

Retaining Supreme Court Justices

The Constitution, the Law, and the Legislature's Duty
To Check An Overreaching Supreme Court

February 2005



An Ethan Allen Institute Report

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CONTENTS

- I. Judicial Election and Retention in Vermont**
- II. The Case Against Retention of Judicial Serial Offenders**
- III. The Case for Retention**
- IV. “Thus Saith the Lord” – When Supreme Court Justices Should be Replaced, Not Obeyed**
- V. The Founders' Views of Judicial Activism**
- VI. Selected References**
- Appendix: Vermont Supreme Court Cases of Interest, 1993-2002**

FOREWORD

The 2005 General Assembly faces the question of reelecting Supreme Court Justices and lower court judges to new six-year terms. This Institute Report sets forth the history of judicial retention in Vermont, the constitutional and statutory process for retention, and the arguments for and against retaining the Court's two “serial offenders”, Justices John Dooley and Denise Johnson. It also contains historical quotations, references, and a summary of recent Supreme Court opinions that have attracted widespread attention.

My opposition to the retention of the two Justices on the bench has nothing to do with our views on educational finance or same-sex marriage. The issue is not Act 60 or civil unions. The issue is the need for legislative discipline of the two Justices who in essence twice agreed to invent their own special Constitution, found in it new “rights” never suspected even a decade ago, put their judicial gun to the heads of the legislature and the people of this state, and transformed themselves from jurists into political actors, declaring in Court opinions what it is the province of elected and accountable legislators to debate and decide.

John McClaughry, President
Ethan Allen Institute

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I. Judicial Election and Retention in Vermont

The authors of Vermont's 1786 Constitution, like the contemporary framers of the U.S. Constitution, shared two somewhat contradictory concerns relating to the judiciary.

On one hand, they believed in judicial independence. They were well familiar with the regrettable practice of English Kings who appointed judges and removed them if a ruling offended the Crown. Such practice was sharply criticized in the Declaration of Independence: "[King George III] has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

On the other hand, the Founders were deeply concerned about judicial usurpation, when judges chose not merely to interpret the Constitution and laws as written and as intended by those who wrote and ratified them, but to go beyond to invent new law and new constitutional provisions to achieve results never contemplated by the people. Alexander Hamilton sought to assuage fears about usurpation by Federal judges under the new Constitution when he wrote:

"To avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." (*Federalist Paper* No.78)

To discipline errant judges with life tenure in office, Hamilton favored impeachment as "complete security": "There can never be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it." (*Federalist Paper* No. 81).

The 1804 impeachment by Congress of Judge John Pickering succeeded, as he was clearly insane. A more notorious case was that of Federalist Justice Samuel Chase, despised by the Jeffersonian Republicans because of his anti-democratic tirades from the bench. His impeachment failed in the Senate in 1805. Ever after President Jefferson regarded the threat of impeachment of judges as a toothless "bugbear" or "scarecrow".

Meanwhile, the early Vermonters, many of them exceedingly hostile to lawyers and courts as a result of their long land struggle with New York, had arrived at a far more democratic method of choosing and policing the state judiciary than had their Federal counterparts.

The first Vermont Constitution made no provision for a judiciary at all. In 1779, noticing this omission, the legislature passed a bill requiring that judges be chosen annually by the Governor, council, and [unicameral] House by joint ballot. There was no provision for tenure or even a secure salary.

In Vermont's next constitution of 1786 (still in force), provision was made for the annual election of judges by Council and House. At the same time a provision was added to the constitution stating that: "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the power properly belonging to the others." (Chapter II, sec. 5, still in force.) By this means the constitution writers intended to erect a wall between judicial actions – settling disputes between parties in cases and controversies – and legislative actions, the responsibility of the elected representatives of the people.

Reflecting the 18th century Vermonters' distrust of lawyers, a 1787 act created the unique office of assistant judge, affirmed in a constitutional amendment in 1793 (now Chapter II, sec.

50). The two “side” judges flank the legally trained judge in Superior Court and may overrule legal decisions that fly in the face of good Vermont common sense. It was not until 1825 that the idea of judicial review of the constitutionality of legislation became accepted.

Judges continued to be accountable to the legislature through annual election for the first 83 years of the State’s existence. In 1870 an amendment was proposed much like the present retention system, with a six-year term. The House rejected the plan by a vote of 233-2, but did agree to give judges two-year terms.

Thus matters stood for another 96 years. Then in 1966, based on the work of a Judicial Branch Study Committee, the legislature created the present appointment, confirmation and retention process, and extended the terms of statutory judges to six years (Act 64). The new provisions for retention, known as “the Missouri Plan”, were actually proposed by Thomas Jefferson in an 1821 letter to James Pleasants:

“The judiciary perversions of the constitution will forever be protected under the pretext of errors of judgment, which by principle are exempt from punishment. Impeachment is therefore a bugbear which they [judges] fear not at all. But they would be under some awe of the canvass of their conduct which would be open to both houses regularly every 6th year. It is a misnomer to call a government a republic, in which a branch of the supreme power is independent of the nation.”

In 1971 the Governor’s Commission for Reform of the Judicial System presented a sweeping plan for a unified court system. It proposed including in the Constitution the 1966 provisions for judicial confirmation and retention of Superior, District, and Supreme Court judges, with six year terms for all. The constitutional amendment was ratified without controversy by the freemen in the 1974 election, and became Chapter II, sections 28-38.

As adopted, Sec. 34 states: “The justices of the Supreme Court and judges of all subordinate courts, except Assistant Judges and Judges of Probate, shall hold office for terms of six years except when holding office under an interim appointment. At the end of the initial six year term and at the end of each six year term thereafter, such justice or judge may give notice in the manner provided by law of his desire to continue in office. When such justice or judge gives the required notice, the question of his continuance in office shall be submitted to the General Assembly and he shall continue in office for another term of six years unless a majority of the members of the General Assembly voting on the question vote against his continuing in office.” This provision is implemented by 4 VSA 608(c), which specifies a ballot vote on the question, “Shall the following supreme court justices be retained in office?”

In proposing the Amendment, the Commission argued that the process would insure that nominees would “possess the necessary ability and professional qualifications, and that the selection process will be as free as possible from the effects of political influence.” However the Commission did not suggest specific criteria for appointment, and scarcely mentioned the retention process other than describing the proposed divergence from the Missouri Plan (where retention is voted on by the people.)

The present process for retention works as follows: Judges file a declaration of intent to seek reelection. At the beginning of the biennium a Joint Committee on Judicial Retention composed of four Representatives and four Senators is appointed by the Speaker and the Committee on Committees respectively. The Committee sends out questionnaires to lawyers, court clerks, and other persons who have had an occasion to observe the judge in action. The re-

Retaining Supreme Court Justices – An Ethan Allen Institute Report

spondents are asked to evaluate the judge with respect to (1) overall judicial performance (2) integrity and impartiality (3) judicial temperament (4) judicial management and (5) legal ability and preparation. Although Justices are required to take an oath to “not, directly or indirectly, do any act or thing injurious to the Constitution...”, the questionnaire does not contain a question relating to fidelity to the Constitution.

The Committee conducts interviews with each judge, and then holds a public hearing. Judges are specifically allowed to “respond to personal attacks or attacks on the candidate’s record” so long as the response does not violate certain prohibitions relating to future partiality, prejudging an issue, misrepresenting qualifications, soliciting or accepting funds, or political activity. (Canon 5, *Code of Judicial Conduct*, 1994).

The Committee then retires to evaluate “judicial performance including but not limited to such factors as integrity, judicial temperament, impartiality, health, diligence, legal knowledge and ability and administrative and communicative skills.” (4 VSA 608(b),(e), emphasis added). The Committee reports its recommendations to a Joint Assembly, at which legislators vote on retention by secret ballot.

Since its creation in 1975 the Judicial Retention Committee has never recommended against the retention of a judge. The closest it came was a 5-3 vote in support of District Judge David Suntag in 1996. In 1993 liberals and feminists upset about his alleged impatience and brusque behavior in a sensitive family case opposed the retention of Superior Court Judge Arthur O’Dea of Arlington. In the initial balloting, Judge O’Dea was denied a new term on a vote of 61-98. Following a recess of several hours, the Joint Assembly reconvened and voted 130 to 39 to reconsider. When the ballots were cast again, Judge O’Dea was denied retention on a vote of 86-87. District Judges Shireen Fisher, Frank Mahady, and Edward Cashman faced significant and outspoken opposition for retention but were reelected.

No Justice had faced a retention challenge until 1999. In that year strong opposition emerged to the retention of Justice John Dooley, formerly Secretary of Administration for Gov. Madeleine Kunin and widely believed to have been the key author of the unsigned opinion in *Brigham*. However Justice Dooley was retained on a vote of 105-71.

Judges, as well as executive branch officers, may also be impeached under Chapter II, sections 57-58. There is no connection between impeachment and retention. No Vermont judge has been impeached since the 1966 retention procedure was adopted.

Unlike the Federal judiciary, whose members once confirmed hold office for life unless impeached, the Vermont six-year retention system attempts to balance the need for judicial independence with a popular check on justices who fall short of what the General Assembly believes is the proper standard of judicial performance.

There is no disagreement about the application by the General Assembly of retention criteria such as integrity, temperament, impartiality, health, diligence, legal knowledge, and other similar skills. Nor is there disagreement about the importance of preserving judicial independence within the proper sphere of judicial power.

The crucial disagreement comes on the question: can a Justice properly be denied reelection because he or she violated his or her oath not to do anything injurious to the Constitution? In particular, is departing from the plain language of the Constitution to invent a new “right”, or strike down a legislative enactment, sufficient grounds for non-retention? Is one such instance enough, or must there be a pattern over many decisions?

As will be seen, critics of Justices Dooley and Johnson believe that their joining in the Court's holdings in two important constitutional cases, *Brigham v. State* (1997) and *Baker v. State* (1999), represents such an outrageous, result-oriented, invention of nonexistent rights for obvious political purposes that the Justices who participated in those cases ought to be denied reelection. (The three other *Brigham* Justices have since retired, as has Chief Justice Amestoy, author of the *Baker* opinion. Justice Marilyn Skogland participated only in *Baker*, and new Chief Justice Paul Reiber participated in neither.)

The defenders of the *Brigham* Justices, which appear to include virtually all the members of the Vermont bar, believe that Justices may be evaluated only by “neutral principles” (as opposed to the content or outcomes of their opinions); that lay legislators do not have the credentials to pass judgment on questions of law decided by the Court; and that opposition to retention of Justices represents a “politicization of the Court” and a threat to judicial independence.

The arguments on both sides will be set forth more fully in the next two parts.

II. The Case Against Retention of Judicial Serial Offenders

The following argument is a combination and expansion of two commentaries by Ethan Allen Institute President John McClaughry, “Who Controls the Supreme Court?” which appeared in various Vermont papers in September 1998, and “Deny Brigham Justices New Terms”, Sunday Times Argus, January 31, 1999).

Article II, section 5 of the Vermont Constitution (dating to 1786) states, “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.” Both legislative and executive branches remain under popular control. If they infringe on each other, or on the judiciary, they can be disciplined by the people through biennial elections. But how can the judiciary be subjected to this cardinal principle of popular sovereignty and republican government?

One method is impeachment. It has only rarely been used anywhere, and then only when a judge was proven to be demented or corrupt. Some other popular check was seen to be necessary.

For the first 192 years of Vermont's history the instrument of popular control of judges was legislative election. As Prof. Sam Hand of UVM has written, up through 1825 “judges did not enjoy job security. They faced annual elections and frequently involuntary retirement.” But by the late 20th century involuntary retirement had nearly vanished. Judges moved automatically up through the chairs, from chief Superior Judge to Associate Justice to, eventually, Chief Justice.

In 1974 the voters ratified the “Judicial Amendment” ardently backed by the lawyers and judges. This changed the Constitution to allow appointment and confirmation instead of legislative election, but in a bow to the principle of popular sovereignty, already embodied in a 1966 statute, it added periodic (6 year) reconfirmation by the representatives of the people. Justices John Dooley and Denise Johnson, the only current survivors from the *Brigham* Court, won new terms in the retention vote in 1999, and have applied for retention again in 2005.

No one doubts that a justice can properly be denied reconfirmation for using his position to advance his own financial interests, or partiality in appeals brought by friends, or drunkenness, or criminal behavior, or senility, or failure to appear to carry out his duties..

Retaining Supreme Court Justices – An Ethan Allen Institute Report

The pressing question today is whether the members of the General Assembly can properly deny justices reelection on the grounds that they participated in a politically motivated, historically unsupportable, and deliberately deceptive constitutional interpretation in defiance of established precedents and procedures.

The answer is easy: of course they can. Justices take an oath of allegiance in which they solemnly swear that they will not “directly or indirectly, do any act or thing injurious to the Constitution.” If a majority of the elected representatives of the people believe that the Justices, in authoring a far-reaching constitutional opinion, violated that oath, they have the power, and indeed the duty, to deny those justices reelection.

If it is demonstrated that the errant justices did something injurious to the Constitution, they deserve to be sent packing. Otherwise, the people will be forced to live under a judicial tyranny of the “Five Supreme Legislators”, for which there is no popular correction short of impeachment. That is not what the founders of our democratic government had in mind.

Here, then is the case against retention of the two *Brigham-Baker* Justices.

It is an original and immutable principle that the Constitution belongs to the people, and is not the exclusive property of the Supreme Court. It is the duty of the elected representatives of the people to resist judicial usurpation of the proper functions of the other branches of government. Such usurpation is prohibited by a Justice’s oath of office, in which a Justice pledges not to do anything injurious to the Constitution. (Chapter II, Sec. 56).

In the Supreme Court’s political, result-oriented performance in a landmark case, *Brigham v. State* (1997), the Dooley Court abandoned its duty to interpret the plain words of the Constitution, for the purpose of amending the Constitution to require legislative enactment of the educational financing scheme long favored by political activist John Dooley.

I have referred to the Court of 1997 as the Dooley Court. Why? Justice Dooley was not its Chief Justice. But there can be little doubt that Justice Dooley had emerged as the intellectual and administrative leader of that Court. In addition, Justice Dooley was the only member of the *Brigham* Court with extensive first hand experience in educational finance policy.

I do not argue that Justice Dooley is a Rasputin with mysterious power over his colleagues, leading them down the slippery slope of judicial activism at his will. A review of sixteen of the most controversial opinions of the Dooley Court shows that other Justices, and especially Justice Johnson, have frequently gone their own way, sometimes quite outspokenly so.

Although the Dooley Court has issued more than a few opinions that illustrate regrettable judicial activism, with two mighty exceptions I do not argue that they constitute grounds for dismissal. That is because, with the exception of *Brigham* and *Baker*, all of the other controversial cases involve common law principles or statutory construction. The Court’s mistakes can be corrected by the legislature and the Governor.

Let’s look first at *Brigham*. In *Brigham*, the Dooley Court simply invented a new constitutional right out of whole cloth, and ordered its recognition by the legislature, governor and people of this state.

Brigham began in 1995 when the ACLU brought suit against the State. Their goal was to get the Court to mandate equality of educational resources and (according to them) educational opportunity.

The *Brigham* case was filed in Lamoille Superior Court before Judge John Meaker. The ACLU lawyers offered the argument that the wide disparity of property tax resources per pupil among the towns created a disparity in educational opportunities which denied some children's fundamental right to an education and therefore violated the Vermont Constitution.

Now, where can this right to education be found? The only sentence in our Constitution that mentions education is Chapter II Section 68, the operative part of which reads: "... a competent number of schools ought to be maintained in each town."

That requirement was satisfied no later than 1870. Judge Meaker listened to the arguments, looked at that provision, decided, quite correctly, that there is no fundamental or self-executing right to education contained in the Vermont Constitution, and issued summary judgment on this point to the state. On questions involving town and taxpayer equity, he set the case for trial.

What happened next is curious. Over the objection of Judge Meaker, both the state and the ACLU appealed to the Supreme Court for an interlocutory opinion. When the appeal arrived at the Dooley Court, it enthusiastically agreed to take the case out of Judge Meaker's hands and settle it without a trial. Only Justice James Morse, to his credit, strongly opposed the Court accepting the appeal without a trial record.

Now why was Dooley Court so keen about deciding *Brigham* then and there? Let's go back to 1987. John Dooley was Administration Secretary. Gov. Kunin, with a surplus building, was eager to reform educational finance. John Dooley was the man in charge, "the man in the chair", as he later put it. He was "Mr. Kunin Education Finance Reform".

His chosen "reform" was the Kunin Foundation Plan. The unique feature of this plan was a provision for state "recapture" of the tax base of towns with high property wealth per pupil. This was the forerunner of Act 60.

John Dooley waged a good fight, but lost. The House rejected the key ingredient of his Foundation Plan – recapture – and passed the remainder. But John Dooley lived to fight another day, as a Justice of the Supreme Court.

Fast forward now to late 1996. The Court overruled Superior Judge Meaker, accepted the interlocutory appeal, and went to work at what for it was breakneck speed.

The Court scheduled oral argument, even before the reply briefs had been submitted. Fifty one days later it issued the most sweeping constitutional decision of the 20th century.

"In all the other cases [where educational finance systems have been found unconstitutional and where there were disagreements of fact]," Prof. Peter Teachout wrote in *Vermont Law Review*, "appellate courts arrived at their decisions only after a full trial below." (Actually full trials were not held in the Arizona and Wyoming cases, but in the former the State had conceded the plaintiff's factual submission, and in the latter there had been extensive non-judicial fact finding before the case reached the Supreme Court.) In denying the State's motion for summary judgment on the common benefits and proportionate contribution clauses of the

Retaining Supreme Court Justices – An Ethan Allen Institute Report

Vermont Constitution, the Superior Court found there were material factual disputes involved in the case, and set it for trial.

But the Vermont Supreme Court overrode the trial court and decided *Brigham* with no trial whatsoever. Even members of the bar who are favorable to the result in *Brigham* have been sharply critical of this startling departure from orderly judicial process to reach a politically important result in a mere 51 days.

By contrast, the Town of Chittenden's case for paying tuition for some of its children to Mount St. Joseph Academy went to oral argument before this Court in March of 1998. It took the Court some 430 days after that to announce a decision.

To discover a fundamental right to education in Section 68, the Dooley Court offered a history of Vermont which is thoroughly bogus, and incorporates what a friend of the *Brigham* holding, Prof. Teachout, has termed "intentional deception".

Consider this: every court is obliged to examine the plain words of a constitution, and the facts and circumstances surrounding its enactment, to derive the correct meaning. That is inherent in the Justices' oath to do nothing injurious to the constitution – as for instance, rewriting the Constitution to justify politically favored results.

In *Brigham*, the court leaned heavily on one address to the legislature by Gov. Crafts in 1828, 42 years after adoption of the Constitution. And Gov. Crafts did indeed expound on the virtues of education. But what did the legislature then do?

After being dazzled by the oratory of Gov. Crafts, the legislature received a report from the textbook commission finding it hopeless to try to standardize textbooks among the towns. They voted \$100 to pay the salary of the Commissioner of Education.

Five years later the legislature abolished the state board of education. In 1845 they took what little money was left in the school fund and used it to build a new state house. In fact, it was not until 1864 that the great grandchildren of the authors of the 1786 Constitution finally decided even to require universal free public education in this state.

But the Dooley Court would have us believe that in 1786 the framers fully intended to create an enforceable, self-executing right to public education, a right that required substantially equal tax bases per pupil throughout the state. This is, to put it mildly, preposterous.

The *Brigham* Court also approvingly quoted *Williams v. School District No. 6* (1860) as authority for its sweeping decision. According to ACLU attorney Robert Gensburg, who urged *Williams* on the *Brigham* Court, the Supreme Court then held that "the state constitution imposes a duty on the Legislature to educate all Vermont children at the expense of the state." As noted, at the time of *Williams* the legislature had not even agreed to require free universal public education, let alone the idea of "paying to educate all Vermont children at the expense of the State." What *Williams* actually held was that the Town of Newfane could properly condemn half an acre of the plaintiff's land for the purpose of erecting a school house.

One might well inquire, if *Williams* in 1860 established the principle that every child had a self-executing right to education that required equal tax bases per pupil throughout the state, how was it that it went unnoticed for 137 years, until exhumed by the ACLU?

In another case (*Buttolph v. Osborn*, 1956) favorably cited by Gensburg as justification for *Brigham*, the Court held only that the Shoreham school board had the authority to close

Shoreham High School notwithstanding a negative vote of the voters. It is simply disingenuous to attempt to twist these two cases into an affirmation of the right to substantially equal tax resources per pupil declared by the *Brigham* Court.

In addition to the bogus history, the Dooley Court engaged in intentional deception. It cited in support of its case for state control of education the sentence in our first constitution of 1777 that reads in part “A school or schools shall be established in each town, by the legislature for the convenient instruction of youth...” The Court deliberately omitted the rest of the sentence: “...with such salaries to the masters, paid by each town, making proper use of school-lands in each town, thereby to enable them to instruct youth at low prices.”

Citing the rest of the sentence completely undercuts the Court’s brusque dismissal of any rational basis argument for local control of public education. The Court knew that, and so the Court omitted the rest of the sentence. As Prof. Teachout observed, this is intentional deception. (This reference to town control was removed in 1786 because by then the General Assembly had passed conflicting legislation requiring payment of schoolmasters by parents as well as by towns.)

Rush to judgment without trial. Bogus history. Intentional deception. How does all this square with fidelity to a Justice’s oath to do nothing injurious to the constitution? There’s more.

As Judge Meaker convincingly wrote, there is simply no right to education in the Vermont Constitution. Enthusiasts for educational tax equalization well knew this. In fact, in 1996, with *Brigham* already in the courts, the Vermont House passed a resolution (H.R. 40) urging the Senate to approve a constitutional amendment to install an enforceable right to a thorough and efficient education in the Vermont Constitution. The resolution was urged by the people who a year later were cheering *Brigham* and enacting Act 60.

So how did the Court extract this sweeping right to education, which even the future friends of Act 60 could not find in the Constitution? Let’s go back a decade to explore Justice Dooley’s views on constitutional interpretation.

Back then, in remarks at a conference at Rutgers University, he said “If the development of state constitutional doctrine gets in the way of [constantly managing and keeping our society and our political institutions modern and responsive to a very difficult and changing world]... if we are not on the cutting edge of future needs ... then I think the people of our states should and will say ‘well, that was a nice little exercise you were engaged in, but it is not relevant to this world’, and through their ability to amend the constitution they will change it.”

In the same talk Justice Dooley declared his willingness, in dealing with constitutional issues, “to wander into never never land and produce a good result that will stand the test of time.”

Now here is a Justice, only a year onto the Court, baldly announcing that the Court cannot settle for merely interpreting out of date constitutions as they were intended by those who drafted and adopted them.

This sort of thing is not for Justice Dooley! He tells us that his Court must do what it has to do to meet modern demands and expectations. This is emphatically not the Court defined by our Constitution.

Now look in *Brigham* again. How did the Dooley Court manufacture a right that simply isn't there? ACLU attorney Gensburg explained how to do it – not that the Dooley Court needed much explanation. His brief argued that when the desired right can not be readily found in the Constitution, the Court can find rights “implicitly recognized in the Constitution.” If that doesn't get the Court to where it wants to go, then it can switch to extra-constitutional sources “deeply rooted in Vermont's traditions and conscience” or “implicit in the concept of ordered liberty.” In short, they were saying “please legislate a new constitution for us, because we really want to win this case.”

And obligingly, in *Brigham*, the Dooley Court solemnly declared that “equal protection of the laws cannot be limited by eighteenth century standards.” In other words, while none of the authors of the constitution could have imagined that it declared any right to “equal educational opportunities”, those benighted framers were “limited by eighteenth century standards”, and today's judges are free – indeed they are required – to interpret the Constitution to declare whatever they think is “deeply rooted in Vermont's traditions and conscience”, that is, whatever is thought by the Five Supreme Legislators to be best for the people.

Prof. Teachout, who did not support dismissing the *Brigham* Justices in 1999, nonetheless called this a “raw assertion of judicial power.”

This is the theory of judicial legislation pure and simple. It is judicial usurpation of the legislative function. It is judicial usurpation of the constitution-writing function of the whole people. It is injurious to the Constitution and an affront to the rights of the people contained in that honored document.

That it was done by the Court at breakneck speed, through an extraordinary process that denied a trial and a trial record for appeal, compounds the offense.

On December 20, 1999 the Court, by then headed by Chief Justice Jeffrey Amestoy, announced its earth-shaking decision in *Baker v. State*. This case was brought by three same sex couples seeking to obtain marriage licenses. Three town clerks refused to issue the licenses. In Superior Court, Judge Linda Levitt concluded that same sex couples had no right to marry under Vermont laws and constitution.

In a unanimous holding the Five Supreme Legislators decided that same sex couples had either the right to marry, or to enjoy “all or most” of the benefits of marriage. Citing their own

Justice Dooley's Legal Philosophy

At a Rutgers University conference in his first year on the bench, 1988: “If the development of state constitutional doctrine gets in the way of [constantly managing and keeping our society and our political institutions modern and responsive to a very difficult and changing world]... *if we are not on the cutting edge of future needs ... then I think the people of our states should and will say 'well, that was a nice little exercise you were engaged in, but it is not relevant to this world', and through their ability to amend the constitution they will change it.*” [Justices must be willing] “to wander into never never land and produce a good result that will stand the test of time.” (Emphasis added.)

In the Brigham opinion (1997): Justifying the Court's ruling that the constitution confers upon plaintiff children an individual right to substantially equal tax bases per capita: “Equal protection of the laws cannot be limited by eighteenth-century standards.”

judicial legislation in *Brigham*, the *Baker* court again observed that “equal protection of the laws cannot be limited by eighteenth-century standards.”

Founding its case once again on the “common benefit” clause already mangled beyond recognition in *Brigham*, the Court said “in the faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples ... The challenge for future generations will be to define what is most essentially human. The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.”

Popular Constitutionalism

To control the Supreme Court, we must first lay claim to the Constitution ourselves. This means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means. It means publicly reprimanding politicians who insist that ‘as Americans’ we should submissively yield to whatever the Supreme Court decides. It means refusing to be deflected by arguments that constitutional law is too complex or difficult for ordinary citizens ... Above all, it means insisting that the Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse. The Supreme Court is not the highest authority in the land on constitutional questions. We are.

– Larry D. Kramer, Russell Niles Professor of Law, New York University (*The People Themselves*, 2004, p. 247-8.)

Though concurring the in the result, Justice Johnson declared that the constitutional rights of the same sex plaintiffs had been violated, and that the Court should order the town clerks to issue marriage licenses forthwith. She found that “None of the State’s justifications [for its marriage statutes] meets the rational-basis test under the Common Benefits Clause, which requires that the classification be ‘reasonably related to the promotion of a valid public purpose’.” Justice Johnson also invoked the *Brigham* standard that “equal protection of the laws cannot be limited by eighteenth-century standards.”

Justice Dooley also concurred in the result, but complained that the majority opinion “backtracks from the established legal framework under Article 7 and fails to provide any guidelines whatsoever for the Legislature, the trial courts, or Vermonters in general to predict the outcome of future cases.” This pseudoconservative position rather disingenuously assumed that *Brigham*’s “legal framework under Article 7”, Justice Dooley’s major contribution to legislating from the bench, serves in any way as a predictable guideline for future cases.

Whether employing the rationale of “deeply rooted in Vermont’s traditions and conscience” from *Brigham*, or “a recognition of our common humanity” from *Baker*, the Dooley/Amestoy Court strayed a long way from the plain language of the Constitution that its Justices were sworn to uphold.

At the time today’s Vermont Constitution was being put into effect, George Washington was President. Like all of the framers of the national Constitution, President Washington was deeply concerned about judicial usurpation.

In his Farewell Address, President Washington said: “If in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be

no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.”

When the elected representatives of the people of Vermont examine the Supreme Court’s process, arguments, and opinions in *Brigham* and *Baker*, they will find themselves staring full in the face of judicial usurpation.

I ask you to defend the people’s constitution against those who have usurped it.

I ask you to use the constitutionally prescribed remedy to excuse from further service the Justices who, from the bench of the highest court in our state, twice now have ignored their judicial oath, violated the constitutional provision for separation of powers, and willfully discarded the principles of constitutional interpretation that have served the people of this state well for over 200 years.

III. The Case for Retention

The case for retention of the *Brigham* (and by implication, *Baker*) Justices was made in 1998 and 1999 in numerous articles and editorials, some of which are excerpted below.

“Sacking any justice on the basis of a single decision, even a far reaching one such as the *Brigham* ruling, sets a dangerous precedent. If opponents of *Brigham* and its offshoot, Act 60, successfully lobby legislators to fire the justices who wrote the decision, the Vermont Supreme Court will lose more than three individuals in black robes. It could lose its independence.”

“Vermont’s high court must not be held hostage by politics, whether conservative or liberal. Justices may be evaluated on their overall performance, not on the basis of one case. The more the court becomes subject to political pressure, the more justice itself is threatened.” (Editorial, *Burlington Free Press*, January 23, 1999)

“It is a mistake to politicize the matter of confirming the appointment of any Vermont judge, and it is particularly mistaken to politicize the confirmation process for the state Supreme Court Justices whose terms the legislature will consider extending later this session... Justice in Vermont should not be made the victim of [legislative] horse trading.” (Editorial, *Rutland Herald*, January 25, 1999.)

“*Brigham* was not a rush to judgment or a power grab or an intentional deception. The decision merely articulated an inequity [in educational funding] most acknowledged.” (Christopher Graff, Associated Press bureau chief, *Free Press*, February 7, 1999.)

“Just this year, even here in Vermont, the bloody flag of ‘judicial activism’ has been raised ... The threat is to use our system of ‘judicial retention’ to try to replace judges on the basis of ideology rather than to review them on the basis of competence. This is dangerous nonsense.” (Sen. Patrick Leahy, *Vermont Bar Journal*, September 1998.)

“The *Brigham* case in fact relies on ... the principle that Vermont’s children have a right to an education at the expense of the state. In the 1860 case of *Williams v. School District*, decided 137 years before *Brigham*, the Supreme Court said that the state constitution imposes a duty on the legislature to educate all Vermont children at the expense of the state. I guess this is not a constitutional right that the *Brigham* decision pulled out of thin air.” (ACLU *Brigham* attorney Robert Gensburg, *Rutland Herald*, February 10, 1999.)

“Cynical judge bashing is all the more insidious because the public has very little knowledge or understanding of the judicial process. One of the profoundly detrimental consequences of unprincipled attacks on the judiciary is the erosion of public acceptance of the legitimacy of judicial decisions. The Washington Post recently reported that more than half the public could name the Three Stooges but not a single Supreme Court Justice... I welcome the efforts of the Vermont Bar Association and the American Bar Association to reinforce the value of judicial independence.” (Chief Justice Jeffrey Amestoy, Address to the Vermont Bar Association, September 18, 1998.)

IV. “Thus Saith the Lord”: When a Supreme Court Should be Replaced, Not Obeyed

(An earlier version of this commentary by EAI President John McClaughry first appeared in the Sunday Herald/Times Argus of October 8, 2000 as a response to commentaries published a week earlier by Times Argus columnist Jack Hoffman and former Attorney General M. Jerome Diamond. It has been expanded and updated here.)

Supreme Courts interpret Constitutions. Whenever a Supreme Court speaks on the meaning of the constitution, is that the last word on the matter? Are the legislative and executive branches bound to meekly obey whatever the Supreme Court proclaims? Can a decision of a state’s Supreme Court itself violate the Constitution?

Friends of the Vermont Supreme Court’s *Baker* (gay marriage) decision – among them Gov. Howard Dean – strongly believe that when the Supremes speak, everybody has to obey. Period.

Vermont Press Bureau chief Jack Hoffman argues that the Court’s rulings are by definition constitutional. He decries those who suggest that “the Court is out of control and has lost

Justice Johnson’s Legal Philosophy

On a case in 1993 (In re: BLVB) where the Court overturned a statute to permit lesbian adoption: “That was a statute that had last been looked at by the legislature in the late ‘40s, so it was a very, very old statute, and there are situations where courts can modernize statutes and give them a more contemporary application.” (VLS Conference on Sexual Orientation and Family Law, 10/3/97.)

On a case in 1998 concerning town government immunity (*Hillerby v. Town of Colchester*)(in dissent): [There are no sound public policy reasons to support town government immunity from suit] “under the laws we currently apply to determine whether municipal immunity exists. We have a responsibility to change those laws and to attempt to rectify the gross inequities that they impose on the people of this state.”

On the gay marriage case (*Baker v. State*, 1999): “None of the state’s justifications meets the rational-basis test under the Common Benefits Clause. I conclude that the [sex-based] classification [in the statutory definition of marriage] is a vestige of the historical unequal marriage relationship that more recent legislative enactments and our own jurisprudence have unequivocally rejected. The protections conferred on Vermonters by the Common Benefits clause cannot be restricted by the outmoded conception that marriage requires one man and one woman. As this Court recently stated [in *Brigham*], ‘equal protection of the laws cannot be limited by eighteenth century standards.’”

its authority”, suggesting that those persons have suffered an inferior education. Former Democratic Attorney General M. Jerome Diamond says a legislator can’t take an oath to support the constitution and then turn around and undo legislation passed to carry out a declaration of the Supreme Court.

The question of whether the authority of a Supreme Court’s decision is absolute and incontrovertible is not a new one in American history. Harvard Law Professor Raoul Berger, in his classic *Government by Judiciary* (1977), convincingly showed that the Framers could scarcely imagine a supreme court invalidating a legislative enactment, unless the enactment clearly and unequivocally flew in the face of a constitutional provision.

Alexander Hamilton in Federalist 81 argued that the threat of impeachment would keep judges from committing “a series of deliberate usurpations on the authority of the legislature”. Even Chief Justice John Marshall, remembered today as the author of judicial review, stated that “a bold and plain usurpation to which the constitution gave no countenance” was required “to invoke the judicial power of annulment.”

President Thomas Jefferson, with his customary clarity, affirmed that each of the three branches of government “acts in the last resort, and without appeal, to decide on the validity of an act according to its own judgment, & uncontroled by the opinion of any other department.” To allow the Supreme Court to have final say on constitutional questions, he believed, would be “very dangerous ... and place us under the despotism of an oligarchy.”

President Andrew Jackson was firmly convinced that the Congress had exceeded its constitutional powers when it chartered the Bank of the United States. Marshall’s Supreme Court had held otherwise. When Congress renewed the Bank’s charter in 1836, Jackson vetoed the bill. “The Congress, the Executive and the Court must each for itself be guided by its own opinion of the Constitution,” Jackson wrote.” And he added “each public officer who takes an oath to support the constitution swears that he will support it as he understands it and not as it is understood by others.... The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.”

Jefferson’s and Jackson’s ire was aroused by Supreme Court decisions that upheld acts of Congress which they believed to be beyond the constitutional power of Congress to enact. It was not until 1857 that the Supreme Court struck down a Congressional enactment not involving the narrow question of the jurisdiction of the Court itself. This was the infamous *Dred Scott* decision.

Scott was a slave who had lived several years in free Wisconsin Territory before returning to slaveholding Missouri. He sued for his freedom, arguing that his residence in a free territory had emancipated him and made him a citizen. The Court might have avoided the issue by holding, as it had in 1850, that the question of slave or free status should be determined in the state courts. Unwisely, the Court went far further. It held that Congress could not constitutionally interfere with a slave owner’s property interest by prohibiting slavery in a territory. This holding was gasoline on the flaming issue of the extension of slavery.

In the following year a rising Illinois politician named Abraham Lincoln engaged Vermont-born Stephen A. Douglas in seven celebrated debates across Illinois. Central to their debates was the constitutional question posed by the *Dred Scott* case: could Congress prohibit the extension of slavery into the territories, or did it have to submit to the Court’s ruling that it could not?

Lincoln and the early Republicans firmly believed that Congress had and should exercise the power to prevent the evil of slavery from taking root in new territory. In their Ottawa debate Lincoln mocked Douglas' belief that the *Dred Scott* decision had settled the matter. Douglas' argument, said Lincoln, came down to dumbly reiterating "Thus Saith the Lord" – the Supreme Court must be obeyed. He cited Democratic icons Jefferson and Jackson as agreeing with his own view that the legislative and executive branches are not bound by a wayward opinion of the judiciary.

Chief Justice Amestoy in the *Baker* case invoked Lincoln's response to Douglas's defense of the *Dred Scott* decision to criticize Justice Johnson for her insistence that the Court should simply declare gay marriage, rather than send the matter to the legislature for further action. "Ironically," wrote Amestoy, "it was a Vermonter, Stephen Douglas, who in defending the [*Dred Scott*] decision said 'I never heard of an appeal being taken from the Supreme Court.'" But it was a profound understanding of the law and the 'unruliness of the human condition' that prompted Abraham Lincoln to respond that the Court does not issue Holy Writ."

Though Amestoy has been a consistent advocate of "judicial independence" (meaning Supreme Court omnipotence), his support for Lincoln's repudiation of *Dred Scott* clearly leads to supporting the right of citizens to repudiate Supreme Court decisions, and to discipline overreaching justices (like Amestoy) by denying them retention.

Justice Dooley on the Retention Process

In 1996 two judges were retained on close votes over considerable legislative opposition. Justice Dooley subsequently wrote: "The 1996 votes call into question the fairness, integrity, and desirability of the judicial retention process. If retention decisions are to be based on a single incident in the six-year term of a judge and the overall performance of the judge is irrelevant to the decision, many very good judges will not survive retention ... One positive impact of the 1996 votes is the emergence of a broad consensus that *the retention process is flawed and must be repaired.* (*Vermont State Government Since 1965*, at 233.)

As someone once observed, "The captain of the *Exxon Valdez* only made one mistake, too".

In the five decades after 1890 progressives and labor unions were increasingly outraged that federal courts were striking down their hard-won state social legislation as unconstitutional incursions on the rights of property and contract. In 1911 these liberal forces in the California legislature passed a sweeping provision for the recall of judges, and gained a 3-1 approval from the electorate in a referendum. In a 1986 initiative making use of this provision, California voters removed two Supreme Court Justices for their adamant refusal to enforce the death penalty provisions of the state constitution.

In 1912 the liberal recall movement gained a strong new adherent in ex-President Theodore Roosevelt. He told the Ohio constitutional convention that "when the Supreme Court of a State declares a given statute unconstitutional, because in conflict with the State or National Constitution, its opinion should be subject to re-

vision by the people themselves." His preferred mechanism was a popular referendum vote, which if successful would reverse the Court's decision: "If the courts have the final say-so on all legislative acts, and if no appeal can lie from them to the people, then they are the irresponsible masters of the people."

For two centuries judicial activism was simply not an issue in Vermont. It was not until 1814 that the Vermont Supreme Court overturned a legislative act, and that was a special private deal for a crony involved in a legal proceeding. Conservative Republican legislatures did not pass much property- or contract-threatening social legislation. Conservative Republican judges believed in strict construction, tradition, precedent and restraint.

In the past decade that venerable judicial tradition has been destroyed by a Supreme Court eager to get out in front of the liberal parade. Unlike the liberals who in 1912 demanded recall of judges who struck down popular statutes, today's liberals, including Dean, Hoffman, Diamond, the ACLU, and Vermont Freedom to Marry, now take the positions of Stephen A. Douglas and the corporate lawyers of 90 years ago: "Thus Saith the Lord! The Court has spoken! Silence, ye insects!"

The case against Vermont's Supreme Legislators comes down to this: The Justices each took an oath "not to do anything injurious to the Constitution." Then they proceeded to write their own constitution. Then they decreed that the legislative branch do their bidding – in the gay marriage case, with a judicial gun pointed squarely at the legislature's head.

The Vermont Constitution enumerates numerous specific rights that government is required to protect. These include such rights as freedom of press, assembly, and worship, the right to just compensation when private property is taken for public use, and the right "to keep and bear arms in defence of themselves and the state."

The Court's *Brigham* and *Baker* decisions, however, are based on no recognizable rights contained in the constitution. Indeed, as late as 1995 few outside of the ACLU and the Gay and Lesbian Advocates and Defenders believed that any such rights existed. The Five Supreme Legislators, eager to get on the cutting edge of progressive social thought, simply invented new "rights" out of thin air. As Justice John Dooley notoriously put it, sometimes the Court has to go off into "never never land" to reach the result that society needs.

In *Brigham*, in a mere 51 days and without the benefit of a trial record, the Dooley Court invented a bogus history, ignored inconvenient constitutional language, ludicrously reinterpreted ancient cases to support the ACLU's theories, and committed what even Vermont Law School Prof. Peter Teachout, himself a liberal, described as "intentional deception" and "a raw assertion of judicial power".

In *Baker*, the Amestoy Court divorced the "common benefit" clause from all of its historical meaning, rewrote it, coupled it to their own notions of "our common humanity", rejected the thought that legislatures might have had rational reasons for enacting marriage law, and overturned 200 years of well-accepted law limiting the benefits and obligations of marriage to one man and one woman.

Judicial independence is very important – when the judges are men and women of complete integrity who respect their oath of office and are faithful to the constitution they are sworn to uphold. On close questions of law, citizens ought to give such a Supreme Court the benefit of any doubt even when its decisions are widely unpopular. In cases where the Court strikes down statutes, the legislature can enact new statutes to correct the defects and reassert the will of the people.

But when justices conspicuously abandon the Constitution they were sworn to defend, when they arrogantly inflict their own views of how the people of Vermont must order their laws and affairs, when they tell the elected legislature to "do what we say, or you'll get even worse", it is time for the people to call a halt. Those justices have forgotten their oaths of office, and the Court has entered politics.

Justice Johnson is said to have remarked at oral argument in the *Baker* case, “some state has to be first”. Very well. Let Vermonters achieve another first: the first state whose citizens acted to replace politicized judicial serial offenders with new men and women who will take their oaths of office seriously, honor our constitution, and respect the people they serve.

V. The Founders’ Views of Judicial Activism

George Washington said “If in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates, But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.” (Farewell Address, 1799.)

Alexander Hamilton called attention to the “important constitutional check which the power of instituting impeachments... would give to that body [Congress] upon the members of the judicial department. This alone is a complete security. There can never be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it.” (*Federalist Paper* No. 81, 1788.) “To avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” (*Federalist Paper* No. 78, 1788).

Thomas Jefferson pledged to administer his constitutional duties “according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption – a meaning to be found in the explanations of those who advocated it.” (4 Elliot 446). “Our peculiar security is in the possession of a written constitution. let us not make it a blank paper by construction.” (Letter to W.C. Nicholas, 9/7/1803). “On every question of construction, carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probably one in which it was past.” (Letter to Justice William Johnson, 6/12/1823)

“The great object of my fear is the federal judiciary. That body, like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them. ... It has long, however, been my opinion, and I have never shrunk from its expression...that the germ of dissolution of our federal government is in the constitution of the federal Judiciary; ... working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped. ... The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric. They are construing our Constitution from a coordination of a general and special government to a general and supreme one alone.” (Letter to Thomas Ritchie, 12/25/1820)

Chief Justice John Marshall urged that Congress be allowed to choose the means for implementing its Constitutional powers, but vigorously denied that the Court could enlarge the powers conferred by the Constitution on Congress. He rejected any suggestion that “those powers ought to be enlarged by [judicial] construction or otherwise.” (Gunther, Gerald, *John Marshall’s Defense of McCulloch v. Maryland*, 1969). “Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to

the will of the legislature.” (*Osborn v. Bank of the United States*, 22 US 866 (1824)).

Justice Joseph Story, the most influential early scholar of the Constitution, wrote “Nor should it be ever lost sight of that the government of the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is pro tanto, the establishment of a new Constitution. It is doing for the people, what they have not chosen to do for themselves. It is usurping the function of a legislator.” (*Commentaries on the Constitution*, (1833) at 426.)

Prof. Raoul Berger of Harvard Law School is the leading modern day scholar of judicial activism. He concluded: “The founders believed in a fixed Constitution of unchanging meaning. They accorded an inferior place in the federal scheme to the judiciary, deriving from suspicion of innovations by judges theretofore regarded with ‘aversion and distrust’. They had a profound distrust of judicial discretion. They were attached to the separation of powers and insisted that courts should not engage in policy making but act only as interpreters. Above all, judges were not to act as revisers of the Constitution, for that function had been reserved to the people themselves by Article V, the provision for amendment of the Constitution.” (*Government by Judiciary*, 1977.)

The Scofflaw Justice

The Constitution (Ch. II, Sec. 56) requires that each officer, including judges, “take and subscribe the following oath or affirmation of allegiance to this state.”

The oath of allegiance says that “you will not, directly or indirectly, do any act or thing injurious the constitution or government thereof.”

To “subscribe” means to sign the oath after taking it orally before a judge or notary. In 1997 inquiring citizens discovered that certain state officials had never subscribed to the oath of allegiance. The citizens asked that the Justices subscribe. Justice Johnson had already subscribed in 1993, three years after her appointment. Justice Skogland promptly subscribed in 1998, a year after her appointment. Justice Reiber subscribed in 2004, one year after his appointment.

Justice Dooley was also asked directly in 1997 whether he had subscribed as required by the Constitution. There is no evidence in the Archives that Justice Dooley ever subscribed to his oath. Even when other Justices responded to the inquiry by duly subscribing, Justice Dooley refused to do so.

VI. Selected References

- Berger, Raoul, *Government by Judiciary* (Indianapolis: Liberty Fund, 2nd ed., 1998) [1977]
- Boot, Max, *Out of Order: Arrogance, Corruption and Incompetence on the Bench* (New York: Basic Books, 1998).
- Burlington Free Press*, “Don’t remove justices because of *Brigham*” (editorial), February 14, 1997.
- Dooley, John, “The Judiciary”, in Michael Sherman, ed. *Vermont State Government Since 1965* (Burlington: Center for Research on Vermont, 1999) at 187-242.
- Dooley, John, Comments, in Lawrence Baum and David Frohnmayer, ed. *The Courts: Sharing and Separating Powers* (report of a symposium at the Eagleton Institute of Politics, Rutgers University, 1988), at 23.
- Gensburg, Robert, “The Road to Equal Educational Opportunity for Vermont School Children”, 22 *Vermont L. Rev.* 1 (Fall 1997).
- Gillies, Paul, “Court’s *Brigham* Decision Was Sound”, *Rutland Herald*, February 7, 1999.
- Hurst, Blake, “Nebraskans Rein in a Judge”, *The American Enterprise*, March 1997 at 13.
- Kramer, Larry D., *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004.)
- McClaughry, John, “Let the Supreme Court Pound Sand”, *Rutland Herald*, March 23, 1997.
- ____ “Who Controls the Supreme Court?”, *Sunday Times Argus*, September 20, 1998
- ____ “Judicial Review Process Provides Necessary Check”, *Burlington Free Press*, September 22, 1998
- ____ “Here are Some Reasons Not to Keep the *Brigham* Justices”, *Burlington Free Press*, February 9, 1999.
- ____ “Who Owns the Vermont Constitution?”, *The Caledonian-Record*, February 23, 1999
- ____ “Reining in an Errant Court”, *The Caledonian-Record*, October 31, 2000
- Mello, Michael, “Review of *Brigham* Reasoning is Proper”, *Rutland Herald*, February 3, 1999.
- Nuquist, Andrew E. and Edith W., *Vermont State Government and Administration* (Burlington: UVM Government Research Center, 1966)
- Ross, William G., *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton: Princeton University Press, 1994).
- Rutland Herald*, “Judicial Independence” (editorial), May 12, 1998.
- Teachout, Peter, “No Simple Disposition: The *Brigham* Case and the Future of Local Control Over School Spending in Vermont”, 22 *Vermont L. Rev.* 21, 1997.
- Tushnet, Mark, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

Appendix: VERMONT SUPREME COURT CASES OF INTEREST, 1993-2002

The following cases describe some of the controversial opinions of the Vermont Supreme Court from 1993 through 2002. During this period the Court overturned established rules of law at least 23 times. In two cases the Court created previously unknown constitutional rights to significantly equal resources per pupil for education (*Brigham v. State*), and to all or most of the benefits of marriage for gay and lesbian couples (*Baker v. State*).

Lesbian Adoption: In re: BLVB 160 VT 368 June 18, 1993

While conceding that the lower court was “technically correct” in declining to permit a lesbian to adopt her partner’s child because the two were not married, the Court held that notwithstanding the statute, “the state’s primary concern is to promote the welfare of children”. The opinion noted that the Court was the first in the nation to rule favorably on lesbian adoption. (5-0; opinion by Johnson).

Motorcycle Helmets: *Benning v. State* 161 VT 472 January 28, 1994

The Court held that a motorcyclist had no right to cycle on public highways without a helmet, on the grounds that “our costs are linked to the actions of others and are driven up when others fail to take preventive steps that would minimize health care consumption”, i.e., the state can prohibit any human activity that might increase anyone’s health care bills. (5-0; opinion by Dooley.)

Legal Requirement Repealed: In Re: Vermont Marble 162 VT 355 June 10, 1994

The Court held that notwithstanding the Legislature’s act to require the Secretary of Natural Resources to sign a water quality certificate, it was acceptable for the Commissioner of Environmental Conservation to sign it instead. (5-0; opinion by Dooley.)

Overturing Murder Verdict: *State v. Duranleau* 163 VT 8 September 30, 1994

Rebecca Duranleau was convicted of inciting her lover to murder her estranged husband. The jury believed that she had made an appointment to meet her husband at a bar and then lured him out to the parking lot, where he was killed from behind by an assailant. The trial record showed that Duranleau had demanded that her lover “prove himself” and arranged the fatal meeting to afford the opportunity. The Court reversed and directed an acquittal verdict, on the grounds that Duranleau had not explicitly told her lover that he “had to kill” the husband. (5-0; opinion by Allen.)

Driveway as “Public Highway”: *State v. Eckhardt* 165 VT 606 August 27, 1996

The Court upheld a conviction of a citizen for driving while intoxicated in his own driveway, on the grounds that the driveway was a “public highway”, and other citizens, not being barred from the driveway, might suffer injury. The statutory definition of a highway, which the

Court consigned to a footnote, includes “all parts of any.. roadway ..open temporarily or permanently to public or general circulation of vehicles.” (3-2; unsigned. Affirmed by Allen, Dooley and Morse; dissent by Johnson and Gibson.).

Manufacturer’s Liability: *Webb v. Navistar* 166 VT 119 December 20, 1996

In this case a sharply divided Court, unable to agree on a standard of liability applicable to a tractor accident in which the manufacturer was clearly not at fault, sent the case back to superior court for a new trial without stating any standard for comparative causation. The Court held that a deep pocket manufacturer could be held liable even when the accident was principally caused by a subsequent customer’s faulty operation (failure to maintain road lights and keep reflector triangle visible to car approaching from the rear.) (3-2; opinion by Dooley, joined by Morse and Peck; dissent by Johnson and Gibson.)

Educational Finance Law Overturned: *Brigham v. State* 166 VT 246 February 5, 1997

The Court, on interlocutory appeal and without a trial, invalidated the state’s system of educational finance. The Court identified a provision in the 1786 Constitution that “a competent number of schools ought to be maintained in each town ...” as creating an enforceable individual right to the availability of a “substantially equal opportunity to have access to similar educational revenues.” (5-0; unsigned.)

Personal Responsibility Overturned: *Spencer v. Killington* 167 VT 137 March 14, 1997

The Court reversed a superior court decision throwing out a damage suit by a skier who, after signing a release releasing the ski area from liability, injured himself in a special limited-entry “Ski Bum” competition. (3-2; unsigned; dissent by Allen and Dooley.)

Land Titles Invalidated: *Bianchi v. Lorenz* 165 VT 555 July 11, 1997

Without statutory support, the Court held that a seller’s failure to present evidence of all required local permits (certificate of occupancy, zoning permits, etc.) constituted an encumbrance of title and thus a violation of the seller’s warranty covenant. This was so, the Court said, even if towns failed to maintain records of permits issued. This decision created an enormous disruption of real estate and title transactions. It was partly overruled by subsequent legislation. (5-0. Opinion by Dooley; Allen and Johnson concurred in the result on different grounds.)

Liability for Bizarre Accident: *Baisley v. Missisquoi Cemetery Association* 167 VT 473 January 23, 1998

The Court held that a cemetery association was liable for damages in the death of a 5-year-old boy because it ought to have known that a boy could enter the cemetery, climb a tree, and fall onto the cemetery’s spiked fence. (4-1; opinion by Dooley, dissent by Johnson).

Prolonged Punishment of Lawyer: In re: Illuzzi July 28, 1998

As of February 9, 1998 attorney Vincent Illuzzi had completed all requirements for reinstatement of his license to practice law following an 18-month suspension, including successful completion of an ethics course and support from other lawyers and judges. In violation of its own rules, and in an apparent effort to prevent Illuzzi from returning to practice for as long as possible, the Court refused to sign the two sentence reinstatement order until July 28.

Police Video Pot Bust: *State v. Costin* 168 VT 175 July 31, 1998

The Court held that a Ferrisburg landowner could be prosecuted for marijuana growing, on the evidence obtained by a warrantless installation of a police video camera on his unposted property, which the Court deemed to be the equivalent of a public place. (3-2. Opinion by Dooley; dissent by Johnson and Morse.)

Child Support Enforced Against Non-Father: *St. Hilaire v. DeBlois* 168 VT 445 October 30, 1998

The Court held that a putative father could not recover \$15,000 in child support from his ex-wife, upon learning from DNA testing and her admission that the children in question were not his. The Court said that Family Court had no authority to order repayment of past child support payments, even if fraudulently obtained, and that St. Hilaire should have raised his doubts about his paternity in the initial divorce proceedings. (5-0)

Gay and Lesbian Marriage Benefits: *Baker v. State* 170 VT 194 December 20, 1999

The Court held that the “common benefits” clause of the Constitution (Chapter I, Art. 7), originally written to prevent a small group of people from using the government to their personal profit, required that same-sex couples enjoy all the benefits of marriage. The Court ordered the legislature to either adopt a bill allowing gay marriage, or a bill giving gays “domestic partnership” benefits equivalent to marriage. The Court retained jurisdiction of the case and stated that the failure of the legislature to act on the Court’s mandate could lead to further Court action, i.e., declaring that gays have a right to marry. (5-0; opinion by Amestoy). Justice Johnson, (concurring) went further, insisting that the Court declare gay marriage rights immediately as a remedy for sex discrimination.

Employer Liability for Recreational Accident: *Grather v. The Gables Inn* 170 VT 377 February 18, 2000

Joseph Grather was a “ski bum” who lived and worked at an Inn in Stowe. Part of his compensation was a free mid-week ski pass at Mt. Mansfield. Using the pass in his spare time, Grather skied into a tree and was injured. Grather applied for workers’ compensation, but his claim was denied by the Department of Labor and Industry.

The Court overruled the Department’s findings of fact and held that the opportunity for Grather to ski recreationally in his spare time was a substantial benefit to his employer, the Inn. (3-2; opinion by Dooley.)

Chief Justice Amestoy (a former Commissioner of Labor and Industry) and Justice Skoglund dissented on the ground that “even a liberal reading of the act’s purpose cannot transform a recreational ski injury into an injury arising in the course of employment.”

Statutory Definition Repealed to Achieve Court’s Desired Result. *Northgate Housing Ltd. v. Kirkland* No. 2002-152 (unreported) November 27, 2002

Prior to 2000, Vermont statutes defined the required notice by a landlord to a defaulting tenant as certified mail or personal service by a law enforcement officer. In Act 115 of 2000 the legislature, after lengthy hearings and debate, amended the statute to require only “a written notice hand delivered or mailed to the last known address”.

Maxine Kirkland rented an apartment from Northgate. Contrary to the lease agreement, she failed to put the gas and electricity accounts in her name, and fell behind on her rent. In late 2001, after delivering notice to Kirkland by mail and by slipping the notice under her door, Northgate brought eviction proceedings. The Superior Court ruled against Northgate on the grounds that it had produced no evidence that Kirkland had actually received the notices announcing breach of contract and eviction.

On appeal, the Supreme Court decided that regardless of how the legislature defined the required notice in Act 115, its correct meaning is that given in Black’s Law Dictionary of 1999, which like the superseded Vermont statute requires evidence of receipt. Because Northgate could not prove that Kirkland received its many notices (including one by certified mail which Kirkland refused to accept from the postal carrier), the Court stopped Northgate from continuing its eviction proceeding. (3-0 – expedited procedure. Dooley, Amestoy, Morse.)



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