Finding Room for Same-Sex Marriage: Toward a More Inclusive Understanding of a Cultural Institution

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I. Introduction

Should the state recognize the relationships of same-sex couples who wish to enter into the institution of marriage? The answer to this question has great symbolic and practical significance. Symbolically, legal recognition is meaningful because it would institutionalize respect for the legitimacy and value of same-sex unions. Practically, the recognition of same-sex marriage is also of great import. The legal status of marriage confers many rights and privileges unavailable to single people such as rights to inheritance, tax deductions, social service entitlements, medical rights, and so on. As symbolically and practically important as marriage seems to be, many conservatives contend that the exclusion of same-sex couples from the institution can be justified.

In this essay, I explore conservative arguments in defense of traditional marriage that are framed in the language of culture.[1] Marriage, conservatives contend, is a cultural institution that would be undermined if same-sex unions were recognized by the state. In what follows I will investigate this claim. Two questions will be central to my assessment. First, what does it mean to defend traditional marriage as a *cultural* institution? Second, does the defense of marriage as a valuable cultural institution require the exclusion of same-sex couples from legal recognition?

I will explore these questions through a consideration of the case against legal recognition of same-sex marriage presented by natural law conservatives such as John Finnis, Robert P. George, Gerard V. Bradley, Douglas W. Kmiec and Hadley Arkes. Focus on the work of these natural law theorists is appropriate for two reasons.[2] First, in my view, these theorists offer the most sophisticated arguments on the conservative side of this debate. In addition to the intellectual weight of their ideas, these natural law theorists are worthy of consideration because they have assumed a prominent policymaking role in the United States. Indeed, George and Bradley have been described as the "principal authors" of the proposed Marriage Protection Amendment to the U.S. Constitution being considered today by the Congress.[3]

In Part II, before taking up the natural law arguments, I will offer a brief explanation of what I think it means to defend marriage as a legally recognized cultural institution and discuss some of the difficulties with legal recognition in

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a pluralistic society. My consideration of the natural law case for exclusion will begin in Part III where I attempt to show that their arguments do *not* depend on the "procreation argument," which holds that limiting recognition to heterosexual couples can be justified by the state's interest in promoting procreation. In Part IV, I describe what I believe to be the heart of the natural law defense of traditional marriage—the state's interest in protecting and promoting "sexual integrity." In Part V, I argue that the natural law argument for the exclusion of same-sex couples from the institution of marriage should be rejected. In Part VI, I suggest how John Rawls's idea of overlapping consensus might point us to a useful way of thinking about the public recognition of marriage in a diverse society and I respond to some of the major objections to my arguments.

II. What It Means to Defend Marriage as a Cultural Institution

Natural law theorists insist that the case for reserving marriage to a man and a woman "has never been premised on mean-spirited exclusion."[4] Rather, they contend, this reservation is based on the belief "that marriage is a cultural institution, not merely a lifestyle choice."[5] Before proceeding to the substance of the natural law arguments, it is necessary to flesh out what it means to defend marriage as a cultural institution.

If we define culture as "the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in a society," then we can think of a cultural institution as a formalized embodiment of a society's commitment to those values, attitudes, beliefs, orientations and underlying assumptions.[6] Because my aim is to explore the legitimacy of same-sex marriage as a matter of political morality, I want to focus on an understanding of marriage as a cultural institution that represents widely shared commitments to certain *values*.

The values embodied in marriage are complex because it is a cultural institution that is recognized within both the public and private spheres. Within the private sphere, for example, marriage is defined and subject to the formal and informal regulations of a wide array of religious institutions. Due to the fact that these religious institutions enjoy a certain level of autonomy from state control, they are free to promote their own particular understandings of the nature and value of marriage as a cultural institution.

The relationship of cultural institutions to the public sphere is a bit more complicated. This is because our society is characterized by what John Rawls called "the fact of reasonable pluralism." According to Rawls, in free societies, it can be expected that reasonable people will accept a variety of comprehensive religious, moral, and philosophical doctrines.[7] The fact of reasonable pluralism makes it necessary to offer "public reasons" as the basis for the application of state power. In other words, when we cross the line from the private realm into the public, the fact of reasonable pluralism requires us to offer reasons that are accessible to those who accept different comprehensive moral and religious doctrines. Although it is permissible to appeal to religious reasons as the source of value for cultural institutions in the private sphere, the fact of reasonable plural-

ism forces us to provide different reasons as the basis for *public* recognition. For example, although the value of marriage as a cultural institution for a Christian may be linked to Biblical revelation, this is not a *public* reason insofar as it is not a reason that can justify legal recognition for someone who does not share the same religious faith.

In sum, the basis for public recognition of cultural institutions must be consistent with the requirements of public justification. In the words of Stephen Macedo,

> To accept the appropriateness of *public* justification is to agree to filter out reasons and arguments whose grounds are private (like religious faith), or too complex to be widely understood, or otherwise incapable of being widely appreciated by reasonable people.[8]

The natural law theorists considered below seem to accept the appropriateness of public justification and, as such, do not rely on ostensibly religious reasons as the basis for their cultural defense of traditional marriage.[9]

As a general matter, then, if we wish to understand marriage as a cultural institution, it is necessary to determine what values it embodies. In the particular case of the natural law defense of traditional marriage, two questions will be central to this consideration. First, what, according to natural law theorists, are the values embodied in the cultural institution of marriage? Second, given these values, is the natural law case for the exclusion of same-sex couples from the institution of marriage compelling? With these questions in mind, we can begin our consideration of the defense of traditional marriage offered by natural law theorists.

III. Beyond the Procreation Argument

Before proceeding to the substantive heart of the argument, it is necessary to point out that the most sophisticated formulations of the natural law case do not rely on the procreation argument, which holds that the state is justified in excluding same-sex couples from the institution of marriage because the basis for legal recognition is linked to the state's desire to promote procreation. While it is certainly true that discussion of procreation is part of many arguments in defense of traditional marriage, there are good reasons why the natural law theorists do not believe it can serve as the basis for public recognition.[10]

First, if the value of marriage as a cultural institution is grounded in its promotion of procreation, then natural law theorists would seem bound to the view that the state should not recognize nonprocreative heterosexual marriages. Simply put, if the purpose of marriage is solely to promote procreation, why would the state have any interest in recognizing the unions of elderly newlyweds, younger couples unable to have children, or younger couples not interested in having children (perhaps their marriage license could be revoked if they failed to procreate within one, five, or ten years)? If one accepts the procreation argument as the basis for state recognition of marriage, it is difficult to see how these nonprocre-

ative heterosexual unions could be deemed any more worthy of legal recognition than same-sex unions.

Although natural law theorists flirt with the procreation argument, they shy away from embracing it as the centerpiece of their defense of traditional marriage. It is necessary for natural law theorists to distance themselves from this view because they believe marriage is valuable *independent* of procreation. In other words, they believe that *both* procreative and nonprocreative heterosexual marriages are valuable and, thus, worthy of state protection and promotion. If natural law theorists relied on the procreation argument as the basis for the exclusion of same-sex couples from legally recognized marriage, they would have to apply an obvious double standard in order to include nonprocreative heterosexual couples under the umbrella of the institution.[11] The reluctance of natural law theorists to exclude nonprocreative heterosexual couples from marriage is one indication of why we must look beyond the procreation argument to discover their reasons for valuing the institution.

Fundamentally, natural law theorists reject the procreation argument as the basis for state recognition because it instrumentalizes the value of marriage. According to the procreation argument, marriage is a mere means by which the state furthers its interest in procreation. In other words, the procreation argument does *not* hold that marriage has any value *independent* of its possible effect of promoting procreation. This instrumental understanding of marriage is not one natural law theorists want to accept. For natural law theorists, marriage is valuable beyond procreation because it is the embodiment of a commitment to sexual integrity.

IV. Marriage as the Embodiment of a Commitment to Sexual Integrity

According to natural law theorists, marriage is valuable independent of procreation because it institutionalizes a commitment to sexual integrity—a sexual morality that values monogamy and views marital sex as the actualization of a unique form of the common good of friendship. This view holds that the protection and promotion of the institution is justified because sexual integrity can be conducive to human flourishing. According to the natural law application of this doctrine, homosexuals are incapable of living according to the principles of sexual integrity and, as such, they must be excluded from the institution of marriage. In the words of John Finnis, "homosexual *conduct* (and indeed all extra-marital sexual gratification) is radically incapable of participating in, actualizing, the common good of friendship."[12] In order to assess this view, we must do two things. First, it is necessary to spell out the argument from sexual integrity in a bit more detail. Second, we must determine whether or not these natural law theorists are correct in their view that homosexuals are incapable of practicing sexual integrity.

As its name suggests, the argument from sexual integrity is grounded in a particular understanding of the moral value of marital sex. The argument from

sexual integrity values not just marital sex, but heterosexual, marital sex of the "procreative-type." If it were just marital status that mattered, the argument against same-sex marriage would take the circular form of: "You should not be allowed to marry because you do not have marital sex." Furthermore, it is not just sex within marriage that is valuable. Rather, it must be sex of the procreative-type. As such, this view condemns not only all homosexual sex, but also all sex acts between heterosexual husbands and wives that are not of the procreative-type.

Consider Finnis's formulation of the sexual integrity argument. According to Finnis, "Genital intercourse between spouses enables them to actualize and experience their marriage itself, a single reality with *two blessings* (children and mutual affection). Nonmarital intercourse, especially but not only homosexual, has no such point and therefore is unacceptable."[13] Note that Finnis goes beyond the procreation argument by declaring that "mutual affection" is another reason marriage is valuable. On Finnis's view, the common good of mutual affection can only be experienced through marital genital intercourse.

> [T]he common good of friends who are not and cannot be married (for example, man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit. So their genital acts together cannot do what they may hope and imagine. Because their choice to activate their reproductive organs cannot be an actualizing and experiencing of the marital good—as marital intercourse can even between spouses who happen to be sterile—it can do no more than provide each partner with an individual gratification.[14]

According to Finnis, "there is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it."[15]

The value of sexual integrity is independent of procreation. Finnis argues that although sterile heterosexual couples may not be *able* to procreate, they can still experience the "two-in-one-flesh common good and reality of marriage" through sex acts of the procreative-type, which are marks of "esteem and affection."[16] Homosexuals, however, are unable to experience this "two-in-one-flesh common good" and, as such, public recognition of their unions would do violence to the value of sexual integrity. In other words, the exclusion of same-sex couples is, on this view, justifiable because

> a political community which judges the stability and educative generosity of a family life as one of the basic goods which political association itself exists to serve can rightly judge that it has a compelling interest in denying that 'gay lifestyles' are a valid, humanly acceptable choice and form of life, and in doing whatever it properly can, as a community . . . to discourage such conduct.[17]

Communities ought to do this, Finnis thinks, not by criminalizing homosexual conduct, but by excluding homosexuals from institutions like legally recognized marriage that represent cultural stamps of approval.[18]

Natural law theorists Robert P. George and Gerard V. Bradley offer a similar version of the integrity argument that is a bit more detailed than Finnis's account. Like Finnis, George and Bradley contend we must go beyond procreation to find the values embodied in marriage: "The intrinsic intelligible point of the sexual intercourse of spouses . . . is, in our view, marriage itself, not procreation considered as an end to which their sexual union is the means."[19] The problem with the procreation argument, according to George and Bradley, is that it assumes that "the value of marriage and marital intercourse can only be instrumental" whereas natural law theorists believe "marriage and marital intercourse are intrinsically good."[20] The intrinsic value of marital genital sex acts stems from the idea that they represent "an irreducibly *unitive* activity; and its unitive significance obtains for the mated pair irrespective of the procreative potential of their particular acts of genital intercourse."[21]

It seems the integrity argument can be reduced to the idea that the state has an interest in recognizing only heterosexual marriage because it promotes something which is intrinsically valuable (the realization of a special form of the common good of friendship through the mutual affection of spouses) whereas homosexual relationships are *always* instrumental and, thus, *necessarily* "morally worthless." To offer public recognition to relationships that are necessarily morally worthless would be utterly destructive of the values embodied in marriage. For this reason, George and Bradley contend that "at a minimum, [a culture] can hold that the state ought not to institutionalize (or otherwise support or promote) same-sex or other intrinsically non-marital sexual relationships or recognize 'marriages' between people of the same sex or others who cannot consummate marriage as a one-flesh communion."[22]

What, according to this view, are the values embodied in the cultural institution of marriage? If we accept the integrity argument as the heart of their view, it seems clear that these natural law theorists believe the cultural institution of marriage is valuable because it institutionalizes the widely shared commitment to the value of sexual integrity. State recognition of marriage is worthwhile, then, because it protects and promotes an institutional framework for the practice of this sexual morality.

V. Assessment of the Natural Law Argument

In my view, natural law theorists are correct to say that marriage is a valuable cultural institution because it provides a moral framework for individuals who wish to make a formal statement of their love for and commitment to one another. On the level of principle, then, I am in agreement with the sexual integrity argument. Where I believe the natural law theorists go wrong is in their application of these principles to homosexuality. I believe this application is flawed because it gives the *physical* details of marital sex far too much moral weight. If we focus less on these physical details that are so important to natural law theorists and more on the metaphysical goods that one hopes animate a marriage,

I believe it is possible to find room for same-sex couples under the umbrella of the institution.

The natural law theorists discussed above believe that homosexuals are unable to experience the common good embodied in marriage because gay couples cannot "actualize" their unions via sex of the procreative-type. In order to assess whether or not these natural law theorists have made a compelling case that there is a necessary connection between procreative sex and the common good embodied in marriage, it is necessary to examine the *reasons* behind this view.

Alas, a search for the *reasons* that animate the natural law application of the argument from integrity is, by their own admission, in vain. The natural law theorists do tell us that sex of the procreative-type is valuable because it is "unitive," but they offer no explanation as to why this is the *only* type of sex that has *any* moral value. George and Bradley avoid argument on this point by declaring that "intrinsic value cannot, strictly speaking, be demonstrated."[23] Applied to this specific case, they write:

> The practical insight that marriage . . . has its own intelligible point, and that marriage as a one-flesh communion of persons is consummated and actualized in the reproductive-type acts of spouses, cannot be attained by someone who has no idea of what these terms mean; nor can it be attained, except with strenuous efforts of imagination, by people who, due to personal or cultural circumstances, have little acquaintance with actual marriages thus understood. For this reason, we believe that whatever undermines the sound understanding and practice of marriage in a culture—including ideologies that are hostile to that understanding and practice—makes it difficult for people to grasp the intrinsic value of marriage and marital intercourse.[24]

In a conclusion that is as shocking as it is disappointing, George and Bradley proclaim: "In the end, we think, one either understands that spousal genital intercourse has a special significance as instantiating a basic, non-instrumental value, or something blocks that understanding and one does not perceive correctly."[25] When asked to give *reasons* to justify the exclusion of homosexuals from the institution of marriage, Finnis, George, and Bradley seem to be saying, "We can't demonstrate *why* they should be excluded, but they should be. And if you don't see why, the fault does not lie with us, but with your own cognitive deficiency." At bottom, the natural law case for exclusion relies on an unintelligible, intuitive claim that some people "get" and others do not.

According to this natural law argument, the basis for the public recognition of marriage can be reduced to an inquiry into the *physical details* of marital sexual acts. Although they refuse to give us any reasons in support of the view that sex of the procreative-type is a *necessary* part of any marriage worthy of state recognition, this claim is the centerpiece of their argument for the exclusion of same-sex couples from the institution.

The natural law understanding of sexual integrity offered by Finnis, George and Bradley should be rejected. Marriage has special moral value because it

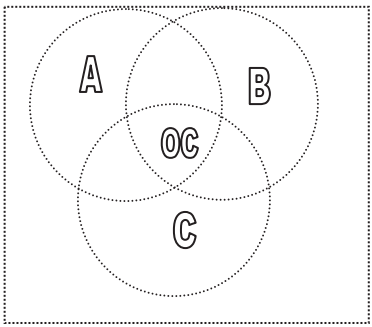
provides a framework within which two people can declare their love for one another before their families, friends, and community. A marriage is not "actualized" by a particular type of sex. Rather, a marriage is actualized by the mutual expression of metaphysical shared goods such as love, mutual respect, commitment and trust. If we understand marriage as the embodiment of these metaphysical goods, it is possible to find room for both heterosexual and same-sex couples within the institution.

VI. Public Recognition and the Problem of Pluralism

So far, I have tried to do three things. First, in Part II, I drew attention to some of the challenges one faces in attempting to ground public recognition of cultural institutions like marriage in a society characterized by the fact of reasonable pluralism. In order to satisfy the requirements of public justification, it is necessary to ground the case for legal recognition in *public* reasons that can be understood by people with divergent moral and religious commitments. In Parts III and IV, I described the natural law case for the exclusion of same-sex couples from the institution of marriage. In Part V, I argued that the natural law understanding of marriage is unacceptable as the basis for public policy because it fails to offer clear and coherent reasons for the exclusion of same-sex couples from the institution. At this point, I want to offer a different way of thinking about the public recognition of marriage and respond to some of the most serious objections that could be raised to my arguments.

First, I think the failure of the natural law case reveals why it may be necessary to rethink the basis for public recognition of marriage. As noted in Part II, marriage is an institution with multiple sources of meaning. This is an inescapable byproduct of the fact of reasonable pluralism. Because marriage is an institution that is valued for many public and private reasons, I think it may be worthwhile to think of the basis for public recognition in terms of "overlapping consensus" rather than absolute agreement.

Rawls's idea of overlapping consensus is simple enough. Consider the following pictorial representation.



Circles A, B, and C represent the different comprehensive moral or religious doctrines that are accepted by individuals and groups within a given society. The area where these three doctrines overlap, OC, is the overlapping consensus.[26] Although A, B, and C come from different starting points, each is able to accept the essentials of the overlapping consensus. It is important to note that the moral basis for the overlapping consensus is not independent of the comprehensive doctrines A, B, and C. "All those who affirm [the overlapping consensus]," Rawls writes, "start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides."[27]

If we apply this idea to the institution of marriage, several of the problems presented by pluralism are addressed. First, note that seeking out an overlapping consensus on the *public* value of marriage does not require anyone to abandon their own *private* reasons for valuing the institution. If an individual has religious reasons for believing that marriage is valuable, she can draw on those reasons to affirm the legitimacy of public recognition of the institution. If, on the other hand, an individual has moral or practical reasons for valuing marriage that are completely independent of religious belief, he can draw on those reasons to affirm the legitimacy of state recognition.

The primary virtue of this way of thinking about marriage is that it allows individuals and groups to maintain incommensurable understandings of the institution in the private sphere, while still seeking common ground as the basis for public recognition. The example of natural law theorists and their critics can be illustrative of how this would work. According to the natural law understanding of marriage, same-sex couples are, prima facie, unworthy of recognition. Natural law theorists could continue to affirm this view of marriage in the private sphere by affiliating themselves with religious institutions that refuse to recognize same-sex marriages. Because, however, they are unable to offer public reasons for this understanding of marriage the natural law theorists would not be permitted to impose this definition on everyone else.

Decentralizing the value of marriage in this way opens the door to a more inclusive institution that appreciates the diverse array of moral and religious doctrines that are embraced by individuals and groups in an open society. The hope is that viewing marriage in this way will provide us with the opportunity to find overlapping reasons why the institution ought to be recognized by the state. As noted above, in addition to the mysterious argument about unitive sex, natural law theorists believe marriage is intrinsically valuable because it provides a framework for the realization of a special form of friendship. This part of their understanding along with commitments to values like mutual affection and fidelity are much more easily understood, widely accepted and, therefore, more likely to fall within an overlapping consensus on the importance of marriage as a legally recognized cultural institution.

A natural law theorist may object to this way of thinking about marriage by saying that it is a clear embrace of sexual relativism, which is described by William Bennett as the view that it is impossible to "draw any lines and make

moral distinctions" concerning matters of sexuality.[28] According to this argument, if we accept the idea that there are multiple reasons for thinking marriage is a valuable cultural institution, we run the risk of eliminating any limitations on what sorts of unions should be recognized. As scary as the slippery slope may be, the idea of overlapping consensus is not susceptible to this criticism because it has limiting principles built into it.

First, it is not necessary to adopt the doctrine of sexual relativism in order to accept the legitimacy of the marital commitments of same-sex couples. Rather than being based on a rejection of all moral distinctions in the sexual realm, the case for inclusion is grounded in a belief that married life can be conducive to human happiness and flourishing. If one rejected all moral distinctions about sex, it is difficult to imagine how it would be possible to formulate any sort of argument for the protection and promotion of the institution of marriage.

A second response to the sexual relativism argument addresses the issue of limiting principles. Although the idea of overlapping consensus does allow for a more decentralized view of the nature and value of marriage, it is not open to all understandings of marriage. "The fact of *reasonable* pluralism," Rawls reminds us, "is not an unfortunate condition of human life, as we might say of pluralism as such, allowing for doctrines that are not only irrational but mad and aggressive."[29] Applied to marriage, we might say that some unions could be deemed unreasonable (i.e., adult–child, incestuous, and polygamous unions) and thus unworthy of recognition if it was clear they fell outside the overlapping consensus on the nature and value of the institution.[30]

In addition to the sorts of objections that have been raised by natural law theorists, it is worth addressing some concerns others might have with my argument. First, a libertarian critic may resist the very idea of legal recognition due to a belief that the state has no business entangling itself with value-laden institutions like marriage. I think the overlapping consensus way of thinking about marriage should allay some of this concern. The overlapping consensus view maintains a strong line between public and private spheres. Religious institutions would continue to have discretion over what marriages to recognize in the private sphere. As noted above, this would enable individuals and groups to maintain divergent understandings of marriage without fear of state interference. In other words, the public understanding of marriage would be decentralized to accommodate the fact of reasonable pluralism. The idea of overlapping consensus allows us to see marriage as a cultural institution with multiple sources of meaning and value, rather than as the embodiment of absolute agreement about its meaning and value. If public recognition is legitimized in this way, the relationship between the state and marriage should be less disconcerting for the libertarian.

A communitarian critic might worry that decentralizing the meaning and value of marriage in this way would undermine the whole point of state recognition of cultural institutions. The idea behind such recognition, the communitarian might say, is to promote the institutionalization of widely shared values. By fragmenting the meaning and value of marriage, the overlapping consensus

approach would undercut that project. I believe the overlapping consensus basis for public recognition provides a middle ground between communitarianism and libertarianism. By maintaining public recognition, this approach satisfies the communitarian desire to protect and promote institutions that embody widely shared values. By seeking an overlapping consensus rather than an absolute agreement on the nature and value of marriage, it maintains public recognition in a way that respects the fact of reasonable pluralism. Furthermore, because entrance into the institution is voluntary, the public recognition of marriage would be a fine example of noncoercive communitarianism.

A final objection that must be addressed is grounded in skepticism about the significance of public recognition. Why, a critic might ask, is public recognition so important for same-sex couples? There are doubtless many complex and varied reasons why public recognition is meaningful, but as a matter of political morality, I think two are worth noting here. The first reason has to do with a commitment to equality. Any time a state allows some to be part of an institution while excluding others, it ought to give compelling reasons for doing so. Marriage is an institution that many same-sex couples desire to be a part of and if the state cannot provide reasons for their exclusion, it fails to treat its citizens as equals before the law and, as such, commits a great injustice.

The second reason has something to do with a commitment to autonomy. Joseph Raz argues that institutions like marriage are intrinsically valuable collective goods that are "constitutive of the very possibility of autonomy" because their existence enhances the ability of individuals to "author their own lives."[31] In other words, in a society where the option of legally recognized marriage is not available, the state undermines the ability of same-sex couples to participate in an institution that may be of great value to them. When the state inhibits the autonomy of some of its citizens without offering compelling public reasons for doing so, it acts unjustly.

In this section, I have tried to do two things. First, I attempted to use Rawls's idea of overlapping consensus as an alternative lens through which we can view the basis for public recognition of marriage in a pluralistic society. Second, I tried to respond to some of the objections that might be raised to my arguments. The debate between natural law theorists and their critics is but one example of the conflicting understandings of marriage that exist within a diverse society. The idea of overlapping consensus moves us toward a moderate understanding of public recognition that appreciates the fact of pluralism without abandoning the quest for institutions that embody shared values.

VII. Conclusion

The argument for public recognition of same-sex marriage presented here is both conservative and progressive. On the plane of principle, it is *conservative* in the sense that it is grounded in the belief that marriage is a valuable institution that ought to be protected and promoted. Rather than representing an abandon-

ment of the moral principles at the foundation of marriage, legal recognition of the marital commitments of same-sex couples would signify a profound reaffirmation of those principles.

Although this argument is grounded in a desire to maintain the moral principles that animate our commitment to marriage, it is also *progressive* in the sense that it asks us whether or not these principles can be squared with our practices. When this process leads us to the conclusion that a gap exists between our moral commitments and our practices, it is incumbent upon us to engage in the progressive task of taking the steps necessary to bridge that gap. Public recognition of the marital commitments of same-sex couples would be one such step.

Notes

[1] In this paper, I refer to heterosexual marriage as "traditional marriage."

[2] This group of contemporary political and legal theorists has attempted to revive the natural law tradition of Aristotle, Cicero, Aquinas, Grotius, Hooker, etc.

[3] See Alan Cooperman, "Little Consensus on Marriage Amendment," *Washington Post*, February 14, 2004, A1.

[4] Douglas Kmiec, "Just What Is Marriage Anyway?" *Los Angeles Times*, Wednesday, November 19, 2003, B15.

[5] Ibid.

[6] Lawrence E. Harrison and Samuel P. Huntington, eds., *Culture Matters* (New York: Basic Books, 2001), xv.

[7] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993). In Rawls's words, "Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within a framework of the free institutions of a constitutional democratic regime."

[8] Stephen Macedo, *Liberal Virtues* (Oxford: Oxford University Press, 1990), 63–64.

[9] I will return to a discussion of the difficulties presented by the fact of pluralism in Part VI.

[10] Some natural law theorists emphasize the importance of procreation more than others. See, for example, Hadley Arkes, "The Role of Nature," in *Same Sex Marriage—Pro & Con: A Reader*, ed. Andrew Sullivan (New York: Vintage, 1997), 276 [hereinafter: *Same-Sex*, Sullivan, page number].

[11] For a discussion of the double standard problem, see Stephen Macedo, "Homosexuality and the Conservative Mind," *Georgetown Law Journal* 84 (1995): 278.

[12] John Finnis, "Is Natural Law Theory Compatible with Limited Government?" in *Natural Law, Liberalism, and Morality*, ed. Robert P. George (Oxford: Clarendon Press, 1996), 12–13.

[13] Ibid., 14. Emphasis added.

[14] Ibid., 15.

[15] Ibid.

[16] Ibid., 16.

[17] Ibid., 17.

[18] Ibid.

[19] Robert P. George and Gerard V. Bradley, "Marriage and the Liberal Imagination," *Georgetown Law Journal* 84 (1995): 304. Emphasis in original.

[20] Ibid., 305.

[21] Ibid., 313.

[22] Ibid., 320.

[23] Ibid., 307.

[24] Ibid., 308.

[25] Ibid., 309.

[26] For Rawls, the area where reasonable comprehensive doctrines overlap is where we find our political conception of justice.

[27] Rawls, *Political Liberalism*, 144. Emphasis added.

[28] William Bennett, "Leave Marriage Alone," in *Same-Sex*, Sullivan, 275.

[29] Rawls, *Political Liberalism*, 144.

[30] It is beyond the scope of this paper to assess the legitimacy of these other arrangements. Suffice it to say that each arrangement would have to be considered separately and we would want to determine the moral weight of the arguments offered both for and against each understanding of marriage.

[31] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 207.