should examine whether the person adversely affected would have been treated differently but for her sex. A separate question not focused upon here is whether same-sex marriage bans would survive heightened scrutiny. The *Virginia* Court made clear that while inherent differences between men and women are "cause for celebration,"[225] they are "not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[226] If indeed Justice Johnson was correct when she suggested in her concurring and dissenting opinion in *Baker* that the state was guilty of "sex stereotyping of the most retrograde sort" when attempting to justify the state's current marriage statute by appealing to certain differences between men and women,[227] then it may well be that other states' statutes (if rationalized in that same way) would be extremely vulnerable if examined with heightened scrutiny.

Just as the *Virginia* Court was unwilling to credit the claim that "admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school,"[228] courts should be equally unwilling to credit the claim that recognizing same-sex marriages would somehow downgrade or destroy the institution of marriage.[229] Perhaps there are other arguments to establish that a statute prohibiting same-sex marriage is closely tailored to promote important state interests.[230] However, there is reason to doubt such a claim. In

225. *Virginia*, 518 U.S. at 533.

226. *Id.*

227. *Baker*, 744 A.2d at 910 (Johnson, J., concurring in part and dissenting in part).

228. *See Virginia*, 518 U.S. at 542.

229. *See* Thomas S. Hixson, *Public and Private Recognition of the Families of Lesbians and Gay Men*, 5 AM U. J. GENDER & L. 501, 521 (1997) ("Another consequence of the public approach to recognizing same-sex families is that over time, it threatens to destroy the institution of marriage entirely."); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 197 (1998) ("Congress concluded that same-sex marriage would 'belittle,' 'demean,' 'trivialize,' and ultimately destroy real marriage."); *see also* Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 755 (1998) (suggesting that heterosexual marriage would be undermined were same-sex marriages recognized).

230. *See* Wardle, *supra* note 133, at 62 (stating that "laws permitting only heterosexual marriage could survive strict judicial scrutiny").

*Baker*, "the State made every conceivable argument in support of the marriage laws, including what it perceived to be its best arguments,"[231] and those arguments nonetheless failed "to satisfy the rational-basis test as articulated under the Common Benefits Clause."[232] If the state's best arguments could not meet even second-order rational basis scrutiny, then it should be clear that any higher form of scrutiny would also uncover the flaws of such arguments and the impermissible bases of such a statute.

It might be argued that it does not matter that the *Baker* court has mischaracterized equal protection jurisprudence, because the court nonetheless recognized the state constitutional requirement that same-sex couples be afforded equal benefits and because the state has recognized civil unions to fulfill that mandate. Such an argument is incorrect. The court's mistaken analysis must be corrected, both because of the disruptive effect that the uncorrected analysis might have on equal protection jurisprudence more generally and because correcting the analysis may in turn affect whether the recognition of same-sex civil unions will be held to have met the constitutional mandate to afford same-sex couples equal benefits and protections.

The current statute entitles same-sex couples in civil unions to all of the benefits that different-sex married couples receive from the state.[233] The Vermont Supreme Court may still have to decide whether the state's "separate but equal" status for same-sex couples nonetheless offends constitutional guarantees, perhaps because these civil unions would not be as likely to be recognized in other states as same-sex marriages would have been[234] or because this specially created separate status is itself stigmatizing.[235] Were the court to recognize that equal protection guarantees were implicated by the state's marriage law and by the separate status created for same-sex couples, the court would impose heightened rather than "rational basis with bite" scrutiny and would be even more likely to find that the statute offended state and federal constitutional guarantees. Thus, because permitting same-sex couples to have civil union status will not end the constitutional inquiry but will instead shift the focus of the analysis when that status is itself challenged, the court's mistaken equal protection analysis must be

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231. *See Baker*, 744 A.2d at 905 n.9 (Johnson, J., concurring in part and dissenting in part).

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

233. Same-sex couples who meet the relevant definition, see 1999 VT H.B. 847 §§ 1202, 1203 (1999), "shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." *See id.* § 1204(a).

234. *See* Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act*, 5 L. & SEX. 541, 551 (1996) (suggesting that a virtue of the partnership proposal therein described was that it "would have few intergovernmental ramifications, since the benefits conferred would remain within the state").

235. *See Baker*, 744 A.2d at 899 n.2 (Johnson, J., concurring in part and dissenting in part) (suggesting that "singling out a particular group for special treatment may have a stigmatizing effect more significant than any economic consequences").

corrected so that the same errors will not be repeated when the court again considers whether the state's reserving marriage for different-sex couples offends constitutional guarantees.

Suppose that in a few years the Vermont Constitution is itself amended to reserve marriage for different-sex couples[236] or, perhaps, to make clear that the Common Benefits Clause does not require same-sex couples to be afforded equal benefits. Federal guarantees would then be especially important to consider, and the robustness of those guarantees would likely depend upon whether heightened scrutiny was triggered by the differential treatment of same-sex couples.

Justice Dooley pointed out in his *Baker* concurrence that while "[t]he marriage statutes do not facially discriminate on the basis of sexual orientation,"[237] there is "no doubt that the requirement that civil marriage be a union of one man and one woman has the effect of discriminating against lesbian and gay [people]."[238] A state might argue that its marriage statute was designed to burden lesbians, gays, and bisexuals rather than to discriminate on the basis of sex. Yet, pointing to a desire to burden lesbians, gays, and bisexuals would not help the state establish the constitutionality of its marriage statute. Because 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,"[239] the statute would still be explicitly classifying on the basis of sex, state purpose to impose a burden on a different group notwithstanding. As Justice Johnson pointed out, "sexual orientation does not appear as a qualification for marriage under the [Vermont] marriage statute[]."[240] Thus, if the state's goal had been to impose a burden on the basis of orientation, the state could instead have chosen a means much more closely tailored to promote that end.

If a state is employing a sex-based classification in order to impose a burden on lesbian and gay couples, then the state is employing an overly broad classification (since it would also preclude non-lesbians and non-gays from marrying a same-sex partner)[241] to effect an illegitimate purpose.[242] Yet, it should not be thought that a state could simply rectify the problem of overbreadth by only allowing non-lesbians and non-gays to marry a same-sex partner, since the state

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236. *See* 1999 VT H.R. 37 (House resolution requesting the Senate to adopt a constitutional amendment defining marriage as a legally sanctioned union between a man and a woman).

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

238. *Id.* (Dooley J., concurring).

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

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

241. *See* Craig M. Bradley, *The Right Not to Endorse Gay Rights: A Reply to Sunstein*, 70 IND. L.J. 29, 34 (1994) ("A ban on same-sex marriages is not perfectly tailored to further the governmental interest in not giving homosexual relationships legal recognition since it forbids people of the same sex from entering into a legally recognized 'marriage' regardless of their sexual proclivities (or lack of same).").

242. *See* Romer v. Evans, 517 U.S. 620, 635 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.").

would then have to establish why some but not other same-sex couples were allowed to marry. It is difficult to imagine that such a statute could survive even the rational basis test.[243] Thus, because a statute solely precluding lesbians and gays from marrying a same-sex partner would not pass constitutional muster and because sex-based classifications will be declared unconstitutional if not closely tailored to promote important state objectives even absent a showing of illegitimate purpose, the *Baker* decision helps to establish why same-sex marriage bans are vulnerable on federal constitutional grounds, even if the *Baker* court did not appreciate exactly why that is so.

243. *See id.*