

# Marriage Rights and the Good Life: A Sociological Theory of Marriage and Constitutional Law

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*The national debate over marriage discrimination against gay and lesbian Americans is playing out in state legislatures, at the ballot, and in the federal courts under the conventional notion that liberal rhetoric, the liberal political philosophy indebted to John Rawls, and the unencumbered self at their cores are the bases for the most effective arguments for the gay rights movement. Pro-gay groups talk often about rights, liberty, and the freedom to choose whom to love. Even in court, gay rights groups repeat the Supreme Court's statements about a fundamental right to make the choice to marry. But the conventional wisdom ignores the important social role marriage plays in society and the way in which the cultural and sociological value of marriage and gay relationships can help jump the constitutional hurdles facing those seeking the freedom to marry.*

*This is the first in a series of three Articles investigating the underappreciated role that the social theory of Emile Durkheim plays in the quest for the freedom to marry for gay Americans. To that end, this Article begins the discussion by examining the Durkheimian legal arguments that go unnoticed in equal protection and due process claims against marriage discrimination. This Article challenges two assumptions: first, that the most effective legal argument for marriage rights is a purely liberal one, and second, that the substance and rhetoric of liberal toleration cannot exist symbiotically in the marriage discrimination debate with a more robust politics based on the experiential social value of marriage and gay relationships. The freedom to marry is both a liberal right and a piece of the good life. Drawing on Durkheim, this Article discusses a sociological theory of marriage and argues that the constitutional case for the freedom to marry is not just about the rights of equal protection and due process, but also about the sociology of marriage. In other words, a successful constitutional argument depends on the recognition that marriage is a social good with both general and everyday demonstrable benefits for the married couple and society as a whole.*

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## INTRODUCTION

The campaign to end marriage discrimination against gay and lesbian Americans has largely been the bailiwick of progressives. When he endorsed same-sex marriage,<sup>1</sup> President Obama joined a long list of moderate and liberal friends: 2 former presidents,<sup>2</sup> 14 current governors,<sup>3</sup>

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1. Matt Compton, *President Obama Supports Same Sex Marriage*, THE WHITE HOUSE BLOG (May 9, 2012, 6:12 PM), <http://www.whitehouse.gov/blog/2012/05/09/president-obama-supports-same-sex-marriage>.

2. *Bill Clinton Supports Marriage Equality in New York*, HRC BLOG (May 5, 2011), <http://www.hrc.org/blog/entry/bill-clinton-supports-marriage-equality-in-new-york>; Paul Brandeis Raushenbush, *President Jimmy Carter Authors New Bible Book, Answers Hard Biblical Questions*, THE HUFFINGTON POST (Mar. 19, 2012), [http://www.huffingtonpost.com/2012/03/19/president-jimmy-carter-bible-book\\_n\\_1349570.html](http://www.huffingtonpost.com/2012/03/19/president-jimmy-carter-bible-book_n_1349570.html) ("I personally think it is very fine for gay people to be married in civil ceremonies.").

3. Lincoln Chafee, *Gay Marriage: A Question of Fairness*, THE HUFFINGTON POST (June 18, 2009), [http://www.huffingtonpost.com/lincoln-chafee/gay-marriage-a-question-o\\_b\\_217389.html](http://www.huffingtonpost.com/lincoln-chafee/gay-marriage-a-question-o_b_217389.html) (Lincoln Chafee, I-R.I.); *Civil Rights/Marriage Equality*, MAGGIE HASSAN: GOVERNOR, <http://www.maggiehassan.com/issues/civil-rights-marriage-equality> (last visited Mar. 15, 2013) (Maggie Hassan, D-N.H.); John Curran, *Peter Shumlin, Vermont Governor, Presides Over Marriage of Lesbian Couple*, THE HUFFINGTON POST (Aug. 17, 2011, 5:52 PM), [http://www.huffingtonpost.com/2011/08/17/peter-shumlin-gay-marriage-vermont\\_n\\_929486.html](http://www.huffingtonpost.com/2011/08/17/peter-shumlin-gay-marriage-vermont_n_929486.html) (Peter Shumlin, D-Vt.); Andrew Garber, *Gregoire Proposes Legislation to Legalize Gay Marriage*, SEATTLE TIMES (Jan. 4, 2012), [http://seattletimes.nwsource.com/html/politicsnorthwest/20117157564\\_gregoire\\_to\\_introduce\\_gay\\_marr.html](http://seattletimes.nwsource.com/html/politicsnorthwest/20117157564_gregoire_to_introduce_gay_marr.html) (Christine Gregoire, D-Wash.); *Governor Abercrombie: Same-Sex Marriage Ban Unconstitutional*, HAWAII

and more than two hundred members of the Senate and House of Representatives,<sup>4</sup> among many more progressive organizations,<sup>5</sup> and businesses.<sup>6</sup> Of those high-profile supporters of same-sex marriage, only three, Republicans Ileana Ros-Lehtinen of Florida, Rob Portman of Ohio, and Richard Hanna of New York, are national Republicans currently in office.<sup>7</sup> And although that is not to say that same-sex marriage has no well-known conservative supporters—President George W. Bush’s Solicitor General, Ted Olson;<sup>8</sup> his Vice President, Dick Cheney;<sup>9</sup> his 2004 campaign

REPORTER (Feb. 21, 2012), <http://www.hawaiiireporter.com/gov-abercrombie-same-sex-marriage-ban-unconstitutional/123> (Neil Abercrombie, D-Haw.); Alissa Groeninger & Rex W. Huppke, *Quinn Makes It Clear He Supports Same-Sex Marriage in Illinois*, CHI. TRIB. (May 11, 2012), [http://articles.chicagotribune.com/2012-05-11/news/ct-met-gay-marriage-illinois-20120511\\_1\\_civil-unions-marriage-bill-marriage-rights](http://articles.chicagotribune.com/2012-05-11/news/ct-met-gay-marriage-illinois-20120511_1_civil-unions-marriage-bill-marriage-rights) (Pat Quinn, D-Ill.); Maggie Haberman, *Cuomo Says All States Should Pass Gay Marriage*, POLITICO (Oct. 28, 2011), <http://www.politico.com/news/stories/1011/67076.html> (Andrew Cuomo, D-N.Y.); Jerry Brown: *Gay-Marriage Ban Should Be Invalidated*, LOS ANGELES TIMES (Dec. 19, 2008), <http://latimesblogs.latimes.com/lanow/2008/12/attorney-genera.html> (Jerry Brown, D-Cal.); John Kitzhaber on *Civil Rights*, ON THE ISSUES (last updated Jan. 21, 2013), [http://www.ontheissues.org/governor/John\\_Kitzhaber\\_Civil\\_Rights.htm](http://www.ontheissues.org/governor/John_Kitzhaber_Civil_Rights.htm) (John Kitzhaber, D-Ore.); *Markell Supports Legalizing Gay Marriage in Del.*, NBC10 PHIL (Mar. 2, 2012, 5:18 PM), <http://www.nbcphiladelphia.com/news/local/Markell-Supports-Legalizing-Gay-Marriage-in-Del-141234223.html> (Jack Markell, D-Del.); Tim Nelson, *Dayton Pushes for Same-Sex Marriage at Capitol Rally*, MINN. PUB. RADIO (Apr. 14, 2011), <http://minnesota.publicradio.org/display/web/2011/04/14/gay-rights-rally> (Mark Dayton, D-Minn.); Martin O'Malley, *Dignity for All: Why I Signed Same-Sex Marriage into Maryland Law*, THE HUFFINGTON POST (Mar. 2, 2012), [http://www.huffingtonpost.com/gov-martin-omalley/maryland-gay-marriage\\_b\\_1314982.html](http://www.huffingtonpost.com/gov-martin-omalley/maryland-gay-marriage_b_1314982.html) (Martin O'Malley, D-Md.); *Statement of Governor Patrick on President Obama's Support for Same-Sex Marriage*, MASS.GOV (May 9, 2012), <http://www.mass.gov/governor/pressoffice/pressreleases/2012/2012509-governor-statement-on-president-support-of-same-sex-marriage.html> (Deval Patrick, D-Mass.); Stephen Reader, *CT Gov. Dan Malloy Talks Budget, Same Sex Marriage*, WNYC.COM (June 15, 2011), <http://www.wnyc.org/articles/its-free-country/2011/jun/15/connecticut-governor-dan-malloy> (Dan Malloy, D-Conn.).

4. See *List of Supporters of Same-Sex Marriage in the United States: Members of the U.S. House of Representatives*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_supporters\\_of\\_same-sex\\_marriage\\_in\\_the\\_United\\_States#Members\\_of\\_the\\_U.S.\\_House\\_of\\_Representatives](http://en.wikipedia.org/wiki/List_of_supporters_of_same-sex_marriage_in_the_United_States#Members_of_the_U.S._House_of_Representatives) (last modified Mar. 21, 2013) (collecting sources); *List of Supporters of Same-Sex Marriage in the United States: U.S. Senators*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_supporters\\_of\\_same-sex\\_marriage\\_in\\_the\\_United\\_States#U.S.\\_Senators](http://en.wikipedia.org/wiki/List_of_supporters_of_same-sex_marriage_in_the_United_States#U.S._Senators) (last modified Mar. 21, 2013) (collecting sources).

5. See, e.g., Michael Barbaro, *In Largely Symbolic Move, N.A.A.C.P. Votes to Endorse Same-Sex Marriage*, N.Y. TIMES, May 20, 2012, at A15, <http://www.nytimes.com/2012/05/20/us/politics/naacp-endorse-same-sex-marriage.html>; Julie Bolcer, *LULAC, Nation's Oldest Latino Group, Backs Marriage Equality*, ADVOCATE.COM (July 1, 2012), <http://www.advocate.com/politics/marriage-equality/2012/07/01/lulac-nation's-oldest-latino-group-backs-marriage-equality>.

6. See, e.g., Zack Ford, *REI Sporting Goods Company Endorses Marriage Equality in Washington*, THINKPROGRESS.ORG (Aug. 14, 2012), <http://thinkprogress.org/lgbt/2012/08/14/687751/rei-sporting-goods-company-endorse-marriage-equality-in-washington> (noting that REI joined Amazon.com, Starbucks, Microsoft, Vulcan, and Nike in publicly supporting same-sex marriage rights in Washington State).

7. Ileana Ros-Lehtinen Is First GOP Member of Congress to Support Marriage Equality, TOWLEROAD (July 13, 2012), <http://www.towleroad.com/2012/07/iliana-ros-lehtinen-is-first-gop-member-of-congress-to-support-marriage-equality.html>; Jeremy W. Peters, *G.O.P. Senator Says He Has a Gay Son, and Backs Gay Marriage*, N.Y. TIMES, Mar. 15, 2013, at A11.

8. Jo Becker, *A Conservative's Road to Same-Sex Marriage Advocacy*, N.Y. TIMES, Aug. 19, 2009, at A1.

9. *Dick Cheney Saw Political Peril in Expressing His Support for Same Sex Marriage Too Soon*,

guru, Ken Mehlman;<sup>10</sup> and former Governor of Utah, Ambassador to China, and Republican Presidential candidate Jon Huntsman<sup>11</sup> are just four examples—or does not benefit from thousands donated by some conservative fundraising lions,<sup>12</sup> it is hard to argue that support for same-sex marriage is, to date, anything but a cause célèbre of liberals and libertarians.<sup>13</sup> And that support is couched in traditional liberal terms.<sup>14</sup>

Governors Dan Malloy of Connecticut and Lincoln Chafee of Rhode Island, for example, explained their support for marriage freedom using the rhetoric of rights, liberty, and equality. Governor Malloy's position is a matter of equal "dignity" for all persons;<sup>15</sup> Governor Chafee supports the freedom to marry because it is a simple question of "fairness."<sup>16</sup> Modern liberal philosophy is characterized by this tolerance and value neutrality and, therefore, supports ending marriage discrimination quite easily. Under the enlightenment framework of Kant,<sup>17</sup> Hagel,<sup>18</sup> Habermas,<sup>19</sup> and Rawls,<sup>20</sup> liberal democracies should be founded on respect for individual rights and free of the personal prejudices and private morality of their leaders. More specifically, when making public policy, leaders should bracket away what any comprehensive doctrine (like religion, for example) might say about homosexuality and support and enact laws that treat everyone equally.<sup>21</sup> Libertarians<sup>22</sup> should agree: To them, government

TOWLEROAD (July 30, 2012), <http://www.towleroad.com/2012/07/cheneymarriage.html>.

10. Sheryl Gay Stolberg, *Republicans Sign Brief in Support of Gay Marriage*, N.Y. TIMES, Feb. 25, 2013, at A1; *Gay Marriage's Unlikely Hero*, THE DAILY BEAST (June 25, 2011), <http://www.thedailybeast.com/articles/2011/06/25/bush-republican-party-leader-ken-mehlman-unlikely-hero-of-new-york-s-gay-marriage-vote.html>.

11. Jon Huntsmann, *Gay Marriage Is a Conservative Cause*, THE AMERICAN CONSERVATIVE (Feb. 21, 2013), <http://www.theamericanconservative.com/articles/marriage-equality-is-a-conservative-cause485>; Stolberg, *supra* note 10.

12. *See, e.g., Billionaire GOP Donor Paul Singer Donates \$150,000 to Maine Marriage Equality Effort*, TOWLEROAD (July 24, 2012), <http://www.towleroad.com/2012/07/billionaire-gop-donor-paul-singer-donates-150000-to-maine-marriage-equality-efforts.html>.

13. *See, e.g., Jay Root, Major Cruz Backer Favors Same-Sex Marriage, Marijuana Legalization*, THE STAR-TELEGRAM (July 3, 2012), <http://www.star-telegram.com/2012/07/03/4077826/major-cruz-backer-favors-same.html>.

14. Ideas that we consider "liberal" and "libertarian" are founded upon similar notions of individual rights and autonomy. Although these philosophies diverge on many things, including the role of government in supporting the disadvantaged, they both rely on neo-Kantian ideas of freedom and individual liberty.

15. *See* Reader, *supra* note 3.

16. *See* Chafee, *supra* note 3.

17. *See* IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Thomas Kingsmill Abbott ed., 2009); IMMANUEL KANT, *FOUNDATIONS FOR THE METAPHYSICS OF MORALS* (Thomas Kingsmill Abbott & Lara Denis eds., 2005).

18. STEVEN M. CAHN, *POLITICAL PHILOSOPHY: THE ESSENTIAL TEXTS* (2005).

19. *Id.*

20. JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*].

21. This is a brief summary of Rawls' "political liberalism." *See* JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]. Both this revised theory and Rawls' original, revolutionary work, *A Theory of Justice*, will be discussed in this Article.

has no place in making moral judgments about the intimate relationships of its citizens. Even the movement's preferred term, "marriage *equality*," evokes the bedrock principles of liberal toleration, individual rights, and an absence of value judgment.<sup>23</sup>

Many lions of the academy have critiqued this vision of politics. They argue, roughly, that it is empty and based on a neo-Kantian vision of the self that is detached from real life experiences.<sup>24</sup> It requires us to ignore the social ties that make us who we are. And marriage is the antithesis of arm's length detachment from values. It is a social and cultural institution that helps constitute the interconnected web of human society. It is a stabilizing, assimilatory institution that is at the foundation of local neighborhoods, communities, and the state. To paraphrase Olson, the former solicitor-general and co-lead counsel in *Hollingsworth v. Perry*, the best marriages are stable bonds between two individuals who come together in social and economic partnership and work hard to create happy, loving, and large households full of children, friends, and guests.<sup>25</sup> Governments encourage couples to marry because the commitments they make to one another provide outsized benefits not only to themselves but also to their families and communities; after all, marriage requires unselfish thinking, for children, family, and community.<sup>26</sup> It is a transformative social institution that brings two individuals into a union based on shared aspirations and, in so doing, buys a share in the future success of society as a whole. To suggest that social and political leaders can judge this particular institution from a detached, value-neutral vantage point, as liberal toleration requires, is to deny the interconnectedness of all things and remain blind to the salient role of the institution of marriage and the role government plays in fostering social progress through marriage.

The liberal conception and this sociological or experiential conception of marriage seem incompatible. These conceptions may occupy two divergent poles in the realms of moral and political philosophy, but my concern is the constitutional argument on marriage.

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22. *Governor Gary Johnson Announces Support for Gay Marriage*, THE TRUTH FOR A CHANGE BLOG (Dec. 1, 2011), <http://www.garyjohnson2012.com/governor-gary-johnson-announces-support-for-gay-marriage> ("[G]overnment has no business choosing who should be allowed the benefits of marriage and who should not. . . . As a believer in individual freedom and keeping government out of personal lives, I simply cannot find a legitimate justification for federal laws, such as the Defense of Marriage Act, which 'define' marriage. That definition should be left to religions and individuals—not government. Government's role when it comes to marriage is one of granting benefits and rights to couples who choose to enter into a marriage 'contract'.").

23. Ari Ezra Waldman, "*Marriage Equality*" and the Power of Words in Law, TOWLEROAD (Feb. 1, 2012), <http://www.towleroad.com/2012/02/marriageequalitylaw.html>.

24. See generally SANDEL, LIBERALISM, *supra* note 37.

25. Theodore Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK, Jan. 18, 2010, at 48.

26. *Id.*

The legal case for marriage recognition runs through both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment and requires advocates of equality to argue that there is no basis for antigay marriage discrimination. That constitutional argument, which first inquires about liberty and equality and then dissects the legitimacy of the substantive reasons for denial of those rights, reflects the Constitution's blend of abstract liberal principles with experiential concepts of community and social goods. It reflects the fact, as Emile Durkheim noted,<sup>27</sup> that modern society is an essential party to every civil marriage and bestows the honor of a marriage license on a loving and committed couple both to ensure the perpetuation of the social norms of marriage and to benefit society as a whole. The real debate over marriage, then, is not about simple equality; rather, it is a question as to whether marriages of persons of the same sex both enhance liberty *and* contribute to and benefit society in the way that opposite-sex marriages do. Answering that question requires pro-marriage recognition advocates to add arguments about the social good of the freedom to marry to liberal arguments about individual rights, equality, and toleration.

This Article challenges two assumptions: (1) The most effective legal argument for marriage rights is a purely liberal one,<sup>28</sup> and (2) the substance and rhetoric of liberal toleration and experience cannot exist symbiotically in the marriage discrimination debate. Let me be clear: Liberalism is neither inconsistent with nor hostile to marriage; liberal toleration can play an essential role in winning over the hearts and minds of a large swath of the population and can help navigate constitutional arguments about liberty and equality. And yet liberalism can only take us so far. With respect to marriage and gay relationships, liberal toleration has three missing pieces. First, it is empty, denying us arguments based on empirical observation and group narrative; second, it is incompatible with

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27. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 20 (W.D. Halls trans., 1984) [hereinafter DURKHEIM, *DIVISION OF LABOR*]; EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 50–51 (Steven Lukes ed., W.D. Halls trans., 1982)) [hereinafter DURKHEIM, *SOCIOLOGICAL METHOD*].

28. The first half of Carlos Ball's scholarly analysis in *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997), is similar to my argument criticizing liberal toleration in the same-sex marriage context. But Professor Ball's conclusion retained the basic framework of liberalism when he sought to fill the void left by the failure of liberal toleration. I agree with Professor Ball's central thesis—namely, that

Rawlsian liberalism, by itself, proves incapable of providing a coherent political framework that engages the normative issues necessary to the debate over whether society should recognize and accept same-sex relationships. A Rawlsian liberalism that insists on moral bracketing and defining the right independently of the good consequently fails to address the normative aspects of the controversy and is, to some extent, irrelevant to the debate,

but also departs significantly from his proposed answer to the problem of liberalism and same-sex marriage. *Id.* at 1884. However, I depart from Professor Ball's thoughtful analysis where he retains Rawlsian liberalism in his conclusion. At the time, of course, Professor Ball did not have the benefit of reflecting on the course of and legal arguments in *Hollingsworth v. Perry*.

gay political identity; and third, it fails to adequately build the constitutional case for marriage. Successful equal protection and due process arguments require us to join liberal toleration with concepts of sociology and the social value of marriage and gay relationships. Drawing on the work of Durkheim, phenomenologists like Maurice Merleau-Ponty, and civic perfectionists like Michael Sandel and Alasdair MacIntyre, I argue that the constitutional question of marriage freedom is not merely a legal one but also a sociological one: Equal protection and due process arguments for marriage require us to join traditional liberal ideas about rights and autonomy with the social good of marriage—namely, that marriage is a social good with demonstrable benefits for the married couple and society as a whole.

To make that argument, Part I of this Article briefly constructs the concept of “liberal toleration” and applies it to the same-sex marriage debate. It tracks the straight line between neo-Kantian theory, liberal neutrality, and marriage equality, but concludes by pointing out the missing pieces in the liberal neutrality argument. In so doing, I introduce Durkheim’s conception of marriage as a social fact, assessed only by empirical analysis of its effects on society. Part II uses *Hollingsworth v. Perry*—the federal court challenge to California’s ban on same-sex marriage—as a case study that proves my argument. Both the broad substantive holding of the district court and the narrower affirmance of the Ninth Circuit Court of Appeals required the judges to recognize the liberty associated with the freedom to marry<sup>29</sup> and wrestle with the value of marriage in society and the ways in which gay participation in the institution of marriage is a social good. Here, I show how Durkheim’s socio-legal analysis of marriage can play an essential role in winning constitutional recognition for the freedom to marry. This Article concludes with a short discussion of the implications of this theory—namely, that the successful campaigns for marriage should include arguments based on community and social goods as well as equality and individual rights.

### I. LIBERALISM AND MARRIAGE

“Liberal toleration” refers to the principle, as Rawls discussed in *Political Liberalism*, that leaders of large, culturally diverse republics should never meddle in the moral debates of their citizens by deciding that one morality or one truth is the correct path to the good life.<sup>30</sup> On the contrary, liberals should enact, execute, and interpret laws so as to protect an individual’s right to choose her own conception of the good

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29. Evan Wolfson, founder the pro-marriage organization Freedom to Marry, argues that the phrase “freedom to marry” is a hybrid term, encompassing the rhetoric of rights and the rhetoric of the good life.

30. RAWLS, *POLITICAL LIBERALISM*, *supra* note 21, at xii–xxvi.

life, free of the comprehensive dogmas of others. To do that, they must bracket away their own personal, moral, and religious proclivities when stepping into the political sphere and tolerate the great tapestry of differences among their citizenry.<sup>31</sup>

The goal of this Part is to assess the ability of liberal toleration to craft successful political and legal arguments for the inclusion of gays in the institution of marriage. After constructing the basis for liberal toleration and applying it to the marriage debate, I argue that this view takes us only part of the way. The doctrine is at once too narrow and too broad: It does not have the tools to comprehend the importance of marriage in society—in general, and with respect to gay identity, in particular—it excludes some of the necessary legal arguments on due process and equality.

#### A. RAWLS' "LIBERAL TOLERATION"

Liberal toleration is primarily a construct of Rawls' "political liberalism," an assessment of democratic legitimacy and constitutionalism that did not rely so much on Kant's metaphysics or the ethereal "original position."<sup>32</sup> Though the totality of Rawls' great project to provide a philosophical foundation for the modern liberal state is beyond the scope of this Article, we must take a small step back to determine why toleration is so essential in the Rawlsian state.

In Rawls' view, fundamental principles of justice—or, the foundations of society—derive from hypothetical negotiations at the "original position" behind the "veil of ignorance."<sup>33</sup> The original position is an Archimedean point, detached from and prior to the encumbrances of society, where individuals can determine what kind of society they want. But, at this position, the veil of ignorance means that those hypothetical pre-society negotiators know very little about themselves: "[N]o one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like."<sup>34</sup> This scenario is both liberating and cautionary: You are free to structure society as your perfect, rational mind would allow, but you have no idea if you will end up a prince or a pauper.

In that context, Rawls believed that any society that developed out of the original position would be founded on two basic principles: liberty and equality. The liberty principle holds that everyone must enjoy the same freedoms of thought, speech, and the freedom to choose one's way

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31. *Id.*

32. For the latter, see RAWLS, A THEORY OF JUSTICE, *supra* note 20.

33. *Id.* at 12.

34. *Id.* Nor would they know their sexual orientation, but Rawls never mentioned that specifically.



in life without government coercion.<sup>35</sup> The second, so-called “difference principle,” requires that any deviations from equality ultimately make society as a whole, and the most disadvantaged in particular, better off.<sup>36</sup> The Kantian foundations of this construct are well known<sup>37</sup> but, as Rawls himself argued in *Political Liberalism*, not essential. This vision of justice need not answer all questions of morality and philosophy (as Kant would require), but rather, as a *political* conception of justice, the complementary principles of liberty and equality provide a “guiding framework of deliberation and reflection which helps us reach political agreement on at least the constitutional essentials and the basic questions of justice.”<sup>38</sup> This is the basic framework of a liberal society in which citizens can choose their version of the good life, act upon their wishes and desires, and debate with others about questions of morality and values.

Toleration is necessary because a free and choosing self is incompatible when government attempts to impose one particular conception of right and wrong. “[I]t is precisely because we are freely choosing, independent selves,” a Rawlsian ethic suggests, “that we need a neutral framework, a framework of rights that refuses to choose among competing values and ends,”<sup>39</sup> or, more specifically, refuses to choose *for us* among the myriad possibilities from which we are supposed to choose. After all, what matters in the Rawlsian ethic is not what ends we choose, but our ability to choose them: “It is not our aims that primarily reveal our nature,” but rather it is creating a society that respects our individual rights, for “the self is prior to the ends which are affirmed by it.”<sup>40</sup> The only result is a society that does not presuppose or impose any particular conception of the good, lest it fail to respect persons as autonomous choosing selves. “The intense convictions of the majority,” Rawls writes as an example, “if they are indeed mere preferences without any foundation in the principles of justice antecedently established, have no weight,” because the state would no longer be neutral among the preferences the autonomous self can choose to have.<sup>41</sup>

Toleration, therefore, means that the government should not affirm any particular vision of the good life or, to use the common parlance, stay out of the moral debates of its citizens. The state should not establish an

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35. *Id.* at 14.

36. *Id.* at 61–62.

37. See MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1998) [hereinafter SANDEL, LIBERALISM]; see also Ari Ezra Waldman, *Durkheim’s Internet: Social and Political Theory in Online Society*, 8 N.Y.U. J. L. & LIBERTY (forthcoming 2013).

38. RAWLS, POLITICAL LIBERALISM, *supra* note 21, at 156.

39. MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 12 (1996) [hereinafter SANDEL, DEMOCRACY].

40. *Id.* (quoting RAWLS, A THEORY OF JUSTICE, *supra* note 20, at 560).

41. RAWLS, A THEORY OF JUSTICE, *supra* note 20, at 450.

official religion,<sup>42</sup> for example, or give the adherents of one religion more rights than the adherents of any other.<sup>43</sup> Nor should the state mandate that no woman can have an abortion<sup>44</sup> or criminalize the possession or distribution of sex toys<sup>45</sup> simply because of the church's teachings. When thinking about these questions in the liberal state, we must bracket away our religious beliefs and consider only the basic principles of individual liberty and equality.<sup>46</sup>

In our private lives, we can regard our "attachments very differently from the way the political conception supposes."<sup>47</sup> Privately, there may be commitments so important that there would be no way that we "could and should . . . stand apart from [them] and evaluate objectively. . . . [I]t [would be] simply unthinkable to view [our]selves apart from certain religious, philosophical, and moral convictions . . ."<sup>48</sup> But, when we turn from our private lives into the public sphere, those ties, however strong, have to be left at home, lest we use our antecedent moral prejudices to infringe on the rights of others. When deciding if all types of picketing except school-related labor picketing should be banned near a school, for example, we should bracket our personal opinions as to unpopular views and the purpose of school grounds and ask ourselves if it is appropriate for the state to accept some type of protest but not others.<sup>49</sup> Similarly, when considering whether to allow Fred Phelps and the hateful Westboro Baptist Church to spew all manner of insults at the private

42. See *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 243 (1963) ("[I]n order to give effect to the First Amendment's purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide such questions [regarding theological disputes]. These principles were first expounded in the case of *Watson v. Jones*, which declared that judicial intervention in such a controversy would open up 'the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination . . .'. Courts above all must be neutral, for '[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'" (alterations in internal quotations in original) (emphasis added) (citations omitted)).

43. See *Emp't Div. v. Smith*, 494 U.S. 872, 918 (1990) (Blackmun, J., dissenting) ("[T]he State must treat all religions equally, and not favor one over another . . .").

44. See *Roe v. Wade*, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

45. See *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008) ("The State's primary justifications for the statute are 'morality based.' The asserted interests include 'discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex.' These interests in 'public morality' cannot constitutionally sustain the statute after *Lawrence*.").

46. RAWLS, *POLITICAL LIBERALISM*, *supra* note 21, at 215.

47. *Id.* at 31.

48. *Id.*

49. In *Mosley*, the Court wrote that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1971).

funeral of a fallen soldier, we should bracket our distaste for the church's language and beliefs and ask whether it is right for a state to silence the unpopular views of a speaker simply because the state dislikes those views.<sup>50</sup> And when determining the constitutionality of conditioning rights on a loyalty oath, we should bracket our love of country and wonder whether we want our rights conditioned on the state forcing us to speak against our better judgment.<sup>51</sup>

Rawls' political conception of the person, therefore, creates a public sphere devoid of the often harsh prejudices of religion and morality. In public, when considering political questions, the political actor leaves his prejudices behind and tolerates the myriad of differences around him. Tolerance, therefore, emerges as a central pillar of the Rawlian liberal state.

#### B. "LIBERAL TOLERATION" AND MARRIAGE FOR GAY COUPLES

The Rawlsian argument for marriage, in particular, and gay rights, in general, seems naturally attractive. If executives, legislators, and jurists bracket away their personal morality, refuse to bring their personal religious beliefs into the public sphere, and decline to enforce any comprehensive doctrines on a pluralistic citizenry, it would seem that gay Americans merit full respect. Sandel recognized this apparent triumph of liberal toleration: Under Rawls' vision, those "who consider homosexuality immoral and therefore unworthy of the privacy rights accorded heterosexual intimacy could not legitimately voice their views in public debate."<sup>52</sup> After all, those "beliefs reflect comprehensive moral and religious convictions and so may not play a part in political discourse about matters of justice."<sup>53</sup> If anti-sodomy laws, for example, are primarily justified on religious or moral grounds, they could not survive in a world governed by Rawlsian liberal toleration.<sup>54</sup> Similarly, bans on same-sex

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50. In *Snyder*, the Court noted that the "content" of Westboro's signs plainly relates to broad issues of interest to society at large" and "[w]hile these messages may fall short of refined social or political commentary, . . . Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a 'special position in terms of First Amendment protection.'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1216–18 (2011).

51. In his concurring opinion in *Speiser v. Randall*'s companion case, Justice Black stated that "[l]oyalty oaths, as well as other contemporary "security measures," tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be.

*First Unitarian Church of L.A. v. Cnty. of L.A.*, 357 U.S. 513, 532 (Black, J., concurring).

52. Michael J. Sandel, *Book Review: Political Liberalism*, 107 HARV. L. REV. 1765, 1790 (1994) [hereinafter Sandel, *Book Review*].

53. *Id.*

54. *Compare Bowers v. Hardwick*, 478 U.S. 186 (1986), with *Lawrence v. Texas*, 539 U.S. 558 (2003).

marriage could never be grounded on a supposed Biblical prohibition<sup>55</sup> because that comprehensive religious dogma would not belong in Rawls' political world.

It should come as no surprise, then, that Rawls' remarkable work has spawned so many progressive admirers and adherents. His admonition to "leave your religion at the door" is common, in various formulations, among liberal politicians<sup>56</sup> and progressive legal arguments.<sup>57</sup> It even is found in liberal Christian arguments in favor of ending marriage discrimination.<sup>58</sup> Additionally, the restrictions that liberal toleration places on public discourse seem understandably appealing to gays and lesbians. As Carlos Ball noted, if the core of conservative arguments against gay equality is a comprehensive religious or moral doctrine, a political philosophy that excludes that doctrine from the public sphere would strip conservatives of their strongest weapon.<sup>59</sup> Absent appeals to tradition or Judeo-Christian morality, the gay rights debate would be "conducted with the understanding that freedom, equality, and toleration (all neutral political values within a Rawlsian framework) are the only permissible values . . . in a public discourse."<sup>60</sup>

This has largely been the context in which marriage advocates have made their arguments. The movement's preferred term, "marriage

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55. See, e.g., *Genesis* 19 (the destruction of Sodom and Gommorah); *Leviticus* 18:22 ("Thou shalt not lie with mankind, as with womankind, it is abomination."); *Leviticus* 20:13 ("If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."); *Paul's First Letter to the Corinthians* 6:9 ("Don't be under any illusion—neither the impure, the idolater or the adulterer; neither the effeminate, the pervert or the thief; neither the swindler, the drunkard, the foul-mouthed or the rapacious shall have any share in the kingdom of God."); *Letter to the Romans* 1:26–27 ("For this reason, God gave them up to vile passions. For their women changed the natural function into that which is against nature. Likewise also the men, leaving the natural function of the woman, burned in their lust toward one another, men doing what is inappropriate with men, and receiving in themselves the due penalty of their error."). But see Lee Jefferson, *What Does the Bible Actually Say About Gay Marriage*, THE HUFFINGTON POST (June 29, 2011, 8:24 AM), [http://www.huffingtonpost.com/lee-jefferson/bible-gay-marriage\\_b\\_886102.html](http://www.huffingtonpost.com/lee-jefferson/bible-gay-marriage_b_886102.html).

56. See, e.g., Press Conference, Minority Leader Nancy Pelosi (June 7, 2012), *transcript available at* <http://pelosi.house.gov/news/press-releases/2012/06/transcript-of-pelosi-press-conference-today-17.shtml> (responding to a question about her opposition to a Catholic institution lawsuit challenging the Obama Administration's contraception provision requirement in health insurance plans and stating, "I do my religion on Sunday in Church and I try to go other days of the week. I don't do it at this press conference.").

57. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

58. See, e.g., Mark Osler, *My Take: The Christian Case for Gay Marriage*, CNN BELIEF BLOG (May 19, 2012, 2:00 AM), <http://religion.blogs.cnn.com/2012/05/19/my-take-the-christian-case-for-gay-marriage> ("It is not our place, it seems, to sort out who should be denied a bond with God and the Holy Spirit of the kind that we find through baptism, communion, and marriage. The water will flow where it will.").

59. Ball, *supra* note 28, at 1891.

60. *Id.*

*equality*,” evokes the Rawlsian concept of liberal toleration and his principles of justice, liberty, and equality and holds fast to the attendant language of autonomy, freedom, and rights.<sup>61</sup> As intellectual descendants of Kant, liberals are comfortable in the language of autonomy and rights, the freedom from oppression, and the right to follow their own path, whatever that may be. Gay rights groups routinely (and rightly) criticize Biblical morality as having no place in a discussion of *civil* marriage, and marriage supporters are quick to consider marriage a civil right.<sup>62</sup> “For me,” the popular progressive refrain goes, “it all comes down to equality.” In fact, nearly every organization dedicated to advancing the cause of same-sex marriage speaks of a simple desire for equal treatment for gay persons who want to marry the ones they love.<sup>63</sup>

It seems like apostasy to argue against liberal toleration, especially when it comes to gay rights. After all, the enemies of the gay rights movement are intolerant, seeking as they do to impose a single, comprehensive dogma on society as a whole. And yet, liberal toleration cannot offer a complete basis for a successful legal argument for marriage recognition. This Part will discuss three problems with Rawlsian toleration as a basis for arguing for a right to marriage. The first—what I call the Social Problem—is a sociological objection to the flat, morally empty conception of liberal toleration, which requires us to ignore core identifying characteristics about ourselves and puts out of reach empirical arguments that could advance gay rights. The second problem—what I call the Identity Problem—is specific to the role of sexual orientation in liberal toleration and argues that bracketing away social and cultural encumbrances—in order to leave only political values in the political sphere—is possible only when your social and cultural identity is not a political identity as well. That duality is not possible for most gay persons. Finally, the third problem—what I call the Legal Problem—will weave in arguments about the sociology of marriage and identity to show how the

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61. See generally SANDEL, *DEMOCRACY*, *supra* note 39. In particular, Professor Sandel argues that the language of Rawlsian liberalism is necessary neo-Kantian and morally neutral: Citizens possess liberty, freedom, and rights and are free to choose their own version of the good life by a government that is neutral among ends. See *id.* at 3–54; MICHAEL J. SANDEL, *THE CASE AGAINST PERFECTION* 96 (2007); see also MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* 13 (2001) (“Rights language offers a rich vernacular for the claims an individual may make on or against the collectivity, but it is relatively impoverished as a means of expressing individuals’ needs for the collectivity.”). The language of liberalism is comfortable expressing community mostly through groups of individuals who are possessors of rights. But, as Professor Ignatieff notes, “we are more than rights-bearing creatures, and there is more to respect in a person than his rights.” IGNATIEFF, *supra*, at 13.

62. See, e.g., *NAACP Backs Gay Marriage as a Civil Right*, *THE GUARDIAN* (May 20, 2012, 8:16 AM), <http://www.guardian.co.uk/world/2012/may/20/naacp-gay-marriage-civil-right> (“Civil marriage is a civil right and a matter of civil law. The NAACP’s support for marriage equality is deeply rooted in the fourteenth amendment of the United States constitution and equal protection of all people.”).

63. See, e.g., *About Us*, *FREEDOM TO MARRY*, <http://www.freedomtomarry.org/pages/about-us> (last visited Mar. 15, 2013).

current constitutional case for the freedom to marry already reflects the limits of liberal toleration. I argue that Rawls' liberal toleration can only take us partway through the legal argument for ending marriage discrimination and recognizing a right to marry because those arguments require us to affirm the social value of gay relationships.

I. *The Social Problem*

a. *A Narrative Conception of the Self*

Rawls may have created a liberating vision of politics, where the political self is an unfettered agent of choice that is free from the nasty prejudices of everyday life. But the detached political self that is necessary for liberal toleration fails to describe who we are, what we want, and what our society should look like.<sup>64</sup> It is not clear that it is either possible or desirable to approach the public sphere without reference to who we are.<sup>65</sup> The liberal political self's detachment from much of the physical world may make her truly free in the deontological ethic, but it strips her of all sorts of external ties that help define her. We are not simply atoms roaming the void, disinterested in others around us,<sup>66</sup> as Rawls would have us believe; rather, we are sons or daughters, Jews or Christians, gay or straight, lovers of basketball or opera. We are, according to Alistair MacIntyre, part of a narrative of life that started before us and that will end after us.<sup>67</sup> Our ends are not fixed or laid out for us before we are born by some oppressive governor out of George Orwell's *1984*<sup>68</sup> or the movie *Gattaca*,<sup>69</sup> but rather, "like characters in a fictional narrative we do not know what will happen next, but nonetheless our lives have a certain form which projects itself towards our future."<sup>70</sup> In other words, our choices and our histories are not detached from who we are: They express who we are.

Phenomenological thinkers would agree. Merleau-Ponty—whose famous *Phenomenology of Perception* rejected the Kantian ideal that truth can only be ascertained through complete detachment from everyday life into what Kant called the noumenal, or intelligible, realm<sup>71</sup>—argued that the only way to comprehend reality is through our bodies, the only

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64. I make a similar argument in the context of online free speech, stating that the detaching Kantian and Rawlsian self, though remarkably similar to the "ideal" and utterly autonomous virtual self, cannot hope to address the substantive problems of Internet speech. See Waldman, *supra* note 37.

65. Much of this discussion is indebted to the work of Michael J. Sandel. See SANDEL, *DEMOCRACY*, *supra* note 39, at 3–24.

66. SANDEL, *LIBERALISM*, *supra* note 37, at 54.

67. ALISTAIR MACINTYRE, *AFTER VIRTUE* 201 (1981).

68. GEORGE ORWELL, *1984* (1961).

69. *GATTACA* (Sony Pictures 1997).

70. MACINTYRE, *supra* note 67, at 201.

71. Kant's noumenal realm is a metaphysical place of pure reason, where man can separate and be free from the base inclinations that hold him back in everyday life. See KANT, *supra* note 14.

physical and observable means we have.<sup>72</sup> Real experiences mediate our conceptions of the world around us; without them, the world is meaningless to us.<sup>73</sup> “The world is not an object such that I have in my possession the law of its making,” Merleau-Ponty wrote; rather, “it is the natural setting of, and field for, all my thoughts and all my explicit perceptions. . . . [T]here is no inner man, man is the world, and only in the world does he know himself.”<sup>74</sup> In other words, meaning arises from interactions with the world; meaning is, therefore, experiential. It follows that any framework of laws that denies the experiential nature of everyday life could never agree on an overlapping consensus.

Consider, for example, the manner in which progressive social movements throughout history have influenced what we think of as the settled background of everyday political life. Before unskilled workers organized, marched, and called our attention to their lot in life, few leaders spoke of a minimum wage or unemployment insurance. Only after women engaged in political resistance to highlight gender discrimination in voting, employment, and property, for example, did the inherent equality of women become part of the background consensus of the modern state. Kerry Whiteside made this point succinctly:

If today we believe it reasonable . . . that workers attain more than a marginal economic existence or if we find racism detestable, it is because people struggled, through strikes and protest and violence, to vindicate those claims. That is to imply that concrete events, not just abstract reasoning . . . are responsible for constituting what is rational.<sup>75</sup>

Excluding that experiential knowledge and the particular social views that come with it, as liberal toleration requires, would be particularly damaging to the gay rights movement. Analyses of changing public opinion on gay rights issues—from employment discrimination protections and “Don’t Ask, Don’t Tell,” to adoption and marriage—suggest that the single most important factor that wins over the vast moderate middle toward gay acceptance is having a gay friend, having a family member who is gay, or living alongside a gay person or family.<sup>76</sup> In fact, studies show a direct relationship between the type of experience with a gay person and the shift on a gay political issue. For example, political positions on “Don’t Ask, Don’t Tell” changed after Americans saw examples of exceedingly

72. MAURICE MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* (Ted Honderich ed., Colin Smith trans., 1962).

73. *Id.*

74. *Id.* at xi.

75. KERRY H. WHITESIDE, *MERLEAU-PONTY AND THE FOUNDATION OF AN EXISTENTIAL POLITICS* 98 (1988).

76. Damla Ergun, *Strong Support for Gay Marriage Now Exceeds Strong Opposition*, ABC NEWS (May 23, 2012), <http://abcnews.go.com/blogs/politics/2012/05/strong-support-for-gay-marriage-now-exceeds-strong-opposition>.

brave gay service members risking their lives for their country.<sup>77</sup> The prominence of the gay impact litigation plaintiff who tells his or her stories of service (in the military) or love (of the person he or she wants to marry) likely adds to that learned experience.

Liberal toleration would force us to deny the impact of experiential knowledge, leaving us with an empty politics. As Anne Dailey has noted, this makes little sense from the perspective of identity politics: “Liberal toleration implies critical distance; when I tolerate the actions of another, I leave him alone.”<sup>78</sup> But feminist identity politics, not to mention the identity politics of other thickly constituted minorities, is

built upon narrative [that] can replace the critical distance of “empty tolerance” with empathetic understanding. This renewed feminist politics should demand more than our passive endurance of others’ differences; it should ask us to engage with others by actively seeking to understand those differences in a way that resonates with our own experience.<sup>79</sup>

We cannot expect to create the democracy we want when the conception of the self that underlies it is not only too thin, but also incapable of understanding the unique narratives that minority groups bring to a pluralistic society. In this way, Rawls’ attempt to keep politics out of the emotional disagreements inevitable in diverse democracies instead makes it impossible for diversity to exist in the first place.

In place of the “emptiness” of liberal toleration as a concept of justice and the detached political self upon which it is based, so-called communitarian thinkers offer a robust politics of the narrative that is based on an entirely different conception of the self. This vision thinks about justice differently, as both teleological—determining the *telos*, or purpose, of a thing or institution—and honorific—determining what values and virtues the thing or institution should honor or reward.<sup>80</sup> It asks us to dive into questions of the good and answer them based on an encumbered vision of who we are, very much in line with the theories of Sandel, Dailey, and Merleau-Ponty.<sup>81</sup> For Aristotle, justice is about the honors of

77. Lymari Morales, *In U.S., 67% Support Repealing “Don’t Ask, Don’t Tell,”* GALLUP POLITICS (Dec. 9, 2010), <http://www.gallup.com/poll/145130/support-repealing-dont-ask-dont-tell.aspx>.

78. Anne C. Dailey, *Feminism’s Return to Liberalism*, 102 YALE L.J. 1265, 1283 (1993) (footnote omitted).

79. *Id.* (citing Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in FEMINIST LEGAL THEORY: READINGS IN LAW & GENDER 181, 197 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (referring to “empty tolerance”).

80. MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 186 (2009) [hereinafter SANDEL, JUSTICE].

81. In addition to Professor Sandel, there are several thinkers whose critiques of Rawls and liberalism are based, at least in part, on an Aristotelian foundation. See generally ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 344–45 (1988) (arguing that liberal neutrality and toleration conceal the fact that liberalism is based on a “particular conception of the good life” and is therefore one tradition among others without any necessary moral claim to priority); MICHAEL



society and how the government distributes them, and so the *polis* should distribute a given honor on the basis of merit—not because everyone deserves to be treated equally, but because giving a flute to the best flautist will benefit her and society as a whole.<sup>82</sup> Similarly, if the government is going to mete out marriage licenses, it should do so after determining the purposes of civil marriage and whether licensing this particular union would realize those purposes.

Of course, a Rawlsian liberal could respond that (a) marriage has various purposes, or (b) a pluralistic society could never agree about the purposes of marriage. Therefore, liberal toleration requires that the state treat all marriages equally. There are two problems with this argument: First, it either requires the state to sanction every conceivable union that its citizens consider a marriage, including unions with multiple wives, or get out of the business of marriage altogether. Although neither of those extremes are part of the mainstream debate over the freedom to marry, liberal toleration's equality mandate, coupled with its denial of value judgment and moral debate, requires this all-or-nothing approach. Second, my point is not that everyone has to agree that the institution of marriage has a single set of purposes or contributes to an immutable list of social goods; rather, I argue that in order to determine if *a* purpose of marriage is realized by the denial of licenses to same-sex couples, we must dive into the social consequences of marriage. As anyone familiar with the constitutional case for ending marriage discrimination should know, our current law already does this: by judging the legitimacy and rationality of state interests in discriminating, determining the fundamental nature of due process rights, and justifying the importance of the marriage right.<sup>83</sup> This suggests that liberal toleration is an insufficient tool to win the constitutional case for marriage recognition.

Even Rawls questioned the capacity of liberal toleration to address gay rights. In *Political Liberalism*, he admitted that to “resolve . . . particular and detailed issues it is often more reasonable to go beyond the political conception [of the self] and the values its principles express, and

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WALZER, WHAT IT MEANS TO BE AN AMERICAN 30 (1996) (stating that citizenship in the liberal world requires commitment only to the abstract ideals of “liberty, equality and republicanism”); Michael J. Sandel, *Religious Liberty: Freedom of Conscience or Freedom of Choice?*, 3 UTAH L. REV. 597 (1989); Charles Taylor, *Modes of Secularism*, in SECULARISM AND ITS CRITICS 31, 36–37 (Rajeev Bhargava ed., 1998) (arguing that freedom of religion “understandably comes across as the imposition of one metaphysical view over others, and an alien one at that”); Charles Taylor, *The Politics of Recognition*, in CHARLES TAYLOR ET AL., MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 37–39 (Amy Gutman ed., 1994) (“[T]he development of the modern notion of identity[] has given rise to a politics of difference.”). For a general discussion of this basic disagreement, see STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS (1992); SANDEL, DEMOCRACY, *supra* note 39, at 3–53, 317–51.

82. That is Professor Sandel's example. See SANDEL, JUSTICE, *supra* note 80, at 187–88.

83. See *infra* Part II.

to invoke nonpolitical values that such a view does not include.”<sup>84</sup> Political liberalism, then, is meant to deal with the central problems of modern society: speech and religious freedom, property rights, equality of opportunity, freedom of movement, and the rule of law, for example.<sup>85</sup> But these are relatively easy questions. The liberal societies Rawls looked to when he wrote *Political Liberalism* all share a long tradition of protection for basic rights and freedoms. After all, Rawls’ work was an overt attempt to observe modern democracies as they exist and provide a philosophical foundation for their success. For Rawls, liberal toleration is supposed to provide a framework for establishing these basic rules of justice; from those debates should flow the tools to answer more specific questions of rights and freedoms.<sup>86</sup> That concession, however, is poised to swallow Rawls’ entire endeavor. If the real hot button political debates of the day cannot be answered by liberal toleration, it can hardly be seen as a governing framework for a well-ordered society. And as I argue below, while it may be possible for many people to consider even basic questions of liberty, property, and opportunity without reference to identity, most gay persons cannot.<sup>87</sup>

*b. The Sociology of Marriage*

But the above discussion is all theoretical. McIntyre, Dailey, and Merleau-Ponty may help elucidate the emptiness and insufficiency of the liberal approach, but narrative and experiential political theory cannot affirmatively answer the constitutional question of the legitimacy of marriage discrimination any more than liberal toleration. To win the freedom to marry, the Constitution asks us to explain why marriage discrimination is not rationally related to any legitimate government interest.<sup>88</sup> Those interests—fostering stability, child rearing, parenting<sup>89</sup>—are social facts, not legal ones. Durkheim’s analysis of sociology, social facts, and marriage, therefore, can help fill the void left by liberalism by

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84. RAWLS, POLITICAL LIBERALISM, *supra* note 21, at 230.

85. Ball, *supra* note 28, at 1892 (quoting RAWLS, POLITICAL LIBERALISM, *supra* note 21, at xxvii).

86. *Id.* (quoting RAWLS, POLITICAL LIBERALISM, *supra* note 21, at xxix).

87. *See infra* Part I.B.2.

88. Even though the level of scrutiny appropriate for state action that discriminates on the basis of sexual orientation is up for debate, *see, e.g.*, Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1, 9–11 (1st Cir. 2012) (concluding that rational basis review should apply, but a form of rational basis stronger than that applied to economic legislation); Golinski v. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 982–91 (N.D. Cal. 2012) (concluding that heightened scrutiny should apply), I use the standard formula for rational basis review because it is the current standard and for ease of use. My analysis would not change if the federal courts adopted heightened scrutiny, because each level of scrutiny requires an understanding of the social importance of marriage. The differences are legal, not sociological.

89. According to opponents of the freedom to marry, these are some of the standard governmental interests supposedly fostered by not allowing gay persons to marry. *See, e.g.*, Defendant-Intervenors-Appellants’ Opening Brief at 75–113, Perry v. Schwarzenegger, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696).

allowing us to see marriage as an important institution and to avail ourselves of real, empirical arguments about the social effects of marriage and the illegitimacy of marriage discrimination. Sociology offers more than MacIntyre's theoretical conception of interconnected narrative; it offers proof of it. We shall see that not only does the constitutional case for ending marriage discrimination depend on proof, it depends on precisely the kind of proof in Durkheim's sociological vision.

Durkheim saw marriage as much more than just a contract between individuals, as a liberal might.<sup>90</sup> For him, the "union of two spouses" was "an intimate association, one that is lasting, often even indissoluble, between two lives throughout their whole existence."<sup>91</sup> The institution creates "solidarity" between spouses: marriage is an "expression of an internal and deeper condition" that brings together "two beings [who] are mutually dependent upon each other because they are both incomplete."<sup>92</sup> Family and domestic law reflect the social norms, customs, and roles marriage plays in society.<sup>93</sup> Marriage, therefore, is a social bargain among two spouses and the state,<sup>94</sup> where the spouses work together, fulfill each other's emotional and practical needs, and enrich each other's lives.<sup>95</sup> At the same time, state law reflects the social norms of marriage<sup>96</sup> and the social fabric of society—what Durkheim called "solidarity"<sup>97</sup>—is enhanced through the transformational effects of the institution of marriage. Olson echoed Durkheim when he argued that marriage is

a stable bond between two individuals who work to create a loving household and a social and economic partnership. We encourage couples to marry because the commitments they make to one another provide benefits not only to themselves but also to their families and communities. Marriage requires thinking beyond one's own needs. It transforms two individuals into a union based on shared aspirations, and in doing so establishes a formal investment in the well-being of society.<sup>98</sup>

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90. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950–56 (1979); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982); Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992); Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121 (1985); Kaylah Campos Zelig, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223 (1993).

91. DURKHEIM, *SOCIOLOGICAL METHOD*, *supra* note 27, at 20.

92. *Id.* at 22. Here, Durkheim was referring to any kind of mutually dependent institution of the division of labor in society. Marriage was his case study.

93. *Id.* at 78.

94. *Id.* at 155.

95. *Id.* at 20–23.

96. *Id.* at 78.

97. *Id.* at 17.

98. Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK (Jan. 8, 2010), <http://www.thedailybeast.com/newsweek/2010/01/08/the-conservative-case-for-gay-marriage.html>.

The Supreme Court also channeled Durkheim's social view of marriage in several cases, including *Griswold v. Connecticut*,<sup>99</sup> where Justice Brennan called marriage "an association that promotes a way of life, not causes; a harmony in living, not political faiths . . . . Yet it is an association for as noble a purpose as any involved in our prior decisions."<sup>100</sup>

Marriage, then, is socially important, playing an essential role in the creation of social solidarity. It is a prototypical "social fact" that is exogenous, external, and prior to the individual and that coerces or mediates him in some way.<sup>101</sup> Belief is a social fact, as are the law, sisterhood, religion, customary practices, and even lasting phenomena like traffic jams: We did not create them, but rather entered into a world in which they exist. We do not control them, but rather they mediate us into acting a certain way. They are "the beliefs, tendencies and practices of the group taken collectively."<sup>102</sup> The institution of marriage is a social fact because it existed as an institution prior to its current participants and it uses the social norms with which it has been encumbered over the years to coerce social behavior outside its bonds (social norms encourage people to marry and to hold the institution in some degree of esteem) and inside its limits (norms within marriage define anything from the impropriety of adultery to the importance of showing love and affection to the need to live together). And as a social fact, marriage can only be studied by reference to its real, empirical effects on society. This is the role of the sociologist, who cannot "observe [a social fact] in its pure state," but only with reference to the effects that norm or institution has on society as a whole.<sup>103</sup> In the case of marriage, for example, a sociologist would study marriage by qualitatively and quantitatively studying its effects on society: from its association with patriotism to its effects on raising children, from the way it alters our social interactions and social networks to its impact on happiness, education, or income.

This kind of analysis is both beyond the liberal language of rights and yet also an essential part of the constitutional case for the freedom to marry. Equal Protection Clause jurisprudence requires that proponents of a law or state action that draws lines between groups of citizens justify that discrimination as a valid exercise of government power. In the case of the freedom to marry, opponents have to pass a "more searching form of rational basis review" that requires them to argue that society benefits

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99. 381 U.S. 479 (1965).

100. *Id.* at 486.

101. DURKHEIM, DIVISION OF LABOR, *supra* note 27, at 50-51.

102. *Id.* at 54. This makes sense coming from the founder of sociology whose goal in *The Rules of Sociological Method* and elsewhere was to establish the study of social phenomena as a rigorous science distinct from psychology and as necessary as biology.

103. *Id.* at 55; DURKHEIM, SOCIOLOGICAL METHOD, *supra* note 27, at 27.

from keeping gay persons out of the institution of marriage.<sup>104</sup> They argue that marriage discrimination encourages “optimal parenting” structures for raising children, preserves meaningful traditions, or helps raise the most well-adjusted children.<sup>105</sup> Conversely, proponents of marriage freedom argue that allowing gay persons to marry contributes the same social benefit as opposite-sex marriages.<sup>106</sup> This makes Durkheim’s sociology of marriage a necessary piece in the constitutional puzzle.

## 2. *The Identity Problem*

The political self in *Political Liberalism* has no gender or sexual orientation (nor a religion, cultural baggage, or a history of social status for that matter), so she cannot bring to bear the unique perspectives of her sexual identity on matters of justice. But bracketing away those personal ties and identities that could only complicate and prejudice decisions in the political sphere is perfectly fine for those whose identities have little to no political impact for them. That may be the case for most heterosexuals for whom, as the presumed majority, society is structured,<sup>107</sup> but it is not true for most gay and lesbian Americans. Gay identity is political, especially when it comes to marriage, and any system of justice that denies gay persons the opportunity to participate in public life as gay persons forces them into a political closet.

Nan Hunter has argued that gay identity is a political identity.<sup>108</sup> She maintains that the “idea of identity is more complicated and unstable than either simply status or conduct,” that is, being gay or doing “gay” things: “It encompasses explanation and representation of the self. Self-representation of one’s sexual identity necessarily includes a message that one has not merely come out, but that one intends to *be* out—to act on and live out that identity.”<sup>109</sup> For many gay Americans, that means engaging in political life to change those institutions that discriminate against them qua gay Americans. Identifying themselves as gay Americans is an essential part of that story, so much so that coming out *is* political. Therefore, the Rawlsian political self upon which liberal toleration is based is problematic for gay persons.

Several academics have addressed the political nature of gay identity;<sup>110</sup> it is a long and learned scholarship that need not be repeated

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104. See, e.g., Gill v. Office of Personnel Mgmt., 699 F. Supp. 2d 374, 387–88 (D. Mass. 2010).

105. See generally Defendant-Intervenors-Appellants’ Opening Brief, *supra* note 89.

106. See generally Brief for Respondents, Hollingsworth v. Perry, No. 12-144 (U.S. Feb. 21, 2013).

107. Ball, *supra* note 28, at 1890.

108. See Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993).

109. *Id.* at 1696.

110. See, e.g., *id.* The theory also applies to the political nature of the identity of racial minorities. See generally Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209 (2003).

here. As a matter of law, the concept is easiest to understand in the context of coming out speech and the fight against various forms of retaliation for manifesting<sup>111</sup> or being “open and notorious” about one’s sexuality.<sup>112</sup>

The First Circuit recognized gay identity as political in *Gay Students Organization of the University of New Hampshire v. Bonner*.<sup>113</sup> That case erupted when the university denied permission for the Gay Students Association (“GSO”) to hold a social gathering after a play on campus.<sup>114</sup> Dr. Bonner, the university’s president, condemned the event, which went ahead anyway, and criticized the distribution of what the then-governor called “‘extremist’ homosexual publications.”<sup>115</sup> The First Circuit sided with the GSO and criticized the university for trying to violate both the associative and communicative rights of the group.<sup>116</sup> The GSO was not merely a social group: It was a group organized around a particular political cause—the inclusion of gays in society—and the university burdened the group’s communicative rights when it refused to approve of the GSO’s particular means of voicing its message.<sup>117</sup> Accordingly, the GSO’s communicative content brought it under the orbit of the First Amendment’s protection for expressive political conduct.<sup>118</sup> The court held that GSO events carried the same underlying “message”: “that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society.”<sup>119</sup> Any speech or expressive conduct that conveys that message is political, not personal or sexual. In order for gay persons to fully participate in the political sphere, therefore, their identity must come with them; in fact, their identity is inextricably tied to their political participation unless they force themselves into a closet. The forced denial of a political identity hardly sounds like a goal of liberal toleration, but it seems like the natural

111. *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 596 (Cal. 1979).

112. *See Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

113. 509 F.2d 652 (1st Cir. 1974).

114. *Id.* at 654.

115. *Id.*

116. *Id.* at 659–61; *see id.* at 659 (calling the GSO a “cause-oriented group”); *id.* at 660 (“The GSO’s efforts to organize the homosexual minority, ‘educate’ the public as to its plight, and obtain for it better treatment from individuals and from the government thus represent but another example of the associational activity unequivocally singled out for protection in the very ‘core’ of association cases decided by the Supreme Court.” (citing *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958); *DeJonge v. Oregon*, 299 U.S. 353 (1937))).

117. *Id.* at 661 (“[President Bonner and the University administrators] relied heavily on their obligation and right to prevent activities which the people of New Hampshire find shocking and offensive.”).

118. *Id.* at 660–61.

119. *Id.* at 661; *see id.* at 654 n.1 (“[The group’s] ‘primary purpose . . . is to promote the recognition of gay people on campus and to form a viable organization through which bisexual and homosexual people may express themselves.”).

result of Rawls' insistence on bracketing those personal and community ties that separate us from an overlapping consensus of justice.

This gay-identity-as-political-identity story developed further in 1978 with California's Briggs Initiative. The Initiative would have allowed any school to fire an employee who engaged in the "advocating, soliciting, imposing, encouraging or promoting of private or public homosexual activity directed at, or likely to come to the attention of, schoolchildren and/or other employees."<sup>120</sup> Hunter argued that this merged viewpoint and status discrimination: The Initiative would certainly reach any gay or lesbian teacher who came out in any public way, but it could also stretch to any heterosexual ally who happened to attend a gay rights rally or speak of homosexuality approvingly. The result of that merger was "the formation of a legal construct of identity"<sup>121</sup> that is unique to gay persons. Granted, the law could have let a school fire heterosexuals, but, as contemporary news reports prove, it was widely considered a way to purge gay teachers from the public schools.<sup>122</sup>

The Initiative failed,<sup>123</sup> but the campaign represented "the moment when American politics began to treat homosexuality as something more than deviance, conduct, or lifestyle; it marked the emergence of homosexuality as an openly political claim and as a viewpoint."<sup>124</sup> In other words, it introduced gay identity into the political sphere: Being gay and coming out as such were more than just proxies for sexual conduct, they were ideas and identities in their own right, deserving of space in the marketplace of political ideas.

One year later, the California Supreme Court agreed, stating that employees could not be fired simply for coming out. In *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*,<sup>125</sup> the court affirmed that identity speech is political speech for gay persons: An employer could not target those who made "an issue of their homosexuality" because that would be tantamount to forcing those employees to "refrain from adopting [a] particular course or line of political . . . activity."<sup>126</sup> Any other holding would make it impossible not only for anyone to ever come out, but also for the community to gather and fight for its rights in the public arena:

[T]he struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. . . . [O]ne important aspect of the struggle for equal

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120. CAL. PROPOSITION 6 § 3(b)(2) (1978).

121. Hunter, *supra* note 108, at 1703.

122. *Id.* (citing RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK 212–51 (1982); *Witch-Hunting*, THE ECONOMIST, Oct. 28, 1978, at 50).

123. Hunter, *supra* note 108, at 1704 (citing *Victory in California, Seattle; Miami Defeat*, THE ADVOCATE, Dec. 13, 1978, at 9).

124. Hunter, *supra* note 108, at 1704.

125. *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610–11 (Cal. 1979).

126. *Id.* at 611 (alterations in original).

rights is to induce homosexual individuals to “come out of the closet,” acknowledge their sexual preferences, and to associate with others in working for equal rights.<sup>127</sup>

Coming out as gay was, therefore, essential to political participation, not an exogenous burden of personhood that had no place in a tolerant public sphere. This acknowledgment of a political identity for gay persons so bound up with their personal sexual identity not only subsumed coming out speech under the First Amendment, but it also recognized the essential role a gay person’s sexual identity has on his political participation. A purely Rawlsian view of the political realm cannot account for the merger of personal and political identities unique to gay persons.

Like *Bonner* and *Gay Law Students, National Gay Task Force v. Board of Education*<sup>128</sup> also recognized that gay persons could not hope to participate in public life and advance their interests without bringing their open identity along with them. The Task Force challenged an Oklahoma law similar to the Briggs Initiative that banned all teachers from engaging in “public homosexual activity” and “public homosexual conduct.”<sup>129</sup> “Activity” included non-private sexual acts, while “conduct” included “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct [would] come to the attention of school children or school employees.”<sup>130</sup> The Tenth Circuit held that the “conduct” section was overbroad: “The First Amendment protects ‘advocacy,’” the court noted, and any statute that would seek to punish a teacher for appearing before the state legislature to advocate for greater gay rights is necessarily unconstitutionally overbroad.<sup>131</sup> Those statements—identifying yourself as gay, as a victim of official discrimination, and advocating for the repeal of anti-sodomy laws or discriminatory workplace rules, for example—“are aimed at legal and social change, [and] are at the core of First Amendment protections.”<sup>132</sup> Gay identity and gay rights are, therefore, political matters, covered by the “core” of the First Amendment because they are matters of great public concern. For the liberal toleration of Rawls’ political liberalism to demand an artificial separation of gay identity from the political sphere would neuter efforts to make positive social change on behalf of gay Americans.

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127. *Id.* at 610.

128. *Nat’l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273–75 (10th Cir. 1984).

129. *Id.* at 1272 (quoting OKLA. STAT. tit. 70, § 6-103.15 (1984)).

130. *Id.*

131. *Id.* at 1274 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)).

132. *Id.*



### 3. *The Legal Problem*

Leaving sexual identity and the capacity for moral judgment at the political door not only makes it difficult to engage in politics as a gay person, it also denies us very real and effective legal arguments that we need to succeed in the quest for overturning bans on same-sex marriage and winning marriage recognition. Sandel made the political core of this argument before, but I would like to go further and show how liberal toleration not only restricts effective arguments in the abstract, the analysis for which I am indebted to Sandel,<sup>133</sup> but also could never adequately jump the substantive constitutional hurdles that currently lay before same-sex marriage in the federal courts—namely, the nature of the supposedly fundamental right to marry, the arguable illegitimacy of state interests to discriminate, and the central importance of marriage in society.

When it comes to certain important social and political issues, Sandel argued, the restrictions that liberal toleration places on the public sphere take away the arguments progressives need to succeed. Conservative views on abortion and gay rights are overtly and unapologetically morality based. But if Christian teachings are correct that “abortion is morally tantamount to murder, then it is not clear why the political values of toleration and women’s equality, important though they are, should prevail.”<sup>134</sup> Similarly, if gay relationships are actually immoral, liberal toleration may get us as far as leaving them alone; anti-sodomy laws, for example, could fall under the liberal ethic.<sup>135</sup> But, as Ball noted, it does not follow that something viewed as immoral should be endorsed or supported by the government through a marriage license and all its attendant benefits.<sup>136</sup>

Frank Michelman responds to this objection, arguing that there is a robust legal interpretive arm to Rawlsian liberalism and liberal toleration that is more than just an absence of antigay moralism. For Rawls,

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133. See, e.g., SANDEL, *DEMOCRACY*, *supra* note 39, at 103–08.

134. Sandel, *Book Review*, *supra* note 52, at 1778.

135. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (“[M]uch of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.”); *id.* at 206 (arguing that the moral status of homosexuality was not the issue; rather, the Constitution had to respect that “different individuals will make different choices” when living their lives); *id.* at 218–19 (Stevens, J., dissenting) (“From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions.”); see also *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”).

136. Ball, *supra* note 28, at 1894.

Michelman argues, liberalism must couple respect for liberty and equality with an “expectation about how constitutionally guaranteed basic liberties will have their meanings filled out in application,” or guiding principles of interpretation that are consistent with the underlying principle of toleration and respect for the individual.<sup>137</sup> Michelman argues that this fleshing out must create the preconditions that allow persons to fully develop as citizens, exercise their moral powers, and participate and cooperate in society.<sup>138</sup> Liberalism, then, can eschew the nitty-gritty of the value of marriage and the moral worth of gay relationships when debating a constitutional right to marriage because the liberal ethic can now say that the denial of this or that constitutional right unjustifiably hinders the development and exercise of citizens’ capacity to fully cooperate in society.<sup>139</sup> Gay persons who cannot adopt, marry, or even express their love in public are not simply the victims of illiberal intolerance, but are also hindered from realizing their true substantive equality as full members of a liberal society.<sup>140</sup>

But although Michelman offers a more robust picture of liberal toleration than the caricature implied by MacKinnon and Dailey,<sup>141</sup> he has not rescued liberalism from its central failing: its inability to address substantive moral debate. Michelman does not challenge Sandel’s basic thesis that liberalism denies the public sphere the tools to address moral

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137. Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in THE CAMBRIDGE COMPANION TO RAWLS 410 (Samuel Freeman ed., 2003).

138. *Id.* at 398–400, 410.

139. *Id.* at 411.

140. Professor Michelman quotes extensively from Justice Brennan’s opinion in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), to show an example of this robust liberalism in practice. Justice Brennan’s use of the language of liberalism to talk about something as intimate and personal as marriage, community, and love resembles Justices Blackmun’s, Stevens’, and Kennedy’s opinions on anti-sodomy laws. See *supra* note 137. It is worth partially quoting here to show the power of Michelman’s argument:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . Protecting these relationships from unwarranted state interference . . . safeguards the ability independently to define one’s identity that is central to any concept of liberty.

*Roberts*, 468 U.S. at 618–19. Justice Brennan goes on to argue that family and intimate relationships merit constitutional protection because they flow from the freedom of association inherent in the liberal principle of liberty:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life. . . . [R]elationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

*Id.* at 619–20.

141. See Michelman, *supra* note 137 and accompanying text (referring to “empty tolerance”).

questions of value, honor, and the good life. Indeed, he insists that the language of liberalism is more robust and capable of addressing marriage, what he calls an “Exemplary Case,”<sup>142</sup> in purely liberal terms. Marriage discrimination laws are unjustified hindrances<sup>143</sup> to gay persons’ full development in society.<sup>144</sup> But it is still not clear how we are to determine, from a constitutional perspective of liberal toleration, what makes a particular hindrance *unjustified*. As I noted earlier, a conservative could argue that abortion is morally wrong and homosexual relations are abominations, so denying them social approval would be the right thing to do to protect the individuals and society as a whole. Liberalism cannot adequately respond to that odious value judgment when it denies itself the tools of moral debate.

My critique of Michelman need not remain abstract. The very standards of constitutional law that the current quest for marriage recognition must overcome are all, in some form or another, proxies for determining whether discrimination in favor of opposite-sex marriage is justifiable. And in each case, the language and underlying philosophy of liberal toleration only takes us part of the way. To be clear, I am not arguing that liberalism is an enemy of gay rights or hostile to marriage recognition for gays; rather, it is a necessary, but insufficient tool. At some point, a successful legal case for marriage recognition must address more than just liberty and equality and affirm the social good of gay relationships.

## II. CASE STUDY: *HOLLINGSWORTH V. PERRY* AND THE CONSTITUTIONAL ARGUMENT FOR ENDING MARRIAGE DISCRIMINATION

To illustrate this point, this Article uses the district and appellate court decisions in *Hollingsworth v. Perry* as cases studies. As arguably the most famous marriage case in the country,<sup>145</sup> and certainly the most successful,<sup>146</sup> *Perry* offers a window into the substantive legal arguments governing the quest for marriage at the federal level. In his broad decision, Judge Vaughn Walker declared that Proposition 8 (“Prop 8”), California’s constitutional marriage discrimination provision, violated both the Equal Protection Clause and the Due Process Clause.<sup>147</sup> The Ninth Circuit

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142. Michelman, *supra* note 137, at 410.

143. *Id.* at 411.

144. *Id.* at 412.

145. This is largely due to the litigation’s sponsor, the American Foundation for Equal Rights, and its concerted media efforts, and the fame of the plaintiffs’ legal team, headed by often courtroom and political adversaries Ted Olson and David Boies. Mr. Olson, a conservative, former George W. Bush solicitor-general and a partner at Gibson Dunn L.L.P., has done much to bridge the gap between the marriage movement and conservatives.

146. *Perry* is the first federal same-sex marriage case to reach a circuit court since *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), a state case, was upheld by the Supreme Court in 1972.

147. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

affirmed the result, but on narrower grounds, holding that the taking away of rights effectuated by Prop 8 violated the Equal Protection Clause.<sup>148</sup> In both cases, the judges stepped outside the boundaries of liberal toleration and wrestled with the social role of marriage to reach their conclusions. First, though Judge Walker found that heightened scrutiny was appropriate, both he and the Ninth Circuit worked through the rational basis review standard to determine that Prop 8 was not rationally related to any legitimate state interest. Their assessments of rationality and legitimacy required them to judge the social value of gay relationships and the social goods embodied by various state rationales. Second, when Judge Walker found that bans on same-sex marriage violated a fundamental due process right to marry, he was implicitly extending a long line of federal cases to include same-sex unions. To do so required him to put those unions on par with opposite-sex unions as contributors to the good life. Third, the Ninth Circuit's reliance on *Romer v. Evans* to find that Prop 8 unlawfully took away rights from gay Californians required Judge Walker to step out of the language of neutral liberalism and elevate the institution of marriage as an essential social good.

#### A. LEGITIMACY AND RATIONALITY UNDER RATIONAL BASIS REVIEW

Despite the President's<sup>149</sup> and certain courts'<sup>150</sup> views of the proper standard for reviewing state actions that discriminate on the basis of sexual orientation, the current convention retains some form of rational basis review.<sup>151</sup> This standard requires a state actor to justify any classification as

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148. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom. *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

149. President Obama believes that laws like the Defense of Marriage Act should be reviewed under heightened scrutiny. See Chris Geidner, *DOJ Stops Defending DOMA Provision*, METROWEEKLY (Feb. 23, 2011), <http://www.metroweekly.com/news/?ak=6022>.

150. See, e.g., *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985–91 (N.D. Cal. 2012). Even Judge Walker concluded, in dictum, that strict scrutiny should apply to sexual orientation discrimination. *Perry*, 704 F. Supp. 2d at 997 (“[T]he evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect.” (citations omitted)).

151. Recently, the Second Circuit held in *Windsor v. United States*, that heightened scrutiny should be used to assess the constitutionality of the Defense of Marriage Act (“DOMA”), in particular, and of discrimination on the basis of sexual orientation, in general. 699 F.3d 169, 181 (2d Cir. 2012). The First Circuit held in *Massachusetts v. Department of Health and Human Services* that a more searching form of rational basis should be used. 682 F.3d 1, 11 (1st Cir. 2012). As of this writing, the Supreme Court has granted a writ of certiorari in this case to make a final determination on DOMA. See *United States v. Windsor*, 133 S. Ct. 786 (2012) (granting cert.). The Court may also clarify the appropriate level of scrutiny. Students of constitutional law are readily familiar with the arguable difference between traditional rational basis review and “rational basis plus” or “rational basis with bite.” Jeffrey D. Jackson, *Putting Rationality Back Into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 538 n.292 (2011) (describing *Romer* and *Cleburne* as instances of an enhanced “rational basis with bite” test involving closer-than-normal scrutiny). Those particular distinctions are beyond the scope of this Article. Suffice it to say that both forms of rational basis review still require the state to justify the given classification as

rationally related to a legitimate government interest.<sup>152</sup> Rationality and legitimacy are certainly not high hurdles to jump, but as the Supreme Court regularly reminds us, rational basis review is not a license for judges to abrogate their responsibility to determine the constitutionality of state action.<sup>153</sup> And in the context of marriage discrimination, determining what is rational and what is legitimate is another way of asking if excluding gays from marriage is justifiable. Answering that question goes beyond the language of liberal toleration.

At the district court, the proponents of Prop 8 offered several rationales for the state to discriminate against gay couples: (1) adhering to tradition, (2) proceeding with caution on a matter of great social change and significance, (3) promoting so-called “optimal” parenting through opposite-sex parents, (4) protecting the freedom of those who oppose the freedom to marry, (5) recognizing that same-sex couples are different from opposite-sex couples, and (6) a catchall.<sup>154</sup> To respond to these purported state interests, Judge Walker combined liberal neutrality with a more robust social experientialism.

Note how the very notion of a purported state interest that is sufficient to justify discrimination already defies strict liberal toleration and takes us into the realm of Durkheim, sociology, and experience. Under either Rawls’ “justice as fairness” or “political liberalism,” none of these interests make sense. Justice as fairness requires any deviation from equality to benefit society as a whole and, in particular, the most disadvantaged. All these aforementioned interests (save the catchall) would fail that requirement immediately. Nor do arguments about tradition, caution, and optimal parenting belong in the political sphere; they are based on comprehensive dogmas and a priori value judgments that should be bracketed away when debating public matters. The very idea that state interests could exist beyond the scope of political liberalism suggests that liberal toleration is, without more, an insufficient tool of constitutional argument.

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rationally related to a legitimate government interest. For a thoughtful analysis on “rational basis with bite” and how it is far from equivalent to heightened scrutiny, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 761–62 (2011); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 673 (3d ed. 2006). This Article’s argument—that the justification inherent in the constitutional case for the freedom to marry requires that we move beyond liberalism to the sociology of marriage—holds regardless of the level of scrutiny. If the Court affirms heightened scrutiny, reaching the higher “important” hurdle would still require reference to the social good of marriage.

152. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–54 (1938).

153. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.”).

154. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010).

Judge Walker and the Ninth Circuit found the Prop 8 proponents' purported state interests not rationally related to the underlying law at issue.<sup>155</sup> The lion's share of the proponents' arguments was that California had a supposed interest in promoting what proponents called "optimal" opposite-sex parenting.<sup>156</sup> As is evident from both the district court and the appellate court decision, the most effective response relied, in part, on the rhetoric and philosophy of liberal toleration, but only succeeded by going beyond it. If marriage discrimination apparently promoted "naturally procreative relationships" and allowed children to be raised by their biological parents in stable households,<sup>157</sup> then the best response would be to show that gay parents are actually great parents and capable of benefiting children, themselves, and society, rather than simply saying that gay parents should be treated as equal to heterosexual parents in the abstract. That is precisely what Judge Walker did.<sup>158</sup>

It would have been easy enough to state that Prop 8 has nothing to do with children, especially since all it does is deny gay couples the word "marriage" but leaves intact California's family law rules that allow gay persons to adopt and raise children.<sup>159</sup> But Judge Walker cited evidence offered at trial that speaks to the experience of marriage, not just legal principles. What affects a child's wellbeing is not the genders of her parents, but "the quality of [her] relationship with . . . her parents," the quality of her relationships with "significant adults in [her] life," and the availability of resources.<sup>160</sup> Plaintiffs also showed that children raised in lesbian or gay homes are "as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted."<sup>161</sup> The Ninth Circuit stated that all evidence proves that "gay individuals are fully capable of . . . responsibly caring for and raising children."<sup>162</sup> All of this helped prove that gay parents are just as good as heterosexual parents, thus discounting the legitimacy of any state interest in marriage discrimination based on some notion of "optimal" parenting structures.

Continuing on to some of the other purported state interests only buttresses the argument that experience and social values are necessary

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155. Neither court had the occasion to assess the "legitimacy" of the particular rationales. That determination would require more than just reliance on the language and substance of rights and force the court to make a value judgment as to whether a state should have that interest.

156. See *Perry*, 704 F. Supp. 2d at 999.

157. *Id.*

158. *Id.* at 999–1000.

159. *Id.* at 1000; *Perry v. Brown*, 671 F.3d 1052, 1086 (9th Cir. 2012).

160. Transcript of Record at 1010:13–1011:13, *Perry*, 671 F.3d 1052 (No. 10-16696).

161. *Id.* at 1014:25–1015:19, 1025:4–23, 1038:23–1040:17, 1040:22–1042:10, 1187:13–1189:6 (testimony of Professor Michael Lamb, University of Cambridge, Department of Psychology); Plaintiff's Exhibit 2565, 2547, *Perry*, 671 F.3d 1052 (No. 10-16696) (peer psychological and sociological studies showing the success of children of gay parents).

162. *Perry*, 671 F.3d at 1087 (alteration in original).

addendums to liberal toleration arguments in the rational basis context. Judge Walker did a courtroom two-step to use the rhetoric of liberalism to make the argument that tradition alone cannot justify discrimination, regardless of the historicity or length of that tradition. His citations to *Williams v. Illinois*<sup>163</sup> and *Heller v. Doe*<sup>164</sup> for the proposition that the ancient origin of discrimination does not necessarily make it rational were technically accurate but misleading. *Williams*, a case about the constitutionality of being sent to jail in default of payment of a fine, and *Heller*, a case about discrimination against the mentally disabled, concede that tradition does not equate with rationality, but both assert that the “antiquity” of and “adherence” to a given practice should weigh heavily in favor of its retention.<sup>165</sup> Judge Walker declined to dive into that balancing test because doing so would likely have required an assessment of the social value of the institution itself. Instead, he equated Prop 8’s marriage discrimination with the antiquated notion that individuals in marriages fulfill specific gender roles and noted, without passing moral judgment, that California has eliminated those gender-specific rules.<sup>166</sup> He also pointed to evidence offered at trial showing that marriage discrimination is a form of sex discrimination: A man can marry a woman, but not another man; a woman can marry a man, but not another woman.<sup>167</sup> Prop 8 treated the sexes differently in a world that believes the sexes should be treated equally. Though successful, liberal toleration’s respect for equality misses other reasons why this discriminatory tradition should not be continued—namely, the social value of equal partnership marriages. Those values are readily apparent from experience: increased workforce productivity among women, a more educated populace, the potential for lasting relationships among equals, and the ripple effects of increased self-esteem and skill valuation, to name just a few.<sup>168</sup> If Judge Walker truly wanted to rebut the heavy presumption antiquity and

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163. *Williams v. Illinois*, 399 U.S. 235 (1970).

164. *Heller v. Doe ex rel. Doe*, 509 U.S. 312 (1993).

165. *Heller*, 509 U.S. at 326 (“Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis. That the law has long treated the classes as distinct, however, suggests that there is a commonsense distinction [between the classifications made by that law].”); *Williams*, 399 U.S. at 239–40 (“While neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack, these factors should be weighed in the balance.” (citing *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664, 678 n.11 (1970) (“Nearly 50 years ago Mr. Justice Holmes stated: ‘If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.’”))); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010).

166. *Perry*, 704 F. Supp. 2d at 960.

167. *Id.* at 973, 998.

168. The social benefits of sexual equality are beyond the scope of this Article. For a thoughtful analysis on the social value of women’s equality, see Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

adherence give to marriage discrimination, he may have needed more than the admittedly important state interest in equality.

Notably, Durkheimian scholars might argue that even though Durkheim's sociology is an essential part of the equal protection argument on the freedom to marry, his theory of organic solidarity would have a difficult time rejecting tradition as a legitimate social and governmental interest for denying gay persons the freedom to marry. For Durkheim, law *reflects* social norms and solidarity, which, collectively, represent the aggregation of belief, traditions, customs, and laws built up over time.<sup>169</sup> Therefore, if long-standing tradition imbues marriage with an opposite sex norm, it would seem difficult to argue against even from an empirical sociological perspective.

The simple response to this canard is that nothing is immutable in the evolving social structure in Durkheim's world. Part of his argument in *The Division of Labor in Society* was that the ever-improving social division of labor is the engine that drives change in society over time, moving us from the sameness of ancient clans and tribes to a modern professional and complementary society full of diversity and interdependence.<sup>170</sup> It stands to reason, then, that as the division of labor within marriage changes, so should the social norms and laws that define the marital bond.

Durkheim's division of labor is not limited to the myopia of the economic realm. Rather, it is broadly social: The natural instinct to "seek in our friends those qualities we lack" moves us to unite in complementary rather than identical social networks in all areas of life, including marriage.<sup>171</sup> So, in marriage, that instinct brings together complements, not identical twins, thereby increasing "the productivity" and linking "them very closely together."<sup>172</sup> Durkheim describes the history of marriage as one of ever-increasing division of labor from ancient times, when marriage, such as it was,<sup>173</sup> meant little, to modern times, when laws detailed the "duties relating to husband and wife, . . . divorce, nullity or separation (including division of property), on the powers of the father, on the legal consequences of adoption," and so on.<sup>174</sup> Domestic law, then, reflected the division of labor within a marriage.<sup>175</sup> But as the division of labor changes,

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169. DURKHEIM, *SOCIOLOGICAL METHOD*, *supra* note 27, at 24 ("[S]ocial solidarity is a wholly moral phenomenon which by itself is not amenable to exact observation and especially not to measurement. To arrive at this classification, . . . we must therefore substitute for this internal datum, which escapes us, an external one which symbolizes it, and then study the former through the latter. That visible symbol is the law.").

170. *Id.* at 18–21.

171. *Id.* at 17.

172. *Id.* at 21.

173. *Id.* at 19–21, 155–56.

174. *Id.* at 78, 156–59.

175. *Id.* at 155 ("[D]omestic law, from being originally simple, has become increasingly complex, that is, the different species of legal relationships that give rise to family life are much more numerous



so should the law. After all, the division of labor created the intricate domestic law of modern marriage and, therefore, it can certainly change it. Nineteenth century French family law may have been patriarchal, but the twenty-first century family is less defined by strict gender roles. Judge Walker made this precise argument in his *Perry* decision.<sup>176</sup> He knew that women are entering the workforce at unprecedented levels<sup>177</sup> while men are increasingly staying home to raise children, cook meals, and pack lunches.<sup>178</sup> Durkheim would probably see the modern family as a product of divorcing domestic division of labor from gender. Given that, the law should change to reflect that change in social norms.

Prop 8 proponents also argued that the state has an interest in proceeding with caution when making significant social change, a purported interest that Judge Walker shot down by going beyond liberal toleration. Letting gay persons into the institution was not sweeping social change; rather, it would have “at least a neutral, if not a positive, effect on the institution of marriage and that same-sex couples’ marriages would benefit the state.”<sup>179</sup> He did not mean monetarily. Referring to evidence that ending marriage discrimination in Massachusetts had no ill effects on the institution and on the state,<sup>180</sup> Judge Walker took a sociological perspective on marriage. That is, he looked beyond the admittedly important principles of liberty and equality in order to prove that the state did not need a go-slow approach. The constitutional framework that legitimizes a purported rationale like caution requires more than just abstract principles: It requires us all to be phenomenologists.

#### B. MARRIAGE AS A FUNDAMENTAL RIGHT AND A SOCIAL GOOD

In an unbroken line of cases, the Supreme Court has stated that the freedom to marry is a fundamental right protected by the Due Process Clause. In *Perry*, gay persons are asking to be let into this institution and to exercise a right enjoyed by everyone else. Liberal toleration is on its sturdiest ground here, as the *Perry* plaintiffs argued before the district court and the Ninth Circuit. But even in this jurisprudence about choice, liberty, and freedom is the recognition of the social importance of the

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than formerly.”).

176. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 960 (N.D. Cal. 2010).

177. *Id.*

178. *Id.*

179. *Id.* at 999.

180. Transcript of Record at 596:13–597:3, 605:18–25, 600:12–602:15, *Perry*, 704 F. Supp. 2d 921 (No. 10-16696) (noting that data from Massachusetts on the “annual rates for marriage and for divorce” for “the four years prior to same-sex marriage being legal and the four years after” show “that the rates of marriage and divorce are no different after [same-sex] marriage was permitted than they were before”); Plaintiff’s Exhibit at 1145, 1195, *Perry*, 704 F. Supp. 2d 921 (No. 10-16696) (explaining that race, employment status, education, age, and other factors impact the success of marriages, not sexual orientation).

institution of marriage. That marriage is both a right and a social good is a testament to the way liberal toleration must work in tandem with a more robust sociological construct.

In *Turner v. Safley*,<sup>181</sup> the Court affirmed that “the decision to marry is a fundamental right.”<sup>182</sup> It reiterated that finding in *Zablocki v. Redhail*.<sup>183</sup> In *Cleveland Board of Education v. LaFleur*,<sup>184</sup> the Court stated even more explicitly that it has long been “recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”<sup>185</sup> *Griswold v. Connecticut*<sup>186</sup> and *Loving v. Virginia*<sup>187</sup> allowed the Court to restate further that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>188</sup> At different times, the right to marry has been couched as a right of liberty,<sup>189</sup> privacy,<sup>190</sup> intimate choice,<sup>191</sup> and association.<sup>192</sup> In all cases, the right is universal, nondiscriminatory, and centered on the individual’s choice. Liberal toleration can succeed here, as evidenced by the American Foundation for Equal Rights’s successful arguments in this vein at the district court.<sup>193</sup>

But these and other cases are not simply about the saliency of a right to choose a spouse; they are also about marriage as a social good. Long ago, the Court characterized marriage as more than just a choice; in fact, it was “the most important relation in life.”<sup>194</sup> It was at “the foundation of the family and of society, without which there would be neither civilization nor

181. 482 U.S. 78 (1987).

182. *Id.* at 95.

183. 434 U.S. 374, 384 (1978) (“The right to marry is of fundamental importance for all individuals.”).

184. 414 U.S. 632 (1974).

185. *Id.* at 639–40.

186. 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”).

187. 388 U.S. 1 (1967).

188. *Id.* at 12.

189. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“The right to marry is of fundamental importance for all individuals.”).

190. *Griswold*, 381 U.S. at 486 (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”); *see, e.g., Whalen v. Roe*, 429 U.S. 589, 598–600 nn.23–26 (1977).

191. *Lawrence v. Texas*, 539 U.S. 558, 573–74 (“The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”); *id.* at 574 (referring to “the respect the Constitution demands for the autonomy of the person in making these [intimate] choices”).

192. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (“Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society.’”).

193. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991–93 (N.D. Cal. 2010).

194. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

progress.”<sup>195</sup> Marriage was both “fundamental to the very existence and survival of the [human] race”<sup>196</sup> and an expression “of emotional support and public commitment.”<sup>197</sup> And immediately after calling a right to marry an inherent part of the right to privacy in *Griswold*, the Court went further, stating that:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>198</sup>

Marriage is sacred and noble; it is essential and loving. These values are part of what makes the *right* to marry fundamental. That is, it is insufficient to call the decision to marry a matter of fundamental liberty, privacy, or intimate association. It is indeed all of those things, but what makes marriage a *fundamental* decision is, in large part, the institution’s role in the good life.

This symbiotic relationship between social values and individual liberty took center stage in the Massachusetts Supreme Judicial Court’s decision in *Goodridge v. Department of Public Health*.<sup>199</sup> Under Massachusetts law, antigay marriage discrimination violated the “respect for individual autonomy and equality under law.”<sup>200</sup> Everyone, regardless of sexual orientation, had a right to choose “whether and whom to marry.”<sup>201</sup> But civil marriage was not just a right. It was “at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.”<sup>202</sup> These values are, at a minimum, a parallel means of understanding why the right to marry is fundamental.

Liberty, autonomy, and privacy are important, but it is not clear why marriage would be elevated to fundamental status when there are countless other rights and privileges founded on those liberal principles unless there is something special about marriage. Even the constitutional framework for determining whether a right is fundamental recognizes this. In *Perry*, Judge Walker referred to the two part test in *Washington v. Glucksberg*<sup>203</sup> to determine “the history, tradition and practice of marriage

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195. *Id.* at 211.

196. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

197. *Turner v. Safley*, 482 U.S. 78, 95 (1987).

198. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

199. 798 N.E.2d 941 (Mass. 2003). This argument comes directly from SANDEL, JUSTICE, *supra* note 80, at 256–60.

200. *Goodridge*, 798 N.E.2d at 949.

201. *Id.* at 959.

202. *Id.* at 954.

203. 521 U.S. 702, 710 (1997).

in the United States.”<sup>204</sup> His analysis is striking in its fidelity to the language of liberal toleration: Marriage, he found, has always been about “free consent” and the state’s respect for “an individual’s choice to build a family.”<sup>205</sup> Marriage also changed to toss aside race and gender discrimination without altering the core of the institution,<sup>206</sup> which was always about “the right to choose a spouse and, with mutual consent, join together and form a household.”<sup>207</sup>

While Judge Walker’s conclusions are steeped in the substance and rhetoric of liberal toleration, some of the evidence presented at trial was not. Nancy Cott, a Harvard historian and expert witness for the plaintiffs in *Perry*, testified that civil marriage is both a civil right<sup>208</sup> and state “recognition and approval” of a union.<sup>209</sup> She and other witnesses testified that the state licenses marriages “to create stable households in which the adults who reside there . . . will support one another”<sup>210</sup> and to channel benefits, rights, and responsibilities through marriage.<sup>211</sup> State marriage recognition encourages mutual support,<sup>212</sup> promotes physical and psychological health,<sup>213</sup> and ensures that these benefits flow to children and to society as a whole.<sup>214</sup> It is no wonder that plaintiffs dedicated nearly one-third of their time in court to testimony on the social value of marriage and that Judge Walker dedicated nearly three pages of his findings of fact to that evidence.

This discussion of the social good of marriage dovetailed nicely with Judge Walker’s ultimate conclusion that the *Perry* plaintiffs were simply seeking to exercise a fundamental right that belongs to everyone. *Perry*, like *Turner*, *Zablocki*, *Griswold*, *Loving*, and the long list of other federal marriage cases that came before it, recognizes that the fundamental nature of the marriage right is founded on more than just a respect for liberty and autonomy. If it were not—if liberal toleration and Michelman’s robust defense were sufficient—the lengthy paeans to marriage as a means of achieving the good life would be superfluous.

### C. ROMER AND THE SOCIAL IMPORTANCE OF MARRIAGE

The social importance of marriage is essential for the coherence of Ninth Circuit’s opinion affirming the district court in *Perry v. Brown*.

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204. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010).

205. *Id.*

206. *Id.* at 993.

207. *Id.*

208. Transcript of Record, *supra* note 180, at 195:13–196:21.

209. *Id.* at 187:11–12.

210. *Id.* at 222:13–17; 226:8–227:4.

211. *Id.* at 1341:2–16; 235:24–236:16.

212. *Id.* at 222:13–17.

213. *Id.* at 578:2–579:9.

214. *Id.* at 1042:20–1043:8.

Relying primarily on *Romer v. Evans*,<sup>215</sup> the Ninth Circuit held that Prop 8 was unconstitutional because it unjustifiably took away marriage rights from gay Californians.<sup>216</sup> We have already discussed how the constitutional proxy for justification in this case, rational basis review, goes beyond the rhetoric and substance of liberal toleration.<sup>217</sup> And without including arguments that would normally be beyond the reach of liberal toleration, the court's reliance on *Romer* would be strained, at best.

To avoid a decision on whether gay couples may ever be lawfully denied the right to marry, the Ninth Circuit found that—like the constitutional amendment at issue in *Romer*—Prop 8 violated the Equal Protection Clause by excluding gays and lesbians from a right they, and everyone else, had already enjoyed.<sup>218</sup> In *Romer*, the citizens of Colorado passed Amendment 2, a constitutional amendment that prohibited the state and any subdivision thereof from passing any ordinance that banned discrimination on the basis of sexual orientation.<sup>219</sup> It, therefore, took away from gays and lesbians—but from no one else—any right to engage in local, county, and state politics to secure protections against discrimination, and it did so out of pure animus toward gays.<sup>220</sup>

This conclusion did not require the court to venture far from the limits of liberal toleration. Amendment 2 did not require any discussion of social goods for rational basis review because its breadth was so far removed from any possible justification, whatever it may be. More explicitly, discriminatory “laws of this sort” were inimical to the Constitution because of its guarantee of equal protection and “the principle that government . . . remain open on impartial terms to all who seek its assistance.”<sup>221</sup> Amendment 2, then, violated the terms of liberal toleration in the most literal sense: It denied the neutrality of the framework of justice in favor of the comprehensive dogma that gays are somehow worse than everyone else.

Yet despite the Ninth Circuit's efforts to restrict its own decision to liberal toleration, any parallel between Amendment 2 and Prop 8 requires an assessment of the social good of gay marriages. In *In re*

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215. 517 U.S. 620 (1996).

216. *Perry v. Brown*, 671 F.3d 1052, 1063–64 (9th Cir. 2012) (“All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of ‘marriage,’ which symbolizes state legitimization and societal recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for ‘laws of this sort.’”).

217. *See supra* Part II.A.

218. *Perry*, 671 F.3d at 1064.

219. *Evans v. Romer*, 854 P.2d 1270, 1284–85 (Colo. 1993).

220. *Evans v. Romer*, 517 U.S. 620, 627 (1996).

221. *Id.* at 633.

*Marriage Cases*,<sup>222</sup> the California Supreme Court held California's statutory ban on same-sex marriage recognition unconstitutional. When Prop 8 took that right away, the Ninth Circuit said, gay and lesbian Californians were put in the same disadvantaged position as gay and lesbian Coloradans after the passage of Amendment 2.<sup>223</sup> Both Prop 8 and Amendment 2 singled "out a certain class of citizens for disfavored legal status."<sup>224</sup> Both had the "peculiar property"<sup>225</sup> of withdrawing "from homosexuals, but no others" a pre-existing legal right.<sup>226</sup> Both denied equal protection "in the most literal sense."<sup>227</sup> Both constitutionalized the "special disability upon" gays alone.<sup>228</sup>

The Ninth Circuit conceded that Amendment 2 effected a substantially broader harm<sup>229</sup> and even correctly interpreted *Romer* as basing its animus holding on both the breadth of the harm<sup>230</sup> and its laser-like focus on gays and lesbians.<sup>231</sup> Justice Kennedy made this explicitly clear:

Amendment 2 fails, indeed defies, even [rational basis review]. First, the amendment has the peculiar property of imposing a *broad* and undifferentiated disability on a single named group. . . . Second, its *sheer breadth* is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.<sup>232</sup>

A finding of animus, therefore, requires more than just bald discrimination against a traditionally disadvantaged group; *Romer* found animus because the "breadth of the amendment [was] so far removed" from the purported state interests.

To make the parallel between Prop 8 and Amendment 2 persuasive, then, the Ninth Circuit had to argue that Prop 8 was discriminatorily

222. 43 Cal. 4th 757 (2008).

223. *Perry v. Brown*, 671 F.3d 1052, 1080–81 (9th Cir. 2012). "Proposition 8 is remarkably similar to Amendment 2." *Id.* at 1080.

224. *Romer*, 517 U.S. at 633.

225. *Id.* at 632 (quoted in *Perry*, 671 F.3d at 1081).

226. *Id.* at 627 (quoted in *Perry*, 671 F.3d at 1081).

227. *Id.* at 633.

228. *Id.* at 631.

229. *Perry*, 671 F.3d at 1081.

230. Indeed, Justice Kennedy's majority opinion refers to the breadth of the underlying law ten different times. *Romer*, 517 U.S. at 624 ("Amendment 2, in explicit terms, does more than repeal or rescind"); *id.* at 627 ("[s]weeping and comprehensive"); *id.* (the change is "far reaching"); *id.* at 629 (Amendment 2 has "severe consequence[s], but there is more"); *id.* at 630 ("broad language"); *id.* at 632 ("a broad and undifferentiated disability"); *id.* ("sheer breadth"); *id.* at 633 ("too broad"); *id.* ("denies [gays] protection across the board"); *id.* at 635 ("breadth of the amendment"). What's more, Justice Kennedy's opinion contrasts Amendment 2 to other classifications that met rational basis review and "were *narrow* enough in scope." *Id.* at 632 (emphasis added).

231. *Evans v. Romer*, 517 U.S. 620, 632–33 (1996) ("Amendment 2 . . . impos[ed] a broad and undifferentiated disability on a single named group . . . [by] identif[ying] persons by a single trait and then den[ying] them protection across the board.")

232. *Id.* at 632 (emphasis added).

precise and exceedingly broad. Prop 8 obviously singled out gays and lesbians for a particular burden,<sup>233</sup> but it was narrower than Amendment 2: It took away the word “marriage,” but left intact all the other rights and responsibilities of family law for gay Californians.<sup>234</sup> The case for Prop 8’s breadth required the court to move beyond the rhetoric and substance of rights and argue for the social value of gay relationships and marriage. That designation had “extraordinary significance.”<sup>235</sup> It is the name that “society gives to the relationship that matters most between two adults.”<sup>236</sup> The word “marriage,” the court found, “is singular in connoting ‘a harmony of living,’ ‘a bilateral loyalty,’ and ‘a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred,’”<sup>237</sup> quoting Supreme Court precedent on marriage as a social good. The word “marriage” is more than a word, it “expresses validation, by the state and the community, and that serves as a symbol . . . of something profoundly important.”<sup>238</sup>

Even the experience of everyday life informs the court’s argument for the social good of the marriage designation. We fill out paperwork that asks us if we are “single” or “married” and ask the ones we love, “Will you marry me?” not “Will you become my domestic partner?”<sup>239</sup> And any word so dyed in the wool of Western culture that it figures prominently in the work of Groucho Marx,<sup>240</sup> William Shakespeare,<sup>241</sup> Abraham Lincoln,<sup>242</sup> Frank Sinatra,<sup>243</sup> and even one of Marilyn Monroe’s most famous movies<sup>244</sup> has to be rhetorically and socially important. Marriage conveys meaning, pops up in common rhetorical tropes about love and lust, and expresses society’s blessing for “harmonious, loyal, enduring, and intimate relationships.”<sup>245</sup> Denying this designation, the profundity of which is proven by the communal importance of the marital union and the rhetorical saliency of the word “marriage” in everyday life, is to wreak an

233. *Perry*, 671 F.3d at 1076 (“Proposition 8 worked a singular and limited change to the California Constitution: it stripped same-sex couples of the right to have their committed relationships recognized by the State with the designations of ‘marriage.’”); *id.* at 1081 (“[T]he surgical precision with which [Prop 8] excises a right belonging to gay and lesbian couples makes it even more suspect.”).

234. *Id.* at 1086 (“Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California. . . . Proposition 8 in no way modified the state’s laws governing parentage, which are distinct from its laws governing marriage.”).

235. *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* (“Marriage is a wonderful institution . . . but who wants to live in an institution.”).

241. *Id.* (“A young man married is a man that’s marr’d.”).

242. *Id.* (“Marriage is neither heaven nor hell, it is simply purgatory.”).

243. *Id.* (“A man doesn’t know what happiness is until he’s married. By then it’s too late.”).

244. *Id.* (noting that the title, “How to Marry a Millionaire,” conveyed more meaning than “How to Register a Domestic Partnership with a Millionaire”).

245. *Id.*

incomparable social harm on gay couples. This analysis is not about rights, equality, or liberty; it reflects the Durkheimian understanding that the state recognizes a given union as a marriage for reasons beyond the realm of liberal toleration. Marriage is an integral part of the good life, not merely a tolerant one.

#### CONCLUSION

In this Article, I have aimed to show both the benefits and limits of a legal argument for ending marriage discrimination based on the language and substance of Rawlsian liberal toleration, as well as to explain the nature of the constitutional argument as reflective of the sociology of marriage within society. Liberalism's focus on liberty, freedom, and equality seem like great allies of the gay rights movement; after all, most opposition to letting gay Americans into the institution of marriage is based on religion or other comprehensive moralities that have no place in the liberal political sphere. And yet the nature of marriage is much more than a free, voluntary union of two autonomous individuals. It is a stabilizing, loving arrangement that can benefit its participants and society as a whole in ways that are far removed from the rhetoric of liberalism. Because marriage is more than just a right, because it is a "social fact," to use Durkheim's phrase, of the good life, liberal toleration can only take us so far. Even Michelman's defense of a more robust form of Rawlsian liberalism fails to adequately address the role that the sociology of marriage and gay relationships will play in proving, as a matter of law, the unlawfulness of denying from gays the designation of marriage. The Constitution recognizes this: Equal Protection and Due Process arguments for ending marriage discrimination demand that we join arguments about liberty with arguments about the social value of marriage in society and in everyday life.

Though my focus has been the constitutional case for marriage, the symbiotic relationship between liberalism and sociology may suggest ways to effectively win the hearts and minds of American voters and legislatures who have the chance to vote on marriage recognition. In 2008, the "No on 8" campaign—the well-funded group that took the lead in opposing Proposition 8 in California—made the mistake of ignoring everyday experience and the social value of marriage in its advertisements. Its various commercials never featured a gay couple in love, and its spots rarely, if ever, mentioned the word "marriage." One commercial featured California's Superintendent of Public Instruction Jack O'Connell telling viewers that "Prop. 8 has nothing to do with schools or kids. Our schools aren't required to teach anything about marriage."<sup>246</sup> Instead, the pro-gay

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246. NoOnProp8dotcom, *Prop 8 Has Nothing to Do with Schools*, YOUTUBE (Oct. 22, 2008), <http://www.youtube.com/watch?v=CIL7PU124hE>.



campaign preferred neutral statements about rights—“Regardless of how you feel about marriage, it’s wrong to treat people differently under the law”<sup>247</sup>—hoping to appeal to Californians’ liberal core. Loving gay couples, their children, and their families, all were excised purposely from the “No on 8” campaign: The message they wanted to convey was about rights and freedom, not about love, commitment, and marriage.<sup>248</sup> Prop 8 passed with a little more than 52% of the vote.<sup>249</sup>

The exclusively liberal “No on 8” campaign contrasts with the political campaign that Freedom to Marry coordinated in Washington State, Maine, Minnesota, and Maryland, the four states where marriage nondiscrimination won in the 2012 election. Their ads featured gay couples, like Richard Door and John Mace, who recently married after being together for sixty-two years.<sup>250</sup> In Minnesota, a former Marine and his wife of nearly sixty years talked about what their marriage means to them—“the happiness and the love that we’ve enjoyed”—and said that gay people should experience the same happiness.<sup>251</sup> In Maine, the *Why Marriage Matters* website told personal stories about love and commitment and the societal benefits of marriage for all.<sup>252</sup> Volunteers talked about love and living long lives together in peace, not about getting religion and morality out of their private lives.<sup>253</sup> The pattern is clear: Freedom to Marry has learned from the omissions and errors of the “No on 8” campaign and has coupled messages about equality with homages to marriage’s role in the good life. And marriage freedom won in all four states,<sup>254</sup> causing a radical shift in the public debate over marriage in America. If we recognize the legal weight of marriage arguments based on social value and the good life—in addition to liberal toleration—we may be successful in court as well.

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247. NoOnProp8dotcom, *No on 8. Unfair. Unnecessary. And Wrong.*, YOUTUBE (Oct. 15, 2008), [http://www.youtube.com/watch?feature=player\\_embedded&v=JHeTVAE4ZkY](http://www.youtube.com/watch?feature=player_embedded&v=JHeTVAE4ZkY).

248. Jonathan Rauch, *Prop 8 Ads’ Invisible Gays*, L.A. TIMES (Oct. 26, 2008), <http://www.latimes.com/news/opinion/la-oe-rauch26-2008oct26,0,3675742.story>.

249. PETER NICOLAS & MIKE STRONG, *THE GEOGRAPHY OF LOVE: SAME-SEX MARRIAGE & RELATIONSHIP RECOGNITION IN AMERICA (THE STORY IN MAPS)* 35 (2011).

250. Cameron Tolle, *Richard and John: Finally Married After 62 Years*, FREEDOM TO MARRY BLOG (Aug. 17, 2012 10:32 AM), <http://www.freedomtomarry.org/blog/entry/richard-and-john-finally-married-after-62-years>.

251. Angela Dallara, *WATCH: New Public Education Television Spot Debuts in Minnesota*, FREEDOM TO MARRY BLOG (Aug. 16, 2012, 8:00 AM), <http://www.freedomtomarry.org/blog/entry/watch-new-public-education-television-spot-debuts-in-minnesota>.

252. See WHY MARRIAGE MATTERS, <http://www.whymarriagemattersmaine.com> (last visited Mar. 15, 2013).

253. Katherine Q. Seelye, *Gay Marriage Again on Ballot in Maine*, N.Y. TIMES (June 24, 2012), <http://www.nytimes.com/2012/06/25/us/politics/second-time-around-hope-for-gay-marriage-in-maine.html>.

254. *Gay Marriage on the Ballot in 4 States (INTERACTIVE RESULTS)*, THE HUFFINGTON POST (updated Nov. 7, 2012, 1:44 AM), [http://www.huffingtonpost.com/2012/11/06/gay-marriage-results\\_n\\_2074188.html](http://www.huffingtonpost.com/2012/11/06/gay-marriage-results_n_2074188.html).

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