December 1988

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Link to publisher version (DOI)
https://doi.org/10.15779/Z38PC6K

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Same-Sex Marriage and Constitutional Privacy:
*Moral Threat and Legal Anomaly*

Hannah Schwarzschild†

Marriage being the mainstay of modern society, its widespread disruption threatens not only individual happiness but also the security of our social order.

ENCYCLOPAEDIA OF SEXUAL KNOWLEDGE‡

[H]eterosexuality, like motherhood, needs to be recognized and studied as a political institution

Adrienne Rich
*Compulsory Heterosexuality and Lesbian Existence* *

INTRODUCTION

“Privacy,” wrote one scholar in 1977, “is a legal wall badly in need of mending.”1 “[N]o constitutional issue has been more prone to loose platitude and sweeping assertion,” wrote another.2 The Supreme Court’s formulation of the right of privacy has been decried as “elusive and ill-defined,”3 wanting in “neutral” constitutional principle,4 and singularly vulnerable to subjective manipulation. Courts as well as legal scholars worry that privacy may serve as a sort of jurisprudential “black hole” that allows “activist” judges to indulge in moral rule-making which,

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‡ A. COSTLER, A. WILLY, ET. AL., ENCYCLOPAEDIA OF SEXUAL KNOWLEDGE 194 (N. Haire ed. 1934).
while deemed appropriate for legislatures, is felt to be unsuitably ideological for the judicial role.

In part, these critiques stem from genuine concerns for the legitimacy of the adjudicative process and the value of judicial restraint. Early in this century, Cardozo warned that a judge, “even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.”

Similarly, Justice Black wrote in 1947,

I fear to see the consequences of the Court’s practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights . . . .

. . . [T]his formula . . . can be used in the future to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the states as well as the Federal Government.

. . . [T]o pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of ‘natural law’ deemed to be above and undefined by the Constitution is another.

More recently, Justice White, writing for the majority in Bowers v. Hardwick,7 worried that “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”

Fundamentally, these expressions reflect profound dissension over the nature and authority of judicial review, and tensions between normative or majoritarian values, on the one hand, and a “higher moral law” on the other.9 The existing power of judges to refuse effect to laws duly enacted by elected representatives in democratic society is indeed anomalous, Marbury v. Madison10 notwithstanding. Justice White’s continuing

7 478 U.S. 186 (1986) (holding that constitutional rights of privacy did not prevent the State of Georgia from imposing criminal penalties for homosexual sodomy).
8 Id. at 194.
9 Compare Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. REV. 800 (1986) with Sandel, Moral Argument and Liberal Toleration (77 CALIF. L. REV.— (upcoming May 1989)). Indeed, the current debates between defenders of a newly deconstructed liberalism and the so-called “communitarians” constitute yet one more round in this unending bout. Privacy theory is a favorite battleground. Thus, liberal scholars point to autonomy and the sanctity of individual choice as the core value informing notions of privacy as well as the overall constitutional scheme. Communitarian advocates strenuously object that democracy itself is imperiled when courts substitute their own moral values for those of the people at large.
10 5 U.S. (1 Cranch) 137 (1803).
discomfort with privacy jurisprudence reflects just such a majoritarian concern: when the judiciary interferes with legislative enactments reflecting the will of the people, without grounding that intrusion in clear Constitutional language, it implicitly calls into question the democratic nature of the entire system of government.

Not surprisingly, the majority of those who view constitutional privacy as the illegitimate brainchild of a hyperactive judiciary also disapprove of the outcomes that its recognition have made possible: the discovery of legal rights to contracept, to abort, to engage in some socially-disapproved sexual behaviors within the privacy of one’s home, etc. Conversely, those who like these outcomes have tended to locate privacy rights in “fundamental principles” crucial to constitutional democracy, as well as enlightened society. While feminist scholars have persistently argued that such outcomes might better have been located in principles of equality, the “penumbra” theory first articulated by Justice Douglas in *Griswold v. Connecticut* appears to have taken root with the courts, as well as with the mainstream of legal thinking. Thus, even legal academicians who admit that “neither abortion, contraception, sterilization, marriage, divorce, nor child rearing falls in a definable category closely related to the protections of the bill of rights,” nonetheless effectively concur with the notion that there exists a core constitutional basis for the right of privacy, whatever its textual source.

But the liberal defense of the “penumbra” doctrine is disingenuous. “Privacy” law has indeed served as a kind of moral lightning rod, and has never in fact functioned to protect the decision-making autonomy that its promoters cite as its core rationale. Moreover, privacy jurisprudence now reflects precisely the doctrinal inconsistencies and subjective valuations of which Justice Black warned. Viewed in their historical context, these results are perhaps unsurprising. Like the similar “discovery” of the tort of invasion of privacy late in the last century, the constitutional right of privacy was “thrown up in great haste” or, rather, made up by judges eager to protect traditionally constructed realms of home and family against certain kinds of state interference. While we may applaud many of the results of this “discovery,” we will despair of

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16 Gerety, supra note 1, at 233.
fathoming the seemingly anomalous outcomes of cases like *Hardwick* until we recognize that constitutional privacy is indeed subject to ideologically based sleight of hand, as its critics have long alleged. The “zones of privacy” which Justice Douglas found “emanating” from “penumbras” suggested by “specific guarantees in the Bill of Rights,”\(^7\) have, from the very first, been circumscribed by normative notions of traditional, that is to say heterosexual—which is to say patriarchal—sexual morality. To the extent that virtually all legal doctrine is, at a certain stage of inquiry, reducible to judicial determinations of “reasonableness,” judicial *trompe l’oeil* of this kind is nothing new. But constitutional privacy, because it is of such recent vintage and, perhaps more importantly, because “nobody seems to have any very clear idea what it is,”\(^8\) appears especially susceptible to moral gerrymandering.

The legal history of same-sex marriage serves as a case in point.\(^9\) Even before *Griswold* the freedom to marry and procreate had been enshrined among the “basic civil rights of man.”\(^20\) In the more than twenty years since *Loving v. Virginia*\(^21\) judges have defended the right to marry—and, indeed, to marry the partner of one’s choosing against challenges centered in time-honored majoritarian norms\(^22\) as well as in hallowed principles of federalism.\(^23\)

The heterosexual community now takes this “right to marry” virtually for granted. So thoroughly has the dominant culture adopted the premise of *Loving* that the notion that a state would refuse to grant a marriage license because the intending couple did not share, for example, religious backgrounds, or had been born into different economic classes, today would be thought outrageous as well as absurd. Yet the courts steadfastly refuse even to consider seriously whether the freedom to marry applies to couples of the same sex. Same-sex marriage as an issue

\(^{17}\) *Griswold*, 381 U.S. at 484.


\(^{19}\) A longstanding debate, particularly within the lesbian feminist community, concerns the political wisdom of seeking legal recognition for same-sex relationships. On the one hand, advocates of same-sex marriage cite the substantial legal disabilities that result from the inability to make lesbian and gay relationships legally legitimate: tax, insurance and disability benefits; rights of tort recovery, such as wrongful death; intestate inheritance; community property rights; state enforced support obligations; as well as the significant social and emotional sense of worth that may be fostered by social acceptance. See, e.g., Note, *A Homosexual's Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979); Friedman, *The Necessity for State Recognition of Same-Sex Marriage*, 3 BERK. WOMEN'S L.J. 134 (1988); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973). Opponents reject the specter of “imitating heterosexual norms” or seeking approval from mainstream society which marginalizes and oppresses lesbians and gay men. See, e.g., D. Teal, *The Gay Militants* 291 (1971); C. MacKinnon, *supra* note 11, at 27.

I do not mean, in this article, to enter this debate on one side or the other. Rather, I am concerned here with the ways and degrees in which privacy jurisprudence is limited by normative “moral” considerations and thus is seemingly self-contradictory.


\(^{21}\) 388 U.S. 1 (1967) (Virginia's anti-miscegenation statute declared unconstitutional).

\(^{22}\) See, e.g., *id*.

of law has become virtually moot—so much so, that an aggressive gay rights bar, which in the last decade has energetically pursued legal and legislative avenues to protect lesbian and gay parental custody, reform sodomy laws, prohibit employment discrimination based on sexual orientation, and even ensure quasi-marital benefits under "domestic partnership" statutes, has effectively passed on the question, redirecting its beleaguered resources in less unpromising directions.

Given the fundamental interest that society as a whole has identified in promoting and maintaining the institution of marriage, an unsocialized observer might well be perplexed to find that marriage between persons of the same sex is so universally and thoroughly anathema. After all, confinement of sexual behaviors to monogamous partnerings, and rearing of children within stable home environments might seem to be worthy societal ends fit for regulation, whether the partners are of different genders or not. But the courts, even when provided no overt legislative guidance, have systematically denied even the possibility that the claims of same-sex couples to marital privacy and legitimacy might be recognized.

How are we to account for this seeming anomaly? What allows the courts to write paeans to the sanctity of the right to marry, and yet summarily dismiss the claims of same-sex couples to this "basic civil right of man?"

A first step toward a coherent answer, I suggest, lies in the very fungibility of privacy doctrine itself. Part I of this Article examines the Court's definition of a "zone of privacy" around the institution of marriage over the thirty-odd years of the "due process revolution."

Part II traces the sources of that doctrine: the pre-Griswold case law, as well as the cultural roots of the traditional visions of marriage. Key to the current positioning of marriage in the jurisprudence is the historically central role that marriage has been seen to play in shaping and preserving democratic society.

Marriage is a normatively based institution; its definition and its societal role have historically been mutable and highly porous. Taking the mutability of such norms as an underlying premise, Part III reviews the courts' treatment of the same-sex marriage issue, focusing on the

25 Id. at § 11.01.
26 Id. at Ch. 5.
27 Interview with Matthew A. Coles, Staff Attorney, Northern California ACLU, in San Francisco, California (Mar. 8, 1989).
socially constructed meanings that shape both the discourse and the silence.

Part IV examines the modern and historical debates over whether it is appropriate to enforce "morality" by means of legal rules, tracing the notion of "harm" as key to the legitimacy of such enforcement. I argue that all societal rule-making, whether legislative or judicial, involves value choices and thus inescapably includes the imposition of norms of morality.

In conclusion, Part V argues that the apparent inconsistency between the theoretical roots of privacy and its application by the courts is illusory: the law of privacy inherently involves choices of moral values and inevitably imposes rule structures with reference to dominant morality. Same-sex marriage is seen to pose an all-but-apocalyptic threat to the very institution that constitutional privacy itself was created to safeguard. Small wonder, then, that that same right of privacy has not been receptive to including its own nemesis within the purview of its beneficent protections.

I. THE RIGHT OF MARITAL PRIVACY

Five years before the Supreme Court announced the existence of the constitutional right of privacy, the Court had already "discovered" a fundamental right to marry within the due process clause of the fourteenth amendment. In Loving v. Virginia,29 the Court reiterated earlier dictum from Skinner v. Oklahoma30 that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival,"31 adding that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."32 The Court refused effect to Virginia's anti-miscegenation statute not only based on equal protection notions, but also because state interference with individual freedom of choice about whom to marry violated due process of law and threatened "our very existence and survival."33 Chief Justice Warren's use of the plural pronoun was telling. For, the freedom to marry is demonstrably not fundamental to the very existence and survival of individual people; rather, Warren was concerned with existence and survival of a way of life, a social system. He based his

29 388 U.S. 1 (1967).
30 316 U.S. 535 (1942).
31 Loving, 388 U.S. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
32 Id. Courts announcing entirely new interpretations of legal doctrine often take pains to note the "ancient roots" of their discovery. See e.g., Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millenium of moral teaching.").
33 Loving, 388 U.S. at 12.
decision upon the sanctity of marital decision-making, a traditional, normative value.

With the discovery in *Griswold v. Connecticut* of constitutional privacy rights, the institution of marriage secured a place for itself within the constitutional scheme. Justice Douglas intoned for the majority:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life.

The language of the *Griswold* opinion drew substantially upon Justice Harlan’s noted dissent in *Poe v. Ullman* a few years earlier. However, while Douglas was content to locate marriage within a constitutionally protected “zone of privacy,” Harlan was characteristically further sighted. Arguing for constitutional safeguarding of marital privacy, Harlan explicitly excluded other “sexual intimacies which the state forbids altogether” from the zone he envisioned. He repeatedly emphasized that he did not mean to suggest that “adultery, homosexuality, fornication and incest are immune from criminal inquiry, however privately practiced.” Unlike sexual practices between married couples, reasoned Harlan, these behaviors clearly fell within “the State’s rightful concern for people’s moral welfare.” Reasoning from fourth amendment principles protecting “the sanctity of a man’s home and the privacies of life” against arbitrary governmental intrusion, Harlan concluded that “[t]he home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.”

Subsequent cases in the *Griswold* line have extended the conception of privacy beyond the strict borders of legal matrimony. The holdings in *Eisenstadt v. Baird*, *Doe v. Bolton*, *Stanley v. Illinois*, and a host of other cases make what was originally the right of marital privacy resemble what Kenneth Karst has called a “freedom of intimate associa-

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34 381 U.S. 479, 486 (1965).
36 Id. at 553.
37 Id. at 552.
38 Id. at 553.
39 Id. at 550.
40 Id. at 551-552.
41 405 U.S. 438 (1972) (single person cannot be denied contraception because they cannot rationally be distinguished from married persons).
42 410 U.S. 179 (1973) (state law severely limiting the right to abortion is unconstitutional).
43 405 U.S. 645 (1972) (biological father is entitled to a fitness hearing before being denied custody of his children).
However, in other decisions the Court has clarified and deepened its commitment to marriage as a specially protected constitutional zone. For example, in *Boddie v. Connecticut* the Court held that because of the "basic position of the marriage relationship in our society," a state could not refuse to grant divorces to indigent couples unable to afford court fees. Even Justice Black, who dissented on federalism grounds, noted that "[t]he institution of marriage is of peculiar importance." No matter within whose jurisdiction fell the role of protecting marriage, all sides concurred that "marriage involves interests of basic importance in our society." Significantly, *Boddie* involved not the right to marry per se, but access to divorce. By locating such access within a constitutionally protected zone, the court effectively established not merely a fundamental right to be married, but further a right of marital choice. Like *Loving*, *Boddie* involved a state policy that effectively restricted individuals' freedom to decide to whom to be married. The Court appeared to define the fundamental right to marry more broadly than the right to enter into a marriage, some marriage, any marriage. Constitutional privacy rights seemed further to protect the individual's choice of marital partner. As the California Supreme Court stated twenty years earlier in its decision refusing effect to that state's miscegenation statute, "the right to marry is the right to join in marriage with the person of one's choice..." "[I]t is a fundamental right of free men."

In *Zablocki v. Redhail*, the Court recognized that the right to marry did not override a state's power to enact "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship." Despite "the importance of the marriage relationship to the maintenance of values essential to organized society," the Court refused effect to a Wisconsin statute which sought to protect the welfare of children of divorced parents by prohibiting the marriage of individuals unable to demonstrate compliance with extant child support orders. The Court reaffirmed in the strongest terms "the fundamental character..."
of the right to marry,"

Even in the face of a competing interest in child welfare, *Zablocki* represents the first time that the Court applied strict scrutiny to the right to marry. The use of strict scrutiny indicates the special and fundamental status of the interest protected.

As recently as 1987, the Court, in *Turner v. Safely*, reaffirmed the fundamental nature of the right to marry by striking down a Missouri penal regulation that impinged on the freedom of state prison inmates to marry. Rejecting strict scrutiny standards because of the prison context, the Court nevertheless found no rational relationship between the legitimate administrative needs of the correctional authorities and the burdening of inmates' "constitutionally protected right to marry." The Court also reiterated that the freedom to marry is a basic right of privacy, subject to infringement only when significant interests are at stake. Even in the prison context, where deference to state authority is the rarely questioned rule, state officials, courts and legislatures are not free to infringe on this basic freedom without a compelling state interest.

The dual strands of the *Griswold* decision presaged an ongoing tension between privacy as decision-making autonomy and privacy as a judicial privileging of "marital bedrooms." While *Eisenstadt v. Baird* seemed to point the Court squarely in the direction of individual autonomy, constitutional decisions in the family law realm have emphasized that it is the marital relation itself which—because of its traditionally elevated status within the culture at large—the courts are protecting. Thus the view that "no individual should be compelled to surrender the freedom to make [a moral] decision for herself simply because her 'value preferences' are not shared by the majority,"—evident particularly in the abortion decisions subsequent to *Roe v. Wade*—coexists with the more traditional view that triumphed in *Bowers v. Hardwick*: "[T]he law ... is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."

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54 Id. at 386.
57 Id. at 107.
58 Indeed, it has been forcefully argued that it was not *Griswold* at all, but rather *Eisenstadt* that shifted the jurisprudence "from the old privacy to the new." Sandel, *supra* note 9.
60 410 U.S. 113 (1973).
61 478 U.S. 186, 196 (1986). The contrasting views of Justice White, writing for the majority, and Justice Blackmun, expressing the views of the four dissenters, may be taken as the starkest and most recent articulation by the Court of the dual nature of contemporary privacy jurisprudence.

Pronouncements of the primacy of traditional family values are never stronger than when, as in *Hardwick*, the Court considers bonds that are in some degree unorthodox. Paeans to traditional family structure appear in decisions affirming as well as rejecting non-traditional relationships. *Compare* Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977) (striking
As such language makes clear, the primacy of autonomy and individualism that appear to fuel cases like Griswold and Eisenstadt coexists ambiguously with an ongoing concern for traditional moral values and for the states’ role in safeguarding the historical status of marriage as a social institution. Even in Zablocki, widely held to be the Court’s most definitive statement of the fundamental nature of the right to marriage and marital privacy, Justice Powell reiterated the position that “[t]he State, representing the collective expression of moral aspiration, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.” Such statements stand in stark contrast to Loving’s and Eisenstadt’s sweeping odes to individualism, autonomy and free choice. The Court, by deriving privacy rights from principles “older than the Bill of Rights,” had opened a Pandora’s Box of doctrinal inconsistency, and left ambiguous the true nature of the relationship between normative moral prescription and individual autonomy-based privacy.

II. THE ROOTS OF TRADITION

A. “A Highly Regulated Institution”

This impressive array of Supreme Court decisions discovering and refining the constitutional right of marital privacy coexists uneasily with the states’ traditional power to regulate marriage and divorce. Likewise, traditional presumptions about what marriage is, what function it fulfills within the broader society, and for whom it is intended have not evaporated. As David Richards has written: “Marriage is a highly regulated legal institution in which the state has traditionally asserted a wide range of legitimate interests. Any constitutional inhibition on state power would have to rebut this long historical tradition.”

As Justice Douglas reminded us in Griswold, the roots of these pre-

In the early nineteenth century, English case law had begun to proclaim marriage as “the most important of human transactions, . . . the very basis of the whole fabric of civilized society.”\footnote{Duntze v. Levett (Comm. Ct., Scotland, 1816), \textit{cited in J. Ferguson Reports of Some Recent Decisions by the Consistorial Court of Scotland [1811-1817] in Action of Divorce, Concluding for Dissolution of Marriage Celebrated Under English Law} (J. Ferguson ed., Edinburgh 1817) 35, 68, 397 (Lord Robertson).} Judges increasingly noted that the marriage contract was “coeval with, and essential to, the existence of society.”\footnote{\textit{Id.} at 401 (Lord Bannatyne).}

By the mid-nineteenth century, American judges and commentators picked up the theme. Courts began to pay regular homage to the institution of marriage and its central role in stabilizing and maintaining the nation’s moral fabric. In his celebrated 1852 treatise on the law of marriage and divorce, Joel Prentiss Bishop emphasized:

\begin{quote}
The institution of marriage, commencing with the race, and attending man in all his periods, in all countries, of his existence, has ever been considered the particular glory of the social system. . . . And but for this institution, all that is valuable, all that is virtuous, all that is desirable in human existence, would long since have faded away in the general retrograde of the race, and in the perilous darkness in which its joys and its hopes would have been wrecked together. And as man has gone up in the path of his improvement, and higher and purer light has shone around him, still has this institution of marriage, receiving accessions of glory with every step of the race toward its ultimate glory, remained ever the first among the institutions of human society.\footnote{J. Bishop, \textit{Commentaries on the Law of Marriage and Divorce} 34-35 (3d ed. Massachusetts 1859).}
\end{quote}

Echoing this theme in an often-cited landmark case, \textit{Maynard v. Hill}, Justice Field wrote that,

\begin{quote}
Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it cre-
\end{quote}
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ates, its effects on the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.\textsuperscript{70}

Courts took pains to note that marriage, although a civil contract enforceable by law, was not merely a private agreement between individuals. As one judge wrote, the law viewed a marriage case as one of the domestic relations. In strictness though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract.\textsuperscript{71}

The "natural" derivation of the marriage relation, and its fundamental relationship to the structure of "well-organized society" was a constant refrain whenever courts spoke about marriage. Bishop noted that marriage's "source is the law of nature, whence it has flowed into the municipal laws of every civilized country, and into the general law of nations."\textsuperscript{72} A Kentucky court, in refusing to recognize divorce by private agreement, observed:

[E]very well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and cannot, like mere contracts, be dissolved by the mutual consent only of contracting parties.\textsuperscript{73}

Because of the vital societal role that marriage was seen to fulfill, some courts went so far as to make the state an actual party to the arrangement. In 1936, for example, a New York court noted that "[t]here are, in effect, three parties to every marriage, the man, the woman, and the state."\textsuperscript{74} An earlier opinion offers insight into the reasons for such a construction; noting that marriage fosters interests, attachments and feelings, partly from necessity, but mainly from a principle in our nature, which together, form the strongest ligament in human society; without which, perhaps, it could not exist in a civilized state: it is a connection of such deep-toned and solemn character, that society has even more interest in preserving it than the parties themselves.\textsuperscript{75}

More than a century later, judges were still relying on the same rationale. For example, in \textit{Posner v. Posner},\textsuperscript{76} the court stated that "[s]ince marriage is of vital interest to society and the state, it has frequently been said that in every divorce suit the state is a third party whose interests take precedence over the private interests of the

\textsuperscript{70} 125 U.S. 190, 205 (1988).
\textsuperscript{71} Ditson v. Ditson, 4 R.I. 87, 101 (1856).
\textsuperscript{72} J. Bishop, supra note 69, at 27.
\textsuperscript{73} Maguire v. Maguire, 37 Ky. (7 Dana) 181, 184 (1838).
\textsuperscript{74} Fearon v. Treanor, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936), appeal dismissed, 301 U.S. 667 (1937), reh'g denied, 302 U.S. 774 (1937).
\textsuperscript{75} Dickson v. Dickson, 9 Tenn. (1 Yer.) 100, 102 (1826).
\textsuperscript{76} 233 So.2d 381 (1970).
spouses.”

Regardless of whether or not courts viewed the state as a party to the marriage “contract,” they could and did justify a significant degree of control over the formation and dissolution of marriages.

The exalted status afforded a state’s interest in protecting the marriage relationship is nowhere more clearly seen than in the judicial treatment of the Mormon polygamists’ free exercise of religion claims brought in the first years after Utah became a state. In the most famous of the uniformly unsuccessful first amendment challenges to Utah’s prohibition of polygamy, the Supreme Court explained:

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.

Upholding an act of Congress excluding polygamists from voting or holding public office, Mr. Justice Matthews wrote:

Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Indeed, until the Supreme Court’s 1967 Loving v. Virginia decision, courts often invoked precisely this rationale to uphold miscegenation statutes; see, e.g., Stevens v. United States, 146 F.2d 120, 123 (10th Cir. 1944):

Marriage is a consentient covenant. It is a contract in the sense that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects, continuance, or dissolution. It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state. . . . And within the range of permissible adoption of policies deemed to be promotive of the welfare of society as well as the individual members thereof, a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment.

But see Perez v. Sharp, 32 Cal.2d 711, 715, 198 P.2d 17, 18-19 (1948). The court, in holding California’s miscegenation statute unconstitutional, stated:

Marriage is something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means. . . . Since the essence of the right to marry is freedom to join in marriage with the person of one’s choice, a segregation statute for marriage necessarily impairs the right to marry. . . . If the miscegenation law under attack . . . is directed at a social evil and employs a reasonable means to prevent that evil, it is valid regardless of its incidental effect upon the conduct of particular religious groups. If, on the other hand, the law is discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well.


Murphy v. Ramsey, 114 U.S. 15, 45 (1885); see also Davis v. Beason, 133 U.S. 333, 341-42 (1890) (“Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . They tend to destroy the purity of the marriage relation, to disturb the peace of
A similarly constant theme in the legal literature is the importance of traditionally constituted marriage in maintaining liberty and democratic government. As early as 1890, a federal judge wrote that "in this country, the home life of the people, their decency and their morality, are the bases of that vast social structure of liberty, and obedience to the law, which excited the patriotic pride of our countrymen and the admiration of the world." 81 Chief Justice Traynor echoed these sentiments in a 1952 California Supreme Court decision to terminate a marriage against the will of one of the parties. Invoking "the public interest in the institution of marriage," 82 Traynor wrote:

The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage. 83

In 1983, Justice Stevens was still drawing the same connection. In the Lehr v. Robertson decision refusing to recognize an unwed father's claims to constitutional protection, Stevens noted that "[t]he institution of marriage has played a critical role . . . [in] developing the decentralized structure of our democratic society." 84

While these cases leave no doubt that the courts saw the promotion of marriage as a key state interest, others make clear that as long as the state did its share to encourage that marriage remained the social norm, and retained public control over formation and dissolution of marital relationships, the content of individual marriages was, for the most part, none of the state's concern. As some feminists have noted, with bitter irony, the rationale for the state's laissez-faire policy was family privacy. 85 Apart from spousal decisions that inhibited procreation, such as

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81 State v. Tutty, 41 F. 753, 762 (1890).
83 Id.
85 See, e.g., C. MacKinnon, Privacy v. Equality in Feminism Unmodified 96-102 (1987): The idea of privacy, if regarded as the outer edge of the limitations on government, embodies, I think a tension between the preclusion of public exposure or governmental intrusion, on the one hand, and autonomy in the sense of protecting personal self-action on the other. This is a tension, not just two facets of one whole right. In the liberal state this tension is resolved by demarking the threshold of the state at its permissible extent of penetration into a domain that is considered free by definition: the private sphere. . . . But if one asks whether women's rights to these values have been
those involving contraception and abortion, what went on between husband and wife was relegated to the private realm. Thus, a court declined to enforce the contractual obligation of a husband to pay his wife $200 annually in exchange for domestic services, "for the reason that judicial inquiry into matters of that character, between husband and wife, would be fraught with irreparable mischief, and forbidden by sound considerations of public policy." Similarly, a New York court in 1926 refused to enforce an agreement between spouses to refrain from consummating their marriage until after performance of a Catholic wedding ceremony, citing "the basic obligations springing from the marriage contract, when viewed from the standpoint of the state and of society at large." In ruling that the plaintiff could not hold her husband to his duty of support so long as she refused sexual relations, the court noted that it requires no fertile vision to see where we may be led if the views now being urged shall prevail—that the parties by private agreement may permanently annul or indefinitely postpone the obligations which they assume when they enter into the marriage contract and defeat the policy of the state and the views which have so long and definitely prevailed in a right-minded society. . . . Public policy in such a vital matter as the marriage contract should not be made to yield to subversive private agreements and personal considerations.

Thus were the lines between public and private drawn. The criminal justice system established the definitional impossibility of marital rape, and declined to involve itself in problems of intrafamilial battery and similar abuses. Once the state had fulfilled its duty by encouraging and sanctifying the marital relation, its work was done. In 1868, a North Carolina court which recognized that "[t]he violence complained of would, without question, have been constituted a battery if the subject of

guaranteed, it appears that the law of privacy works to translate traditional social values into the rhetoric of individual rights as a means of subordinating those rights to specific social imperatives. . . . It is at once an ideological division that lies about women's shared experience and that mystifies the unity among the spheres of women's violation. It is a very material division that keeps the private beyond public redress and depoliticizes women's subjection within it. It keeps some men out of the bedrooms of other men. . . .

86 Miller v. Miller, 78 Iowa 177, 182, 42 N.W. 641, 642 (1887).
88 Id. at 608-609.
it had not been the defendant’s wife,” could nonetheless decline to “interfere with family government in trifling cases . . . [or] inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”

As Andrea Dworkin has noted:

The right of a man to use his wife the way he wants has been the essential meaning of sexual privacy in law. The state, to quote one Florida legislator who opposed criminalizing rape in marriage, ‘has absolutely no business intervening into the sexual relationship between a husband and a wife.’ [citation omitted] The state, of course, has created that relationship and has protected the husband’s forced access to the wife; and it is the above conception of privacy—keeping the wife sexually subjugated to the husband as a matter of law (statutory, metaphysical, divine)—that cloaks the abuse of wives in a legitimacy and a secrecy that stop active, cogent, material interference.

Even as the state asserted its fundamental interest in marriage, the “sacred obligation,” and “basic unit of our society” upon which rests “all that is stable and noble in our civilization,” it defined the character of that relationship as one that, for reasons of public policy, was exempt from state control. As Adrienne Rich has written, “The ‘preservation of the family’ is quoted as an abstract principle without considering the quality of life within the family, or the fact that families may be held together by force, legally sanctioned terrorism, and the threat of violence.”

Such, for women, has been the reality of nonintervention into the “private realm of family life which the state cannot enter.”

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92 Id. at 450. The “family government” theme is recited in scores of cases declining to punish civil and criminal wrongs within marriage. For example, the Rhodes court noted that “family government is recognized by law as being complete in itself as the State government is in itself, and yet subordinate to it . . . we will not interfere with it or attempt to control it.” Id. at 448. Similarly, an Iowa court in 1871 refused to grant a divorce to a battered wife “in view of the rapidly increasing tendency to divorces in the present day, and the corresponding weakening of the marital tie, fraught with the most dangerous consequences to social order . . .” Knight v. Knight, 31 Iowa 451, 456 (1871). The opinion observed that “[s]ociety has an interest in the permanency and stability of the marriage relation; and as individuals, in entering into the social compact, have been required to yield many personal rights for the general good, for the good of their common offspring, the conservation of social order, and the maintenance of general morality, must bear with patience and composure the occasional disquietudes growing out of inharmonious tempers and dispositions.” Id.
93 A. DWORKIN, supra note 89, 166 (1988) (Dworkin adds, “The down-to-earth meaning of this privacy was eloquently stated by Bob Wilson, a state senator from California, talking to women lobbyists in 1979: ‘But if you can’t rape your wife’, the lawmaker asked, ‘who can you rape?’ ”).
95 DeBurgh v. DeBurgh, 39 Cal. 2d at 863, 250 P.2d at 601.
96 Murphy v. Ramsey, 114 U.S. at 45.
97 A. RICH, supra note 90, at 219.
B. “Our most fundamental moral and social institution”

“[M]arriage,” wrote a noted sociologist in 1973, “is a relationship between two people, but it is more than a couple relationship—it is an institution.”99 Like all cultural norms, the institution of marriage itself—its sexual aspects as well as its vaunted emotional infrastructure—is a social construction.100 Common law and constitutional doctrine have both responded to, and themselves been instrumental in shaping, the meaning ascribed to the term as well as its normative status. Over years and centuries, courts and legal scholars have functioned much like social scientists: as they perceive and attempt to analyze cultural reality, they also play a crucial role in constructing that reality. In similar fashion, the writings of sociologists, anthropologists, cultural historians, and philosophers on the institution of marriage and the roles it fulfills in diverse societies provide both primary and secondary data about marriage as an institution and its placement within a broader social framework.

Whatever its formal attributes, marriage has long been identified as a central organizing unit of culture, key to establishing and maintaining social structure. In Western society, certainly, marriage’s historical ties both to religious authority and to systems of property relations have ensured it a role that reaches far beyond the “private” sphere. Talcott Parsons’ oft-quoted remark that marriage is, “in our society, the main structural keystone of the kinship system,”101 identifies one important ingredient of marriage’s central role within the culture. Yet, it fails to account for other, more “public” functions that the institution of marriage serves. Marriage not only plays this key role in structuring relationships between and among blood relatives; it is, further, “a social institution in which sexual intercourse is socially and legally legitimate and in which the production of socially and legally legitimate offspring is possible.”102

Public legitimation of sexual relationships, social recognition of children and the indoctrination of children into the existing social structure are not functions that the institution of marriage only happens to fulfill. They are basic purposes for which it exists at all. Thus, the private

The structuring of intimate relationships and familial bonds is secondary to the public legitimating functions that are ascribed to marriage, home and family. A mid-nineteenth century treatise on marriage and divorce thus described the “two principle ends of marriage—a lawful indulgence of the passions to prevent licentiousness, and the procreation of children under the shield and sanction of the law.”

Marriage is fundamentally a public relationship, conceived and elevated because of the niche it fills in polity and law. Kate Millett once wrote that “[t]o insure that its crucial functions of reproduction and socialization of the young take place only within its confines, the patriarchal family insists upon legitimacy.” Millett’s observation turned inside out is equally true: to insure its own legitimacy, the patriarchal family insists that the crucial functions of reproduction and socialization of the young take place only within its confines.

A key weapon for guaranteeing the exclusivity of this arrangement is the identification of marriage as inherently bound up with “morality.” As Lord Patrick Devlin wrote:

The institution of marriage is the creation of morality. The moral law of a society is made up from the ideas which members of that society have in common about the right way to live. The association of man and woman in wedlock has from time immemorial been of such importance in every society that its regulation has always been a matter of morals. . . . [B]ecause the institution of marriage is fundamental to society, the moral law regulates it very closely . . . according to the ideas of right and wrong which prevail in that society, that is, according to its moral law.

Moreover, Devlin concludes:

[M]arriage is a fundamental institution in any society and . . . society has a right to lay down the conditions under which it should be recognized. . . . In short, the right-thinking man in western society accepts a Christian notion of marriage as the ideal and would not dispute that the secular law should be based on it.

Marriage is not simply a structural device, a value-free system by which kinship ties are sorted out. Rather, marriage is an instrument of the state by which the state regulates “morality.”

What is meant by “morality” will, to be sure, vary significantly over time and between cultures, according to the values that the dominant group holds and seeks to promote. We may take Devlin’s definition, “the ideas of right and wrong which prevail [in a given society],” as standard. Fundamentally, “morality” is a rule structure that serves to create social boundaries. Though written by the sort of “free-thinker” that he

103 Stewart, Marriage and Divorce as Established in England and the United States, § 103 (1884).
106 Id. at 62-63.
107 Id. at 61.
found most objectionable, Devlin would have been hard-pressed to dispute the following observation:

[M]orality exists in every culture, in every common little group where people share values.

Morality is heavily into "insider" and "outsider." And it doesn't just see itself as a different morality—it is supreme. It is Good. Everything outside it is other, or, Bad. . . . Morality is used to generalize concepts of good and bad, so that everyone will know what is considered good and bad in their particular society.108

"Morality" is a key means to cultural self-definition, and marriage is a key instrument in constructing "morality."

As the link between marriage and the enforcement of moral norms becomes clear, however, marriage's role in policing other aspects of social organization also comes into focus. "Kinship and marriage are always parts of total social systems, and are always tied into economic and political arrangements," wrote Gayle Rubin in 1975.109 As Rubin implies, marriage, "morality," and political and economic power form an integral unit, each serving the ends of all the others. For the construction of "morality" within any given culture is little more than a process by which political and economic relationships are sanctified and so removed from ordinary "political" discourse. Kate Millett's classic formulation of the role that marriage and family play in maintaining the political status quo has yet to be improved:

Patriarchy's chief institution is the family. It is both a mirror of and a connection with the larger society; a patriarchal unit within a patriarchal whole. Mediating between the individual and the social structure, the family effects control and conformity where political and other authorities are insufficient. As the fundamental instrument and the foundation unit of patriarchal society the family and its roles are prototypical. Serving as an agent of the larger society, the family not only encourages its own members to adjust and conform, but acts as a unit in the government of the patriarchal state which rules its citizens through its family heads.

As one student of the family states it, "the family is the keystone of the stratification system, the social mechanism by which it is maintained."110

III. SAME-SEX MARRIAGE AND THE COURTS

Long before marriage became ensconced under the constitutional privacy rubric, the courts made abundantly clear that legal marriage was restricted to opposite-sex couplings. In the late nineteenth and early

108 S. NEGRIN, BEGIN AT START 60 (1972).
110 K. MILLETT, supra note 104, at 33-36.
twentieth centuries, courts not infrequently imposed criminal penalties on same-sex couples who had obtained marriage licenses by having a cross-dressing partner pose as a member of the opposite gender.111 Well into the 1970s, courts granted divorces to men and women who "discovered" that their spouses were transsexuals. For example, in 1971 a New York state court, liberally sprinkling quotation marks near any pronouns that hinted even vaguely of gender, invalidated a marriage involving a transsexual, invoking "the two basic requirements for a marriage contract, i.e., a man and a woman."112 Without for a moment questioning this premise, the court found one of the basic requirements of marriage missing, noting that "[t]he law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman."113 Such reasoning, based on what "is and always has been," remains the foundation for most of the case law governing same-sex marriage.114

With the rise of a lesbian and gay rights movement, same-sex couples began to press for legal recognition of their relationships.115 One commentator has noted, however, that "[t]he early same-sex marriage cases are better viewed as political efforts to raise the consciousness of the American public than as realistic efforts to effect social change through litigation."116 The three leading cases that ruled on the legality of same-sex marriage were all decided between 1970 and 1975.117 Each uses a version of the "is and always has been" argument to support its conclusion that same-sex marriage is not and should not be recognized. These opinions emphasize that marriage is, by definition, an opposite-sex union, pointedly footnoting Black's Law Dictionary118—a somewhat more sophisticated version of the "is and always has been" rationale. Fundamentally, these cases rely upon normative "facts" about the essential meaning of marriage in society to hold that neither constitutional privacy rights, nor guarantees of equal protection, are relevant in determining the legitimacy of enforcing such norms by legal means.

In the first of these cases, Baker v. Nelson, two men challenged, on statutory and constitutional grounds, the state of Minnesota's refusal to

113 Id., 325 N.Y.S. at 500, 67 Misc. at 984.
116 Friedman, The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family, 3 BERK. WOMEN'S L.J. 151 (1988). One wonders whether the litigants in these early cases were as convinced of the purely rhetorical nature of the efforts as is Ms. Friedman.
118 E.g., Baker, 291 Minn. at 311, n. 1, 191 N.W.2d 186, n. 1.
issue them a marriage license. The couple based their claim on the fact that the state statute did not specify that marriage was restricted to couples of opposite sexes. The Minnesota Supreme Court, however, employed customary rules of statutory construction to reach the conclusion that "common usage" would dictate its interpretation of the term, "marriage." After quickly dismissing the statutory claim, with the help of Black's Law Dictionary, the Baker court proceeded to consider the plaintiffs' assertion that "the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." Noting that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis," the court then turned the plaintiffs' reliance on Griswold back on them. Because Griswold had been founded on traditional notions of marital intimacy and the inviolability of the "sacred precincts of marital bedrooms," the court found constitutional arguments unavailing. To objections that opposite-sex couples who were unable or unwilling to procreate were not similarly denied the right to marry, the court retorted that the fourteenth amendment does not demand "abstract symmetry." The plaintiffs' claims based on Loving v. Virginia were similarly rejected, since "in common-sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." As if to remove any lingering doubts as to the marginality of the issue, the United States Supreme Court dismissed an appeal in Baker "for want of a substantial federal questions."

Although decided before the major sex-discrimination cases of the 1970s, and a year before Eisenstadt v. Baird, Baker v. Nelson's wholehearted reliance upon "commonsense" and marriage as an "historic
institution . . . deeply founded” is peculiar. As Millett has observed, “Religion is also universal in human society and slavery was once nearly so; advocates of each were fond of arguing in terms of fatality, or irre-\n\ncovable human ‘instinct’—even ‘biological origins.’” Loving v. Virginia, after all, had invalidated a statute whose premises were equally the product of “commonsense” and an “historic institution . . . deeply founded.”

Two years later, the Kentucky Court of Appeals used similar reasoning to reject the claims of two women who challenged a county clerks refusal to issue them a marriage license. While acknowledging that “Kentucky statutes do not specifically prohibit marriage between persons of the same sex,” the court noted that “nor do they authorize the issuance of a marriage license to such persons.” After quoting at length from dictionaries and encyclopedias, the court reasoned:

Marriage was a custom long before the state commenced to issue licenses for that purpose.

A license to enter into a status or a relationship which the parties are incapable of achieving is a nullity.

In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.

The court then held that “no constitutional issue is involved. We find no constitutional sanction or protection of the right of marriage between persons of the same sex.”

In a similar fashion, the Washington Court of Appeals, in Singer v. Hara, summarily dismissed the marital rights of two men, and went on to hold that the state statute prohibiting same-sex marriage did not violate the state’s Equal Rights Amendment. Echoing the language used by other courts, the Singer court stated that there exists a “presumption that marriage, as a legal relationship, may exist only between one man and one woman,”—adding in a footnote that it found no need to “resort to the quotation of dictionary definitions to establish that ‘mar-\niage’ in the usual and ordinary sense refers to the legal union of one man and one woman.” The court went on to say that the state’s refusal to

128 Id. at 312, 191 N.W.2d at 186 (quoting Skinner v. Oklahoma ex. rel Williamson, 316 U.S. 535, 541 (1942)).
129 K. MILLETT, supra note 104, at 58. Millett’s comment was in reference to patriarchy, not to heterosexual marriage per se.
130 Jones v. Hallahan, 501 S.W.2d 588 (1973). (Prior to 1976, the court of appeals was the highest state court in Kentucky).
131 Id. at 589.
132 Id. at 589-90.
133 Id. at 590.
135 Id. at 253, 522 P.2d at 1191.
136 Id.
issue marriage licenses to same-sex couples was legitimately based on the "unique physical characteristics" of men and women.\textsuperscript{137} It remarked:

[It] is apparent that the state’s refusal to grant a license allowing the appellants to marry one another is not based upon appellants’ status as males, but rather is based upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. . . . [I]t is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination "on account of sex."\textsuperscript{138}

The Singer court felt no need to address the facts that opposite-sex marriages which, due to the incapacity of one or both spouses, do not "offer the possibility of children by their union," are not refused legal legitimation, and that "the underlying empirical and technological basis for that justification has been eroding steadily. Lesbian and gay couples are raising children, even bearing children, within the context of their relationship as a family."\textsuperscript{139}

Significantly, the Singer court refused a heightened scrutiny analysis of the plaintiffs’ equal protection and due process claims. Having concluded that the case did not involve issues of sex discrimination under the applicable Equal Rights Amendment provisions, the court added that "appellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."\textsuperscript{140}

The "nature of marriage itself" has remained the unexamined premise of similar, though rare, same-sex marriage cases in the current decade. In 1980, a federal court in California considered the validity of a claimed same-sex marriage in a challenge to an immigrant partner’s deportation. Beginning with the premise that "[t]he term ‘marriage’ . . . necessarily and exclusively involves a contract, a status, and a relationship between persons of different sexes,"\textsuperscript{141} the court in Adams v. Howerton continued:

Canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a "marriage" between persons of the same sex was unthinkable and, by definition, impossible.\textsuperscript{142}

\textsuperscript{137} Id. at 259, 522 P.2d at 1195.
\textsuperscript{138} Id. at 259-60, 522 P.2d at 1195.
\textsuperscript{139} Friedman, supra note 116, at 152.
\textsuperscript{140} Singer, 11 Wash. App. at 261, 522 P.2d at 1196.
\textsuperscript{142} Id. at 1123 (footnote omitted).
The Adams court found no constitutional infirmity, even under strict scrutiny standards, noting “[i]t seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society’s paramount goals.”

On appeal, the Ninth Circuit Court of Appeals affirmed, finding a rational basis for the congressional determination that “preferential status is not warranted for the spouses of homosexual marriages. Perhaps this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores.”

This scant judicial record constitutes essentially the entire body of case law governing the applicability of constitutional protections to marriage between persons of the same sex. They share a common logic as well as a common blind spot. What fuels each of them is tradition—and the persuasive force of dictionary definitions, which amounts to the same thing. By definition, the courts have proclaimed, persons of the same sex cannot enter into legal marriage, “because of the nature of marriage itself.” But the necessity of this definition, how we view “nature . . . itself” is, of course, the very question being asked. Kate Millett, again, made the pertinent observation:

Perhaps patriarchy’s greatest psychological weapon is simply its universality and longevity. A referent scarcely exists with which it might be contrasted or by which it might be confuted. While the same might be said of class, patriarchy has a still more tenacious or powerful hold through its successful habit of passing itself off as nature.

IV. MARRIAGE LAW AND THE ENFORCEMENT OF MORALITY

A. Morality and the Harm Principle

Unresolved questions about the relationship between moral law and the social order lie at the heart of the same-sex marriage issue. At least since the nineteenth century’s ideological battles over the principles of

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143 Id. at 1124.
144 The Ninth Circuit applied minimal scrutiny because of the traditional prerogative of Congress to control immigration. Note that in Turner v. Safely, 482 U.S. 78 (1987), no rational basis was found to support the prohibition of heterosexual marriage by prisoners.
146 See also T. v. T., 140 N.J. Super. 77, 355 A.2d 204 (1976) (marriage valid between man and spouse who had acquired female features surgically because she functioned as a woman sexually); Slayton v. State of Texas, 633 S.W.2d 934 (1982) (person charged with indecency with a “child younger than seventeen and not his spouse” received adequate notice of charges against him despite the indictment’s failure to state that the victim was not his spouse); De Santo v. Barnsley, 328 Pa. Super. 181, 476 A.2d 952 (1984) (one spouse denied validity of common law marriage when the other spouse filed for divorce). Each relies upon the above cases to reach identical conclusions.
148 K. MILLETT, supra note 104, at 58.
liberty articulated by John Stuart Mill, an intermittently lively philosophical debate has wrestled with the moral basis for enforcing morality by means of law. Mill, believing that legal paternalism was anathema to individual liberty, announced that harm was the only justifiable basis for the legal imposition of one set of moral beliefs upon the whole of society. In its most orthodox form, this view is founded on strict principles of autonomy and anti-paternalism: each individual is always the best judge of her own best interests. It is inherently intolerable for society to enforce rules governing behavior that does not harm others, even—and, for Mill, especially—when a popular majority supports such enforcement.

Mill’s contemporaneous critics responded by invoking, more-or-less explicitly, theologically rooted justifications for state regulation of morality. Governments enforced moral principles if not by divine right, then on the basis of an unchallenged state interest in safeguarding the moral welfare of its people. Harm, or its absence, had very little to do with it.

In the early 1960s, H.L.A. Hart and Lord Patrick Devlin took up the two prongs of this debate in a series of published lectures responding to the 1957 release of the Wolfenden Report, which recommended decriminalization of homosexuality and prostitution in Britain. Devlin’s chief contribution was the identification of the existence of society with moral consensus, and hence the principle that, Mill’s conception notwithstanding, the harm that is averted when morality is enforced by means of the criminal law is harm to the social order itself. To prevent what Hart referred to as “constructive harm” to society — i.e., a harm to society’s moral fabric — Devlin thought that criminalization of “immorality” was not only permissible, but crucial to a properly functioning society. To determine the locus of “immorality,” Devlin looked simply to “what every right-minded person is presumed to consider immoral,” noting that while “[i]t is not nearly enough to say that a majority dislike a practice . . . [n]ot everything is to be tolerated. No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law.” Therefore, society should indeed outlaw “a vice so abominable that its mere presence is an offense.”

Hart preferred to separate the question into two component parts, asking “first, [d]oes this act harm anyone independently of its repercussion on the shared morality of the society? And secondly . . . [d]oes this

150 J.F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1873).
151 P. DEVLIN, supra note 105; H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).
152 P. DEVLIN supra note 105, at 9, 13-14.
154 Id. at 17.
155 Id. But see P. DEVLIN, supra note 105, at vii-ix, for comments about this language.
act affect the shared morality and thereby weaken society?"\textsuperscript{156} Hart agreed with Mill that if only offenses to the shared morality of the society were threatened, value pluralism militated against criminalization; he thus attempted to distinguish "mere moral conservatism."\textsuperscript{157} But logic compelled Hart to modify anti-paternalistic principles at least insofar as behavior involving harm to oneself was concerned,\textsuperscript{158} and to admit, using Hobbesian logic, that a state without power to preserve "a moral attitude" would serve no useful function.\textsuperscript{159}

There is, of course, a substantial difference between using the force of the criminal law to punish behaviors that "all right-thinking persons" believe immoral,\textsuperscript{160} and simply refusing to grant such behaviors social legitimacy under the rubric of "privacy." Thus, contemporary followers of a Devlin-like line of argument can, without difficulty, advocate the decriminalization of sodomy and fornication in the name of "Christian toleration" and still wholeheartedly reject legitimation of same-sex marriage. As one writer explained, a "construction of the Constitution compelling the states to recognize same-sex marriage would create precisely that kind of danger[:]" that the majority would be deprived of its ability to pursue moral excellence by means of the legislative process "on an issue going to the core of the social structure."\textsuperscript{161}

The question is, then, to what extent the law of privacy can or should expand to include within its protections acts or behaviors that are, first, offensive to the dominant morality, and second, perceived to threaten the existing social order. Neither camp seems able to make sense of the issue without reference to a "higher morality." Those who view same-sex marriage as a fundamental threat to the existing social order rely either directly upon scripture, upon tradition, or, alternatively, upon hallowed principles of majoritarianism and democratic self-determination. Those who would recognize same-sex marriage as a constitutionally protected aspect of the right to privacy find within this higher ground principles of autonomy and equality that they claim form the inherent underpinnings of the constitutional structure itself.

Kenneth Karst\textsuperscript{162} and David Richards,\textsuperscript{163} among others, argue that the essential basis of the discovery of the right of privacy was, in Richard's terms, a "transvaluation of values."\textsuperscript{164} Assertion of a right of constitutional privacy, wrote Richards, typically arises in areas where there

\begin{itemize}
\item \textsuperscript{156} H.L.A. Hart, supra note 151, at 49-50.
\item \textsuperscript{157} Id. at 72.
\item \textsuperscript{158} Id. at 30-34.
\item \textsuperscript{159} Id. at 71-73.
\item \textsuperscript{160} F. Devlin, supra note 105, at 15.
\item \textsuperscript{161} G. Buchanan, supra note 28, at 149.
\item \textsuperscript{162} Karst, The Freedom of Intimate Association, 89 Yale L.J. 624 (1980).
\item \textsuperscript{163} Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 Hastings L.J. 957 (1979).
\item \textsuperscript{164} Id. at 975.
\end{itemize}
exists "a strong conventional wisdom that certain conduct is morally wrong and where the justice of that wisdom is under fundamental attack."165 The concept of privacy rights reorders the prevailing value structure, so that
certain areas of conduct, traditionally conceived as morally wrong and thus the proper object of public regulation and prohibition, are now perceived as affirmative goods the pursuit of which does not raise serious moral questions and thus is no longer a proper object of public critical concern.166

Richards argues that constitutional protections are misinterpreted when they do not incorporate "the background theory of human values that the Constitution assumes."167 Consistent with the underlying values that the Constitution seeks to protect—in his terms "equal concern and respect for personal autonomy"168—there is, says Richards, a limit to what courts may enforce in the name of "morality":
Where public attitudes about public morality are, in fact, demonstrably not justified by underlying moral constitutional principles, laws resting on such attitudes are constitutionally dubious. . . . [A] view is not a moral one merely because it is passionately and sincerely held, or because it has a certain emotional depth, or because it is the view of one's father or mother or clan, or because it is conventional.169

Thus, Richards embraces a notion that there is an "objective" test for morality "demonstrated by facts capable of empirical validation,"170 and criticizes as hypocritical Justice White's invocation of the notion that privacy rights must be justified as "more than the imposition of the Justices' own choice of values" to uphold criminal sodomy statutes in Bowers v. Hardwick.171 He proceeds to argue that sodomy laws, specifically, are not compatible with the objective conception of morality that he finds in the Griswold line of cases.172

Karst argues along parallel lines. Having noted that incestuous relationships and age limitations on marriage would withstand close judicial scrutiny based on a version of the "harm principle," he proceeds to deal with the "state's interest in promoting a moral view."173 This he finds "generally a valid concern," but sees "no legitimacy in an effort by the state to advance one view of morals by preventing the expression of another view."174 Thus, he concludes, there can be no validity in the

165 Id.
166 Id.
167 Id. at 963.
168 Id. at 977.
169 Id.
170 Id. at 1009.
172 Id.
173 Karst, supra note 162, at 672.
174 Id.
refusal of marital status to same-sex couples, since no “harm” can be demonstrated and all that is involved is the promotion of conventional morality.175

But others know differently. Lord Devlin was not wrong when he contended that “the criminal law as we know it is based upon moral principle. In a number of crimes its function is simply to enforce a moral principle and nothing else.”176 The difficulty, to be sure, is that what makes a principle “moral” can only be discovered by reference either to social norms or to the force of tradition, i.e. to social norms of an earlier era. Reference to religious doctrine or “scientific” logic in no way alters this proposition. All law involves the imposition of one view of morality—or at least of the morality of imposing morality—to the inherent negation of opposing views. Hence, Hart’s insistence that the important question is not which morality will be imposed, but rather upon what moral justification (by what “right”) society enforces a dominant morality, is both correct and entirely beside the point.177 A society which abdicates the right to enforce its moral standards, as Hart indeed admits,178 would cease to serve any practical purpose as a society at all. Thus, the exercise boils down to line-drawing: which kinds of moral rules will be beyond the reach of the majority to enforce, and what kinds of sanctions will be deemed inappropriate? Like the content of the rules themselves, answers to such questions involve value choices. We may name the source of such values “God,” “autonomy and equal concern,” “the concept of an ordered liberty,” or “the will of the people;” they remain value choices just the same.

Whether by means of the “Hobbesian experiment,”179 interpretation of divine providence, or invocation of “neutral principles of autonomy and equal concern,”180 the scholarly community appears to agree that to prevent harm, the legal system is entitled to enforce rules that impose one view of “moral law” over another. For all but self-identified anarchists, this consensus is seemingly inescapable: without the “harm principle,” there could be no basis for sanction by the criminal justice system of any of the behaviors that the “dominant morality” deems unacceptable. Murderers, rapists, and armed burglars would only need protest that their “deviant” behavior is perfectly acceptable within their competing system of moral values. With the legitimation of such arguments, the entire fabric of the criminal law, if not of the social order itself, might begin to come apart at the seams.

175 See id. at 30-34.
176 P. DEVLIN, supra note 105, at 7.
178 See id. at 69-77.
179 Id. at 71. Hobbes imagined a world where socializations, and hence virtues, were totally absent.
180 Richards, supra note 163, at 964-67.
The point of dissension among theorists is the nature and degree of the "harm" which will call the legal system into play. One need only consider rules governing use of controlled narcotics—leaving aside more troubling issues of, for example, suicide and euthanasia—to conclude relatively quickly that strict antipaternalism, which would permit legal sanction only in cases of actual harm to persons other than oneself, is today an extreme and disfavored theoretical position. There is all but universal consensus that, at least in some cases, society is entitled to prevent harm as it defines harm. The harm may be constructive. It may be inferred from "general principle." And harm may be construed in such a way that consent does not vitiate the wrong.

[O]ne who is "no menace to others" nonetheless may by his immoral conduct "threaten one of the great moral principles on which society is based." In this sense the breach of moral principle is an offense "against society as a whole," and society may use the law to preserve its morality as it uses it to safeguard anything else essential to its existence.

B. A Significant Threat

It appears that the state can legitimately enforce morality when some version of harm is threatened, though when the feared harm is constructive or general, most would require a higher degree of harm.

Same-sex marriage is traditionally viewed as just such a harm. Those who oppose its recognition do not contest that the harm is constructive; but they see the threat as uniquely destructive of an institution, traditional heterosexual marriage, which itself is the keystone of the existing social order.

The envisioned destructive capacities of same-sex marriage are essentially threefold. First, opponents fear that recognition of same-sex marriage will undermine the majority's faith in its power to "promote its own perception of moral excellence through all the mediating structures of society." Recognition by the courts would, according to one commentator, "turn the Constitution into an instrument that saps the will of the majority to pursue moral excellence, through the legislative process" such that "the majority may come to believe that, on questions of morality, it has lost dominant control over its own destiny." Adds another, "The power of family life to develop public virtue and to promote the ends of a democratic society would . . . be seriously impaired by recognition of alternate forms of 'marriage.'"

\[182\] Id. at 48-49 (quoting P. Devlin, supra note 105, at 8).
\[183\] G. Buchanan, supra note 28, at 148.
\[184\] Id. at 149.
Secondly, the capacity of same-sex marriage to stand as a viable alternative to traditional opposite-sex marriage is viewed as gravely threatening. The danger is primarily viewed in moral terms, not in practical ones: predictions of depopulation are rarely treated seriously. But if society advanced same-sex marriage as a real alternative, the possibility that significant numbers of people would choose to live their lives with same-sex spouses threatens heterosexual hegemony. "The most threatening aspect of homosexuality," claims one article, "is its potential to become a viable alternative to heterosexual intimacy."

In such a circumstance, wrote Devlin:

[T]he law-makers of society have the duty to balance conflicting values—the value of diversity against the value of conformity—and to form a judgment according to the merits of each case. They cannot be constrained by rule. They cannot suffer a definite limitation on their powers. They cannot be denied entry into some private realm. This too is a majoritarian position: it asserts the majority's absolute power to choose against diversity, hence to promote its own standards of moral behavior unconstrained by abstract rules which might trump a dominant preference for conformity.

Lastly, there is the concern that recognition of same-sex marriage will devalue the societal status of heterosexual marriage. According to this view, "any recognition of a constitutional right to practice homosexuality would undermine the value of heterosexuality and the institutions and practices—conventional marriage and child-rearing—associated with it. This state concern... should not be minimized."

Diversity and pluralism, then, are innately threatening: any sharing of cultural benefits with those who currently are excluded from preferred status ineluctably makes the preferred status less desirable. Arguing that "exclusiveness is a virtue," G. Sidney Buchanan has explained:

[The traditional "laws regarding marriage" have made opposite-sex marriage the standard of moral excellence in the core areas of sexual conduct and child-bearing. As a relationship, opposite-sex marriage thus draws its nourishment from its elevated status, a status more difficult to maintain if it must be shared with same-sex unions. The majority, therefore, may reasonably believe that legal recognition of same-sex marriage would destroy the exclusiveness of the present position held by opposite-sex marriage in the eyes of society and, by so doing, would impair the ability of opposite-sex marriage to advance the individual and community values that it has traditionally promoted.

By its very nature, same-sex marriage is seen as "an attack upon social
If the essence of traditional marriage is its preferred status, then society will feel any attempt to elevate nontraditional forms to that same status as a serious and highly subversive blow.

The profound import that the culture attaches to the institution of marriage makes these threats appear all the more ominous. "So great, in fact, is our emotional investment in orthodox family life that the rationality of these fears and the reality of the threat may never be fully tested," wrote two legal commentators in 1977, and their predictions ring frighteningly true more than a decade later in the wake of the Hardwick decision.

The basis upon which critics justify the prohibition of same-sex marriage—that it poses a threat to "orthodox family life"—may not tell the whole story. In deciphering the bases underlying the claim that moral paternalism is warranted, it would be a mistake to ignore individual judges' emotional—and sexual—responses to sexual deviancy. Historically, rule structures governing marriage have been intertwined with principles of "morality." Thus, the habituated responses of individual courts to the inherent "immorality" of homosexuality naturally have seemed to play a part in judicial decision-making. Because judges understand their role as one of adjudicating morality, their own moral beliefs seem legitimately to enter the discourse; which presumably they would not if morality itself were not centrally at issue.

Courts have not been sparing in their condemnation of homosexuality. In addition to the major constitutional cases upholding sodomy laws, individual judges have often made known their personal disgust toward lesbians and gay men. In deciding a divorce case, one New York court noted that "[f]ew behavioral deviations are more offensive to American mores than is homosexuality," adding that "[u]nnatural practices of the kind charged here are an infamous indignity to the wife, and which would make the marriage relation so revolting to her that it would...defeat the whole purpose of the relation." In another case, the judge saw fit to remark that "[a]ny schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene." Further, when deciding child custody and visitation cases involving lesbian and gay parents, some judges comment on the inherent harm to children's best interests in being in the company of homosexuals. For example, one court noted that "[e]very trial judge, or for that matter, every appellate judge, knows

191 Hafen, supra note 185, at 464 (quoting San Francisco Examiner, Nov. 21, 1982, at B10, col. 1).
192 Wilkinson & White, supra note 186, at 573-74.
196 See, e.g., SEXUAL ORIENTATION AND THE LAW § 1.03(1)(a) (R. Achtenberg ed. 1987).
that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated,"197 and insisted further that it was not moral considerations, but rather "the court's concern for potential harm to the child which requires consideration of such conduct as gay political activism and "lifestyle." 198 Finally, one court, in deciding whether lesbians and gay men may become naturalized American citizens, found homosexuality inherently inconsistent with the requirement of "good moral character,"199 while another grudgingly granted citizenship, commenting:

If the criterion were our own personal moral principles, we would deny the petition, subscribing as we personally do to the general "revulsion" or "moral conviction or instinctive feeling" against homosexuality.200

In a legal realm where rules governing "moral conduct" are centrally at issue, it is no wonder that personal tastes and distastes are an important, if not a decisive, factor. Though the superiority of one sexual practice over another is only marginally relevant when the courts confront the legality of same-sex marriage, questions of moral authority and superiority are clearly at the heart of the adjudication. Whether judges rely on their individual sexual tastes or couch these inclinations as the moral views of "right-thinking people," it seems likely that their legal conclusions rest, at least in part, on personal orientation and normative models of morality.

Clearly, "morality," like "privacy," is a culturally determined notion. Legal issues which by their nature refer to moral principles for determination cannot help but be guided by normative views. Even where no formal rules dictate that the governing standard will be the court's projection of the attitudes of a "reasonable man of ordinary prudence,"201 the law of privacy is uniquely susceptible to subjective evaluations. Laws governing marriage, as Professor Marjorie Shultz has written, involve "deep, often irrational feelings, profound inchoate yearnings."202 Inchoate and irrational though they may be, they are also rooted in long-standing traditions of morality and beliefs about the relation of that morality to the social order. As one court stated in 1949,

The state and the community are interested in and concerned with the institution which marriage creates. Man enters a marital relationship to perpetuate the species. The family is the result of the marital relationship. It is the institution which determines in a large measure the environmental influences, cultural backgrounds, and even economic status of its members. It is the foundation upon which society rests and is the basis for the

198 Id.
201 RESTATEMENT (SECOND) OF TORTS § 283 (1965).
family and all of its benefits. . . . The community, man, has a vital interest in the marriage institution, for the present generation is father to the succeeding one, and that generation will be the determinant as to the advance of civilization, morals, law, and relationships of the future. 203

V. CONCLUSION: PRIVACY, SAME-SEX MARRIAGE AND JURIDICAL SILENCES

Silence can be a plan
rigorously executed
the blueprint to a life

It is a presence
it has a history a form

Do not confuse it
with any kind of absence

Adrienne Rich
"Cartographies of Silence" 204

The heritage of Griswold v. Connecticut establishes the principle that marriage exists within a "zone of privacy." Within this zone, state intrusion to enforce moral choices is, it is said, impermissible. 205 Loving implies a further proposition: that social norms may not be used by courts or legislatures as the rationale for state interference with private decision-making about whom to marry. 206 In light of these precedents, the courts' refusal to grant legitimacy to same-sex marriage appears, at first glance, illogical, inconsistent, and contradictory. Their relative silence on the issue, moreover, belies both the perceived threat and the challenge that same-sex marriage—and homosexuality itself—poses to traditional values and structures of power.

But the contradiction itself is illusory. The right of privacy has never been free from normative values, and the state has never relinquished its right to intrude into private decision-making in order to prevent what the dominant society views as harm. Marriage continues to be viewed as the "unspecifiable bedrock of society," 207 and remains invested with the emotional force attached to norms of morality. Hence the courts have seen themselves as legitimate protectors of an institution

204 A. RICH, DREAM OF A COMMON LANGUAGE 17 (1978).
205 See supra note 17 and accompanying text.
206 See supra notes 29-33 and accompanying text.
207 B. HAFEN, supra note 186, at 472.
whose traditional status is essential "to ensure civilized society." 208

Thus, the "zone of marital privacy" is "private" only insofar as it does not too radically disrupt or threaten contemporary social values, including those of moral rectitude. Same-sex marriage, unlike the use of contraceptives, unlike miscegenation, and even more than sodomy, is perceived as profoundly threatening to the very institution in whose name "privacy" was originally enshrined. Until what is "private" is no longer determined by reference to tradition, deeply rooted prejudice, and normative notions of morality, the courts will continue to ignore and reject same-sex marriage. Their silence fairly shouts the entrenchment of dominant morality and the real valuation of what is at stake.