

**NEITHER A RIGHTS BEARER NOR A REPRODUCER BE:
SAME-SEX MARRIAGE AND THE TASK OF POLITICAL PHILOSOPHY**

Draft Ver.1.1 (May 16, 2006)

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**Neither a Rights Bearer Nor a Reproducer Be:
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What is the task of political philosophy in relation to the issue of same-sex marriage? This question has two parts: first, to determine out how to approach the issue and, second, to determine what, then, ought to be done. This paper is an attempt to problematize the first and thereby set the stage for the second.

The movement of the paper's argument occurs over four sections. Using Polonius' speech to his son in Shakespeare's *Hamlet*, section I sets out an heuristic to help us identify three main dynamics that structure or set out the terrain of the public debate over same-sex marriage. In section II, I show how these dynamics occlude the access of both a public discourse and political philosophy to the issue of same-sex marriage, particularly by shifting the terrain of the debate from marriage as an object of discourse and investigation to the assimilation of marriage to pre-existing and external systems of meaning. Section III, consists of two parts. The first, examines Rawlsian liberalism to reveal both how its most salient philosophic tools are structured by and reenforce one occluding assimilationist dynamic, but also how the self-identified foundation of his account escapes from that dynamic and thereby provides a way of problematizing the issue of same-sex marriage in terms of what I call "participation". The second, engages in the same analysis but from the side of the new natural law theorists. Here, however, the philosophic possibility of escape from the dynamic of assimilationism emerges in the way the new natural law allows us to problematize the issue of same-sex marriage in terms that I call "boundary". The concluding section, IV, briefly sketches how problematizing same-sex marriage in terms of the

participation and boundary problems transforms the task of political philosophy in relation to same-sex marriage, taking it outside the either liberalism or natural law and beyond conceptualizing marriage’s possibilities in terms of either rights or reproduction.

I. Preliminaries: Shakespeare and the Dynamics of Occlusion

The public discourse and history of conflicting jurisprudence on the same-sex marriage raises and sustains the issue as a vital object of investigation for political philosophy. At the same time, this article suggests that the dynamic of the public debate both occludes the possibility of adequately approaching same-sex marriage as an object of investigation but contains within it resources for the recovery of those possibilities. This section sets out the abstract structure of that dynamic, which I will argue consists of two elements: (i) an impulse towards taking the ultimate object of analysis as the individual; and, (ii) twin epistemological impulses, (a) one to reduce differentiated phenomena to monological grounds, the other, (b) a remnant of an impulse towards the irreducibility of phenomena.

To reveal this dynamic, especially its potential to assume a popular form, a convenient device can be found in Shakespeare’s *Hamlet*. In that play, the ill-fated Polonius provides “a few precepts” to his departing son, Laertes. Among that now familiar advice, his concluding sentences are the most famous:

Neither a borrower nor a lender be:
For a loan oft loses both itself and friend;
And borrowing dulls the edge of husbandry.
This above all, —to thine own self be true;
And it must follow, as the night the day,

Thou canst not then be false to any man.¹

These final precepts have become part of our common vocabulary. Both in substance and epistemic imperative, Polonius’ advice to his son articulates in popular form what would become the dominant understandings of a liberal modernity. Substantively, Polonius commends his audience to, and anticipates, the two ideals of autonomy that have come to dominant the framing and evaluation of our social world. The penultimate precept, “Neither a borrower nor a lender be”, captures liberalism’s early modern ideal of liberty as autarky that was to gain theoretical prominence in the writings of Thomas Hobbes and then John Locke—i.e., a freedom from external dependence cultivated through one’s own industry. The final precept, “to thine own self be true”, foreshadows the rather more explicitly metaphysical conception of autonomy as a matter of the will’s own internal obedience that was to be announced in its philosophical form by Jean-Jacques Rousseau and Immanuel Kant. epistemically, with this advice Polonius asks his son to reflect on his own actions and relations in light of these ideals of autonomy. The precepts do not ask that this evaluation be done in light of the specific nature or content of the actions or relations themselves. In this way, these precepts aim not only to reduce Laertes’ empirical external dependency, but more importantly to draw him inward to an *internal* ground of evaluation.

But these two precepts are more than epistemically and empirically individualizing advice. They also imply an another epistemic principle. This second epistemic principle does not anticipate the liberal philosophic tradition of autonomy but rather looks back to a pre-liberal

1 William Shakespeare, *Hamlet, Prince of Denmark*, <edition>, Act. I, Scene iii, p. 1076.

mode of evaluation. Abstracted from the liberal substance, so that the advice becomes a general principle of inquiry, the movement from “neither a borrower nor a lender be” to “to thine own self be true” is no longer a movement inward to the inquirer. Instead, it focuses attention of the particularity of the object under consideration. Thus abstracted, the epistemic principle is an Aristotelian return to the things themselves.

So, we have then in Polonius’ precepts a three-fold dynamic of practical reasoning: (i) a substantive ideal of liberal autonomy, (ii.a) an epistemic principle that individualizes and then interiorizes a monological normative ground, and, finally, (ii.b) the echo of an older epistemic principle that locates grounds in the irreducible uniqueness of the phenomenon under consideration. Polonius’ precepts are worth unpacking, because their dynamic is also the structure of the public debate over same-sex marriage. By revealing these dynamics at work as the structure of the public debate, we will have secured for ourselves an account of how access to same-sex marriage as an object of investigation is lost, but also an account of how that access might be recovered. But first, where and how do we see this dynamic in the public same-sex marriage debate?

II. Structure of the Public Debate and Political Philosophy

The debate over same-sex marriage at first appears as yet another front in the so-called “culture wars” as the values of social conservatism clash with values of universalism and equality—or at least a J.S. Millian concerns for the preservation or extension of those spheres of self-regarding acts. Seen in this way, though, the public force of the culture wars then derives from the apparent

incommensurability of the underpinning valuations that inform the debate. That is, the force of the conflict does not emerge from the specific object of conflict. In Aristotle’s language, the culture wars are underpinned by conflicts “because of” already existing frameworks of meaning, not “over” the objects of conflict themselves. Thus for example, to take the most salient front in this war—the abortion debate—it is the public values of “choice” and “life” that clash, not the value of abortion itself. However, an examination of the conceptual possibility of their being such a thing as the public debate over same-sex marriage, reveals this debate to be at its core, of quite a different sort.

Historically marriage, and thus the legal access to marriage, did not begin as the central item on the political agenda of the gay liberation movement.² Yet, quite apart from the time-table and imperatives of that organized movement, marriage did emerge as the issue around which the battle came to be fought. The important point here is that the ideational terrain of this conflict is not in itself conflictual for the simple reason that both sides of the public debate value marriage as an institution somehow bound up with human flourishing. Moreover, the most salient features of marriage—features that may not *define* marriage, but are mutually understood at least to be *associated* with a marriage that is more than simply in name only—are shared by both sides. Ralph Wedgwood provides us with a sufficient list: sexual intimacy, economic cooperation, and mutual commitment.³ This list could be expanded or altered without itself altering the broadly

2 <David Rayside and Miriam Smith on the movement in Canada>

3 Ralph Wedgwood, “The Fundamental Argument for Same-Sex Marriage” in *The Journal of Political Philosophy*, vol. 7, no. 3, 1999: 225–242, p. 229.

shared sense of what marriage involves or that marriage (if not any one of its characteristics) is important.

Without this moment of unreflective public consensus, without this unwitting penetration of the value of marriage into a collective conception of human flourishing, the foundational shape of the debate over marriage would not be possible. For without this originary moment of consensus, the debate would be something quite different other than whether *same-sex* marriage should be legalized but whether *marriage itself* should exist as a state recognized and supported institution.⁴ This unreflective, originary moment of consensus constitutes the first, albeit most obscured, articulation of the three-fold dynamic that structures the public terrain of the same-sex marriage debate. And the modality of the dynamic that it articulates is the oldest, for this moment of consensus points the public face of the debate back to an attentiveness to the nature, or being, of marriage itself. More than simply a sum or mechanical fastening together of the characteristics of marriage—for these characteristics might be more or less easily achieved in some other form of recognized or informal union—this shared value of marriage marks a fundamental intuition of marriage as an irreducibly unique good.

Once marriage is held to be an irreducibly unique good, it is possible to move from the public discourse to a political-philosophic inquiry into the nature of marriage. More importantly, the public status of this intuition provides a way for political philosophy to carry back to the public the results of its inquiry into marriage. So, in this way, the public intuition’s epistemic status

4 <Of course the possibility of the state getting out of the “marriage business” has been entertained, e.g., in Canada by the Liberal government under Prime Minister Jean Chrétien and then Paul Martin before deciding on the now-enacted same-sex marriage legislation, Bill C-38.>

holds open the possibility of entering into an investigation of the object to which it is an intuition. A philosophic investigation of marriage could, of course, reveal this shared intuition as incorrect. We are not question begging: marriage, may not be an irreducible good. Similarly, political philosophy could begin with any understanding of marriage and move from there through internal critique to a comprehension of marriage that is more philosophically coherent. No epistemic necessity exists requiring this shared intuition of marriage’s irreducible uniqueness as the starting point. For instance, this manner of proceeding from what is commonly held characterizes both Plato’s and Aristotle’s political-philosophic investigations.⁵

However, as a matter of *political* philosophy, a disregard for this shared intuition has practical consequences. As a first consequence, we are likely to hypostasize features of marriage (e.g., marriage as a voluntary companionate relationship) or the situation in which the discussion of same-sex marriage occurs (e.g., the radically incommensurate ways of locating its importance) as objects that are *more* worthy of investigation than the admittedly more abstract idea of marriage itself. As a second consequence, the way back from philosophy to politics made more difficult. Even if we do manage to return, we may be returning with philosophic solutions that are internally coherent and fitted to politically salient problems—no difficulties so far—but these problems may obscure the more foundational conditions out of which these problems emerge in the first place. In other words, without being oriented to marriage itself as an object of investigation we may close off the possibility of being able to discern what is philosophically essential in

5 This method of beginning from *doxa* or opinion in part defines the Socratic method perhaps most famous in Plato’s *Republic* but also present in a non-dialogic form in the first or sometimes the second books of Aristotle’s writings, e.g., the *Politics*, *Nicomachean Ethics*, *Physics*, *Metaphysics*, and *On the Soul*.

the same-sex marriage debate rather than seemingly politically salient but structurally epiphenomenal. Without settling the philosophic obligations of political philosophy with regard to the issue of same-sex marriage we cannot settle on its appropriate political task.

So, the shared intuition of the irreducible importance of marriage, as an articulation of one epistemic dynamic, is crucial to properly orient political philosophy to the issue of same-sex marriage. Yet, this initial condition which provides the initial, albeit hidden or unreflective, shape and impulse behind the debate is occluded both politically and philosophically by the other epistemic dynamic we heuristically located in Polonius’ advice. This superceding and occluding dynamic is one that inverts the movement of the first. It asks us to orient ourselves towards the object of investigation (in this case, marriage) by *first* orienting ourselves to a prior system of meaning or foundational source of valuation. In this way, this new epistemic dynamic shifts the individual’s primary activity in relation to the object from *grasping* (if only intuitively) the irreducible quality of the object via a confrontation with the object itself to *assimilating* the object to the universal and priorly existing grounds in which that object is now seen to emerge and from which it gains its foundational meaning.

In order to see how the movement occludes the sort of inquiry in same-sex marriage, we need first to see where and in what shape this assimilationist epistemic dynamic articulates itself. This single dynamic shows itself in the dominant ways in which the arguments for and against same-sex marriage are publicly articulated. We can reduce these ways to two.

First, the value of same-sex marriage is characterized in terms of individual right. Politically and proximately, this mode of argumentation represents a continuation of earlier strategies used

by social groups to gain access to social goods and institutions previously denied them because of some particular attribute—preeminently sex, religion, language, disability, and ethnicity.⁶ The force of these arguments in shaping the public understanding of the meaning of marriage is best seen in the legislative acts and court rulings of those jurisdictions in which the obstacles to same-sex marriage have been, even if temporarily, removed. Apart from technical arguments pertaining to the particular constitutional and legislative context in which they are brought down, the basic legislative and juridical arguments are of a piece.⁷ We can restrict ourselves to <e.g., Canadian Bill C-38 (Preamble ¶¶ 1–3, 4, 8–9,11), Ontario, Vermont or Hawaii ruling>. <Brief mention of the jurisprudence of these rulings/legislation>.

The second way characterizes the value of same-sex marriage in terms of traditions, nature, or the divine. These arguments represent a justification of the given attribute—be they of individuals, social institutions, or evaluative frameworks—that once formed the dominant and unreflective background conditions, the presuppositions or prejudices in the Burkeian and Gadamerian sense, against which rights-based arguments now work. And like their rights-based counterparts, these arguments too find an specific articulation in the public discourse of legislation and jurisprudence. <Brief discussion of, e.g., DOMA, overturning of Vermont or Hawaii, factums arguing against, as well as Preamble ¶¶ 6,7,10 of, Canadian Bill C-38.>

6 For continuities between the legal strategies of the “gay liberation” movement and early struggles for racial and sexual equalities see <Rayside, X, etc.>. For philosophic attempts to see the denial of same-sex marriage as a direct analog to racial and sexual discrimination see <e.g., Andrew Koppelman, “Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination” in *New York University Law Review*, vol. 69 no. 2 1994:<x-y>>.

7 <X, Y, Z> discusses the differences between making rights-based arguments from the situation of constitutional grounds (e.g., that in Canada based on the Charter of Rights and Freedoms) and non-constitutional grounds (e.g., in the United States of America).

In each of these contemporary and radically divergent characterizations of the value same-sex marriage, the epistemic dynamic at work is the same. The specific meaning of *same-sex* marriage arises from an assessment of what marriage *simpliciter* is; what marriage *simpliciter* is, arises from a more primal foundation of meaning. In the first way, the rights arguments represent the wedding of two of the elements present in our Shakespearean heuristic: (i) an impulse to move to an external ground as the ultimate source of evaluation and meaning with, (ii), a conception of the substantive good that we also saw pregnant in Polonius’ ideals of individual autonomy. We could give a philosophical account of this external ground by drawing upon the liberal tradition that has worked out that intuition of autonomy. However, Polonius’ own intuitions of the ground’s shape provide a better path to understanding the *public* shape of the debate over same-sex marriage. For this public shape—even in its legislative and juridical articulations—relies instead on grasping the broad sense of the basic principles animating or at stake in the ground. The public shape does not rely on a knowledge or ability to provide specific philosophic reasonings and arguments for the ground’s substantive content. In this case, in the reduction of the issue of same-sex marriage to the grounds of individual autonomy, public reasoning has the shape of a reasoning *from* an intuition of substantive content rather than a reasoning *about* that substantive content.

We can broadly label as a “humanism” the above epistemic movement to a ground and with its intuited substantive content of individual autonomy. As a description of this ground, humanism goes beyond the more specific idea of individual autonomy to capture the broader way in which these foundational ideals reside within the circle of what is possible through human

knowledge, capacities, and desires alone.⁸ The public intuition of these humanist grounds consists in grasping the principle that the externally existing world ought to be articulations of human knowledge, capacities, and desires. Humanism understands that the full possibility flourishing is independent of forces and dispensations which are external to human acts of creation and knowledge. The normative result of this public intuition is that this external world ought not to present any obstacles to the expression of our humanity or the achievement of our good. Our world ought to be infinitely conformable to our humanity. In the current and more philosophic language in which it finds its public expression, the external world ought to preserve our individual autonomy, not compromise it. Any resistance that the social world does pose—any non-conformity to the ground of humanist meaning and evaluation—requires countering or correcting. It requires a demand that the world conform. For us in liberal modernity, these demands take the form of claims, that rights discourse in which the arguments for same-sex marriage are framed.⁹

In the second case, there are a variety of attempts to define the ethicality of same-sex marriage in terms of accounts of the nature of human reproduction, the persistence of marriage’s existence and shape within human history, and divine pronouncements regarding the permissibility or sacredness of particular modalities of marriage. Predominately, these second-

8 See Martin Heidegger, “Letter on Humanism” in *Basic Writings From Being and Time (1927) to The Task of Thinking (1964)* (David Farrell Krell (ed.). USA: Harper San Francisco, 1977) ; Karl Marx, *Economic and Philosophic Manuscripts* in *Selected Writings* (David McLellan (ed.). Oxford: Oxford University Press, 1977), pp. <x-y>.

9 Humanism does not require a rights-discourse to make its claims. See, e.g., Niccolò Machiavelli’s constant reference to our “humanity” *simpliciter* and his conception of “*virtù*”. <Further examples of Renaissance humanism>

case arguments have been used to argue against same-sex marriage. However, as *forms* of arguments they do not by themselves demand a particular stance either way. For example, Stephen Macedo has used arguments from nature to indicate that same-sex couples have the same ontological status as infertile different-sex couples,¹⁰ William Eskeridge and <X, Y> have presented historical arguments for persistence of socially recognized same-sex unions throughout recorded history, and deeply practicing Catholics, for example, such as the Jesuit brothers in <Boston> have used scripture and Christian ethics to argue for the requirements of the Church’s openness to gay and lesbian couples.¹¹

What unites these second-case approaches is not the univocal ethical characterizations of same-sex marriage that result. Rather it is the way in which those ethical characterizations, be they for or against same-sex marriage, are grounded. Whether one turns to nature, history, or the divine as a ground, each of the latter locates marriage’s value in some structure that both beyond the possibility of humans to change or create and yet necessary for the achievement of marriage’s good. Here we can call “traditionalism” the epistemic dynamic that takes us from marriage as an object of investigation to any ground external to human control.

In this way, the difference between humanist and traditionalist grounds is not the Weberian distinction between rational-legal authority and traditional authority. Nor is the difference

10 Stephen Macedo, “Sexual Morality and the New Natural Law” in *Natural Law, Liberalism, and Morality* (Robert P. George (ed.). Oxford: Oxford University Press, 1996), pp. <x-y>.

11 See William N. Eskeridge, “A History of Same-Sex Marriage” in *Virginia Law Review*, vol. 79, 1993:1419–1513, <Eskeridge book>, and <essays in Mark D. Jordan (ed.), *Authorizing Marriage? Canon, Tradition, and Critique in the Blessings of Same-Sex Unions* (Princeton University Press, 2006)>. See also <Jesuits> and Sidney Callahan, “Why I Changed My Mind” in *Commonweal*, vol. 121 no. 8 (April 22) 1994:6.

between the illumination of reason and pre-enlightenment superstition. Indeed, the historical methods of determining the fact of the matter of whether same-sex unions are a wholly new historical occurrence or represent an unbroken (albeit obscured) line back to the origins of human sociality are not different and neither are the methods of scriptural interpretation or the rather explicit examinations of the mechanics of human reproduction.¹² Moreover, no less so than humanism, traditionalism in its most philosophical form makes claims to the rational knowability of its grounds. Within traditionalism, an epistemic ladder connects the internal realm of the purely human to governing structures *outside* of those boundaries. We can see this ladder articulated most clearly in Plato’s divided line or Augustine’s account of how knowledge of even our most base desires and functions can lead us successively to the architectonic cosmological structure.¹³

When we appeal to nature, history, or the divine we are making a radically different claim on the world than the humanist appeals. This radical difference is present even when traditionalist arguments are used to support the morality of same-sex marriage. For appeals to traditionalist grounds demand the conformity of the world of human action and understanding to those grounds. Traditionalism inverts humanism’s demand of the conformity of the world to the requirements of human action and understanding. In this way, traditionalism’s dominant orientation to the world of institutions and values in which individuals live is one of conserva-

12 <Mention arguments between new natural law and liberal accounts re: <“proper ordering of the emission of seed” vs. sexual mutuality (Carlos Ball), the nature of human sexual reproduction as “penile-vaginal” unity vs. “sperm-ovum”, etc.>

13 Plato, *The Republic of Plato*. Allan Bloom (trans.). <x>:Basic Books, 1991, bk. VI; Augustine, *City of God*. <x>, bk. XIX <x>.

tism. It is not against change itself, but against change that does not conserve fixed structures and systems of meaning. Change may be required, but it is for the sake of the ground, not for the sake of the human. That humans do or should flourish when in accord with these external structures is thus a *consequence* of a good that nonetheless exists beyond human creation and manipulation.

Once humanism and traditionalism internally structure and externally mark out the terrain over which the debate over same-sex marriage ranges, the nature of the debate itself is transformed. Now, instead of ordinary shared value of marriage against which different conceptions of marriage might then be tested and explored, the debate now appears to be about two incommensurable systems of meaning. What now appears to be exclusively at stake is how to ground that value of marriage. This epistemic transformation of the debate occasions a political transformation. Since these different grounds are incommensurable, the debate now appears intractably conflictual and of a piece with the debates over abortion or euthanasia, for instance. At the same time, the debate is also intensified because same-sex marriage now becomes a locus for whole constellations of fundamental values and concerns that are the province of these grounds—e.g., the place of the divine or the inviolability of rights in the realm of social institutions. Finally, and for this reason, the debate on both sides takes on broader significance. Same-sex marriage can no longer be seen as simply a minor struggle but becomes emblematic of a whole range of struggles. It is not just intense across a narrow issue, but is synoptic of a whole range of issues.

This political transformation, intensification, and signification is the same on either side of the issue. However, it tends to be obscured by the humanist supporters of same-sex marriage and their characterization of marriage as simply a matter of individual expressions of love, commitment, or emotional expressivism in general. Rhetorically, foundationally humanist characterizations have the advantage of appearing to lower the stakes of same-sex marriage by reducing those stakes to private matters of emotion. As a result, for instance, the claims of vocal opponents of same-sex marriage can appear ridiculously disconnected from the realities of the issue at hand with their predictions of social catastrophe.¹⁴ Nonetheless, these humanist attempts to reduce the significance of same-sex marriage play against the real epistemic transformation that has occurred here. For the invocation of marriage as mere private expressivism is only possible if humanist grounds are operative. To challenge this privatized account of same-sex marriage is no small political matter, and indeed invokes an intense and wide-ranging response from them, *just because* what is at stake is the very humanist foundations themselves that make the emotivism characterization possible.

This transformation in the debate has a particular political and philosophic importance for the project under consideration here. Philosophically, the movement from marriage as the object of valuation and inquiry to grounds external to marriage is problematic because it takes us farther away from the intuition and epistemic dynamic that first gives the public same-sex marriage debate its structure and that provides the most advantageous mode of beginning to inquire in to the nature of marriage. Political philosophy no longer has within the terrain of its investigation

14 <Bestiality, incest, harm to children, social break-down quotes>.

that object of inquiry which might lead to the determination of its task. However, the importance goes beyond simply the absence of this felicitous object. More importantly for our investigation here, the transformations of the terrain occludes any simple or easy return by political philosophy to that object.

Politically, once an incommensurable conflict is the most salient feature of the debate, the most salient concerns of political philosophy now seem bound up with this apparent fact of the matter. The task that seems to naturally fall to political philosophy is to provide the techniques and justifications for the managing of the conflict. The latter project, of course, is the one taken up and championed by liberal political philosophy. The metaphysical underpinnings that allow for the centrality of questions of consensus find their fullest expression in Kant’s separation of the will’s material end from its form.¹⁵ But the contemporary liberal techniques of Rawls’ “political reason”, Heyd’s “toleration”, Gutman’s “deliberative democracy” or Habermas’ “communicative action”,¹⁶ emerge from the simple givenness of the conflict against the brute fact of a multiplicity of goods combined with a philosophic unconcern with entering into an examination of those goods themselves.

Now, the emphasis on devising philosophic and institutional frameworks out of which agreement can emerge (if not over the result, then at least over the process by which the result emerged) could provide a way back to the concern with the original consensus over marriage as

15 E.g., see Kant’s clear statement of the matter in “Perpetual Peace: A Philosophical Sketch” in *Kant’s Political Writings*. Hans Reiss (ed.), H.B. Nisbet (trans.). New York: Cambridge University Press, 1985, p. <x> as well as the various formulations of the categorical imperative—in which, of course, it is the maxim of action, not the objects towards which one is directed that matter <*Groundwork for the Metaphysics of Morals*> <x>.

16 <citations>.

good that made the debate possible in the first place. But for political philosophy to be led back to this occluded object from its emphasis on the resolution of conflict would require a re-engagement with a transformation of the originating conditions for the conflict. And as Kant observed in the realm of international politics, the cessation of conflict that does not alter these original conditions is not "peace" but only a "truce".¹⁷ So, the dominance of the assimilationist epistemic dynamic is the ultimate difficulty. Yet, once the dynamic has transformed the terrain of the debate these grounds appear not as epiphenomenal to the issue, not as occlusions of an original unity, but now as foundational systems of meaning or conceptions of the good. In Rawls' language, they become "comprehensive doctrines" and so removed from political consideration.¹⁸ This liberal approach of bracketing foundational concerns, at least with the issue of same-sex marriage, has two problems. First, as we can now see, it is too hasty in its assessment of the dispute's structure, by understanding conflict as originary when it is the product of a particular epistemic dynamic that has nothing to do with the issue of same-sex marriage or marriage itself. Second, and more importantly, it fastens onto the importance of a social consensus without providing any either of grasping the original point of consensus (i.e., marriage is seen as an irreducible good) or interrogating that social consensus to understand what might make it irreducibly a good to be pursued.¹⁹

17 Immanuel Kant, "Perpetual Peace", p. <x>.

18 John Rawls, *Political Liberalism* <x>.

19 <Robert George> makes a similar argument, however emphasizing the way in which the idea of political reason forces us to embrace the empirical and thus historical nature of the intuition as morally relevant when, of course, there has been a great number of historically shared intuitions of consensus—the large-scale social agreement over the rightness of slavery in the United States of American until President Lincoln's public conversion to the opposite in <1862> being the most obvious—that require us to move beyond the mere fact itself. See <George
(continued...)

In this way, the apparent liberal honouring of the construction of a social consensus over same-sex marriage dishonours the power of consensus. Now, consensus can have no deeper significance than a *modus vivendi*. The political expediency or efficacy of consensus within the democratic order has no deeper philosophic significance than a truce, and never the truth of the matter. It can provoke no questioning of what ought to be the objects of investigation. To fashion a *modus vivendi* over same-sex marriage cannot then lead to a philosophic investigation as to why *marriage* is an object that might (or might not) require being an object of public compromise let alone a foundational aspect of the political community. The liberal acknowledgment of the importance of a consensus over marriage and same-sex marriage is not able to translate into an account of either marriage's or the consensus fundamental as opposed to instrumental importance. And in sense, it provides a distortion and occlusion of the determination of political philosophy's task in relation to same-sex marriage.

The focus on conflict as a mere *modus vivendi* is one aspect, and a particularly liberal one, of tendency of current political philosophy approaches to same-sex marriage to following and reinforcement of the epistemic dynamic that assimilates to grounds. The other is to refocus on the comprehensive doctrines that are now seen to animate the conflict over same-sex marriage. Indeed, such a refocusing could appear as a salutary advance for a political philosophy of same-sex marriage, as both supporters such as Carlos Ball and opponents, like Robert George, have

indicated.²⁰ Yet, as a corrective, though, such as refocusing on the need to investigate foundations fails to provide a philosophic way back an investigation of same-sex marriage itself. It does so for three reasons.

First, insofar as the philosophic disposition invoked by this assimilationist epistemic dynamic is one of partisanship for a particular ground, philosophy comes to the service of sectarianism. Of course critics of liberal neutrality have accused it of masking a sectarianism.²¹ Nonetheless, the explicit sectarianism that is provoked is more harmful because it is inimical both to philosophic investigation in general and the shared—i.e., non-conflictual—intuition that made the public debate possible in the first instance.

Second, in this way, this philosophic sectarianism or focus on the justification of humanist or traditionalist foundations serves to buttress all the characteristics of the public debate’s transformation that we had detailed above: its incommensurably conflictualness, its intensification, and its broadening signification. In this sense, a turn to the sectarianism of immediately defending foundations shifts the focus even further to those epiphenomenal elements that come from the reductionist epistemic dynamic. For in this cauldron either liberal neutrality with its consensualism and proceduralism appear attractive because it appears to pull us back from the conflict or a more radicalized philosophic sectarianism does, because comprehensive doctrines appear even more imperiled. Whether the public debate over same-sex marriage provokes the philosophic

20 See Carlos A. Ball, *The Morality of Gay Rights: An Exploration of Political Philosophy* (New York: Routledge, 2003), pp. <x-y>, and Robert P. George and Christopher Wolfe, “Natural Law and Liberal Public Reason” in *American Journal of Jurisprudence*, vol. 42, 1997:<31-<xx>, p. <x>.

21 E.g., Robert P. George and Christopher Wolfe, “Natural Law and Liberal Public Reason”.

projects of liberal consensualism or philosophic sectarianism, the originary consensus around the importance of *marriage* and thus access to *marriage itself* as an object to investigate is lost by the very attempts at political-philosophic investigation.

Third, in relationship to marriage, the movement to grounds transforms philosophic inquiry’s primary activity from interrogation of the object itself to one of asking how marriage might be *assimilated* to grounds both external and prior to marriage. Philosophically, the new task becomes carrying marriage back to that foundational system of meaning—whether humanist or traditionalist—and sinking it within that ground so that marriage’s essence or nature cannot be specified apart from that foundation.

I speak here of “assimilation” rather than, say, “application” as the primary mode of thought invoked by this epistemic dynamic because the fact of the matter is the simple existence of the institution of marriage. Both in terms of the originary possibilities of the public debate and philosophic investigation, the institution is not *created*. Politically, the institution may be legally defined, subject to revisions and shifting conceptions of the specific content of the values that adhere to it, and so on. Nonetheless, political society, as the Ancients have famously observed, begins with marriage always already there. It is not that the *oikos* (marriage-based household) is the foundation of the political community, the *polis*, but simply that we always find ourselves in a world in which the *oikos* is present even when other, more differentiated forms of society are not. The institution may be subject to historical variation and heterodox conceptions of marriage may always be hidden alongside orthodox ones, yet philosophy does not need to *create* marriage, for

example, through deduction arrive at the shape of institutional arrangements from the *a priori* criteria of its ground.

Yet, under the sway of epistemic dynamic, the current political philosophic approaches to issue of same-sex marriage breakdown the ordinary shared fact of marriage into something that cannot be shared. The absence of a community of meaning is not because any one political philosophic approach definitely discovers that marriage's meaning is the exclusive province of, e.g., humanist or traditionalist grounds. Rather, it is because the contemporary political philosophic approaches do not *discover* in marriage any unique meaning at all. The meaning of marriage does not emerge through an interrogation of it, rather the meaning of the marriage emerges from the ways in which marriage is assimilated to a ground. Marriage becomes something unshareable because meaning is not being fitted to the always already existing fact of marriage, rather marriage is being fitted to always already existing systems of meaning. Like a Procrustean bed, what parts of marriage cannot be made to fall within the ground are cut away as meaningless or are stretched to meaningfulness. Philosophy is not here to interrogate them; it is here to assimilate what can be, and to discard what cannot.

So, in sketching out the structure of the contemporary public debate over same-sex marriage and its effects on the task of political philosophy, we have also seen how it is paradoxical. Its structure at once makes same-sex marriage into a matter of supreme importance, for now what is at stake are whole foundational systems of meaning and valuations, humanism and traditionalism. However, in this intensification of same-sex marriage's importance, we also have lost

something: a confrontation with marriage *simpliciter* as well as that ordinary shared intuition of marriage’s importance that made possible the existence of the debate at all.

As we have seen, at the same time, the paradoxical character of the structure of the public debate over same-sex marriage represents a profound challenge to political philosophy. On the one hand, insofar as political philosophy takes its orientation from the existing political situation, it is confronted with real issues that *do* require theoretical solutions: a moderation of conflict before it becomes destructive, a justification of the ethicality of animating grounds in order to show their rationality or suitability to modern politics, and the discernment of the criteria by which the same-sex marriage might be decided. On the other hand, only the latter situation is one that concerns the issue of same-sex marriage itself. Although the first two are real political problems, *political philosophy* cannot begin to grapple with same-sex marriage if it begins with the idea that finding solutions to moderate conflict or the justification of foundations of meaning will shine light on issue of same-sex marriage itself.

The task of political philosophy in relationship to same-sex marriage must strike out on a different path from an unreflective assimilation to grounds, whether this assimilation takes the form of liberal neutralism or an overt philosophic defence of humanist or traditionalist systems of meaning and evaluation. What we first require is a way of approaching the issue of same-sex marriage itself so that we can be *lead to* rather than *presuppose* the conditions for an answer.

Now that we have completed the negative task of uncovering the structure of the public debate over same-sex marriage and the structural distortions for political philosophy flowing from it, the next task is to determine how to approach the institution of marriage in a way that

keeps us true both to the original shared intuition and to the structure of marriage. Only in this way might political philosophy find its way back to politics and find itself not engaged in objects of investigation epiphenomenal.

III. The Participation and Boundary Problems

An examination of the structure of the same-sex marriage debate reveals the extent of the problem that political philosophy faces. If political philosophy takes its bearings from the terrain of the debate, it will be lead away from marriage itself. So, the question that we must now turn is how to approach the question of marriage in a way that a political-philosophic investigation of same-sex marriage becomes possible. By such an investigation, I mean one oriented around what *marriage* is rather than an orientation around epiphenomenal features orbiting about the issue of marriage that we have identified in sections I and II.

We can grapple with this problem through the two dominant political-philosophic approaches used to address the issue of same-sex marriage. These approaches are the Rawlsian account of justice²² and what is often called the “new natural law” whose secular form has been more recently expounded by John Finnis, Patrick Lee, and Robert George.²³ Within the framework of the problem developed above, both Rawlsian liberalism and the new natural law

22 I set aside deliberative democracy and political rationality approaches because, as mentioned in section I, they mere hypostasize the intuition of consensus without allowing to either validate that consensus or adjudicate between different interpretation of the meaning and nature of that consensus.

23 The secularized new natural law tradition was preceded by explicitly religious recovery of the natural law tradition of Thomas Aquinas by Germain Grisez in his three volume philosophic exposition of a Christian ethics. See Germain Grisez, *The Way of The Lord Jesus*, vol. 1-3, <Quincy, IL: Franciscan Press, 19<x>-1997>.

could appear as nothing more than the philosophic form of the otherwise unreflectively held grounds of humanism and traditionalism respectively. For this reason, we might assume that their only contribution is the rather unhelpful one of further intensifying the assimilationist dynamic that we are trying to avoid as our investigative starting point. As we will explore below, while both philosophic positions are often taken up *as if* the assimilationist possibilities were exhaustive of them, we can recover from each of Rawlsian liberalism and the new natural other potentialities, ones that can help to orient properly political philosophy to the issue of same-sex marriage.

A. Rawls' Foundations and the Participation Problem

That humanism and an assimilation to humanism is exhaustive of the deep structure of Rawls' political philosophy becomes most visible if we concentrate on those features which have become most prominent: the idea of political reason, his two principles of justice, and his "original position" out of which the latter principles are determined. Taken together, these three provides mechanisms for the reduction of already existing external conditions and meanings to humanist grounds. Stated simply, and as already discussed, the idea of political reason carves out of the world of meaning given by the institutions themselves a potential sphere of meaning, one now given by the contingent possibilities of overlapping consensus. The principles of justice locate the criteria by which any system of objects, institutions, or public policy within that consensus should be judged as moral by standards external to those arrangements.²⁴ These principles

24 In her posthumously published last work on the subject before her death, Susan Moller Okin criticizes Rawls for not applying the principles of justice *within* institutions that comprise the "basic structure" of society, particularly
(continued...)

emerge out of the final feature, the original position. For Rawls, the need for the original position heuristic with its veil of ignorance derives from two factors that are only coherent when animated by a humanist impulse. First, his rejection of the ability to affirm any criterion of evaluation that is not known, derived, sustained from unaided human resources. As Rawls asks rather rhetorically of the criteria of evaluation:

Are they specified by an authority distinct from persons cooperating, say, by God’s law? Or are these terms recognized by everyone as fair by reference to a moral order of values, say, by rational intuition, or by reference to what some have viewed as “natural law”? Or are they settled by an agreement reached by free and equal citizens engaged in cooperation, and made in view of what they regard as their reciprocal advantage, or good?²⁵

Famously, for him, the answer is the latter. Second, Rawls employs the original position out of a respect for reasonable pluralism. Nonetheless, the original position privileges the place and reasoning of abstract individualism than the individuals constituted by those very plurality of comprehensive doctrines which Rawls’ account also wishes to protect. In Rawls’ language: the individual’s capacity for justice has priority over my other capacity for the good. So, even where Rawls’ position opens up the possibility of a self constituted by thick conceptions of the good—goods that could locate those foundations external to the individual as, for example, many comprehensive religious doctrines do—the results of my ability “to have, to raise, and to rationally pursue a conception of the good” are to be protected, but it is only the actuality of and

24 (...continued)

the family. Her criticism rightly fastens on the logic of assimilation (in this case to humanist grounds) present in his work. However, Rawls’ own resistance to such an application of his principles of justice is perhaps an intuition of the need not to simply give over to this logic and to preserve other possibilities. We will reconstruct these possibilities shortly. See Susan Moller Okin, “Justice and Gender: An Unfinished Debate” in *Fordham Law Review*, vol. 72, 2003–2004: 1537–1567 and John Rawls <x>.

25 John Rawls, *Justice as Fairness*, pp. 14–15 (notes omitted).

capacity for this radically human justice that are to be operative as a shared political experience.²⁶

The point I am making here is different from the familiar criticism of the Rawls requiring or hypostasizing an “unencumbered self” in contrast to more constitutive conceptions selfhood.

Rather, it is that this collective decision-making can done without reference to any criteria external to unsituated and unaided human possibilities. His is a justice that is radically *human*.

Now, if the three-fold assimilationist aspect of Rawls’ thought was exhaustive of his possible contribution to a philosophic approach to same-sex marriage then access to the issue would be blocked no less by it than the issue is by the structure of the public debate. However, these more famous elements of public reason, principles of justice, and the original position rest on, and flow from, what Rawls calls the imperatives of “[t]he most fundamental idea in this conception of justice[, that] is the idea of society as a fair system of social cooperation over time from one generation to the next”.²⁷ Unlike the elements of his theory of justice discussed above, this idea of society is begins with the fact of the existing shared social world²⁸ and asks, not about how it might be assimilated to individual acts of self-creation,²⁹ but how that world might be made open to individual participation.

In order to see the importance and meaning of participation, it is necessary to detail the terms for its realization. Rawls gives us three. First, these externally existing rules ought to be

26 John Rawls, *Justice as Fairness*, pp. 18–19.

27 John Rawls, *Justice as Fairness*, p. 5.

28 John Rawls, *Justice as Fairness*, § 2.2(a), p. 6.

29 This follows the principle laid out by the Rousseauian project of individual consent only as individual creation, e.g., “obedience to the law one has prescribed to oneself is freedom” (Jean-Jacques Rousseau, *Of the Social Contract* in *The Social Contract and other later political writings*. (Victor Gourevitch (ed. and trans.). New York: Cambridge University Press, 2003), bk. I, ch. 8, p. 54).

publicly recognizable or knowable. Once known, they must prove themselves as such by being “acceptable”.³⁰ Second, one condition of acceptability is the proof of the practical universality of the existing world in the form of “reciprocity or mutuality: all who do their part as the recognized roles require are to benefit as specified by a public and agreed upon standard”.³¹ Now, the idea of “agreed-upon standard” anticipates the assimilationism dominating the rest of Rawls’ own project. However, here it is belied by the thrust of the argument which emphasizes conditions for the externally existing world’s *transparency* not its mutual *createdness*. For this reason in *Justice as Fairness* he emphasizes the *fact of reciprocity* as the foundational condition that allows “each participant [in the social world to] reasonably accept and sometimes *should* accept” these evaluative criteria.³² In other words, this world of social cooperation ought to be transparent to me based on the nature of the empirical attributes of the system of cooperation itself, rather than its provenance (e.g., in an act of human creation) or my psychological states (e.g., my *willingness* to accept or reject it).

This emphasis on the transparency rather than the creation of a knowable externally existing world is continued in the third element which specifies that this externally existing world must further prove itself by being compatible with the “idea of each participant’s rational advantage, or good”. By this good, Rawls means only “what it is that those engaged in cooperation [i.e., participants in the existing shared world] are seeking to advance from the standpoint of their

30 John Rawls, *Justice as Fairness*, § 2.2(a), p. 6.

31 John Rawls, *Justice as Fairness*, § 2.2(b), p. 6.

32 John Rawls, *Justice as Fairness*, § 2.2(b), p. 6 (italics added).

own good”.³³ Crucially, he does not ask how the externally existing world might be translated into terms, or put on the Procrustean bed, of my meaning. Instead he asks how that good which is radically mine *might be found* in that world. Whereas in the more famous aspects of Rawls’ philosophy we have the moment of assimilation, here we have that of participation.

The problem of participation asks how the externally existing world might continue to exist, *as it is*, and nonetheless be radically open to the individual on her own terms. The overt shape in which Rawls expresses and then works through the participation problem is that of justice given the fact of pluralism. However, once the presence of the participation problem is brought out as the animating question of Rawls’ self-identified foundation, we transform the possibilities of framing the issue of same-sex marriage and thereby secure for political philosophy the real contribution of the Rawlsian justice project. Now, instead of bringing questions of justice—i.e., of equality rights or distributive rights—to the fore in a way that has characterized the public discourse and particularly the legal discourse over same-sex marriage, we have the possibility of asking whether same-sex marriage is a form of marriage that is adequate to the demands of participation. Doing so means asking in what way same-sex marriage sustains or increases the receptivity or openness of the institution of marriage in a way that allows individuals to find their own good within it.

Here we will notice, though, that we run immediately into a difficulty that points to the deficiency of the question of participation as exhaustive of how the issue of same-sex marriage might be approached. For if we ask this question alone, the whole problem of participation

33 John Rawls, *Justice as Fairness*, § 2.2(c), p. 6.

simply collapses into the merely assimilationist question of justice. The question of participation requires that we simultaneously ask what is it for marriage to remain as marriage. That is, we must also ask what it is for marriage to *not* be infinitely conformable to some standard outside itself (the assimilationist project) but remain as an externally existing institution irreducible to any other good.

To this question the participation problem has no answer even as it demands one. And, insofar as the participation problem is the only liberal way of non-reductively approaching the issue of same-sex marriage, the total occlusion of participation or its immediate collapse into assimilationism is understandable. Since liberalism takes the individual asking for admittance as one of the two focal points of the investigation but simultaneously has no way of asking about the other (i.e., the institution itself), we must ignore it or exclude it. Once everything is reduced to the needs of the individual rather than the needs of the participation, then this externally existing institution with which we began the inquiry is now being asked how it radically conforms to those needs.

B. The New Natural Law and the Boundary Problem

So, the problem of participation stands as one way of inquiring into the institution of marriage and the issue of same-sex marriage on its own terms without leaving behind the impulse animating humanism. But the problem of participation also points to its own insufficiency. This point of insufficiency—that participation requires an inquiry into what is being stabilized—is both the very one which traditionalism, as an ideology, has concerned itself and the one to which the new natural law returns in its philosophic form.

The assimilationist aspects of the new natural law are less apparent than those within the Rawlsian tradition. However, we can begin to locate them by first turning to the medieval natural law tradition, of whom Aquinas is the towering figure. There, this dynamic of assimilationism appears in the way in which the power of human reason to know those “rules and measures” by which actions are to be “ruled and measured”³⁴ is both acknowledged but then more fundamentally and radically delimited. Aquinas’ acknowledgment is found in the central place reason has in grasping through rules and measures of the cosmos and all that falls within it such as human activity and human society. Nonetheless, reason’s power, whose result is “natural law”, is immediately understood, in the *Summa Theologica*, as a “participation” in a greater and radically distinct and thus independent foundation. On the theoretical side, the power of human reason is radically delimited by what Aquinas calls the Eternal law: the largely unknowable thoughts of God. On the practical side, the specific fruits of the natural law’s application are delimited in their absolute validity by what he calls the Divine law: those Biblical commandments and principles to which human reason contributes nothing.³⁵ In this way, the moral status of what is simply and ultimately given—the thoughts of God, the words of God—provides the impulse to assimilate all meaning to these ultimate rules and measures of meaning.

The extent to which this assimilation to the given in the Medieval natural law tradition comes to be replaced by assimilation to the human is readily discernable in Thomas Hobbes’ inversion of the priority of right and natural law so that the latter is derived wholly from the

34 Aquinas, *Summa Theologica* <x>.

35 Aquinas, *Summa Theologica* <X>, ques. 91, art. <x-y> <x>.

former, and then most fully in Immanuel Kant’s remark we have already mentioned that “as regards my freedom, I am not under any obligation even to divine laws (which I can recognise by reason alone), except in so far as I have been able to give my own consent to them; for I can form a conception of the divine will only in terms of the law of freedom of my own reason”.³⁶ Unlike either the neo-Scholastic tradition of natural law theorizing or some of the characterizations of the new natural law by its critics,³⁷ the new natural law theorists consciously attempt to return to the preeminent role of reason in the determination of the natural law. They consciously attempt to do so without falling into assimilation to either humanist or simply given grounds. In this sense, the new natural law is a real return to roots of natural law theorizing before it was transformed into a tradition of natural right and then simply right.

Nonetheless, these critics are not to be wholly blamed for seeing the new natural law as simply reproducing neo-Scholastic equation of nature with morality, particularly when it comes to the issue of same-sex marriage. No where is this more apparent than in the most prominent member of the secular new natural law tradition, John Finnis. In the last section of an important article on the morality of same-sex marriage,³⁸ he begins with what he takes to be the central intuition we have of marriage: it is an institution involving “faithfulness—reservation of one’s sex acts exclusively for one’s spouse—[and this faithfulness] is an intelligible, intelligent, and

36 Thomas Hobbes, *Leviathan* <x>; Immanuel Kant, “Perpetual Peace”, p. 99n.

37 <E.g., Carlos Ball’s characterization>. See also John Finnis’ discussion of his critics, particularly John Noonan, Andrew Koppelman, and John Boswell, in “The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations”, secs. II and III, pp. 102–118.

38 John Finnis, “The Good of Marriage”, p. 102.

reasonable requirement”.³⁹ But how does Finnis philosophically validate this intuition and thereby provide us with a way to guide an investigation into same-sex marriage? His apparent method is to point to the natural fact of human reproduction:

The reason why marriage requires not just ‘a commitment to each other’ but commitment to permanence and exclusiveness in the spouses’ sexual union is that, as a morally coherent institution or form of life, it 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 (and object of devotion) of *those two partners*. Apart from this orientation towards children, the institution of marriage, characterized by marital *fides* (faithfulness), would make little or no sense.⁴⁰

If we were to take this account as definitive then, as a method, we would be yet again returned to a assimilationist epistemic dynamic. The meaning of marriage and of same-sex marriage would be given the meaning and nature of human sexual reproduction. The point I am making here is that regardless of whether we agree or not with the *conclusions* that Finnis and other natural law and new natural law theorists arrive at—viz., that same-sex marriages are “caricatures of marriage” at best and that same-sex sexual relations are <“in no way choice worthy ways of human life and are destructive of the good”>⁴¹—the philosophic approach, if it consisted only of this movement from institution to natural fact, cannot help us get at what, in fact, marriage is.

However, the assimilationist movement from institution to nature is not how Finnis’ account of the new natural law approach to the good of marriage begins. And we need to be attentive to it in order to discern the epistemic contribution that the new natural law can make to the larger question which informs this article. Reconstructed, the account starts with two premises. First,

39 John Finnis, “The Good of Marriage”, p. 130.

40 John Finnis, “The Good of Marriage”, p. 131 (note omitted; italics original) ; see also pp. 129, 132.

41 <Find and confirm Finnis quote>.

an idea that human action should be ordered around a comprehensible good. This idea, rather than requiring a Rawlsian *comprehensive* doctrine, is simply that human action should be ordered around a that-which-is-to-be-pursued. Finnis, as he acknowledges, adopts the famous Aristotelian idea that every action and intention aims at some good.⁴² This grounding premise is the minimal one necessary for any morality whatsoever, for it simply allows us to say moral action has *some* knowable pattern. In his earlier foundational work on natural law, Finnis call this the “basic value” that morally structures our practically reasoning.⁴³ Second, there are the objects about which we reason. In the case that we are considering here, the primary object is the natural fact of human reproduction—i.e., that only certain forms of unaided sex acts are capable of producing, and do produce, children who then need nurturing and education in order to be able to live lives that they themselves can order around some rationally intelligible good-to-be-pursued.

Importantly, for Finnis, by themselves the impulses and unique natural consequences of some sorts sexual acts—i.e., that some men father children (at least in the sense of contributing that biological material apart from which there is no successful human reproduction) and some women become pregnant and give birth—*do not* provide the moral basis for practical reasoning nor are these natural consequences in themselves moral. Rather they are the *occasion* for thinking about what moral category might uniquely correspond to, and in this way uniquely comprehend, these natural facts in their interconnectedness and consequences. For Finnis, the shape which

42 Aristotle, *Aristotle's Nicomachean Ethics* (Hippocrates G. Apostle (trans.). Grinnell: The Peripatetic Press, 1984), bk. I, ch.1, 1094a1–5, p. 1.

43 John Finnis, *Natural Law and Natural Rights*, <ch. III, p. <x>>.

practical reasoning takes for individuals when it apprehends that good uniquely corresponding to, and integrative of, these natural facts is *fides* or faithfulness. To act motivated by *fides* is to direct one’s sexual and emotional actions towards the end of a mutual and exclusive giving to one-another.⁴⁴ The institutional shape that this end of practical reason takes is a form of *societas* or human community. Since the institution of marriage is the unique moral articulation of the unique practical reasoning (i.e., the good) of *fides* which, in turn, is the moral category corresponding to the unique natural fact of human reproduction, marriage can be, for Finnis, only a union of one man and one women to the exclusion of all others that finds its natural (i.e., given) fulfilment through the production of children.

Now, again, regardless of whether we agree or disagree with Finnis’ conclusions, the *method* that he and the other new natural law theorists take to the question of the moral status of marriage introduces a new concern that is quite distinct from the assimilationist concerns that reduce marriage to systems of meaning given both beforehand and external to marriage. For its approach is to ask how marriage is an irreducibly unique good. That is to say, the question implicitly animating the new natural law is what makes marriage endure as itself and not something else? This was the question to which the problem of participation pointed, but to which it could supply no answer. Here, though, this question is being asked without any concern for the permeability or transparency to human formulated goods; it is *indifferent* to human constructions.

44 John Finnis, “The Good of Marriage”, pp. 118, 122, <etc.>.

In this way, the essential problem that is being posed by Finnis, and other new natural law theorists, is that of boundary, specifically morally unique boundaries. To investigate an object for its unique boundary is to be able to specify, first, what the object is and, then, whether and in what way that object is an irreducible good, and therefore worth pursuing as an end in itself. (Of course to investigate whether an object has moral boundaries is quite different from saying that there are a hierarchy of goods.) Moreover, we then have a way to indicate what must be done to both fully make that good live in the world and what must be done to prevent that good from being lost. By linking marriage's irreducibility to the knowable natural facts of human reproduction, the new natural law theorists try to provide an answer that they think avoids the mutability of moral boundaries drawn from the foundations of pleasure, mutuality, commitment, utility, or some other humanly changeable ground cannot be. Moreover, no matter how much they cloud the matter, by mediating the relation of natural fact to moral boundary through reason, the new natural law theorists give pride of place to the transformative power of the moral categories themselves and thereby end up diminishing the place of naturalness as a definitive aspect of this moral category.⁴⁵

<So, the contribution of the boundary problem for the issue of same-sex marriage is to take us away from external grounds and systems of meaning and take us back to the original intuition that marriage is an irreducibly unique good to be pursued. Whether an investigation of marriage reveals that it is or is not a good to be pursued, at least we are able to approach the issue in a way that allows us to investigate marriage itself.>

45 <Finnis and George response to Macedo's equation of sterile different-sex couple with same-sex couples>.

Yet, just as the participation problem pointed to the need to clarify *what* it was that we are participating, the boundary problem points to the need to make these boundaries comprehensible and therefore transparent to human practical reasoning. We must be able to participate in these boundaries. In each implicating the other, the problems of boundary and participation point to the need to fashion a new way to approach the issue of same-sex marriage, one that neither rests on, nor results in, ideologically an assimilation of marriage to humanism or traditionalism, nor philosophically to rights or reproduction.

IV. Conclusion: Same-sex Marriage and the Task of Philosophy

The task of political philosophy in relationship to the issue of same-sex marriage stands apart from the dominant epistemic dynamic that we first identified as structuring the public debate. Instead, the task that emerges out of the public debate’s distortions returns us to the philosophical importance of marriage as the appropriate object of investigation. It also returns us to the political importance of the shared intuition of that formed the permissive cause of the public debate. Now we can see that the task of political philosophy in relationship to the issue of same-sex marriage is to approach the object of investigation with two questions or problems simultaneously in mind. Once we think the two questions together, our posing of them shifts from simply participation or simply boundary. Instead we now ask ‘How might the institution of marriage respond to the demands of our individual participation and satisfaction within it?’ and, ‘How might the institution nonetheless, and simultaneously have boundaries such that the shape of our satisfaction is unique and inseparable from that institution?’

To know that we must set aside assimilationism as the dynamic—even in its philosophic forms—represents an advance for the project of understanding political philosophy’s task in relation to same-sex marriage. For in setting aside the assimilationist project, we also set aside further entrenching the appearance that the issue of same-sex marriage is essentially conflictual and that its resolution will require the victory (political or philosophic) of either humanism or traditionalism. This way of approaching the issue of same-sex marriage opens the possibility of specifying a philosophic concept of marriage that can then guide our public policy regarding marriage in two aspects. Institutionally, it would allow us to determine the ethical possibility of drawing or redrawing its boundaries to include same-sex marriage. Subjectively, it would also allow us to determine what sorts of satisfactions one might rightly expect *and demand of* marriage as an institution. Politically, because the boundary and participation problems draw upon the broad *orientations* of traditionalism and humanism respectively, the results of any investigation that simultaneously posed these two questions will return an answer that articulates the sort of essential concerns elevated by those systems of meaning—i.e., a concern with marriage as defined by given, non-plastic, and irreducibly external qualities, and a concern with marriage as transparent and malleable to those radical types of human needs and interests that are implicated by marriage. To be able to politically find one’s concerns within the philosophic definition of marriage is quite different from grounding marriage within foundation that gave rise to those concerns.

The task in relation to same-sex marriage sketched above returns political philosophy to its original vocation as a mode of inquiry that always takes its guidance from political things, while

letting aside the world of presuppositions that informs or unreflective evaluation of those things, whether they be the presuppositions of humanism or traditionalism, rights or reproduction.