WHY LIBERAL NEUTRALITY PROHIBITS SAME-SEX MARRIAGE: RAWLS, POLITICAL LIBERALISM, AND THE FAMILY

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ABSTRACT

John Rawls's political liberalism and its ideal of public reason are tremendously influential in contemporary political philosophy and in constitutional law as well. Many liberals are Rawlsians of one stripe or another. This is problematic, because most liberals also support the redefinition of civil marriage to include same-sex unions, and as I show, Rawls's political liberalism actually prohibits same-sex marriage. Recently in Perry v. Schwarzenegger*, however, California's northern federal district court reinterpreted the traditional rational basis review in terms of liberal neutrality akin to Rawls's ideal of "public reason," and overturned Proposition 8 and established same-sex marriage. (This reinterpretation was amplified in the 9th Circuit Court's decision upholding the district court on appeal in* Perry v. Brown*). But on its own grounds Perry should have drawn the opposite conclusion. This is because all the available arguments for recognizing same-sex unions as civil marriages stem from controversial comprehensive doctrines about the good, and this violates the ideal of public reason; yet there remains a publicly reasonable argument for traditional marriage, which I sketch here. In the course of my argument I develop Rawls's politically liberal account of the family and defend it against objections, discussing its implications for political theory and constitutional law.*

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I. INTRODUCTION

In *Perry v. Schwarzenegger* federal district judge Vaughn Walker overturned California's Proposition 8 that defined marriage as between a man and a woman.[1] Among the findings of fact in the case, Walker includes the following assertion about the illegitimacy of moral judgment as a justifiable ground for state action:

> In the absence of a rational basis, what remains of the proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. FF 78-80. *Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.* See *Romer*, 517 U.S. at 633; *Moreno*, 413 U.S. at 534; *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[T]he Constitution cannot control [private biases] but neither can it tolerate them.").[2]

None of Walker's citations in *Romer, Moreno,* or *Palmore* actually support the assertion that moral judgment, as such, is an unreasonable basis for legislation. Indeed, how could they? State governments have always exercised the traditional "police powers" over public health, safety, and morals, however broadly or narrowly the courts have construed them. *Romer, Moreno,* and *Palmore* each disqualifies animus as a rational basis, but none of them makes the claim, as Walker does, that "moral disapproval" or judgments of ethical superiority are themselves equivalent to irrational animus.

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[1] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).
[2] *Id. at* 1002 (emphasis added).

In the 9th Circuit Court's decision upholding Walker's ruling on appeal (now as *Perry v. Brown*[3]), Judge Stephen Reinhardt, writing for the 2-1 judgment of the panel, amplifies Walker's assertion. Reinhardt notes that California's Proposition 8 is not subject to any heightened scrutiny, because the U.S. Supreme Court has never held that sexual orientation is a suspect classification. Rather, he argues that Proposition 8 is subject to the lower hurdle of rational basis review, which it nevertheless fails to clear. Although Reinhardt admits that "[a]s a general rule, states may use their police powers to regulate the 'morals' of their population," straightaway he withdraws this concession and echoes Walker by asserting that moral judgment as such does not constitute a legitimate state interest, and that "animus, negative attitudes, fear, a bare desire to harm, and moral disapproval" are equivalently unconstitutional grounds for legislation.[4] Reinhardt's evidence for his assertion is a remark by Justice O'Connor in a concurrent opinion in *Lawrence v. Texas:* "Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."[5] Reinhardt speculates that "[t]he *Lawrence* majority opinion seems to have implicitly agreed" with O'Connor's remark, which thus entails that moral judgment as such is an illegitimate state interest according to Supreme Court precedent.[6]

Walker and Reinhardt's arguments against moral judgment as a legitimate state interest are novel developments in constitutional law. Nevertheless, the thought that moral approval and disapproval as such are somehow an illegitimate basis for state action is a very familiar one. The thought arises not from federal case law, but liberal political theory, where the thought is expressed in more sophisticated fashion as the political principle of liberal neutrality.[7] However immediate or derivative the influence of liberal political theory upon Walker and Reinhardt's thinking, their decisions in *Perry* effectively reinterpret the traditional judicial standard of rational basis review in terms of a liberal neutrality principle. I point this out not in order to raise a question about the legitimacy of informing constitutional interpretation with philosophical considerations about justice—this may be inevitable anyway—but in order to show the real impact of academic theorizing about law and justice upon judicial practice, especially in the contentious public debate about same-sex marriage. What I do wish to question is whether liberal neutrality as a constitutional principle, which seems so attractive to many people, has the implications for the marriage debate that philosophers, constitutional theorists, and the 9th Circuit judges think that it does.

What is the same-sex marriage debate really about? The legal institution of marriage has the expressive effect of socially recognizing, promoting and dignifying the nature of the relationships that the law deems eligible for marriage. The expressive effect of legal marriage is what the debate over same-sex unions is

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[3] Perry v. Brown, 671 F. 3d 1052 (9th Cir. 2012).
[4] *Id.* at 1102 (citing Romer v. Evans, 517 U.S. at 635).
[5] Lawrence v. Texas, 539 U.S. 558 at 582.
[6] *Perry,* 671 F. 3d at 1102.
[7] For an overview of liberal neutrality, *see e.g.* the classic essays collected in, PERFECTIONISM AND NEUTRALITY: ESSAYS IN LIBERAL THEORY (George Klosko & Steven Wall eds.,2003).

really about.[8] As it is playing out in the United States and elsewhere, the debate is about which rival conception of sexual value and identity should harness law's expressive effect and be reinforced by the law's coercive and pedagogical powers. Traditionalists, on the one hand, want the law to preserve its historic definition of marriage as a sexually complementary and conjugal union between a man and a woman. Where the law does this it has had the effect of reinforcing heterosexuality as socially normative and bolstering traditional gender roles. The revisionists, on the other hand, fall into one of three camps. The first camp wants the law to redefine "marriage" as any adult affective sexual relationship in which two parties of whichever sex wish to be recognized by the state.[9] The second camp wants to redefine marriage by introducing "plural" or polygamous marriage in addition to two-person same-sex unions.[10] The third camp wants to disestablish civil marriage altogether or remove intimate associations from state concern.[11] Where the law follows any of the revisionist camps, it has the effect of inducing social acceptance of homosexuality as normal, undermining traditional gender roles, and legally establishing a liberal conception of moral equality.[12]

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[8] *See* Martha Nussbaum, *A Right to Marry? Same-Sex Marriage and Constitutional Law*, DISSENT, (Summer 2009), *available at* http://www.dissentmagazine.org/article/?article=1935. *C.f.* Adam Haslett, *Love Supreme*, THE NEW YORKER, May 31, 2004, at 19 (("As a political and cultural matter, [same-sex marriage cases] are contests over something less easy to codify: the official recognition of love…. The state is being asked not only to distribute benefits equally but to legitimate gay people's love and affection for their partners. The gay couples now marrying in Massachusetts want not only the same protections that straight people enjoy but the social status that goes along with the state's recognition of a romantic relationship") *quoted in* William C. Duncan, *Marriage and the Utopian Temptation,* 59 RUTGERS L. REV. 265, 272 (2007)).

[9] *See, e.g.*, ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1996) (explaining how such redefinition just catches up with contemporary social practice and has fundamentally conservative implications); Jonathan Rauch, *For Better or Worse? The Case for Gay (and Straight) Marriage,* THE NEW REPUBLIC (May 6, 1996) at 18 (arguing that defenders of traditional marriage are actually better served, by their own lights, in endorsing gay marriage).

[10] *See Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006) *available at* http://beyondmarriage.org/full_statement.html. Signatories include influential figures such as Cornel West, Gloria Steinem, and Barbara Ehrenreich.

[11] *See, e.g.*, David Boaz, *Privatize Marriage: A Simple Solution to the Gay-Marriage Debate,* SLATE (April 25, 1997) *available at* http://www.slate.com/articles/briefing/articles/1997/04/privatize_marriage.html (arguing for a libertarian "privatization" of marriage); TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE (2010) (explaining that liberals and gay rights activists should abolish legal marriage); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES, (1995) (explaining that the very institution of legal marriage harms women).

[12] As gay marriage advocate Victoria A. Brownworth says, "[President George W.] Bush is correct … when he states that allowing same-sex couples to marry will weaken the institution of marriage…. It most certainly will do so, and that will make marriage a far better concept than it previously has been." Victoria A. Brownworth, *Something*

Participants in the marriage debate sometimes say that traditionalists and revisionists agree upon the importance of marriage, but differ over who should have access to it. Such "agreement" is specious and merely verbal, however. It conceals the depth of the conflict and the significance of what is at stake as the debate is engaged at present: if one side wins, then the other side necessarily loses. The winner-take-all terms in which this debate is posed are why it is so acrimonious. As Ellen Willis, a same-sex marriage advocate, puts it, "conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart."[13] The traditionalists and the revisionists alike propose to enshrine in the law a deeply controversial facet of their incompatible "comprehensive doctrines," to use John Rawls's term, about the valuable forms of sexuality, their place in human flourishing, and the nature of moral equality.[14]

The Rawlsian theory of political liberalism provides a principled way to prescind from the socially divisive, zero-sum terms in which the marriage debate is now engaged. Rawls's political liberalism and its ideal of "public reason" are tremendously influential in contemporary political philosophy and in constitutional law as well. Many, perhaps even most, liberals are Rawlsians of one stripe or another. Political liberalism has the resources to propose an alternative deliberative framework for resolving the debate that treats the opposing parties equally, because the framework's justification is neutral relative to divergent comprehensive doctrines. At the center of this framework is the ideal of public reason, which requires that arguments over the legal definition of marriage, like other arguments over matters of basic justice, be "publicly reasonable."[15] That is, marriage arguments must be acceptable from citizen's different viewpoints within the

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Borrowed, Something Blue: Is Marriage Right for Queers? in I DO/I DON'T: QUEERS ON MARRIAGE 53, 58-59 (Greg Wharton & Ian Philips eds., 2004).

[13] Ellen Willis, *Can Marriage Be Saved? A Forum,* THE NATION (July 5, 2004) at 16. Gay activist Michelangelo Signorile is even more explicit: he argues that gay couples "demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution." The strategy is for gay couples "to fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely [, because the] … most subversive action lesbians and gay men can undertake … is to transform the notion of 'family' entirely." Michelangelo Signorile, *Bridal Wave,* OUT (Dec.-Jan. 1994) at 68, 161.

[14] A "comprehensive doctrine" in this technical sense includes "conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole. A conception [of the good] is fully comprehensive if it covers all recognized values and virtues within one rather precisely articulated system; whereas a conception is only partially comprehensive when it comprises a number of, but by no means all, nonpolitical values and virtues and is rather loosely articulated," JOHN RAWLS, POLITICAL LIBERALISM 13 (1995).

[15] Public reason "is a view about the kind of reasons on which citizens are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government concerning fundamental political questions." John Rawls, *The Idea of Public Reason Revisited*, 64 CHICAGO L. REV. 765, 795 (1997).

various comprehensive doctrines that overlap to form the public political culture of liberal democracies. The arguments must not depend essentially upon controversial facets of any comprehensive doctrine as such.

Granted that the actual terms of the marriage debate today are publicly *un*reasonable, because all sides appeal to their incompatible comprehensive doctrines, what would happen if the debate were reconceived along the lines of political liberalism? When this question has been asked, Rawlsians and their fellow travelers such as Walker and Reinhardt have concluded that fairness requires the politically liberal state to revise the legal definition of marriage to include (at least) homosexual unions.[16] The burden of this essay is to show the contrary. In fact, political liberalism and its ideal of public reason, rightly understood, prohibit the legal recognition of homosexual unions as civil marriages. The upshot is that even if the decisions in *Perry* are justified in construing the rational basis review in terms of liberal neutrality, this construal provides no grounds for endorsing same-sex marriage. In fact, to the extent that the rational basis standard in U.S. constitutional jurisprudence includes neutrality, the courts have a positive legal duty to strike down federal and state statutes enacting same-sex marriage as unconstitutional.

I will argue that there are two reasons why liberal neutrality is incompatible with same-sex marriage: the first reason is that all available arguments in favor of same-sex marriage depend essentially upon controversial moral values and principles drawn from comprehensive doctrines about the good life. These arguments are therefore illegitimate grounds for state action in a liberal democracy marked by reasonable pluralism. Traditional marriage, however, can be defended in terms of public reasons. The most familiar defenses that traditionalists give are not publicly reasonable, as I will show in a moment, but the defense I propose here is publicly reasonable. There is a legitimate, politically liberal state interest in ensuring the orderly reproduction of society over time. This interest entails two public responsibilities: first, ensuring a sufficient and sustainable birth rate, and second, ensuring the just and effective rearing of children into capable citizens. The second responsibility, understood in politically liberal terms, requires that citizens develop what Rawls calls "the two moral powers." These are the power to exercise a sense of justice as fairness and the power to form one's own reasonable comprehensive conception of the good. Although there are alternatives to Rawls' account of public reason, such as the work of Gerald F. Gaus, for example, it is worth focusing upon Rawls' account because it is the most influen-

[16] Elizabeth Brake, *Minimal Marriage,* 120 ETHICS 302, 312 (2010) ("The ban on arguments which depend on comprehensive conceptions of the good precludes appeal to the special value of long-term dyadic sexual relationships, and without such appeal, … restriction of marriage to such relationships cannot be justified."). *See also*, Linda C. McClain*, Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1244-52 (1998) (arguing that Rawlsian liberalism requires gay marriage); Kory Schaff, *Equal Protection and Same-Sex Marriage*, 35 JOURNAL OF SOCIAL PHILOSOPHY 133, (2004) (explaining how Fourteenth Amendment claims for equal protection support gay marriage). Later on I will discuss the purportedly Rawlsian arguments of Samuel Freeman, Frank Michelman, Stephen Macedo, Véronique Munoz-Dardé, and Elizabeth Brake.

tial.[17] Furthermore, many of the main features of Rawls' theory that I will appeal to are independently plausible, as I hope to show.

My specific claim is that the two aforementioned responsibilities provide sound public reasons for reaffirming the conception of civil marriage that happens to be the traditional one, by legally recognizing and promoting families headed by two married parents who are the biological mother and father of their children. Rawls himself is very clear that any candidate conception of legal marriage must be specified in terms of the publicly reasonable, limited state interest in marriage and the family as the organ of orderly social reproduction. By contrast, the politically liberal state has no legitimate interest in promoting the personal intimate relationships of adults *as such*, but arguments in favor of same-sex marriage wrongly assume that it does. In a pluralistic democracy regulated by the ideal of public reason, there is no legitimate state interest in singling out, recognizing and promoting as civil marriages *specifically* homosexual relationships, because doing so privileges them uniquely among intimate relationships generally.

My argument will proceed by taking for granted the core of political liberalism: viz., that there is a purely "political" conception of justice, in Rawls's special sense of that term, and public reason is the regulatory ideal for legitimate state action on matters of basic justice and constitutional essentials. Public reason is central to political liberalism because, as Rawls says, it is a pluralistic democracy's form of civic friendship that constitutes the political community, binding citizens together with mutual respect and equal concern, in spite of their differing religious and philosophical worldviews.[18] I will sketch a case against same-sex marriage developed from Rawls's discussion of the family that, unlike the most familiar arguments for traditional heterosexual marriage, satisfies the strictures of public reason.

I will summarize Rawls's account of the family in Section I, tracing its maturation from his early to later work, and outline his response to feminist critics of his account. In Section II I will show how within political liberalism the legitimate state interest in the family is functional, as the organ of orderly social reproduction. In Section III I will defend my claim that defining civil marriage as the conjugal union between a man and a woman is necessary in order for the state to ensure sustainable procreation and education of children in terms of the two moral powers. In support of my argument, I will appeal to and develop a number of insightful reflections about kinship and the family that J. David Velleman has sketched in a recent series of articles.[19] Finally, in Section IV I will survey the best available arguments for same-sex marriage and show how they, unlike my argument in Section III, invariably make illicit appeals to comprehensive doc-

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[17] *Cf.* GERALD F. GAUS, THE ORDER OF PUBLIC REASON: A THEORY OF FREEDOM AND MORALITY IN A DIVERSE AND BOUNDED WORLD (2010); PUBLIC REASON (1998, Fred D'Agostino & Gerald F. Gaus, eds.).

[18] RAWLS, *supra* note 14, at 470.

[19] J. David Velleman, *Narrative Explanation*, 112 (1) THE PHILOSOPHICAL REVIEW (2003); J. David Velleman, *Family History*, 34 PHILOSOPHICAL PAPERS 357 (2005); J. David Velleman, *Persons in Prospect II: The Gift of Life*, 36 PHILOSOPHY & PUBLIC AFFAIRS 245 (2008).

trines and are thereby incompatible with the moral demands of pluralistic democracy.

Before addressing Rawls' account of the family, it will be helpful to contrast the form and content of a politically liberal argument with the more familiar arguments against legally recognizing same-sex unions as marriages. The most prominent philosophical arguments against same-sex marriage (and against the morality of same-sex acts generally) are those arguments advanced by John Finnis, Robert P. George and other moral and legal theorists in the natural law tradition.[20] Mary Geach, in a more Aristotelian vein, has offered similar arguments.[21] One of the chief complaints about natural law arguments is that they rely upon contestable metaphysical premises about human nature, because they require endorsing a version of Aristotelian-Thomistic naturalism and a moralized conception of practical rationality.[22] From the perspective of political liberalism, arguments from such premises face a dilemma: first, they are straightforwardly implausible, critics say, yet even if they are true, the appeal to such controversial metaphysical premises as a basis for legal action is unjust in a contemporary democratic society marked by moral and religious pluralism.[23] Legislating by appeal to some controversial philosophical or religious vision of the good life fails to treat as equals those citizens who do not subscribe to that vision.[24] Therefore, in order to treat citizens fairly legislation should appeal only to those more limited grounds that reasonable citizens could accept by their own lights.

If Rawls's political liberalism or something like it is correct, then even if the natural law arguments about sexual morality are sound, they still fail in the political realm to justify restricting civil marriage to heterosexual couples because such arguments appeal to a controversial comprehensive doctrine about human flourishing, since it is only from appeals to the natural sexual complemen-

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[20] Perhaps the clearest statement of the natural law argument for traditional marriage is by Sherif Girgis, Robert P. George, and Ryan T. Anderson. *See* Sherif Girgis et al., *What is Marriage?* 34 HARV. J. L. & PUB. POL'Y 245 (2010).

[21] *See* Mary Geach, *Marriage: Arguing to a First Principle in Sexual Ethics*, *in* MORAL TRUTH AND MORAL TRADITION 178 (L. Gormally ed., 1994); Mary Geach, *Lying with the Body*, 91 THE MONIST 523 (2008); *see also* Francis Beckwith, *Legal Neutrality and Same-Sex Marriage*, 7 PHILOSOPHIA CHRISTI 19 (2005) (explaining a traditional Christian natural law conception of marriage); Roger Scruton, *Sacrament and Sacrilege* in THE MEANING OF MARRIAGE (Robert P. George & Jean Bethke Elshtain eds., 2005) (arguing for a traditional conception of marriage by appealing to anthropology and phenomenology); ROGER SCRUTON, SEXUAL DESIRE: A PHILOSOPHICAL INVESTIGATION (2006) (arguing that homosexual desire is ethically suspect because its object is not essentially "other").

[22] *See* Girgis et al., *supra* note 20 at 248-260; *see also* ROBERT P. GEORGE & PATRICK LEE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS (2008) (presenting a more extended treatments of Aristotelian-Thomistic philosophical anthropology); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS at 100-133 (1980) (offering an account of "practical rationality").

[23] *See* Steven Macedo, *Homosexuality and the Conservative Mind,* 84 GEORGETOWN L.J. 261 (1995) Paul Weithman, *Natural Law, Ethics and Sexual Complementarity in* SEX, PREFERENCE AND FAMILY 227 (Martha Nussbaum & David Estlund eds., 1997).

[24] *See, e.g.*, Ronald Dworkin, *Liberalism in* PUBLIC AND PRIVATE MORALITY 60 (Stuart Hampshire ed., 1978).

tarity that natural law theorists are able to conclude that civil marriage should be defined as between one man and one woman.[25] There are other philosophical theories of sexual morality in addition to the natural law tradition—notably the phenomenological theories of Roger Scruton and Aurel Kolnai, for example—which are also critical of homosexual acts and same-sex marriage.[26] These theories are no less "comprehensive" in their philosophical presuppositions than natural law, however, so they are equally impugned by political liberalism as grounds for legislation in a pluralistic democracy. There are of course religious conceptions of marriage that define marriage as an exclusively male-female union, but these conceptions are manifestly nonpublic from the perspective of political liberalism and ineligible as grounds for legislation.[27]

For these reasons philosophers, political theorists, and constitutional lawyers alike have concluded that Rawlsian political liberalism mandates same-sex marriage as a requirement of basic justice. The significance of this conclusion goes beyond mere academic issues debated among idle theoreticians. For as Stephen Macedo has observed, "The insistence on public reasonableness is at the core of liberal constitutionalism and helps explain the importance of the political power of the courts and of judicial review."[28] In the United States the legal recognition of same-sex unions as marriages has proceeded almost entirely through the action of state and federal courts or executive officials, without and often against considerable democratic majorities.[29] These courts and officials have justified the introduction of same-sex marriage by appealing to moral ideals of fairness and equality, which they purport to have found implicit in state and federal constitutional provisions regarding equal protection and due process of law. These interpretations of such constitutional provisions have often been justified along Rawlsian lines, as Rawls himself urges: "in a constitutional regime with judicial review, public reason is the reason of its supreme court," and "the supreme court is the branch of government that serves as the exemplar of public reason."[30] In this way and in others Rawlsian political liberalism, which dominates contemporary Anglophone political thought, has extended its influence to the actual practice of constitutional law by justifying an expansive moral reading of constitutional provisions. Legal practitioners have shown an increasing willingness to make the ideal of public reason judiciable, and the issue of same-sex marriage is a prime example of this tendency. Rawls himself remarked that the

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[25] *See* Robert P. George & Christopher Wolfe, *Natural Law and Public Reason in* NATURAL LAW AND PUBLIC REASON (Robert P. George & Christopher Wolfe eds., 2005)
[26] *See* Scruton, *supra* note 21 and SCRUTON, *supra* note 21; AUREL KOLNAI, SEXUAL ETHICS (Francis Dunlop ed., 2005).
[27] For a concise account and defense of the traditional Christian understanding of marriage, see J. Budziszewski, *The Illusion of Gay Marriage*, 7 PHILOSOPHIA CHRISTI 46 (2005).
[28] Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 299 (1995-1996)..
[29] The one exception is the recent example of the State of New York, which established same-sex marriage legislatively on July 24, 2011, Marriage Equality Act (AB A08354).
[30] Rawls, *supra* note 14, at 231.

judiciary should be the exemplar of public reason; many American judges like Walker and Reinhardt seem primed to take his advice.

Rawls's followers, however, have failed to appreciate that although the standard natural law case against same-sex marriage violates public reason by appealing to comprehensive philosophical doctrines, so too do all the available arguments *for* same-sex marriage.[31] All available justifications for same-sex marriage appeal to different varieties of comprehensive doctrines about, e.g., sexual liberation or personal autonomy. Nonetheless there remains a persuasive and publicly reasonable case for preserving marriage as a legal union between a man and a woman, which is what I propose to demonstrate here.

If the foregoing contention is correct, why have Rawls's followers not recognized that political liberalism prohibits same-sex marriage? I suspect that the reason is threefold: firstly, Rawls's followers have almost universally failed to ask *why* the state has a legitimate interest in marriage at all, but without first answering this question the issue of same-sex marriage cannot be resolved; secondly, they have failed to attend closely to the implications of Rawls's own functional definition of the legitimate state interest in the family; thirdly, most Rawlsian political liberals are also comprehensive liberals, and so they are prone to read their own private liberal convictions into the "purely political" conception of justice, which is supposed to be free from such private convictions.

II. RAWLS'S ACCOUNT OF THE FAMILY

In order to understand Rawls's account of the family, it is important to grasp how political liberalism is supposed to adjudicate policy disagreements like the debate over same-sex marriage. Political liberalism *as such* does not demand or prohibit any specific marriage policy. This is because public reason applies to and imposes strictures upon what sorts of grounds may be invoked to justify policies, but it does not actually speak to specific policy programs themselves. Unlike liberalism as a comprehensive doctrine, liberalism as a "purely political conception of justice," as Rawls puts it, does not provide a substantive policy platform, but rather it regulates *how* contemporary pluralistic democracies should make substantive policy by providing a deliberative framework that ensures reasonable citizens participate politically on fair and equal terms. Political liberalism is thus a form of deliberative democracy.[32] As Rawls emphasizes:

> Public reason may also seem too restrictive because it might seem to settle questions in advance. However, it does not, as such, determine or settle par-

[31] Of course natural law theorists have argued against public reason, or argued that it should be reformulated to allow for natural law arguments. *See, e.g.*, John Haldane, *The Individual, the State and the Common Good*, 13 SOCIAL PHILOSOPHY & POLICY, 59 (1996) (making the case against public reason); George & Wolfe, *supra* note 25, at 51-74 (arguing that public reason should be expanded in order to include natural law arguments).
[32] *See* AMY GUTMANN & DENIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004).

> ticular questions of law or policy. Rather, it specifies the public reasons in terms of which such questions are to be decided.[33]

No available arguments for legal recognition of same-sex unions can be specified in terms of public reasons because all essentially appeal to controversial comprehensive doctrines about sexual value. At first blush this claim is no doubt surprising. Rawls himself was a liberal and his passing remarks about same-sex unions suggest that he found them unproblematic. Furthermore, the few discussions of same-sex marriage in the voluminous secondary literature on Rawls of which I am aware extrapolate Rawls's casual remarks and conclude that political liberalism allows legal recognition of same-sex marriage, and some go further and argue that political liberalism demands it.[34] It is important to recall, however, that even by his own lights Rawls's profession of liberalism as a comprehensive doctrine includes commitments to moral positions which a "purely politically liberal" conception of justice would circumscribe from the public sphere, and the recommendation of same-sex marriage may be just one of those moral positions.

If both the comprehensive liberal arguments for same-sex marriage and the natural law arguments against it violate the strictures of public reason, it is natural to conclude that marriage, as a legal institution, should be disestablished entirely.[35] Perhaps there is no publicly reasonable justification for the state to be in the marriage business to begin with. If this is so, then marriage should be reconceived as a private form of voluntary association available to those who seek it on whatever terms they decide, but it should be detached from the public concerns of the state. Rawls, however, is quite explicit that the politically liberal state *must* be in the marriage and family business, and his reasons for affirming the state's interest are sound. His treatment of the family and the state's interest in it changed over the course of his career, however, and it is worth tracing his development.

Rawls wrote two big books defending different versions of his theory of "justice as fairness," *A Theory of Justice* (1971) and *Political Liberalism* (1994).[36] By his own admission the former book fails by the standard of the latter, since *A Theory of Justice* depends upon a comprehensive liberal doctrine about human good. By the time Rawls published *Political Liberalism* in 1994, the

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[33] RAWLS, *supra* note 14, at Iiii. *See also* Frank Michelman, *Rawls on Constitutionalism and Constitutional Law in* THE CAMBRIDGE COMPANION TO RAWLS 413-414 (Samuel Freeman ed., 2003) ("[I]n a company of free and equal persons divided by a plurality of comprehensive ethical views, it cannot be reasonable to allow any subgroup a privilege of using political authority to shape the basic structure [of political society] in accordance with that group's special ethical convictions at the cost of equal citizenship for all; that 'neutrality of aim' is the only reasonable approach to adjusting the claims to liberty of equally respected citizens whose ethical convictions differ and sometimes collide; that, in sum, a morally defensible answer to the problem of political legitimacy in modern free societies does not come without its price, and the price is the constraint of public reason....").

[34] *Id.*

[35] *See* TAMARA METZ, *supra* note 11; Véronique Munoz-Dardé, *Is the Family to be Abolished Then?*, PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (1998).

[36] The latter was further developed in JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001).

American "culture wars" were in full swing and an account of justice like the one in *Theory*, which relied upon prior acceptance of controversial liberal moral ideals such as individual autonomy and economic egalitarianism, failed to address what Rawls now took to be the central problem of political philosophy for modern western democracies, viz., securing agreement among reasonable people about principles of fair political cooperation in order to ensure a stable and just democratic society.[37] The historical context of Rawls's work is suggestive: *A Theory of Justice* was published two years before the U.S. Supreme Court handed down *Roe v. Wade*,[38] which stoked the culture wars, and *Political Liberalism* was published two years after *Planned Parenthood v. Casey*,[39] which aggravated them further.

Although *A Theory of Justice* relied too heavily upon comprehensive liberal moral doctrines, there is a different sense in which it was not comprehensive enough in its treatment of the basic structure of social life. As critics pointed out, Rawls neglected both the role of the family in sustaining a just society over generations and the possible application of principles of justice *within* the family itself. With respect to the first issue, Annette Baier points out that

> Rawls's sensitive account of the conditions for the development of that sense of justice needed for the maintenance of his version of a just society takes it for granted that there will be loving parents rearing the children in whom the sense of justice is to develop. "The parents, we may suppose, love the child, and in time the child comes to love and trust the parents." Why may we suppose this? Not because compliance with Rawls's version of our obligations and duties will ensure it. Rawls's theory, like so many other theories of obligation, in the end must take out a loan not only on the natural duty of parents to care for children (which he will have no trouble including) but on the natural *virtue* of parental love (or even a loan on the maternal instinct?). The virtue of being a *loving* parent must supplement the natural duties and the obligations of justice, if the just society is to last beyond the first generation.[40]

In *Political Liberalism* Rawls acknowledges this problem and attempts to correct it by incorporating the family into his account of the basic structure of

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[37] The question which POLITICAL LIBERALISM attempts to answer is, 'How is it possible for there to exist over time a just and stable society of free and equal citizens who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?' (4). By contrast, A THEORY OF JUSTICE "explicitly attempts to develop from the idea of the social contract, represented by Locke, Rousseau, and Kant, a theory of justice…. *A Theory of Justice* hopes to present the structural features of such a theory so as to make it the best approximation to our considered judgments of justice and hence to give the most appropriate moral basis for a democratic society. Furthermore, justice as fairness is presented there as a 'comprehensive doctrine' (although the term 'comprehensive doctrine' is not used in the book) in which all the members of its well-ordered society affirm that same doctrine. *This kind of well-ordered society contradicts the fact of reasonable pluralism and hence* Political Liberalism *regards that society as impossible*." JOHN RAWLS, LAW OF PEOPLES 179 (2001) (emphasis added).

[38] 410 U.S. 113 (1973).

[39] 505 U.S. 833 (1992).

[40] Annette Baier, *What do Women Want in a Moral Theory?, in* VIRTUE ETHICS 267-68 (Roger Crisp & Michael Slote eds., 1997).

society and emphasizing the family's functional role in reproducing society over time.[41] Rawls also attempts to respond to the second allegation of neglect, often leveled by feminist theorists, that he gives an insufficiently radical scope to the principles of justice and so prevents reforming gender relations within the family. On this point Rawls more or less holds the ground he staked out in *Theory*.[42] Most discussion of Rawls's treatment of the family has centered on this second issue, viz., of justice applied *within* the family. In this essay I focus on the first.

III. THE POLITICAL FUNCTION OF THE FAMILY

In *A Theory of Justice* Rawls states, "[h]owever attractive a conception of justice might be on other grounds, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it."[43] A candidate conception of justice must be a conception of justice adequate to real human beings, and not to some merely imaginable rational creature. Although Rawls makes this point in terms of moral psychology, the point needs to be generalized, in light of Baier's criticism quoted above, in terms of sociology: that is, however attractive a conception of justice might be on other grounds, it is seriously defective if the principles of sociology are such that a "just" society fails to reproduce itself in an orderly way over time. This implication is precisely what Rawls comes to recognize in his later work. As he notes in *Justice as Fairness,* "the family is part of the basic structure [of society], the reason being that one of its essential roles is to establish the orderly production and reproduction of society and of its culture from one generation to the next."[44] Political responsibility for ensuring the orderly reproduction of society is not optional within Rawls's political liberalism. Unlike so many liberal theorists, Rawls in his later work attends to the social imperative of providing for society's future generations:

> a political society is always regarded as a scheme of cooperation over time indefinitely; the idea of a future time when its affairs are to be wound up and society disbanded is foreign to our conception of society. Reproductive labor is socially necessary labor. Accepting this, essential to the role of the family is the arrangement in a reasonable and effective way of the raising and caring for children, ensuring their moral development and education into the wider culture.[45]

The purely political liberal conception of justice bears an important, if limited, resemblance to Aristotelian justice, and it is worth fleshing out this comparison. Unlike Aristotelian justice, the purely political conception eschews grandi-

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[41] RAWLS, *supra* note 14 at 258. This latter discussion comes chiefly in the later essay, Rawls, *supra* note 15.
[42] *See* SAMUEL FREEMAN, RAWLS (2007) (describing how Rawls defended certain aspects of his early claims from later feminist criticisms).
[43] JOHN RAWLS, A THEORY OF JUSTICE 398 (2d ed., 1997).
[44] *Id.* at 162.
[45] *Id.* at 162-63.

ose metaphysical commitments about human nature and presupposes a basic separation between political and comprehensive values that is a given historical feature of modern pluralistic democracies. Like Aristotelian justice and unlike some perfectionist forms of liberal individualism, however, the purely political conception acknowledges the sociality of human nature by making orderly social reproduction by means of the family a desideratum for any candidate theory of justice.[46] Thus political liberalism presupposes a non-trivial but "thin" moral psychology and sociology of human nature.[47]

Political liberalism's presupposition of a certain moral psychology and sociology does not compromise its commitment to neutrality as an ideal. It is a common misunderstanding to think that because political liberalism is anti-perfectionist, then its "neutrality" purports to go all the way down, as it were, and implies being neutral about neutrality itself. On the contrary, political liberalism can take its own side in an argument (*pace* Robert Frost) because political liberalism entails a *moral* commitment to neutrality—or better, a moral commitment to impartial regard for citizens and their reasonable comprehensive doctrines. This is why Stephen Macedo, for example, prefers to contrast neutrality with public reason:

> Neutrality builds on principles that are central to liberalism, but for them it erects an excessively strong ban on judgments about human ideals. Liberals properly deploy reasons that can widely be seen to be reasonable, and liberal believe in respect for all those who pass the threshold requirements of reasonableness. Liberals resist paternalism, and minimize interference with people's choice. These do not, however, add up to neutrality. Liberal restrictions on the reason that can be offered to support government actions are not strict enough to constitute a commitment to neutrality.[48]

Rawls himself tended to avoid the idiom of neutrality precisely to discourage the misunderstanding that political liberalism purported to be free from moral commitments; it doesn't. Given political liberalism's manifest commitment to the moral ideal of equal citizenship, therefore, the moral commitments implicit in

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[46] Just as certain forms of perfectionist liberalism echo Plato's radical proposals in the REPUBLIC to abolish the family, so Rawls's neutralist liberalism seems to echo Aristotle's criticism of Plato's proposal. In the POLITICS Aristotle argues, "…everybody is more inclined to neglect something which he expects another to fulfill; as in families many attendants are often less useful than a few. Each citizen will have a thousand sons who will not be his sons individually, but anybody will equally be the son of anybody, and will therefore be neglected by all alike…. Nor is there any way of preventing brothers and children and fathers and mothers from sometimes recognizing one another; for children are born like their parents and they will necessarily be finding indications of their relationship to one another". THE COMPLETE WORKS OF ARISTOTLE 1262a 1-20 (Jonathan Barnes, ed. 1984).

[47] *See* RAWLS, *supra* note 14, at 86-88. For a further treatment of the need to press Rawls's political conception of the person in an Aristotelian direction, see Martha C. Nussbaum *The Future of Feminist Liberalism* in 74 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION at 47 (Nov., 2000).

[48] STEPHEN MACEDO, LIBERAL VIRTUES, 262-3.

political liberalism's prerequisite moral psychology and sociology are unproblematic.

Political liberalism's thin moral psychology and sociology bears similarities to the notion of natural necessity that H. L. A. Hart deploys in *The Concept of Law.*[49] Considering Hart's discussion is instructive for clarifying the circumscribed but essential role of human nature as a foundation of political liberalism.[50] Hart isolates and contrasts two concepts of law: a wide concept, which includes any valid norm of a legal system, and a narrow concept, which includes only those legal norms that are just and morally admirable. Hart is a legal positivist whose task is to develop a jurisprudence *qua* descriptive sociology of the wide concept of law. Even so, the wide concept of law inevitably includes a "minimal moral content," given certain natural necessities of social life for human beings associated together. Hart identifies six truisms about human life and community: human vulnerability, approximate equality, limited altruism, limited resources, limited understanding and strength of will. These natural facts "afford a *reason* why, given survival as an aim, law and morals should include a specific content," because "without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other."[51] These truisms about human life correspond roughly to the basic human needs that Rawls addresses under the rubric of primary goods.

Political liberalism provides a specifically "political understanding of what is to be publicly recognized as citizens' needs."[52] Accommodation of these needs, and thus access to primary goods, is necessary from infancy to adult citizenship, whatever one's ultimate conception of the good life. Thus Rawls argues:

> [t]o identify the primary goods we look to social background conditions and general all-purpose means normally needed for developing and exercising the two moral powers and for effectively pursuing conceptions of the good with widely different contents.[53]

Although neither Hart nor Rawls appeals to human nature in a morally thick sense, the fact that they do appeal to human nature is undeniable and necessary. Hart recognizes that any theory of law must conceive of human beings as natural-

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[49] H. L. A. HART, THE CONCEPT OF LAW 199-200 (2d ed., 1994) ("For it is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those [*natural necessities*] the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have").

[50] It is true that Rawls himself says that in political liberalism "[a]ccounts of human nature we put aside and rely on a political conception of persons as citizens instead." RAWLS, *supra* note 14, at 800. In the context of this remark, however, Rawls uses "human nature" to refer to all-things-considered comprehensive accounts of human nature, such as those accounts that figure in Thomism, Platonism, or Marxism. *See id.* at 800 n. 86. What I am calling a "thin moral psychology and sociology" is compatible with what Rawls means by "a political conception of persons as citizens."

[51] HART, *supra* note 49, at 199.

[52] RAWLS, *supra* note 14, at 179.

[53] RAWLS, *supra* note 14, at 75-76.

ly inclined towards survival, self-maintenance, and improvement in association with one another, because without these inclinations there would be no law to begin with. Nevertheless, as Hart insists—in a very Rawlsian tone—such an appeal to human nature "can be disentangled from more disputable parts of the general teleological outlook in which the end or good for man appears as a specific way of life about which, in fact, men may profoundly disagree."[54] Likewise Rawls claims that there is a specifically political understanding of primary human goods that provides the impetus for a political conception of justice, and without such primary goods there would be no content for a theory of justice. Marriage and the family are not themselves primary goods, because there are of course reasonable life plans that do not include getting married or having children, but marriage and the family are nevertheless part of society's basic structure.

Many Rawlsians, even if they were willing to concede that this is a plausible elaboration of Rawls's own views, might argue that the family should not be as central to political liberalism as Rawls himself makes it out to be; or they would argue that the state's interest in the family should be more than purely functional and the state should set out to transform the family in light of a substantive moral vision of equality.[55] Véronique Munoz-Dardé, for example, accepts political liberalism and the ideal of public reason, but argues, against Rawls, that:

> we should displace most of the *expectations* for securing material impartial care for the needs of individuals to the state. The aim is for affection not to be enforced (which is futile), nor assumed (for it fails). If political institutions fulfill their impartial role, the family can then be the realm of the genuinely affectional, not a fallible refuge which increases the vulnerability of the worst off.[56]

Munoz-Dardé proposes that "families" should be redefined as "any social unity in which a group of elders are primarily responsible and have primary authority over a *particular* group of children," and argues that marriage should be abolished as a legal category.[57] Her article is entitled "Is the Family to be Abolished Then?" which is a quotation from *A Theory of Justice*, where Rawls himself answers the question negatively. Although Munoz-Dardé's nominal answer to this question is also negative, she rejects the fanciful alternative of mandatory state-administered orphanages so tepidly and redefines "family" so thoroughly that her conclusion is tantamount to abolishing the family in all but name. Her argument here and in a similar article is worth evaluating, firstly, because it addresses our primary concern, which is the justice *of* the family and not merely justice *within* the family, and secondly, because Munoz-Dardé's argument betrays a number of substantive and methodological flaws that vitiate attempts to

[54] HART, *supra* note 49, at 193.
[55] There is admittedly some ambiguity in Rawls's treatment of the family as it develops from A THEORY OF JUSTICE to POLITICAL LIBERALISM. In the former the parties to the original position are 'heads of households'.
[56] Munoz-Dardé, *supra* note 35 at 55.
[57] Munoz-Dardé, *supra* note 35 at 44.

deploy a Rawlsian framework to justify radical transformations of marriage and the family.[58]

Munoz-Dardé purports to show how a "form of contractualism more individualistic than Rawls's would do better at addressing the concerns about justice and the family raised by feminist theorists, and would also compel us to be more egalitarian."[59] This can be achieved, she argues, by retooling the original position within which parties to the social contract deliberate over principles of justice. If parties within the original position are defined merely as individuals, and never as representatives of households as Rawls himself defines them in *A Theory of Justice*,[60] and furthermore if those individuals are shorn of any knowledge about or sentimental ties to family members, then the principles of justice produced by this decision procedure would be more radically egalitarian.

There are liberal theories, feminist or otherwise, that are of course more individualistic and more egalitarian than Rawls's political liberalism, and no doubt Munoz-Dardé is correct on the narrow point that by alterations to the original position, Rawls's political liberalism could be modified in this direction. This point hardly amounts to an objection against Rawls's project as it stands, however, because the suggested modification fails even to engage with the distinctive aim of properly *political* liberalism. That aim is to provide a *noncomprehensive* and purely political conception of justice that can be agreed to in a principled fashion by people who disagree about the ultimate aims of life, but who live together in a democratic society. By arguing that the original position should be packed with more controversial assumptions based on individualistic and egalitarian moral ideals, Munoz-Dardé undermines the consensus-building purpose of the social contract methodology and plays into the hands of Rawls's antiliberal critics.

Conservative and Marxist critics alike have long maintained that the original position is an elaborate sham whose real function is to disguise the bourgeois liberal assumptions of justice as fairness, which would never gain assent if Rawls argued for them openly.[61] Munoz-Dardé's modifications of the original position, however attractive they might be to holders of liberal comprehensive doctrines, would simply validate the conservative and Marxist suspicions. As I mentioned above, Rawls came to realize that even the version of justice as fairness that he proposed in *A Theory of Justice* was too sectarian for a pluralistic democracy, and so he tried to restate justice as fairness in terms accessible to all reasonable citizens without appealing to a comprehensive liberalism. This greater epistemic humility, which contrasts with the ambitious comprehensive philosophies of earlier liberals like Mill and Kant, is not a form of moral skepticism on Rawls's part,

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[58] The very similar paper is Véronique Munoz-Dardé, *Rawls, Justice in the Family, and Justice of the Family*, 48 PHILOSOPHICAL QUARTERLY 335 (July 1998).
[59] *Id.* at 335.
[60] RAWLS, *supra* note 37, at 128-29.
[61] *Cf.* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1995); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*,106 YALE LAW JOURNAL 2475(1996-7) ; ROBERT PAUL WOLFF, UNDERSTANDING RAWLS: A CRITIQUE AND RECONSTRUCTION OF A THEORY OF JUSTICE, (1977).

but a response to the historically demonstrable "burdens of judgment" in moral and political matters, which is a fact of the Western democratic inheritance.[62] Thus Rawls says:

> *A Theory of Justice* hopes to present the structural features of such a theory so as to make it the best approximation to our considered judgments of justice and hence to give the most appropriate moral basis for a democratic society. Furthermore, justice as fairness is presented there as a "comprehensive doctrine" (although the term "comprehensive doctrine" is not used in the book) in which all the members of its well-ordered society affirm that same doctrine. This kind of well-ordered society contradicts the fact of reasonable pluralism and hence *Political Liberalism* regards that society as impossible.[63]

Munoz-Dardé's proposed modifications to the original position with respect to the family would contradict the fact of reasonable pluralism even more egregiously than the first version of justice as fairness from *A Theory of Justice,* which Rawls himself came to reject. Munoz-Dardé's argument is less a sympathetic critique of Rawlsian political liberalism than simply an alternative, perfectionist form of liberalism grounded in a particular comprehensive doctrine.

Stephen Macedo, unlike Munoz-Dardé, has offered an argument that emends Rawls' account while agreeing that the family should play a central role in political liberalism. The state should promote marriage and the family, he says, with the conviction "that encouraging people to make deeper and more stable commitments than they might otherwise do will be good for them and for society, and that seems [publicly] reasonable."[64] At this level of generality, he acknowledges common ground with conservative natural law theorists about the legitimate state interest in the family. But Macedo goes on to argue that natural law theory's narrower conception of marriage and the family violates public reason by relying upon further philosophically controversial assumptions. He reasons that if "incentives to form relatively stable commitments are good for straight people, then they may be good for gays and lesbians as well."[65] Therefore, Macedo claims that promotion of same-sex marriage should be part of the general state interest in ensuring marital and familial stability.

Macedo's argument fails because it relies upon the assumption that homosexual sexual relationships are intrinsically valuable. Even if this is true, to premise state action upon its truth violates public reason, and it is the mirror image of the natural law argument against same-sex marriage, which is premised upon the truth of *its* claims that heterosexual marriage is the intrinsically valuable expression of sexuality. As David Estlund puts it, "... Macedo's reasons for state action [to promote homosexual unions] are simply the value of the form of life the ac-

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[62] There are of course doubts that may be raised about Rawls's conception of political history, but I'm bracketing these concerns.

[63] RAWLS, *supra* note 37 at 179 (emphasis added).

[64] Stephen Macedo, *Sexuality and Liberty: Making Room for Nature and Tradition? in* SEX, PREFERENCE AND FAMILY 94 (David M. Estlund & Martha C. Nussbaum eds., 1998). It is worth noting that Macedo's claim is so broad that, barring further qualifications that he does not make, it clearly justifies the state promotion of polygamy in addition to same-sex marriage.

[65] *Id.* at 93.

tion would encourage, just the sort of reasoning political liberalism seems to repudiate."[66] In spite of his professed sympathy with Rawls, therefore, Macedo ends up advocating a form of perfectionist liberalism at odds with the purely political conception of justice, and so like Munoz-Dardé, he fails to specify an argument for redefining marriage and the family in terms of public reasons. Elsewhere Macedo urges that the evaluation of arguments about legislation on matters of basic justice should restrict itself to "…the reasonableness of these arguments as contributions to our *public* deliberations about important and basic matters of political morality."[67] But Macedo violates his own recommendation.

Elizabeth Brake argues that Rawlsian political liberalism requires only "minimal marriage."[68] According to Brake, minimal marriage "institutes the most extensive set of restrictions on marriage compatible with political liberalism [and it implies] no principled restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that they be caring relationships."[69] Thus Brake thinks that any "network" of individuals should qualify as a civil marriage so long as they care for each other. Brake's argument is perhaps the closest to the one I am proposing here, because she tries to avoid relying upon controversial liberal ideals about sexual morality: "…it is unjust to define marriage legally on the basis of contested moral views regarding same-sex activity."[70] Brake also recognizes at some level that the state interests in orderly reproduction (i.e., marriage) and in the "caring networks" of adults are distinct.[71] But her argument nevertheless fails because she neglects to attend to the full implications of the family's role in political liberalism as the unit of orderly social reproduction over time, which is the role that distinguishes marriage and the family specifically from networks of caring generally. Brake also mistakenly inverts the burden of proof for justifying legislative policy. Because there is (allegedly) no "compelling reason" from social science data to think that her conception of "minimal marriage" would harm children, she thinks that minimal marriage is justified as a viable policy. Even if social science suggested that traditional marriage provided the *optimal* context for childrearing, Brake claims, "[s]ociety does not and cannot require that parents be ideally suited to maximize children's well-being (there would not be enough parents)."[72] This is a straw man. A politically liberal argument for traditional marriage need not assert that the state *require* parents to be ideally suited to maximize children's well-being. It only needs to promote and encourage people to choose for themselves to become parents within the context of traditional conjugal marriage, because this is the context that is optimal for children. (I will discuss this momentarily.) For her argument to be successful, Brake would have to show that "minimal marriage," as she conceives

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[66] Estlund & Nussbaum, *supra* note 64, at 164.
[67] Stephen Macedo, *Homosexuality and the Conservative Mind* at 264.
[68] Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302 (2010).
[69] *Id.* at 305.
[70] ELIZABETH BRAKE, MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW (2012) *at* 133.
[71] *See* BRAKE, *supra* note 70, ch. 6.
[72] *Id*. at 318.

it, is the form of relationship that specifically benefits children and therefore promotes orderly reproduction.[73] It isn't sufficient just to argue from ignorance by pointing to the absence of evidence that "minimal marriage" specifically harms children. The *absence* of evidence that a policy harms does not amount to the *presence* of evidence that a policy benefits.

Before addressing what for Rawls constitutes the moral development and education of children, it bears reminding ourselves of the obvious fact that children cannot be raised and cared for if they do not come to be in the first place. It is no more legitimate for political liberalism to take out a loan on a supposedly incorrigible "natural instinct" of people to conceive and bear children than it was for *A Theory of Justice* to take out a loan on the "maternal instinct" of women to nurture their children.[74] A necessary prerequisite, therefore, to families fulfilling their essential role of raising and caring for children in a reasonable and effective way is that families have sufficient numbers of children in the first place. There is a politically liberal state interest in ensuring that this happens. An insufficient average birthrate below population replacement levels for a long enough period would have a number of destabilizing effects on society, some of them grave, and it is worth mentioning some of these explicitly.[75]

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[73] In fact, the optimal status of family headed by a married mother and father, in comparison to merely cohabiting and unmarried parents, has again been reaffirmed in a recent federal study report to the US Congress on child abuse and neglect. *See* A.J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS–4): REPORT TO CONGRESS, EXECUTIVE SUMMARY 12 (2010) *available at* http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/index.html (noting that after having "classified children into six categories: living with two married biological parents, living with other married parents [e.g., step-parent, adoptive parent], living with two unmarried parents, living with one parent who had an unmarried partner in the household, living with one parent who had no partner in the household, and living with no parent... [t]he groups differed in rates of every maltreatment category and across both definitional standards. *Children living with their married biological parents universally had the lowest rate*, *whereas those living with a single parent who had a cohabiting partner in the household had the highest rate in all maltreatment categories. Compared to children living with married biological parents, those whose single parent had a live-in partner had more than 8 times the rate of maltreatment overall, over 10 times the rate of abuse, and nearly 8 times the rate of neglect*") (emphasis added).

[74] *See* William A. Galston, *Individualism, Liberalism and Democratic Civil Society in* THE ESSENTIAL CIVIL SOCIETY READER: CLASSIC ESSAYS IN THE AMERICAN CIVIL SOCIETY DEBATE 370 (Don Eberly ed., 2000) ("We cannot simply chant the mantra of diversity and hope that fate will smile upon us. We must try as best we can to repair our tattered social fabric by attending more carefully to the moral requirements of liberal public life and by doing what is possible and proper to reinforce them.").

[75] Such destabilization has occurred before in Western European social history; famously, during the late Roman period when imperial officials constantly tried unsuccessfully to encourage the Roman governing classes to have enough children to sustain their population levels. Harvard sociologist Carle C. Zimmerman chronicled how three basic family structures have appeared in different periods in Western history: the quasi-tribal "trustee family" of ancient Greece which re-emerged during the political and social instability of the early medieval period after the Roman collapse, the "domestic family"

Since the early twentieth century there has been a revolution in the economics of childbearing.[76] From a social perspective, children are a capital asset. Without sufficient children, society comes to an end. For most of history children were also material assets for the parents who had and reared them, so that the huge opportunity cost of parenting was more than offset by the investment in the children themselves. Before the early twentieth century it was easy for adults to see the clear economic benefits in having children. In 1776 Adam Smith estimated that in colonial America, "the labour of each child before it can leave [its parents' house] is computed to be a hundred pounds clear gain to them." Even as late as 1899, a child's economic contribution to his parents, if he stayed at home until age 18, was estimated at $599.95.[77] Parents also saw their opportunity costs in having large families as investments in their security in old age, since by having many children parents could ensure that they would be cared for when they themselves eventually became weak or ill.

Although today children remain necessary assets to society, they no longer yield material returns, either in monetary or security value, to their parents. As early as 1938 the economist Henry C. Simmons could argue, "it would be hard to maintain that the raising of children is not a form of consumption on the part of the parents." Indeed, by 1982 the economist Laurence Olson pointed out, "in purely monetary terms, couples would be better off putting their money in a bank as a way of saving for their old age," rather than incurring the costs of childrearing. If most people took Olson's advice, the consequence would of course be disaster. Not only would society's future disappear, but the viability of the present generations would also be destroyed, because present economic viability assumes future generation-linked cycles of production and investment. Moreover, the availability of socialized pension systems creates a further free rider problem. Socialized pension systems tend to require growing numbers of workers and/or continual increases in productivity because politicians tend to favor increasing present payouts at the cost of future debt. So although socialized pension systems need large young generations, adult individuals are "better off" materially if they opt not to have children, since they can still draw their benefits regardless of whether they support the broader system by having children themselves. Thus they can externalize the costs of their growing old onto other people whose having children sustains the system.[78]

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which arose in the early modern period as a result of the social stability and control introduced by strong ecclesiastical and civil institutions, and finally the "atomistic family" which emerged in force during the nineteenth century as a result of urbanization and liberalized social and religious *mores*. *See* CARLE C. ZIMMERMAN, FAMILY AND CIVILIZATION (1947).

[76] The following draws upon Rolf George, *On the External Benefits of Children in* KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY (D. T. Meyers et al. eds., 1993).

[77] *Id.* at 209. (The 1899 estimate is from an Indiana jury in a wrongful death case).

[78] Someone might raise the problem of overpopulation. First, it is not clear that this really is a problem, given present estimates of global population and productivity, as against the alarmist and false predictions in the 1970s and 80s. In any case, Rolf George has made a

Recent estimates about the financial costs of childrearing are bracing. In 2007 the estimated cost of raising a child from birth through age 17 in the United States, *excluding* the price of a college education, was $204,060.[79] In constant 2007 U.S. dollars that cost was a three percent increase from 1995 (at $197,709), whereas during that same period the average income for husband-wife families remained static. Furthermore, during that same time period the additional average cost of an in-state, public college increased by forty percent, to $11,963 from $8,562 in constant 2007 dollars. Philip Longman argues, "[w]ithout the multimillion-dollar liability of children, even young couples of comparatively modest means can often afford big-ticket luxury items. These might include a fair-sized McMansion, two BMWs, and regular vacations to the Caribbean, all of which could easily cost less than raising 2.1 children."[80] The Department of Labor estimates that adults who are not raising children have on average 500 additional hours of leisure time each year compared with adults who are raising children.[81]

From an economic perspective, therefore, parents incur tremendous, uncompensated expenses and opportunity costs, yet having and rearing children remains a socially necessary task. Liberal western *mores*, a market economy, and the social welfare state create a massive economic externality in which childbearing families confer an uncompensated and unintended benefit on the childless.[82]

Socialized pension systems have become integral to all advanced democratic nations and their maintenance presupposes sufficiently large young generations. A persistently low birthrate would endanger socialized pension systems, and any consequent benefits reduction or (more drastically) system collapse would have a disparate impact upon the retired, disabled, and poor who depend principally upon the support of such systems. Western Europe appears to face just this threat since its average birth rate has dropped well below replacement levels and at present there is no indication of a significant reversal. Asia is threatened by the same prospect.[83] The population situation in the United States appears to be less threatening because the birthrate remains at replacement level.

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persuasive argument against the relevance of overpopulation to any given nation's orderly (self) reproduction over time. *See* George, *supra* note 76, at 215.

[79] 2007 dollars calculated using the Bureau of Labor Statistics CPI Inflation Calculator *available at* www.bls.gov/data/inflation_calculator.htm; Mark Lino, U.S. DEP'T OF AGRIC., CTR. FOR NUTRITIONAL POL'Y & PROMOTION, *Expenditures on Children by Families* (2007) *available at* http://www.cnpp.usda.gov/Publications/CRC/crc2006.pdf.

[80] PHILIP LONGMAN, THE EMPTY CRADLE: HOW FALLING BIRTHRATES THREATEN WORLD PROSPERITY AND WHAT TO DO ABOUT IT 82 (2004).

[81] U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *American Time-Use Surveys* (June 2008) *available at* http://www.bls.gov/news.release/archives/atus_06242009.pdf.

[82] These facts undermine an argument for same-sex marriage made by Laurence Drew Borton. *See* Lawrence Drew Borton, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUMBIA L. REV. 1089 (2002) (arguing that United States case law shows that the historic state interest in marriage was not procreation, but simply preventing sexual activity outside of marriage). Even if Borton is correct, which is not evident, there may be a *new* state interest in marriage that arises from present conditions.

[83] See Nicholas Eberstadt, *Demographic Trends in Northeast Asia: Changing the Realm of the Possible*, FAR E. ECON. REV. (May 2007).

Low birthrates lead to a dearth of productive workers and governments often try to compensate for this by encouraging large-scale immigration (or "guest worker" programs that have amounted to de facto immigration), which leads to another potentially socially destabilizing effect. Immigration is not a principled solution to society's orderly reproduction over time. From the perspective of political liberalism, there is certainly nothing suspect about immigration as such. However, immigration cannot reliably fill the population gap when the family fails to provide the socially necessary labor of reproduction. Immigration is first of all not a sustainable means of social reproduction since the number of possible immigrants is finite and subject to extrinsic contingencies, since any given country has very little control over whether, when or how many aliens will in fact immigrate. Furthermore, large-scale immigration from nonliberal societies could threaten to undermine the public political culture, which embodies the requisite principles of reciprocity and mutual respect. Not every conceivable or actual comprehensive doctrine can participate in the reasonable overlapping consensus. It is crucial to note that for Rawls:

> [t]he dualism in political liberalism between the point of view of the political conception and the many points of view of comprehensive doctrines is not a dualism originating in philosophy. Rather, it originates in the special nature of democratic culture as marked by reasonable pluralism.[84]

It is certainly possible that through significant unacculturated immigration a democratic culture once hospitable to the ideals of political liberalism could become marked by an *unreasonable* pluralism.[85] Rawls requires that "members of the community have a common sense of justice and they are bound by ties of civic friendship," but substantial illiberal minorities could break such ties.[86] The point here is not to argue about the empirical question of whether or not such destabilizing immigration actually obtains anywhere today.[87] Rather, it is simply to flesh out the implications of Rawls's recognition that a politically liberal pluralistic democracy must ensure a *sustainable* arrangement of social reproduction *by means of the family*, and not rely parasitically on fickle immigration trends for support. Political liberalism requires that "[c]itizens must have a sense of justice and the political virtues that support political and social institutions." Therefore, "[t]he family must ensure the nurturing and development of such citizens in appropriate numbers to maintain an enduring society."[88] The concept of sustainability receives much attention today in environmental ethics and public policy. Rawls recognized that sustainability should apply to our treatment of *human* political ecology just as much as to natural ecology. Indeed, Rawls emphasizes that in principle, "[n]o particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a political conception of justice so long as it is

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[84] RAWLS, *supra* note 14, at 23.
[85] *Cf.* Philip Longman, *The Return of Patriarchy,* FOREIGN POL'Y (Feb. 17, 2006).
[86] RAWLS, *supra* note 43, at 470.
[87] Some social commentators from the left and the right have argued that this is in fact the case with Western Europe today. *See, e.g.,* BRUCE BAWER, WHILE EUROPE SLEPT (2007); Stanley Kurtz, *Demographics and the Culture War*, 129 POL'Y REV (Feb. 2005).
[88] JOHN RAWLS, COLLECTED PAPERS 596 (Samuel Freeman ed., 2001).

arranged to fulfill these tasks [of social reproduction] effectively and does not run afoul of other political values"[89] That is, for political liberalism the state interest in the family is purely functional, even if families in their own self-image are not, and so there is no antecedent political preference for either "traditional" or "liberated" family forms as such.[90]

> 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. Accordingly, that interest would be improperly specified.[91]

But as I will show in the next section, that interest can be *properly* specified. The state has a state interest in monogamy and against same-sex marriage, not because it need claim that one is intrinsically valuable and the other is not, but for the sake of the orderly reproduction of society. The appeals to the *moral value* of monogamy as such and the *moral value* of same-sex unions as such both equally reflect comprehensive doctrines and are therefore illegitimate within political liberalism.

At any rate, there are further reasons why it is insufficient that there simply *be* enough young workers to support the old; it is socially ? important for many people, if not all, to have children of *their own*.[92] When people have children of their own, they forge intergenerational ties of reciprocal concern. Adult generations become better able to absorb the disruptive effects of technological development and consequent increases in economic productivity that are persistent features of modern life. Technological change that renders one's own lifelong craft or profession obsolete can be borne more easily when that obsolescence is seen to benefit one's *own* children in the long run. Without the personal affective ties to future generations that having children establishes, an adult is less likely to see his own interest as tied up in the long-term wellbeing of society. When this propensity is writ large across a society, then the relations between its generations are prone to become antagonistic, rather than cooperative, with the interests of the young pitted against the interests of the old.[93] It is well-known that family busi-

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[89] *Id*., at 163

[90] Samuel Freeman says, "The *primary function of the family* for Rawls—what makes it a basic social institution—has nothing to do with romantic love or even marriage between the natural or adoptive parents or caretakers of children. The family is rather regarded as a basic social institution since any society has to have some social structure for nurturing and raising its children. Without some kind of family formation, a society cannot *reproduce itself over time."* SAMUEL FREEMAN, RAWLS 237 (2007).

[91] Rawls, *supra* note 15, at 779.

[92] Cf. the study published by the National Marriage Project, a nonpartisan research partnership at Rutgers University (and now at the University of Virginia), BARBARA DAFOE WHITEHEAD AND DAVID POPENOE, LIFE WITHOUT CHILDREN: THE SOCIAL RETREAT FROM CHILDREN AND HOW IT IS CHANGING AMERICA (2008) *available at* http://www.virginia.edu/marriageproject/specialreports.html.

[93] *Cf.* Rachel Donadio, *Europe's Young Grow Agitated over Future Prospects*, N.Y. TIMES. Jan. 2, 2011 at A6, *available at* http://www.nytimes.com/2011/01/02/world/europe/02youth.html?pagewanted=all

nesses provide invaluable social stability in times of economic and political turmoil.[94]

More generally, however, even during peaceful periods, individuals' membership in intergenerational families serves to lengthen their range of self-interest into the future and to moderate the narrowly consumptive mentality that market economies encourage. As Alexis de Tocqueville recognized, when "family spirit" is a strong force in one's life, then:

> [o]ne seeks to perpetuate and in a way to immortalize oneself in one's remote posterity. Whenever the spirit of family ends, individual selfishness reenters into the reality of its penchants. As the family no longer presents itself to the mind as anything but vague, indeterminate, and uncertain, each concentrates on the comfort of the present; he dreams of the establishment of each generation that is going to follow, and nothing more.[95]

Without children of one's own, then one loses a powerfully tangible reason to dream even about the next immediate generation, let alone more remote generations into the future. But the political community needs people to forgo present satisfactions for the sake of the well-being of remote future generations.

Children are needy and dependent beings; when they are raised outside of a stable family they put a tremendous material burden on the state, which must step in to care for them. Therefore, well-ordered families not only build up the social capital that liberal democracies rely upon to sustain social welfare programs such as socialized pensions, but they prevent the erosion of that capital by avoiding social dysfunction.

What, then, is the content of the moral development and education that families must provide to children once they are born? The principal responsibility of families within political liberalism is to educate children into mature citizens who can capably exercise the two basic moral powers, which are a shared sense of justice and a rational conception of the good (whatever particular eligible comprehensive doctrine that conception may embody). This responsibility of course includes providing basic care for physical health, nutrition, safety and intellectual development. As Samuel Freeman emphasizes, Rawls nonetheless

> sees this as consistent with parents raising their children within their own religion, and even with teaching them anti-liberal moral and religious views…. The reasons for this seem to be that Rawls, for reasons of religious freedom, association, and other basic liberties, did not want to give governments the power to intervene in within family life and impose a positive duty upon parents to bring up their children as morally autonomous beings.[96]

Requiring the government to impose this sort of positive duty would not be publicly reasonable, since "moral autonomy" as an ideal is part of controversial comprehensive doctrines of the good. *Whose* conception of moral autonomy? Saint Paul and John Stuart Mill, for example, would both nominally agree on

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[94] HAROLD JAMES, FAMILY CAPITALISM: WENDELS, HANIELS, FALCKS AND THE CONTINENTAL EUROPEAN MODEL (2006).
[95] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Vol. I, Pt. 1, Ch. 3 (2000). 49.
[96] FREEMAN, *supra* note 90, at 238.

"moral autonomy" as a goal, but they would of course fill out the ideal in very different ways: freedom in the truth of Christ versus freedom for experiments in living.[97] Both ideals, religious and secular, are illegitimate grounds for political action.

Rawls's functional role for the family within political liberalism might seem to some critics as perversely instrumentalizing. Is not the family, in whatever form it should take, an intrinsically valuable form of association whose significance is much more profound than any mere instrument for fabricating future citizens? In a word, the answer is *yes*—but this conviction is not in fact at odds with the Rawlsian position. No one can deny that the bonds of kinship are among the most intimate and meaningful relations in a human life, and it is within families that most people seek their happiness. Far from these truths being an objection to Rawls's functional treatment of the family, however, they in fact support it. It is precisely because the family is the locus of such profoundly intimate affective relationships that from the perspective of political liberalism the state should have a strictly limited interest in it.

First of all, the massive apparatus of the modern nation-state is too blunt and bureaucratic an instrument to entrust with regulating the complicated and emotionally fraught terrain of personal friendships, filial ties and domestic relations embodied in the family. To task the nation-state with brokering intimate personal associations is to give it a therapeutic mandate that it is incapable of managing. Secondly, friendship, kinship, and personal and affective relationships are not basic matters of political justice or constitutional essentials of a liberal regime. Rawls contrasts the state's publicly reasonable interest in the family's social reproductive function with the distinctive and non-public perspective of people *within* families.

> The public vs. non-public distinction is not the distinction between public and private. This latter I ignore: there is no such thing as private reason. There is social reason—the many reasons of associations in society which make up the background culture; there is also, let us say, domestic reason—the reason of families as small groups in society—and this contrasts both with public and social reason. As citizens, we participate in all these kinds of reason and have the rights of equal citizens when we do so.[98]

Followers of Rawls who ignore or downplay the centrality he gives to the family have difficulty making sense of this passage.[99] What Rawls seems to be saying is that the family has a dual rationale, which is explained from both internal and external perspectives. The external perspective captures the family's public and functional role of ensuring orderly reproduction. The internal perspective, which is the perspective of "domestic reason," captures the family's intrinsic significance to its members, considered from their vantage point as spouses, chil-

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[97] *Cf. Romans* 7; J.S. MILL, ON LIBERTY.
[98] RAWLS, *supra* note 14, at 220.
[99] *See, e.g.*, Munoz-Dardé, *supra* note 35, at 336-37 (dealing with the passage by imputing ambiguity and confusion to Rawls). She addresses this passage and related ones under the heading "Perplexing statements."

dren, and siblings, and not as citizens alone.[100] The family, along with other forms of social organization like churches, synagogues, mosques, clubs, and businesses, forms part of the "background culture" of a politically liberal society, as Rawls puts it. But in virtue of its additional public role, the family is unique among the social institutions of the background culture. Rawls marks this distinction by singling out and contrasting the "domestic reason" proper to the family with both the generic "social reason" of other institutions in the background culture and public reason of political life.

The centrality of the family does not mean that the autonomy of its inner life is absolute. In participating in the overlapping spheres of domestic, social, and public reason we "have the rights of equal citizens when we do so," Rawls reiterates.[101] J. S. Mill claimed that the Victorian-era family was a "school for despotism," which habituated people's characters in ways that undermined democracy; if sociological data could show the same to be true of present-day family, then, as Rawls asserts, "the principles of justice enjoining a reasonable constitutional democratic society can plainly be invoked to reform the family."[102]

In short, for Rawlsian political liberalism the family is semi-autonomous. It is accountable to the claims of political justice but at the same time it is not a creature of the state and has a defeasible sovereignty over a certain sphere of personal life. Indeed, analogous to the way in which political justice constrains possible family forms, so too "[t]he family," Rawls says, "imposes constraints on ways in which [equality of opportunity] can be achieved."[103] It has considerable range of discretion to raise and care for children as the parents see fit, provided it performs its functional role of inculcating in the children the two moral powers prerequisite to publicly reasonable citizenship. In *A Theory of Justice* Rawls asks, "[e]ven when fair opportunity (as it has been defined) is satisfied, the family will lead to unequal basic chances between individuals. Is the family to be abolished then?"[104] Rawls's answer is *no*. The family, as the institution defined by the task of society's reproduction, is a permanent feature of the basic structure of a well-ordered liberal democratic polity. The achievement of absolute equality, or any other political aspiration, which came at the cost of undermining the family would be a self-destructive and fleeting victory, since such a momentary gain could not be preserved or transmitted to future generations. To sacrifice the well-being of future generations in order to provide unsustainable benefits to the present strikes at society's integrity and is a failure of political rationality—a conception of justice as social suicide pact—because it is part of society's nature to be temporally extended across generations. Although radical restructurings of the

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[100] *Cf.* SCRUTON, *supra* note 21.
[101] RAWLS, *supra* note 88, at 598 (*quoted* in Freeman, *supra* note 90, at 240).
[102] *Id.*
[103] RAWLS, *supra* note 88, at 596. Thus some important recent judicial decisions are incompatible with the Rawlsian conception of the state interest in the family, because they conceive of marriage and the family as mere creatures of state discretion. For example, the Supreme Judicial Court of Massachusetts asserts: "Simply put, the government creates civil marriage." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 945 (Mass. 2003).
[104] RAWLS, *supra* note 43, at 448 (*quoted* in Freeman, *supra* note 90, at 242).

family may have a part in the politics of utopian perfectionism, liberal or otherwise, political liberalism prudently forgoes such ambitions.

IV. A PUBLICLY REASONABLE ARGUMENT FOR TRADITIONAL MARRIAGE

Given the Rawlsian account of the family's functional role sketched above, it is not difficult to frame an argument for traditional marriage in Rawlsian terms. A publicly reasonable argument for traditional marriage specifies the state interest in terms of sustainable procreation and cultivating in citizens the two moral powers, which are "a capacity for a sense of justice and for a conception of the good."[105] According to Rawls, a conception of the good is "a conception of what is valuable in human life," which is comprised "of a more or less determinate scheme of final ends, that is, ends that we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups and associations."[106] A conception of the good is "fully comprehensive if it covers all recognized values and virtues within one rather precisely articulated system; whereas a conception is only partially comprehensive when it comprises a number of, but by no means all, nonpolitical values and virtues and is rather loosely articulated."[107] In short, a conception of the good is the coherent narrative of a person's identity that he develops for himself.

A liberal democratic society needs sufficient children and it needs them to be educated. Therefore, a liberal democratic society needs families headed by two married parents who are the biological mother and father of the children, because such families are (a) intrinsically generative and (b) optimal for childrearing. In other words, sex between men and women makes babies; society needs sufficient babies; babies need moms and dads.[108] Every family arrangement in which children are raised need not and cannot conform to this pattern, but the state has a legitimate interest in encouraging people to form families that do so, which the state can accomplish by enshrining this conception of marriage in the law, as conferring unique social status, and promoting it with material benefits.

Why are traditional families intrinsically generative and what does this entail? Many viable forms of parenting partnerships are not generative. Consider, for example, an order of nuns who partner together to run an orphanage, or a

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[105] RAWLS, *supra* note 14, at 19.
[106] *See id.*
[107] *See id.* at 19-20.
[108] I paraphrase Maggie Gallagher. She argues that traditional heterosexual marriage "is about uniting these three dimensions of human social life: creating the conditions under which sex between men and women can make babies safely, in which the fundamental interests of children in the care and protection of their own mother and father will be protected, and so that women receive the protections they need to compensate for the high and gendered (*i.e.*, nonreciprocal) costs of childbearing." Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post*-Lawrence *World*, 23 QUINNIPIAC L. REV. 447, 451 (2004).

widower and his brother who are raising the children from the widower's marriage. These arrangements may be viable parenting partnerships, but they are not intrinsically generative, so they could not answer society's need for orderly reproduction over time. Traditional heterosexual marriage is intrinsically generative, because children characteristically result from sexual intercourse between a man and a woman in a statistically significant sense, and sexual intercourse is of course partly constitutive of marriage as a relation. In making this functional claim about heterosexual sex's generative character, I am not appealing to any controversial metaphysical biology about natural normativity in the way that natural law theorists or neo-Aristotelian virtue ethicists might.[109] Neither am I saying that every marriage does or should beget children. Rather, I am making an incontrovertible observation about a social fact, which has implications for the orderly reproduction of a liberal society.

Hart's work is again helpful here for making sense of this notion of social fact. In his analysis of law Hart notices that there are certain inescapable social facts about human nature, such as the persistent human desire for survival, which any social theory must acknowledge.[110] A theory need not affirm a metaphysical thesis that survival "is something antecedently fixed which men necessarily desire because it is their proper goal or end."[111] It may simply prescind from such ambitious assertions or denials altogether. Nevertheless, a fact such as the desire for survival "still has a special status in relation to human conduct and in our thought about it, which parallels the prominence and the necessity ascribed to it in the orthodox formulations of Natural Law." The necessity with which human beings desire survival is, as it were, political and not metaphysical necessity, to use the Rawlsian language.[112] What I am suggesting is that the procreativity of heterosexual couples is analogous to the human desire for survival; for the purposes of social theory, both facts are necessary features of a political conception of human nature. Just as Hart's analysis of law asserts that human beings *naturally* desire survival, and yet avoids contentious metaphysical claims, so too a Rawlsian analysis of marriage and the family will recognize that heterosexual

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[109] Although what I am claiming is not incompatible with Aristotelian ethical naturalism.

[110] HART, *supra* note 49, at 191, quotes Hume, who writes, "Human nature cannot by any means subsist without the association of individuals: and that association never could have place were no regard paid to the laws of equity and justice." David Hume, *Of Justice and Injustice*, in TREATISE OF HUMAN NATURE, III, ii.

[111] HART, *supra* note 49, at 192.

[112] Thus Hart writes, "For it is not merely that an overwhelming majority of men do wish to live, even at the cost of hideous misery, but that his is reflected in the whole structures of our thought and language, in terms of which we describe the world and each other. We could not subtract the general wish to live and leave intact concepts like danger and safety, harm and benefit, need and function, disease and cure; for these are ways of simultaneously describing and appraising things by reference to the contribution they make to survival which is accepted as an aim." *Id.* at 192. Likewise, with the procreativity of heterosexual intercourse.

unions are *naturally* procreative. In both these cases, the "nature" appealed to is political, not metaphysical.[113]

What about the implications of biotechnology? Some might object that the availability of effective contraception for heterosexuals and artificial gamete donation for homosexuals makes procreation a matter of voluntary choice, not a given feature of relationships that happen to have the biological complementarity that makes them naturally reproductive. It is true that contraception and artificial reproduction make it more rhetorically difficult for natural law theorists to make persuasive arguments that procreation is the unique proper function of sexual intercourse. But such arguments are anyway irrelevant to political liberalism. It remains a social fact that sex—even contraceptive sex—makes babies. Irrespective of access to contraceptives, it is a social fact that heterosexual relationships result in children. Consider some data.[114] The National Survey of Family Growth conducted a nationally representative survey of 10, 847 women aged between 15-44 years. It concluded that about one-third of births between 1990 and 1995 were not planned; 56 percent of births to unmarried women were unintended, as were 39 percent of births to divorced women and 19 percent of births to married women.[115] At least one parent did not initially plan to have a child in nearly one-third of births to married parents and three-fourths of the births to unmarried parents.[116] A study published by the Alan Guttmacher Institute, which is associated with the abortion and contraceptive provider Planned Parenthood, showed that 60 percent of women in the United States have had at least one unplanned pregnancy by the time they reach their late 30s, and nearly four out of ten women aged 40-44 have at least one unplanned birth.[117]

The normal woman who uses contraceptives continuously will have on average nearly two unplanned pregnancies over the course of her life.[118] The preg-

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[113] "In political philosophy one role of the ideas about our nature has been to think of people in a standard, or canonical, fashion so that they might accept the same kind of reasons. In political liberalism, however, we try to avoid natural or psychological views of this kind, as well as theological or secular doctrines. Accounts of human nature we put aside and rely on a political conception of persons as citizens instead," RAWLS, *supra* note 14, at 800.

[114] *See* Gallagher, *supra* note 108, at 454-56.

[115] J. Abma, et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth*, NAT'L CTR. FOR HEALTH STATS. 19 (1997), *quoted in* Gallagher, *supra* note 108, at 454.

[116] *Id.* at 28 (Table 17). Only 28 percent of the births to unmarried mothers were intended by both parents, while 70.4 percent of the births to married mothers were intended by both parents.

[117] Stanley K. Henshaw, *Unintended Pregnancies in the United States,* 30 FAMILY PLANNING PERSPECTIVES 28 (1998) (noting that 38.1% of women 40-44 years old have had at least one unplanned birth) (*quoted in* Gallagher, *supra* note 108, at 455).

[118] James Trussell & Barbara Vaughan, *Contraceptive Failure, Method-Related Discontinuation and Resumption of Use: Results from the 1995 National Survey of Family Growth,* 31 FAMILY PLANNING PERSPECTIVES 71 (1999) (*quoted in* Gallagher, *supra* note 108, at 455). This high pregnancy rate is a function of *actual* use of contraceptive methods, which is significantly less effective than *perfect* use. "The typical woman who

nancy rate for contracepting women varies dramatically among specific demographic groups. A cohabiting adolescent woman, for example, has a contraceptive failure rate of roughly 47 percent during her first year of contraceptive use; among married women who are aged 30 and older, the failure rate is 8 percent for 12-month use.[119] In sum, "[a]bout three million pregnancies in the United States (48%) were unintended in 1994. Some 53 percent of these occurred among women who were using contraceptives."[120] Although contraception lowers the odds that sex results in pregnancy, it does not alter the social fact that heterosexual relationships are generative, and this fact is just as important for political theory as the fact that human beings desire survival, and no more dubious.

The possibility of artificial gamete donation does not make homosexual relationships become generative. Rather, the possibility allows individuals of whatever sexual inclination to produce children without having sexual intercourse: a woman may have her egg fertilized from donor sperm, or a man can have a donor egg fertilized with his sperm and then gestated. Such a man or woman may or may not be involved in a homosexual relationship. In fact, the vast majority of people who produce a child through gamete donation are not gay or lesbian. It is typically single, married, or cohabiting heterosexuals who use gamete donation.

Therefore, the advent of gamete donation does not change the fact that relationships other than traditional heterosexual ones are non-generative, which means that neither does gamete donation provide a public reason for singling out some of the people who could use the procedure and empowering them to enter into civil marriage just because they happen to be involved in a homosexual relationship. For to do so would be to assume that homosexual relationships especially are intrinsically valuable (as the order of nuns or a widower and his brother, for example, are not), and this assumption is an illegitimate grounds for state action, because it violates public reason. There is an analogy between gamete donation and ordinary adoption. Both of these practices are available to anybody, whether or not he or she is a partner in a traditional heterosexual relationship or a non-traditional relationship. Neither practice, therefore, gives any reason for uniquely picking out homosexual relationships as a class from among non-traditional relationships generally, and privileging just those with eligibility for civil marriage.

There is a further problem with the practice of gamete donation from the perspective of political liberalism, which is a problem that arises independently from the same-sex marriage debate, and implies that the political imperative for orderly social reproduction over time could not be met by using the practice. As David Velleman has argued persuasively, gamete donation violates the rights of the children produced by it. I will re-state a publicly reasonable version of Velleman's argument momentarily.

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uses reversible methods of contraception continuously from her 15th to her 45th birthday will experience 1.8 contraceptive failures." *Id.*

[119] Haishan Fu, et al. *Contraceptive Failure Rates: New Estimates from the 1995 National Survey of Family Growth,* 31 FAMILY PLANNING PERSPECTIVES, 56 (1999) (*quoted in* Gallagher, *supra* note 108, at 455).

[120] Fu, *supra* note 119, at 56.

First, however, consider the second claim I made at the outset of Section III: families headed by two married parents who are the biological mother and father of their children are (b) the optimal structure for childrearing. This claim can be demonstrated in two ways: first, by making an empirical argument that children do best when raised by the mother and father who bore them; second, by making a philosophical argument that developing a conception of the good requires knowing your mother and father and the family history into which you are born. These two arguments are complementary, but largely independent.

The empirical argument is available elsewhere, and I can only summarize it here, and show how it can be framed in terms of public reason. According to Child Trends, a liberal think tank:

> [R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in step-families or cohabitating relationships face higher risks of poor outcomes…. There is thus value for children in promoting strong, stable marriages between biological parents…. [I]t is not simply the presence of two parents, … but the presence of two biological parents that seems to support children's development.[121]

Sara McLanahan and Gary Sandefur, sociologists from Princeton University and the University of Wisconsin, respectively, argue:

> If we were asked to design a system for making sure that children's basic needs were met, we would probably come up with something quite similar to the two-parent ideal. Such a design, in theory, would not only ensure that children had access to the time and money of two adults, it would also provide a system of checks and balances that promoted equality parenting. The fact that both parents have a *biological* connection to the child would increase the likelihood that parents would identify with the child and be willing to sacrifice for that child, and it would reduce the likelihood that either parent would abuse the child.[122]

Within political liberalism, childrearing should be deemed successful just to the extent it cultivates in children the two moral powers. A family headed by a married mother and father tends to provide better and more consistent access to primary goods. Recall that primary goods are comprised of a "political understanding of what is to be publicly recognized as citizens' needs…."[123] The content of these goods is morally thin (see Section II above) and may be derived

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[121] *See* Kristin Andersen Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?,* CHILD TRENDS RES. BRIEF 1-2, 6 (June 2002) *available at* http://www.childtrends.org/files/MarriageRB602.pdf; *see also* WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2008) *available at* http://www.princetonprinciples.org (summarizing research in a statement on marriage signed by various scholars across multiple disciplines).

[122] SARAH MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT 38 (1994).

[123] RAWLS, *supra* note 14, at 179.

from the "social background conditions and general all-purpose means normally needed for developing and exercising the two moral powers and for effectively pursuing conceptions of the good with widely different contents."[124]

The claim that children do best when reared by the married mother and father who bore them, like any empirical claim whatsoever, is of course contestable. When social scientists do contest it, however, they often mischaracterize what alternative sociological data would have to show in order to support specifically homosexual parenting, or polyamorous parenting for that matter. Only if conclusive social scientific evidence were to show that children do as well or better with two homosexual parents in comparison to two heterosexual parents, *and in comparison to two parents of the same sex who were not homosexual*, could the data be taken as evidence that grounded a publicly reasonable argument on behalf of homosexual marriage as such. Otherwise, studies that purported to show the benefits of homosexual parenting would really just show at best the benefits of having two parents of whatever sexual relation, because they would not control for parenting couples such as a widower and his brother, for example, who are neither homosexual nor husband and wife.

This mistake along with many others vitiates the force of the American Psychological Association's influential 2005 brief on lesbian and gay parenting. The brief asserts, "Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents."[125] But this assertion is extremely misleading, because the 59 studies cited in the brief do not really examine the "children of lesbian or gay parents" and furthermore they fail to use a stable and well-defined conception of "heterosexual parents" as a comparison class.[126] The studies overwhelmingly examine small, non-representative convenience samples of well-educated, wealthy, white lesbian mothers who live in cities on the East or West coast. The studies fail to investigate how children fare beyond adolescence, which precludes the studies from registering dysfunctions that typically arise in adulthood, and they evaluate children by documenting their *parents'* perceptions about the children's wellbeing, rather than evaluating the children themselves.

The studies also focus upon an extremely narrow range of outcomes for children. Thus they examine outcomes such as "sexual orientation," "behavioral adjustment," "self-concepts," and "sex-role identity," "sexual identity," "sex-role behavior," self-esteem, "psychosexual and psychiatric appraisal," and "socioemotional development," and "maternal mental health and child adjustment";[127] but they generally neglect to study the effects of lesbian or gay parenting on "intergenerational poverty, collegiate education and/or labor force contribution, serious

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[124] RAWLS, *supra* note 14, at 75-76.
[125] C. J. Patterson, *Lesbian and Gay Parents and their Children: Summary of Research Findings,* LESBIAN AND GAY PARENTING: AMERICAN PSYCHOLOGICAL ASSOCIATION (2005) 5-22, a*vailable at* http://www.apa.org/pi/lgbt/resources/parenting-full.pdf.
[126] *See* Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting,* SOCIAL SCIENCE RESEARCH, VOLUME 41, ISSUE 4, JULY 2012, Pages 735–751, *available at* http://dx.doi.org/10.1016/j.ssresearch.2012.03.006.
[127] *Id.* at 743.

criminality, incarceration, early childbearing, drug/alcohol abuse, or suicide that are frequently the foci of national studies on children, adolescents, and young adults…."[128]

Twenty-two of the 59 studies cited in the brief (44.1%) have no heterosexual parenting comparison group whatsoever, and of the remaining 33 studies that do have a comparison group, many do not use intact families headed by a married mother and father. At least 13 of the 33 studies used various *single-parent* families as the heterosexual comparison groups, usually single mothers who were divorced or never married. The remaining 20 studies ambiguously refer to their heterosexual comparison group as "mothers" or "couples" without identifying whether they are single, married, divorced, cohabiting, or a mixture of these.[129]

In summary, the Association's brief is a methodological mess, and whatever the implications of the studies it cites, they do not establish that children of homosexual parents "are not disadvantaged in any significant respect relative to children of heterosexual parents." Indeed, there is now evidence to the contrary, for the New Family Structures Study (NFSS) recently conducted by the University of Texas at Austin provides the first nationally-representative sample of adult children of homosexual parents, evaluated across a range of 40 important outcome measures.[130] The NFSS shows statistically significant differences between the adult children of intact biological families and of lesbian mothers on 25 of the 40 outcomes, with the adult children of lesbian mothers faring worse on factors such as need for psychiatric therapy, sexually transmitted infections, educational attainment, state welfare support, depression, drug use, criminality, infidelity, sexual victimization, and smoking.[131] The NFSS shows statistically significant differences between the adult children of intact biological families and of gay fathers on 11 of 40 outcomes, with the latter group worse off on 10 out of 11.[132] The adult children of gay fathers were better off in one respect: they reported a higher rate of voting in presidential elections than the adult children of intact biological families.[133]

The NFSS is not a longitudinal study and on its own does not establish a causal link between homosexual parenting and poor outcomes for children.[134] But

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[128] *Id.*
[129] *Id.* at 740-741.
[130] *Available at* http://www.prc.utexas.edu/nfss/.
[131] *See* Mark Regnerus, *How Different are the Adult Children of Parents who have Same-Sex Relationships? Findings from the New Family Structures Study*, SOCIAL SCIENCE RESEARCH 41 (2012) 752-770.
[132] *Id.*
[133] *See* http://www.familystructurestudies.com (for illuminating graphic comparisons on outcomes between various family structures).
[134] Mark Regnerus, the principal investigator of the NFSS is quite explicit about its limits. *See* REGNERUS, *supra* note 131, at 755 ("It is a cross-sectional study, and collected data from respondents at only one point in time, when they were between the ages of 18 and 39. It does not evaluate the offspring of gay marriages, since the vast majority of its respondents came of age prior to the legalization of gay marriage in several states. This study cannot answer political questions about same-sex relationships and their legal legitimacy.").

it does conclusively refute the claim that there are "no differences" between the childrearing of intact families headed by a mother and father and of homosexual couples. In any case, for the purposes of my argument here, I need to go beyond the narrowly social scientific, and to consider the second argument for the claim that children do best when reared by the married mother and father who bore them. This argument is philosophical and it is specific to political liberalism.[135] It is here that I will develop the work of David Velleman on family history and narrative identity. What I wish to contend is that biological kinship is among the conditions that are ordinarily necessary for someone to develop his narrative identity—that is, his conception of the good—and a just liberal regime will try to ensure that these conditions are obtained by enshrining heterosexual marriage in the law.

Velleman makes a powerful argument that biological kinship and family history are objectively valuable, so "other things being equal, children should be raised by their biological parents."[136] For human animals, forming a conception of the good involves engaging with a narrative that is already partly written by one's family history and biological kin. One's personal knowledge of one's origins:

> is especially important to identify formation because it is important to the telling of one's life-story, which necessarily encodes one's appreciation of meaning in the events of one's life. I [Velleman writes] began with the story of my Russian ancestors, whose search for something better I imagined to have culminated in my writing this essay. My family background includes many such stories, whose denouement I can see myself undergoing or enacting. … Of course, my own life provides narrative context for many of the events within it; but my family history provides an even broader context, in which large stretches of my life can take on meaning, as the trajectory of my entire education and career takes on meaning in relation to the story of my ancestors.[137]

Therefore, to have a child by a means that knowingly deprives him or her from having biological kin and a family history, e.g. through gamete donation, is to wrong the child gravely. Thus Velleman argues,

> our society has embarked on a vast social experiment in producing children designed to have no human relations with some of their biological relatives…. The experiment of creating these children is supported by a new ideology of the family, developed for people who want to have children but lack the biological means to 'have' them in the usual sense.[138]

A person's desire to procreate

> has been thought to ground a moral right to procreate only for those who are in a position to provide the resulting child with a family. According to the new ideology of the family, of course, virtually any adult is in a position to satisfy

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[135] *Nota bene* that by calling this argument "philosophical" I don't mean that it is entirely non-empirical.
[136] J. David Velleman, *Family History,* 34 PHILOSOPHICAL PAPERS 357 (2005).
[137] *Id.* at 375-76. For a lengthier account of narratives and narrative identity, *see* J. David Velleman, *Narrative Explanation,* 112 THE PHILOSOPHICAL REVIEW 1 (2003).
[138] Velleman, *Family History, supra* note136, at 360.

> this requirement, since a family is whatever we choose to call by that name. … [But] what counts as providing the child with a family in the relevant sense is a question that must be settled prior to any claim of procreative rights.[139]
>
> [Nevertheless] people who create children by donor conception already know—or already should know—that their children will be disadvantaged by the lack of a basic good on which most people rely in their pursuit of self-knowledge and identity formation. In coming to know and define themselves, most people rely on their acquaintance with people who are like them by virtue of being their biological relatives.[140]
>
> [G]amete donation … purposely severs a connection of the sort that normally informs a person's sense of identity, which is composed of elements that must bear emotional meaning, as only symbols and stories can.[141]

Velleman focuses his argument against the practice of anonymous gamete donation, but he recognizes that it also tells against deliberate single parenting and homosexual parenting as well, because such arrangements can "have" children only with artificially assisted reproduction through gamete donation.[142]

Empirical evidence supports Velleman's argument that forming one's own narrative identity, or one's conception of the good, requires engaging with one's inherited family history through one's parents and siblings.[143] Forty-five percent of gamete donor offspring agree with the statement, "The circumstances of my conception bother me." Forty-eight percent of donor offspring, as opposed to only 19% of adopted adults, agree, "When I see friends with their biological fathers and mothers, it makes me feel sad," and 53% of donor offspring agree, "It hurts when I hear other people talk about their genealogical background," whereas only 29% of adopted adults agree with this. After donor offspring reach adulthood, a full 57% agree, "I feel that I can depend on my friends more than my family," which is about twice as many as adults who were raised by their biological parents. When controlling for socio-economic factors, gamete donor offspring are significantly more likely than their peers raised by their biological parents to manifest delinquency, substance abuse, and depression. Gamete donor offspring are 1.5 times more likely to suffer from mental health

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[139] *Id.* at 374.
[140] *Id.* at 364-65.
[141] *Id.* at 363.
[142] *Id.* at 360 ("Creating children with the intention that they not have a custodial father, or alternatively a custodial mother, is potentially just as problematic as creating children divorced from their biological origins.").
[143] This is drawn from ELIZABETH MARQUARDT ET AL., INST. FOR AM. VALUES, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION, *available at* http://familyscholars.org/my-daddys-name-is-donor-2/. This study, which is the first of its kind, attempts "to learn about the identity, kinship, well-being, and social justice experiences of young adults who were conceived through sperm donation." The study collects a representative sample of 485 adults (18-45 years old) who said their mother used a sperm donor to conceive them and compares groups of 562 young adults who were adopted as infants and 563 who were raised by their biological parents.

problems. Yale psychiatrist Kyle Pruett argues that his research on artificial reproductive technologies shows that children conceived through gamete donation and raised without fathers "hunger for an abiding paternal presence," and this felt need that such children express mirrors the findings of work on divorce and single-parenthood.[144] These data of course do not show that it is impossible to flourish as the offspring of gamete donation, but they show that it is significantly more difficult.[145] There is quite generally considerable evidence for the importance to children of having biological ties with their parents *as* mother and father.[146]

Although this empirical evidence should be fairly uncontroversial, Velleman's argument, by contrast, is more controversial because it makes moral claims that implicate comprehensive doctrines about sorts of relationships that are intrinsically valuable in human life. If you fail to value your family history, and fail to take seriously the significance of your biological ties of kinship, then on Velleman's account you make a moral error in not attending to something worthy of respect.[147] Velleman's argument can be moderated, however, by weakening the conclusion. Weakening the conclusion has the effect of strengthening the force of the argument overall and making it defensible in terms of public reasons. Whereas Velleman wants to conclude that you ought to value biological ties, all I need to claim is that you ought to let other people decide for themselves whether to value their biological ties. In other words, for human beings this is an important and often life-defining decision to make, and no one should have the right to make this decision taken away from him. Therefore, one shouldn't preempt people's choice and foreclose access to an intimate sphere of human life for them by rendering them biological orphans through the

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[144] KYLE PRUETT, FATHERNEED 207 (2000); *see also* DAVID POPENOE, LIFE WITHOUT FATHER (1996).

[145] *Cf.* Velleman, *Family History, supra* note136, at 374 n.10 ("Children can of course be successfully reared by single mothers, if necessary. But children can be successfully reared, if necessary, in orphanages as well—a fact that cannot justify deliberately creating children with the intention of abandoning them to an orphanage. (Imagine a woman who would like to have the experience of conception and childbirth without incurring the responsibility for raising a child.) Just as the serviceability of orphanages cannot justify procreation in reliance on their services, so the serviceability of single parenting cannot justify the creation of children with the intention they grow up without a father of any kind.").

[146] *See, e.g.*, Kristin Anderson Moore, et al., *Marriage From a Child's Perspective*, CHILD TRENDS RESEARCH BRIEF at 6 (June 2002) ("Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage."); *id.* at 1-2 ("[I]t is not simply the presence of two parents, … but the presence of *two biological parents* that seems to support children's development."); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, & Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 890 (2003) ("The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents.") (*Quoted in* Gallagher, *supra* note 107).

[147] Velleman's argument rightly does not criticize ordinary adoption. Cases of adoption are those in which, "The child needs to be parented by someone, and it cannot or should not be parented by its biological parents, for reasons that outweigh any value inhering in biological ties." *See* Velleman, *supra* note135136, at 363.

manner of their conception.[148] The desires of adults should not trump the just claims of children, and yet this is just what gamete donation does.

Without the possibility of gamete donation, children cannot be produced within the context of homosexual unions or other non-traditional relationships. Even with gamete donation, children conceived from the procedure are thereby deprived of the conditions ordinarily necessary for them to develop conceptions of the good, regardless of the family structure present, because developing one's own conception of the good includes forming one's narrative identity in terms of inherited family history. Therefore, homosexual unions or other non-standard relationships cannot satisfy the procreative functional criteria of civil marriage in a politically liberal regime. Only traditional heterosexual marriages are intrinsically generative and optimal for childrearing. It's worth emphasizing that this argument could not spring from any special disregard for an intimate union *as homosexual*, because the problem lies with the kin-alienation caused by gamete donation, which is a procedure used much more frequently by heterosexuals and single people than by homosexual couples. Political liberalism has no problem with conceptions of the good that reject traditional sexual morality. Yet traditional marriage is the publicly reasonable marital form because it happens to be the arrangement that serves the social need for orderly reproduction over time.

Sally Haslanger has objected to Velleman's argument for the importance of biological kinship in forming one's own sense of identity.[149] She argues that children are not wronged by being intentionally conceived as biological orphans via gamete donation or by conventional "closed" adoptions. Haslanger agrees with Velleman that parents and society have an obligation "to provide the social bases for healthy identity formation" in children, but she claims there are "multiple routes to this result," so "the obligation is only to provide for one or another of these routes." Indeed, the optimal alternative may be to promote anonymous gamete donation, among other things, because the practice undermines the cultural importance granted to biological ties and "it may even be a moral duty to combat bionormativity."[150] I mention Haslanger's objection only to set it aside, however, because her counterargument is premised upon her own controversial comprehensive doctrines, so it is irrelevant to the modified, publicly reasonable version of Velleman's argument that I have proposed here. As Haslanger says, "I enthusiastically endorse the disruption of old ideologies of the family, and resist new ideologies that entrench and naturalize the value of biological ties."[151] In any case, throughout her analysis Haslanger carelessly runs together conventional adoption of children who have already been born and the "adoption" of donated gametes, which undermines the force of her objection against Velleman's original argument as well.

Even someone resolutely opposed to "old ideologies of the family" should concede that a publicly reasonable argument for the traditional conception of

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[148] *See id.* (explaining why nonexistence isn't relevant here).
[149] Sally Haslanger, *Family, Ancestry, and Self: What's the Relevance of Biological Ties?* 2 ADOPTION & CULTURE (2009).
[150] *Id.* at 114.
[151] *Id.* at 92.

marriage does not defend that conception *qua* traditional. It is irrelevant that the conception of marriage as an exclusive union of a man and woman, ordered toward the bearing and rearing of children, happens to be one that is traditional in many societies (but not all, of course). Neither does a publicly reasonable argument defend traditional marriage because it is the sort of relationship in which a constituent of some comprehensive doctrine is realizable, as natural law theorists have argued. There is an apt comparison with between a publicly reasonable defense of traditional marriage and of racial equality. The mid-twentieth century civil rights movement for racial equality in the United States was deeply Christian. Many participants in the movement were not Christians of course, and there were specifically Christian arguments that some segregationists made *against* racial equality. Nevertheless, Rev. Martin Luther King and other key leaders in the movement made Christian arguments in the public square for racial equality in a biblical idiom that echoed the arguments of the anti-slavery movement in the 19th century, which were even more confessionally Christian.[152] The reliance of Rev. King and others upon the controversial comprehensive doctrines of the Christian moral tradition did not violate the canons of public reason, however, because the case for racial equality could be re-stated in nonsectarian terms that expressed a purely political conception of justice.[153] The same is true for the traditional marriage movement. Much of this movement deploys specifically religious arguments in its defense, but this fact is irrelevant so long as some of these arguments can be re-stated in terms of public reasons, as I have done here.[154]

This point merits emphasis because liberal proponents of same-sex marriage habitually refer to the religious motivations of advocacy for traditional marriage in the United States as if this fact implies a *reductio ad absurdum* of any political argument in favor of traditional marriage. But if the Christian inspiration of the anti-slavery and civil rights movements did not render them incompatible with political liberalism, then neither should the Christian inspiration of the traditional marriage movement. Furthermore, the translation of the Christian defense of traditional marriage into public reasons is not a mere hypothetical possibility, because this is already what Christian politicians and activists have been doing in practice.[155] In 2004 Republicans in the US Senate proposed a Federal Marriage Amendment (FMA) to the Constitution, which would

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[152] On the Christian character of abolitionism *see* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 8 (1988); ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 72 (1980); AILEEN S. KRADITOR, MEANS AND ENDS IN AMERICAN ABOLITIONISM (1967). *See also* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 213 n.74 (2d ed. 1998).

[153] *See* Rawls, *supra* note 15. *But see* JEFFREY STOUT, DEMOCRACY AND TRADITION (2004) (arguing that Rawlsian public reason cannot successfully re-state the US civil rights movement independently of its Christian inspiration).

[154] It is worth noting that many of the arguments made in favor of same-sex marriage have been specifically religious.

[155] Of course they have done this without the sophistication or precision of an academic theorist, and they have been responding to political realities rather than being self-consciously motivated by Rawls' work.

have defined marriage as between one man and one woman. At the time, Frederick Liu and Stephen Macedo criticized the Republicans' "inarticulate gestures" in support of the FMA that failed to "amount to an adequate public justification for legislation." The senators' alleged inarticulacy about their deeper motivations, which stemmed more or less from traditional Christian natural law theory, "risk[ed] enshrining popular prejudices in the law," Liu and Macedo claimed.

> It may be true that Republican senators lack the philosophical training to defend the natural law teaching on marriage. But we believe that most politicians would have no interest in articulating it if they could…. On Capitol Hill, however, there is a conscious effort, including among Republicans, to avoid adopting the sort of "intolerant" and "moralistic" tone often associated with the "Religious Right." One Republican legislative assistant admitted that his senator eliminated references to Judeo-Christian values that appeared in the original draft of his floor statement on the FMA. Another Republican aid spoke of her senator as "a religious man" who took a position against gay marriage first and "put words to it" later—words that never mentioned the influence of his faith. And yet another staffer conceded that, while her Republican senator's religious views were important in determining his stance on same-sex marriage, the senator could not reveal them and risk appearing "homophobic" before his constituents.[156]

Liu and Macedo mention these facts as supposed evidence for the conclusion that Republicans in the US Senate employed a legislative strategy that was "cynical, opportunistic, and inconsistent with the equal respect and fairness that majorities owe to minorities if they are to govern legitimately."[157]

Of course the irony is that Liu and Macedo accuse the Republican senators of bad faith for doing precisely what Rawls prescribes citizens in a pluralistic democracy should do: filter their comprehensive doctrines through the deliberative screen of public reason before proposing grounds for legislation. The only inconsistency here is on Macedo's part, since he professes to be an advocate of public reason.[158] In fact, Liu and Macedo's description of the Republican legislative process gives a rather exemplary case study of public reason at work, which is all the more impressive because it involves a conservative political party, which is officially hostile to liberalism as a comprehensive doctrine, nevertheless adopting something like public reason as its *de facto* regulative ideal.[159] If Liu and Macedo's description of the process is accurate, the senators and their aides seemed to have examined their comprehensive doctrines about marriage and sexuality and sifted out the aspects of those doctrines that they thought were too controversial and sectarian, in order to make a publicly reasonable case for traditional marriage in terms that all their fellow citizens could accept. They

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[156] Frederick Liu & Stephen Macedo, *The Federal Marriage Amendment and the Strange Evolution of the Conservative Case against Gay Marriage,* 38 POL SCI. & POLITICS 213-14 (2005).
[157] *Id.* at 214.
[158] *See* my discussion *supra* at 20.
[159] Of course the senators must have also been concerned about their own electoral popularity.

knew that many of their fellow citizens could have reasonably rejected specifically Christian arguments for traditional marriage, so they circumscribed those arguments and put forward accessible ones instead. Why impute this process with bad faith? The Republican senators were doing just what Rawls argues that the Rev. Martin Luther King and his fellow civil rights activists could have done if their Christian case for racial equality were translated into public reasons. Indeed, Liu and Macedo go on to give even more conclusive evidence of the publicly reasonable character of the Republicans' legislative strategy in 2004:

> When asked whether their senator believe homosexual conduct to be immoral, no legislative aides could respond for none had ever discussed the matter. One legislative assistant even questioned whether the morality of homosexual conduct was in any way relevant to the same-sex marriage debate. Legislators and their staffs on Capitol Hill seem to lack both the capacity and the motivation to advance a morally perfectionist case against same-sex partnerships.[160]

Liu and Macedo assume that the Republicans were being incompetent natural lawyers who failed to grasp the dependence of natural law theory's criticism of gay marriage upon its criticism of homosexual conduct. But why not see the Republicans as well-intentioned, if unwitting, Rawlsians, whose lack of animus towards homosexuality is happily confirmed by Liu and Macedo's account? This interpretation fits plainly with the facts. Liu and Macedo's description of the legislative process in the Senate bolsters the publicly reasonable credentials of my argument for heterosexual marriage, because it shows that the actual partisan debate over marriage is already primed to be recast in politically liberal terms; the movement for the FMA in 2004 had already begun to do so.

Now I want to proceed by answering a more general objection to the argument thus far. Someone might respond to my conclusion: Isn't marriage about more than having kids? Marriage is about love too. Marital love can have real social and political implications beyond mere "affective feelings," since such love characteristically translates into real practices of caring—caring for the sick, infirm, and elderly in a way that impersonal institutions cannot. "Parenting partnerships" defined as exclusively procreative and childrearing would short-sell this caring love because it doesn't just arise within the context of having and raising children. Doesn't political liberalism have an interest in supporting it, not as merely "affective," but as the source of tangible practices of caring that benefit society?

This response is fundamentally correct. There are good public reasons within political liberalism for the state to promote and support relationships of tangible care between citizens, so long as some relationships aren't specially privileged by appeal to sectarian comprehensive doctrines. This issue connects with a central theme in Rawls' work, which is the social basis of self-respect. In *Theory* Rawls identifies self-respect as "perhaps the most important primary good."[161] He sees self-respect in two aspects: "First…it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life is

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[160] *Id.*
[161] RAWLS, *supra* note 14, at 386.

worth carrying out. And second, self-respect implies confidence in one's ability, so far as it is within one's power, to fulfill one's intentions."[162] Although a parenting partnership should no doubt include the relationship of caring that would foster the primary good of self-respect, it wouldn't suffice. Therefore, there seem to be good public reasons to include another legal category, which might be called a "domestic dependency relationship," which supported relationships of caring that were not also parental. It might include legal benefits like hospital visitation rights, certain tax credits, power of attorney, and so on. The eligibility criteria for this status could not be based on values stemming from sectarian comprehensive doctrines: two elderly sisters, a pastor and his associate, or a widower and his brother would be eligible. A homosexual couple too would be eligible for entry, not because they happened to be homosexual, but because they were friends who committed to care for and support one another.[163]

Proponents of same-sex marriage sometimes concede, for the sake of argument, that traditional heterosexual marriage may be the ideal context for raising children, but they point out that there is no reason why the law must always and only promote the ideal.[164] They infer, therefore, that even the optimality of a married mother and father's parenting wouldn't preclude redefining civil marriage to include couples who are homosexual.

It is true that the law needn't always and only promote the ideal, but same-sex marriage proponents are mistaken to think that this fact provides a toehold for their argument. Within political liberalism, the burden of proof for legislative justification lies with the proponent of any policy that would affect matters of basic justice and constitutional essentials. Heterosexual marriage meets this burden because the state's limited interest in ensuring orderly social reproduction is served by the optimality of a married mother and father's parenting. The contribution of specifically homosexual unions to orderly social reproduction is no different from the contribution of other, non-sexual affective unions, such as the ones mentioned in the previous paragraph. This is why a legal category for domestic dependency partnerships that is sex-neutral and orientation-neutral would meet all the publicly reasonable needs of non-standard families and real caring relationships. For example, there is at present no reason to think that a gay couple raising adopted children meets the need for orderly social reproduction any better or worse than, say, a widower and his bachelor brother who partner to raise the widower's children. The law would unreasonably privilege the gay couple and implicitly denigrate the widower and his brother if, on account of the former cou-

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[162] *Id.*

[163] Someone might argue that access to the primary good of self-respect itself directly justifies same-sex marriage, because the members of a homosexual couple might lack self-respect without the social affirmation that the status of civil marriage confers. This argument fails, however, because in general form it would lead to the absurd conclusion that anyone could petition for any kind of legal recognition that would promote his self-respect; thus a Catholic priest might petition to have his ordination recognized by the state as sacramentally valid, since without recognition he would be expressively harmed. Therefore, direct claims to promotion of self-respect, apart from the other criteria of public reason, cannot justify specific policy prescriptions.

[164] *Cf.* Liu & Macedo, *supra* note 156.

ple's sexual orientation alone, its relationship was distinguished by making it eligible for civil marriage. This is why public reason still excludes homosexual unions from civil marriage, even granting that there is no general imperative for the law to promote the ideal.

Even with a further legal category of domestic dependency relationships whose entry criteria are blind to controversial ideals about the worth of kinds of sexual intimacy, enshrining traditional marriage in the law may still have the consequence of reinforcing traditional sexual *mores* and perhaps even of discouraging the social acceptance of homosexuality and other nontraditional forms of sexual expression as normal. It would be foolish to deny this real possibility. These possible consequences do not undermine the publicly reasonable case for traditional marriage, however, because political liberalism only involves a neutrality of *justification* and *aim* for political conceptions of justice and not a neutrality of *effect*.

> It is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time; and it is futile to try to counteract these effects and influences, or even to ascertain for political purposes how deep or pervasive they are.[165]

It is impossible for every theory or application of justice to be neutral in its effects on the holders of different reasonable comprehensive doctrines. Even if this means that a politically liberal society will effectively suppress radical programs "to make every effort to disrupt the hegemony of the [nuclear family] schema"[166] and this schema's "heteronormative models of the family,"[167] this suppression is so much the worse for such programs, which anyway sit uneasily in a pluralistic democracy.

Although the argument I make here is novel because it is presented systematically in Rawlsian terms, its substance is not entirely unfamiliar. I have already shown how, according to Liu and Macedo's unintentionally revealing account, the 2004 Republican effort to pass the FMA in the US Senate was roughly in accord with public reason. Now I wish to highlight how the state's legitimate interest in ensuring orderly social reproduction appears to be an emerging theme of American jurisprudence, as reflected in the decisions of U.S. state and federal courts from 2000 to 2012 that deal with same-sex unions. During this period, eight decisions upheld the traditional definition of civil marriage.[168] One state court decision mandated "civil unions" that are equivalent in all but name to tra-

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[165] RAWLS, *supra* note 14, at 193.
[166] Haslanger, *supra* note149, at 115.
[167] *Id.* at 114.
[168] *See* Conaway v. Deane, 932 A.2d 571 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006) (en banc);Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004); Standhardt v. Superior Court ex rel. Cnty. of Maricopa, 77 P.3d 451 (Ariz. Ct. 2003), *reh'g denied,* 2004 Ariz. LEXIS 62, May 25, 2004.

ditional civil marriage.[169] Four decisions overturned traditional civil marriage and mandated same-sex marriage.[170] All eight decisions upholding traditional marriage accepted the defendants' appeal to the legitimate state interest in procreation and childrearing. Indeed, even in the New Jersey Supreme Court case that ordered civil unions, the majority notes:

> The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is not implicated in this discussion, the State has not articulated any legitimate public need [for attaching specific benefits and burdens to married heterosexual couples].

Thus, the Court implies that the State *could* have justifiably argued against homosexual civil unions if it had appealed to encouraging procreation or childrearing. The Connecticut Supreme Court mandated same-sex marriages in *Kerrigan v. Dept. of Public Health* (2008), but here too, the majority decision emphasizes:

> we note that the defendants expressly have disavowed any … belief that the preservation of marriage as a heterosexual institution is in the best interest of children, or that prohibiting same-sex couples from marrying promotes responsible heterosexual procreation….

Therefore, only three decisions out of thirteen rejected the state defense of traditional marriage when that defense was expressed in terms of promoting procreation and childrearing. Furthermore, the three anomalous cases—*Goodridge v. Dept. of Public Health* (Mass. 2003), *In re Marriage Cases* (Cal. 2008), and *Varnum v. Brien* (Iowa 2009)—were decided explicitly on the basis of moral comprehensive doctrines and violated the ideal of public reason.

V. Arguments for Same-Sex Marriage are Publicly Unreasonable

The 2003 *Goodridge* decision of the Supreme Judicial Court of Massachusetts ignited the present same-sex marriage debate in the United States. "Simply put, the government creates civil marriage," the Court declared, and then inferred that the state—via the mandates of the Court—was free to refashion the terms of civil marriage according to values stemming from what its judges decided were its comprehensive doctrines.[171] Thus, the Court contradicted Rawls's

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[169] Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

[170] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Kerrigan v. Dep't of Pub. Health, 957 A.2d 407 (Conn. 2008); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Goodrich v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). A fifth case was the 9th Circuit's February 2012 decision in *Perry v. Brown* reaffirming the district court's overturning of California's Proposition 8, which I discussed at the outset of this article.(Perry v. Brown, 671 F. 3d 1052, (9th Cir. 2012)).

[171] Goodridge,v. Dep't of Pub. Health, 798 N.E.2d 941, 945.

account of the state's limited and functional state interest in marriage and the family, and usurped for the state a power that is incompatible with a pluralistic democracy guided by public reason. Impetus for *Goodridge* presumably came from the U.S. Supreme Court's decision *Lawrence v. Texas*, which was handed down several months before *Goodridge.* In *Lawrence,* the Court violated public reason even more egregiously than *Goodridge* by finding in the U.S. Constitution a highly sectarian conception of liberal autonomy. Justice Anthony Kennedy, writing for the majority in *Lawrence*, announces:

> Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[172]

Kennedy proceeds to quote *Planned Parenthood v. Casey:* "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[173] The remarkable fact about this decision is not the holding in *Lawrence*, which struck down irregularly enforced and unpopular anti-sodomy laws, but the sectarian principle the Court announced in support of it and injected into Federal case law.[174] One needn't have any sympathy for anti-sodomy laws to see that the purported right to define one's own concept of the universe, or of the autonomy of the self generally, are illegitimate grounds for judicial and legislative actions, because they are manifestly sectarian pieces of comprehensive liberal doctrines.[175]

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[172] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[173] *Lawrence*, 539 U.S. at 574.

[174] The philosopher John Deigh wrote at the time in an editorial for *Ethics*, the preeminent academic journal for moral philosophy: "What is striking about this remark [i.e. 'Liberty presumes an autonomy of self….'] is its language. One would look in vain for similar language in the majority opinions of the major cases from the 1960s and 1970s on which this opinion rests. These are the famous cases in which the Court found a fundamental right of privacy in the penumbra and emanations of the rights enumerated in the Bill of Rights. The authors of those opinions, in explaining the value of the liberty this right of privacy guarantees, speak of traditional values going back to a time before the founding of the United States, the sanctity of the home and the privacies of life, the sacredness of marriage, and the security of individuals in their person and possessions from unwarranted governmental intrusions. Nowhere, however, does one find reference to anything like the 'autonomy of self' to which Justice Kennedy, the author of the majority opinion in the Texas case, appeals." *Editorial,* 114 ETHICS (Oct. 2003), *available at* http://www.jstor.org/stable/10.1086/380103.

[175] Presumably the Court could have overturned the anti-sodomy statute on alternative, publicly reasonable grounds, without appealing to the sectarian liberal values proclaimed by Justice Kennedy. There do not appear to be any publicly reasonable arguments for criminalizing private sex acts between consenting adults, so in principle there could have been a more narrowly tailored, liberty-based objection to anti-sodomy laws that avoided relying upon controversial comprehensive doctrines. I owe this clarification to Frank Michelman.

The pro-same-sex marriage arguments of philosophers and legal theorists are no better than those of the judges in *Goodridge* and *Lawrence*.[176] The non-public, moralistic character of arguments in favor of same-sex marriage is often obscured by a rhetorical maneuver, however, which frames the debate as if it were simply about providing equal and fair access to an agreed-upon, uncontroversial social good. In brief, such rhetorical arguments for same-sex marriage proceed as follows. First, "marriage" gets implicitly defined as *any* affective sexual relationship between two adults. Second, it is argued that since the state promotes "marriage," it should promote it fairly and with equal respect, not denying access to anyone who is eligible. Third, it is argued that since gays and lesbians can obviously have affective sexual relationships, there is no reason to preclude them from marrying, because to do so would be to discriminate against them as a class. This argument is often quite successful rhetorically, but it relies on a question begging definition of "marriage."

Mary Lyndon Shanley, for example, begs the question when she says, "Despite their differences, neither side [in the same-sex marriage debate] questions whether marriage is a good thing and whether it should be recognized by the state; their argument is over who should be able to marry."[177] On the contrary, the debate is precisely about whether marriage, according to its historic meaning, is a good thing or not. Gay rights activists think that marriage, historically understood, is a bad thing because it has the effect of establishing heterosexuality as socially normative, and by implication, they argue that it "inflicts profound psychic damage" on people who embrace a homosexual identity as part of their self-image.[178] They propose abolishing marriage and replacing it with a new legal category that solemnizes any affective sexual relationship between any two adults and thus discourages sexual complementarity as a social norm. It is politically useful to *call* this new category "marriage," too, because it conceals just how expressively significant the change is, and makes it more likely to convince wary voters to accept the change.[179] But to define "marriage" as a relation equally open to heterosexual and homosexual couples, as Shanley does, is first, simply to beg the question against the natural law defenders of traditional marriage, for whom sexual complementarity is marriage's *sine qua non*, and second, to impose an alternative comprehensive doctrine. In other words, the natural law theorists claim that marriage is essentially heterosexual because they claim that only heterosexual sex is valuable.[180] Liberals like Shanley think that *any* kind of consen-

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[176] *See, e.g.*, Cass Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081,(2005) ("[M]arriage is a government run licensing system, no more and no less," which happens to come with the conferral of material benefits and expressive legitimacy).

[177] MARY LYNDON SHANLEY, *Afterword, in* JUST MARRIAGE 109, at 110 (Deborah Chasman & Joshua Cohen eds., 2004).

[178] MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (Geoffrey R. Stone eds., 2010).

[179] It is noteworthy that although she professes to follow the limits of public reason, Elizabeth Brake argues for retaining the term "marriage," even though she proposes replacing its substance with generic social networks of care, in order to help induce public acceptance of homosexuality and gay sex.

[180] *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (2001).

sual sex is valuable, so they reject the natural law account and want to redefine "marriage."

Consider the professedly Rawlsian, constitutional argument put forth by Frank Michelman in favor of same-sex marriage. Michelman states correctly that, within political liberalism, "no political value can inhere in hostility or opposition to same-sex partnerships 'as such,' which can only reflect some religious or otherwise sectarian ethical doctrine."[181] From the fact that opposition to same-sex unions *as such* would be sectarian, he concludes that same-sex unions *as such* must be legally endorsed. But this inference is fallacious. In order for legal recognition to be justified, there needs to be a positive case made in terms of public reasons for why the state should pick out and enshrine specifically *homosexual* relationships among all the other affective relationships that there are.

Why limit the entry conditions to a parenting partnership to people who happen to be engaged in a romantic sexual relationship? Surely two brothers, an aunt and her grown niece, or a priest and his housekeeper, say, might also wish to enter a legally supported parenting partnership in order to assist them in raising a child who has come under their care. Traditional marriage was in the past indeed conceived of as in part a parenting partnership and Michelman thinks that political liberalism requires broadening that partnership just a little bit to include his preferred class, which is the couple who happens to be engaged in a homosexual romance. But this selective extension of marriage to homosexual unions *as such*, which singles out homosexual relationships as specially significant, discriminates against other intimate relationships (e.g. fraternal, non-sexual ones) which appear to be at least equally good candidates for parenting as homosexual unions.

It is true that the recent statutes and decisions imposing gay marriage do not explicitly refer to homosexual orientation as the empowering criterion that makes two men or two women eligible for civil marriage.[182] But they do so implicitly. These laws invariably maintain the traditional prohibitions against consanguinity in marriage, even as they redefine marriage to include couples of the same sex. If these laws really were blind to sexual orientation and erotic intimacy as such—as public reason requires—then they wouldn't maintain consanguinity prohibitions. By maintaining consanguinity prohibitions, however, these laws presume that couples entering marriage are sexually intimate, which is why they wish to prohibit incest, and thus they channel the state's affirmative endorsement of gay sex.[183] The selective extension of legal marriage to homosexual unions in this

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[181] Michelman, *supra* note 33, at 413.

[182] Professor Michelman pointed this out to me in personal correspondence.

[183] Elizabeth Brake appreciates this point in effect when she notes that the state's "special priority accorded to marriage and marriage-like relationships marginalizes other forms of caring relationships. To the extent that it sustains 'amatonormativity'—the focus on marital and amorous love relationships as special sites of value—marriage undermines other forms of care." BRAKE, *supra* note 70, at 5. What Brake fails to see is that the state's prioritizing interest in heterosexual marriage isn't necessarily "amatonormative" because heterosexual marriage, unlike gay marriage, is publicly justifiable in terms of orderly reproduction.

way illicitly deploys the law's coercive and pedagogical power to promote a controversial piece of sectarian liberal sexual morality.

Michelman's argument goes awry because he fails to attend to Rawls's explicitly functional conception of marriage as a procreative and childrearing partnership. Michelman, like others, neglects this question altogether. In a footnote he says:

> My aim here is strictly limited to confirming the general receptivity of Rawlsian thought to fundamental complaint against a publicly and legally privileged form of domestic association that is closed to same-sex partners. I do not address the intriguing question of what this thought has to say about the justifiability of making marriage a publicly recognized, legally consequential status at all, as opposed to a purely "private" matter.[184]

The "intriguing question" cannot be avoided. First of all, to do so obscures the basic needs of children and the interest that children have in their parents' marriage as a public good which meets those needs. The state interest in marriage is not merely as a benefit for adults; but Michelman is insensitive to this fact by failing to consider what the function of legal marriage is.

More generally, it is absurd to attempt to assess whether some individual or group has a claim on a public benefit, or liability to some public burden, without first determining what the state interest is in offering the benefit or imposing the burden. The nature of the state interest in the family will determine whether and what publicly reasonable arguments are available to justify restricting or expanding access to the legal category "marriage." Consider an analogy. Suppose that U.S. Medicaid policy had a health benefit that provided African-Americans with vouchers for a sickle-cell anemia diagnostic test. Caucasian, Latino, and Asian Medicaid recipients would not be eligible for the voucher. People of any ethnicity may suffer from sickle-cell anemia and might benefit from the test, so is there any publicly reasonable argument for restricting access to public benefits by the "suspect classification" of race? If we adopted Michelman's approach, we would immediately have to conclude *no*, thus "confirming the general receptivity of Rawlsian thought to fundamental complaint against a publicly and legally privileged" form of medical benefit that is closed to Caucasians, Latinos, and Asians. But this conclusion is absurd, since there is, in fact, a straightforward public reason for the imagined policy: people descended from sub-Saharan Africans have a genetic predisposition to sickle-cell anemia (since apparently the relevant gene also protects against malaria) and therefore it is reasonable for the state to allocate scarce resources using the otherwise suspect classification of race, since race happens to indicate likely presence of the disease.

Michelman is representative among Rawlsians who have failed to grasp the import of political liberalism's functional conception of marriage and the family as ensuring orderly social reproduction over time. Rawlsians tend to be sectarian liberals and they have relied illicitly on their comprehensive religious or secular doctrines about "liberated" sexual morality in order to single out homosexual relationships *as such* for special promotion, thereby violating the ideal of public reason and the political conception of justice. But homosexual relationships as

[184] *Id.* at 423, n. 64.

such lack any claim in justice for state recognition. In this regard, homosexual orientation is on a political par with, say, a traditional order of chivalry or theology of sacramental rites. The Knights of Malta and the Jesuits, for example, may be legally recognized as non-profit charitable associations that indirectly contribute to the political common good, but they cannot, for the politically liberal state, be recognized *as* a titled nobility or sacramental priesthood, respectively. In the same way, a gay couple may be legally recognized as being party to a generic domestic dependency relationship, but this cannot be endorsed as a "marriage".

Cass Sunstein has offered an argument for same-sex marriage based on U.S. constitutional law that differs from Michelman's.[185] Sunstein's argument is interesting because he hedges his claims in a way that betrays sensitivity to a counterargument against same-sex marriage in Rawlsian terms along the lines I am arguing here but he fails to address the counterargument nevertheless. Sunstein canvasses and rejects three possible constitutional routes for requiring the legal recognition of same-sex unions as marriages: via (a) the right to privacy and "substantive due process," (b) the right to equal legal treatment without irrational animus, and (c) the right against legal treatment according to a "suspect classification." Each of these grounds has its weaknesses, so Sunstein proposes a fourth strategy rooted in the equal protection clause. He claims that it is "artificial and unfortunate" for the law to divide gender into male and female—although noting reassuringly that "[t]here are men and women, to be sure"—because the "diversity of human character" in private life and public life alike cannot be captured by just two complementary categories. Sunstein thinks that the complementary categories of male and female traditional marriage "undergirds the system of caste based on gender" and discriminates against homosexual relations. This discrimination is really a form of prohibition, like old the prohibitions on miscegenation: "But prohibitions are invalid under the equal protection clause."[186] Sunstein therefore concludes:

> In terms of their purposes and effects, bans on same-sex marriage have very much the same connection to gender caste as bans on racial intermarriage have to racial caste. I am speaking here of real-world motivations for these bans, and I am assuming, as does the current law, that impermissible motivations are fatal to legislation. The claim from neutrality is implausible in this context for exactly the same reason that it was implausible in *Loving [v. Virginia]*. To say this is not to say that the ban on same-sex marriages is necessarily unacceptable in all theoretically possible worlds. In our world, the ban is like a literacy test motivated by a discriminatory purpose, or a veterans' preference law designed to exclude women from employment.[187]

From a politically liberal perspective, Sunstein's argument fails. Note that he relies on empirical assumptions about what motivates support for traditional

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[185] But Cass Sunstein does reproduce Michelman's error of failing to examine the public function of civil marriage, which undermines his conclusion in favor of same-sex marriage. *See* Sunstein, *supra* note 176, at 2081.
[186] Cass R. Sunstein, *Homosexuality and the Constitution in* SEX, PREFERENCE, AND FAMILY 221 (David Estlund & Martha Nussbaum eds., 1998).
[187] *Id.* at 219.

marriage. He assumes that such motivations have a discriminatory purpose because presumably he thinks that they are rooted in animus or controversial religious beliefs. As I noted earlier, however, Martin Luther King's support of racial equality was, in the actual world, motivated by controversial religious beliefs, and this did not make the cause of racial equality illegitimate in a pluralistic democracy, because King's support could be re-stated in publicly reasonable terms. As with civil rights, so with traditional marriage. In the actual world, it is the case *in favor* of same-sex marriage that has impermissible motivations that are fatal to legislation, but unlike the civil rights movement, there is not an alternative, publicly reasonable argument available to same-sex marriage proponents.

William Eskridge is another prominent proponent of same-sex marriage who, like Michelman, frames the debate as between proponents of uncontroversial equality and neutrality (his own side) and perfectionist moralizers (his opponents).[188] This framing of the debate stacks the deck carefully in order to ensure that only opponents of same-sex marriage appear to be making contentious moral claims, and therefore are vulnerable to being excluded by public reason.[189] But Eskridge's argument is unsuccessful for the same reasons that Michelman's argument fails; his presuppositions are in fact just as controversial and comprehensive as the assumptions of the conservative perfectionists he attacks, and he never bothers to consider the possibility of a non-perfectionist, publicly reasonable defense of conjugal marriage, such as I have proposed here.

Carlos A. Ball argues that perfectionist politics is unavoidable, and because there is a widely held egalitarian argument for same-sex marriage, same-sex civil marriage should be recognized in law. Ball argues for legal recognition because, "when the State makes distinctions among intimate relationships in order to recognize and support some (but not all) of them, it must make assessments regarding the value and goodness of those relationships." Ball claims that once the state "is in the business of recognizing and protecting some intimate relationships and not others," then the state inevitably must take sides and legislate from some controversial comprehensive doctrine. Ball concludes from this that the public debate over legally recognizing same-sex unions cannot be about "whether the State should remain morally neutral on the goodness and value of those relationships," but about what sorts of intimate personal relationships are intrinsically valuable, all things considered.[190] Ball's argument falters because he never gives any persuasive reasons for thinking that perfectionism really is unavoidable. Where he does consider Rawls's political liberalism specifically, in fact, his analysis is curiously results-driven and ultimately question-begging.

> It is no longer sufficient to argue that homosexual conduct is morally-neutral behavior deserving only toleration. If our society is going to recognize same-sex marriage, the supporters of such marriages must incorporate perfectionist

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[188] *William N. Eskridge Jr.,* The Relational Case for Same-Sex Marriage in *JUST MARRIAGE 58, at 58-59 (Mary Lyndon Shanley et al. eds., 2004).*

[189] *Id.*

[190] Carlos A. Ball, *Against Neutrality in the Legal Recognition of Intimate Relationships, in* MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD 75, at 79 (Gordon A. Babst et al. eds., 2009).

> ideals into their arguments-they must be prepared to speak not only in terms of individual rights but also in terms of collective *goods* and the moral *value* of same-sex relationships.[191]

Ball does not ask, is political liberalism true? Rather, he asks, will political liberalism get me the results I want? And what he wants is

> … to provide the theoretical framework for a gay rights movement that is not only concerned with repealing sodomy statutes and guaranteeing nondiscrimination in employment and housing, but also aims to *attain society's acceptance of homosexual relationships.*[192]

Ball's maneuver is simply beside the point. He is correct that political liberalism is incompatible with his moralistic program—just as it is incompatible with the moralistic program of natural law theory and other comprehensive doctrines—but this fact alone does not bear on the truth or falsehood of political liberalism.[193] Ball may be right when he declares, "The struggle for societal acceptance of same-sex relationships entails a frontal attack on the deeply held views of many Americans…."[194] If so, then this struggle is precluded by political liberalism, which has no room for frontal attacks against fellow citizens' conceptions of the good.

Unlike Ball, Ralph Wedgwood has offered an argument for same-sex marriage that is meant to be framed in morally neutral terms.[195] Wedgwood gives a conceptual analysis of "marriage" using his intuitions about what marriage involves —and extensive assertions about what "we" think—and he concludes that marriage shouldn't "exclude" homosexual couples. This conclusion is unsurprising; Wedgwood titles his article "The Fundamental Argument for Same-Sex Marriage," so presumably it was safe to infer without reading the analysis that he

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[191] Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1881 (1996-1997).
[192] *Id.* at 1882.
[193] Ball's ultimate strategy seems rather cynical, for he recommends endorsing liberal perfectionism or liberal neutrality whenever it makes prudential sense for the sake of promoting gay rights: "The theoretical framework that I propose in this article is not meant to be appropriate in all contexts and circumstances. There may be instances, whether in litigating before a court or in lobbying a legislature on a particular issue, when relying on neutral ideals such as equality, tolerance, and privacy, and eschewing issues of morality and values, may make prudential sense." *Id.* at 1881.
[194] *Id.*at 1927. Contrast Rawls: *The Idea of Public Reason Revisited,* 64 CHICAGO L. REV. 765, 776 (1997): "Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity." And *id.* at 782: "… no one is expected to put his or her religious or nonreligious doctrine in danger, but we must each give up forever the hope of changing the constitution so as to establish our religion's hegemony, or of qualifying our obligations so as to ensure its influence and success. To retain such hopes and aims would be inconsistent with the idea of equal basic liberties for all free and equal citizens."
[195] *See* Ralph Wedgwood, *The Meaning of Same-Sex Marriage* in THE NEW YORK TIMES, May 26, 2012. *Available at* http://opinionator.blogs.nytimes.com/2012/05/24/marriage-meaning-and-equality/ (for a recent restatement of his argument).

thought same-sex marriage would accord with his intuitions. The three essential features that Wedgwood thinks define "modern Western marriage" are: "(1) sexual intimacy; (2) domestic and economic cooperation; and (3) a voluntary mutual commitment to sustaining this relationship."[196] Homosexual relationships obviously can include these features, so he concludes that civil marriage should be extended to homosexual couples. Although Wedgwood does not seem to notice it, his analysis is rather overbroad, because if he is right, many pimps and prostitutes will turn out to be "married" to each other, since surely there are sexually intimate, domestically and economically cooperative pimps and prostitutes who are mutually committed to sustaining their relationship.

Wedgwood argues that the essential social function of civil marriage is therapeutic affirmation for certain people's intimate relationships: the reason for civil marriage "is simply that many people *want* to be married, where this desire to marry is typically a serious desire that deserves to be respected."[197] What they want is the common public status conferred by social recognition of their relationship. Thus civil "marriage furthers a fundamental interest in *mutual understanding*, both between the couple and the rest of society."[198] It is no doubt correct that civil marriage has the *effect* of reinforcing a married couple's social identity and status, but this cultural effect need not—and in a politically liberal society cannot—be the justificatory grounds for a publicly reasonably marriage policy, unless the particular conception of civil marriage is neutral relative to controversial comprehensive doctrines. By this score, Wedgwood's argument, like the others, fails to justify enshrining same-sex unions in law.

VI. CONCLUSION

I have been arguing for a conception of civil marriage that happens to be the traditional one, but the argument I have given does not depend upon tradition, religion, or most notably, upon controversial philosophical doctrines about the natural law or human flourishing. I have made a publicly reasonable case for defining civil marriage as the union of a man and a woman, and for legally recognizing and promoting families headed by two married parents who are the biological mother and father of their children. The ground for such a policy is, as Rawls argues the ground of any marriage and family policy must be, the permanent and basic social need for orderly reproduction over time. A family headed by two married parents who are the biological mother and father of their children is the optimal arrangement for maintaining a socially stable fertility rate, rearing children, and inculcating in them the two moral powers requisite for politically liberal citizenship. Furthermore, I have canvassed the available arguments in favor of recognizing homosexual relationships (or polyamorous relationships, etc.) as civil marriages, and shown how these arguments depend essentially upon controversial

[196] Ralph Wedgwood, *The Fundamental Argument for Same Sex Marriage*, 7 J. POL. PHIL. 225, 229 (1999).
[197] *Id.* at 235.
[198] *Id.* at 236.

moral doctrines drawn from various comprehensive liberal visions of the good life and fail to link same-sex marriage with the social need for orderly reproduction over time. The nonpublic and sectarian character of the case for same-sex marriage entails that liberals who are sympathetic with the idea of public reason—and this seems to be most liberals—should reject the case for same-sex marriage.

The publicly unreasonable nature of the arguments for same-sex marriage should resolve the contentious marriage debate along the lines of a principled, political consensus in favor of conjugal marriage, because the ideal of public reason applies quite broadly across the various partisan, legislative and judicial spheres in which this debate is engaged today. As Rawls argues:

> [t]he ideal of public reason does hold for citizens when they engage in political advocacy in the public forum, and thus for members of political parties and for candidates in their campaigns and for other groups who support them. It holds equally for how citizens are to vote in elections when constitutional essentials and matters of basic justice are at stake…. It applies in official forums and so to legislators when they speak on the floor of parliament, and to the executive in its public acts and pronouncements. It applies also in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review.[199]

If the rational basis standard of constitutional jurisprudence is the standard of public reason, then judges have a positive duty in upholding the Constitution to strike down the sectarian legislation that has established same-sex marriage. Furthermore, the broad scope of public reason requires liberal citizens to abandon their unreasonable advocacy for same-sex marriage that divides and destabilizes the public forum, and fails to treat as equals their fellow citizens who reasonably reject their sectarian arguments.

Some liberals might prefer to jettison their commitment to the ideal of neutrality if they recognized that neutrality, or public reason, required opposing same-sex marriage and supporting heterosexual marriage. As the gay activist and journalist Andrew Sullivan has cogently argued, however, liberalism

> has most to lose when it abandons the high ground of liberal neutrality. Perhaps especially in areas where passion and emotion are so deep, such as homosexuality, the liberal should be wary of identifying his or her tradition with a particular way of life, or a particular cause; for in that process, the whole potential for liberalism's appeal is lost. Liberalism works—and is the most resilient modem politics—precisely because it is the only politics that seeks to avoid these irresolvable and contentious conflicts.[200]

Of course perfectionist liberals would disagree with Sullivan that neutrality is as central to the broad tradition of liberalism as he suggests. Nevertheless, perfectionist liberals who support same-sex marriage would be mistaken if they assumed that they are immune to the argument I have given here, simply because they reject its key premise, which is the idea of public reason.

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[199] RAWLS, *supra* note 14, at 215-26.

[200] ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY at 162-136(1996).

This would be mistaken because the concerns for orderly social reproduction and the rearing of children who are capable of forming their own conception of the good are concerns that implicate other substantive liberal values, in particular the preeminent value of autonomy. Although the task itself exceeds the scope of this essay, it would be possible craft a parallel, liberal perfectionist version of the publicly reasonable case for heterosexual marriage, because orderly social reproduction promotes autonomy. Even if the absence of same-sex marriage restricts the autonomy of those homosexual couples who might wish to be legally married, this restriction may very well be compatible with holding that a substantive conception of moral autonomy should be the governing value for politics. As Joseph Raz has argued:

> [a] moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future. That is why it can justify coercion to prevent harm, for harm interferes with autonomy. But it will not tolerate coercion for other reasons.[201]

As we have seen, children are harmed when they are intentionally conceived and reared in situations that deprive them of the social bases of forming an identity and conception of the good.[202] In such situations, their ability to exercise autonomy is diminished, and children are denied what is due to them in justice.

> One can harm another by denying him what is due to him. This is obscured by the common misconception which confines harming a person to acting in a way the result of which is that that person is worse off after the action than he was before. While such actions do indeed harm, so do acts or omissions the result of which is that a person is worse off after them than he should then be.[203]

Thus there are promising grounds for developing a liberal perfectionist argument, which is framed in terms of promoting autonomy, for enshrining heterosexual marriage in the law.

However that may be, the politically liberal case for heterosexual marriage as I have presented it is a philosophical argument, framed in terms of public reason, about the importance of family history to the development of one's narrative identity and conception of the good. This argument relies in part upon a number of plausible empirical claims, but like all empirical claims, these are subject to qualification and revision based on better data in the future. At the present moment, nationally representative, longitudinal studies of child rearing by homosexual couples do not exist. Probably the best study to-date is the NFSS and it establishes a significant correlation between parents who have had a same-sex relationship and dysfunctional outcomes for children. The existing studies that pur-

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[201] JOSEPH RAZ, THE MORALITY OF FREEDOM 419 (1986). Raz himself endorses same-sex marriage, but it is not clear that he should, given the considerations about orderly social reproduction, which he does not consider. *Id.* at 234.

[202] Recall that such cases do not include conventional adoption, in which the biological parents are for some reason incapable of rearing the children they have already had.

[203] RAZ, *supra* note 201, at 416.

port to show that homosexual parenting is harmless suffer from fatal methodological defects.[204] I have cited some of the many reliable studies that robustly indicate the importance for children of having a married mother and father to whom they are biologically related.[205] Although evidence for this claim, like *any* actual evidential claim, could be stronger by theoretical criteria, it is extremely strong for practical political purposes, and indeed, it is decisive. This is because, in politics, you can't beat somebody with nobody, and in the debate over marriage there isn't *any* competitor to the case I have made here, for there is no publicly reasonable argument in view that would support same-sex civil marriage. There may be good public reasons for establishing generic "civil unions" or "domestic dependency partnerships" in the law, as I have shown, but homosexual orientation cannot be a condition for entry into such a legal status.

The only problem that the politically liberal case on behalf of heterosexual marriage faces, it seems, is the extreme self-confidence of the many liberal proponents of legally recognizing homosexual relationships. But self-confidence is no substitute for reasonable argument, and the intrinsic value of any intimate sexual relationship as such is simply not a public matter for political liberalism. In a recent review article of several books arguing for same-sex marriage, Andrew Lister declares, "it is obvious that same-sex marriage is preferable to opposite-sex-only marriage," and he concludes that "[t]he case for same-sex marriage seems so strong to its proponents, that the issue seems to present no interesting normative problems—only the psychological problem of explaining resistance and the strategic problem of overcoming it."[206] This attitude is no doubt widespread among liberals, but if liberals are going to participate as reasonable citizens in a pluralistic society animated by fairness, they will have to learn what John Rawls has to teach. Rawls's lesson is that reasonableness excludes political fundamentalism and requires recognizing the fallibility of one's beliefs and the duty of civility to moderate one's transcendent claims to having the whole truth. This lesson is especially important for the influential majorities within the academy, judiciary, and news and entertainment media that seem intent on legislating their deeply held convictions about sexuality. As Stephen Macedo aptly notes:

> The liberal commitment to public reasonableness stands for the view that the mere fact of power—even of overwhelming numerical superiority combined with passionate conviction—is not enough to establish the legitimacy of laws and policies in the face of principled objections. [Because] … the politically powerful need to provide an adequate public justification: reasons that can be openly presented to others, critically defended, and widely shared by reasonable people.[207]

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[204] *See* Affidavit of the University of Virginia sociologist, Professor Steven Lowell Nock, in *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. Justice 2001) (describing serious methodological defects in studies and scholarship about the parenting of children by homosexual couples).

[205] *See* Sections II-III *supra*.

[206] Andrew Lister, *How to Defend (Same-Sex) Marriage*, 37 POLITY 409 (2005).

[207] Macedo, *supra* note 28, at 299.

Liberals cannot reasonably expect everyone to endorse their personal views about sexual morality and the value of some intimate relationships, even when those views are accompanied by intense feelings of moral certainty. Therefore, liberals must limit their arguments for statutory and constitutional legislation about these matters by the specifically political values that "belong to the most reasonable understanding of the public political conception and its political values of justice and public reason." [208]

The reasonable understanding of marriage by this standard is the understanding that happens to be the traditional one: between a man and a woman.

[208] RAWLS, *supra* note 14, at 236.