

The Liberal Case against Same-Sex Marriage Prohibitions

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Abstract

Experience suggests that most legal philosophers and ethicists are not surprised to be told that liberal states cannot permissibly prohibit same-sex marriage (henceforth: SSM). It is somewhat less clear what the appropriate liberal strategy is, and should be, in defense of this thesis. Rather than defend SSM directly, I proceed indirectly by arguing that SSM prohibitions are indefensible on liberal grounds. First, I articulate a principle that has roots in constitutional law that I dub the “Rational Basis Principle,” a principle intended to capture a constitutive commitment of liberalism: a commitment to liberty. The Rational Basis Principle condemns liberty-limiting legislation as indefensible unless that legislation bears a reasonably conceivable rational relationship to a legitimate state interest. I then argue that while SSM prohibitions limit liberty, they bear no reasonably conceivable rational relationship to anything that a liberal would regard as a legitimate state interest. Accordingly, same-sex marriage prohibitions are rightly dismissed as illiberal.

Keywords: liberalism, same-sex marriage, gay marriage, rational basis review, conceivability

1. Introduction

Experience suggests that most legal philosophers are not surprised to be told that liberal states cannot permissibly prohibit same-sex marriage (henceforth: SSM). It is less clear how the faithful liberal this thesis.

One way to defend SSM on liberal grounds is to invoke some right jealously guarded by liberals that requires the legal recognition of SSM—say, the right to marry simpliciter or the right to privacy or “to be let alone.” But spelling out the relevant right claim is tricky business and even proponents of SSM do not necessarily agree about how that claim should be spelled out: proponents of SSM appeal variously to the right to marry somebody that one loves (Rauch, 2004), to fulfill a shared desire to make a familiar sort of legally binding mutual commitment (Wedgwood, 1999), and the right to marry whomever one wishes and have that marriage publicly recognized (Boonin, 1999). There is an embarrassment of riches here: why should liberals prefer to defend SSM by appeal to one such right rather than some other?

Perhaps the most obvious direct strategy to defend SSM is to make a straightforward appeal to a commitment to equality and contend that SSM prohibitions deny homosexual persons equal status. So understood, SSM prohibitions are problematic on liberal grounds for the same reason that racial and gender-based discrimination is: they are inconsistent with a liberal commitment to equality. However, this sort of defense of SSM—one that I am not unsympathetic with, as I endeavor to make clear below—is a false start without an antecedent account of what constitutes unacceptable discrimination in the first place. *Some* kinds of discrimination are legally and morally tolerable. A commitment to equal protection is arguably consistent with some kinds of unequal treatment so long as there is a legally and morally sufficient justification for it.

My reluctance to appeal to the above strategies signals only my uncertainty about them, not my hostility. I offer a different indirect argument that liberal states must recognize SSM. I propose an argument rooted American Constitutional law—that area of the law I am most familiar with—that implies that SSM prohibitions are indefensible on liberal grounds. In brief, I contend that SSM prohibitions do not survive a liberalized version of rational basis review and thus that SSM cannot be prohibited justly. Since liberal states must permit what they cannot justly prohibit and since permitting SSM requires its recognition, liberal states must therefore recognize SSM.

2. Why Liberals (Might) Want to Recognize SSM

In response to the question “What does it mean for the government to treat its citizens as equals?” Ronald Dworkin famously answers that “government must be neutral on what might be called the questions of the good life” (Dworkin, 1995). Following Dworkin, it is commonly supposed that a liberal state should not *promote* or *justify* its actions by appeal to controversial conceptions of the good life. So, it would seem that if a liberal state recognizes SSM it must do so within the boundaries of liberal neutrality.

Some arguments against SSM prohibitions appeal directly to Dworkin’s account of liberal neutrality. Here is one representative example:

The basic rationale for marriage lies in its serving certain legitimate and important interests of married couples. But many same-sex couples have the same interests, which marriage would serve in essentially the same way. So restricting marriage to opposite-sex couples is a denial of *equality*. There is no way of justifying this denial of equality without appealing to controversial conceptions of the good (such as the moral superiority of heterosexuality or the procreative family); and it is a basic principle of *liberalism* that the state should not promote, or justify its actions by appeal to, such controversial conceptions of the good. So the institution of marriage ought to be reformed so as to allow same-sex couples to marry (Wellington, 1995).

This sort of argument puts tremendous pressure on opponents of SSM to identify some neutral rationale for opposing SSM given that a line of liberal thinkers from Mill to Feinberg deny that any rationale will suffice. In particular, liberals reject legal moralism and deny that it a morally good reason to limit someone’s liberty because their conduct is inherently immoral or to preserve a traditional way of life or enforce popular morality or perfect human character (Feinberg, 1990).

However, some opponents of SSM argue that *recognition* of SSM, not its prohibition, is illiberal in virtue of violating the liberal commitment to neutrality (Beckwith, 2005; Gilboa, 2009; Levin, 1996; Shell, 2004). Of course, it is one thing to assert that recognizing SSM is illiberal and another thing to show that this is the case, and I doubt that opponents of SSM can cogently show that recognition of SSM is illiberal (Barry, 2011). But even if opponents of SSM are confused about just what the liberal commitment to neutrality demands, that confusion should ideally be dispelled.

One way to show that recognizing SSM does not run afoul of a commitment to neutrality is to appeal to public reason, to articulate a rationale for SSM’s recognition that everyone could (or would) reasonably accept (Rawls, 1993). Suppose, for example, that *M* is a necessary means for realizing *S*. Suppose also that some people have a serious desire for *S*, where a desire counts as “serious” if and only if there is widespread agreement that there are good reasons for the state to support and assist people’s attempts to fulfill it and strong reasons for the state not to impede or hinder people’s attempts to fulfill it. Finally, suppose that the existence of *M* depends upon its legal recognition by the state. If neither the recognition of *M* nor the realization of *M* and *S* imposes serious burdens on anyone else and violates no principles of justice, then a liberal state should not legally prohibit *M*. Since even reasonable individuals who believe that there is nothing especially morally valuable or virtuous about *M* would presumably allow that the state should not legally prevent people from satisfying serious desires when the satisfaction of those desires burdens no one and violates no principles of justice, the liberal state need not adopt any controversial view about the good life to justify permitting *M*. But, arguably, many individuals have a serious desire to marry their partner who happens to be of the same-sex. And satisfaction of that serious desire requires the recognition of SSM (Wedgwood, 1999).

I am sympathetic with this line of reasoning, but it is not unproblematic. I am uncertain that the relevant desires of every individual who would exercise the right to SSM if it were recognized all have the same propositional object—that they all want the very same thing and desire it under the same description. And much depends on whether the content of the relevant desire is given a “coarse-grained” or “fine-grained” description. On a coarse-grained description, the relevant desire is simply the desire to marry *simpliciter*—the same desire that typical opposite-sex couples have (Wolfson, 2004). On a fine-grained description, the content of the desire is more detailed and specific; the relevant desire might be described as a desire to “marry somebody one loves” or “to marry whomever you share a serious desire to wed” or whatever. If the relevant desire is given a coarse-grained reading, some opponents of SSM will object that the state has *already* provided its citizens with the means to satisfy it; SSM prohibitions do not frustrate the right to marry per se. But then the demand that liberal states recognize SSM lest they frustrate some serious desire is unfounded. By contrast, if the relevant desire is given a fine-grained rendering then it is much less clear that it really is a serious desire after all. For example, if the relevant desire is the desire to “marry someone that I love” or “to marry my same-sex partner” it may well fail to

count as a serious desire; surely the contentious nature of SSM suggestions that many people believe that there *are* strong reasons for the state to impede or hinder attempts to act on such desires.

Even if these worries can be overcome, the liberal who takes her commitment to neutrality seriously has to worry about determining whether recognition of SSM seriously burdens anyone else. Perhaps recognition of SSM would force the unwilling to associate with homosexuals over their objections; perhaps some individuals object to having their tax money used to subsidize the marriages of homosexual persons; perhaps some people are seriously offended specifically by same-sex marriage itself (if not same-sex coupling *per se*) and recognition of SSM increases the likelihood of coming into contact with homosexual couples who were not simply “together” but genuinely married (Levin, 1996). By what standard can the liberal distinguish serious burdens from slight and superfluous ones?

The liberal could either appeal to some objective standard for determining whether a burden is genuine and serious or else appeal to the subjective beliefs and values of the complainant. However, articulating an objective standard is bound to weaken the liberal’s commitment to neutrality with respect to questions of the good life (Malm, 1995). At least, it is difficult to provide a defensible rationale for asserting that some burdens are not genuine or serious without appealing to some conception of the good life. But the more seriously the liberal state takes the subjective beliefs and values of the complainant, the more likely that the alleged burdens under consideration are genuine and serious.

I want to suggest a different strategy for defending SSM on liberal grounds, consistent with the observation that not all liberals accept that liberalism’s primary and constitutive commitment is to neutrality (Raz, 1986). Arguably, liberalism’s fundamental and constitutive commitment is not to ensuring neutrality, but *liberty*. In what follows, I argue that a plausible way of understanding liberalism’s constitutive commitment to liberty suffices to show that prohibitions of SSM are illiberal.

3. Liberalism and Liberty

In an especially liberal moment, Mill declares that “the burden of proof is supposed to be with those who are against liberty” and that “The *a priori* assumption is in favour of freedom” (Mill, 1963) and many contemporary liberals agree (Benn, 1988; Feinberg, 1990; Rawls, 2001). Indeed one contemporary liberal identifies Mill’s declaration as the “Fundamental Liberal Principle—FLP, for short (Gaus, 1996). The FLP does not absolutely preclude liberty-limiting legislation: liberty-limiting legislation is permissible only if FLP’s demands can be met. After all, liberal states do sometimes legitimately limit the liberty of their citizens. Can the FLP be developed in a way that shows why SSM prohibitions are illiberal?

A diversion may be instructive. In American constitutional law, legislation that either utilizes a suspect classification (such as race) or implicates some fundamental right is subject to a stringent test for legitimacy: strict scrutiny. Legislation survives strict scrutiny only if it is a *necessary means* and *narrowly tailored* to realize some *compelling* state interest. If the relevant interest is not a compelling one or if the legislation is not necessary and narrowly tailored to realize that interest, the legislation does not survive strict scrutiny. Not much legislation meets both of these conditions and not much legislation survives strict scrutiny, but this should strike liberal philosophers as just about right. Fundamental rights are those rights that are either deeply ingrained in our nation’s history and traditions (such as the right to refuse unwanted medical treatment) or such that ordered liberty itself could not exist without their guarantee (such as the rights to free association and privacy). Frustrating rights deeply ingrained in our nation’s history will very likely frustrate the liberty and autonomy of a citizenry that has come to count on and rely upon the free exercise of those rights, and even a minimal commitment to liberty demands protecting ordered liberty itself. Accordingly, liberals have good reason to hope that not much legislation will survive strict scrutiny.

The least stringent test for legitimacy is rational basis review, a test that requires only that legislation bears a *reasonable* relationship to the attainment of a *legitimate* governmental objective, a rather weaker standard. On one account, “if there is any *reasonably conceivable* state of facts that could provide a rational basis,” legislation survives rational basis review. (Note 1) Not surprisingly, most legislation survives rational basis review. At least many liberals will similarly find this result attractive. After all, allowing appellate courts to determine the wisdom and efficacy of legislation—especially legislation that does not utilize and suspect or quasi-suspect classifications or implicate fundamental rights—would effectively transform the judiciary into a “super-legislature”, a result that liberals impressed with American-style democracy and its separation of powers should find attractive.

This way of understanding rational basis review arguably renders it so weak as to be effectively toothless. One notable jurist complains that it is “difficult to imagine a legislative classification that could not be supported by a ‘reasonably conceivable state of facts’” such that rational basis review “is tantamount to no review at all” (Note 2) While rational basis review is a weak test, not just all legislation survives. For example, in *Romer v. Evans* the

Supreme Court of the United States (henceforth: SCOTUS) struck down a proposed amendment to the Colorado constitution that would have effectively prohibited equal protection for homosexuals, partly because the proposed amendment “cannot be said to be directed to an identifiable legitimate purpose.” (Note 3) Similarly, in *Lawrence v. Texas* SCOTUS struck down a Texas law prohibiting consensual acts of sodomy between same-sex partners, partly because Texas’ law “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” (Note 4) So, while rational basis review supplies a fairly low hurdle, it is a hurdle that can be tripped over.

While the *Romer* majority found a scarcity of legitimate state interests, Justice Scalia found them in abundance. In a vigorous dissent, Scalia insists “there is no doubt of a rational basis for the substance of the prohibition at issue here”—say, “to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores” or “traditional American moral values.” (Note 5) Scalia’s position in *Romer* requires endorsing a version of legal moralism, an uncontroversially illiberal liberty-limiting principle. Scalia’s anti-liberal leanings are especially clear in the following discussion of an Indiana state ordinance prohibiting “indecent behavior”:

Perhaps the dissenters believe that “offense to others” ought to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian “you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else” beau ideal... The purpose of Indiana’s nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *contra bonos mores*, i.e., immoral. (Note 6)

Clearly, one underlying dispute between liberal and illiberal jurists—like Scalia—concerns the facts that constitute a rational basis for legislation.

Recalling both the FLP and the above suggestion that legislation will survive rational basis review if there is any reasonably conceivable state of facts that could provide a rational basis, I submit that liberal jurists will endorse the following principle:

The Rational Basis Principle (RBP): If legislation limits liberty then that legislation is illiberal unless it bears a *reasonably conceivable* rational relationship to a *liberally legitimate* state interest.

To be clear, endorsing RBP is consistent with thinking that legislation might be illiberal for *other* reasons—say, because it unnecessarily utilizes suspect classifications or because it implicates a fundamental right. RBP hardly exhausts concerns about due process or equal protection; it simply constitutes a necessary condition for liberal legitimacy. RBP goes a long way to capturing liberalism’s constitutive commitment to liberty, or so I shall argue. But if it is going to be useful for present purposes, at least two matters require clarification.

4. Liberal Rational Basis Review

First, RBP says nothing about what differentiates liberally legitimate state interests from illegitimate ones. There is a danger of stipulating the problem away, but liberty-limiting legislation probably does not serve a liberally legitimate state interest unless it prevents something akin to harm or offense—that is, wrongful setbacks to interests or right-violating disliked mental states (Feinberg, 1990). At least, the more some putative state interest approximates the prevention of harm and serious offense, the more likely that it is to be a liberally legitimate interest. Since it is difficult to see how the preservation of sexual mores per se could prevent anyone’s interests from being setback, it is not likely that a liberal state has any legitimate interest in prohibiting consensual acts of sodomy. And since it is unclear how unwilling spectators could have their rights violated by consenting adults displaying their genitals to one another behind closed doors, it is not likely that a liberal state has a legitimate interest in prohibiting fully nude dancing. These results are significant since they suggest, first, that RBP is not a trivial principle, and second, that RBP coheres well with actual liberal intuitions. So far, so good.

Clarification is needed for a second reason given that RBP calls for, not a conceivable rational relationship to some liberally legitimate state interest, but a *reasonably* conceivable rational relationship. Legislation bears a rational relationship to some interest just in case that legislation tends to promote that interest to some non-trivial degree. But what is it, exactly, to *reasonably* conceive of such a relationship?

Philosophical interest in the thesis that conceivability entails possibility has peaked recently and many philosophers have wondered about its implications for the reducibility of the mental to the physical, the unity of the sciences, the truth of naturalism, and so forth. Undoubtedly, ‘conceivability’ is a term of art but several distinctions should be noted.

First, “prima facie conceivability” is distinct from “ideal conceivability”: *P* is prima facie conceivable for a subject when *P* is conceivable on first appearances while *P* is ideally conceivable when *P* is conceivable after ideal rational reflection (Chalmers, 2002). While articulating just what is necessary for ideal conceivability is a tricky business, it probably depends on undefeatable justification—that is, justification that cannot be defeated by better reasoning. Undefeatable justification involves, at least, the absence of familiar cognitive limitations and external impediments to knowledge: it requires the absence of external conditions that undermine justification; it requires that the acquisition of further true justified beliefs will not result in the revision of relevant beliefs, and so forth. Things can come in degrees: the more apt a subject’s belief is to be defeated by better reasoning the less that subject approximates ideal conceivability; the less apt a subject’s belief is to be defeated the more that subject approximates ideal conceivability.

Second, “positive conceivability” is distinct from “negative conceivability”: *P* is negatively possible for a subject when *P* cannot be “ruled out” a priori—that is, when a subject cannot conceive of not-*P* a priori—while *P* is positively conceivable when, roughly, a subject can form some sort of positive conception of a situation in which *P* is the case (Chalmers, 2002). Roughly, *P* is positively conceivable just in case a subject can “coherently modally imagine” a situation that verifies *P* such that it is possible to fill in any missing details about that situation without contradiction (Chalmers, 2002). And filling in those details may well be beyond the reach of some subjects. Thus, positively conceiving that *P* is not an idle exercise of imagination uninformed by relevant facts.

All these distinctions can be used simultaneously. Prima facie negative conceivability only requires not being able to rule out *P* based on initial appearances while something approaching ideal negative conceivability demands not being able to rule out *P* after rather more consideration. Prima facie positive conceivability requires only a modest imaginative exercise constrained by rather little while idealized positive conceivability requires a rather complicated and informed imaginative exercise.

How, then, should *reasonable* conceivability be understood? I take it that it requires positive conceivability, not negative conceivability, given that FLP demands that liberty-limiting legislation actually be justified. As such, reasonable conceivability requires more than simply insisting that one cannot rule it out that legislation will tend to some liberally legitimate interest. Also, reasonable conceivability surely requires more than prima facie conceivability since requiring only prima facie conceivability makes rational basis review a toothless test. But reasonable conceivability does not require ideal conceivability either; generally, that which is reasonable is not ideal. I submit that reasonable conceivability requires *moderate* conceivability, something between prima facie and idealized conceivability. Roughly, a subject can moderately conceive of *P* just in case her belief that *P* is conceivable will not easily be defeated—that is, just in case her belief that *P* is conceivable is consistent with the vast majority of other true justified beliefs she has and with true propositions that she could reasonably be expected to believe. So, whether or not *P* is moderately conceivable is, to some extent, fixed by certain facts about the actual world; if it is actually the case that some subject would abandon her belief that *P* is conceivable if she only thought a bit harder or did a bit more research then *P* is not moderately conceivable.

So long as neither prima facie nor ideal conceivability is required for reasonable conceivability, *something* like what I am calling moderate conceivability must be appropriate for rational basis review. Moderate conceivability does not demand that judges (or whoever) be experts in fields outside the law or that appellate courts become super-legislatures. It only demands that the reasoning relevant to the evaluation of legislation is subject to familiar epistemic standards. Unless we *entirely* suspend reasonable epistemic standards with respect to the evaluation of legislation, it must be the case that legislation survives rational basis review only if it is moderately conceivable.

Recall that RBP demands that legislation bears a reasonably conceivable—that is, positively and moderately conceivable—relationship to some liberally legitimate state interest. So, RBP can be restated as follows:

(RBP*): If legislation limits liberty then that legislation is illiberal unless it is possible i) to coherently modally imagine a situation in which that legislation ii) tends, to a non-trivial degree, to promote a state interest iii) that at least approximates the prevention of wrongful setbacks to interests or right-violating offense, and iv) no somewhat better reasoning would defeat the belief that such a situation is conceivable.

In what follows, RBP is shorthand for the more complicated thesis expressed by RBP*.

I submit that RBP is consistent with the legal traditions of liberal states and independently attractive to liberally inclined philosophers. It certainly is consistent with how courts of liberal states, at least sometimes, actually reason and deliberate. Something like RBP is used to smoke out motivations for legislation based on little more than animosity towards some target group. For example, SCOTUS has ruled that denying a special zoning permit for the construction of a group home is unconstitutional when based on little more than an irrational prejudice towards

the mentally retarded. (Note 7) And while SCOTUS allowed that a state has a legitimate state interest in reducing the workload on probate courts, it still struck down a portion of the Idaho Code that demanded giving preference to male heirs against female heirs in probate cases while declining to utilize some more stringent test of equal protection. (Note 8) And in the above noted *Romer*, SCOTUS insisted that the “sheer breath” of Amendment 2 “is so discontinuous with the reasons offered for it that the amendment... lacks a rational relationship to legitimate state interests.” None of these rulings make sense unless the validity of the legislation in question requires moderate conceivability.

Thus, while RBP’s minimal test for legitimacy only demands that legislation bear a reasonably conceivable rational relationship to a liberally legitimate state interest, it is not a toothless test. RBP is only tantamount to no review at all if we suppose that reasonable conceivability requires something less than moderate conceivability. And as I have argued, RBP demands more than this. And importantly, RBP is a crucial component of the liberal case against SSM prohibitions.

5. The Rational Basis Argument

The above discussion of liberalism’s constitutive commitment to liberty suggests the following “Rational Basis Argument” that prohibiting SSM is unjustifiable on liberal grounds:

- 1) If legislation limits liberty then that legislation is justifiable on liberal grounds only if it bears a reasonably conceivable rational relationship to a liberally legitimate state interest
- 2) SSM prohibitions limit liberty
- 3) SSM prohibitions bear no reasonably conceivable rational relationship to a liberally legitimate state interest
- 4) Therefore, SSM prohibitions are illiberal—that is, unjustifiable on liberal grounds

Since 1) is simply a restatement of RBP, it is true if RBP is. The remaining two premises require some discussion.

Premise 2) seems to me true but not beyond dispute. Clear examples of liberty-limiting legislation include legislation that forbids black voters from entering polling places based on their race. Liberty can also be limited by ensuring that there are sufficient obstacles in place to prevent citizens from easily exercising their rights: for example, legislation that enacts excessive poll taxes or requires an exceptionally long waiting period for abortive services. But some legislation is not plausibly regarded as liberty-limiting legislation at all, even if it impacts the ability of citizens to act in ways that they want to. For example, the National Endowment for the Humanities (NEH) might institute a policy that makes opportunities and resources available to historians but not philosophers. While historians would seemingly be enabled in a way that philosophers are not, it would not follow that the liberty of philosophers had been undermined or limited even if the NEH’s actions would impact the ability of philosophers to act in ways that they want to. Generally, making opportunities available to only *A* but not *B* need not limit *B*’s liberty. Arguably, SSM prohibitions are akin to NEH policies that make opportunities available to historians but not philosophers: neither actively prevents anyone from doing anything but only limit the scope of a service that the state provides. Since NEH policies that make opportunities available only to historians do not really limit liberty, parity of reasoning suggests that SSM prohibitions do not either such that 2) is false.

However, the analogy is suspect and for several reasons. First, the imagined NEH policy positively enables some persons, but SSM prohibitions enable no one. Second, philosophers are free to seek other equivalent arrangements to support their research even given the NEH policy, but same-sex couples are not similarly free to seek arrangements equivalent to marriage. Civil unions and registered partnerships are somewhat similar to civil marriage but only a handful of states make either available to same-sex couples. Third, there are significant rights and protections and privileges associated with civil marriage not associated with either civil unions or registered partnerships, including significant federal tax benefits and legal guarantees. Whatever benefits the imagined NEH policy confers, there are many more benefits associated with civil marriage of much greater importance. Finally, (at least some) same-sex couples *would* wed if not but for SSM prohibitions. Historically, same-sex couples have encountered sympathetic clerks and judges and mayors who willingly issue marriage licenses. Thus, unlike the imagined NEH policy, SSM prohibitions do deny (at least some) same-sex couples something they would have had otherwise. All this suggests that SSM prohibitions are different from policies that selectively enable academics: they limit liberty.

6. State Interests and Liberal Rational Basis Review

The crucial premise of the Rational Basis argument, then, is 3). I cannot consider every possible state interest, but reflection on some state interests that have been advanced in support of SSM prohibitions will be helpful here. I argue that none of them are both legitimate by liberal standards and rationally related to SSM prohibitions.

6.1 *Tradition and Marriage*

In defense of SSM prohibitions, some states have asserted an interest in affirming their commitment to a traditional understanding of marriage as a union of a man and a woman, or in promoting the integrity of traditional marriage, or in promoting the traditional family unit, or in simply maintaining tradition for the sake of maintaining tradition. However, any of these defenses requires adopting broad legal moralism—the principle that it is a morally good reason to limit someone's liberty if doing so preserves a traditional way of life (Feinberg, 1990). And, as noted above, legal moralism is an uncontroversially illiberal liberty-limiting principle. Thus, appeals to tradition are non-starters for purposes of liberal rational basis review.

6.2 *Financial Interests and Public Subsidies*

Alternatively, a state could argue that it has a legitimate interest in protecting its fisc from the effects of recognizing SSM. Presumably, if SSM were recognized, then same-sex marriages will be subsidized and that could tax limited financial resources that would otherwise be dedicated to furthering other compelling state interests. Arguably, the state's interest in protecting and preserving valuable financial resources justifies prohibiting SSM.

The various assertions that recognition of SSM would diminish a state's tax base, exhaust its resources to fund social security, and so forth are not uncommon but are typically made without appeal to any evidence whatsoever (Dobson, 2004). As such, it is far from clear that opponents of SSM have really reasonably conceived of a situation in which SSM prohibitions are rationally related to a legitimate interest. Worse, there is at least some reason to suppose that recognition of SSM is actually cost-effective; a report of the Congressional Budget Office of the United States found that allowing same-sex couples to marry in all fifty states would save the federal government nearly one *billion* dollars a year. This suggests that recognition of SSM will actually enhance a state's fisc, not threaten it. Admittedly, this response to the present objection is contingent on empirical verification. But if somewhat better reasoning defeats this objection then opponents of SSM have not reasonably conceived of a situation in which SSM prohibitions are rationally related to a legitimate interest.

Further, a liberal state could surely find the resources to fund or subsidize SSM in a way that will not threaten its fisc: it could, for example, raise fees for marriage licenses or require a greater fee for applying for a SSM license in particular or introduce some milage for jurisdictions that demand SSM; alternatively, it could separate marriage from the familiar tax benefits and resources associated with civil marriage such that it winds up not subsidizing SSM at all. If rather minimal reasoning suggests plausible ways for protecting a state's fisc, then even if the state does have a legitimate interest in preserving its fisc, SSM prohibitions bear no reasonably conceivable rational relationship to it.

6.3 *Protection of Civil Liberties*

Consider also the worry that prohibiting SSM is necessary to protect the civil liberties of citizens who would be wrongly affected by its recognition. The usual argument here is that prohibiting SSM will either i) protect the financial liberties of unwilling opponents of SSM who would be forced involuntarily to subsidize SSM or ii) protect their liberties of association or religious freedom, or both. Arguably, recognition of SSM will require unwilling landlords to rent to same-sex married couples (Jordan, 1995), unwilling employers to extend benefits to same-sex spouses (Knight, 1997), and unwilling religious organizations involved in adoption to place children in same-sex households (Gallagher, 2006), all in violation of their right of free association. Undoubtedly, liberal states have a legitimate interest in protecting both the civil liberties of their citizens, but here too, it is doubtful that prohibiting SSM is rationally related to that interest.

Consider first the possibility that SSM prohibitions will tend to protect the financial liberties of those forced to subsidize SSM unwillingly. This sort of argument only gets started if it is really the case that involuntarily subsidizing SSM approximates a wrongful setback to interests, and it is far from clear that this is so. It is simply unclear how to validate the assumption that one's incurred tax burden goes to fund one program or policy rather than some other. If defense spending constitutes 42% of the Congressional budget for the United States does it follow that 42% of my taxes fund national defense? If so, then given that only a terribly small percent of any state's budget would need to be dedicated to subsidizing SSM, the incurred tax burden on unwilling opponents of SSM would be terribly small, arguably too small to constitute a burden. But suppose that the relevant tax burden that

would be incurred does approximate a setback to interests. It would still not follow that SSM prohibitions would tend to prevent unwilling opponents of SSM from involuntarily subsidizing SSM, partly for reasons I have already suggested. If the public fisc of states that recognize SSM will generally increase, then no one's tax burden need be increased and thus their financial interests are not set back. The assumption that the financial liberties of citizens will be negatively implicated by recognition of SSM is rather easily defeated.

The argument that SSM prohibitions will tend to infringe on the right of association of unwilling opponents of SSM is more intriguing. But recognition of SSM per se does not require unwilling opponents of SSM to rent to same-sex couples or extend benefits to same-sex spouses, for example. Legislation that prohibits private acts of discrimination—say, the 1964 Civil Rights Act in the United States—would be responsible for that. And presumably, liberals are inclined to support anti-discrimination legislation that *already* precludes refusing to hire someone or rent to them based on their sexual orientation. At this point, opponents of SSM who take up this strategy face a dilemma: opponents of SSM must either oppose *all* legislation that prohibits private acts of discrimination (Levin, 1996) or else deny that the right of association protects any and every act of private discrimination. The first horn of this dilemma surely shocks the conscience of the liberal while the second requires abandoning this defense of SSM prohibitions.

6.4 Procreation and Responsible Parenting

Without a doubt, the interests most commonly advanced in support of prohibiting SSM concern procreation and child-rearing and, almost without exception, courts that have upheld the legitimacy of SSM prohibitions explicitly appeal to them. It is difficult to deny that a state has a legitimate interest in procreation and child-rearing; even Mill supposes that laws forcing to-be-married parties to prove they have the means for supporting a child are not “objectionable as violations of liberty” (Mill, 2000). The question, then, is whether SSM prohibitions bear a reasonably conceivable rational relationship to this state interest.

Some proponents of SSM have too quickly dismissed the possibility that there is a reasonably conceivable rational relationship here, resting content with noting that no evidence suggests that recognition of SSM decreases live-birth rates (Wolfson, 2004). It will be helpful to articulate the argument that has impressed so many courts. Here is one especially clear example of the argument that I have in mind:

[The state] has a legitimate interest in encouraging procreation and child-rearing within the stable environment traditionally associated with marriage, and... limiting marriage to opposite-sex couples is rationally related to that interest. Essentially, the State asserts that by legally sanctioning a heterosexual relationship through marriage, thereby imposing both obligations and benefits on the couple and inserting the State in the relationship, the State communicates to parents and prospective parents that their long-term, committed relationships are uniquely important as a public concern. (Note 9)

I refer to this argument as the “Responsible Parenting Rationale” and it rests on at least three assumptions: first, it is desirable to take measures to ensure that biological parents avoid “irresponsible parenting,” either by producing children out of wedlock or by separating and disrupting a stable family unit; second, civil marriage is correlated with attractive rights and benefits that serve as incentives for unmarried couples to marry and for presently married couples to remain so; finally, same-sex couples cannot produce out-of-wedlock children and thus cannot engage in irresponsible parenting. Thus, the state has a reason to make civil marriage available to opposite-sex couples—to discourage irresponsible parenting—that does not echo in support of SSM. As such, opponents of SSM need not appeal to any dubious conceptual connection between marriage and procreation. Instead, their position is that opposite-sex relationships are uniquely important as a public concern because, unlike same-sex relationships, they can generate undesirable results of undeniable public concern.

The Responsible Parenting Rationale is bound to strike proponents of SSM as perverse: it effectively *rewards* opposite-sex couples with the incentives of civil marriage because they *can* engage in irresponsible parenting while same-sex couples are *not* similarly rewarded because they *cannot*. But my cynic best recall Rawls' Difference Principle that permits social inequalities so long as those inequalities work to everyone's advantage (Rawls, 1999). If discouraging irresponsible parenting really works to everyone's advantage, prohibiting SSM would not necessarily be illiberal.

Still, the cynical complaint is not without force. First, legislation restricting civil marriage to opposite-sex couples is either unacceptably overbroad or unduly narrow. It is overbroad if it supposes that the class of opposite-sex couples is isomorphic with the class of couples who can engage in irresponsible parenting: elderly and otherwise sterile couples cannot produce out of wedlock children, for example. So, parity of reasoning suggests that the Responsible Parenting Rationale permits prohibiting elderly or sterile couples from marrying, a result that surely smacks of illiberality. It might be replied that even if sterile opposite-sex couples cannot reproduce, they could still

engage in irresponsible parenting: they can adopt or care for foster children and then later separate. But then the Responsible Parenting Rationale is unduly narrow: same-sex couples can similarly engage in irresponsible parenting by adopting or caring for foster children and later divorcing or separating. Parity of reasoning suggests if prohibiting sterile couples from marrying is illiberal, so are SSM prohibitions.

Second, it is doubtful that making the benefits of civil marriage available to opposite-sex couples is effective in promoting responsible parenting. As many opponents of SSM have noted, divorce rates have steadily increased as have incidences of illegitimate births, despite the attractive benefits of civil marriage (Dobson, 2004). It is difficult to maintain both that restricting civil marriage to opposite-sex couples will encourage responsible parenting while lamenting its failure to do so.

Further, one popular strategy of opponents of SSM is closed off: it will not do to simply insist that we cannot rule out the possibility that recognition of SSM would gravely harm children and therefore refuse to sanction SSM on the grounds that it is “too risky” (Stanton & Maier, 2004). Simply holding that same-sex parenting is too new a phenomenon and that we can’t rule out the possibility that recognizing SSM will imperil children amounts to make the claim that it is negatively conceivable that children will be harmed. Since reasonable conceivability requires making the case that prohibitions of SSM will tend to promote some state interest, opponents of SSM must make the case that such scenarios are positively conceivable.

At this point, the proponent of SSM prohibitions might object that even if prohibiting SSM does not *perfectly* advance any legitimate state interest—either because they SSM prohibitions would fail to prevent some instances of irresponsible parenting or because we have evidence that they doesn’t work—it might advance a state interest to *some* degree. But—and this is the third reason for denying that SSM prohibitions bear a rational relationship to a legitimate state interest in child-rearing—given the liberal commitment to liberty expressed in FLP, encouraging responsible parenting does not justify prohibiting SSM if that interest can be realized by other less restrictive measures. And other less restrictive measures are available: a liberal state could recognize SSM but provide special benefits to biological parents who stay married and care for their progeny; it could both recognize SSM but penalize parents who divorce or separate while children are in their care or refuse to subsidize parents who produce out-of-wedlock children, and so forth. In either case, the state encourages responsible parenting without also restricting liberty by prohibiting SSM; any of these measures should be preferable to liberal states.

The most familiar proposed state interests advanced in support of SSM are either not interests that a liberal would regard as legitimate or are not rationally related to prohibiting SSM. The suspicion now has to be *very* strong that SSM prohibitions do not survive liberal rational basis review. If SSM prohibitions do not survive a liberal version of rational basis review, they are not going to survive more stringent tests for legitimacy. So, even those liberal philosophers who contend that SSM prohibitions violate liberal commitments to neutrality or equality can endorse this result.

More importantly, an indirect argument for recognizing SSM is now in place. If the Rational Basis argument is sound, prohibitions of SSM are illiberal and, quite generally, the liberal state must permit what it cannot reasonably prohibit. But permitting same-sex couples to marry requires legally recognizing their marriages. So, liberal states are, after all, committed to legally recognizing SSM. Thus, some order is restored to the liberal universe.

7. An Aside on Polygamy

Recently, Elizabeth Brake argues that while faithful liberals are correct to conclude that liberal commitments demand extending civil marriage rights to opposite-sex couples, they err insofar as they do not recognize the full implication of their demand (2012: 133, 156). In particular, if a liberal proponent of SSM argues that a commitment to neutrality demands recognition of both SSM and opposite-sex marriage, she must acknowledge that commitment precludes her from tacitly making “amatornormative” assumptions that romantically exclusive couplings are exclusively morally valuable and worthy of state recognition (Brake, 2012: 144). But that means a commitment to neutrality demands that a liberal state refrain from uniquely privileging dyadic relationships for the same reason it must refrain from uniquely privileging dyadic heterosexual relationships. Thus, on Brake’s view, a faithful liberal must not only defend SSM if she believes that the state should recognize opposite-sex marriage; she must also defend legal recognition of polygamous marriages as well.

Faithful liberals appear to disagree about the legitimacy of polygamy in a liberal state. John Rawls would seem to oppose polygamy, insofar as he holds that a family arrangement that undermines the equality of women or fails to afford wives with the same basic rights and liberties and opportunities as their husbands is unjust (2001: 10, 166-7). And polygamous marriages do seem to afford husbands with rights that wives are not afforded. As it is typically practiced, polygyny—the marriage of one man to many women—permits men, but not women, to marry multiple

partners and permits a man to divorce any and all of his wives while a woman can only divorce her husband. By contrast, Martha Nussbaum holds that while polygamy as typically practiced is radically unjust, morally permissible polygamy is conceivable so long as women have the same entry and exit rights into polygamous marriage as men do and so long as consent is real and sincere (2000: 229; 2008: 129). What is the faithful liberal to think here?

It might be thought that I can escape Brake's argument insofar as the argument I offer above does not appeal to neutrality as a constitutive liberal commitment. But this is probably not enough to escape Brake's complaint, one that can easily be rendered into terms that are relevant for present purposes: In the absence of a publicly justifiable reason for defining marital relationships as monogamous and exclusive, for example, a state must give equal legal recognition to any number of polyamorous relationships under the heading of 'marriage' if it recognizes marriage at all. (Brake, 2010: 323). To put it another way, in the absence of some publically justifiable reason, an analogue of the Rational Basis Argument similarly yields the conclusion that legally prohibiting polygamous marriages is illiberal:

- 1) If legislation limits liberty then that legislation is justifiable on liberal grounds only if it bears a reasonably conceivable rational relationship to a liberally legitimate state interest
- 2) Prohibitions of polygamy limit liberty
- 3) Prohibitions of polygamy bear no reasonably conceivable rational relationship to a liberally legitimate state interest
- 4) Therefore, prohibitions of polygamy are illiberal

Again, I am committed to endorsing 1) and 2) seems true for reasons enumerated above. The question, then, is whether there is any rational basis for prohibiting polygamous marriages.

I contend that there is such a rational basis and that my faithful liberal can resist Brake's challenge. And this is the case even if the liberal acknowledges that "gender inequality is a contingent, not a conceptual, feature of polygamy" (Calhoun, 2005: 1039). After all, polygamy includes polyandry—where one wife has many husbands—in its extension as well. So even if gender inequality pervades polygamy as it is and has been practiced, that inequality might simply be the upshot of particular cultural or social or historical contingencies and it would not follow that polygamy per se is illiberal. Thus, I allow that there is no necessary connection between polygamy on the one hand and gender inequality or harm to women more generally on the other. However, as long as there is some *reasonably conceivable* rational relationship to a *liberally legitimate* state interest then, in the absence of other problematic matters—say, the use of a suspect classification or the implication of a fundamental right—legally prohibiting *A* is permissible on liberal grounds.

I take it for granted that preventing harm to women and the prevention of gender inequality are legitimate state interests. The question is whether it is possible to modally imagine a situation in which legislation that prohibits polygamy will tend to either prevent harm to women or mollify gender inequality and whether somewhat better reasoning would defeat the justification that such a situation is conceivable. Insofar as I contend that there is a rational basis for legally prohibiting polygamy, I contend that it is possible to modally imagine such a situation and that the imagined justification does survive reasonable epistemic scrutiny. Even if the harms suffered by women in the actual practice of polygamy are merely contingent and not necessary consequences of polygamy, the harms that arise in actual practice are fairly well documented and discussed (Brooks, 2009; Calhoun, 2005). And more importantly, while there have been significant social, cultural, and historical changes in those places where polygamy is and has been practiced for some time, gender inequality remains fairly pervasive where polygamy is practiced. And this is in spite of the fact that at least many of the historical arguments favoring polygamy—for example, in the Islamic world, polygamy was sometimes justified by noting a surplus of women and a dearth of men who were lost in battle—are no longer tenable (Rehman, 2007). So, while it is no conceptual truth that women will be harmed and gender inequality will follow from the practice of polygamy, insofar as gender inequality has stubbornly survived at least some historical contingencies it is hardly unreasonable to worry that gender inequality will persist if polygamy is practiced (Brooks, 2009).

Of course, some critics of the institution of marriage have noted *that* institution has a long inegalitarian tradition, that gender inequality has historically been rampant, and that despite a comparatively recent history of reforms contemporary marriage law continues to engender and support gender inequality. But without trying to sound Pollyanna, contemporary marriage reform has eliminated at least some of the inegalitarian tendencies of marriage as it has been traditionally practiced; women are no longer regarded as their husband's property, the availability of no-fault divorce enables men and women alike to exit marital arrangements, "rape shield" laws that prohibit

introducing evidence of a victim's sexual history at trial are rather new developments, and so forth. I do not mean to offer apologia for marriage law and I acknowledge that current marriage law is correlated with gender inequality in problematic ways. For example, it is an embarrassing fact that at the dawn of the 21st century a majority of states in the United States "still retain[ed] some form of the rule exempting a husband from prosecution for raping his wife" (Hasday, 2000: 1484). My only point is that a case can be made that marriage law has reformed in ways that promote gender equality, a result that suggests that further reform is possible. The same simply cannot be said for polygamy.

8. Conclusion

I have suggested that liberalism demands a constitutive commitment to liberty, one expressed by RBP. I contend that SSM prohibitions limit liberty and that they bear no reasonably conceivable relationship to any liberally legitimate state interest. Thus, I conclude that SSM prohibitions are illiberal. Justice in a liberal state requires recognizing SSM if opposite-sex marriages are recognized.

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Notes

- Note 1. See *FCC v. Beach Communication, Inc.*, 508 U.S. 307(1993), emphasis mine.
- Note 2. J. Stevens, concurring opinion, *Federal Communications Division v. Beach* 508 U.S. 307 (1993).
- Note 3. *Romer v. Evans* 517 U.S. 620 (1996).
- Note 4. *Lawrence v. Texas* 539 U.S. 558 (2003).
- Note 5. J. Scalia, dissenting opinion, *Romer v. Evans* 517 U.S. 620 (1996).
- Note 6. Justice Scalia, concurring opinion, *Barnes v. Glen Theatre* 501 U.S. 560 (1991).
- Note 7. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).
- Note 8. See *Reed v. Reed*, 404 U.S. 71 (1971).
- Note 9. *Standhardt v. Superior Court, County of Maricopa* 77 P.3d 451 (Arizona Court of Appeals, 2003).

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