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A TALE OF TWO CONCURRENCES: SAME-SEX MARRIAGE AND PRODUCTS LIABILITY

JOHN G. CULHANE*

I. INTRODUCTION

In the landmark decision, *Baker v. Vermont*,¹ the Vermont Supreme Court held that the state had not honored its constitutional guarantee of “common benefits” to all Vermonters when it denied same-sex couples the benefits accruing from marriage. Significantly, the court did *not* hold the marriage licensing laws—which had been interpreted by the state to apply only to opposite-sex couples—unconstitutional. Instead, the matter of how best to afford the benefits of marriage to same-sex couples was remitted to the legislature, for determination within “a reasonable period of time.”² As the court stated, the legislature might either decide simply to extend the right to marry to same-sex couples, or instead create “a parallel ‘domestic partnership’ system or some equivalent statutory alternative.”³ Thus, justice was further delayed for the three couples who had brought suit back in 1996, and for other same-sex couples in Vermont.⁴

As public reaction to the decision underscored, the court’s approach was certainly politically astute.⁵ Those on the political

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1. 744 A.2d 864 (Vt. 1999).

2. *Id.* at 881.

3. *Id.* at 867.

4. On April 26, 2000, Governor Howard Dean signed into law An Act Relating to Civil Unions. VT. STAT. ANN. tit. 15, ch. 1, §§ 4 & 8, ch. 23, §§ 1201-1207 (Supp. 2000). The act reserves the marriage label for opposite-sex couples, declaring that “[m]arriage means the legally recognized union of one man and one woman.” *Id.* § 1201(4). Same-sex couples continue to be “excluded from the marriage laws of [Vermont].” *Id.* § 1202(3). As this Essay argues, this separate-but-equal treatment cannot amount to full equality. Nonetheless, the legislature’s decision to recognize a parallel creation, called “civil union,” for same-sex couples is a substantial step toward that goal. Although a detailed analysis of the myriad benefits conferred upon same-sex couples—many for the first time in U.S. history—is not the subject of this Essay, it is worth quoting the Act’s central, and startling, provision in full: “Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.” *Id.* § 1204(a).

5. The court’s unexpected, and perhaps novel, solution to the problem might explain the long wait (about thirteen months) between oral argument, in November 1998, and decision, in December 1999.

right were rendered toothless by the court's related decisions not to require marriage and to send the matter to the legislature for a suitable remedy. Opponents of same-sex marriage were left in the awkward position of having to give the court at least some credit for its deferential approach, and a nuanced response hardly calls for the kind of blunderbuss sloganeering that has been the right's specialty.⁶ On the other hand, inasmuch as the decision went further than any other state supreme court has been willing to go,⁷ advocates of gay and lesbian civil rights also generally applauded the court's decision, or at least qualified their criticism.⁸ The legislature's response was also positive, as argument was generally limited to the issue of whether to grant full-blown marriage rights to same-sex couples or create a parallel package of rights that would

6. See, e.g., Carey Goldberg, *Redefining a Marriage Made New in Vermont*, N.Y. TIMES, Dec. 26, 1999, § 4, at 3, LEXIS, News Library (explaining the views of Jay Sekulow, Chief Counsel of the American Center for Law and Justice, to the effect that the court's logic should have led it to take the final step of requiring same-sex marriage); Carey Goldberg, *Vermont High Court Backs Rights of Same-Sex Couples*, N.Y. TIMES, Dec. 21, 1999, at A1, LEXIS, News Library [hereinafter Goldberg, *Rights of Same-Sex Couples*] (although disagreeing with the decision, Craig Bensen, an evangelical pastor and vice president of Take It to the People, was "happy to see the issue go to the legislature"). A corollary is that any extreme reaction seems particularly hysterical. See, e.g., Douglas W. Kmiec, *There Cannot Be a Same-Sex Marriage*, CHI. TRIB., Dec. 23, 1999, at 27, LEXIS, News Library (accusing the court of using "the voice . . . of Hitler or Slobodan Milosevic").

7. Appearances to the contrary, the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), did not go quite so far, because it did not hold that the refusal to grant marriage licenses to same-sex couples was, in fact, unconstitutional. *Id.* at 67. Rather, the case was remanded for findings as to whether the state could demonstrate a compelling interest in its position. *Id.* at 68. The trial judge assigned to the remand found that such interest had not been demonstrated. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *1 (Haw. Cir. Ct. Dec. 3, 1996). While the case was on its second appeal to the Hawaii Supreme Court, however, the voters approved a referendum allowing the state legislature to amend the state's constitution to declare that marriage is solely between a man and a woman. Sam Howe Verhovek, *From Same-Sex Marriage to Gambling, Voters Speak*, N.Y. TIMES, Nov. 5, 1998, at B1, LEXIS, News Library. In light of that development, the court recently ruled that the case before it was moot. *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999). Unresolved, though, is the issue of whether the state can deny same-sex couples the benefits that married couples enjoy.

8. See Goldberg, *Rights of Same-Sex Couples*, *supra* note 6 (citing the positive reaction of Matt Coles, director of the Lesbian and Gay Rights Project of the American Civil Liberties Union: "it's astonishing"); *Homosexual Rights*, FACTS ON FILE WORLD NEWS DIG., Dec. 23, 1999, E3 at 933, LEXIS, News Library, Facts File (quoting Beatrice Dohrn, Legal Director for the Lambda Legal Defense Fund: "We've never gotten this kind of official recognition. They're saying it's a social good that we be who we are, that we be in strong and loving families."). But see John C. Campbell, Letter to the Editor, *A Gay-Rights Victory in Vermont*, N.Y. TIMES, Dec. 23, 1999, at A28, LEXIS, News Library (pointing out practical problems of any solution short of marriage); Steve Chapman, *Do Conservatives Really Believe in Marriage?*, CHI. TRIB., Dec. 26, 1999, at 23, LEXIS, News Library (denying same-sex couples access to marriage "serves mainly to harm children").

survive any subsequent judicial challenge.⁹ The debate resulted in the creation of a new legal creature, called the "civil union," which attempts to convey all the benefits of marriage—except for the word itself—upon same-sex couples.¹⁰

Chief Justice Amestoy, writing for the *Baker* majority, was candid about the possible negative consequences of simply requiring the state to issue marriage licenses, noting that similarly progressive decisions by courts in Hawaii and Alaska were subsequently undone by the legislature and the citizens of those states.¹¹ Although political and constitutional realities would have made such developments less likely in Vermont,¹² the court obviously thought that avoiding the "m" word stood to achieve a more just outcome, by depriving opponents of a totem to rally around. However politically shrewd, the decision—and the legislative response it effectively encouraged—is deficient in remedy and (therefore, not surprisingly) in justification for that remedy.

These inadequacies were pierced by Justice Denise Johnson's partial concurrence: while agreeing that excluding same-sex couples from the benefits of marriage violated the state constitution, she disagreed with the majority's decision to "punt" the remedy issue to the legislature.¹³ She would have given the plaintiffs the remedy they sought: marriage.¹⁴

9. See, e.g., Goldberg, *Rights of Same-Sex Couples*, *supra* note 6 (comparing the views of Governor Howard Dean, who supported what became the civil union compromise, with that of Attorney General William Sorrell, who noted that domestic partners "wouldn't be called spouses . . . and for a number of people, that makes an enormous difference"); William R. Macklin, Editorial, *Ruling Heats Up Same-Sex Debate*, PHILA. INQUIRER, Dec. 26, 1999, at E01, WL, PHILINQ database (discussing view of Vermont House Speaker Michael Obuchowski, who supports same sex-marriage but believes that domestic partnership is a more politically attainable solution).

10. See discussion and sources cited *supra* note 4.

11. *Baker v. Vermont*, 744 A.2d 864, 888 (Vt. 1999).

12. As to the political climate in Vermont, see sources cited *supra* note 9. It also happens that the Vermont Constitution is especially difficult to amend. See VT. CONST. ch. II, § 72 (1999) (setting forth the procedure for amendment). Beginning in 1975, amendments can be proposed only during biennial sessions of the General Assembly "convening every fourth year thereafter." *Id.* This means that the next opportunity for such proposals would occur in 2003. Proposals must be made by a two-thirds vote of the Senate and then approved by a majority of the House of Representatives. *Id.* Amendments approved through that process must then be referred to the next biennial session, and reapproved by a majority of both the Senate and House. *Id.* If all of those hurdles are cleared, the General Assembly must then submit the proposed amendment to the voters, who have the final say. *Id.* Only if they approve the amendment by a majority does it finally become part of the state constitution. *Id.*

13. *Baker*, 744 A.2d at 897 (Johnson, J., concurring in part).

14. Justice Johnson agreed that the state's refusal to grant marriage licenses unconstitutionally deprived Vermonters of their rights under the Common Benefits Clause, but dissented from the court's remedial disposition. Her opinion is discussed more fully *infra* Part III.

This Essay explores that concurrence through comparison with an unexpected source: Justice Roger Traynor's memorable concurrence in *Escola v. Coca Cola Bottling Co.*,¹⁵ in which he straightforwardly, but radically, endorsed the principle of strict liability in tort for latent product defects that cause personal injuries to consumers¹⁶—a principle finally vindicated in California (and ultimately everywhere) some nineteen years later, in a decision written by Traynor himself.¹⁷

The similarity between these two concurrences occurred to me shortly after reading Justice Johnson's opinion. I then spent some time wondering why. On the surface, after all, there are surely better candidates for comparison: the Vermont decision involved constitutional law, while the California case turned on a question of common law tort; while *Baker* involved *couples* disadvantaged by a state licensing scheme, *Escola* was a simple personal injury case; perhaps most significantly, the plaintiffs in *Baker* were not granted an immediate remedy, while the plaintiff in *Escola* recovered damages under the majority holding.

Yet, the two cases share vital similarities that can be instructively explored. Indeed, this Essay takes the position that *Baker's* concurrence is of the same lineage as *Escola's*.¹⁸ Both opinions reflect uncommon insight into areas that, while substantively disparate, share a position at the *avant-garde*. They grasp that, at certain points of societal transformation, it is time to articulate principles that reach beyond what may be strictly necessary to resolve the case under consideration. Justice Traynor's opinion was more plainly an extension, because an adequate remedy was at hand without the principle of strict liability for which he argued. In contrast, much of Justice Johnson's opinion was taken up by a discussion of the very inadequacy of the remedy provided by the majority. The opinions, however, share a refreshing focus on the kinds of societal changes that compel a reconsideration of underly-

15. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

16. *Id.*

17. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

18. For a broad treatment of the issue of concurring opinions, see Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1990). Professor Ray identifies and discusses four categories of concurring opinions: the limiting concurrence, the expansive concurrence, the emphatic concurrence and the doctrinal concurrence. *Id.* at 784-809. Justice Traynor's opinion is a doctrinal concurrence, but Justice Johnson's is so difficult to categorize that not much is gained by the effort. Part of the problem, of course, is that the decision is a partial concurrence and a partial dissent (as to the remedy).

ing assumptions, thereby unmasking the inadequacy of both the majorities' decisions.

Part II of this Essay discusses Justice Traynor's contribution to the development of product liability law. Much of this story will be familiar to torts scholars, but I hope to underscore the reasons that the doctrinal change he advocated, although "tiny" in result, was of great, and rare, importance. Part III makes the point that Justice Johnson's partial concurrence, although likely to be similarly small in terms of ultimate legal result, will reverberate throughout the same-sex marriage debate, just as Justice Traynor's did in the product liability context. Today, the wisdom of the *Escola* concurrence is taken as commonplace. This Essay will be successful if it persuades readers that the *Baker* concurrence deserves the same privileged status—*without* the two-decade lag.

II. *ESCOLA'S* ACHIEVEMENT

By 1944, when the *Escola* concurrence was written, liability for injuries caused by latent product defects was in a messy state.¹⁹ In order to appreciate the incisiveness of Justice Traynor's opinion, a summary of that state follows. The main problem for plaintiffs was that, unless they could prove negligence, they were remitted to the Byzantine law of warranty for recovery. Warranty law was appealing because liability was strict: in selling a consumer good, sellers warranted that good free from dangerous defects. Inasmuch as warranty law was, and remains, a hybrid of contract and tort principles, its application to personal injury cases has always proven problematic.²⁰ The chief obstacle has been privity: because

19. Latent defect cases are the sole source of analysis here. Mainly, but not exclusively, these are defects of manufacture, not of design. John G. Culhane, *The Limits of Product Liability Reform Within Consumer Expectation Model: A Comparison of Approaches Taken by the United States and the European Union*, 19 HASTINGS INT'L & COMP. L. REV. 1, 52-55 (1995). These cases are the cleanest because the latency of the defect means that the consumer is in a position of forced reliance on the seller. This point is explored further later in this Essay. The argument works less well in the case of consumer awareness of, and conscious engagement with, the aspect of the product that creates the risk. As has long been recognized, such engagement may be subtle and difficult to discern, especially in view of the complexities of product marketing and presentation. See generally Marshall Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974) (analyzing the legal development of products liability and focusing on representations made to the consumer).

20. The problems to be discussed in this Essay are the best known, but the issue of how to analyze product defect claims brought under a theory of implied warranty has caused puzzlement in unexpected situations. In *Woolworths Ltd. v. Crotty* (1942) 66 CLR 603, for example, the Australian High Court had to decide whether the wrongful death statute afforded a remedy where the triggering death had been caused by a breach of

warranty law liability was tied to the *sale* of the good, the injured consumer could only sue his immediate seller—and then, only if the consumer himself was the purchaser.²¹ Sometimes courts skirted this requirement, but at the expense of clarity and consistency.

As demonstrated by *Klein v. Duchess Sandwich Co.*,²² courts had a particular appetite for sidestepping the hurdles imposed by warranty law in so-called “foodstuffs” cases. In *Klein*, the plaintiff consumer, whose husband had bought a ham and cheese sandwich for her, found her dining experience compromised by the presence of maggots within the refreshment.²³ She sued both the sandwich retailer and the manufacturer.²⁴ As to the manufacturer, Mrs. Klein had a double privity problem: the immediate seller was the retailer and she was not a purchaser.²⁵ The court, however, had little patience for these supposed impediments to recovery. After citing a number of sources for the proposition that an exception to the rule should be made for defective food products,²⁶ the court looked to both the realities of current marketing practices and food and drug laws designed to safeguard public health.²⁷ It thereby concluded that the lack of vertical privity of contract between the consumer and the manufacturer should not be a barrier to recovery.²⁸ It then quickly dismissed the argument that the wife had not herself been the purchaser, noting that the point had “been answered by the ruling hereinbefore made.”²⁹ The court’s conclusion was bolstered by noting the consequences of a contrary holding. A child would not be able to recover for injury suffered by drinking a bottle of unwholesome milk purchased by his/her parents, for example.³⁰

contract—implied warranty for an electric globe that exploded—not by a tort, at least not as pleaded.

21. These privity rules applied in cases of both personal injury, *Chanin v. Chevrolet Motor Co.*, 15 F. Supp. 57, 58-59 (N.D. Ill. 1935) (plaintiff’s claim only against direct seller of automobile; argument about implied representation “probably contains much truth,” but change in law should come from legislature), and economic loss, *Timberland Lumber Co. v. Climax Mfg.*, 61 F.2d 391, 392 (3d Cir. 1932) (warranty of sale “is understood ordinarily to apply only between the vendor and the immediate purchaser), although, as stated in the text, the rule was sometimes relaxed in cases involving contaminated foods. *Young v. Great Atl. & Pac. Tea Co.*, 15 F. Supp. 1018, 1018-19 (W.D. Pa. 1936) (husband who bit into a mouse was a proper plaintiff under warranty law, even though wife had purchased the product, but claim was against immediate, not remote, seller).

22. 93 P.2d 799 (Cal. 1939).

23. *Id.* at 800.

24. *Id.*

25. *Id.*

26. *Id.* at 802-03.

27. *Id.* at 803.

28. *Id.* at 803-04.

29. *Id.* at 804.

30. *Id.* at 805.

Furthermore, the court characterized the husband in this case as his wife's agent, since "the evidence shows that [she] 'sent' [him] into the restaurant for the express purpose of purchasing for her the sandwich" ³¹

By the standard of that time or this, the above result is just. But what about consumers injured by something other than food products? ³² What courts and litigants could not accomplish through warranty, they sought to do through negligence law. The problem for plaintiffs is that it can be difficult, if not impossible, to prove that the manufacturer's practices were negligent. In *Klein*, the trial court had directed a verdict for the defendant on the negligence issue, because of undisputed (and probably indisputable) evidence that "in the manufacture of sandwiches generally, care had been exercised." ³³ This determination was reversed. ³⁴ The California Supreme Court was quite willing to conclude that only a lack of care could have caused the wrapped sandwiches to have reached the plaintiff in a diseased condition, despite the lack of direct evidence on that score. ³⁵

This kind of inference was often dignified with the label *res ipsa loquitur*, the doctrine that permits, but does not require, juries to find negligence in cases where "(1) defendant had exclusive control of the thing causing the injury and (2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant." ³⁶ A moment's reflection reveals the clumsiness of fit between *res ipsa* and defective product cases. First, it may not be possible to know whether the accident would have happened in the absence of negligence: given a high enough volume of production, even a highly responsible manufacturer will presumably allow *some* defective goods to be placed in the market. More difficult still is the problem of exclusive control, even if that term is used liberally to mean that the product was in the defendant's hands when it became defective (rather than, as generally required, when it caused injury). In a significant number of cases,

31. *Id.*

32. As might be expected, courts did not consistently limit the exception to cases involving food. In *Klein*, the court cited favorably to the Washington Supreme Court's decision in *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1915), which also excused the privity requirement "where the thing causing the injury is of a noxious or dangerous [character]"—whatever that means. *Klein*, 93 P.2d at 803 (quoting *Mazetti*, 135 P. at 634).

33. 93 P.2d at 800.

34. *Id.* at 805.

35. *Id.* at 801.

36. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 438 (Cal. 1944) (citations omitted).

it will be impossible to satisfy the requirement even on that liberal reading of it.

The deficiencies of *res ipsa* in product defect cases are dramatically illustrated by *Escola v. Coca Cola Bottling Co.*³⁷ In *Escola*, some thirty-six hours elapsed between the time the defendant's driver delivered the Coca Cola and the bottle breaking, or exploding, in the plaintiff's hand causing serious injury.³⁸ Perhaps in part because the defendant had not pressed the point on appeal, the treatment of this significant time lag was terse in the majority opinion: "[t]he evidence appears sufficient to support a reasonable inference that the bottle here involved was not damaged by any extraneous force after delivery to the restaurant by defendant."³⁹ Well, who knows?⁴⁰

In short, even if there are cases where *res ipsa* might be made to apply without too much manipulation, *Escola* requires a particularly high degree of maneuvering. Given the court's eagerness to find the manufacturer liable here—a willingness shared by other courts of that era⁴¹—why not simply apply a rule of strict liability and be done with it? The simplest answer is that courts were just not ready to do so. Although the case law increasingly sided with the plaintiffs, courts gave away their generally conservative nature in refusing to make liability strict *in tort*, although warranty law, as we have seen, was contorted to serve that purpose. As late as 1960, just three years before the ground-breaking, strict liability decision in *Greenman v. Yuba Products, Inc.*,⁴² and sixteen years after *Escola*, no less an authority than William Prosser predicted that acceptance of strict liability would not be quick. "Thus far there has been relatively little indication that the time is yet ripe for what may very possibly be the law of fifty years ahead."⁴³ Yet, aside from

37. *Id.* at 436.

38. *Id.* at 437-38.

39. *Id.* at 439.

40. The case would have been more difficult still had the driver not been employed by the bottler, because then the driver's conduct would also have presented opportunity for misuse of the product. The problem of establishing that the defect would not have been created without negligence was also thorny in *Escola*. *Id.* at 439-40.

41. See generally JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY 11-12 (3d ed. 1997) (discussing succinctly the rise of, and problems with, *res ipsa loquitur* in product defect cases).

42. 377 P.2d 897 (Cal. 1963).

43. William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1120 (1960). Oddly, though, at an earlier point in the article Prosser discussed several recent cases that had applied strict liability in tort beyond the foodstuffs, or inherently dangerous, cases. *Id.* at 1110-14. Although he found the "wall [to be] still stoutly defended," *id.* at 1110, he also stated that these cases gave "the definite impression that the dam has busted," *id.* at 1113. For present purposes, it is worth noting that, although

noting the presumably dire consequence that strict liability would take in *everyone* along the chain of manufacture, distribution and sale, Prosser's own logic impelled in favor of such liability. In fact, each of the good reasons Prosser cited for moving to strict liability had been laid out by Justice Traynor more than fifteen years earlier.⁴⁴

The persuasive force of Justice Traynor's opinion resides in its appeal to both the practical and the normative. As the majority decision itself in *Escola* inadvertently makes clear, defective product cases had bent *res ipsa* into a shape that would have been unrecognizable to its creators.⁴⁵ The step Traynor advocated was short, inasmuch as "the negligence rule approaches the rule of strict liability."⁴⁶ Accordingly, "[i]t is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence."⁴⁷ Further, he noted that warranty law had been set free of its hallmark requirement of privity through a series of fictions, especially in the foodstuffs cases.⁴⁸ "[A] warranty runs with the chattel [or] the cause of action of the dealer is assigned to the consumer [or] the consumer is a third party beneficiary of the manufacturer's contract with the dealer."⁴⁹ Even in cases involving other products, the privity requirement was routinely hurdled through the chain of lawsuits running up from consumer through retailer and wholesaler to manufacturer, in a process Justice Traynor also described as "needlessly circuitous."⁵⁰

These doctrinal alterations, Justice Traynor argued, were understandable in view of changed circumstances in the relationship between manufacturer and consumer. "As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer

Justice Traynor's own decision in *Greenman*, 377 P.2d at 897, is usually cited as the breakthrough case on strict liability, his concurrence in *Escola* had begun to bear fruit sooner. See *infra* notes 57-60 and accompanying text for a discussion of *Greenman*.

44. Prosser, *supra* note 43, at 1120 (crediting Justice Traynor's opinion with first articulating the "risk spreading" argument for strict liability).

45. DAN B. DOBBS, *THE LAW OF TORTS* 372 (2000) (discussing the "ancestor" of the doctrine, *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863)).

46. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Traynor, J., concurring). One might question this conclusion by noting that *res ipsa* creates only an inference of negligence, which the jury is free to reject, while strict liability eliminates the question of reasonableness entirely. This is true, but of little practical effect. As Prosser noted, once the *res ipsa* inference is made, "a jury verdict for the defendant on the negligence issue is virtually unknown." Prosser, *supra* note 43, at 1115.

47. *Escola*, 150 P.2d at 441 (Traynor, J., concurring).

48. *Id.* at 442.

49. *Id.*

50. *Id.*

and the consumer has been altered."⁵¹ The incidents of this transformation justify both the consumer's right to rely on the manufacturer and the latter's responsibility for injuries caused by defective products. The consumer's inability to inspect mass-produced and plentiful products, her concomitant forced reliance on the safety of those products, and the manufacturer's participation in that reliance through aggressive marketing meant, for Traynor, that the manufacturer should be compelled to stand behind its goods. It should not be permitted to escape liability merely because "the marketing of a product has become so complicated as to require one or more intermediaries."⁵²

The opacity of the manufacturing and marketing processes, in turn, creates difficulties of proof for the product-injured consumer that further support imposing liability without fault. The consumer "is not ordinarily in a position to refute" the manufacturer's evidence, Justice Traynor correctly noted, because he/she "can hardly be [as] familiar with the manufacturing process as the manufacturer."⁵³ As a kind of corollary, the manufacturer will be more disposed to adhere to rigid quality and safety standards when liability is strict, as it then loses the economic benefit conferred by the indeterminacy of the negligence-finding apparatus.⁵⁴

Finally, the manufacturer is better positioned to spread the loss caused by injury, whether through self-insurance or third-party insurance, with the added cost passed on to consumers as a class. It has been noted that this last argument proves too much, as it could as much justify imposing strict liability for an injury caused by the manufacturer's truck delivering the goods to market as for defects in the goods themselves.⁵⁵ This point is well taken only if considered in isolation. Justice Traynor's observation about cost spreading is powerful in conjunction with his perceptive points on the relative helplessness of the consumer in product-defect cases and the related difficulties of proof. Neither factor is present in the vehicular accident case, as it is equally likely that the injured party

51. *Id.* at 443.

52. *Id.*

53. *Id.* at 441.

54. This indeterminacy operates in the defendant's favor given the burden of proof in negligence cases. It is multiplied where the product is open for inspection, or is altered, by sellers downstream from the manufacturer. See generally John G. Culhane, *Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products*, 95 DICK. L. REV. 287 (1991) (discussing complexities raised by the participation of non-manufacturing sellers).

55. See, e.g., *Wights v. Staff Jennings, Inc.*, 405 P.2d 624, 628 (Or. 1965).

was negligent as that the manufacturer's driver was, and the proof problems, as a class, are faced equally by both parties.⁵⁶

In sum, Justice Traynor's concurrence in *Escola* understands a changed reality and is not afraid to adapt the law to reflect it. It would be almost twenty years, though, before he could command a majority of the California Supreme Court to vindicate his vision. In *Greenman v. Yuba Power Products, Inc.*,⁵⁷ Traynor, in the final decade of his outstanding judicial career,⁵⁸ wrote for a unanimous court in announcing a principle of strict liability for latent product defects,⁵⁹ a principle whose justification he did not recanvass at length. It comes down to this: "Implicit in the [product's] presence on the market [is] a representation that it would safely do the jobs for which it was built."⁶⁰ When that expectation is dramatically frustrated by personal injury, liability should be—and has largely remained—strict.

Indeed, Justice Traynor's insight—that representation inheres in the product's very presence in the market—was insufficiently noticed by those who, with Prosser,⁶¹ maintained that the choice between strict liability and negligence in latent defect cases is quite small, given the court's willingness to permit, and the jury's to accept, the inference generated by *res ipsa*. Given the helplessness of the consumer in true latent defect cases, strictly enforcing the obligations such representations create is consistent with a consumer-expectation model of product defect. These expectations have been frustrated most dramatically in personal injury cases, whether or not the manufacturer has been negligent in creating the defect. The American Law Institute caught up to Traynor in 1964, when it produced the *Restatement (Second) of Torts*.⁶² Section 402(A) provided that strict liability for defective products would apply when the product's danger exceeded what would be expected by a reasonable consumer.⁶³ Thus, it has come to be recognized that

56. This is not to be confused with the employer's liability, under the doctrine of respondeat superior, for any negligence on the part of its employees.

57. 377 P.2d 897 (Cal. 1963).

58. Justice Traynor served on the California Supreme Court from 1940 to 1970. See John W. Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643, 1643 (1995). Professor Poulos cites a staggering array of praise for Traynor's work, coming from scholars, judges, lawyers and the press. *Id.* at 1643-45.

59. *Greenman*, 377 P.2d at 900.

60. *Id.* at 901.

61. Prosser, *supra* note 43, at 1114-15, 1120.

62. RESTATEMENT (SECOND) OF TORTS § 402(A) (1964).

63. *Restatement (Second) of Torts* section 402(A) imposes strict liability for "unreasonably dangerous" products and then goes on to define unreasonably dangerous articles as those that are "dangerous to an extent beyond that which would be contemplated by the ordinary

strict liability, while often only marginally improving the injured party's chances of success at trial, both enforces the obligations of product makers and takes seriously the expectations that manufacturers themselves create and upon which they trade.

III. BAKER'S PROMISE

The difference between marriage and the "virtually equivalent" civil union status is as small as the practical difference between strict liability and negligence in product defect cases. That is not to say that, in both cases, one cannot imagine situations in which the choice of words would matter. A manufacturer might be able to demonstrate its use of state-of-the-art quality control, thereby dispelling the inference of negligence; then, only a theory of strict liability would carry the day. In a parallel way, a same-sex couple residing in Vermont will doubtless find that their civil union is less portable than marriage. If one member of the couple were hospitalized while vacationing in a different state, the "almost spouse" could encounter difficulty using his/her civil union status to visit the other person in the hospital. Of course, the neighboring state might also refuse to recognize even a same-sex marriage, but it is predictable that the couple's difficulties would, in all, be greater with something *less* than marriage.⁶⁴ In the hospital case, for example, even if the state did not recognize the couple's marriage, the hospital itself might be more willing to honor a marital relationship than the unfamiliar (and still different) civil union.⁶⁵ Inasmuch as the

consumer who purchases it." *Id.* at cmt. i. Obviously, products that have latent defects, whether of manufacture or design, are dangerous in this way. The *Restatement (Third) of Torts: Products Liability* has confused the issue of consumer expectation considerably. See *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 2(a) (1998). As to manufacturing defects, disappointed consumer expectations are expressly invoked in section 2(a). More than any other type of defect, "manufacturing defects disappoint [consumer] expectation." *Id.* at cmt. c. As to design defects, though, the picture is much less clear. Frustrated expectations, standing alone, do not suffice for a finding of defect, although they may "substantially influence," *id.* at cmt. g, or "even be ultimately determinative," *id.*, on that issue, in ways not spelled out. Section 3 creates an independent basis for a finding of defect, allowing an inference to that effect for injuries "of a kind that ordinarily occur[] as a result of product defect[s]." *Id.* at § 3. Section 3 will capture some of the cases involving latently defective design, but perhaps not all. For an effective criticism of the failure to consistently value consumer expectations, see Jerry J. Phillips, *Achilles' Heel*, 61 TENN. L. REV. 1265, 1265-67 (1994) (pointing out that the strict liability remaining for manufacturing defects now constitutes an exception that reveals the inadequacy of the general rule).

64. See Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 137-44 (2000) (arguing that civil unions are likely to pose greater portability problems for same-sex couples than marriage would have).

65. I have only scratched the skin of a very deep problem, one that could easily be the

legislature followed the majority's mandate to confer on same-sex couples "the *same* benefits and protections afforded by Vermont law to married opposite-sex couples,"⁶⁶ though, the real legal differences between marriage and its same-sex equivalent seem rather small.

substance of a complete article. Part of the problem is that it is unclear whether civil union status will be of benefit to anyone other than Vermont residents. Although the legality of marriage is typically judged by universal recognition, the more recent, and inconsistently defined, domestic partnership is a local creature. The Vermont legislature has sought to make civil union, which is much more than a domestic partnership but still not marriage, portable in the same way that marriage has been. An Act Relating to Civil Unions, VT. STAT. ANN. tit. 18, § 5160(a), assumes that non-residents may be issued a civil union license. "The license shall be issued by the clerk of the town where either party resides or, *if neither is a resident of the state*, by any town clerk in the state." *Id.* (emphasis added). It is, therefore, inevitable that some same-sex couples will go to Vermont, be certified as civil unions, and return home with hopes of having their unions recognized. Whether the couple's state of residence will recognize this status is a wide-open question: the federal government and more than half the states have recently passed laws and constitutional amendments defining marriage as between a man and a woman. For a compilation of laws encompassing such changes see Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 394 n.22 (1999). During the primary season of the 2000 Presidential Campaign, California became the "hot spot" in terms of "defending" marriage. See Carol Ness, *Prop. 22 Passage Forces Gays to Regroup*, S.F. EXAMINER, Mar. 8, 2000, at A1, LEXIS, News Library. On March 7, voters approved Proposition 22, validating only marriages between a man and a woman. *Id.*

The odd lacuna in the language used in statutes that define marriage as between a man and a woman is that, by their terms, they do not prevent the recognition of any status other than marriage. This omission may be "remedied," however, in the wake of developments in Vermont. An early indication of trouble comes from Nebraska, where the state constitution was just amended to block recognition of "the uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship" NEB. CONST. art. 1, § 29. It is a cruel irony that this new section appears in the state's so-called Bill of Rights. In most states, however, it remains open for a civil union couple to argue that their state's defense of marriage laws do not apply to them. Even where such statutes are absent or do not apply, it is unclear whether other states are obliged to recognize same-sex unions, however labeled. See, e.g., Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 804-06 (1999) (arguing that states should not use a public policy exception to decline recognition of same-sex marriages performed in other states, but should employ non-political choice of law principles). This question, or the more fundamental question of whether states must, as an initial matter, allow same-sex unions, can be predicted to come before the U.S. Supreme Court at some point. Although these points are not addressed in any of the three Baker opinions, the majority's repeated reference to the rights of "Vermonters" (the term itself is used seven times by my count) signals the Vermont court's unwillingness to reach beyond its own borders. *Baker v. Vermont*, 744 A.2d 864, 867-912 (Vt. 1999). Indeed, the court pointedly declined to reach beyond the state's own constitutional Common Benefits Clause. VT. CONST. ch. I, art. 7. Given the opprobrium that would attach to the state responsible for unleashing same-sex marriage on the nation, the court's cautious approach is certainly politically understandable. As Justice Johnson points out, though, the court has the obligation to decide the case before it—an obligation that it dodges by issuing "little more than a declaration of rights." *Baker*, 744 A.2d at 904 (Johnson, J., concurring in part).

66. *Baker*, 744 A.2d at 886 (emphasis added).

Indeed, the hospital visitation example indirectly makes that point.⁶⁷

A. *The Requirement of Formal Equality*

But, just as Justice Traynor's concurrence understood the importance of insisting that manufacturers stand behind their products, Justice Johnson's opinion reveals a deep understanding of the requirements for real equality, and the proper place of the judiciary in ensuring it. She brings to the case a rich understanding of the importance of marriage itself and, therefore, the necessity of granting plaintiffs access to that institution, not some newly machined, virtual equivalent. Her commitment to true equality—an anti-caste principle—is evident both in her disagreement with the (non)remedy the court orders and in her recognition that the exclusion of same-sex couples from marriage perpetuates the historical inequality of that institution.

Justice Johnson begins with a concise plea to simply require the state to grant marriage licenses to same-sex couples. This exhortation straightforwardly places same-sex and opposite-sex couples on the same plane, so as to "create reliable expectations that would stabilize the legal rights and duties of all couples."⁶⁸ Granting a marriage license—which, after all, is what the plaintiffs sought—is the simplest way to achieve that goal, and so commends itself. The radical theme of Johnson's disagreement as to the remedy is, it seems: "What's the big deal?" She states: "This case concerns the secular licensing of marriage. . . . [A] marriage license merely acts as a trigger for state-conferred benefits."⁶⁹ By emphasizing the banality of the *process*, this language represents a kind of legal distillate: this secular institution should be available to all couples who desire admission to it.⁷⁰ Equality so demands.⁷¹ With elegant

67. Of course, state law will impose additional legal disabilities on civilly united couples who move out of Vermont, in part because of the various defense of marriage acts that have been passed. For example, an employee of a certain corporation might find that the benefits afforded to her same-sex partner in Vermont would not follow the couple if the employee were transferred to another state. While the couple would have the same rights as a married couple in Vermont (including a right to employer-conferred benefits available to married persons), upon moving it might shed that status.

68. *Baker*, 744 A.2d at 898 (Johnson, J., concurring in part).

69. *Id.* at 898-99.

70. This is true *prima facie*. The state may shepherd forth justifications for disallowing particular couples, or classes of them, from marrying. All of the justices agreed, however, that the state had not done so in the case of same-sex couples. The point is explored further in the text.

71. I made the same point in John G. Culhane, *Uprooting the Arguments Against Same-*

simplicity, Justice Johnson avoids the deep debate concerning the social and religious significance of marriage.

Unfortunately, though, this tidy argument will not do the trick by itself. Although there is a presumption that the state's obligation to issue marriage licenses extends to all couples who want them, it may be overcome by showing a "sufficiently strong" state interest for refusing such a license. I have deliberately used the non-committal term "sufficiently strong" because the *Baker* opinion is unusually blurry in this regard.⁷² The majority (three of five on this issue alone)⁷³ formally renounced any allegiance to conventional equal protection analysis, by which courts employ different tiers of analysis depending on the class of person affected or nature of the right asserted.⁷⁴ The court opted instead for a more general balancing test, by which it will hereafter decide whether a classification that "includes some members of the community . . . but excludes others . . . is reasonably necessary to accomplish the State's claimed objectives."⁷⁵

Whatever this general balancing test requires, the state did not meet it. On this point, the court was unanimous.⁷⁶ Boiled down, the court's central findings on the state's justification for excluding same-sex couples were that the link between procreation and child-rearing, while cognizable, would not be impaired by permitting same-sex couples to marry, and that the deprivations occasioned by

Sex Marriage, 20 CARDOZO L. REV. 1119, 1180-82 (1999). The positive argument for same-sex marriage, anchored in principles of fundamental equality, is disarmingly simple to make. See *id.* It is also not enough, for reasons I develop later in this Essay. See *infra* Part III.B.

72. *Baker*, 744 A.2d at 870.

73. In addition to Justice Johnson's partial concurrence and partial dissent, Justice Dooley wrote a separate concurrence. *Baker*, 744 A.2d at 889-97 (Dooley, J., concurring). His sole, but significant, disagreement with the majority was on the issue of how to analyze claims arising under the Common Benefits Clause. In his view, the decision to abandon the layered approach to equal protection issues (as translated by the Vermont State Constitution into the requirement of Common Benefits) in favor of a kind of totality of the circumstances approach was a mistake. *Id.* On this point, Justices Dooley and Johnson were in agreement. *Id.* at 907 n.13 (Johnson, J., concurring in part) ("I share Justice Dooley's concern . . . with the majority's approach.").

74. The Vermont court ably summarized the three-tiered approach. *Baker*, 744 A.2d at 870 n.3 (for suspect classes or where fundamental rights are at stake, scrutiny is strict; for issues of gender or illegitimacy, the law must have a "substantia[li] relat[ionship] to a sufficiently important governmental interest;" for other classifications, the law must simply have a rational basis). As the court later points out, though, the Supreme Court has recently made "unacknowledged departures" from its own framework. *Id.* at 872 n.5 (citing Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 59-61 (1996)); see also Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 619-22, 628-34 (2000) (examining the application of rational scrutiny in recent Supreme Court decision concerning gay rights).

75. *Baker*, 744 A.2d at 878.

76. *Id.*

exclusion from the state-conferred benefits of marriage were substantial.⁷⁷ Thus, the court's balancing test weighed heavily in favor of same-sex couples.

Notwithstanding this result, the majority's decision to jettison the tiered approach to equal protection (or, in Vermont, common benefits) cases is worth some discussion. As Justice Dooley exhaustively demonstrated in his concurrence, with which Justice Johnson agreed,⁷⁸ the move is a wholesale repudiation of the decisional law holding that cases involving fundamental constitutional rights or suspect classifications deserve more searching scrutiny than cases involving, say, economic discrimination.⁷⁹ Dooley fears, probably with some justification, that the new balancing approach may be "ignored . . . in the future."⁸⁰ Given the sacrifice in predictability brought about by this shift, why did the court make the change? More to the point, why now?

I suspect that the answer has something to do with a residual discomfort with the notion that gays and lesbians deserve the full panoply of civil rights afforded everyone else. This conclusion may seem uncharitable in view of the court's "recognition of our common humanity,"⁸¹ and its statement that the couple's rights should be vindicated "not because they are part of a 'suspect class,' but because they are part of the Vermont community."⁸² Nonetheless, the timing of the collapse of categories, together with a few clues from the language of the decision, offer at least some support for this reading. The first sign of trouble is that the court is at pains to disagree with Justice Johnson's belief that denying same-sex couples the right to marry amounts to a form of sex discrimination.⁸³ If discrimination on the basis of gender would simply be run

77. *Id.* at 881-84. The state made other arguments, but the court disposed of these rather quickly, in part because the state's position on same-sex marriage was "diametrically at odds" with its generally progressive legislation on gay issues. *Id.* at 884. For example, the contention that exclusion of same-sex couples was necessary to "promot[e] child rearing in a setting that provides both male and female role models," *id.*, was belied by "a law removing all prior legal barriers to the adoption of children by same-sex couples." *Id.*

78. *Id.* at 908 n.3 (Johnson, J., concurring in part).

79. *Id.* at 893 (Dooley, J., concurring). Dooley noted that Vermont's former approach is also consistent with that followed by the federal courts and other state courts. *Id.* at 896-97.

80. *Id.* at 889. He also feared how it might be applied, since "the State now bears no higher burden to justify discrimination against African-Americans or women than it does to justify discrimination against large retail stores." *Id.* at 894. As explained later, *infra* notes 97-105 and accompanying text, there is reason to believe that the court will continue to demand a greater justification for state action in areas usually thought to trigger strict-scrutiny analysis.

81. *Baker*, 744 A.2d at 889.

82. *Id.* at 878 n.10.

83. *Id.* at 880 n.13.

through the same balancing test as the discrimination against same-sex couples was in this case, why not simply point that out and be done with it? Instead, the court noted that "discriminat[ion] on the basis of sex would bear a heavy burden" of justification.⁸⁴ Similarly, in its disagreement with Johnson on the remedy issue, the majority stated: "We do not confront in this case the evil [of] institutionalized racism"⁸⁵ As Johnson pointed out, this statement "implies that our duty to remedy unconstitutional discrimination is somehow limited when that discrimination is based on sex or sexual orientation rather than race."⁸⁶ Finally, and most directly, the court noted that "the overwhelming majority of decisions have rejected [claims] . . . that lesbians and gay men are a suspect class."⁸⁷ Although there is a strong argument that consistent state policy in Vermont supports treating gays as a suspect class,⁸⁸ and despite the fact that the court did not decide the issue, there is at least some evidence in the majority's decision to suggest a lingering discomfort with fully recognizing the rights of gays and lesbians.⁸⁹

One reason for the court's diffidence may be a simple desire to keep its options open in this case. Consider what may occur in the aftermath of the Vermont decision. The legislature granted the full package of rights held by opposite-sex couples to same-sex couples, but withheld the approbation of the word "marriage."⁹⁰ Now suppose that a civilly united couple brings a suit claiming that the legislative remedy is not complete, perhaps because of the added difficulties the couple would likely face outside the state.⁹¹ In that instance, the court could say that the balancing now weighs in favor

84. *Id.*

85. *Id.* at 887.

86. *Id.* at 902 n.5 (Johnson, J., concurring in part). In fairness, this conclusion is only an implication. As the court pointed out, racial segregation was the very point of segregation statutes, whereas Vermont's marriage statutes were not drafted for the purposes of excluding same-sex couples, since the possibility of such marriages was unimaginable at that time in Western society.

87. *Id.* at 902 n.10.

88. *Id.* at 890-91 (Dooley, J., concurring) (noting that the state's legislative policies, which include the prohibition of discrimination based on sexual orientation, are considerably more gay-friendly than most states').

89. As noted earlier, the decision may have been politically wise. The majority may have feared legislative overreaction from a directive to issue marriage licenses. The argument here is simply that the court's commitment to full equality for gays and lesbians is less than fully clear from the language of the decision.

90. See discussion and sources cited *supra* note 4. Professor Cox regards the legislative decision to begin the civil union law with a finding that marriage still means the union of a man and a woman as showing the "thin disguise" of equality. Cox, *supra* note 64, at 127.

91. See discussion *supra* Part III; see also Cox, *supra* note 64, at 137-44.

of the state.⁹² The couple's interest is significantly less because of the possibly small set of problems that would remain, so the state might succeed on a less-than-powerful showing: perhaps some vague concern about problems it might face by becoming known as the "gay marriage state." By anchoring its analysis in the couple's interest in having the same rights as opposite-sex couples, rather than in a presumption that such discrimination is targeted at members of a marginalized or suspect group, the court might have provided itself with a tool for continuing the political compromise ushered in by *Baker*.

B. Beyond Formal Equality

Another reason for the inadequacy of a stand-alone, formal argument for equality is that the moral bracketing—the consignment of values to arenas other than the judiciary—it seeks to achieve is neither possible nor desirable. Ultimately, the argument for same-sex marriage will succeed only when it comes to be seen as a good thing, not "merely" something required by the mechanical application of a set of neutral legal principles. Commentators are beginning to recognize the importance of arguments about values in this area,⁹³ and Justice Johnson's opinion did too, albeit inconsistently. She made two related points, on one of which she expressly declined to reach a conclusion (although her sympathies are clear enough).⁹⁴ Together, these points form the core of the opinion's radical promise of equality.

The first point is a short step from the formal guarantee of equal treatment of citizens under the law. In a lengthy footnote, Justice Johnson addressed the argument that even a domestic partnership type of scheme that placed same-sex couples on the same legal plane as opposite-sex couples would still, by withholding the term and, therefore, the status of marriage, fail to solve the problem of unequal status.⁹⁵ She cited, with evident approval, both

92. See Gil Kujovich, *An Essay on the Passive Virtue of Baker v. State*, 25 VT. L. REV. 93, 110 (2000) ("Under the majority's balancing approach, the constitutionality of legislation that failed to achieve complete equality of benefits depended . . . on the [c]ourt's subjective evaluation of the significance of the benefits excluded.").

93. See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 109-15 (1996); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1930-35 (1997); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1594-1615 (1997); Culhane, *supra* note 71, at 1130.

94. *Baker v. Vermont*, 744 A.2d 864, 898 (Vt. 1999) (Johnson, J., concurring in part).

95. *Id.* at 899 n.2.

commentators and courts on this point,⁹⁶ including the Supreme Court's observation that "laws singling out gays and lesbians for special treatment 'raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.'"⁹⁷ Here, though, Johnson's sensible conclusion that the simple act of granting a marriage license would be the most direct remedy, as well as being the result the plaintiffs sought, led her to demur on the social stigma point: "Because enjoining defendants from denying plaintiffs a marriage license is the most effective and complete way to remedy the constitutional violation . . . [,] it is not necessary to reach the issue of whether depriving plaintiffs of the 'status' of being able to obtain . . . [a] marriage license . . . violates their civil rights."⁹⁸

If a suit challenging the completeness of the legislative remedy is brought, Justice Johnson may be asked to answer the question she (properly) declined to decide in *Baker*. Stated provocatively, the question would reduce to whether the state could impose a separate-but-equal system for licensing couples. We know that, in the context of race, government-mandated separation is "inherently unequal,"⁹⁹ and Justice Johnson's opinion strongly suggests that the same is true in the context of sexual orientation, even in the unlikely event that formal equality could be attained. This warning should be heeded.

If the court is called upon to decide whether same-sex couples must be afforded the right to marriage, per se, two related points from *Brown v. Board of Education*¹⁰⁰ should guide its consideration. First, marriage, like education, is a fundamental incident of citizenship.¹⁰¹ Both come directly from the state, which should not be a party to the creation of caste.¹⁰² Consider the surprising ease

96. *Id.*

97. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

98. *Id.*

99. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

100. *Id.* at 483.

101. In *Brown*, the Supreme Court described education as "the very foundation of good citizenship." *Id.* at 493. One difference between the two is that marriage is not a foundation of citizenship so much as a right of citizens.

102. Although the right to marry and the right to an education are basic, they are generally regulated by the individual states. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (education); *Zablocki v. Redhail*, 434 U.S. 374, 398 (1978) (Powell, J., concurring) (marriage). Both, however, enjoy some level of heightened federal constitutional protection. The Court in *Brown* stated that education is "perhaps the most important function of state and local governments," *Brown*, 347 U.S. at 493, and the Court has, on other occasions, stated that, while education is not a fundamental right, the state must show a "substantial . . . interest" in order to deny its benefits, *Plyler v. Doe*, 457 U.S. 202, 230 (1982). Marriage, on the other hand, is a fundamental right. *Zablocki*, 434 U.S. at 383-85.

with which I have adapted a passage from *Brown* to the same-sex marriage setting: "To separate [people] from others of similar . . . qualifications solely because of their [sexual orientation] generates a feeling of inferiority as to their status in the community" ¹⁰³ Second, *Brown* assumed the equality of tangible things, but found that "the effect of segregation itself" violates the guarantee of equal protection. ¹⁰⁴ By parity of reasoning, the *pure* inequality that remains under the compromise institution, civil union, should be found to offend principles of status neutrality. ¹⁰⁵

The other strand of Justice Johnson's argument that transcends legal formalism provides additional support for the conclusion that she would find this same-sex/opposite-sex centrifuge unacceptable. ¹⁰⁶ It may be useful to begin exploration of this point where Johnson does: by recognizing that the ban on same-sex marriage is a form of sex discrimination. ¹⁰⁷ This point seems initially debatable. One can say, with the majority, that banning same-sex marriages discriminates against neither sex because both sexes are equally disabled. Women can't marry women and men can't marry men; therefore, neither sex is at a disadvantage. ¹⁰⁸

There are two related responses to this conclusion. The first is simple, while the second is radical. The logic of the first response is this: even though taken overall, neither sex is discriminated against, in an individual case sex discrimination does occur. Consider Justice Johnson's example:

Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of the opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex This is sex discrimination. ¹⁰⁹

103. *Brown*, 347 U.S. at 494.

104. *Id.* at 492.

105. See Andrew Sullivan, *State of the Union*, NEW REPUBLIC, May 8, 2000, at 22. But see Kujovich, *supra* note 92, at 96 (suggesting that the court might see civil unions as "different but equal" and, therefore, constitutional).

106. *Baker*, 744 A.2d at 905 (Johnson, J., concurring in part).

107. *Id.*

108. *Baker*, 744 A.2d at 880 n.13.

109. *Id.* at 906 (Johnson, J., concurring in part); see also *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (treating some couples differently from others amounts to sex discrimination); ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 205-07 (1995) (decrying "mirror image" symmetry that attempts to justify one kind of discrimination with another).

Justice Johnson selected a particularly apt example in further support of her view. A statute might "requir[e] courts to give custody of male children to fathers and female children to mothers." She is correct (and unchallenged by the majority) in concluding that such a statute would amount to impermissible sex discrimination, even though men and women were visited with an equal disqualification.¹¹⁰ This example is sublime, because it simultaneously resolves the formal argument and moves the reader to examine *why* the conclusion is so obvious in this case, as it is not (perhaps) in the marriage context. The custody illustration thus oils the transition to Johnson's second response, which forms the radical core of her opinion.

A custody rule requiring a matching of the parent-child genders would fail, among other reasons, for its unstated but obvious assumptions about the natural affinity of fathers and sons, and of mothers and daughters. While such an affinity is, of course, often present, in particular instances the reverse might be true, or the child might have equal affinity for both parents. Such a law would rightly be condemned for embodying discredited gender stereotyping in legislative requirement. Although not as apparent, denying same-sex couples the right to marry amounts to a form of sex discrimination, because it is animated by "a vestige of sex-role stereotyping that applies to both men and women."¹¹¹ Justice Johnson concluded that Vermont may not differentiate between same-sex and opposite-sex marriages if doing so only "giv[es] credence to generally discredited sex-role stereotyping."¹¹²

Reading the state's view of marriage both historically and broadly, Justice Johnson noted that, until little more than a century ago, "the marriage laws imposed sex-based roles for the partners to a marriage—male provider and female dependent—that bore no relation to their inherent abilities to contribute to society."¹¹³ Of course, the requirement that marriage consist of one man and one woman does not, by itself, say anything about such roles. But it is clear that laws relating to marriage licenses embodied these long-standing assumptions of gender roles because the surrounding legal terrain did. Marriage swallowed whole a woman's very legal existence. "[S]he merged with her husband and held no separate rights to enter into a contract or execute a deed. . . . She could not

110. *Baker*, 744 A.2d at 905 n.10 (Johnson, J., concurring in part).

111. *Id.* at 906.

112. *Id.* at 905 n.11 (citations omitted).

113. *Id.* at 908.

sue without her husband's consent or be sued without joining her husband as a defendant."¹¹⁴

The bundle of laws negating the legal existence of women is gone,¹¹⁵ but the requirement that marriage be reserved for unions of one man and one woman remains. Thus, it is appropriate to ask whether the "sex-based classification . . . is simply a vestige of the common-law unequal marriage relationship or whether there is some valid governmental purpose for the classification today."¹¹⁶ One might be tempted to argue, with the majority, that this inquiry is improper because one should look at the motivations of those who drafted the marriage laws. As there is no evidence that "the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender role confusion,"¹¹⁷ the sex discrimination argument might be thought to fail.

This static view of constitutional interpretation, however, is at odds with the Vermont court's own precedent. In *MacCallum v. Seymour's Administrator*,¹¹⁸ the court struck down a statute prohibiting adopted children from inheriting from collateral heirs because the statute "rest[ed] on outdated presumptions not reasonable today when vast cultural and social changes have occurred."¹¹⁹ Whatever the legislature's intent in enacting a law, its continued validity is judged in light of contemporary conditions. The *MacCallum* court provided a useful, if banal, illustration of this principle in discussing an earlier case invalidating the law requiring adjoining landowners to share the cost of a division fence.¹²⁰ Although that law made sense when "the land was predominantly open and farmed, and most rural landowners were also livestock owners,"¹²¹ today it amounts to a confiscation by one landowner against another. The court considers the constitutionality of a law in light of contemporary conditions.

Measured by this standard, the exclusion of same-sex couples from the benefits of marriage fails. Justice Johnson concluded that the state's justifications are either "tautological, wholly arbitrary, or based on impermissible assumptions about the roles of men and

114. *Id.*

115. *Id.* (describing the development of women's legal rights in marriage).

116. *Id.* at 909.

117. *Baker*, 744 A.2d at 880 n.13.

118. 686 A.2d 935, 939-41 (Vt. 1996).

119. *Baker*, 744 A.2d at 909 (Johnson, J., concurring in part) (citing *MacCallum*, 686 A.2d at 939-41).

120. *MacCallum*, 686 A.2d at 939.

121. *Id.* (quoting *Choquette v. Perrault*, 569 A.2d 455, 460 (Vt. 1989)).

women."¹²² It is in discussing this latter class of defenses that the opinion attains its transforming power. The idea of "uniting men and women to celebrate the 'complementarity' . . . of the sexes and providing male and female role models for children"¹²³ is an echo of natural law arguments propounded by such legal scholars as John Finnis.¹²⁴ The state's justifications, as summarized by Johnson, are worth quoting in full because they represent a mainstream synopsis of the reconstructed natural law argument we can expect to see in every state, when same-sex marriage arises as an issue:

(1) [M]arriage unites the rich physical and psychological differences between the sexes; (2) [S]ex differences strengthen and stabilize a marriage; (3) [E]ach sex contributes differently to a family unit and to society; and (4) [U]niting the different male and female qualities and contributions in the same institution instructs the young of the value of such a union.¹²⁵

Using these gender-based differences as a kind of springboard, the state then pointed to the gains achieved by bringing diversity, of gender and of race, to society: women and minorities have a different voice.¹²⁶ This seductive argument, however, confuses the laudable goal of community diversity with the relationship between two people. True diversity in marriage would be further promoted, as Justice Johnson notes, by requiring "all marriages to be between people, not just of the opposite sex, but of different races, religions, national origins, and so forth. . . ."¹²⁷ Whatever may be the case on

122. *Baker*, 744 A.2d at 911 (Johnson, J., concurring in part). The discussion in the text concerns only the last of these three inadequacies. For the sake of completeness, I note here that the tautological argument was that, in essence, the status quo should be preserved. It is obvious that the state wishes that to be so, or it would not be defending the law. So this is no argument at all. *Id.* at 910. The arbitrary arguments were those that were plainly inconsistent with other expressed policies of the state. As one example, the state urged that the "prohibition may deter uses of technologically assisted reproduction by same-sex couples." *Id.* at 910. The state, however, does not deter such uses by opposite-sex couples, nor is there any other indication in Vermont law that the state disfavors such technologies. *Id.* Similarly, the state's interest in preventing marriages of convenience is no different whether the couple is same-sex or opposite-sex. *Id.* at 911.

123. *Id.* at 909.

124. *E.g.*, John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049 (1994). In fairness to the state of Vermont, Finnis' argument is that even sexual conduct between two members of the same sex violates natural law. *Id.* at 1069-70. Inasmuch as Vermont long ago abolished its proscriptions against particular forms of consensual intimate contact, *Baker*, 744 A.2d at 885, it would presumably not urge upon the court this version of a natural law argument.

125. *Baker*, 744 A.2d at 909 (Johnson, J., concurring in part).

126. *Id.*

127. *Id.* at 910.

the community level, on the intimate level of a committed couple the state's natural law argument "is sex stereotyping of the most retrograde sort."¹²⁸ Any two people might be more or less stereotypically masculine or feminine, whether those terms are defined in terms of historic role—who works outside the home, who inside, for example—or in terms of assumptions about behavior or "nature." As applied to a couple, "in short, the 'diversity' argument is based on illogical conclusions from stereotypical imaginings."¹²⁹ As Johnson noted, the Supreme Court has struck down sex-based classifications that "rely on overbroad generalizations about different talents, capabilities, or preferences of males and females."¹³⁰ Vermont's prohibitions on same-sex marriages fall into this category.

I have gone a step further, arguing that same-sex marriage would be healthy for marriage in general. By distancing itself from archaic assumptions about the scripted roles of men and women, the state would "unleash a great positive force, by encouraging the creative reconsideration of the true goods of the marital relationship."¹³¹ Those goods include a reaffirmation of the value of real commitment—untethered to role—and the unleashing of the couple's real potential. In fact, one of the reasons for the vitriolic opposition to same-sex marriage is its reinforcement of the simple truth that men and women have already traveled a great distance from their historically assigned roles. Occasionally, this dirty little secret bubbles to the surface. Consider this statement by Robert Knight of the Family Research Council: "As man is reduced in stature, all hell will break loose. We'll see a breakdown in social organization, with more drug use, more disease, more unwanted pregnancies."¹³² While this statement was made in reference to the perils presented by the movement toward gay equality, the women's

128. *Id.* I recognize a certain tension between the argument that the exclusion of same-sex couples from marriage reflects outdated notions of gender stereotyping and the observation that previously excluded groups, including women, bring a different voice to enterprises to which they are permitted access. The problem is more apparent than real, however. First, as Justice Johnson recognized, whatever may be the case on the broader cultural level may not be true in the instance of a particular couple. Second, often the exclusion of women from specific realms of public life is itself grounded in essentializing notions of male and female, which inclusion upends. As Justice Ginsburg stated in *United States v. Virginia*, 518 U.S. 515, 550 (1996), "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.*

129. *Baker*, 744 A.2d at 910 (Johnson, J., concurring in part).

130. *Id.* (quoting *United States v. Virginia*, 518 U.S. at 533).

131. Culhane, *supra* note 71, at 1198.

132. Robert Dreyfuss, *The Holy War on Gays*, ROLLING STONE, Mar. 18, 1999, at 38, 39-40.

movement would seem a better fit. Same-sex marriage is simply the more acceptable target.

IV. CONCLUSION

The Vermont Supreme Court has taken a bold step, delivering an opinion that announces judicial commitment to basic rights of citizenship for all: "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."¹³³

As inspiring as this language is, the majority should have discharged its responsibility to provide the plaintiffs with the remedy sought. Instead, what remains is the shell of legal discrimination against same-sex couples, who have to settle for *something* not-quite-marriage. The genius of Justice Johnson's opinion is its clear-eyed recognition that justice requires more than virtual equality. Her insistence on real equality, within the court's capacity to provide it, places her with those who are not afraid to celebrate the fullest expression of human potential. In seeing through to what is truly at stake, her opinion is of the same house as Justice Traynor's. One hopes that her validation will not take twenty years.

133. *Baker*, 744 A.2d at 889.