RAWLS, POLITICAL LIBERALISM, AND THE FAMILY: A REPLY TO MATTHEW B. O'BRIEN

Greg Walker*

Institute of Education, University of London

ABSTRACT

Responding to an article in a previous issue from Matthew B. O'Brien on the impermissibility of same-sex marriage, this reply corrects a misinterpretation of Rawls's understanding of political liberalism and a misdirected complaint against the jurisprudence of the U.S. federal courts on civil marriage and other matters. In correcting these interpretations, I seek to demonstrate that a publicly reasonable case for same-sex civil marriage is conceivable in line with political liberalism. I conclude the article by arguing that, although the same-sex civil marriage issue is likely to be a matter of controversy for some time in western societies, a proper understanding of the theoretical issues at stake may contribute to a partial de-escalation of the 'culture wars' currently surrounding the issue.

CONTENTS

I. INTRODUCTION

Matthew B. O'Brien's article in a previous issue[1] is worthy of note in that no other opponent of same-sex civil marriage in the U.S. (hereafter SSCM)[2] has maintained that the oft-cited arguments for SSCM are *contrary* to Rawlsian public reason. While others have suggested that arguments *for* traditional opposite-sex marriage are publicly reasonable none as far as I am aware claim, as O'Brien does, that Rawls's own written statements on the family—which appear at least open to SSCM to most interpreters—can be used directly *against* SSCM. O'Brien's article is forthright, raising matters about the recognition of SSCM that need to be addressed squarely by legal and political theorists. Although O'Brien's arguments are not completely original, he presents us with the most sustained treatment of the 'functional' or 'empirical' purpose of civil marriage with a view to resisting the case for SSCM. The view that natural social reproduction is the central publicly reasonable argument in favor of restricting civil marriage to opposite-sex couples has been argued before by other thinkers.[3]

Addressing this argument is important in juristic terms as the legal argumentation employed by many opponents of SSCM has refocused on the argument that the restriction of marriage to opposite-sex couples is justified by the procreative and reproductive function of heterosexual mar-

* Graduate student, Institute of Education, University of London, 2013-; Research Associate, Cardiff School of European Studies, Cardiff University, 2011-2012; Ph.D., Political theory, Cardiff University, 2012, BSc (Hons.) Politics, University of Bristol, 1997. Elements of section III of the article were presented at the conference 'Liberalism and Republicanism: Public Policy Implications' at University College London's School of Public Policy in February 2013. I am grateful for the encouragement offered by Frank I. Michelman and Cécile Laborde at various stages in writing the article. My thanks also go to two anonymous reviewers and the Editor whose comments and corrections have improved the article. All errors and infelicities remaining are my own.

[1] Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 BRIT. J. AM. LEGAL STUD. 411 (2012).

[2] I use same-sex *civil* marriage prevalently (rather than the term same-sex marriage) as I take the view that there is clearly a crucial aspect of marriage as a concept that relates to its religious or deeper ethical dimension. Given that I adhere to the principle of religious freedom, civil law should not force any religious institution to hold that any particular law on civil marriage is truly just or that the religious institution should be impelled to solemnise or bless civil marriages that it does not recognise as marriages in a religious or sacramental sense. This is not a point of marginal importance.

[3] O'Brien's argument is reminiscent of the Catholic political and ethical philosopher Martin Rhonheimer's internal critique of Rawls's political liberalism on matters such as same-sex marriage. *See* Martin Rhonheimer, *The Political Ethos of a Constitutional Democracy and the Place of Natural Law in Public Reason: Rawls's Political Liberalism Revisited*, 50 AM. J. JURIS. 41 (2005). The Jewish natural law theorist David Novak has similarly argued that natural social reproduction is the key argument for traditional heterosexual civil marriage. *See* David Novak, *Response to Martha Nussbaum's--A Right to Marry?*, 98 CAL. L. REV. 51 (2010).

riage.[4] O'Brien's article may be seen by some as a reflection of this new emphasis from the perspective of legal and political theory as he eschews using arguments rooted in the moral disapproval of same-sex relationships advanced by some Roman Catholic natural law theorists.

Matthew O'Brien boldly seeks to turn the tables on advocates of SSCM by arguing that all arguments for SSCM are based on the *moral approval* of same-sex relationships and are thus out of bounds as arguments within the terms of John Rawls's conception of public reason, as outlined in his seminal later works. O'Brien puts forward sustained arguments that any specifically moral arguments for or against SSCM are not admissible as public reasons in Rawls's schema and so we have to look for purely political reasons to justify the institution of civil marriage. O'Brien's exclusive candidate for a purely political reason for the existence of the institution of civil marriage is the political function served by opposite-sex couples in the way that they foster the natural social reproduction of a political community.[5] All other arguments—for or against SSCM—are partly or wholly based on moral viewpoints that are not directly relevant to political argumentation in the Rawlsian scheme.[6]

My first point in reply to O'Brien is that he is not successful in his central claim that there are no public reasons for the recognition of SSCM whereas there is, in his view, a clear public reason for the exclusive recognition of opposite-sex marriage. He is not successful because O'Brien omits or glosses important and relevant aspects of Rawls's conception of political liberalism in his presentation of it (see section II of this article) and that he does not properly assess the merits of the case for SSCM. In making a counter-argument, I will synthesize an argument for SSCM that is expressible in the language of public reason, drawing on elements present in the public political culture of the United States in its common law and in more recent U.S. constitutional case law that is not *derived* from a comprehensive philosophical anthropology (section III), though it may be *consistent* with some reasonable comprehensive conceptions of human nature.

This reply will challenge aspects of O'Brien's claim that U.S. courts have misapplied the rational basis test to SSCM cases (section IV) by implicitly adopting aspects of Rawls's political-legal theory into the rational basis review - but in doing so the courts have (according to O'Brien) misunderstood key aspects of Rawls's conception of public reason with problematic consequences. It will be beyond the scope of this reply to address all of the numerous sub-arguments O'Brien marshals to defend the overall thesis of his article.[7] I will concentrate on the main contours of his argu-

---

[4] This has been noted by a number of commentators and was wryly referred to by Chief Judge Vaughn R. Walker in his summary of the Proposition 8 proponents' case in his judgment in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010).

[5] O'Brien, *supra* note 1, at § IV.

[6] *Id.* at § V.

[7] If anything O'Brien - by including a range of argumentative 'hostages to fortune' which do not seem to be crucial to his overall philosophical argument and may be interpreted by

ment, which is that there is a clear political value or justification for civil marriage status exclusively for opposite-sex couples but that there is no political value to be gained from recognizing SSCM.

II. How O'Brien Does Not Get Rawls's Political Liberalism Quite Right

The core of O'Brien's argument against SSCM is his contention that all arguments for it fail the test of being admissible in terms of the political and legal theory expounded in John Rawls's highly influential treatise, *Political Liberalism*.[8] O'Brien supplements this argument by highlighting a passage in Rawls's *Justice as Fairness: A Restatement*[9] that supports the role of the family in reproducing a political society over time, going beyond Rawls to argue that this is the sole publicly reasonable justification of civil marriage – and that this justification applies only to same-sex couples. In this section I aim to demonstrate that O'Brien misinterprets important elements of *Political Liberalism* in relation to the borderline between the domains of the 'moral' and the 'political' and therefore misconstrues Rawls's notion of public reason. This is important for O'Brien's line of argument because he seeks to represent arguments in favor of SSCM as intrinsically *moral* while Rawls's theory of political liberalism is abstemiously and strictly *political*. As we shall see, the issues involved are not so clear-cut.[10]

I also clarify Rawls's recognition of the importance of the family in relation to the social reproduction of a political society, arguing *contra* O'Brien, that Rawls's idea of social reproduction through procreative family life does not preclude the recognition of SSCM and that the passages relevant to this in his oeuvre do not demonstrate a putative Rawlsian backing for O'Brien's view that civil marriage should be available only to opposite-sex partners.

John Rawls, in the works cited, is characteristically nuanced in the way he demarcates the boundaries between the moral/philosophical and

---

some readers as betraying a particular ideological perspective - does not help the reader make a clear judgment on the two key arguments he presents. These argumentative statements include: that low birth rates, such as in Western Europe, threaten the destabilisation of those societies (*Id.* at 432), that large scale immigration "threaten[s] to undermine [European societies'] public political culture" (*Id.* at 433), that people without children are less concerned about intergenerational justice (*Id.* at 435), that contraception is generally ineffective and unreliable (*Id.* at 440-41), that the Association of American Psychologists persists in using discredited methodology in its analyses of same-sex parenting (*Id.* at 444), and that parents who have children through gamete donation act immorally and unjustly to their future children (*Id.* at 441-48).

[8] JOHN RAWLS, POLITICAL LIBERALISM (2005).

[9] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001).

[10] That O'Brien operates with these hard and fast distinctions in his treatment of the SSCM issue is confusing because at one point he acknowledges that Rawls's political liberalism involves moral ideas, though he seems to think that this is limited "to the moral idea of equal citizenship". *See* O'Brien, *supra* note 1, at 424.

the political. Rawls explicitly writes of a political conception of justice being "of course, a moral conception, it is a moral conception worked out for a specific kind of subject" that is for the "basic structure of a constitutional democratic regime".[11] Rawls therefore does indeed hold that we should view the domain of the political as being *distinct* from other facets of our lives, but at the same time he recognizes that a citizens' moral values cannot be seen as *separate* from, or in conflict with, fundamentally political values.[12] Inversely for Rawls, "[p]olitical conceptions of justice are themselves intrinsically moral ideas, as I have stressed from the outset. As such they are a kind of normative value."[13]

This distinction has been clearly recognized by interpreters of Rawls such as the prominent political theorist Gerald Gaus, who states in relation to Rawls's theory:

> [t]hat a belief is moral, religious or philosophical does not itself show that it is comprehensive or general. Indeed, Rawls himself indicates that the political conception has moral, epistemological and metaphysical elements. Moral, religious and philosophical beliefs need not be, and very often are not, comprehensive or general.[14]

This is a common enough interpretation of the connections between the moral and the political in *Political Liberalism,*[15] though it is not an interpretation mentioned by O'Brien. He may, however, respond that interpretations of Rawls's work do, of course, vary.[16]

In trying to portray *Political Liberalism* in a strictly neutralist light O'Brien seizes on the phrase "purely political"[17] used by Rawls to describe an aspect of his theory. Although Rawls does use this construction a handful of times in his essay 'The Idea of Public Reason Revisited'[18] in outlining his own normative view of political liberalism, when he does so he is careful to add the immediate qualification "although political values are intrinsically moral."[19] As we have seen, Rawls is upfront about the fact that he conceives political liberalism to be a moral conception of human life and value, save that the form and subject matter of that moral content is directed to the basic structure of a political society and is therefore *partial*

---

[11] RAWLS, *supra* note 8, at 175.
[12] "Nor does it [political liberalism] say that political values are separate from, or discontinuous with, other values". RAWLS, *supra* note 8, at 10.
[13] *Id.* at 484 n.91.
[14] Gerald F. Gaus, *Reasonable Pluralism and the Domain of the Political*, 42 INQUIRY: INTERDISCIPLINARY J. PHIL. 259, 263 (1999).
[15] *See*, for instance, Martha Nussbaum, *Political Liberalism: A Reassessment*, 24 RATIO JURIS 1 (2011); Martha Nussbaum, *Political Objectivity*, 32 NEW LITERARY HIST. 887, 891-94 (2001).
[16] For a brief survey of interpretations, *see* Anthony Simon Laden**,** *The House That Jack Built: Thirty Years of Reading Rawls*, 113 ETHICS 367 (2003).
[17] *See* O'Brien, *supra* note 1, at 7, 11, 15.
[18] *See* RAWLS, *supra* note 8, at 457, 461, 486.
[19] *Id.* at 446 n.19.

rather than comprehensive.[20]

Reading *Political Liberalism* as advancing a strict form of liberal moral neutrality is not helpful or fully accurate. In contrast Peter de Marneffe sets out a helpful typology between liberal neutrality and perfectionism that helps us see that John Rawls's later political theory is not strictly neutralist but is a form of what de Marneffe calls "deontological perfectionism". He takes this view because, for de Marneffe, "Rawls clearly holds that it is wrong for the government to limit *basic* liberties for the reason that exercising them is base or unworthy, [but] he apparently allows *non-basic* liberties to be limited for this reason, and confines the basic liberties to those that are "truly essential.'"[21] Rawls himself writes strikingly that neutralism beyond the strict bounds of basic justice and constitutional essentials is "neither attainable nor desirable."[22]

Rawls thus denied being a strong neutralist—and held that the term neutrality itself was "unfortunate" when used in connection with his theory of political liberalism.[23] He resisted the notion of neutrality as put forward by other liberal theorists such as Ronald Dworkin and, though he conceded that his approach did have a certain "neutrality of aim", Rawls did not believe that his theory was consistent with a "neutrality of effect" as other liberals had proposed.[24] In fact O'Brien's entire narrative in relation to liberal moral neutralism would arguably have been better applied to the early work of Ronald Dworkin (in particular his widely cited essay 'Liberalism')[25] than the later work of John Rawls. In this regard Jonathan Quong rightly distinguishes between Rawls's *political* antiperfectionism and Dworkin's comprehensive (i.e. moral *and* political) antiperfectionism.[26] This is not a marginal reading of Rawls, as a varied range of interpreters other than those cited stress aspects of Rawls's works that do not easily fit with O'Brien's view of Rawls as a strict moral neutralist.[27]

---

[20] Rawls writes that, notwithstanding the priority of the right over the good, this "does not mean that ideas of the good need to be avoided: that is impossible". *See* RAWLS, *supra* note 8, at 203.

[21] *See* Peter de Marneffe, *Liberalism and Perfectionism*, 43 AM. J. JURIS. 101 (1998).

[22] RAWLS, *supra* note 9, at 91 n.13.

[23] Rawls writes that he uses the term neutrality as a "stage piece" and as a way of *contrasting* his position with other liberal theories. *See* RAWLS, *supra* note 8, at 191. Although O'Brien (*supra* note 1, at 424) notes that Rawls did not use the "idiom" of neutrality, O'Brien nonetheless breezily proceeds to label Rawls as a moral neutralist numerous times in his article.

[24] *See* RAWLS, *supra* note 8, at 193, 194.

[25] Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 191 (Stuart Hampshire ed., 1978).

[26] JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 21-21 (2010).

[27] Steven Wall, for instance, goes as far as interpreting a key aspect of Rawls's original theory of justice ('the Aristotelian Principle' in the unduly neglected Part III of Rawls's *A Theory of Justice*) as being, in a sense, perfectionist. *See* Steven Wall, *Rawlsian Perfectionism*, 10 J. MORAL PHIL. 573 (2013).

One of O'Brien's tactics in disregarding the work of advocates of SSCM is to select quotes from liberal authors in favor of SSCM that would appear to confirm that they are 'comprehensive' liberals—in that they may, for instance, value moral autonomy over other conceptions of human agency. He then infers that some or all of the cited advocates of SSCM are comprehensive liberals and hence their arguments in favor of SSCM are, by that very fact, ruled out of bounds because comprehensive liberalism is not consistent with Rawlsian political liberalism.[28]

What this neglects to take into account is that Rawls clearly does not consider that advancing reasonable comprehensive reasons for supporting certain political measures relating to the basic structure disqualifies the citizen from participating in public reasoning. Following criticism of the first edition of *Political Liberalism*, Rawls clarified his position on public reason in his article 'The Idea of Public Reason Revisited'. There he outlined a 'Proviso': that "comprehensive doctrines, religious or non-religious, may be introduced into public political discussion at any time, provided that in due course proper political reasons.... are presented" in relation to the matter under discussion.[29] In other words people may freely mix and concurrently advance both public and comprehensive reasons for measures relating to the basic structure and be considered responsible and public-spirited citizens.

O'Brien in contrast fails to consider the 'Proviso' and writes, incorrectly, that "what Rawls prescribes citizens in a pluralistic democracy should do [is to]: filter their comprehensive doctrines through the deliberative screen of public reason before proposing grounds for legislation."[30] As we have just seen, Rawls proposes no such filtering process, only a stipulation that comprehensive moral or philosophical reasons should not be advanced without *any* subsequent public reasons. This clear misinterpretation may explain why O'Brien supposes that comprehensive liberals somehow disqualify their publicly reasonable arguments for SSCM when they venture their own more comprehensive (and contestable) views about autonomy or the *ultimate* nature or purpose of marriage or of human sexuality generally.

This somewhat more permissive approach to public reasoning works with Rawls's wider theory because he allows persons with a comprehensive worldview to be considered *publicly* reasonable (as well as rational) if they can fit a liberal political conception of justice as a 'module' within their comprehensive *weltanschuung*.[31] Again, O'Brien does not mention this important aspect of Rawls's conception of public reason. Such a 'module' in Rawls's formulation has its own internal principles and reasons that may be consonant with a wider metaphysical or moral comprehensive doctrine,

---

[28] O'Brien, *supra* note 1, at 434, 454-62.
[29] *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 783-84 (1997).
[30] O'Brien, *supra* note 1, at 450.
[31] RAWLS, *supra* note 8, at 145.

but not be immediately derived from the comprehensive doctrine held by the citizen. A political conception of justice would be freestanding in the sense that it *includes* "no specific religious, metaphysical or epistemological doctrine beyond what is implied by the political conception itself"[32] though, as we have seen, it should still be seen as a partial moral conception as it necessarily includes certain goods of citizens which (as O'Brien himself notes) relate to certain fundamental human needs.

The 'Proviso' and the notion of a 'module' within political liberalism renders O'Brien's claim that "an argument [made by Stephen Macedo for SSCM] fails *because* it relies on the assumption that homosexual sexual relationships are intrinsically valuable" highly questionable.[33] An argument does not 'fail' for Rawls—I presume in the sense of being impermissible in public reasoning—because it includes or refers to moral claims from a reasonable comprehensive doctrine. Such arguments *are* genuinely permitted in the idea of public reason as long as those moral arguments are, at some point, accompanied by arguments involving distinctively political values.[34] This is indeed exactly what Macedo provides in the article cited by O'Brien and there are no grounds for O'Brien to claim that arguments for the *political* value of SSCM (in terms of equal civil rights or primary goods) are somehow disqualified by the fact that this or that theorist may also advance substantively *moral* arguments for treating committed same-sex relationships with respect, or hold more generally that people should be considered morally autonomous.

O'Brien compounds his partial misinterpretation of Rawls[35] by appearing to apply a double standard to the arguments put forward by proponents and opponents of SSCM. He is dismissive of those like Macedo and others who may simultaneously advance both public and (in some ways) reasonable comprehensive reasons for recognizing SSCM, writing that it is "the case *in favor* of same-sex marriage that has impermissible

---

[32] *Id.* at 144.

[33] *See* O'Brien, *supra* note 1, at 428 (emphasis added). O'Brien is referring to an argument Stephen Macedo put forward for SSCM and gay rights generally. O'Brien generally accuses Rawlsians of relying "illicitly on their comprehensive religious or secular doctrines about 'liberated' sexual morality in order to single out homosexual relationships *as such* for special promotion", *supra* note 1, at 437. Macedo, in fact, argues that committed, long term relationships – whether same-sex or opposite sex – are intrinsically valuable and he does not single out same-sex relationships as having any 'special' value. *See* Stephen Macedo, *Sexuality and Liberty: Making Room for Nature and Tradition?*, *in* SEX, PREFERENCE AND FAMILY (David M. Estlund & Martha Nussbaum eds., 1998).

[34] Macedo, in the essay referred to by O'Brien, also advances arguments clearly relating to political values when he gives reasons for SSCM on the basis of "social welfare" and the various demonstrable public health and other beneficial externalities of committed relationships (including same-sex relationships). *See* Macedo, *supra* note 33, at 92-94.

[35] I write 'partial' here because there is much in O'Brien's presentation of Rawls's theory that is both comprehensive and fair, which is why it is surprising that he manages to mischaracterize Rawls in the important ways that I point out in this reply.

motivations that are fatal to legislation".[36] Yet O'Brien inexplicably permits *opponents* of SSCM to use both comprehensive and public reasons for resisting SSCM, without this having any adverse impact in terms of their admissibility in public reason. Referring to the 'traditional marriage movement', he concedes that "[m]uch of this movement deploys specifically religious arguments in its defense, but this fact is irrelevant so long as some of these arguments can be re-stated in terms of public reasons...").[37] I cannot understand why O'Brien does not apply the same standard to both sides of the debate, which would surely be the Rawlsian approach. Advocates and opponents of SSCM should both be viewed as reasoning publicly if they use arguments from a comprehensive worldview *and* public arguments centered on political values, or just the latter.

As we have seen, political liberalism as a theory of political principles does not divorce political value from the human good but it does seek to focus the role of a political society on promoting those goods that are relevant to persons as citizens. This is clear from Rawls's conception of primary goods, which he develops from his initial treatment of them in *A Theory of Justice,*[38] as O'Brien notes.[39] The primary goods are those goods that any *citizen* would reasonably seek regardless of whatever else they sought. They are of a broad scope and include basic civil and political rights, the "social bases of self-respect" and "income and wealth."[40] These primary goods allow citizens a sense of self-worth that enables them to pursue a plan of life.[41]

One key feature of justice as fairness – Rawls's own proposal for a liberal conception of political justice – is that "it is constructed on the basis of the shared fundamental ideas implicit in the public political culture [of a democracy] in the hope of developing from them a political conception of justice."[42] This is a point not explicitly mentioned by O'Brien. This shared public political culture "comprises the political institutions of a constitu-

---

[36] O'Brien, *supra* note 1, at 460.

[37] *Id.* at 449. O'Brien explains this further when he writes that "[t]he reliance of Rev. [Martin Luther] King [Jr.] and others upon the controversial comprehensive doctrines of the Christian moral tradition did not violate the canons of public reason, however, because the case for racial equality could be re-stated in non-sectarian terms that expressed a purely political conception of justice." *See* O'Brien, *supra* note 1, at 449. These statements are consistent with the Rawlsian *Proviso* just outlined, which is not referred to by O'Brien, and I agree with O'Brien in the case of Dr King.

[38] JOHN RAWLS, A THEORY OF JUSTICE chapter II, § 15 (1971).

[39] O'Brien, *supra* note 1, at 425.

[40] Though Rawls wrote at times of his own sympathies with the idea of human capabilities (as outlined by Amartya Sen and others) when he affirmed that that "basic capabilities are of first importance and that the use of primary goods is always to be assessed in the light of those assumptions", in this passage he appears to have held that the capabilities should come into play as a constructivist throughput from, rather than an ethical input into the original position. *See* RAWLS, *supra* note 8, at 183.

[41] *See* RAWLS, *supra* note 9, at 58-59.

[42] *See* RAWLS, *supra* note 8, at 100-101.

tional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge."[43]

This is what other theorists categorize as a form of *secondary* constructivism, or *political* constructivism as Rawls himself described it. It is a secondary form of constructivism because it takes as its starting point a thin moral psychology[44] *and* the pre-existing content of a public political culture coupled with an understanding of citizens as free and equal. Rawls does not subject these primary presuppositions to a strict procedure of moral construction from the bare minimum of human rationality alone - as some more stringently constructivist theories do.[45] It is therefore for good reason that readers of Rawls's political theory even interpret him as including *ethical* elements in his political theory via the notion of the public political culture.[46]

It is worth noting that 'justice as fairness', Rawls own version of a liberal political conception of justice, was never intended by Rawls to be the only possible liberal conception. Rawls set out certain broad characteristics of any political conception of justice that may be considered a *liberal* conception, which include:

> certain basic rights, liberties, and opportunities (of the kind familiar from constitutional democratic regimes); second, it assigns a special priority to these rights, liberties and opportunities, especially with respect to claims of the general good and of perfectionist values; and third, it affirms measures assuring all citizens adequate all-purpose means to make effective use of their basic liberties and opportunities.[47]

As I see it O'Brien elides Rawls's understanding into his own by reading Rawls as holding that social reproduction is the *only* reason for marriage, whereas in my judgment Rawls's position is, at the very least, open to the idea of SSCM. This is not to say that anyone committed to political liberalism of a Rawlsian hue should *ipso facto* be convinced of the case for

---

[43] *Id*. at 13-14.

[44] The moral psychology predicated in political liberalism is noted by O'Brien, *supra* note 1, at 424.

[45] For a fuller exploration of the important differences between primary and secondary constructivism in Rawls and other theorists, *see* PERI ROBERTS, POLITICAL CONSTRUCTIVISM (2007).

[46] *See* James Gordon Finlayson & Fabian Freyenhagen, *The Habermas-Rawls Dispute: Analysis and Reevaluation*, *in* HABERMAS AND RAWLS: DISPUTING THE POLITICAL 15 (James Gordon Finlayson & Fabian Freyenhagen eds., 2011) ("Political values and ideas taken from the public political culture [and inputted into the constructivist procedure in Rawls's theory] might include materials that Habermas would classify as ethical rather than moral."). In Habermas's political theory 'morality' refers broadly to intersubjective social and moral norms governing the common life of a community (or humanity as a whole), whereas 'ethics' refers to an individual's own understanding of 'the good life' or personal fulfillment, which can include substantive religious or metaphysical dimensions.

[47] *See* RAWLS, *supra* note 8, at 223.

SSCM. That is, after all, a product of deliberative public reasoning and personal judgment.

Quoting Rawls on the family in his later writings, O'Brien writes:

> Indeed, Rawls emphasizes that in principle, "[n]o particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a political conception of justice so long as it is arranged to fulfill these tasks [of social reproduction] effectively and does not run afoul of other political values" That is, for political liberalism the state interest in the family is purely functional, even if families in their own self-image are not, and so there is no antecedent political preference for either "traditional" or "liberated" family forms as such.[48]

O'Brien's comment misses the significance of a key point in Rawls's statement he quotes, that such politically recognized forms should "not run afoul of other political values" which could of course refer to those legally approved family forms being in accordance with norms of justice, not breaching citizens' civil rights, or failing to provide for the primary goods of citizens.

The next section of this article aims to demonstrate that a publicly reasonable argument can be made for SSCM along Rawlsian lines, with support from aspects of the public political culture of the United States.

III. How A Case For Same-Sex Civil Marriage Can Be Made Within the Bounds of Political Liberalism

A case can be made for SSCM that is consistent with Rawls's conception of political liberalism on one or both of two grounds: first, that civil marriage is a civil right that should be granted regardless of gender or sexual orientation and that such a right has priority over perfectionist arguments about what constitutes the deepest truth regarding marriage derived from a metaphysical or theological anthropology. (This claim requires further argumentation, as O'Brien rightly notes, as to the nature and purpose of marriage from the perspective of civil law).[49] Secondly, it can be argued that a bar on SSCM is a denial of citizens' access to what Rawls names primary goods, which are themselves expressions of basic human needs, particularly in relation to the primary good Rawls calls the 'social bases of self-respect'.[50]

The civil rights-based and primary goods argument for SSCM to a certain degree overlap, as justifications for either depend on whether any discrimination between opposite-sex couples and same-sex couples in relation to access to civil marriage is considered unjust or merely reflects the essential nature and purpose of civil marriage itself (as SSCM opponents argue). I argue that the relationship between committed and loving same-sex cou-

---

[48] *See* O'Brien, *supra* note 1, at 433-34.
[49] O'Brien, *supra* note 1, at 421.
[50] Rawls, *supra* note 9, at 59.

ples exhibits certain essential features that are present in committed opposite-sex couples to the degree that the denial of same-sex civil marriage rights constitutes arbitrary treatment which fails to 'treat like cases alike' without good reason. Therefore the denial of SSCM in the United States can be considered a breach of fundamental justice (rendering another 'his/her due' – '*suum cuique*'). Such an argument does not depend on metaphysical argumentation inaccessible to public reason and can be seen to flow from reasoning about basic justice consistent with Rawls's notion of narrow reflective equilibrium.[51]

In this section I argue that that there is a sufficient basis in the *public political culture* (in the Rawlsian sense) of the United States, expressed through the case law developed from the common law understanding of civil marriage, to justify the assertion that access to both opposite and same-sex marriage should be considered a civil right within a properly *liberal* political conception of justice (in Rawlsian terms).[52] The denial of SSCM might also constitute the undue withholding of a primary good—the social bases of self-respect—to a fellow citizen in a way that does not respect their fundamental dignity. I make this claim on the basis of the evolution of its juridical understanding of marriage from its source in the western Christian understanding of marriage through to a more recent understanding, which properly distinguishes the procreative understanding of marriage from the other goods and purposes that civil marriage enables.

In setting out a publicly reasonable case for SSCM from the public political culture, I do so while taking up the challenge of Robert George and his collaborators that a political society must come to at least some minimal determination of what the essence of *civil* marriage is before it can adequately respond to the issue of SSCM.[53] This minimal determination is unavoidable in some respects,[54] though any definition must of course be careful not to derive its content from a controversial metaphysical anthropology that could not be shared by adherents of a range of different reasonable comprehensive doctrines (in Rawls's nomenclature).

I would briefly define *civil* marriage, from the perspective of the legal official (the internal point of view),[55] as the government's rightful recognition of the formation of a loving union (of an indefinite term) comprising a

---

[51] *See* RAWLS, *supra* note 9, at 30-32 for more on his understanding of narrow and wide reflective equilibrium, concepts that Rawls was instrumental in developing in ethical and political theory.

[52] In the sense described by Rawls at the close of § II of this article.

[53] Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?* 34 HARV. J. L. & PUB. POL'Y 248-49 (2010). O'Brien similarly notes – and here we are in agreement - that some definition of civil marriage is needed to avoid question-begging and undue rhetorical flourishes in relation to SSCM, though he does not consider what a possible sex-neutral definition of civil marriage might be; *see* O'Brien *supra* note 1, at 456.

[54] For how else might we distinguish a marital relationship from any other type of friendship or personal (non-corporate) association?

[55] Here I use the internal/external distinction used in H.L.A HART, THE CONCEPT OF LAW 57-58, 89-91 (1997).

new human society of two eligible[56] consenting adults who publicly commit to certain responsibilities, including fidelity and mutual aid, who thus become beneficiaries of certain legal rights.[57] In this new society the capacity and human need for companionate and affective domestic association helps enable continent sexual expression and can serve a wider good of the orderly reproduction of a political society (and the human race generally). These are the common goods proper to the conjugal society. (This is a definition for the purpose of the present argument—clearly any developed understanding of civil marriage would have to comprehensively examine the essence of marriage, something I cannot do here.)

Certain features from this definition are of course familiar from the threefold traditional 'goods of marriage' formed from the traditional western Christian tradition[58]—each of which is familiar from the Anglican 1662 Prayer Book preface to the marriage service.[59] These goods are, in their established order: *procreatio* (procreation), *mutuum audiutorium* (mutual aid) and the *remedium concupiscentium* (as a remedy for concupiscence, or as a way or legitimately ordering sexual desire).[60] This tradition is the product of many influences and stages of development, from Augustine's engagement with Jovinian and St Jerome's debate on the nature of matrimony, through to the scholastic development of the concept with Thomas Aquinas, all the way to the twentieth century personalist emphasis on the relational and loving character of the marital bond.[61]

The influence of this tradition on western legal systems through canon law and, in turn, the common law is well documented. This is the case in

---

[56] "Eligibility" referring here to consanguinity rules on the basis that there should be no confusion between essentially familial relationships and conjugal relations.

[57] As Leslie Green argues, civil marriage is the recognition of what already "exists as a matter of social or religious practice" – giving a de jure recognition to a de facto union. *See* Leslie Green, *Sex–Neutral Marriage*, 64 CURRENT LEG. PROBS 1, 7-8 (2011).

[58] A clear and concise overview on this development is John Witte, Jr., *The Goods and Goals of Marriage,* 76 NOTRE DAME L. REV. 1019 (2001).

[59] The words are "[f]irst, It [i.e. marriage] was ordained for the procreation of children, to be brought up in the fear and nurture of the Lord, and to the praise of his holy Name. Secondly, It was ordained for a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry, and keep themselves undefiled members of Christ's body. Thirdly, it was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity. Into which holy estate these two persons present come now to be joined." *The Solemnization of Matrimony*, *in* THE BOOK OF COMMON PRAYER (1662).

[60] Augustine wrote of the three aspects of marriage as being *proles* (children), *fidelium* (fidelity), and *sacramentum* (symbolic stability). *See* Witte, *supra* note 58, at 1030.

[61] As seen in Sections 47 to 50 of the Second Vatican Council's pastoral constitution, *Gaudium et Spes*, Dec. 7, 1965: *AAS*58 1025-1115, §47-50 (1966), which strongly foregrounds the centrality of conjugal love in its presentation of marriage. *See Pastoral Constitution on the Church in the Modern World:* Gaudium et Spes, THE HOLY SEE (last visited Nov. 25, 2013) (announced December 7, 1965, and published in 1966), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html.

the U.S. states, which inherited the common law and canon law understanding of marriage from England from the pre-revolutionary era.[62] This understanding evolved over time according to the peculiarities of each state's law, with constitutional provisions being invoked at the federal level from time to time when matters of great import arose. Procreation and the other goods of marriage were often cited in the case law of the U.S. courts.[63]

In the Catholic understanding of this tradition, though there is more than one 'end' or 'aim' to marriage "[t]hese aims can….only be realized in practice as a single complex aim" and, despite the traditional ordering of the ends of marriage, "there is no question of opposing love to procreation nor yet of suggesting that procreation takes precedence over [conjugal] love".[64] Indeed the traditional western twofold or threefold ends of marriage,[65] which do not refer explicitly to love, should not be understood as in any way implying that the foundation of marriage within this understanding is not *love* itself (a communion of love in the original theological language).[66] What is distinctive in this Catholic tradition—in which the western tradition is rooted—is the notion that the procreative and other ends of marriage are *inseparable* and that what makes a conjugal community different from other forms of human society is its reproductive end, as that tradition sees it.[67]

---

[62] *See* Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. PUB. L. 449 (2003-2004); Charles J. Reid, Jr., *The Gingerbread Man Thirty Years On: The Parlous State of Marital Theory,* 1 U. ST. THOMAS L.J. 656 (2003); Charles J. Reid, Jr., *Marriage in its Procreative Dimension: The Meaning of the Institution of Marriage throughout the Ages*, 6 U. ST. THOMAS L.J. 454 (2008-2009). Incidentally Professor Reid, who was an outspoken (Roman Catholic) opponent of SSCM when writing these cited articles, in 2013 publically declared that he has changed his mind and that he now favors same-sex civil marriage.

[63] *See id.* (collecting Reid's articles).

[64] KAROL WOJTYLA, LOVE AND RESPONSIBILITY 68 (1981). Wojtyla later became Pope John Paul II.

[65] The 1917 Code of Canon Law of the Catholic Church combined the second and third ends of marriage, something perpetuated in later treatments of the ends of marriage in canon law and in *Gaudium et Spes*. *See supra* note 61.

[66] For one prominent and mainstream Catholic thinker interpreting the magisterial tradition, Martin Rhonheimer, conjugal love is not an abstract love for an end that may or may not issue from the relationship (children) but is a "love for a concrete person" (the spouse), and that "the" "purpose" or "end" of love is the person himself [the spouse], and nothing else". Rhonheimer writes "[l]ove could not be an end to marriage it is rather *its foundation and content*, content that is nevertheless characterised by a natural end in a specific way: at the service of life [referring to the procreative end of marriage]" (emphasis added). *See* MARTIN RHONHEIMER, ETHICS OF PROCREATION AND THE DEFENSE OF HUMAN LIFE, 86, 87 (2010).

[67] Martin Rhonheimer calls this strong thesis about the intrinsic bond between sex and procreation, the Catholic 'Inseparability Principle', and this is reflected in the Catholic opposition to all forms of intentional contraception. *See* Rhonheimer, *supra* note 66, at 44-46, 71-90. I pay particular attention to the Roman Catholic understanding of marriage

An alternative approach is to retain this basic outline of the nature of marriage as a union of love between spouses forming a new society that yields a nexus of human goods for its participants. But in reasserting this basic scheme one can hold that the procreative and mutual aid (companionate) ends of civil marriage are not held to be utterly inseparable and thus incapable of justifying the conferral of civil marriage rights on the basis of the latter (companionate) end of marriage alone.[68] Being separable as goods or ends does not mean that they cannot be mutually reinforcing as ends in those couples who can procreate. Marriage is understood as a loving union of an indefinite term that produces goods that provide benefit both to the couple concerned and to the wider society.

The possibility of (opposite-sex) civil marriages in which procreation does not occur—or is strictly controlled—has come into sharp relief with the advent of effective contraception in Western societies since the 1960s. This has been reinforced with the increasing phenomenon of new marriages involving post-menopausal women, in part due to the substantial increase in life expectancy. This has inevitably raised the question of how the traditional Western ends of marriage (procreation, mutual aid etc.) can be seen to be absolutely inseparable. [69]

The philosopher G.E.M. Anscombe presciently considered that an acceptance of the principle of intentional contraception (which she opposed) into societal mores could have wider consequences on how civil marriage was conceived. She predicted that the acceptance of sexual expression between partners not founded on a marital relationship intentionally aimed at procreation would create a logic for opening up civil marriage to members of the same-sex, something she clearly opposed.[70] In other words if the

---

because many of the most ardent (and philosophically sophisticated) supporters of traditional civil marriage, such as Rhonheimer, John Finnis, Robert P. George and Maggie Gallagher, are Roman Catholic. I surmise that Matthew O'Brien also writes from within this tradition although his arguments differ in part from those advanced by Finnis and George.

[68] Here I differ with Ralph Wedgwood, who goes too far by altogether omitting procreation within his threefold understanding of the essence of marriage, which for him includes "(1) sexual intimacy; (2) domestic and economic cooperation; and (3) a voluntary mutual commitment". *See* Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. POL. PHIL. 229 (1999).

[69] It is worth noting that the Catholic Church has always allowed people who know they are infertile to marry. Cf. CODE OF CANON LAW OF THE CATHOLIC CHURCH c.1084.3 (1983) affirming that "[s]terility neither prohibits nor invalidates marriage". Appreciating the suffering of an infertile couple, CATECHISM OF THE CATHOLIC CHURCH c.1654 (1999) states: "Spouses to whom God has not granted children can nevertheless have a conjugal life full of meaning, in both human and Christian terms. Their marriage can radiate a fruitfulness of charity, of hospitality, and of sacrifice".

[70] As Anscombe writes "[f]or if that [reproduction] is not its fundamental purpose [of sex] there is no reason why for example 'marriage' should have to be between people of opposite sexes." *See* Elizabeth Anscombe, *Contraception and Chastity*, ORTHODOXY TODAY (last visited Dec. 24, 2013), http://www.orthodoxytoday.org/articles/AnscombeChastity.php (quoting § 1, para.5).

loving union of partners does not necessarily have to possess or express a procreative function or intention, then arguments could be made that the other characteristic functions/ends of marriage (mutual aid, the responsible orientation of sexual desire) are possible within same-sex relationships and infertile opposite-sex relationships.

Anscombe's prediction about the consequences of the logical separation of the ends of marriage has in some ways been gradually incorporated into the jurisprudence of the U.S. courts in relation to civil marriage, much to the frustration of some traditionalist proponents of opposite-sex only civil marriage. The development of U.S. case law in recent decades has gradually acknowledged the separability of the procreative and companionate ends of civil marriage in relation to heterosexual marriage. The jurisprudence of the U.S. state and federal courts has changed from one that has always principally viewed the institution of civil marriage as a reproductive unit towards an understanding that allows the other purposes of marriage to have a distinct and distinguishable value.[71] Early indications of this direction of travel include *Griswold* v. *Connecticut* (1965)[72] which would assert the right to marital privacy over a state interest in barring contraception among married couples.

This was succeeded by other cases that had a more relevant impact on how case law treated non-procreative marital relations, such as Turner v. Safley in 1987.[73] In this pivotal case the U.S. Supreme Court overturned a Missouri state ban on prisoner inmates marrying, even if consummation (and therefore procreation) was not always possible.[74] The majority opinion (authored by Justice Sandra Day O'Connor) outlined the significance of marriage in constitutional law as relating not only to procreation, but inferred that independently of this procreative justification civil marriage could be justified by the "emotional support and public commitment ... [as well as the religious or] spiritual significance" of civil marriage to the citizen (in this case the inmate).[75]

Recent court jurisprudence on marriage has tended to avoid the prior U.S. case law precedent of making procreation "*the* central organizing

---

Indeed, a prominent Roman Catholic bishop in the UK (Philip Egan of Portsmouth) has noted that the use of contraception and the consequent acceptance of a clear distinction between the unitive and procreative functions of sex within opposite-sex relationships has created, in Egan's words, the "inevitable outcome" of SSCM. *See* 'Contraceptive Mentality Led to Gay Marriage, Says Egan', THE TABLET, Aug. 3, 2013, at 36.

[71] Consider Charles Reid's analysis. *See supra* note 62 (collecting Reid's articles).

[72] 381 U.S. 479, 485-486 (1965).

[73] 482 U.S. 78 (1987).

[74] *Turner v. Safley* has relevance in the UK as well. For as Leslie Green has helped clarify, the case law on achieved consummation is ambiguous at best, and the key issue for the law in the UK has been held to be the consenting nature of the union. According to Green, the *capacity* to have sex at all - rather than procreation - is the basis of UK consummation case law. *See* Green, *supra* note 57, at 14-16.

[75] 482 U.S. 78, 95-96 (1987).

principle" of marital law.[76] Legal theorists have used this to build a case for same-sex marriage and the Courts themselves have taken up the development of case law in this area to extend the separability of the goods and purposes of civil marriage to the area of SSCM. This has happened most notably at the state level in *Goodridge v. Dep't of Pub. Health*[77] and at the federal level in the various opinions handed down in the *Perry* cases.[78] In these opinions the Courts have not granted the argument that there is a decisive legitimate state interest in ensuring that civil marriage is restricted to heterosexuals on the basis of 'responsible procreation' (a variation on O'Brien's argument), partly because the Courts point to the many infertile or non-procreative heterosexuals who are granted marriage licenses.[79]

This understanding of civil marriage (as involving separable marital goods) from the public political culture is subject to Rawls's process of political constructivism[80] using the idea of reflective equilibrium. We may model this in the case at hand by arguing that citizens will reflectively consider, in the original position, what the demands of fairness require in terms of the inclusion of a right to civil marriage within the suite of civil rights included in Rawls's first principle of justice.[81] The extent and scope of this right is further examined to see whether it applies to opposite-sex

---

[76] *See* Reid, *Marriage in its Procreative Dimension, supra* note 62, at 484 (emphasis added).

[77] 798 N.E.2d 941 (Mass. 2003).

[78] At the federal level, *see Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal., 2010); *aff'd*, Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012) (Reinhardt, J.) (finding California's Proposition 8, which became CAL. CONST. art. I, § 7.5, unconstitutional under the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment), *vacated on other grounds, Perry,* 133 S. Ct. 2652 (2013).

[79] As the *Goodridge* majority found, "[t]he judge in the Superior Court endorsed the first rationale, holding that 'the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation.' This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. *See Franklin v. Franklin*, 154 Mass. 515, 516 (1891) ('The consummation of a marriage by coition is not necessary to its validity'). People who cannot stir from their deathbed may marry. *See* G. L. c. 207, § 28A. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage". *Goodridge*, 798 N.E.2d 941 at 961-62 (references suppressed).

[80] *See* RAWLS, *supra* note 8, particularly Lecture III – 'Political Constructivism', and Lecture VIII – 'The Basic Liberties and their Priority'.

[81] Rawls's first principle of justice states that: '[E]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all". *See* RAWLS, *supra* note 8, at 291.

couples only, or is sex-neutral.[82] Citizens in the original position (which is a heuristic, not a 'real life' scenario) do not know their gender, sexual orientation or fertility, as this is cloaked behind a notional veil of ignorance in Rawls's theory.

One can use the Rawlsian method of a (narrow) reflective equilibrium to illustrate how a typical approach to the civil rights of gay and lesbian citizens might have changed since, say, the 1950's in the United States. Reflective equilibrium in the political domain is the process by which a person's initial moral views or intuitions about matters of justice (and/or their application) are tested and adjusted into a coherent equilibrium by comparing them to other relevant background beliefs the person may have, whether these beliefs relate to assumptions (moral or empirical) about human nature or social norms.

In the case at hand, U.S. citizens in the 1950's might have widely assumed that gay people were rapacious, incapable of fidelity in relationships and suffered from a psychiatric illness. Popular views in the U.S., however, will likely have evolved in recent times to a commonplace understanding that same-sex couples are capable of forming stable and loving relationships in ways that clearly resemble committed opposite-sex relationships.[83] Wider changes to sexual mores in relation to the acceptability of (fertile) opposite-sex couples choosing not to procreate are also relevant to this evolved narrow reflective equilibrium in relation to matters of justice and the family.

But would this position also justify going beyond sex-neutral civil marriage towards the more radical option of 'plural marriages'—perhaps on the putative basis that the distinctive good of mutual aid can be rendered between multiple partners?[84] I argue that this would not necessarily be the case as the notion of plural marriages and the relations they contain are closer to the generic notion of friendship than the distinctive nature of the *marital* bond, which has been thought of in the western tradition as being dyadic. There are reasons, good reasons in my view, why this dyadic

---

[82] To be clear, I do not subscribe to Rawls's notion of "Justice as Fairness" and the "original position", which is his own species of political constructivism, though I do take the view that it is helpful in a theory of liberal constitutionalism to have principle(s) that would help citizens reasonably filter out arbitrary or unduly partial motivations, interests or biases.

[83] Judge Richard A. Posner argues, without referring to the method of reflective equilibrium, that evolving public views about same-sex relationships, as much as decisions by state and federal courts, have been instrumental to the gradual extension of civil rights to gay and lesbian citizens. *See* Richard A. Posner, *How Gay Marriage Became Legitimate: A Revisionist History of a Social Revolution*, NEW REPUBLIC (July 24, 2013) http://www.newrepublic.com/article/113816/how-gay-marriage-became-legitimate.

[84] The political theorist Elizabeth Brake is an advocate of this stance – *see* Elisabeth Brake, *Minimal Marriage*, 120 ETHICS 302 (2010), particularly at sections II and III. Brake believes that permitting plural marriages (or minimal marriages as she calls them) is the only form of civil marriage that is consistent with Rawlsian liberalism properly considered.

understanding of civil marriage is fully defensible in public reasoning and that there is no irresistible logic to the case for plural civil marriage.[85] 'Slippery slope' arguments are often used by those who seem to be on the losing side of a political debate as a tactic to resist change to the *status quo*. They are often not arguments that directly address the issue under scrutiny, but raise fears about undemonstrated further consequences. But all this is not to say that citizens would not, in the original position, consider whether the fulfillment of certain primary goods for citizens might justify some form of legal recognition for certain dependent relationships in particular circumstances. This does not equate to the recognition of plural marriage.

Proponents of SSCM often point to the fact that U.S. citizens have a legal right to civil marriage, currently restricted to opposite-sex couples in most state jurisdictions. There is disagreement about how this situation should be rectified in relation to same-sex couples. Some SSCM advocates argue that the denial of same-sex civil marriage rights is contrary to the Fourteenth Amendment of the U.S. Constitution, with its guarantee that citizens should receive: (1) the Equal Protection of the laws and/or (2) protection under the fundamental rights understood to flow from the Due Process clause of the same amendment. The argument is that there is no clear and rationally compelling state interest that should justify the denial of a civil marriage license to a properly qualifying same-sex couple. This breach of fundamental rights argument can either be approached from the perspective of sex discrimination[86] or as a specific determination to address unjust discrimination on the basis of sexual orientation.

The same end can be arrived at through the use of Rawls' notion of the primary good of the 'social bases of self-respect'—"understood as those aspects of basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence."[87] Allowing couples currently denied access to the basic legal institution of civil marriage through SSCM would affirm those couples' sense of self-respect and enable them to live out their lives as citizens more fully. This Rawlsian emphasis on promoting the self-worth of citizens

---

[85] For arguments that SSCM does not lead to a slippery slope in recognising plural marriage, *see* the arguments of Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997); James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N.KY. L. REV. 521 (2002): and Ruth K. Khalsa, *Polygamy as a Red Herring in the Same-Sex Marriage Debate*, 54 DUKE L.J. 1655 (2004-2005). On the more theoretical and historical basis of reasons provided against plural marriages *see* JOHN WITTE JR., WHY TWO IN ONE FLESH? THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY (forthcoming, Oxford University Press).

[86] Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001); Andrew Koppelman, *Why Discrimination against Lesbians and Gay Men Is Sex Discrimination,* 69 N.Y.U. L. REV. 197 (1994).

[87] *See* RAWLS, *supra* note 9, at 59.

accords with the way that the U.S. Supreme Court has affirmed that "[f]rom its founding, the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."[88] We can see the potential recognition of SSCM as, far from being a "therapeutic" measure to fulfill trivial subjective desires,[89] as being one that affirms the dignity of its citizens by according them equal access to a basic civic institution.

In what sense does civil marriage generate goods that accrue not only to the spouses but to the wider society, even when procreation is taken out of the picture? For an answer to this question O'Brien could have consulted Judge Walker's judgment in *Perry v. Schwarzenegger* (which O'Brien cites) that clearly summarizes the government interest in civil marriage apart from social reproduction—including the mix of public and personal benefits that can in some way be attributed to the state of civil marriage.[90] Benefits which generate political value include allowing the civil law to effectively organize matters such as hospital visiting rights, tenancy rights on the death of one partner, inheritance entitlements and so on. All of which have the benefit of avoiding unnecessary legal disputes or queries in cases when one spouse dies or is seriously ill. Without these clearly established rights the prospect of dispute and the attendant costs to public agencies (and family members) is considerably more likely. This is surely of some social and political value.

We may also say that marital associations that encourage supportive relationships and cohabitation prevent the proliferation of single person households with the negative externalities generated by them. Inversely, these positive social externalities from civil marriage insofar as it helps sustain relationships may broadly be classified as those that relate to: 1) the public health improvements that may accrue from the maintenance of stable relationships;[91] 2) the lower social care costs that fall on the state as a result of cohabiting partners assisting each other; and 3) the lower level of pressure on scarce housing stock that fewer single person households would ensure.[92]

More broadly still, the virtues facilitated by marital bonds with their characteristic habits of commitment and fidelity can bleed into political virtues that create political value. Marriage can be a 'school of virtue' in

---

[88] Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970), which was a case relating to the provision of welfare.

[89] O'Brien writes of the recognition of SSCM as an example of the "therapeutic" role of government which he feels is illegitimate. *See supra* note 1, at 436.

[90] *Perry*, 704 F. Supp. 2d, at 961-63.

[91] *Id*. at 962 (referencing public health evidence on this claim). Healthier people in a society clearly generate political value in terms of greater economic and social productivity and the benefit of lower health care costs, some of which would certainly fall on the taxpayer.

[92] These costs are widely known, but a summary of them can be found at: JIM BENNETT & MIKE DIXON, SINGLE PERSON'S HOUSEHOLDS AND SOCIAL POLICY: LOOKING FORWARD (2006), *available at* http://www.jrf.org.uk/sites/files/jrf/bennett-9781859354759.pdf.

which spouses learn patience, listening skills, forbearance, compromise, mutual understanding, commitment and mutual care 'in sickness and in health'. These personal virtues overlap with important political virtues for citizens, as citizens are called to embody many of the same virtues in a different mode as 'civic friends'. These virtues or capacities are not strictly limited to the twin Rawlsian capacities to form a plan of life (the 'non-public' rational power) and a sense of political justice ('public' reasonableness). O'Brien should not be surprised at such arguments as they have been part of the public political culture of western societies for centuries. The legal historian and jurisprudent John Witte, for example, refers to the:

> core insight of the Western tradition - that marriage is good not only for the couple and their children, but also [good] for the broader civic communities of which they are a part. The ancient Greek philosophers and Roman Stoics called marriage "the foundation of the republic," "the private font of public virtue." The Church Fathers called marital and familial love "the seedbed of the city," "the force that welds society together." Catholics called the family … "a kind of school of deeper humanity." Protestants called the household … a "little commonwealth." American jurists … taught that marriage is both private and public, individual and social …, a useful if not an essential association, a pillar if not the foundation of civil society. At the core of all these metaphors is a perennial Western ideal that stable marriages and families are essential to the….flourishing, and happiness of the greater commonwealths…[93]

Moreover, as the natural lawyer Gary Chartier has argued, one does not have to see the relationships included in marital law as being universally morally admirable to recognize that societal benefits may accrue from their legal recognition.[94]

Towards the end of his article,[95] O'Brien reaches for the idea of legally recognized domestic dependency arrangements, almost as a *deus ex machina,* claiming that this addresses the interests of mutually reliant same-sex couples or other caring relationships not based on gender or orientation (e.g. two siblings living together). He does not spell out how these domestic dependency rights would differ from the rights accorded to civilly married couples (power of attorney, tax benefits, hospital visitation rights etc.) This move from O'Brien is a significant concession, because in doing so he acknowledges that mutual aid and companionate aspects of a relationship

---

[93] *See* Witte, *supra* note 58, at 1070.

[94] As Chartier writes, those "who believe same-sex relationships are wrong must recognize that such relationships exist and will continue to exist for the foreseeable future. Societal pressure may drive these relationships underground, but it is unlikely to eradicate them. Given that they exist, societies, even those that regard them with distaste, cannot simply ignore them. Providing people involved in such relationships with the option of marriage will help them to contribute to each other's welfare and to that of society as a whole." *See* Gary Chartier, *Natural Law, Same-Sex Marriage, and the Politics of Virtue*, 48 UCLA L. REV. 1622 (2000-2001).

[95] O'Brien, *supra* note 1, at 452-53.

are clearly a political value—otherwise there would be no reason to allow for domestic dependency arrangements as he proposes.

Various inconsistencies arise with this concession. Applying Ockham's razor to the logic of O'Brien's argument regarding the imperative of social reproduction, taken as the sole or dominant political value, would surely be to abolish civil marriage altogether (as there is no stipulation or specific incentive to procreate *inherent* in traditional marriage law) and replace it outright with universal domestic dependency arrangements (open to all different types of couples, sexual relationships or not) accompanied by further tax or other financial incentives for those couples in domestic dependency arrangements who *actually go on to have children*. Monetary benefits to such couples could vary depending on the demographic challenges facing a particular society. A society with a fertility rate above replacement level might not need to put in place any such incentives and could use the resources saved for other socially useful purposes. Those societies below replacement level could make a choice as to whether immigration or specific tax incentives for citizens to have children would be the most socially or politically appropriate response to the challenges of an unduly ageing population.

This solution, from the logic of O'Brien's position (which is not my own), would also mean that the imperative of treating 'like cases alike' would be met—infertile or non-procreative hetero- and homosexual couples would have the same legal status (domestic dependency status) while couples who *actually* contributed to the reproduction of a society by having their own children would have additional recognition from the state (domestic dependency status plus financial benefits for child rearing).[96] Yet O'Brien does not reach for this obvious solution despite his professed theoretical commitment to moral neutrality.[97]

Equally, O'Brien's domestic dependency proposal raises the following question: if virtually all the legal rights and privileges of marriage are granted to same-sex couples through this domestic dependency route, is a society granting same-sex couples (and others) the *de facto* equivalent of civil marriage? In which case if the *only* thing that he is seeking to withhold from same-sex unions is the 'expressive' approval of the law contained in social meanings of marriage—something at stake in the *Perry* case—then this seems quite a semantic approach to the question of SSCM. If the basic legal entitlements of civil marriage are to be conferred to same-sex couples via the domestic dependency route, why not go the whole way, especially given the majority popular support that has emerged for SSCM

[96] It is worth pointing out that a number of European nations have specific welfare benefits relating to the number of dependent children within a family (including single parent families). In the United Kingdom this benefit is known as Child Benefit.

[97] Whether this commitment to moral neutrality is O'Brien's own personal view or a 'stage piece' is not clear, as I shall explain in §V of this article.

in the United States in recent times?[98] The fact that a number of religious organizations in the U.S. consider such couples to be civilly married (not just 'domestic dependents') and wish to be free to bless or solemnize those relationships must surely add a further reason to consider going the whole way to recognizing SSCM.[99]

IV. SAME-SEX MARRIAGE, 'RATIONAL BASIS' REVIEW AND U.S. CONSTITUTIONAL LAW

Matthew O'Brien raises the issue of the appropriateness of the federal court's use of the rational basis review test to strike down laws that bar same-sex couples from access to civil marriage (in the *Perry* case). He sees this as a doubly mistaken move in that not only have the Courts: (1) made the wrong substantive decision but, in doing so, they have (2) directly rejected what he considers to be the *only* rational governmental interest in civil marriage *per se* (i.e. societal reproduction).

I hold that O'Brien's complaint on juristic grounds in this respect is overblown, even setting aside the substantive theoretical issues already discussed. I say this firstly on the basis that the Ninth Circuit Court of Appeals and the U.S. Supreme Court's rulings in the *Perry* case (and the *Goodridge* decision in Massachusetts for that matter) have actually not been nearly as expansive and wide ranging as they might have been, in that neither decision announced a nation-wide constitutional right to SSCM by using the fundamental rights doctrine derived from the Due Process Clause of the Fourteenth Amendment.

Second, I would question the parallel O'Brien draws between the notion of a rational government interest (held by the states), which is crucial in determining the outcome of a rational basis review by the Federal Courts, with aspects of Rawls's political liberalism. Taking the latter point first, at certain points in his article O'Brien seeks to deliberately parallel the rational basis test in U.S. law with John Rawls's notion of public reason.[100] Though there are superficial similarities between the two ideas the connection between them may not be useful in the analysis of the same-sex marriage issue.

There are again two reasons why the parallel is not particularly apt. First, the rational basis test is a specific *legal* principle/precedent from U.S. constitutional law grounded in the historical experience of that polity relating to the respective roles of the legislative and judicial branches and the

---

[98] *See Gay Marriage: Key Data Points from Pew Research*, PEW RESEARCH CENTER (June 11, 2013), http://www.pewresearch.org/2013/03/21/gay-marriage-key-data-points-from-pew-research/ (showing that a plurality of people surveyed since 2011 by the Pew Center in the U.S. favor SSCM).

[99] As Leslie Green reminds us, Canada took the step to legalize SSCM when an Ontario court retroactively recognized two religious same-sex marriages as legally valid. *See* Green, *supra* note 57, at 7-8.

[100] O'Brien, *supra* note 1, at 413, 416, 463.

structuring of powers between the federal and state governments (where the latter have general 'police powers', as O'Brien notes).[101] Judges Walker and Reinhardt do not themselves draw any implicit or explicit parallel between their rulings on Proposition 8 and Rawls's theory, despite O'Brien implication that there is a link between them.[102]

Secondly, nowhere in *Political Liberalism* or *Justice as Fairness: A Restatement,* as far as I can determine, did Rawls himself draw a parallel between the rational basis review and his concept of public reason.[103] Rawls's reference to the U.S. Supreme Court as normatively being the epitome of public reason in *Political Liberalism*[104] does not imply that Rawls saw public reason and rational basis review as analogous. O'Brien seems to allow the parallel between the rational basis review and notion of public reason do work in his article that, on closer consideration, it cannot.

The history of the *Perry* case may also not be helpful in clarifying the key issues in relation to SSCM and Rawlsian public reason. This is for two reasons: first because the findings of fact from Judge Walker showed that the *actual* reasoning put forward by the Proposition 8 proponents in court were not arguments closely tethered to legitimate 'rational' government interests as he judged them, but were arguments that were either irrelevant (such as those addressing the desirability of gay parenting – parenting rights were not affected by the passage of Proposition 8), arbitrary (such as the argument that infertile heterosexual couples should be able to marry but same-sex couples must not) or those grounded in *animus* against same-sex couples[105] (the 'findings of fact' documented the formal participation in the California 'Project Marriage' campaign of persons publicly arguing that

---

[101] These general powers reside in the States rather than the Federal Government. *Cf.* U.S. CONST. art. IV, § 4, which guarantees a "Republican Form of Government" to the States.

[102] O'Brien, *supra* note 1, at 413.

[103] We may reasonably assume that that John Rawls would have been aware of the notion of 'rational basis review' in U.S. law, which was widely known as a key judicial instrument in racial and gender cases for much of the twentieth century. *But cf. infra* note 107.

[104] *See* RAWLS, *supra* note 8, at 231.

[105] Like the jurist Michael J. Perry (a Catholic proponent of SSCM), I do not assume that those opposed to same-sex marriage are generally motivated by animus or bigotry (though some SSCM opponents certainly appear to hold bigoted views). I agree with Perry in regretting that the federal courts, including the US Supreme Court in its ruling on the *Windsor* case, has seemingly deemed that opposition to SSCM is fundamentally premised on *animus* rather than any (non-bigoted) ethical argument, however morally mistaken and/or politically unjust such arguments may be. *See* Michael Perry, *Right Decision, Wrong Reason: Same-Sex Marriage & the Supreme Court*, COMMONWEAL (Aug. 5, 2013), http://www.commonwealmagazine.org/right-decision-wrong-reason. This does not mean that I echo the (typically) splenetic rhetoric of Justice Antonin Scalia who, in his dissenting opinion in the United States v. Windsor, hyperbolically accuses the majority of treating SSCM opponents as 'enemies of the human race'. *See Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

homosexuals were prevalently child sex abusers who would lead America into the hands of the Evil One if allowed to marry).[106]

It is of course possible to hold that there are clear public reasons (in Rawlsian terms) for the recognition of SSCM, whilst not believing that any particular legislative decision in relation to SSCM has failed a rational basis review in U.S. constitutional practice.[107] Moreover, one can hold the general normative view—as I do—that that decisions relating to matters such as SSCM should generally not be made by the judicial branch but should be the province of legislatures (a view often described as 'popular' or 'political' constitutionalism).[108] In other words, even if O'Brien succeeds in persuading his critics that the rational basis test was wrongly applied in this or that case in the federal courts, he would still not necessarily have succeeded in his aim of demonstrating that there are no Rawlsian public reasons in favor of the recognition of SSCM.[109]

In any case O'Brien's fears about the application of the rational basis test to SSCM cases are exaggerated because the basis of the Ninth Circuit Appeals Court's decision in favor of the plaintiffs in the *Perry* case was limited and *sui generis*. The Ninth Circuit decided not that the constitution grants a general civil right to SSCM (as *Loving v. Virginia*[110] established a civil right under the Fourteenth Amendment to race-blind marriage) but ruled that the *withdrawal* of SSCM brought in by Proposition 8 was not—

---

[106] "[T]he America Return to God Prayer Movement, which operates the website '1man1woman.net.' ... 1man1woman.net encouraged voters to support Proposition 8 on grounds that homosexuals are twelve times more likely to molest children [according to 1man1woman.net] ... and because Proposition 8 will cause states one-by-one to fall into Satan's hands", *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 937, 989 (N.D. Cal. 2010), at 22.

[107] Of relevance here is the view of U.S. Attorney General Holder that "classifications based on sexual orientation should be subject to a heightened standard of constitutional scrutiny under equal protection principles" as are classifications such as race, national origin, alienage, non-marital parentage, and gender (in varying degrees) than the rational basis test. Letter from U.S. Attorney General, Eric H. Holder, Jr., to Speaker of the U.S. House of Representatives, John A. Boehner, regarding *McLaughlin v. Panetta*, Civ. A. No. 11-11905 (D. Mass., Feb. 17, 2012). In this view, the SSCM issue should be treated under a different rubric than the straightforward rational basis test, that of 'heightened scrutiny'.

[108] For an example of such a view *see* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM (2009) or, from a different perspective, the work of Mark Tushnet including in MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000).

[109] As Robin West writes "[t]his decision is thus of no relevance to cases challenging a state's refusal to extend marriage to include gays and lesbians [generally], and it is of no relevance to cases challenging a state's withdrawal of such a right if that right is also accompanied by a denial of concrete benefits and accompanied by some explanation—such as the superiority of heterosexual parenting—for the decision to do so. Perry v. Brown is nothing more than a sui generis decision for a unique set of facts." Robin L. West, *A Marriage Is a Marriage Is a Marriage: The Limits of* Perry v. Brown, 125 HARV. L. REV. F. 48 (2012).

[110] 388 U.S. 1 (1967).

in the circumstances of the specific campaign and legal context of California—clearly advanced by its proponents to serve a defined and legitimate government interest. It was thus considered a breach of equal protection of the laws under the Fourteenth Amendment by Judge Reinhardt. In limiting the judgment to the Equal Protection Clause, it overruled Judge Walker's District Court ruling that Proposition 8 contravened *both* the fundamental rights jurisprudence (from the Due Process Clause) as well as the Equal Protection Clause.

As such the controlling precedent for the case for the Ninth Circuit was not the chain of case law emerging from the U.S. Supreme Court's establishment and elaboration of a constitutional right to civil marriage (in *Loving, Zablocki v. Redhail,*[111] *Turner v. Safley,* etc.) but the U.S. Supreme Court's much more limited judgment in *Romer v. Evans* to strike down a Colorado law that withdraw protection from discrimination against citizens purely on basis of their sexual orientation.[112] A decision directly based on *Loving*, *Zablocki* and *Turner* using the fundamental rights doctrine based on the Fourteenth Amendment might have led to a move to enforce a sex-neutral legal definition of civil marriage across the states. In the event, the *Perry* case was vacated as the U.S. Supreme Court decided, by a majority decision, that the plaintiffs did not have legal standing in the case (in part because the State of California did not contest the lower court's rulings). The decision of the lower courts striking down Proposition 8 thus stood.[113]

The majority decision of the U.S. Supreme Court in the twined case of *United States v. Windsor*[114] also did not affirm a constitutional right to sex-neutral civil marriage. *Windsor* was, again, decided on narrow grounds. First, on the basis that it is state governments and not Congress who have traditionally decided matters relating to marital and family law and, second, on the Fifth Amendment's Due Process requirement.[115] (Edith Windsor's lawyers did not invoke the fundamental rights jurisprudence of the Fourteenth Amendment to support her claim). As Chief Justice John Roberts noted in his dissent, the majority decision in *Windsor* leaves intact Section II of Defense of Marriage Act, which legislates that states that do

[111] Zablocki v. Redhail, 434 U.S. 374 (1978).

[112] Romer v. Evans, 517 U.S. 620 (1996). This case, in effect, introduced a rational basis test 'with bite', which is perhaps something of a half-way house between a conventional rational basis test and a heightened scrutiny review. This 'with bite' element of the rational basis test is not mentioned by O'Brien but is perhaps relevant in considering the Perry case. Cf. Jennifer Sirrine, *A Rational Approach to California's Proposition 8*, 9 DARTMOUTH L.J. 49 (2011).

[113] *Perry*, 133 S. Ct. 2652 (2013).

[114] 133 S. Ct. 2675 (2013) (striking down Section III of the Defense of Marriage Act, 1 U.S.C. § 7 (1996), which barred the federal government and its agencies from recognizing the civil marriages of same-sex couples from states where SSCM is legal).

[115] Which mandates, according to the U.S. Supreme Court's prior jurisprudence, the equal protection of the law for citizens under federal authority. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

not recognize SSCM are not compelled to recognize the civil marriages of same-sex spouses from states that do.[116] The U.S. Supreme Court thus again refrained from using the chain of precedent from *Loving*, as the Ninth Circuit did with regard to *Perry*.

The decision of the U.S. Supreme Court to stay the December 20, 2013 ruling of the U.S. District Court for the District of Utah striking down the ban on SSCM contained in that state's constitution (on the basis of both the Fourteenth Amendment's fundamental rights doctrine and the Equal Protection Clause) may indicate that the highest court is not yet of the view that the denial of SSCM by a state is a contravention of the federal constitutional right to marry (*à la Loving* and marital race bars).[117]

The question of what can serve as a legitimate government interest goes to the heart of the traditional powers to enforce public morality under the general 'police powers' of state governments. This is clearly a controversial question on which legal and social attitudes have changed over the decades (for instance in relation to the legal censorship of the content of theatrical performances or movies). Key to the discussion of the enforcement of public morality is surely its interplay with the contrasting doctrine of the right to privacy that the U.S. Supreme Court has found, in the post-war period, in the 'penumbras' of the Bill of Rights.[118] There are, of course, other ways than a general and wide-ranging right to privacy to conceive of the limits to the legitimate scope of government in advancing human goods (or militating against human wrongs)[119] or in justifying the existence of

---

[116] 133 S. Ct. at 2696 (Roberts, C.J., dissenting) ("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,'… may continue to utilize the traditional [heterosexual] definition of marriage." (quoting the opinion of the Court)).

[117] Order in pending case, Herbert v. Kitchen, Docket No. 13A687, Jan. 6, 2014, 571 U.S. _. The Tenth Circuit Court of Appeals is seeking briefing on the case as I write. A similar case was decided on January 14, 2014 by the U.S. District Court for the Northern District of Oklahoma, striking down that state's constitutional ban on SSCM *and* disapplying Section II of the Defense of Marriage Act (*Bishop v. United States*, 4:04-cv-00848-TCK-TLW (N.D. Okla.)). The U.S. District Court for the Northern District of Oklahoma has stayed its ruling pending the Tenth Circuit's ruling regarding the Kitchen v. Herbert case.

[118] Most famously in *Griswold v. Connecticut,* 381 U.S. 479, 484 (1965), Justice Douglas, delivering the opinion of the Court, stated that there is a right of marital privacy that justifies the legalisation of contraceptives for married couples on the basis that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. … Various guarantees create zones of privacy." Douglas based these (unenumerated) guarantees in the *Griswold* case on the penumbras of the First, Third, Fourth, Fifth and Ninth Amendments.

[119] A Millian may wish to refer to 'the harm principle' and contemporary Thomists use Aquinas's distinction between sin and crime and his recommendation that it is necessary only to legally enforce matters of morality that relate to interpersonal justice, civil peace or public order. *See* for instance the limited role of government outlined in John Finnis, *Public Good: The Specifically Political Common Good in Aquinas*, in NATURAL LAW AND MORAL INQUIRY: ETHICS, METAPHYSICS, AND POLITICS IN THE WORK OF GERMAIN

'liberty' or 'privilege' rights grounded in the autonomy of the legal person,[120] however autonomy is conceived from the philosophical perspective.

Concerns expressed by O'Brien that the U.S. Supreme Court has endorsed a comprehensive ethical conception of autonomy in its recent case law may also be somewhat exaggerated[121]–though I would concur that, when taken in isolation, some of the purple passages authored by Justices O'Connor and Kennedy in the *Planned Parenthood* and *Lawrence* majority opinions respectively[122] are regrettably apt for such an interpretation. It is

---

GRISEZ, (Robert P. George ed., 1998) and John Finnis, *Liberalism and Natural Law Theory*, 45 MERCER L. REV. 687 (1994).

[120] The intellectual historian Brian Tierney argues that as early as the twelfth century canon lawyers were referring to *ius* (right) as a personal faculty (*facultas*) or moral power (*potestas*). The relevant aspect of Tierney's work in this context is the argument that the concept of explicitly subjective 'liberty' ('privilege') or 'power' rights (in the Hohfeldian sense) extended back to the 1180's where English canonists were referring to a concept of a 'permissive natural law' based on a subject's faculty for choice in situations where actions "are neither commanded nor forbidden by the Lord or by any Statute" (quoting the English canonist author of *Summa, In Nomine*). *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 67 (2001). Also relevant here is: Jean Porter, *Natural Right, Authority and Power, the Theological Trajectory of Human Rights*, 3 J.L. Phil. & Culture 299 (2009). I am not, of course, suggesting here that either Tierney or Porter thinks that 'unenumerated' substantive due process rights, as found in twentieth century U.S. Supreme Court jurisprudence, are present in English medieval canonistic thought, only that such twelfth and thirteenth century jurists and philosophers had already begun to see that personal self-dominium (practical self-direction if you will) inferred a zone of liberty that should be protected. This is perhaps an early conceptual root of the modern right of privacy, even if we may disagree on how such privacy rights should be specified in relation to controversial moral issues such as abortion or sexual relations.

[121] Relevant here in interpreting the notion of autonomy found in the *Planned Parenthood* and *Lawrence* opinions is James E. Fleming's notion of "deliberative autonomy" which he sees as much narrower than a comprehensive (in the Rawlsian sense) liberal or libertarian understanding of autonomy. Fleming sees deliberative autonomy as being drawn from the underlying values of freedom of conscience and the other civil liberties contained in the structure and text of the U.S. Constitution. Fleming interprets the *Lawrence* majority opinion in this more limited light; pointing out that it protected same-sex intimate relations on the basis that such conduct can be seen as "closely analogous to heterosexual intimate conduct, which is already constitutionally protected", *see* JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 137 (2006). Chapters 5 and 6 of the book give Fleming's considered view of deliberative autonomy, and the whole work is an attempt to show how Rawlsian political liberalism can be used to create a coherent philosophic reading of the constitution. I cite Fleming's work not because I share its fundamental jurisprudential position, but because it propounds a well thought through reading of autonomy rights within the U.S. constitutional order—a view that O'Brien does not consider.

[122] The majority opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992), stated that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attrib-

important to point out that neither of these purple passages directly imply that moral norms or the moral law are themselves somehow *created or wholly specified by the citizen in her/his exercise of autonomy*. It is therefore questionable that these opinions have reified in U.S. constitutional law a substantive and comprehensive doctrine of *constitutive* moral autonomy, as O'Brien implies. Moreover, a modest and limited notion of moral autonomy or 'practical freedom' is consistent with a range of reasonable comprehensive ethical, philosophical or religious doctrines, even those that allow a strong role for revealed divine law (such as Catholicism).[123] What is important—and contested—is the extent to which the recognition of the autonomy or practical freedom of legal persons mandates a zone of privacy that the law must respect. This zone of privacy itself helps to delineate the permissible scope of 'public morals' legislation.[124]

V. CONCLUSION

In concluding it is worth examining the overarching strong and weak points that come over in O'Brien's provocative article. His article valuably focuses on Rawls's argument that the family has a clear social function in the reproduction of a political society over time. This point has the potential to contribute to public reasoning in favor of the inclusion of a right to civil marriage in the list of civil rights within a liberal political conception of justice. This point has not had the prominence in the literature on same-sex marriage that it should have. Rawls's insights on social reproduction have some relevance, particularly in societies where the birth rate might dip well below replacement level.

---

utes of personhood were they formed under compulsion of the State." In *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), the purple passage announces: "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."

[123] For an instructive survey of how both pre-modern and modern ethical worldviews have posited or valued forms of autonomy, practical freedom or 'self-dominium' *see* T.H. Irwin, *Continuity in the History of Autonomy*, 54 INQUIRY: AN INTERDISCIPLINARY JOURNAL OF PHILOSOPHY 442 (2011) and Brian Tierney, *Dominium of Self and Natural Rights before Locke and After, in TRANSFORMATIONS IN MEDIEVAL AND EARLY MODERN RIGHTS DISCOURSE* 176-94 (V. Makinen & P. Korkmann, eds., 2006).

[124] Even though O'Brien points to what he sees as a fundamental inconsistency between the privacy rights implied in the *Planned Parenthood* and *Lawrence* cases with the notion of public morals legislation (O'Brien, *supra* note 1, at 412-13), the courts themselves have seen no fundamental clash and continue to implement public morals legislation – albeit with a different scope than they would have before the jurisprudence of the U.S. Supreme Court in the post-war period carved out certain privacy rights. O'Brien notes this himself (*id.* at 413) when he quotes Judge Reinhardt's Ninth Circuit opinion in *Perry v. Brown* that affirms the *continuation* of the states' police powers on public morality. (I make no judgment here about the rights and wrongs of the *Planned Parenthood* decision, which relates to abortion.)

O'Brien, however, spoils his argument when he relies on a tendentious reading of Rawls's later oeuvre, claiming that Rawls propounds a thoroughgoing moral neutralism which, in a balanced reading, he does not. This reading of Rawls is used by O'Brien to invalidate arguments for SSCM on the basis that its proponents hold substantively liberal ethical commitments. As I have demonstrated, Rawls did not believe that holding reasonable comprehensive commitments and advancing them in the political (or academic) domain discredits or disqualifies the otherwise publicly accessible arguments that the same people may also advance in favor of SSCM, or any other issue relating to the basic structure of a constitutional democracy.

The particular account of the justification of civil marriage O'Brien proffers does not escape some internal contradictions that make it vulnerable to the charge that it is unduly inconsistent in its treatment of same-sex and opposite-sex couples. His sole justification of civil marriage is that it engenders natural social reproduction and preferable parenting conditions.[125] Yet O'Brien considers that infertile heterosexual couples, or those with no intention to procreate, should be allowed to marry. If the justification for the civil recognition of marriage is *solely* the procreative function of such a relationship (rather than the broader recognition of loving unions and the polyfunctional ends that are produced by that union), then there is little justification for allowing post-menopausal women to marry or those who have known medical conditions that prevent procreation. O'Brien undermines his own train of argument by affirming that civil marriage should be limited to opposite-sex couples regardless of their *actual* fertility because *in abstracto* they are "characteristically" reproductive and that heterosexual sex is in a generic sense "intrinsically generative".[126]

Despite O'Brien's protestations—which are not argued through dialectically against potential objections—such a position presupposes some form of (contestable) natural philosophy or metaphysical anthropology. Such a metaphysical anthropology would struggle to be expressed in the purely political terms that O'Brien himself interprets Rawls as stipulating within his understanding of public reason. For it is surely far from a statement of the obvious (as O'Brien infers) that a postmenopausal woman wishing to get married is entering an "intrinsically generative" union with her prospective husband. It is biologically 'natural', after all, that people of both sexes (e.g. in childhood and extreme old age in men) to have periods when they are not 'generative'. As is obvious, in women the postmenopausal infertile period is a result of a perfectly normal biological process, it is

[125] As O'Brien and I are not trained in the methods of child psychology or its allied disciplines (and are writing in a law journal), I shall pass over his strong and substantive judgments about the right conditions for child rearing while noting – as O'Brien does with more than a little chagrin – that the main professional association in the United States in that discipline has formally stated that that children are not generally disadvantaged by being brought up by same-sex parents. *See* O'Brien, *supra* note 1, at 443.

[126] O'Brien, *supra* note 1, at 438-39.

not considered either a pathology or a disability.[127] This is a key flaw in O'Brien's argument that does not receive sufficient argumentative attention given the stakes involved: the failure of the "intrinsically generative" argument would undermine his support for traditionalist heterosexual marriage, or at least mean that age restrictions (or a fertility test) should be considered for opposite-sex partners wishing to get married in civil law.[128]

This lack of argumentation is surprising because reference to "characteristically" reproductive relationships seems to be a variation on the view, put forward by Robert George and John Finnis, that infertile heterosexual sex is still of a reproductive *type* or *kind* and thus infertile heterosexuals should still be eligible to marry. But this parallel is awkward for O'Brien because he has clearly distanced himself from the New Natural Law understanding of ethics and has already judged that their arguments are inapt with regard to public reason.[129] In this sense the "intrinsically generative" argument for traditionalist marriage advanced by O'Brien is vulnerable to the same criticisms to those made against New Natural Law theorists who claim that *only* married heterosexual (and non-contracepted) coital sex acts can properly be considered morally licit sexual acts.[130] In my judgment and that of others, criticisms of the New Natural Law argument in relation to the so-called 'sterility objection' have never been answered adequately, despite the spilling of much ink on the question.[131]

---

[127] It would be more defensible to say that women, in particular, are intrinsically generative at points *in their fertile period* between puberty and menopause. But this would undercut the logic of O'Brien's argument, which (silently) seems to rely on a naturalistic notions of 'natural kinds' or 'finalities' that smack of a 'comprehensive' philosophic conception of gender and sexual potency. Though I am far from unsympathetic with a revised and critically nuanced form of Aristotelian(-Thomistic) ethical naturalism, which seems to be back in academic fashion, I do not draw the same sort of applied moral conclusions from a (neo) naturalistic philosophical anthropology that O'Brien does.

[128] Martha Nussbaum argues that the procreative argument for traditional heterosexual marriage is inconsistent and challenges its proponents to answer the *reductio* of why there should not be an upper age bar for women wishing to apply for a marriage license to cover their post-menopausal period. *See* Martha C. Nussbaum, *Reply - A Right to Marry?*, 98 CAL. L. REV. 744 (2010). Needless to say I do not favor such an age bar.

[129] *E.g.*, O'Brien, *supra* note 1, at 418ff.

[130] New Natural Law theorists consider all other types of sex acts, including all heterosexual marital but non-coital sex (such as oral sex), to be intrinsically immoral and self-alienating, a position that has come under intense scrutiny and criticism in a number of places, not least in NICHOLAS BAMFORTH & DAVID A. J. RICHARDS, PATRIARCHAL RELIGION, SEXUALITY, AND GENDER: A CRITIQUE OF NEW NATURAL LAW (2008).

[131] *See* on the one side of the argument Girgis et al. *supra* note 53 (who claim that infertile married couples are still 'biologically' ordered to procreation) and on the other Andrew Koppelman, *Careful with That Gun: Lee, George, Wax, and Geach on Gay Rights and Same-Sex Marriage* (Northwestern Public Law Research Paper No. 10-06, Jan. 11, 2010), http://dx.doi.org/10.2139/ssrn.1544478, and Erik A. Anderson, *A Defense of the 'Sterility Objection' to the New Natural Lawyers' Argument Against Same-Sex Marriage*, 16 ETHICAL THEORY & MORAL PRAC., 759 (2013).

In my alternative politically liberal understanding of the SSCM issue we do not bypass the widely received western understanding of marriage in civil and canon law as a society founded on interpersonal love for the advancement of the goods of procreation, mutual aid and sexual continence. Following the post-war introduction of contraception we can understand better that the traditional goods of marriage of mutual aid and continence are separable from the reproductive purpose of marriage. The separability of the traditional goods of marriage has also been recognized, by inference, in the public political culture of the U.S. in constitutional case law (such as in *Turner v. Safley*). As I have noted, this changing legal precedent has been accompanied by the rightful marginalization of the hitherto commonly held assumption that gay people are generally rapacious or suffer from a psychiatric illness.

Thus we can, by using a process of Rawlsian political constructivism, come to a liberal political conception of justice that includes same-sex couples as well as opposite-sex couples in the general legal right to civil marriage. There is a substantial gap between arguments expressed in publicly reasonable terms in favor of civil marriage that *includes* the key function of societal reproduction over time and O'Brien's position, which is that the *only* publicly reasonable argument for civil marriage is social reproduction. I find the *inclusive* Rawlsian argument not only publicly reasonable but also persuasive, whereas the latter *exclusive* argument (as advanced by O'Brien) appears to be arbitrary and tinged with ideological undertones.[132] After all, does O'Brien believe that extending marital rights to same-sex partners would adversely affect the birth rate among married heterosexual couples?[133]

How might we interpret the impetus behind O'Brien's article? The author is curiously circumspect in that he gives the reader no direct indication as to whether he actually subscribes to Rawls's understanding of political liberalism. This leads one to at least raise the question of whether he is us-

---

[132] At times O'Brien's article does not help to dispel the view that he may be writing from a strongly ideological perspective when he draws some colorful (but unfortunate) parallels or *reductiones* between arguments to recognize same-sex relationships with, for instance, the mutually dependent relationship between a "pimp and prostitute" or when he claims that "homosexual orientation is on a political par with, say, a traditional order of chivalry". These parallels come in O'Brien, *supra* note 1, at 462 and 459 respectively.

[133] Such an implicit argument was rightly dismissed by the United States Court of Appeals for the Ninth Circuit in relation to Proposition 8 when the majority opinion stated that "withdrawing from same-sex couples access to the designation of 'marriage'—without in any way altering the substantive laws concerning their rights regarding childrearing or family formation—will encourage heterosexual couples to enter into matrimony, or will strengthen their matrimonial bonds, we believe that the People of California 'could not reasonably' have 'conceived' such an argument 'to be true.' It is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman. While deferential, the rational-basis standard 'is not a toothless one.'" *See* Perry v. Brown, 671 F.3d 1088 (9th Cir. 2012) (internal citations omitted).

ing an interpretation of Rawls to pick holes in the case for SSCM, by advancing a *faux* or ironical internal critique of the widely made Rawlsian case for SSCM.[134] And though O'Brien offers his personal views on a wide range of social and ethical questions he puzzlingly never addresses his own ethical judgment of the morality of committed same-sex relationships.

Other opponents of SSCM are much more upfront about their views on the immorality of all homosexual sexual relationships. O'Brien distances himself from the judgment of John Finnis and Robert George on same-sex relations, but only on the rather narrow grounds that their natural law arguments have irreducibly metaphysical elements that are not apt for public argumentation. Other contemporary natural law theorists—even those who espouse a more metaphysically 'upfront' version of natural law deny that same-sex relationships are necessarily prohibited by natural law (or fail to realize any human good)[135] and other natural lawyers are highly sympathetic with the case for SSCM.[136] It might have been helpful for the reader for O'Brien to have situated his understanding of the *moral* issues at stake in considering same-sex relationships in this context.[137]

Where does this leave us in the wider argument about SSCM in the U.S. and elsewhere? Are we stuck in a series of philosophical zero-sum games that can only be resolved by an unambiguous victory by one side or the other in a series of ongoing culture wars? I am not as pessimistic as O'Brien seems to be. Sound argumentation and balanced interpretation of texts can help us at least begin to work through some of the more extreme positions that are present on both sides of the same-sex marriage debate. If we agree with the concept of public reason, in one of its many variations,

---

[134] I raise this point as a genuine question rather than as cynical assumption.

[135] MARK C. MURPHY, AN ESSAY ON DIVINE AUTHORITY 176-83 (2002). Murphy is one of the foremost members of a younger generation of natural law philosophers.

[136] *See* JEAN PORTER, MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY 123 (2010); Chartier, *supra* note 94. Some committed lay Roman Catholics in the UK such as Lord Deben (formerly John Gummer, a past Conservative cabinet minister) endorsed the UK Government's same-sex marriage bill (now enacted) on the basis that natural law arguments would support the extension of civil marriage rights to same-sex partners. Lord Deben said "[s]urely our understanding of sexual relationships and sexuality should lead us to understand that there is an extension of natural law from that understanding (i.e. of civil marriage being a natural institution common to humanity). That extension should lead us to be prepared in the state to allow people of the same-sex to marry. It is wrong to suggest that there is something unnatural for them to wish to take this step." H.L. DEB. Dec. 11, 2012, vol 741, col.993.

[137] Many readers will be surprised by O'Brien's lack of curiosity or appreciation as to how a loving and committed same-sex relationship is categorically different to the relationship between a widower and his brother who may choose to live together for company. Nowhere in the article does O'Brien seek to explore how such same-sex couples may experience distinctive common (human) goods from their relationship in a way that is more similar to the experience of a heterosexual married couple than with two friends or siblings lodging together. Instead O'Brien tendentiously seeks to frame the SSCM question as if it were if were essentially a dispute about the state's general "endorsement of gay sex". O'Brien, *supra* note 1, at 457.

then we may have some cause to believe that debates in western societies can produce more than just a repeating series of fruitless, agonistic debates. This is not to say that there is only one politically objective response to every vexed ethical-political question, only that in line with our duty of civility to each other, we need to keep working at the answers together.