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### Cover Page Footnote

Professor of Law, Hofstra University School of Law. I presented an earlier version of this essay at "The Relevance of Religion to a Lawyer's Work: An Interfaith Conference," held at Fordham University School of Law, June 1-3, 1997. Thanks to Jim Fleming for helpful comments, and to Hofstra law student Bella Blat and law librarian Connie Lenz for valuable research assistance

# DELIBERATIVE DEMOCRACY, OVERLAPPING CONSENSUS, AND SAME- SEX MARRIAGE

Linda C. McClain\*

## I. DELIBERATIVE DEMOCRACY AND THE SEARCH FOR A LIMITING PRINCIPLE OF PUBLIC JUSTIFICATION

A pressing concern in political and constitutional theory is how to construct a model of justification in law and politics that offers methods for securing agreement and social cooperation in the face of moral pluralism. A common goal of this work is to elaborate the requirements of deliberative democracy, that is, a model of democratic self-government that “asks citizens and officials to justify public policy by giving reasons that can be accepted by those who are bound by it.”<sup>1</sup> Two fundamental questions are: (1) are there any limits to the grounds to which citizens may appeal or the reasons that they may proffer to support their positions?; and (2) if so, what are they?

One familiar answer to these questions is found in John Rawls’s account of political liberalism, which holds that where questions of constitutional essentials (such as basic liberties) and matters of basic justice are at stake, citizens and governmental officials should abide by an idea of public reason and satisfy the criterion of “reciprocity.” Public reason requires that citizens not simply appeal to their comprehensive moral doctrines, or seek the “whole truth” in politics, but ultimately appeal to political values or public reasons. They should give reasons that other citizens can understand and that they might reasonably expect those citizens reasonably to accept.<sup>2</sup> Such work draws the criticism that it unduly constrains the appeal to substantive moral argument and bars a perfectionist goal of “settling law and public policy in accordance with what is true as a matter of justice, human rights,

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1. Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* 52 (1996).

2. See John Rawls, *Political Liberalism* (1996); John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997) [hereinafter Rawls, *Public Reason*]. Rawls defines “comprehensive moral doctrine” as a moral conception that “includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct . . . .” Rawls, *Political Liberalism*, *supra*, at 13. Other leading work on deliberative democracy shares Rawls’s premise that citizens should not seek to impose or establish their comprehensive moral doctrines in politics, but should abide by an idea of public reason and a duty of reciprocity. See Gutmann & Thompson, *supra* note 1, at 46-49.

and political morality generally."<sup>3</sup> Moreover, it is said to lead to discontent with democracy because it asks citizens to put aside their deeply held beliefs and moral judgments when they enter into politics.<sup>4</sup>

It is helpful to situate Professor Edward B. Foley's ambitious and thought-provoking article, *Jurisprudence and Theology*,<sup>5</sup> within the framework of this debate over deliberative democracy. He too attempts to put forth an appropriate limiting principle for justification, pursuant to a principle of reciprocity. He finds that principle in a distinction between the secular and the theological. Contending that it is possible, appropriate, and fair to have an "entirely secular legal system," he makes two basic claims. First, he argues that a constitutional and legal system can have a commitment to a set of "transcendent human rights" (that is, rights that exist without regard to their enactment by a legislature in a text, and that supersede any contrary legislative enactments) without taking a position in the theological debate over the existence of God.<sup>6</sup> Instead of resolving the question of whether such rights rest upon a natural law foundation or are the product of human reason through a social contract, both theists and atheists could accept the use of a principle of reciprocity to govern the identification of transcendental human rights. This principle of reciprocity seeks to secure assent on fair terms of social cooperation, whereby persons imagine themselves in each other's position, having to abide by whatever terms were mutually agreeable.

Second, Foley contends that it is possible to use such a principle of reciprocity to develop a method of reasoning about transcendental human rights that does not reflect a commitment to either the natural law or social contract view about the origin of such rights. In written opinions, judges need not and should not rely upon theological argument, which Foley defines as "any belief about the ultimate status and character of moral propositions."<sup>7</sup> The problem with theological propositions is that "theology is different from other matters"—such propositions are "inherently unconvincing to someone who is not already a theist."<sup>8</sup> For the same reason, legislators should not draft their enactments in "explicitly theological terms" and legislation should never "make reference to theological beliefs."<sup>9</sup>

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3. Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 Yale L.J. 2475, 2504 (1997).

4. See generally Michael J. Sandel, *Democracy's Discontent: America In Search of a Public Philosophy* (1996) (attributing the "procedural republic" characteristic of America's public philosophy to, *inter alia*, Rawls's political liberalism).

5. See Edward B. Foley, *Jurisprudence and Theology*, 66 Fordham L. Rev. 1195 (1998). Foley draws upon Gutmann & Thompson, *supra* note 1; Rawls, *Political Liberalism*, *supra* note 2; and Rawls, *Public Reason*, *supra* note 2.

6. Foley, *supra* note 5, at 1197.

7. *Id.* at 1207.

8. *Id.* at 1204.

9. *Id.* at 1209–10.

But Foley allows at least one point of entry for theological beliefs into his otherwise “entirely secular” legal system. When a transcendental legal system confronts a problem that cannot be resolved by recourse to the principle of reciprocity alone, it is permissible for judges, lawyers, and (presumably) legislators, in attempting to justify a proposition of law or an outcome, to invoke the existence of an overlapping consensus, or agreement upon a proposition of law or a legislative enactment arrived at from a variety of theological perspectives.<sup>10</sup> When it is uncertain how reciprocity applies in a particular case, that is, “when secular (that is, public) reasoning can go no further to justify a decision the law must make,” judges (and presumably legislators) may appeal to an overlapping consensus of theological positions for one outcome rather than another, even though there may also be an overlapping consensus for the other outcome.<sup>11</sup>

In this essay, I use the current debate over whether same-sex marriage should be permissible as a practical test case for Foley’s strategy for achieving a secular legal system. This debate is a helpful test case because some scholars and many citizens and public officials believe that the issue of the permissibility of same-sex marriage cannot be resolved without recourse to what Foley calls theological arguments or beliefs, and appeals to theological beliefs feature prominently in the opposition to legal recognition of such marriages.<sup>12</sup> I suggest that his ban on theological arguments may be unduly restrictive and unrealistic, as a comparison with Rawls’s idea of public reason will suggest. At the same time, ironically, Foley’s stricture upon theology may prove to be insufficiently restrictive because of his allowance of the appeal to an overlapping consensus of theological beliefs—what I will call the “strength in numbers” exception to his general proscription against theological argument. This creates unresolved tension over what his model requires in cases of apparent conflict between the demands of transcendental human rights and the existence of an apparent overlapping consensus to restrict or deny such rights. In such cases, what, ultimately, does his model require of citizens and legislators engaged in deliberation over questions of basic liberties or rights?<sup>13</sup> I conclude that Foley should incorporate, into his appeal to an overlapping consensus, a requirement of the evaluation of arguments for the legitimacy of state interests in limiting basic liberties or rights by reference to political values and public reasons. Even when

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10. *Id.* at 1206–09. The idea of an overlapping consensus, which Foley takes from Rawls, plays a central role in Foley’s approach to achieving a secular legal system. See *id.*

11. *Id.* at 1211 n.22. Foley offers the example of abortion. *Id.* at 1210.

12. See discussion *infra* text accompanying notes 25–29.

13. Although Professor Foley’s article focuses primarily upon the responsibilities of judges, in this essay, based upon his few references to the responsibilities of legislators, I focus upon implications of his model for public justification by legislators and citizens.

citizens disagree fundamentally about matters of public policy because of their diverse conscientious moral and religious beliefs, or comprehensive moral doctrines, an adequate model of public justification should require that they not abandon the commitment to reciprocity and the effort to appeal to such political values and public reasons in their deliberation and voting.<sup>14</sup> Such an approach would serve the goals of fairness and reciprocity, and the protection of basic human rights and liberties in a pluralistic society, better than asking whether such arguments are theological or secular.<sup>15</sup>

## II. SAME-SEX MARRIAGE AND THE REQUIREMENTS OF RECIPROCITY

Our constitutional order recognizes the right to marry as among citizens' "basic civil rights," and "one of the vital personal rights essential to the orderly pursuit of happiness" by free persons.<sup>16</sup> Does this right properly extend to persons who seek to marry persons of the same sex? Is the right of gay men and lesbians to marry a "transcendental human right" (within Foley's system) or a constitutional essential or "basic liberty" (to use Rawls's terms)? May government restrict or deny this right to gay men and lesbians and, if so, on what basis?

Until recently, every state court that considered the question upheld the denial of marriage licenses to gay men and lesbians. The bases for such denial generally included: (1) a definitional argument that, as supported by millennia of religious tradition and historical practice, marriage consists of the union of a man and a woman, even if the state's marriage law failed to make that definition explicit; and/or (2) an incapacity argument, that gay men and lesbians lacked the capacity to enter into marriage because a same-sex couple lacked the capacity to procreate (and rear children), a primary purpose of marriage.<sup>17</sup> In *Baehr v. Lewin*,<sup>18</sup> Hawaii's Supreme Court distinguished itself among state courts by holding unconstitutional, on grounds of sex discrimination, Hawaii's exclusion of same-sex couples from mar-

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14. See Rawls, *Public Reason*, *supra* note 2, at 797.

15. Foley suggests that his distinction between secular and theological reasoning is "essentially equivalent" to Rawls's discussion between public and private reason. Foley, *supra* note 5 at 1206 n.16 (discussing John Rawls, *A Theory of Justice* (1971)). But Rawls distinguishes public reason from "secular reason and secular values," because the latter, on his view, include "reasoning in terms of comprehensive nonreligious doctrines," and are "too broad to serve the purposes of public reason." Rawls, *Public Reason*, *supra* note 2, at 775.

16. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see *Zablocki v. Redhail*, 434 U.S. 374 (1978).

17. See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). For a helpful discussion and critique of these and other arguments against same-sex marriage, see William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* 795-817 (1997).

18. 852 P.2d 44 (Haw. 1993).

riage and rejecting such arguments—under a strict scrutiny test—as “circular” and “unpersuasive.”<sup>19</sup>

In the wake of *Baehr*, fearing the specter of marriage tourism, whereby gay and lesbian couples would travel from their home states to Hawaii to marry and then return and expect their home states to recognize their marriages, Congress passed the Defense of Marriage Act of 1996 (“DOMA”).<sup>20</sup> DOMA has two provisions: (1) it provides that states shall not be required to recognize “a relationship between persons of the same sex that is treated as a marriage” under the laws of another state or any right or claim arising from such a relationship; and (2) it defines marriage, for purposes of federal law only, to mean “only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”<sup>21</sup> Nearly twenty state legislatures have enacted—and others are considering—similar “protective” legislation which declares same-sex marriage to be contrary to public policy and prohibits the state from recognizing same-sex marriage (entered into within the state or elsewhere).<sup>22</sup> And in Hawaii itself, the legislature responded to *Baehr* by proposing a constitutional amendment, on which citizens will vote by ballot initiative, granting the legislature the power to reserve marriage to “opposite sex couples.”<sup>23</sup>

How would Foley’s prescription for the avoidance of theological argument apply to a conscientious state legislator asked to consider the merits of and vote upon a state “defense of marriage” act? What strictures would apply to citizens debating and voting on such a measure as a ballot initiative? Can the debate over whether the denial of marriage licenses to gays and lesbians violates their basic liberties be resolved by recourse to a principle of reciprocity, such as Foley advocates? Or, given that much opposition to same-sex marriage derives from religious beliefs and moral convictions, must the resolution turn—as some argue—on deliberation concerning competing theolog-

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19. *Id.* at 61.

20. Pub. L. No. 104-199, 110 Stat. 2419. (1996) (codified at 28 U.S.C. § 1738C (1996) and 1 U.S.C. § 1 (1996)). Proponents of DOMA repeatedly cited, as evidence of a “gay activist scheme,” a LAMBDA Legal Defense and Education Fund memorandum raising this possibility as one outcome of Hawaiian legalization of same-sex marriage. See, e.g., 142 Cong. Rec. H7484 (daily ed. July 12, 1996) (statement of Rep. Sensenbrenner) (“Gay rights groups are scheming to manipulate the full faith and credit clause to achieve through the judicial system what they cannot obtain through the democratic process.”).

21. 110 Stat. 2419.

22. See, e.g., Alaska Stat. § 25.05.013 (Michie 1996) (declaring that a same-sex marriage recognized by another state is “void in this state”); 750 Ill. Comp. Stat. Ann. § 5/213.1 (West 1997) (“[a] marriage between 2 individuals of the same sex is contrary to the public policy of this State”); see also David W. Dunlap, *Fearing A Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. Times, Mar. 6, 1996, at A13 (describing status of legislative efforts).

23. See *Hawaii Seeks Law to Block Gay Marriage*, N.Y. Times, Apr. 18, 1997, at A15.

ical beliefs or comprehensive moral doctrines?<sup>24</sup> And, if so, does Foley's principle of reciprocity impose any limitation concerning the appeal to such doctrines?

First, it seems clear that Foley's directive that legislators should not draft legislative enactments in "explicitly theological terms" or "invoke theological beliefs" would rule out the following statements, if they appeared as "findings" in a state defense of marriage act:

[w]e affirm our trust in the divine approbation of union between a man and a woman, between a male and female for all time.<sup>25</sup>

[T]housands of years of Judeo-Christian teachings leave absolutely no doubt as to the sanctity, purpose, and reason for the union of man and woman. One has only to turn to the Old Testament [*Genesis* 1:27-28] and read the word of God to understand how eternal is the true definition of marriage . . . . Woe betide that society . . . that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator in the beginning.<sup>26</sup>

But what if such rhetoric appears—as was the case with DOMA—in argument in the legislative debate?<sup>27</sup> Or what if legislators' reasons for proposing, defending, and voting for legislation are undeniably rooted in theological beliefs? Does Foley's "entirely secular" system police the legislative process to weed out the role of theology in motivating and passing legislation?

Let's assume that Foley would hold that, like a judge, the conscientious legislator should avoid recourse to theological argument because, *inter alia*, the persuasiveness of such an argument rests on sharing the theological perspective out of which it arises.<sup>28</sup> Suppose

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24. See George, *supra* note 3, at 2495-2501 (arguing that resolution of same-sex marriage debate depends upon comprehensive moral views); Steven A. Holmes, *Civil Rights Dance Lesson: The Tiny Step Forward*, N.Y. Times, Sept. 15, 1996, at E5 (reporting poll results that 67 percent of respondents felt gay marriages went against their "religious beliefs"); Alan Wolfe, *The Homosexual Exception*, N.Y. Times, Feb. 8, 1998, § 6 (Magazine), at 46 (reporting prevalence of references to sin, unnaturalness, and immorality in a survey of middle-class suburban Americans' attitudes about homosexuality and resistance to toleration and acceptance of gay men and lesbians).

25. 142 Cong. Rec. S10111 (Sept. 10, 1996) (statement of Sen. Byrd).

26. *Id.* at S10109-10.

27. The argument was made by Senator Robert Byrd, a co-sponsor of DOMA, *see* text accompanying notes 25-26, and subsequently praised by Senator Nickles, who brought DOMA to the floor for debate, for putting the legislation in "historical perspective." 142 Cong. Rec. S10111 (daily ed. Sept. 10, 1996) (statement of Sen. Nickles).

28. Foley, *supra* note 5, at 1202-05. For Gutmann and Thompson, the appeal to divine authority as such is not what creates a problem for a deliberative perspective (for example, to take an earlier battle, miscegenation is wrong because God says so in the Bible): "The problem lies in the appeal to *any* authority whose conclusions are impervious, in principle as well as practice, to the standards of logical consistency or to reliable methods of inquiry that themselves should be mutually acceptable." Gutmann & Thompson, *supra* note 1, at 56. A claim "fails to respect reciprocity if it imposes a requirement on other citizens to adopt one's sectarian way of life as a con-



that a legislator makes the following argument in support of a state variant of DOMA:

For every moment of recorded history . . . [i]n every major religion in history, from the early Greek myths of the "Iliad" and the "Odyssey" to the oldest writings of the Bible to the oldest teachings of civilization, governments have recognized the traditional family as the foundation of prosperity and happiness, and in democratic societies, as the foundation of freedom. Human beings have always given traditional marriage a special sanction. [This legislation is necessary] to defend, protect, and even perpetuate this historical recognition of the traditional family as the foundation for society.<sup>29</sup>

This argument (which was made in Congress in support of DOMA) appears to satisfy Foley's "strength in numbers" exception: It invokes an overlapping consensus drawn from a range of religious traditions concerning the unique and vital significance of the family, and in turn, heterosexual marriage as the basic family unit. If a legislator makes this argument, is he or she making a claim about the character and status of a moral belief, or merely invoking and agreeing with an overlapping consensus?

And how is a conscientious legislator or citizen who believes that the ban on same-sex marriage violates the demands of "transcendental human rights" to respond to such an invocation of an overlapping consensus against same-sex marriage? Within Foley's system, of course, one could attempt to invoke an overlapping consensus of other theological beliefs supporting same-sex marriage,<sup>30</sup> but what happens if the numbers are not on her side? Is there room in Foley's system for the argument (made in Congress against DOMA) that marriage is a basic human and civil right, that equal rights for gay men and lesbians is an unfinished chapter in the civil rights movement, and that public opposition, and even revulsion, should not be dispositive, just as it was not thirty years ago when the issue was ending racial segregation and bans on miscegenation?<sup>31</sup> If the denial of the civil

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dition of gaining access to the moral understanding that is essential to judging the validity of one's moral claims." *Id.* at 57.

29. Cf. 142 Cong. Rec. S10106 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm) (making this argument in support of DOMA).

30. For example, a helpful point made at the Conference in response to this essay was that some contemporary religions support same-sex marriage, which calls into question the assertion of uniform religious opposition to same-sex marriage. *See also* *Shahar v. Bowers*, 114 F.3d 1097, 1118-22 (11th Cir. 1997) (Godbold, J., dissenting) (noting that Reconstructionist Judaism accepts same-sex marriage and that state's denial of employment to lesbian participant in such marriage violated her constitutional right of intimate association), *cert. denied*, 118 S. Ct. 693 (1998); William N. Eskridge, Jr., *The Case for Same-Sex Marriage* 46-48 (1996) (noting various religions' support of same-sex unions).

31. *See, e.g.*, 142 Cong. Rec. S10122 (daily ed. Sept. 13, 1996) (statement of Sen. Robb) (referring to "last frontier" in fight for civil rights and earlier public revulsion at miscegenation); 142 Cong. Rec. H7491 (daily ed. July 12, 1996) (statement of Rep. Studds) ("this is . . . the last unfinished chapter of civil rights in this country"); *id.* at

right of marriage to gay men and lesbians is a form of discrimination in violation of rights of conscience, human dignity, and equal respect, then why should an overlapping consensus in favor of such denial be dispositive? What constraints does Foley's principle of reciprocity impose when it encounters a conflict between overlapping consensus and the demands of transcendental human rights?

Missing from Foley's analysis is a requirement of critical examination of a supposed overlapping consensus and repudiation of it if it impinges upon basic rights. Without such a requirement, we are left with a simplistic and disturbing equation of constitutional democracy with majority rule, within which "millennia of moral teaching"<sup>32</sup> or the electorate's moral condemnation of homosexuality suffices to justify discrimination and second-class citizenship.<sup>33</sup> By way of comparison, let me suggest another approach, one that does not preclude, as a general matter, the appeal to theological arguments or comprehensive moral views, but instead requires a commitment to deliberation in terms of political values. I consider how Rawls's requirement of public reason and the criterion of reciprocity would apply to legislators and citizens and encourage Foley to take his own model in a similar direction.

Rawls analogizes the office of citizen, with its duties of civility and of reasoning in accord with public reason and reciprocity, to the office of judgeship, with its duty of deciding cases according to precedent and canons of interpretation.<sup>34</sup> Reciprocity, which serves as the basis for "civic friendship," requires that a citizen give reasons that can be understood by other citizens and she might reasonably expect other citizens reasonably to accept.<sup>35</sup> Indeed, the ideal of public reason further analogizes citizens to legislators, asking citizens to ask themselves "what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact."<sup>36</sup> Rawls's model of public reason does allow citizens to introduce their comprehensive moral doctrines in public political discourse, subject to the proviso that in due course they properly give public reasons and appeal to political values to support public policies—not reasons given

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H7499 (statement of Rep. Conyers) (referring to public opposition to ending segregation when civil rights laws were passed in the 1960s).

32. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

33. *See Bowers*, 478 U.S. at 190-96 (upholding sodomy statute because of electorate's presumed moral condemnation of homosexual sodomy). *But see Romer v. Evans*, 517 U.S. 620 (1996) (striking down constitutional amendment prohibiting protection of gay men, lesbians, and bisexuals against discrimination as premised on impermissible "animus").

34. Rawls, *Public Reason*, *supra* note 2, at 797.

35. *Id.* at 771; *see also* Gutmann & Thompson, *supra* note 1, at 52-53 (linking reciprocity to a sense of mutuality that citizens and representatives should bring to the public forum).

36. Rawls, *Public Reason*, *supra* note 2, at 769.

solely by their comprehensive doctrine.<sup>37</sup> What is missing in Foley's account, which would bar theological argument unless it supports an overlapping consensus, is a similar criterion concerning the appeal to political values and public reasons. Foley seems to give up too quickly on the requirement of reciprocity and the responsibility of citizens, even in the face of apparent "standoff," not simply to appeal to their comprehensive views, but to "vote for the ordering of *political* values they sincerely think the most reasonable."<sup>38</sup>

Rawls argues that "[t]he criterion of reciprocity is normally violated whenever basic liberties are denied."<sup>39</sup> If, as in our constitutional system, the right to marry is a basic liberty, then it is hard to imagine "what reasons can both satisfy the criterion of reciprocity and justify denying" to gays and lesbians that basic liberty.<sup>40</sup> We have seen two candidates: the definitional argument and the incapacity argument.<sup>41</sup> A third argument, widely prevalent in the wake of *Baehr*, is that the recognition of same-sex marriage would threaten the embattled institution of marriage and make a mockery of it.<sup>42</sup> A related claim is the familiar invocation of the slippery slope: recognizing same-sex marriage would open the door to the recognition of all manner of relationships, including incest, polygamy, and bestiality.<sup>43</sup>

How would these arguments fare under the requirements of public reason? Here I can only sketch the possible lines of debate, using the definitional and incapacity arguments as illustrative. Public reason would require that citizens who make such arguments based upon

37. *Id.* at 776, 783-84.

38. *Id.* at 797.

39. *Id.* at 771.

40. *Id.* (discussing the examples of slavery, the denial of religious liberty, and the denial of suffrage to women).

41. Some prominent natural law scholars attempt to elaborate a teleological version of these arguments: government does not treat gays and lesbians unequally or discriminate against them in denying them the right to marry if gays and lesbians lack the capability to fulfill its requirements and to realize the goods of marriage, that is, a "one-flesh" union of a male and a female yielding friendship and children. George, *supra* note 3, at 2497-99; see also John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 *Notre Dame L. Rev.* 1049, 1066-68 (1994) (defending government's failure to protect against discrimination on the basis of sexual orientation because of the immorality of homosexual conduct and arguing that same-sex couples cannot achieve the goods of marriage).

42. See, e.g., Ronald Smothers, *Mississippi Governor Bans Same-Sex Marriage*, *N.Y. Times*, Aug. 24, 1996, at 7 (reporting Governor Fordice's statement that "same-sex marriage makes a mockery out of the institution of marriage, which is already embattled").

43. See, e.g., Kit R. Roane, *Gay Couples and the Law, at Odds Over the Right to Marry*, *N.Y. Times*, Feb. 2, 1997, at § 13, 7 (quoting New Jersey Assemblyman Marian Crecco: "Allowing [gays and lesbians] to marry would make the institution meaningless. What if someone next wants to marry their brother or sister? Where does it stop?"). For a thoughtful exploration by a proponent of same-sex marriage of the lessons to be learned from the invocation of the polygamy analogy in the debate over DOMA, see David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 *Hofstra L. Rev.* 53 (1997).

their theological or comprehensive beliefs in due course support these arguments by reference to public reasons and political values. The closest that DOMA proponents came to asserting political values was their appeal to the family as the foundation of society and its vital role in preparing children for citizenship.<sup>44</sup> But that alone is not enough to explain *why* the marital family must consist of one man and one woman. In contrast, Rawls contends that his political liberal approach would not recognize a legitimate governmental interest in any particular form of family life *as such* (whether monogamous or heterosexual), but would hold that government's legitimate interest is in reproducing political society over time, that is, families serve the important function of rearing children and preparing them for citizenship. Unless there are political values that same-sex marriage offends (for example, if same-sex marriages are "destructive to the raising and educating of children"), then government has no legitimate interest in denying the basic liberties of gays and lesbians to marry.<sup>45</sup> This functional approach to family is similar to that adopted in the recent Hawaii decision, *Baehr v. Miike*,<sup>46</sup> in which the circuit court held that the state failed to demonstrate that its compelling interest in the optimal development of children required two biological (or at least heterosexual) parents.<sup>47</sup> The state's own experts testified that gay and lesbian parents could be as capable and successful as heterosexual parents.<sup>48</sup>

As Rawls puts it, the question is not whether gay and lesbian intimate relations "are precluded by a worthy idea of full human good as characterized by a sound philosophical and nonreligious view, nor whether those of religious faith regard it as sin, but primarily whether legislative statutes forbidding those relations infringe the civil rights of free and equal democratic citizens."<sup>49</sup> It is not necessary to determine the "whole truth" about the best conception of sexuality and marriage, whether it rests upon a "secular" or "religious" comprehensive moral doctrine, to affirm a principle of toleration that secures a realm of personal self-government and liberty of conscience in matters of intimate association.<sup>50</sup> Whether such a conception is arguably "secular," because it is "reflective and critical" or "publicly intelligible," is not the point: pursuant to the requirement of reciprocity, neither sec-

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44. See 142 Cong. Rec. S10113-14 (daily ed. Sept. 10, 1996) (statement of Sen. Coats).

45. Rawls, *Public Reason*, *supra* note 2, at 779-80, 788 & n.60.

46. Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

47. *Id.* at \*20-21.

48. *Id.* at \*5-6.

49. Rawls, *Public Reason*, *supra* note 2, at 780 (discussing laws treating homosexual relations between citizens as criminal offenses).

50. *Id.* at 779-80. In contrast, natural law scholar Robert George argues that society and government have an obligation to "get it right," that is, to embody a morally sound conception of marriage, and that doing so must appeal to comprehensive moral doctrines concerning the nature and good of marriage. George, *supra* note 3, at 2500.

ular philosophical doctrines nor religious ones in themselves provide public reasons.<sup>51</sup>

The requirements of public reason would similarly require the delineation of precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our public culture. Unanswered in the debate over DOMA was the question posed by its opponents: Do loving, committed relationships between two members of the same sex threaten individual marriages or the *institution* of marriage, or do they instead promise to affirm the goods of marriage?<sup>52</sup> A more rigorous principle of reciprocity, akin to what Rawls advocates, would also require critical examination of the appeal to "tradition" concerning the institution of marriage and appreciation that a commitment to political values (such as racial and sex equality) and to what I elsewhere argue for as a model of toleration as respect (which includes liberty of conscience and respect for citizens' moral powers) may itself require the transformation of that institution.<sup>53</sup> For example, to what extent is the definitional requirement that marriage simply is, in the natural order of things, between a man and a woman rooted in the history of the institution as that of a hierarchical relationship between husband and wife with clearly delineated roles, duties, and rights based on sex? And if that hierarchy and gender differentiation is no longer an essential part of the institution

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51. Rawls, *Public Reason*, *supra* note 2, at 780. *But see* George, *supra* note 3, at 2499 (contending that his conception of marriage rests upon a comprehensive view that does not "make[ ] any appeal to principles or propositions that are not publicly available to rational persons"). In contrast, Foley appears to reject "theological" beliefs because of their inaccessibility to those who do not share the belief. *See* Foley, *supra* note 5, 1204–06. Gutmann and Thompson similarly emphasize that such beliefs violate the condition of reciprocity because of their inaccessibility. *See* discussion *supra* note 28 and accompanying text. As discussed *supra* note 15, Rawls does not equate secular with public reason. Although I cannot here elaborate on the extent to which Gutmann and Thompson's account of reciprocity may differ from that of Rawls, for present purposes, the significant point of agreement is the insistence upon public justification on the basis of mutually acceptable reasons and the requirement that citizens not seek to impose their comprehensive moral conceptions or doctrines. *See* Gutmann & Thompson, *supra* note 1, at 14, 92. I do not criticize Foley's invocation of reciprocity to the extent that it shares these two features. My argument here is that Foley's approach does not go far enough in requiring the appeal to political values and public reason, even when citizens may permissibly appeal to theological beliefs and argument.

52. *See* 142 Cong. Rec. H7278 (daily ed. July 11, 1996) (statement of Rep. Frank).

53. *See* *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (striking down anti-miscegenation law, defended in terms of religious and moral convictions, as being rooted in impermissible ideology of white supremacy); Rawls, *Public Reason*, *supra* note 2, at 790–91 (noting John Stuart Mill's critique of the family in Mill's day as a "school for male despotism" and arguing that, if the family continues to perpetuate injustice, then society must reform it). Elsewhere I enlist feminist and liberal arguments in favor of a principle of toleration as respect that would support same-sex marriage. *See* Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 Ohio St. L.J. (forthcoming Apr. 1998).

of marriage, and indeed is antithetical to contemporary constitutional norms of equality and individual liberty, then what justification can the state offer for continuing to insist that a definition of marriage that excludes same-sex couples? Opening marriage up to persons of the same sex not only respects the diversity that stems from the exercise of moral personality, but also allows for what may prove to be valuable cultural transformation.

#### CONCLUSION

Professor Foley's quest for an entirely legal system is an understandable and laudable project, given the challenge of finding a model of justification in law and politics that is appropriate for a morally pluralistic constitutional democracy. The appeal to the requirement of reciprocity and public (not secular) reason is a promising way of meeting that challenge. The duty of reciprocity does not require that citizens wholly divest themselves of their deepest beliefs or judgments in such deliberation; rather, the goal is that citizens committed both to deliberative democracy and to equal basic liberties engage in the reason-giving and public justification that make civic friendship in a diverse polity achievable.