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March 2012

Modern Marriage and Judgmental Liberalism: A Reply to George, Girgis, and Anderson

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Modern Marriage and Judgmental Liberalism:
A Reply to George, Girgis, and Anderson

MATTHEW CLEMENTE

"People are meant to go through life two by two. 'Tain't natural to be lonesome."[1]
— Thorton Wilder, *Our Town.*

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Few social issues elicit as much vitriolic opposition as gay marriage. State by state, cantankerous debates about same-sex marriage continue to capture headlines. As recently as March 2012, Maryland's governor signed a bill into law that would make Maryland the eighth state to recognize same-sex marriage in the United States.[2] Maryland followed Washington state, whose governor signed a similar bill a month earlier.[3] However, these victories for gay rights advocates may be short-lived.

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[1] Thornton Wilder, OUR TOWN 54 (2003).
[2] The Associated Press, *Maryland Governor Signs Bill Legalizing Gay Marriage*, N.Y. TIMES (Mar. 1, 2012, 8:12 PM) http://www.nytimes.com/aponline/2012/03/01/us/AP-US-Gay-Marriage-Maryland.html.
[3] Reuters, *Washington: Gay Marriage Legalized*, N.Y. TIMES (Feb. 13, 2012) http://www.nytimes.com/2012/02/14/us/washington-gay-marriage-legalized.html.

Opponents of same-sex marriage are expected to force referenda in both states that could possibly overturn the passed legislation.[4] While in New Hampshire, lawmakers may vote to repeal existing law in the state that permits same-sex marriage.[5] In Maine and New Jersey, after bills allowing same-sex marriage were overturned, gay marriage faces referendum in the November 2012 elections.[6]

The political question of whether same-sex marriage ought to be permitted is inextricably linked with a more fundamental philosophical question—why is the government in the marrying business at all? Simply put, why does the state sanction and encourage marriage?[7] At stake in the same-sex marriage debate is not only the legitimacy of same-sex couples relationships, but also the legitimacy of the modern institution of marriage itself.

As I shall argue, the question of what the right to marriage entails is interwoven with the question of what is marriage's social purpose? If marriage is purposeless, then the state ought not to be involved in marriage at all. The state should leave marriage to private institutions and treat marriage as any other contract. If, on the other hand, marriage does serve a social function, then a further question arises—does the rationale for heterosexual marriages apply to same-sex couples?

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[4]David Crary, *Bruising gay-marriage showdowns likely in 5 states*, BOSTON GLOBE (Mar. 11, 2012) http://boston globe.com/news/nation/2012/03/11/bruising-gay-marriage-showdowns-likely states/pMxMA7vZJVDVcbv8XE0Q CN/story.html.

[5] Abby Goodnough, *As Gay Marriage Gains Ground in Nation, New Hampshire May Revoke Its Law*, N.Y. TIMES (Feb. 27, 2012) http://www.nytimes.com/2012/02/28/us/gay-marriage-law-in-new-hampshire-may-be-revoked.html.

[6] Cray, *supra* note 4. Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES (Feb 17, 2012) http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gay-marriage-bill.html.

[7] Much confusion has been created in the public discourse by mistaking this question, which is the true focus of the same-sex marriage debate, with a related question—why do individuals want to marry? This inquiry is tangential to the issue at hand. Moreover, as a matter of empirical fact, it appears to be a hopeless pursuit to try to find a common thread in individuals' actual motivations for marriage. Instead, I ask *why should individuals marry*? and set aside the question of *why individuals actually do marry*?

Conservative natural law theorists, specifically Robert George, Gerard Bradley, and John Finnis, traditionally answer the first question affirmatively, maintaining that marriage does have a purpose.[8] However, they hold that the purpose of marriage is unique to heterosexual couples.[9] With regard to marriage licenses, homosexual couples need not apply.

In the mid-1990s, Stephen Macedo answered these conservative critics of same-sex marriage, arguing that their criticisms stem from a "cramped" conception of sexual morality and marriage.[10] As a result, Macedo concludes that although their argument against same-sex marriage is coherent, it is ultimately unconvincing.[11] In a recent article, Robert George, Sherif Girgis, and Ryan Anderson respond to Macedo and criticize his conception of marriage.[12]

Their argument is twofold. First, they defend their traditionalist definition of marriage, thereby arguing against gay marriage. Second, they attempt to gain the rhetorical upper hand against Macedo and other advocates of same-sex marriage by arguing that the standard liberal justification of same-sex marriage rests on an incoherent, "revisionist" conception of marriage, which faces overwhelming objections.[13]

Similar to my thesis, George, Girgis, and Anderson posit that the same-sex marriage debate "hinges on one question: *What is marriage*?"[14] However, unlike my approach George, Girgis, and Anderson attempt to identify not what marriage's purpose is in modern Western

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[8] John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1993-94). Robert P. George & Gerald Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995).
[9] *Id*.
[10] Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 281 (1995).
Stephen Macedo, *Sexuality and Liberty: Making Room for Nature and Tradition?*, *in* SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 86, 91 (David Estlund & Martha Nussbaum eds. 1997) [hereinafter *Sexuality and Liberty*].
[11] *Id*.
[12] Robert P. George et. al., *What Is Marriage?*, 34 HARV. J.L & PUB. POL'Y 245, 247 n.2 (2010).
[13] *Id*. at 246-48.
[14] *Id*. at 248.

democracies but what the essence of natural marriage is. Their paper examines two competing conceptions of marriage. The first conception, which they call the "conjugal view" of marriage, underpins their argument against same-sex marriage. According to the conjugal, or traditionalist, view, "real marriage" is "the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts—acts that constitute the behavioral part of the process of reproduction, thus them as a reproductive unit." [15]

In contrast, the second conception of marriage is one commonly utilized by gay marriage advocates. It conceives of marriage as a "union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life. It is essentially a union of hearts and minds, enhanced by whatever forms of sexual intimacy both partners find agreeable."[16]

George, Girgis, and Anderson defend the former. In essence, they argue for a sophisticated version of a standard conservative argument against same-sex marriage—that marriage is fundamentally linked to procreation and childrearing. The second conception of marriage, they argue, is not "internally coherent" since it is inconsistent with the standard liberal justification of same-sex marriage.[17]

In this paper, I agree with George, Girgis, and Anderson in several areas. First, they are right to point out that the modern institution of marriage has inherent normative elements.

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[15] *Id*. at 246, 250.
[16] *Id*. at 246.
[17] *Id*. at 269.

Second, it is because these normative elements are engrained into the modern conception of marriage that standard liberal justifications of same-sex marriage are inconsistent with tenets of certain strains of legal liberal theory.[18]

In Part I of this paper, I explain these inconsistencies by analyzing the political and legal theoretical framework in which standard liberal justifications of same-sex marriage are rooted. I do this by, first, exploring John Rawls' liberalism circa *Political Liberalism*.[19] Rawls' liberalism is a convenient place to begin because in *Political Liberalism* and Rawls' subsequent writings, Rawls discusses how debates about fundamental rights (such as the right to marry) ought to unfold.[20] Rawls provides guidance as to what kinds of considerations should bear on, for example, a New Jersey citizen voting in a referendum on same-sex marriage or a New Hampshire legislator deciding whether or not to repeal same-sex marriage rights.

Second, I assess the standard liberal justification of same-sex marriage in light of Rawlsian liberalism. The standard liberal justification unfolds in a fairly straight forward fashion.

1. Marriage is a fundamental individual right.
2. Equality entails that fundamental individual rights ought not to be abridged without a compelling countervailing consideration (given the priority of the right).[21]
3. As a basic tenet of liberalism, countervailing considerations that are rooted only solely in comprehensive conceptions of the good cannot be compelling (given public reason).
4. Arguments against same-sex marriage all rely on comprehensive conceptions of the good.
5. Therefore, same-marriage ought not to be prohibited.[22]

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[18] *Id*.
[19] John Rawls, POLITICAL LIBERALISM xvi (2005). Rawls' liberalism is a convenient springboard for a political and philosophical discussion of the same-sex marriage since Rawlsian liberalism is the fountainhead of the contemporary debates about political philosophy.
[20] John Rawls, *The Idea of Public Reason Revisited*, *in* POLITICAL LIBERALISM 440 (2005).
[21] By compelling, I mean simply philosophically consistent and, at least partly, intuitive.
[22] This formulation roughly follows Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage* 7 J. POL. PHIL. 225, 225 (1999).

While I agree with George, Girgis, and Anderson's premise that what they call the "revisionist" conception of marriage (and which I defend and call "modern marriage") is inconsistent with this standard liberal justification, I contend that their conclusion is misguided.[23] They conclude that what follows from this inconsistency is that modern conception of marriage is inaccurate or unpersuasive.[24] Instead, I argue that the more sensible response to this inconsistency is to fine-tune the Rawlsian liberal framework.

In Part II, I demonstrate why Rawlsian liberalism is an insufficient theoretical foundation. I argue that the inadequacies are superficial and that the standard liberal justification of same-sex marriage suffers from only artificial limitations. Therefore, rather than entirely abandoning the modern conception of marriage or the liberal legal framework, Rawlsian liberalism ought to be slightly adapted and the standard liberal justification of same-sex marriage ought to be bolstered. In other words, by re-enforcing the foundations of liberal theory, I intend to construct a sturdier argument in favor of gay marriage.

Part III focuses on the George, Girgis, and Anderson's traditionalist conception of marriage and their argument against same-sex marriage. In explaining their opposition, I suggest that although it is ultimately unconvincing, their claims are coherent. Their position is rooted in a controversial conception of the good. To refute their arguments, however implausible, requires engaging with comprehensive doctrines, something a neutral liberal cannot do.

Although I hold that the negative portion of George, Girgis, and Anderson's argument raises significant objections to the traditional arguments in favor of same-sex marriage, I posit that the positive portion of their paper is flawed. George, Girgis, and Anderson challenge same-

[23] George et. al., *supra* note 12, at 246.
[24] *Id*. at 247.

sex marriage advocates to criticize their argument on its merits, "for example, by showing that it rests on a false premise or a fallacious inference."[25] In Part IV, I argue that their reliance on a pre-political notion of marriage is fundamentally misguided. Moreover, I contend that their argument against same-sex marriage rests on premises that are counterintuitive within the modern Western world and that run counter to everyday experience.[26]

George, Girgis, and Anderson also challenge same-sex marriage advocates to construct an argument for same-sex marriage that can explain the normative features of modern marriage (its commitments to monogamy and fidelity) and answer their objections to standard liberal justifications of marriage.[27] In Part V, I provide an argument to same-sex marriage that overcomes their criticisms. While Rawlsian liberalism cannot support a modern conception of marriage, Stephen Macedo's "judgmental liberalism" can.[28] Here, I explain how judgmental liberalism slightly tweaks Rawlsian liberalism.

Judgmental liberalism holds that justice-respecting conceptions of the good can be ranked, insofar as certain ones can be gently encouraged by the state. However, this does not entail that other justice-respecting conceptions of the good should be actively discouraged. Judicial liberalism provides a basis not only for modern marriage but also for same-sex marriage.

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[25] Robert P. George, et. al., *The Argument Against Gay Marriage: And Why it Doesn't Fail*, PUB. DISCOURSE (Dec. 17, 2010), http://www.thepublicdiscourse.com/2010/12/2217.

[26] It is worth noting that George, Girgis, and Anderson also argue against same-sex marriage on pragmatic grounds, contending that permitting it would lead to harmful empirical consequences. George et. al., supra note 12, at Part I.C. For the purpose of this paper, I shall set aside these claims and focus on George, Girgis, and Anderson's philosophical arguments.

[27] George et. al., *supra* note 12, at 271-72, 274. The first and second challenges being that if the same-sex debate it is to be value-neutral, then on what grounds can one presume that marital relationships should be monogamous or that the state should be involved in them?

[28] *Sexuality and Liberty*, *supra* note 10, at 86-87.

In turn, the same-sex marriage debate demonstrates how a judicial liberal would tackle a thorny social issue without infringing on people's rights or inhibiting their conceptions of the good.

Finally, aside from answering George, Girgis, and Anderson's objections to same-sex marriage and rebuffing their traditionalist conception of marriage, this paper has two practical purposes. First, if nothing else, hopefully this paper can help explain why the current rhetoric regarding same-sex marriage is so futile. Part of the problem with the same-sex marriage debate (both in philosophical circles and the political sphere) is that Rawlsian liberals (and those on the political left) who support same-sex marriage and philosophical conservatives (and those on the political right) who oppose same-sex marriage are largely engaging in different debates and are operating within different philosophical frameworks.

Rawlsian liberals, by in large, believe that the debate turns the right to marriage and that controversial moral and religious views have no place in the debate. Conversely, conservatives commonly contend that the debate hinges on the good of marriage and that the discussions about morality of marriage cannot be avoided. As a result, each side tends to talk past one another and the debate produces a predictable impasse. Part of the purpose of this paper is to bridge the theoretical gap between these two entrenched positions by demonstrating that a more productive dialogue would focus on what the right to marriage in modern Western democracies entails by debating modern marriage's public purpose.

Second, I intend for the modern conception marriage and my argument in favor of same-sex marriage to reveal that supporting only same-sex civil unions is not a principled compromise. Those who hold this view face a dilemma. They must hold either that marriage is no more than a

bundle of rights or that same-sex couples are second-class citizens who are not entitled to all of the rights and benefits associated with marriage.

I. The Standard Liberal Justification of Same-Sex Marriage

Before delving directly into the same-sex marriage debate and analyzing the standard liberal position, it is important to understand the theoretical framework within which this argument operates. Underpinning the liberal justification is a commitment to a liberal philosophy similar to that of John Rawl's *Political Liberalism*.[29] John Rawls' main motivation in *Political Liberalism* is to address "the fact of reasonable pluralism," which he believes creates "a torturing question" for contemporary political theory. How can citizens from a rich and diverse set of religious, moral, and philosophical convictions come together to create "a stable and just society of free and equal citizens"?[30] His answer, in part, rests on his commitment to public reason.

A. Rawls on Public Reason

Is it possible for feminists and Roman Catholics to discuss abortion and maintain mutual respect? Can Evangelicals and homosexuals debate gay rights without being intolerant of one another? What values can they appeal to? John Rawls' political liberalism and his idea of public reason explain how such discussions can be conducted respectfully. At the heart of public reason is the fact of reasonable pluralism, which is distinct from the fact of pluralism. The latter simply states that the free exercise of reason under democratic institutions gives rise to various

[29] Rawls, supra note 19.
[30] Rawls, *supra* note 19, at xxv, 4. Rawls' first principle of justice, in part, explains what it means to be "a stable and just society of free and equal citizens." The first principle states that "each person has an equal claim to a fully adequate scheme of equal basic rights and liberties." *Id*. at 4-5.

conceptions of the good, whereas the former recognizes that there is a range of *reasonable* comprehensive doctrines.[31]

Whether or not a comprehensive moral, religious, or philosophical doctrine is reasonable depends on whether it accepts the criterion of reciprocity. "The criterion of reciprocity says: our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons."[32] Citizens are reasonable insofar as they honor this criterion.

Political liberalism and public reason are only concerned with reasonable citizens and reasonable comprehensive doctrines.[33] For Rawls, "the idea of political legitimacy," and of liberal social contract theory generally, is based on the criterion of reciprocity.[34] Those who view the state merely as an instrument to advance their own comprehensive conceptions of the good reject the criterion of reciprocity.[35] Furthermore, their "unreasonable doctrines are a threat to democratic institutions, since it is impossible for them to abide by a constitutional regime except as a *modus vivendi*."[36] Therefore, Rawls argues that in addressing "fundamental political questions" citizens must set aside, or bracket, their conceptions of the "whole truth" as they see it and instead appeal only to shared political values and public reason to settle such essential

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[31] *Id*. at 36-37.
[32] John Rawls, *supra* note 20, at 446-47.
[33] *Id*. at 441 n.3. I shall follow Rawls in focusing on reasonable comprehensive doctrines and shall set aside unreasonable ones from my consideration.
[34] *Id*. at 446.
[35] *Id*.
[36] *Id*. at 489.

issues.[37] Only when citizens do this are toleration and mutual respect possible, which, in turn, are essential to "the idea of legitimate law" and the success of a democratic state.[38]

I fear that at this juncture we may have fallen too deeply into the world of Rawlsian abstraction. It may be helpful to consider an example to illustrate what Rawls envisions. Consider the vexing issue of abortion. A feminist might believe, as part of her comprehensive doctrine, that regardless of whether or not a fetus in the first trimester is a person, it does not have an absolute "right to life."[39] In contrast, a Catholic may hold, as part of his comprehensive religious doctrine, that life begins at conception, that there is an absolute right to life, and that, therefore, all abortion amounts to murder. Rawls acknowledges public reason may not be able to resolve all important political questions, especially ones that are as "hotly disputed" as abortion, but he did believe that public reason provides a legitimate framework from which reasonable debates can unfold.[40]

Catholics cannot simply cite Scripture nor can feminists merely rely on their philosophical convictions. Both would realize, assuming they are reasonable, that not everyone subscribes to their particular faith or philosophy. In the case of the Catholic, it would be unreasonable for him to tell the feminist that she cannot have an abortion based on beliefs she does endorse. This would violate the criterion of reciprocity.

Rawls suggests that in setting basic constitutional policy we must disentangle ourselves from thorny debates between incompatible comprehensive doctrines and to look to shared liberal democratic political values to settle these disputes. Of course, there are numerous political

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[37] *Id*. at 447.
[38] *Id*. at 488.
[39] *See, e.g.*, Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).
[40] Rawls, *supra* note 20, at 479.

considerations that must come to bear in the case of abortion, but Rawls provides three relevant examples of "important political values: the due respect for human life, the ordered reproduction of political society over time . . . and finally the equality of women as equal citizens."[41]

As a result of his tolerance and respect for different reasonable conceptions of the good, some have labeled Rawls' political theory "neutral liberalism."[42] Rawls feels "that the term *neutrality* is unfortunate" due its disparate definitions.[43] Certainly Rawlsian liberalism is not morally neutral since it gives credence to political values, but there is a specific sense in which using the term is fair. Rawls' political liberalism is neutral insofar as it does not rank reasonable comprehensive doctrines and does not settle questions of constitutional importance "on the basis of the intrinsic superiority or inferiority of conceptions of the good life."[44] Therefore, with this limited scope in mind, I will use the term "neutral liberalism" interchangeably with "political liberalism" and "Rawlsian liberalism" hereafter.

Although public reason, at first blush, might appear a bit odd—to require citizens to set aside the whole truth as one sees it and to restrict oneself to public values—Rawls argues that this way of thinking is not unprecedented or unfounded. Public reason becomes more plausible and less strange when one considers the Supreme Court as an "exemplar" of public reason.[45] When cases come before the Supreme Court,

> Public reason is the sole reason the court exercises . . . it is the task of the justices to try to develop and express in their reasoned opinions the best interpretation of the constitution they can, using their knowledge of what the constitution and constitutional precedents

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[41] Rawls, *supra* note 19, at 243 n.32.
[42] Carlos A. Ball, THE MORALITY OF GAY RIGHTS 6 (2003).
[43] Rawls, *supra* note 19, at 191.
[44] Will Kymlicka, CONTEMPORARY POLITICAL PHILOSOPHY 217 (2d ed. 2002). Kymlicka correctly contends that when discussing political liberalism "it might be preferable to talk of 'state anti-perfectionism' rather than 'state neutrality.'" *Id*. 218.
[45] Rawls, *supra* note 19, at 235.

> require . . . justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views.[46]

Just as the justices of the Supreme Court are required to be "blind" to their personal beliefs and predispositions, so too does public reason require public officials and citizens to discount their comprehensive doctrines and rely solely on public values when debating constitutional essentials.[47]

Now that we have a basic sense of how public reason is intended to operate, let us consider the scope of public reason. Public reason is essentially a filter that sieves through permissible political rhetoric and reasoning. However, public reason is only applicable in a very narrow range of cases. Rawls argues that part of what reciprocity and reasonableness require is that citizens seek a set of shared political values as a basis for political debates about "'constitutional essentials' and questions of basic justice."[48]

Constitutional essentials involve "the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule."[49] Questions of basic justice include the "equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and participate in politics, liberty of conscience," etc..[50] These are the fundamental questions public reason is designed to answer.

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[46] Rawls, *supra* note 20, at 489.
[47] Former Governor Mario Cuomo's stance on abortion is another example of the type of public reasoning Rawls advocates. Cuomo was the governor of the state of the New York and a devout Catholic. He held as a matter of faith that abortion is morally impermissible; however, "he nonetheless believed that in his role as governor, he should not allow his official conduct to be affected by this conviction." He politically supported the right to a procedure that he was personally opposed to. Thomas Pogge, JOHN RAWLS HIS LIFE AND THEORY OF JUSTICE 141 (Michelle Kosch trans., 2007).
[48] Rawls, *supra* note 19, at 214.
[49] *Id*.
[50] *Id*. at 227.

Rawls is clear that "the idea of public reason does not apply to all political discussions of fundamental questions."[51]

Public reason is only meant to filter the discourse of a specific public arena—the "public political forum."[52] The public political forum includes three sections of the civic discourse: "the discourse of judges . . . the discourse of government officials, especially chief executives and legislators; and finally, the discourse of candidates for public office."[53] Ideally, public reason also ought to sieve through citizens' judgments in certain circumstances. When citizens are asked to vote on matters of constitutional essentials, Rawls instructs that they ought "to think of themselves *as if they were legislators*."[54]

In contrast, public reason does not apply to the "background culture" of a society. Rawls defines background culture as "the culture of civil society," which includes "the culture of churches and associations of all kinds, and institutions of learning at all levels . . . scientific and other societies."[55] The Catholic Church, for example, can excommunicate one of its parishioners if it discovers that she is an abortion doctor, or it can choose to exclude women from the priesthood. Put plainly, the Church need not be limited to the same shared values as the state. At the same time, it would be unreasonable for a state to institute a blasphemy law based on the teachings of the Church since, as the fact of reasonable pluralism demonstrates, not everyone in a modern democratic society would agree with the canons of Catholicism.

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[51] Rawls, *supra* note 20, at 442.
[52] *Id.*
[53] *Id.* at 443.
[54] Under most circumstances, citizens are not required to adhere to the restriction of public reason. *Id*. at 444.
[55] *Id*. at 442-43, 443 n.13.

In a sizable percentage of *political* debates ("many if not most"), basic constitutional issues are not at stake. "For example, [in] much tax legislation and many laws regulating property," as well as many of the laws regarding education and the environment, Rawls says the limitations of public reason not may be applicable.[56] If constitutional essentials are not at issue, perhaps when a town council debates the merits of whether a traffic light should be placed at a particular intersection, then the decision need not depend on political values alone. A councilman can reasonably argue on utilitarian grounds (from a comprehensive doctrine) that having a traffic light would yield more utility than not.[57]

However, when a constitutional essential is at stake and when public reason alone is inconclusive (when difficult cases, or "stand-offs," arise) nonpublic reasons—one's rooted in comprehensive doctrines—cannot be used to break ties. This stance parallels Rawls' Supreme Court analogy. If a case before the Court does not lend itself to a clear-cut decision, the justices cannot appeal to their personal political opinions to resolve the matter. Political liberalism is not committed to stating that stand-offs never occur; instead, it just says that such cases would seldom surface in an ideal society (one "well-ordered" by the tenets of political liberalism).

In the event of a stand-off, Rawls realizes that some important political questions, however vexing, cannot go unanswered. Public reason recommends that citizens must "simply vote" in accordance with the criterion of reciprocity and an "ordering of political values they

[56] Rawls, *supra* note 19, at 214.

[57] It should be noted that even in this hypothetical example, it is not difficult to imagine circumstances in which basic matters of justice are at play. For example, if a city were to ignore the deaths of several low-income children at a high traffic stop sign intersection and refuse to install a traffic light even though such a measure would likely reduce the vehicular death rate. I am indebted to Anna Marie Smith for calling my attention to the complexity of these sorts of cases.

sincerely think the most reasonable."[58] While the outcome of such a vote is legitimate law and is binding on all citizens, it does not follow it is true nor does it mean that it is the last say on the matter.

For instance, "some may, of course reject a legitimate decision, as Roman Catholics may reject a decision to grant a right to abortion . . . Certainly Catholics may, in line with public reason, continue to argue against the right to abortion."[59] However, they cannot forcibly resist it. "Forceful resistance is unreasonable: it would mean attempting to impose by force their own comprehensive doctrine that a majority of other citizens who follow public reason, not unreasonably, do not accept."[60]

B. Rawls on Same-Sex Marriage

Rawls' public reason provides a framework for debates about same-sex marriage to follow in liberal constitutional democracies. This is confirmed by the few cursory remarks Rawls makes about the topic in "Public Reason Revisited."[61] For public reason to apply to the issue of same-sex marriage, marriage must be a constitutional essential, or a matter of basic justice. Constitutional essentials concern a society's basic structure and an individual's fundamental rights.

Clearly, Rawls holds that public reason applies to the question of same-sex marriage. He argues that same-sex marriage, and issues of marriage and family more generally, warrant using the standard of public reason on the grounds that "the family is part of" any society's "basic

[58] Rawls, *supra* note 20 at 478-79. Rawls, *supra* note 18, at liii.
[59] Rawls, *supra* note 20, at 480.
[60] *Id*.
[61] *Id*. at 467.

structure."[62] However that Rawls could have justified marriage as a matter of basic justice on the ground that it is a fundamental right. The United States' Supreme Court has repeatedly recognized marriage as a fundamental right.

The Court most famously affirmed this in *Loving v. Virginia*.[63] *Loving* struck down anti-miscegenation statues, when it found "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. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[64]

Zablocki v. Redhail echoed this sentiment.[65] In *Zablocki*, the Supreme Court struck down a Wisconsin statute which sought to prevent parents who failed to pay child support payments from marrying.[66] Justice Marshall wrote in the opinion of the Court that "the right to marry is of fundamental importance."[67]

Finally, in *Turner v. Safley*, the Supreme Court found a Missouri prison regulation that prohibited prison inmates from marrying to be unconstitutional.[68] The court acknowledged that "the right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration;" however, it ultimately ruled that even "in the prison context" there existed a right to "constitutionally protected marital relationship."[69]

Having established that the question of whether to permit same-sex marriages is one of constitutional importance and, on a Rawlsian liberal account, one that cannot be decided on the

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[62] *Id*.
[63] Loving v. Virginia, 388 U.S. 1 (1967).
[64] *Id*. at 12.
[65] Zablocki v. Redhail, 434 U.S. 374 (1968).
[66] *Id*. at 383.
[67] *Id*.
[68] Turner v. Safley, 482 U.S. 78 (1987).
[69] *Id*. at 96.

basis of comprehensive conceptions of the good alone, two further questions arise. First, as Martha Nussbaum wonders, "what does the 'right to marriage' mean?".[70] Second, can political liberalism explain what the right to marriage means, or is same-sex marriage, like abortion, an issue public reason alone cannot resolve? Do debates about gay marriage lead to a "stand-off"? In the next section, I lay out a neutral liberal account of what marriage is and a justification of same-sex marriage. I then argue that same-sex marriage is a tricky case for political liberalism and that, as a result, a Rawlsian liberal cannot adequately define modern marriage.

C. Wedgwood's Liberal Justification of Same-Sex Marriage

Ralph Wedgwood provides possibly the best justification for same-sex marriage from the perspective of neutral liberalism.[71] Wedgwood begins by outlining what he calls the "fundamental argument for same-sex marriage" and then attempts to restate this argument in a way that can circumvent the most serious objections to it.[72] According to Wedgwood, the fundamental argument unfolds as follows:

> The basic rationale for marriage lies in its serving certain legitimate and important interests of married couples. But many same-sex couples have the same interests . . . So restricting marriage to opposite-sex couples is a denial of *equality*. There is no way of justifying this denial of equality without appealing to controversial conceptions of the good (such as the moral superiority of the procreative family); and it is a basic principle of *liberalism* that the state should not promote, or justify its actions by appeal to, such controversial conceptions of the good. So, the institution of marriage ought to be reformed so as to allow same-sex couples to marry.[73]

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[70] Martha C. Nussbaum, FROM DISGUST TO HUMANITY 151 (2010).
[71] Wedgwood, supra note 22.
[72] Wedgwood, *supra* note 22, at 225.
[73] *Id*.

Although this argument nicely maps onto Rawls' conception of public reason, Wedgwood rightly recognizes that it has weaknesses that "arise from its lack of any precise account of what marriage is, and of its essential rationale."[74]

Wedgwood addresses three weaknesses. The first concerns the essential rationale of marriage, or its function. The fundamental argument rests on two related assumptions—that marriage's essential rationale lies in satisfying important interests of couples and that these interests are the same for heterosexual and homosexual couples alike. Without an explanation of the function of marriage, an appeal to a principle of equality "cannot even get off the ground."[75] If a couple is denied the right to marry, then there must be, to use a Rawlsian term, a reasonable rationale for such a restriction—one grounded in political values and not in a particular comprehensive doctrine.

For instance, equality requires that, absent a reasonable restriction, all eligible citizens have the right to keep and bear arms under the Second Amendment.[76] To be eligible in some states one must, amongst other factors, be mentally competent. If a mentally ill individual contends that based on the Second Amendment and a principle of equality he ought to be allowed to keep and bear firearms, we would dismiss his argument because there are reasonable restrictions to the Second Amendment.[77] The political value of public safety, for example, may outweigh the right of a mentally incompetent individual to keep and bear arms.

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[74] *Id*. at 226.
[75] *Id*. at 226-28.
[76] This interpretation of the Second Amendment remains controversial but was affirmed in District of Columbia v. Heller, 554 U.S. 570 (2008).
[77] The Court in *Heller* acknowledges that "the right secured by the Second Amendment is not unlimited" and that such a right does not conflict with "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id*. at 626-27.

Likewise, there are reasonable restrictions to the right to marriage. One cannot marry a minor, or a close relative. In order for an appeal to equality to work in the case of marriage, it must be established that there is no reasonable rationale for denying same-sex couples the right to marry. Otherwise, arguing in favor of same-sex marriages is comparable to arguing in favor of gun rights for the mentally ill.

This is essentially how George, Girgis, and Anderson understand arguments in favor of gay marriage. Same-sex couples, like many other types of relationships, simply are not eligible to marry. "It is not the state that keeps marriage from certain people, but their circumstances that unfortunately keep certain people from marriage . . . This is so, not only for those with exclusively homosexual attractions, but also for people who cannot marry because of, for example, prior and pressing family obligations incompatible with marriage's comprehensiveness and orientation to children, inability to find a mate, or any other cause."[78]

For them, there is "a deep link between marriage and children. Sever that connection, and it becomes much harder to show why the state should take any interest in marriage at all."[79] They challenge advocates of same-sex marriage, contending that no conception of marriage that would allow for gay marriage can explain why the state should have a fundamental interest in the institution. Why not privatize marriage?[80]

The second weakness in the standard liberal justification is that even if denying same-sex couples the right to marry does infringe upon a principle of equality, this inequality could be addressed without permitting same-sex couples to marry. This objection essentially amounts to

[78] George et. al., *supra* note 12, at 282.
[79] *Id*. at 271.
[80] *Id*. at 270, 274.

what I shall call the civil union concern. If marriage is simply a bundle of individual rights, then gay couples' exclusion from marriage could be rectified by permitting ideal same-sex civil unions that include the same legal rights and benefits of marriage.[81]

With the civil union concern lies a paradox and a challenge. To support ideal same-sex civil unions but not same-sex marriage, one must maintain either: 1) that there is no significant difference between a marriage and an ideal civil union, or 2) that gays and lesbians are second class citizens. Therefore, if justice requires that same-sex couples be eligible for marriage and not simply ideal civil unions, then what is the essential difference between the two?

Lastly, Wedgwood worries about what I shall call the polygamy problem.[82] Roughly, the polygamy problem is the objection that the liberal justification goes too far and that it can be used to justify polygamous marriages (as well as other unsavory forms of marriage such as incestuous and bestial marriages). The polygamy problem asks the question: can we alter the line between permissible and impermissible marriages without erasing it? George, Girgis and Anderson press proponents of same-sex marriage precisely on this point. They contend that if standard liberal justification of same-sex marriage were to be accepted, "we would still, by" this same "logic, be discriminating against those seeking open, temporary, polygynous, polyandrous, polyamorous, incestuous, or bestial unions."[83]

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[81] I used the phrase "ideal civil union," because civil unions/domestic partnerships laws vary from state to state in the United States. In many states, civil unions include some, but not all, of legal rights, obligations, and benefits of marriage. Alison M. Smith, Cong. Research Serv., RL3199, SAME-SEX MARRIAGE: LEGAL ISSUES (2011). An ideal civil union would include all of legal rights, obligations, and benefits as marriage.
[82] Wedgwood, *supra* note 22, at 228.
[83] George et. al., *supra* note 12, at 250.

Wedgwood wants to recast the fundamental argument for same-sex marriage in such a way that can circumvent these objections.[84] His proposal is that this is possible if a neutral liberal justification can accurately define marriage and its essential rationale. I will ultimately argue it is not possible for a Rawlsian liberal to define marriage in a cogent way. Public reason is "too thin to support a coherent and convincing" conception of marriage or "argument in favor of same-sex marriage."[85] However, let us consider Wedgwood's notion of marriage and its essential rationale.

In light of the first problem with the fundamental argument, if an equality argument is expected to be compelling, then Wedgwood must first provide a convincing definition of marriage. To this end, Wedgwood wants to "find out what is *essential* to marriage," specifically 'modern Western marriages.'[86] He uses an intuition test and holds that an element of marriage is essential "if and only if we modern Westerners find it intuitively hard to understand how an institution that lacks that feature can really be a form of marriage."[87] There are two broad features of marriage which Wedgwood claims are essential.

The first is marriage's legal aspect. The legal aspect of marriage is split into three further categories: marriage status, mutual marital rights, and state-sanctioned marital benefits. Wedgwood argues that an essential element of marriage is that the law decides marital status. The question of whether Harry and Sally are married turns on a legal designation.

Furthermore, part of what it means to be married is to share certain legal rights and obligations. Some of these rights are premised on the notion that spouses can rely on one

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[84] Wedgwood, supra note 22, at 228.
[85] Ball, *supra* note 41, at 26.
[86] Wedgwood, *supra* note 22, at 228.
[87] *Id*.

another economically. Such rights include: "the right to be financially supported by one's spouse; the right (in the event of a divorce or separation) to an equitable division of property and, if necessary, alimony; and the right to inherit if one's spouse dies interstate." Other mutual marital "rights follow from the principle that spouses are each other's 'next of kin'. These rights include priority in being appointed guardian of an incapacitated spouse; priority in being recognized as acting for an incapacitated spouse in health care decisions; and priority in claiming a deceased spouse's body."[88] However, state conferred marital benefits, although an "undeniably . . . important aspect of contemporary marriage law," are not "*essential* to the institution of marriage itself," since "we have no difficulty understanding how an institution could be a form of marriage even if it involved no tax breaks for married couples."[89]

Wedgwood holds that it is wrongheaded to understand marriage simply in legal terms. There is a third essential element to marriage: its social expressive aspect.[90] Modern Western marriage has a "*social meaning*, the web of common knowledge and assumption about marriage that are shared throughout society . . . This social meaning consists of certain *generally shared expectations*."[91]

Wedgwood postulates that there are three such fundamental expectations. Within a marriage, it is generally assumed that there will be: "(1) sexual intimacy; (2) domestic and economic cooperation; and (3) a voluntary mutual commitment to sustaining this relationship."[92] As a caveat, Wedgwood notes that it is not expected that all of these elements will be sustained

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[88] *Id*. at 231.
[89] *Id*. at 232.
[90] *Id*. at 229.
[91] *Id*.
[92] *Id*.

in every marriage all the time, but the further a marriage strays from these expectations the more uncommon it becomes. It is, at any rate, generally expected by society that couples marry with the intention of entering into a relationship with these three characteristics.[93] The legal aspects of marriage in turn reinforce the social meaning of marriage.

While it is also widely expected that marriages be heterosexual, Wedgwood argues this expectation is not essentially what defines marriage. He writes:

> It does not much matter what belongs to this essential core of marriage's social meaning. It matters more what does *not* belong to this essential core . . . The fact that marriage is known to be reserved for opposite-sex couples seems much less important for explaining why marriage is so central in people's lives than the fact that marriage is generally expected to involve domestic and economic cooperation, sexual intimacy and a mutual commitment to maintaining the relationship.[94]

Wedgwood's definition of marriage—as "a legal relationship between two people, involving mutual legal rights and obligations, which reflect society's shared expectations about marriage; and the core of these expectations is that marriage typically involves sexual intimacy, economic and domestic cooperation, and a voluntary mutual commitment to sustaining this relationship"—underpins his account of marriage's essential rationale.[95]

Marriage's essential rationale, Wedgwood writes, rests in the simple fact that "many people *want* to be married, where this desire to marry is typically a serious desire that deserves to be respected."[96] To be a "serious desire that deserves to be respected," a desire has to meet two criteria. There must be

> widespread agreement [that] there are good reasons for the state to support and assist people's attempts to fulfil [*sic*] such desires, and strong reasons for the state not to

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[93] *Id*. at 229-30.
[94] *Id*. at 230.
[95] *Id*. at 233.
[96] *Id*. at 235.

> impede or hinder people's attempts to fulfil [*sic*] such desires. It is strong evidence that as a desire of this kind if the desire is widely and strongly held, and if few people sincerely resent those who succeed in fulfilling the desire.[97]

Wedgwood argues that there is such evidence in the case of marriage and that his definition of marriage can explain why people want to marry. Given marriage's well-known social meaning, the primary reason couples want to wed is to achieve a "*mutual understanding*, both between the spouses themselves and between the couple and the rest of society."[98] Couples gain understanding from each other by making vows of fidelity before the eyes of the law, while couples gain understanding from the rest of society by entering into an institution with an established social meaning.

II. Objections to Wedgwood's Justification of Same-Sex Marriage

Elizabeth Brake observes that Wedgwood's argument is "one of the strongest defenses of liberal marriage law."[99] Despite this, she also astutely notes that it still has serious problems.[100] Wedgwood ingeniously tries to balance conceiving of a convincing conception of marriage without relying on any comprehensive doctrine. In this section, I shall assess the success of Wedgwood's balancing act primarily by appraising it in light of the objections he hopes to circumvent by his reformulation of the traditional liberal justification of same-sex marriage. I

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[97] *Id*.
[98] *Id.* at 236. "One might object that" this line of reasoning, Wedgwood anticipates, has "an unacceptable circularity," that the reason people want to marry is a product of social traditions. Wedgwood's response is twofold. First, he say that he does not claim to have a "full justification" of marriage. He does not hold that every society ought to have the modern institution of marriage. All he wants to claim is that if marriage is justified, then gay couples cannot be excluded from marriage. *Id*. at 236-27.
[99] Elizabeth Brake, *Ethics Discussions at PEA Soup*, PEA SOUP BLOG (Comment, June 7, 2010 12:01PM), http://peasoup.typepad.com/peasoup/2010/06/ethics-discussions-at-pea-soup-elizabeth-brakes-minimal-marriage-what-political-liberalism-implies-f-1.html.
[100] *Id*.

will argue that although his argument may be logically coherent, it is fundamentally flawed due to the limitations of public reason and, in turn, an inadequate conception of marriage.

A. Polygamy Problem

First, let us return to the polygamy problem. Wedgwood admits that by his argument there is no theoretical reason for allowing same-sex marriages but not polygamous ones. He writes that there "is not an essential difference in kind" only "a purely empirical difference in degree. There is much less demand for polygamy than for same-sex marriage," although in both cases there is the same serious desire to marry.[101] The only way to justify prohibiting polygamous marriages while allowing same-sex marriages would be to establish that polygamy would have "clearly harmful effects" that override the fundamental right to marry and same-sex marriage would not.[102]

Wedgwood takes it as a point of empirical fact that same-sex marriage does not have "clearly harmful effects." However, in the case of polygamy, this is less clear. Martha Nussbaum, who makes a legal argument for same-sex marriage that parallels Wedgwood's philosophical argument, states the following about the polygamy problem: "no group of people may be fenced out of this right [to marry] without an exceedingly strong state justification. It would seem that the best way to think about the cases of incest and polygamy is that in these cases the state can meet its burden by showing that policy considerations outweigh the individual's right."[103]

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[101] Wedgwood, *supra* note 22, at 242.
[102] *Id*.
[103] Nussbaum, *supra* note 70, at 156. For the entirety of her argument, see chapter 5 more generally.

It is not a devastating objection to Wedgwood's argument, and arguments from neutral liberalism more generally, that it can only account for an (indirect) empirical difference between same-sex marriage and forms of marriage that are widely held to be unsavory (polygamous and incestuous marriages). However, it does make his argument less compelling. Presumably, a stronger case for homosexual marriage could also elucidate a (direct) theoretical difference. A sturdier justification could explain why the line between permissible and impermissible marriages ought to be altered to include same-sex couples but not erased entirely.

B. Civil Union Concern

Perhaps the greatest strength of Wedgwood's article is that it appreciates the difficulties that liberal arguments for same-sex marriage traditionally face. This is especially true with regard to the civil union concern. Assuming that his account of marriage is convincing, Wedgwood adequately addresses this issue. The civil union concern challenges that if the right to marriage only involves a bundle of legal rights, obligations, and benefits; then why should homosexuals fight for marriage? Why not simply push for ideal same-sex civil unions? Or, even more fundamentally, why not achieve equality by having civil unions for all, heterosexuals and homosexuals alike?

Wedgwood answers this challenge by claiming that there is a social component of marriage that is essential to the institution. Marriage brings with it a nearly universally understood set of expectations. Civil unions, on the other hand, only capture the legal aspects of marriage. Under Wedgwood's conception of marriage, even if ideal same-sex civil unions were permitted, homosexuals would still be treated as second-class citizens. Such civil unions would not be even "separate but equal," since civil unions do not include an element that is essential to

marriage. I agree with Wedgwood that the difference between ideal civil unions and marriage is more than mere "legal flummery," but I part with his argument insofar as it claims that this difference lies solely in expectations about what marriage entails.[104] For this reason, Wedgwood's conception of marriage and its essential rationale are unconvincing.

Wedgwood's reply to the civil union concern is similar to the California Supreme Court's ruling in *Marriage Cases.* The California Attorney General argued that since California law afforded same-sex couples the same rights, obligations, and benefits of marriage under the Domestic Partnership Act; "the word 'marriage' is all that the state is denying to registered domestic partners," and that this does not "violate the fundamental rights of same-sex couples."[105] The court disagreed.

The court found that "California was violating the rights of same-sex couples by withholding the 'marriage' signifier from them," despite the fact that the state offered them "'ostenisbly equal' domestic partnership status."[106] Acknowledging the marital status of heterosexual couples, but not homosexual couples, was stigmatizing. "By reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership," the court found that the distinction between marriages and domestic partnerships "pose[d] a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry."[107]

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[104] Wedgwood, *supra* note 22, at 227.
[105] In re Marriage Cases, 43 Cal. 4th 757, 830 (Cal. 2008).
[106] Anna Marie Smith, *The Paradoxes of Popular Constitutionalism: Proposition 8 and* Strauss v. Horton, 45 U.S.F. L. REV. 517, 525.
[107] In re Marriage Cases, *supra* note 106, 830-31.

C. Definitional Issues

The civil union concern leads to another more fundamental objection. Wedgwood rightly recognizes that "without an account of marriage's rationale, the argument that restricting marriage to opposite-sex couples is a denial of equality cannot even get off the ground."[108] Wedgwood provides such an account, but not a compelling one. Wedgwood's conception of marriage and its essential rationale are inadequate, primarily in two ways. First, his definition of marriage and its essential rationale are incomplete due to the framework of liberalism within which he is operating. Second, he cannot provide a "full justification of marriage" (and he states that his "proposal is not intended" to do so).[109]

First, the neutral liberal justification of same-sex marriage is inadequate insofar as marriage is considered only as an individual right but not a public good. Wedgwood argues that the state ought to permit marriage because individuals want to wed, but the state should not promote marriage. "It is widely believed that the state's purpose in honouring [*sic*] married couples," Wedgwood writes, is to endorse "married life . . . [as] an especially virtuous or valuable way of life."[110] However, this rationale is not available to a Rawlsian liberal. To justify marriage on these grounds would violate public reason, "in underwriting the institution of marriage, the state would be promoting this conjugal love, which is a controversial conception of the good."[111]

As a result of this artificial limitation of neutral liberalism, Wedgwood's conception of marriage does not capture all of the essential aspects of marriage. I agree that marriage is more

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[108] Wedgwood, *supra* note 22, at 226.
[109] *Id*. at 233.
[110] *Id*. at 227.
[111] *Id*.

than a bundle of rights, obligations, and benefits, but it is also more than a matter of social expression.

As I will argue, there is a reason that it is widely believed that the state's purpose in honoring marriage is to endorse married life as an especially virtuous or valuable way of life. Marriage *is* an especially virtuous or valuable way of life, one worthy of state encouragement. There *is* a normative aspect to marriage. It has a purpose. Marriage encourages stable relationships and fidelity. It also creates better citizens.[112] To leave these normative aspects of marriage out of one's definition of marriage is to misconceive the institution. In parts IV and V, I will expound upon the "good" of marriage.

However, more fundamentally, Wedgwood, and other neutral liberals, cannot explain why the state ought to promote marriage at all. He discusses why individuals want to marry, but not why the state permits and promotes marriage. Wedgwood acknowledges this limitation to his argument when he writes, "my proposal is not intended as a full justification of marriage. Indeed, I shall remain neutral on the question of whether marriage is, on balance, justified at all."[113] Likewise Nussbaum states, "so long as the state is in the marrying business, equality concerns require it to offer marriage to same-sex couples—but . . . it would be a lot better, as a matter of both political theory and public policy, if the state withdrew from the marrying business."[114] This makes the neutral liberal's argument an awkward, one since the neutral liberal is forced to argue for same-sex marriage contingently.

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[112] *Sexuality and Liberty, supra* note 10, at 93-94. Carlos Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J.1871, 1930 (1996-1997).
[113] Wedgwood, *supra* note 22, at 227.
[114] Nussbaum, *supra* note 70, at 132.

From the perspective of neutral liberalism the question of *whether or not the state should recognize marriages at all*, as Nussbaum notes, is independent of the question of *whether same-sex couples ought be allowed to marry in our society*, where heterosexual couples can marry.[115] Neutral liberalism can provide an answer to the latter question, but not the former. However, political liberalism faces the following objection:

1) If modern marriage cannot be justified, then same-sex marriage cannot be justified
2) Political liberalism cannot justify modern marriage.

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3) So, political liberalism cannot justify same-sex marriage.

Nussbaum and Wedgwood both grant the first premise. And the second premise follows from the fact that "public reason implies that a legal framework for adult relationships should not endorse an ideal of relationship depending on a comprehensive doctrine—but this is just what the [modern] monogamous ideal of marriage, gay or straight, is."[116]

This objection is devastating because it implies that the issue of same-sex marriage, like abortion, is a "stand-off" case for public reason. I submit that Wedgwood does not attempt to make a full justification of same-sex marriage, because to fully justify same-sex marriage requires a justification of marriage in the first place. To do this, in turn requires an appeal to a controversial conception of the good. This is why, Brake writes, "public reason and neutrality, where invoked in the same-sex marriage debate, have not been consistently followed, even by those defending same-sex marriage."[117]

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[115] *Id*.
[116] Elizabeth Brake, *Minimal Marriage* 120 ETHICS 302, 320 (2010).
[117] *Id.* at 312. In Section E, I will explain what Brake contends being a consistent political liberal (who respects the restrictions of public reason) means for the same-sex marriage debate. I shall argue, following Brake, that a consistent Rawlsian cannot justify modern marriage at all.

While Wedgwood's argument certainly is not exhaustive of Rawlsian liberal justifications of same-sex marriage, it does highlight the limitations of this tradition of political philosophy in dealing with the topic. Same-sex marriage is a tricky case for political liberalism. Since modern marriage entails inherently normative elements, one cannot explain and define marriage using public reason alone without substantially redefining it. Political liberalism does not have a "thick" enough conception of the good to properly account for a compelling definition of marriage. As a result, Rawlsian liberal justifications of same-sex marriage cannot be compelling.

D. Privatize Marriages?

Some libertarians take this weakness to the liberal position a step further, arguing that the state ought not to be involved in marriage at all. These "contractualists," as Mary Shanley calls them, contend that the state surpasses its proper bounds by taking a "one-size-fits-all" approach to marriage.[118] There is a (legal) contractual aspect to marriage, but the marriage contract is peculiar.

Unlike most other contracts, the terms of marital contracts are prearranged by the state. For example, a couple cannot enter into a marriage with a sunset clause or contract beforehand to a marriage that is '5-year renewable' or a 'marriage for the night.'[119] Moreover, the marriage contract is odd insofar as "the terms of the contract cannot be renegotiated, neither party need

[118]Mary Shanley, *Just Marriage*, *in* JUST MARRIAGE 3,16-18 (Joshua Cohen & Deborah Chasman eds. 2004). Brake, *supra* note 116, at 323.
[119] Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 97, 108 (Robert Wintemute & Mads Andenaes eds. 2001).

understand its terms, it must be between two and only two people, and these two people must be one man and one woman." [120]

Contractualists, such as Martha Fineman and Michael Kinsley, contend that the state sanctioned institution of marriage should be abolished.[121] More accurately, contractualists argue that the state should get out of the marriage business and should allow individuals to privately determine the terms of marital arrangements. Kinsley claims that the "solution" to the "gay-marriage controversy" is to "[p]rivatize marriage . . . Let churches and other religious institutions continue to offer marriage ceremonies. Let department stores and casinos get into the act if they want. Let each organization decide for itself what kinds of couples it wants to offer marriage to. Let couples celebrate their union in any way they choose and consider themselves married whenever they want."[122]

E. Minimal Marriage?

Elizabeth Brake, arguing from the perspective of a "thinner," more libertarian, tradition of liberalism, takes a similar approach in defining the proper scope of marriage. She too claims that the institution of marriage must be radically restructured. However, she stops short of

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[120] Will Kymlicka, *Rethinking the Family*, 20 PHIL. & PUB. AFF. 77, 88 (1991).

[121] Martha Fineman, *Why Marriage?*, *in* JUST MARRIAGE 46-51 (Joshua Cohen & Deborah Chasman eds. 2004) [hereafter *Why Marriage?*]. Michael Kinsley, *Abolish Marriage*, *in* JUSTICE: A READER 383, 383-84 (Michael Sandel ed., 2007). Given the scope of this paper, I do not directly address the critiques of marriage on the left by feminists and queer theorists. From the feminist perspective, Fineman, for example, argues that modern marriage, with its implicit traditional conception of the family, is "the most gendered of our social institutions." John Rawls, *supra* note 19, at xvi. Martha Fineman, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES, 7 (1995) [hereafter *Neutred Mother*]. She contends that the state ought not to try to "resuscitate marriage and . . . the traditional family." *Id.* Instead, marriage ought to be abolished and state policy should be "supporting and subsidizing . . . the care-taker-dependent tie." *Why Marriage?* at 50. The focus should be placed not on the spouse-spouse connection, as traditionally understood, but on the mother-child unit as the core of the family structure. *Neutered Mother* at 4-5.

[122] Michael Kinsley, *supra* note 121, at 383-84.

asserting that the state should not sanction marriages. Instead, Brake argues that a consistent reading of Rawls on public reason can only account for what she calls "minimal marriage."[123]

Liberal legal theorists have at least two options for justifying same-sex marriage. One can define what is essential to marriage (as it is commonly understood) and then contend that since same-sex couples fit that definition as well as heterosexual couples. Therefore, by a principle of equality, same-sex couples ought to be allowed to wed. This is what Nussbaum and Wedgwood, and most political liberals, do.

Elizabeth Brake takes a different approach. On the question of how the institution of marriage ought to operate, Brake writes

> I do not think this can be answered by appealing to 'the' definition of marriage. The legal definition is just what is at issue. Constraints of public reason rule out basing law on essentially religious understandings of marriage. Even a widely shared understanding of marriage does not in itself justify a legal definition. Marriage design will depend on what marriage is 'for' and the question of what it is 'for' will have to be settled by looking at independent reasons for what kind of institutions there should be.[124]

Rather than argue that gay couples ought to be allowed to enter into the current institution of marriage, Brake asserts that modern marriage ought to be altered such that same-sex relationships and other important intimate relationships can be eligible for legal recognition. Whereas Wedgwood wants to accurately define marriage, Brake contends that as a consequence of public reason, modern marriage must be redefined.[125]

Brake argues for "marital pluralism or disestablishment," but not abolition.[126] In a (neutral) liberal state, she asserts, there are "no principled restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that they be caring

[123] Brake, *supra* note 116, at 303.
[124] *Id*. at 315-16.
[125] *Id*. Wedgwood, *supra* note 22, at 226.
[126] *Id*. at 305, 308.

relationships."[127] Brake rightly notes that according to Rawlsian liberalism, questions of family and of marriage are matters of basic justice. As a result, the restrictions of public reason are applicable in the same-sex marriage debate. Requirements of public reason stipulate that marriage cannot be defined solely with reference to a comprehensive moral, religious, or philosophical doctrine. Moreover, a political liberal cannot assume that the state should sanction the institution of marriage. Public reason "requires that there be publicly justifiable grounds for there being marriage law at all."[128]

Typical (neutral) liberal justifications of same-sex marriage, such as Wedgwood's, "presuppose sexual or romantic relationships, aspirations to permanence or exclusivity . . . [and] a full reciprocal exchange of marital rights," however such a assumption is inconsistent with public reason as there is great "diversity" in the "competing conceptions of valuable relationships."[129] Public reason entails that the state cannot endorse any particular type of relationship on the basis of a comprehensive doctrine. As Rawls writes, "the government would appear to have no interest in the particular form of family life, or of relations among the sexes . . . Thus, appeals to monogamy as such, or against same-sex marriages, as within the government's legitimate interest in the family, would reflect religious or comprehensive moral doctrines."[130]

Brake contends that the ideal of monogamous marriage (heterosexual or homosexual) is but one conception of a valuable relationship based on a particular comprehensive conception of the good. Committed, lifelong, monogamous relationships are not the only types of valuable

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[127] *Id*. at 305.
[128] *Id*. at 313-15.
[129] *Id*. at 320.
[130] Rawls, *supra* note 20, at 457.

relationships. Some citizens prefer polygamy or "polyamory—engaging multiple love relationships." Still others are "quirkalones" or urban tribalists who hold that "good relationships involve networks, 'tribes,' or groups of friends."[131]

When a state promotes monogamy as marriage's one-size-fits-all standard, it is not respecting those citizens who subscribe to an alternative conception of valuable relationships.[132] Recall that under Rawlsian liberalism there are no better or worse (reasonable) comprehensive doctrines. There are no (reasonable) conceptions of valuable relationships that the state should encourage or discourage. There are only permissible (reasonable) conceptions of the good and permissible (reasonable) conceptions of valuable relationships or there are impermissible (unreasonable) ones. There is no room for supererogatory conceptions of the good or for conceptions of the good which are tolerated but discouraged. "There is no public ranking of the value of different (justice-respecting) ways of life" in a Rawlsian state.[133]

This is the third challenge that George, Girgis, and Anderson put to advocates of same-sex marriage. If the debate it is to be value-neutral, then on what grounds can one presume that marital relationships should be sexual or romantic? They write, "we challenge the many revisionists who support norms, like monogamy, as a matter of moral principle to complete the

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[131] Brake, *supra* note 116, at 322. Brake borrows the term "quirkalone" from Sasha Cagen, QUIRKYALONE (2006).
[132] Brake, *supra* note 116, at 323.
[133] Will Kymlicka, *supra* note 44, at 218. I say "reasonable" and "justice-respecting" conceptions of valuable relationship because Brake makes clear that political liberalism "cannot permit rights violations." Therefore, certain types of marriages would be prohibited. Marital slave contracts, for instance, would be impermissible, as would pedophilia and bestiality—on the grounds that "children and nonhuman animals" cannot consent and "cannot make any contracts." Brake, *supra* note 116, at 310.

following sentence: *Polyamorous unions and nonsexual unions by nature cannot be marriages, and should not be recognized, because . . .*"[134]

So what would a conception of marriage that abided by the restrictions of public reason look like according to Brake?[135] For one, since a neutral liberal state would not assume any particular relationship between spouses, there would be no presumption of economic dependency in the law. As a result, "most marital entitlements to direct financial benefits would be eliminated."[136] For instance, no longer would married couples receive increased Social Security benefits or tax breaks based on marital status.[137] "Unlike current marriage, minimal marriage does not require that individuals exchange marital rights reciprocally and in complete bundles." A couple, of course, could decide to share marital rights in a traditional way, but minimal marriage would also allow individuals to break up the different marital rights and distribute them with several different people through what she calls an "adult care network."[138]

In order to illustrate how an adult care network might operate, Brake proposes a hypothetical. Rose cohabitates with Octavian, but "there is no single person with whom Rose wants or needs to exchange the whole package of marital rights and entitlements."[139] She shares household expenses with Octavian and they formed "a legal entity for certain purposes—jointly owned property, bank account access, homeowner and car insurance, and so on," but this

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[134] George et. al., *supra* note 12, at 271-72, 274. The first and second challenges being that if the same-sex debate it is to be value-neutral, then on what grounds can one presume that marital relationships should be monogamous or that the state should be involved in them?
[135] I will not go into the same degree of specificity about what a minimal marriage might involve as Brake does. For a more detailed description, see Brake, *supra* note 116, at pt. II.
[136] *Id*. at 308.
[137] *Id*. at 332.
[138] *Id*. at 306-07.
[139] *Id*. at 312.

arrangement is not a permanent one.[140] Because Octavian's job will be relocating him in a few years and since Rose does not want to move, their marriage has a sunset clause which specifies how their household property will be divided once the marriage terminates.[141]

Aside from Octavian, Rose has affection for her Aunt Alice who lives close by. "Alice lives in genteel poverty, and Rose feels a filial responsibility toward her."[142] Rose's job provides her with a benefits package including a pension and healthcare perks.[143] For a modest fee, any of Rose's spouses are eligible for these benefits.[144] Octavian's financial situation is such that this package would be superfluous to him (he has his own pension and healthcare through his employer); however, "Alice needs access to good health care and, should Rose die, she could use the pension that would go to Rose's spouse if she had one." Through the adult care networks of minimal marriage, Rose would be able "to transfer the eligibility for these entitlements to Alice."[145]

Finally, there is Marcel. "While Rose enjoys Octavian's company and has affection for Alice, only Marcel truly understands her. Marcel is, like Rose, a bioethicist, and he understands her complex views on end-of-life decision making. Rose wants to transfer powers of executorship and emergency decision making to him."[146]

With Brake we get at the core of the problem for political liberal justifications of same-sex marriage. Modern marriage in Western democracies combines liberal ideals with underlying normative values. Brake grants that her use of the term marriage "departs from [its] current

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[140] *Id*. at 311-12.
[141] *Id.* at 311.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] *Id.*
[146] *Id.*

usage." If her minimal marriage model were to be adopted, she asserts, "it would be less important to retain the term 'marriage,' and in that case, it might be desirable to replace 'marriage' as a legal term with 'personal relationships' or 'adult care networks.'[147]

If you take Brake to her logical conclusion, then you are left with the supposition that political liberalism cannot consistently justify modern marriage at all (nonetheless same-sex marriage). This line of reasoning goes as follows:

1. Minimal marriage is distinct from modern Western marriage.
2. The terms of modern marriage are more restrictive than minimal marriages.
3. The most restrictive terms of a marriage that political liberalism can consistently justify are those of a minimal marriage.

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4. Political liberalism cannot justify the terms of modern marriage.

On the surface this argument does not seem problematic for supporters of same-sex marriage. Supporters of same-sex marriage do not want to justify modern marriage exactly as it is currently conceived. After all, modern marriage, in most parts of the Western world, prohibits same-sex couples from marrying. However, if gay couples want to enter into an institution that is even remotely similar to marriage, one which captures what is truly essential to modern marriage (a legal commitment to lasting love and fidelity), then neutral liberalism simply does not have the necessary resources. In Part V, I will provide an argument as to why same-sex couples should want to enter into a modern marriage

III. Conservative Conception of Marriage

While undoubtedly much, if not most, of the criticism of same-sex marriage in popular culture stems from unreflective disgust (what former Arkansas Governor Mike Huckabee calls

[147] *Id.* at 323-24.

the "ick factor") or prejudice, not all of it is.[148] Finnis, George, Bradley, Girgis, and Anderson demonstrate this by anchoring their opposition in philosophic grounds. "These conservative scholars aim to supply the 'public' arguments and widely accessible 'reasons' that are often missing from popular attacks on the morality of homosexuality."[149]

For George, Girgis, and Anderson, like Wedgwood, ascertaining an accurate conception of marriage is crucial. They claim the entire same-sex marriage debate "hinges on one question: *What is marriage?*"[150] However, contrary to Wedgwood's approach, when George, Girgis, and Anderson pose this question, they are not looking to determine what is essential to "modern Western marriages."[151] Instead, they assume that marriage has an absolute, pre-political reality of its own and that, regardless of whether "the state recognizes it or not," the structure and value of "real marriage" cannot be altered.[152] I will also refer to "real marriage" as "natural marriage," since, as we shall see, George, Girgis, and Anderson's conception of marriage is derived from its alleged natural purpose.[153] This assumption is coupled with another, "the state is justified in recognizing only real marriages as marriages."[154] These two assumptions form the basis of George, Girgis, and Anderson's basic argument:

1. "Real marriage" has a pre-political, moral reality.
2. The state is justified in recognizing only real marriages as marriages.
3. Real marriage inherently excludes same-sex couples.

Therefore, the state is not justified in recognizing same-sex couples as marriages.

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[148] George et. al., *supra* note 12, at 263-65. Ariel Levy, *Prodigal Son: Is The Wayward Republican Mike Huckabee Now His Party's Best Hope?*, THE NEW YORKER (June 28, 2010), http://www.newyorker.com/reporting/2010/06/28/100628fa_fact_levy.
[149] George et. al., *supra* note 12, at 262-63.
[150] *Id*. at 248.
[151] Wedgwood, *supra* note 22, at 228.
[152] George et. al., *supra* note 12, at 250.
[153] *Id*. at 253-54.
[154] *Id*. at 251.

George, Girgis, and Anderson, in responding to one of their critics, challenges same-sex marriage advocates to criticize their argument on its merits, "for example, by showing that it rests on a false premise or a fallacious inference."[155] While I will not take issue with the validity of their argument, its soundness certainly seems questionable. Their third premise is clearly controversial, so I will lay out their justification of it in the rest of this section. In the following section, I shall show that this premise rests on a strained understanding of marriage and that their first premise is also misguided.

These conservative critics essentially embrace and embellish the common criticism of same-sex marriage that it redefines marriages. For them, the definition of marriage is inescapably bound up with straight sex, but not procreation. This leads to an awkward (and I will argue ultimately unsuccessful) balancing act between maintaining that marriage "oriented to and fulfilled by" procreation, but that procreation is not the defining feature of marriage.[156] Instead, "procreative-type" acts are essential.[157]

In the mid-1990s, George and Bradley defined marriage using fairly opaque natural law terminology: a "two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type, [which] is an intrinsic (or . . . 'basic') human good."[158] Let us unpack it. First, there is a distinction between intrinsic (basic) and extrinsic (instrumental) human goods. "Among the basic goods are life, knowledge, play, aesthetic experience, sociability or friendship, and practical reasonableness . . . Basic goods are foundational reasons

[155] George et. al., supra note 25.
[156] George et. al., *supra* note 12, at 256
[157] *Id.*
[158] George & Bradley, *supra* note 8, at 301-02.

for action: they are self-evident, intrinsic, and incommensurable goods."[159] Instrumental goods are goods pursued as means, for the sake of other goods.

The ideas of sex as a two-in-one-flesh communion and of a reproductive type are interrelated. They are the components of what George and Bradley call a "marital act."[160] A marital act is "sexual intercourse [within a marriage] that consummates and actualizes marriage by uniting the spouses."[161] Reproductive type acts are defined as "acts of inseminatory union of male with female genital organs."[162] In other words, penises and vaginas are necessarily involved. Of the potential suggestion that a reproductive type act could be anything but vaginal intercourse, Finnis writes, "Here fantasy has taken leave of reality. Anal or oral intercourse, whether between spouses or males, is no more a biological union 'open to procreation' than is intercourse with a goat by a shepherd who fantasizes about breeding a faun."[163]

The two-in-one-flesh communion, or one-flesh communion, can roughly be understood as meaningful sex. For sex to be meaningful, it must be "mutual self-giving" and "unitive."[164] In contrast, the conservative natural lawyers claim that all anal or oral sex, heterosexual or homosexual, is inherently nonmarital, even if it is performed within a heterosexual marriage. Such sex instrumentalizes each other's bodies. It treats them as if they were pleasure machines.

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[159] Macedo, *supra* note 10, at 273 n.54.
[160] George & Bradley, *supra* note 8, at 301-02 n.4.
[161] *Id*.
[162] *Id*.
[163] Finnis, *supra* note 8, at 1066 n.46. George and Bradley note, "though all marital acts are reproductive in type, not all reproductive-type acts are marital. Acts of fornication and adultery can be reproductive in type, though they are intrinsically nonmarital. And even the reproductive type acts of spouses lose their marital quality when they are wholly instrumentalized to ends extrinsic to marriage." George & Bradley, *supra* note 7, at 301-02 n.4. An example of married couple has nonmarital sex would be a couple who has sex simply to satisfy their individual desires rather than to consummate their marriage and to cultivate an intimate bond. Even when married straight couples engage in oral or anal sex, it is not marital according to George and Bradley. *Id*.
[164] *Id.* at 313. Macedo, *supra* note 10, at 274.

The conservative natural lawyers hold that marriage and that marital sex are part of an intrinsic good. It seeks no other end then this unity.[165]

Marital sex is not about pleasure, or even procreation. Whereas other conservative critics of same-sex marriage follow the Augustinian tradition of wedding their definition of marriage with procreation, Finnis, George, and Bradley "reject the instrumentalizing of marriage and marital intercourse to any extrinsic end, including the great good of having and rearing children."[166] Spouses do not engage in marital sex for a specific purpose.[167] On this view, children are an indirect (possibly foreseen) consequence of marital sex. They are a gift (from God), not a product (of one's loins).

Marital sex is certainly not pursued for pleasure alone. George and Bradley go as far as to claim that elderly couples who no longer enjoy sex ought to still do it "at least occasionally, as a way of actualizing and experiencing their marriage as a one-flesh union."[168] This stance has led to division within conservative circles as to whether contracepted sex is permissible. While some hold that such sex can be marital, George and Bradley reject this.[169]

To summarize, the conservative conception of marriage and their objection to marriage more generally (circa the mid-1990s) essentially rests of the following argument:

1) Marital sex is essential to marriage.
2) The state should only permits marriage that encourages marital sex.
3) Sex is marital if and only if it is:
    a) of the reproductive type.
    b) a two-in-one-flesh communion.
4) Sex is of the reproductive type if and only if it involves male and female genitalia.

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[165] George & Bradley, *supra* note 8, at 304-05.
[166] *Id*. at 304.
[167] *Id*.
[168] *Id*. at 310, 319.
[169] *Id*. at 310 n.30.

5) Sex is a two-in-one-flesh communion if and only if it seeks the intrinsic good of marriage.
6) In order for sex to seek the intrinsic good of marriage, it must:
    a) be vaginal intercourse
    b) be within a marriage
    c) be mutually self-giving (not motivated by individual gratification).
7) Homosexuals cannot have sex involving male and female genitalia.
8) So, gay and lesbian sex is inherently non-marital.

Therefore, same-sex marriage is an incoherent notion; the state should not permit same-sex marriages.

With this coherent (although admittedly implausible) conception of marriage, conservative critics of homosexual marriage are able to exploit the weaknesses of the Rawlsian liberal justification of same-sex marriage. What is marriage? Why should the state sanction it in the first place?

Conservatives have answers to both of these questions. Neutral liberals can answer the first but not the second question. For Wedgwood, marriage has a definition which fits within the confines of public reason. His definition does not rely on a particular conception of the good. Essentially, the conservative natural lawyers counter that the liberal conception of marriage is simply mistaken. Marriage is inherently about a specific basic good—the good of marriage, which is actualized through marital sex. Moreover, since marital sex necessarily involves male and female genitalia, this good precludes same-sex couples from participating in marriage.

The conservative challenge is problematic for the political liberal. How can he reply? He cannot claim that the conservative critique is wrong. Wrong on what grounds? It seems that given the constraints of public reason a Rawlsian liberal can object if the conservative's argument is not valid; but if it is valid, he cannot question the soundness of the argument. In other words, a political liberal could highlight holes in a conservative argument's reasoning but

he cannot criticize it on the grounds that its premises are false. To do this would be to make a claim about a controversial conception of the good.

Nonetheless, the conservative natural law conception of marriage raises several questions. First, why does sex of the reproductive type, or a procreation-type act, necessarily involve male and female genitalia? Second, why is a procreative-type act relevant to marriage in the first place? Third, why is mutually self-giving sex limited only to heterosexual couples? Finally, if sex is essential to marriage, then why does the bodily element of sex (the type of genitalia involved) take precedence over the psychological element (whether sex is part of a couple fostering a unity or individuals seeking physical gratification)?

George, Girgis, and Anderson provide a conception of marriage, the "conjugal view," to address these issues.[170] Three elements encompass the essence of the conjugal view of marriage: "first, a comprehensive union of spouses; second, a special link to children; and third, norms of permanence, monogamy, and exclusivity."[171] Since the norms of permanence, monogamy, and exclusivity are consistent with modern marriage, and hence same-sex marriage, I will focus on the first two elements of the conjugal view of marriage.

First, marriage being a comprehensive union and having a special link to children is not, on its face, antithetical to same-sex marriage. Same-sex marriage "involves a sharing of lives and resources, and a union of minds and wills" as well as bodily unions (i.e. sex).[172] Similarly, many same-sex couples raise children and are aided in doing so by their marriages. It is not until

[170] George et. al., *supra* note 12, at 246.
[171] *Id*. at 252.
[172] *Id*. at 253.

one examines what George, Girgis, and Anderson mean by a comprehensive union and a special link to children that their conception of marriage comes into tension with same-sex marriage.

Not only does a comprehensive union of spouses require a bodily union, but it also entails that marital sex must take a specific physical form.[173] This claim has two parts. First, marriage necessarily involves a physical element (sex). The psychological element (marital love) alone is insufficient.[174] George, Girgis, and Anderson predicate this claim on a metaphysical assumption that "persons are body-mind composites."[175] Therefore, since bodies are an integral part of our personhood, defining marriage without reference to the bodily aspects of a relationship (sex) "would leave out an important part of each person's being."[176]

Second, George, Girgis, and Anderson argue that marriage necessarily involves a particular type of sex—vaginal intercourse. However, even if one grants that sex is a defining feature of a marriage (or at least that it is a typically important part of most marriages), it does not necessarily follow that intercourse is required. In order to reach this further conclusion, George, Girgis, and Anderson argue (from natural law theory) that the type of sex which is relevant to marriage is that which corresponds with its natural purpose.

1) "Our organs . . . are coordinated, along with other parts, for a common biological purpose of the whole: our biological life."
2) "For two individuals to unite organically, and thus bodily, their bodies must be coordinated for some biological purpose of the whole."
3) "But individual adults are naturally incomplete with respect to one biological function: sexual reproduction."
4) Coitus is the only form of sexual contact that can lead to reproduction.

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5) Therefore, bodily unity requires coitus.[177]

[173] *Id*.
[174] *Id*. at 255 & n.16.
[175] *Id.* at 253.
[176] *Id*.
[177] *Id*. at 253-54.

They conclude that "two men or two women cannot achieve organic bodily union since there is no bodily good or function toward which their bodies can coordinate, reproduction being the only candidate."[178]

However, even if one concedes that intercourse is an important part of most marriages, it is unclear why intercourse and the bodily aspects of marriage outweigh love and the other psychological aspects of marriage. In other words, if marriage is more than merely a means of reproduction and the psychological aspects of marriage (love, care, commitment) are also significant to marriage, then why should same-sex couples not be encouraged make the psychological commitments of marriage (to honor, love, and care for their partners)? George, Girgis, and Anderson acknowledge that the psychological elements of marriage are important. They note that "interpersonal unions are valuable in themselves."[179] Indeed, they seem to suggest that the psychological aspects are a necessarily condition for marriage.[180]

George, Girgis, and Anderson also make clear that the psychological aspects of marriage alone are not sufficient.[181] Both the bodily and psychological are necessary elements of marriage. Therefore, it is not that the bodily aspects of marriage outweigh the psychological. They are each insufficient on their own. Intercourse embodies a marriage "if (and only if) it is a free and loving expression of the spouses' permanent and exclusive commitment."[182]

Thus, while same-sex couples can take part in the psychological aspects of marriage (by being in loving, monogamous, faithful relationships); according to George, Girgis, and

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[178] *Id*. at 255.
[179] *Id*.
[180] *Id*. at 254-55.
[181] *Id*. at 255 & n.16.
[182] *Id*. at 254-55.

Anderson, it would be inaccurate for a state to designate such relationships as marriages.[183] Marriage, by (pre-political) definition, necessarily involves intercourse. Since same-sex couples cannot partake in intercourse, they cannot be married.[184]

The claim that procreative-type acts (intercourse) are necessary to marriage is the first part of the George, Girgis, and Anderson's balancing act. The second part is that procreation and childrearing are not necessary. For George, Girgis, and Anderson, the second element of the conjugal view of marriage is its "special link to children."[185] The special link for children comes out of their belief that "marriage is also deeply—indeed, in an important sense, uniquely—oriented to having and rearing children."[186]

Although childbearing and childrearing are not necessary to marriage, the institution of marriage and its structure are "oriented to and fulfilled by the bearing, rearing, and education of children."[187] George, Girgis, and Anderson are adamant that this claim does not entail that childless marriages are not real marriages.[188] Here, George, Girgis, and Anderson draw a fine line between what is essential to marriage on the one hand, and what is not essential but still fulfills or seals marriage on the other. Procreation-type acts (intercourse) are essential to marriage. Procreation and childrearing are not essential but are still what fulfills a marriage.[189]

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[183] *Id*. at 255.
[184] *Id*.
[185] *Id*.
[186] *Id*.
[187] *Id*. at 256.
[188] *Id*. Whether or not it is consistent to say that a procreative-type act is essential while maintain that procreation itself in not essential will be explored in the next section.
[189] *Id*.

To illustrate the difference between the what is essential to marriage and what fulfills a marriage, George, Girgis, and Anderson compare infertile couples to winless baseball teams.[190] Winless baseball teams and infertile couples both have the right equipment (bats and gloves; penises and vaginas). Both have a "characteristic structure largely" as a result of their "orientation to" a specific purpose (winning games; procreation).[191] Being a member of a baseball team

> involves developing and sharing one's athletic skills in the way best suited for honorably winning . . . But such development and sharing are possible and inherently valuable for teammates even when they lose their games. Just so, marriage . . . involves developing and sharing one's body and whole self in the way best suited for honorable parenthood . . . But such development and sharing, including the bodily union of the generative act, are possible and inherently valuable for spouses even when they do not conceive children.[192]

Same-sex couples, on the other hand, "lack any essential orientation to children."[193] Same-sex couples simply do not have the right equipment.

In sum, there is little difference between George and Bradley's argument against same-sex marriage and George, Girgis, and Anderson's opposition. The latter is merely a more modern version of the former with less of an explicit reliance on natural law theory. Both rely on intuition and the premise that marriage has a natural, pre-political definition and structure.[194] Moreover, both turn on a precarious balancing act between maintaining that marriage "oriented to and fulfilled by" procreation, but that procreation is not the defining feature of marriage.[195]

IV. Objections to the Conservative Marriage

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[190] *Id*. at 256-57.
[191] *Id*. at 256.
[192] *Id.* at 256-57.
[193] *Id.* at 257.
[194] *Id*. at 250. George & Bradley, *supra* note 8, at 301-02.
[195] George et. al., *supra* note 12, at 256.

In a defense of "What is Marriage? ", George, Girgis, and Anderson challenge those who criticize their argument to provide "a clear explanation of its flaws—for example, by showing that it rests on a false premise or a fallacious inference."[196] The problem with their argument is not that there is a flaw in their logic or that their premises rely on a controversial conception of the good. Instead, the issue is that their premises are false. They rely on intuitions that are not widely shared and run counter to everyday experience.

In this section, I shall dispute two claims that are central to George, Girgis, and Anderson's argument. First, I will contest that pre-political, "real marriages," if such things exist, are relevant to current debate. Second, I shall argue that modern Western marriage, which is the true focus of the current debate, does not inherently exclude same-sex couples. I will focus in particular on the claim that marriage necessarily involves a bodily union.

A. The Fantasy of "Real Marriage"

George, Girgis, and Anderson are right to emphasize the centrality of accurately defining marriage. As we have seen, for a Rawlsian liberal justification of same-sex marriage "to get off the ground," it must be able to provide a compelling definition of marriage.[197] Where George, Girgis, and Anderson go astray is with their insistence that marriage, or "real marriage," has a pre-political, pre-legal reality.[198]

They claim that natural marriage "has its own value and structure, independent of the state and its laws. Natural marriage is essential to their overarching argument but is largely

[196] George et. al., *supra* note 25.
[197] Wedgwood, *supra* note 10, at 226.
[198] George et. al., *supra* note 12, at 250.

taken as uncontroversial. They provide only "a brief defense of this idea."[199] They argue that "marriage is not a legal construct with totally malleable contours—not 'just a contract.'"[200] Otherwise, it would be "impossible for the state's policy to be wrong about marriage."[201] However, even if one were to accept, as I do, that marriage is more than a typical contract, it does not follow that the modern institution of marriage can be entirely separated from the state and its laws.[202]

To define marriage in such a way that ignores its political and legal dimensions is fundamentally misguided. Whether or not marriage has a moral reality is irrelevant to current same-sex marriage debate. The essential issue is one of legal recognition. What types of relationships warrant the state's recognition and endorsement? It is the answer to this question that informs what the right to marriage entails in modern Western states.

In order to determine the scope of the right to marriage, one must examine what is essential to modern Western marriages. A reasonable way to determine what is essential to a definition of marriage is the approach taken by Wedgwood with his intuition test.[203] An element of marriage is essential "if and only if we modern Westerners find it intuitively hard to understand how an institution that lacks that feature can really be a form of marriage."[204] Since it is "hard to understand how an institution that does not involve law in any way can really be a form of marriage," there are important legal aspects of marriage that cannot be ignored in

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[199] *Id*. at 250 n.11.
[200] *Id*. at 250, 274.
[201] *Id*. at 272.
[202] George, Girgis, and Anderson also rest this premise on the dubious empirical claim that, "marriage's independent reality is only confirmed by the fact that the known cultures of every time and place have seen fit to regulate the relationships of actual or would-be parents to each other and to any children that they might have." *Id*. at 275.
[203] Wedgwood, *supra* note 22, at 228.
[204] *Id*.

defining modern marriage.[205] Therefore, modern marriage is not pre-political, and natural marriage, if such a thing exists, is irrelevant to the same-sex marriage debate.

Moreover, it is possible for the state's policy to be wrong about marriage without there being natural marriage. As Martha Nussbaum notes, and the Supreme Court has confirmed, there is a fundamental right "to choose whom to marry" and "no group of people may be fenced out of this right without an exceedingly strong state justification."[206] Therefore, the state's policy toward marriage may be wrong if certain groups are barred from marriage without a reasonable justification. In *Loving v. Virginia*, for example, the Court determined that race was irrelevant the state's rationale for sanctioning marriages.[207] Likewise, I will argue that the reason that the state is wrong in banning same-sex marriage is because the reasons that the state recognizes and encourages marriage apply equally to both same-sex and opposite-sex couples.

George, Girgis, and Anderson look to their pre-political definition of marriage to inform their conception of the state's rationale for marriage.[208] This approach appears backwards. Instead, the state's rationale for marriage ought to inform what the right to marriage entails. For George, Girgis, and Anderson to disregard what the right to marriage entails, which is the true focus of the same-sex marriage debate, and instead focus on an occult notion of "real marriage" is, at best, changing the subject. At worst, such a move is strikingly similar to the "No True Scotsman" fallacy, or an ad hoc rescue.

The No True Scotsman fallacy can be illustrated by the following dialogue between Scott and Burns:

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[205] *Id*.
[206] Nussbaum, *supra* note 70, at 156. *Loving,* 388 U.S. at 12. *Zablocki*, 434 U.S. at 383. *Turner*, 482 U.S. at 96.
[207] *Loving,* 388 U.S. at Part II.
[208] George et. at., *supra* note 12, at 251.

Scott: All Scotsmen enjoy haggis.
Burns: But McDougal is a Scotsman, and he finds haggis unpalatable.
Scott: Well, all *true* Scotsmen enjoy haggis.

When presented with the proposition that the modern marriage is applicable to both same-sex couples as well as opposite-sex couples, the essence of George, Girgis, and Anderson reply echos that of Scott's—"Well, all *real* marriages are inconsistent with same-sex relationships." Such a move is especially problematic when one recalls that the purpose of their paper is to refute the arguments in favor of same-sex marriage "without appeals to revelation or religious authority of any type."[209] George, Girgis, and Anderson's intuitions about marriage's "moral reality" appear heavily influenced by religious belief.

Republican presidential candidate Rick Santorum takes a similar stance on marriage. Senator Santorum also believes that the essence of "marriage existed before government existed."[210] He concurs with George, Girgis, and Anderson's statement "the state cannot choose or change the essence of real marriage."[211]

Senator Santorum analogizes marriage to water [212] and a napkin[213]. "Water is what water is," just as "marriage is what marriage is."[214] Recognizing same-sex marriage is "like saying . . . [a] glass of water is a glass of beer. . [Y]ou can call it a glass of beer, but it's not a glass of

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[209] *Id.* at 285.
[210] *Rick Santorum:Obama's health care "will rob America of its soul"*, S.F. CHRONICLE POL. BLOG (Aug. 8, 2011, 2:24 PM) http://blog.sfgate.com/nov05election/2011/08/08/rick-santorumobamas- health-care-will- rob-america-of-its-soul/ [hereinafter *Santorum*].
[211] *Id*. George et. al., *supra* note 12, at 252.
[212] Jo Ling Kent, *Santorum gets 'metaphysical' on gay marriage*, MSNBC (Aug. 10, 2011, 11:20 AM), http://first read.msnbc.msn. com/_news/2011/08/10/7332224-santorum-gets-metaphysical-on--marriage.
[213] *Santorum*, *supra* note 211.
[214] Kent, *supra* note 213.

beer.[215] Similarly, one can call a napkin a paper towel, but this does not change the napkin's "metaphysical" character.[216] A napkin, like a marriage, "is what it is."[217]

For both Senator Santorum and George, Girgis, and Anderson, marriage's moral reality is confirmed by nature and marriage's supposed similarity across cultures.[218] However, Senator Santorum makes explicit that his views on natural law come from God and that natural law is God's law.[219] Again, George, Girgis, and Anderson deny that their arguments rely on "revelation or religious authority of any type."[220] However, in light of the fact that is it widely believed that modern Western marriages have essential elements that are social, political, and legal, its seem as though the source George, Girgis, and Anderson's intuitions regarding natural marriage are similar to Senator Santorum's—a matter of faith.

B. Infertility and Intuition

Having set aside the suspect metaphysical claim that marriage has a pre-political reality and refocused the debate on why modern Western governments sanction marriage, let us consider a fundamental objection to George, Girgis, and Anderson's traditionalist view of marriage—infertile couples. This objection grants that the bodily element of marriage is essential, but questions why same-sex couples cannot achieve a bodily union. Why are bodily unions limited to straight sex?

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[215] *Id*.
[216] *Santorum*, *supra* note 211.
[217] *Id*.
[218] *Santorum*, *supra* note 211. George et. al., *supra* note 12, at 275.
[219] *Santorum*, *supra* note 211.
[220] George et. al., *supra* note 12, at 285.

Stephen Macedo argues that conservatives who oppose sex-marriage have an "extremely narrow view of valuable sexual activity" and what the good of marriage entails.[221] As a result of their restricted conception of the good of marriage, the conservative natural lawyers argue marriage is an inherently (and exclusively) heterosexual institution. They claim that, aside from the instrumental goods of marriage, the basic good of marriage is essentially interwoven with marital sex—a one-flesh communion.[222] Marital sex is a reproductive-type act that is unitive.[223]

On this account, all non-marital sex (sex outside of a marriage, all anal or oral sex—gay or straight, and, according to Finnis, George, Bradley, all contracepted sex) is valueless and ought not to be encouraged by the state.[224] Only marital sex can be meaningful and unitive. All else is equivalent to "mutual masturbation."[225] Macedo astutely asks, are there "*no* distinctions to be drawn here?"[226]

Surely, Macedo argues, "most committed, loving couples—whether gay or straight—are sensitive to the difference between loving sexual acts expressing a shared intimacy and mere mutual masturbation."[227] Can no committed gay couple have sex that is emotionally meaningful and mutually self-giving? For the conservative objections to same-sex marriage to hold, critics of same-sex marriage have two possible answers.

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[221] Macedo, *supra* note 10, at 281.
[222] Mary Shanley notes that the notion of "one-flesh" unity has historically had implications of female subjection, where that husband is the head of the household and "the suspension of the wife's legal personality." Shanley, *supra* note 118, at 7.
[223] George & Bradley, *supra* note 8, at 313. As we have seen, there is little daylight between George and Bradley, who explicitly rely on natural law theory and George, Girgis, and Anderson.
[224] *Id*. at 310 n.30.
[225] Macedo, *supra* note 10, at 275.
[226] *Id*. at 282.
[227] *Id*.

One option is to bite the bullet and assert that no committed gay couples can have sex that is emotionally meaningful and mutually self-giving. Alternatively, opponents of same-sex marriage may argue that even if same-sex couples have sex that is psychologically unitive, the bodily element of marital sex is not present. In other words, same-sex couples are incapable of having marital sex (i.e. sex that is physically and psychologically unitive), because they lack the necessary bodily equipment.

Past opponents of same-sex marriage were willing to bite the bullet.[228] Macedo notes that Finnis, for example, relies on the overgeneralization that all homosexuals subscribe to a 'gay lifestyle,' which "regard[s] sexual capacities, organs, and acts as instruments for gratifying the individual 'selves' who have them."[229] The stereotype that homosexuals lack the ability to love in a unitive and self-giving way is not only counterintuitive but also runs counter to ordinary experience. As Carlos Ball writes, "For countless gay and lesbian couples, sexual intimacy is valued not just for the sexual pleasure it provides, but for the bonds of affection and commitment that they simultaneously represent and engender. Only those who are so removed from and have no exposure to the daily lives of lesbians and gay men could possibly think otherwise."[230]

George, Girgis, and Anderson do not explicitly state that same-sex couples are incapable of achieving the psychological element of marital sex. Instead, the issue is that same-sex couples lack the bodily element of marital sex. They lack the "essential dynamism" toward procreation

[228] Finnis, *supra* note 8, at 1070
[229] Macedo, *supra* note 10, at 272, 284. Finnis, *supra* note 8, at 1070.
[230] Ball, *supra* note 42, at 125.

and childrearing.[231] However, as Macedo notes, conservative critics of same-sex marriage seem to have "double standard" when confronting the infertility objection.[232]

According to the infertility objection, gay marriage critics cannot consistently claim that infertile heterosexual couples should be permitted to marry but that same-sex couples cannot.[233] For infertile heterosexual couples, like homosexual couples, "there is no possibility of procreation."[234] Yet, no one objects to elderly couples and other infertile heterosexual couples from getting married. George, Girgis, and Anderson hold that "this challenge is easily met."[235]

While George, Girgis, and Anderson's traditionalist conception of marriage is naturally "oriented to and fulfilled by the bearing, rearing, and education of children," capacity to procreate is not a necessary.[236] Recall that on their account of marriage what is required is the capacity to engage in a "procreative-type" act.[237] Procreative-type acts do not necessarily result in conception.[238] Moreover, the possibility of procreation is not necessary marital sex to be of a reproductive type.[239]

This type of tightrope walking, between procreation and procreative-type acts, is consistent, but ultimately unconvincing. There is another, more natural, response to the infertility objection. Instead of concocting an awkward argument that holds that the essence of marriage deals with a specific type of sexual contact (but not conception), a more natural response to the infertility objection is that sex is not fundamental to marriage. What is

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[231] George et. al., *supra* note 12, at 267.
[232] Macedo, supra note 10, at 278.
[233] George et. al., *supra* note 12, at 265-66.
[234] Macedo, *supra* note 10, at 278.
[235] George et. al., *supra* note 12, at 266.
[236] *Id.* at 256.
[237] *Id*. at 256. *See* Part III.
[238] *Id*. at 266.
[239] *Id*.

fundamental to marriage is conjugal love. In other words, the emotional and psychological aspects are essential to marriage, not the bodily element.

Aside from intuition, the Supreme Court and American history support defining marriage in terms of its emotional and psychological aspects. *Turner v. Safely* makes clear that the bodily elements of marriage are not essential to right to marry in the United States.[240] At issue in *Turner* was a regulation that permitted inmates to marry "only with permission of the superintendent of the prison."[241] The Court held that this regulation was unconstitutional and that the fundamental right to marriage endures even in the prison context, where one's rights are (obviously) greatly curtailed.[242]

Although the bodily aspect of marriage is often impossible for inmates, "many important attributes of marriage remain."[243] The Court noted that "inmate marriages, like others, are expressions of emotional support and public commitment" and that "these elements are an important and significant aspect of the marital relationship."[244] George, Girgis, and Anderson's conception of marriage cannot account for this ruling. For them, recognizing marriage without the possibility of consummation "blurs" the line between marriage and "ordinary friendships."[245]

However, the ruling in *Turner* is consistent with attitudes towards marriage throughout American history. Historian Nancy Cott chronicles how, in early American political theory, there was a widely accepted republican conception of marriage. Following Baron de Montesquieu and his *Spirit of the Laws*, which "influenced the central tenets of American

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[240] *Turner*, 482 U.S. at 78.
[241] *Id*. at 82.
[242] *Id*. at 96.
[243] *Id*. at 95.
[244] *Id*. at 95-96.
[245] George et. al., *supra* note 8, at 261.

republicanism, the founders learned to think of marriage and the [republican] form of government as mirroring each other."[246] Marriage, like government, is a lasting union that is entered into only by consent.

These parallels were especially important to the signatories of the Declaration of Independence, who sought separation from the British crown.[247] Both the bond of marriage and bond between man and his government ought not to be taken lightly and must be held together by love, not coercion.[248] A great deal of Revolutionary era political writing discussed the proper conception of marriage as one which is rooted in the 'mutual return of *conjugal love*' and 'the ties of reciprocal sincerity.'[249]

The reason the founding fathers held marriage in such high regard was that, aside from its metaphorical meaning, "actual marriages of the proper sort were presumed to create the kind of citizen needed to make the new republic succeed."[250] Having studied Montesquieu and his categorization of different forms of governance, the founders steadfastly held that in a republic, where the people are sovereign, a virtuous citizenry is vital. The type of virtue republicanism requires includes

> not only moral integrity, but public-spiritedness. Selfish, small-minded individuals narrowly seeking their own advancement would not do: citizens in a republic had to recognize civic obligation, to see the social good of the polity among their own responsibilities. How would the nation make sure that republic citizens would appear and be suitably virtuous? Marriage supplied an important part of the answer. . . [to] American republicans . . . marriage [w]as a training ground for citizenly virtue.[251]

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[246] Nancy Cott, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 10 (2000).
[247] *Id*.
[248] *Id*.
[249] *Id*. at 15-16.
[250] *Id*. at 17-18.
[251] *Id*. at 18.

Marriage was believed to foster other-regarding and to subdue self-love, as well as to habituate sociability and compromise.[252]

Marriage was also understood as mechanism for encouraging the moral integrity necessary for republican governance.[253] Because marriage was considered part of 'the foundations of national Morality,' the founders favored monogamy to polygamy and other forms of marriage.[254] Philosophers as far back as Plato and Aristotle have noted virtue of moderation and self-control and how man's unbridled desires for "animal pleasures," such as food and sex, tend to lead towards excess and immorality.[255]

Monogamous marriage idealizes fidelity and the restraint of one's sexual desires. Societal expectations and support help sustain one's commitment to this ideal. Monogamy encourages self-control.[256] John Adams discussed the importance of monogamy in one's moral education. "How is it possible," he wrote, "that Children can have any just Sense of the sacred Obligations of Morality and Religion if, from their earliest Infancy, they learn that their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers."[257] At the same time, the founders, following Montesquieu, came to equate polygamy with "despotism . . . political corruption, coercion, elevation of the passions over reasons,

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[252] *Id*.
[253] *Id*. at 10.
[254] *Id*. at 21.
[255] Plato, *Republic*, *in* PLATO COMPLETE WORKS, 327a; 329c-d, 389e, 390c, 402e-403c (John M. Cooper & D.S Hutchinson eds., G.M.A Grube & C.D.C Reeve trans., 1997). Aristotle, NICOMACHEAN ETHICS, bk. 3, at 77-82 (Martin Ostwald trans., 1962).
[256] Stephen Macedo, *Against the Old Sexual Morality of the New Natural Law*, *in* NATURAL LAW, LIBERALISM, AND MORALITY, 27, 43 (Robert George ed., 1996).
[257] Cott, *supra* note 247, at 21.

selfishness, [and] hypocrisy . . . Monogamy, in contrast, stood for government of consent, moderation, and political liberty."[258]

An aspect of conservative natural law theory of that can be extracted and restored into republican defense of same-sex marriage is their notion of valuable sexual activity. Although Cott does not indicate that the founders went this far, it seems that a republican may be apt to agree with the conservative natural lawyers that the only type of sex that the state ought to promote is marital sex. Marital sex, on this broader account, is meaningful and unitive.[259]

Spouses seek their partners' gratification as an end in itself and seek their own pleasure merely as means. As a result, ideally both spouses are left with a sense of genuine fulfillment of both the lower, animal desire for sex, as well as their higher, rational desire for closeness and togetherness. Such mutual self-giving can create a bond of intimacy and condition citizens to associate other-regarding with their own pleasure.

This republican notion of sexual relations could further foster civic virtue. In terms of the same-sex marriage debate, advocates can contend that gay marital sex, between two committed partners who seek a meaningful connection, can have a positive impact on society.[260] Therefore, unlike George, Girgis, and Anderson who are unnecessarily hostile to pleasure, on this account of marital sex, pleasure plays a socially constructive role.

George, Girgis, and Anderson, of course, contest the contention that marriage is, at bottom, about love and the psychological and emotional aspects of marriage.[261] They have two

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[258] *Id*. at 22.
[259] Of course, it is possible for sex to be meaningful and unitive outside of the context of marriage, but it would be difficult for the state to incentivize these relations outside of institution of marriage.
[260] As a result, George, Girgis, and Anderson's focus on sex is relevant insofar as it is a means of further developing the psychological and emotional aspects of marriage (love).
[261] George et. al., *supra* note 12, at 248.

primary objections to this proposition. First, they argue that marriage is "a comprehensive union of spouses."[262] Since marriage is comprehensive and our bodies are an inessential part of our identities, they conclude that there must be a bodily aspect of marriage.[263]

It is clear how this argument unfolds within the flawed framework of natural marriage. However, as we have established, natural marriage is irrelevant to the same-sex marriage debate. The real question is why the state sanctions and encourages marriages. While the state certainly has an interest in procreation and childrearing, it is unapparent why the state is concerned with reproductive-type acts . This suggests, as *Turner* appears to confirm, that sex is often part of most marriages but that sex is not essential to modern marriage.

George, Girgis, and Anderson's second argument for the necessity of the bodily element of marriage is that for the state to recognize marriage without consummation "obscure[s] people's understanding about what truly marital unions do involve."[264] It blurs the line between marriage and ordinary friendships.[265] The difference between marriage and friendships (or other relationships), George, Girgis, and Anderson argue, is romance. "Romance is the kind of desire that aims at bodily union, and marriage has much to do with that."[266]

George, Girgis, and Anderson illustrate their argument through their example of Joe and Jim, who

> live together, support each other, share domestic responsibilities, and have no dependents. Because Joe knows and trusts Jim more than anyone else, he would like Jim

[262] *Id*.
[263] *Id*. at 253.
[264] *Id*. at 282.
[265] *Id*. at 261.
[266] *Id*. at 271.

> to be the one to visit him in the hospital if he is ill, give directives for his care if he is unconscious, inherit his assets if he dies first, and so on. The same goes for Jim.[267]

George, Girgis, and Anderson ask: if same-sex marriage were permitted, what would differentiate Joe and Jim relationship (as, say, best friends) from a married couple?[268] Their answer is Joe and Jim's relationship is not romantic—that is, they do not have sex.[269]

Here, again, George, Girgis, and Anderson appear to rely on intuitions that run counter to our everyday experience. What distinguishes friends from spouses is not that one has sex with the later but not the former. Instead, the difference comes down to the type or degree of love involved. Love, in general, involves caring for the welfare of others. However, the love one has for a spouse (conjugal love) is different from that of a parent or sibling or friend.

There are two ways for accounting for this difference. On the one hand, one may contend that love between spouses is different from the love between friends (or between parents and children) in kind. Conjugal love, on this view, goes deeper. As Ball explains, conjugal love "allows for an expansion of the self. When a person loves another, she begins to see that other as an extension of herself."[270] Aristophanes discusses this conception of conjugal love in Plato's *Symposium*.[271] "When a person meets the half that is his very own, whatever his orientation . . . something wonderful happens: the two are struck from their sense by love, by a sense of belonging to one another, and by desire, and they don't want to be separated from one another, not even for a moment." [272]

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[267] *Id*.
[268] *Id*.
[269] *Id*.
[270] Ball, *supra* note 42, at 109.
[271] Plato, *Symposium*, *in* PLATO COMPLETE WORKS, 172a, 189c-193e (eds. John M. Cooper & D.S Hutchinson, trans. Alexander Nehamas & Paul Woodruff, 1997).
[272] *Id*. at 192b-d.

Admittedly, it is difficult to describe how the expansion of the self that one feels through spousal love is different from the love of a parent and child or the love of friendship. Aristophanes acknowledges this difficulty.[273] He states that there are

> people who finish out their lives together and still cannot say what it is they want from one another. No one would think it's the intimacy of sex . . . It's obvious that the soul of every love longs for something else; his soul cannot say what it is, but like an oracle it has a sense of what it wants . . . [274]

Despite the fact that is difficult to precisely explain this difference, it is clear that the difference is not rooted merely in sex.

Alternatively, one may argue that the difference between the love of friendship and conjugal love is one of degree. On this view, conjugal love and the love of friendship are on the same continuum. Both kinds of love are an extension of the self; but, with conjugal love, the self is so intermingled with the other that the two cannot be separated.

The degree of affection is so strong that the couple wants society and the state to recognize and, thereby, help reinforce their relationship.[275] They want to take on the burdens of social pressure that accompany marriage (as opposed to simply living together). Marriage is a covenant not only between a couple but also between a couple and society. As Andrew Sullivan notes, "society has good reason to extend legal advantages to heterosexuals who choose the formal sanction of marriage over simply living together. They make a deeper commitment to one another and to society; in exchange society extends certain benefits to them."[276]

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[273] *Id*. at 192c-e.
[274] *Id*. at 192c-d.
[275] Ball, *supra* note 42, at 109.
[276] Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC. Aug., 28, 1989, at 20.

In the final analysis, the George, Girgis, and Anderson's conception of natural marriage and their main objections to same-sex marriage rest on two intuitions that are not widely shared and run counter to everyday experience. First, they hold that marriage is pre-political, despite the fact that state sanction and legal recognition is fundamental to the modern institution of marriage and the same-sex marriage debate. Second, George, Girgis, and Anderson assert that intercourse is essential to marriage even though encouraging love and conditioning other-regarding is the core of modern marriage.

V. Judgmental Liberalism and Same-Sex Marriage

As the same-sex marriage debate demonstrates, Rawlsian liberalism has too thin a conception of the good to adequately capture the complexities of some of the most vexing social issues. Political liberals and the conservative natural law theorists alike take too narrow a view of same-sex marriage and sexual ethics generally. Both unnecessarily "throw down the gauntlet of sexual nihilism." Conservatives say "either one must accept a sweeping prohibitionism of one sort or another, or one gives up the only grounds on which to criticize promiscuity, incest, polygamy, pederasty, liberationism, or you name it."[277] They create a false dichotomy between the state encouraging all varieties of sexual relationships or just one specific one—heterosexual monogamous marriage.

While the conservative natural lawyers endorse prohibitionism, neutral liberals embrace liberationism. Rawlsian liberals are reluctant to take this absolutist line—Ralph Wedgwood, for

[277] Stephen Macedo, *Reply to Critics*, 84 GEO. L.J.329, 329 (1995).

instance, resists it. But, as Elizabeth Brake demonstrates, a consistent political liberal cannot accept modern marriage as it must honor a broad range of alternative sexual relationships.[278]

Judgmental liberalism rejects this dichotomy. We need not "jettison the very effort to think critically about what has value in the sexual realm" in order to rebut the conservative arguments against same-sex marriage as neutral liberals do.[279] Judgmental liberalism allows one to take a more nuanced approach to same-sex marriage.

It allows the case to be made that there are reasons for the state to encourage modern marriage and that these reasons apply equally to gay couples as well as straight ones. A judgmental liberal approaches the topic of same-sex marriage from the perspective that certain types of sexual relationships should be state sanctioned because of the basic benefits they bring both individuals and the state alike. In order to determine if same-sex marriage ought to be promoted, one must establish the essential rationale behind monogamous marriage (why is marriage a public good?). At the same time, judgmental liberalism acknowledges Rawlsian liberalism's insistence that no justice-respecting modes of life ought to be directly (legally) discouraged a priori.

By utilizing judgmental liberalism and the sketch of modern marriage that I have defended, one can effectively answer George, Girgis, and Anderson's challenges to same-sex marriage. Their first challenge, following Brake, asks why the state is involved in the marriage business in the first place? Why does it acknowledge some relationships as marriage but not

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[278] Of course, a political liberal has the resources to prohibit marriages that violate principles of justice. For example, bestiality and pederasty could be ruled out on the ground than neither non-human animals nor minors can consent.

[279] *Sexuality and Liberty*, *supra* note 10, at 87.

others?[280] Their answer is that "marriages bear a principled and practical connection to children."[281] "Sever that connection," they argue, "and it becomes much harder to show why the state should take any interest in marriage at all."[282] Moreover, it becomes unclear why the state should encourage the marital norms of fidelity and permanence.[283]

This challenge is easily met. Modern Western states sanction and encourage marriage, as we have seen, because monogamous marriage in its ideal, benefits the state by creating better citizens. As Nancy Cott notes, the founding fathers believed that since "in a republic, the people . . . [are] sovereign," republican government requires a citizenry with "not only moral integrity, but public-spiritedness." Marriage was understood to be a "training ground" for both personal and public virtue.[284]

The framers assumed that marriage led to civic virtue, because they held that marriage inherently habituates sociability and compromise. These traits are necessary in the public square as a means of tempering the "individualistic foundation of social contract thinking." It was taken for granted that marriage fosters other-regarding and empathy, while subduing self-love and apathy.[285]

Furthermore, the framers found marriage to be a tool for cultivating private virtue. Monogamous marriage, with its commitment to fidelity and sexual restraint, was understood as a mechanism to promote for morality.[286] Whereas man's unbridled desires for the "animal

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[280] George et. al., *supra* note 12, at 270-71.
[281] *Id*. at 271.
[282] *Id*.
[283] *Id*. at 259.
[284] Cott, *supra* note 247, at 18.
[285] *Id*. 17-18.
[286] *Id*. at 21-22.

pleasures," such as food and sex, tend to lead towards excess and immorality, marriage was understood as a means of achieving self-mastery and moderation.[287]

This, in part, explains why the founders preferred monogamy to polygamy, despite the fact that most of the world's cultures at the time were not strictly committed to monogamy.[288] Following Montesquieu, they equated polygamy with "despotism . . . political corruption, coercion, elevation of the passions over reasons, selfishness, [and] hypocrisy," while, "monogamy, in contrast, stood for government of consent, moderation, and political liberty."[289] Therefore, judgmental liberalism can easily answer George, Girgis, and Anderson's second challenge, the polygamy problem.[290] In short, monogamy is a fundamental feature of modern marriage.

Finally, George, Girgis, and Anderson's third challenge asks why only romantic relationships ought to be legally recognized as marriage.[291] For George, Girgis, and Anderson, a romantic relationship is another way of saying sexual relationship.[292] I have resisted the claim that marriage necessarily includes a sexual component. What is fundamental to modern marriage, I have argued, are the emotional and psychological elements of marriage—conjugal love. The bodily element of marriage is, undoubtedly, important to most marriages. However, sex (as well as kissing, hugging, and all of the other forms of physical affection) are only important to modern marriage insofar as they are a means of reinforcing a couples love and

[287] *Id*. at 23. Macedo, *supra* note 256, at 43.
[288] Cott, *supra* note 246, at 9.
[289] *Id*. at 22.
[290] George, et. al., *supra* note 12, at 272-74.
[291] *Id*. at 271-72.
[292] *Id*.

commitment to one another. In short, George, Girgis, and Anderson's argument that intercourse is essential to marriage is simply mistaken.[293]

Although the early American conception of marriage that I endorse is admittedly aspirational and Romantic, it seems that it is still part of the state's rationale for encouraging couples to marry today. Modern monogamous marriage encourages couples to make deep, meaningful commitments of love to one another. Brake contends that a consistent Rawlsian state could not allow for "most marital entitlements to direct financial benefits," such as the increased Social Security benefits or tax breaks married couples currently receive based on their marital status, precisely because the rationale behind these benefits "depend on comprehensive conceptions of the good" and an "appeal to the special value of long-term dyadic sexual relationships."[294]

However, there is good reason for the state to confer a special status and benefits to married couples. Monogamous marriage is a way of life worthy of state sanction. The early American Romantic conception of marriage is implicit in modern marriage.[295] "The central claim here is that encouraging people to make deeper and more stable commitments than they might otherwise do will be good for them and for society;" and such incentives, if they are "good for straight people, then they may be good for gays and lesbians as well."[296]

In sum, the judgmental liberal justification of same-sex marriage can provide a more compelling conception of modern marriage than either political liberal arguments for gay

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[293] *Id*. at 272.
[294] Brake, *supra* note 116, at 306, 308, 312.
[295] This is why Brake must abandon modern marriage. A liberal state, as she points out, can only justify minimal marriage.
[296] *Sexuality and Liberty*, *supra* note 10, at 93-94.

marriage or the conservative natural law argument against it. According to my argument for same-sex marriage, from a judgmental liberal foundation, marriage is a legal lifelong commitment to monogamy and fidelity. Marriage's essential rationale, from the state's perspective, is to create a more responsible citizenry. In the ideal, modern marriage fosters moral integrity and public spiritedness. Therefore, not only should same-sex couples be allowed to wed, all couples (gay or straight) should be *encouraged* to marry.

The fact that the state has good reason to promote modern marriage does not necessarily mean that the state is unreasonably discriminating against other alternative conceptions of the good. Macedo anticipates that "liberationists" might make this objection to a judgmental liberal justification of same-sex marriage. "Liberationists . . . might argue that political reliance on conceptions of the human good will always be perceived by some to be exclusionary and oppressive."[297]

I take Macedo's response to be the keenest insight of judgmental liberalism. Here, the same-sex marriage debate illustrates how it is possible promote virtuous conceptions of the good life without oppressing others. Macedo writes, "It should be remembered . . . that I am not proposing that anyone should be coerced to marry, or prevented by law from engaging in forms of sexual behavior that are simply degrading or perverse but involve no harm to others."[298] Instead, what Macedo does endorse, and what I agree seems reasonable, is to "use public power in gentle ways—by promoting tax benefits for married couples, for example—to encourage

[297] *Id*. at 96.
[298] *Id*. at 97.

preferable forms of life,"[299] while guarding against discrimination against those in alternative intimate relationships (polygamists, polyamorists, etc.).

Judgmental liberalism has a theoretical safeguard against using controversial community values judgments as a mechanism for minority exclusion. Therefore, when it comes to marriage, a judgmental liberal state may encourage monogamous marriage and can choose not to sanction polygamous marriages, but it cannot prohibit religious or other non-governmental institutions from sanctioning polygamous marriages (so long as these marriages do not violate the principles of justice). Judgmental liberalism may even be able to accommodate some of Brake's arguments.

If Brake is correct that the state must have "a legal framework supporting [for all justice-respecting] nondependent caring relationships between adults," then a judgmental liberal society could conceivably allow minimal marriages for alternative relationships.[300] I see no reason, at least theoretically, why a judgmental liberal would not permit the state recognition (although not encouragement) of alternative (justice-respecting) sexual relationships such as polygamy, polyamory, and quirkalone relationships, so long these legal frameworks are practically plausible. Under such a scheme, alternative relationships would get the rights and obligations of minimal marriage, but would not be eligible to enjoy the benefits (such as tax breaks) reserved for monogamous modern marriage.[301]

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[299] *Id*. at 96.
[300] Brake, *supra* note 116, at 303.
[301] George, Girgis, and Anderson do not, in principle, oppose Brake's contention that society should provide a scheme of legal rights for alternative relationships. However, they hold, as I do, that such a scheme would not be marriage. George, et. al., *supra* note 12, at 280. I agree with George, Girgis, and Anderson that Brakes contentions must be taken seriously.

Liberalism need not be committed to moral minimalism; that is, being non-judgmental and shirking from questions as to which of ways of life are exemplary. This is true even when matters of basic justice are at stake. While John Stuart Mill expounds upon the virtues of allowing for different "experiments of living," he also notes that "it would be absurd to pretend that people ought to live as if nothing whatever had been known in the world before they came into it; as if experience had as yet done nothing towards showing that one mode of existence, or of conduct, is preferable to another."[302]

This is the same lesson which judgmental liberalism tries to impart. The judgmental liberal agrees with Rawls that it is unreasonable to curb one's freedoms simply because her way of life conflicts with the comprehensive doctrines of the majority. Furthermore, Mill is correct that individual happiness and social progress both depend upon only allowing autonomy and a wide range of different conceptions of the good to choose from.[303]

However, judgmental liberalism does insist that there is a purpose in permitting and promoting for different experiments of living. There is no reason why the results of such experiments should not be used to help guide human conduct and goad individuals to consider virtuous ways of life first. In this regard, judgmental liberalism is a political philosophy that promotes a political science and parallels the scientific method itself.

The different theories of the good life, like the theories of science, must be tested to determine which are the closest approximations to the truth and which yield the most utility. No

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[302] John Stuart Mill, *On Liberty*, *in* ON LIBERTY AND OTHER ESSAYS 63-64 (John Gray ed., 1991).
Flathman seems to reject this second strand of Millian liberalism a bit too quickly. He holds that a state that is committed to anything less than "an abundant plurality . . . of outlooks and views" does not deserve "the name of liberal." Richard E. Flathman, *"It All Depends...on How One Understands Liberalism": A Brief Response to Stephen Macedo*," 26 POL. TH. 81, 82 (1998). Even Macedo's "extensive" but "circumscribed plurality" is not sufficiently liberal for Flathman. *Id*. Flathman's definition of liberalism seems excessively restrictive.
[303] Mill, *supra* note 303, at 63-64.

law, moral or scientific, ought to be accepted by sheer orthodoxy alone; however, ultimately societies must adopt guiding principles for practical consideration—to successfully execute the day to day affairs of life. These principles ought be established and built upon practically, but it must also be kept in mind that it is always theoretically possible that these doctrines are inaccurate and need be displaced by principles that are more precise.

Judgmental liberalism is understood in this way embraces the core liberalism, holding that societies must allow for different experiments of living and must never stop testing them. At the same time, however, judicial liberalism also points out one cannot ignore the current results of these tests. Those conceptions of the good that currently appear to yield the greatest utility ought to be gently encouraged.

Ideally, the empirical claims that logically follow from my propositions—most notably, that marriage cultivates the necessary qualities for effective citizenship in a modern democratic society—would be thoroughly tested in a longer work. Given the scope of my project, such empirical questions will have to remain open for further investigation. That being said, it seems that there is sufficient theoretical evidence to establish that modern marriage, with its ideals of monogamy and lifelong fidelity, is a way of life worthy of the state's embrace for gay and straight couples alike.

As Brake convincingly contends and George, Girgis, and Anderson correctly point out, neutral liberalism, with its commitment to public reason, cannot make sense of the notion that marriage is virtuous way of life.[304] As a result, Brake argues that liberal states must abandon

[304] Brake, *supra* note 116, at 312.

modern marriage for minimal marriage.[305] George, Girgis, and Anderson conclude that the arguments in favor of same-sex marriage are all fundamentally flawed.[306] However, simply because modern marriage does not accord with Rawlsian liberalism does not demonstrate that the modern conception marriage should be dispensed with. Instead, this merely makes manifest the limitations of neutral liberalism.

[305] *Id*.
[306] George et. al., *supra* note 12, at 274.