

Of Marriage and Monarchy;  
Why John Locke Would Support Same-Sex Marriage

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“Marriage precedes and exceeds the church and the state.”<sup>1</sup>

“Can I vote on your marriage?”<sup>2</sup>

“And hence it is, that he who attempts to get another Man into his absolute power, does thereby put himself into a state of war with him; it being to be understood as a declaration of a design upon his life. For I have reason to conclude, that he who would get me into his power without my consent, would use me as he pleased, when he had got me there, and destroy me too when he had a fancy to it: for no body can desire to have me in his absolute power, unless it be to compel me by force to that, which is against the right of my freedom, i.e. make me a slave.”<sup>3</sup>

## I. Introduction

The debate over same-sex marriage produces very strong reactions because it raises fundamental questions about human identity, political institutions, and law. Conservatives are apparently quite sincere in their belief that the ability to impose restrictions on lesbians and gay men is essential to the power of government.<sup>4</sup> This article presents the case that the political philosophy of John Locke provides a largely overlooked framework for resolving the legal issues of the lesbian/gay civil rights movement, including recognition of same-sex marriages. As a matter of political morality, Locke’s theory of governmental legitimacy renders profoundly unjust – that is, profoundly immoral -- all discrimination based on sexual orientation, including the refusal to recognize same-sex marriages.

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<sup>1</sup> Glenn T. Stanton, *Why Not Gay Marriage?*, undated PDF, available at [http://www.family.org/cforum/pdfs/fosi/marriage/Why\\_Not\\_Gay\\_Marriage.pdf](http://www.family.org/cforum/pdfs/fosi/marriage/Why_Not_Gay_Marriage.pdf), last visited, October 8, 2006.

<sup>2</sup> Pam Belluck, *Gain for Same-Sex Marriage in Massachusetts*, N.Y. TIMES, Nov. 10, 2006. Quotation from sign held by demonstrator in photograph.

<sup>3</sup> JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 17 (1689) (hereinafter, THE SECOND TREATISE).

<sup>4</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia dissenting): “I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence--indeed, with the jurisprudence of *any* society we know--that it requires little discussion”; *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger concurring) (upholding state sodomy statute against privacy challenge): “This is essentially not a question of personal ‘preferences’ but rather of the legislative authority of the State”; Sarah Catherine Mowchan, Comment and Note, *A Supreme Court that is “Willing to Start down That Road”*: *The Slippery Slope of Lawrence v. Texas*, 17 REGENT U.L. REV. 125 (2004/2005) (reviewing the types of legislation that are supposedly now invalid under the due process analysis in *Lawrence*).

Lockean political philosophy is a compelling framework for evaluating the legal issues of lesbian/gay civil rights for at least two major reasons. First, Locke was the single most influential political philosopher for the Founders of the United States.<sup>5</sup> Second, Locke's thought was influential then, and should remain influential now, because it presented a compelling solution to the problem of how to build political and legal institutions that balance the opportunities and dangers stemming from the vicissitudes of human identity.<sup>6</sup> In important respects, the debate over same-sex marriage mirrors the debate in seventeenth-century England over the moral foundations of legitimate government, which is intimately related to the question of which moral propositions legitimate government should enforce. The question of recognizing same-sex marriages is remarkably similar to the question of enforcing specific religious doctrines and practices in terms of the issues it presents about individuals and their relationship to the state.

All of these issues, in turn, boil down to the question of how to define human identity.<sup>7</sup> Do humans possess a significant, albeit imperfect, capacity for moral reasoning, such that we can rationally discern and articulate moral rules for ourselves? Or do we need to depend on the authority of revelation and sacred text to dictate closely the rules of conduct that we should follow? In the analysis of Locke's political theory below,<sup>8</sup> I demonstrate that Locke considered both of these options and concluded two things. First, the authority of revelation and sacred text

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<sup>5</sup> See *infra*, sec. II.A.

<sup>6</sup> See *infra*, notes 64-68 and accompanying text; MICHAEL P. ZUCKERT, LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY 2 (1994) (hereinafter, LAUNCHING LIBERALISM): "I argue that [Locke] has philosophically important things to say to us about politics, especially about the kind of politics we practice, and therefore has politically relevant things to say to us as well."

<sup>7</sup> See *infra*, sec. II.B.

<sup>8</sup> *Infra* sec. II.

alone is not a reliable basis for legitimate government.<sup>9</sup> Second, humans do have significant capacity for moral reasoning, which is to say, significant capacity for self-government.<sup>10</sup> From these two propositions, Locke concluded that humans' capacity for moral reasoning provided not only a more legitimate, but also a much more stable basis for government than reliance on sacred text simpliciter.<sup>11</sup>

The debate over lesbian/gay civil rights, especially recognition of same-sex marriage, illustrates how Locke's theory articulates the possibility of politics in the sense of a set of principles for guiding debate among humans over conflicting moral norms. Conservative appeals to sacred text for the purpose of refusing to recognize same-sex marriages not only attempt to remove marriage from the realm of political debate, but threaten to eliminate the possibility of politics entirely by dictating a single, substantive moral order in place of Locke's emphasis on an open-ended capacity for moral reasoning. Any morally legitimate discrimination on the basis of sexual orientation must rest on a demonstration that lesbians and gay men as a class lack the capacity for moral reasoning that justifies self-government in the Anglo-American tradition. Or, given Lockean theory, why would any rational lesbian or gay man consent to a government that has the power to discriminate against them solely on the basis of sexual orientation?

For purposes of the present article, I relinquish the argument that the refusal to recognize same-sex marriages, and all other forms of discrimination based on sexual orientation, violate the prohibition on establishment of religion in the First Amendment to the United States

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<sup>9</sup> *Infra* note 84 and accompanying text.

<sup>10</sup> *Infra* note 79 and accompanying text.

<sup>11</sup> *Infra* sec. II.

Constitution.<sup>12</sup> The value to our understanding of contemporary legal and political debates of considering Locke's theory of government lies in the opportunity to refresh our understanding of the intellectual context that produced the Constitution. Locke's own articulation of his theory would have invited objection as an establishment of religion. Even in his famous *Letter on Toleration*, he explicitly excluded Catholics and atheists from full participation in the polity.

But the important point is that, although Locke grounded his theory in the same place that many modern opponents of lesbian/gay equality do – the biblical book of Genesis – he came to exactly the opposite conclusion: legitimate government has a moral responsibility to protect a high degree of pluralism among the members of the polity. That responsibility, in turn, rests on the proposition that individuals possess the capacity for moral reasoning. Individuals' capacity for moral reasoning is the source of government's legitimacy, and the source of limits on government power – legitimacy and limits are two sides of the same coin.

Locke's conclusions about the relationship between the Bible and political legitimacy stemmed from at least three factors. First, living as he did through the English Civil War, the Puritan rule of the Interregnum, and the Glorious Revolution, he saw firsthand that claims to biblical morality simpliciter produced more disorder than order precisely because the issues were so important. When the state takes sides in matters of biblical morality (or, presumably, morality grounded in other sacred text), the result is likely to be violence. For Locke, abandoning the Bible altogether was inconceivable. Instead, as the second factor, he concluded that the Bible contained no indication that God had determined a particular form of government for humans.<sup>13</sup>

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<sup>12</sup> See, e.g. Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159 (2003-2004); James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christianism*, 4 MICH. J. GENDER & L. 335 (1996-1997).

<sup>13</sup> *Infra*, notes 76-77 and accompanying text.

He also concluded that the biblical patriarchalism of his contemporaries such as Robert Filmer was both illogical on its face, and inconsistent with a reasonable reading of the Bible.<sup>14</sup> Both propositions – inconsistency with the Bible, and facial illogic – are true of conservative arguments in opposition to equality for lesbians and gay men.

The result of Locke's study is something we now call "liberalism" based on a particular conception of human identity, especially the capacity for reason. According to Lockean liberalism, the state has a positive moral obligation to respect all citizens' foundational equality, and to defend their natural rights to life, liberty, and property. This is a vague framework, but its vagueness is part of its virtue. Locke believed that human reason is fallible, but he believed it is robust enough to enable humans to resolve their own political issues, and that God made it that way.<sup>15</sup> This is the third factor. He rejected the account of human nature according to which humans are so corrupt that they need strong government to keep them in line.<sup>16</sup> On this view, the state's refusal to recognize same-sex marriages entails a denial of the foundational equality of lesbians and gay men (not to mention an infringement on their rights to liberty and property), which is in turn a denial of their capacity for moral subjectivity. Such denial is immoral.

Legal scholars Carlos Ball<sup>17</sup> and Chai Feldblum<sup>18</sup> have argued that relying on a version of liberalism according to which the state may not make moral distinctions is a mistake for advocates of lesbian/gay equality. Pointing to congressional debates over a proposed

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<sup>14</sup> *Infra*, notes 88-90 and accompanying text.

<sup>15</sup> *Infra*, notes 61-66 and accompanying text.

<sup>16</sup> *Infra*, notes 55-56 and accompanying text.

<sup>17</sup> Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking beyond Political Liberalism*, 85 GEO. L.J. 1871 (1996-1997) (hereinafter, *Moral Foundations*).

<sup>18</sup> Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005) (hereinafter, *Gay is Good*). See also, Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOKLYN L. REV. 61 (2006).

constitutional amendment to prohibit recognition of same-sex marriages, Feldblum notes that, whether modern theorists like it or not, many elected officials refuse to bracket their moral principles on the issue of defining marriage.<sup>19</sup> It is, she demonstrates, a strategic error for advocates of lesbian/gay equality to continue to rely on the argument for moral bracketing by the state in political and legal debates.

Feldblum and Ball address this issue by offering arguments for why same-sex relationships, including the sex, can be morally valuable and therefore merit legal recognition on the same terms as opposite-sex relationships. Feldblum also invokes Robin West, who offers a different argument for not abandoning moral reasoning: it provides a potentially independent basis for critiquing the law.<sup>20</sup> Thus, this article takes a tack that is different from, but complementary to, that of Ball and Feldblum: it explores why conservative opposition to lesbian/gay equality necessarily rests on moral principles, or on political and legal principles and practices, that contravene the founding moral commitments of the United States as a polity.

Modern lesbian/gay liberals<sup>21</sup> are wrong to believe that they can only achieve their legal and political goals by asserting that the state may make no moral distinctions among citizens. Conservatives are wrong, however, in believing that the moral principles that ground American

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<sup>19</sup> Feldblum, *Gay is Good*, *supra* note 18 at 141-42.

<sup>20</sup> ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 2 (1993). To be sure, West presents the problem that the law has enormous influence on our conceptions of what is morally good, begging the question of how moral reasoning could provide the basis for any independent critique of law. She advocates “naturalistic and teleological criticism, grounded loosely in Aristotelian philosophy and humanistic inquiry,” *id.* at 7, as the basis for a moral philosophy that would meet the need. My answer in the present article to West’s “critical dilemma” of law’s influence on moral reasoning is that we should revisit the moral foundations Locke relied on in articulating his political theory. Again, Locke’s moral foundations are expressly Christian, but that alone hardly invalidates them as a source for evaluating the legitimacy of law, even under a Constitution that expressly prohibits the state from establishing religion.

<sup>21</sup> See, e.g., Patrick J. Egan and Kenneth Sherrill, *Same-Sex Marriage Initiatives and Lesbian, Gay, and Bisexual Voters in the 2006 Elections* 11-13, available at [http://thetaskforce.org/reports\\_and\\_research/lgb\\_voters\\_2006](http://thetaskforce.org/reports_and_research/lgb_voters_2006) (last visited Jan. 30, 2007) (analysis of exit poll data showing that lesbian, gay, and bisexual voters are significantly more liberal than the general population).

law and politics require or permit the prohibition of same-sex marriages, or any other form of discrimination based on sexual orientation. Not only is Feldblum correct that “gay is good,”<sup>22</sup> but discrimination on the basis of sexual orientation is morally bad.

Section II of this article provides an overview of Locke’s political theory in terms of its biblical origins, and the conclusions Locke drew from the Bible about human identity and the legitimate basis for the authority of government. Section III then explores the significance of Lockean political theory for the question of lesbian/gay equality generally. Section IV presents three distinct conservative arguments against same-sex marriage and considers why, whatever the differences among them on their own terms, they all violate Lockean principles for similar reasons.

## II. Locke

This section describes Lockean political theory as grounded primarily in *The Second Treatise of Government*. The major principles we should derive from *The Second Treatise of Government* are relatively few and relatively simple. Indeed, in my view, one of the chief virtues of Locke’s political theory is precisely its open-endedness. Locke posited a definition of human nature, but because that definition hinges on the capacity for reason, it leaves open the possibility of adaptation to changing circumstances. Invoking *The Second Treatise of Government* does not entail advocating seventeenth-century substantive moral standards beyond the elementary principles of foundational equality and the rights to life, liberty, and property.

Before looking directly at *The Second Treatise*, however, it is necessary to appreciate the historical context in which Locke wrote, and the historical reception of Locke’s work. First,

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<sup>22</sup> *Supra* note 18. See also, Franklin Kameny, “Gay is Good,” in *THE SAME SEX: AN APPRAISAL OF HOMOSEXUALITY* (1969).



Locke's ideas did in fact have a major impact on the thinking of the Founders of the United States. Second, Locke himself was quite serious about his Christian belief and grounded his political philosophy in the Bible because he could conceive of no other place to ground it. Those two issues make up the first two parts of this section. The remaining parts of this section develop Locke's political and legal theory based on a close reading of *The Second Treatise of Government*.

The important point to derive from Locke's theory of government is that all humans presumptively have sufficient reasoning capacity to understand their responsibilities and rights under natural law, and to evaluate their own actions and the actions of government accordingly. This reasoning capacity is far from perfect, but it does provide the basis in principle for identifying and punishing violations of natural law in the state of nature, and for allowing groups to create and dissolve governments. And, according to Locke, it is all we have. God chose not to institute government for humans directly, leaving us to create and manage our own institutions. Because the substantive natural rights of Locke's scheme are few and broad – life, liberty, and property – and because humans have reliable, albeit imperfect, reasoning skills, substantial leeway exists for those humans in deciding what form of government they will adopt and in adapting both the form of government, and its positive laws, to new circumstances. But this is simply politics as governed by natural law.

#### A. Locke's Impact on the Founding

I find it puzzling that legal scholars do not pay more attention to Locke. His theory of political legitimacy depends centrally on a notion of law and contract, and it had a significant impact on the Founders of the United States. Nomi Maya Stolzenberg perhaps provides an explanation with her personal and scholarly account of legal scholars who felt burned by their

effort to adapt historians' discussion of Lockean liberalism and classical republicanism to their own needs.<sup>23</sup> Part of the problem is the apparently inevitable tendency of scholars to take increasingly polarized, reductive positions on issues that require nuance and subtlety for full understanding.<sup>24</sup> Stolzenberg summarizes the debate well in a brief compass, explaining that the emphasis certain scholars placed on classical republican elements in the thought of eighteenth-century Americans served to compensate for an excessive emphasis on Locke as the only theorist who mattered.<sup>25</sup> Thus, even the leading avatars of the republican synthesis, as the claim for classical republican elements in American revolutionary thought is commonly known,<sup>26</sup> never claimed that Locke's ideas had no impact on that thought.<sup>27</sup>

Political scientist Alex Tuckness recently explained that the "tide of recent scholarship has been against the... position that downplayed the influence of Locke on the American

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<sup>23</sup> Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 HARV. L. REV. 1025 (1998) (review of LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)).

<sup>24</sup> See, e.g., RICHARD DAWKINS, *THE GOD DELUSION* (2006); Marilynne Robinson, *Hysterical Scientism: The Ecstasy of Richard Dawkins*, HARPER'S MAGAZINE, Nov. 2006, 83-88.

<sup>25</sup> Stolzenberg, *supra* note 23 at 1025-26.

<sup>26</sup> *Id.* But see MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC* 6-7, 208-10 (1996) (hereinafter, *NATURAL RIGHTS REPUBLIC*), MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM passim* (1994) (hereinafter, *NEW REPUBLICANISM*) (disputing the dichotomy between the Lockean natural rights and republican political theories).

<sup>27</sup> See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1967): "The pervasiveness of such citations is at times astonishing. In his two most prominent pamphlets James Otis cited as authorities, and quoted at length, Locke, Rousseau, Grotius, and Pufendorf, and denounced spokesmen, such as Filmer, for more traditional ideas of political authority." Bailyn is Stolzenberg's leading example of a "republican synthesis" author. Stolzenberg, *supra* note 15 at 1025. Often lost in all of the debate is Bailyn's point that American revolutionaries made what they wanted and needed out of the ideas they found available: "The common law was manifestly influential in shaping the awareness of the Revolutionary generation. But, again, it did not in itself determine the kinds of conclusions men would draw in the crisis of the time. Otis and Hutchinson both worshiped Coke, but for reasons that have nothing to do with the great chief justice, they read significantly different meanings into his opinion in *Bonham's Case*." Bailyn, *supra* at 31.

founding in favor of authors in the republican tradition.”<sup>28</sup> Tuckness captures the point that the Founders’ worldviews were complex, even contradictory to the modern eye. “One can grant that Locke was not a hegemonic figure and that republican sources played an important role without denying Locke’s central place.”<sup>29</sup> This is an important issue precisely because of the relationship between our understanding of the Founders and our understanding of contemporary political debates. Steve Dworetz is correct to assert that “[t]he dominant understanding of the founding doctrine... also contains prescriptive implications for public policy and constitutes the essential source of historical legitimacy for any general political program,”<sup>30</sup> even if he is incorrect to claim that acceptance of the republican synthesis is a prescription for tyranny.<sup>31</sup>

Thus, in a novel and interesting invocation of civic republican thought on behalf of welfare rights, Jon D. Michaels states, “[p]rivacy and procedural rights comport with the traditional Lockean protections of private property and negative liberties that are deeply embedded in our constitutional order. In contrast, substantive welfare rights are completely

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<sup>28</sup> Alex Tuckness, *Discourses of Resistance in the American Revolution*, 64 J. OF THE HIST. OF IDEAS 547-63, 547 (2003) (hereinafter, *Discourses of Resistance*). Accord Zuckert, *supra* note 26; GILLIAN BROWN, THE CONSENT OF THE GOVERNED: THE LOCKEAN LEGACY IN EARLY AMERICAN CULTURE 3 (2001): “The formation of Americans from British colonials (and other immigrants under British rule) proceeded according to Lockean reorientations of British habits of thought. Locke’s reconceptualization of consent pervaded the colonies not only through editions of his works but also through schoolbooks and popular stories.” Note that this is a claim, not only about revolutionary leaders, but about the educated populace as a whole, and it rests on observations of a wide range of relevant primary sources.

<sup>29</sup> Tuckness, *supra* note 28 at 547. See also, ZUCKERT, NATURAL RIGHTS REPUBLIC, *supra* note 26 at 210: “One needs to see how these two elements [liberalism and republicanism] fit together for the founding generation, but one can never do that so long as one takes as a point of departure the conceptualization of these matters prevalent in the literature.”

<sup>30</sup> STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 4 (1990).

<sup>31</sup> *Id.* at 5. See also, Pamela A. Mason, *Rhetorics of “The People”*: *The Supreme Court, the Social Contract, and the Constitution*, 61 REV. OF POLITICS 275 (1999) (discussing conflicting conceptions of the social contract in U.S. v. Verdugo-Urquidez, 494 U.S. 259).

anathema to the Lockean tradition.”<sup>32</sup> I mean no criticism of Michaels when I point out that, where “Lockean protections... are deeply embedded in our constitutional order” on one page, we learn that “the values of civic republicanism... infuse our Constitution” on the next page.<sup>33</sup> This juxtaposition constitutes incoherence only for one who chooses to posit Lockean liberalism and civic republicanism as antipodes to begin with.<sup>34</sup>

I would suggest that Locke’s liberalism is not as anathematic to claims for substantive welfare rights as Michael says it is, although he may be right about the “Lockean tradition” as it has developed in the United States.<sup>35</sup> Rather, the debates over same-sex marriage, and lesbian/gay civil rights in general, offer an important opportunity to revisit the proposition that respect for individual rights is actually a reliable moral basis for the well-being of the community as a whole. Locke’s importance for contemporary political and policy debates lies in the fact that he presented a broad-based account, thoroughly embedded in his own historical moment and therefore thoroughly connected historically to our own culture, of how rights-bearing individuals could collectively identify and pursue the community’s welfare.<sup>36</sup> As Ball<sup>37</sup> and Feldblum<sup>38</sup>

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<sup>32</sup> Jon D. Michaels, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 YALE L. J. 1457, 1458 (2001-2002).

<sup>33</sup> *Id.* at 1459.

<sup>34</sup> ZUCKERT, NATURAL RIGHTS REPUBLIC, *supra* note 26.

<sup>35</sup> *See, e.g.*, ZUCKERT, NEW REPUBLICANISM, *supra* note 26 at 7: “Locke’s state of nature is not what it is often taken to be, an affirmation of an ahistorical, asocial atomistic individualism. Locke not only can but does accept many of the claims of our contemporary communitarians about the social rootedness of humanity”; Brown, *supra* note 28 at 26; Mary B. Walsh, *Locke and Feminism on Private and Public Relams of Activities*, 57 REV. OF POLITICS 251-78, 273 (1995) (feminist reading of Locke in terms of relationships, rather than naked self-interest). *But see* The John Locke Foundation, [www.johnlocke.org/about/](http://www.johnlocke.org/about/) (last visited Feb. 17, 2007) (bemoaning, *inter alia*, “a decline of individual freedom and self-reliance”).

<sup>36</sup> *But see* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (particular mode in which Americans during post World War II period claim rights for themselves has impeded effective political discussion of important issues).

<sup>37</sup> Ball, *Moral Foundations*, *supra* note 17.

suggest, same-sex marriage, and lesbian/gay civil rights generally, pose the central question of liberalism, which is necessarily a moral question: how do we balance the rights claims of individuals against the legitimate demands of the community?

### 1. Rawls

Ball's article also reviews the solutions that a number of modern authors have offered to this problem. He demonstrates that, instead of Locke, legal scholars in the late twentieth and early twenty-first centuries like to get their liberalism from John Rawls and other modern theorists.<sup>39</sup> I refer almost exclusively to Locke, rather than moderns such as Rawls, for two reasons. First, I find Rawls' specification of the persons who will negotiate the social contract highly implausible. He writes:

I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.<sup>40</sup>

Whatever its virtues in terms of theoretical consistency, the idea of negotiators who lack knowledge of their own "psychological propensities" is so far-fetched as to render this definition useless. More importantly, this definition of the negotiators is profoundly different from, and far less useful than, Locke's.

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<sup>38</sup> Feldblum, *supra* note 18.

<sup>39</sup> See, e.g. Ball, *Moral Foundations*, *supra* note 17. See also, Robert P. George and Christopher Wolfe, *Natural Law and Liberal Public Reason*, 42 AM. J. JURIS. 31 (1997) (hereinafter *Liberal Public Reason*) (not adopting Rawls' perspective, but using his notion of "public reason" as the starting point for their articulation of a conservative version of natural law as a different basis from Rawls' liberalism for the moral legitimacy of government).

<sup>40</sup> JOHN RAWLS, A THEORY OF JUSTICE 11 (1971, rev. ed. 1999).

In order for a discussion of consent theory to have purchase on actual legal and political disputes, it is essential to appreciate the stakes as potential negotiators actually see them. Like John Locke and Robert Filmer in the seventeenth century, participants in the current debate over lesbian/gay civil rights do not have the luxury of defining our interlocutors as we wish them to be. Rawls has a prescription for complete justice and social peace, which are admirable but unrealistic goals. Consent theory influenced the founders because it provided a framework for managing conflict,<sup>41</sup> which is what American society must now do with respect to lesbian/gay civil rights generally, and same-sex marriage particularly.

Secondly, an important goal of this article is, so far as possible, to meet conservatives on their own terms, but still demonstrate why their advocacy of sexual-orientation discrimination violates the founding principles of American law. Conservatives who chose to engage Rawls' theory at all would likely refuse to accept his evacuation of all moral commitments<sup>42</sup> and psychological characteristics from the identities of his negotiators precisely because, as devoutly religious persons, their starting point is that their lives, and the society as a whole, they hope, will follow the dictates of sacred text. Rawls' abstract social contract, with its personality-free negotiators in the initial position, creates the perplexity of responding to persons who refuse to participate. Would Rawls coerce traditionalists to accept the evacuation of their identities in order to participate in the negotiations that will result in justice?

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<sup>41</sup> See, e.g., THE FEDERALIST, no. 10 (Madison). See also, Brown, *supra* note 28 at 26: "Consent therefore registers conflict even as it redresses it through the establishment of accord. Lockean consent encapsulates a story of reconciliations, a narrative not of unchecked individuality but of continual checks to which individuals agree to comply. That consent recalls and reenacts the managing of disputes in the state of nature suggests that consent operates even before explicit social compacts."

<sup>42</sup> See Feldblum, *Gay Rights and Religion*, *supra* note 18 at 64: "intellectual coherence and ethical integrity demand that we acknowledge that civil rights laws can burden an individual's belief liberty interest when the conduct demanded by these laws burdens an individual's core beliefs, whether these beliefs are religiously based or secularly based."

Locke is indisputably a canonical figure in the Anglo-American tradition of political and legal theory. His writings influenced the authors of the United States Constitution in a way that neither Rawls' nor those of any other modern theorist could have done simply by dint of chronology. Traditionalists can easily dismiss Rawls as just another liberal university professor of the sort they have dismissed in various terms over the past several decades.<sup>43</sup> They would object strenuously to Rawls' definition of negotiators in the original position precisely because persons who lack knowledge of their own "psychological propensities" will also lack an understanding of their religious beliefs, which traditionalists would rightly refuse to abandon. The argument for lesbian/gay equality will be all the stronger insofar as it begins by acknowledging the legitimacy of conservatives' religious beliefs. Rawls invites dismissal by traditionalists.<sup>44</sup>

Traditionalists cannot so easily dismiss Locke.

## B. The Biblical Context

Traditionalists in the United States cannot dismiss Locke partly because of his impact on the founding of the nation. But they cannot dismiss Locke also because, as political theorist Kim Ian Parker has demonstrated, Locke derived his political theory from his reading of the Bible.<sup>45</sup>

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<sup>43</sup> See, e.g., George and Wolfe, *supra* note 39 at 48: "Most Americans believe in God, though few could get very far with, say, an unbelieving professor from their state university in arguing on the subject. We would nonetheless contend that they possess genuine knowledge. Their views are, to be sure, less sophisticated than the views of professional academics or other intellectuals, but they possess the considerable virtue of being true." See generally, ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (rev. ed. 1998).

<sup>44</sup> See George and Wolfe, *supra* note 39, at 31-32 (not dismissing Rawls, but citing him at the outset of their article explaining their differences with his notion of "public reason," and other scholars' use of that notion).

<sup>45</sup> KIM IAN PARKER, *THE BIBLICAL POLITICS OF JOHN LOCKE* (2004) (Locke's political theory as growing out of his understanding of the Bible, to which he applied methods of critical scholarship and reasoning). See also, STRUAN JACOBS, *SCIENCE AND BRITISH LIBERALISM: LOCKE, BENTHAM, MILL AND POPPER 2* (1991) (Locke's protestantism essential to a complete understanding of his political philosophy).

His political theory depends on his understanding of human identity, and his understanding of human identity begins with Adam as described in Genesis. The political philosophy he derived from that understanding of human nature is distinctively liberal – that is, not conservative – not solely, perhaps not even primarily, because of his substantive account of human nature. Rather, Lockean liberalism derives as much as anything else from Locke’s intellectual procedure, his willingness to evaluate the claims of revelation according to reason and empirical evidence. Locke was as concerned with epistemology as he was with political theory. As Parker has demonstrated, it was precisely because Locke took the Bible and its revealed wisdom seriously that he subjected its claims, and the arguments from revelation of his contemporaries, to searching criticism.<sup>46</sup> The result was a very parsimonious account of human nature, according to which humans have the capacity to understand natural law, including natural rights, and they have the capacity to evaluate law and policy for its compliance with the demands of natural rights.

But those natural rights are few: equality, life, liberty, and property. That natural rights in Locke’s account amount to a few broad concepts leaves plenty of room for argument, but one who trusts the human capacity for reason and empirical observation should not much fear argument.<sup>47</sup> Indeed, one great virtue of Locke’s vagueness is that we can readily adapt his belief in the human capacity for moral reasoning to a modern world where excluding Catholics and atheists, and persons of any other religious belief, is entirely unacceptable. Where the modern debate too often pits tradition against innovation, reason against revelation, as fully dichotomous

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<sup>46</sup> *Id.*

<sup>47</sup> *But see* Stanton, *supra* note 1 (asserting that time for political debate over recognition of same-sex marriages is over because Stanton himself has engaged in such debate and now knows the right answer).



propositions,<sup>48</sup> Locke strove to balance the elements in those paradoxes against each other. Reason and empiricism can lead to innovations that may improve the human condition – how else to move from the state of nature to civil society? – but the potential for rational improvement need not lead to the rejection of tradition as a universal rule.<sup>49</sup> At the same time, Locke’s commitment to reason as a viable basis for evaluating moral claims indicates his rejection of reliance on claims to tradition or sacred text simpliciter as a reliable source of substantive rules for human conduct that all must accept.

In demonstrating the centrality of biblical exegesis to John Locke’s political theory, Parker takes pains to explain why he disagrees with C.B. McPherson’s and Leo Strauss’ contentions that Locke grounded the argument of *Two Treatises of Government* in the Bible and Christian belief primarily for strategic reasons.<sup>50</sup> Locke genuinely believed in a Christian God, and genuinely accepted the Bible as the revealed word of that God. But the important question is not whether Locke was a devout Christian.

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<sup>48</sup> See, e.g., Laurie Goodstein, *In Intelligent Design Case, a Cause in Search of a Lawsuit*, N.Y. TIMES, Nov. 4, 2005 (describing efforts by Thomas More Law Center to find school district that would serve as plaintiff in law suit to establish that teaching “intelligent design” as a substitute for evolution did not violate the Establishment Clause of the First Amendment to the Constitution). See also, *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005) (application of endorsement and *Lemon* tests render “abundantly clear that the Board’s ID [Intelligent Design] Policy violates the *Establishment Clause*”). See also, Cornelia Dean, *Believing Scripture but Playing by Science’s Rules*, NY TIMES, Feb. 12, 2007 (graduate student in paleontology whose belief in the literal truth of the Bible leads him to reject scientific claims about the age of the earth).

<sup>49</sup> But see, Hans Aarsleff, *Locke’s Influence*, THE CAMBRIDGE COMPANION TO LOCKE 252-289 (1994): “John Locke is the most influential philosopher of modern times.... His great message was to set us free from the burden of tradition and authority, both in theology and knowledge, by showing that the entire grounds of our right conduct in the world can be secured by the experience we may gain by the innate faculties and powers we are born with. God ‘commands what reason does’ are the words that best reveal the tenor and unity of Locke’s thought.” *Id.* at 252 (citation omitted). Thus, while I agree with Aarsleff’s estimation of Locke’s impact, I disagree with his characterization of “tradition and authority” solely as “burden[s]” in Locke’s thought.

<sup>50</sup> Parker, *supra* note 45 at 100-03.

The important question is how he reconciled his own Christian beliefs with the indisputable need of the state to govern persons with profoundly different beliefs.<sup>51</sup> Again, my argument here is not that religious persons should bracket or otherwise exclude their religious beliefs, including moral commitments, from their considerations of political and policy issues. My argument is that Locke's political philosophy articulates moral reasons why Christians and all other religious persons should refrain from expecting that the state will enforce all, or even most, of the specific moral principles they derive from their religious beliefs. The imposition of specific moral principles against the consent of another person entails the denial of that person's capacity for moral reasoning and self-government. Locke's reasons are even more compelling in the modern United States than they were in seventeenth-century England if only because the modern United States encompasses a degree of religious and moral pluralism that far exceeds anything Locke could have conceived of.

### 1. Original Sin and Patriarchalism

Locke harbored profound doubts about certain prevailing political and theological doctrines of his day, and his doubts rested in part on his careful reading of the Bible.<sup>52</sup> Specifically, Locke doubted the doctrine of original sin, and the theory that monarchs derived their power from God via the direct grant of authority over the earth to Adam as described in

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<sup>51</sup> See ALEX TUCKNESS, *LOCKE AND THE LEGISLATIVE POINT OF VIEW: TOLERATION, CONTESTED PRINCIPLES, AND THE LAW* 3 (2002) (hereinafter, *THE LEGISLATIVE POINT OF VIEW*): "The legislative point of view uses a legislative metaphor as a heuristic to guide political deliberation. One imagines oneself in the position of a legislator when deciding what moral principles should guide the use of political power." Tuckness derives his concept of "the legislative point of view" from Locke's *Third Letter Concerning Toleration*, where Locke addressed "why a person should refrain from using political power to bring about a real good or to enforce a true moral principle." *Id.* at 4. I am not persuaded that Tuckness's legislative point of view resolves the issue of same-sex marriage, but I think his study is an important contribution to the discussion about how Locke's political philosophy can help citizens in the twenty-first century to think about seemingly intractable issues at the intersection of morality and politics.

<sup>52</sup> Parker, *supra* note 45 at 3-4, *passim*.

Genesis.<sup>53</sup> That is, based on his reading of Genesis, Locke doubted both that God's punishment of Adam included the imputation of sinfulness to all subsequent human beings, and that God set Adam up as the model for patriarchal political authority in the future.<sup>54</sup> In addition to the fact that both propositions stem from Genesis, they are closely related insofar as biblical patriarchalists of the seventeenth century relied on both propositions in asserting the need for strong government in order to control human sinfulness.<sup>55</sup>

Locke, by contrast, saw in original sin a denial of human moral responsibility: if we all inherited from Adam a propensity to sinfulness, how could we ever change our ways, and how could anyone justly hold us accountable for those sins?<sup>56</sup> The issue of original sin was not simply a matter of theological interest in the seventeenth century. Illustrating the practical as well as theoretical importance of these issues, Locke could not repudiate the doctrine of original sin without violating English law of the time, which mandated assent to various doctrines of the Church of England, including original sin.

So Locke refrained from repudiating the doctrine of original sin outright, but his political theory reflects a level of optimism about the possibility of improving human individuals and institutions that is entirely absent from the patriarchal conservatism of his contemporary interlocutors.<sup>57</sup> This is not a naïve perfectionism. Locke recognized significant limitations in the

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<sup>53</sup> *Id.* at 3-4, 32, 149.

<sup>54</sup> *Id.* at 6, 32, 37.

<sup>55</sup> *Id.* at 67-91.

<sup>56</sup> *Id.* at 55, 63, 65. *See esp., id.* at 149: "The doctrine of Adam's original sin was contrary to the goodness of God [on Locke's view], and to base a political order on such a false doctrine was very dangerous indeed."

<sup>57</sup> *Id.* at 55-58, 65-67.

power of human reason.<sup>58</sup> He did not wish to withdraw authority from a government that claimed power for patriarchal conservatism only to grant that authority to a government that would claim power for patriarchal liberalism. The point remains, however: Anglo-American political theory, at least in its Lockean manifestation, rests not simply on an appeal to the Bible, but to the Bible as interpreted by human reason. The Bible as interpreted by Locke's human reason, in turn, provides a balanced account of human nature that acknowledges both its promise and its limitations.<sup>59</sup>

The two points are closely related to each other, and to political philosophy, insofar as they address the vexed question of human freedom. Locke confessed:

I cannot make freedom in man consistent with omnipotence and omniscience in God, though I am as fully as [sic] persuaded of both as of any truths I most firmly assent to.

And therefore I have long since given off the consideration of that question, resolving all into this short conclusion, that if it be possible for God to make a free agent, then man is free, though I see not the way of it.<sup>60</sup>

In other words, for Locke, better to embrace the paradox, with its attendant uncertainty, than to give up either his belief in God's sovereignty, or his belief in human freedom. Logically, politically, and morally, this is a much more sensible solution to the paradox than the demand for government enforcement of any individual's or group's interpretation of sacred text.

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<sup>58</sup> *Id.* at 65.

<sup>59</sup> *Id.* at 37.

<sup>60</sup> John Locke, quoted in BERNARD BAILYN, *FACES OF THE REVOLUTION: PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE* 110-11 (1990). Note that this passage comes from Bailyn's description of Andrew Eliot, a Harvard-educated Congregationalist minister who became "a reluctant revolutionary." At the risk of belaboring the point, then, here is the leading avatar of the "republican synthesis" offering a quotation from Locke as part of a complex portrait of an indecisive person for the purpose of showing nuance in the attitudes of British citizens on the eve of the American Revolution.

Note that, in Locke's account, his substantive conclusions about human nature and legitimate political authority are inextricably intertwined with his intellectual and political procedure. A defining element of human identity in Locke's conception of it is the capacity for reason.<sup>61</sup> Because of this capacity for reason, including the ability to make reliable empirical observations and draw rational inferences, Locke was unwilling to accept a reading of the Bible according to which challenges to royal authority were inherently impious. That is, the Anglo-American tradition of political and legal theory grows out of the proposition that humans can and should critically examine received sources of authority, and that critical examination can lead to substantial modification in our understanding of those sources without entailing rejection of them.

This starting point has very important implications for the relationship between individuals and the cultural, political, and legal traditions that they inherit. It does not entail a wholesale rejection of tradition.<sup>62</sup> Locke remained a Christian, and lived contentedly under a constitutional monarchy from the Glorious Revolution until his death. Rather than rejection of tradition, Locke's reading of Genesis entails the proposition that humans have the capacity to evaluate traditions according to the principles of reason and evidence, and to demand changes in traditions that produce unreasonable outcomes.

An important corollary that comes through especially in the *Third Letter on Toleration* is the point that "magistrates," the generic term Locke used for public officials, have no greater

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<sup>61</sup> See Parker, *supra* note 45 at 39-40. Obviously, to observe that Locke emphasized the human capacity for reason in his political philosophy, as well as in his epistemology, is to risk restating what has almost become a caricature of Locke during the twentieth century, but is at least the hegemonic view of him. What makes Parker's analysis so helpful is his connection of Locke's conception of reason to his conception of revelation. See *id.* at 65.

<sup>62</sup> *Id.* at 3: "For Locke... it was never a case of rejecting scripture per se but, rather, of rejecting the more dubious claims that others were making about the biblical text."

capacity for rational evaluation of empirical evidence than anyone else.<sup>63</sup> In a Lockean universe, then, even one who believes that the Bible contains absolute moral truth must still establish her superior understanding of that truth in order to justify imposing it on unwilling fellow citizens. Unwilling fellow citizens, in turn, have not only the right, but the moral duty, to reject those impositions of self-styled biblical moralists whom they disagree with.<sup>64</sup>

That is, bracketing of moral claims is not the only way to justify a state that refrains from enforcing biblical morality on its citizens. Another way is to insist, as Locke did, that God intended to create humans as political equals of one another, making the denial of any citizen's equality, especially of her equal right to moral self-evaluation, an immoral act. This theory leaves almost completely undetermined the substance of positive law, but that is a virtue, not a flaw, of Locke's theory, which defines politics in the sense of a mostly open field for the determination and enforcement of the community's norms.

The result of Locke's rational reflection on biblical revelation is a thoughtful, nuanced conception of human identity as the basis for reflection on political legitimacy. Locke was not naïve.<sup>65</sup> But neither was he a pessimist. Parker's analysis of Locke's Christian faith and commitment to intellectually responsible biblical exegesis provides a compelling account of the conception of human identity that informs *The Second Treatise of Government*. Locke was willing to confer an enormous degree of responsibility on ordinary individuals acting as

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<sup>63</sup> *Id.* at 29-32, 152: "The sovereign had no right to impose religious doctrines, for there was no way to be sure that he had the correct interpretation of scripture." *See also*, Tuckness, *supra* note 51 at 4.

<sup>64</sup> LOCKE, *THE SECOND TREATISE* at § 17.

<sup>65</sup> Parker, *supra* note 45 at 39: "But while reason would seem to have great potential to provide understanding, what reason can actually *know for certain* amounts to little."

members of a polity.<sup>66</sup> He was willing to do so because he was persuaded of the human capacity for moral reasoning. The logic of *The Second Treatise* demonstrates this point.

But *The Second Treatise* also confirms what the historical context of the seventeenth century makes clear: the good news for Locke was that humans have the capacity for moral reasoning, but the bad news is that they also have the capacity to kill each other in the name of religious disagreement.<sup>67</sup> In Locke's calculus, better to prohibit the state from enforcing religious doctrine than incur the enormous moral risk of having one set of fallible human beings dictate matters of conscience to other fallible human beings, especially when we know that the results of such dictatorship include war.<sup>68</sup>

### C. The Historical Context

The last chapter in the *Second Treatise of Government* discusses the dissolution of government. Historically, Locke lived through three of them in England: the removal of Charles I at the beginning of the Interregnum, the end of the Interregnum and restoration of the monarchy in the person of Charles II, and the Glorious Revolution, which involved the removal of James II from the throne in favor of William and Mary.<sup>69</sup> Locke went into exile from 1683 to 1689, after the authorities arrested his close political associates for attempting to assassinate both Charles II

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<sup>66</sup> *Id.* at 55, 146.

<sup>67</sup> See, e.g., EDWARD VALLANCE, *THE GLORIOUS REVOLUTION: 1688 AND BRITAIN'S FIGHT FOR LIBERTY* (2006); Peter H. Wilson, *New Perspectives on The Thirty Years War*, 23 *GERMAN HIST.* 237 (2005); DENIS CROUZET, *LES GUERRIERS DE DIEU: LA VIOLENCE AU TEMPS DES TROUBLES DE RELIGION, VERS 1525-VERS 1610* (1990, reprint 2005); ROBERT BUCHOLZ AND NEWTON KEY, *EARLY MODERN ENGLAND, 1485-1714: A NARRATIVE HISTORY* (2003); ROSS HARRISON, *HOBBS, LOCKE, AND CONFUSION'S MASTERPIECE* 4-10 (2003).

<sup>68</sup> Parker, *supra* note 45 at 55.

<sup>69</sup> See *id.* at 67 for a brief overview of these political changes in terms of the biblical claims to authority that each ruler made. See also, Bucholz and Key, *supra* note 67.

and James II.<sup>70</sup> The dissolution of government is important not only as the most prominent type of event during the historical period in which Locke lived, but also as the most obvious point of contact between Locke's life and writing, on one hand, and the American Revolution on the other. But this section on the historical context of Locke's theory discusses the Bible and Adam as much as it does seventeenth-century England because, for Locke as for Filmer, the question of the historical connection between Adam and the present was very real. Adam, and the Christian God, were historical actors for Locke in a way that they are for few modern Americans.<sup>71</sup>

Conceptually, the central question is: Do circumstances exist in which citizens may remove one government or form of government and install another? The purpose of *Two Treatises of Government* is for Locke to explain why he believed the answer was, yes. His rationale involved two primary components, natural law and consent. Consent functions primarily as a means, not an end, in Locke's framework. He asserts that persons may not consent to slavery,<sup>72</sup> or to suicide.<sup>73</sup> The substantive limits on what persons may consent to stem

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<sup>70</sup> See Ashcraft, *supra* note at 406-07ff for a detailed description of these events.

<sup>71</sup> *Infra* notes 89-90 and accompanying text.

<sup>72</sup> This is not to say that slavery is impossible for Locke, only that one may not consent to such status. Insofar as any individual consents to an exercise of authority over her/him that violates natural law, such consent is invalid. One can legitimately become a slave only by committing some crime in the state of nature – that is, by violating someone else's natural rights. LOCKE, THE SECOND TREATISE at §§17, 23. If one legitimately becomes a slave, it is only because she has violated natural law to an extent that death would be a condign punishment, but the person who has captured her in retribution for her crime chooses not to inflict that penalty, extracting labor from her instead. This form of slavery, to reiterate, is valid only in the state of nature as punishment for a violation of natural law.

<sup>73</sup> LOCKE, THE SECOND TREATISE at §6: "But though this be a state of liberty, yet it is not a state of licence, though man in that state have an uncontrollable liberty, to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use, than its bare preservation calls for it.... Every one as he is bound to preserve himself, and not to quit his station wilfully; so by the like reason when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, liberty, health, limb or goods of another."



from natural law, which in turn comes from God.<sup>74</sup> Slavery and suicide both involve what amounts to a disposition of property – the person her/himself – in a manner that violates the rights of the owner, God.<sup>75</sup>

If God created humans, then She has the power to establish hierarchies and governments among them. According to Locke, all empirical evidence indicates that She has not chosen to do either of those things.<sup>76</sup> As he wrote in the early *First Tract on Government*, “the Scripture speaks very little of polities [i.e., politics] anywhere (except only the government of the Jews constituted by God himself over which he had a particular care) and God doth nowhere by distinct and particular prescriptions set down rules of government and bounds to the magistrate’s authority.”<sup>77</sup> Humans, therefore, are completely free and equal relative to each other.<sup>78</sup> This is an axiom for Locke. It is a matter of definition. It is an axiom that he derived from the Bible,

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<sup>74</sup> See Tuckness, *supra* note 51 at 95-96: “Locke justified political power in two primary ways, by appeal to natural law and by appeal to consent. But... the former is logically prior to the latter. We cannot consent to those things that are outlawed by natural law. A promise to commit murder is not binding. Moreover, it is the theory of natural law that justifies the doctrine of consent itself. Locke believed that specific persons could only take on the obligations of a citizen by their own consent because he believed that by nature persons were free, equal, and independent.”

<sup>75</sup> LOCKE, THE SECOND TREATISE at §6: “For men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master... they are his property, whose workmanship they are, made to last during his, not one another’s pleasure. And being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another’s uses, as the inferior ranks of creatures are for ours.” See also § 23.

<sup>76</sup> *Id.* See also, §4: “A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that Creatures of the same species and rank... should also be equal one amongst another without subordination or subjection, unless the Lord and Master of them all, should by any manifest declaration of his will set one above another, and confer on him by an evidence and clear appointment an undoubted right to dominion and sovereignty”; Parker, *supra* note 45 at 12-13.

<sup>77</sup> Locke, *First Tract of Government* (1660), quoted in Parker, *supra* note 45 at 12. As Parker explains, one interesting aspect of this claim, that the Bible nowhere shows a design by God to establish earthly government among humans, appearing in this relatively early work by Locke is that, in 1660, Locke still opposed religious toleration, believing that the best way to avoid political conflict over religious differences was to have government enforce religious belief. It is significant that Locke completely changed his position on this issue by the time of the *Second Treatise of Government* (1689).

<sup>78</sup> LOCKE, THE SECOND TREATISE at §4.

but not on the basis of any text or claim to literalism. Rather, for Locke, God gave humans the power to reason, and although humans should start their deliberations on the legitimacy of political institutions with the Bible, still they must also use reason, fallible though it undoubtedly is, in order to understand how to achieve legitimacy for those institutions and their practices.<sup>79</sup>

This conceptual move on Locke's part does at least two important things. First, it gives all humans equal claim to a basis on which to evaluate the legitimacy of government. Second, it gives those humans a framework within which to acknowledge the importance of the Bible to their personal belief systems while still engaging in non-violent political debate with persons who have different belief systems.<sup>80</sup> Given that disputes between Catholics and Protestants<sup>81</sup> (or, in England, between Protestants and Protestants<sup>82</sup>) played a major, if not the defining, role in the various political conflicts that Locke witnessed during his lifetime – the English Civil War and Glorious Revolution, but also the Thirty Years War in Germany, the French persecution of Huguenots, and the efforts of the Protestant Dutch to remove themselves from the remains of the Holy Roman Empire<sup>83</sup> – the goal of reconciling religious belief with the use of state power was paramount for him. Early in his career, Locke asserted that state enforcement of religious

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<sup>79</sup> Peter Laslett, *Introduction*, in JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (ed. and intro., Peter Laslett) at 110: "There can be no arbitrary source of power of one man over another, not even a source in Revelation, for Divine right has already been disposed of as not proven"; Parker, *supra* note 45 at 3-4, 38ff.

<sup>80</sup> See TUCKNESS, *supra* note 51 at 3-5, *passim*. Based on the *Third Letter Concerning Toleration*, Tuckness develops what he calls the "legislative point of view," according to which all political actors (citizens as well as elected officials) should advocate only those policies that they are prepared to have others enforce, with the explicit expectation that those who enforce a policy will invariably have a somewhat different understanding of its meaning.

<sup>81</sup> See MEIC PEARSE, *THE AGE OF REASON: FROM THE WARS OF RELIGION TO THE FRENCH REVOLUTION, 1570-1789* (2006) (overview of period from the perspective of the Catholic Church).

<sup>82</sup> See ZUCKERT, *THE NEW REPUBLICANISM*, *supra* note 26 at xvi, who notes that, in the English Civil War, if not so much in the Glorious Revolution, the English differed from most Europeans in pitting one group of protestants against another group of protestants.

<sup>83</sup> See *id.*, where Zuckert places major emphasis on Grotius as one of Locke's intellectual interlocutors, noting that Grotius developed his own version of early modern contract theory as the Dutch fought to remove themselves from the Holy Roman Empire. See also sources at *supra* note 67.

practice was the best way to achieve order and stability. He came to conclude over the next twenty years or so, however, that just the opposite was the case: state enforcement of religious practice was a prescription for tyranny, disorder, or both.<sup>84</sup>

In solving this problem, Locke's conceptual starting point was also the textual starting point of the Bible, the book of Genesis. For Locke, Adam was the literal starting point of human history in a manner that even many Christians in the modern world may have trouble appreciating.<sup>85</sup> Even if Locke himself had doubted the historical significance of Adam in Genesis for understanding the legitimacy of government, he had to address the issue if only because he wrote to refute a justification of absolute authority in monarchs as articulated by the conservative author, Sir Robert Filmer.<sup>86</sup> According to Filmer, monarchs in the modern world derive their authority from Adam, to whom God directly granted sovereignty over the earth.<sup>87</sup>

Precisely because Locke possessed a formidable knowledge of the Bible,<sup>88</sup> he was able to refute Filmer on Filmer's own terms. Locke pointed out various logical absurdities on the face of Filmer's argument, including the absence of evidence linking modern monarchs in hereditary terms to Adam. But in addition to logical absurdities, Locke noted ways in which Filmer's defense of patriarchal conservatism failed even to fit well with the Biblical texts that Filmer cited

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<sup>84</sup> See RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS AND LOCKE'S TWO TREATISES OF GOVERNMENT* 75ff (1986) (hereinafter, *REVOLUTIONARY POLITICS*). Accord, ZUCKERT, *LAUNCHING LIBERALISM*, *supra* note 6 at 8-9.

<sup>85</sup> Parker, *supra* note 45 at 103.

<sup>86</sup> *Id.* at 4, 103.

<sup>87</sup> Modern conservatives would do well to consider the following observation about Filmer's patriarchal conservatism: "Property, like authority, is transferable only by the express consent of the authority himself. Acquisition of property was only at the sufferance of the sovereign, as no one else was entitled to any portion of the property by any natural right. Since Adam was granted everything at the beginning, so too the sovereign, and only the sovereign, had the power to give (or take away) property. No one had any natural right to property at all, save what the sovereign handed out." Parker, *supra* note 45 at 87.

<sup>88</sup> *Id.* at 45-46.

for it. One key textual point for Locke was that the Bible itself described ambiguity and change in God's grant of authority to Adam, and between his initial grant to Adam and his postdiluvial regrant of authority to Noah.<sup>89</sup> As Parker concludes,

At the heart of Locke's political theory is a theological view that God intervenes in human affairs, not arbitrarily, but in response to human activities or to accommodate human needs and desires. The emphasis on the changing nature of God's directives in purely theological terms allows for a much more dynamic political structure than the static one promoted by Filmer and other seventeenth-century patriarchalists.<sup>90</sup>

Whereas Filmer tried to use the Bible as a conservative bulwark against historical change, Locke responded that the Bible itself documented historical change, to the point that Locke saw in Genesis deliberate responses by God to changing human needs.

But this means that neither Genesis nor any other book of the Bible can dictate rules of human conduct apart from the human capacity for reason, including consideration of specific historical and cultural circumstances. Locke articulated the implications of this proposition most clearly in the *Second Treatise of Government*, which is the focus of the next section.

#### D. *The Second Treatise of Government*

The *Second Treatise of Government* begins with a brief recapitulation of the points Locke believed he had established in the *First Treatise*, the primary point of which was to refute Sir

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<sup>89</sup> See *id.* at 69 for explanation of how patriarchalists justified the divine right of kings in terms of these two events; see also *id.* at 107-08: "what Adam (as humanity) is given dominion over are only the irrational animals that were created before human beings; they were given no political power, then or subsequently, over other human beings. The fact that Noah is allowed to eat these things in God's reiteration of the donation indicates as much, unless, of course, God allows Noah to eat other humans."

<sup>90</sup> *Id.* at 109.

Robert Filmer's defense of divinely invested monarchy.<sup>91</sup> Filmer asserted that English monarchs, like all monarchs, received their right to rule from God because they descended from Adam, to whom God originally granted dominion over all the earth. Locke raised several objections to this argument, including denying that God's grant of authority to Adam took the form of political power over other humans. He also noted the absurdity of trying to trace human lineages of the seventeenth century directly back to Adam.

From our perspective, however, it is interesting and important to note what Locke did not do: he did not dispute Filmer's strategy of deriving the legitimacy of political power from a biblical story. Whereas, under the United States Constitution, such an intellectual procedure would invite objection as an establishment of religion in violation of the First Amendment, for Locke and his interlocutors, the Bible was an indispensable reference point. The intellectual and political difficulty, for Locke, Filmer, and others at the time was not whether to consult the Bible, but how to understand the significance of biblical stories for contemporary political issues.

For Locke, the solution lay in the use of human reason.<sup>92</sup> The most important claims in the *Second Treatise* have confirmation both from reason and from revelation.<sup>93</sup> This includes his first axiom, the equality of all humans.<sup>94</sup> First, according to Locke's understanding of the

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<sup>91</sup> LOCKE, THE SECOND TREATISE at § 1.

<sup>92</sup> See, e.g., LOCKE, THE SECOND TREATISE at § 8: "And thus in the state of nature, one man comes by a power over another; but yet no absolute or arbitrary power, to use a criminal when he has got him in his hands, according to the passion heats, or boundless extravagancy of his own will, but only to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his transgression, which is so much as may serve for reparation and restraint." See also, *id.* at § 57.

<sup>93</sup> See, e.g., *id.* at § 25: "Whether we consider natural reason, which tells us, that men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things, as nature affords for their subsistence: or revelation, which gives us an account of those grants god made of the world to Adam, and to Noah, and his Sons, 'tis very clear, that God, as King David says, Psal. CXV. Xvi. has given the earth to the children of men, given it to mankind in common"; see also, § 31.

<sup>94</sup> *Id.* at § 4.

Christian God, there is no evidence that such God intended to create some humans as superior to others, at least not with respect to any characteristics that matter for purposes of political philosophy.<sup>95</sup> Second, as an active participant in the Glorious Revolution in England,<sup>96</sup> he faced a problem with a finite range of possible solutions. The problem was where to ground political legitimacy other than in the person of a monarch whose authority stemmed from divine grant. How could the people of England justify removing a particular monarch without legitimating anarchy? If government in fact depended for its legitimacy on divine investiture, as Filmer claimed, then removal of a divinely invested monarch threatened the end of all legitimate government.<sup>97</sup>

But any claim to divine right for the monarch perpetuated, rather than resolving, the two central problems of the day, which were closely intertwined. First, the House of Commons, as the putative representative of English citizens, wished to assert its own authority at the expense of any claim by the monarch to absolute authority.<sup>98</sup> Second, the religious beliefs of the Catholic James II perpetuated the problem of warfare over the relationship between state power and religion that marred Europe throughout the early modern period. The great virtue of natural law for Locke, and for many others in the late seventeenth and eighteenth centuries, was precisely that it provided a basis for political legitimacy apart from sacred text and religious belief, which

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<sup>95</sup> *Id.*

<sup>96</sup> ASHCRAFT, REVOLUTIONARY POLITICS, *supra* note 71, *passim*.

<sup>97</sup> *Second Treatise* at § 1.

<sup>98</sup> See, e.g., ASHCRAFT, REVOLUTIONARY POLITICS, *supra* note 71 at 288-90 for passage on Nov. 11, 1680 by the House of Commons of the bill to exclude the King's brother, James, from the throne, and subsequent defeat of that bill in the House of Lords.

had proven disastrously incapable of legitimating a stable government for the better part of a century.<sup>99</sup>

Locke chose to solve this problem by positing a state of nature in which no government existed.<sup>100</sup> This theoretical situation allows one to think through what powers individuals would permit government to have in terms of the freedoms one could imagine exercising in the absence of government, but that one would willingly grant to other persons the power to restrict.

Lockean consent theory, in short, requires reciprocity in at least two senses: first, one gives up freedoms from the state of nature only insofar as others also give up the same or equivalent freedoms, a proposition that works best conceptually to the extent, second, that one posits antecedent reciprocity – or antecedent power to demand reciprocity<sup>101</sup> -- among the participants. This is foundational equality. Logically, it eliminates the possibility of monarchy or oligarchy in the state of nature.<sup>102</sup> Insofar as monarchy and oligarchy assume the superiority of an individual or small group as the basis for their right to rule, neither can exist in the state of nature because all are equal.

The negotiators of a social contract might still decide that a monarchy or oligarchy would best serve the purpose of government. Locke's consent theory does not logically preclude all forms of monarchy or oligarchy. Prudential considerations might militate in favor of vesting significant power in an individual or small group. Historically, we know that Locke accepted the

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<sup>99</sup> See, e.g., BUCHOLZ AND KEY, HARRISON, *supra* note 67.

<sup>100</sup> LOCKE, THE SECOND TREATISE at § 4: "To understand political power right, and derive it from its Original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."

<sup>101</sup> *Id.* at § 4: "A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another."

<sup>102</sup> *Id.* at § 19.

monarchy under William and Mary after the deposing of James II in the Glorious Revolution.

The key issue for Locke's consent theory is not the type of government per se, but the purpose of government.<sup>103</sup>

Locke began, then, with the axiom that all humans start out free and equal in a hypothetical state of nature. The concept of a state of nature allowed Locke to think through what powers rational adults would grant to a government of their own making, consistent with the principles of natural law. Thus, although he offered majority rule as the only viable form of decision making once a society chose to create a government,<sup>104</sup> still natural law imposes restrictions on what majorities may do. Just as individuals may not consent to slavery or suicide in the state of nature, they may not do so in order to comply with majority rule, either.<sup>105</sup> The definition of government's proper domain, through the device of the founding contract, precedes and limits the exercise of majority rule.

This claim, like many of Locke's claims, has both a principled and a prudential basis. In principle, just as persons may not volunteer for slavery or commit suicide, so they may not cede their natural rights to anyone, including a governing majority, for the simple reason that persons do not own their natural rights.<sup>106</sup> God grants them to us for Her purposes, so we cannot give them up to one another.<sup>107</sup> In practice, the only reason why persons would forego the complete freedom of the state of nature in favor of life under a government is that the enjoyment of natural

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<sup>103</sup> See, e.g., *id.* at § 13, where Locke explains why life under an absolute monarchy would be worse than life in the state of nature insofar as, under an absolute monarchy, one would have no recourse against a self-serving ruler. This claim only makes sense if one assumes the possibility of a non-absolute monarchy, that is, one in which the monarch, as well as everyone else, must abide by some law that exists independently of the monarch.

<sup>104</sup> *Id.* at §§ 95-99.

<sup>105</sup> *Supra*, notes 3, 41, 42 and accompanying text.

<sup>106</sup> LOCKE, THE SECOND TREATISE at §6.

<sup>107</sup> *Id.*



rights in the state of nature is always a highly uncertain business.<sup>108</sup> Although he rejected the notion of original sin, still Locke recognized that some significant number of persons will disregard the natural rights of others. In the state of nature, all persons have the right to punish violations of natural law, so the problem is not that violations will go unpunished.<sup>109</sup> The problem is that enforcement through self-help is expensive, inconvenient, and unreliable.<sup>110</sup> Even in the absence of deliberate violations, fallible human reason will result in conflicting understandings of how to apply natural law in specific situations.<sup>111</sup> Better to divide tasks, such that those who wish to devote their time to law enforcement may do so, presumably in return for an income from the many other persons in the society who are, thanks to the presence of law enforcement, much more free to go about their other business.<sup>112</sup>

This division of labor under government also minimizes one of the biggest problems Locke identifies in both the state of nature and in absolute governments: self-dealing. He was under no illusion about the ability of persons in the state of nature to refrain from evaluating alleged breaches of natural law in terms of their own self-interest. Perhaps the single most important practical effect of creating a government is precisely that it allows for the establishment of a nearly neutral arbiter for disputes. According to Locke, in this respect, an

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<sup>108</sup> *Id.* at § 21.

<sup>109</sup> *Id.* at § 7: “And that all men may be restrained from invading others rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is in that state, put into every mans hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation.” *See also id.* at § 87. *But see id.* at § 126.

<sup>110</sup> *Id.* at § 123: “If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? Why will he give up this empire, and subject himself to the dominion and controul of any other power? To which ‘tis obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others.”

<sup>111</sup> *Id.* at §§ 124-25.

<sup>112</sup> *Id.* at §§ 19, 87-89, 130.

absolute monarchy would be worse than the state of nature.<sup>113</sup> Whereas a self-dealing individual in the state of nature is just that, an individual, and therefore susceptible in turn to retribution if she allows self-interest to lead to excessive punishments for the violations of others, an absolute monarch will routinely decide issues involving her own self-interest, as the primary representative of the state. But to make matters worse, she has the power of a “multitude” with which to escape retribution for acts of self-dealing.<sup>114</sup>

Both in terms of Locke’s formal theory of government as articulated in *The Second Treatise of Government*, and in terms of the historical circumstance in which he wrote, liberalism by definition posits humans as entities with a limited but still useful capacity for reason, which they can and should use to reconsider existing institutions and practices, no matter how long standing or “traditional,” when those institutions and practices have come to promote significant discord and/or injustice. While casting off tradition entirely is probably a bad idea, even if it were possible, still all citizens have in principle an equal right and responsibility to participate in the debate, and no responsibility to accept any given institution or practice as beyond reconsideration. The test that the state’s institutions and practices must pass is their impact on the natural rights of the citizens to life, liberty, and property. Any state institution or practice that fails this test is eligible for rejection by the aggrieved citizens. The next section applies this broad theory of government to the specific issue of legal recognition for same-sex marriages.

### III. General observations about Locke and SSM

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<sup>113</sup> *Id.* at §§ 87, 90-94, 136.

<sup>114</sup> *Id.* at § 13.

The central issue for lesbian/gay equality is same-sex marriage, conservative opposition to which begins with the biblical book of Genesis.<sup>115</sup> Lockean consent theory also begins with Genesis, but for Locke it leads to a system that allows for a high degree of religious and moral pluralism.<sup>116</sup> Historically, that is, Christian conservatives are correct that the prevailing political theory of the United States grows out of Genesis, but they err in the conclusions they draw from this observation. One who would derive legal and policy guidance from a reading of Genesis that is consistent with the Anglo-American tradition of political and legal thought must either accept Locke's premise of foundational equality for all citizens, or justify a departure from the tradition.

Although the Declaration of Independence, stating the Lockean right to withdraw consent as the basis for the American Revolution,<sup>117</sup> also stated a prudential willingness to suffer such wrongs by government as are sufferable,<sup>118</sup> still the underlying point is that individuals' natural rights are worth risking revolution over. It is testament to the value of the American political system that lesbians and gay men as a group have historically preferred to work within that

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<sup>115</sup> JAMES DOBSON, MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS WAR 7 (2004): "Behold, the institution of marriage! It is one of the Creator's most marvelous and enduring gifts to humankind. This divine plan was revealed to Adam and Eve in the Garden of Eden and then described succinctly in Genesis 2:24, where we read, 'Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh' (KJV)."

<sup>116</sup> LOCKE, THE SECOND TREATISE, chap. II, "Of the State of Nature." See also, Parker, *supra* note 45 at 1, *passim*: "Locke's understanding of the relationship between the account of humanity in the book of Genesis and his view of what is the best political ordering for human beings – heretofore a subject of relative neglect – will be the subject of this book."

<sup>117</sup> DECL. OF IND. (1776): "We hold these truths to be self-evident, that all men are created equal... That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government...."

<sup>118</sup> *Id.*: "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."

system in order to achieve equality,<sup>119</sup> rather than calling for a wholesale withdrawal of consent. Or, one could characterize the practice of filing civil rights litigation as a partial withdrawal of consent according to which the petitioners grant the legitimacy of the system as a whole but point out how a specific practice or rule violates the principles that give the system its legitimacy.

Thus, in the Anglo-American political tradition, even the most dire predictions of conservatives are insufficient to justify the continued denial of full equality to lesbians and gay men. The signers of the Declaration, after all, pledged to the cause of natural rights “our lives, our fortunes, and our sacred honor.”<sup>120</sup> Lockean consent theory rests on the belief that humans have the capacity to resolve political issues among themselves, that blind obeisance to supposedly pre-political moral principles is an abdication of our moral and political responsibility, and that efforts to achieve political and policy conformity through appeals to sources of morality that lie beyond the realm of political dispute are themselves immoral.<sup>121</sup>

Or, to put the point another way, the claim that marriage is beyond emendation by law or politics is logically congruent to the claim that monarchy is beyond emendation by law or politics. Neither claim is enforceable in the political and legal tradition of the United States because both violate the principles of consent theory.

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<sup>119</sup> See, e.g., JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1945-1970* (1982); JOHN D’EMILIO, WILLIAM B. TURNER, AND URVASHI VAID, EDs., *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* (2000); DUDLEY CLENDINEN AND ADAM NAGOURNEY, *OUT FOR GOOD* (1999).

<sup>120</sup> DECL. OF IND. (1776).

<sup>121</sup> See Parker, *supra* note 45 at 4, 37, 57 (Locke went as far as he could, short of legal penalty, toward denying the official doctrine of original sin in developing his political theory because he found in that doctrine a denial of individual responsibility).

As to tradition, the most recent decision addressing lesbian/gay civil rights from the United States Supreme Court acknowledges and depends upon the historical scholarship demonstrating that “homosexual” as an identity category only came into existence in the late 19<sup>th</sup> century.<sup>122</sup> In other words, discrimination based on sexual orientation cannot be as ancient as conservatives claim<sup>123</sup> because “sexual orientation” itself is not yet 150 years old. Even if such discrimination were ancient, however, consent theory functions in the Anglo-American tradition of politics and law as justification for the reconsideration of all traditions. Again – not rejection of tradition, but reconsideration. Had the English in the seventeenth century, or Americans in 1776, believed that deference to tradition simpliciter – or to tradition as self-appointed arbiters chose to define it -- was more important than their natural rights, or that the traditional form of government was more important than the traditional rights the government existed to protect, they would have continued to accept the rule of the monarch without question. Again, Locke himself did not reject monarchy outright – he was quite content with the constitutional monarchy of William and Mary that replaced the absolute monarchy of James II.

But Locke articulated the belief that all potential members of the polity start out as equals,<sup>124</sup> and therefore bring equal capacity to negotiate the terms of government with their fellow citizens. From this perspective, opponents of lesbian/gay equality must explain either why lesbians and gay men are not equal to begin with, or why they should be willing to forego their foundational equality in favor of life under a government that could legitimately treat them as second-class citizens. Either claim is facially absurd. Government, according to Locke,

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<sup>122</sup> *Lawrence*, 539 U.S. at 568.

<sup>123</sup> *Bowers*, 478 U.S. at 197 (Justice Burger concurring): “To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”

<sup>124</sup> LOCKE, THE SECOND TREATISE at §4 (quoted at *supra* note 64).

confers distinct advantages over the absence of government, or the state of nature, but a necessary element of the theory is that individuals, equal by birth, forego the complete freedom of the state of nature only in return for access to the benefits of government.<sup>125</sup>

Conservatives would have lesbians and gay men forego the freedoms of non-government without receiving the benefits of government. Again, the conservative argument that discrimination against lesbians and gay men is a long-standing tradition, even if it were true, will not serve the need because lesbians and gay men have the same right as everyone else to insist on the defense of their natural equality and rights to life, liberty, and property. That right trumps any claim to tradition in just the same manner that the rights claims of the revolutionaries in either England or America trumped the traditional claim to authority of the monarch. Or, more precisely, the return to Lockean consent theory reminds us that traditions can come into conflict, requiring a choice. Opponents of same-sex marriage are fond of referring to opposite-sex marriage as “traditional,”<sup>126</sup> but in the United States the willingness to take substantial risks in the name of defending individual rights is also a tradition. Indeed, individual rights are the highest moral good in Lockean liberalism.

In other words, why, in principle, should same-sex couples have to ask for “acceptance” from anyone, particularly from anyone who wishes to deny their right to equality?<sup>127</sup>

Empirically, Justice Kennedy has demonstrated the error in asserting a long-standing tradition in

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<sup>125</sup> *Id.* at § 123.

<sup>126</sup> See, e.g., George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 *BYU J. PUB. L.* 419 (2003-2004); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 *J.L. & POL.* 581 (1999).

<sup>127</sup> See Ball, *Moral Foundations*, *supra* note 17 at 1874-75: “In the past, most gays and lesbians sought, and were satisfied with, tolerance, but now many are asking for *acceptance* by demanding that their relationships be legally recognized.” Emphasis in original.

Western culture of restricting the liberties of lesbians and gay men.<sup>128</sup> Theoretically, we should consider the demand for lesbian/gay equality in terms of the perennial dilemma of American conservatives: as good Burkeans, they would conserve the cultural and political traditions of their nation, but in the United States, those traditions are by definition liberal.<sup>129</sup> The defining tradition of the American polity is a willingness to withdraw consent from any government that fails to defend the rights of its citizens.<sup>130</sup>

Framed in these terms, the question should not be, how do lesbians and gay men secure “acceptance” from the larger society? The question should be, how do conservatives justify the continued denial of equality to lesbians and gay men? Conservative opposition to lesbian/gay equality, whether in the form of same-sex marriage, or otherwise (e.g., military service), begins with an assumption that is morally impermissible in a Lockean framework: the right of the non-lesbian/gay majority to disregard the moral subjectivity of lesbians and gay men. The strongest argument for equality by lesbians and gay men rests on the assertion that, in the Anglo-American tradition, respect for natural rights depends on a foundational commitment to equality as the first moral good and a defining feature of our political and legal traditions.

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<sup>128</sup> *Lawrence*, 539 U.S. at 569-70.

<sup>129</sup> Stephen L. Newman, *Liberalism and the Divided Mind of the American Right*, 22 *POLITY* 75-96 (1989). With over 200 years of liberal tradition now available to citizens of the United States, some conservatives identify an older version of liberalism as an element of the culture they see themselves as defending against innovation. See, e.g., WILLIAM A. RUSHER, *THE RISE OF THE RIGHT* 15-29 (1984). Rusher confirms that conservatives differ from liberals in their understanding of the relationship between an omnipotent deity and human society by quoting, *id.* at 29, principles of conservatism from RUSSELL KIRK, *THE CONSERVATIVE MIND*: “Belief that a divine intent rules society as well as conscience, forging an eternal chain of right and duty which links great and obscure, living and dead. Political problems, at bottom, are religious and moral problems....” But Rusher also identifies nineteenth-century classical liberalism as a set of principles that he, as a conservative, wished to defend. *Id.* But see ZUCKERT, *THE NATURAL RIGHTS REPUBLIC*, *supra* note 26 at 149, describing Harvard President Samuel Langdon’s jeremiad to the First Continental Congress in 1775 as a combination of Puritan theology and Lockean political philosophy.

<sup>130</sup> *DECL. OF IND.* (1776); see also, Tuckness, *supra* note 28 at 547-63.

This is preeminently a question of law. Conservatives often complain in the debate over lesbian/gay civil rights of “activist judges” who override majority sentiment by striking down laws that discriminate on the basis of sexual orientation.<sup>131</sup> The appeal to Lockean consent theory demonstrates why judges are correct to enforce the principle of equality against the principle of majority rule. Scalia implicitly claims that the impositions of government under the United States Constitution are inherently more legitimate than those of the English monarch because the government of the United States is a “democracy,” which vests the power to make such decisions in “the people.”<sup>132</sup>

This answer only begs the question: who are “the people”? If, as representatives of the Christian conservative organization Focus on the Family claim, marriage precedes the state,<sup>133</sup> and lesbians and gay men may not marry whom they wish, one may infer that lesbians and gay men are not part of “the people.” But this proposition violates the foundational equality of Lockean consent theory, and the plain language of the United States Constitution.<sup>134</sup> More directly, the decision of “the people” to confer significant rights and benefits upon the married couples among them raises again the constitutive logical flaw in the conservative argument: why

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<sup>131</sup> See Dobson, *supra* note 115 at 79, quoting law professor Gerard V. Bradley, “The only way to rein in this runaway Court is to change the supreme positive law: the Constitution. The Federal Marriage Amendment (FMA) would do that. It would impose upon willful judges and justices a limitation on their ability to redefine the family”; *Bush Hits Hard at Gay Marriage*, N.Y. TIMES, Oct. 30, 2006: “For decades, activist judges have tried to redefine America by court order,” [President George W.] Bush said Monday. ‘Just this last week in New Jersey, another activist court issued a ruling that raises doubt about the institution of marriage. We believe marriage is a union between a man and a woman, and should be defended’”; PETER SPRIGG, *OUTRAGE: HOW GAY ACTIVISTS AND LIBERAL JUDGES ARE TRASHING DEMOCRACY TO REDEFINE MARRIAGE* (2004).

<sup>132</sup> *Lawrence*, 539 U.S. at 603 (Scalia dissenting): “What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change”; ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9 (1997).

<sup>133</sup> *Supra* note 1.

<sup>134</sup> “We, the People, of the united States of America,” U.S. CONST., preamble. The opening phrase of the Constitution plainly admits of no distinctions on the basis of sexual orientation.



would lesbians and gay men ever consent to such a regime if it systematically excludes them from a whole class of rights and benefits?

One answer might be that those are the only terms on which all others will admit them to the polity. But this only moves the practice of majority rule back one step further in the conceptual framework, allowing it to dictate the terms of the social contract. Such a move violates Locke's theory. If all individuals have equal claim to life, liberty, and property in the state of nature, and government exists first and foremost to protect those rights, then the majority may not condition participation in the polity on a minority's willingness to relinquish those rights. And the current refusal to recognize same-sex marriages patently infringes on the rights to liberty and property of lesbians and gay men.

Thus, bracketing the issue of the First Amendment's prohibition on establishment of religion, Lockean consent theory provides a framework in which lesbian/gay activists can acknowledge the centrality of religious belief to many of their fellow citizens – and, indeed, can acknowledge the centrality of religious belief to themselves<sup>135</sup> -- while still demanding equal protection of the laws against the call by Christian, or any other, conservatives for discrimination by the state<sup>136</sup> against lesbians and gay men. The very political and legal tradition that conservatives in the United States claim to defend, grounded as it is historically in Christian

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<sup>135</sup> See, e.g., Dana Clark Felty, *Hinesville Native Hits the Road for Gay Rights*, SAVANNAH MORNING NEWS, Jan. 29, 2007, available at [www.savannahnow.com](http://www.savannahnow.com) (last visited, Jan. 30, 2007) (story about openly gay, Christian, south Georgia graduate student who will visit campuses of religious colleges and universities that impose restrictions on lesbian/gay students); ADRIAN THATCHER, MARRIAGE AFTER MODERNITY: CHRISTIAN MARRIAGE IN POSTMODERN TIMES 299 (1999): “[M]arriage is able to be extended theologically to lesbian and gay couples.”

<sup>136</sup> To state the obvious, even in the complete absence of discrimination by the state, churches will remain completely free to discriminate against lesbians and gay men all they like, given their right under the First Amendment (and, by implication, under natural law as Locke articulated it) to run their religious polities as they like.

belief, requires equal treatment and equal opportunity in all areas, including marriage, for lesbians and gay men.

#### IV. Specific conservative arguments

This section presents various prominent versions of the proposition that government in the United States has legitimate reason to deny equality to lesbians and gay men, primarily by refusing to recognize same-sex marriages. I do not claim to offer a comprehensive review of the arguments against recognition of same-sex marriages in a textual sense – many specific books and articles on this topic appear here in the footnotes, if at all. The three arguments that I present below, however, cover a wide range of possibilities in that one is distinctively Protestant,<sup>137</sup> one is distinctively Catholic (albeit explicitly articulated in terms of non-Catholic authors in order to increase its persuasiveness and avoid the charge of establishing religion),<sup>138</sup> and one is explicitly non-religious.<sup>139</sup>

Two things tie these three arguments together, apart from their all opposing same-sex marriage. The first is that they couch their opposition to recognition of same-sex marriages in terms of morality, even as they draw their moral principles from different sources. Whatever the differences in the sources of their moral principles, the second commonality they share is that they all illustrate why the conservative position violates the principles of Lockean consent theory. That is, their moral theories entail either assumptions about lesbians and gay men as

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<sup>137</sup> Dobson, *supra* note 115.

<sup>138</sup> *See infra*, IV.C. for discussion.

<sup>139</sup> Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059 (2005). *See infra*, IV.B. for discussion.

persons, or about the relationship of persons generally to the state, or both, that contravene the principles of legitimate government as Locke articulated them.

First, to state the obvious, conservatives want to preserve their definition of marriage precisely because they consider it hugely important. Glenn Stanton's claim that marriage "precedes and exceeds both the church and the state"<sup>140</sup> amounts to the claim that marriage is a precondition for full citizenship. None of these conservative authors makes such a claim explicitly, but, from a Lockean perspective, their arguments in opposition to same-sex marriage entail the denial of citizenship rights to lesbians and gay men if, as Stanton implies, the primary social actors who create government are married.<sup>141</sup>

This is true not only, or even primarily, in the substantive sense that the state licenses marriages, such that state action is involved in the refusal to recognize same-sex marriages, but in a more important procedural sense: opponents of same-sex marriage, whether they say as much or not, deny the right of lesbians and gay men to full participation in the political process precisely because they advocate a close connection between moral evaluation and political outcomes, and they implicitly deny the moral competence of lesbians and gay men. Persons who cannot be trusted to form primary relationships that redound to the good of the larger society also cannot be trusted to participate fully in political and legal decisionmaking. Liberal responses to such claims could take either of two forms. First, liberals could insist that the state should not rely on moral evaluation in deciding political outcomes. Again, this position has not convinced

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<sup>140</sup> *Supra* note 1.

<sup>141</sup> Stanton's point in asserting that marriage precedes and exceeds the church and the state may be that God created all three, rather than that persons must be married in order to participate fully in the creation of churches and states, but if so, then he is even further from Locke's position. *See supra*, notes 76 & 77 and accompanying text.

many people.<sup>142</sup> Second, liberals could insist that Lockean foundational equality prohibits the attribution of moral incompetence to lesbians and gay men as a class.

The unpersuasiveness of the first option – bracketing of moral considerations by the state – helps explain why I consider James Dobson’s argument here. Inclusion of Dobson’s position in this article is perhaps the most controversial for a legal audience. Dr. Dobson has a Ph.D. in psychology, but claims no legal training, and his explicitly Christian conservative argument seems the most susceptible of these three to easy rejection on the grounds that adoption of it would violate the Establishment Clause of the First Amendment to the United States Constitution. Dobson expressly calls on his followers to contact their members of Congress in support of an amendment to the federal Constitution prohibiting recognition of same-sex marriages, however.<sup>143</sup> He does so as part of his argument that any successes for the movement to recognize such marriages result from the decisions of “imperious courts.”<sup>144</sup> Even if lawyers and judges ignore Dr. Dobson, he is unwilling to return the favor.<sup>145</sup>

More importantly, it is impossible for persons with sincere religious beliefs to evaluate legal arguments about lesbian/gay equality without recurring to those beliefs as their primary reference point. One virtue of efforts by scholars such as Ball and Feldblum to provide a moral framework for discussions of lesbian/gay equality is that they recognize the futility and injustice

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<sup>142</sup> See *supra*, notes 17-19 and accompanying text.

<sup>143</sup> Dobson, *supra* note 115 at 79-82.

<sup>144</sup> *Id.* at 79.

<sup>145</sup> See also, David D. Kirkpatrick, *Conservative Christians Criticize Republicans*, N.Y. TIMES, May 15, 2006: “In the last several weeks, Dr. James C. Dobson, founder of Focus on the Family and one of the most influential Christian conservatives, has publicly accused Republican leaders of betraying the social conservatives who helped elect them in 2004.... In addition to reminding conservatives of the confirmations of Chief Justice John G. Roberts, Jr., and Justice Samuel A. Alito, Jr. to the Supreme Court, party strategists say the White House and Senate Republicans are escalating their fights against the Democrats over conservative nominees to lower federal courts, and the Senate is set to revive the same-sex marriage debate next month with a vote on the proposed amendment.”

of defining religious or other moral perspectives as beyond the pale of political and legal discussion. The advantage of Lockean consent theory is that it provides a framework for starting with religious commitments and arriving at a government that respects a high degree of religious and moral pluralism among the citizens.

A. James Dobson

Dobson's argument is conceptually quite simple. He asserts that God ordained marriage as the institutional form of the mystical union between men and women.<sup>146</sup> Certainly married couples routinely produce children, but the genius of marriage in providing appropriate outlet for, and satisfaction of, distinctively male and female emotional and psychological needs is just as important an element of the divine plan, according to Dobson.<sup>147</sup> It is possible for humans to deviate from this divine plan, given that humans have free will and a propensity to sin. From the perspective of the society as a whole, however, significant departures of any type, especially including recognition of same-sex marriages, will result in all manner of major problems.<sup>148</sup>

Dobson's position thus illustrates the common Christian conservative perspective according to which there is little point in distinguishing arguments from first principles and arguments about consequences. Because God defined the known universe in a particular way, it would be foolish not to expect dire consequences to follow from ignoring or defying divine definitions. Formally, this argument is no different from the claim by Christian conservatives that acquired immune deficiency syndrome (AIDS) is the predictable, natural result of gay men's

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<sup>146</sup> Dobson, *supra* note 115 7-8.

<sup>147</sup> Dobson, *supra* note 115 at 9-16, *passim*.

<sup>148</sup> *Id.* at 17, *passim*.

deviation from the divine plan of heterosexuality.<sup>149</sup> On this view, marriage is the basis of the social order. As Dobson puts it, “God announced the ordination of the family, long before He established the two other great human institutions, the church and the government.”<sup>150</sup>

But this statement alone illustrates the difference between Dobson’s perspective and Locke’s. The most obvious difference is simply that, in Locke’s account, marriage is purely contractual and lasts as long as it does among humans because of the long period during which human children are incapable of shifting for themselves, a time also when both parents have the responsibility to ensure their children’s intellectual and moral development.<sup>151</sup> More importantly, as we have seen, Locke inferred the foundational equality of all persons from his conclusion, thoroughly grounded in his reading of the Bible, that God established no government for human beings. Instead, He endowed humans with reason so that they could work out legitimate governing institutions of their own. This is not merely a textual difference. The rest of Dobson’s argument illustrates vividly the differences that follow depending on how one conceives of the relationship between the revealed wisdom of the Bible and the capacity for human reason.

Dobson asserts that

The impact of that vast sociological experiment [recognizing same-sex marriages] is no longer speculative. We can see where it leads by observing the Scandinavian nations of Norway, Denmark, and Sweden, whose leaders embraced de facto marriages between homosexuals in the nineties.... The institution of marriage in those countries is rapidly

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<sup>149</sup> See, e.g., Pat Buchanan, *Nature’s Retribution*, WASH. TIMES, May 27, 1983: “The poor homosexuals: they have declared war upon nature, and now nature is exacting an awful retribution.”

<sup>150</sup> Dobson, *supra* note 115 at 7.

<sup>151</sup> LOCKE, *THE SECOND TREATISE* at §§ 79-83.

dying, with most young couples cohabiting or choosing to remain single. In some areas of Norway, 80 percent of firstborn children are conceived out of wedlock, as are 60 percent of subsequent births. It appears that tampering with the ancient plan for males and females spells doom for the family and for everything related to it.<sup>152</sup>

Even if the statistics Dobson cites are correct, the important question to ask is whether the causal relationship is what Dobson represents it to be. That is, can one really ascribe a very high incidence of births out of wedlock, and the choice of opposite-sex couples not to marry, to the decision to recognize same-sex marriages?<sup>153</sup> This proposition will strike many observers as irrational on its face.

Such reasoning makes sense only if one starts with the proposition that God, via Her divine plan, has established a strict teleology with immediate consequences as the basis for controlling human conduct. But this is precisely the sort of divine government on earth that Locke could find no evidence for, either in the Bible or in human history. It also provides an answer that we should find disturbing to Locke's paradox about the relationship between God's omnipotence and human freedom. Where Locke chose to embrace the paradox, Dobson apparently believes that God's omnipotence places strict limitations on human freedom, not in the mechanical sense of preventing humans from making certain choices, but in the teleological sense of imposing dire consequences on those humans who dare to step out of line.

This point shows the connection between epistemology and morality in Locke's framework. One who advocates an uncritical literalism in biblical interpretation is more likely to

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<sup>152</sup> Dobson, *supra* note 115 at 9.

<sup>153</sup> Dobson could insist that his point is more subtle, that the same set of social and political attitudes that produced recognition for same-sex marriages also produces a very high incidence of births out of wedlock, and a declining overall incidence of marriage. At least in Dobson's version of it, however, even this more subtle form of the argument falls to the objection that I present in the following text.

advocate authoritarian government on the logic that government must adhere to the text of the Bible. Dobson's data is irrelevant from the perspective of Lockean rational empiricism and its concomitant commitment to self-government. Not surprisingly, given that Dobson's starting point is in some sense the opposite of Locke's, the rest of Dobson's reasoning is also the inverse of Locke's. Most importantly, although he does not say so explicitly, Dobson adopts a politics that rejects Locke's foundational equality.

Dobson's biblical ideal of marriage clearly assumes a gender hierarchy. Men and women in Dobson's account play different roles, and women's role is just as important as men's, but it is plainly a subordinate role.<sup>154</sup> Offering his own marriage as an exemplar, Dobson asserts about his wife, Shirley:

She observed that I needed her to respect me, to believe in me, and to listen to my hopes and dreams. Shirley said all the right things, not because she was trying to manipulate me, but because she clearly believed them. She would often tell me, "I am proud of you, and I'm glad to be part of your team. It is going to be exciting to see what God will do with us in the days ahead."<sup>155</sup>

Apparently, at least on Dobson's reading, the Bible makes no provision for women as team leaders.<sup>156</sup>

But at least women have a role to play in Dobson's universe, albeit a role defined in terms of cooking meals on Valentine's Day.<sup>157</sup> Far more troubling from the perspective of

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<sup>154</sup> Dobson, *supra* note 115 at 9-12.

<sup>155</sup> *Id.* at 15-16.

<sup>156</sup> See Feldblum, *Gay is Good*, *supra* note 18 at 169-71, for a useful overview of why feminists have significant concerns about "traditional marriage" along the lines that Dobson promotes.

<sup>157</sup> See Dobson, *supra* note 115 at 15-16, where he tells the story of forgetting to observe the first Valentine's Day that occurred after his marriage to Shirley. The implication of Dobson's story is that all women, or at least all



Lockean foundational equality is Dobson's contemptuous assessment of lesbians and gay men. In general, Dobson's support for the "ex-gay" movement parallels his effort to remove the definition of marriage from political and legal debate.<sup>158</sup> "Ex-gay" activists assert that lesbians and gay men can become heterosexual with the right combination of therapy and conversion to conservative Christianity.<sup>159</sup> Indeed, Dobson claims to offer "information on addressing, understanding, and preventing homosexuality."<sup>160</sup> This amounts to the implicit claim that lesbians and gay men inherently lack competence to participate on their own behalf in political debates, and that "homosexuality" is a disorder that our society would be better off preventing entirely.<sup>161</sup>

Dobson confirms this characterization of his position with his description of lesbian/gay civil rights activists:

The shouting and blustering of homosexual activists is not unlike that of a rebellious teen who slams doors, throws things around, and threatens to run away. Most parents have had to deal with this kind of behavior and have learned that giving in at such a time can be disastrous for both parties. What's needed is loving firmness in the face of temper tantrums and accusations.<sup>162</sup>

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normal women, are obsessed with romanticism and emotional issues, which men need to realize and respect in order to have successful marriages.

<sup>158</sup> *Id.* at 73-74.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 74.

<sup>161</sup> See *Homosexuality May be Based on Biology, Baptist Says*, NY TIMES, March 16, 2007 (President of Southern Baptist Seminary speculating that identification of biological marker for lesbian/gay identity might allow parents to prevent it); RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1980) (describing events that led the American Psychiatric Association to remove "homosexuality" as a diagnosis from its nosology, the Diagnostic and Statistical Manual, in 1973).

<sup>162</sup> Dobson, *supra* note 115 at 66.

This is patriarchal politics in the most literal sense. Dobson claims no legal authority to exclude lesbian/gay activists from political debates, but he does represent himself as the concerned father who knows the best interest of his children better than they know themselves.<sup>163</sup>

Reading Locke as Kim Ian Parker does, in terms of his expertise in biblical exegesis, illustrates that Dobson has one foot on the boat and one foot on the dock. He wants to invoke what he takes to be God's definition of marriage in Genesis, but he also calls upon his readers to petition government on behalf of a constitutional amendment prohibiting recognition of same-sex marriages. Parker explains, however, that the approach to biblical interpretation that Dobson uses also leads to the proposition that Adam's descendants have no moral basis for any disagreement with the sovereign.<sup>164</sup> If the sovereign chooses to recognize same-sex marriages, that is, opponents have no grounds for objection under the Filmerian description, unlike the Lockean description, which asserts the existence of natural rights that government has a responsibility to respect and protect. Perhaps Dobson has some explanation for why we should accept a divine definition of marriage from Genesis, but not a divine grant of authority to Adam as the basis for the divine right of kings. However, from a Lockean perspective, the logic of his defense of marriage is formally indistinguishable from Filmer's defense of divine monarchy.

Or perhaps Dobson would take the same position as Thomas Hobbes, Locke's predecessor in articulating modern consent theory. The dilemma in terms of political theory is the same for Dobson, whether he adopts Filmer's or Hobbes' position. Because he saw the state of nature as the war of all against all, Hobbes concluded that citizens should create government,

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<sup>163</sup> See also, *id.* at 105 (comparing prevention of same-sex marriage to stopping someone from stepping off a cliff).

<sup>164</sup> Parker, *supra* note 45 at 93.

then surrender all power to it.<sup>165</sup> No justice exists in the Hobbesian state of nature, making government the sole source of any justice the citizens can hope to get.<sup>166</sup> But one problem that emerges is, how do we determine which is the legitimate source of authority, the father or the government, if the two come into conflict? Dobson simultaneously defends a profoundly patriarchal definition of marriage, and the proposition from political liberalism that individuals should petition government for the redress of grievances. If we would have limited government, the limits must come from somewhere.

Illustrating the differences between Hobbes' social contract theory and Locke's, Parker cites a passage from Hobbes' *Leviathan* that he calls "often overlooked":

originally the Father of every man was also his Sovereign Lord, with power over him of life and death; and that the Fathers of families, when by instituting a common-wealth, they resigned that absolute power, yet it was never intended, they should lost [sic] the honour due unto them [from their children] for their education.<sup>167</sup>

This is a key point on which Hobbes and Locke differ – Locke specifically rejected the proposition that fathers have the right of death over their children.<sup>168</sup> Parker notes that, in Hobbes' account, fathers speak for their families in creating government, as opposed to Locke's account, in which individuals speak for themselves.<sup>169</sup> In toto, Dobson's position on same-sex

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<sup>165</sup> THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL* 64-65 (1651).

<sup>166</sup> *Id.*

<sup>167</sup> HOBBS, *LEVIATHAN*, quoted in Parker, *supra* note 45 at 79-80.

<sup>168</sup> LOCKE, *THE SECOND TREATISE* at § 65: "Or can she [the mother] inforce the observation of them with capital punishments? For this is the power of the magistrate, of which the father hath not so much as the shadow. His command over his children is but temporary, and reaches not their life or property."

<sup>169</sup> Parker, *supra* note 45 at 79-80.

marriage seems to commit him to Hobbes' position, in which wives and children silently accept the dictates of patriarchal power.

Happily for the tradition of Anglo-American liberalism, Locke's decisive refutation of Filmer remains just as available and relevant in the early twenty-first century as it was in the late seventeenth century. Although the focus has shifted from monarchy to marriage, Dobson's position is formally congruent to Filmer's. Both assert that the institution they claim to defend is that which God ordained, as described in the first book of the Bible. We should continue this comparison in evaluating the dire consequences conservatives predict from revolutionary change: according to conservative predictions in the seventeenth and eighteenth centuries, neither England nor the United States can survive as a nation without absolute monarchy, in the case of England, or monarchy of some sort in the case of the United States, guiding it. It is reasonable to infer that conservative predictions about the consequences of recognizing same-sex marriages will be just as accurate as their predictions about the consequences of rebelling against an unjust king.

#### B. Amy Wax

Law professor Amy Wax is unusual in offering an explicitly non-religious conservative explanation for opposing recognition of same-sex marriages. She wrote expressly to fill a void she saw in the literature on this topic. Describing the arguments against recognition of same-sex marriage in conservative journals of opinion, Wax sees "something of a grab bag, lacking sustained and systematic exposition."<sup>170</sup> Similarly, she notes that Justice Scalia expressed his opposition to same-sex marriage, especially if it results from a judicial opinion, in his dissent in

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<sup>170</sup> Wax, *supra* note 139 at 1062.

*Lawrence v. Texas*, but he failed to articulate fully why he believes that government in the United States has permission under the Constitution to prohibit such marriages.<sup>171</sup> She finds somewhat more robust justifications in *In re Kandu*<sup>172</sup> and *Lofton v. Kearny*,<sup>173</sup> but she still notes that the courts in both of these cases overlook the statutes' own stated rationale for discriminating against lesbians and gay men: "the goals of promoting traditional morality."<sup>174</sup> This is, as Wax notes, a rational basis for legislation according to Scalia in his *Lawrence* dissent.<sup>175</sup>

In order to provide the "unified, systematic exposition" that she finds lacking elsewhere, Wax looks to the work of conservative authors Edmund Burke and Michael Oakeshott.<sup>176</sup> A common theme in the work of both is the belief that existing institutions embody the accumulated wisdom of generations, which any given generation tampers with at its peril.<sup>177</sup> As Wax notes, both Burke and Oakeshott emphasized the limits of human reason, asserting that no individual or generation is likely to understand fully why their forebears for generations past have done something in a particular way.<sup>178</sup> Therefore, tampering with long-standing institutions on the basis of the rationality of the day is a dangerous business.

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<sup>171</sup> *Id.* at 1063-64.

<sup>172</sup> 315 B.R. 123, 148 (2004) (holding that Defense of Marriage Act as forbidding joint bankruptcy filing by lesbian couple who married in Canada is not unconstitutional).

<sup>173</sup> 157 F. Supp. 2d 1372 (S.D. Fla. 2001), *appealed sub nom.* *Lofton v. Sec'y of the Dept. of Children and Family Svcs.*, 358 F.3d 804 (CA 11 2004), *reh'g en banc denied*, 377 F.3d 1275 (CA 11 2004), *cert. denied*, 2005 U.S. Lexis 285 (Jan. 10, 2005) (holding that statute prohibiting adoption by lesbians and gay men does not violate the U.S. Constitution).

<sup>174</sup> Wax, *supra* note 139 at 1064.

<sup>175</sup> *Id.* at 1064-65.

<sup>176</sup> *Id.* at 1065.

<sup>177</sup> *Id.* at 1066-67.

<sup>178</sup> *Id.*

Thus, in Wax's summary,

The dilemmas of human existence are particularly resistant to rational analysis because social practices and traditions are not derived from first principles, but evolve over time by trial and error.... The test of behavioral rules is thus whether they work well in the real world as guides for human interaction rather than whether they conform precisely to syllogistic demands. For this reason, institutions and customs routinely admit of exceptions or variations that fit uneasily within logical categories or fall short of treating seemingly like cases alike.<sup>179</sup>

As Wax explains, this does not mean that either Burke or Oakeshott opposed all social change on principle. Rather, their positions lead them to take a hesitant attitude toward change.<sup>180</sup>

Wax's conservatives evaluate proposed changes with a combination of respect for the wisdom of existing institutions, and a strong concern for the likelihood of unintended consequences growing out of untested innovation. Given this perspective, Wax surmises that both Burke and Oakeshott would oppose the use of the courts as the vehicle for achieving legal recognition of same-sex marriage.<sup>181</sup> Changes should reflect the belief of at least a majority that

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<sup>179</sup> *Id.* at 1069. Of course, to anyone who is familiar with the problems in "the real world" that same-sex couples routinely face, this sounds like an argument for recognition of same-sex marriages, not an argument against it. *See, e.g.,* Varnum v. Brien, Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, Ia. Dist. Court for Polk County, Dec. 13, 2005 at ¶¶ 24-29 (describing harms that plaintiff couples suffer from their inability to marry, none of which involves sexual activity). Available at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/586.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/586.pdf). *See also* letter, Dayna K. Shah, Assoc. Gen. Counsel, Gov't. Accounting Offc., to Bill Frist, Majority Leader, United States Senate, Jan. 23, 2004, identifying "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges," <http://www.gao.gov/new.items/d04353r.pdf> (last visited Feb. 2, 2007). The availability of many rights and benefits depends on state law. *See* <http://www.hrc.org/Template.cfm?Section=Center&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=63&ContentID=29906> (last visited Feb. 2, 2007). If "institutions and customs routinely admit of exceptions or variations," then why do conservatives insist on a narrow definition of marriage, such that it excludes same-sex couples?

<sup>180</sup> Wax, *supra* note 139 at 1069-70.

<sup>181</sup> *Id.* at 1075.

the proposed change is necessary.<sup>182</sup> Much more than a majority will often be necessary in Wax's scheme because she would give decisive voice to persons who doubt the wisdom of change as a matter of inclination.<sup>183</sup>

This point illustrates how Wax's conservatism closely parallels Locke's analysis in one important respect. Wax emphasizes the signaling effect of social practices. Custom is more important than abstract principles of reason for evaluating the moral quality of existing institutions and practices in part because most individuals either will not or cannot reason through the full implications of their choices.<sup>184</sup> In Wax's account, this limitation results at least in part from the impossibility of any given individual predicting accurately how her choices will ripple across generations. The society as a whole, then, has good reason to rely on categories defined by bright-line rules as elaborated over time – e.g., all valid marriages must consist only of one man and one woman. Such categories signal the wisdom of the society more effectively to persons who might have doubts about how to organize their lives.

This evaluation of the relationship between any given individual's knowledge and reasoning capacity, on one hand, and the cumulative wisdom of the larger society, on the other, might seem fundamentally at odds with Locke's willingness to evaluate the political implications of biblical stories according to reason and empirical evidence. Locke believed, however, that whatever the theoretical value of reason and empiricism for moral and political philosophy, in practice many individuals would find it difficult to engage in such reasoning successfully. The

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1070-71.

<sup>184</sup> *Id.* at 1068-69.

concern here parallels his observation that all persons in the state of nature would know the principles of natural law, but many would regularly violate those principles.<sup>185</sup>

Locke arrived at a libertarian, rather than a conservative, conclusion from this observation, however. One could decide that doubts about the moral reasoning ability of ordinary individuals justify deference to tradition, as Wax advocates by citing Burke and Oakeshott. One could just as easily, however, notice that deficiencies of moral reasoning ability seem as common among statesmen and other leaders as among ordinary persons, leading to the belief that one should constantly subject existing beliefs and practices to review in order to detect and extirpate injustice. The fallibility of human moral reasoning might mean that traditions are repositories of wisdom, but it might also mean that traditions are repositories of injustice. The most likely conclusion, I think, is that traditions are repositories of both wisdom and injustice, raising the question of how to distinguish between the two. Perhaps Wax and other conservatives have a better candidate than human reason for this purpose. If so, they should articulate it.

Certainly the example of the Founders of the United States, several of whom owned slaves<sup>186</sup> even as they proclaimed the equality of all men [sic], suggests that moral reasoning can legitimately cause us both to admire our Founders and to criticize them for specific beliefs and practices at the same time. Similarly, as both the Founders and Locke himself demonstrated, certain deeply embedded, long-standing moral principles of a single culture can come into conflict with each other because of historical circumstances. This is a reasonable description of the problem with absolute monarchy that Locke suffered from throughout his life and wrote *Two Treatises of Government* to resolve. It is also a reasonable description of the argument in the

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<sup>185</sup> LOCKE, THE SECOND TREATISE at § 136.

<sup>186</sup> See, e.g., PETER S. ONUF, ED., JEFFERSONIAN LEGACIES (1993).



Declaration of Independence, with its claim to defend the traditional rights of British Americans against “the present king of Great Britain.” This argument is illogical on its face. How could British citizens need to vindicate their rights against the King of Great Britain? It makes sense only in light of the assertion that the self-styled avatar of the British political, legal, and cultural tradition, the King, himself violated the rules, and that the citizens have the right to defend themselves, including by resort to arms if necessary.

Again, Locke’s consent theory does not entail, or even contemplate, the rejection of all tradition. It entails instead systematic, rational reflection on tradition. Here is where, despite their similar assessments of individuals’ capacity for moral reasoning, Locke parts company from Wax’s conservatives. If Locke had accepted Burke’s and Oakeshott’s argument for the moral wisdom inherent in social institutions as they emerged over time, he would never have written *Two Treatises of Government*, or any of the three *Letters on Toleration*. Wax’s position implicitly assumes widespread acquiescence within the society to existing institutions. But where groups disagree over the legitimate power of government to the point of warfare, as they did in England during the seventeenth century and in British North America during the eighteenth century, it is hard to imagine why one would reject an abstract, philosophical analysis of the morality of state power that had the effect of legitimating the beginnings of a lasting peace simply because it was abstract and philosophical. In other words, the great irony of Wax’s position – that Burke and Oakeshott correctly warn us about the dangers of relying on abstract principles to critique traditional institutions and practices – is that it is profoundly unmoored from the facts of American history.

This point also reminds us to attend more carefully to the form of the argument than to the specific actors involved. Just as Scalia distinguishes “democracy” in the United States from

monarchy and suggests that we should defer to majority rule because we live in a “democracy,”<sup>187</sup> so Wax effectively argues that the accumulated wisdom of a culture is definitionally more reliable as a source of moral evaluation than the thoughts of any given person, including a monarch.<sup>188</sup> But the important point from a Lockean perspective is not so much the source of the moral evaluation as the attitude that its proponents ask us to take toward it. Both Wax and Dobson (and, we shall see, New Natural Law theorists) implicitly advocate a highly deferential, not to say completely uncritical, attitude toward sources of moral authority. They are certainly free to take such an attitude if they so choose, but they should not be surprised if many American citizens, whether they have read Locke or not,<sup>189</sup> understand that a defining element of our political and legal tradition is a certain amount of skepticism toward political and legal traditions, and toward those who would define our traditions for us.

Wax’s conservative account is probably correct descriptively. That is, major social changes probably take place in somewhat the manner she describes as preferable from a conservative perspective. But her account also begs a number of important questions, both practical and normative. First, how is it that the “practical dilemmas” of daily life do not now include the problems that same-sex couples routinely face because of their inability to marry? Conservatives might insist that the inability of same-sex partners, for example, to sue for wrongful death after the violent expiration of their partners, or the uncertainty of their ability to visit one another in the hospital, or their inability in many instances to provide health insurance

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<sup>187</sup> See Scalia, *supra* note 117 at 9.

<sup>188</sup> Wax, *supra* note 139 at 1068-69.

<sup>189</sup> See sticker on utility pole, DeKalb Avenue at Moreland, Atlanta, GA (last visited Jan. 29, 2007): “Declaration of Independence, 1776: When my VOTE does not count! [sic] Then your LAWS do not count!” This statement seems to endorse simple majority rule, but the issue of counting votes necessarily implicates rules about who gets to vote and which votes count – that is, it implicates a constitution. See, e.g., *Bush v. Gore*.

and other benefits to their partners even when their heterosexual coworkers take spousal benefits for granted<sup>190</sup> – all of these specific, concrete disadvantages that attach to same-sex couples might be a small price to pay for the continuing viability of marriage in its “traditional” form, according to Wax’s conservative analysis. According to consent theory, however, the persons who will suffer the harm should have at least the same opportunity as all others to evaluate the cost of the harm to themselves relative to the benefit that the larger society supposedly enjoys thereby. On its face, foundational equality militates against imposing harms on individuals in the name of alleged social benefit.

Secondly, Wax’s conservatism seems to eliminate the possibility of constitutionalism, which after all is an effort to codify a set of abstract propositions about government for continued use across generations. Here is a specific example of the problem that conservatives face in conserving a liberal political and legal tradition. Even if they often lack knowledge of its specific provisions, most Americans revere the Constitution, to the point that they are willing to defer to those provisions despite the unpopularity of the result (and, in some cases, the dubiousness of the official interpretation that leads to that result<sup>191</sup>). Where a constitutional provision comes into conflict with another allegedly “traditional” practice or institution,<sup>192</sup> how would Wax’s conservatives have us decide the issue?

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<sup>190</sup> See *supra* note 178.

<sup>191</sup> See, e.g., Bush v. Gore. Compare *House to Vote on Eminent Domain Measure*, N.Y. TIMES, Nov. 3, 2005: “‘For a country founded on property rights this is a terrible blow,’ said the House’s third-ranking Republican, Deborah Pryce of Ohio,” referring to *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (municipal taking of private property for transfer to another private owner in the name of economic development does not violate Takings Clause of Fifth Amendment). The N.Y. TIMES story described likely bipartisan passage of a bill that would withhold all federal economic development funds for two years from any municipality that uses eminent domain to transfer property from one private owner to another in the interest of economic development..

<sup>192</sup> See Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2005-2006).

This point is closely related to a third, more specific question: how would Wax's conservatives have dealt with particular problems in the history of the United States, such as racial segregation? Note that this is not the practice, which Burke and Oakeshott deplore in Wax's account, of deriving a moral principle from one set of circumstances and trying to apply it to others.<sup>193</sup> Instead, this is simply the identification of a major – THE major – social and political debate of the twentieth century in the United States in order to consider what impact conservative thinking would have had on it.

To take the most famous relevant court case, *Brown v. Board of Education*<sup>194</sup> produced what most observers call “massive resistance” from a large number of conservative political leaders in the affected states.<sup>195</sup> It is hard to see how Burke or Oakeshott, under Wax's explication, could avoid siding with the conservative opposition to *Brown* (although they might well choose to do so in a manner that showed more respect for the plaintiffs – let us at least consider the possibility of a responsibly non-racist position in opposition to *Brown* on the conservative grounds that Wax articulates). *Brown* was nothing if not the application of an abstract definition of “equality” as a moral principle for the purpose of eradicating a long

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<sup>193</sup> Wax, *supra* note 139 at 1074.

<sup>194</sup> 347 U.S. 483 (1954).

<sup>195</sup> See, e.g., CLIVE WEBB, MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION (2005); GEORGE LEWIS, THE WHITE SOUTH AND RED MENACE: SEGREGATIONISTS, ANTICOMMUNISM, AND MASSIVE RESISTANCE, 1945-1965 (2004); MATTHEW D. LASSITER, THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA (1998); ALEXANDER LEINDHOLDT, STANDING BEFORE THE SHOUTING MOB: LENOIR CHAMBERS AND VIRGINIA'S MASSIVE RESISTANCE TO PUBLIC-SCHOOL INTEGRATION (1997); Thomas Victor O'Brien, “Georgia's response to *Brown v. Board of Education*: The Rise and Fall of Massive Resistance, 1949-1961,” Ph.D. diss., Emory University, 1992; JAMES W. ELY, THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE (1976); WILLIAM H. TURPIN, EDITORIAL LEADERSHIP IN A TIME OF CRISIS: VIRGINIA'S MASSIVE RESISTANCE, 1954-1959 (1976); FRANCIS M. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE (1973).

standing, organic social custom.<sup>196</sup> Or to take the more obviously relevant desegregation decision, *Loving v. Virginia*,<sup>197</sup> one need not compare interracial to same-sex marriages in order to ask how the Supreme Court could have struck down Virginia's antimiscegenation statute consistently with Burke's and Oakeshott's preference for practices and institutions that emerge over time against the abstract propositions of moral reflection.<sup>198</sup>

In the end, it is hard to see how Wax's conservatives can avoid perpetuating hierarchies in violation of foundational equality. Some conservatives, perhaps including Wax, would respond consistently by asserting the value of hierarchies to the social order.<sup>199</sup> But such a position only begs the question: how do we choose which hierarchies to perpetuate, and which to eliminate? Do Wax and her fellow conservatives support the anti-hierarchical implications of the 1964 Civil Rights Act? If not, why not? If so, then why is heterosexual supremacy acceptable when white supremacy<sup>200</sup> and male supremacy<sup>201</sup> are not?

Wax seems ill-prepared to address this question, based on the scholarly apparatus of her article. It is worth noting here, for example, Wax's peculiar refusal to cite any of the relevant literature on changes in marriage law in the United States, even though she offers such changes

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<sup>196</sup> 347 U.S. at 495: "we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *But see* DAVID FORT GODSCHALK, *VEILED VISIONS: THE 1906 ATLANTA RACE RIOT AND THE RESHAPING OF AMERICAN RACE RELATIONS* 5-10 (2005) (recent discussion of historical literature demonstrating the fluidity of racial identities and relationships in the late nineteenth and early twentieth centuries, belying belief that segregation was as deeply rooted custom as its proponents liked to claim).

<sup>197</sup> 388 U.S. 1, 12 (1967): "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."

<sup>198</sup> Wax, *supra* note 139 at 1072-73.

<sup>199</sup> *See, e.g.*, Rusher, *supra* note 129, quoting Russell Kirk.

<sup>200</sup> *Loving*, 388 U.S. at 11, characterizing antimiscegenation statute at issue as designed to perpetuate "White Supremacy."

<sup>201</sup> *Reed v. Reed*, 404 U.S. 71 (1971) (striking down statute preferring males to similarly situated females for purposes of administering decedents' estates as violation of Equal Protection Clause).

as possible case studies for developing a non-religious conservative position on changes in marriage law.<sup>202</sup> Charitably, one might note that some champions of women's rights have argued that applying the abstraction of "equality" to women via such law "reforms" as no-fault divorce and employment nondiscrimination has done more harm than good.<sup>203</sup> Granted, this is not a conservative position, but it is evidence for the claim that applying moral abstractions to social practices does not always result in improvement.

Less charitably, one cannot help but wonder at Wax's decision to offer only a reference to Australia<sup>204</sup> in a passage that refers broadly to "the disappearance of the marriage bar in employment, the enactment of no-fault divorce, the virtual abolition of alimony, and the evolution in the rules of child custody from paternal prerogative to 'tender years' maternal preference to joint custody[.]"<sup>205</sup> Could it be that the relevant literature on these topics illustrates more vividly than Wax cares to admit why the application of moral abstractions, or at least constitutional propositions, is a good idea? Could it be that, while each of these changes undoubtedly produced some unintended, and undesirable, consequences, still they are part of a process of social and legal change in the right direction? Why exclude from this list the elimination of antimiscegenation laws,<sup>206</sup> or repeal of laws and practices permitting men to beat their wives,<sup>207</sup> or of laws making marital rape a legal impossibility? In context, Wax's omission

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<sup>202</sup> Wax, *supra* note 139 at 1074.

<sup>203</sup> See, e.g., MARTHA FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); FINEMAN, *THE AUTONOMY MYTH* (2004).

<sup>204</sup> Wax, *supra* note 139 at 1074 n. 51.

<sup>205</sup> *Id.*

<sup>206</sup> *Loving*, 388 U.S. 1.

<sup>207</sup> Reva Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 *YALE L.J.* 2117 (1995-1996).

of these issues from her discussion looks like a tendentious decision to avoid precisely those examples that demonstrate vividly the perils of her brand of conservatism.

Worse, in doctrinal terms, Wax's critique of the substantive arguments that activists provide on behalf of same-sex marriage rests on a characterization of those arguments that is simply wrong. According to Wax,

the arguments for same-sex marriage that are grounded in the primacy of equality are intertwined with a call for respecting 'fundamental' individual rights to sexual privacy and autonomy. Although some rights are regarded as absolute and inviolable, legal doctrine allows the presumption of invalidity to be rebutted in some cases.... Those who plead the case for same sex marriage demand a compelling justification for the claimed violation of equal treatment and the compromise of the full exercise of sexual autonomy that results."<sup>208</sup>

But this is a gross mischaracterization, even of the position as Justice Kennedy states it in *Lawrence*, where he notes that it would demean both opposite- and same-sex couples to state that their rights claims boil down to nothing other than the right to have sex.<sup>209</sup>

Wax's characterization of the legal position that proponents of same-sex marriage adopt, conspicuously unsupported by a single reference to any relevant source material, looks like an attempt to perpetuate the stereotype that lesbians and gay men care about liberty only insofar as it permits sexual promiscuity.<sup>210</sup> Attorneys who file suits to win recognition of same-sex marriage, as good litigators, include multiple arguments for their positions, including an

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<sup>208</sup> Wax, *supra* note 139 at 1076.

<sup>209</sup> *Lawrence*, 539 U.S. at 567.

<sup>210</sup> See, e.g., Dobson, *supra* note 115 at 17-18: "Homosexuality is only one of the several ways we can wound ourselves and devastate those around us. Ironically, homosexual activists strive with all their energies to achieve 'freedom' from the shackles of moral law and traditional families. But the Scripture teaches that true freedom and genuine fulfillment can be found only when we live in harmony with our design."

argument from sexual autonomy where appropriate.<sup>211</sup> The fact remains that an equal protection critique of the refusal to recognize same-sex marriages can stand easily on its own.<sup>212</sup> Absent the red herring of “sexual autonomy,” what justification would Wax, or any other conservative, offer for the practice of conferring multiple privileges and benefits on one set of couples, while denying those privileges and benefits to other, similarly situated, couples? If Wax disputes the claim that opposite- and same-sex couples are similarly situated, on what basis does she do so?

It is true, of course, that equal protection of the rights of same-sex couples to legal marriage would result in sexual autonomy for such couples – to exactly the same extent as opposite-sex couples. Wax inadvertently flags the very definition of equality: the right to sexual autonomy that she would use to taint the equal protection claims of same-sex couples is only the right to sexual autonomy that opposite-sex couples need make no demand for because they can take it for granted.<sup>213</sup> Anyone who doubts this proposition must offer some other explanation for the fact that the Supreme Court in *Bowers v. Hardwick* endorsed the dismissal of a heterosexual couple from the challenge to Georgia’s facially neutral sodomy statute by noting that the heterosexual couple was unlikely to suffer any enforcement of the statute.<sup>214</sup> This is undoubtedly a deeply rooted social practice of just the sort Wax’s conservatives believe we change only at our

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<sup>211</sup> *But see* Varnum v. Brien, Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, *supra* note 178 (no mention of “sexual autonomy” in petition to secure recognition of same-sex marriages).

<sup>212</sup> *Id.* at ¶37: “The State’s prohibition on marriages between persons of the same sex discriminates against individuals in same-sex relationships because they wish to marry a life partner of the same sex, allowing access to marriage only for different-sex couples. This prohibition draws impermissible distinctions based on sex and sexual orientation, and in the exercise of fundamental rights, all in violation of the equal protection guarantee of the Iowa Constitution, Article I, § 6.”

<sup>213</sup> *Lawrence*, 539 U.S. at 575: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests”; *id.* at 584 (O’Connor dissenting): “A state can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law.”

<sup>214</sup> *Bowers v. Hardwick*, 478 U.S. 186, 188 n. 2 (1986).



peril, but the obvious Lockean question is, why should lesbians and gay men rest content with their own susceptibility to enforcement of a statute that does not even distinguish them as targets when others who commit the same acts can rest assured that they will remain free of enforcement?

### C. New Natural Law Theorists

New Natural Law theory is “new” in the sense that its proponents have mostly articulated their positions over the past twenty years.<sup>215</sup> New Natural Law theory is quite old, however, insofar as those proponents rely on a wide range of authors dating back to Plato and Aristotle for the moral propositions they believe government should enforce, including the refusal to recognize same-sex marriages.<sup>216</sup> James Dobson’s biblical argument against recognition of same-sex marriage fails in the Lockean framework because Locke saw that attempts to ground the legitimacy of government directly in biblical text failed, leading him to apply reasoned empiricism to the problem of providing moral legitimacy for government. The New Natural Law (NNL) argument against recognition of same-sex marriage fails in the Lockean framework because Locke articulated a version of natural law that was significantly more parsimonious and flexible than that which NNL theorists rely on. Locke understood humans as having a significant capacity for moral reasoning that would allow them to infer and apply entirely new political rules – hence his focus on epistemology. NNL theorists, by contrast, try to specify in very detailed terms what human identity looks like, such that they quickly mire

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<sup>215</sup> See RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* 5 (1987) (coining term, “New Natural Law Theory” to describe primarily the work of John Finnis and Germain Grisez).

<sup>216</sup> See John Finnis, *The “Natural Law Tradition,”* 36 J. LEGAL EDUC. 492 (1986).

themselves in ontological and metaphysical claims that they cannot support with any empirical evidence.

The difference between the natural law of NNL theory and that of Locke can be quite subtle. Professor John Finnis expressly defends a version of New Natural Law that is “liberal.”<sup>217</sup> He does so in part by suggesting that Thomas Aquinas was the first “theorist of government” to advocate limited government.<sup>218</sup> Whether he considers himself and his position “liberal” or “conservative,” NNL author Robert P. George, revisiting the famous Hart-Devlin debate about the moral basis for legislation in the wake of England’s decriminalization of consensual sodomy, addresses Devlin’s concern that regulation of private morality will lead to tyranny.<sup>219</sup> George rejects Devlin’s position in part by claiming that it results in unreasoning prohibitions, whereas George sees his own position as requiring legislators to reason about any prohibitions they enact.<sup>220</sup> Reason as a bulwark against tyranny sounds much like Locke.

The NNL position is ultimately quite different from Locke’s, however, and it illustrates well Ball’s and Feldblum’s point that advocacy of moral bracketing has little intellectual and political purchase against overt moral condemnation of lesbian/gay relationships. Finnis adopts a position regarding sodomy as private, and therefore beyond the state’s purview, that is little different from the position of lesbian/gay civil rights activists.<sup>221</sup> However, he also asserts:

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<sup>217</sup> John Finnis, *Liberalism and Natural Law Theory*, 45 MERCER L. REV. 687 (1993-1994).

<sup>218</sup> *Id.* at 688.

<sup>219</sup> Robert P. George, *Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate*, 35 AM. J. JURIS. 15 (1990) (hereinafter *Social Cohesion*).

<sup>220</sup> *Id.* at 42-43.

<sup>221</sup> John Finnis, *Law, Morality, and “Sexual Orientation,”* 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, 14-15 (1995).

So there was a sound and important distinction of principle which the Supreme Court of the United States overlooked in moving from *Griswold v. Connecticut* (private use of contraceptives by spouses) to *Eisenstadt v. Baird* (public distribution of contraceptives to unmarried people). The truth and relevance of that distinction, and its high importance for the common good, would be overlooked again if laws criminalizing private acts of sodomy between adults were to be struck down by the Court on any ground which would also constitutionally require the law to tolerate the advertising or marketing of homosexual services, the maintenance of places of resort for homosexual activity, or the promotion of homosexualist ‘lifestyles’ via education and public media of communication, or to recognize homosexual ‘marriages’ or permit the adoption of children by homosexually active people, and so forth.<sup>222</sup>

Note well – the position Finnis here articulates is the inverse of the common expectation among lesbian/gay civil rights activists that eliminating sodomy statutes would enable, even require, myriad other legal benefits for lesbians and gay men. In effect, Finnis asserts that the state should not prohibit sodomy, but it should still actively promote heterosexual monogamy, *inter alia* by significantly restricting circulation of information by and about lesbians and gay men.

Part of the problem here is historical. Finnis may simply not have known about *One, Inc. v. Oleson*,<sup>223</sup> a decision of the Supreme Court from 1957, forty-six years before *Lawrence v. Texas*. In *One, Inc.*, the Court reversed, *per curiam*, a decision of the Ninth Circuit Court of

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<sup>222</sup> *Id.* at 38. Similarly, Robert George asserts that prudential considerations regarding marital privacy and law enforcement could lead one consistently to hold that all contraceptive use is immoral and that the state still should not attempt to prohibit married couples from using contraceptives. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 152 (1999).

<sup>223</sup> 355 U.S. 317 (1957) (per curiam).

Appeals<sup>224</sup> upholding a postmaster's refusal to distribute an early lesbian/gay civil rights publication solely on the grounds that the homosexual content rendered it obscene. The Supreme Court referred in its reversal to *Roth v. United States*.<sup>225</sup> In *Roth*, the Court upheld two separate convictions, one under state law for keeping and purveying obscenity, the other under the same federal law as in *One, Inc.* for mailing obscenity.<sup>226</sup> It stated that not all representations of sex were inherently obscene,<sup>227</sup> and that courts must evaluate the impact of the publication as a whole, not simply pieces of it, on the full range of potential recipients, not only on the potential readers who were most susceptible to prurience.<sup>228</sup> The trial court in *One, Inc.* had specified individual components of the allegedly obscene issue as the basis for upholding the postmaster's decision.<sup>229</sup> Presumably the trial court's failure to conduct the sort of overall evaluation that the Supreme Court described in *Roth* was the basis for its reversal of the Ninth Circuit's decision affirming the trial court in *One, Inc.*

Supreme Court Justice Antonin Scalia, who wrote scathing dissents in both of the major Supreme Court cases defending the equality of lesbians and gay men, agrees with Finnis on the danger of striking down sodomy statutes in terms that might also require recognition of same-sex marriages.<sup>230</sup> Even Scalia, however, recognizes that the United States Constitution prohibits government from interfering directly with the participation of lesbians and gay men in the

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<sup>224</sup> 241 F.2d 772 (CA9 1957).

<sup>225</sup> 354 U.S. 476 (1957).

<sup>226</sup> 354 U.S. at 479-80.

<sup>227</sup> *Id.* at 487.

<sup>228</sup> *Id.* at 489-91.

<sup>229</sup> *One, Inc.*, 241 F.2d at 774.

<sup>230</sup> *Lawrence*, 539 U.S. at 604 (Scalia dissenting).

political process.<sup>231</sup> Scalia fails to appreciate the extent to which sodomy statutes and prohibitions of same-sex marriage themselves prevent lesbians and gay men from participating fully in the political process, but his point is still significantly different from Finnis' NNL position, and the difference is instructive. As the passage above indicates, Finnis would allow government to interfere with the rights of lesbians and gay men to free speech and peaceable assembly in ways that patently violate the First Amendment to the United States Constitution.

The reason is that Finnis claims to know the reality of all lesbian/gay lives, especially the moral significance of all sexual acts that same-sex couples can perform. Thus, according to Finnis:

*in reality*, whatever the generous hopes and dreams and thoughts of *giving* with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleases a client to give him pleasure in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships after a gruelling day on the assembly line.<sup>232</sup>

That is, for Finnis, by definition, lesbians and gay men are incapable of evaluating the moral significance of their own relationships, including sexual relationships. The immorality of such

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<sup>231</sup> *Lawrence*, 539 U.S. at 603 (Scalia dissenting): "Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best."

<sup>232</sup> Finnis, *Law, Morality, and "Sexual Orientation," supra* note 221 at 28. Emphases in original.

relationships is a matter of “reality” as dictated by the Catholic Church<sup>233</sup> and many other major authors in the western intellectual tradition, according to Finnis.<sup>234</sup>

As Robert George demonstrates, it is not necessary to ground NNL principles in ancient authors, as Finnis typically prefers to do.<sup>235</sup> This is only logical. If NNL principles are correct, then we should not find surprising the fact that multiple authors across centuries have repeatedly articulated those principles as the basis for morality. George defends NNL moral reasoning against the charge by modern followers of David Hume that human reason is necessarily instrumental.<sup>236</sup> On the modern Humean view, humans can use reason to achieve their goals once they have decided what goals to strive for, but the choice of goals is always a matter of desire or emotion, not of reason.<sup>237</sup> George insists, by contrast, that humans can identify goals to pursue, as well as the means of pursuing them, by use of reason.<sup>238</sup>

George’s position in this debate is no different from his critique of Devlin<sup>239</sup>: he wants to require legislators to use reason in deciding what laws to pass. Rejecting John Rawls’ definition of “public reason,” George writes, “if ‘public reason’ is interpreted broadly (perhaps we could even say literally), then natural law theorists believe that natural law theory is nothing more or

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<sup>233</sup> See, e.g., reference to “encyclical on the foundations of morality, *Veritatis Splendor*,” *id.* at 27. *Veritatis Splendor* itself is available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html) (last visited Feb. 4, 2007).

<sup>234</sup> Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 221 at 26-28.

<sup>235</sup> *But see* Finnis, *The “Natural Law Tradition,”* *supra* note 216 at 493 (defining NNL by contrast to Hume, Bentham, and various twentieth-century authors).

<sup>236</sup> Robert P. George, *A Defense of the New Natural Law Theory*, 41 AM. J. JURIS. 47 (1996) (hereinafter, *A Defense*).

<sup>237</sup> *Id.* at 48-9.

<sup>238</sup> *Id.*

<sup>239</sup> George, *Social Cohesion*, *supra* note 219.

less than the philosophy of public reason.”<sup>240</sup> This sounds much like Locke, as one would expect from modern British and American scholars writing about natural law. One might become suspicious, however, upon noticing the total absence of references to Locke and his work in the writings of Finnis, George, and other NNL authors.<sup>241</sup>

The absence of references to Locke, whether to confirm or reject his work, by NNL authors becomes all the more puzzling given that many of their concerns are the same. In addition to George’s desire to have legislators reason about prohibitions they enact, Finnis describes the concern Aquinas expressed, following Aristotle, for the rule of law as opposed to the rule of men:

right government does not tolerate an unregulated rule by rulers (‘rule of men’), but calls for rulers to be ruled by law, precisely because law is a dictate of *reason*, while what threatens to turn government into tyranny (rule in the interests of the rulers) is their human *passions*, inclining them to attribute to themselves more of the good things, and fewer of the bad things, than is their fair share.<sup>242</sup>

This formulation sounds remarkably like Locke’s account of how the tyranny of absolute monarchs results in part from their ability to engage in self-dealing with impunity.

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<sup>240</sup> George, *Natural Law and Liberal Public Reason*, *supra* note 39 at 31. See also, Finnis, *The “Natural Law Tradition,” supra* note 212 at : “It scarcely makes sense to talk of a natural law tradition. For ‘natural law’ (in the context of ethics, politics, law and jurisprudence) simply means the set of true propositions identifying basic human goods, general requirements of right choosing, and the specific moral norms deducible from those requirements as they bear on particular basic goods.”

<sup>241</sup> The only exception I have found is James R. Stoner, Jr., *Property, the Common Law, and John Locke*, in *NATURAL LAW AND CONTEMPORARY PUBLIC POLICY* 193-218 (1998), although even this essay emphasizes Locke’s account of private property as a departure from the ancient and medieval traditions.

<sup>242</sup> Finnis, *Liberalism and Natural Law Theory*, *supra* note 217 at 689. See also *id.* at 690 for Finnis’ claim, which he does not develop, that the moral truths he believes himself to explicate are both a matter of revelation and discernable through “reason unaided by revelation.”

For advocates of lesbian/gay equality, the glaring problem with this formulation coming from an opponent of same-sex marriage is that this is exactly what opposite-sex couples do when they arrogate to themselves the benefits of marriage while denying those benefits to same-sex couples: they “attribute to themselves more of the good things, and fewer of the bad things, than is their fair share.” Opponents of same-sex marriage stand in exactly the same relationship to same-sex couples as absolute monarchs stand to members of the polity generally.

Finnis and George apparently consider this outcome acceptable because they choose to define “marriage” such that same-sex couples cannot qualify.<sup>243</sup> This definition depends heavily on their distinction between goods that are “instrumental” and goods that are “intrinsic” or “basic.” Finnis defines political community, for example, as “instrumental,” by which he means that it performs a useful function, but its utility depends on how well it facilitates the pursuit of intrinsic goods.<sup>244</sup> Marriage, on this view, is an intrinsic good.<sup>245</sup> Note that this definition of political community as instrumental, and therefore subservient to, intrinsic goods, one of which is marriage, is logically congruent to Glenn Stanton’s claim that marriage precedes and exceeds the state. Again, the key problem with this approach from a Lockean perspective is that all institutions and practices are susceptible to political analysis in order to ensure that they do not enact or entail violations of the citizens’ natural rights to life, liberty, and property.

Not surprisingly, the NNL definition of marriage as an intrinsic good necessarily implicates sexual morality. As Finnis puts it:

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<sup>243</sup> See, e.g., Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 221 at 32-33: “A political community which judges that the stability and protective and educative generosity of family life is of fundamental importance to that community’s present and future can rightly judge that it has a compelling interest in denying that homosexual conduct – a ‘gay lifestyle’ – is a valid, humanly acceptable choice and form of life, and in doing whatever it *properly* can, as a community with uniquely wide but still subsidiary functions, to discourage such conduct.”

<sup>244</sup> Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 221 at 33-34.

<sup>245</sup> *Id.* at 27, *passim*.



In short, sexual acts are not unitive in their significance unless they are marital ... and ... they are not marital unless they have not only the generosity of acts of friendship but also the procreative significance, not necessarily of being intended to generate or capable in the circumstances of generating but at least of being, as human conduct, acts of the reproductive kind – actualizations, so far as the spouses then and there can, of the reproductive function in which they are biologically and thus personally one.<sup>246</sup>

As George puts it, “Although not all reproductive-type acts are marital -- adulterous acts, for example, may be reproductive in type (and even in effect), but are intrinsically nonmarital -- there can be no marital act that is not reproductive in type.”<sup>247</sup>

By “reproductive in type,” George means sex acts that have at least the hypothetical capacity for conception. Finnis agrees. This definition allows Finnis and George to assert that the penile-vaginal sex of a sterile married couple is morally good, while all sex by same-sex couples is morally bad, because it is definitionally not “reproductive in type.”<sup>248</sup> Apparently Finnis and George see their definitions as internally consistent. For an observer who starts with the belief that lesbians and gay men are foundationally equal to other persons, however, this

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<sup>246</sup> Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 221 at 30-31.

<sup>247</sup> Robert P. George, *What’s Sex Got to Do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 72 (2004) (hereinafter, *Marriage, Morality, and Rationality*).

<sup>248</sup> Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 221 at 28: “The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can *actualize* and allow them to *experience* their *real common good* – *their marriage* with the two goods, parenthood and friendship, which (leaving aside the order of grace) are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will, their capacity for biological parenthood will not be fulfilled by that act of genital union. But the common good of friends who are not and cannot be married (for example, man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit.” Emphasis in original. *See also*, George, *Marriage, Morality, and Rationality*, *supra* note 247 at 72.

definition of morally good sex looks suspiciously gerrymandered.<sup>249</sup> Non-procreative sex is “reproductive in type,” and therefore morally good, when a sterile opposite-sex couple performs it, but not when a same-sex couple performs it.<sup>250</sup>

By definition, the creation of a zygote in sex that is “reproductive in type” cannot be the distinguishing factor – that would eliminate sterile opposite-sex couples. George quotes Finnis to the effect that neither can the distinguishing factor be the anatomical parts involved per se.<sup>251</sup> So married sex is good and lesbian/gay sex is bad because same-sex couples cannot marry. Why? Because Finnis and George say so. Finnis and George represent themselves as explicating the necessary moral conclusions that generations of scholars have arrived at simply because those scholars have a correct understanding of human nature and its moral implications.<sup>252</sup> What they have actually done, however, is decided at the outset that they prefer

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<sup>249</sup> George inadvertently illustrates well the gerrymandered quality of the exception for sterile heterosexuals by citing a “thought experiment” from Grisez: “Imagine a type of bodily, rational being that reproduces, not by mating, but by some individual performance. Imagine that for these beings, however, locomotion or digestion is performed not by individuals, but only by biologically complementary pairs that unite for this purpose. Would anybody acquainted with such beings have difficulty understanding that in respect of reproduction the organism performing the function is the individual, while in respect of locomotion or digestion the organism performing the function is the united pair?” George, *Marriage, Morality, and Rationality*, *supra* note 247 at 78. In the case of locomotion, what is the analog to a sterile couple? A couple who walks together but never reaches a destination? What is the analog to a same-sex couple, and what reason would we have for thinking that the same-sex analog would locomote immorally? This analogy demonstrates that the New Natural Law theorists define morally good sex tendentiously to include heterosexual couples and exclude lesbian/gay couples, not from the necessity of human biology, but from the necessity the theorists feel to derogate same-sex couples.

<sup>250</sup> Thatcher, *supra* note 135 at 297-99, articulates the view, expressly within the context of Catholic theology, that marriage should focus on actual, rather than hypothetical, children. Given her observation that no good reason exists to doubt the parenting abilities of lesbians and gay men, and that the children of lesbians and gay men will presumably benefit as much from the marriage of their parents as do the children of opposite-sex parents, she concludes “that marriage is able to be extended theologically to lesbian and gay couples.”

<sup>251</sup> George *Marriage, Morality, and Rationality*, *supra* note 247 at 79.

<sup>252</sup> George, *Marriage, Morality, and Rationality*, *supra* note 247 at 71.

opposite-sex to same-sex marriage, and gone about ginning up authors whose work plausibly supports their position.<sup>253</sup>

Apart from the facial incoherence and self-serving character of the New Natural Law position as Finnis and George articulate it, at least two major problems arise with their definition of marriage. First, it is simply that: a definition. Such theorists are free to offer their definitions and play with gerrymandered tautologies all they like, but under Lockean consent theory they have no right to impose their definitions on other citizens through the power of law. Locke's commitment to foundational equality, combined with his insistence on applying the practices of reasoned empirical inquiry to sacred texts, have the effect of precluding exactly the sort of purely stipulative definitions about citizens that the New Natural Law theorists offer as justification for refusing to recognize same-sex marriages. That is, Locke stipulates his own definition of persons – that they are all inherently equal as a matter of moral principle – then acknowledges the inadequacy of human reason to justify any imposition of authority by one person over another, except where the person imposed on has demonstrably violated another's natural rights, or has consented to that authority.<sup>254</sup>

This point is related to the more theoretical point about how the New Natural Law theorists profoundly violate the principles of Lockean consent theory: they expect the state to

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<sup>253</sup> Michael Perry articulates his differences with Finnis in terms of the Catholic tradition: *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41 (1995). Andrew Koppelman articulates his differences with Finnis in terms of the ancient and medieval texts Finnis relies on: *Is Marriage Inherently Heterosexual?* 42 AM. J. JURIS. 51 (1997). While I admire Perry and Koppelman for their efforts and agree with Perry's analysis (I claim no expertise to evaluate the textual debt between Finnis and Koppelman, or between Finnis and Martha Nussbaum, see Finnis, *Law, Morality, and "Sexual Orientation," supra* note 221 at 18-25), I believe they give the New Natural Law theorists too much credit in two senses. First, I find Finnis' and George's claims so wildly implausible on their face that I have trouble discerning a rational basis for a response; second, I consider Finnis' and George's claims wholly irrelevant to the issue of how to translate moral propositions into policy and law under the United States Constitution because they rely exclusively on authors whose impact on the Founders was tangential at best while ignoring the author who demonstrably had the largest single impact on the Founders, John Locke.

<sup>254</sup> Locke, *supra* note 3. See also, Tuckness, *supra* note 51 at 79-80.

impose a definition that they have derived from their interpretations of an intellectual tradition on citizens who have not chosen to adopt that tradition as their own, or who, following Locke's example, have chosen to adopt versions of the tradition that they have modified in light of empirical evidence and their own reasoning capacities.<sup>255</sup> But again, one important way of stating the central point of *The Second Treatise of Government* is that individuals should be as free as possible to determine their own relationship to the available moral and intellectual traditions of their culture, with the state imposing restrictions only to achieve those moral goals that the state is capable of achieving, that are consistent with the citizens' natural rights, and that the citizens agree are central to the polity.<sup>256</sup>

In other words, the New Natural Law theorists would have us discard one of the central elements of the Anglo-American tradition of political and legal theory: the belief that individuals have a right and responsibility to evaluate moral and political claims on their own, including by adding and evaluating new empirical evidence as it becomes available. Indeed, this is perhaps the most important practical limitation on the political efficacy of the New Natural Law argument: many of the ordinary persons whom Finnis claims to speak for<sup>257</sup> with his definition of same-sex sexual activity as "intrinsically" morally bad increasingly reject arguments such as Finnis' precisely because their direct empirical knowledge of same-sex couples tells them that

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<sup>255</sup> See, e.g., Perry, *supra* note 253, *passim* (responding to Finnis, describing himself as Catholic and Finnis' central claim as "strange"). Perry makes the important empirical point that many lay Catholics reject the Church's official prohibition on contraception, presumably as the result of their use of the "practical reason" that Finnis and George repeatedly offer as the epistemological basis for their gerrymandered tautology. See also ZUCKERT, NATURAL RIGHTS REPUBLIC, *supra* note 26 at 1-2 (describing Thomas Jefferson's understanding of himself as having only articulated the widespread beliefs of Americans in writing the Declaration of Independence).

<sup>256</sup> Thus, both Ball, *supra* note 17, and Feldblum, *supra* note 18, take the position that the state can promote marriage as the preferred option for adults, but they insist that it must do so equally for all similarly situated persons.

<sup>257</sup> Finnis, *Law, Morality, and "Sexual Orientation," supra* note 221 at 27.

the relationships in question are morally good, and the sex within those relationships is none of their business.<sup>258</sup>

Thus, New Natural Law theorists posit a definition of human nature that is empirically false, and inconsistent with Lockean consent theory. Finnis and George advocate non-recognition of same-sex marriages because they believe such marriages contravene the ontological and metaphysical truths of human identity. Finnis states,

Sexual acts cannot *in reality* be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other – in biological, affective, and volitional union in mutual commitment, both open-ended and exclusive – which like Plato and Aristotle and most people we call marriage.<sup>259</sup>

But this claim about “reality” is radically inconsistent with Lockean political epistemology. If Locke was willing to apply practices of critical reasoning, including empirical observation, to his understanding of the Bible, then citizens who operate in a moral/political/legal system that he contributed mightily to defining should also apply those practices, including empirical observation, to “reality,” even when the results contradict Plato and Aquinas.<sup>260</sup>

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<sup>258</sup> See, e.g., Perry, *supra* note 253 at 59-60; Ginia Bellafante, *In the Heartland and Out of the Closet*, N.Y. TIMES Dec. 28, 2006. This story describes lesbians and gay men in Kansas who had chosen to remain closeted about their sexual orientation until the state amended its constitution to prohibit same-sex marriages. Most relevant to the current point is the example of Cathy Jambrosic, who finally acknowledged her lesbian relationship to her “religious Christian” neighbors. The neighbors served as witnesses when Jambrosic married her female partner in Canada. See also, Neela Banerjee, *Gay and Evangelical, Seeking Paths of Acceptance*, N.Y. TIMES, Dec. 12, 2006 (describing openly lesbian/gay conservative Christians). See also, *Varnum v. Brien*, Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, *supra* note 178. This complaint necessarily contains self-representations of lesbian and gay couples as part of its explanation for why the prohibition of same-sex marriage violates the Iowa state constitution. If NNL theorists believe that such information is irrelevant to the debate, they must explain why.

<sup>259</sup> Finnis, *Law, Morality, and “Sexual Orientation,” supra* note 221 at 30. Emphasis in original.

<sup>260</sup> See, e.g., Elizabeth Mensch, *Christianity and the Roots of Liberalism*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 66-67 (Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella, eds. 2001): “Thus by the time of Locke, the ‘rights’ conceptualism so often associated with him had, in fact, a long Catholic history. Locke did, however, base his analysis of rights on a conception of natural reason sharply different from that of the Thomists. Locke did not describe a reason that discovered in nature a substantive moral order reflecting God’s

Note that the point is not to argue that Locke abjured the concept of human nature. His state of nature plainly reflects beliefs about the propensities of human identity and concomitant expectations about human conduct.<sup>261</sup> Humans as a species have reason such that we can discern and abide by natural law, but we also have a predilection for violating natural law, or at least a significant percentage of us do. But note that this is a very parsimonious definition of human nature, unlike that of the New Natural Law theorists, whose definition includes specific rules about the morality of sexual conduct. The reasoning of the New Natural Law theorists falls to a Lockean critique in just the same way that Filmer's reasoning did: New Natural Law theorists and Filmer both start with definitions based solely on their preferred interpretations of sacred text, then use those definitions to arrive at conclusions about the modern world that are at once logically consistent with their founding definitions, and plainly at odds with the empirical evidence.<sup>262</sup>

The primary effect of Locke's parsimony in defining human nature is to create a strong presumption in favor of relying on persuasion rather than force in moral decision making. He does not prohibit the use of force – his definition of political power expressly contemplates the possibility of the death penalty, and therefore of all lesser punishments.<sup>263</sup> But, more explicitly

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wisdom or divinely ordained teleological ends. Rather, as with Descartes, Locke's reason was the disengaged, instrumental reason that came to characterize the Enlightenment generally...."

<sup>261</sup> See, e.g., ZUCKERT, *LAUNCHING LIBERALISM*, *supra* note 6 at 9.

<sup>262</sup> See MICHAEL PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* 55 (2003) (starting chapter titled *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint* with long quotation from Galileo explaining why it is a bad idea to dispute the theory of a heliocentric universe because of contrary biblical passages).

<sup>263</sup> LOCKE, *THE SECOND TREATISE* at § 3.

in the *Letters on Toleration*<sup>264</sup> than in *The Second Treatise of Government*, Locke argues that force is ineffective in matters of conscience. The state might induce individuals to attend a particular church and assent to particular doctrines on pain of fines or imprisonment, but there is no reason to believe that persons who attend and assent solely to avoid such penalties have actually adopted the underlying belief structure; indeed, there is ample reason to doubt that they have done so.

This applies to the arguments of the New Natural Law theorists. If they have failed to persuade me (and, to state the obvious, they have failed to persuade me) with their circular definitions of moral sexual activity, what recourse do they have? Finnis acknowledges that the state should not prohibit particular sexual acts among consenting adults.<sup>265</sup> He insists, however, that the state may still discourage persons from engaging in those acts by adopting other policies that signal the state's disapproval.<sup>266</sup> The problem from a Lockean perspective is that the state's refusal to recognize my marriage, while it recognizes the marriages of others, infringes on my right to liberty and property. Recognition of my marriage, however, will infringe on the rights of no other citizen. Why would any lesbian or gay man consent to a regime that at once denied them rights and benefits while signaling their inequality to the rest of the society? How does the regime legitimate such policies absent the consent of the governed?

Finnis and George are both careful to ground their definitions in the work of ancient, as well as medieval and modern, authors in order to avoid the charge that they would establish religion in violation of the First Amendment. Formally, however, their reasoning is no different

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<sup>264</sup> TUCKNESS, *supra* note 51, emphasizes the third letter on toleration, arguing that we should attend to it more carefully than most observers to date have, not least because it contains an extended discussion, which Tuckness builds on, of religious toleration as a question of law and practical politics.

<sup>265</sup> Finnis, *Law, Morality, and "Sexual Orientation," supra* note 221 at 14-15.

<sup>266</sup> *Id.* This is similar to Wax's argument for the signaling effect of law, *supra* note 183 and accompanying text.

from James Dobson's: they would place the definition of marriage beyond dispute in the political realm with their assertions about its "intrinsic" worth, thereby denying to lesbians and gay men any opportunity to participate in self-government and self-definition. All lesbians and gay men must accept the conservative definition of who they are in Dobson's and the NNL frameworks. According to Finnis, George, and Dobson, the demand for recognition of same-sex marriages is inherently unreasonable. According to Lockean consent theory, however, citizens' demands for equal protection of their natural rights are reasonable by definition – indeed, such demands are the apotheosis of reason -- because such protection is the first legitimate end of government.

The demands of lesbians and gay men are reasonable also because the converse is completely untenable insofar as it posits an act of unreasonableness by all participants in the lesbian/gay civil rights movement.<sup>267</sup> The New Natural Law theorists' definition of morally good sex in marriage requires them to postulate characteristics about all lesbians and gay men that also have the effect of denying lesbians' and gay men's right to self-government and self-definition.<sup>268</sup> Because they work only with definitions of their own stipulation, those theorists are immune to empirical considerations, and to political responses from lesbians and gay men. The demonstrable fact that many lesbians and gay men, and their sexual conduct, belie the definitions of New Natural Law theorists is irrelevant to the those theorists. But this observation

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<sup>267</sup> Of course, insofar as lesbian/gay activists and conservative activists take mutually exclusive positions, for one side to be right, the other must be wrong. Thus, reasonableness on the part of lesbian/gay activists at least implies, if not entails, unreasonableness on the part of conservatives. This is not a denial of equality for the conservatives for at least two reasons. In Lockean terms, conservatives will not be able to sustain a complaint of inequality relative to lesbians and gay men after recognition of same-sex marriages begins precisely because then all similarly situated couples will have the same opportunity to marry. In Waxian conservative terms, traditions may be presumptively reasonable on their face, such that it is reasonable to defend them even against some amount of criticism for unfairness. At the same time, past a certain point, conservative opposition to major legal and social changes does, in fact, become unreasonable. *See supra* notes 193-201 and accompanying text for discussion of the unreasonable implications of Wax's conservatism as applied to the elimination of racial segregation.

<sup>268</sup> Finnis, *Law, Morality, and "Sexual Orientation," supra* note 221 at 31: "The deliberate genital coupling of persons of the same sex... disposes the participants to an abdication of responsibility for the future of humankind."



only illustrates yet again the value of Locke's parsimonious definition of human nature, combined with his emphasis on reason and empiricism: the prejudices of ancient and medieval authors, and their modern adherents, no matter how longstanding, are insufficient to override the presumption of lesbians' and gay men's equality, including their reasonable expectation that their fellow citizens will recognize their contributions to the larger society and respect their right to equal protection of the laws, both as a matter of first principle, and as a result of the rule that citizens' rights should match their responsibilities. New Natural Law theorists choose to define human nature such that lesbian/gay sex acts are inherently immoral. Locke chose to define human nature such that lesbians and gay men have the right to decide for themselves the moral value of their sex acts, so long as they infringe on the natural rights of no other persons.

The New Natural Law theorists' definitions in lieu of arguments illustrate the importance of Locke's decision to triangulate the principles he derived from revelation by the use of his reason. Although they understand themselves (quite sincerely, I must assume) to offer arguments that demonstrate the inherent moral superiority of opposite-sex relationships over same-sex relationships, all NNL theorists really do is offer their own, preferred definitions, which lack any empirical or rational capacity to persuade anyone who does not share their prejudices. The New Natural Law theorists' definitions are completely circular, and as such, arbitrary. Any persuasive force Finnis' and George's definition of marriage and morally good sex might have must come from respect for the overall intellectual quality of the authors they cite in support of their definition. In this, they instantiate Wax's version of conservatism from Oakeshott, asserting that the philosophical tradition consistently reflects the wisdom of the larger culture.<sup>269</sup> But this only brings us back to the historical point that, insofar as Finnis' and

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<sup>269</sup> Finnis, *Law, Morality, and "Sexual Orientation,"* *supra* note 221 at 25-26; George, *Marriage, Morality, and Rationality,* *supra* note 247 at 70.

George's preferred authors were relevant for the Founders of the United States, they were so primarily via a tradition of political philosophy in which Locke dominated, and Locke's predominant contribution to the tradition was to articulate responsible practices for questioning the tradition.

Conservatives, whether New Natural Law theorists, Wax, Dobson, or Scalia, consistently claim that fealty to sacred text or tradition (or some combination of the two) is the only source of moral constraint humans can rely on. Without jettisoning sacred text or tradition, Locke demonstrated that reason in the form of public debate provides reliable moral constraints in a manner that is uniquely suited to political questions – that is, to questions involving humans' interactions with each other. Apart from the historical fact of Locke's enormous impact on the Founders of the United States, the failure of all of these authors to engage with his thought indicates the conservative dilemma in a predominantly liberal political, legal, and intellectual tradition.

Finnis is at pains to list those authors who, on his reading, "rejected all homosexual conduct."<sup>270</sup> The key point is not that his list, indeed his entire discussion, omits all reference to John Locke. The key point is that, even if Finnis and George could produce irrefutable textual evidence that Locke also "rejected all homosexual conduct," modern lesbians and gay men would remain as free as Locke himself was to use their capacities for reason and empirical inquiry to demonstrate how foundational equality and the natural rights to life, liberty, and property require legitimate government under the United States Constitution to recognize same-

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<sup>270</sup> Finnis, *Law, Morality, and "Sexual Orientation,"* *supra* note 221 at 17, 25. Quotation appears on 25 and refers specifically to Immanuel Kant, but the point of the passage is Finnis' claim that, in articulating his opposition to lesbian/gay equality, he only develops a position that was at least implicit in the work of Plato and Aristotle, as well as Plutarch and Kant.

sex marriages. Unless, that is, one adopts a special rule denying the foundational equality and practical reasoning skills of all lesbians and gay men.

Finnis' and George's version of the reality of sexual morality is both politically and intellectually dictatorial from the Lockean perspective. They believe they can describe the moral worth of all sex acts by same-sex couples without consulting the participants. This is patently a denial of the right of self-government in the most literal sense. According to Finnis<sup>271</sup> and George,<sup>272</sup> what they define as "non-marital" sex acts disintegrate the participants. According to Locke, the worst disintegration results from authority figures' efforts to deny individuals' right to self-government.

## V. Conclusion

Legal and political debates over same-sex marriage, and other demands for equality by lesbians and gay men, pose an acute dilemma for conservatives who are unwilling to assert that might makes right. Lesbian/gay civil rights activists should not start with the proposition that the liberal state must eschew moral distinctions because the primary moral commitment of liberalism, at least as Locke formulated it, is the foundational equality of all persons. This foundational equality is a moral proposition in its origins – Locke considered it essential based on his reading of the Bible in light of reason and empirical observation.

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<sup>271</sup> Finnis, *Law, Morality, and "Sexual Orientation,"* *supra* note 221 at 31: The sex of same-sex couples "cannot *really* actualize the mutual devotion which some homosexual persons hope to manifest and experience by it, and... it harms the personalities of its participants by its dis-integrative manipulation of different parts of their one personal reality."

<sup>272</sup> George, *Marriage, Morality, and Rationality,* *supra* note 247 at 80: "The dualistic presuppositions of the revisionist position are fully on display in the frequent references by Macedo and others to sexual organs as "equipment." Neither sperm nor eggs, neither penises nor vaginas, are properly discussed in ethical discourse in such terms. Nor are reproductive and other bodily organs "used" by persons considered as somehow standing over and apart from these and other aspects of their personal reality. In fact, where a person treats his body as mere equipment, a mere means to extrinsic ends, the existential sundering of the bodily and conscious dimensions of the self that he affects by his choices and actions brings with it a certain self-alienation, a damaging of the good of personal self-integration."

It is also a proposition about the capacity of humans for moral reasoning. If they care about moral and intellectual consistency, conservatives in the United States must either accede to the specific legal and policy demands of lesbian/gay civil rights activists, or explain why they dispute the capacity of lesbians and gay men for moral reasoning. If same-sex marriage is both definitionally impossible, and a major threat to the well-being of our society, then to demand it is intellectually and morally obtuse. Lockean foundational equality may be a rebuttable presumption. It may be that conservatives can demonstrate rationally and empirically – without, that is, resort to religious arguments disguised as definitions – how lesbians and gay men forfeit their claim to foundational equality by dint of their irresponsible demands. I am willing to frame the issue in such terms, however, precisely because I consider that outcome highly unlikely.