SAME-SEX MARRIAGE IN VERMONT: IMPLICATIONS OF LEGISLATIVE REMAND FOR THE JUDICIARY'S ROLE

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INTRODUCTION

In December 1999, the Vermont Supreme Court vindicated the right of same-sex couples to equal treatment under the law in *Baker v. State*, but refrained from deciding how that right should be implemented.[1] Instead, the court remanded determination of an appropriate remedy to the Vermont General Assembly. The General Assembly codified its remedy through the Civil Unions Act, and popular and academic attention continues to center on whether same-sex couples should have the substantive right to marry. The case, however, raises a broader institutional question: which branch of government should decide such a controversial issue? Did the court abdicate its duty to provide a remedy to constitutionally-injured citizens? Or should courts let popularly-elected legislatures decide society's most divisive issues?

The court's decision to remand to the legislature appears, at first, to remove the judiciary from a political question, passing determination of a highly controversial policy question to an elected branch of government. But the court's decision is highly political in a different way—the decision explicitly weighed considerations other than the purely legal issues raised in the case, such as the likely public reaction to its ruling.[2] The court's modest statement that the responsibility to determine the details of the policy behind civil unions rests with the legislature implies that the court considered questions of political responsibility, and potential political responses to its own actions. The decision to remand to the legislature the determination of a remedy was also necessarily influenced by, and in turn influences, con-ceptions of the judiciary's appropriate role within a democratic system. Indeed, the difference between the majority opinion and the concurring and dissenting opinions illustrates a clash between two contending conceptions of the judicial role.

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1. Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999).
2. *Id.* at 225, 229, 248, 744 A.2d at 887, 889, 902.

This Article examines why, given the political choice the court faced, the *Baker* court's legislative remand constitutes a principled choice: the decision vindicated individual rights without compromising the separation of powers. Because little scholarly attention has focused on this aspect of the case,[3] this Article proposes three possible objections to the court's use of legislative remand. First, this Article considers whether legislative remand is overly deferential to the legislature in two respects: because in remanding the court acknowledged infringement upon a legal right but refused to provide a correlative remedy, or because remanding to the legislature prevented the parties from participating in formulating a remedy arising from their litigation. Second, the Article poses the question of whether legislative remand is overly interventionist, either because remand entangles the judiciary in supervising the legislature, or because legislative remand creates the danger that courts may bring about unintended policy outcomes. Finally, this Article examines whether legislative remand in the *Baker* case constitutes an expansion of the law of remedies.

Each objection will be answered in turn. Legislative remand in *Baker* actually protected the integrity of legislative functions while upholding the judiciary's responsibility to protect individual rights. Legislative remand was the option least likely, under the circumstances, to produce harmful unintended policy outcomes, and was also the remedy most likely to promote inter-branch cooperation. More broadly, legislative remand has important implications for the separation of powers, for questions of what constitutes an appropriate judicial role, and for issues relating to judicial power. Given the circumstances, the legislative remand in *Baker* struck a careful balance between separation of powers and the protection of individual rights. Thus, legislative remand can preserve judicial power by minimizing inter-branch conflict, and is clearly the most judicious option available to the court.

I. THE DECISION TO REMAND TO THE LEGISLATURE

3. *But see* Gil Kujovich, *An Essay on the Passive Virtue of* Baker v. State, 25 VT. L. REV. 93 (2000). Professor Kujovich's essay provides useful background for the present inquiry.

In *Baker,* the Vermont Supreme Court declared that the State of Vermont is "constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[4] This decision has led to, or at least highlighted, the division within the Vermont community over gay rights and the "sanctity of marriage."[5] But the controversy has overshadowed another equally vexing issue raised by the case. Despite a number of available alternative mechanisms, the court elected not to fashion a specific remedy itself. Instead, the majority held that the decision over which form of inclusion should be used to grant the recognized constitutional rights "rests with the legislature."[6]

The court unanimously held that gay couples are entitled to the same benefits of marriage that opposite-sex couples enjoy, such as spousal support, intestate succession, and medical decision-making privileges.[7] However, the majority refrained from providing a specific remedy to the plaintiffs. Instead, the court left to the legislature the opportunity to craft a remedy and redress the denial of rights recognized in *Baker*.

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4. *Baker*, 170 Vt. at 197, 744 A.2d at 867.

5. *E.g.*, Carey Goldberg, *Forced to Act on Gay Marriage, Vermont Finds Itself Deeply Split*, N.Y. TIMES, Feb. 3, 2000, WL 12395618; Carey Goldberg, *Vermont Panel Shies from Gay Marriage*, N.Y. TIMES, Feb. 10, 2000, WL 16310274.

6. *Baker*, 170 Vt. at 197-98, 744 A.2d at 867. There is precedent for this approach. *See, e.g.*, Virginia v. West Virginia, 246 U.S. 565, 603 (1918); Horton v. Meskill, 376 A.2d 359, 375-76 (Conn. 1977); Brigham v. State, 166 Vt. 246, 249, 692 A.2d 384, 386 (1997).

7. *Baker*, 170 Vt. at 197, 235, 242, 744 A.2d at 867, 893, 898 (Dooley, J., concurring; Johnson, J., concurring and dissenting on other grounds).

The court did not have to defer to the legislature; it did so voluntarily. Legislatures cannot require courts to defer or refrain from providing a remedy because such a requirement would violate the separation powers between the judicial and legislative branches.[8] In contrast to the decision in *Baker*, when the question of whether same-sex couples have the right to marry came before the Hawai'i Supreme Court, that court did not remand the formulation of a remedy to the state legislature. Although the Hawai'i court failed to find that the state constitution gave same-sex couples a fundamental right to marry, the court did hold that the relevant law was presumptively unconstitutional unless it could be shown that the statute's sex-based classification was justified by a narrowly drawn, compelling state interest.[9]

8. *See Baker*, 170 Vt. at 251, 744 A.2d at 904 (Johnson, J., dissenting and concurring on other grounds (citing In re *Williams*, 154 Vt. 318, 318-19, 321, 577 A. 2d 686, 686-87 (1990)).

9. Baehr v. Lewin, 852 P. 2d 44, 68 (Haw. 1993). Although the state never attempted to meet this heightened standard, the Hawai'ian Constitution was amended to explicitly allow the state to deprive same-sex couples of marriage licenses. *See infra* note 126.

The Vermont Supreme Court proffered several reasons to support its course of action. First, acknowledging a respect for the separation of powers, and specifically the desire not to intrude upon the legislative sphere, the court stated that it did not "purport to infringe upon the prerogatives of the legislature to craft an appropriate means of addressing this constitutional mandate."[10] Second, motivated by its recognition of the limits of the judicial role, the court recognized that judicial action, "absent legislative guidelines defining the status of rights of same-sex couples," could result in "uncertainty and confusion."[11] Third, the court recognized the political consequences of its decision. While the court was determined to decide the issue on the legal merits without exception for controversial cases,[12] it did recognize that to grant same-sex couples the substantive right to marry would embroil it in the "political cauldron" of public debate.[13] Further, and although the court considered that imposing a judicial remedy might be counter-productive, the court did limit the legislature's discretion to act. If the legislature did not "consider and enact implementing legislation in an orderly and expeditious fashion," or failed to provide the constitutionally required benefits altogether, the court made it clear that it would then provide its own remedy.[14]

In response, the Vermont General Assembly passed the Civil Unions Act.[15] The Act created a "civil union" relationship under which the benefits and protections, as well as the responsibilities, of married spouses are applied to certified same-sex couples.[16] While the Act mentions specific benefits such as probate, adoption, workers compensation, family leave, and public assistance, the legislation is written broadly and the listed benefits are not exhaustive. The Act specifies that all benefits married couples enjoy now apply to civil union couples.[17] Any law referring to spouses, families, dependents, or next-of-kin must include parties to a civil union.[18] Further, the Act specifies that discrimination between married couples and parties to a civil union is illegal.[19]

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10. *Baker*, 170 Vt. at 225, 744 A.2d at 886.

11. *Id.* at 225, 744 A.2d at 887.

12. *Id.* at 197, 744 A.2d at 867.

13. *Id.* at 227, 744 A.2d at 888. *See also, id.* at 226 & n.15, 744 A.2d at 887 & n.15.

14. *Id.* at 226, 744 A.2d at 887.

15. VT. STAT. ANN. tit. 15, § 1201-1207 (Supp. 2001).

16. *Id.* at § 1204.

17. *Id.* at § 1204(a).

18. *Id.* at § 1204(b).

19. VT. STAT. ANN. tit. 8, § 4724(7)(E) (1994 & Supp. 2001) (limited to insurance trade

II. CONCEPTIONS OF JUDICIAL ROLE

The traditional debate over the most appropriate role for the judiciary concerns two apparent extremes of judicial behavior: minimalism and activism. Judicial minimalism is often associated with deference to the legislative or executive branches, while judicial activism is associated with a pronounced lack of deference. These associations are erroneously simplified and ultimately misleading.

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practices).

A minimalist conception of the judicial role suggests that the judiciary should take small steps, avoiding broad policy questions and generally deciding only what is necessary in each case.[20] Support for judicial restraint is usually associated with this minimalist view. The predominant argument favoring judicial restraint maintains that deference is appropriate because the judiciary is a largely unelected, politically unaccountable branch of government and therefore should not determine important questions of policy.[21] The suggestion that the nature of the judicial function is limited and ill-suited to determine the complexities of policy decisions further supports this minimalist view.[22]

In contrast, an activist or interventionist conception of the judicial role considers that courts should act freely, unconstrained by any obligation to defer to the legislature or the executive branches of government. Arguments supporting this view contemplate a "pure" conception of the judiciary in which decisions are made without reference to external "political" concerns.[23] The suggestion that courts are both capable of, and relatively advantaged in, fashioning policy decisions directly challenges minimalist assertions favoring judicial restraint.[24]

These dichotomized positions are not the only ways of conceptualizing notions of the appropriate judicial role. The stark positions outlined above mask complexities in the judiciary's relationship with the public and the other branches of government. Deference can in fact serve as a veiled form of activism. In appearing to exercise self-restraint through deference, courts are able to extend their power to actively intervene. Robert McCloskey suggested that "paradoxical though it may seem, the Supreme Court often gains rather than loses power by adopting a policy of forbearance."[25] By denying itself otherwise constitutionally permissible judicial power, a court

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20. *E.g.*, CASS SUNSTEIN, ONE CASE AT A TIME ix (1999).

21. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (2d ed. 1986) (containing Bickel's famous discussion of the "counter-majoritarian difficulty").

22. *E.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 59 (The Brookings Institute 1977); Lon Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978), *reprinted in* ROBERT M. COVER ET AL., PROCEDURE 376-91 (1988) (discussing polycentric decisions).

23. *E.g.*, *Baker*, 170 Vt. at 242, 744 A.2d at 898 (Johnson, J., concurring and dissenting opinion). *See infra*, at Part III.

24. *See, e.g.*, Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 44 (1979), *reprinted in* COVER, ET AL., *supra* note 22, at 383 (1979); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV 1281, 1316 (1976).

25. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 47 (1960) (advocating judicial deference to the political branches of government).

can in fact lay the groundwork for extending the judicial power by demarcating exclusively judicial functions. By avoiding groundbreaking decisions, a court may appear less confrontational. At the same time, by avoiding clear pronouncements of principle, a court can allow itself enormous discretion to shape social policy.[26]

26. *Id.* at 134.

The methods through which the court is able to accrue power while appearing to limit itself are examples of what Bickel labels the "passive virtues."[27] A court exercises a "'triune function:' it checks, it legitimates, or it does neither."[28] It "does neither" by employing devices such as vagueness or delegation. "Doing neither" in fact means doing something else, such as permitting previous judgments to have a certain effect, frustrating or checking a prior legislative or official decision, or allowing lower courts to engage in constitutional experimentation.[29] As such, even where a court takes no positive action, it nevertheless may affect the outcome of subsequent cases.

By finding new means through which the court can choose to defer, a court actually allows itself greater discretion. As legislatures cannot require courts to defer, deference is merely a discretionary tool available to the court. Conversely, any insistence that the court must always act to decide every question raised in each case actually reduces judicial choice, and determination to decide even controversial questions of public policy constrains the court. Thus, while minimalism and activism are often associated with support for and opposition toward legislative deference, respectively, they do not always equate.

The decision to remand to the legislature the choice of remedies in *Baker* is more complicated than it appears at first glance. The decision to remand is deferential because it allows the state legislature, rather than the court, to fashion a remedy. Nevertheless the court took an active, arguably imperialist, approach by making it clear that it would be supervising, and possibly reviewing, the legislature's actions. Remand can thus be viewed as an acceptance of judicial minimalism, because the court attempted to decide as little as possible. At the same time, the majority opinion reflects conceptions of an activist judicial role, both because it implicitly rejects the notion that courts make decisions immune from political considerations, and because it potentially places the court in an ongoing supervisory role over the legislature.

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27. BICKEL, *supra* note 21, at 201.

28. *Id.* at 200.

29. *Id*. at 200-01.

Instead of insisting that courts must always intervene or defer in order to comply with an idealized notion of judicial role, decisions such as *Baker* can be more usefully viewed in terms of their effect on judicial discretion, judicial power, and judicial legitimacy in a system of separated powers. With attention to *Baker* focused on the substantive question of the right of gay couples to marry, little attention has been given to other questions raised by the case. An important question that has only been partly explored is the impact of legislative remand on conceptions of judicial role, judicial power, and judicial responsibility. The remainder of this Article raises and considers possible objections to legislative remand in *Baker*. These objections include whether remand to the legislature is either inappropriately restrained or inappropriately activist.

Ultimately, it is argued that deference in this case was reasonable. This, however, does not imply a requirement of legislative deference, nor that such deference was the only reasonable judicial alternative. Instead, it was one of several options available to the judiciary, and in this case the court's decision to invoke legislative remand was politically astute. Legislative remand was the choice most likely to protect judicial power, which in turn enabled the judiciary to command respect and ensure that its orders were followed. In exercising respect for the legislative and executive branches, legislative remand was most likely to promote inter-branch cooperation, which in turn will empower the judiciary and promote its legitimacy. Perhaps counter-intuitively, legislative remand is also the course of action that will most effectively promote the enjoyment of the rights of same-sex couples, because it is the action least likely to cause popular backlash.

III. IS LEGISLATIVE REMAND TOO DEFERENTIAL?

The decision to remand to the legislature the formulation of a remedy in *Baker* is open to criticism both for being too deferential and alternately for being too assertive. This Part examines the first criticism; the latter criticism is explored in Parts IV and V.

The decision to remand to the legislature can be criticized as inappropriately deferential because of the implications this decision has for notions of judicial responsibility and judicial function. *Marbury v. Madison* established that the recognition of a right is empty if there is no remedy to correct a violation of that right.[30] Arguably, by recognizing a constitutional violation but refusing to grant a judicial remedy, the Vermont Supreme Court

30. *See* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 737 (1992) (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

abdicated its constitutional responsibility to provide for the enforcement of those constitutional rights. Similarly, as Justice Johnson argued in *Baker*,

> the judiciary's obligation to remedy constitutional violations is central to our form of government. This power is not merely to rule on cases, but to *decide* them.'. . . Accordingly, absent 'compelling' reasons that dictate otherwise, it is not only the prerogative but the duty of courts to provide prompt relief from violations of individual civil rights.[31]

31. *Baker*, 170 Vt. at 244-46, 744 A.2d at 899-901 (quoting Plaut v. Spendthrift Farm Inc., 544 U.S. 211, 218-19 (1995)).

This conception of judicial responsibility is not purely theoretical; abdication of the court's remedial role would leave citizens without protection from recognized constitutional violations. In *Baker*, Justice Johnson characterized the court's dilemma as a question of whether the relief the court majority promised should be provided promptly by the courts or at some uncertain time by the legislature.[32] As the Connecticut Supreme Court previously recognized, when a remedy is not quickly imposed, every passing day denies the plaintiff class substantive equal protection.[33]

While the judiciary has a responsibility to ensure both the recognition and protection of rights, it is disingenuous to suggest that a judicial remedy provides the only choice available to the court that is compatible with accepted notions of judicial responsibility. In addition to legislative remand, the judiciary has at its disposal many established mechanisms of deference and avoidance, such as ripeness, mootness and abstention. In deciding whether to utilize remand or other deference mechanisms, the court must consider the best means of protecting individual rights; but this is not the only consideration. The court must also work within the confines of the separation of powers and consider the appropriateness of allowing the legislature to determine the details of social policy.

The court may also consider its own popular legitimacy. Professor Cramton found that a main cause of "popular dissatisfaction with the administration of justice," was found in a judiciary actively engaged in lawmaking on social and economic issues that might be more appropriately handled by other institutions of government.[34] On the other hand, the discretionary nature of remedies allows for more subtle maneuvering. Professor Friedman argues that theories explaining what constitutes an

32. *Baker*, 170 Vt. at 249, 744 A.2d at 903.

33. Sheff v. O'Neill, 733 A.2d 925, 937 (Conn. 1999).

34. Roger C. Cramton, *Judicial Law-Making and Administration*, 31 PUB. ADMIN. REV. 551, 553 (1976) (using Roscoe Pound's famous phrase, Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in *Proceedings Honoring Roscoe Pound*, 35 F.R.D. 241, 273, and citing examples of judges "running" schools, prisons, mental hospitals, and highway patrols).

appropriate judicial role can be brought to bear more easily through the creation of remedies than the recognition of rights. "Rights are often abstract; they are announced without a clear sense of how they will be received or implemented. Through the process of remediation and enforcement, however, courts take into account popular will and tolerance for the rights announced."[35] Thus, even where courts make bold judicial statements, the discretionary nature of remedies allows them to consider the popular will.

This is a step away from purely legal considerations, but judges work within the balance set by the separation of powers. Maintaining this balance must also be weighed against the protection of individual rights. Because the court in *Baker* made it clear that it would provide a remedy if the legislature failed to do so, the question central to this balancing process is not whether rights will be protected, but rather how quickly they will be protected. Since the court determined that the rights impinged are constitutional and must be protected, it was a reasonable exercise of judicial responsibility for the court to balance the immediate implementation of such rights in favor of deference and respect for the separation of powers.

35. Friedman, *supra* note 30, at 738.

The second possible objection to legislative remand as too deferential relates to judicial function. To deny a judicial remedy removes from the parties the ability to participate in an essential element of the case. This participation is arguably essential to judicial functioning. In his seminal work, Professor Fuller argued that the integrity of adjudication is impaired if parties do not have full and meaningful participation in the process. Professor Fuller's analysis centered on such elements as the participants initiating the judicial process and having a right to reasoned opinions.[36] Fuller did not expressly discuss party involvement in fashioning a remedy, but choice of remedy is as much a question for the litigants as the establishment of a cause of action.[37] But Professor Fiss has argued that participation is not necessarily the key to the judicial function. Professor Fiss considered that litigation is a means of clarifying public values and reflects the power-sharing between institutions and individuals. He contended that courts are capable of considering decisions that are polycentric in nature and affect large numbers of individuals.[38]

36. Fuller, *supra* note 22, 376.

37. On party negotiation of remedies, *see* Chayes, *supra* note 24, at 1298-1301. Note however that Fuller was concerned to limit judicial tasks. In particular, he stressed that polycentric tasks are ill-suited to adjudication by courts. Fuller, *supra* note 22, at 380. Consequently, he may have approved of the court deferring the policy question of how gay couples should be afforded their constitutional rights to the legislature. However, as will be shown in Part VI, the decision to remand to the legislature may be deferential, but will not necessarily minimize the judiciary's involvement in polycentric decisions. *Id.*

38. Fiss, *supra* note 24, at 384-85.

A polycentric decision involves a broad question of social policy affecting the community generally, resolution of which is arguably beyond the capacity of judicial adjudication, narrowly defined.[39] In deciding a polycentric issue, "the judge must be certain that the full range of interests is vigorously represented, but he need not turn his back on the constitutional claim or deny an effective remedy because each and every individual affected will not or cannot meaningfully participate in the suit."[40] Using this reasoning, judges can confidently decide broad constitutional issues and fashion remedies to accord with the recognized constitutional rights.[41]

This response, however, pits one assertion of the essential nature of the judicial function against another. It is more useful to formulate a judicial response based on the particular type of lawsuit at issue. Even if Fuller's analysis is accepted as applying to a traditional lawsuit, such as a negligence or contract action between two parties, it does not apply where a law is challenged as contrary to the constitution. This is because a successful constitutional challenge alters the position of many parties not before the court. Since the outcome of the lawsuit affects the community generally, it is appropriate that the legislature, a body directly representing and responsible to the community, determine the mechanism to remedy the constitutional breach.

Fuller would counter that the court should not be examining polycentric questions in the first place. To accept this argument, however, is to ignore the nature of much modern litigation. Professor Chayes describes the object of much modern public law litigation not as the adjudication of disputes relating to private rights, but rather the vindication of constitutional or statutory policies.[42] This is particularly so in litigation where remedies apply to

39. *See* Fuller, *supra* note 22, at 380.

40. *Id*. at 385.

41. *Id.* (placing "adjudication on a moral plane with legislative and executive action").

42. Chayes, *supra* note 24, at 1284.

legislatures or executives. In such cases, parties are "more diffuse, involving many and varied groups whose status throughout the litigation is subject to change."[43] Accordingly, the traditional assumption that litigation is party-initiated and party-controlled is out-of-date, as is the assumption that rights and remedies are necessarily interdependent.[44]

Remanding a remedy to the legislature in *Baker* is a form of deference, but this deference is justified where the nature of the case raises broad community issues. It is necessary to balance protection of individual rights against the recognition of the responsibilities of each branch of government. Since the court can ensure that a remedy will be provided, it is not abdicating its judicial responsibility when it decides, at least initially, to defer to the legislature's right to determine questions of social policy. Given the effect of any remedy on the public generally, it is also not inappropriate to allow the legislature to craft a remedy, even where such a remedy may deny the parties active participation in formulating that remedy. While this does not suggest that in such situations remedies *must* be remanded to the legislature, its logic indicates that legislative remand is not overly deferential under the circumstances.

IV. IS LEGISLATIVE REMAND TOO INTERVENTIONIST?

JUDICIAL ADMINISTRATION OF LEGISLATIVE FUNCTIONS CONSIDERED

There are two ways in which the decision to remand the determination of a remedy to the state legislature in *Baker* can be characterized as inappropriately aggressive. First, legislative remand necessitates judicial overview of legislative functioning, entangling the judiciary in a supervisory role contrary to the principle of separation of powers. Second, the court's use of legislative remand in cases where a simple judicial decree would provide an effective remedy expands the substantive law of remedies.

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43. Karla Grossenbacher, Note, *Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist*, 80 GEO. L.J. 2227, 2232 (1992).

44. Chayes, *supra* note 24, at 1282-84. Chayes describes the inquiry as legislative, but does not say that the legislature must therefore determine this question. *Id.*

Both of these criticisms center on the ways in which *Baker* fits within the context of a group of cases involving institutional injunctions, also known as legislative or structural injunctions. Legislative injunctions are decrees issued by the judiciary ordering, regulating, supervising, or restricting specific executive and legislative functions. These decisions constitute the high water mark of judicial intervention into administrative and legislative affairs, at times involving courts in the minutiae of administration, at times testing such fundamental questions of inter-branch relations as whether courts can order legislators to vote in a particular way.[45]

45. *See* U.S. v. City of Yonkers, 856 F.2d 444, 454-55 (2d Cir. 1988).

Some examples of legislative injunctions include courts regulating student assignment in order to combat racial segregation in schools, the training of teachers, testing mechanisms and counseling availability,[46] the conditions in state penitentiaries,[47] and the building of sewage treatment plants.[48] Such involvement in detailed administrative and legislative decisions appears, at first, to be the very antithesis of remand to a legislature. The contrast is misleading, however, as in both cases the court orders *some* action on the part of the legislature and then must evaluate that action to assess the legislature's compliance. In both cases, the legislature is instructed to remedy a situation arising due to a violation of constitutional or statutory rights. In both, the legislature is given discretion over which remedial mechanism it will use. In both legislative injunction and legislative remand cases, the court orders the legislature to act. The question of whether the legislature has fully satisfied the remedy requirement will be open to challenge and review before the court. As such, legislative remand, like legislative injunction cases, may cause the court to assume a supervisory role over legislative action.

Baker typifies legislative remand decisions in that the court limited its deference to the legislature; the legislature was expected to provide a remedy. If it failed to do so, the court would have provided its own remedy. Sometimes courts simply express the hope that the legislature will respect the constitutional obligations the court has enunciated.[49] But the same power exists to enforce judgments against the state as against any other defendants. "Where a state expresses its unwillingness to comply with a valid judgment of a federal district court, the court may use any of the weapons generally at its disposal to ensure compliance."[50] Even if the court chooses not to state explicitly what action would be taken if the legislature failed to act as required, the court will consider the legislature's actions and determine its response accordingly.[51]

The possibility clearly exists that the court will couple legislative remand with subsequent judicial review of legislative responses to a judicial order. Often, remand to the legislature, rather than avoiding judicial involvement in legislative or administrative functions, can deeply entangle

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46. Milliken v. Bradley, 433 U.S. 267, 272-77 (1977).

47. Gates v. Collier, 616 F.2d 1268, 1270 (5th Cir. 1980).

48. City of Vernon v. Superior Court, 241 P.2d 243, 244-45 (Cal. 1952).

49. *E.g.*, Wyatt v. Aderholt, 503 F.2d 1305, 1318 (5th Cir. 1974).

50. *Gates,* 616 F.2d at 1271. The only limit is if the court action was so inappropriate as to be an abuse of discretion. *Id.*

51. Welsch v. Likins, 550 F.2d 1122, 1133 (8th Cir. 1977).

courts in review and supervision of the other branches. The *Robinson v. Cahill* series of cases provides a striking example of how legislative remand can fail to produce an adequate remedy and necessitate the court's ongoing involvement.[52]

52. *See* Abbott v. Burke, 495 A.2d 376, 382-83 (N.J. 1985) (citing *Robinson v. Cahill* procedural history beginning with *Robinson V. Cahill*, 303 A.2d 273 (N.J. 1973)).

Starting with a complaint in 1970, *Robinson I* concerned a systemic challenge to school financing legislation.[53] The court found that the financing legislation governing the New Jersey school system created unconstitutional disparities among school districts.[54] The court requested further arguments on remedies.[55] In *Robinson II*, because of the prospective nature of the relief, the court deferred to the legislature and refused to provide a remedy at that point, allowing the legislature an opportunity to adopt appropriate legislation.[56] In 1975, in *Robinson III*, the court extended the time allowed for the legislature to act before the court would strike down the existing legislative scheme.[57] But the legislature did not act, and in *Robinson IV*, in the absence of legislative action, the court authorized a provisional remedy to effectuate the constitutional right to a "thorough and efficient system of education."[58] Before the judicial measure became effective, the legislature enacted the remedy which had been previously required by the court in *Robinson II*.[59] This legislative remedy was tested for facial compliance in *Robinson V*.[60] In that case, the court refused to assess the validity of the legislation until its application to any individual school district could be determined.[61]

Abbott v. Burke, effectively *Robinson VI*, challenged as unconstitutional the legislative remedy and its system of funding schools because the financial disparities among school districts remained excessive.[62] This case determined which tribunal should hear the merits of the issue at the next stage of the litigation. Because of the extraordinarily complex factual issues involved, the court decided that administrative handling of the issues, including the design of remedial measures and supervision of program implementation, was once again preferred.[63] The court remanded the case to

53. Robinson v. Cahill, 303 A.2d 273, 273 (N.J. 1973).

54. *Id.* at 298.

55. *Id.*

56. Robinson v. Cahill, 306 A.2d 65, 66 (N.J. 1973).

57. Robinson v. Cahill, 335 A.2d 6, 7 (N.J. 1975).

58. Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975).

59. Robinson v. Cahill, 355 A.2d 129, 163 (N.J. 1975).

60. *Id.*

61. *Id.*

62. *Abbott*, 495 A.2d at 383.

63. *Id.* at 383.

the Commissioner of Education,[64] but decided not to dismiss the complaint, stating that keeping the complaint alive would expedite the process,[65] no doubt anticipating further litigation.

64. *Id.*

65. *Id.* at 393.

If legislatures refuse to fulfill their constitutional obligations, remand will not be the last a court sees of a case. However, even when the legislature does act to remedy the violation, remand can draw a court into a lengthy supervisory role over a legislature. *Hutto v. Finney* marked the culmination of a series of cases that started when the Arkansas prison system was declared unconstitutional in 1969.[66] Initially, the district court allowed the Department of Corrections to provide a remedy, but the remedy proved inadequate.[67] The court issued remedial guidelines and reviewed prison conditions through annual hearings.[68] In 1973, the court found that continued supervision was no longer necessary because substantial improvements had been made.[69] After the court of appeals reversed this decision, the district court held another hearing and found that "conditions had seriously deteriorated since 1973 when the court withdrew its supervision."[70] As a result, the court entered an order setting a time limit on the maximum period of solitary confinement and awarding payment of solicitors' fees because the state's recalcitrance had required ongoing litigation.[71] In 1978, the United States Supreme Court heard *Hutto v. Finney*, the fourth in the series, and upheld the two district court orders.[72]

The cases above illustrate that both legislative remand and legislative injunctions may involve a degree of judicial intervention into legislative functions. This intervention arises most often because of official disobedience, but may also occur when legislative or executive action is taken. In cases where litigation is brought as a means of challenging social policy, such as in *Baker*, it is particularly likely that an interest group will seek further judicial review of legislative action.[73] Thus, at least one more stage of judicial overview will become part of the normal process of legislative remand, and not simply in cases of legislative failure.

To the extent that legislative remand resembles legislative injunctions, courts may become embroiled in the supervision of traditional legislative and

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66. Hutto v. Finney, 437 U.S. 678, 681 (1978). In *Hutto*, the district court, in fashioning a remedy, remanded the case to an executive body, rather than a legislature. *Id.* at 683. However the legal principles remain the same.

67. *Id.* at 683.

68. *Id.*

69. *Id.*

70. *Id.* at 684.

71. *Id.* at 684-85.

72. *Id.* at 689. The Supreme Court affirmed the district court order and the "additional award by the Court of Appeals." *Id.*

73. *See supra* Part III.

executive functions. Such supervision has two potential adverse consequences. First, it impacts the separation of powers and consequently the conceptions of an appropriate judicial role. Second, legislative supervision hinders effective policy-making. These two potential hazards are outlined below, but ultimately, the similarities between legislative remand and legislative injunctions should not be overstated. Most significantly, these differences limit the extent to which each remedy endangers the separation of powers and effective policy-making.

Judicial administration of legislative or executive functions has been met with scholarly objection. First, judicial control of such functions conflicts with the separation of powers doctrine that limits each branch to its specialized functional role. Notably, judicial orders relating to government functions are especially detailed and constitute a particularly deep judicial intrusion into legislative or executive spheres.[74] Through such intrusion, the judiciary arguably steps outside its sphere of competence by deciding polycentric issues and drawing itself into an arena where "legal aspirations, bureaucratic possibilities, and political constraints converge."[75] Professor Cramton has suggested that such an interventionist judiciary "may undermine the self-reliance and responsibility of the people and their elected officials."[76] This suggests that judicial overview reduces legislative responsibility and weakens the political capacity of the people.[77] Congress may be weakened by judicial intervention, drafting legislation that contains only general policy objectives, and that leaves provision of the detail to the judiciary.[78]

Administrative court orders further exacerbate the harm done to the legislative capacity. Once judicial intervention has occurred, it then becomes very difficult for political actors to institute reform outside the boundaries of the judicial order, even in favor of the plaintiffs who brought the original action.[79] "In principle, decrees are supposed to be lifted when the defendant complies. In practice, they can be interminable."[80]

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74. Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 708-09 (1978).

75. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 640-41 (1982).

76. Cramton, *supra* note 34, at 553.

77. Bickel, *supra* note 21, at 22. Bickel discusses the effect of judicial review on the role of the legislature, but his critique is also applicable to at least as much to interventionist judicial remedies. *Id.*

78. *See* P.S. ATTIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 307 (1987); Chayes, *supra* note 24, at 1314; *see also* R. Shep. Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 253 (1992), *reprinted in* FOUNDATIONS OF ADMINISTRATIVE LAW 312-324 (Peter H. Schuck ed., 1994).

79. Ross Sandler & David Schoenbrod, *Government by Decree: the High Cost of Letting Judges*

As discussed in Part III, *supra*, deference to the legislature has to be balanced against the protection of individual rights, particularly in light of legislative failure to protect those rights. However, the question remains whether courts enforcing legislative remedies do in fact protect individual rights. Legislative remand and legislative injunctions often "allow constitutional violations to linger on in the face of governmental inaction."[81] Nonetheless, attempts to force legislative action through disciplinary judicial powers can also be counter-productive. When the judiciary levies contempt fines to force legislative action, for example, the injunction's intended beneficiaries often bear the burden of protecting their own rights.[82] Arguably, one cannot effectively balance the protection of individual rights against the separation of powers if those individual rights are not actually being protected by the judicial, legislative or executive branches. Therefore, judicial overview of legislative or executive action can undermine the separation of powers.

Legislative remand differs from legislative injunctions, because legislative remand is by its nature an attempt to preserve institutional distinctions and maintain the principles of the separation of powers. The primary concern prompting judicial use of legislative remand is respect for the differences between judicial and legislative functions. At first glance, legislative remand may not be viewed as deferential, but legislative remand is realistically the most deferential remedy for courts to use without entirely abdicating the judiciary's responsibility to protect individual rights.

Make Policy, 4 CITY J. 54 (1994) (discussing consent decrees, but the same problems apply to structural injunctions).

80. *Id.* at 55.

81. Grossenbacher, *supra* note 43, at 2230.

82. *Id.*

The judiciary cannot unconditionally remand to the legislature. The judiciary must be willing to enforce its own remedy against the legislature if the legislature fails to act according to constitutional mandates. This conditional limitation on legislative remand unavoidably embroils the courts in administrative or legislative functions.[83] Legislative remand is an attempt to avoid, or at least forestall, judicial supervision to the extent that the exercise of traditional *judicial* functions will allow. Remand to a legislature is an attempt by courts to keep legislative functions within the responsibility of legislatures. Moreover, it excludes judicial activity from legislative function, yet preserves the judicial function of ensuring that legislatures adhere to constitutional mandates. The similarities between legislative injunctions and legislative remand should not overshadow the fact that legislative remand is a remedy specifically directed to preserving a distinction between legislative and judicial functions. This remedy is the most the courts can reasonably do.

A second objection to judicial administration of legislative functions concerns the possibility of unintended policy effects. It is well established that the policy-making efforts of each branch of government are likely to produce unforeseen consequences.[84] Moreover, judicial deference can lead to

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83. The most extreme aspects of the judicial supervision cases involve enforcement mechanisms utilized by courts in the face of executive disobedience. These include fines, imprisonment, displacement of officials, sequestration, or shutdown of the institution—outlined in detail by James M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1841-51 (1984). These examples arise in the face of extreme disobedience, and have only been used against executive officers or local council members. It is unlikely that such mechanisms would ever be used against state or national legislators. Also, enforcement mechanisms would be unnecessary in principle cases, such as *Baker*. In that case, the Vermont Supreme Court stated that if the legislature failed to provide a remedy, the court could do so simply by judicial declaration.

84. *See, e.g.*, Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79, 86 (1959).

greater judicial intrusion, as aptly illustrated by Professor Reed's assessment of the impact of *San Antonio Independent School District v. Rodriguez*, in which the Supreme Court refrained from intruding into local education policies because of the need to maintain an appropriate federal balance:[85]

85. Douglas S. Reed, *Twenty-Five Years After* Rodriguez: *School Financing Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC'Y REV. 175, 176 (1998).

> The irony of the decision is that the U.S. Supreme Court's exercising judicial restraint at the national level has translated into an expanded judicial agenda for supreme courts at the state level. After *Rodriguez*, school financing equity activists, realizing that federal courts held little promise for their claims, began to litigate the matter under provisions of state constitutions.[86]

Fletcher also suggests that courts are particularly prone to produce unforeseen consequences because they lack the institutional authority to normatively assess the consequences of their solutions to polycentric problems.[87] This leaves the formulation of institutional decrees dependent upon the "moral and political intuitions" of the judge.[88]

Once again, this returns the discussion to the conflicting assertions regarding the innate limits of judicial functioning. But even if Fletcher wrongly asserts that courts are *more* likely than the other branches of government to be institutionally unable to evaluate the consequences their policymaking efforts, some problems inevitably remain. Recognizing that judicial orders can have many unintended consequences, some commentators argue that courts must work with management, as well as experts in the field and the organization itself, to identify specific targets, formulate specific strategies, and develop timetables to implement change.[89] However, following this advice would place the judiciary in a position equivalent to that of a managerial administrator, further exacerbating the judicial intrusion into legislative functioning and further increasing the chances of unintended policy consequences.

While it may be true that the imposition of judicial orders upon legislative functions can lead to unintended policy consequences, the courts

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86. *Id.* at 176.

87. Fletcher, *supra* note 75, at 649.

88. *Id.*

89. Geoffrey P. Alpert, et al., *Prison Reform by Judicial Decree: the Unintended Consequences of* Ruiz v. Estelle, 9 JUST. SYS. J. 291, 302-03 (1984) (explaining how courts can effectively implement change in institutions like prisons).

seek to limit, to the extent possible, unintended policy effects. The courts' use of legislative remand is an attempt to impose as few details on the legislature as possible. Thus, as was the case in *Baker*, the courts leave the choice of a particular remedy to the legislature, outlining only minimal constitutional requirements.[90] Detailed judicial orders, which are more likely to have unintended policy effects, are generally given only as a last resort when the legislature fails to act.

90. *Baker*, 170 Vt. at 225, 744 A.2d at 886.

Imposing the details of policy in stages, and as a last resort in the face of legislative disobedience, is an example of incrementalism. Institutional administrative theorist Charles Lindblom advocated incrementalism as the best method of limiting the unintended policy effects of court decisions.[91] According to Lindblom, small incremental steps minimize the chances of large or irreversible unintended policy effects.[92] Incrementalism necessarily requires reviewing previous policy decisions, assessing their effects, and making marginal adjustments.[93] Assuming that Fletcher's argument that courts lack the ability to assess the consequences of their solutions is true, courts are unable to incrementalize their decisions in an attempt to reduce unintended policy effects.[94] Fletcher's claim, however, is not borne out by the cases discussed. Rather, it is a fundamental principle that courts should perform the minimum necessary when deciding cases, particularly in cases involving judicial overview of legislative or executive functions.[95] Courts should follow this principle, and then review the matter if necessary. The *Robinson* litigation involved multiple cases, and although not ideal, certainly is an example of incrementalism in action.[96] The *Robinson* courts were willing to take small steps over the course of multiple cases, rather than taking one large step and risking unintended policy consequences.[97]

The assertions regarding the inherent limitations of judicial functions fail to consider that judicial outcomes are rarely a product of judicial craftsmanship alone. Rather, judicial outcomes are a product of the

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91. Lindblom, *supra* note 84, at 86.

92. *Id.*

93. *Id.*

94. Fletcher, *supra* note 75, at 649.

95. *See, e.g.*, SUNSTEIN, *supra* note 20.

96. *See supra*, notes 52-65 and acompanying text.

97. *Id.*

interactions between the parties and the court. Often, many other actors become involved, either through *amicus curiae* interventions or judicial notice of external activities, or through the more subtle influence of public opinion. This interaction often results in negotiated and incremental outcomes implemented in stages and subject to review.

Like a legislative injunction, legislative remand also takes the form of a judicial order, and often requires subsequent judicial review to ensure that the legislature has satisfied the order. As such, legislative remand may well involve some level of judicial supervision or regulation of legislative activity. It also creates the risk that judicial orders will result in unintended and potentially damaging consequences. However, legislative remand is shaped with an eye toward preserving legislative distinctiveness, and judicial supervision does not compromise legislative integrity. Legislative remand is also an exercise in incrementalism, and thus is the least likely of available remedies to have unintended policy outcomes. While legislative remand shares some qualities with the highly interventionist legislative injunction, the differences between legislative remand and legislative injunctions can mitigate many of the concerns that apply to legislative injunction. However, the differences between legislative remand and legislative injunction also underlie another objection to legislative remand as too interventionist.

V. IS LEGISLATIVE REMAND TOO INTERVENTIONIST? EXPANSION OF REMEDIES LAW

The final criticism of the *Baker* court's decision to remand to the legislature focused on the court's order to the legislature as extending the substantive law of remedies. Legislative remand and legislative injunctions are both judicial orders, albeit varying in the degree of detail of the order. Rather than ordering the legislature to act, the Vermont Supreme Court could have issued a judicial decree, declaring the remedy by judicial fiat.[98] While there is precedent for using judicial orders over judicial decrees, prior case law differs from *Baker* in both the circumstances requiring an order, and the stage at which the order was issued.[99] While these differences suggest that

98. The alternatives available to the court in this case are discussed in detail in the next section. *See infra*, Part VI.

99. Hutto v. Finney, 437 U.S. 678, 687 (1978).

Baker extends the law of remedies, such an extension in *Baker* is distinguishable, justifiable, and ultimately not cause for concern.

Legislative orders in the form of legislative injunctions are generally granted when the implementation of a remedy requires state action.[100] This is typically because the order requires increased spending, but it can involve some other enabling action, such as a zoning ordinance. Many of the cases relate to school desegregation, for which implementation often requires financing or even tax legislation.[101] Financing or enabling acts are traditionally solely legislative prerogatives, particularly the exercise of the appropriations power. *Baker* is groundbreaking in that it applies a legislative order to a circumstance in which the court was not dependent upon the legislature to act. The court was quite capable of making a judicial pronouncement, the effect of which would be to establish the substantive right which the court had found to be constitutionally enshrined. While this case involved questions of principle, it did not require governmental action. Consequently, granting such an order in a case involving only a question of principle, without complicated judicial administration, extends the law of remedies.

In addition to extending the legislative injunction to legislative enforcement of judicial orders, the decision also alters the law of remedies by providing a judicial order earlier than usual in the litigation process. Remedial orders are generally instituted only after an initial judicial determination has been made and only after the government's clear dereliction of its duty to comply with the judicial order.[102] Thus, remedial legislative orders are "instruments of last resort."[103] In *Baker*, the judicial determination and judicial order came in the one judgment, and *Baker* brought this remedy of last resort into play much sooner than generally anticipated.[104]

Legislative injunctions are remedies of last resort because they usurp legislative functions. Unlike legislative injunctions, however, legislative remand does not usurp the legislature's function. For example, in *Baker*, although the court required the legislature to act, it did not remove the

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100. The majority of these cases relate to executive injunctions, but the principles apply; for the sake of convenience, only legislatures are referred to here. Missouri v. Jenkins, 495 U.S. 33 (1990); Milliken v. Bradley, 433 U.S. 267 (1977).

101. *Jenkins*, 495 U.S. at 37; *Milliken*, 433 U.S. at 289.

102. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); *see also* Robert A. Schapiro, Note, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction,* 99 YALE L.J. 231, 236-37 (1989).

103. Schapiro, *supra* note 102, at 243.

104. *Baker*, 170 Vt. at 245-46, 744 A.2d at 901 (Johnson, J., concurring).

legislature's discretion to fashion a remedy, but merely defined the constitutional parameters within which the legislature must act.[105] While the circum-stances in which the *Baker* legislative order was exercised differ from cases requiring financing or enabling acts, so too does the nature of the remedy.

Part of the controversy behind legislative injunctions lies in their specificity, through which courts constrain legislative discretion. In contrast, the legislative order in *Baker* did not prevent legislative discretion. As such, it is more akin to judicial review, in which a court strikes down a statute. In such an instance, the legislature is free to try again to rewrite the legislation within the constitutional parameters delineated by the court. In previous legislative injunction cases, the court has specified exactly what the legislature must do, leaving the legislature without discretion. In such cases, the court required greater evidence of necessity and legislative inaction,[106] because the consequences of the judicial order are far greater in terms of limiting the legislature's traditional right to exercise its discretion in its lawmaking power than in a case only involving a question of principle.

Granting a judicial order prior to legislative inaction in a case involving a question of principle constitutes a new direction in remedies law. However, the order in question is a remand to the legislature, and consequently an action *extending* rather than *limiting* legislative discretion over questions of social policy. As such, this change does not interfere with legislative functions or the separation of powers; rather, such an extension provides the judiciary with the option of affording the legislature the ability to make substantive policy.

While the *Baker* court's use of legislative remand was a justifiable extension of the law remedies, it now remains to be seen whether legislative remand was in fact the best choice. This requires an assessment of the alternatives available to the court in this case, and their potential effect on the judiciary.

VI. THE ALTERNATIVE REMEDIES AND THEIR IMPLICATIONS

105. *Id.* at 226, 744 A.2d at 887.

106. Schapiro, *supra* note 102, at 233 (defining a legislative injunction as "a court order that serves to create legislation without any intervening legislative discretion").

FOR JUDICIAL POWER

The *Baker* court could have provided three alternative remedies: (1) overturning the Vermont Marriage Act;[107] (2) holding those Acts that confer benefits and protections on the basis of marriage unconstitutional; or (3) holding the gender distinction within the Vermont Marriage Act unconstitutional. The first two remedies can be easily dismissed as unworkable. The third remedy would, in effect, grant the substantive right to marry, a more interventionist step than the court's decision to remand to the legislature for a remedy. Assessing the court's choice of legislative remand in terms of its probable effects on judicial power and on the rights of same-sex couples illustrates that remand was more likely to protect judicial power than holding the gender distinction unconstitutional, and was also more likely to provide some protection for same-sex couples.

The court could have held the Marriage Act unconstitutional by finding, as a matter of statutory interpretation, that the Act prevented same-sex couples from marrying,[108] and that such exclusions from the benefits of marriage were an unconstitutional violation of the right to equal protection of the laws of the State.[109] I would argue that this remedy would have been an extreme, even absurd, solution. It would not actually have assisted gay couples in gaining the right to marry, and it would have called into question the validity of many Vermont marriages.

107. Vermont Marriage Act, VT. STAT. ANN. tit. 18, § 5131 (2000).

108. *Baker*, 170 Vt. at 201, 744 A.2d at 869.

109. *Id.* at 224, 744 A.2d at 886.

A less extreme, although more complex, solution would have been to declare unconstitutional the myriad of other laws which confer benefits only to married couples, at least to the extent that they deny equal protection to same-sex couples. This approach would be consistent with the court's ruling that it is the denial of the benefits and protections of marriage, not the denial of marriage itself, that is unconstitutional.[110] However, holding these laws unconstitutional would prove more unworkable than overturning the Marriage Act itself, as these laws underlie the operation of an enormous number of social policies. Also, the option of modifying each of these statutes to ensure that each complies with the constitutional obligation not to discriminate would be a massive task.

Since the Marriage Act was held valid but for the gender distinction it contains, the only realistic alternative to legislative remand would have been to declare the gender distinction invalid.[111] The court could then have enjoined the state from denying the plaintiff couples the right to marry; however, such a remedy is not a minimalist or incrementalist approach to upholding the Constitution. Declaring the gender distinction unconstitutional grants the substantive right to marry, but the court held that the right to marry itself is not enshrined in the Vermont Constitution. In contrast, the court had at its disposal alternative means of granting the otherwise constitutionally-enshrined right to the protections and benefits of marriage. For example, the court might have created a marriage-alternative, granting legal status to same-sex couples. In recognizing this possibility,[112] the court opted, through legislative remand, to encourage the Vermont General Assembly to grant legal status to same-sex couples.[113]

The Vermont Civil Union Review Commission, responsible for monitoring and analyzing the implementation and enforcement of Vermont's newly enacted Civil Unions Act, has not reported any instance of a government official interfering with the exercise of the rights of parties to enter a civil union.[114] While some benefits of marriage, such as the right to have one's marriage recognized interstate, are not protected by this legislation,[115] the Commission's findings nevertheless suggest that it was not necessary for

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110. *Id.*

111. *Baker*, 170 Vt. at 252, 744 A.2d at 904-05 (Johnson, J. concurring).

112. *Id.* at 225, 744 A.2d at 886.

113. An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, § 1201-1207 (Supp. 2001).

114. STATE OF VT. LEG. COUNCIL, REPORT OF THE VT. CIVIL UNION REV. COMM'N 8, *available at* http://www.leg.state.vt.us/baker/cureport.htm (last visited Nov. 12, 2001).

115. Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Union Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV, 113, 137 (2000); Gerald V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 729, 730 (2000).

the court to recognize a constitutional right to same-sex marriage in order to protect same-sex couples from discrimination and the deprivation of their constitutionally protected rights as individuals.

The right of same-sex couples to marry is a highly controversial issue, one which has divided Vermont communities. Justice Johnson, who proposed granting a more interventionist remedy,[116] recognized that the issue was perhaps the most controversial ever to come before that court. Nevertheless, she argued that, as a matter of principle, the judiciary cannot shy away from protecting a constitutional right merely because the subject is controversial, or even because "the outcome may be deeply offensive to the strongly held beliefs of many of our citizens."[117] Scholars have long disagreed on this point,[118] but, rather than exploring the literature that pits one normative assertion against another, it is more useful to consider whether the judiciary should shy away from protecting controversial rights in terms of the implications that legislative remand has on the judiciary's institutional role, and the consequences it could have for judicial power in relation to the other branches of government.

Rosenberg's seminal study of the conditions under which courts can independently bring about broad social reform found that courts are only likely to be effective when political, social and economic conditions support change.[119] While the *Baker* court may not have been concerned with establishing broad social policy, Rosenberg's evidence suggests that a court which imposes overly ambitious remedies in the face of popular or elite hostility can in fact undermine the substantive rights the court sought to protect.[120] In remanding the choice of a remedy to the legislature, the *Baker* court implicitly recognized these constraints on judicial power. If a court cannot successfully implement a remedy itself when opposed by both the executive and legislative branches, one alternative available to it is to enlist the support of another branch of government. By placing the onus on the legislature to act, the *Baker* court, in effect, forced the legislature to join in taking responsibility for fashioning and implementing a remedy. Thus, even

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116. *Baker*, 170 Vt. at 247, 744 A.2d at 901.

117. *Id.* at 262, 744 A.2d at 912.

118. *E.g.*, *compare* SUNSTEIN *supra* note 20 at xiv, *with* RICHARD HODDER-WILLIAMS, THE POLITICS OF THE US SUPREME COURT 5 (1980).

119. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 31 (1991). *But see* Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 722-24 (1992) (questioning Rosenberg's sources and evidentiary support); Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 LAW & SOC. INQUIRY 745, 749 (1992) (criticizing Rosenberg's characterizations of the aims of reform groups).

120. *See* Rosenberg, *supra* note 119, at 132.

without substantive support from the legislature, the court may have transformed governmental opposition into governmental support for some protection of same-sex marital rights.

Rosenberg's arguments are far from universally accepted. Reed challenges Rosenberg's claim that courts need to cooperate with the other branches of government in order to effectuate change. Reed's results show a large variation in court effectiveness.[121] He suggests that political logic within a particular context, specifically judicial assertiveness—a court's willingness to challenge a state legislature and firmly enforce compliance—explains court effectiveness, rather than systemic notions of judicial capacity.[122] According to Reed's analysis, deference to a legislature can only encourage legislators to disobey judicial orders and weaken prospects of eventual remediation. This logic would suggest that, viewed in terms of judicial responsibility to protect rights, legislative remand constitutes an abdication of judicial responsibility, not just because the court has failed to provide a *judicial* remedy, but also because remand would undermine the chances of implementing *any* remedy.

Reed admits that this claim is difficult to test and may not be applicable in other situations.[123] In fact, the relationship between judicial assertiveness and judicial effectiveness is unlikely to be linear, representing an ever-increasing upward trend in judicial effectiveness in response to greater judicial assertiveness. This relationship more likely approximates a polynomial shape where judicial assertiveness may bring about greater

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121. Reed, *supra* note 85, at 201. Note that Reed's analysis can also be criticized: he does not assess whether the trend he establishes was in existence prior to the cases upon which he pins causation for reform. Instead, as a control group, he uses states in which the judiciary rejected the proposed reforms, but this contradicts his conclusion that variability in judicial effectiveness within states that upheld reform is a product of the particularized context of each state. *Id.* at 205.

122. *Id.* at 205, 213. Other political contexts include interest group opposition and voter opposi-tion. *Id.* at 205.

123. *Id.* at 213. In fact, the cases Reed discusses provided mostly just declaratory relief; Reed does not extrapolate on what greater judicial aggressiveness is within these limits. *Id.*

results initially, but at some point the effectiveness of further judicial assertiveness provides diminishing returns, and ultimately has a negative effect on reform goals. Diminishing returns could occur, for example, if strong judicial assertiveness creates a public backlash.

To further complicate the relationship between judicial assertiveness and judicial effectiveness, is quite likely to prompt multifaceted feedback effects from numerous other actors. For example, not only could judicial assertiveness result in public backlash, but as political actors come to expect judicial assertiveness, they could act preemptively in an attempt to prevent the purported judicial goal.

In contrast, the Vermont General Assembly reacted to *Baker* in the manner the court suggested, by enacting civil union legislation granting most protections and benefits of marriage to same-sex couples.[124] If the court had opted for a more aggressive judicial ruling, holding that same-sex couples should be allowed to marry, the legislature would have been unable to institute the civil unions measure. Had the court opted for a requirement of same-sex marriage, the legislature might have attempted a more aggressive remedial measure, such as amending the state constitution. When the question of whether same-sex couples held the right to marry came before the Hawai'i Supreme Court, the court took a more assertive stance than the Vermont Supreme Court, holding the relevant statute to be presumptively unconstitutional until the sex-based classification was justified by the state.[125] Subsequently, the Hawai'i legislature amended the Hawai'i Constitution to allow the legislature to prevent same-sex marriage.[126] Yet now the Hawai'i legislature is considering legislation that will grant many of the benefits of marriage to same-sex couples.[127] It appears that the Hawai'i legislature is more inclined to protect the rights of same-sex couples when the court is not forcing the legislature to so act. The Hawai'i court's assertiveness may have undermined the goal of promoting equal protection, whereas a degree of deference has ensured greater protection in Vermont.

One must further consider the distinction between long-term and short-term gains or losses. Although the judicial power provides that a court may force an unwilling populace or administration into short-term reform, doing so may compromise long-term effectiveness. Scholars disagree about what constitutes "appropriate" judicial behavior, and whether judicial

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124. An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, § 1201-1207 (Supp. 2001).

125. Baehr v. Miike, 825 P.2d 44 (1996); *see also, supra* note 9, and accompanying text.

126. HAW. CONST. art. I, § 23 (amended 1998).

127. A Bill For An Act Relating To Civil Union, H.B. 1468, 21st Leg., Reg. Sess. (Haw. 2001) (held in committee and carried over to the 2002 Reg. Sess.).

legitimacy hinges on judges staying within those bounds.[128] Within a system based on separation of powers, however, a ceiling limits institutional gains reached through ever-increasing aggressiveness.

The relationship between judicial effectiveness and judicial assertiveness or deference is opaque, not merely because the optimal *level* of assertiveness or deference is unknown, but because deference and assertiveness can also vary in *nature*. Just as judicial assertiveness may further or hinder judicial efforts to institute reform, deference to the legislature may weaken or strengthen the judiciary's position. When a court asserts that it has the power to provide a remedy, yet elects to provide the legislature with the opportunity to provide a remedy within court-prescribed constitutional parameters, the court may strengthen its own hand.

128. *See supra* note 121 and accompanying text.

This is not to suggest that deference is always appropriate, or necessary, to preserve judicial legitimacy. Rather, this approach recognizes that an institution's decision not to use all of its available power is a politically astute choice. The strength the judiciary gains by staying its hand may be lost, however, if the court is unwilling to act in the face of legislative disobedience. Judicial deference cannot continue if the legislature fails to fulfill its part of the bargain. In *New York State Association for Retarded Children v. Carey*[129] and *United States v. City of Yonkers*,[130] the courts provided the legislature and the administration with an opportunity to provide details of a remedy, but those entities repeatedly failed to act. In such cases, the court exercised judicial responsibility by curtailing deference in favor of a court remedy.

Even where the court grants the legislature the opportunity to craft the details of policy reform, any delay in the provision of a remedy to an aggrieved class is nonetheless justifiable unless it operates to trump rights indefinitely. If the legislature abdicates its duty to provide the policy detail necessary to protect constitutional rights, then the judiciary is duty-bound to provide a remedy. But, as the *Baker* majority clearly anticipated, the legislature acted to protect the rights of same-sex couples.[131]

The *Baker* decision can be viewed in terms of balancing respect for the separation of powers with protection of individual rights. The court allowed the Vermont legislature the opportunity to choose the means to satisfy the court-prescribed constitutional requirements for same-sex marriage. At the same time, the court made it clear that if the legislature failed to create a remedy falling within its constitutionally-approved guidelines, the court would have withdrawn its initial deference and provided a judicial remedy. On the whole, the court's deference represents a minimalist approach to adjudicating a legal dispute with potentially large and unintended social policy repercussions, effecting inter-branch cooperation, and ensuring that same-sex couples have a constitutional right to the benefits and protections of marriage.

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129. N. Y. Ass'n for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980) (court unable to force a remedy when governor acted in good faith with consent judgment).

130. *City of Yonkers*, 856 F.2d at 454.

131. An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, §1201-1207 (Supp. 2001).