MODERN MARRIAGE AND JUDGMENTAL LIBERALISM: A REPLY TO GEORGE, GIRGIS, AND ANDERSON

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“People are meant to go through life two by two. ’Tain’t natural to be lonesome.”

Thorton Wilder, Our Town

I. INTRODUCTION

The political question of whether same-sex marriage ought to be permitted is inextricably linked with a more fundamental philosophical question—why is the government in the marrying business at all? Simply put, why does the state sanction and encourage marriage? At stake in the

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1 Thorton Wilder, Our Town 54 (2003).
2 Much confusion has been created in the public discourse by mistaking this question, which is the true focus of the same-sex marriage debate, with a related question—why do individuals want to marry? This inquiry is tangential to the issue at hand. Moreover, as a matter of empirical fact, it appears to be a hopeless pursuit to try to find a common thread in individuals’ actual motivations for marriage.

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same-sex marriage debate is not only the legitimacy of same-sex relationships, but also the legitimacy of the modern institution of marriage itself.

I will show that the extent of the right to marriage is interwoven with the question of marriage’s social purpose. If marriage is purposeless, then the state ought not to be involved in marriage at all, and marriage should be left to private institutions and treated like typical private contracts. If, on the other hand, marriage serves a social function, then a further question arises—does the rationale for heterosexual marriages apply to same-sex couples?

Conservative natural law theorists, specifically Robert George, Gerard Bradley, and John Finnis, traditionally answer the first question affirmatively, maintaining that marriage has a purpose: the intrinsic good of marriage. However, they hold that this purpose is unique to heterosexual

Instead, I ask why should individuals marry? and set aside the question of why individuals actually do marry?

couples. With regard to marriage licenses, homosexual couples need not apply.

In the mid-1990s, Stephen Macedo answered these conservative critics of same-sex marriage, arguing that their criticisms stem from a “cramped” conception of sexual morality and marriage. As a result, Macedo concludes that although they present a coherent argument against same-sex marriage, it is ultimately unconvincing. In a recent article, Robert George, Sherif Girgis, and Ryan Anderson responded to Macedo and criticized his conception of marriage.

Their argument is twofold. First, they defend their traditionalist definition of marriage. Second, they argue that the standard liberal justification of

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4 Id.
8 Id.
9 Id. at 247-48.
same-sex marriage rests on an incoherent, “revisionist” conception of marriage.\textsuperscript{10} 

George, Girgis, and Anderson posit that the same-sex marriage debate “hinges on one question: What is marriage?”\textsuperscript{11} However, rather than attempting to identify marriage’s social purpose in modern Western democracies, George, Girgis, and Anderson discuss the essence of natural marriage instead.\textsuperscript{12} Their paper examines two competing conceptions of marriage. The first conception, “conjugal view” of marriage, underpins their argument against same-sex marriage.\textsuperscript{13} According to the conjugal, or traditionalist, view, “real marriage” is

the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts—

\textsuperscript{10} \textit{Id.} at 246-48.  
\textsuperscript{11} \textit{Id.} at 248.  
\textsuperscript{12} \textit{Id.} at 247.  
\textsuperscript{13} \textit{Id.} at 246.
acts that constitute the behavioral part of the process of reproduction, thus them as a reproductive unit.\textsuperscript{14}

In contrast, the second conception of marriage is one commonly utilized by gay marriage advocates. It conceives marriage as a union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life. It is essentially a union of hearts and minds, enhanced by whatever forms of sexual intimacy both partners find agreeable.\textsuperscript{15}

George, Girgis, and Anderson defend the former.\textsuperscript{16} In essence, they argue that marriage is fundamentally linked to procreation and childrearing—a sophisticated version of a standard conservative argument against same-sex marriage.\textsuperscript{17} They argue that the second conception of marriage is not “internally coherent” since it is inconsistent

\textsuperscript{14} Id. at 246, 250.
\textsuperscript{15} Id. at 246.
\textsuperscript{16} Id. at 248.
\textsuperscript{17} Id. at 255-57.

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with the standard liberal justification of same-sex marriage.\textsuperscript{18}

This paper agrees with George, Girgis, and Anderson in several areas. First, they correctly discern that the same-sex marriage debate turns on how marriage is defined.\textsuperscript{19} Second, the modern institution of marriage has inherent normative elements.\textsuperscript{20} Third, standard liberal justifications of same-sex marriage are inconsistent with tenets of certain strains of legal liberal theory because these normative elements are engrained into the modern marriage.\textsuperscript{21}

In Part I, I explain these inconsistencies by analyzing the political and legal theoretical framework where standard liberal justifications of same-sex marriage are rooted. First, I explore John Rawls’ liberalism circa \textit{Political Liberalism}.\textsuperscript{22} Rawls discusses how debates about fundamental

\textsuperscript{18} \textit{Id.} at 269.

\textsuperscript{19} \textit{Id.} at 248.

\textsuperscript{20} \textit{Id.} at 259.

\textsuperscript{21} \textit{Id.} at 269.

\textsuperscript{22} John Rawls, \textit{Political Liberalism} xvi (2005). Rawls’ liberalism is a convenient springboard for a political and philosophical discussion of the same-sex marriage since Rawlsian liberalism is the fountainhead of the contemporary debates about political philosophy.
rights (such as the right to marry) ought to unfold.\textsuperscript{23} Second, I assess the standard liberal justification of same-sex marriage within Rawlsian liberalism. The standard liberal justification unfolds in a fairly straight-forward fashion.

1. Marriage is a fundamental individual right.

2. Equality entails that fundamental individual rights ought not to be abridged without a compelling countervailing consideration (given the priority of the right).^{24}

3. As a basic tenet of liberalism, countervailing considerations that are rooted only solely in comprehensive conceptions of the good cannot be compelling (given public reason).

4. Arguments against same-sex marriage all rely on comprehensive conceptions of the good.

5. Therefore, same-marriage ought not to be prohibited.^{25}

In Part II, I demonstrate why Rawlsian liberalism offers an insufficient theoretical foundation for supporting George, Girgis, and Anderson’s “revisionist” conception of marriage; I

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^{24} By compelling, I mean simply philosophically consistent and, at least partly, intuitive.

^{25} This formulation roughly follows Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage* 7 J. POL. PHIL. 225, 225 (1999).

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define this concept as “modern marriage.”

However, unlike George, Girgis, and Anderson, I argue that these inadequacies are superficial and the standard liberal justification of same-sex marriage suffers from only artificial limitations. Therefore, rather than abandoning the modern conception of marriage or the liberal legal framework entirely, we should adapt Rawlsian liberalism slightly. By re-enforcing the foundations of liberal theory, I intend to construct a sturdier argument for gay marriage.

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

26 George et. al., supra note 12, at 246.
27 Id. at 246-48.
Although this article holds that the negative portion of George, Girgis, and Anderson’s argument raises significant objections to the traditional arguments for same-sex marriage, this article posits that the positive portion of their paper is flawed.\textsuperscript{28} George, Girgis, and Anderson challenge same-sex marriage advocates to criticize their argument on its merits, “for example, by showing that it rests on a false premise or a fallacious inference.”\textsuperscript{29} In Part IV, this article argues that these traditionalists’ reliance on a pre-political notion of marriage is fundamentally misguided.\textsuperscript{30} Moreover, the article contends that their argument against same-sex marriage rests on counterintuitive premises within the modern Western world, which run counter to everyday experience.\textsuperscript{31}

\textsuperscript{28} \textit{Id.}
\textsuperscript{30} George et. al., \textit{supra} note 5, at 250.
\textsuperscript{31} It is worth noting that George, Girgis, and Anderson also argue against same-sex marriage on pragmatic grounds, contending that permitting it would lead to harmful empirical consequences. George et. al., \textit{supra} note 12, at Part I.C. For the purpose of this paper, I shall set aside these claims and focus on George, Girgis, and Anderson’s philosophical arguments.
George, Girgis, and Anderson also challenge same-sex marriage advocates to construct an argument for same-sex marriage to explain the normative features of modern marriage (its commitments to monogamy and fidelity) and answer their objections to standard liberal justifications of marriage.\textsuperscript{32} In Part V, this article provides an argument to same-sex marriage that overcomes the traditionalists’ criticisms. While Rawlsian liberalism cannot support a modern conception of marriage, Stephen Macedo’s “judgmental liberalism” can support this modern view.\textsuperscript{33} Judgmental liberalism holds that justice-respecting conceptions of the good can be ranked, insofar as certain ones can be “gently encouraged” by the state.\textsuperscript{34} In turn, the same-sex marriage debate demonstrates how a judicial liberal would tackle a

\textsuperscript{32} George et. al., supra note 12, at 271-72, 274. The first and second challenges being that if the same-sex debate it is to be value-neutral, then on what grounds can one presume that marital relationships should be monogamous or that the state should be involved in them? 
\textsuperscript{33} Sexuality and Liberty, supra note 10, at 86-87.
\textsuperscript{34} See Id. at 87.

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thorny social issue without infringing on people’s rights or inhibiting their conceptions of the good.\textsuperscript{35}

\textsuperscript{35} Aside from answering George, Girgis, and Anderson’s objections to same-sex marriage and rebuffing their traditionalist conception of marriage, this paper has two practical purposes. First, if nothing else, hopefully this paper can help explain why the current rhetoric regarding same-sex marriage is so futile. Part of the problem with the same-sex marriage debate (both in philosophical circles and the political sphere) is that Rawlsian liberals (and those on the political left) who support same-sex marriage and philosophical conservatives (and those on the political right) who oppose same-sex marriage are largely engaging in different debates and are operating within different philosophical frameworks. Rawlsian liberals, by in large, believe that the debate turns the right to marriage and that controversial moral and religious views have no place in the debate. Conversely, conservatives commonly contend that the debate hinges on the good of marriage and that the discussions about morality of marriage cannot be avoided. As a result, each side tends to talk past one another and the debate produces a predictable impasse. Part of the purpose of this paper is to bridge the theoretical gap between these two entrenched positions by demonstrating that a more productive dialogue would focus on what the right to marriage in modern Western democracies entails by debating modern marriage’s public purpose. Second, I intend for the modern conception marriage and my argument in favor of same-sex marriage to reveal that supporting only same-sex civil unions is not a principled compromise. Those who hold this view face a dilemma. They must hold either that marriage is no more than a bundle of rights or that same-sex couples are second-class citizens who are not entitled to all of the rights and benefits associated with marriage.

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II. THE STANDARD LIBERAL JUSTIFICATION OF SAME-SEX MARRIAGE

Before delving directly into the same-sex marriage debate and analyzing the standard liberal position, we must explore and understand the argument’s theoretical framework. Underpinning the liberal justification is a commitment to a liberal philosophy similar to John Rawl’s *Political Liberalism*. John Rawls’ main motivation in *Political Liberalism* is to address “the fact of reasonable pluralism,” which he believes creates “a torturing question” for contemporary political theory. How can citizens from a rich and diverse set of religious, moral, and philosophical convictions come together to create “a stable and just society of free and equal citizens”? His

37 Rawls, *supra* note 21, at 441, 485.
38 Rawls, *supra* note 19, at 4. Rawls’ first principle of justice, in part, explains what it means to be “a stable and just society of free and equal citizens.” The first principle states that “each person has an equal claim to a fully adequate scheme of equal basic rights and liberties.” *Id.* at 4-5.

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answer rests partly on his commitment to public reason.\textsuperscript{39}

A. Rawls on Public Reason

Is it possible for feminists and Roman Catholics to discuss abortion and maintain mutual respect? Can Evangelicals and homosexuals debate gay rights without being intolerant of one another? To what values can they appeal? John Rawls’ political liberalism and public reason explain how to conduct respectfully such discussions.\textsuperscript{40}

Reasonable pluralism reigns at the heart of public reason, stating that democratic institutions inevitably give rise to a range of reasonable conceptions of the good.\textsuperscript{41} A comprehensive moral, religious, or philosophical doctrine is reasonable if it accepts the criterion of reciprocity.\textsuperscript{42} “The criterion of reciprocity says: our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our

\begin{footnotes}
\footnotetext[39]{Rawls, supra note 21, at 440-441.}
\footnotetext[40]{Rawls, supra note 21.}
\footnotetext[41]{Rawls, supra note 20, at 36-37.}
\footnotetext[42]{Id.}
\end{footnotes}

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political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.”

Citizens are reasonable insofar as they honor this criterion. Within reasonable pluralism, Rawls argues that a liberal democracy’s success depends on its citizens’ acceptance of reciprocity. The citizens reject this reciprocity when they treat the state merely as an instrument to advance their own comprehensive conceptions of the good. These unreasonable citizens make toleration and mutual respect impossible, and “unreasonable doctrines are a threat to democratic institutions, since it is impossible for them to abide by a constitutional regime except as a modus vivendi.” Therefore, Rawls argues that reasonable citizens must set aside, or bracket, their conceptions of the “whole truth” as they see it by addressing “fundamental political questions,” and instead they should appeal only to shared political

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43 Rawls, supra note 21, at 446-47.
44 Id. at 446.
45 Id.
46 Id. at 489.

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values and public reason to settle such essential issues.\textsuperscript{47}

For example, in the abortion debate, a feminist might believe that a fetus does not have an absolute “right to life,” regardless whether a fetus in the first trimester is a person.\textsuperscript{48} In contrast, a Catholic may hold that life begins at conception, a fetus holds an absolute right to life, and, therefore, all abortions amount to murder. Rawls acknowledges public reason may not resolve all-important political questions, especially “hotly disputed” topics like abortion, but he did believe

\textsuperscript{47} \textit{Id.} at 447. As a result of his tolerance and respect for different reasonable conceptions of the good, some have labeled Rawls’ political theory “neutral liberalism.” Carlos A. Ball, The Morality of Gay Rights 6 (2003). Rawls feels “that the term neutrality is unfortunate” due its disparate definitions. Rawls, supra note 18, at 191. Certainly Rawlsian liberalism is not morally neutral since it gives credence to political values, but there is a specific sense in which using the term is fair. Rawls’ political liberalism is neutral insofar as it does not rank reasonable comprehensive doctrines and does not settle questions of constitutional importance “on the basis of the intrinsic superiority or inferiority of conceptions of the good life.” Will Kymlicka, Contemporary Political Philosophy 217 (2d ed. 2002). Kymlicka correctly contends that when discussing political liberalism “it might be preferable to talk of ‘state anti-perfectionism’ rather than ‘state neutrality.’” \textit{Id.} 218. However, with this limited scope in mind, I will use the term “neutral liberalism” interchangeably with “political” and “Rawlsian” liberalism hereafter.

that public reason provides a legitimate framework to reasonably debate these topics.  

Catholics cannot simply cite Scripture nor can feminists merely rely on their philosophical convictions. Assuming they are reasonable, both groups realize that not everyone subscribes to their particular faith or philosophy. The Catholic cannot reasonably tell the feminist that she cannot have an abortion based on her beliefs she does endorse as this would violate the criterion of reciprocity. Rawls suggests we must disentangle ourselves from thorny debates between incompatible comprehensive doctrines in setting basic constitutional policy, and instead look to our shared liberal democratic political values. Of course, numerous political considerations apply in the abortion debate, but Rawls provides three relevant examples of “important political values: the due respect for human life, the ordered reproduction of political society over time . . . and finally the

49 Rawls, supra note 21, at 479.
50 Id. at 478.
51 Rawls, supra note 20, at 243 n.32
equality of women as equal citizens.”

Although at first blush public reason appears a bit odd—to require citizens to set aside the whole truth as one sees it and to restrict oneself to public values—Rawls argues that this thought process is not unprecedented nor unfounded. Public reason becomes more plausible and less strange when we consider the Supreme Court as an “exemplar” of public reason.

When cases come before the Supreme Court,

[p]ublic reason is the sole reason the court exercises . . . justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people’s religious or philosophical views.

Just as Supreme Court Justices must be “blind” to their personal beliefs and biases, public reason

\[52\] Id. \\
\[53\] Rawls, supra note 20, at 236. \\
\[54\] Id. \\
\[55\] Rawls, supra note 20, at 489.
requires public officials and citizens to discount their comprehensive doctrines and to rely solely on public values when debating constitutional essentials.\textsuperscript{56}

Public reason acts as a filter that sieves through permissible political rhetoric and reasoning. However, public reason applies only in a very narrow range of cases. Rawls argues that part of what reciprocity and reasonableness requirements is that citizens seek a set of shared political values as a basis for political debates about “‘constitutional essentials’ and questions of basic justice.”\textsuperscript{57}

Rawls argues clearly “the idea of public reason does not apply to all political discussions of fundamental

\textsuperscript{56} Former Governor Mario Cuomo’s stance on abortion is another example of the type of public reasoning Rawls advocates. Cuomo was the governor of the state of the New York and a devout Catholic. He held as a matter of faith that abortion is morally impermissible; however, “he nonetheless believed that in his role as governor, he should not allow his official conduct to be affected by this conviction.” He politically supported the right to a procedure that he was personally opposed to. Thomas Pogge, John Rawls His Life and Theory of Justice 141 (Michelle Kosch trans., 2007).

\textsuperscript{57} Rawls, supra note 19, at 214. Constitutional essentials involve “the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule.”\textsuperscript{57} Likewise, questions of basic justice include the “equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and participate in politics [and] liberty of conscience.”\textsuperscript{57} Id. at 227.

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questions.”  

Public reason is only meant to filter the discourse of a specific public arena—the “public political forum.” The public political forum includes three sections of the civic discourse: “the discourse of judges . . . the discourse of government officials, especially chief executives and legislators; and finally, the discourse of candidates for public office.” Ideally, public reason sieves through citizens’ judgments in certain circumstances. When citizens vote on matters of constitutional essentials, Rawls instructs that they ought “to think of themselves as if they were legislators.”

In contrast, public reason does not apply to the “background culture” of a society. For example, the Catholic Church can excommunicate one of its parishioners if she is an abortion doctor or can

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58 Rawls, supra note 20, at 442.
59 Id.
60 Id. at 443.
61 Under most circumstances, citizens are not required to adhere to the restriction of public reason. Id. at 444.
62 Id. at 442. Rawls defines background culture as “the culture of civil society,” which includes “the culture of churches and associations of all kinds, and institutions of learning at all levels . . . scientific and other societies.” Id. at 442-43, 443 n.13.

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choose to exclude women from the priesthood.\textsuperscript{63} The Church need not be limited to the same, shared values as the state. At the same time, the state may not reasonably institute a blasphemy law based on the teachings of the Church because, as reasonable pluralism demonstrates, not everyone in a modern democratic society would agree with the canons of Catholicism.\textsuperscript{64}

In a sizable percentage of political debates ("many if not most"), basic constitutional issues are not at stake.\textsuperscript{65} "For example, [in] much tax legislation and many laws regulating property," and many of the laws regarding education and the environment, Rawls says the limitations of public reason may not apply.\textsuperscript{66} If constitutional essentials are not at stake, perhaps when a town council debates the merits of whether a traffic light should be placed at a particular intersection, then the decision need not depend on political values alone.

\begin{itemize}
  \item \textsuperscript{63} Id. at 443.
  \item \textsuperscript{64} See id.
  \item \textsuperscript{65} Rawls, supra note 19, at 214.
  \item \textsuperscript{66} Id.
\end{itemize}
A councilman can reasonably argue on utilitarian grounds that a traffic light yields more utility.\textsuperscript{67}

However, when a constitutional essential is at stake and public reason alone is inconclusive (when difficult cases, or “stand-offs,” arise) nonpublic reasons—one’s rooted in comprehensive doctrines—cannot be used to break ties.\textsuperscript{68} This stance parallels Rawls’ Supreme Court analogy.\textsuperscript{69} If a case before the Court does not lend itself to a clear-cut decision, the Justices cannot appeal to their personal political opinions to resolve the matter.\textsuperscript{70} Political liberalism is not committed to stating that stand-offs never occur; instead, it says that these cases seldom surface in an ideal society.\textsuperscript{71} Rawls realizes that some stand-offs are such important political questions that they cannot go

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\item \textsuperscript{67} It should be noted that even in this hypothetical example, it is not difficult to imagine circumstances in which basic matters of justice are at play. For example, if a city were to ignore the deaths of several low-income children at a high traffic stop sign intersection and refuse to install a traffic light even though such a measure would likely reduce the vehicular death rate. I am indebted to Anna Marie Smith for calling my attention to the complexity of these sorts of cases.
\item \textsuperscript{68} Rawls, \textit{supra} note 21 at 478-79.
\item \textsuperscript{69} Rawls, \textit{supra} note 20, at 236.
\item \textsuperscript{70} \textit{Id}.
\item \textsuperscript{71} \textit{Id} at 241.
\end{itemize}
unanswered.\textsuperscript{72} Public reason recommends that citizens must “simply vote” in accordance with criterion of reciprocity and an “ordering of political values they sincerely think the most reasonable.”\textsuperscript{73} While the vote’s outcome is legitimate law and binds all citizens, the outcome’s validity is neither true nor final. For instance, “some may, of course reject a legitimate decision, as Roman Catholics may reject a decision to grant a right to abortion. . . .Certainly Catholics may, in line with public reason, continue to argue against the right to abortion.”\textsuperscript{74} However, these Catholics cannot forcibly resist it.\textsuperscript{75} For, “forceful resistance is unreasonable: it would mean attempting to impose by force their own comprehensive doctrine that a majority of other citizens who follow public reason, not unreasonably, do not accept.”\textsuperscript{76}

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\textsuperscript{72} Rawls, \textit{supra} note 21 at 479.  \\
\textsuperscript{73} Rawls, \textit{supra} note 21 at 478-79. Rawls, \textit{supra} note 20, at liii.  \\
\textsuperscript{74} Rawls, \textit{supra} note 21, at 480.  \\
\textsuperscript{75} \textit{Id.}  \\
\textsuperscript{76} \textit{Id.}
\end{flushleft}

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B. Rawls on Same-Sex Marriage

Rawls’ public reason provides a framework for debates about same-sex marriage to follow in liberal constitutional democracies. Rawls’ cursory remarks in “Public Reason Revisited” on this topic confirm this framework. For public reason to apply to same-sex marriage, marriage must be a constitutional essential, or a matter of basic justice.

Clearly, Rawls holds that public reason applies to the same-sex marriage debate. He argues that the question of same-sex marriage, and marital and familial issues more generally, warrants using the public reason standard, since “the family is part of” any society’s “basic structure.” However, Rawls could justify marriage as a matter of basic justice on the ground that marriage is a fundamental right. The United States’ Supreme

77 Id. at 467.
78 Id..
79 Rawls, supra note 20, at 214.
80 Rawls, supra note 21, at 467n. 60.
81 Id.
82 Rawls, supra note 20, at 227.
Court has repeatedly recognized marriage as a fundamental right.\textsuperscript{83}

The Court most famously affirmed this ideal in \textit{Loving v. Virginia}.\textsuperscript{84} \textit{Loving} struck down anti-miscegenation statues when it found “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”\textsuperscript{85} Likewise, \textit{Zablocki v. Redhail} echoed this sentiment, when the Supreme Court struck down a Wisconsin statute which sought to prevent parents who failed to pay child support payments from marrying.\textsuperscript{86} Justice Marshall wrote that “the right to marry is of fundamental importance.”\textsuperscript{87} Finally, in \textit{Turner v. Safley}, the Supreme Court found unconstitutional a Missouri prison regulation that prohibited prison inmates from marrying.\textsuperscript{88} The court acknowledged that “the right to marry, like many other rights, is subject to substantial restrictions as a result of

\textsuperscript{84} Loving v. Virginia, 388 U.S. 1 (1967).
\textsuperscript{85} Id. at 12.
\textsuperscript{86} Id. at 383.
\textsuperscript{87} Id.
\textsuperscript{88} Turner v. Safley, 482 U.S. 78 (1987).

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incarceration;” however, the Court ruled that the right to a “constitutionally protected marital relationship [endures even] in the prison context”\textsuperscript{89}

As same-sex marriage is a question of constitutional importance and, under Rawlsian liberalism, a question that cannot be decided on the basis of comprehensive conceptions of the good alone, two further questions arise.\textsuperscript{90} First, Martha Nussbaum wonders, “what does the ‘right to marriage’ mean?”\textsuperscript{91} Second, can political liberalism explain the meaning of the right to marriage, or is same-sex marriage, like abortion, an issue public reason alone cannot resolve, and therefore lead to a “stand-off”?

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

Ralph Wedgwood provides possibly the best liberal justification for same-sex marriage.\textsuperscript{92} Wedgwood begins by outlining the “fundamental

\textsuperscript{89} \textit{Id.} at 96.
\textsuperscript{90} Rawls, \textit{supra} note 21, at 467 n. 60.
\textsuperscript{91} Martha C. Nussbaum, From Disgust to Humanity 151 (2010).
\textsuperscript{92} Wedgwood, \textit{supra} note 22.
argument for same-sex marriage” and then attempts to restate this argument to circumvent its most serious objections.\textsuperscript{93} According to Wedgwood, the fundamental argument unfolds that:

The basic rationale for marriage lies in its serving certain legitimate and important interests of married couples. But many same-sex couples have the same interests . . . So restricting marriage to opposite-sex couples is a denial of equality. There is no way of justifying this denial of equality without appealing to controversial conceptions of the good . . . and it is a basic principle of liberalism that the state should not promote, or justify its actions by appeal to, such controversial conceptions of the good. So, the institution of marriage ought to be reformed so as to allow same-sex couples to marry.\textsuperscript{94}

Although this argument nicely maps onto Rawls’ conception of public reason, Wedgwood rightly

\textsuperscript{93} Wedgwood, supra note 22, at 225.
\textsuperscript{94} Id.
recognizes that it has weaknesses that “arise from its lack of any precise account of what marriage is, and of its essential rationale.”

Wedgwood addresses three weaknesses. The first weakness concerns the essential rationale of marriage, or its function. Without an explanation of marriage’s function, an appeal to equality “cannot even get off the ground.” If a state denies a couple the right to marry, then there must be, to use a Rawlsian term, a reasonable rationale for such a restriction—one grounded in political values and not in a particular comprehensive doctrine.

For instance, Rawlsian equality requires that, absent a reasonable restriction, all eligible citizens have the right to keep and bear arms under

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95 Id. at 226.
96 Id. at 226-28.
97 Id. at 226.
98 Id. at 226-28.
99 Id. at 226. By “reasonable” here, I mean reasonable in a Rawlsian sense. I do not mean to invoke rational review or any standard of review courts use to assess Second Amendment violation claims.
the Second Amendment.\textsuperscript{100} To be eligible in some states a person must be mentally competent. If a mentally ill individual contends that he ought to be allowed to keep and bear firearms based on the Second Amendment and a principle of equality, we would dismiss his argument because of the Second Amendment’s reasonable restrictions.\textsuperscript{101} For example, the political value of public safety may outweigh the right of this individual to keep and bear arms.\textsuperscript{102}

Likewise, for Rawls, reasonable restrictions to the right to marriage exist. A person cannot marry a minor, or a close relative.\textsuperscript{103} An appeal to equality may only work if the state cannot provide a reasonable rationale for denying same-sex couples the right to marry. Otherwise, arguing for same-sex

\textsuperscript{100} This interpretation of the Second Amendment remains controversial but was affirmed in District of Columbia v. Heller, 554 U.S. 570 (2008).
\textsuperscript{101} The Court in \textit{Heller} acknowledges that “the right secured by the Second Amendment is not unlimited” and that such a right does not conflict with “longstanding prohibitions on the possession of firearms by felons and the mentally ill.” \textit{Id.} at 626-27.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Supra} note 21.
marriages is comparable to arguing for gun rights for the mentally ill.

George, Girgis, and Anderson understand arguments for gay marriage under this lens.\textsuperscript{104} Like many other types of relationships, same-sex couples simply are not eligible to marry.

It is not the state that keeps marriage from certain people, but their circumstances that unfortunately keep certain people from marriage . . . This is so, not only for those with exclusively homosexual attractions, but also for people who cannot marry because of, for example, prior and pressing family obligations . . . , inability to find a mate, or any other cause.\textsuperscript{105}

For these traditionalists, “a deep link [exists] between marriage and children. Sever that connection, and it becomes much harder to show why the state should take any interest in marriage at

\textsuperscript{104} George et. al., supra note 12, at 282.

\textsuperscript{105} Id.
all.”106 They challenge advocates for same-sex marriage, contending that no marriage conception allowing gay marriage can explain why the state should have a fundamental interest in the institution. Why not privatize marriage?107

The second weakness in the standard liberal justification is that even if denying same-sex couples the right to marry infringes upon a principle of equality, the state could address this inequality without permitting same-sex couples to marry.108 This objection essentially amounts to what I shall call the civil union concern. If marriage is simply a bundle of individual rights, then the state could rectify gay couples’ exclusion from marriage by permitting ideal same-sex civil unions that include the same legal rights and benefits of marriage.109

106 Id. at 271.
107 Id. at 270, 274.
108 Wedgwood, supra note 22, at 226-27.
109 I used the phrase “ideal civil union,” because civil unions/domestic partnerships laws vary from state to state in the United States. In many states, civil unions include some, but not all, of legal rights, obligations, and benefits of marriage. Alison M. Smith, Cong. Research Serv., RL3199, Same-Sex Marriage: Legal Issues (2011). An ideal civil union would include all of legal rights, obligations, and benefits as marriage.
However, the civil union concern contains both a paradox and a challenge. To support ideal same-sex civil unions but not same-sex marriage, one must believe either: 1) no significant difference exists between a marriage and an ideal civil union, or 2) gays and lesbians are second-class citizens. Therefore, if justice requires same-sex couples be eligible for marriage and not simply ideal civil unions, then what is the essential difference between the two institutions?

Lastly, Wedgwood worries about what I shall call the polygamy problem, or the objection that the liberal justification extends too far, and potentially justifies polygamous marriages and other unsavory forms of marriage (such as incestuous and bestial marriages). The polygamy problem asks the question: can we alter the line between permissible and impermissible marriages without erasing the distinction? George, Girgis and Anderson press proponents of same-sex marriage on

\[110\text{ Wedgwood, supra note } 22, \text{ at } 228.\]

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These traditionalists contend that if society accepted the standard liberal justification of same-sex marriage, “we would still, by” this same “logic, be discriminating against those seeking open, temporary, polygynous, polyandrous, polyamorous, incestuous, or bestial unions.”

Wedgwood wants to recast the fundamental argument for same-sex marriage so as to circumvent these objections. He proposes that a neutral liberal justification accurately defines marriage and its essential rationale. To this end, Wedgwood wants to “find out what is essential to marriage,” specifically ‘modern Western marriages.’ He uses an intuition test and holds that an element of marriage is essential “if and only if we modern Westerners find it intuitively hard to understand

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111 George et. al., supra note 12, at 250.
112 Id.
113 Wedgwood, supra note 22, at 228.
114 Id.
115 Id.
how an institution that lacks that feature can really be a form of marriage.”\textsuperscript{116}

Wedgwood claims two broad features of marriage are essential.\textsuperscript{117} The first is marriage’s legal aspect.\textsuperscript{118} The legal aspect of marriage is split into three further categories: marriage status, mutual marital rights, and state-sanctioned marital benefits.\textsuperscript{119} Wedgwood argues that an essential element of marriage is that the law decides marital status.\textsuperscript{120} The question of whether Harry and Sally are married turns on a legal designation.\textsuperscript{121}

Furthermore, part of marriage is sharing certain legal rights and obligations.\textsuperscript{122} Society premises some of these rights on whether spouses rely on one another economically, including: “the right to be financially supported by one’s spouse; the right (in the event of a divorce or separation) to an equitable division of property and, if necessary,  

\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 229.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 230.
\textsuperscript{122} Id. at 231.
alimony; and the right to inherit if one’s spouse dies interstate.”\textsuperscript{123} Other mutual marital

rights follow from the principle that spouses are each other’s ‘next of kin’. These rights include priority in
being appointed guardian of an incapacitated spouse; priority in
being recognized as acting for an incapacitated spouse in health care
decisions; and priority in claiming a deceased spouse’s body.\textsuperscript{124}

However, although an “undeniably . . . important aspect of contemporary marriage law,” state
conferred marital benefits are not “essential to the institution of marriage itself,” since “we have no
difficulty understanding how an institution could be a form of marriage even if it involved no tax breaks
for married couples.”\textsuperscript{125}

Wedgwood holds that we cannot understand marriage simply in legal terms.\textsuperscript{126} Another essential
element to marriage is its social expressive

\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 232.
\textsuperscript{126} Id. at 229.
Modern Western marriage has a “social meaning, the web of common knowledge and assumption about marriage that are shared throughout society. . . .This social meaning consists of certain generally shared expectations.” Wedgwood postulates three fundamental expectations. Within a marriage, society expects: “(1) sexual intimacy; (2) domestic and economic cooperation; and (3) a voluntary mutual commitment to sustaining this relationship.” In turn, marriage’s legal aspects reinforce the social meaning of marriage.

While society also tends to expect marriages that will be heterosexual, Wedgwood argues this expectation does not essentially define marriage. He writes:

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127 Id.
128 Id.
129 Id.
130 Id. As a caveat, Wedgwood notes that his theory does not entail that every marriage will sustain all of these elements. Id. However, he holds that the further a marriage strays from these expectations, the more uncommon the marriage becomes. Id.
131 Id. at 232.
132 Id. at 230.
The fact that marriage is known to be reserved for opposite-sex couples seems much less important for explaining why marriage is so central in people’s lives than the fact that marriage is generally expected to involve domestic and economic cooperation, sexual intimacy and a mutual commitment to maintaining the relationship.\(^{133}\)

Wedgwood’s definition of marriage—as “a legal relationship between two people, involving mutual legal rights and obligations, which reflect society’s shared expectations about marriage; and the core of these expectations is that marriage typically involves sexual intimacy, economic and domestic cooperation, and a voluntary mutual commitment to sustaining this relationship”—underpins his account of marriage’s essential rationale.\(^{134}\) Marriage’s essential rationale rests on the simple fact that “many people want to be married, where this desire to marry is typically a serious desire that

\(^{133}\) *Id.*
\(^{134}\) *Id.* at 233.

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deserves to be respected.” To be a “serious desire that deserves to be respected,” there must be widespread agreement [that] there are good reasons for the state to support and assist people’s attempts to fulfil [sic] such desires, and strong reasons for the state not to impede or hinder people’s attempts to fulfil [sic] such desires. It is strong evidence that as a desire of this kind if the desire is widely and strongly held, and if few people sincerely resent those who succeed in fulfilling the desire.

Wedgwood argues that this evidence exists in marriage, and his definition of marriage explains why people want to marry. Given marriage’s well-known social meaning, the primary reason couples want to wed is to achieve a “mutual understanding, both between the spouses themselves and between the couple and the rest of society.” By making vows of fidelity before the eyes of the law, couples gain understanding from each other as well as

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135 Id. at 235.
136 Id.
137 Id. at 236.
understanding from the rest of society that they are entering into an institution with an established social meaning.\footnote{138}

\section*{D. Objections to Wedgwood’s Justification of Same-Sex Marriage}

Elizabeth Brake observes that Wedgwood’s argument is “one of the strongest defenses of liberal marriage law.”\footnote{139} Despite this praise, she also astutely notes that this argument still has serious problems.\footnote{140} Wedgwood ingeniously tries to balance conceiving a convincing conception of marriage with avoiding any comprehensive doctrine.\footnote{141} This section assesses the success of Wedgwood’s balancing act primarily by appraising it in light of the objections he hopes to circumvent by his reformulation of the traditional liberal

\footnote{138 Id.}
\footnote{140 Id.}
\footnote{141 Id.}
justification of same-sex marriage.\textsuperscript{142} Although his argument may be logically coherent, it is ultimately fundamentally flawed due to the limitations of public reason and, in turn, an inadequate conception of marriage.

E. Polygamy Problem

Wedgwood admits that no theoretical reason exists for allowing same-sex marriages but not polygamous marriages.\textsuperscript{143} He writes that there “is not an essential difference in kind,” only “a purely empirical difference in degree. There is much less demand for polygamy than for same-sex marriage,” although in both cases people share the same serious desire to marry.\textsuperscript{144} To justify permitting same-sex marriages but prohibiting polygamy requires establishing that polygamy has “clearly harmful effects” that override the right to marry, but

\textsuperscript{142} Wedgwood, supra note 22, at 226-28.
\textsuperscript{143} Id. at 242.
\textsuperscript{144} Id.
same-sex marriage does not share these harmful effects.\textsuperscript{145}

Wedgwood relies on the empirical fact that same-sex marriage does not have “clearly harmful effects.”\textsuperscript{146} However, with polygamy, this argument is less clear.\textsuperscript{147} Martha Nussbaum, who makes a legal argument for same-sex marriage that parallels Wedgwood, states the following about the polygamy problem: “no group of people may be fenced out of this right [to marry] without an exceedingly strong state justification. It would seem that the best way to think about the cases of incest and polygamy is that in these cases the state can meet its burden by showing that policy considerations outweigh the individual’s right.”\textsuperscript{148}

The fact that Wedgwood’s argument can only account for an (indirect) empirical difference between same-sex marriage and forms of marriage that are widely held to be unsavory (polygamous

\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} Nussbaum, \textit{supra} note 70, at 156. For the entirety of her argument, see chapter 5 more generally.

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and incestuous marriages) is not a devastating objection.\textsuperscript{149} However, this objection weakens his argument.\textsuperscript{150} Presumably, a stronger case for homosexual marriage also elucidates a (direct) theoretical difference that explains why society should alter, but not erase entirely, the line between permissible and impermissible marriages to include same-sex couples.

F. Civil Union Concern

Perhaps Wedgwood’s article’s greatest strength is its appreciation of the difficulties that liberal arguments for same-sex marriage traditionally face.\textsuperscript{151} The civil union concern presents one such difficulty. Assuming that his account of marriage is convincing, Wedgwood adequately addresses this issue.\textsuperscript{152} The civil union concern challenges that if the right to marriage only involves a bundle of legal rights, obligations, and benefits, why should homosexuals fight for

\textsuperscript{149}Wedgwood, \textit{supra} note 22, at 242.
\textsuperscript{150}Id.
\textsuperscript{151}Wedgwood, \textit{supra} note 22, at 227.
\textsuperscript{152}Id.
marriage? Why not simply push for ideal same-sex civil unions?

Wedgwood answers this challenge by claiming that marriage has essential a social component.\(^{153}\) Marriage includes nearly universally understood set of expectations.\(^{154}\) On the other hand, civil unions capture only the legal aspects of marriage. Under Wedgwood’s conception of marriage, even if society permitted the ideal same-sex civil unions, society would still treat homosexuals as second-class citizens.\(^{155}\) These idealized civil unions would not be even “separate but equal,” since civil unions omit an essential element of marriage.\(^{156}\) The difference between ideal civil unions and marriage is more than mere “legal flummery,” but this difference lies in more than the expectations about what marriage entails.\(^{157}\) For this reason, Wedgwood’s conception

\(^{153}\) Id. at 229.
\(^{154}\) Id.
\(^{155}\) Id.
\(^{156}\) Id.
\(^{157}\) Id. at 227.

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of marriage and its essential rationale are unconvincing.\footnote{Wedgwood, supra note 22, at 226. Wedgwood’s reply to the civil union concern is similar to the California Supreme Court’s ruling in Marriage Cases. In re Marriage Cases, 43 Cal. 4th 757 (Cal. 2008). The California Attorney General argued that since California law afforded same-sex couples the same rights, obligations, and benefits of marriage under the Domestic Partnership Act; “the word ‘marriage’ is all that the state is denying to registered domestic partners,” and that this does not “violate the fundamental rights of same-sex couples.” Id. at 830. The court disagreed. The court found that “California was violating the rights of same-sex couples by withholding the ‘marriage’ signifier from them,” despite the fact that the state offered them “‘ostensibly equal’ domestic partnership status.” Anna Marie Smith, The Paradoxes of Popular Constitutionalism: Proposition 8 and Strauss v. Horton, 45 U.S.F. L. Rev. 517, 525. Acknowledging the marital status of heterosexual couples, but not homosexual couples, was stigmatizing. “By reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership,” the court found that the distinction between marriages and domestic partnerships “pose[d] a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is
such an account, but not a compelling one.\textsuperscript{160} Wedgwood’s conception of marriage and its essential rationale are inadequate, primarily in two ways.\textsuperscript{161} First, his definition of marriage and its essential rationale are incomplete due to the framework of liberalism within which he is operating.\textsuperscript{162} Second, he cannot provide a “full justification of marriage.”\textsuperscript{163}

First, neutral liberal justifications of same-sex marriage are inadequate insofar as marriage is considered only an individual right but not a public good.\textsuperscript{164} Wedgwood argues that the state ought to permit marriage because individuals want to wed, but the state should not promote marriage.\textsuperscript{165} “It is widely believed that the state’s purpose in honouring [\textit{sic}] married couples,” Wedgwood

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\textsuperscript{160} \textit{Id.} at 240.
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 240.
\textsuperscript{163} \textit{Id.} at 233.
\textsuperscript{164} \textit{Id.} at 227.
\textsuperscript{165} \textit{Id.}
writes, is to endorse “married life . . . [as] an especially virtuous or valuable way of life.”  

However, this rationale is not available to a Rawlsian liberal. To justify marriage on these grounds would violate public reason because, “in underwriting the institution of marriage, the state would be promoting this conjugal love, which is a controversial conception of the good.” As a result of this artificial limitation of neutral liberalism, Wedgwood’s conception of marriage does not capture all of the essential aspects of marriage.  

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

There is a reason that “it is widely believed” that the state’s purpose in honoring marriage is to endorse married life as an especially virtuous or valuable way of life. Marriage is an especially virtuous or valuable way of life, one worthy of state

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166 Id.
167 Id.
168 Id.
169 Id.
170 Id.

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encouragement. There is a normative aspect to marriage. It has a purpose. Marriage encourages stable relationships and fidelity. Marriage also creates better citizens.\textsuperscript{171} To leave these normative aspects of marriage out of one’s definition of marriage is to misconceive the institution.

However, more fundamentally, Wedgwood and other neutral liberals cannot explain why the state ought to promote marriage at all.\textsuperscript{172} He discusses why individuals want to marry, but not why the state permits and promotes marriage.\textsuperscript{173} Wedgwood acknowledges his argument’s limitation when he writes, “my proposal is not intended as a full justification of marriage. Indeed, I shall remain neutral on the question of whether marriage is, on balance, justified at all.”\textsuperscript{174} Likewise, Nussbaum states, “so long as the state is in the marrying business, equality concerns require it to offer

\textsuperscript{171} For other arguments to this affect, see Sexuality and Liberty, supra note 10, at 93-94. Carlos Ball, Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism, 85 Geo. L.J.1871, 1930 (1996-1997).
\textsuperscript{172} Wedgwood, supra note 22, at 227.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
marriage to same-sex couples—but . . . it would be a lot better, as a matter of both political theory and public policy, if the state withdrew from the marrying business.” 175 The neutral liberal’s argument becomes an awkward one, since the neutral liberal is forced to argue for same-sex marriage contingently.

From the perspective of neutral liberalism the question of whether or not the state should recognize marriages at all, as Nussbaum notes, is independent of the question of whether same-sex couples ought be allowed to marry in our society, where heterosexual couples can marry. 176 Neutral liberalism provides an answer to the latter question, but not the former. As a result, political liberalism faces the following objection:

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175 Nussbaum, supra note 70, at 132.
176 Id.
1) If modern marriage cannot be justified, then same-sex marriage cannot be justified.

2) Political liberalism cannot justify modern marriage.

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

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

This objection devastatingly implies that the issue of same-sex marriage, like abortion, is a “stand-off” case for public reason. The likely reason that Wedgwood does not attempt to make a

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177 Id. Wedgwood, supra note 22, at 227.
178 Elizabeth Brake, Minimal Marriage 120 Ethics 302, 320 (2010).
179 Rawls, supra note 21 at 478-79.
full justification for same-sex marriage because to justify same-sex marriage fully requires a justification of marriage in the first place. To make this argument requires an appeal to a controversial conception of the good. Therefore, Brake writes, “public reason and neutrality, where invoked in the same-sex marriage debate, have not been consistently followed, even by those defending same-sex marriage.”

While Wedgwood’s argument is not exhaustive of Rawlsian liberal justifications of same-sex marriage, Wedgwood’s argument highlights the limitations of this political philosophy’s traditions in dealing with same-sex marriage. Same-sex marriage presents a tricky case for political liberalism. Since modern marriage entails inherently normative elements, a liberal cannot explain and define marriage using public reason alone without substantially redefining it.

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180 Id. at 312. In Section E, I will explain what Brake contends being a consistent political liberal (who respects the restrictions of public reason) means for the same-sex marriage debate. I shall argue, following Brake, that a consistent Rawlsian cannot justify modern marriage at all.


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Political liberalism does not have a “thick” enough conception of the good to properly account for a compelling definition of marriage. As a result, Rawlsian liberal justifications of same-sex marriage cannot be compelling.

H. Privatize Marriages?

Some libertarians take the political liberal’s weakness a step further, arguing that the state ought not to be involved in marriage at all. These “contractualists,” as Mary Shanley calls them, contend that the state surpasses its proper bounds by taking a “one-size-fits-all” approach to marriage.\textsuperscript{182} Marriage entails a (legal) contractual aspect, but the marriage contract is peculiar.

Unlike most contracts, the terms of marital contracts are prearranged by the state.\textsuperscript{183} For example, a couple cannot enter into a marriage with

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a sunset clause or contract beforehand to a marriage that is ‘5-year renewable’ or a ‘marriage for the night.’ Moreover, the marriage contract is odd insofar as “the terms of the contract cannot be renegotiated, neither party need understand its terms, it must be between two and only two people, and these two people must be one man and one woman.”

Contractualists, such as Martha Fineman and Michael Kinsley, contend that state sanctioned marriage should be abolished. The state should

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184 Id.
186 Martha Fineman, Why Marriage?, in Just Marriage 46-51 (Joshua Cohen & Deborah Chasman eds. 2004) [hereafter Why Marriage?]. Michael Kinsley, Abolish Marriage, in Justice: A Reader 383, 383-84 (Michael Sandel ed., 2007). Given the scope of this paper, I do not directly address the critiques of marriage on the left by feminists and queer theorists. From the feminist perspective, Fineman, for example, argues that modern marriage, with its implicit traditional conception of the family, is “the most gendered of our social institutions.” John Rawls, supra note 19, at xvi. Martha Fineman, The Neutered Mother, The Sexual Family And Other Twentieth Century Tragedies, 7 (1995) [hereafter Neutred Mother]. She contends that the state ought not to try to “resuscitate marriage and . . . the traditional family.” Id. Instead, marriage ought to be abolished and state policy should be “supporting and subsidizing . . . the caretaker-dependent tie.” Why Marriage? at 50. The focus should be placed not on the spouse-spouse connection, as traditionally understood, but on the mother-child unit as the core of the family structure. Neutered Mother at 4-5.

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get out of the marriage business and should allow individuals to privately determine the terms of marital arrangements.\textsuperscript{187} Kinsley claims that the “solution” to the “gay-marriage controversy” is to “[p]rivatize marriage. . . . Let churches and other religious institutions continue to offer marriage ceremonies. Let department stores and casinos get into the act if they want. . . . Let couples celebrate their union in any way they choose and consider themselves married whenever they want.”\textsuperscript{188}

III. MINIMAL MARRIAGE?

Arguing from the perspective of a “thinner,” more libertarian, tradition of liberalism, Elizabeth Brake defines a similar approach for the proper scope of marriage.\textsuperscript{189} She claims that the institution of marriage must be radically restructured.\textsuperscript{190} However, she stops short of asserting that the state

\textsuperscript{188} Michael Kinsley, supra note 121, at 383-84.
\textsuperscript{189} Brake, supra note 116, at 303.
\textsuperscript{190} See id.
should not sanction marriages. Instead, Brake contends that a consistent reading of Rawls’ public reason can only account for “minimal marriage.” Liberal legal theorists have at least two options for justifying same-sex marriage. The first defines what is essential to marriage (as it is commonly understood) and then contends that same-sex couples fit that definition as well as heterosexual couples. Therefore, by a principle of equality, same-sex couples ought to be allowed to wed. Elizabeth Brake takes a different approach. Questioning how the institution of marriage ought to operate, Brake writes:

I do not think this can be answered by appealing to ‘the’ definition of marriage. The legal definition is just what is at issue. Constraints of public reason rule out basing law on essentially religious understandings of marriage. Even a widely shared understanding of marriage does not

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191 Id.
192 Id.
193 See Wedgwood, supra note 22, at 240-41; Nussbaum, supra note 70, at 132.
194 Id.

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in itself justify a legal definition. Marriage design will depend on what marriage is ‘for’ and the question of what it is ‘for’ will have to be settled by looking at independent reasons for what kind of institutions there should be.\textsuperscript{195}

Rather than argue that gay couples ought to be allowed to enter into the current institution of marriage, Brake asserts that society should alter modern marriage to legally recognize same-sex relationships and other important intimate relationships. Whereas Wedgwood wants to accurately define marriage, Brake contends that public reason requires marriage be redefined.\textsuperscript{196}

Brake argues for “marital pluralism or disestablishment,” but not abolition.\textsuperscript{197} She asserts that in a (neutral) liberal state, “no principled restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that

\textsuperscript{195} Brake, supra note 116, at 315-16.
\textsuperscript{196} Id. Wedgwood, supra note 22, at 226.
\textsuperscript{197} Brake, supra note 116, at 305, 308.
they be caring relationships” should exist.\textsuperscript{198} Under Rawlsian liberalism, public reason requires that marriage cannot be defined solely with reference to a comprehensive moral, religious, or philosophical doctrine.\textsuperscript{199} Moreover, a political liberal cannot assume that the state should sanction the institution of marriage. Public reason “requires that there be publicly justifiable grounds for there being marriage law at all.”\textsuperscript{200}

Typical liberal justifications of same-sex marriage “presuppose sexual or romantic relationships, aspirations to permanence or exclusivity . . . [and] a full reciprocal exchange of marital rights,” however such an assumption is inconsistent with public reason because of the great “diversity” in the “competing conceptions of valuable relationships.”\textsuperscript{201} Public reason entails that the state cannot endorse any particular type of relationship on the basis of a comprehensive

\textsuperscript{198} \textit{Id.} at 305.  
\textsuperscript{199} \textit{Id.} at 313.  
\textsuperscript{200} \textit{Id.} at 313-15.  
\textsuperscript{201} \textit{Id.} at 320.  

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doctrine. As Rawls writes, “the government would appear to have no interest in the particular form of family life, or of relations among the sexes . . . Thus, appeals to monogamy as such, or against same-sex marriages . . . would reflect religious or comprehensive moral doctrines.”

Brake contends that the ideal of monogamous marriage (heterosexual or homosexual) is only one conception of a valuable relationship based on a particular comprehensive conception of the good. Committed, lifelong, monogamous relationships are not the only types of valuable relationships. Some citizens prefer polygamy or “polyamory—engaging multiple love relationships.” Still others are “quirkalones” or urban tribalists who hold that “good relationships involve networks, ‘tribes,’ or groups of friends.”

When a state promotes monogamy as marriage’s “one-size-fits-all” standard, the state fails to respect

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202 See Rawls, supra note 21, at 446-47, 467.
203 Rawls, supra note 20, at 457.
204 Brake, supra note 116, at 323.
205 Id. at 321.
206 Id. at 322. Brake borrows the term “quirkalone” from Sasha Cagen, Quirkyalone (2006).
citizens who subscribe to an alternative conception of valuable relationships.\textsuperscript{207} Recall that under Rawlsian liberalism no better or worse (reasonable) comprehensive doctrines exist.\textsuperscript{208} There are permissible (reasonable) and impermissible (unreasonable) conceptions of valuable relationships, but there is no room for supererogatory conceptions of the good or for conceptions of the good that are tolerated but discouraged.\textsuperscript{209} “There is no public ranking of the value of different (justice-respecting) ways of life” in a Rawlsian state.\textsuperscript{210}

George, Girgis, and Anderson present a third challenge for advocates of same-sex marriage.\textsuperscript{211} If the debate should be value-neutral, then on what grounds can one presume that marital relationships

\textsuperscript{207} Brake, supra note 116, at 323.
\textsuperscript{208} Will Kymlicka, supra note 44, at 218.
\textsuperscript{209} Id.
\textsuperscript{210} Id. I say “reasonable” and “justice-respecting” conceptions of valuable relationship because Brake makes clear that political liberalism “cannot permit rights violations.” Therefore, certain types of marriages would be prohibited. Marital slave contracts, for instance, would be impermissible, as would pedophilia and bestiality—on the grounds that “children and nonhuman animals” cannot consent and “cannot make any contracts.” Brake, supra note 116, at 310.
\textsuperscript{211} George et. al., supra note 12, at 271-72.
should be sexual or romantic? They write, “we challenge the many revisionists who support norms, like monogamy, as a matter of moral principle to complete the following sentence: Polyamorous unions and nonsexual unions by nature cannot be marriages, and should not be recognized, because . . .”

So, what would a conception of marriage that abided by the restrictions of public reason look like according to Brake? First, since a neutral, liberal state would not assume any particular relationship between spouses, no presumption of economic dependency in the law would exist. As a result, “most marital entitlements to direct financial benefits would be eliminated.” For instance, married couples would no longer receive increased Social Security benefits or tax breaks based on

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212 Id. at 271-72, 274. The first and second challenges being that if the same-sex debate it is to be value-neutral, then on what grounds can one presume that marital relationships should be monogamous or that the state should be involved in them?
213 I will not go into the same degree of specificity about what a minimal marriage might involve as Brake does. For a more detailed description, see Brake, supra note 116, at pt. II.
214 Id. at 308.
marital status.\footnote{Id. at 332.} “Unlike current marriage, minimal marriage does not require that individuals exchange marital rights reciprocally and in complete bundles”.\footnote{Id. at 307.} Of course, a couple could decide to share marital rights in a traditional way, but minimal marriage would also allow individuals to divide different marital rights and distribute them amongst several different people through an “adult care network.”\footnote{Id. at 306-07.}

To illustrate how an adult care network might operate, Brake proposes a hypothetical.\footnote{Id. at 311-12.} Rose cohabitates with Octavian, but “there is no single person with whom Rose wants or needs to exchange the whole package of marital rights and entitlements.”\footnote{Id.} She shares household expenses with Octavian, and they form “a legal entity for certain purposes—jointly owned property, bank account access, homeowner and car insurance, and so on,” but this arrangement is not a permanent

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\begin{itemize}
\item \textsuperscript{215} Id. at 332.
\item \textsuperscript{216} Id. at 307.
\item \textsuperscript{217} Id. at 306-07.
\item \textsuperscript{218} Id. at 311-12.
\item \textsuperscript{219} Id. at 312.
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Because Octavian’s job will relocate him in a few years, and since Rose does not want to move, their marriage has a sunset clause specifying how their household property will be divided once their marriage terminates.221

Aside from Octavian, Rose has affection for her Aunt Alice who lives nearby. “Alice lives in genteel poverty, and Rose feels a filial responsibility toward her.” 222 Rose’s job provides her with a benefits package including a pension and healthcare perks.223 For a modest fee, any of Rose’s spouses are eligible for these benefits.224 Octavian’s financial situation makes this package superfluous for him (i.e. he has his own pension and healthcare through his employer); however, “Alice needs access to good health care and, should Rose die, she could use the pension that would go to Rose’s spouse if she had one.” Through the “adult care networks” of minimal marriage, Rose could

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220 Id. at 311-12.
221 Id. at 311.
222 Id.
223 Id.
224 Id.

Clemente
“transfer the eligibility for these entitlements to Alice.”

With Brake, we get to the problem’s core for political liberal justifications of same-sex marriage. Modern marriage in Western democracies combines liberal ideals with underlying normative values. Brake admits that her use of the term “marriage” “departs from [its] current usage.” If her “minimal marriage” model were adopted, she asserts, “it would be less important to retain the term ‘marriage,’ and in that case, it might be desirable to replace ‘marriage’ as a legal term with ‘personal relationships’ or ‘adult care networks.’

If taken to her logical conclusion, then Brake leaves us with the supposition that political liberalism cannot consistently justify modern marriage at all (nonetheless same-sex marriage):

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225 Id.
226 Id. at 323.
227 Id.
228 Id. at 323-24.
229 See id.

Clemente
1. Minimal marriage is distinct from modern Western marriage.
2. The terms of modern marriage are more restrictive than minimal marriages.
3. The most restrictive terms of a marriage that political liberalism can consistently justify are those of a minimal marriage.
4. Therefore, political liberalism cannot justify the terms of modern marriage.

On the surface, this argument does not seem problematic for supporters of same-sex marriage. Supporters of same-sex marriage do not want to justify modern marriage exactly as society currently conceives of it. In most parts of the Western world, modern marriage excludes same-sex couples. However, if gay couples want to enter into an institution even remotely similar to marriage, one which captures what is truly essential to the institution (a legal commitment to lasting love and fidelity), then neutral liberalism simply does not have the necessary resources.
IV. CONSERVATIVE CONCEPTION
OF MARRIAGE

While undoubtedly much, if not most, of the criticism of same-sex marriage in popular culture stems from unreflective disgust (what former Arkansas Governor Mike Huckabee calls the “ick factor”) or prejudice, not all of the criticism has these roots. Finnis, George, Bradley, Girgis, and Anderson demonstrate this alternative by anchoring their opposition in philosophic grounds. “These conservative scholars aim to supply the ‘public’ arguments and widely accessible ‘reasons’ that are often missing from popular attacks on the morality of homosexuality.”

For George, Girgis, and Anderson, like Wedgwood, ascertaining an accurate conception of marriage is crucial. They claim the entire same-
sex marriage debate “hinges on one question: What is marriage?” However, unlike Wedgwood, George, Girgis, and Anderson assume that “real marriage” has an absolute, pre-political reality that cannot be altered, regardless of whether “the state recognizes it or not.” This assumption is coupled with the idea that “the state is justified in recognizing only real marriages as marriages.” These two assumptions form the basis of George, Girgis, and Anderson’s basic argument:

1. “Real marriage” has a pre-political, moral reality.
2. The state is justified in recognizing only real marriages as marriages.
3. Real marriage inherently excludes same-sex couples.
4. Therefore, the state is not justified in recognizing same-sex couples as marriages.

George et. al., supra note 12, at 248.
George et. al., supra note 12, at 250. Wedgwood, supra note 22, at 240. I will also refer to “real marriage” as “natural marriage,” since, as we shall see, George, Girgis, and Anderson’s conception of marriage is derived from its alleged natural purpose. Id. at 253-54.

Id. at 251.

Clemente
These conservative critics essentially embrace and embellish the common criticism of same-sex marriage that it redefines marriages. For them, the definition of marriage is inescapably bound-up with straight sex, but not procreation.\textsuperscript{237} This argument leads to an awkward, and I will argue ultimately unsuccessful, balancing act between maintaining that marriage “oriented to and fulfilled by” procreation, but that procreation is not the defining feature of marriage.\textsuperscript{238} Instead, “procreative-type” acts are essential.\textsuperscript{239}

In the mid-1990s, George and Bradley defined marriage using fairly opaque natural law terminology: a “two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type, [which] is an intrinsic (or . . . ‘basic’) human good.”\textsuperscript{240} First, these critics distinguish between intrinsic (basic) and extrinsic (instrumental) human goods. “Among the basic goods are life, knowledge, play, aesthetic

\begin{footnotes}
\textsuperscript{237} George et. al., supra note 12, at 253-55.
\textsuperscript{238} Id. at 256.
\textsuperscript{239} Id.
\textsuperscript{240} George & Bradley, supra note 8, at 301-02.
\end{footnotes}
experience, sociability or friendship, and practical reasonableness. . . . Basic goods are foundational reasons for action: they are self-evident, intrinsic, and incommensurable goods.” Instrumental goods are goods pursued as means, for the sake of other goods.

The ideas of sex as a two-in-one-flesh communion and a reproductive type act are interrelated. They comprise a “marital act.” A marital act is “sexual intercourse [within a marriage] that consummates and actualizes marriage by uniting the spouses.” Reproductive type acts are defined as “acts of inseminatory union of male with female genital organs.” In other words, penises and vaginas are necessarily involved. Of the potential suggestion that a reproductive-type act could be anything but vaginal intercourse, Finnis writes, “[h]ere fantasy has taken leave of reality. Anal or oral intercourse, whether

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241 Macedo, supra note 10, at 273 n.54.
242 See id. at 273.
243 George & Bradley, supra note 8, at 301-02 n.4.
244 Id.
245 Id.
between spouses or males, is no more a biological union ‘open to procreation’ than is intercourse with a goat by a shepherd who fantasizes about breeding a faun.”

The two-in-one-flesh communion, or one-flesh communion, can roughly be understood as meaningful sex. For sex to be meaningful, it must be “mutual self-giving” and “unitive.” In contrast, these conservative natural law theorists claim that all anal or oral sex, heterosexual or homosexual, is inherently nonmarital, even if it is performed within a heterosexual marriage. This sex instrumentalizes each other’s bodies and further treats these bodies as if they were pleasure

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

247 Id. at 313. Macedo, supra note 10, at 274.

248 George & Bradley, supra note 8, at 303 n.9.

Clemente
This conservative philosophy holds that marriage and marital sex are part of an intrinsic good and seeks no other end than this unity.\textsuperscript{250}

However, marital sex is not about pleasure, or even procreation.\textsuperscript{251} Whereas other conservative critics of same-sex marriage follow the Augustinian tradition of wedding their definition of marriage with procreation, Finnis, George, and Bradley “reject the instrumentalizing of marriage and marital intercourse to any extrinsic end, including the great good of having and rearing children.”\textsuperscript{252}

Spouses do not engage in marital sex for a specific purpose.\textsuperscript{253} On this view, children are an indirect (possibly foreseen) consequence of marital sex. They are a gift (from God), not a product (of one’s loins).\textsuperscript{254}

Couples do not pursue marital sex for pleasure alone. George and Bradley go as far as to

\textsuperscript{249} See Macedo, \textit{supra} note 10, at 273; George & Bradley, \textit{supra} note 8, at 303 n.9.
\textsuperscript{250} George & Bradley, \textit{supra} note 8, at 304-05.
\textsuperscript{251} \textit{Id.} at 303-04.
\textsuperscript{252} \textit{Id.} at 304.
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} \textit{Id.}
claim that elderly couples who no longer enjoy sex ought to still do it “at least occasionally, as a way of actualizing and experiencing their marriage as a one-flesh union.”

This stance leads to a division within conservative circles as to whether contracepted sex is permissible. While some hold that contracepted sex can be marital, George and Bradley reject this argument.

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

1) Marital sex is essential to marriage.

2) The state should only permit marriage that encourages marital sex.

3) Sex is marital if, and only if, it is:
   a) of the reproductive type.
   b) a two-in-one-flesh communion.

\[255\] Id. at 310, 319.
\[256\] Id. at 310 n.30
\[257\] Id.
4) Sex is of the reproductive type if, and only if, it involves male and female genitalia.

5) Sex is a two-in-one-flesh communion if, and only if, it seeks the intrinsic good of marriage.

6) For sex to seek the intrinsic good of marriage, it must be:
   a) Vaginal intercourse
   b) Within a marriage
   c) Mutually self-giving (not motivated by individual gratification).

7) Homosexuals cannot have sex involving male and female genitalia.

8) So, gay and lesbian sex is inherently non-marital.

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

Clemente
With this coherent (although admittedly implausible) conception of marriage, conservative critics of same-sex marriage may exploit the weaknesses of the Rawlsian liberal justification of same-sex marriage. What is marriage? Why should the state sanction it in the first place? Conservatives answer both of these questions. Neutral liberals answer the first, but not the second question. For Wedgwood, marriage’s definition fits within the confines of public reason. His definition does not rely on a particular conception of the good.

The conservative natural theorists counter that the liberal conception of marriage is simply mistaken. Marriage is inherently about a specific basic good—the good of marriage, which is actualized through marital sex. Moreover, since marital sex necessarily involves male and female

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258 Wedgwood, supra note 23.
259 Id. at 240.
260 Id.
261 George & Bradley, supra note 8, at 301-02.
genitalia, this good precludes same-sex couples from participating in marriage.  

The conservative challenge is problematic for the political liberal. How can he reply? He cannot claim that the conservative critique is wrong. Wrong on what grounds? Given the constraints of public reason, a Rawlsian liberal may object if the conservative’s argument is not valid; but if the conservative’s argument is valid, the Rawlsian liberal cannot question the soundness of the argument. In other words, a political liberal could highlight holes in a conservative argument’s reasoning but he cannot criticize it on the grounds that its premises are false because then the liberal is making a claim about a controversial conception of the good.

Nonetheless, the conservative natural law’s conception of marriage raises several questions. First, why does reproductive sex, or a procreation-type act, necessarily involve male and female genitalia? Second, why is a procreative-type act

\[262 \text{id.}\]

Clemente
relevant to marriage in the first place? Third, why is mutually self-giving sex limited only to heterosexual couples? Finally, if sex is essential to marriage, then why does the bodily element of sex (i.e., the type of genitalia involved) take precedence over the psychological element (i.e., whether sex is part of a couple fostering a unity or individuals seeking physical gratification)?

George, Girgis, and Anderson provide a conception of marriage, the “conjugal view,” to address these issues. Three elements encompass the essence of the conjugal view of marriage: “first, a comprehensive union of spouses; second, a special link to children; and third, norms of permanence, monogamy, and exclusivity.” Since the norms of permanence, monogamy, and exclusivity are consistent with modern marriage, and hence same-sex marriage, this article focuses on the first two elements of the conjugal view of marriage.

First, marriage being a comprehensive union and having a special link to children is not facially

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263 George et. al., supra note 12, at 246.
264 Id. at 252.
antithetical to same-sex marriage. Same-sex marriage “involves a sharing of lives and resources, and a union of minds and wills” as well as bodily unions (i.e. sex).\textsuperscript{265} Similarly, many same-sex couples raise children and are aided in doing so by their marriages. However, it is not until one examines what George, Girgis, and Anderson’s mean by a comprehensive union and a special link to children their conception of marriage comes into tension with same-sex marriage.\textsuperscript{266} Not only does a comprehensive union of spouses require a bodily union, but the union also entails that marital sex must take a specific physical form.\textsuperscript{267} This claim has two parts. First, marriage necessarily involves a physical element (sex). The psychological element (marital love) alone is insufficient.\textsuperscript{268} George, Girgis, and Anderson predicate this claim on a metaphysical assumption that “persons are body-mind composites.”\textsuperscript{269} Therefore, since bodies are an

\textsuperscript{265} Id. at 253.
\textsuperscript{266} Id. at 253-57.
\textsuperscript{267} Id. at 253.
\textsuperscript{268} Id. at 255 & n.16.
\textsuperscript{269} Id. at 253.
integral part of our personhood, defining marriage without reference to the bodily aspects of a relationship (sex) “would leave out an important part of each person’s being.”\textsuperscript{270}

Second, George, Girgis, and Anderson argue that marriage necessarily involves a particular type of sex—vaginal intercourse.\textsuperscript{271} However, even if one grants that sex is a defining feature of a marriage (or at least that sex is a typically important part of most marriages), it does not necessarily follow that intercourse is required. To reach this further conclusion, George, Girgis, and Anderson argue (from natural law theory) that the relevant type of sex for marriage corresponds with its natural purpose.\textsuperscript{272}

\textsuperscript{270} Id.
\textsuperscript{271} Id. at 254.
\textsuperscript{272} Id. at 253-54.

Clemente
1) “Our organs . . . are coordinated, along with other parts, for a common biological purpose of the whole: our biological life.”

2) “For two individuals to unite organically, and thus bodily, their bodies must be coordinated for some biological purpose of the whole.”

3) “But individual adults are naturally incomplete with respect to one biological function: sexual reproduction.”

4) Coitus is the only form of sexual contact that can lead to reproduction.

5) Therefore, bodily unity requires coitus.\(^{273}\)

They conclude that “two men or two women cannot achieve organic bodily union since there is no bodily good or function toward which their bodies

\(^{273}\) Id.

Clemente
can coordinate, reproduction being the only candidate."  

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

\[274\] Id. at 255.
\[275\] Id.
\[276\] Id.
\[277\] Id. at 254-55.

Clemente
George, Girgis, and Anderson also make clear that the psychological aspects of marriage alone are not sufficient.\textsuperscript{278} Both the bodily and psychological are necessary elements of marriage. Therefore, it is not that the bodily aspects of marriage outweigh the psychological. They are each insufficient on their own. Intercourse embodies a marriage “if (and only if) it is a free and loving expression of the spouses’ permanent and exclusive commitment.”\textsuperscript{279}

Thus, while same-sex couples may participate in the psychological aspects of marriage (by being in loving, monogamous, faithful relationships), according to George, Girgis, and Anderson, a state cannot designate such relationships as marriages.\textsuperscript{280} By pre-political definition, marriage necessarily involves intercourse.\textsuperscript{281} Since same-sex couples cannot partake in intercourse, they cannot be married.\textsuperscript{282}

\textsuperscript{278} Id. at 255 & n.16.
\textsuperscript{279} Id. at 254-55.
\textsuperscript{280} Id. at 255.
\textsuperscript{281} Id.
\textsuperscript{282} Id.

Clemente
The claim that procreative-type acts (intercourse) are necessary to marriage is the first part of the George, Girgis, and Anderson’s balancing act.283 The second part is that procreation and childrearing are not necessary. For George, Girgis, and Anderson, the second element of the conjugal view of marriage is its “special link to children.”284 The special link to children comes from their belief that “marriage is also deeply—indeed, in an important sense, uniquely—oriented to having and rearing children.”285

Although childbearing and childrearing are not necessary to marriage, the institution of marriage and its structure are “oriented to and fulfilled by the bearing, rearing, and education of children.”286 George, Girgis, and Anderson adamantly claim that this argument does not entail that childless marriages are not real marriages.287

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283 See id.
284 Id.
285 Id.
286 Id. at 256.
287 Id. Whether or not it is consistent to say that a procreative-type act is essential while maintain that procreation itself in not essential will be explored in the next section.

Clemente
childless marriages, George, Girgis, and Anderson draw a fine line between what is essential to marriage, and what is not essential but still fulfills or seals marriage.\textsuperscript{288} Procreation-type acts (intercourse) are essential to marriage. Procreation and childrearing are not essential but still fulfill a marriage.\textsuperscript{289}

To illustrate this distinction, George, Girgis, and Anderson compare infertile couples to winless baseball teams.\textsuperscript{290} Winless baseball teams and infertile couples both have the right equipment (bats and gloves; penises and vaginas).\textsuperscript{291} Additionally, both groups have a “characteristic structure largely” from their “orientation to” a specific purpose (winning games; procreation).\textsuperscript{292} Being a member of a baseball team involves developing and sharing one’s athletic skills in the way best suited for honorably winning . . . .

\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} Id. at 256-57.
\textsuperscript{291} See id.
\textsuperscript{292} Id. at 256.
But such development and sharing are possible and inherently valuable for teammates even when they lose their games. Just so, marriage . . . involves developing and sharing one’s body and whole self in the way best suited for honorable parenthood . . . . But such development and sharing, including the bodily union of the generative act, are possible and inherently valuable for spouses even when they do not conceive children.  

On the other hand, same-sex couples “lack any essential orientation to children.” Same-sex couples simply do not have the right equipment. In sum, little difference exists between George and Bradley’s argument against same-sex marriage and George, Girgis, and Anderson’s opposition. The latter argument merely offers a more modern version of the former argument with a less explicit reliance on natural law theory. Both criticisms rely

293 Id. at 256-57.
294 Id. at 257.
295 See id. at 256-57.
296 See generally, supra notes. 297 Id. at 250. George & Bradley, supra note 8, at 301-02.
on intuition and the premise that marriage has a natural, pre-political definition and structure.\(^{297}\)

Moreover, both arguments turn on a precarious balancing act between maintaining that marriage is “oriented to and fulfilled by” procreation, but that procreation is not the defining feature of marriage.\(^{298}\)

V. OBJECTIONS TO THE CONSERVATIVE MARRIAGE

In a defense of “What is Marriage?”, George, Girgis, and Anderson challenge their critics to provide “a clear explanation of its flaws—for example, by showing that it rests on a false premise or a fallacious inference.”\(^{299}\) However, the problem with these conservatives’ argument is not a flaw in their logic or their premises’ reliance on a controversial conception of the good. Instead, the issue is that their premises are false.\(^{300}\) They rely on

\(^{297}\) Id. at 250. George & Bradley, supra note 8, at 301-02.

\(^{298}\) George et. al., supra note 12, at 256.

\(^{299}\) George et. al., supra note 25.

\(^{300}\) Id. at 275

Clemente
intuitions that are not widely shared and run counter to everyday experience.\textsuperscript{301}

A. The Fantasy of “Real Marriage”

George, Girgis, and Anderson rightly emphasize the centrality of accurately defining marriage.\textsuperscript{302} For a Rawlsian liberal justification of same-sex marriage “to get off the ground,” the justification must provide a compelling definition of marriage.\textsuperscript{303} Where George, Girgis, and Anderson go astray is with their insistence that marriage, or “real marriage,” has a pre-political, pre-legal reality.\textsuperscript{304} They claim that natural marriage “has its own value and structure, independent of the state and its laws.”\textsuperscript{305} Natural marriage is essential to their overarching argument but is largely taken as uncontroversial.\textsuperscript{306} They provide only “a brief defense of this idea.”\textsuperscript{307} Instead, they argue that

\textsuperscript{301} Id.
\textsuperscript{302} George et. al., supra note 12, at 252.
\textsuperscript{303} Wedgwood, supra note 10, at 226.
\textsuperscript{304} George et. al., supra note 10, at 226.
\textsuperscript{305} Id. at 250.
\textsuperscript{306} Id.
\textsuperscript{307} Id. at 250 n.11.
“marriage is not a legal construct with totally malleable contours—not ‘just a contract.’”\textsuperscript{308} Otherwise, it would be “impossible for the state’s policy to be wrong about marriage.”\textsuperscript{309} However, even if one were to accept, as I do, that marriage is more than a typical contract, it does not follow that the modern institution of marriage can be entirely separated from the state and its laws.\textsuperscript{310}

These conservative’s marriage definition ignores marriage’s political and legal dimensions and is fundamentally misguided. Marriage’s potential moral reality is irrelevant to the current same-sex marriage debate. The essential issue is legal recognition: What types of relationships warrant the state’s recognition and endorsement? The answer informs what the right to marriage entails in modern Western states.

\textsuperscript{308} Id. at 250, 274.
\textsuperscript{309} Id. at 272.
\textsuperscript{310} George, Girgis, and Anderson also rest this premise on the dubious empirical claim that, “marriage’s independent reality is only confirmed by the fact that the known cultures of every time and place have seen fit to regulate the relationships of actual or would-be parents to each other and to any children that they might have.” Id. at 275.

Clemente
To determine the scope of the right to marriage, one must examine what is essential to modern Western marriages. Wedgwood’s intuition test approach provides a reasonable way to determine what is essential to a marriage.\textsuperscript{311} An element of marriage is essential “if and only if we modern Westerners find it intuitively hard to understand how an institution that lacks that feature can really be a form of marriage.”\textsuperscript{312} Since it is “hard to understand how an institution that does not involve law in any way can really be a form of marriage,” we cannot ignore the important legal aspects of marriage in defining modern marriage.\textsuperscript{313} Therefore, modern marriage is not pre-political, and natural marriage, if such a thing exists, is irrelevant to the same-sex marriage debate.

Moreover, the state’s policy may be wrong about marriage without the existence of there being natural marriage. As Martha Nussbaum notes, and the Supreme Court confirms, a fundamental right

\textsuperscript{311} Wedgwood, \textit{supra} note 22, at 228.
\textsuperscript{312} \textit{Id}.
\textsuperscript{313} \textit{Id}.

Clemente
exists “to choose whom to marry,” and “no group of people may be fenced out of this right without an exceedingly strong state justification.” Therefore, the state’s policy toward marriage may be wrong if certain groups are barred from marriage without a reasonable justification. For example, in Loving v. Virginia, the Court determined that race was irrelevant to the state’s rationale for sanctioning marriages. Likewise, the state is wrong in banning same-sex marriage because the state’s rationales for recognizing and encouraging marriage apply equally to both same-sex and opposite-sex couples.

George, Girgis, and Anderson look to their pre-political definition of marriage to inform their conception of the state’s rationale for marriage. This approach appears backwards. Instead, the state’s rationale for marriage ought to inform what the right to marriage entails. At best, George, Girgis, and Anderson change the subject by

315 Loving, 388 U.S. at Part II.
316 George et. at., supra note 12, at 251.
disregarding what the right to marriage entails (the true focus of the same-sex marriage debate), and instead focusing on an occult notion of “real marriage.” At worst, this move mirrors the “No True Scotsman” fallacy.

The No True Scotsman fallacy is illustrated by a dialogue between Scott and Burns:

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

When presented with the proposition that the modern marriage is applicable to both same-sex and opposite-sex couples, George, Girgis, and Anderson reply echoes Scott’s—“Well, all real marriages are inherently heterosexual.” Such a move is especially problematic when a critic considers that their paper’s purpose is to refute the arguments for same-sex marriage “without appeals to revelation or revelation or

\[317\] Id. at 252.
\[318\] Id.
religious authority of any type.”319 George, Girgis, and Anderson’s intuitions about marriage’s “moral reality” appear heavily influenced by religious belief.320

Former Republican presidential candidate Rick Santorum takes a similar stance on marriage. Senator Santorum also believes that the essence of “marriage existed before government existed.”321 He concurs with George, Girgis, and Anderson’s statement that “the state cannot choose or change the essence of real marriage.”322 Further, Senator Santorum analogizes marriage to water323 and a napkin.324 “Water is what water is,” just as “marriage is what marriage is.”325 Recognizing same-sex marriage is “like saying . . .

319 Id. at 285.
320 Id. at 252.
322 Id. George et. al., supra note 12, at 252.
324 Santorum, supra note 211.
325 Kent, supra note 213.

Clemente
[a] glass of water is a glass of beer. . . [Y]ou can call it a glass of beer, but it’s not a glass of beer.\(^{326}\) Similarly, you can call a napkin a paper towel, but this delineation does not change the napkin’s “metaphysical” character.\(^{327}\) A napkin, like a marriage, “is what it is.”\(^{328}\)

For Senator Santorum, George, Girgis, and Anderson, marriage’s moral reality is confirmed by nature and marriage’s supposed similarity across cultures.\(^{329}\) However, Senator Santorum explicitly states that his views on natural law come from God, and that natural law is God’s law.\(^{330}\) Again, George, Girgis, and Anderson deny that their arguments rely on “revelation or religious authority of any type.”\(^{331}\) However, in light of the widely held belief that modern Western marriages have essential social, political, and legal elements, the source of George, Girgis, and Anderson’s intuitions regarding natural

\(^{326}\) Id.
\(^{327}\) Santorum, supra note 211.
\(^{328}\) Id.
\(^{329}\) Santorum, supra note 211. George et. al., supra note 12, at 275.
\(^{330}\) Santorum, supra note 211.
\(^{331}\) George et. al., supra note 12, at 285.

Clemente
marriage are seemingly similar to Senator Santorum’s—a matter of faith.

1. Infertility and Intuition

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

Stephen Macedo argues that conservatives who oppose sex-marriage have an “extremely narrow view of valuable sexual activity” and what the good of marriage entails. As a result of their restricted conception of the good of marriage,

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332 Id. at 265.
333 Id. at 266-68.
334 Macedo, supra note 10, at 281.

Clemente
proponents of conservative natural law argue marriage is an inherently heterosexual institution. They claim that, aside from the instrumental goods of marriage, the basic good of marriage is essentially interwoven with marital sex—a one-flesh communion. Marital sex is a unitive, reproductive-type act.

Therefore, all non-marital sex (sex outside of a marriage, all anal or oral sex—gay or straight, and, according to Finnis, George, Bradley, all contracepted sex) is valueless and ought not to be encouraged by the state. Under this view, only marital sex can be meaningful and unitive. All else is equivalent to “mutual masturbation.” Macedo astutely asks, are there “no distinctions to be drawn here?”

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335 George et. at., supra note 12, at 252.
336 Mary Shanley notes that the notion of “one-flesh” unity has historically had implications of female subjection, where that husband is the head of the household and “the suspension of the wife’s legal personality.” Shanley, supra note 118, at 7.
337 George & Bradley, supra note 8, at 313. As we have seen, there is little daylight between George and Bradley, who explicitly rely on natural law theory and George, Girgis, and Anderson.
338 Id. at 310 n.30.
339 Macedo, supra note 10, at 275.
340 Id. at 282.

Clemente
Surely, Macedo argues, “most committed, loving couples—whether gay or straight—are sensitive to the difference between loving sexual acts expressing a shared intimacy and mere mutual masturbation.”\textsuperscript{341} Can no committed gay couple have sex that is emotionally meaningful and mutually self-giving? For the conservative objections to same-sex marriage to hold, critics of same-sex marriage have two possible answers.

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

\textsuperscript{341} \textit{Id.}

Clemente
Past opponents of same-sex marriage willing to were bite the bullet.\textsuperscript{342} Macedo notes that Finnis, for example, relies on the overgeneralization that all homosexuals subscribe to a “gay lifestyle,” which “regard[s] sexual capacities, organs, and acts as instruments for gratifying the individual ‘selves’ who have them.”\textsuperscript{343} The stereotype that homosexuals lack the ability to love in a unitive and self-giving way is not only counterintuitive but also runs counter to ordinary experience. As Carlos Ball writes, “For countless gay and lesbian couples, sexual intimacy is valued not just for the sexual pleasure it provides, but for the bonds of affection and commitment that they simultaneously represent and engender. Only those who are so removed from and have no exposure to the daily lives of lesbians and gay men could possibly think otherwise.”\textsuperscript{344}

George, Girgis, and Anderson do not explicitly state that same-sex couples are incapable of achieving the psychological element of marital

\textsuperscript{342} Finnis, \textit{supra} note 8, at 1070
\textsuperscript{343} Macedo, \textit{supra} note 10, at 272, 284. Finnis, \textit{supra} note 8, at 1070.
\textsuperscript{344} Ball, \textit{supra} note 42, at 125.

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sex.\textsuperscript{345} Instead, they argue that same-sex couples lack the bodily element of marital sex.\textsuperscript{346} They lack the “essential dynamism” toward procreation and childrearing.\textsuperscript{347} However, as Macedo notes, conservative critics of same-sex marriage seem to have “double standard” when confronting the infertility objection.\textsuperscript{348}

According to the infertility objection, gay marriage critics cannot consistently claim that infertile heterosexual couples should be permitted to marry but that same-sex couples cannot.\textsuperscript{349} For infertile heterosexual couples, like homosexual couples, “there is no possibility of procreation.”\textsuperscript{350} Yet, no one objects to elderly couples and other infertile heterosexual couples from getting married.\textsuperscript{351}

\textsuperscript{345} George et. at., \textit{supra} note 12, at 253.  
\textsuperscript{346} \textit{Id.}  
\textsuperscript{347} \textit{Id.} at 267.  
\textsuperscript{348} Macedo, \textit{supra} note 10, at 278.  
\textsuperscript{349} George et. al., \textit{supra} note 12, at 265-66.  
\textsuperscript{350} Macedo, \textit{supra} note 10, at 278.  
\textsuperscript{351} \textit{Id.}
However, George, Girgis, and Anderson hold that “this challenge is easily met.” While George, Girgis, and Anderson’s traditionalist conception of marriage is naturally “oriented to and fulfilled by the bearing, rearing, and education of children,” capacity to procreate is not a necessary condition. They require only the capacity to engage in a “procreative-type” act. Procreative-type acts do not necessarily result in conception. Moreover, the possibility of procreation is not necessary for marital sex to be of a reproductive type.

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

352 George et. al., supra note 12, at 266.
353 Id. at 256.
354 Id. at 256. See Part III.
355 Id. at 266.
356 Id.

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response to the infertility objection is that sex is not fundamental to marriage. Conjugal love is fundamental to marriage. In other words, the emotional and psychological aspects are essential to marriage, not the bodily element.

Aside from intuition, the Supreme Court and American history support defining marriage under its emotional and psychological aspects.\textsuperscript{357} \textit{Turner v. Safely} makes clear that the bodily elements of marriage are not essential to right to marry in the United States.\textsuperscript{358} In \textit{Turner}, a regulation permitted inmates to marry “only with permission of the superintendent of the prison.”\textsuperscript{359} The Court held that this regulation was unconstitutional and the fundamental right to marriage endures even in the prison context, where one’s rights are greatly curtailed.\textsuperscript{360}

Although the bodily aspect of marriage is often impossible for inmates, “many important

\textsuperscript{357} \textit{Turner}, 482 U.S. at 78.
\textsuperscript{358} Id.
\textsuperscript{359} Id. at 82.
\textsuperscript{360} Id. at 96.
attributes of marriage remain.” The Court noted that “inmate marriages, like others, are expressions of emotional support and public commitment” and “these elements are an important and significant aspect of the marital relationship.” George, Girgis, and Anderson’s conception of marriage cannot account for this ruling. For them, recognizing marriage without the possibility of consummation “blurs” the line between marriage and “ordinary friendships.”

However, Turner’s ruling is consistent with attitudes towards marriage throughout American history. Historian Nancy Cott chronicles how early American political theory widely accepted republican conception of marriage. Following Baron de Montesquieu and his Spirit of the Laws, which “influenced the central tenets of American republicanism, the [American] founders learned to think of marriage and the [republican] form of

361 Id. at 95.
362 Id. at 95-96.
363 George et. al., supra note 8, at 253.
364 Id.
government as mirroring each other.” Like government, marriage is a lasting union entered into only by consent.

Moreover, these parallels were especially important to the signatories of the Declaration of Independence, who sought separation from the British crown. Both the bond of marriage and bond between man and his government ought not to be taken lightly and must be held together by love, not coercion. A great deal of Revolutionary era political writing discussed the proper conception of marriage as rooted in the “mutual return of conjugal love” and “the ties of reciprocal sincerity.”

The founding fathers’ reasoning held marriage in such high regard that, aside from its metaphorical meaning, “actual marriages of the proper sort were presumed to create the kind of citizen needed to make the new republic

366 Id.
367 Id.
368 Id. at 15-16.
succeed." Having studied Montesquieu and his categorization of different forms of governance, the founders steadfastly held that in a republic, where the people are sovereign, a virtuous citizenry is vital. Republican virtue requires not only moral integrity, but public-spiritedness. Selfish, small-minded individuals narrowly seeking their own advancement would not do: citizens in a republic had to recognize civic obligation, to see the social good of the polity among their own responsibilities. How would the nation make sure that republic citizens would appear and be suitably virtuous? Marriage supplied an important part of the answer. . . [to] American republicans . . . marriage [w]as a training ground for citizenly virtue.

These founders believed marriage fostered other-regarding and subdued self-love, and habituated sociability and compromise.

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\(^{369}\) Id. at 17-18.  
\(^{370}\) Id.  
\(^{371}\) Id. at 18.  
\(^{372}\) Id.
The founders also understood marriage as a mechanism for encouraging the moral integrity necessary for republican governance.\textsuperscript{373} Because marriage was considered part of “the foundations of national Morality,” the founders favored monogamy to polygamy and other forms of marriage.\textsuperscript{374} Ancient philosophers, such as Plato and Aristotle, noted the virtues of moderation and self-control and that man’s unbridled desires for basic pleasures, such as food and sex, tends to lead towards excess and immorality.\textsuperscript{375}

Monogamous marriage idealizes fidelity and the restraint of one’s sexual desires. Societal expectations and support help sustain one’s commitment to this ideal. Monogamy encourages self-control.\textsuperscript{376} John Adams discussed the importance of monogamy in one’s moral

\textsuperscript{373} Id. at 10.  
\textsuperscript{374} Id. at 21.  
\textsuperscript{376} Stephen Macedo, Against the Old Sexual Morality of the New Natural Law, in Natural Law, Liberalism, and Morality, 27, 43 (Robert George ed., 1996).
education. He wondered “How is it possible that Children can have any just Sense of the sacred Obligations of Morality and Religion if, from their earliest Infancy, they learn that their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers.” At the same time, following Montesquieu, the founders equated polygamy with “despotism . . . political corruption, coercion, elevation of the passions over reasons, selfishness, [and] hypocrisy. . . . Monogamy, in contrast, stood for government of consent, moderation, and political liberty.”

An aspect of conservative natural law theory of that can be extracted and restored into republican defense of same-sex marriage is their notion of valuable sexual activity. Although Cott does not indicate that the founders extended their argument this far, a republican may be apt to agree with the conservative natural lawyers that the only type of sex the state ought to promote is marital sex. On

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377 Cott, supra note 247, at 21.
378 Id.
379 Id. at 22.

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this broader account, marital sex is meaningful and unitive.  

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

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

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380 Of course, it is possible for sex to be meaningful and unitive outside of the context of marriage, but it would be difficult for the state to incentivize these relations outside of institution of marriage.

381 As a result, George, Girgis, and Anderson’s focus on sex is relevant insofar as it is a means of further developing the psychological and emotional aspects of marriage (love).
of marital sex, pleasure plays a socially constructive role.\textsuperscript{382}

Of course, George, Girgis, and Anderson contest the contention that marriage is, at bottom, about love and the psychological and emotional aspects of marriage.\textsuperscript{383} They have two primary objections to this proposition. First, they argue that marriage is “a comprehensive union of spouses.”\textsuperscript{384} Since marriage is comprehensive and our bodies are an inessential part of our identities, they conclude that there must be a bodily aspect of marriage.\textsuperscript{385}

This argument clearly unfolds within the flawed framework of natural marriage. However, as we have established, natural marriage is irrelevant to the same-sex marriage debate.\textsuperscript{386} The real question is why the state sanctions and encourages marriages. While the state certainly has an interest in procreation and childrearing, the state’s concerned with reproductive-type acts remains

\textsuperscript{382} George et. al., supra note 12, at 248.
\textsuperscript{383} Id. at 255n.16. George & Bradley, supra note 3 at 303.
\textsuperscript{384} Id. at 248.
\textsuperscript{385} Id. at 253.
\textsuperscript{386} See part IV.A

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unclear. This suggests, as *Turner* appears to confirm, that sex is often part of most marriages, but that sex is not essential to modern marriage.\(^{387}\)

Second, George, Girgis, and Anderson argue that the state’s recognition of marriage without consummation “obscure[s] people’s understanding about what truly marital unions do involve.”\(^ {388}\) Further, they state this recognition blurs the line between marriage and ordinary friendships.\(^ {389}\) The difference between marriage and friendships (or other relationships), George, Girgis, and Anderson argue, is romance.\(^ {390}\) “Romance is the kind of desire that aims at bodily union, and marriage has much to do with that.”\(^ {391}\)

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

live together, support each other, share domestic responsibilities, and have no dependents. Because Joe knows and trusts Jim more than

\(^{387}\) *Turner*, 482 U.S. at 78.

\(^{388}\) George et. al., *supra* note 12, at 282.

\(^{389}\) *Id.* at 261.

\(^{390}\) *Id.* at 271.

\(^{391}\) *Id.*
anyone else, he would like Jim to be the one to visit him in the hospital if he is ill, give directives for his care if he is unconscious, inherit his assets if he dies first, and so on.  

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

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

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392 Id.
393 Id.
394 Id.
395 Id.
There are two ways to account for this difference. On the one hand, one may contend that love between spouses is different in kind from the love between friends. On this view, Conjugal love goes deeper. As Ball explains, conjugal love “allows for an expansion of the self. When a person loves another, she begins to see that other as an extension of herself.”

Aristophanes discusses this conception of conjugal love in Plato’s *Symposium.* “When a person meets the half that is his very own, whatever his orientation . . . something wonderful happens: the two are struck from their sense by love, by a sense of belonging to one another, and by desire, and they don’t want to be separated from one another, not even for a moment.”

Aristophanes acknowledges the difficulty in describing how the expansion of the self that one feels through spousal love is different

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398 *Id.* at 192b-d.

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from the love of a parent and child or the love of friendship. He states that there are people who finish out their lives together and still cannot say what it is they want from one another. No one would think it’s the intimacy of sex. . . . It’s obvious that the soul of every love longs for something else; his soul cannot say what it is, but like an oracle it has a sense of what it wants . . .

Despite this difficulty, difference is clearly not rooted merely in sex.

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

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399 Id. at 192c-e.
400 Id. at 192c-d.

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Moreover, the degree of affection is so strong that the couple wants society and the state to recognize and, thereby, help reinforce their relationship.\(^{401}\) They want to take on the social expectations that accompany marriage rather than simply living together. Marriage is a covenant not only between a couple but also between a couple and society. As Andrew Sullivan notes, “society has good reason to extend legal advantages to heterosexuals who choose the formal sanction of marriage over simply living together. These individually make a deeper commitment to one another and to society; in exchange society extends certain benefits to them.”\(^{402}\)

V. JUDGMENTAL LIBERALISM AND SAME-SEX MARRIAGE

As the same-sex marriage debate demonstrates, Rawlsian liberalism has too thin a conception of the good to adequately capture the

\(^{401}\) Ball, supra note 42, at 109.

complexities of some of the most vexing social issues. Political liberals and the conservative natural law theorists alike take too narrowly a view of same-sex marriage and sexual ethics generally. Both groups unnecessarily “throw down the gauntlet of sexual nihilism.”

Conservatives say, “either one must accept a sweeping prohibitionism of one sort or another, or one gives up the only grounds on which to criticize promiscuity, incest, polygamy, pederasty, liberationism, or you name it.”

They create a false dichotomy between the state encouraging all varieties of sexual relationships, or just one specific variety—heterosexual monogamous marriage.

While the conservative natural lawyers endorse prohibitionism, neutral liberals embrace liberationism. Rawlsian liberals are reluctant to take this absolutist line—Ralph Wedgwood, for instance, resists it. But, as Elizabeth Brake demonstrates, consistent political liberals cannot accept modern

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404 *Id.*
405 Wedgwood, *supra* note 22, at 241-42.
marriage because they must honor a broad range of alternative sexual relationships.\textsuperscript{406} Judgmental liberalism rejects this dichotomy. Further, we need not “jettison the very effort to think critically about what has value in the sexual realm” in order to rebut the conservative arguments against same-sex marriage as neutral liberals do.\textsuperscript{407} Judgmental liberalism allows one to take a more nuanced approach to same-sex marriage.

This view permits many reasons for the state to encourage modern marriage; these reasons apply equally to gay and straight couples.\textsuperscript{408} A judgmental liberal approaches same-sex marriage from the perspective that certain types of sexual relationships should be state-sanctioned because they bring benefits to both individuals and the state.\textsuperscript{409} At the same time, judgmental liberalism acknowledges Rawlsian liberalism’s insistence that no justice-

\textsuperscript{406} Of course, a political liberal has the resources to prohibit marriages that violate principles of justice. For example, bestiality and pederasty could be ruled out on the ground than neither non-human animals nor minors can consent.

\textsuperscript{407} \textit{Sexuality and Liberty}, supra note 10, at 87.

\textsuperscript{408} \textit{See id.}

\textsuperscript{409} \textit{See id.}

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respecting modes of life ought to be directly (legally) discouraged a priori.410

By utilizing judgmental liberalism and this defense of conception of modern marriage, this article answers George, Girgis, and Anderson’s challenges to same-sex marriage.411 Following Brake, their first challenge asks why the state is involved in the marriage business in the first place?412 Why does it acknowledge some relationships as marriage but not others?413 Their answer is that “marriages bear a principled and practical connection to children.” 414 They argue that to “[s]ever that connection, and it becomes much harder to show why the state should take any interest in marriage at all.”415 Moreover, it becomes unclear why the state encourages the marital norms of fidelity and permanence.416

410 Id.
412 George et. al., supra note 12, at 269-74.
413 Id. at 270-71.
414 Id. at 271.
415 Id.
416 Id. at 259.

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However, this challenge is easily met. Modern Western states sanction and encourage marriage because, as the founding fathers believed, in its ideal, monogamous marriage benefits the state by creating better citizens.\textsuperscript{417} Furthermore, the framers found marriage to be a tool for cultivating private virtue. The founders understood monogamous marriage as a mechanism to promote for morality, with its commitment to fidelity and sexual restraint.\textsuperscript{418}

In part, this argument explains why the founders preferred monogamy to polygamy, despite that most of the world’s cultures at the time were not strictly committed to monogamy.\textsuperscript{419} Following Montesqueieu, they equated polygamy with “despotism . . . political corruption, coercion, elevation of the passions over reasons, selfishness, [and] hypocrisy,” while, “monogamy, in contrast, stood for government of consent, moderation, and

\textsuperscript{417} Cott, supra note 247, at 18.  
\textsuperscript{418} Id. at 21-22.  
\textsuperscript{419} Cott, supra note 246, at 9.
political liberty.”\footnote{Id. at 22.} Therefore, judgmental liberalism can easily answer George, Girgis, and Anderson’s second challenge, the polygamy problem.\footnote{George, et. al., \textit{supra} note 12, at 272-74.} In short, monogamy is a fundamental feature of modern marriage.

Finally, George, Girgis, and Anderson’s third challenge asks why only romantic relationships ought to be legally recognized as marriage.\footnote{Id. at 271-72.} For George, Girgis, and Anderson, a romantic relationship is another way of saying “sexual relationship.”\footnote{Id.} I have resisted the claim that marriage necessarily includes a sexual component. What is fundamental to modern marriage, I have argued, are the emotional and psychological elements of marriage—conjugal love. The bodily element of marriage is, undoubtedly, important to most marriages. However, sex (as well as kissing, hugging, and all of the other forms of physical affection) are only important to modern marriage insofar as they are a means of reinforcing

\footnote{Id. at 22.} \footnote{George, et. al., \textit{supra} note 12, at 272-74.} \footnote{Id. at 271-72.} \footnote{Id.}
a couples love and commitment to one another. In short, George, Girgis, and Anderson’s argument is simply mistaken that intercourse is essential to marriage. 424

Although the early American conception of marriage is admittedly aspirational and Romantic, it is still part of the state’s still holds this conception as rationale for encouraging couples to marry today. 425 Modern monogamous marriage encourages couples to make deep, meaningful commitments of love to one another. Brake contends that a consistent Rawlsian state could not allow for “most marital entitlements to direct financial benefits,” such as the increased Social Security benefits or tax breaks married couples currently receive based on their marital status, precisely because the rationale behind these benefits “depend on comprehensive conceptions of the good” and an “appeal to the special value of long-term dyadic sexual relationships.” 426

424 Id. at 272.
425 Cott, supra note 246, at 20-21.
426 Brake, supra note 116, at 306, 308, 312.
However, good reason exists for the state to confer a special status and benefits to married couples. Monogamous marriage is worthy of state sanction. The early American Romantic conception of marriage is implicit in modern marriage.\textsuperscript{427} “The central claim here is that encouraging people to make deeper and more stable commitments than they might otherwise do will be good for them and for society;” and such incentives, if they are “good for straight people, then they may be good for gays and lesbians as well.”\textsuperscript{428}

In sum, the judgmental liberal justification of same-sex marriage provides a more compelling conception of modern marriage than either political liberal arguments for gay marriage or the conservative natural law argument against it. According to this article’s argument for same-sex marriage, from a judgmental liberal foundation, marriage is a legal lifelong commitment to monogamy and fidelity. From the state’s

\textsuperscript{427} This is why Brake must abandon modern marriage. A liberal state, as she points out, can only justify minimal marriage.

\textsuperscript{428} Sexuality and Liberty, supra note 10, at 93-94.

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perspective, marriage’s essential rationale is to create a more responsible citizenry. In the ideal, modern marriage fosters moral integrity and public spiritedness. Therefore, not only should same-sex couples be allowed to wed, all couples (gay or straight) should be encouraged to marry.

The fact that the state has good reason to promote modern marriage does not necessarily mean that the state is unreasonably discriminating against other alternative conceptions of the good. Macedo anticipates that “liberationists” might make this objection to a judgmental liberal justification of same-sex marriage. “Liberationists . . . might argue that political reliance on conceptions of the human good will always be perceived by some to be exclusionary and oppressive.” Macedo’s response may be the keenest insight of judgmental liberalism. Here, the same-sex marriage debate illustrates how it is possible promote virtuous conceptions of the good without oppressing

\[429\] See id. at 96.
\[430\] Id.
\[431\] Id.
others. Macedo writes, “It should be remembered . . . that I am not proposing that anyone should be coerced to marry, or prevented by law from engaging in forms of sexual behavior that are simply degrading or perverse but involve no harm to others.”

Instead, Macedo endorses “us[ing] public power in gentle ways—by promoting tax benefits for married couples, for example—to encourage preferable forms of life,” while guarding against discrimination against those individuals in alternative intimate relationships (polygamists, polyamorists, etc.).

If Brake correctly states that the state must have “a legal framework supporting [for all justice-respecting] nondependent caring relationships

432 Id. at 97.
433 Id.
434 Id. at 96.
435 Judgmental liberalism theoretically safeguards against using controversial community values judgments as a mechanism for minority exclusion. Id. Therefore, when it comes to marriage, a judgmental liberal state may encourage monogamous marriage and choose not to sanction polygamous marriages, but the state cannot prohibit religious or other non-governmental institutions from sanctioning polygamous marriages (if these marriages do not violate the principles of justice). Id. Judgmental liberalism also accommodate some of Brake’s arguments. Brake, supra note 116, at 321-22.

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between adults,” then a judgmental liberal society could conceivably allow minimal marriages for alternative relationships.\textsuperscript{436} Under this scheme, alternative relationships, such as polygamy and polyamory, would get the rights and obligations of minimal marriage, but would not be eligible to enjoy the benefits (such as tax breaks) reserved for monogamous modern marriage.\textsuperscript{437}

Liberalism need not commit to moral minimalism and shirking from questions of which ways of life are exemplary. This is true even when matters of basic justice are at stake. While John Stuart Mill expounds upon the virtues of allowing for different “experiments of living,” he also notes that “it would be absurd to pretend that people ought to live as if nothing whatever had been known in the world before they came into it; as if experience had as yet done nothing towards

\textsuperscript{436} \textit{Id.} at 303.

\textsuperscript{437} George, Girgis, and Anderson do not, in principle, oppose Brake’s contention that society should provide a scheme of legal rights for alternative relationships. However, they hold, as I do, that such a scheme would not be marriage. George, et. al., \textit{supra} note 12, at 280. I agree with George, Girgis, and Anderson that Brakes contentions must be taken seriously.

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showing that one mode of existence, or of conduct, is preferable to another.”

Judgmental liberalism tries to impart the same lesson. The judgmental liberal agrees with Rawls that it is unreasonable to curb one’s freedoms simply because her way of life conflicts with the comprehensive doctrines of the majority. Furthermore, Mill correctly identifies that both individual happiness and social progress depend upon only allowing autonomy and a choice of a wide range of different conceptions of the good. However, judgmental liberalism insists that there is a purpose in permitting and promoting for different experiments of living. The results of such experiments should not be used to help guide

438 John Stuart Mill, On Liberty, in On Liberty and Other Essays 63-64 (John Gray ed., 1991). Flathman seems to reject this second strand of Millian liberalism a bit too quickly. He holds that a state that is committed to anything less than “an abundant plurality . . . of outlooks and views” does not deserve “the name of liberal.” Richard E. Flathman, “It All Depends...on How One Understands Liberalism”: A Brief Response to Stephen Macedo,” 26 Pol. Th. 81, 82 (1998). Even Macedo’s “extensive” but “circumscribed plurality” is not sufficiently liberal for Flathman. Id. Flathman’s definition of liberalism seems excessively restrictive.
439 Sexuality and Liberty, supra note 10, at 96.
440 Mill, supra note 303, at 63-64.
human conduct and goad individuals to consider virtuous ways of life. In this regard, judgmental liberalism is a political philosophy that promotes a political science and parallels the scientific method. Like the theories of science, the different theories of the good life must be tested to determine the closest approximations to the truth and which yield the most utility. No moral or scientific law ought to be accepted by sheer orthodoxy alone; however, ultimately, societies must adopt guiding principles for practical consideration—to successfully execute the day-to-day affairs of life. Society ought to establish and build upon these principles. However, healthy skepticism must be maintained, since it is always possible that the accepted doctrines are inaccurate and need be displaced by more precise principles.

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

Currently, there is sufficient theoretical evidence supports modern marriages, with its ideals of monogamy and lifelong fidelity, as a way of life worthy of the state’s embrace for both gay and straight couples.