

VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION
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Chase Center, Vermont Law School

Testimony of Professor Peter Teachout

“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.”

Baker v. State, 744 A.2d 864, 889 (1999)

I. Introduction

II. Does the establishment of civil unions for same-sex couples as an alternative to marriage violate the Vermont Constitution: What does Baker v. State say?

“While some future case may attempt to establish that - notwithstanding equal benefits and protections under Vermont law - the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today.

“We hold only that plaintiffs are entitled under . . . the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.”

Baker v. State, 744 A.2d 864, 886 (1999)

III. The role of the court versus that of the state legislature in carrying forward the Vermont constitutional tradition in this area: a collaborative relationship.

“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”

Baker v. State, 744 A.2d 864, 888 (1999)

IV. Rulings in other states compared: Opinion of the Justices (Massachusetts Supreme Court, 2004) and Kerrigan v. Connecticut (Connecticut Superior Court, 2006).

- A. Opinion of the Justices (Mass. 2004): advisory opinion, in which Mass. Ct. held, 4-3, that civil union not equivalent to marriage.

“[S]eparate is seldom, if ever, equal.”

Proposed civil union law “would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.”

It would have the effect of “assigning” same-sex couples “to second-class status.”

- B. *Kerrigan v. Connecticut* (2006). Connecticut Superior Court found no constitutionally significant differences between civil union and marriage.

- C. What accounts for the different outcomes in these two opinions?

1. Differences in state constitutional textual provisions?

2. Differences in modes of analysis?

3. Differences in state constitutional philosophy?

a. Role of courts in development of state constitutional law:

i. Massachusetts: protection of rights exclusively a judicial function.

ii. Vermont and Connecticut: allowing some role for participatory democracy (“judicial humility”).

- V. Key differences between “civil unions” and “marriage”:

A. “Portability”

B. Other tangible benefits and advantages

C. “Separate but equal”: how does establishment of distinct category of civil union compare with system of institutionalized racism which existed in the South?

D. The importance and constitutional relevance of “intangibles”:

“Elizabeth Kerrigan . . . feels the government views her relationship as unequal to and less worthy than a heterosexual marriage. Carol Conklin feels that “civil unions say to me that I am . . . not good enough for marriage.” Jeffery Busch feels that he is “an outsider and a second-class citizen, in the eyes of the government

and society generally,” a feeling that to him is “humiliating.” [Other plaintiffs] are concerned because “civil unions do not have anywhere near the same common cultural recognition and respect that marriage has.” [To others] the concept of civil union “feels inferior and demeaning” compared to marriage.”

From Kerrigan (Connecticut case),
at p. 62

VI. Legislative determination as to what Vermont constitution requires allows much greater latitude than courts have in making a constitutional ruling.

A. Still, in determining what the Vermont constitution requires, the legislature should be guided by pertinent constitutional directives:

1. The “Common Benefit” Clause:

“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 . . .”

Vermont Constitution, ch. I, art. 7

2. The “Prudential” Clause:

“That frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the blessings of liberty.”

Vermont Constitution, ch. I, art. 18

B. Standards of Review irrelevant

C. Free to consider intangible as well as tangible differences

D. Legislature has not just the right but the responsibility to carry the Vermont constitutional tradition forward

V. An “advisory referendum”?

A. Historic practice (see Paul Gillies, *The Role of Voters in Legislation*).

B. Advisory referendum constitutionally sanctioned by Court:

[Such referenda as the General Assembly have established are “not only proper and legal, and just and moral, but highly commendable and creditable to the legislature who passed the statute, for, at the very threshold of inquiry into the expediency of such a law, lies the other and more important inquiry, are the people prepared for such a law?”

Chief Justice Isaac Refield, *State v. Parker*, 26 Vt. 357 (1854)

C. What purposes served by an advisory referendum?

D. Suggested language:

“Shall the voters advise the General Assembly to consider [adopt] legislation eliminating the current dual track of civil union and marriage and replacing it with a single system of marriage available to all couples [otherwise entitled to all the rights and privileges associated with marriage under the Vermont constitution] to be effective January 1, 20__.”