

# VERMONT: WHERE THE PRINCIPLES OF ROE V. WADE WOULD LIVE LONG AFTER ROE DIES

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Vermont has a long history of independence. One could even say it marches to the beat of its own drummer. Nowhere is this clearer than in its jurisprudence and legislation regarding life issues and judicial restraint. The Vermont Supreme Court (“Court”) has struck down any restrictions on abortion and stretched its reach to accomplish activist results. In turn, the legislature has been unable or unwilling to do anything to restrict the availability of abortion-on-demand. Accordingly, little would change if the United States Supreme Court (“USSC”) reverses *Roe v. Wade*.<sup>2</sup>

## I. LIFE ISSUES

NARAL Pro-Choice America (“NARAL”) gives Vermont an “A” grade for its abortion stance. Unfortunately, that grade accurately summarizes the state of Vermont’s stance on life issues. One can find no objective indication that the Court or legislature is willing to allow abortion to be restricted. They also have failed to step forward on other life issues, such as cloning and embryonic stem-cell research.

### Abortion

Technically, Vermont has a statute on the books that prohibits abortion in all cases.<sup>3</sup> However, prior to *Roe*, the Court had overturned the law as inapplicable, as applied to women. In *Vermont v. Bartlett*,<sup>4</sup> the Court examined whether title 13, section 101 of the Vermont Code<sup>5</sup>

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<sup>2</sup> 410 U.S. 113 (1973).

<sup>3</sup> See VT. STAT. ANN. tit. 13, § 101 (2006).

<sup>4</sup> 128 Vt. 618 (1970).

<sup>5</sup> The language of the statute remains unchanged:

A person who willfully administers, advises or causes to be administered anything to a woman pregnant, or supposed by such person to be pregnant, or employs or causes to be employed any means with intent to procure the miscarriage of such woman, or assists or counsels therein, unless the same is necessary to preserve her life, if the woman dies in consequence thereof, shall be imprisoned in the state prison not more than twenty years nor less than five years. If the woman does not die in consequence thereof, such person shall be imprisoned in the state prison not more than ten years nor

could be used against a man who helped a woman procure an abortion. Joseph Bartlett pled guilty to two counts of procuring an abortion and then later said he did not willfully violate the statute.<sup>6</sup> The Court disagreed, finding it is impossible to plead guilty to a crime that contains an element that the accused willfully acted.<sup>7</sup>

In 1972, section 101 was again in front of the Court — this time, with a different result. In *Beecham v. Leahy*,<sup>8</sup> a woman and doctor argued the law was unconstitutional because it denied them their right to substantive due process. There, the Court did not address the doctor's situation because it was not ripe, and the doctor sought an advisory opinion the court could not provide.<sup>9</sup>

However, as to the woman, the Court found that the purpose of the statute was to protect women from unskilled individuals performing abortions, and to that extent, the statute withstood scrutiny.<sup>10</sup> Unless her life was at stake, she was left to try to self-induce an abortion.<sup>11</sup> In this, the Court found section 101 impinged on a woman's right to an abortion.<sup>12</sup> The Court recognized the right of the legislature to regulate medical practice for the protection of citizens but found section 101 did not do that.<sup>13</sup> Finally, the Court held that “the legislature, having affirmed the right of a woman to abort, cannot simultaneously, by denying medical aid in all but cases where it is necessary to preserve her life, prohibit its safe exercise.”<sup>14</sup>

*Bartlett*<sup>15</sup> and *Beechum*<sup>16</sup> demonstrate a change in strategy. In *Bartlett*,<sup>17</sup> the defendant had pled guilty, and there was no woman involved in the suit. Accordingly, the Court enforced

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less than three years. However, the woman whose miscarriage is caused or attempted shall not be liable to the penalties prescribed by this section.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 130 Vt. 164 (1972).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *Beechum*, 130 Vt. at 169.

<sup>14</sup> *Id.* at 170.

<sup>15</sup> *Bartlett*, 128 Vt. 618

section 101.<sup>18</sup> But in *Beechum*,<sup>19</sup> a doctor and woman who wanted an abortion proactively sued under section 101. While the doctor was ultimately dismissed from the suit, the woman's rights were affirmed by the Court, and she was allowed to proceed.<sup>20</sup>

If *Roe*<sup>21</sup> is overturned by the USSC, little will change in Vermont. While section 101 of title 13 is still on the books, the Court has also held it is unconstitutional as applied to physicians, for the reasons discussed above.<sup>22</sup> Accordingly, abortions could be performed for any reason without restriction if *Roe*<sup>23</sup> is overturned.

Additionally, one of Vermont's superior courts has held the Vermont Constitution provides greater reproductive rights than the U.S. Constitution, striking down a regulation limiting state medical assistance for abortion to those covered by the federal Medicaid program, because the provision excluded "medically necessary" abortions.<sup>24</sup> Vermont also has no parental notification law and no partial birth abortion ban.

Vermont allows women eligible for state medical assistance to obtain public funds for medically necessary abortions.<sup>25</sup> Even prior to the Food and Drug Administration's (FDA) approval of "emergency contraception" for over-the-counter use, Vermont had already enacted a provision allowing pharmacists to dispense the drug without a prescription, as long as that pharmacist is under a collaborative agreement with a physician.<sup>26</sup>

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<sup>16</sup> *Beechum*, 130 Vt. 164.

<sup>17</sup> 128 Vt. 618.

<sup>18</sup> *Id.*

<sup>19</sup> 130 Vt. 164.

<sup>20</sup> *Id.*

<sup>21</sup> 410 U.S. 113.

<sup>22</sup> See *Beecham*, 130 Vt. 164.

<sup>23</sup> 410 U.S. 113.

<sup>24</sup> See *Doe v. Celani*, No. S81-84CnC, slip op. (Vt. Super. Ct. May 26, 1986).

<sup>25</sup> VT. DEP'T OF SOC. WELFARE, PP & D MEMO: POLICY INTERPRETATION (1994); VT. DEP'T OF SOC. WELFARE, DSW 219B, REVISED ABORTION CERTIFICATION, (1998), available at <http://www.vtmedicaid.com/Downloads/forms/Abortion%20forms%20219AB.pdf>.

<sup>26</sup> See VT. STAT. ANN. tit. 24, §§ 2077 to 2079 (2006).

NARAL calls the Vermont house and senate “pro-choice” and the governor “mixed-choice.”<sup>27</sup> In fact, NARAL gives Vermont an “A” grade.<sup>28</sup> This appears to be an accurate assessment. Though numerous bills to limit and restrict abortion have been introduced in the last fifteen years, none made it out of committee. Therefore, it appears the legislature will not do anything to change the current situation in Vermont.

### **Protection of the Unborn from Criminal Violence**

Thirty-six states have fetal homicide laws of some sort on their books, but Vermont does not.<sup>29</sup> A bill was proposed in the house during the 1989-1990 legislative session, but failed to pass out of committee. Representative Nancy Sheltra introduced bills in 1989 and 2001 to criminalize killing or assaulting an unborn child. In neither case did the bill make it out of committee.

The Court,<sup>30</sup> in *Vermont v. Oliver*, found that, under common law, “only living human beings could be the victims of homicide. The killing of a fetus did not constitute criminal homicide unless it was born alive and later died of injuries inflicted prior to birth.”<sup>31</sup> In *Oliver*,<sup>32</sup> an unborn child of approximately thirty-four weeks gestation was killed after a car accident. Even though Vermont is a common law state, the Court refused to expand the definition of “person” under title 23, section 1091(c) of the Vermont Code to include unborn children at any stage of gestational development, even as it acknowledged the legal inconsistencies that could

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<sup>27</sup> NARAL PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF WOMEN’S REPRODUCTIVE RIGHTS IN THE UNITED STATES (2007), [http://www.prochoiceamerica.org/choice-action-center/in\\_your\\_state/who-decides](http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides).

<sup>28</sup> *Id.*

<sup>29</sup> While VT. STAT. ANN. tit. 13, § 103 (2006) seems to indicate that one can be indicted for the murder of an unborn child (“A person who is indicted for the murder of an infant child, or of a woman pregnant or supposed by such person to be pregnant...”), there are no published cases as of January 11, 2007, in which this statute was used to find protection for unborn children.

<sup>30</sup> Current Associate Justice Dooley participated in the *Vermont v. Oliver* decision.

<sup>31</sup> 151 Vt. 626, 627-28 (1989).

<sup>32</sup> 151 Vt. 626.

result from its decision.<sup>33</sup> In this case, it left the task of defining a viable fetus to the legislature.<sup>34</sup>

There are a couple cases that discuss whether a wrongful death action is available against someone who causes the death of a viable fetus. In *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, the Court stated a viable unborn child is “a presently existing person and a living human being because it has reached such a state of development that it can presently live outside the female body, as well as within it.”<sup>35</sup> Here, the Court held there “exists statutory wrongful death liability for the negligently caused death of an unborn, viable fetus.”<sup>36</sup>

### **Assisted Suicide**

Courts have recognized that Vermont has a common-law prohibition against assisted suicide, which has been incorporated into its statutes governing durable powers of attorney for healthcare.<sup>37</sup>

Since *Vacco*, the Vermont legislature has amended its advance-directive statutes twice — first in 2003, when House Bill 752 was adopted; and most recently in 2005, when House Bill 115 passed. Accordingly, title 18, section 5260 of the Vermont Code has been superceded by title 18, part 10, chapter 231. This chapter empowers an individual to make advanced decisions about the end-of-life medical care they wish to receive or not receive. However, it does not allow for assisted suicide.

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<sup>33</sup> *Id.* at 630

<sup>34</sup> Justice Dooley was a member of this unanimous panel, but did not author the opinion.

<sup>35</sup> 139 Vt. 138, 142 (1980).

<sup>36</sup> *Id.* at 142.

<sup>37</sup> See *Vacco v. Quill*, 521 U.S. 793, 805 n.9 (1997) (quoting *People v. Kevorkian*, 527 N.W.2d 714, 731-32 & 475-476 nn. 53-54 (Mich. 1994)) (collecting state statutes in support of proposition that “nearly all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations, or in ‘living will’ statutes,” including VT. STAT. ANN. tit. 18, § 5260 (1987); see also *Washington v. Glucksberg*, 521 U.S. 702, 717 n. 15 (1997) (collecting unsuccessful State legislative efforts to legalize assisted suicide, including Vt. H.B. 109, (1997) and Vt. H.B. 335 (1995)), and *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 291 nn. 2-3 (1990) (collecting State statutes authorizing appointments of proxies for healthcare decisions, including VT. STAT. ANN. tit. 14, § 3051-52 (2006), and statutes authorizing general durable powers of attorney, including VT. STAT. ANN. tit. 14, § 2077 to 3451-67 (2006)).

As recently as the 2005-06 legislative session,<sup>38</sup> legislators have introduced bills that would allow assisted suicide. These efforts have been met with intense resistance, and, to date, have not passed. Because there is no specific statutory law allowing assisted suicide, the prevailing belief is that, under title 1, section 271 of the Vermont Code, it would be prohibited under Vermont's common law.

### **Cloning and Destructive Embryonic Research**

With the advent of cloning of sheep, cats, and other animals, some state legislatures have addressed the possible cloning of humans for medicinal and reproductive purposes. According to an April 18, 2006, paper of the National Conference of State Legislatures,<sup>39</sup> fifteen states have human-cloning laws on the books. However, as of January 2007, Vermont has not passed a law prohibiting or restricting cloning.

In addition, Vermont has no laws on the books to address embryonic and fetal research.<sup>40</sup> While thirty-two states have filled the legal gap in some measure with laws regarding the use of embryos for stem cell research, Vermont's legislature has remained silent. Nor has it joined the sixteen states that have laws dealing with the disposal of frozen gametes and embryos.<sup>41</sup>

From its court decisions to its legislation, Vermont lags far behind other states in protecting the unborn. Overall, the state demonstrates a reluctance to limit abortion in any form and to provide parameters in the emerging technology areas of cloning and embryonic research. Thus, it will take more than the reversal of *Roe* to protect the unborn in Vermont.

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<sup>38</sup> House Bill 168, the *Vermont Death with Dignity Act*, was sponsored by Representatives Severance, Aswad and Zuckerman. It failed to get past first reading and out of committee. No similar bill has been introduced for the 2007-08 session as of January 12, 2007. The Death with Dignity Act would have allowed a capable patient who is determined to have less than 6 months to live to voluntarily submit a written request, witnessed by 2 persons, for medication "for the purpose of ending his or her life in a humane and dignified manner."

<sup>39</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE HUMAN CLONING LAWS (2006)  
<http://www.ncsl.org/programs/health/Genetics/rt-shcl.htm>.

<sup>40</sup> See NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE EMBRYONIC AND FETAL RESEARCH LAWS (2006)  
<http://www.ncsl.org/programs/health/genetics/embfet.htm>.

<sup>41</sup> See NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LAWS ON FROZEN EMBRYOS (July 2006)  
<http://www.ncsl.org/programs/health/embryodisposition.htm>.

## II. JUDICIAL RESTRAINT

The Vermont Supreme Court of recent years is thoroughly activist, though it makes commendably little effort to conceal its activist approach. At least as early as 1982, the Court noted its “duty of judicial restraint which encompasses...deference to legislative exercise of the sovereign power allocated to that body by the state constitution,” including a “presumption that the legislative action is taken in good faith, and in accordance with constitutional standards.”<sup>42</sup> However, it also began to hint that it has less reason to exercise restraint in reviewing matters of State law: “Rather than disposing of a case on the premise that its impact will presumably affect more than fifty varying jurisdictions, a state court reaches its result in the legal climate of the single jurisdiction with which it is associated,” and can “evaluate the aim and intent of the statutory enactments, as well as the precise expressions of its own state constitutional equivalents.”<sup>43</sup>

Through the late 1980s and early 1990s, it continued to telegraph the possibility of wielding greater power by deciding cases on state-law grounds — first, noting that “[a] state, as a matter of its own law in determining constitutional rights, may impose higher standards for police activity than those imposed by the United States Supreme Court under the federal constitution,”<sup>44</sup>; then stating more generally that “[t]he Vermont Constitution may afford greater protection to individual rights than do the provisions of the federal charter.”<sup>45</sup> The latter case also forthrightly stated a “living document” approach to the Vermont constitution, under which it

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<sup>42</sup> Vermont v. Ludlow Supermarkets, Inc., 448 A.2d 791, 794 (Vt. 1982).

<sup>43</sup> *Id.* at 794.

<sup>44</sup> Vermont v. Brunelle, 534 A.2d 198, 201 (Vt. 1987).

<sup>45</sup> Vermont v. Kirchoff, 587 A.2d 988, 991 (Vt. 1991).

would “strive to honor not merely the words but the underlying purposes of constitutional guarantees, and to give meaning to the text *in light of contemporary experience*.”<sup>46</sup>

Even during those expansions of its constitutional-review powers, the Court still showed genuine deference to the legislature, at least in purely-economic matters. In *Hinesburg Sand & Gravel Co. v. Vermont*, the Court spoke broadly of “judicial restraint” and “limiting the occasions for judicial intervention into the political process.”<sup>47</sup> It even applied uncharacteristically colorful language in declining to turn a state contract procurement dispute into a state constitutional issue:

The government has a legitimate interest in making procurement decisions free from continuous litigation by suppliers who claim to have a better product. The judiciary cannot become the ‘Consumer Reports’ of the procurement business, enforcing product choices on a reluctant executive branch.<sup>48</sup>

In recent years, however — particularly where social issues are concerned — the Court has become quite enthusiastic about the breadth of its policymaking powers, when deciding cases on state constitutional grounds. The high-water mark was 1999, when the Court found that it has a “duty” to base its decisions on state law when possible:

We are the final judicial interpreters of the Vermont Constitution, and our fundamental charter is a freestanding document. Therefore, ...when faced with a choice between deciding a constitutional case on state grounds — yielding a final answer in the form of “adequate and independent state grounds to support our judgment” — and a construction of the federal constitution that faces an uncertain future given the state of applicable federal principles, our duty is to choose the former course of action.<sup>49</sup>

Justice Dooley wrote for the majority.<sup>50</sup> Justice Johnson’s concurrence is noteworthy for asserting the absence of any analytical difference between religious *education* and religious

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<sup>46</sup> *Id.* at 992.

<sup>47</sup> 693 A.2d 1045, 1047-48 (Vt. 1997).

<sup>48</sup> *Id.* at 1050 (unanimous decision authored by Justice Dooley).

<sup>49</sup> *Chittenden Town Sch. Dist. v. Dep’t of Ed.*, 738 A.2d 539, 546-47 (Vt. 1999) (*citing State v. Badger*, 450 A.2d 336, 347 (1982)).

<sup>50</sup> *Id.* at 541-564.

*worship*, holding that tax money applied to the former offends the Common Benefits Clause no less than the latter.<sup>51</sup> Then, six months later in *Baker v. Vermont*,<sup>52</sup> the Court issued a mandate to the legislature to enact either same-sex marriage or a comparable institution extending the same legal benefits, based on the “Common Benefits Clause” of the Vermont Constitution.

In its own words, the Court “vigorously” exercises its own judgment whether legislation “bear[s] a just and reasonable relation”<sup>53</sup> to the Legislature’s aims — and *Baker* illustrates that forthright activism. *Baker* began by surveying the Court’s decisions under the common benefits clause, in recognition that its decisions “have been less than consistent in their application”<sup>54</sup> of rational-basis or strict-scrutiny standards of review under that provision. But it resolved the inconsistency by reframing its review powers in broader terms — requiring deference only to “to the legislative prerogative to define and advance governmental ends,” while reserving to itself the power to “vigorously ensur[e] that the means chosen bear a just and reasonable relation to the governmental objective.”<sup>55</sup>

*Baker*<sup>56</sup> then illustrates the degree of that “vigor” by discussing two earlier decisions that overturned statutes as unconstitutional simply because, in light of modern circumstances, they had outlived their usefulness. In one case cited, “[n]ot content to accept arguments derived from a bygone agricultural era, the Court held that the policies underlying [a fence-repair statute] were outdated and failed to establish a reasonable relation to the public purpose in the light of contemporary circumstances”<sup>57</sup> and in another case, it found that

however reasonable the [statutory] classification when originally enacted, it represented an ‘outdated’ distinction today. Thus, while deferential to the historical purpose

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<sup>51</sup> *Id.* at 564-567 (Johnson, J., concurring).

<sup>52</sup> 744 A.2d 864, 886-87 (Vt. 1999).

<sup>53</sup> *Id.* at 872.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 871.

<sup>56</sup> *Id.* at 873.

<sup>57</sup> *Id.*

underlying the classification, we demanded that it bear a reasonable and just relation to the governmental objective *in light of contemporary conditions*.<sup>58</sup>

In sum, the Court frankly acknowledged that its common benefits clause jurisprudence “yield[s] no rigid categories or formulas of analysis,” instead representing an *ad hoc* case-by-case balancing approach based not merely upon the language, but also the “history and values at the core of the common benefits clause.”<sup>59</sup> Justice Dooley concurred separately, believing the majority’s constitutional analysis was not “clearly commanded by the Constitution and [the Court’s] precedents,” and was not “a careful and necessary exercise of the Court’s limited powers,” and therefore “fear[ed] how it may be applied — or ignored — in the future.”<sup>60</sup> However, his disagreement was not with the “result and remedy” reached by the majority (as he emphasized, “This is a concurrence, not a dissent,”),<sup>61</sup> but with the majority’s reliance on an *ad hoc*, case-by-case balancing test, instead of adopting a uniform “suspect-class” analysis for claims of discrimination based on homosexuality.<sup>62</sup>

*Baker* is also significant for the majority’s willingness to implement a *judicial* decision by mandating *legislative* action — mandating what laws the legislature must pass, in the name of “deference” to the legislature. After holding that “plaintiffs are entitled under [the common benefits clause] to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples,” the majority opinion then mandated the Legislature to implement the decision, rather than doing so on its own.<sup>63</sup> “We do not purport to infringe upon the prerogatives of the legislature to craft an appropriate means of addressing this constitutional mandate;” instead, the legislature was ordered “to consider and enact implementing legislation in an orderly and expeditious fashion” — all in recognition that the Court had just “declare[d] decidedly new

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<sup>58</sup> *Id.* (citing *Choquette v. Perrault*, 569 A.2d 455, 459-60 (Vt. 1989) and *MacCallum v. Seymour’s Administrator*, 686 A.2d 935, 939 (Vt. 1996)) (emphasis added).

<sup>59</sup> *Id.* at 873.

<sup>60</sup> *Id.* at 889 (Cooley, J., concurring).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 893 (Cooley, J. concurring).

<sup>63</sup> *Baker*, 744 A.2d at 886.

doctrine.”<sup>64</sup> (However, Justice Johnson’s dissent argued that the remedy should have been “simply [to] enjoin the State from denying marriage licenses to plaintiffs based on sex or sexual orientation,” rather than allowing the legislature to craft its own remedy.)<sup>65</sup>

In fairness, though, not even *Baker*’s specific mandate to the legislature was entirely unprecedented. Two years earlier, the Court concluded in *Brigham v. Vermont* (“*Brigham I*”) that the statutory scheme for funding education created an “inequality of educational opportunity” between “property-rich” and “property-poor” school districts in violation of the common benefits clause, as well as a specific provision in Vt. Const. Ch. II, § 68 requiring the state to provide “a competent number of schools.”<sup>66</sup> The Court, therefore, directed the legislature “to make education opportunity available on substantially equal terms.”<sup>67</sup> Still, *Baker* marked a new level of judicial intervention into the legislative process — since unlike *Baker*’s highly-specific mandate, *Brigham I* specifically noted that “the specific means of discharging this broadly defined duty is properly left to [the Legislature’s] discretion.”<sup>68</sup>

Finally, *Baker* signals an abandonment, more or less, of strict construction or “original intent” as significant parts of its state constitutional jurisprudence. Early in the opinion, the Court gave a fleeting nod to the idea of “original intent,” but also forthrightly announced its power to expand the state’s constitution beyond its framers’ actual intent:

Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, *while addressing contemporary issues that the framers undoubtedly could never have imagined.*<sup>69</sup>

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<sup>64</sup> *Id.* at 886-88.

<sup>65</sup> *Id.* at 898 (Johnson, J., dissenting).

<sup>66</sup> 692 A.2d 384, 395 (Vt. 1997); *See also Id.* at 396-398.

<sup>67</sup> *Id.* at 398.

<sup>68</sup> *Id.*

<sup>69</sup> *Baker*, 744 A.2d at 874 (emphasis added).

The Court justified such power as part of the legislative function, based on “the inescapable fact...that adjudication of...claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.”<sup>70</sup>

However, while acknowledging that “the imprecision of ‘reasoned judgment’...compels both judicial restraint and respect for tradition in constitutional interpretation,” it again approved of a “living document” approach, quoting Justice Harlan’s characterization of such tradition as itself being “a living thing.”<sup>71</sup> In sum, it stated its willingness to blaze *Baker*’s new doctrinal trail based on its “faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it.”<sup>72</sup>

This paper has uncovered few more-recent cases of similar magnitude to *Baker* from which to further plot the Court’s activist trajectory — and it would require another case with the potential to be as sweeping as *Baker* to fully indicate whether the Court will retreat from that degree of activism. However, the early indications do not suggest any significant return to a restrained jurisprudence.

One decision related to *Baker* superficially suggests renewed deference to the legislature. In *Brady v. Dean*, the Court — composed of the same members who had decided *Baker* — recognized the value of “[t]he doctrine of standing” as “represent[ing] a core constitutional and prudential commitment to judicial restraint,” and found that the case compelled “the prudent exercise of judicial self-restraint and deference to the independence of a coordinate governmental branch.”<sup>73</sup> However, the facts of *Brady* could readily have justified the same sort of “vigorous” review as had *Baker*, since it alleged that “fourteen members of the House of Representatives participated in a ‘dollar-a-guess’ betting pool in connection with a preliminary vote on the civil

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<sup>70</sup> *Id.* at 879 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992)).

<sup>71</sup> *Id.* at 879; *See also Id.* at 879 n. 12 (Harlan, J., dissenting) (quoting *Poe v. Ullman*, 267 U.S. 497, 542 (1961)).

<sup>72</sup> *Id.* at 886.

<sup>73</sup> 790 A.2d 428, 431 (Vt. 2001).

unions bill” that was enacted in response to *Baker*.<sup>74</sup> “The vote was seventy-six to sixty-nine in favor of having the bill read a third time,” and “[a]ll fourteen participants in the pool voted ‘yes.’”<sup>75</sup>

However, the unanimous Court rejected the argument that the betting pool violated the state constitutional prohibition on legislators “vot[ing] upon any question in which they are immediately or directly interested.”<sup>76</sup> On that question of legislative procedure (as opposed to *Baker*’s question of Legislative *substance*), the Court held that the legislature “has the sole authority to” judge of the qualifications of its members, “and courts must refrain from interfering in that determination” — and again, that “as a policy matter, a proper regard for the independence of the Legislature requires that we respect its members’ personal judgments concerning their participation in matters before them.”<sup>77</sup> In sum, *Brady* had discovered “a core legislative function which this Court — as a constitutional and prudential matter — will not scrutinize.”<sup>78</sup>

A final and rather recent case is also significant — though again, mostly for *not* suggesting any meaningful departure from *Baker*’s activism. In *Brigham v. Vermont (Brigham II)*,<sup>79</sup> the Court was confronted with a taxpayer challenge to the legislature’s response to the open-ended mandate of *Brigham I*. The trial court had dismissed the challenge, “rel[ying] on a general notion of judicial restraint to reach the conclusion that the court should not hear the

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<sup>74</sup> *Id.* at 430.

<sup>75</sup> *Id.*

<sup>76</sup> Vt. Const. Ch. I, Art. 6.

<sup>77</sup> *Brady*, at 431-32.

<sup>78</sup> *Id.* at 433. Additionally, *Brady* concluded that compelling town clerks to issue civil-union licenses, or to appoint assistant town clerks to do so, did not violate their free exercise of religion under Article 3 of the Vermont Constitution, because the religious burden on the clerks was not “substantial.” *See generally Id.* at 433-35. Unlike *Baker*’s analysis of the Common Benefits Clause as independent of and stronger than federal Equal Protection requirements, *Brady* relied primarily on federal First Amendment cases in reaching its State-law result — though finding it unnecessary to determine whether it should incorporate *Employment Div’n, Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990), into State law. However, its disposition of the free-exercise claim was essentially unremarkable under settled First Amendment principles, and is therefore not especially significant in assessing the Court’s activism.

<sup>79</sup> 889 A.2d 715 (Vt. 2005).

case.”<sup>80</sup> Specifically, it had concluded the taxpayers lacked standing because their complaints of “disproportionately high state and local education taxes compared to similarly situated taxpayers of other Vermont towns” were “nonjusticiable *per se*,” and would “derail [the political process underway] with unnecessary mandates, or worse, the unnecessary perception of mandates.”<sup>81</sup>

On appeal, the Court found the trial court’s analysis insufficient to support a 12(b)(6) dismissal. The Court again recited, as it had in *Brady*, the value of “limit[ing] the role of the courts to ensure proper balance among the three branches of government.”<sup>82</sup> Yet the Court reinstated the taxpayers’ claim, based largely on broad pronouncements about judicial powers even while legislative action is pending:

Prudential judicial restraint in and of itself...does not excuse the court from its duty to uphold the constitution. Adjudicating cases involving alleged violations of plaintiffs’ constitutional rights resulting from a legislative enactment does not undermine the legislative process, nor is it disrespectful of the other branches of government. Rather, the court abdicated its duty to uphold the Vermont Constitution by refusing to entertain plaintiffs’ claims.... The doctrine of judicial restraint does not allow the court to relinquish its duty to interpret the constitution when judicial intervention may potentially block legislative action.<sup>83</sup>

Though *Brady* and *Brigham II* may not give rise to particularly strong indications about whether the Court’s activism will continue to *increase*, they at least suggest that its activism will not *decrease* anytime soon. Beyond the substance of their holdings, it is noteworthy that the *Brigham II* Court was comprised of only three of the five members who had decided *Baker* (since two justices had been specially assigned to the case, one of whom had been on the *Brigham I* panel) — and even with a two-fifths change in composition, it signaled no particular retreat in its activism.

It, therefore, appears the Court will continue to see itself as an “aggressive co-equal” with the legislature, for lack of a better term — engaged in a perpetual and highly-active dialogue

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<sup>80</sup> *Id.* at 718.

<sup>81</sup> *Id.* at 719.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 720.

with the legislature about the specifics of statutes it enacts. It will probably continue to be very activist for the foreseeable future.

### III. THE COURT

Through the first eighty-three years of Vermont's existence as an independent state, judges<sup>84</sup> were elected by the legislature on an annual basis.<sup>85</sup> In 1870, this system changed. The original proposal would have allowed judges to serve for six years. However, the house only approved two-year terms. This system stood for another ninety-six years (until 1966), when the legislature created the current appointment, confirmation, and retention process, which allows judges to serve six years before a joint session of the legislature votes on whether to retain the judges.<sup>86</sup>

When a vacancy occurs on the Court, it is filled by gubernatorial appointment from those suggested by a nominating commission. The senate then confirms the governor's appointment. Standard terms are six years, unless a judge is appointed to an interim appointment.

Judges can be removed in either of two ways:

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<sup>84</sup> An interesting side note: Vermont retains its practice of each county being served by assistant judges who are elected in partisan elections and serve four year terms. These judges do not have to be attorneys. *See* AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES (2004) [http://www.ajs.org/js/VT\\_methods.htm](http://www.ajs.org/js/VT_methods.htm).

<sup>85</sup> *See* ETHAN ALLEN INSTITUTE, RETAINING SUPREME COURT JUSTICES: THE CONSTITUTION, THE LAW, AND THE LEGISLATURE'S DUTY TO CHECK AN OVERREACHING SUPREME COURT (2005), <http://www.ethanallen.org/pdf/JudicialRetention.pdf>.

<sup>86</sup> *See Id.*; *See also* DAVID A. GIBSON, CLERK OF THE JOINT ASSEMBLY, JOURNAL OF THE JOINT ASSEMBLY (2005) <http://www.leg.state.vt.us/DOCS/2006/JOURNAL/JA050317.DOC>.

1. They may be impeached by a two-thirds vote of the house of representatives and convicted by a two-thirds vote of the senate.
2. The judicial conduct board can investigate complaints and recommend any necessary discipline to the Court, including suspension for the remainder of the judge's term or forced retirement.<sup>87</sup>

Regardless of when a judge is appointed to the Court, the legislature votes to retain all of them every six years.<sup>88</sup> The last vote for retention occurred on March 17, 2005. At that vote, Chief Justice Paul Reiber and Associate Justices John Dooley, Denise Johnson, and Marilyn Skoglund were retained. Due to the late 2004 resignation of the prior chief justice, there was a vacancy on the court.

### Individual Justices' Biographical Information

Judge	Appointed by/Year	Term Expires	Miscellaneous
Paul L. Reiber, Chief Justice	Governor J. Douglas/ 2003; Chief Justice, 2004	2011  Retained in 2005	-Biographical information: Suffolk Law School, 1974; Alumni profile at: <a href="http://www2.hsc.edu/alumni/profiles/reiber70.php">http://www2.hsc.edu/alumni/profiles/reiber70.php</a> -Professional/social affiliations: <i>Ex officio</i> member of ALI; Co-chairs Vermont Justice for Children
John Dooley, Associate Justice	Governor M. Kunin/ 1987	2011  Retained in 2005	-Biographical information: Boston College Law School, 1968 -Professional./social affiliations: Served as Secretary of Administration for the State of Vermont and President of the Vermont Bar Association; Serves on boards of Institute for Sustainable Communities and the Vermont Broadband Council

<sup>87</sup> See AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES, (2004) [http://www.ajs.org/js/VT\\_methods.htm](http://www.ajs.org/js/VT_methods.htm).

<sup>88</sup> *Id.*

			-Noteworthy opinions: In his opinions and dissents, Associate Justice Dooley demonstrates a willingness to follow the confines of the laws as passed by the legislature. <i>See Hunt v. Hunt</i> <sup>89</sup> ; <i>In re Spring Brook Farm Corp.</i> <sup>90</sup> ; <i>In re D.T.</i> <sup>91</sup> ; <i>State v. Spitsyn</i> <sup>92</sup> ; <i>State v. Anderson</i> <sup>93</sup> ; <i>Stanzione v. Stanzione</i> <sup>94</sup> ; <i>Vermont v. Deyo</i> <sup>95</sup> ; <i>Chittenden v. Waterbury Center Comm. Church</i> <sup>96</sup> ; <i>Chittenden Town Sch. Dist. v. Dept. of Educ.</i> <sup>97</sup> ; <i>Miller-Jenkins v. Miller-Jenkins</i> <sup>98</sup> ; <i>Baker v. State.</i> <sup>99</sup> For a detailed analysis of his role on the court, see the February 2005, Ethan Allen Institute report, <i>Retaining Supreme Court Justices.</i> <sup>100</sup>
Denise Johnson, Associate Justice	Governor H. Dean/ 2000	2011  Retained in 2005	-Biographical information: University of Connecticut School of Law, 1974; LLM University of Virginia School of Law, 1995 -Professional/social affiliations: Taught at Vermont Law School (1978-79); served as an Assistant Attorney General as Chief of Civil Rights and Public Protection Divisions (1980-88); and chaired the Vermont Human Rights

<sup>89</sup> 162 Vt. 423, 442 (1994) (Dooley, J., dissenting).

<sup>90</sup> 164 Vt. 282 (1995) (Dooley, J., dissenting) (dissenting because law as written by court looks nothing like that of the one written by the legislature).

<sup>91</sup> 170 Vt. 148 (1999) (Dooley, J., dissenting) (dissenting because opinion ignores precedent and law).

<sup>92</sup> 174 Vt. 545 (2002) (Dooley, J., dissenting) (dissenting because opinion makes policy sense but ignores precedent).

<sup>93</sup> 179 Vt. 43 (2005) (Dooley, J., dissenting) (dissenting because court doesn't follow statutory scheme adopted by Legislature).

<sup>94</sup> 2006 VT 98 (2006) (Dooley, J., dissenting) (dissenting because court doesn't follow statutory scheme).

<sup>95</sup> 2006 VT 120 (2006) (Dooley, J., dissenting) (dissenting from Reiber opinion because opinion doesn't follow statutes).

<sup>96</sup> 168 Vt. 478 (1998) (Dooley opinion that uses Vermont statutes to protect a church's property interest).

<sup>97</sup> 169 Vt. 310 (1999) (Dooley opinion that found that state funds could not be used to fund education in the school choice program).

<sup>98</sup> 2006 VT 78 (2006) (Dooley opinion that found that Vermont courts retained jurisdiction in child custody disputes arising out of civil union dissolutions even after a former partner moved to another state with the child; the court will act where the Legislature has not regarding reproductive technology).

<sup>99</sup> 170 Vt. 194 (1999) (Dooley, J., concurring) (opinion directly paved the way for civil unions).

<sup>100</sup> ETHAN ALLEN INSTITUTE, *RETAINING SUPREME COURT JUSTICES* (2005), <http://www.ethanallen.org/pdf/JudicialRetention.pdf>, (detailed analysis of Dooley's role on the court).

			<p>Commission (1988-90)</p> <p>-Noteworthy opinions: <i>In re B.L.V.B.</i><sup>101</sup></p> <p>-Speeches: Speech for the Vermont Law School Conference on Sexual Orientation and Family Law.<sup>102</sup></p> <p>-Articles: <i>The Legal Needs of the Poor as a Starting Point for Systemic Reform</i><sup>103</sup> and <i>Special Focus: Access to the Justice: Making a Life</i>.<sup>104</sup></p>
Marilyn Skoglund, Associate Justice	Governor H. Dean/ 1997	2011  Retained in 2005	<p>-Biographical information: Southern Illinois University (undergraduate; read for the bar rather than attending law school)</p> <p>-Professional/social affiliations: Office of the Attorney General as the Special Assistant Attorney General (1978-81), Assistant Attorney General (1981-89), Chief of the Civil Law Division (1989-93), and Chief of Public Protection Division (1993-94); trial judge.</p> <p>-Noteworthy opinions: <i>Vermont Soc. of Ass'n Execs. v. Milne</i>.<sup>105</sup></p> <p>-Other: Sings with a band; appears to have appeared in 2005 independent film "The Summer of Walter Hacks".</p>
Brian L. Burgess, Associate Justice	Governor J. Douglas/ 2005	2010	<p>-Biographical information: College of the Holy Cross, B.A. 1973; Villanova University School of Law, 1976</p> <p>-Professional/social affiliations: District Court Judge (1992-2004) and the Vermont Administrative Trial Judge (2004-05); also</p>

<sup>101</sup> 160 Vt. 368, 628 A.2d 1271 (1993) (unanimous opinion holding that lesbian parent's partner could adopt without terminating natural parent's rights, though lower court's holding that statutory language forbade it was "technically correct," because "[w]hen social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment").

<sup>102</sup> Denise Johnson, Associate Justice, Vermont Law School Conference on Sexual Orientation and Family Law (Oct. 3, 1997) (a late-1940's adoption statute was "very, very old . . . and there are situations where courts can modernize statutes and give them a more contemporary application").

<sup>103</sup> Denise Johnson, *The Legal Needs of the Poor as a Starting Point for Systemic Reform*, 17 YALE L. & POLICY REV. 479 (1998).

<sup>104</sup> Denise Johnson, *Special Focus: Access to the Justice: Making a Life*, 30 VER. B. J. & L. DIG. 22 (2004).

<sup>105</sup> 172 Vt. 375, 779 A.2d 20 (2001) (3-2 majority opinion stating that the 5% tax on political lobbyists' expenditures over \$2,500 violated First Amendment of U.S. Const.; "a special tax that singles out and burdens First Amendment interests, as § 264(a) does, is subject to heightened scrutiny regardless of whether it is content-neutral").

			Attorney for Social Welfare Department, Department of Labor and Deputy Attorney General; Chair of Vermont Sentencing Commission -Noteworthy opinions: <i>Dep't of Corr. v. Human          Rights Comm'n.</i> <sup>106</sup> -Other: Avid reader of history, nonfiction and science fiction; owns a sailboat on Lake Champlain.
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## CONCLUSION

In bumper-sticker terms, the Court of recent years is “activist and proud of it.” Unless the still-recent additions of Chief Justice Reiber and Justice Burgess tip the Court’s balance on matters of judicial restraint, that activist trend will continue into the foreseeable future. But even if the Court retreats from its activist philosophy, its history on life issues suggests that, even if *Roe v. Wade* dies in Washington, D.C., its spirit will live on in Vermont.

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<sup>106</sup> 2006 VT 134 (2006) (Burgess, J., dissenting) (dissent would hold state Fair Housing and Public Accommodations Act inapplicable to prisons, noting “[w]e might frequently perceive an arguably better policy of reason to extend legislation beyond what is actually declared by the statute. It is not the function of this Court, however, to correct or change a statute that can otherwise effectively achieve a purpose plainly and unambiguously written by the legislature”).