

## IS *BAKER v. NELSON* BINDING PRECEDENT IN DOMA CASES?

What follows is a discussion on whether or not *Baker v. Nelson* is binding precedent on cases involving DOMA. I have used Wikipedia, Supreme Court Reporter, and various law journal articles to reach these conclusions.

### HISTORICAL NOTE

At the time that *Baker* was decided, the Rules for getting into the U.S. Supreme Court were vastly different from those of today. At that time, if you were challenging a state statute based on a FEDERAL constitutional ground and you were denied that challenge, you had an **automatic** right to a **DIRECT APPEAL** to the U.S. Supreme Court. Today, almost all cases get to the Court by way of a Writ of Certiorari.

BLAG (The House of Republican Reps) keeps arguing in every appellate case that *Baker v. Nelson* is binding.

### IT IS NOT BINDING FOR THE FOLLOWING REASONS

When dealing with precedents like *Baker*, lower courts may have to guess at the meaning of these unexplained decisions. The Supreme Court has laid out rules, however, to guide lower courts ***in narrowly applying*** these summary dispositions to subsequent cases:

- The facts in the potentially binding case must not bear any legally significant differences to the case under consideration.
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- The binding precedent encompasses only the issues presented to the Court, not the reasoning found in the lower court's decision.

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- Of the issues presented, only those necessarily decided by the Court in dismissing the case control.
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- Subsequent developments by the Court on the relevant doctrines may cast doubt on the continuing validity of a summary judgment.

I will discuss each of these rules seriatim.

The first item (the facts in the *Baker* case must ***not bear any legally significant differences*** to the case under consideration.)

Baker and McConnell, ***both single men***, applied in Minnesota for a marriage license and were denied the license because they were of the same sex.

In the DOMA cases, the plaintiffs are **ALREADY MARRIED** and are applying for federal benefits and for marriage equality.

The important distinction is that they are **ALREADY MARRIED**.

Hence, the REQUIREMENTS of the first rule are not met.

The second item listed above (*Baker* encompasses only the issues presented to the Court in DOMA cases). Note that the Supreme Court **ONLY** addresses the issues presented in the Jurisdictional Statement.

## JURISDICTIONAL STATEMENT IN BAKER v. NELSON

Appellants in the case presented three constitutional questions:

(1) “Whether appellee’s refusal to sanctify appellants’ marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment”;

(2) “Whether appellee’s refusal, pursuant to Minnesota marriage statutes, to sanctify appellants’ marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment”;

and (3) “Whether appellee’s refusal to sanctify appellants’ marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.”

Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

The first jurisdictional statement deals with whether or not the refusal to grant a marriage license to two single men deprived them of their liberty interest under the 14<sup>th</sup> Amendment.

*DOMA has nothing to do with **single** men.*

The second jurisdictional statement deals with whether the denial of a marriage license violated their equal protection rights under the 14<sup>th</sup> Amendment because both were of the same sex. (A **sex-based** argument; in most of the DOMA cases, they are not arguing discrimination based on **sex** – they are arguing discrimination based upon **sexual orientation**).

Moreover, neither the Minnesota Supreme Court decision, *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), nor the questions presented in the plaintiffs’ jurisdictional statement raised whether classifications based on **sexual orientation** are subject to review or whether or not heightened scrutiny was applicable. There is

no indication in the Court's order that the Court even considered, much less resolved, that question.

***Baker* did not concern the constitutionality of a federal law**, like DOMA Section 3, that distinguishes among couples who are already legally married in their own states, and was motivated by animus toward gay and lesbian people. *Baker* concerned itself with the constitutionality of denying a marriage certificate to two single people of the same sex.

In neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *Lawrence v. Texas*, 539 U.S. 558 (2003), did the Supreme Court opine on the applicability of heightened scrutiny to sexual orientation. In both cases, the Court **invalidated sexual orientation classifications** under a more permissive standard of review without having to decide whether heightened scrutiny applied (*Romer* found that the legislation failed rational basis review, 517 U.S. at 634–35; *Lawrence* found the law invalid under the Due Process Clause, 539 U.S. at 574–75).

Hence, DOMA *has nothing to do with Baker*.

The third item (only those items necessarily decided by the Court in dismissing the case control [just which of the 3 questions presented did the court necessarily decide in order to dismiss the case?]).

The memorandum decision of the US Supreme Court in *Baker* is below along with a link to the actual decision.

**"October 10, 1972. Appeal from the Supreme Court of Minnesota. The appeal is dismissed for want of a substantial question."**

<http://www.scribd.com/doc/21017674/Baker-v-Nelson-409-U-S-810-1972>

The Supreme Court's failure to mention ANY item which was necessarily decided by the Court in dismissing *Baker*, raises the following questions:

1. Was a federal question presented, but it just was NOT a SUBSTANTIAL federal question, and if so, what does that mean?
2. Since the Court did not mention any of the three, does that mean that they based their decision on all three of the questions presented?

The fourth item (subsequent developments by the court may cast doubt on the continuing validity of the summary judgment) provides the last and final nail in the coffin of *Baker* as a precedent.

There can be no doubt that the legal landscape has been altered dramatically by subsequent developments by the Court.

The first case decided after *Baker* which altered the landscape was the infamous Hippy Food Stamp Case, *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973). Its progeny are too numerous to count.

Other cases, such as ***Roe v. Wade***, ***Planned Parenthood v. Casey***, ***Romer v. Evans***, and ***Lawrence v. Texas***, and all of their hundreds of progeny, leave no doubt that the legal landscape has changed.

Hence, the fourth test imposed by the Supreme Court has not been satisfied.

In my opinion, because not one of the four requirements laid down by the U.S. Supreme Court for establishing "binding precedent" have been satisfied, **BAKER IS NOT BINDING.**