ARTICLES

NEW NATURAL LAW, RELIGION, AND SAME-SEX MARRIAGE: CURRENT CONSTITUTIONAL ISSUES

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Debate about granting legal recognition to same-sex marriage, or legal recognition to same-sex partnerships under some other name, continues with real ferocity within the United States,[1] even though many other constitutional democracies have now accepted that those in committed same-sex relationships should be entitled to receive some form of legal recognition of that status—including, in many jurisdictions, inclusion within the right to marry.[2] Among the more vocal opponents of granting any form of legal recognition to same-sex partners are the so-called "new natural lawyers," the most well-known members of that group within the legal academy being John Finnis, Robert George, and Gerard Bradley.[3] Finnis, for example, sought to use arguments based on the new natural law theory of

1. *See, e.g.*, Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2106, 2108 (2008) (observing the debate, discussing the contradictions between federal and state laws regarding homosexual marriage, and citing statistics showing widespread opposition to the legalization of homosexual marriage in the United States).

2. *See, e.g.*, Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. PUB. POL'Y 939, 952 n.63 (2007) ("The Netherlands, Belgium, Spain, Canada, and South Africa have legalized same-sex marriage, while Croatia, Denmark, England, Finland, France, Germany, Hungary, Iceland, New Zealand, Norway, Portugal, Scotland, Sweden, and Wales provide the functional equivalent of marriage to same-sex couples.").

3. *E.g.*, NICHOLAS BAMFORTH & DAVID A.J. RICHARDS, PATRIARCHAL RELIGION, SEXUALITY, AND GENDER: A CRITIQUE OF NEW NATURAL LAW 2 (2008) (identifying Finnis, George, and Bradley as three of the "main thinkers about law in the group" of those who advocate the "new natural law").

the "good of marriage" to support the proposed Amendment 2 to the Colorado State Constitution, which would have prohibited Colorado from adopting any form of anti-discrimination protection for lesbians and gay men as individuals, or for same-sex relationships.[4] However, the United States Supreme Court ruled against the Amendment in *Romer v. Evans*, suggesting that it raised "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[5] Similarly, George and Bradley tried to employ the good of marriage to defend the Texas anti-sodomy statute that was struck down by the Supreme Court in *Lawrence v. Texas*.[6] George was also a coauthor of the proposed, but unadopted, "Federal Marriage Amendment" designed to amend the U.S. Constitution so as to confine the definition of marriage to unions of one man and one woman.[7]

In light of the prominent role played by the new natural lawyers in opposing the legal recognition of same-sex partnerships, opposing protections for lesbians and gay men against invidious forms of discrimination, and—in the case of George and Bradley in *Lawrence*[8]—supporting the retention of state-level criminalization of

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4. Brief in Opposition at 12–13, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17013889 at *12–*13; *see also* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1056, 1064–65 (1994) [hereinafter Finnis, *Sexual Orientation*] (describing the Colorado amendment and positing that the "intrinsic, non-instrumental" good of marriage lies in the creation and education of children).

5. 517 U.S. 620, 634 (1996).

6. Brief Amicus Curiae of the Family Research Council, Inc. and Focus on the Family in Support of the Respondent at 10, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 470066 at *10 [hereinafter George & Bradley Brief] (stating the Texas anti-sodomy statute was "a requirement of the great common—and thus objective—good of marriage"); *see* Lawrence, 539 U.S. at 563 (striking down a statute that stated, in part, [a] Person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex" (quoting Tex. Penal Code Ann. §21.06(a) (West 2003))).

7. *E.g.*, David A. Kirkpatrick, *A Religious Push Against Gay Unions*, N.Y. TIMES, Apr. 24, 2006, at A12 (discussing the organization of religious leaders in support of the amendment and noting George's involvement).

8. In fact, Finnis believes that while the law should not recognize same-sex partnerships, private and consensual sex acts between adults of the same sex should not be criminalized, whereas George and Bradley have defended the criminal prohibition of such private, consensual homosexual conduct. *Compare* Finnis, *Sexual Orientation*, *supra* note 4, at 1076 (arguing that outlawing "secret and truly consensual adult acts of vice" constitutes an unjustifiable effort by the State to "direct people to virtue"), *with* George & Bradley Brief, *supra* note 6, at 29 (arguing that Texas did not violate constitutional or moral imperatives by outlawing private, consensual sodomy). *See generally* J. I. Merritt, *Heretic in the Temple*, DAILY PRINCETONIAN (Oct. 8, 2003), http://www.princeton.edu/paw/archive_new/PAW03-04/02-1008/features1 (arguing that

consensual sexual acts between adults of the same sex, the new natural lawyers' arguments formed the central focus of, and the subject of sustained criticism in, a monograph by David Richards and myself, which was published in 2008.[9] Since the United States continues to debate whether legal recognition should be given to same-sex partnerships—perhaps by including same-sex relationships within the definition of marriage—and since political activity, including state-level referenda and litigation concerning the issue, still continues, arguments concerning new natural law remain of importance today. This is particularly true given the leadership role played by new natural lawyers such as Robert George in the campaign against same-sex marriage. George, for example, was one of three coauthors of the 2009 "Manhattan Declaration," an explicitly religious denunciation of same-sex marriage and abortion.[10] Furthermore, following the decision of a U.S. district court in *Perry v. Schwarzenegger*, ruling that Proposition 8—a referendum-generated attempt to amend the California State Constitution to read "[o]nly marriage between a man and a woman is valid or recognized in California" —was impermissible under the Equal Protection and Due Process Clauses of the Fourteenth Amendment,[11] George (who is reported to have played a role

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"George would leave state laws prohibiting adultery, fornication, and sodomy on the books.").

9. BAMFORTH & RICHARDS, *supra* note 3.

10. Robert George, Timothy George & Chuck Colson, *Manhattan Declaration: A Call of Christian Conscience*, THE MANHATTAN DECLARATION (Nov. 20, 2009), http://www.manhattandeclaration.org/pdfs/ManhattanDeclaration.pdf [hereinafter MANHATTAN DECLARATION].

11. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010), *motion to stay district court order pending appeal granted* 2010 WL 3212786 (9th Cir. Aug. 16, 2010), *certifying question to Cal. Sup. Ct*. 628 F.3d 1191 (9th Cir. 2011) (certifying state law question of appellant's standing). Proposition 8 followed the California Supreme Court's recognition that courts must employ strict scrutiny when reviewing statutes that treat people differently on the basis of sexual orientation, and that legislation confining marriage to persons of the opposite sex violated the right to marry contained in the California Constitution. *See In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008) (concluding that strict scrutiny is the appropriate level of review to be applied under the California Constitution because sexual orientation is a suspect class and because an individual's choice of family relationships is a fundamental right). Proposition 8 was initially upheld by the California Supreme Court in the face of procedural and constitutional challenges relating to the method of its enactment. Strauss v. Horton, 207 P.3d 48, 76 (Cal. 2009) (holding that Proposition 8 "cannot properly be interpreted as having repealed, by implication, the pre-existing *state constitutional right* of same-sex couples to enter into an officially recognized and protected *family relationship*").

in the pro-Proposition 8 campaign[12]) has coauthored an amicus brief to the U.S. Court of Appeals for the Ninth Circuit in opposition to the district court's decision.[13]

For as long as the United States remains sharply divided over the issue of same-sex partnerships, new natural law arguments are likely to be deployed in support of conservative positions, continuing to raise questions about the role of such essentially religious arguments in the course of litigation and constitutional debate and about the attractiveness of these arguments on their merits. The present Article will therefore focus on the role of new natural law in light of developments such as the Manhattan Declaration, Proposition 8, and the *Perry* case. It will be suggested in Section I that the arguments advanced by the new natural lawyers in the constitutional context, as exemplified by *Perry*, continue to be ultimately dependent on normatively unappealing doctrinal religious beliefs. Beneath the rhetoric of George and others, it continues to be apparent that the substantive arguments concerning marriage and the constitutional rights of lesbians and gay men have no force unless one accepts the underlying doctrinal position. Section II will consider a distinct issue which is becoming visible in the debate about the legal recognition of same-sex partnerships: namely, the extent to which arguments for and against such recognition—whether it involves inclusion within marriage or some other method—and arguments for or against the right to be free from discrimination on the basis of one's sexual orientation, or to engage in consenting sexual activity with persons of the same sex, ought to be international rather than national in their focus. This is a dispute with deep roots in political and constitutional theory, but it has produced a visible by-product in the form of argu-

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12. *See* Tasnim Shamma, *NOM Was the Top Donor to Fund Proposition 8*, DAILY PRINCETONIAN (Nov. 19, 2008), http://www.dailyprincetonian.com/2008/11/19/22161 (noting that "[t]he Princeton-based National Organization for Marriage (NOM), founded in 2007 by Maggie Gallagher and politics professor Robert George, was the largest monetary supporter of Proposition 8, whose passage on Nov. 4 [2008] eliminated the right of same-sex couples to marry in California.").

13. Brief for Robert P. George, Sherif Girgis, and Ryan T. Anderson as Amici Curiae Supporting Reversal and the Intervening Defendants-Appellants at 28, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (2010) (No. 10-16696) [hereinafter George, Girgis & Anderson Brief] ("Because these are substantive moral and value questions unsettled by the Constitution and logically prior to any determination that some marriage law violates the fundamental right to marry or equal protection, Proposition 8 cannot be ruled unconstitutional on such grounds without usurping the people's freedom to resolve such questions for themselves.").

ments about the extent to which courts from different jurisdictions should take account of one another's case law. For example, the Supreme Court's references in *Lawrence* to European Court of Human Rights case law have generated considerable commentary, parts of it hostile. Since new natural law has at its heart the notion of universal, objective goods, including the good of marriage, it may be that such a wide focus opens up a point of departure from other conservative approaches. It is also interesting to see how arguments concerning universalist approaches in general might apply to new natural law.

I. NEW NATURAL LAW, MARRIAGE, AND CONSTITUTIONAL LITIGATION

This Section will explore how recent developments continue to reflect the point that arguments advanced against same-sex marriage by the new natural lawyers are of a religious rather than a secular character, as well as being unappealing on their merits. To properly understand the new natural law arguments concerning marriage and against legal protections for lesbians and gay men, it is necessary to make some summary remarks about the theory generally, as well as examining its specific application in the area of sexuality. The use of new natural law arguments in the Manhattan Declaration and in the constitutional litigation resulting from Proposition 8 in California can then be considered. In the course of this exploration, the religious character of new natural law arguments concerning marriage will become clearer, as will the basis for describing such arguments as unattractive.[14]

The new natural law theory has been propounded in the legal arena principally by John Finnis, Robert George, and Gerard Bradley, but is rooted in the theological writings of Germain Grisez.[15] At a general level, new natural lawyers believe that there is a fixed set of basic human goods, which are objective and univer-

14. The arguments regarding new natural law in this Section are, in part, a summary of the major points addressed in the aforementioned monograph by David Richards and myself. BAMFORTH & RICHARDS, *supra* note 3, at 6–9 (arguing that new natural law's interventions into constitutional issues highlight the negative aspects of the theory as sexist and homophobic).

15. *See* 1 GERMAIN GABRIEL GRISEZ, THE WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES (1983) [hereinafter GRISEZ, CHRISTIAN MORAL PRINCIPLES]; 2 GERMAIN GABRIEL GRISEZ, THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE (1983) [hereinafter GRISEZ, LIVING A CHRISTIAN LIFE].

sal.[16] Morality enters the picture through what are called the modes of responsibility or requirements of practical reasonableness, which specify how one must approach and employ the goods.[17] Thus, a morally justifiable decision concerning a basic human good is one that is taken in accordance with the modes/requirements.[18] Unsurprisingly, the new natural lawyers seek to argue that their scheme of morality ought to be embodied in and, so far as possible, defended via the legal system.[19] Sexuality-related issues enter the picture through the so-called good of marriage, brought into the scheme of basic goods by Grisez in 1987[20] and since deployed in the legal arena by Finnis, George, and others.[21] Marriage is defined as the union of one man and one woman who become literally joined as one being during acts of marital sexual intercourse which have procreative potential (or which would have such potential were both parties capable of reproduction).[22] An intentional decision by any unmarried person to engage in sexual activity, or by any married person to engage in sexual activity which does not count as "marital," even if performed with the person to whom they are married, defies the necessity to re-

16. *See generally* BAMFORTH & RICHARDS, *supra* note 3, at 57–92 (summarizing the development and scope of the new natural law theory).

17. *Id.* at 65–66.

18. *Id.* at 66.

19. *Id.* at 83.

20. *See* GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 568 n.43.

21. *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999) (arguing that natural law theory is the superior approach when confronting issues of justice and morality and asserting, inter alia, that "non-marital" sexual acts violate the good of marriage); John Finnis, *Natural Law Theory and Limited Government*, *in* NATURAL LAW, LIBERALISM AND MORALITY 1, 1–18 (Robert P. George ed., 1996) [hereinafter Finnis, *Natural Law Theory*] (developing a natural law argument through an interpretation of various philosophical texts and claiming that "non-marital" sexual acts are immoral as they violate the good of marriage); Finnis, *Sexual Orientation*, *supra* note 4, *reprinted with amendments in* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11 (1995) (arguing that natural law justifies discrimination against homosexuals since homosexual activity violates the good of marriage); John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURISPRUDENCE 97, 99 (1997) [hereinafter Finnis, *Good of Marriage*] (concluding that unmarried individuals who engage in masturbation or homosexual sodomy violate the goods of marriage); John Finnis & Martha Nussbaum, *Is Homosexual Conduct Wrong? A Philosophical Exchange*, NEW REPUBLIC, Nov. 12, 1993, at 12 (arguing that the marital goods of procreation and friendship cannot be derived from homosexual sodomy or masturbation and, therefore, all sexual activities outside the bond of marriage are immoral) (Finnis's argument in multi-party exchange). For a much earlier discussion by Finnis, see generally *Natural Law and Unnatural Acts*, 11 HEYTHROP J. 365 (1970).

22. *See* BAMFORTH & RICHARDS, *supra* note 3, at 96.

spect the basic goods imposed by the modes/requirements and is thus immoral.[23]

In the next seven subsections, various component parts of the new natural lawyers' arguments, together with criticisms of those arguments, will be considered.

A. Two-in-One Flesh Union

At the heart of the new natural law position concerning marriage lays the notion of "two-in-one flesh" communion, originally developed by Germain Grisez in the second volume of his theological treatise, *The Way of the Lord Jesus*.[24] Both Finnis and George are keen to acknowledge the reliance of their arguments about marriage upon those of Grisez,[25] and the claim by critics such as Richards and I that such arguments are of a religious character—even though presented in ostensibly secular terms, as they are required to be in the constitutional context—is closely tied to this reliance. To consider this point further, it is first necessary to offer some criteria whereby arguments can be identified as being of a religious rather than a secular character. Four criteria advanced by Robert Audi seem useful in this regard.[26] Audi's first and most obvious criterion relates to an argument's content.

> [O]n this standard, an argument with essentially religious content (as opposed to, say, merely quoted religious statements) is religious. Paradigmatically, this is theistic content such as a reference to a divine command. There are also other cases, such as appeals to scripture, or to a religious leader, as a guide in human life.[27]

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23. *Id.* at 99.

24. *See* GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 568.

25. *See* Finnis, *Sexual Orientation*, *supra* note 4, at 1063; Finnis, *Good of Marriage*, *supra* note 21, at 99, 118 (relying on Grisez's theory of the good of marriage); *see also* GEORGE, *supra* note 21, at 154 nn.8, 15 & 16, 158 nn.34, 36 & 40 (citing Grisez and his construction of marriage and family).

26. Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 677 (1993) (asserting that arguments may be religious in content, virtue, motivation, history, or a combination thereof).

27. *Id.* at 679.

Audi stresses that this criterion relates to the substantive content of an argument, as opposed to "non-committal" or "accidental" religious content—as when a speaker refers, without endorsement, to another person's statement of a religious doctrine.[28] The second criterion is epistemic, in the sense that it relates to how an argument must be justified. Audi defines an argument as religious on this basis if: "(a) its premises, or (b) its conclusion, or (c) both, or (d) its premises *warranting* its conclusion, cannot be known, or at least justifiably accepted, apart from reliance on religious considerations, for example scripture or revelation."[29] The third criterion is motivational.[30] According to this criterion, an argument "as presented in a context, is religious provided an essential part of the person's motivation for presenting it is to accomplish a religious purpose."[31] The fourth criterion is historical,[32] although it might better be described as psychological given that the "historical" element relates to the thought process of the person developing the argument. Audi suggests that

> an argument, as used on a particular occasion, is religious in the historical sense provided that, as used on that occasion, it genetically traces, explicitly or implicitly, by some mainly cognitive chain, such as a chain of beliefs, to one or more arguments that are religious in one of the . . . [first three] . . . senses, or to one or more propositions that are either religious in content or epistemically dependent on a proposition that is religious in content.[33]

Importantly, Audi observes that an argument can be implicit in the background of another argument if the openly presented argument is either based on—or would be taken by a reasonable observer to be based on—the implicit argument. The derivation need not even go through the speaker's mind; it is enough, as a matter of logic, if a

28. *Id.* at 679–80.
29. *Id.* at 680–81 (emphasis added).
30. *Id.* at 682.
31. *Id.*
32. *Id.* at 683.
33. *Id.*

link can be established.[34] With this in mind, Audi observes that some arguments convince only by their "pedigree or . . . associations" rather than by their "evidential merits."[35]

Returning to the new natural law arguments about marriage, Finnis defines two-in-one flesh communion, originally developed by Grisez, in the following terms:

> 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 . . . are the parts of its wholeness as an intelligible common good.[36]

Finnis and other new natural lawyers thus believe that a married couple becomes *literally one biological unit* during intercourse that is appropriate for procreation: hence the notion of "one [shared] reality" as distinct from separate "personal realities."[37] Grisez thus states, citing Genesis, that

> with respect to reproduction, each animal is incomplete, for a male or a female individual is only a potential part of the mated pair, which is the complete organism that is capable of reproducing sexually. This is true also of men and women: as mates who engage in sexual intercourse suited to initiate new life, they complete each other and become an organic unit. In doing so, it is literally true that "they become one flesh."[38]

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34. *Id.* at 684.

35. *Id.*

36. Finnis, *Sexual Orientation*, *supra* note 4, at 1066 (emphasis added); *accord* GEORGE, *supra* note 21, at 146–47, 168–70 (examining the concept of the two-in-one flesh union).

37. *E.g.*, Finnis, *Sexual Orientation*, *supra* note 4, at 1066–67.

38. GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 570 (citing *Genesis* 2:24); *see also id.* at 618 (discussing the *married couple* becoming "one-flesh").

As Patrick Lee and Robert George put it:

> In reproductive activity the bodily parts of the male and the bodily parts of the female participate in a single action, coitus, which is oriented to reproduction (though not every act of coitus is reproductive) . . . . Coitus is a unitary action in which the male and the female become literally one organism.[39]

Grisez expresses the point in slightly broader terms.

> [M]arriage is a basic human good, and the married couple's common good is . . . the communion of married life itself. The *communion of married life* refers to the couple's *being* married, that is, their being united as complementary, bodily persons, so really and so completely that they are two in one flesh. This form of interpersonal unity is actualized by conjugal love when that love takes shape in the couple's acts of mutual marital consent, loving consummation, and their whole life together, not least in the parenthood of couples whose marriages are fruitful. Thus, in considering marriage as a basic human good, none of its traditional ends and goods is set aside; rather, all of them are included in the intrinsically good communion of married life itself.[40]

The basic good of marriage includes parenthood, which is a "realization of the potentiality of one-flesh union rather than an intrinsic end to which it is instrumental."[41]

The new natural lawyers then suggest that "non-marital" sex—whether heterosexual or homosexual (and including, within a marriage, oral and anal sex committed for their own sake, as well as masturbation)—would, if committed intentionally, go against the moral principle that one may never intend to destroy, damage, impede, or violate any basic human good, or prefer an illusory instan-

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39. GEORGE, *supra* note 21, at 168.

40. GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 568. *See generally id.* at 339–43 (discussing the "common good" aspects of marriage as related to individual goods).

41. *Id.* at 568; *see also id.* at 572.

tiation of it to a real one.[42] Grisez bluntly states that the unmarried (both straight and gay) "Should Never Engage In Any Sexual Act,"[43] given that to do so would "in one way or another . . . violate the good of marriage, that is, the good of fully personal one-flesh communion realized in true marital acts."[44] Finnis stresses that

> *[a]ny willingness (no matter how conditional)* to engage in nonmarital sex undermines . . . one's marriage itself as a reality to be initiated, fostered, and preserved in and by clear-headed deliberation and the work of an alert and well-formed conscience. For it disintegrates the intelligibility of one's marriage: one's sex acts, understood from the inside . . . as the bodily carrying out of choices each made in a certain state of mind (will), no longer truly actualize and make possible authentic experience of one's *marriage*; they are unhinged from the other aspects of the spouses' mutual marital commitment and project.[45]

George and Bradley separately emphasize that the body may not be treated as a mere instrument or means to an end without damaging a person's integrity as a unity of body, mind, and spirit, and that "non-marital" sexual acts and masturbation involve using the body in this way.[46] On this view, pleasure, including sexual pleasure, cannot in itself provide a coherent moral basis for engaging in sexual activity.[47] Instead, its value depends on the moral quality of the acts in which pleasure is sought. As Lee and George put it:

> [A] choice to pursue pleasure apart from a real good may also involve a denigration of one's bodily self. If one chooses to actualize one's bodily, sexual power as an extrinsic means to producing an effect in one's

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42. *E.g.*, Finnis, *Sexual Orientation*, *supra* note 4, at 1069; *see also* Finnis, *Good of Marriage*, *supra* note 21, at 99 (explaining rationales for the proposition that intentional "non-marital" sex would violate a moral principle of marriage).

43. GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 648 (emphasis in original from section heading).

44. *Id.* (observing that additional goods are thereby possibly violated as well).

45. Finnis, *Good of Marriage*, *supra* note 21, at 125 (first emphasis added).

46. *Accord* GEORGE, *supra* note 21, at 147–51.

47. *Accord id.* at 141–42, 162–67.

> consciousness . . . one treats the body as a mere extrinsic means: one regards the body as something outside or apart from the subject, and so as a mere object. A certain contempt for the body inheres in such choices.[48]

In *The Way of the Lord Jesus*, Grisez had thus emphasized that insofar as

> a sexual act involving complete satisfaction is not marital intercourse, it is wrong. It violates the sixth mode of responsibility [not sacrificing the reality of enjoying a good to the appearance of doing so] . . . because, by diverting the couple's sexual behavior and experience from the good of marriage in its integrity, it damages that good and substitutes a merely apparent good: some of the psychological satisfactions or sentient pleasures pertaining to marital sex isolated from its wholeness.[49]

Furthermore, a mere emotional desire to share in intimacy achieves only an illusory experience—the use of the body for pleasure is masturbatory and may hinder rather than help true friendship between a couple.[50] In addition, "if either husband or wife intentionally does anything," whether or not involving sex with another person,

> to obtain sexual satisfaction without reference to his or her spouse, that act is contrary to the gift of self which realizes the good of marriage, and so violates marital communion. Such acts involve infidelity, because by them married persons treat their bodies, which they had dedicated to one-flesh communion, as if retaining authority over them.[51]

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48. *Id.* at 164. George suggests that it is for this reason that Finnis describes attempts to promote the goods involved in marriage by any type of orgasmic "non-marital" sex as an "illusion." *Id.* at 148.

49. GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 646.

50. *Id.* at 653.

51. *Id.* at 646.

Grisez provides further detailed argument concerning lesbian and gay sexual acts. "Sodomites," we are told, "use their bodies in a self-defeating attempt at intimacy."[52] Grisez is willing to concede that lesbians and gays "[l]ike everyone else . . . have sexual urges and a natural inclination toward intimate, one-flesh communion."[53] However, the idea of one-flesh union acts as a bar to any further concession. Grisez states that while partners of the same sex "could conceivably share in a committed relationship with sincere mutual affection and express their feelings in ways that would be appropriate in any friendship," nonetheless,

> the coupling of two bodies of the same sex *cannot form one complete organism* and so cannot contribute to a bodily communion of persons. Hence, the experience of intimacy of the partners in sodomy cannot be the experience of any real unity between them. Rather, each one's experience of intimacy is private and incommunicable, and is no more a common good than is the mere experience of sexual arousal and orgasm. Therefore, the choice to engage in sodomy for the sake of that experience of intimacy in no way contributes to the partners' real common good as committed friends.[54]

Furthermore, a gay couple cannot claim that sodomy can appropriately be chosen as a way to communicate good will and affection: for gay men do not choose to have sex just as a more expressive way to communicate affection than might be possible via conversation. Instead, Grisez suggests, the sexual act is chosen because it provides subjective satisfactions that are otherwise unavailable. "[S]odomites . . . choose to use their own and each other's bodies to provide subjective satisfactions, and thus they choose self-disintegrity as masturbators do. Of course, while masturbators can be interested exclusively in the experience of sexual arousal and orgasm, sodomites also are interested in the illusion of intimacy."[55] In consequence

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52. *Id.* at 653.
53. *Id.*
54. *Id.* (emphasis added).
55. *Id.* at 654.

> those who engage in sodomy can be interested in some aspects of the good of marriage, including satisfaction of the inclination toward sexual intimacy and, perhaps, ongoing partnership in a common life. However, in choosing sexual intercourse for its subjective satisfactions, sodomites violate the body's capacity for self-giving as masturbators do. At the same time, in choosing to act for an experience which they know cannot fulfil that capacity, they act on their inclination toward one-flesh communion in a self-defeating way, and in this respect sodomy is similar to fornication, though more unreasonable.[56]

These points are echoed in an even more inflammatory tone by Finnis. He suggests that "the common good of friends who are not and cannot be married . . ." for example, persons of the same sex,

> has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit. . . . Because their activation of one or even each of their reproductive organs cannot be an actualizing and experiencing of the *marital* good . . . it can do no more than provide each partner with an individual gratification.[57]

A properly unitive sexual act must be the *type of act* that is, in general, capable of generating children between spouses.[58] It must involve at least the possibility of procreation, and therefore entails "the inseminatory union of male genital organ with female genital organ;" even if this does not result in conception on most occasions when it occurs, it nonetheless unites husband and wife "biologically because it is the behavior which, as behavior, is suitable for generation."[59] In consequence, Finnis claims that attempts to promote the goods in-

56. *Id.*
57. Finnis, *Sexual Orientation*, *supra* note 4, at 1066.
58. *Id.* at 1067.
59. *Id.* at 1066 n.46.

volved in marriage by any type of orgasmic "non-marital" sex are simply an "illusion."[60] For:

> Reality is known in judgment, not in emotion, and *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 pleasures a client to give himself pleasure in return for money, or (say) a man masturbates to give himself pleasure . . . after a gruelling day on the assembly line. . . . [T]here is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it.[61]

Whatever commitment partners of the same sex may feel toward one another, their union

> can do no more than provide each partner with an individual gratification. For want of a *common good* that could be experienced *by and in this bodily union*, that conduct involves the partners in treating their bodies as instruments . . . their choice to engage in such conduct thus dis-integrates each of them precisely as acting persons.[62]

The new natural lawyers are thus arguing that same-sex sexual acts violate the good or goods inherent in marital sexual acts of a potentially procreative variety. In consequence, a decision to engage in a same-sex sexual act runs counter to the modes of responsibility/requirements of practical reasonableness and is morally wrongful. As noted above, *any* "non-marital" sexual act is,

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60. *Id.* at 1065; s*ee also* GEORGE, *supra* note 21, at 148.

61. Finnis, *Sexual Orientation*, *supra* note 4, at 1067 (emphasis added).

62. *Id*. at 1066–67 (emphasis added). This condemnation of sex lacking in procreative potential does not apply to married couples who happen to be sterile. *See id.* at 1066–68; s*ee also* Finnis, *The Good of Marriage*, *supra* note 21, at 126–29; GEORGE, *supra* note 21, at 140–42.

according to this view, wrongful, whoever the partners happen to be, as is masturbation.[63]

When it comes to marriage as an institution, the new natural lawyers can see no parallel between an opposite-sex marriage and a committed same-sex partnership, and seek to confine the right to marry to opposite-sex partners.[64] Finnis stresses that heterosexual marriage involves a "commitment to permanence and exclusiveness in the spouses' sexual union" and is

> fundamentally shaped by its dynamism towards, appropriateness for, and fulfilment in, the generation, nurture, and education of children who each can only have two parents and who are fittingly the primary responsibility . . . of *those two parents*. Apart from this orientation towards children, the institution of marriage, characterized by marital *fides* (faithfulness), would make little or no sense.[65]

Since "same-sex partners cannot engage in acts of the reproductive kind, i.e. in marital sexual intercourse," the "permanent, exclusive commitment of marriage—in which bodily union in such acts is the biological actuation of the . . . marital relationship—is inexplicable" for them.[66] When

> we realize that—and why—the core of marriage is *fides*, the stringently exclusive commitment . . . we realize that—and why—the world of same-sex partnerships . . . offers no genuine instantiations, equivalents or counterparts to marriage, and so very few whole-hearted imitations. *Marriage* is the coherent, stable category of relationships, activities, satisfactions, and responsibilities which can be intelligibly and reasonably chosen by a man together with a woman, and adopted as their demanding mutual commitment and common good, because its compo-

63. *E.g.*, GEORGE, *supra* note 21, at 161–62, 215.

64. Finnis, *Sexual Orientation*, *supra* note 4, at 1067; *see also* GEORGE, *supra* note 21, at 161.

65. Finnis, *Good of Marriage*, *supra* note 21, at 131 (emphasis added).

66. *Id.* at 132.

> nents respond and correspond fully reasonably to that complex of interlocking, complementary good *reasons*.[67]

A useful starting point when examining the extent to which new natural law arguments concerning marriage are secular or religious is to consider the purposes and methodology of Grisez's *The Way of the Lord Jesus*, on the arguments of which, as noted above, Finnis and George acknowledge their reliance in relation to marriage.[68] Grisez clearly states that *The Way of the Lord Jesus* assumes "that the reader accepts everything the Catholic Church believes and teaches" and is not "apologetics aimed at nonbelievers nor is it an attempt to rescue the faith of those who have serious doubts."[69] Grisez also notes that the "chief sources of this work are Scripture, the teachings of the Catholic Church, and the writings of certain Fathers and Doctors of the Church, especially St. Thomas Aquinas,"[70] and these sources are referred to as authorities throughout. Furthermore, minimal attention is paid "to positions inconsistent with received Catholic teaching."[71] Finally, Grisez observes that "arguments based on common human experience can help prepare the way for the acceptance of the Church's teaching," but nonetheless these are intended as "helps" rather than as "proofs" of "what the Church

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67. *Id.* at 133–34 (emphasis added).

68. Finnis has tried to suggest that while *The Way of the Lord Jesus* is theological, relevant philosophical arguments can be distinguished by careful analysis, with Finnis's own discussion being "restricted to philosophical and historical considerations and method." *Id.* at 99 n.6. However, certain portions of Grisez's account are articulated in non-theological terms. *See* GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 567. References are sometimes made to non-religious authority in support of three arguments. *See, e.g.*, *id.* at 555 (discussing supposedly anthropological references, but with very little or no supporting data); *id.* at 583–84 (asserting that marriage has largely invariable characteristics across cultures, but seemingly tied to the notion that Christian societies understand these best). First, it is extremely difficult—even if Grisez's statements about the aims and methodology of the work are ignored—to see how the examples cited here can in any sense convincingly be distinguished from the clearly theological material, a point which holds particular force in the discussion of marriage as a two-in-one flesh union. Second, the references to nonreligious authority are spread *extremely* thin by contrast to the religious material. Finally, some references are slanted towards the work of social scientists who are conservative Christians. We are thus referred to Christian psychological work which makes clear that homosexuality has a "pathological character . . . ." *Id.* at 654 n.194.

69. GRISEZ, CHRISTIAN MORAL PRINCIPLES, *supra* note 15, at xxx.

70. *Id.* at xxv.

71. *Id.* at xxx.

believes and proposes."[72] In terms of Audi's criteria for identifying an argument as religious, *The Way of the Lord Jesus* therefore appears—in terms of its aims and methodology—to have a religious content in the sense that its prescriptions rest on the authority of a religious institution in the form of the Church hierarchy, and to employ religious considerations in its logic structure, premises, or justifications. In other words, it corresponds with Audi's first and second bases for identifying an argument as religious rather than secular.

Grisez's explanation of the good of marriage contains religious content and rests squarely on religious authority. This much is clear even from Grisez's account of why marriage was included as a good in Volume 2 of *The Way of the Lord Jesus* when it had not been so categorized in the new natural lawyers' earlier writings:[73] "recent Church teaching, which resolves the tensions in the tradition, presents an integrated view of marriage; therefore, marriage is one reality having a basic good proper to it."[74] As William E. May suggests, Grisez came "to acknowledge marriage as a distinct human good . . . precisely in light of the development of magisterial teaching on marriage from Pope Pius XI through Pope John Paul II."[75] In fact, Grisez makes reference to or relies upon religious authority throughout his account of the good of marriage.[76] A particularly obvious example is the argument, made in opposition to what are characterized as feminist approaches to marriage (under which "marriage is considered a merely consensual relationship similar to other friendships" and in which "the spouses' equality seems more important than their complementarity"), that "if marriage is understood as Vatican II and John Paul II understand it, it is seen to be a unique kind of communion and form of cooperation . . . ."[77] A further point which is particularly crucial for present purposes is that Grisez's "one-flesh" account of the marital sexual act—on which Finnis's and George's arguments depend—is also, on examination, of a strongly theological character. Grisez's claim that a husband and wife complete one another to become biologically one flesh, and that one-flesh unity depends on

72. *Id.*

73. GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 568 n.43.

74. *Id.*

75. William E. May, *Germain Grisez on Moral Principles and Moral Norms: Natural and Christian*, *in* NATURAL LAW AND MORAL INQUIRY: ETHICS, METAPHYSICS, AND POLITICS IN THE WORK OF GERMAIN GRISEZ 3, 30 (Robert George ed., 1998).

76. *See, e.g.*, GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15 *passim*.

77. *Id.* at 619.

"marital intercourse,"[78] is thus tied to Genesis and to the teachings of John Paul II, and an analogy is drawn to communion with Jesus.[79] Grisez writes, by reference to the teachings of Pius VIII, of the "enduring sacrament" consisting of the "marital union of the man and the woman, by virtue of which they, as husband and wife, together are a married couple."[80] Grisez also suggests that marriage signifies and develops the union of Jesus with his Church: "[t]he sacramental character of Christian marriage confirms the properties that belong to marriage as such: unity (the necessity of monogamy) and indissolubility (the impossibility of divorce),"[81] points which are supported by reference to scripture and Church teaching.[82] The theological nature of the argument is also clear if one puts together the assertions that

> [w]hen a man and a woman . . . consent to marriage and enter into communion open to new life, they form not only a bodily union with inescapable moral implications but a full communion of persons: a communion of will by mutual covenantal commitment, and of organism by the generative act they share in[83]

and that marriage "will endure in the resurrection" without its earthly limitations, "and will be perfected within the greater one-flesh communion of the blessed in and with the Lord Jesus," a claim which relies on the teachings of John Paul II as authority.[84] Furthermore, a discussion of marriage as an open-ended community in which "the appropriateness" of marital sex does not relate to its being "able to cause conception, but only on its being the pattern of behavior which, in conjunction with other necessary conditions, would result in conception" is tied to the teachings of Paul VI and John Paul II.[85]

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78. *Id.* at 575–86; *see also* Germain Grisez, Joseph Boyle, John Finnis & William E. May, *"Every Marital Act Ought to be Open to New Life": Toward A Clearer Understanding*, 52 THOMIST 365, 365 (1988) [hereinafter *Every Marital Act*] (advancing the idea that marital intercourse can only occur absent the use of contraception).

79. GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15 *passim.*

80. *Id.* at 602.

81. *Id.*

82. *Id.* at 603–05.

83. *Id.* at 580.

84. *Id.* at 608 (citing the teachings of Pope John Paul II).

85. *Id.* at 634.

Meanwhile, a discussion of the marital act being required to be something which realizes one-flesh unity is tied to the Second Vatican Council.[86] More directly still, Grisez suggests that the complementary capacities of males and females, the natural inclination of men and women to realize those capacities, and the principle of practical reason directing them to do so, between them determine what marriage is, and that "[i]nsofar as these features of men and women pertain to human nature, their source is God, the author of nature."[87]

Grisez's account of the good of marriage is rooted in Church teachings and biblical references, and would thus appear to be clearly religious in its content and in the justifications cited as support for its substantive conclusions, even if non-religious language is employed in certain parts.[88] In other words, it is religious when assessed in terms of Audi's first two criteria. The exact similarity between Grisez's reasoning and that of Finnis and George must also provide strong evidence that the assertions of the latter two concerning the law can be categorized as religious using the two criteria concerned. This is reinforced by the point that Finnis has personally described the "good of marriage" in wholly religious terms.

> Unless God had created sex, and thus familial relationships, we could not begin to understand the meaning of "Father", "Son", Trinity, Incarnation, and adoption as children of God. By its utmost intimacy which yet preserves the individual identities and roles of those who share it, marriage (defined by negative moral absolutes in the way Grisez recalled) discloses the possibility of divine-human communion, initiated by a covenant-relationship in which we trust God will remain faithful unconditionally, exceptionlessly, by a commitment which has the moral necessity and stability of absolute moral norms.[89]

Furthermore, Finnis frequently invokes Catholic teachings, especially those of St. Augustine and Pope John Paul II, as authority

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86. *Id.* at 635 n.163.

87. *Id.* at 635–36 (quoting Pope Paul VI); *see also id.* at 637–41, 644–657 (noting the additional doctrinal references within Pope Paul VI's teachings).

88. *Id.* at 636.

89. JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH 29 (1991).

concerning the place of sexual intercourse within marriage,[90] and—after initially presenting his arguments in non-sectarian terms—Robert George later produced what appears to be just the same arguments as examples of the Catholic Church's teachings about sexual morality.[91]

However, despite this plethora of evidence to show on a watertight basis that Audi's criteria are complied with, it is useful to go further by showing that the contents of the new natural lawyers' arguments make little or no sense in the absence of a religious foundation. With this in mind, we might ask how far it is *reasonably* possible to believe—in the absence of a set of religious convictions which dictate such conclusions—that vaginal intercourse between a married couple *literally* turns the partners into one being, that the unmarried must *never* engage in sexual acts *of any kind*, that acts of oral or anal sex between a married couple are *always* impermissible if done for their own sake, and that *all* acts of masturbation are impermissible.[92] One might add to this list the notion that a married person commits adultery in the heart merely by *looking* with desire at someone to whom they are not married.[93] Is it really possible, convincingly, to justify such conclusions—all of which are articulated by the new natural lawyers—in the absence of religious authority? Is it really possible, in the absence of religious authority, to sustain the view that the sexual activity of a committed, monogamous same-sex couple is not morally equivalent to that of a married opposite-sex couple if, as a matter of fact, both couples possess a deep companionship and mutual and exclusive commitment and love, these characteristics being reflected in and the point of their sexual acts? Or equally, why can the sexual acts of a committed, monogamous,

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90. *See* Finnis, *Sexual Orientation*, *supra* note 4, at 1049, 1063–69.

91. *See* GEORGE, supra note 21, at 147–51 (expounding upon arguments produced by various authors on the moral harm of "non-marital" sexual acts); *id.* at 290–94 (enlisting the Catholic Church's reasoning on the morality of sexual acts to support the author's own arguments).

92. *See generally* GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 641–57 (discussing the theory that marital sexual acts should be chaste and even marital sexual acts are immoral if they are intended to bring satisfaction apart from sexual intercourse); *Every Marital Act*, *supra* note 78, at 414 (asserting the theory that marital intercourse does not include masturbation by one partner or the other, oral or anal sex, or intercourse involving contraception).

93. GRISEZ, LIVING A CHRISTIAN LIFE, *supra* note 15, at 644 (quoting *Matthew* 5.27–28) ("Jesus teaches that 'to look at a woman with lust'—that is—deliberately to entertain illicit sexual desire—is sufficient to constitute the act.").

but unmarried *opposite*-sex couple not be so compared with those of a married couple? As will be obvious, such questions are relevant both to the religious foundations of the new natural law arguments and to their substantive appeal, or lack thereof. In the cases of all three couples just mentioned, the same elements of companionship and love would appear to be in play as a matter of *fact* (a point which, as was noted earlier, Grisez himself appears partly to concede in the case of same-sex couples). However, if we try to explain why the two unmarried couples' sexual acts are contrary to the *inherently* marital nature of sex and contravene the modes of responsibility in relation to the good of marriage without reference to the religious material in Grisez's account—including, crucially, the central notion of marriage as two-in-one flesh union[94]—we are rapidly reduced to saying that those two couples' sexual acts cannot be marital because marital acts involving *fides* can only be performed between married partners of the *opposite* sex. This is a position which simply looks circular in the absence of the concept of two-in-one flesh union. It thus appears crucial to seek to understand whether—religious foundations and nature aside—the idea of two-in-one flesh union is in fact plausible and capable of offering any solid foundation for the new natural lawyers' definition of the good of marriage.

B. Critique of the Two-in-One Flesh Union Concept

At this point, it is important to consider Gareth Moore's devastating critique of the idea of two-in-one flesh union. The idea, Moore suggests, gets the facts wrong even as a description of animal reproductive biology, given that it must be seen as failing to distinguish between an animal's activities and the functioning of its organs and other parts.[95] When an animal walks, it acts, and we ascribe to it

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94. *Id.* at 568.

95. GARETH MOORE, A QUESTION OF TRUTH: CHRISTIANITY AND HOMOSEXUALITY 253–57 (2003). Moore's argument is not, David Richards and I believe, undermined by the assertions of George and Bradley concerning the lack of analogy between a sex organ and a gun. *See* GEORGE, *supra* note 21, at 146–47 (explaining the analogy between a sterile sex organ and an unloaded gun in that both fail to achieve their respective goals of procreation and killing, and discrediting this analogy because reproduction is a biological function even when it fails). A sex organ, like any other organ, is and functions as part of a person. Moore's argument attacks the further proposition that it is inextricably bound up with the "personal reality of the human being," as George and Bradley define it, and thus helps undermine the plausibility of that conception of "reality." *Id.* at 147–48. George and Bradley's assertions are in any event problematic. They claim that reproductive organs never cease to

a voluntary act: it is an agent.[96] But the beating of an animal's heart, an important organ, is not something that the animal voluntarily does; the heart functions, but it does not involve the agency of the animal as walking does, and neither is the heart itself an agent.[97] The ability of an animal to act depends on the functioning of its parts, but acts and functions are conceptually distinct.[98] This, Moore points out, undermines Grisez's entire argument.[99] The different parts of an animal, each of which has a function, are combined to form the complete organism, capable of acting. When talking of the male and female coming together to form the complete organism that is capable of reproducing sexually, Grisez is thus treating two animals as organs or parts of some other animal or organism.[100] In doing so, Grisez gets his facts wrong. As Moore states, "while organs are parts of animals or organisms, animals are not parts of animals or organisms."[101] Grisez's mating couple is not an organism, but two people who engage in a joint activity for a certain purpose: "[t]he real biological unity that Grisez wishes to find, which would make of the two together one complete organism, is simply not there. The couple just is not one flesh in the sense that Grisez wants."[102] As Moore also observes, Grisez's argument would, if correct, have an extraordinary consequence.

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operate as reproductive organs, even when they are not actively performing reproductive functions. But if this were correct, then a penis would be performing in a reproductive fashion while urinating.

96. MOORE, *supra* note 95, at 255.

97. *Id.*

98. *See, e.g.*, *id.* at 256 (comparing the connection between people who are members of a group, such as a military, coming together to act as one, and the different body parts and organs that make up a living animal).

99. *Id.* at 231–34.

100. *See id.* at 231 (arguing that to treat two persons engaged in a sexual procreative act as a single completed organism is to reduce the individual partner to the status of organ; this status means the individual is devoid of intent, motivation, or individual desire).

101. MOORE, *supra* note 95, at 256; a*ccord* Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 280 (1995) (disputing the arguments and rhetoric of the new natural lawyers that rest on the idea of the "one-flesh union," and arguing that what is being united, if anything, is sperm and egg instead of persons).

102. MOORE, *supra* note 95, at 257 (citing Jack A. Bonsor, *Homosexual Orientation and Anthropology*, 59 THEOLOGICAL STUD. 60, 81 (1998) (reasoning that couples engage in mating as a result of the individuals' impulses for love and self-giving, and that these impulses should not be acceptable for one couple but sinful for another)).

> [I]t would be rather peculiar if Grisez were correct, if it were the case that male and female formed one organism when they mated. For then it would be this single organism that reproduced. . . . But if a single organism reproduces, this is what we call asexual reproduction. It is characteristic of sexual reproduction, by contrast, that it is carried out by two animals in collaboration.[103]

In relation to same-sex sexual acts, Moore points out that even if the one-flesh union theory was true, Grisez would still need to show that one-flesh union was the *only* form of bodily communion of persons involving sex that was possible if he is to successfully show that same-sex couples should not have sex.[104] However, as Moore suggests,

> Grisez would have a hard time showing this, for, *prima facie*, the simple bodily joining of two people bound together in a committed relationship of mutual affection, be they both male, both female or a mixed couple, is just the sort of thing we would call a form of bodily communion of persons. The experience of intimacy they have in their intercourse may not be the experience of marital union, but it by no means follows that it is not the experience of any real unity between them. That could only be so if marital union were the only real unity between people, which is plainly not the case.[105]

The idea of one-flesh union, thus, appears to be distinctly problematic when subjected to critical assessment. Remove one-flesh union from the analysis, however, and the boundaries which the new natural lawyers ascribe to the marriage good lose their rooting. If the couple having sex is not in fact one organism for reproductive purposes, they might—other things being equal, in moral terms—

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103. MOORE, *supra* note 95, at 257.

104. *Id.* at 234 (asserting that the alleged immorality of non-reproductive sexual activity has never been convincingly argued on non-secular grounds alone).

105. Gareth Moore, *Natural Sex: Germain Grisez, Sex, and Natural Law*, *in* THE REVIVAL OF NATURAL LAW 223, 237 (Nigel Biggar & Rufus Black eds., 2000).

reasonably engage in sexual activity for purposes wholly unconnected with reproduction or marriage (as an expression of sexual love and intimacy, for example, or purely for pleasure).[106] In all of the new natural lawyers' arguments about "non-marital" sexual acts, the existence of one-flesh union between a married couple when engaging in vaginal intercourse, but its absence as between the unmarried (heterosexual or homosexual) partners or the married couple whose acts produce orgasm by some other route, provides the foundation for the claim that the sexual activities of the first couple must be classified, morally, in fundamentally different terms from those of the others. Remove the fiction of one-flesh union from the picture and the foundation simply disappears.[107]

Moore also points out that, even if Grisez's arguments were not defeated by the implausibility of his pseudo biology of one-flesh union, they involve a running together of form and motive.[108] Because a particular sexual act has a non-procreative *form*, Grisez assumes that the couple's motives are lacking in reciprocal self-giving. Moore is clear that this is unacceptable.

> [T]he form of an act implies nothing whatever about the motives of the couple . . . . Any sexual act, even though not suited to procreation, may be an act of reciprocal self-giving, an act undertaken willingly and lovingly, and Grisez is not entitled to infer otherwise . . . if [an act] is not selfish, but undertaken in a context of mutual affectionate feelings, it surely is likely to strengthen marital communion. It is hard to see how mutual affectionate feelings can be uninte-

106. That couples might engage in sex for other purposes is something which has implications for the stance which the law should properly adopt. This is particularly true given the importance that Finnis and George attach to one-flesh union when discussing the law's treatment of lesbians and gay men. *See supra* text accompanying notes 24 and 25. Furthermore, the one-flesh union cannot play a plausible role in argument about *civil* marriage (or secular law more generally) given that civil marriage allows for divorce whereas the one-flesh union account decisively does not. *See* David O. Erdos, *Questions of Tolerance and Fairness*, *in* THE FUTURE OF GAY RIGHTS IN AMERICA 15, 28–30 (H. N. Hirsch ed., 2005).

107. Moore, *supra* note 105, at 230 (asserting that because reproduction is the result of successful organ functioning, and not a function on its own, Grisez is unable to adequately support his argument that some sexual functions are legitimate while other (homosexual) sexual functions are not).

108. *Id.* at 228 (distinguishing the form or idea of marriage from the motivating factors that lead partners to get married).

> grated with conjugal love, and still harder to understand how they can be at odds with it.[109]

What seems clear is that Grisez is not employing a definition of conjugal love, which has much to do with people's actual feelings. Rather, having defined certain acts as incompatible with the marital good, Grisez is making assumptions about people's motives for engaging in them.

As a matter of logic, it is thus hard to see how one-flesh union can produce anything approaching a plausible foundation for the new natural lawyers' arguments, strongly reinforcing the point that the only real foundation for those arguments is religion. Furthermore, the notion of one-flesh union seems decidedly unappealing, not least for its thoroughly impoverished view of what sexual activity is, or can be about. Stephen Macedo has suggested that the new natural lawyers have an "extremely narrow view of valuable sexual activity as only that which is open to procreation and within a permanent heterosexual marriage."[110] Furthermore, as Gareth Moore demonstrates, Grisez's assertion that same-sex partners experience intimacy only in private and incommunicable ways, rather than in a fashion that is shared between them, involves a myopic understanding of intimacy. As a factual matter, people can share experiences in all sorts of ways, for example by sharing food and jointly enjoying its taste. Sharing, understood in this practical, common sense way is even more important in consensual sexual activity, whatever the sexes of the partners. The partners can share with each other the intimacy that they are enjoying, "and the enjoyment of sharing it [is] also shared," just as taste is shared.[111] The sharing of experiences of intimacy *can* therefore be a common good for the partners: "[i]f they are friends and enjoy sex together, their joint enjoyment and their desire to provide enjoyment for each other will contribute to the strength of their friendship and their mutual commitment."[112] More significantly still, however, Grisez seems to miss the point that intimacy is *by definition* a shared experience. A person's experience of

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109. *Id.* at 230.

110. Macedo, *supra* note 101, at 281. Flaws in the new natural lawyers' arguments are addressed here rather than in Section I.A.

111. *See, e.g.*, Moore, *supra* note 105, at 238.

112. *Id.*

intimacy depends upon their perceiving the world around them in such a way as to believe certain things. As Moore puts it:

> If I am in bed with you, I can have an experience of intimacy only if I believe that there is an intimacy to experience, which implies believing that you too are having a similar experience. If I think that for you this is a moment of intimate communion, that will enable me to think in the same way, and so to have the experience of intimacy. If, on the other hand, I think that our joint sexual activity is irksome to you . . . then, whatever orgasms and other sensations I have, I will realize that there is no intimacy, and I therefore cannot have an experience of intimacy.[113]

A key part of the value of consensual sexual activity *is*, surely, that it involves a unique level and type of personal interdependence, and that it is crucially defined by the infinitely variable perceptions of the participants. Grisez's account simply ignores this.

C. New Natural Law and the Manhattan Declaration

Arguments considered so far in this Section have sought to demonstrate the religious character and unappealing content of the new natural lawyers' views concerning the good of marriage. It is now time to consider the continuing practical role of debate about new natural law, something which can be neatly illustrated by comparing the arguments of the Manhattan Declaration with some of those advanced by George and his colleagues in *Perry v. Schwarzenegger*—a comparison which highlights the religious nature and lack of appeal of those more recent arguments. George is one of the three coauthors of the Manhattan Declaration, released on November 20, 2009.[114] The Declaration is subtitled "A Call of Christian Conscience," and one of its significant aspects is that the coauthors proclaim themselves as having "joined together," despite Christian denominational differences (another coauthor, for example, is prominent Protestant fundamentalist and former Watergate defen-

113. *Id.*

114. MANHATTAN DECLARATION, *supra* note 10, at 9.

dant Charles Colson[115]) "to affirm our right—and, more importantly, to *embrace our obligation*—to speak and act in defense" of what are described as the Christian truths of the "inherent" right to life, of "marriage as a conjugal union of man and woman, ordained by God from the creation, and historically understood by believers and non-believers alike, to be the most basic institution in society" and of religious liberty.[116] The Declaration thus describes itself as being articulated "in light of the truth that is grounded in Holy Scripture, in natural human reason (which is itself, in our view, the gift of a beneficent God), and in the very nature of the human person," the authors being "compelled by our Christian faith to speak and act" in defense of matters such as "the dignity of marriage as a union of husband and wife."[117] Accompanying publicity describes the Declaration as having been "born out of an urgent concern about growing efforts to marginalize the Christian voice in the public sphere, to redefine marriage, and to move away from the biblical view of the sanctity of life."[118] It is thus "a call of Christian Conscience . . . in defense of biblical truths with respect to the three issues it addresses."[119]

The Declaration begins with a lengthy attack on the constitutionally protected right to abortion, in which the authors assert that

> [a] truly prophetic Christian witness will insistently call on those who have been entrusted with temporal power to fulfill the first responsibility of government . . . . The Bible enjoins us to defend those who cannot defend themselves, to speak for those who cannot themselves speak. . . . What the Bible and the light of reason make clear, we must make clear.[120]

The Declaration is thus using what it understands to be a Christian argument as a basis for influencing and criticizing the law. A similar trend is evident in the discussion of marriage, which gains more at-

115. *Id.*

116. *Id.* at 2.

117. *Id.*

118. *Id.*

119. *About the Movement*, THE MANHATTAN DECLARATION, http://www.manhattandeclaration.org/the-movement/movement.aspx (last visited Feb. 13, 2011).

120. MANHATTAN DECLARATION, *supra* note 10, at 4.

tention than any other subject in the Declaration. The discussion begins with a quotation from Genesis, and states that marriage is "an institution ordained by God"[121] and that "[t]he Bible teaches us that marriage is a central part of God's creation covenant. Indeed, the union of husband and wife mirrors the bond between Christ and his church."[122] Much of the reasoning underpinning these statements appears to be of a new natural law character, and clearly the statements are religious in terms of Audi's criteria. Readers are thus told that "[i]n Scripture, the creation of man and woman, and their one-flesh union as husband and wife, is the crowning achievement of God's creation"[123]—effectively, a running together of the new natural law concept of heterosexual marriage as one-flesh union with the type of biblical literalism characteristic of Protestant fundamentalists. Furthermore,

> marriage is made possible by the sexual complementarity of man and woman, and that the comprehensive, multi-level sharing of life that marriage is includes bodily unity of the sort that unites husband and wife biologically as one. This is because the body is no mere extrinsic instrument of the human person, but truly part of the personal reality of the human being.[124]

This argument is, of course, highly reminiscent of the new natural lawyers' writings discussed above. Furthermore, marriage—defined as one man and one woman—is

> actualized by loving sexual intercourse in which the spouses become one flesh, not in some merely metaphorical sense, but by fulfilling together the behavioral conditions of procreation. That is why in the Christian tradition, and historically in Western law, consummated marriages are not dissoluble or annullable on the ground of infertility, even though the nature of the marital relationship is shaped and struc-

121. *Id.*
122. *Id.* at 7.
123. *Id.* at 4.
124. *Id.* at 6.

> tured by its intrinsic orientation to the great good of procreation.[125]

Again, this exactly parallels new natural law writings concerning one-flesh union. This fixed definition of marriage also shows through in the Declaration's denunciation of the "false and destructive belief that marriage is all about romance and other adult satisfactions, and not, in any intrinsic way, about procreation and the unique character and value of acts and relationships whose meaning is shaped by their aptness for the generation, promotion and protection of life"[126] and in the assertion that marriage "is an objective reality—a covenantal union of husband and wife."[127] As will be apparent straightaway, this definition very much reflects the new natural law view, discussed above, that personal pleasure and emotional satisfaction do not lie at the heart of marriage. Rather, the essence of any marriage lies in one-flesh union, with its focus on procreation, or at least on acts which have procreative potential. It will shortly become apparent that this view is also reflected in George's amicus brief argument in *Perry*[128] (and, earlier, in the brief for *Lawrence v. Texas*[129]). It should thus be clear that the Declaration places absolutely central reliance on the one-flesh union definition of marriage developed by the new natural lawyers. The one modification to this is the occasional attempt to pair up this definition with pieces of biblical literalism. This is unsurprising, given the involvement of Protestant fundamentalist Charles Colson in the Declaration's drafting, but perhaps rather revealing insofar as it shows the ease with which the new natural law scheme, resting as it officially does on a process of practically reasonable reflection about human goods, can in fact serve as an intellectual bedfellow for fundamentalist Protestantism.[130]

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125. *Id.*

126. *Id.* at 5.

127. *Id.* at 6.

128. George, Girgis & Anderson Brief, *supra* note 13, at 17 (arguing that marriage has traditionally been understood as "a bodily, 'two-in-one' flesh union of persons").

129. George & Bradley Brief, *supra* note 6, at 17 (arguing that a legal redefinition of marriage would make clear that the idea of marriage is more about emotional, rather than physical union).

130. *See generally* BAMFORTH & RICHARDS, *supra* note 3, at 279–303 (assessing the moral absolutes as well as the possible fundamentalism of new natural law); DAVID A.J. RICHARDS, FUNDAMENTALISM IN AMERICAN RELIGION AND LAW: OBAMA'S CHALLENGE TO PATRIARCHY'S THREAT TO DEMOCRACY (2010).

The authors of the Declaration also argue that the law has a duty to recognize marriage as they define it. Otherwise, the "religious liberty of those for whom this is a matter of conscience is jeopardized,"[131] sex education programs will be used in schools to teach definitions of marriage with which religious-minded parents disagree, and "the common good of civil society is damaged when the law itself . . . becomes a tool for eroding a sound understanding of marriage."[132] Each of these assertions is open to question. First, the religious liberty argument appears in reality to be saying that the law must give effect to a biblical definition of marriage in order not to offend the religious liberty of those who support that definition, a difficult argument to sustain where there is a constitutional separation of church and state.[133]

The extent to which the Declaration is keen to emphasize the priority of the religious over the secular is underlined still further by its later, more general discussion of "religious liberty." This discussion begins with an attack on what are characterized as attempts to undermine "conscience clauses," which might otherwise exclude religious organizations opposed to the right to abortion and the legal recognition of same-sex partnerships from any obligation to recognize such arrangements, but goes on to bluntly advocate noncompliance with the law by religious organizations where their faith so decrees.[134] The Declaration thus asserts that its signatories

> will not comply with any edict that purports to compel our [religious] institutions to participate in abortions . . . or any other anti-life act; nor will we bend to any rule purporting to force us to bless immoral sexual partnerships, treat them as marriages or the equivalent, or refrain from proclaiming the truth, as we know it . . . . [U]nder no circumstances will we render to Caesar what is God's.[135]

Second, the sex education argument appears to be a classic piece of unsupported rhetoric, given that it is just not explained how, as an in-

131. MANHATTAN DECLARATION, *supra* note 10, at 6.
132. *Id.* at 6–7.
133. *See* U.S. CONST. amend. I.
134. MANHATTAN DECLARATION, *supra* note 10, at 7–9.
135. *Id.* at 9.

evitable consequence of the legal recognition of same-sex partnership rights, mandatory sex education programs of the type described would inevitably appear in all schools. Third, the common good argument only presents a problem if one is first convinced of the soundness of the definition of marriage offered in the Declaration, and also if one believes the ill-defined, slippery-slope-type notion that legal change inevitably brings with it ill-defined social change, which is inevitably to be feared.

Clearly, the arguments of the Manhattan Declaration, including the treatment of the good of marriage, are of a religious nature in terms of Audi's criteria: they are rooted in commitments of religious faith, and indeed seek to give priority to them, ultimately claiming that such commitments must take priority over the law if necessary. The Declaration thus provides an important backdrop to, and point of comparison with, the purportedly secular arguments concerning the definition of marriage advanced by George in subsequent constitutional litigation in *Perry v. Schwarzenegger*. Robert George filed an amicus brief with two others on September 24, 2010 before the Court of Appeals for the Ninth Circuit, appealing the district court's decision that Proposition 8 was unconstitutional under the Fourteenth Amendment.[136] This brief, employing as it does what purports to be secular constitutional argument concerning the good of marriage, can thus be compared directly with the openly religious arguments of the Manhattan Declaration, a comparison which will reveal strong similarities between the two. Before engaging in such a comparison, however, it is first necessary to explain in further detail the district court's reasoning in *Perry*, given that Judge Walker's judgment contains important arguments concerning same-sex marriage and the Constitution.

D. New Natural Law and the Perry *Decision*

In *Perry*, Judge Walker noted that the freedom to marry was recognized as a fundamental constitutional right protected by the Due Process Clause, and that the plaintiffs were seeking to exercise that right.[137] At the heart of his judgment, in terms of the legal status

136. George, Girgis & Anderson Brief, *supra* note 13, at 28–29.

137. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991–92 (N.D. Cal. 2010) (acknowledging that the freedom to marry is recognized as a fundamental right under the Due Process Clause of the Fourteenth Amendment), *motion to stay district court order pending*

of same-sex partnerships, was his assessment of the character of marriage. By reference to earlier evidentiary findings, Judge Walker was clear that

> [m]arriage has retained certain characteristics throughout the history of the United States . . . . [It] requires two parties to give their free consent to form a relationship, which then forms the foundation of a household. . . . The spouses must consent to support each other and any dependents. . . . The state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace. . . . The state respects an individual's choice to build a family with another and protects the relationship because it is so central a part of an individual's life.[138]

The state had never inquired into the parties' procreative capacity or intent before issuing a marriage licence, for "a marriage license is more than a license to have procreative sexual intercourse" and "wholly apart from procreation, choice and privacy play a pivotal role in the marital relationship."[139] This reflected a shift in the history of marriage law, from the earlier understanding of marriage as a gendered institution, toward an understanding from which state-mandated gender roles were absent and according to which men and women were treated as equals.[140] Evidence for such a shift included

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appeal granted 2010 WL 3212786 (9th Cir. Aug. 16, 2010), *certifying question to Cal. Sup. Ct.* 630 F.3d 898 (9th Cir. 2011); *see also* Turner v. Safely, 482 U.S. 78, 95 (1987) (holding that the decision to marry is a fundamental constitutional right); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (holding that the right to marry is fundamentally important to all people); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) (documenting the Court's long recognition of freedom of choice regarding marriage); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by men."); *cf.* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("Marriage is a coming together . . . promot[ing] a way of life, not causes.").

138. *Perry*, 704 F. Supp. 2d at 992.

139. *Id.*

140. *Id.* at 992–93; *see also id.* at 958–61 (reviewing the history and evolution of marriage in the United States).

the emergence of no-fault divorce laws,[141] making it easier for spouses to define their own roles within a marriage, and California's elimination of marital obligations based on gender.[142] Significantly, given his eventual conclusion concerning the unconstitutionality of Proposition 8, Judge Walker suggested that such developments "reflect[ed] an evolution in the understanding of gender rather than a change in marriage" and that the right to marry "did not become different simply because the institution of marriage became compatible with gender equality."[143] The genders of the parties aside, "same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage" as a legal institution.[144] As such, the evidence did not reveal any historical purpose for excluding same-sex couples from marriage, given that married couples had never been required to procreate. Instead, the exclusion merely reflected a time when the parties' genders had played a distinct role in society and marriage, a position which was no longer the case.[145] Recognition of committed same-sex relationships was consistent with the history, tradition, and practice of marriage in the United States and did not involve the creation of a new right.[146] Rather, those opposed to Proposition 8 were merely seeking to have their partnerships recognized for what they were, namely marriage.[147]

Judge Walker was clear that the availability of a separate regime of domestic partnerships for same-sex couples under California law merely served to symbolically mark out those relationships as being of a lesser status than opposite-sex partnerships and did not fulfill the state's obligations under the Fourteenth Amendment's Due Process Clause.[148] Domestic partnerships, as recognized in California, "do not provide the same social meaning as marriage,"[149] an institution Judge Walker had earlier categorized in his evidentiary

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141. *See, e.g.*, Cal. Fam. Code § 2310 (West 2006) ("Dissolution of the marriage . . . of the parties may be based on either of the following grounds . . . irreconcilable differences, which have caused the irremediable breakdown of the marriage. . . .").

142. *See, e.g.*, *Perry*, 704 F. Supp. 2d at 958–59.

143. *Id.* at 993.

144. *Id.*

145. *See id.* at 992–93.

146. *Id.* at 993.

147. *Id.*

148. *Id.* at 993–94.

149. *Id*. at 994.

findings as the definitive social expression of love and commitment.[150] The sole basis on which California determined whether a couple was designated as married or as a domestic partnership was the respective sexes of the partners.[151] Domestic partnerships explicitly withheld the status of marriage from same-sex couples—something which significantly disadvantaged them—and had been created specifically to withhold that status.[152] Judge Walker also found as an evidentiary matter that Proposition 8 placed "the force of law behind a broader set of stigmas against gays and lesbians, including: gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society."[153] Such stigmas, Judge Walker reasoned, helped to reserve the most socially valued form of relationship for opposite-sex couples and to entrench distinct and unique roles for men and women in marriage.[154]

Judge Walker concluded that Proposition 8 could withstand neither rational basis nor strict scrutiny review,[155] the latter standard being used under the Due Process heading and requiring the production of evidence to show that the measure in question was narrowly tailored to serving a compelling government interest.[156] He noted that gays and lesbians experienced discrimination based on unfounded stereotypes and prejudices,[157] while finding as an evidentiary matter that Proposition 8 increased costs and decreased wealth for same-sex couples in terms of tax and health insurance burdens, while singling out lesbians and gays for unfavorable treatment by suggesting that they were incapable of forming long-term relationships and were not good parents.[158] Those who wished to marry a person of the same

150. *Id.*

151. *Id.* (comparing California statutes for domestic partnership, Cal. Fam. Code §§ 297–299.6 (West 2006), with California's marriage statutes, §§ 300–536 (West 2006)).

152. *See id.* (reasoning that since the evidence showed that withholding "marriage" from plaintiffs significantly disadvantaged them, and the record reflected that marriage is a culturally superior status to domestic partnership, that Due Process was not met by offering same-sex couples an "inferior institution that denies marriage to same-sex couples").

153. *Id.* at 973.

154. *Id.* at 974.

155. *Id.* at 997.

156. *Id.* at 995; s*ee also* City of Boerne v. Flores, 521 U.S. 507, 515–16 (1997) (summarizing the strict scrutiny standard of review).

157. *Perry*, 704 F. Supp. 2d at 996.

158. *Id.* at 978.

sex (i.e., lesbians and gay men) had had their right to do so eliminated by Proposition 8.[159] The only possible basis advanced for distinguishing between same-sex and opposite-sex couples related to the possibility of biological reproduction through sexual intercourse, but this did not explain how sexual orientation could be used as a proxy for fertility.[160] (And it is worth noting, in this regard, that the new natural lawyers have themselves gone to some lengths to defend the right of infertile opposite-sex couples to marry.)[161]

Under the more deferential standard of rational basis review (under the Equal Protection heading), a rational relationship must be shown between the classification adopted and the government object to be attained, and the classification must not be drawn in order to disadvantage the group burdened by the law.[162] Furthermore, tradition alone could not form a rational basis for a law; instead, the state needed an interest other than the tradition itself, which could not legitimize the claim that opposite-sex relationships were better than same-sex relationships.[163] In this case, Judge Walker concluded, the tradition underpinning Proposition 8 was related to the now-discredited notion of distinct gender roles in marriage.[164] The evidence suggested that the recognition of same-sex relationships would not effect a sweeping social change, could have a neutral or even positive effect on the institution of marriage, and would benefit the state.[165] In relation to procreation and parenting, Judge Walker was clear that same-sex and opposite-sex parents were of equal quality and that parents' genders were irrelevant to children's developmental outcomes.[166] In addition, Proposition 8 did not make it more likely that opposite-sex couples would marry and raise children biologically related to both parents, suggesting that it did not advance any identified state interest. As it was drafted, Proposition 8, in fact, had no direct connection to the upbringing of children, instead simply

159. *Id*. at 997.

160. *Perry*, 704 F. Supp. 2d at 997.

161. *See* Finnis, *Good of Marriage*, *supra* note 21, at 126–29; GEORGE, *supra* note 21, at 140–42.

162. *See, e.g.*, *Perry*, 704 F. Supp. 2d at 996–97.

163. *Id*. at 998 (citing Williams v. Illinois, 399 U.S. 235, 239 (1970)).

164. *Id*. at 998 (citing evidence showing that Proposition 8 harmed the state's interest in gender equality by mandating that men and women be treated differently based on antiquated and discredited notions of gender).

165. *Id*. at 998–99.

166. *Id.* at 980.

serving to deny same-sex couples the benefits, including stability, associated with marriage.[167] Additionally, and in direct contradiction of the claims made in the Manhattan Declaration,[168] "the evidence shows that the rights of those opposed to homosexuality or same-sex couples will remain unaffected if the state ceases to enforce Proposition 8."[169] For example, allowing same-sex couples to marry would not restrict the religious freedom of any faith-based organization to refuse to recognize a same-sex partnership.[170] (Judge Walker had earlier noted that, "[m]arriage in the United States has always been a civil matter. . . . Religious leaders may determine independently whether to recognize a civil marriage or divorce but that recognition or lack thereof has no effect on the relationship under state law.")[171] The evidence also suggested (again, as discussed above) that same-sex and opposite-sex partnerships were the same for all relevant legal purposes.[172] Indeed, it showed "conclusively that moral and religious views form[ed] the only basis [on the part of the defenders of Proposition 8] for a belief that same-sex couples are different from opposite-sex couples."[173]

Judge Walker concluded as a matter of law that what remained of the case for Proposition 8 was the notion that

> same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate, [174]

given that the Constitution could not give effect to private biases. Proposition 8, on the evidence, enacted "a private moral view that same-sex couples are inferior to opposite-sex couples" (raising the

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167. *Id.* at 999–1000.
168. *See supra* Section I.C.
169. *Id*. at 999.
170. *Id.*
171. *Id.* at 956.
172. *Id.* at 1001.
173. *Id.*
174. *Id.* at 1002.

inference, from *Romer*, that the disadvantage imposed arose from animosity toward the group affected), a type of disapproval which was constitutionally prohibited.[175] As Judge Walker had noted when reviewing the evidence, the campaign in favor of Proposition 8 had relied on fears that children exposed to the concept of same-sex marriage might somehow "become" gay or lesbian, entailing inaccurate insinuations about the possibility of "conversion" from heterosexuality and implicit fears that parents should dread having a non-heterosexual child, propositions which again reduced to stereotypes concerning the "inferiority" of same-sex relationships.[176] As in *Lawrence v. Texas*, the majority of voters could not use the power of the state to enforce their moral convictions through the law.[177] Proposition 8 thus could not survive rational basis review under the Equal Protection Clause.

E. George's Amicus Brief

As noted earlier, George is the lead coauthor of an amicus brief submitted to the Court of Appeals for the Ninth Circuit in the *Perry* litigation, written in opposition to Judge Walker's judgment. Four points about the brief are significant for present purposes, and each will be considered in turn. First, George and his colleagues acknowledge that religious arguments played a role in Proposition 8, and attempt to defend the use of such arguments in the constitutional context.[178] Second, the new natural law definition of marriage—in direct opposition to Judge Walker's view of the institution—plays a central part in their argument, albeit—by contrast with the Manhattan Declaration—dressed strictly in the vocabulary of federal constitutional law rather than religious belief. However, in an interesting parallel with the Declaration, the definition is used in alliance with distinct, non-new natural law conservative arguments against the recognition of same-sex marriage.[179] Third, and following from the second point, a critical battleground for opponents of the district court's decision is the nature of marriage. For George and other new natural lawyers, marriage is the one-flesh union of husband and wife,

175. *Id.* at 1003.
176. *Id.* at 988.
177. *Id.* at 1002 (citing Lawrence v. Texas, 539 U.S. 558, 571, 582 (2003)).
178. George, Girgis & Anderson Brief, *supra* note 13, at 5–7.
179. *Id.* at 12.

performing only certain sexual acts with procreative potential, whereas for Judge Walker, it is a companionate relationship of mutual social, economic, emotional, spiritual, and physical support, whatever the sexes of the spouses. Fourth, the brief appears difficult to reconcile with George's arguments in his earlier amicus brief in *Lawrence v. Texas*,[180] where the same one-flesh union definition of marriage was invoked in support of the criminal prohibition of consenting sexual activity between men, a consequence to which George and his colleagues do not offer their open support in *Perry*.

Each point will now be considered in turn.

i. The Role of Religious Argument

In relation to the first point, concerning the role of religious argument, George and his colleagues suggest that it is logically inevitable that constitutional amendments and legislation concerning the boundaries of marriage entail some moral view, that questions about justice are inescapably matters of morality—albeit not inevitably religious morality—and (by reference to *Loving v. Virginia*[181]) that laws concerning marriage involve the type of value judgments about the common good which can be found throughout the law and that can be ascertained without appeal to religious authority.[182] Hence, they argue, the

> legal recognition of certain relationships as *marriages* necessarily involves taking a position on at least two questions, *both inescapably normative*, having to do with morality or basic values: (1) the purposes or ends of the institution of marriage, and (2) the moral worthiness of adherence to the norms of marriage so conceived—adherence which is . . . *honored* and *encouraged* by state recognition.[183]

However, it is worth emphasizing in response to this argument that it is unremarkable to state that rules concerning marriage,

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180. George & Bradley Brief, *supra* note 6, at 3, 7–8.

181. George, Girgis & Anderson Brief, *supra* note 13, at 4 (citing Loving v. Virginia, 338 U.S. 1 (1967).

182. *Id.* at 4–5, 9–10.

183. *Id.* at 11 (emphasis added).

or other widely accepted social institutions, reflect moral views in the form of broad and widely understood normative conceptions of what is right and desirable or wrong and undesirable. As Neil MacCormick and Joseph Raz have shown, without such an acknowledgement it is difficult, if not impossible, to make sense of wide areas of the substantive law.[184] It needs to be stressed that MacCormick, Raz, and others who share this view present their argument at a level of some generality. To accept that laws generally reflect broad conceptions of right and wrong is not inevitably to mandate that any *particular* conception (whether broad or narrow) must be adopted in any given situation. For, as a matter of logic, the latter conclusion requires a further, much more openly normative level, or levels, of argument—for example, concerning the role of law in relation to contested theories of the good and individual rights—to be advanced and convincingly defended in order to survive scrutiny. In his judgment, Judge Walker invoked *Lawrence* when stipulating that the state does not have an interest in enforcing *private moral or religious beliefs without an accompanying secular purpose*.[185] This is a proposition that is widely accepted in U.S. constitutional law and which serves to exclude various specific conceptions of right and wrong—that is, conceptions which operate at the "particular" level just outlined—from assuming overriding priority. As the use of the word "without" in relation to any "accompanying secular purpose" makes clear, Judge Walker does not appear to have been saying that the state may not enforce any moral beliefs *whatsoever*. In other words, he seems to be acknowledging the possibility of arguments at the "general" level outlined above.[186] However, George and his col-

184. NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY 22, 26–27, 37 (1982) (discussing moral disestablishment, a theory suggesting that humans are autonomous and thus must be free to make their own choices of morality, and concluding that the best governing system would include limited moral establishment constrained to prevent excessive repression of human freedom); JOSEPH RAZ, THE MORALITY OF FREEDOM 412–420 (1986) (suggesting that John Stewart Mill's harm principle—holding that the only justification for coercively interfering with a person is to prevent him from harming others—actually entails the enforcement of morality, and thus governments should promote the moral quality of their constituents); *see also* BAMFORTH & RICHARDS, *supra* note 3, at 25–31.

185. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 930–31 (N.D. Cal. 2010) (citing Lawrence v. Texas, 539 U.S. 558, 571 (2003) and Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947)), *motion to stay district court order pending appeal granted* 2010 WL 3212786 (9th Cir. Aug. 16, 2010), *certifying question to Cal. Sup. Ct.* 628 F.3d 1191 (9th Cir. 2011) (certifying state law question of appellant's standing).

186. *Id.*

leagues appear to be taking Judge Walker's judgment to task at the more "particular" level. In reality, it is unremarkable that analysis of the constitutionality of Proposition 8 entails normative debate about the nature of the institution of marriage: in terms of constitutionality, what is crucial instead is the basis for and nature of the views advanced in favor of the disputed amendment. In other words, the argument advanced by George and his colleagues about the inevitability of fairly general normative claims being used in debate about Proposition 8 does not undermine Judge Walker's more specific stipulation concerning particular private moral or religious beliefs that lack an accompanying secular purpose.

George and his colleagues then proceed to argue that while many supporters of Proposition 8 may have been motivated by religious reasons, the fact that a moral position is supported by a religious tradition is not sufficient to disqualify it from consideration in support of a legislative proposal.[187] In the view of George and his colleagues, the belief that a relationship between a man and a woman is inherently better than a relationship between two men or between two women, or a view entailing moral disapproval of homosexuality, is "very likely" a legitimate basis for legislation, not being reducible to irrational emotional responses.[188] George and his colleagues also assert—albeit with reference to an extremely limited range of sources—that "the goods at stake in such a public institution as marriage," defined as the union of one man and one woman, "have to do with public morality and welfare both, and are themselves secular purposes."[189] The brief concludes with the argument—doubtless advanced in an effort to avoid the Supreme Court's conclusion in *Romer v. Evans* that a constitutional amendment motivated by animus was unlawful—that

> [s]upport for [Proposition 8] need not involve a desire to harm or disadvantage, reliance on bare tradition or animus, or even moral disapproval of homosexual conduct. The irreducibly normative content of Propo-

187. George, Girgis & Anderson Brief, *supra* note 13, at 5–6.

188. *Id.* at 6−8. This is arguably contrary—although the point is not answered head-on in the brief—to *Romer v. Evans*. Romer v. Evans, 517 U.S. 620, 632–35 (1996). Interestingly, supporters of Proposition 8 are also described as having abandoned arguments based on the "moral superiority of opposite-sex couples" at the district court level. *Perry*, 704 F. Supp. 2d at 931.

189. George, Girgis & Anderson Brief, *supra* note 13, at 20.

> sition 8 is the same as the irreducibly normative content of *any* marriage law at all: a claim about the purposes or ends of marriage, and an endorsement and encouragement of adherence to those as worthwhile and consistent with the state's interests.[190]

Two issues must be raised about the argument at this stage. First, George and his colleagues appear to have moved, without real explanation, from a "general" argument about the inevitability that moral views, broadly understood, play a role in the law's treatment of a widely accepted institution such as marriage, through to the much more "specific" and contentious position that it is acceptable for *arguments rooted in religious tradition* to be invoked in support of measures such as Proposition 8. As explained above, one cannot simply slide from the general to the specific in this way. Instead, a further level, or levels, of argument is or are needed. Second, the brief's rather loose statements that support for Proposition 8 need not entail bare tradition or animus and that moral disapproval is "very likely" a legitimate basis for legislation are extremely revealing insofar as they allow for exactly the possibility that very many supporters of Proposition 8 were in fact driven by the illegitimate motivations concerned—motivations which George and his colleagues claim to be absent from their own arguments—and that moral disapproval may not, or may not always, prove sufficient on deeper analysis. The looseness of these statements rather begs the question how far the brief is concerned with the actual, day-to-day realities of the campaign surrounding Proposition 8 and the consequences of the Proposition's passage, and how far it is seeking to avoid confronting them. Moreover, the arguments concerning tradition and moral disapproval have in any event been rebutted in earlier cases. The Supreme Court majority in *Lawrence*, citing Justice Stevens's dissent in *Bowers v. Hardwick*, made the point in strong terms that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law."[191] Since George and his colleagues do not seem to be suggesting that

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190. *Id.* at 28.

191. Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *see also* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 389–90 (D. Mass. 2010) (citing the Supreme Court's conclusion in *Lawrence*), *and infra* text accompanying notes 221–226.

the majority of Proposition 8 supporters formed their moral beliefs concerning the constitutional amendment on the basis of new evidence or argument, it seems hard to resist the conclusion that exactly the types of "majority moral belief" excluded from consideration in *Lawrence* were in fact in play. If correct, this point reinforces the power of Judge Walker's conclusion in *Perry* that supporters of Proposition 8 were forced back—once their arguments were subjected to critical examination—to the claim that "same-sex couples simply are not as good as opposite-sex couples."[192] When coupled with Judge Walker's various evidentiary findings concerning the forms of symbolic disadvantage conferred on same-sex couples by their exclusion from marriage, this point helps underline the unreality of the social distance that the brief seeks to maintain may be possible between the passage of Proposition 8 and the attachment of social stigma to same-sex partners and partnerships.

ii. The Definition of Marriage

Moving to the second point about the brief set out above—concerning the centrality to it of argument about the definition of marriage—George and his colleagues argue that the fact that some arrangements are left out of the definition of marriage is a feature of any legal system in which marriages are distinguished from "non-marital" forms of association.[193] In consequence, before one can conclude that a particular marriage policy violates a fundamental constitutional right, for example, to marry or to equal protection, "one must determine what marriage *actually is* (i.e., its specific ends and purposes) and why it should be recognized legally in the first place."[194] George and his colleagues initially use this argument, without more, as a basis for asserting that since the definition of marriage is a substantive normative matter, it is not something for the courts to determine, thus precluding any judicial assessment of the constitutionality of Proposition 8.[195] The brief then engages in what may be described as a somewhat rhetorical strategy relating to public

192. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010), *motion to stay district court order pending appeal granted* 2010 WL 3212786 (9th Cir. Aug. 16, 2010), *certifying question to Cal. Sup. Ct.* 630 F.3d 898 (9th Cir. 2011).

193. George, Girgis & Anderson Brief, *supra* note 13, at 12.

194. *Id.* (emphasis added).

195. *Id.* at 13.

belief, or as an attempt to present a set of subtly differing conservative positions relating to the definition of marriage within one umbrella heading. George and his colleagues argue that as a general matter, the effects of obscuring the public understanding of an institution's purposes or ends—here, those of marriage—can sometimes do significant damage to the common good, even if the claims made about the institution are in fact incorrect. They thus suggest that some supporters of Proposition 8 may plausibly claim that obscuring the purposes of marriage harms the common good, whatever the moral status of homosexual conduct. Such supporters (it is unclear whether George and his colleagues fall into the group concerned) believe that heterosexual marriage is the best environment for the production and upbringing of children. However, "[i]t has also been argued"—this time, it is openly acknowledged, by George and other new natural lawyers—that

> (a) opposite-sex couples are capable of real bodily union (in mating, whether or not conception can or does occur); that (b) this makes it possible for such couples—and only such couples—to form and consummate the *kind* of relationship intrinsically oriented to procreation and childrearing; and that (c) only if marriage inherently involves bodily union and its corresponding orientation to children can one fully make sense of the other marital norms of permanence, exclusivity and monogamy, annulability for non-consummation, etc.[196]

"Redefining" marriage would, in this view, suggest that the institution was crucially about adults' (frequently transient) emotional unions rather than about children, weakening society's commitment to the stability of marriage. George and his colleagues thus suggest that same-sex partnerships cannot ever constitute marriages since they cannot fulfill the ends of marriage as they define them.

By way of comment, it should be noted that as it is presented, the argument by George and his colleagues concerning the definition of marriage is insufficient to explain their assertion about the limits

196. *Id.* at 17 (citing PATRICK LEE & ROBERT GEORGE, BODY SELF-DUALISM IN CONTEMPORARY ETHICS AND POLITICS 176–219 (2008)).

to the proper role of courts. Argument concerning the content of a constitutional right—for example, that the content in issue turns on substantive moral deliberation—is simply not enough on its own to determine the limits of the competence or appropriate activity of particular institutions in relation to that right. Instead, the latter issue must entail consideration of more generally applicable, institution-related, rather than exclusively content-related, arguments concerning matters such as the separation of powers. Consideration of such issues is, however, not apparent in the brief.

It is also important to focus on the brief's argument about the purposes of marriage. The substantive definition advanced is the classic new natural law definition, offered in explicitly religious terms by Germain Grisez and in the Manhattan Declaration and previously deployed by writers such as John Finnis and George as the basis for arguments in the constitutional context in cases like *Romer* and *Lawrence*.[197] As was noted earlier in Section I.A, this definition cannot be understood at a general level as being anything other than religious in terms of Audi's first two criteria, and despite the brief's attempt to rely on constitutional argument (albeit qualified by assertions concerning the permissibility of religious motivations in a constitutional context), nothing is offered to warrant departing from this conclusion. Without the religious—characterized in Audi's terms—notion of two-in-one flesh communion, the discussion of the good of marriage has no analytical foundation, whether in the Manhattan Declaration or the new natural lawyers' *Perry* brief. Furthermore, rather as with the Manhattan Declaration, George appears content on this occasion to allow a "coalition" of conservative arguments to find voice in the brief in *Perry*: not merely the new natural law definition of the good of marriage, but also other conservative arguments relating to morality and constitutional law (as discussed above).

iii. The Good of Marriage

Turning to the third point about the brief set out above, it should be clear that, excluding its religious character, the definition of the good of marriage, opens up the definition to exactly the criticisms (developed by Moore, Macedo, and others) concerning its substantive unattractiveness highlighted earlier. This point might be felt

197. George, Girgis & Anderson Brief, *supra* note 13, at 4−5, 12−19, 28.

to have particular resonance in the context of *Perry* given the alternative understanding of marriage, relating to mutual emotional, social, and financial support, companionship and sexual activity, that was advanced by Judge Walker. This definition might well, for reasons alluded to above, be felt to be closer to a normatively desirable understanding of the purposes of marriage and other long-term sexual/emotional partnerships than the new natural law definition, which is inflexible and prescriptive.

iv. Inconsistency Between the Perry *Brief and the* Lawrence *Brief*

The fourth point set out above focuses on the apparent inconsistency between the arguments of George and his colleagues in their *Perry* brief and George's earlier arguments in his brief, coauthored with Gerard Bradley, in *Lawrence*. This point focuses on George's argument in the *Perry* brief concerning the symbolic effect of Proposition 8. George and his colleagues argue in *Perry* that the state may decline to sponsor or promote something—thereby expressing moral disapproval—without criminalizing it, a point they associate with the broader assertion that a normative moral judgment about the value of marriage is prior to any moral assessment of the acceptability of homosexual conduct.[198] They thus seek to argue that Proposition 8 can be clearly distinguished from the anti-sodomy statute held in *Lawrence* to contravene the Due Process Clause of the Fourteenth Amendment. Proposition 8, they argue, leaves the criminal law untouched. Furthermore, "Proposition 8 does not stigmatize same-sex-attracted Californians, impugn their character, or blemish their permanent criminal record any more than any marriage law so harms those for whom marriage is not in prospect (whether because of failure to find a mate, absorbing work responsibilities, or any other reason)."[199] Proposition 8 does not prevent people from forming private same-sex partnerships; rather, it merely precludes the state from recognizing such arrangements. Indeed, "[t]here is no logical contradiction in holding that while the state may introduce legal structures to encourage adherence to certain moral norms or ideals . . . it may not

198. George, Girgis & Anderson Brief, *supra* note 13, at 8–9.

199. *Id.* at 23.

use the heavy hand of criminal law . . . in service of the same goals."[200]

Before directly examining the inconsistency issue, it is worth noting in light of Judge Walker's analysis in *Perry* that the assertion that "Proposition 8 does not stigmatize"[201] is, to put the point mildly, highly unrealistic in social terms. Law frequently plays a symbolic role in society, and it is hard to see why debate about the passage of Proposition 8 should have been fought so hard on either side unless it was clearly assumed that some form of symbolic message was in play, quite apart from the measure's practical consequences for same-sex couples if passed and enforced. This is quite apart from the findings of fact by Judge Walker, noted above in Section I.D, concerning some of the inflammatory political messages concerning children which were sent out by campaigners for Proposition 8, or the point that the very content of Proposition 8—that marriage, as a valued social institution, is reserved for some couples only—is heavily symbolic. In suggesting that the measure "does not stigmatize,"[202] George and his colleagues are missing or perhaps even avoiding the social reality of Proposition 8. A measure need not be drafted in such ostentatiously hostile terms as the disputed Amendment 2 in *Romer*[203] to have an unfairly discriminatory effect in social life. A more neutrally worded measure may also have such an effect, just as an apparently facially neutral government measure can be found in practice to have a disparate impact on a disadvantaged group.[204] The apparent failure of George and his colleagues to grasp this point in their *Perry* brief may be thought to provide a further example of the unattractiveness of their substantive argument.

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200. *Id.* at 25; *see also id.* at 26 (discussing a restrictive interpretation of references to autonomy in the majority judgments in *Lawrence*).

201. *Id.* at 23.

202. *Id.*

203. Romer v. Evans, 517 U.S. 620, 624 (1996) (holding that Amendment 2, prohibiting "all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians," failed strict scrutiny analysis and was therefore unconstitutional) (citation omitted).

204. *See generally* Washington v. Davis, 426 U.S. 229 (1976) (examining a facially neutral requirement that police force applicants pass a written examination, noting statistics showing that African American applicants passed the test less frequently than white applicants, but holding that proof of discriminatory purpose was required under the Equal Protection Clause to invalidate the challenged requirement because of its discriminatory impact).

Be that as it may, there seems to be an inconsistency between George's *Perry* brief and the position he and Gerard Bradley previously urged the U.S. Supreme Court to adopt in their coauthored amicus brief in *Lawrence*, where Bradley had acted as counsel to the conservative groups Focus on the Family and the Family Research Council.[205] That brief urged that the constitutional legitimacy of the impugned Texas anti-sodomy statute be confirmed.[206] The essence of their argument was that "Texas may constitutionally choose to protect marital intimacy by prohibiting same-sex deviate acts, while tolerating similar behavior by unmarried opposite-sex persons," the "critical difference" being that "same-sex deviate acts can never occur within marriage, during an engagement to marry, during a courtship prior to engagement, or within any relationship that could ever lead to marriage."[207] As such, "[e]ndeavoring to prudently protect and promote marriage by . . . reasonable means, Texas legislators are scarcely liable to charges of acting on mere prejudice against a class of persons, unreasoned moral hostility to certain acts, or in servile reliance upon mere popular disapproval of either"[208] by criminalizing only sexual acts between persons of the same sex, just as they could adopt more permissive or more restrictive regimes for sexual acts between opposite-sex, unmarried persons. As things stood, the statute was a "reasonable means of promoting and protecting marriage" defined as "the union of a man and a woman."[209] Central to George and Bradley's argument was, as in the later *Perry* brief, the definition of marriage. "Marriage," they claimed, "is, and has always been understood by our law to be, a bodily, two-in-one flesh union of persons."[210] Citing Justice Harlan's dissent in *Poe v. Ullman*, they suggested that the state was authorized by the Constitution and required by the new natural law notion of the common good to promote marriage by respecting the privacy of the marital bedroom and discouraging sexual acts outside of marriage.[211] George and Bradley

205. George & Bradley Brief, *supra* note 6.

206. *Id.* at 5.

207. *Id.* at 3.

208. *Id.* at 4.

209. *Id.* at 5.

210. *Id.* at 17.

211. *Id.* at 9–10 (citing Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) (reasoning that "laws . . . confining sexuality to lawful marriage form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.")).

also tried to stress that the state's discouragement of "non-marital" and extra-marital sexual acts was a requirement of the common and objective good of marriage, defined in new natural law terms, rather than arising from a dislike of lesbians and gay men or a paternalistic desire to punish.[212] Any distinction between "unmarried deviate sex" and "marital sexual acts" could not be arbitrary.[213] A value-free marital regime was also impossible; without moral limits (another argument used in the later *Perry* brief) there could be no restrictions on who could marry, including on the numbers of the partners in a marriage.[214] Relying on *Eisenstadt v. Baird*, George and Bradley sought to invoke "the State's traditional authority to promote marriage by deterring—even by criminal sanctions—all sexual acts outside of marriage."[215] Also citing an institutional competence argument (again, something later echoed in the *Perry* brief), they suggested that if the definition of marriage was to be changed, it should be by elected representatives rather than by judges.[216] Reversal of the Texas law to exclude the criminalization of consenting same-sex sexual acts in private would imply that marriage was not limited to the union of one man and one woman, or was not a key principle of sexual morality.[217] Legal recognition of same-sex partnerships as something other than the new natural law notion of bodily or two-in-one communion of persons, and its conversion merely into an association of individuals seeking from one another certain emotional, sexual, and psychological satisfactions, would be a fundamental change.[218] Leaving to one side the various logical jumps and questionable assumptions in George and Bradley's brief, the crucial point for present purposes is that George and Bradley proceeded to use the new natural law two-in-one flesh union definition of marriage—albeit without explaining it as a concept in the *Lawrence* brief, least of all its religious sense—accompanied by the claim that it was crucial to protect marriage so defined, to argue that there was a

212. *Id.* at 10.

213. *Id.*

214. *Id.* at 11.

215. *Id.* at 13 (citing Eisenstadt v. Baird, 405 U.S. 438, 448 (1971) (reasoning that the purpose of such laws is, among other reasons, to defend the sanctity of the home against premarital and extramarital sexual intercourse)).

216. *Id.* at 16.

217. *Id.* at 17.

218. *Id.* at 18–19.

rational basis for the impugned Texas anti-sodomy statute.[219] Given the consistency of this reasoning with much of the reasoning used in the *Perry* brief, one *absolutely* striking observation is that the new natural law two-in-one flesh union idea of marriage was used to try to justify the continuing criminalization of consenting same-sex sexual acts committed in private in *Lawrence*, even though George and his fellow brief writers use the same reasoning to claim that they had no such aim in *Perry*. Without further explanation of this apparent change of position, the arguments employed in the two briefs appear hard to fit together, despite George's role in the drafting of both.[220]

F. Continuing Relevance of Arguments Against Same-Sex Marriage

It is important to observe that the issues in *Perry v. Schwarzenegger*, and alongside them new natural law arguments against the legal recognition of same-sex marriage, are unlikely to go away. For one thing, while the outcome of the attempted appeal to the Ninth Circuit is unknown at the time of writing, the district court's reliance on the Fourteenth Amendment's Due Process and Equal Protection Clauses suggests that the way may ultimately be open to argument before the Supreme Court. For another, an additional recent district court decision—namely that of the United States District Court for the District of Massachusetts in *Gill v. Office of Personnel Management*[221]—may have equal potential.

In *Gill*, the federal Defense of Marriage Act of 1996, which seeks to restrict the federal-level definition of marriage to a partnership of one man and one woman and allows U.S. states not to recognize same-sex partnerships where they have been recognized by other U.S. states, was declared unconstitutional by Judge Tauro applying merely the deferential rational basis standard of review of leg-

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219. *Id.* at 22–24.

220. It might, perhaps, be possible to argue that the two briefs are consistent on the basis that in both, the brief authors are merely arguing about legal regimes which, out of a range of possible regimes, are possibly consistent with the good of marriage as the authors of the briefs have defined it. That is, the exact definition of the limits of the range are to be taken by elected representatives or electors rather than the judiciary. However, the distinction involved here is of an extremely technical character, and might be hard to reconcile with the extremely detailed and prescriptive substantive content of the new natural lawyers' good of marriage.

221. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

islation.[222] The district court drew attention to the Act's denial of benefits to same-sex couples.[223] The court further dismissed arguments that there was any rational relationship between the restriction of marriage rights to opposite-sex couples and the encouragement of responsible procreation, or making opposite-sex marriages more secure, or the allocation of scarce resources.[224] Moreover, the court questioned whether it was constitutionally appropriate for Congress to seek to impose a definition of marriage upon state-level authorities.[225] Judge Tauro concluded that it was "only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled" under the 1996 Act, involving a "distinction without meaning" if not "irrational prejudice."[226] While the execution of the decision has been stayed pending appeal,[227] further argument—including at the federal appellate level—may very well follow. This being so, it is interesting to note the apparent similarity between Judge Tauro's reasoning and that of Judge Walker in *Perry* in relation to the unjustifiable role of sexual orientation in excluding same-sex couples from participation in the established right of marriage.

As the issues considered in Section I have shown, the new natural lawyers have continued their campaigns against the legal recognition of same-sex partnership rights, in particular through the public arguments of Robert George. The new natural law logic concerning the good of marriage relating to one man and one woman performing only certain sexual acts with procreative potential continues to form the basis for such arguments. That logic also continues to be used both in openly religious contexts such as the Manhattan Declaration and the officially more secular context of the *Perry v. Schwarzenegger* litigation concerning California's Proposition 8. In reality, and whatever the context, the new natural lawyers' arguments about marriage are ultimately religious in terms of Audi's criteria, in particular given their roots in the writings of Germain Grisez in *The Way of the Lord Jesus*. In this regard, the new natural lawyers

222. *Id.* at 387.

223. *Id.* at 389.

224. *Id.* at 396–97.

225. *Id.* at 397.

226. *Id.* at 396–97.

227. Order Staying Judgment Pending Appeal, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 09-10309-JLT).

continue to campaign for what must ultimately be defined as a religious—and, on its merits, unattractive—position concerning marriage to be entrenched in U.S. constitutional law, despite their attempts to categorize their purposes as non-religious in contexts such as *Perry v. Schwarzenegger*. The concerns that David Richards and I highlighted in our earlier analysis of new natural law therefore continue to be of real constitutional relevance.

G. A Possible Counterargument: New Natural Law as a Publicly Reasonable Theory in Relation to Marriage?

Before leaving this part of the analysis, one counterargument should be briefly considered: namely whether, notwithstanding the points made so far, the new natural lawyers should be viewed as trying to participate in a conscientious attempt to engage with reasoning accessible to all when discussing the definition of marriage in a public, constitutional context, even if the bedrock for their views might lie in their Catholic faith.

This counterargument is effectively seeking to bring into play John Rawls's well-known idea of "public reason,"[228] the notion that in a well-ordered constitutional democracy, rival comprehensive doctrines of the good—that is, theories concerning what is true or right—will be in competition and that reasons for political decisions, including the passage of particular laws, must therefore be capable of being shared by all citizens as free and equal citizens whatever their personal comprehensive doctrines.[229] On this view, reasonable comprehensive doctrines, both secular and religious, may be introduced into public political discussion provided that "proper political reasons"—that is, reasons which are not given solely by the comprehensive doctrine or doctrines in play and which are sufficient to justify the position being advanced—are presented "in due course."[230] For Rawls, religious views of the common good may fall within the ambit of public reason when expressed in terms of proper political reasons.[231]

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228. *See, e.g.*, John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997) (arguing that "[c]entral to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.").

229. *Id.* at 771, 776, 799–800.

230. *Id.* at 784.

231. *Id.* at 775; *see also* JOHN RAWLS, POLITICAL LIBERALISM 242 (1995).

While the new natural lawyers do not accept Rawls's formulation of "public reason," Finnis has nonetheless stated that "[n]atural law theory is nothing other than the account of all the reasons-for-action which people ought to be able to accept, precisely because these are good, valid, and sound as reasons."[232] Finnis also defines as a feature of classical political thought—as expounded by St. Thomas Aquinas—the notion that "in determining and enforcing the requirements of public good, the state's law-makers and other rulers (including voters) are entitled to impose as requirements only those practical principles which are accessible to all people whatever their religious beliefs or cultural practices."[233] Finnis further accepts that "it is possible for a salvationist, creedal, and expansionist religion to respect liberty, including the liberty of religions which, if [the first mentioned religion] is true, cannot also be true."[234] Using these statements, it might be suggested that even if the definition of marriage advanced by the new natural lawyers—including its consequence that same-sex marriage would be impossible—might be unappealing, the definition itself must be seen as seeking to offer a reason for action—namely, the good of marriage—that all should be able to accept. If correct, this might be thought to critically dilute, if not eliminate, the significance of the points made in previous parts of this Section concerning the religious nature of new natural law arguments about marriage.

Public reason and its relevance to the assessment of any natural law theory are complex subject matters.[235] It will suffice for present purposes to outline a key set of problems with the counter-argument just presented. These problems stem from the fact that the new natural lawyers categorize the good of marriage, as they define it, as a foundational, objective, basic good in their theory. In other words, it offers a reason for action that all reasonable people should

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232. Finnis, *Natural Law Theory*, *supra* note 21, at 10–11; *see also* Robert P. George & Christopher Wolfe, *Natural Law and Liberal Public Reason*, 42 AM. J. JURISPRUDENCE 31 (1997) (postulating a stronger, though less measured, new natural law denunciation of Rawls's theory of public reason).

233. John Finnis, *On "Public Reason"* 6 (Oxford Legal Studies Research Paper No. 1/2007; Notre Dame Legal Studies Paper No. 06-27, 2005), *available at* http://ssrn.com/abstract=955815.

234. *Id.* at 8 (categorizing Roman Catholicism after the Second Vatican Council as a "Salvationist" religion).

235. *See generally* BAMFORTH & RICHARDS, *supra* note 3, at 6 (asserting that while many criticisms of new natural law focus on the concept of public reason, that book's critique does not).

be able to grasp.[236] The difficulty here, though, is that the properties of marriage as they define them are so utterly specific and exclusive of many incredibly common, unremarkable, and—one might reasonably think—morally uncontentious human relationships and sexual practices (couples living together in long-term mutually supportive sexual and emotional partnerships, consensual sexual acts within monogamous heterosexual marriages which fall short of the two-in-one flesh union, and so forth), that it is difficult, if not impossible, to view the new natural law good of marriage as a reason for action which all should be able to grasp. Many new natural law basic goods—for example, aesthetic experience or play[237]—are defined in such general terms that it is not difficult to see how one might argue that reasonable people would understand their role as general-level reasons for action. Had marriage been defined in equivalently general terms—for example, as a loving, mutually supportive, long-term sexual and emotional partnership (a definition rather closer to Judge Walker's)—it might be argued that reasonable people would tend to grasp its role as a general reason for action even if they disagreed about whether, for example, same-sex partners could count as married.[238] However, the properties of the good of marriage, *as the new natural lawyers define them*, are from the very start just so specific, and so exclusionary, that marriage cannot plausibly be presented in the same way as goods such as play or aesthetic experience. Quite apart from preventing the marriage good from being accessible to all—a crucial aspect of the counterargument in the previous paragraph—this brings back to center stage the question of why the new natural layers argue about marriage as they do. At this point, the absolute overlap between the marriage good as presented in constitu-

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236. *See* George & Bradley Brief, *supra* note 6, at 1 (noting the importance of "protect[ing] the institutions of marriage and family" by "strengthen[ing] the legal definition of marriage as being a union of one man and one woman," and citing the "tangible benefits of traditional marriage").

237. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 85–90 (1980) (identifying life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion as the "basic aspects of . . . well-being"); MARK C. MURPHY, NATURAL LAW AND PRACTICAL RATIONALITY 96 (2001) (arguing for a classification of nine basic goods: "life, knowledge, aesthetic experience, excellence in play and work, excellence in agency, inner peace, friendship and community, religion, and happiness" and labeling each of them as a "fundamental reason for action").

238. I appreciate that this does not take full account of the further new natural law stipulations concerning the requirements of practical reasonableness/modes of responsibility. That is not necessary for present purposes, however.

tional argument and as presented in religious contexts such as the Manhattan Declaration becomes extremely telling. In light of the deep religious faith manifested by the new natural lawyers, their marriage good may neatly illustrate Kent Greenawalt's perceptive observation that "[i]n much of what we believe, rational understanding, however this is conceived, intertwines with other assumptions."[239] To say this is not to accuse the new natural lawyers of acting in bad faith, deliberately dressing up religious arguments in secular garb. It would be unfair not to accept that the new natural lawyers, as serious scholars and people of deep religious faith, most likely believe that their arguments about marriage and sexuality can be arrived at by practical reason rather than through doctrinal commitment.[240] But to acknowledge this point does not provide a sufficient basis for making the case that new natural law arguments *are* accessible to all. Employing Robert Audi's criteria, discussed above, the arguments must still be identified as religious.

II. THE REACH OF ARGUMENTS CONCERNING THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS

An increasingly visible dimension in debates about the legal rights of lesbians and gay men, including whether same-sex partnerships should be open to legal recognition as marriages, is the extent to which the substantive arguments advanced on either side are or should be of a universal character rather than being culture-specific.[241] There are, of course, long-standing philosophical disputes

239. Kent Greenawalt, *Natural Law and Public Reasons*, 47 VILL. L. REV. 531, 538 (2002). A broader problem that is also associated with the point made in the quoted passage is whether it is ever possible to reach a meaningful level of consensus in an area where there are strongly divergent, substantive views about what may be seen as a rational, publicly reasonable "reason-for-action which people ought to be able to accept." John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 1, 10–11 (Robert George ed., 1996).

240. BAMFORTH & RICHARDS, *supra* note 3, at 10; *see also* Patrick Neal, *Political Liberalism, Public Reason, and the Citizen of Faith*, *in* NATURAL LAW AND PUBLIC REASON 171, 183 (Robert George & Christopher Wolfe eds., 2000) (stating that "citizens of faith" can agree with positions taken by Rawlsian liberals and also agree on secular policy issues); Patrick Neal, *Religion Within the Limits of Liberalism Alone?*, 39 J. CHURCH & ST. 697, 699 (1997) (stating that citizens who follow these religious beliefs do not insist on the exclusion of religious reasons and motivations, but insist upon the inclusion of secular reasons and motivations).

241. *See, e.g.*, Robin West, *Universalism, Legal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705, 711 (1998) (reasoning that it is ineffective for gay

about whether arguments for the use of law in particular ways or to particular ends may be employed with equal validity across time and across cultures[242] (something which might be termed a "universalist" stance), or whether those arguments must be locally focused, if not locally derived (a "relativist" stance).[243] At a practical level, such disputes find voice in questions regarding the appropriateness of condemning *all* societies whose laws (about sexuality or other issues) fail to match up to the standards demanded by a given theory of justice, or whether such a theory may only properly be used to assess the laws of the society in which it evolved. Hence, if a country invokes "local cultural and religious values" to justify the passage of legislation which explicitly discriminates against lesbians and gay men, debate might focus on whether people from outside the country can legitimately condemn the legislation by reference to universally applicable theories of justice, or whether their arguments must be based only on the values of the local culture. Related examples might include whether those arguing for the legislative recognition of same-sex marriages in a given jurisdiction can legitimately point to examples from elsewhere as evidence in support of their substantive argument. A similar point would be whether those seeking to convince a court that a jurisdiction's constitutional right to marry should be interpreted to cover same-sex couples should be able to employ case law from other jurisdictions to back up that argument.[244]

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marriage advocates to "relentlessly deny the essentially communitarian, rather than individualistic, nature of the institution of marriage"); *see also* Naz Found. v. Gov't. of Nat. Capital Terr. of Delhi, 160 DELHI L. TIMES 277, 2, 93 (2009) (providing an example of a culture-specific focus by examining discrimination of sodomy within Indian jurisprudence).

242. *E.g.*, GRAHAM LONG, RELATIVISM AND THE FOUNDATIONS OF LIBERALISM 53 (2004).

243. *Id.* at 1, 13–14.

244. *See infra* Section II.A; *cf.* Atkins v. Virginia, 536 U.S. 304, 322–24 (2002) (Rehnquist, C.J., dissenting) (stating in a death penalty case, "I write separately . . . to call attention to the defects in the Court's decision to place weight on foreign laws. . . . In reaching its conclusion today, the Court . . . adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders.") (footnotes omitted); Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT'L. L. 301, 302–03 (2004) (chronicling recent Supreme Court opinions citing foreign legal sources and noting the diverging opinions, including sometimes fierce criticisms, that greet reliance on foreign law and comparative experiences abroad). It should be stressed that support for national courts drawing on comparative case law when engaging in national-level constitutional interpretation need not automatically imply commitment to a "universalist" theory of justice: there may be plausible, locally related reasons why a court should use such case law. However, the issues tend often to be tied together, and it seems unlikely that one could advocate

These issues are relevant for present purposes because new natural law presents itself in a universalist fashion, given the role played within it of allegedly universal and objective basic goods. (Thus, when the good of marriage has been deployed by George and his colleagues in the context of litigation, it has always been as something in the light of which existing U.S. case law needs to be interpreted.) Two relevant points emerge from this. First, new natural law differs in its treatment of marriage from many other arguments advanced by moral conservatives in the United States insofar as it does not rest on an appeal to what are understood to be specifically *American* values, opening up an interesting point of contrast. Second, while liberal arguments in favor of lesbian and gay rights and-or same-sex marriage *themselves* divide between the universal and the relativist, criticisms which have been made of other universalist approaches might come into play in relation to the new natural law position concerning the good of marriage.

A. Applying Law from Other Jurisdictions to Oppose Same-Sex Marriage: Differences Between New Natural Law and Other Conservative Positions

The first point can best be understood by contrasting the new natural law approach to marriage with other arguments that have arisen concerning *Lawrence v. Texas*. Marriage, as a good, fits within the general scheme of goods identified by the new natural lawyers.[245] The properties of the goods are distinctly universalist, a point which is neatly captured in John Finnis's discussion of them. Finnis suggests that there is "a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions."[246] The basic human goods are described as self-evident, obvious, intrinsic, and objective values which need no demonstration and which are desirable for their

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the use of comparative authority on anything more than a rather half-hearted and sporadic basis unless one had at least some openness to the notion that other nations' experiences were and should be relevant to any nation's understanding of its own constitution.

245. *But see* BAMFORTH & RICHARDS, *supra* note 3, at 100–01 (noting an ambiguity regarding whether marriage is considered a "basic" or "common" good).

246. FINNIS, *supra* note 237, at 23; *see also id.* at 61, 63–64 (stating that a "good" refers to a general item or activity that can be participated in and assigned a value).

own sake; they do not make or presuppose moral judgments.[247] Regardless of perspective, one can realize that they are beneficial and desirable for human beings, and this understanding requires no further justification.[248] The practical principle that a particular good is worth pursuing is "underived . . . . [n]either its intelligibility nor its force rests on any further principle."[249] Expressed more fully, "[I]f one attends carefully and honestly to the relevant human possibilities one can understand, without reasoning from any other judgment, that the realization of those possibilities is, as such, good and desirable for the human person; and . . . one's understanding needs no further justification."[250] It would thus seem that the new natural law goods are to be described as "basic" precisely because they are expressed in such terms that no one—whatever his or her personal circumstances or beliefs—could deny their value when making decisions concerning the way in which they or others should act.[251] Finnis also observes that the empirical "universality of a few basic values" (as demonstrated, he argues by the work of anthropologists[252] but without citation to specific anthropological data) highlights the "connection between a basic human urge/drive/inclination/tendency and the corresponding basic form of human good."[253] On this view, the goods are thus clearly universal in their basis and application, a point which applies in full to the good of marriage as set out by Grisez, Finnis, George, and other new natural lawyers. It is this universal notion that is in play in George's invocation of the good of marriage in his amicus briefs in *Lawrence* and *Perry*,[254] even though that good is necessarily employed in the briefs in order to advocate the adoption of a particular interpretation of existing U.S. constitutional case law.

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247. *Id.* at 59, 65–66; *see also id.* at 85–97 (describing what goods are included as basic forms of good).

248. *Id.* at 70–73.

249. *Id.* at 69; *see also id.* at 87 (noting that "play," too, has its own value and that, similar to knowledge and truth, is underived and does not rest on any further principle).

250. *Id.* at 73; *see also id.* at 82 (distinguishing between goods and urges).

251. *See id*. at 61.

252. *Id.* at 83–84.

253. *Id.* at 84. Nonetheless, Finnis goes on to emphasize the role of reflection by stressing that though they correspond to urges and inclinations which can make themselves felt prior to any intelligent consideration of what is worth pursuing, the basic aspects of human well-being are discernible only to one who thinks about his opportunities, and thus are realizable only by one who intelligently directs, focuses, and controls his urges, inclinations, and impulses. *Id.* at 103.

254. George, Girgis & Anderson Brief, *supra* note 13, at 4–6; George & Bradley Brief, *supra* note 6, at 8–9.

Other conservative approaches to the legal rights of lesbians and gay men in the United States have, by contrast, been clearly more culture-specific in nature, a point which becomes strongly evident if we further consider *Lawrence v. Texas*. As is well-known, comparative (i.e., non-U.S.) case law was mentioned by the majority in *Lawrence* to help justify its conclusion that the Texas anti-sodomy statute was incompatible with the Due Process Clause of the Fourteenth Amendment and that the earlier, contrasting decision in *Bowers v. Hardwick* should be overruled.[255] William Eskridge categorizes *Lawrence* as "the first time that the Supreme Court has cited foreign case law in the process of overruling an American constitutional precedent,"[256] although non-U.S. authority had been cited in other contexts.[257] In his majority opinion in *Lawrence*, Justice Kennedy noted that the "sweeping references" made in *Bowers v. Hardwick* to "the history of western civilization and to Judaeo-Christian moral and ethical standards" as a factor supporting anti-sodomy legislation "did not take account" of contradictory authorities.[258] "Of even more importance," for Justice Kennedy and the majority, was the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*[259] (decided almost five years before *Bowers*) that the criminal prohibition of private, consensual gay sex contravened the European Convention on Human Rights.[260] Furthermore, Justice Kennedy wrote, "[t]o the extent *Bowers* relied on values we share with a wider civilization . . . [its] reasoning and holding . . . have been rejected elsewhere."[261] The Court of Human Rights followed *Dudgeon* in later cases, and "[o]ther nations . . . have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct . . . [which] has been accepted as an integral part of human freedom."[262] However, Justice

255. Lawrence v. Texas, 539 U.S. 558, 573 (2003) (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 149, 167–168 (1982)).

256. William N. Eskridge, Jr., *United States:* Lawrence v. Texas *and the Imperative of Comparative Constitutionalism*, 2 INT'L J. CONST. L. 555, 555 (2004). *But cf.* Robert Leckey, *Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights*, 40 COLUM. HUM. RTS. L. REV. 425, 443 (2009) (criticizing Eskridge's analysis on the grounds that it does not address the possibility that selecting foreign authorities carefully allows a skewed version of the law).

257. *See* Eskridge, *supra* note 256, at 555.

258. *Lawrence*, 539 U.S. at 572.

259. *Id.* at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. at 167–68).

260. *Id.* (citing *Dudgeon*, 45 Eur. Ct. H.R. at 168).

261. *Id.* at 514.

262. *Id.* at 576–77.

Scalia, dissenting, challenged this use of comparative authority in strongly hostile terms.

> Constitutional entitlements do not spring into existence because some [U.S.] States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence . . . because foreign nations decriminalize conduct. The *Bowers* majority . . . rejected the claimed right to sodomy on the ground that such a right was not "deeply rooted in this Nation's history and tradition."[263]

Justice Scalia also emphasized that it was dangerous to use such dicta. He cited Justice Thomas's statement from *Foster v. Florida* that "this Court . . . should not impose foreign moods, fads, or fashions, on Americans."[264]

At first sight, Justice Kennedy might appear to have been treating the inconsistency between the values expressed in the *Bowers* majority and the values held in common between the United States and "a wider civilization" as an empirical difference. Indeed, he was measuring prevailing opinion and showing that analogous legislative provisions to those upheld in *Bowers* had been treated differently elsewhere, most obviously in *Dudgeon*.[265] Eskridge thus suggests that "the fact that *Bowers* had received a hostile reaction among judges in Europe" and in some "traditionalist" U.S. states "provided a neutral reason" for the *Lawrence* majority "to believe there was an emerging consensus that this precedent" had misread the "libertarian traditions" of America and fellow democracies.[266] Eskridge notes, however, that Justice Kennedy must also have been engaged in a normative exercise. "The foreign precedents were both normative focal points, helping an American judge to evaluate the consistency of sodomy laws with fundamental and shared constitutional principles, and normative feedback, deepening concerns . . . about the harmfulness as well as the incorrect-

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263. *Id.* at 598 (Scalia, J., dissenting) (citations omitted).

264. *Id.* (citing Foster v. Florida, 810 So. 2d 910 (2002), *cert. denied*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in certiorari denial)).

265. *Compare* Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986) (reasoning that proscriptions against consensual sodomy have roots in American tradition), *with Dudgeon*, 45 Eur. Ct. H.R. at 168 (holding that criminal laws against sodomy unjustifiably interfere with a right to and respect for private life).

266. Eskridge, *supra* note 256, at 557 (citing *Lawrence*, 539 U.S. at 576).

ness of *Bowers*."[267] Furthermore, "country after country has recognized rights for gay people . . . without negative consequences for the body politic," so that Justice Kennedy may have "implicitly recognized" that this "political experience" was "instructive for the United States. . . . Once other countries have accorded gay people . . . equal treatment without wrenching their pluralist systems, the price of denying gay people the same rights in the United States goes up and the arguments against equality grow shakier."[268] This, in turn, helped "signal other countries that the Court is attentive to their norms and is a cooperative court," [269] an assessment which clearly implies a normative commitment to a universalist position of some sort. Meanwhile, Justice Scalia's comment about "*this Nation's* history and tradition"[270] might at first look like an observation of fact, but the context and subject matter suggest that it was playing a normative role. The normative dimension is made explicit through Justice Scalia's reiteration that it was "dangerous" to use non-U.S. dicta which imposed "foreign moods, fads, or fashions" on Americans,[271] a statement which might effectively be paraphrased as "Americans know best about American values and the Constitution," or perhaps even that the U.S. Constitution should be interpreted only according to American values and should in no sense be "degraded" by reinterpretation in the light of non-American precedent.[272] Strong hints of a culture-specific, normative dimension are also apparent in the rather heated suggestion by Steven G. Calabresi, a conservative academic opponent of *Lawrence*, that while it may be relevant that the European Convention prohibits discrimination on the basis of sexual orientation, "it is a long leap" from that statement to "the proposition that the United States Supreme Court

267. *Id.*

268. *Id.* at 559.

269. *Id.* at 558.

270. *Id.* (citing *Lawrence*, 539 U.S. at 573 (Scalia, J., dissenting)) (emphasis added).

271. *Id.* (citing *Lawrence*, 539 U.S. at 573 (Scalia, J., dissenting) (quoting *Foster*, 537 U.S. at 991 (Thomas, J., concurring))).

272. *Compare* Joan L. Larsen, *Importing Constitutional Norms from a Wider Civilization:* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1295 (2004) (arguing that the judgments and practices of foreign nations and international agreements determine what the content of the domestic constitutional rule should be), *with Lawrence*, 539 U.S. at 576 ("When our precedent has been . . . weakened . . . criticism from other sources is of greater significance."), *and* Cass Sunstein, *Liberty after* Lawrence, 65 OHIO ST. L.J. 1059, 1061 (2004) (arguing the Court in *Lawrence* was balancing the laws and traditions of the United States rather than the tradition and laws of foreign precedents).

should take sides in the culture war looming in this country over gay rights by outlawing discrimination against gays."[273]

As noted above, the interesting issue in terms of new natural law is that while Justice Scalia—hardly a peripheral figure within contemporary moral conservatism[274]—employs a culture-specific methodology in his *Lawrence* dissent in evaluating the scope of constitutional rights under the Fourteenth Amendment, the new natural lawyers are by contrast in the universalist camp. This may not, for the moment, be of enormous practical significance given that the new natural lawyers would claim that the good of marriage, as they understand it, is reflected in U.S. constitutional law (if properly interpreted) and in society.[275] However, since the conservative position articulated by Justice Scalia in *Lawrence* would appear to differ from that of the new natural lawyers, that difference serves to further underline the observation made in the previous Section about the "coalition" nature of the conservative arguments in play in opposition to the recognition of legal protections for lesbians and gay men.[276]

B. Implications of Universalism and Relativism

The second point to be considered in this Section concerns the implications of the debate between universalist and relativist approaches for any evaluation of new natural law. As noted above, new natural law clearly aims to be a universalist approach, begging the question how criticisms made of universalism might come into play in relation to it. It is important to note, however, that this question is only significant in reality to the extent that universalism may be seen as a

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273. Steven G. Calabresi, Lawrence*, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1122 (2004).

274. *See* Donald E. Childress, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193, 216 (stating that when addressing comparative constitutional law, Justice Scalia embraces a strict textualist approach to judicial interpretation that is evoked through modern standards of decency).

275. This can be seen in George's arguments in the Manhattan Declaration and in his coauthored amicus briefs in *Lawrence* and *Perry*.

276. This point is further highlighted by the fact that the new natural lawyers are supporters of unilateral nuclear disarmament, a position that is not widely shared among moral conservatives. *E.g.*, JOHN FINNIS, JOSEPH BOYLE & GERMAIN GRISEZ, NUCLEAR DETERRENCE, MORALITY AND REALISM 326, 328 (1987); *see also* BAMFORTH & RICHARDS, *supra* note 3, at 285–92 (2008) (exploring the extent of possible overlaps between this position and the authors' religious faith).

deficient approach in regard to matters of justice and human rights. It is therefore necessary to begin by considering general criticisms made of both universalism and relativism. It will be argued that neither approach is appealing, at least in extreme form, and that we should instead aim to advance an intermediate approach when developing arguments about justice and human rights, including concerning the legal rights of lesbians and gay men. Viewed from this perspective, the definition of the good of marriage advanced by the new natural lawyers is open to criticism, although universalist statements made at a suitable level of generality and with sufficient openness to local flexibility might not be.

Beginning with the general merits and deficiencies of universalism and relativism, the relativist Michael Walzer has argued that ideas about human rights do not emerge from any conception of a common, universal humanity.[277] Rather, rights and rights-claims are "local and particular in character," with different societies having their own notions of what is just.[278] "History," Walzer suggests, "reveals no single good and no naturally dominant good."[279] Since social meanings are historical in character, what counts as a just or unjust distribution will change over time. On this view, it is a mistake to search for universally applicable arguments about law and rights. In matters of morality, an argument is no more than an appeal to the common meanings which prevail in a given political community and which in consequence vary according to the community in question. For Walzer, "[j]ustice is rooted in [a community's own] distinct understandings of places, honors, jobs, things of all sorts that constitute a shared way of life. To override these understandings is (always) to act unjustly."[280] On this view, any struggle against the existing social (or legal) order of a given society cannot—if it is to count as just—be based upon some claim that the society fails to meet an externally determined standard. Sexual minorities would therefore presumably need to base their arguments on a sufficiently "authentic" interpretation of the "traditional values" of their society in order to defend themselves.

As Ernest Gellner notes, however, pure relativism of this type must "allow illiberal values their place in the sun" and "deprives us of

277. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY xv (1983).

278. *Id.*

279. *Id.* at 11.

280. *Id.* at 314.

the means—indeed of the right—to express deep revulsion" at such values.[281] By what means, Gellner asks rhetorically, could a relativist condemn a society that condoned slavery, gulags, female circumcision, or gas chambers as part of its *own* deep-rooted moral code?[282] If marginalized groups can only appeal to the values internal to their culture in order to build arguments to change the law—that is, to the values of the culture that is *already* oppressing them—they would appear to be in an almost hopeless position.[283] Moral relativism may also make it difficult to assess whether a group can even properly be described as unfairly oppressed. The universalist Richard Mohr suggests that "[w]ithout culturally-neutral values, we cannot know that certain groups aren't simply being put in their proper place" when they are harshly treated by a society.[284] "[W]e are unable to tell when ill-treatment and ill-will is warranted and when they constitute oppression."[285] This point is echoed by Gellner, who suggests that "[m]odern liberty differs from its ancient predecessor not merely because it stresses individual freedom over collective self-rule: it also includes the notion of trans-ethnic or trans-political truth, which is not simply engendered by a culture and its practices."[286] Relativism might well be thought to serve in practice to *exclude* arguments which are intended to improve the lot of members of groups who are highly disempowered and badly treated on a local basis (assuming that there is no good reason—local ideas of right and wrong aside—for the treatment received by members of that group). This consequence might apply to lesbians and gay men in many societies.[287] A related argument has been developed by Ronald Dworkin, who notes that if anything can be seen as a traditional social practice of a given community, it is worrying about

281. Ernest Gellner, *Sauce for the Liberal Goose*, PROSPECT, Nov. 1995, at 59.

282. *Id.*

283. *Cf.* WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 65–66 (1989) (illustrating the case of a Muslim woman in Egypt who states that sexual discrimination is wrong would be appealing to values external to her culture, demonstrating that if she appealed to values of her own culture, her pleas would not be heard).

284. Richard D. Mohr, *The Perils of Postmodernity for Gay Rights*, 8 CANADIAN J.L. & JURISPRUDENCE 5, 12 (1995).

285. *Id.* at 12–13.

286. Gellner, *supra* note 281, at 61.

287. *Cf.* AMNESTY INTERNATIONAL, CRIMES OF HATE, CONSPIRACY OF SILENCE (2001), http://www.amnesty.org/en/library/info/ACT40/016/2001 (anecdotally illustrating the force of relativist thought by stating that in many cultures, gay men and lesbian women are viewed as less than human).

what justice really is.[288] We presume, in other words, that justice is a critic of the community's practices rather than its mirror, implying that justice is a matter of general, transcultural standards by which a society can be evaluated and criticized.[289] Ultimately, Dworkin claims

> [p]olitical theory can make no contribution to how we govern ourselves except by struggling, against all the impulses that drag us back into our own culture, toward generality and some reflective basis for deciding which of our traditional distinctions and discriminations are genuine and which spurious, which contribute to the flourishing of the ideals we want, after reflection, to embrace, and which serve only to protect us from the personal costs of that demanding process. We cannot leave justice to convention and anecdote.[290]

At first sight, theories which lay claim to universal application might therefore seem attractive, for they enable similar criteria to be used for moral assessment in all circumstances, offering clear lines of defense, for example, to badly treated sexual minorities in repressive jurisdictions, and might, as Dworkin suggests,[291] fit with our intuitions about justice as something standing above localized, day-to-day life. However, when applied with too much enthusiasm, universalist approaches generate normative and practical problems of their own. On the normative front, given the sheer variety of ways in which human understanding and behavior vary across cultures, it seems facile not to acknowledge that at least some moral assessments are likely also to vary, to some extent, according to the society and time period in question. It also seems presumptuous or even arrogant to assert, without more, that a particular theory of justice must automatically apply regardless of the circumstances in assessing the laws of all societies. On the practical front, an important concern is that universalist theories are prone to fail as defenses of human rights. For, given the differences among cultures, arguments that are expressed in *unduly* general terms run the risk of not making their point with real effect at the local level where they need to be made most powerfully. This latter point has been

288. RONALD DWORKIN, A MATTER OF PRINCIPLE 219 (1985).
289. *Id.*
290. *Id.* at 219–20.
291. *Id.* at 216.

developed by Richard Rorty, who suggests that universalist arguments may be unhelpful if we are concerned with guaranteeing effective day-to-day protection against unjust ill-treatment.[292] Rorty argues that declarations of universally valid human rights are empty if they mean nothing to the people whose behavior they are supposed to constrain.[293] Many people, Rorty suggests, live in a world in which their sense of moral community extends no further than their family, clan, or tribe.[294] If they have never conceived that they may owe moral commitments to members of other groups, or that those groups deserve moral respect, then abstract demands to respect them are likely to seem nonsensical. According to Rorty,

> [t]o get whites to be nicer to Blacks, males to females, Serbs to Muslims, or straights to gays, to help our species link up into . . . a "planetary community" dominated by a culture of human rights, it is of no use whatever to say, with Kant: Notice that what you have in common, your humanity, is more important than these trivial differences. For the people we are trying to convince will rejoin that they notice nothing of the sort.[295]

The implication of Rorty's view is that arguments can only hope to provide an *effective* basis for better legal or social treatment for sexual minorities where they make sense according to local understandings.[296] Abstract, universal theories which say nothing about day-

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292. Richard Rorty, *Human Rights, Rationality, and Sentimentality*, *in* ON HUMAN RIGHTS 111, 116 (Stephen Shute & Susan Hurley eds., 1993).

293. *Id.* at 112.

294. *Id.* at 124–25.

295. *Id.* at 125.

296. Including, one assumes, local understandings of sexuality, something which is extremely important given the long-standing debate between essentialist and constructionist theorists of sexuality. *See, e.g.*, DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE 3–6 (1989) (examining the debates between pure essence and social construct, using a feminist poststructuralist perspective to address the strengths and limitations of both essentialism and constructionism); JEFFREY WEEKS, AGAINST NATURE: ESSAYS ON HISTORY, SEXUALITY AND IDENTITY viii (1991) (referencing a collection of essays "[t]he aim [of which] is to show that sexual identities are both historical in nature, and essential in day-to-day life. . . . constructed in a traceable history, but . . . the crucial means through which we negotiate the hazards of our contemporary lives"). *See generally* Edward Stein, *Conclusion: The Essentials of Constructionism and the Construction of Essentialism*, *in* FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 325, 325–

to-day life will have little resonance and little ability to afford effective protection.

C. *Criticisms of Universalist Approaches as Applied to New Natural Law*

As things stand, it seems clear that the criticisms of universalist approaches set out here can be applied to new natural law in relation to the good of marriage. For one thing, the good as defined by the new natural lawyers clearly takes no real account of local variations as between societies. It is accepted in, for example, Robert George's amicus brief in *Perry* that different jurisdictions might respond to the good in slightly different ways in their legal systems.[297] However, it is nonetheless clear that the detailed content of the good remains the same across the board and that as a general matter proper respect for the good demands the adoption of an unfavorable attitude toward "non-marital" sexual practices as strictly defined by the new natural lawyers. (For example, this was done through the adoption of measures such as California's Proposition 8,[298] or the attempted amendment to the Colorado State Constitution which was declared unconstitutional by the Supreme Court in *Romer v. Evans*.[299]) So specific are the requirements of the good of marriage—that is, as encompassing one man and one woman performing only marital sexual acts with procreative potential, regardless of the much wider range of consensual sexual/emotional relation-

53 (Edward Stein ed., 1992) (examining debate between core constructionalist and essentialist arguments as to each one's understanding of the role of sexuality in a given society).

297. George, Girgis & Anderson Brief, *supra* note 13, at 11, 9–14 (arguing that decisions such as what relationships constitute marriage are political questions, which may necessarily result in different jurisdictions reaching different decisions on the matter).

298. *See* Jesse McKinley & Carolyn Marshall, *California Ruling on Same-Sex Marriage Fuels a Battle Rather Than Ending It*, N.Y. TIMES, May 18, 2008, at A18 (noting the views of Tony Perkins, the president of the Family Research Council—one of the organizations that formed the coalition supporting the California Marriage Protection Act which became Proposition 8—who called homosexuality "harmful to the persons who engage in it and to society at large").

299. Romer v. Evans, 517 U.S. 620, 626–27 (1996) (holding that a proposed amendment to the Colorado State Constitution violated the Fourteenth Amendment's Equal Protection Clause by prohibiting all state action designed to protect homosexual persons from discrimination, on grounds that the amendment imposed a broad and undifferentiated disability on a single named group, rather than simply "putting gays and lesbians in the same position as all other persons," and reasoning that the amendment lacked a rational relationship to legitimate state interests).

ships[300] that exist in the world and are of real benefit to the participants and others—that it must indeed be seen as presumptuous to seek to apply it the world over, whether through education, social pressure, or the law. In addition, given the sheer diversity of human interrelationships and attitudes regarding sex and sexuality, it seems highly unlikely that the restrictive specifications of the new natural law approach are ever likely to find fulfillment on a broad social basis, whether due to social pressure or through the application of the law. In reality, arguments about the good of marriage might stand some chance of success if they were presented at a very general level, leaving it to different societies and different eras to fill in the specific details by reference to normatively desirable overarching notions relating to emotional fulfillment and personal autonomy. But to insist by contrast on an unchanging and wholly inflexible definition does not seem—as noted in the discussion of public reason in Section I.G—to be at all plausible if one is concerned with promoting the importance of stable sexual/emotional relationships as a general matter.

D. An Intermediate Strategy Between Moral Relativism and Universalism?

Given that liberal arguments about the legal rights of lesbians and gay men, including the law's treatment of same-sex partnerships, also divide into the universalist and the relativist—bringing into play the deficiencies associated with each approach—it seems sensible to conclude in this Section by outlining the possibility that an intermediate position or strategy might be adopted, thereby combining the benefits of each approach while avoiding the worst of its pitfalls. Such a position or strategy would aim to draw on aspects of relevant universalist and relativist approaches where appropriate and provided that this could be done in a fashion which did not involve logical contradiction.

In this regard, comments offered by Sir Stephen Sedley, an English Court of Appeal judge, might be thought to offer a useful starting point.[301] In summary, Sedley denies that there are universally valid

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300. ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER 6–9 (1995) (defining the term "sexual/emotional" as including opposite-sex as well as same-sex relationships, which are intended to operate flexibly so as to reflect the highly diverse range of relationships that can exist in practice).

301. Stephen Sedley, *Human Rights: A Twenty-First Century Agenda*, 1995 PUB. L. 386, 386.

notions of human rights, but rejects the view that it is impermissible to use our own standards to measure or criticize other societies.[302] While it may be wrong to work from the unrealistic, universalist assumption that our standards are the only valid ones (i.e., to prejudge situations on the basis that our standards *automatically* apply to them) it remains acceptable to press others to adopt our standards on their merits if, at the same time, we are willing to listen to such arguments as those others might advance.[303] This approach must imply that we *can* properly rank certain values as superior on their merits, if only for our own benefit, and that the idea of justice used to do this is, to some extent, general and transcultural in nature. More specifically, Sedley has argued that we can accept that statements about human rights are rooted in a particular time and culture *without* consigning them "to the bin of relativism."[304] A society's views about the content of fundamental human rights will vary with the times and any list of currently accepted human rights will itself be a product of a particular time and place, so that claims about universal human rights can only properly be understood when set against their distinctive historical backdrop. However, there are

> moral and practical continuities—of which the democratic principle is one—which can be powerfully represented as fundamental values, at least within the temporal and social horizons of each society. This relatively modest foundation for the legitimacy of human rights has perhaps the virtue that, without reducing all discourse to incoherent subjectivity, it recognizes that a single right outcome to every issue is attainable, if at all, only locally and temporarily.[305]

While the comments quoted so far are largely relativist, Sedley's idea of "continuities" seemingly implies that each society has

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302. *Id.* at 386–88.

303. There are analogies here to Leckey's "thick instrumentalist" approach. *See* Leckey, *supra* note 256, at 432–38, 447, 469. These analogies exist because Sedley's approach and Leckey's approach both encourage the use of comparative, discursive, and transcultural methods of pursuing improved standards for human rights by acknowledging the contextually rooted nature of present values while recognizing the potential for those values to be challenged and thus evolve or morph into new standards for that culture or community.

304. Sedley, *supra* note 301, at 387.

305. *Id.* at 390.

a *bedrock* of fundamental values which can be interpreted and developed to provide a satisfactory answer at any given time. The interpretation and the answer may vary according to the circumstances, but the outline of values to which they pay lip service is more permanent. Furthermore, a later part of Sedley's argument clearly distinguishes it from pure moral relativism. He claims that if

> we are to escape the cold wind of history which blows sooner or later on [universal] higher-order laws and self-evident truths, it is to our present epoch's consensus about society's ground rules that we should turn. To admit this is to admit . . . that different societies will agree on different ground rules, and to accept accordingly that we have both a right to review and recast our standards and an obligation to make the case for the adoption of them by others rather than continue to assert loftily that ours, being self-evident, are the only acceptable ones.[306]

Sedley's argument thus allows us to reject the presumptuousness of universalist theories (their assumption that a theory of justice can automatically apply to all societies at all times) while preserving the ability to criticize the values of other societies, according to our own theory of justice. We can believe that our own theory is better than any alternative, but acknowledge that it is necessary to convince members of other societies of this point rather than just asserting that our theory applies to them.

An intermediate position or strategy could thus refuse to opt for moral relativism while endorsing Rorty's view that presumptively universal theories are likely to be ineffective.[307] Indeed, it could go beyond Sedley's argument by accepting that people can properly believe that their theory or justification *should* be regarded as universally applicable. But however framed, such a position or strategy would depart from the universalist outlook in its skepticism about the ability of presumptively universal standards to enhance the position of disempowered social minorities in societies whose values are radically different from the theorist's own. It would therefore refuse to talk about auto-

306. *Id.* at 396.
307. *Id.* at 387.

matically applicable standards, and by doing so would seek to avoid moral presumptuousness in practice. By invoking such a strategy, the pitfalls of pure relativism—for example, the inability to condemn other societies for their treatment of sexual minorities—can be avoided, as can the arrogance of universalism given the strategy's acceptance of the need to engage in dialogue with others, a process which will involve give as well as take.

Such a strategy would also allow us to acknowledge the power of a further question, namely how far it is, in practice, ever possible to be *wholly* relativist. Analytically, this question arises when considering theories of justice in general. Despite the relativism of much of his work, Michael Walzer acknowledges the existence of "a kind of minimal and universal moral code"[308] that operates on a transcultural basis in the sense that nearly all societies have prohibitions on murder, cruelty, deception, and betrayal. Equally, Bernard Williams draws attention, as part of his critique of relativism, to a universalist aspect. Williams suggests that

> [i]n its vulgar and unregenerate form . . . [relativism] . . . consists of three propositions: that "right" means (can only be coherently understood as meaning) "right for a given society;" that "right for a given society is to be understood in a functionalist sense; and that (therefore) it is wrong for people in one society to condemn, interfere with, etc., the values of another society.[309]

As Williams points out, the third proposition is clearly *non-relative*, for moral relativists appear to be claiming that it is *always* wrong to condemn the moral values of another society from the outside, a claim which is itself of a universal, transcultural nature.[310] This last point might be taken still further if we accept that in order for human beings the world over to be able to discuss certain ideas, even at a very high level of generality with some sort of common frame of reference, there must be certain points of reference which are universal in nature, even if they are expressed in extremely general terms indeed, and so offer only a very minimal baseline for further discussions of particular is-

308. MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 24 (1987).
309. BERNARD WILLIAMS, MORALITY 20 (1993).
310. *Id.* at 21.

sues. If this argument is correct, then for any purportedly universal ideas about sexuality, partnerships, and marriage to have practical resonance, they would need to be conducted at a far higher level of generality than the new natural lawyers appear prepared to countenance.

CONCLUSION

It is not, of course, possible to conduct a full treatment of the arguments concerning new natural law in an Article such as the present. The first point of the present Article, rather, has been to argue that some of the key difficulties that David Richards and I identified with the theory's treatment of partnership rights for lesbians and gay men still continue. Most obviously, proponents of new natural law claim to be offering secular arguments before the courts in the course of constitutional litigation, when in reality those arguments are not explicable without first acknowledging their underpinning dependence on the conservative Catholic moral theory advanced in a theological context by Germain Grisez. Even if we assume that individual new natural lawyers believe themselves able to distinguish between religious arguments about marriage advanced in a context such as the Manhattan Declaration and secular, constitutional arguments advanced before the courts, the content of those arguments highlights the lack of reality associated with such a belief.

The second point of the Article has been to highlight some emerging issues in arguments for and against same-sex partnership rights, including, on the opposition side of the debate, in the arguments of the new natural lawyers. For it seems clear that some regularly advanced views focus on accounts of the prevailing or historically dominant morality of particular cultures, whereas others, including the arguments of the new natural lawyers, purport to be transcultural in their application. Distinguishing carefully between the relevant positions will remain important on both liberal and conservative sides of the debate, for reasons of analytical clarity but also for practical reasons given the prominent role played in the debate by the arguments of the new natural lawyers. For the moment it remains an open question whether an acceptable intermediate position will come to be accepted in this regard, whether by liberals or conservatives.