

6-1-1995

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Recommended Citation

Richard Ante, *Same-Sex Marriage and the Construction of Family: An Historical Perspective*, 15 B.C. Third World L.J. 421 (1995), <http://lawdigitalcommons.bc.edu/twlj/vol15/iss2/6>

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BOOK REVIEWS

SAME-SEX MARRIAGE AND THE CONSTRUCTION OF FAMILY: AN HISTORICAL PERSPECTIVE

RICHARD ANTE*

SAME-SEX UNIONS IN PREMODERN EUROPE. By JOHN BOSWELL.
New York: Villard Books. 1994. Pp. 412.

I. INTRODUCTION

Same-Sex Unions in Premodern Europe is a scholarly attempt which, through an examination of Western history, proposes that same-sex marriage existed in classical and medieval cultures, and, indeed, is part of the same Western culture which now excludes it.¹ Controversial as it may sound, more important to this history than the discovery of same-sex unions in the Western tradition is the book's underlying argument that marriage is a socially, not naturally, constructed institution, tailored to fit society's needs, mores, and beliefs.² With this strong argument, the modern world is called on to reexamine its belief that marriage is by definition an opposite-sex partnership.³ Such a belief may indeed be misplaced, if not downright erroneous, given the his-

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¹ See JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* 53-107, 199-279 (1994).

² See William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1421-22, 1485 (1993). Eskridge uses social constructionist history to evaluate the constitutional arguments for and against same-sex marriage. *Id.* In his representation of the two gay men in *Dean v. District of Columbia*, he amassed historical and cross-cultural evidence of socially and religiously approved same-sex marriages, spanning all continents, including premodern Europe. See No. 90-13892, 1992 WL 685364 (D.C. Super. Ct. June 2, 1992), *aff'd*, 1995 WL 21117 (D.C. 1995) (holding that same-sex couples do not have legal right to marry); Nancy D. Polikoff, Comment, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535, 1537-38 (1993). Eskridge's research is independent of that conducted by Boswell for *Same-Sex Unions in Premodern Europe* and may be found in Eskridge, *supra*.

³ See Eskridge, *supra* note 2, at 1485, 1496.

torical evidence that societies define marriage, and therefore may in the future define marriage in any number of ways.⁴ That is, there is no such thing as an *essential* definition of marriage.⁵

Notwithstanding the weight of its mission, *Same-Sex Unions in Premodern Europe* succeeds in challenging, if not ultimately deconstructing, the reader's gender-based notion of matrimony. The author, John Boswell,⁶ embarks on this difficult task by delineating a persuasive historical account, stretching from the Greco-Roman world to the rise of the Christian Church in the early Middle Ages.⁷ The book is heavily researched, deserving of one who previously chaired Yale University's history department, and Boswell's findings draw from original texts as well as the discoveries of other historians, sociologists, and anthropologists.⁸ In some instances, Boswell offers revision and criticism of the work of some previous historians, noting their failure to clarify and interpret evidence pointing to the existence of same-sex unions.⁹ Indeed, he finds compelling support for his historical account in early Christian texts describing nuptial rites and ceremonies for same-sex couples.¹⁰ His book gives a sampling of these rites, such as *Grottaferrata* Γ.βVII, which dates back to the tenth century,¹¹ and offers a fascinating glimpse into the practices of an era from which Western culture received a significant part of its tradition.¹²

Boswell divides his book into chapters that, in turn, lay out the history of heterosexual marriage and same-sex unions in the Greco-Roman world and in Medieval Europe, and offer a comparison of the nuptial traditions for both kinds of unions.¹³ This method allows the

⁴ See *id.* at 1493–94.

⁵ See *id.* at 1485.

⁶ The author is the late A. Whitney Griswold Professor of History at Yale University. He died at age 47 from AIDS complications on Christmas Eve in 1994. *John Boswell*, S.F. CHRON., Jan. 12, 1995, at C3. Boswell gained national recognition with the publication in 1980 of his first book, *Christianity, Social Tolerance and Homosexuality*, which unearthed 1,500 years of gay history in Western Europe from the time of Jesus to the 15th century. *Id.* It received the American Book Award for history in 1981. *Id.* Boswell wrote that one major goal of his work was "to rebut the common idea that religious belief—Christian or other—has been the cause of intolerance in regard to gay people." *Id.* Boswell was born in Boston and received his doctorate in history from Harvard University. *Id.*

⁷ See BOSWELL, *supra* note 1, at 53–107, 218–61 (chapters 3 and 7, respectively).

⁸ See, e.g., *id.* at 80–83, 178–79, 267–70.

⁹ *Id.* at 270–79.

¹⁰ E.g., *id.* at 291–306 (appendix of translations of Greek and Old Church Slavonic offices, nuptials, and prayers for same-sex unions).

¹¹ *Id.* at 291–94.

¹² See *id.* at 262–73.

¹³ See generally *id.* at 53–107, 162–217 (chapters 3, "Same-Sex Unions in the Greco-Roman

reader to understand the nature of marriage as it existed then, what its purpose was, and how the Christian Church's philosophy on marriage developed.¹⁴ The insight into history alone is invaluable, and yet it is also crucial to examine the contribution such historical evidence may make to the legal arguments advancing same-sex marriages in the United States. This Book Review examines how Boswell's work shapes some of these arguments. Part II begins by outlining the background of the current legal battle for legitimization of same-sex marriages. Part III summarizes Boswell's historical evidence. Part IV discusses the implications of such evidence to the constitutional arguments for same-sex marriage, applying the social constructionist view¹⁵ to a functional interpretation of marriage, the courts' procreation rationale, the analogy of same-sex marriage to miscegenation, and the moral tradition argument advanced by opponents of same-sex marriage.

II. THE LEGAL LANDSCAPE

Opponents of same-sex marriage have always argued that the notion is an oxymoron.¹⁶ In fact, court opinions have consistently cited this rationale for refusing to recognize a fundamental right for same-sex couples to be legally married.¹⁷ Beginning in 1971, when the Supreme Court of Minnesota ruled that same-sex couples have no legal right to marry because marriage is and always has been an inherently hetero-

World"; 5, "The Development of Nuptial Offices"; and 6, "Comparison of Same-Sex and Heterosexual Ceremonies of Union").

¹⁴ See *id.* at 28–52, 108–61 (chapters 2 and 4, respectively).

¹⁵ According to social constructionist theory, society does not discover the one true definition of marriage, but rather continually constructs it over time, based on changing attitudes, mores, and social relations. Eskridge, *supra* note 2, at 1432–34. Social constructionist theory, then, as opposed to essentialist theory, does not propose a definition of marriage that is resistant to time, preferring to view marriage as something that evolves, depending on the types of relationships society chooses to value. *Id.* But see Steven Seidman, *Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes*, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 105 (Michael Warner ed., 1993) ("[T]he new sociology and history of same-sex intimacies has been narrowly focused on the social origin and development of lesbian and gay male identities and communities among almost exclusively white, middle-class Europeans or Americans.").

¹⁶ Eskridge, *supra* note 2, at 1421.

¹⁷ See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1188, 1197 (Wash. Ct. App. 1974) (affirming state's refusal to issue marriage license to two men); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (upholding denial of marriage license to same-sex couple); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (upholding state statute denying marriage license to same-sex couples); *Dean v. District of Columbia*, No. 90-13892, 1992 WL 685364, at *1–*2 (D.C. Super. Ct. June 2, 1992), *aff'd*, 1995 WL 21117 (D.C. 1995) (holding that same-sex couples do not have legal right to marry). See also *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982) (holding that federal immigration law excludes same-sex marriages for citizenship purposes).

sexual institution, "a union of man and woman, uniquely involving the procreation and rearing of children,"¹⁸ courts in the United States have affirmed the idea that same-sex couples are precluded from marrying because of the nature of the institution of marriage itself.¹⁹ As Kentucky's highest court observed, after quoting extensively from dictionaries and an encyclopedia: "It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined."²⁰

The courts seem to have rung the death knell of same-sex marriage as a matter of state substantive right.²¹ Considering the United States Supreme Court's refusal to extend constitutional protection to sexual liberty involving same-sex partners in the infamous *Bowers v. Hardwick* decision,²² and the Ninth Circuit's conclusion that Congress could not have intended that same-sex marriage would satisfy immigration law requirements,²³ the case law seems to signal a defeat for proponents of same-sex unions.²⁴

Whether this defeat is conclusive is up for debate. On the one hand, courts deny that same-sex marriage is a matter of fundamental constitutional right.²⁵ Yet on the other hand, they have nonetheless recognized gay and lesbian relationships and legitimized them in certain settings.²⁶ Legal alternatives to marriage have become available to gay and lesbian couples through quasi-marital structures like domestic partnership, contracts, and adult adoption.²⁷ These arrangements have

¹⁸ *Baker*, 191 N.W.2d at 186.

¹⁹ See *supra* note 17 and accompanying text.

²⁰ *Jones*, 501 S.W.2d at 589.

²¹ See *supra* note 17 and accompanying text.

²² *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (upholding constitutionality of Georgia's sodomy law and holding that right to privacy does not prevent states from criminalizing same-sex sexual activity). *Hardwick* has received some harsh criticism from commentators. See, e.g., Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 FORDHAM URB. L.J. 997, 1041 (1994); *Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1523 n.30 (1989).

²³ *Adams*, 673 F.2d at 1039, 1042 (holding that even if same-sex marriage were recognized by state law, Congressional intent still foreclosed granting of citizenship to same-sex spouses as matter of federal immigration law).

²⁴ See *supra* note 17 and accompanying text.

²⁵ See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

²⁶ See Edward J. Juel, Note, *Non-Traditional Family Values: Providing Quasi-Marital Rights to Same-Sex Couples*, 13 B.C. THIRD WORLD L.J. 317, 318, 321-22 (1993).

²⁷ Jennifer L. Heeb, Note, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 355-61 (1993).

created marriage-like entitlements for gay and lesbian partners, including employment benefits and protection of property rights.²⁸

Recently, the Hawaii Supreme Court put a dent into the judicial consensus against same-sex marriage by recognizing an equal protection argument based on gender discrimination that would trigger heightened scrutiny of such a ban.²⁹ The caveat is that, at the same time, the court rejected a due process argument much like that recognized by the United States Supreme Court in its heterosexual right-to-marry jurisprudence, most notably in *Loving v. Virginia*.³⁰ As such, the Hawaii Supreme Court refused to extend the state constitution's right to privacy, expressly derived from the general right under the Federal Constitution, to include a fundamental right to same-sex marriage.³¹ Nevertheless, the court remanded the challenge to the constitutionality of the state's prohibition of same-sex marriage and subjected it to a "strict scrutiny" test.³² The court declared that the marriage statute, on its face and as applied, denies same-sex couples access to marital status because of the gender of the partners.³³ Sex being a suspect category for purposes of equal protection analysis under the Hawaii Constitution, the Hawaii Supreme Court, applying the strict scrutiny test, declared that the marriage statute is presumed to be unconstitutional unless the state can show that the sex-based classification is justified by compelling interests and is narrowly tailored to avoid unnecessarily abridging constitutional rights.³⁴

This opinion, which makes legally-sanctioned same-sex marriage a possibility in the United States, should be seen as part of a trend recognizing that the notion of the American family is continually

²⁸ *Id.* at 358, 360.

²⁹ *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

³⁰ *See id.* at 57; *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding state antimiscegenation statute unconstitutional because it infringed on fundamental right to marry; Fourteenth Amendment requires freedom of choice to marry not be restricted by invidious racial discrimination). *See also* *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (striking down Wisconsin statute that prevented persons from marrying if they could not meet preexisting child support obligations as interfering with fundamental right to marry).

³¹ *See Baehr*, 852 P.2d at 57. The Hawaii Supreme Court stated:

We do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.

Id.

³² *Id.* at 67.

³³ *See id.*

³⁴ *Id.* at 63-64, 67.

changing.³⁵ That notion has already expanded to include not just traditional heterosexual nuclear families, but also domestic partners of any gender with or without children, single parents with one or more children, and grandparent-led households.³⁶ The underlying argument in *Same-Sex Unions in Premodern Europe* is that this change should be seen as part of a long historical and social evolution of the family structure, because marriage is not and never has been a monolithic, time-resistant institution as the Judeo-Christian tradition would have it.³⁷ Rather, marriage is rooted in the socio-economic structures of the times.³⁸

Throughout its history, marriage has been viewed in varying ways, early on as a mere property arrangement, a form of extending inheritance and dynastic rights, in which love was incidental.³⁹ Later on, marriage became viewed as a passionate friendship and romantic relationship between two people, regardless of gender.⁴⁰ Hence, why is it inconceivable that earlier societies recognized and validated same-sex unions when the prevailing social structures then tolerated such relationships? Boswell challenges contemporary notions of marriage by providing historical evidence to show what marriage was like in classical and medieval civilizations and how same-sex unions, proscribed heavily since the late Christian era, were accepted by earlier cultures.⁴¹ This evidence even shows that same-sex unions were vindicated by the Church itself in its earlier years through nuptials and ceremonies.⁴²

³⁵ See *id.* at 67.

³⁶ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 499–500 (1977) (holding unconstitutional local ordinance selecting categories of relatives who may and may not live together in a single dwelling unit, because it “makes a crime of a grandmother’s choice to live with her grandsons”). See also Heeb, *supra* note 27, at 348; Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925, 931–32 (1991) (noting that traditional nuclear family has been subsumed by range of alternatives, including single-parent families and cohabiting unmarried adults); Barbara J. Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J.L. & POL. 5, 5 (1991) (observing decrease in number of traditional families with simultaneous rise in number of alternative families within past thirty years); Alissa Friedman, Comment, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN’S L.J. 134, 135 (1988) (commenting that today’s family represents variety of alternatives to traditional nuclear family, including unmarried homosexual or heterosexual cohabitation, group living, and single parent families).

³⁷ See Eskridge, *supra* note 2, at 1422.

³⁸ *Id.* at 1421–22, 1485.

³⁹ BOSWELL, *supra* note 1, at 32–34, 280.

⁴⁰ See *id.* at 280.

⁴¹ See *id.* at 53–107 (chapter 3, “Same-Sex Unions in the Greco-Roman World”).

⁴² *Id.* at 178–82.

Boswell's argument is valuable in the ongoing debate on same-sex marriage because the law claims that the same Western tradition is antagonistic to the idea of such unions.⁴³ But if history shows that the "tradition" cited by the law does not actually support the purportedly tradition-based argument of the courts, then such a judicial consensus may in fact be misplaced.⁴⁴ *Same-Sex Unions in Premodern Europe* challenges this consensus by offering a social constructionist history, a lens which "emphasizes the ways in which marriage is 'constructed' by society over time, with 'exclusions' from the institution being viewed as reflecting larger social power relations."⁴⁵ Professor Eskridge notes that this history has "argumentative power [because] it reveals [that] the traditional arguments against same-sex marriage [are] seriously defective: the definitional argument essentializing marriage around male-female intimacy is factually wrong; the argument from Judeo-Christian tradition is hypocritical, given early Christianity's tolerance of same-sex intimacy. . . ."⁴⁶

III. THE HISTORICAL EVIDENCE

A. *Heterosexual Marriages in Premodern Societies*

According to Boswell, in the Greco-Roman world, unlike in the contemporary one, marriage was not seen as the method of being permanently committed to a "loved" one, because the notions of love and marriage did not necessarily go together.⁴⁷ In fact, the idea of marrying someone for affection and emotional reasons was considered bizarre.⁴⁸ Love came after the marriage, if ever it did.⁴⁹ If it did not, husbands were free to turn to concubines for erotic and emotional fulfillment.⁵⁰ Unfortunately for women, marriage was the only respectable sexual relationship for them.⁵¹

⁴³ See Eskridge, *supra* note 2, at 1420–21.

⁴⁴ *Id.* at 1497.

⁴⁵ See *id.* at 1421–22.

⁴⁶ *Id.* at 1422.

⁴⁷ See BOSWELL, *supra* note 1, at 39, 280.

⁴⁸ *Id.* (citing, e.g., XENOPHON, SYMPOSIUM 8.3 (expressing surprise that "Nicerates, I hear, loves and is loved by his wife"); PLAUTUS, MENAECHMI 129 (referring to *amatores mariti* as a special class of person); PLUTARCH, EROTIKOS 761E (noting astonishment at a husband being "in love" with his wife)).

⁴⁹ *Id.*

⁵⁰ *Id.* at 29–31.

⁵¹ *Id.* at 31.

Marriage as a social institution in premodern eras was primarily a property arrangement, facilitating the transfer of assets in a preindustrial world where wealth was held by families and was not redistributed through salaries.⁵² The only way to increase wealth was essentially to marry someone with a large dowry.⁵³ Marriage thus was a way of expanding the inheritance, especially for upper classes, and it served the purpose of perpetuating the dynasty of the ruling class.⁵⁴ Wives were seen as property in earlier patriarchal society, and only in the Roman era was marriage perceived as a merger between two families.⁵⁵

Because of this essentially materialistic view of marriage, men were allowed to find sexual satisfaction and even emotional intimacy with female or male concubines.⁵⁶ In fact, this was an accepted practice at that time.⁵⁷ A man could very well have a wife for economic reasons and, at the same time, a concubine for sex or love, without being viewed as immoral or promiscuous.⁵⁸ This practice was possible because ancient marriage entailed "fundamentally different expectations" when compared to modern marriage.⁵⁹ For example, according to Boswell,

Since Romans did not look to marriage to fulfill erotic needs, even a devoted and happy marriage did not depend on (or

⁵² *Id.* at 32–34, 32 n.20 (citing Susan Treggiari, *Consent to Roman Marriage: Some Aspects of Law and Reality*, 26 CLASSICAL VIEWS 34, 34–35 ("Money, political influence, social position, the perpetuation of the family were all bound up with the choice of partner"); *id.* at 33 n.21 (citing SUZANNE DIXON, *THE ROMAN FAMILY* 62 (1992); HANS WOLFF, *WRITTEN AND UNWRITTEN MARRIAGES* 78–79 (1939) ("The bride legally was considered as a mere object of the contract that was made by and between her [father] and her future husband"))).

⁵³ *Id.* at 33–34.

⁵⁴ *Id.* at 33.

⁵⁵ *Id.* at 41–42, 46–47, 223–25. The three most important consequences of this shift were that: (1) the woman's consent (not simply that of her parents) became emphasized as necessary to a valid marriage; (2) wives could sue their husbands for divorce; and (3) the husband's right to have sex with any member of the *familia* or all social inferiors was thence restricted in many households. *Id.* at 42.

⁵⁶ *Id.* at 29–31, 55. For more on homosexual concubinage, see generally JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980).

⁵⁷ BOSWELL, *supra* note 1, at 30–31, 30 n.9 (citing DIGEST 25.7.3.1 (Roman legislation proclaiming that having a concubine does not constitute adultery, "for since concubinage is recognized by law, its punishment cannot be legal")); *id.* at 31 n.10 (citing JEAN-LOUIS FLANDRIN, *FAMILIES IN FORMER TIMES: KINSHIP, HOUSEHOLD AND SEXUALITY* 181 (Richard Southern trans., Cambridge, 1979) ("In contrast to marriage, which was a social institution by which families of the same standing entered into an alliance to perpetuate themselves, concubinage was a personal union, an affair of love, at least on the part of the man.")).

⁵⁸ *Id.* at 37.

⁵⁹ *Id.*

disclose) sexual orientation (as it might in modern societies where people choose marital partners primarily for emotional and sexual fulfillment), nor would it have the same significance for a Roman as it would for an American to be in love with someone other than his spouse.⁶⁰

According to Boswell, procreation was not integral to the Roman ideals of matrimony and no one took childlessness as undermining the validity or reality of marriages.⁶¹ Only in the Christian era did the idea of marriage for procreation become dominant due to the Church's consistent and vehement insistence.⁶² Once Christianity's power was established, this idea was incorporated into many European philosophies and legal structures as a Christian principle.⁶³ Yet, despite its emphasis on procreation as the theoretical justification for marriage, the Christian Church nonetheless adhered to the basic foundation of pagan Roman law that consent and marital affection were the primary determinants of a valid marriage.⁶⁴ According to Boswell, "heterosexual marriage was regarded [by the Church] as a compromise with the material world—a world Christians struggled, with varying degrees of commitment and success, to abandon—and its celebration and regulation were left almost entirely to the habits, customs, and peoples of that world."⁶⁵

Furthermore, even in the Christian era, the consummation of marriages was not encouraged.⁶⁶ It was the "spiritual" companionship which mattered the most, and that is why, argues the author, allowing same-sex unions was not such a controversial idea.⁶⁷ The primacy of spiritual companionship over sexual gratification is even written in ancient Roman marriage law to which the Christian Church later adhered: "Not coitus, but marital affection constitutes matrimony."⁶⁸

Understanding the nature of heterosexual marriage in premodern Western civilization is essential to Boswell's analysis.⁶⁹ Only with

⁶⁰ *Id.*

⁶¹ *Id.* at 49. See *id.* at 49 n.86 (citing Musonius Rufus, *What is the Chief End of Marriage?*, in CORA LUTZ, *MUSONIUS RUFUS: THE ROMAN SOCRATES* 86 (1947) (procreation alone could hardly justify matrimony since one could produce children from any sexual union)).

⁶² *Id.* at 112.

⁶³ *Id.*

⁶⁴ *Id.* at 51, 111. See also *id.* at 14–23.

⁶⁵ *Id.* at 111.

⁶⁶ *Id.* at 111, 119.

⁶⁷ *Id.* at 119 ("spiritual" presumably alludes to the union of the spirits of the spouses, rather than to their bodies).

⁶⁸ *Id.* at 51.

⁶⁹ See *id.* at 29.

such an understanding can the book's reader see that same-sex unions, which are largely affectional and for emotional sharing, did not really contravene the mores of the time, when heterosexual marriage was seen merely as an instrument of pecuniary gain.⁷⁰

B. *Same-Sex Unions*

In the bulk of the book, Boswell presents much evidence of same-sex unions throughout history.⁷¹ He argues that such unions were fairly common, and he substantiates his argument by citing the literature and history written during these periods.⁷² The evidence includes ancient biographies⁷³ and ceremonies joining same-sex couples.⁷⁴

His premise seems to depend on key words and connotations which, upon translation from the ancient Greek, Latin, and Slavic, may be contentious.⁷⁵ His translation is nonetheless persuasive because he rejects simple transliteration in favor of examining in depth the social context and circumstances in which a word was used.⁷⁶ For example, he argues that use of the word "brother" in ancient texts did not really signify biological affiliation, as a simple transliteration would suggest, but signified a bond of affection.⁷⁷ This was because, in pre-modern Western societies, "brother" connoted a husband and a man's male lover, due to the attendant erotic and emotional attachments springing from the word.⁷⁸ In fact, because of these emotional connotations of intimacy, trust, fidelity, and devotion, being "brothers" was held in high regard.⁷⁹ It signified that two men were from the same generation and social stature.⁸⁰

Same-Sex Unions in Premodern Europe also contains several biographies of same-sex couples, and also some historical accounts of customs by same-sex couples which emulated those of husband and wife.⁸¹ For

⁷⁰ See *id.* at 32–34.

⁷¹ *Id.* at 53–107 (chapter 3), 199–279 (chapters 6 to 7).

⁷² *Id.* at 66–69, 82, 88, 218–61 (chapter 7), 264–65, 280.

⁷³ E.g., *id.* at 147–61, 237–38, 252–53.

⁷⁴ E.g., *id.* at 180–88, 240. The appendix includes various examples of same-sex nuptials, translated from, *inter alia*, Greek, Latin, and Old Church Slavonic. *Id.* at 291–306.

⁷⁵ See *id.* at 19–26.

⁷⁶ *Id.*

⁷⁷ *Id.* at 19–25, 67–70, 221–28; *id.* at 70 n.84 (citing QUINTILLIAN [?], DECLAMATIONES 321 ("There is no greater degree of affection than calling someone 'brother'; how could a friendship be more blessed than to imitate brotherhood?")). Lexicographers have generally recognized the sexual, non-biological senses of the words *frater* ("brother") and *soror* ("sister"). *Id.* at 68 n.78.

⁷⁸ *Id.* at 19–26, 67–71, 129–36.

⁷⁹ See *id.* at 69.

⁸⁰ *Id.*

⁸¹ *Id.* at 53–107 (chapter 3), 218–61 (chapter 7). Boswell presents convincing evidence that these practices were perfectly acceptable and even vindicated. See *id.*

example, the burial rite given for Achilles and Patroclus, both men, was the burial rite for a man and his wife.⁸² The relationships of Hadrian and Antinoüs,⁸³ of Polyeuct and Nearchos,⁸⁴ of Perpetua and Felicitas,⁸⁵ and of Saints Serge and Bacchus,⁸⁶ all bore resemblance to heterosexual marriages of their times.⁸⁷ The iconography of Serge and Bacchus was even used in same-sex nuptial ceremonies by the early Christian Church.⁸⁸

C. *Legal Aspects of Premodern Unions*

Boswell argues that the law only played a part in premodern marriages in order to protect property rights, since marriage was, after all, a property arrangement.⁸⁹ The law also enforced the marriage contract, which delineated the rights of the spouses.⁹⁰ For example, Boswell cites a contract executed in Roman Egypt, which resembles a business contract and determines the woman's dowry and what she is seeking in exchange as consideration: among other things, that her husband promise to have no concubines or male lovers.⁹¹ Actually, the law today acts in basically the same way—as a device to assure the partners economic and social benefits and to protect their common property rights.⁹² Modern marriage bestows entitlements upon the married couple, as it triggers state recognition and protection of economic benefits, such as inheritance, property rights, and tax benefits.⁹³

IV. HISTORY AND THE CONSTITUTIONAL ARGUMENTS

A. *The Functional View of Marriage*

Boswell's historical evidence seems to support a "functional view" of marriage as the legal framework for a committed relationship be-

⁸² *Id.* at 59; *id.* at 59 n.25 (citing PLATO, SYMPOSIUM 180A; HOMER, ILIAD 18.80, 19.330–32, 23.243–44; HOMER, ODYSSEY 24.77).

⁸³ *Id.* at 64–66.

⁸⁴ *Id.* at 141–46.

⁸⁵ *Id.* at 139–45; *id.* at 139 n.133 (citing *e.g.*, CORNELIUS VAN BEEK, PASSIO SANCTARUM PERPETUAE ET FELICITATIS (1936)).

⁸⁶ *Id.* at 147–51, 375–90 (translation of Passion of Saints Serge and Bacchus in appendix).

⁸⁷ See *supra* notes 82–86 and accompanying text.

⁸⁸ BOSWELL, *supra* note 1, at 145–58.

⁸⁹ *Id.* at 32–35.

⁹⁰ *Id.* at 42.

⁹¹ *Id.* at 42–43.

⁹² Heeb, *supra* note 27, at 352. See also *id.* at 352 n.20 (citing Mary P. Truehart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 92 (1991); Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539, 540 (1991)).

⁹³ *Id.* at 352.

tween two adults, regardless of gender.⁹⁴ According to one commentator, "viewed functionally, legal marriage is essentially a binding commitment uniting two intimately related adults, a commitment which sustains the relationship between such adults by structuring their dealings with each other and with third parties. Conceived in this way, marriage is indifferent to the relative genders of its occupants."⁹⁵

This functional view has been adopted by the New York Court of Appeals in *Braschi v. Stahl Associates*.⁹⁶ In this case, the term "family," when used in state regulations to describe persons who cannot be evicted from a rent-controlled apartment when the leaseholder dies, was construed to include "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."⁹⁷ The partners in *Braschi* were gay men, and the Court of Appeals placed "the reality of family life" before a formal requirement of a marriage license, calling the latter a "fictitious legal distinction."⁹⁸ The Court of Appeals went on to say:

The determination as to whether an individual is entitled to noneviction protection should be based upon an objective examination of the relationship of the parties. In making this assessment, the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services. These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.⁹⁹

This interpretation of marriage is consistent with a social constructionist view.¹⁰⁰ The central theme of an historical perspective is that

⁹⁴ See William H. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1496 (1994).

⁹⁵ *Id.*

⁹⁶ See *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53-54 (N.Y. 1989).

⁹⁷ *Id.* at 54. Although the holding in *Braschi* was confined to the construction of the word "family" in New York's rent control statute, it is undeniably an important step in the judicial recognition of the rights of same-sex partners. See *id.*

⁹⁸ *Id.* at 53.

⁹⁹ *Id.* at 55 (citations omitted).

¹⁰⁰ Compare Hohengarten, *supra* note 94, at 1496 with Eskridge, *supra* note 2, at 1432-34.

marriage, like other cultural institutions, is a social and not a natural creation; this theme subverts the traditional definitional argument that marriage is, by definition, restricted to male-female partners.¹⁰¹

In addition, the functional view has its own support in history.¹⁰² History refutes any argument positing that marriage has always been exclusively between opposite-sex couples.¹⁰³ Boswell offers evidence that at the start of the Christian era, marriage was created by the consent of the parties, regardless of gender.¹⁰⁴ The Church adopted this view from Roman marriage law, where consent and marital affection made a marriage, not coitus or cohabitation.¹⁰⁵ Indeed, it was the parties that married each other, not the Church.¹⁰⁶ In ecclesiastical nuptials, the Church merely served as a witness and was not the creator of the marital structure.¹⁰⁷ If the parties intended to be married, then they were.¹⁰⁸

Aside from consent, early Christian societies also recognized that marital affection formed the matrimony.¹⁰⁹ In fact, marriage, regardless of gender, often drew an analogy with the notion of "brotherhood."¹¹⁰ Thus, as seen above, in the premodern era, sibling referents were used for spouses because fraternal relationships signified intimacy, emotional attachment, and affection beyond consanguinity.¹¹¹ Boswell's historical discovery reveals that such fraternal relationships were indeed similar to heterosexual marriages, which were collateral adoptions—that is, the wife was literally adopted by the husband—with the resulting creation of a unit where property rights were pooled.¹¹²

B. *The Procreation Rationale*

Boswell claims that procreation was not the primary purpose of marriages in premodern Europe.¹¹³ It did not even become a rationale

¹⁰¹ See Eskridge, *supra* note 2, at 1485.

¹⁰² See *id.*

¹⁰³ *Id.*

¹⁰⁴ BOSWELL, *supra* note 1, at 50–51. See *id.* at 165.

¹⁰⁵ *Id.* at 50; *id.* at 50 n.89 (citing the Roman code DIGEST 50.17.30) ("The classical formulation of Roman law on the constitution of marriage avers that 'consent, not cohabitation, makes a marriage' (*nuptias non concubitus sed consensus facit*)"); *id.* at 169 n.34 (citing Hans Julius Wolff, *Written and Unwritten Marriages in Hellenistic and Postclassical Roman Law*, 9 PHILOLOGICAL MONOGRAPHS 89 (1939) (discussing the law for Romans living under Burgundy rule, *LEX ROMANA BURGUNDIONUM* § 37: *consensus perficit nuptias* ("consent makes marriage"))).

¹⁰⁶ *Id.* at 165.

¹⁰⁷ *Id.*

¹⁰⁸ See *id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 121.

¹¹¹ *Id.* at 129.

¹¹² See *id.* at 41, 97.

¹¹³ *Id.* at 49; see *id.* at 51.

for matrimony until well into the Christian era, when the Church, hoping to find a theological basis for this worldly social construct that was consistent with its exhortation of celibacy and the afterlife, advanced the idea that the propagation of the race was an acceptable compromise with the powers of sexual desire.¹¹⁴ Indeed, the advent of Christianity created an ambiguity over the emotional significance of matrimony, since the early Church emphasized celibacy over marriage.¹¹⁵

This history shows a degendering of marriage by challenging the current judicial consensus, a step that one commentator argues is important in the legal struggle for recognition of same-sex marriages because of the emphasis given to the remaining gender-based element of present-day heterosexual marriage, that is, its connection with the biological act of procreation.¹¹⁶ Indeed, it is the prevailing judicial view that the purpose of marriage is procreation.¹¹⁷ According to one state court:

The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage results from such *impossibility of reproduction* rather than from an invidious discrimination "on account of sex."¹¹⁸

Yet the argument that procreation is the cornerstone of marriage, or even that it is a necessary attribute of marriage, is flawed and inconsistent with the Supreme Court's jurisprudence, which protects individual reproductive decisions.¹¹⁹

¹¹⁴ *Id.* at 280.

¹¹⁵ *Id.* at 110–11. Prior to this development, procreation did not necessarily occur within marriages. *Id.* at 49.

¹¹⁶ Hohengarten, *supra* note 94, at 1513. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that right to marry was inextricably linked to the right of procreation because both were fundamental to the very existence and survival of the race).

¹¹⁷ Hohengarten, *supra* note 94, at 1511.

¹¹⁸ *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (emphasis added).

¹¹⁹ See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (upholding the right of married persons to use contraceptives, stressing the importance of protecting intimacy within the marital relationship); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (extending the *Griswold* holding to include non-married individuals, focusing on the importance of reproductive freedom not only to married people but also to the individual). It is important to note that in *Eisenstadt*, the Court endorsed the right of an individual to make family choices outside of the traditional family

First, heterosexual marriages never had a procreative requirement in the United States.¹²⁰ Indeed, any such requirement would be too intrusive to constitutionally protected spheres of privacy.¹²¹ Encompassed within the constitutional privacy doctrine is the freedom of choice in all matters pertaining to reproduction.¹²² This the Court has articulated and affirmed in *Griswold v. Connecticut* and *Eisenstadt v. Baird*, two cases which illustrate the illogic of simultaneously granting freedom over procreation and then denying a right to marry because of the couples' biological inability to procreate.¹²³ Thus, it would seem that if procreation were the sole purpose of marriage, then all couples unwilling or unable to have children might be prohibited from marrying.¹²⁴

Furthermore, one commentator argues that, although marriage seems to be the culturally and legally favored milieu in which to bear and raise children, an exclusive focus on biology is necessarily too narrow, because it ignores types of parenthood already existing in American society: legal parenthood and functional parenthood.¹²⁵ Adoption proves that it is not necessary for legal parenthood to mean biological parenthood.¹²⁶ Also, an adult may fulfill the functional role of a parent by providing love, care, companionship, and education to a child even if he or she may have no biological connection to him or her.¹²⁷

The reality of family life is indeed so complex that biological, legal, and functional parenthood intersect with each other in many permutations.¹²⁸ Through divorce, remarriage, cohabitation, second-parent

structure. Heeb, *supra* note 27, at 386. *But see Skinner*, 316 U.S. at 541 (holding that right to marry and right of procreation were inextricably linked because both were fundamental to the very existence and survival of the race).

¹²⁰ Hohengarten, *supra* note 94, at 1518.

¹²¹ *See id.* at 1523.

¹²² Heeb, *supra* note 27, at 384. Since any express federal constitutional guarantee of a right to privacy is nonexistent, *Griswold* held that there existed a zone of privacy, protected by "penumbras" and "emanations" from the specific guarantees of the Bill of Rights. *See* 381 U.S. at 484. *See also Roe v. Wade*, 410 U.S. 113, 152 (1973) (recognizing that, although the Constitution does not explicitly mention any right to privacy, the Court has nonetheless recognized a right of personal privacy, or a guarantee of certain areas or zones of privacy, in varying contexts).

¹²³ Heeb, *supra* note 27, at 387.

¹²⁴ *Id.*

¹²⁵ Hohengarten, *supra* note 94, at 1519.

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1520. *See* Nancy D. Polikoff, *This Child Does Have Two Mothers*, 78 GEO. L.J. 459, 474 (1990) ("Neither biology nor legal adoption is sufficient to establish who is a parent in a complex world affected by cultural norms, technology, and patterns of sexual behavior. Deviation from the one-mother/one-father prescription for parenthood is common.").

adoptions, and legal adoptions, a single family may have adults functioning under some or all of the three types of parenthood.¹²⁹ This crisscrossing can be found among same-sex couples, too.¹³⁰ In fact, in some jurisdictions, courts have approved same-sex second-parent adoptions, adding another layer to the innumerable ways in which these types of parenthood may intertwine.¹³¹ Thus, a narrow biological view of parenthood, based on a preconceived notion of marriage's procreative purpose, seems blind to the realities of parenthood in American society today.¹³² Because same-sex couples do in fact participate in these realities by being biological, legal, or functional parents, a procreation-based argument decrying the impossibility of parenthood in same-sex unions does not have much credibility.¹³³

C. *The Miscegenation Analogy*

Loving v. Virginia is the Supreme Court's principal case establishing the due process right to marry, but it is mainly an equal protection case.¹³⁴ The right to marry comes as an alternative holding at the end of the opinion.¹³⁵ The primary holding of the Court was that the Virginia antimiscegenation statute was a racial classification and that the state offered "... no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."¹³⁶

It is easy to recognize the analogy between antimiscegenation and the prohibition on same-sex marriage.¹³⁷ *Loving* attacked a restrictive view of marriage based on race.¹³⁸ Same-sex marriage attacks a similarly narrow view about gender and marriage.¹³⁹ Gay and lesbian activists and commentators have therefore argued that by prohibiting same-sex marriage, states engage in sex discrimination, in violation of their own

¹²⁹ Hohengarten, *supra* note 94, at 1520.

¹³⁰ *Id.*

¹³¹ See, e.g., Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993) (allowing second-parent adoptions by the same-sex partners of the children's natural parents); Adoption of Tammy, 619 N.E.2d 315, 315-316 (Mass. 1993) (same).

¹³² See Hohengarten, *supra* note 94, at 1519-20.

¹³³ See *id.*

¹³⁴ 388 U.S. 1 (1966). See Eskridge, *supra* note 2, at 1504.

¹³⁵ Eskridge, *supra* note 2, at 1504. See *Loving*, 388 U.S. at 12.

¹³⁶ *Loving*, 388 U.S. at 11-12.

¹³⁷ See Eskridge, *supra* note 2, at 1504.

¹³⁸ *Id.* at 1505.

¹³⁹ *Id.*

equal rights amendments and even of the Equal Protection Clause.¹⁴⁰ Particularly, since states will grant a marriage license to an opposite sex couple, but not to a same-sex couple, states are discriminating against the latter couple for the sole reason that the second partner is the same sex as the first.¹⁴¹ According to this argument, that is pure sex discrimination, unjustifiable unless there is a compelling state interest.¹⁴² Indeed, the Hawaii Supreme Court itself accepted the plaintiffs' *Loving* analogy with regards to prohibitions of same-sex marriage in *Baehr v. Lewin*, raising as it did an equal protection argument with regards to the marriage statute's classification based on gender, instead of race.¹⁴³

Loving also struck down Virginia's antimiscegenation law because it violated Fourteenth Amendment due process rights.¹⁴⁴ One commentator observes that the Court's rationale, while confined to the issue of race, is relevant to same-sex marriage as well when extended to the issue of gender.¹⁴⁵ According to the Court:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. . . . To deny this fundamental freedom on so insupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.¹⁴⁶

Cases following *Loving* seemed to emphasize that the freedom to marry the *person of one's choosing* is a fundamental due process right that cannot be abridged unless there is a compelling state interest.¹⁴⁷

¹⁴⁰ *Id.* at 1424–25. See James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 95 (1993). See also Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 232 (1988); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988) (arguing that sodomy laws targeted specifically against same-sex couples, like antimiscegenation laws, violate the Equal Protection Clause because they rigidly lock some people into inferior gender and racial roles at birth); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 574, 589 (1973) (arguing that prohibitions of same-sex marriage would violate then anticipated federal Equal Rights Amendment).

¹⁴¹ See Eskridge, *supra* note 2, at 1425.

¹⁴² *Id.*

¹⁴³ *Id.* at 1508. See *Baehr v. Lewin*, 852 P.2d 44, 60, 68 (Haw. 1993).

¹⁴⁴ *Loving v. Virginia*, 388 U.S. 1, 12 (1966).

¹⁴⁵ Trosino, *supra* note 140, at 107.

¹⁴⁶ *Loving*, 388 U.S. at 12.

¹⁴⁷ See *Turner v. Safley*, 482 U.S. 78, 96–99 (1987) (recognizing prison inmates' fundamental due process right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 388–91 (1978) (holding that state

Thus, commentators argue, states violate same-sex couples' due process right to marry by refusing to give legal sanction to their relationships.¹⁴⁸ For example, in *Zablocki v. Redhail*, the Supreme Court distinguished laws interfering with the decision to marry from laws through which the state exercises its traditional power to define the legal incidents of marriage:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.¹⁴⁹

One commentator suggests that, under *Zablocki*, the state's power to define the legal relationship of marriage does not encompass the power to exclude persons from it, and therefore, a state may not negate the right of a same-sex couple to marry simply by defining marriage as a union between two persons of opposite sexes, any more than it could define marriage as a union of two persons of the same race.¹⁵⁰

Virginia defended its antiscegenation statute in *Loving v. Virginia* by invoking religion.¹⁵¹ The Virginia Supreme Court asserted that race is a fundamental dividing characteristic created by God, and because of this ideology and the state's asserted interest in preventing a mongrel breed of citizens, the state argued that it was justified in banning mixed-race marriages.¹⁵² Analogously, the prohibition on same-sex marriage is based upon an ideology and a tradition of homophobia and rigid gender stereotypes.¹⁵³ The Court ultimately struck down the antiscegenation law, despite its long history and the nation's tradition.¹⁵⁴ *Loving* thus presents a principle that is relevant to same-sex marriage: "the right to marry is not circumscribed by longstanding

cannot abridge person's right to marry even though he is unable to satisfy previous parental support obligations); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (emphasizing due process right to marry and to terminate marriage for indigents who could not afford payment of fees required by state for a divorce).

¹⁴⁸ Eskridge, *supra* note 2, at 1426.

¹⁴⁹ 434 U.S. at 386.

¹⁵⁰ Hohengarten, *supra* note 94, at 1507.

¹⁵¹ Eskridge, *supra* note 2, at 1505.

¹⁵² *Id.* at 1506.

¹⁵³ *Id.* at 1507-08.

¹⁵⁴ See Hohengarten, *supra* note 94, at 1506.

legal or cultural exclusions from marriage, no matter how deeply rooted in the nation's traditions and history."¹⁵⁵

Some courts have attempted to differentiate marital restrictions based upon race from those based upon the fundamental difference in sex, using the procreation rationale.¹⁵⁶ According to this argument, the notion that marriage uniquely involves procreation and child-rearing should foreclose any analogy between the purported unconstitutionality of barring same-sex and different-race heterosexual marriages.¹⁵⁷ However, as noted above, the Supreme Court's marriage jurisprudence does not reflect the primacy of procreation in opposite-sex unions, but instead emphasizes the freedom of choice in procreation.¹⁵⁸ Indeed, heterosexual marriages are not made invalid by the spouses' inability or lack of desire to have children.¹⁵⁹

D. *The Moral Tradition Argument*

The history of same-sex marriage points to the illogic of banning such marriages on moral or religious grounds, especially those invoking the Judeo-Christian tradition.¹⁶⁰ Eskridge emphasizes that it must be recognized that "... 'tradition' is itself a construction and therefore an arena for contest."¹⁶¹ Courts have found themselves necessarily citing this moral tradition as compelling evidence to prohibit same-sex marriages.¹⁶² They have attempted to show that limiting marriage to opposite-sex partners is justified morally, "... to preserve family values and traditional ethical notions."¹⁶³ For example, the federal court in *Adams v. Howerton* linked its argument to the Judeo-Christian moral tradition:

Canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex

¹⁵⁵ *Id.*

¹⁵⁶ *See, e.g.,* Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971).

¹⁵⁷ *See id.* at 186.

¹⁵⁸ *See* Eisenstadt v. Baird, 405 U.S. 438, 441-43 (1972); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

¹⁵⁹ *See* Heeb, *supra* note 27, at 387.

¹⁶⁰ Eskridge, *supra* note 2, at 1497.

¹⁶¹ *Id.*

¹⁶² *See e.g.,* Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982); Eskridge, *supra* note 2, at 1430 (citing Dean v. District of Columbia, No. 90-13892, slip op. at 18-21 (D.C. Super. Ct. Jun. 2, 1992) (invoking Genesis, Deuteronomy, Matthew, and Ephesians to support its holding that "societal recognition that it takes a man and a woman to form a marital relationship is older than Christianity itself")).

¹⁶³ Eskridge, *supra* note 2, at 1429.

because of the vehement condemnation in the scriptures of both religions of all homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a "marriage" between persons of the same sex was unthinkable and, by definition, impossible.¹⁶⁴

Yet a cursory look at Boswell's historical evidence is enough to undermine such arguments based upon a "univocal" Christian tradition.¹⁶⁵ Roman Catholic and Greek Orthodox Churches performed same-sex nuptial rites for centuries, invoking Saints Serge and Bacchus, themselves same-sex partners.¹⁶⁶ These churches also published same-sex liturgies glorifying such unions and placing them in the same regard as heterosexual unions.¹⁶⁷

Some anthropologists and historians have interpreted these unions as business partnerships and blood brotherhoods.¹⁶⁸ However, the emotional and erotic ingredients of these relationships dispel any reading that they were merely for business arrangements or intertribal pacts.¹⁶⁹ The fact that these unions were recognized and even given ecclesiastical blessing by the early Christian Church unveils the hypocrisy of arguments grounded on an ethical or religious tradition.¹⁷⁰

V. CONCLUSION

The most useful lesson from John Boswell's historical perspective on marriage is that marriage is an institution that is constructed, not discovered, by societies. This means that marriage at any point in history reflects the cultural and social attitudes of that time. Societies in premodern Europe, including early Christian ones, recognized same-sex marriages, and therefore any argument prohibiting such marriages based on history or tradition is internally flawed.¹⁷¹ Marriage is not insensitive to time, and since it is a construction of society, marriage is vulnerable to change.

Boswell's historical viewpoint argues that the current legal and social consensus against same-sex marriage is necessarily restrictive and

¹⁶⁴ Adams, 486 F. Supp. at 1123.

¹⁶⁵ Eskridge, *supra* note 2, at 1497. See BOSWELL, *supra* note 1, at 240.

¹⁶⁶ Eskridge, *supra* note 2, at 1497. See BOSWELL, *supra* note 1, at 180-85.

¹⁶⁷ BOSWELL, *supra* note 1, at 180-85.

¹⁶⁸ *Id.* at 193-95, 270-79. Boswell offers summaries and his criticism of the findings and interpretations of these scholars.

¹⁶⁹ *Id.* at 195.

¹⁷⁰ Eskridge, *supra* note 2, at 1422. See BOSWELL, *supra* note 1, at 180-85.

¹⁷¹ See, e.g., BOSWELL, *supra* note 1, at 56, 180-85.

reactionary because the consensus refuses to acknowledge that marriage as a structure can be changed by society to take into account evolving patterns of relationship. Our society has already changed to expand the modern notion of the family, and the courts have begun to recognize a substance-over-form perspective on family.¹⁷² Indeed, functionally, same-sex partnerships have the sharing, intimacy, and commitment found in heterosexual marriages. The right to marry for same-sex couples would give legal sanction to the relationship, a legitimization not altogether new in the Western tradition. The granting of that right by courts and legislatures seems to be the next logical step in this social and cultural evolution.

¹⁷² See, e.g., *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53-54 (N.Y. 1989).

