University of Dayton Law Review

Volume 10
Number 3 *Symposum: The Legal System and Homosexuality: Approbation, Accommodation, or Reprobation?*

Article 4

5-1-1985

Same-Sex Marriage: The Linchpin Issue

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SAME-SEX MARRIAGE: THE LINCHPIN ISSUE*

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I. INTRODUCTION

When Peter and the apostles were brought before "the council and all the senate of Israel," some members of the council "were enraged and wanted to kill them" because the apostles had been "teaching the people" in the name of Jesus contrary to an earlier charge of the council.[1] "But a Pharisee in the council named Gamaliel" opposed this course of action, saying:

> [I]n the present case I tell you, keep away from these men and let them alone; for if this plan or this undertaking is of men, it will fail; but if it is of God, you will not be able to overthrow them. You might even be found opposing God![2]

Scripture then records that the members of the council "took [Gamaliel's] advice, and when they had called in the apostles, they . . . charged them not to speak in the name of Jesus, and let them go."[3]

In the spirit of Gamaliel's advice, this article urges that the courts "keep away" from the political process as it grapples with the issue of same-sex marriage. From a Judeo-Christian perspective,[4] if same-sex marriage "is of men, it will fail; but if it is of God," same-sex marriage will, in due course of time, take root and thrive in the social fabric of the nation. Here, if ever, is the place for the courts to take special note of the values promoted by the majority rule principle in our representative form of government[5] and of the majority's strong interest in seek-

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* This article is a modified version of chapter five of the author's book, *Morality, Sex, and the Constitution: A Christian Perspective on the Power of Government to Regulate Private Sexual Conduct between Consenting Adults* (copyright 1985, University Press of America, Inc.).

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1. *Acts* 5:21, 25 & 33 (all biblical references and quotations in this article are to the Revised Standard Version).

2. *Id.* 5:34, 38–39.

3. *Id.* 5:40.

4. In relation to any discussion of homosexual conduct and same-sex marriage, one cannot talk about the moral norms of society without an examination of the main source of those norms. In American society, that "main source" is the Judeo-Christian heritage as reflected primarily in Jewish and Christian scripture, and in the modern pronouncements of the major branches and denominations of Judaism and Christianity. *See supra* notes 30–41 and accompanying text. Throughout this article, therefore, I weave into my discussion and analysis what I believe to be relevant insights from the Judeo-Christian tradition.

5. *See supra* text accompanying notes 44–65.

ing to promote its own perception of moral excellence through the legal system.[6] On the issue of same-sex marriage, the political process should be allowed to work its will without having the issue preempted by judicial intervention.

Conceptually, this article argues that state governments have no constitutional obligation to recognize same-sex marriage, that state governments may, at their constitutional option, limit the institution of marriage to opposite-sex unions. This discussion proceeds on two conceptual assumptions: (1) The right of privacy includes an adult person's decision to engage privately in sexual conduct with another consenting adult;[7] and (2) state governments have a "compelling" interest in protecting and fostering the marriage institution.[8] Conceding that governmental action limiting marriage to opposite-sex unions does impinge

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6. *See supra* text accompanying notes 66–85.

7. The decision of the United States Supreme Court in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975), points in the opposite direction. In *Doe*, the Court summarily affirmed a three-judge federal court's dismissal of a challenge by male homosexuals to Virginia's sodomy law. A recent decision of the D.C. Circuit also refused to find a constitutional right to engage in homosexual conduct. Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir.), *reh'g en banc denied*, 746 F.2d 1579 (1984). As the sharply divided opinions appended to the denial of rehearing *en banc* indicate, however, a conclusion that the right of privacy does not apply is by no means certain.

8. The marriage relationship promotes certain individual and community values. It is perhaps impossible to list all the individual values promoted by the marriage relationship, but five such values come readily to mind: (1) generosity or the spirit of sacrificial giving; (2) fidelity or the honoring of commitments; (3) integrity or the creation of trust; (4) self-respect or the assurance of personal worth; (5) sustained joy. These individual values acquire added significance for society because individual and community values are interrelated. Persons who practice and experience generosity, fidelity, integrity, self-respect, and sustained joy in the marriage relationship are more apt to practice and experience those values in the larger reaches of life. Society benefits from a process of value-infusion whereby those individual values nurtured in the marital relationship are transmitted into the broader community.

In addition, certain identifiable community values are promoted by the marriage relationship. In an admirable article, Professor Bruce C. Hafen advances persuasively four community values that he believes are promoted by the formal marital relationship. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 471–91 (1983). These values, he contends, "are . . . related to the political ends of democracy, because it is primarily through family bonds that both children and parents learn the attitudes and skills that sustain an open society." *Id.* at 472. Hafen discusses his community values under the following headings: (1) the needs of children; (2) socialization and public virtue: obedience to the unenforceable; (3) the family in the democratic structure; and (4) marriage and minority status (in the age sense) as sources of objective jurisprudence. *Id.* at 473, 476, 479, 484. While it is beyond the scope of this article to set forth an extended analysis of Hafen's values, I believe that, in combination with the individual values set forth above, these values are sufficiently weighty to justify a conclusion that government has a compelling interest in their advancement. To characterize as less than compelling the societal interest in protecting and fostering the institution of marriage would demean a relationship described by Justice Douglas as, "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects . . . an association for as noble a purpose as any involved in our prior decisions." Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

significantly on the right of privacy of those seeking a same-sex marriage,[9] the article contends, nevertheless, that such governmental action is a means "narrowly drawn to express only the legitimate state interests at stake"[10]—that such action is the least "drastic means"[11] of advancing the state's compelling interest in protecting and fostering the marriage institution. If this analysis were adopted by the courts, the governmental action would pass constitutional muster under the strict scrutiny level of judicial review and would represent one of the few areas in constitutional law where such review is "strict in theory" but not "fatal in fact."[12]

Several additional conceptual points should be noted. This article does not concern the power of government to subject same-sex conduct (or, more generally, sexual conduct outside of marriage) to criminal punishment.[13] Nor does this article urge that government be constitutionally prohibited from recognizing same-sex marriage if it chooses to do so. It argues simply that this choice, in constitutional terms, be left to the nonjudicial branches of government, to the free workings of the political process.

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9. As stressed by Kenneth Karst,

> [w]e have seen how the act and state of marriage are statements of identity and of identification with one's partner. This phenomenon feeds on itself; if large numbers of people equate marriage and commitment, then each successive marriage is apt to seem to the marrying couple both the symbol of commitment and the undertaking itself. The notion of marriage as a contract, long embedded in law and popular culture, conveys this dual meaning.

Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 670 (1980). Thus, a prohibition of same-sex marriage does preclude same-sex couples from making the "statements of identity and of identification with one's partner" that Karst describes.

10. Roe v. Wade, 410 U.S. 113, 155 (1973).

11. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

12. The United States Supreme Court has recognized that such areas do exist. In certain cases involving governmental regulation of access to the political process or the free exercise of religion, the Court, while applying strict scrutiny review, has upheld the challenged governmental action. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982); American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). More recently, in Bob Jones Univ. v. United States, 461 U.S. 574 (1983), the Court reaffirmed its position that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* at 603 (quoting *Lee*, 455 U.S. at 257–58). In *Bob Jones*, the Court held that the government's "fundamental, overriding interest in eradicating racial discrimination in education . . . substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Id.* at 604.

13. In this article, unless the context clearly indicates otherwise, all references to "sexual conduct" mean noncommercial, private sexual conduct between consenting adults. Elsewhere I have taken the position that the right of privacy should be held to protect such conduct against criminal prosecution when engaged in by two unmarried persons. See chapter four of G. BUCHANAN, MORALITY, SEX, AND THE CONSTITUTION: A CHRISTIAN PERSPECTIVE ON THE POWER OF GOVERNMENT TO REGULATE PRIVATE SEXUAL CONDUCT BETWEEN CONSENTING ADULTS (copyright 1985, University Press of American, Inc.).

Much is at stake in the resolution of the same-sex marriage issue. If the courts impose on government a constitutional obligation to recognize same-sex marriage, this obligation would have important ramifications for all civil-law distinctions made by government between same-sex and opposite-sex conduct. This would be especially true in the areas of child custody and adoption proceedings.[14] If government may not distinguish between same-sex and opposite-sex conduct in the area of marriage, it is difficult to use the societal interest in protecting and fostering the marriage institution as a basis for justifying that distinction in other areas of the civil law. In this sense, therefore, the same-sex marriage issue is a linchpin issue. If it is resolved against the power of government to limit marriage to opposite-sex unions, against the power of government to confine marriage to its traditional opposite-sex moorings, then the legal system, as a practical matter, will have lost its capacity to make distinctions between same-sex and opposite-sex conduct in any walk of life. Government would be constitutionally straitjacketed into a requirement of total equality in the regulation of same-sex and opposite-sex conduct. Some might applaud that result, while others would oppose it vehemently. Whatever may be a person's position on the issue of same-sex marriage and the obligation of government to recognize it, it is crucially important to appreciate the legal consequences that flow from the issue's resolution. With so much riding on the outcome, it may be well, in this area of constitutional law, for the courts to heed Justice Harlan's advice that they should not proceed with "precipitate and insecure strides"[15] in imposing new constitutional obligations on the political process.

II. THE CURRENT STATUS OF THE LAW

The current status of the law on the same-sex marriage issue may be simply stated. From a legislative viewpoint, "[n]o state today would knowingly issue a marriage license to a homosexual couple."[16] Moreover, no state statute expressly affirms the right of homosexual couples

14. In Comment, *Homosexual's Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979), the comment authors, while urging that homosexuals "should . . . be afforded the opportunity to obtain the legal status and marital benefits to which they are entitled," concede that the state should not "ordinarily" be required to permit homosexuals to adopt "absent a biological relationship [between the adopted child and] one member of the homosexual union." *Id.* at 213, 215. The comment's difficulty with the adoption issue stems directly from its conclusion that government should be required to recognize some form of same-sex marriage. *See id.* at 215–16.

15. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 478 (1968) (Harlan, J., dissenting). While I disagree strongly with Justice Harlan's criticism as applied to the racial discrimination issue before the Court in that case, the quoted words do reflect my attitude concerning the caution with which I believe the courts should proceed on the same-sex marriage issue.

16. Hafen, *supra* note 8, at 465 n.6.

to marry.[17] From a judicial viewpoint, "[t]he judiciary has unanimously inferred prohibitions of same-sex marriage from silent state statutes,"[18] and all courts "faced with [the same-sex marriage] issue have relied on the premise that a lawful marriage, by definition, can be entered into only by two persons of opposite sex. No court has taken the position that state prohibition of homosexual marriage is unconstitutional."[19]

In two major decisions, *Baker v. Nelson*[20] and *Singer v. Hara*,[21] state courts have addressed the constitutional issues involved in "state prohibition of homosexual marriage" and in each case concluded that the failure of the state to issue a marriage license to a homosexual couple did not deprive the couple "of a fundamental right" nor subject the couple to "irrational or invidious discrimination."[22] More precisely, the *Singer* court held that the restriction of marriage to heterosexual couples was not a gender-based classification demanding an intermediate level of judicial scrutiny.[23] Nor, held the court, did the restriction impinge on the fundamental right to marry because marriage refers to an opposite-sex union.[24] Hence, the strict scrutiny doctrine was inapplicable, and the *Singer* court employed a low level of scrutiny in which the restriction of marriage to heterosexual couples was justified as bearing a rational relationship to the policy of "affording a favorable environment for the growth of children."[25]

Finally, it should be stressed that the United States Supreme Court has not directly confronted the same-sex marriage issue. In *Baker v. Nelson*,[26] the Minnesota Supreme Court rejected a constitu-

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17. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 324–25 (1980–81) [hereinafter cited as Rivera, *Recent Developments*]; Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 874–78 (1979) [hereinafter cited as Rivera, *Legal Position*].

18. Comment, *supra* note 14, at 196.

19. *Id.* at 194.

20. 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

21. 11 Wash. App. 247, 522 P.2d 1187 (1974).

22. Comment, *supra* note 14, at 196.

23. *Singer*, 11 Wash. App. at ____, 522 P.2d at 1192. In cases involving gender-based classifications, the United States Supreme Court has held that such classifications, to withstand constitutional challenge, "must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). *See also* Califano v. Webster, 430 U.S. 313, 316–17 (1977).

24. *Singer*, 11 Wash. App. at ____, 522 P.2d at 1195.

25. *Id.* at ____, 522 P.2d at 1197. In this article, I will take a different conceptual route to the same result reached by the *Singer* court. While conceding that nonrecognition of same-sex marriage does infringe significantly on the right to privacy of same-sex couples, I will argue that such a ban is narrowly drawn to promote the compelling governmental interest in protecting and fostering the institution of marriage in its traditional opposite-sex form.

26. 291 Minn. 310, 191 N.W.2d 185.

tional challenge to Minnesota's restriction of marriage to heterosexual couples.[27] An appeal of that decision to the United States Supreme Court was dismissed for want of a substantial federal question.[28] The weight to be given that dismissal remains uncertain,[29] and the same-sex marriage issue awaits further elucidation by the Supreme Court.

III. THE JUDEO-CHRISTIAN HERITAGE

To define a heritage is not an easy task when talking about something as broad and amorphous as the Judeo-Christian heritage. To bring some specificity to the notion of the Judeo-Christian tradition in American society today, this section will focus on two aspects of that heritage: (1) the Judeo-Christian tradition as reflected in Scripture; and (2) that same heritage as reflected in the current pronouncements of the major American branches and denominations of Judaism and Christianity.[30] Each of these heritage aspects will be examined in relation to the issue of same-sex marriage.

A. Scripture and Current Denominational Pronouncements

From the book of Genesis forward, the Bible affirms the moral rightness of opposite-sex marriage and of sexual conduct within the framework of opposite-sex marriage.[31] To those scriptural affirmations could be added the many biblical stories in which the marriage of man and woman is cast in a favorable and approving light.[32] Not the least of

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27. *Id.* at ____, 191 N.W.2d at 187.

28. *Nelson*, 409 U.S. 810.

29. Justices Brennan and Rehnquist would probably disagree on the meaning of the Court's summary dismissal in *Nelson* as they have concerning the Supreme Court's summary affirmance in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976). In Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), Justice Brennan observed that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Id.* at 694 n.17. Justice Rehnquist replied: "While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established." *Id.* at 718 n.2 (Rehnquist, J., dissenting) (citing *Doe*).

30. Admittedly, this focus omits other relevant components of the Judeo-Christian heritage, e.g., the opinions of modern religious leaders and scholars.

31. "Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh." *Genesis* 2:24.

> And Pharisees came up to [Jesus] and tested him by asking, "Is it lawful to divorce one's wife for any cause?" He answered, "Have you not read that he who made them from the beginning made them male and female, and said 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh?' So they are no longer two but one flesh. What therefore God has joined together, let not man put asunder.

Matthew 19:3–6. *See also* 1 *Corinthians* 7:3–4.

32. The marriages of Abraham and Sarah, *Genesis* 12–23, Isaac and Rebecca, *id.* 24–25, Jacob and Rachel, *id.* 29–35, and Ruth and Boaz, *Ruth* 4, are obvious Old Testament examples.

these is the supportive presence of Jesus at the "marriage at Cana in Galilee" where, at time of need, Scripture records that Jesus performed the miracle of turning water into "good wine."[33] Viewed in totality, therefore, the Bible radiates a moral approval of opposite-sex marriage and its accompanying sexual intimacies. Any other construction would be difficult, if not impossible, to sustain.

In sharp contrast, the Bible nowhere affirms the moral rightness of same-sex marriage. No scriptural passage even approaches that position. Moreover, the Bible contains several express condemnations of homosexual conduct.[34] These condemnations are stated in absolute terms and do not appear to turn on the question of whether persons engaging in homosexual conduct are seeking a permanent relationship with each other. The Bible's condemnation of homosexual conduct, combined with the total absence of any scriptural language approving same-sex marriage, creates an implied negation of same-sex marriage that is equally as strong as the Bible's express affirmation of opposite-sex marriage. Again, it would require an act of constructional legerdemain to reach any other conclusion.

The current pronouncements of the major branches and denominations of Judaism and Christianity are in accord with Scripture on the issue of same-sex marriage. As does Scripture, these pronouncements expressly condemn homosexual conduct and strongly affirm the moral rightness of opposite-sex marriage and of sexual conduct within such a marriage.[35] Indeed, some of the pronouncements go further and expressly state that the church should not give its liturgical blessing to same-sex marriage but, instead, should reject such unions as contrary to God's will as expressed in Scripture. The Roman Catholic Church's

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The marriages of Joseph and Mary, *Matthew* 1:18–25, and of Zechariah and Elizabeth, *Luke* 1:5–80, are equally obvious New Testament examples.

33. *John* 2:1–11.

34. *E.g., Leviticus* 20:13 ("If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them."); *Romans* 1:26–27 ("men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men"); 1 *Corinthians* 6:9–10 ("neither the immoral, nor idolaters, nor adulterers, nor homosexuals, nor thieves, nor the greedy, nor drunkards, nor revilers, nor robbers will inherit the kingdom of God"); *see also* 1 *Timothy* 1:10. These passages notwithstanding, one scholar has argued that the "New Testament takes no demonstrable position on homosexuality." J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 117 (1980).

35. *See, e.g.*, BOOK OF COMMON PRAYER OF THE EPISCOPAL CHURCH 423 (1977); R. GORDIS, LOVE AND SEX: A MODERN JEWISH PERSPECTIVE 98 (1978); NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *To Live in Jesus Christ: A Pastoral Reflection on the Moral Life*, in IV PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS 181 (1984); REPORT OF THE COMM'N ON THEOLOGY AND CHURCH RELATIONS OF THE LUTHERAN CHURCH—MISSOURI SYNOD 12 (1981).

1975 *Declaration on Certain Questions Concerning Sexual Ethics* provides a representative statement:

> A distinction is drawn, and it seems with some reason, between homosexuals whose tendency comes from a false education, from a lack of normal sexual development, from habit, from bad example, or from other similar causes, and is transitory or at least not incurable; and homosexuals who are definitively such because of some kind of innate instinct or a pathological constitution judged to be incurable.
>
> In regard to this second category of subjects, some people conclude that their tendency is so natural that it justifies in their case homosexual relations within a sincere communion of life and love analogous to marriage, in so far as homosexuals feel incapable of enduring a solitary life.
>
> In the pastoral field, these homosexuals must certainly be treated with understanding and sustained in the hope of overcoming their personal difficulties and their inability to fit into society. Their culpability will be judged with prudence. But no pastoral method can be employed which would give moral justification to these acts on the grounds that they would be consonant with the condition of such people. For according to the objective moral order, homosexual relations are acts which lack an essential and indispensable finality. . . . [and] are intrinsically disordered and can in no case be approved.[36]

Declarations from Jewish,[37] Episcopal,[38] and Greek Orthodox[39] groups or leaders are in accord. Research reveals no pronouncement of a major branch of Christianity or Judaism that affirms the moral rightness of homosexual conduct or of same-sex marriage.[40]

B. Concluding Thoughts on the Judeo-Christian Heritage

In relation to same-sex marriage, the message of the Judeo-Christian tradition, as expressed in Scripture and current denominational

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36. SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON CERTAIN QUESTIONS CONCERNING SEXUAL ETHICS 8–9 (1975) [hereinafter cited as DECLARATION ON SEXUAL ETHICS].

37. *E.g.*, R. GORDIS, *supra* note 35, at 155.

38. REPORT OF THE 1977 SPECIAL MEETING OF THE HOUSE OF BISHOPS OF THE EPISCOPAL CHURCH 41 (1977) [hereinafter cited as 1977 EPISCOPAL REPORT].

39. *The Church and Contemporary Moral Issues*, 22 GREEK ORTHODOX THEOLOGICAL REV. (1977) (on file with University of Dayton Law Review).

40. The Metropolitan Community Church, most of whose 27,000 parishioners are of homosexual orientation, teaches that homosexuality is "a gift from God" and conducts rites of "holy union" for homosexual couples, as well as rites of "holy matrimony" for heterosexual couples. TIME, May 23, 1983, at 58. More recently, the Unitarian Universalist Association, a liberal Protestant denomination, has approved homosexual unions. On June 28, 1984, 1,300 delegates representing the denomination's 175,000 members voted overwhelmingly by voice vote to affirm "the growing practice of some of its ministers of conducting services of union of gay and lesbian couples." Houston Chronicle, June 29, 1984, § 1, at 2. It is too early to assess the impact of this decision on "mainline" religious denominations.

pronouncements, seems clear: The morality of opposite-sex marriage is expressly affirmed; homosexual conduct is expressly condemned; and same-sex marriage, expressly or by implication, is stated to be a relationship that is contrary to God's will and, therefore, not entitled to receive the church's liturgical blessing.[41] One may disagree with the Judeo-Christian heritage on any or all of these points. What I believe one may not do and remain intellectually honest is to distort the meaning of the scriptural passages and church pronouncements cited in this section into a position that is neutral toward, or even favorable to, homosexual conduct and same-sex marriage. What weight, if any, should be given in constitutional adjudication to the position of the Judeo-Christian heritage is a different and important question, a question on which reasonable minds can differ. On the question of the meaning of the sources cited in this section, it does not seem to me that reasonable minds can differ to any significant degree. In relation to same-sex marriage, the position of the Judeo-Christian heritage should be dealt with as it is and not as some would tendentiously like it to be.

IV. NONRECOGNITION OF SAME-SEX MARRIAGE AS A PERMISSIBLE GOVERNMENTAL MEANS OF PROTECTING AND FOSTERING THE INSTITUTION OF MARRIAGE

While it is difficult to articulate a nonfaith rationale for the distinction made by the Judeo-Christian heritage between same-sex and opposite-sex marriage, the task is not impossible.[42] Accordingly, this section will explicate a series of secular arguments that support the refusal of government to recognize same-sex marriage, arguments that would justify a court in holding that nonrecognition of same-sex marriage is a governmental means "narrowly drawn" in relation to government's compelling interest in protecting and fostering the marriage institution. Alternatively, these same arguments will serve to show why government has a compelling interest in confining the institution of marriage to its traditional opposite-sex framework.[43] For if that pro-

41. *See supra* text accompanying notes 30–40.

42. The task is mandated by establishment clause considerations. For constitutional law purposes, it is not sufficient to justify government's nonrecognition of same-sex marriage by reference solely to religious beliefs and doctrine. A significant secular reason for the nonrecognition must be found to avoid establishment of religion difficulties. In sustaining the validity of Sunday closing laws against an establishment clause attack, for example, the United States Supreme Court found that such laws had a secular purpose and effect. McGowan v. Maryland, 366 U.S. 420, 444 (1961). The Court identified that secular purpose as a desire by the state "to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together." *Id.* at 450.

43. Unless the context clearly indicates otherwise, all references in this section to "marriage" or the "marriage institution" mean marriage in its traditional opposite-sex form.

position can be established, the means argument follows ineluctably. As a means, the nonrecognition of same-sex marriage is more than narrowly drawn in relation to the government's interest in confining marriage to opposite-sex unions; it is a means that is indispensable to the advancement of that interest.

A. Honoring the Values Promoted by the Majority Rule Principle in Our Representative Form of Government

Perhaps in no generation other than our own have the rights of individuals and of minor parties received greater solicitude in judicial decisions[44] and in the writings of legal scholars.[45] This solicitude is par-

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44. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court was "required . . . to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.* at 256. The Court stated: "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. The Court went on to hold that this "profound national commitment" requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80.

In a similar vein, the Court, in Cohen v. California, 403 U.S. 15 (1971), confronted facts in which "Paul Robert Cohen was convicted . . . of violating that part of California Penal Code § 415 which prohibits 'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct.' " *Id.* at 16. Cohen had been observed in the corridor of the Los Angeles County Courthouse wearing a jacket bearing the words "Fuck the Draft." In reversing Cohen's conviction, the Court stressed the importance of

> the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours . . . .
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Id. at 24–25.

45. In describing "the function of noninterpretive review in human rights cases," Professor Michael J. Perry states:

> The function of noninterpretive review in human rights cases, then, is the elaboration and enforcement by the Court of values, pertaining to human rights, not constitutionalized by the framers; it is the function of deciding what rights, beyond those specified by the framers, individuals should and shall have against government.

M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, 93 (1982). Because human rights are so important and because the "stakes are very high indeed," *id.* at 92, Perry argues that in human rights cases, the Court should not limit itself to "interpretive review"—review in which the Court "ascertains the constitutionality of a given policy choice . . . by reference to a value judgment embodied, though not necessarily explicitly, either in some particular provision of the

ticularly evident in relation to the individual rights of freedom of speech and religion protected by the first amendment,[46] the individual right of privacy now emerging under the Supreme Court's modern interpretation of substantive due process,[47] and in the heightened level of judicial scrutiny applied by the Court to governmental action based on racial and other minority group classifications.[48] In these areas, individ-

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text of the Constitution or in the overall structure of government ordained by the Constitution." *Id.* at 10. Rather, Perry urges, the Court should protect individual rights through noninterpretive review in which "it makes the determination of constitutionality by reference to a value judgment other than one constitutionalized by the framers." *Id.* at 11.

In adopting a position that falls somewhere between "a clause-bound interpretivism" and "a value-laden form of noninterpretivism," J. ELY, DEMOCRACY AND DISTRUST 89 n.* (1980), Dean John Hart Ely argues for an approach to constitutional adjudication that "is akin to what might be called an 'antitrust' as opposed to a 'regulatory' orientation to economic affairs—rather than dictate substantive results it intervenes only when the 'market,' in our case the political market, is systematically malfunctioning." *Id.* at 102–03. Ely stresses the special competence of appointed judges

> objectively to assess claims—though no one could suppose the evaluation won't be full of judgment calls—that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.

Id. at 103. This "representation-reinforcing theory of judicial review," *id.* at 181, would have the Court pursue an activist role in "clearing the channels of political change" and in "facilitating the representation of minorities." *Id.* at 105, 135.

Whatever may be their differences in the ongoing debate over the proper scope of noninterpretive judicial review, Perry and Ely are representative of the modern generation of legal scholars who attach great importance to the judicial protection of individual and minority group rights. In a similar spirit, Professor Jordan J. Paust argues that "an active judicial involvement is necessary to guarantee more fully, for all Americans, the human and constitutional right to human dignity." Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 223 (1984). Finally, note the statement of Professor Jesse H. Choper that "the overriding virtue of and justification for vesting the [Supreme] Court with [the] awesome power [of judicial review] is to guard against governmental infringement of individual liberties secured by the Constitution." J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 64 (1980).

46. In addition to the *Sullivan* and *Cohen* cases cited in *supra* note 44, see Brandenburg v. Ohio, 395 U.S. 444 (1969), and Tinker v. Des Moines School District, 393 U.S. 503 (1969).

47. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Stanley v. Georgia, 394 U.S. 557 (1969) (obscene material in home); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives).

48. The Supreme Court has held, for example, that disadvantaging racial classifications are "immediately suspect" and subject "to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967). Typically, in the words of Professor Gunther, this rigid scrutiny requires government to show "both a 'compelling' end and a carefully tailored, 'necessary' means" to justify the classification that it has employed. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 750 n.3 (10th ed. 1980).

Other classifications, while not triggering "rigid" or "strict" scrutiny, have at least generated an "intermediate" level of scrutiny. In the area of gender classifications, for example, the Supreme Court has held that such classifications, to withstand constitutional challenge, "must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). *See also* Califano v. Webster, 430 U.S. 313, 316–17 (1977).

ual and minority group rights have received strong, even rhapsodic, praise and support.[49]

This accentuated concern for individual and minority group rights is in large part a healthy and welcome development on the American political scene. In American history, overbearing majorities have indeed oppressed the rights of the minor party.[50] The majority's zealous desire to advance its own interests through the political process does require an equally zealous protection of individual and minority group rights. This political truism, firmly embedded in the American constitutional framework, becomes even more persuasive when individual rights are viewed from a global perspective.[51]

Should we not then rejoice in a society that seeks a vigorous protection of individual and minority group rights? We should, subject to a crucial caveat: In our rush to accord that protection, we should not destroy the principle of majority rule as the operative norm in the American political process. In our infatuation with individual and minority group rights, we are in danger of forgetting the importance of the majority rule principle and the vital role that it plays in our society. We are in danger of developing an attitude of distaste, suspicion, and even hostility toward majority action per se, of viewing majority action as a lower form of political action that is invariably the product of unsophisticated thinking and selfish motivation.[52] More fundamentally,

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49. In addition to the statements quoted in *supra* notes 44–48, see *Tinker*, 393 U.S. at 508–09; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 486.

50. The American slave system and the white majority's treatment of American Indians are the examples that come readily to mind.

51. From a global perspective, it is clear that individual and minority group rights are today being violated on a pervasive and ongoing basis. This violation stems typically from the action of minority ruling classes wielding dictatorial power over those subject to their control. Examples abound at both ends of the political spectrum: The treatment of Jews and political dissidents by the ruling clique of the Soviet Union is an example of oppression on the left side of the political spectrum, while the dictatorial regimes of Chile and Haiti are prime examples of oppression on the right side of the political spectrum. More often than not, the violation of individual rights, as in South Africa, extends beyond the deprivation of minority group rights to the broader deprivation of "majority group" rights. Indeed, it is the very nature of dictatorial regimes (whether of the left or of the right) that, in order to perpetuate their power, they must engage in a continuing violation of political rights on a wholesale basis.

52. Professor Perry, for example, states that, in the resolution of "certain political issues . . . widely perceived to be fundamental moral issues as well," our "electorally accountable policymaking institutions are not well suited to deal with such issues in a way that is faithful to the notion of moral evolution, or therefore, to our religious understanding of ourselves." M. PERRY, *supra* note 45, at 100. Perry's elaboration of this point can be boiled down to two statements: (1) Courts can resolve "fundamental moral issues" more wisely than the legislative and executive branches of government; and (2) the "established moral conventions of the greater part of . . . particular [legislative] constituencies" do not promote "moral evolution" or "moral growth" as effectively as moral conventions stemming from other sources, whatever those other sources may be. *See id.*

Other scholars share Perry's viewpoint. *See, e.g.*, R. DAHL, PLURALIST DEMOCRACY IN THE

we are in danger of confusing the excesses of majority rule with the rule itself.

At this point then, it is well to recall the positive values that the principle of majority rule is designed to promote in a representative form of government. Foremost among those values is the role played by the majority rule principle in preserving the very substance of representative government itself. Without the principle of majority rule, representative government would crumble. A casual glance at the American political structure reveals the workings of the majority rule principle. At every level of that structure, whether local, state, or national, legislative action depends for its efficacy upon the majority vote of one or more representative bodies of government.[53]

The preservation role of the majority rule principle reaches still more deeply. It is tied indissolubly to the preservation of free elections in a representative form of government. By a free election is meant an election in which: (1) the results of the election (including especially the defeat of incumbents) will, realistically, be accepted and carried out by those holding political power; (2) those who are voting are not, realistically, subject to the control of those holding political power; and (3) the qualifications and procedures for voting are fair and reasonable in relation to the purposes of the election.[54] While not perfect, this defi-

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UNITED STATES (1967). In analyzing the motives of the typical legislator, Dahl states:

> [Congressional leaders] rely mainly on persuasion, party loyalty, expectations of reciprocal treatment, and, occasionally, special inducements such as patronage or public works. But none of these is likely to be adequate if a member is persuaded that a vote to support his party will cost him votes among his constituents. Fortunately, for him, the mores of Congress, accepted by the leaders themselves, are perfectly clear on this point: His [or her] own election comes first.

Id. at 131. *See also* Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979) ("Legislators . . . see their primary function in terms of registering the actual, occurrent preferences of the people—what they want and what they believe should be done."); Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 8 (1977) ("Legislators have become astute at turning a deaf ear to highly visible issues on which they do not want to gamble their political lives.").

From a historical perspective, it would be difficult to support Perry's thesis in the area of civil rights. In the elimination of racial and other forms of class discrimination, one of the "fundamental moral issues" cited by Perry, the "morality" record of Congress has been no worse than, and probably better than, the record of the Supreme Court. It was, after all, the Court's decisions in the Civil Rights Cases, 109 U.S. 3 (1883), and Plessy v. Ferguson, 163 U.S. 537 (1896), that played a major role in vitiating the civil rights legislation enacted by Congress in the post-Civil War period, and in blocking further progress in the civil rights movement for close to a century.

53. Of course, a bill originating in either house of Congress must first be approved by a majority vote in both houses. Without such approval, the bill lacks legal efficacy and cannot be presented to the president for consideration. U.S. CONST. art. I, § 7, cl. 2.

54. The first requirement concerning acceptance of the election results includes "issue-oriented" elections as well as "candidate-oriented" elections. In the third requirement concerning qualifications and procedures, I am setting forth a general guideline of fairness and reasonableness.

nition suffices to show the vital link between the preservation of free elections and the majority rule principle.

Beyond its role in helping to preserve the very essence of a representative form of government, i.e., law-making power exercised by representatives chosen in free elections, the majority rule principle also contributes strongly to the political stability of society. It does so by its appeal to a rudimentary sense of fairness in both the governors and the governed.[55] If a group of persons is debating a course of action which, when decided, is intended to bind all members of the group, the majority rule principle commends itself as generally the fairest means of determining what course of action the group should take. Common sense dictates to the normal person that group decision making is an inescapable fact of political life and that some procedural method for moving the group forward must be chosen. For that purpose, the majority rule principle, in all but the rarest cases, radiates an appeal to elemental justice that no other procedural mechanism can match.

What is true of groups in which persons participate directly in the decision-making process is also true of a representative form of government in which persons delegate decision-making authority to others chosen by them in free elections. In the procedures both of electing representatives and in the decision-making processes of the representatives themselves, the majority rule principle promotes political stability by making the "losers" more willing to accept the choices and decisions of the "winners." With the majority rule principle "alive and well" in a representative form of government, the average citizen will more readily "buy into the system" and accept peacefully, even constructively, those political decisions and choices with which the citizen disagrees. Such a citizen will then be more willing to work for change within the system than outside it.[56]

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55. In chapter one of his book, *Mere Christianity*, C.S. Lewis argues that there is a rudimentary sense of fairness that is shared generally by all persons, a "law or Rule about Right and Wrong" that "used to be called the Law of Nature":

> This law was called the Law of Nature because people thought that every one knew it by nature and did not need to be taught it. They did not mean, of course, that you might not find an odd individual here and there who did not know it, just as you find a few people who are colourblind or have no ear for a tune. But taking the race as a whole, they thought that the human idea of decent behavior was obvious to every one. And I believe they were right.

C.S. LEWIS, MERE CHRISTIANITY 18 (1960). The majority rule principle constitutes, I believe, a fundamental rule of "decent behavior" in the sense described by Lewis.

56. In describing the values promoted by freedom of expression, Professor Thomas I. Emerson states that, among other things, "[freedom of expression] is an essential mechanism for maintaining the balance between stability and change." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970). By its appeal to the citizen's "rudimentary sense of fairness," the majority rule principle helps to preserve that same "balance between stability and change."

Finally, the majority rule principle promotes "consensus politics" and makes less likely the implementation of governmental policy that has only a narrow base of public support. Definitionally, the majority rule principle requires a broad base of public support for any governmental action that is sustained in character and significant in its impact upon the citizenry; without that support, such action will, sooner or later, encounter political headwinds that require modification or abandonment of the action in question.[57] The majority rule principle thus fashions a crucial link between important governmental policy and broad public support of that policy.

In so doing, the majority rule principle encourages greater citizen participation in the political process. In a political system in which the majority rule principle is the operative norm, minority factions must appeal to a wider base of public support in order to achieve a majority consensus that will move the system.[58] The building of that consensus requires political persuasion—perhaps the most basic form of free speech protected by the first amendment.[59] By making political persuasion a practical requirement for "moving the system," the majority rule principle helps to insure that freedom of speech will be exercised frequently and vigorously so that, in the words of Justice Brennan, "debate on public issues" will remain "uninhibited, robust, and wide-open."[60] Seen in this light, the majority rule principle becomes, somewhat paradoxically, a guardian of individual rights, for individual rights that are exercised vigorously are less likely to atrophy than those that fall into desuetude.

Beyond this, consensus building generally promotes wiser political decisions than those that are achieved through the rule of a dictatorial minority.[61] By requiring an appeal to a broad base of political support,

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57. This is precisely what happened with respect to our policy of military intervention in Vietnam. As support for that policy eroded, the nation reached a point at which the government's Vietnam policy was no longer supported by the "majority will." As a result, the policy of military intervention was abandoned in favor of military withdrawal.

58. Emerson states that "freedom of expression is essential to provide for participation in decision making by all members of society. This is particularly significant for political decisions." T. EMERSON, *supra* note 56, at 7. With its requirement of consensus building, the majority rule principle promotes the "participation" value that Emerson describes.

59. Alexander Meiklejohn has stressed that "public issue" speech is at the core of speech protected by the first amendment and has urged that such speech should be wholly immune from governmental regulation. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 106–07 (1948). Upon the unabridged freedom to engage in such speech, he insists, "the entire structure of our free institutions rests." *Id.* at 48.

60. *Sullivan*, 376 U.S. at 270.

61. If continued rule by a "philosopher-king" could be ensured, such a ruler might well make wiser decisions than those made by a majority in a representative form of government. THE REPUBLIC OF PLATO (F. Cornford ed. 1961). Plato contended that it is possible to devise a political system that would generate a continuing procession of philosopher-kings as rulers. *Id.* at

the majority rule principle mandates exposure by minority factions to viewpoints other than their own. And, in the process of achieving a majority consensus, the viewpoints of differing factions must be taken into account and at least partially accommodated. Clearly, the fact that governmental action commands majority support does not guarantee wise political decisions; majorities can blunder stupidly and act oppressively. But, in the long view of history, a governmental system that, in its daily operation, requires a blending and accommodation of competing viewpoints across a wide spectrum of ideas is a better conduit for political wisdom than any other.[62] If political wisdom flows, at least in part, from a vibrant pluralism in society,[63] the majority rule principle, with its concomitant requirement of consensus building, is ideally calculated to keep that pluralism alive.

To summarize, the majority rule principle in our representative form of government preserves values such as political stability, the collective political wisdom that flows from the demands of compromise, the stimulation of freedom of speech and association generated by the requirement of consensus building, and the contribution of the majority rule principle itself to the very preservation of representative government. For these values to thrive, courts must adopt a dominant stance

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205–11. In the recorded history of mankind, however, no such system has emerged. On this latter point, note the famous observation of Judge Learned Hand: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. HAND, THE BILL OF RIGHTS 73 (1958).

62. Professor Paust makes this point persuasively:

> If one is serious about the value and worth of each individual, then one must pay serious attention to what each person actually expects and does and, thus, to what the aggregate of people in a community actually expect and do. Human dignity requires recognition of the role of each individual as a participant in the processes of authority and in the formation of normative content. . . . Patterns of generally shared legal expectations that are shaped by both majority and minority preferences, I would argue, are the most useful and objective (even principled, but certainly not neutral) guides for a decisonmaker to follow if one is concerned about democracy, human dignity, and a process of self-determination that involves participation by each individual member of the community.
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> I would rather trust such a process on the whole than a jurisprudence that allowed decisions merely on the basis of the preferences of official elites—elites who . . . often confuse common interest with their own interests and prejudices. The actual social evils and human atrocities that we seem most concerned about, moreover, are usually those that have been caused or approved by minority-elites. Such atrocities rarely occur when the people govern as equal individual participants, although official authority has been misused in their name in numerous social systems.

Paust, *The Concept of Norm: Toward a Better Understanding of Content, Authority, and Constitutional Choice*, 53 TEMP. L.Q. 226, 286–87 (1980).

63. In his concurring opinion in Walz v. Tax Comm'n, 397 U.S. 664 (1970), Justice Brennan stressed the values of pluralism in these words: "Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous pluralistic society." *Id.* at 689.

of judicial self-restraint in relation to legislative action, a stance that recognizes that "[c]ourts are not the only agency of government that must be assumed to have capacity to govern."[64] As the primary instruments in our political system for reflection of the majority will, the legislative branches of government should be allowed to function in a largely unencumbered fashion if the values promoted by the majority rule principle are to be fully realized. Admittedly, this is an argument that applies generally to all legislative action. In the case of same-sex marriage, the respect-for-majority-rule argument serves as a backdrop to the more particularized arguments that follow. It is an argument none the less fundamental for being general in its application and "is not therefore to be lost sight of in the further consideration of this subject."[65]

B. The Majority's Aspirational Interest in Promoting Its Own Perception of Moral Excellence through the Legal System

In his book, *The Morality of Law*,[66] Lon Fuller describes two moralities, the morality of aspiration and the morality of duty:

> The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of the Good Life, of excellence, of the fullest realization of human powers. In a morality of aspiration there may be overtones of a notion approaching that of duty. But these overtones are usually muted, as they are in Plato and Aristotle. Those thinkers recognized, of course, that a man might fail to realize his fullest capabilities. As a citizen or as an official, he might be found wanting. But in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing. Generally with the Greeks instead of ideas of right and wrong, of moral claim and moral duty, we have rather the conception of proper and fitting conduct, conduct such as beseems a human being functioning at his best.[67]

In contrasting language, Fuller continues:

> Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark. It is the morality of the Old Testament and the Ten Commandments. It speaks in terms of "thou shalt not," and, less frequently, of "thou shalt." It does not condemn men for failing to embrace opportuni-

64. United States v. Butler, 297 U.S. 1, 87 (1936) (Stone, J., dissenting).

65. The quoted phrase was used in another context by Chief Justice Marshall in his opinion for the Court in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

66. L. FULLER, THE MORALITY OF LAW (1964).

67. *Id.* at 5.

ties for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.[68]

There is an obvious connection between lawmaking and Fuller's morality of duty.[69] If a lawmaker believes that certain conduct does not violate the morality of duty, there would normally be little reason for legislating against such conduct, and for subjecting such conduct, by law, to criminal or civil disabilities. Typically, the lawmaker would remit such conduct to the legally unregulated realms of morality of aspiration.[70] If the lawmaker believes that the conduct in question does violate the morality of duty, he or she then confronts a challenging question of jurisprudence: To what extent should we legislate against (civilly or criminally) conduct that we believe is immoral?[71] In many instances, there is no easy answer to this question, and it may well be the most perplexing question that the conscientious lawmaker is required to face.[72] Implicitly or explicitly, it is a question that lies at the core of much legislative debate and action.

What is not so obvious is the connection between lawmaking and the morality of aspiration. While it may be true that there "is no way by which the law can compel a man to live up to the excellences of

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68. *Id.* at 5–6.

69. Fuller himself stresses that connection: "There is no way by which the law can compel a man to live up to the excellences of which he is capable. For workable standards of judgment the law must turn to its blood cousin, the morality of duty." *Id.* at 9.

70. Morality of aspiration concerns, however, may often cause government to encourage or discourage certain conduct through the conditional appropriation technique or by offering a status, *e.g.*, employment position, to the public conditioned upon the status-holder's performance or nonperformance of certain conduct. Stated more tersely, government may often seek to induce that which it cannot, or chooses not to, compel.

71. At the anticriminalization end of the spectrum is the "unkind" act. Most people would characterize an unkind act as wrong or immoral, but few would contend that people should be punished criminally for committing unkind acts. At the procriminalization end of the spectrum is the case of murder. Nearly all would agree that murder is wrong or immoral, and nearly all would agree that murder should be punished criminally. In the middle of the spectrum lie the more difficult and borderline examples of abortion and the dissemination of pornography. In all of these examples, we assume, for purposes of the jurisprudential question stated in the text, that the issue of criminalization is being decided by a person who believes that the conduct in question is wrong or immoral.

72. To illustrate this point, Fuller uses the example of "gambling for high stakes" and then discusses the perplexities that confront a conscientious legislator both in deciding whether such conduct is immoral and whether it should be legislated against. L. FULLER, *supra* note 66, at 6–9.

During the debate on the public accommodations section of the 1964 Civil Rights Act, United States Senators and Representatives faced this same jurisprudential question: How far should congressional power be pressed in the elimination of racial and other forms of class discrimination in places of public accommodation? That such discrimination constituted a moral evil was generally conceded, but the question of the proper use of congressional power in relation to that evil was seriously debated. See selections from hearings before the Senate Commerce Committee in July and August of 1963 as excerpted in G. GUNTHER, *supra* note 48, at 199–203.

which he is capable,"[73] law can influence morality in two related ways. First, through what it prohibits or compels, law can force a change in the habits of the people, and the new habits, if persisted in over a period of time, can eventually become the new morality.[74] Here, a change in moral attitude follows in the train of a legally compelled change in conduct. Second, through what it permits or authorizes, law can help to create a moral climate that is hospitable to certain forms of conduct and hostile to other forms. It is in this second area that the connection between lawmaking and the morality of aspiration principally lies.

What we aspire to achieve morally is influenced by what we permit legally. To a degree hard to calibrate, every retreat from the legal prohibition of conduct enhances, in the eyes of society, the moral appeal of the conduct that is now permitted legally to occur. All other things being equal, it is harder to condemn what the law permits than what the law prohibits.[75] Hence, the majority may rightly believe that legal recognition of conduct that it deems morally deficient undermines, to at least some extent, the capacity of the majority to achieve the levels of moral excellence to which it aspires. The majority thus has a natural and logical interest in not only opposing legislation that threatens the moral climate that the majority wishes to preserve, but also in supporting legislation that reinforces that climate. Because of that interest, legislators representing the will of the majority do not operate in a moral vacuum, nor can they fairly be expected to do so.

The majority's aspirational interest acquires special force in the area of same-sex marriage. There, opposite-sex marriage, the status traditionally offered by government as the framework in which sexual conduct may legally occur, is tied uniquely to the gender of those seeking to enter the relationship. This is not a status, such as a state highway engineer, in which a person's private sexual conduct may be fairly said to bear no rational relationship to the person's fitness for the function that he or she seeks to discharge. In the case of opposite-sex marriage, the private sexual conduct of the marriage participants is not

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73. L. FULLER, *supra* note 66, at 9.

74. An example of which I am personally aware illustrates this capacity of law to shape a new morality by compelling a change in habit. In 1968, I was talking with a man who had, in 1964, opposed passage of the public accommodations section of the 1964 Civil Rights Act. His opposition in 1964 was based on what he then believed to be the legal and moral right of a restaurant owner to discriminate racially in the choice of his or her customers. In 1968, almost as a passing remark, he said to me: "I think it's right that a black can eat in a restaurant without being discriminated against." His perception of morality had clearly been affected by the change in habit wrought by the 1964 Act.

75. The debate over legalization of the use and possession of marijuana must confront that jurisprudential reality. If the use and possession of marijuana is legalized, it becomes more difficult for society to maintain a position of moral opposition to that conduct.

peripheral; it is normally an intimate and vital part of the relationship and goes to the heart of the relationship's ability to function successfully. Definitionally, two persons of the same sex are not fit for the function of participating in opposite-sex marriage. Making them fit for the function of marriage would require a fundamental change in the legal definition of marriage, a dramatic revision of the concept of marriage as it has been traditionally understood by society. The majority may reasonably believe that a fundamental change in the legal definition of an institution "older than the Bill of Rights"[76] has a significant capacity to threaten the standards of morality that the majority wishes to preserve in relation to that institution.

In secular terms, the legal recognition of same-sex marriage is akin to the church's liturgical blessing of same-sex unions. It is a highly visible statement of approval by the legal system.[77] Moreover, it occurs with reference to a status that cannot function without that approval. It is one thing for society to determine that particular conduct should not be subject to criminal regulation. Much occurs in society that the majority may believe is morally wrong but that the majority may determine, for various policy reasons, should not be made a crime. Admittedly, even that determination may have some limited capacity to elevate the moral appeal of the legally tolerated conduct in the eyes of society. This "moral elevation" phenomenon, however, becomes more pronounced when the legal system moves beyond toleration on the criminal side to affirmative approval on the civil side. Refraining from breaking into the private bedrooms of same-sex couples for purposes of criminal prosecution has little realistic capacity to threaten the moral foundations of opposite-sex marriage. By way of contrast, to broaden the governmentally created status of marriage to include same-sex unions is an affirmative statement of legal approval that places same-sex unions on a plane of total legal equality with opposite-sex unions. Clearly, the majority may reasonably infer that this latter action has a substantially greater capacity than decriminalization to enhance the moral appeal of same-sex marriage in the eyes of society.

The "visibility factor" mentioned in the preceding paragraph

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76. *Griswold*, 381 U.S. at 486.

77. In rejecting church recognition of same-sex marriage, the 1977 Special Meeting of Episcopal Bishops stated:

> The Church . . . is right to confine its nuptial blessing exclusively to heterosexual marriage. Homosexual unions witness to incompleteness. For the Church to institutionalize by liturgical action a relationship that violates its own teaching about sex is inadmissable [sic].
>
> The Church's liturgical action is corporate. It is also public. It witnesses to what the Church stands for and to what it advocates as good for society as a whole.

1977 EPISCOPAL REPORT, *supra* note 38, at 41. *Cf.* DECLARATION ON SEXUAL ETHICS, *supra* note 36, at 8–9.

needs further explication. When same-sex couples are engaging in nonadulterous conduct in the privacy of their bedroom, we should, as argued by Professor Bickel in relation to the bedroom reading of obscenity, "protect [their] privacy."[78] Constitutionally speaking, we should be required to let them alone, to hold that their conduct is protected by the right of privacy against criminal prosecution.[79] When, however, their relationship receives the affirmative legal approval of government under the name of marriage, the nature of their relationship, again in Bickel's works, "intrudes upon us all, want it or not."[80] Under the trappings of that approval, participants in same-sex marriage would be able to project their relationship into the daily aspects of public life, its commercial, recreational, and entertainment centers, with substantially the same force and visibility as participants in opposite-sex marriage. That this reality would have some tendency to enhance the moral appeal of same-sex marriage in the eyes of society seems obvious even though, in advance of the legal recognition of same-sex marriage, the degree of enhancement would be difficult to substantiate empirically. We may say with Chief Justice Taft, speaking in a different context: "All others can see and understand this. How can we properly shut our minds to it?"[81]

In a different area of constitutional law, Justice Stevens has stressed the wisdom of respecting the majority's morality of aspiration. In *Runyon v. McCrary*,[82] the Supreme Court, in a majority opinion by Justice Stewart, adopted a broad construction of a civil rights statute enacted by Congress in the immediate post-Civil War period.[83] Concurring separately, Justice Stevens stated that, if the case were one of first impression, he would have construed the statute more narrowly. He noted, however, that the Court had recently placed a similarly broad construction on a companion statute to the one before the Court in *Runyon*. Accordingly, Stevens reasoned that a narrow construction of the present statute "would be a significant step backwards" and "contrary to my understanding of the mores of today" in the area of race

78. Bickel, *Concurring and Dissenting Opinions*, PUBLIC INTEREST, Winter 1971, at 25, 26.

79. *See supra* text accompanying notes 7 & 13.

80. Bickel, *supra* note 78, at 26.

81. Child Labor Tax Case (Bailey v. Drexel Furniture Co.), 259 U.S. 20, 37 (1922).

82. 427 U.S. 160 (1976).

83. The statute before the *Runyon* Court was originally enacted in 1866 and in its present form provides in part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (1982). The Court construed § 1981 to prohibit "private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes." *Runyon*, 427 U.S. at 160, 168, 173–75.

relations.[84] The sensitivity shown by Stevens to "the mores of today" in the area of race relations should be shown by the courts to the mores of today in the area of same-sex marriage.

There is an independent value that flows from respecting the majority's morality of aspiration. Generally, society benefits from a vital desire on the part of the majority to realize its own perception of moral excellence. Conversely, society suffers when the majority is indifferent to that goal. Accordingly, the majority should be encouraged to promote its own perception of moral excellence through all the mediating structures of society. And among those mediating structures is, of course, the legal system itself. Here, the majority needs to know that the legal system, and especially the legislative process, may be used to promote the standards of morality to which the majority aspires. Without that assurance, the zeal to achieve moral excellence slackens, and the task of promoting moral excellence may fall into hands less friendly to the interests of society.[85] For, with all its imperfections and tendencies to excess, the majority will, over the course of time, can bring greater wisdom to bear on questions of morality than any other force in society.

Thus, while the courts may fairly construe the Constitution to protect individual rights against majoritarian excesses, they should avoid turning the Constitution into an instrument that saps the will of the majority to pursue moral excellence through the legislative process. A construction of the Constitution compelling the states to recognize same-sex marriage would create precisely that kind of danger. On an issue going to the core of the social structure, the majority would be deprived of its decision-making power. If many such issues are withdrawn from the purview of the legislative process, the majority may come to believe that, on questions of morality, it has lost dominant control over its own destiny. In a representative form of government, that is not the situation in which we want to be.

C. *The Impact of History and Tradition*

In his dissenting opinion in *Poe v. Ullman*,[86] Justice Harlan stated:

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84. *Id.* at 191–92, (Stevens, J., concurring).

85. Here again, the words of Professor Jordan Paust are apt:

> The actual social evils and human atrocities that we seem most concerned about . . . are usually those that have been caused or approved by minority-elites. Such atrocities rarely occur when the people govern as equal individual participants, although official authority has been misused in their name in numerous social systems.

Paust, *supra* note 62, at 286–87. Those who are suspicious of the majority's efforts to promote moral excellence through the legal system are under an obligation to identify some other group in society to whom they would assign the dominant role of shaping morality in our political system.

86. 367 U.S. 497, 522 (1961) (Harlan, J. dissenting). Harlan's dissent in *Poe* related to the

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.[87]

Clearly, state laws restricting marriage to opposite-sex unions are part of the "pattern . . . pressed into the substance of our social life." It is equally clear that such laws thus have the support of history and tradition on their side. While "history and tradition" should not be used to immunize governmental action against constitutional attack, they should temper the force and direction of that attack. This is especially so in the area of substantive due process. For, as stressed by Justice Harlan in his same *Poe* dissent:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[88]

A Supreme Court decision compelling the states to recognize same-sex marriage would be a decision "which radically departs" from the tradition of leaving this issue to the legislative process for resolution.

More recently, Justice Powell has urged that "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect from the teachings of history [and] solid recognition of the basic values that underlie our society.' "[89] He warned

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issue of ripeness. His position on the merits was later vindicated in *Griswold*, 381 U.S. 479.

87. *Poe*, 367 U.S. at 546 (Harlan, J., dissenting).

88. *Id.* at 542.

89. Moore v. East Cleveland, 431 U.S. 494, 503 (1977). Powell's approach in *Moore* received approving comments in Developments, *The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

also of the "risks" which are present "when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights" and that such "risks" counsel "caution and restraint" on the part of the courts.[90]

The words of Harlan and Powell have particular force in relation to the issue of same-sex marriage. As an institution "older than the Bill of Rights," marriage in its traditional opposite-sex form has existed throughout our nation's history. Equally long-lasting has been the tradition that confines lawful marriage to opposite-sex unions and that leaves to the states the constitutional power to continue that confinement. Conversely, there is no traditional support in our nation's history for the recognition of same-sex marriage or for removing this issue from state control. In the constitutional resolution of this issue, therefore, history and tradition speak compellingly for judicial self-restraint.

In two cases, *Zablocki v. Redhail*[91] and *Loving v. Virginia*,[92] the Supreme Court has invalidated substantive restrictions imposed by a state on the right to marry. But, in both such cases, the restrictions related to opposite-sex marriage and not to same-sex marriage.[93] In *Baker v. Nelson*,[94] the Supreme Court, as noted earlier,[95] dismissed for want of a substantial federal question a decision of the Minnesota Supreme Court upholding the power of Minnesota to restrict marriage to heterosexual couples. The Supreme Court's own history, therefore, contains no direct decisional elements that would require the Court to break tradition and remove the same-sex marriage issue from state control. Indeed, the *Nelson* dismissal action points in the direction of sustaining state control and not in the direction of abrogation.

In terms of indirect decisional elements, Supreme Court history also supports a judical stance of self-restraint in relation to the issue of same-sex marriage. In the area of religion, for example, the Court has held that government may do more than it must, that government may accommodate the free exercise of religion in situations where it is not constitutionally obligated to do so.[96] This accommodation, of course, if

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90. *Moore*, 431 U.S. at 502.

91. 434 U.S. 374 (1978).

92. 388 U.S. 1 (1967).

93. In *Zablocki*, the Court invalidated a Wisconsin law that denied the right to marry to any person who (1) has minor issue not in his custody and whom he or she is under a legal obligation to support and (2) cannot show to the court that he or she will be able to meet that obligation in the future. *Zablocki*, 434 U.S. at 375. In *Loving*, the Court invalidated Virginia's ban on interracial marriages. *Loving*, 388 U.S. at 2.

94. 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

95. *See supra* notes 20–29 and accompanying text.

96. *Walz*, 397 U.S. 664, illustrates the proposition stated in the text. In *Walz*, the Court upheld a New York statute that exempted from taxation real property owned "by a corporation or

pressed too far will result in a prohibited establishment of religion.[97] For our purposes, however, the thing to note is the Court's recognition of an area in which the decision to accommodate is left to governmental control. By ready analogy, it would be entirely proper for the Court to hold that a state may, at its own option, accommodate right of privacy interests by recognizing the validity of same-sex marriage. But it is equally proper for the Court to hold that the state is not constitutionally obligated to make that accommodation. Here, as in the area of religion, the Court should apply the principle that government may do more than it must and should leave the issue of same-sex marriage to the workings of legislative discretion.

D. The Threat to the Individual and Community Values Promoted by Opposite-Sex Marriage

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears.[98]

Presumably, the majority would contend that legal recognition of same-sex marriage poses a significant threat to the individual and community values promoted by marriage in its traditional opposite-sex form. Is this fear rational? May it be reasonably entertained? If not, is the majority then in the position of the Salem citizens who "feared witches and burned women"? In the preceding subsections, I have argued that compelling the states to recognize same-sex marriage would do three negative things: (1) undermine generally the values promoted

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association organized exclusively for . . . religious . . . purposes . . . and used exclusively for . . . such purposes." *Id.* at 667 n.1. The Court sustained the statute against a claim by Walz, a real estate owner, that the "grant of an exemption to church property indirectly require[d] [him] to make a contribution to religious bodies and thereby violate[d] provisions prohibiting establishment of religion under the First Amendment." *Id.* at 667.

In sustaining the New York statute, the *Walz* Court reasoned that New York could properly take into account free exercise of religion values and "the latent dangers" to such values "inherent in the imposition of property taxes." *Id.* at 673. Of importance to this article, the Court then stated that:

> The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.

Id. (citations omitted). In *Walz*, therefore, the Court clearly held that government may do more than it must in accommodating free exercise of religion interests.

97. In Engel v. Vitale, 379 U.S. 41 (1962), and Abington School Dist. v. Schempp, 374 U.S. 203 (1963), the "school prayer" cases, the Supreme Court held that a state-initiated religious ceremony in the public schools constitutes a prohibited establishment of religion. In other words, the Court held that government may not press accommodation of religion to that extent.

98. Whitney v. California, 274 U.S. 357, 387 (1927) (Brandeis, J., concurring).

by the majority rule principle in our representative form of government; (2) undermine specifically the efforts of the majority to promote through the legal system its own perception of moral excellence in the area of marriage; and (3) depart radically from the teachings of history and tradition on this issue. These arguments, however accurate and persuasive they may be, are not enough to carry the day unless the majority may reasonably believe that recognition of same-sex marriage poses a significant threat to the values promoted by opposite-sex marriage. Predictably, the analysis would not have come this far unless I thought that such a belief was rational and that it could be reasonably entertained by the majority.

At the outset, two things should be noted. In relation to same-sex marriage, the majority, unlike the citizens of Salem, is not advocating that anyone should be burned or otherwise subjected to criminal punishment. The majority is simply advocating that the issue of recognizing same-sex marriage should be left to state resolution. Secondly, the refusal to recognize same-sex marriage pertains to a highly visible form of relational conduct that is more than the exercise of "free speech and assembly."[99] Traditionally, the Supreme Court has accorded to government a substantially greater latitude in the regulation of conduct than in the regulation of speech content.[100] This conduct-content distinction, while not a talismanic solution to all freedom of speech problems, is a factor which, in the case of same-sex marriage, weighs in favor of judicial self-restraint.

Turning to the threat posed by the legal recognition of same-sex marriage to the values promoted by opposite-sex marriage, I would stress first that the marriage bond, in its traditional opposite-sex form, "is, in our society, the main structural keystone of the kinship system."[101] Historically, "the laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up"[102] have contributed significantly to the high and honored position that opposite-sex marriage has always occupied in our society. That very process has enabled the marriage institution to promote more effectively the individual and commu-

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99. I am not here talking about the intimate sexual conduct that lies at the core of the relationship; presumably, that conduct remains private. I am talking instead about those aspects of the relationship that are projected visibly and openly into daily life.

100. *See, e.g.*, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984); United States v. O'Brien, 391 U.S. 367, 376 (1968); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

101. Parsons, *The Kinship System of the Contemporary United States*, 45 AM. ANTHROPOLOGIST 22, 30 (1943).

102. *Poe*, 367 U.S. at 546 (Harlan, J. dissenting).

nity values enumerated earlier.[103] Here, there is a strong link between process and perception, and the perception of marriage as an institution that is "intimate to the degree of being sacred"[104] would be compromised by enlarging its base to include same-sex unions.

I am arguing bluntly that, in this area, exclusiveness is a virtue, that the traditional "laws regarding marriage" have designated opposite-sex marriage, and the larger kinship system of which it is "the main structural keystone," as the one societal institution in which intimate sexual conduct and the bearing and rearing of children are not only tolerated but affirmatively and positively endorsed. Phrased differently, the traditional "laws regarding marriage" have made opposite-sex marriage the standard of moral excellence in the core areas of sexual conduct and childrearing. As a relationship, opposite-sex marriage thus draws 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. It is perhaps too strong a statement to say that loss of exclusiveness would trivialize opposite-sex marriage, but that loss would, to some extent at least, lessen the intensity of its moral appeal. And, it is the present intensity of that appeal that operates as a spur to the full realization of the benefits that opposite-sex marriage can bring to society.[105]

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103. *See supra* note 8.

104. *Griswold*, 381 U.S. at 486.

105. In evaluating the strength of the state's interest in criminalizing homosexual conduct, Professors Wilkinson and White discuss "a final state concern:"

> The most threatening aspect of homosexuality is its potential to become a viable alternative to heterosexual intimacy. . . . Thus, any recognition of a constitutional right to practice homosexuality would undermine the value of heterosexuality and the institutions and practices—conventional marriage and childbearing—associated with it.
>
> This state concern, in our view, should not be minimized. . . . Family life has been a central unifying experience throughout American society. Preserving the strength of this basic, organic unit is a central and legitimate end of the police power. The state ought to be concerned that if allegiance to traditional family arrangements declines, society as a whole may well suffer.
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> . . . .
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> . . . A shift on the part of the law from opposition to neutrality arguably makes homosexuality appear a more acceptable sexual lifestyle, particularly to younger persons whose sexual preferences are as yet unformed. . . . If homosexual behavior is legalized, and thus partly legitimized, an adolescent may question whether he or she should "choose" heterosexuality. . . . If society accorded more legitimacy to expressions of homosexual attraction, attachment to the opposite sex might be postponed or diverted for some time . . . . For those persons who eventually choose the heterosexual model, the existence of conflicting models might provide further sexual tension destructive to the traditional marital unit.

The majority's concern may reasonably extend beyond a concern for the loss of exclusiveness. This broader concern relates to what I have called the "linchpin" nature of the same-sex marriage issue. As described earlier, the legal recognition of same-sex marriage would produce major social and legal consequences.[106] Socially, the legal recognition of same-sex marriage is the secular equivalent of the church's liturgical blessing of same-sex unions. It is a highly visible act that enables the same-sex couple to project their relationship into the daily walks of public life in substantially the same manner as the opposite-sex couple. Legally, the state's recognition of same-sex marriage leads irresistibly to a constitutional position that precludes any difference in the legal regulation of same-sex and opposite-sex conduct in any area of human endeavor. This principle of "total equality" would have particular relevance in proceedings concerning adoption and child custody. For, if the courts compel the states to recognize same-sex marriage, it becomes difficult indeed to justify any law that prohibits a married homosexual couple from doing what a married heterosexual couple is permitted to do or, more generally, any law that discriminates between the two kinds of married couples in defining their legal rights. The governmental interest that supports such discrimination would disappear with the legal recognition of same-sex marriage.[107]

What impact would these major social and legal consequences have upon the ability of opposite-sex marriage to advance the values it has traditionally promoted? It is, of course, impossible to know in advance of the event. This is all the more reason for not locking the states constitutionally into a position from which they cannot withdraw. If the issue of same-sex marriage is left to state resolution, a state may, at its option, choose to recognize same-sex marriage. This legislative action, if it proves harmful to society, may be modified or revoked. If the issue of same-sex marriage is removed constitutionally from state control, this power of legislative experimentation likewise disappears. Moreover, if the constitutional mandate produces harmful consequences to society,

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Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 595–96 (1977). While Wilkinson and White were addressing the issue of state power to make homosexual conduct a crime, their words are particularly persuasive when applied to the same-sex marriage issue.

106. *See supra* notes 76–81 and accompanying text.

107. In Comment, *supra* note 14, the authors conclude that "[h]omosexual couples should . . . be afforded the opportunity to obtain the legal status and marital benefits to which they are entitled." *Id.* at 213. On the question, however, of the right of homosexuals to adopt, they concede that "[c]hildren growing up in homosexual environments frequently incur a great deal of ridicule from their peers." *Id.* at 214–15. Accordingly, the authors conclude that a "legislature may legitimately find that, absent a biological relationship to one member of the homosexual union, children ordinarily should not suffer such needless emotional trauma." *Id.* at 215.

the states will have lost their power to legislate a remedy and must ultimately apply to the Supreme Court (or the amendment process) for relief.

More fundamentally, state legislatures, in reflecting the majority will, are under no constitutional obligation to prove empirically that legal recognition of same-sex marriage would impair the ability of opposite-sex marriage to advance the values it has traditionally promoted. As stated by the Supreme Court in *Paris Adult Theater I v. Slaton*,[108] a case involving state regulation of obscenity: "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions."[109] If the current "laws regarding marriage" constitute a "pattern . . . deeply pressed into the substance of our social life,"[110] a legislature might reasonably conclude that a major alteration of that pattern could affect negatively the pattern's ability to benefit society as it has in the past, that this major alteration would create a significant risk of negative impact that the legislature does not wish society to incur.[111] "Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data" to support the conclusion.[112]

Admittedly, the *Paris* Court's remarks concerning empirical data were made in a case involving the showing of obscenity to consenting adults in a public theater. And, in stating that "[i]t is not for us to resolve empirical uncertainties underlying state legislation," the Court reserved "the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself."[113] The right of privacy is a fundamental right "protected by the Constitution," and this article has conceded that nonrecognition of same-sex marriage does impinge upon that right if expanded generally to include sexual conduct

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108. 413 U.S. 49 (1973).

109. *Id.* at 61. In the obscenity context of *Paris*, the Court added: "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could reasonably determine that such a connection does or might exist." *Id.* at 60–61.

110. *Poe*, 367 U.S. at 546 (Harlan, J., dissenting).

111. See *supra* note 105, for excerpts from the extensive comments of Professors Wilkinson and White on this point. As noted there, Wilkinson and White are discussing the "negative impact" problem in the context of decriminalizing homosexual conduct. Their remarks apply, with perhaps even greater force, to the negative impact flowing from the recognition of same-sex marriage.

112. *Paris*, 413 U.S. at 63. In the obscenity context of *Paris*, the conclusion referred to by the Court was that "[t]he sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex." *Id.* at 63.

113. *Id.* at 60.

between consenting adults in private.[114] This should not make the *Paris* Court's remarks concerning empirical data inapposite to the issue of same-sex marriage. It does mean that, under the assumptions of this article, those remarks must be applied in the context of the strict scrutiny doctrine that is triggered when state legislation impinges on a fundamental right. Even at that level of judicial review, the Supreme Court has never held that the "compelling" nature of the interest that government is seeking to advance or the "least drastic" nature of the means it employs must be conclusively demonstrated by empirical data.

Clearly, on both of the prongs of strict scrutiny review, the government's supporting rationale should be probed more searchingly than in those cases where a lower level of judicial review is applied. That rationale, however, should not be discarded because it relies primarily on arguments for which conclusive empirical data are lacking.[115] Especially is this so in those instances where the relevant empirical data for testing the validity of the government's rationale will become available only through making the legislative change that government is resisting. Government should not be required to yield its position in advance for the main purpose of creating the empirical data that may only tend to show why government should not have yielded in the first place. Unprovable assumptions have their own legitimate role to play in advancing the "compelling" interests of society.

E. Nonrecognition of Same-Sex Marriage as a "Narrowly Drawn" Means

Under strict scrutiny review, the means employed by government to advance its "compelling" interest must be "narrowly drawn to express only the legitimate state interests at stake,"[116] or, as is often said, must be the least drastic means available to government for achieving its interests. As stated by Justice Stewart in *Shelton v. Tucker*:[117]

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be

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114. *See supra* text accompanying note 9.

115. I would argue that a standard of "reasonableness" is implicit in the application of the two prongs of strict scrutiny review. In determining whether a governmental end is "compelling" or a governmental means "narrowly drawn," a court is really asking whether it is reasonable to conclude that the end is compelling or the means narrowly drawn. The presence or absence of the strict scrutiny elements are, in this view, determined from the perspective of a reasonable person. There is room in that perspective for conclusions not absolutely supported by empirical data and even for conclusions based on inherently unprovable assumptions. How, for example, do we prove empirically that vigilant protection of the right of free speech is essential to the preservation of a representative form of government in which the majority will principle is the dominant norm?

116. Roe v. Wade, 410 U.S. 113, 155 (1973).

117. 364 U.S. 479 (1960).

> pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[118]

This article has assumed that government does have a "compelling" interest in protecting and fostering the institution of marriage[119] and that the right of privacy, a "fundamental" right, does include the decision of one adult to engage privately in sexual conduct with another consenting adult.[120] In addition, this article has conceded that nonrecognition of same-sex marriage does limit the right of privacy as so construed.[121] Accordingly, attention must now focus on nonrecognition of same-sex marriage as a means in relation both to the governmental end pursued and the individual right affected.

In relation to the governmental end pursued, that of protecting and fostering the institution of marriage, the nonrecognition of same-sex marriage is a "narrowly drawn" means. If recognition of same-sex marriage poses a significant threat to the values traditionally promoted by opposite-sex marriage, and I have argued that it does, then, nonrecognition of same-sex marriage is a means narrowly drawn to prevent that threat from arising; it has a tight and highly logical tie to the end that government is seeking to advance. Indeed, if the threat posed by the recognition of same-sex marriage is real, it is hard to imagine how any means short of nonrecognition could block that threat. Here, nonrecognition as a means is not only narrowly drawn in relation to the governmental end pursued, it may well be indispensable to the achievement of that end.[122]

Further support for nonrecognition of same-sex marriage as a permissible means comes from an examination of that means in relation to its impact on the right of privacy. If the right of privacy includes the decision of one adult to engage privately in sexual conduct with another consenting adult, nonrecognition of same-sex marriage does impinge on that right as exercised by homosexual couples seeking to establish a permanent relationship. Among other things, nonrecognition of same-sex marriage deprives such couples of the material, emotional, and psychological benefits that legal recognition of their relationship would bring.[123] The impact of nonrecognition, therefore, is not slight.

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118. *Id.* at 488.
119. *See supra* note 8 and accompanying text.
120. *See supra* note 7 and accompanying text.
121. *See supra* note 9 and accompanying text.
122. *See supra* text accompanying notes 43–44.
123. As stressed by Professor Karst:

> The homosexual couple who wish to enter a formal marriage will not be looking for mate-

If not slight, the impact of nonrecognition is no more "gouging" than it has to be to enable government to achieve its goal of protecting and fostering the institution of marriage in its traditional opposite-sex form. More precisely, nonrecognition of same-sex marriage is the "least drastic" means of advancing that goal. As a means, nonrecognition of same-sex marriage involves no criminal prosecution or regulation of same-sex conduct. It involves simply the legal system's refusal to give an affirmative endorsement to such conduct within the framework of a permanent relationship. Moreover, nonrecognition of same-sex marriage does not impair the legal capacity of persons engaging in same-sex conduct to enter into contractual and donative transactions with and for each other. Recent state court decisions[124] indicate a judicial willingness to enforce, as valid contracts, agreements pertaining to the acquisition, division, and distribution of property that are entered into between unmarried persons who are living together. Presumably, this judicial willingness extends also to the enforcement of gifts and wills duly made or executed by such persons in which they give or devise property to each other. Nonrecognition of same-sex marriage thus affects the same-sex couple no more severely than is necessary in relation to the end that government is seeking to achieve. No means that is less drastic in its impact comes readily to mind. Between the choices of nonrecognition and recognition, there exists no intermediate option.

V. CONCLUSION

The arguments advanced in this article should have particular force in determining whether the courts should impose on the states a constitutional obligation to recognize same-sex marriage. It is one thing for a state, acting voluntarily through its own legislative process, to recognize same-sex marriage. Here, at least, the values promoted by the majority rule principle are not impaired and the majority is, by definition, pursuing its own perception of moral excellence through the legal system. It is quite another thing for the courts to remove this issue from state control. That judicial action would impair the values promoted by the majority rule principle and would prevent the majority from pursuing its own perception of moral excellence through the legislature. This reality, coupled with the empirical uncertainties that admittedly surround the same-sex marriage issue, should warn the courts

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rial benefits, or even for the pleasure of each other's company (which they already have), so much as for the opportunity to say something about who they are and to obtain community recognition of their relationship.

Karst, *supra* note 9, at 651.

124. The most notable example of these recent decisions is Marvin v. Marvin, 18 Cal.3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

to move slowly. For, when the wisdom of judicial intervention is in serious doubt and the consequences of that intervention are major in their impact on the traditional fabric of society, the courts should err on the side of judicial restraint. Like adjudication, wise judicial intervention "has its own time for ripening."[125] In the case of same-sex marriage, that time has not arrived.

125. The quoted phrase is from Justice Frankfurter's opinion in Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1950).