MARRIAGE AS AN INSTITUTION: A NATURAL LAW APPROACH

PABLO NUEVO LOPEZ*

JOHN M. B. BALOUZIYEH,** TRANSLATOR

A critical approach to the issue of state recognition of same-sex unions in the context of contemporary Western societies is particularly controversial. Modern times are marked by a plurality of values, which, according to the elites of the dominant culture, implies that the configuration of the public space should be based on ethical neutrality.[1] This strict ethical neutrality is often taken to the point where a legal order's assumption that determines a person's good falls into the "so-

* Professor of constitutional law, Universidad Abat Oliba CEU; Director of Programs, Fundación Burke; Heritage Foundation International Policy Expert on Marriage. J.D. equivalent, Universidad Pontificia de Comillas (1997, Specialization in Competition Law, 1998); Master, Universidad CEU San Pablo (2002); Ph.D., cum laude, Universidad CEU San Pablo (2007). The author and translator express their gratitude to the following individuals for their comments and suggestions: Jeffrey A. Brauch, James E. Murphy, Miriel Thomas, Lynne Marie Kohm, and Alejandro García Canedo.

** Attorney, United States Department of State. B.A., Columbia University (2001); Fulbright Fellow, Turkish Legal Reform (2003); Master, Institut d'Études Politiques de Paris (2005); J.D., Regent University School of Law; J.D. equivalent, Universidad Abat Oliba CEU (Barcelona) (2009).

1. *See,* e.g., Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. Pa. L. Rev. 291, 292–93 (1985).

> In the advanced industrial societies, the destruction of ethics and the demise of community life that Schiller and Coleridge feared as all too possible are by now all too real. The doubts that have surrounded recent attempts at ethical reconstruction are themselves sufficient testimony to the continuing experience of moral disintegration. The experience itself is not questioned; what is questioned instead is whether anything may be done about it. Or, indeed, whether anything *ought* to be done—for the experience of disintegration has not been greeted with universal dismay. Just as Nietzsche announced the "end of man" with glee, so too have recent postmodernists mocked as philosophically confused and politically suspect those who would restore the unity of human nature. Meanwhile, the very concept of the liberal subject—the notion of a meaning-giving agent distinct from social structure and from linguistic convention—is deconstructed as liberal structures are themselves dereified.

Id. (footnotes omitted).

cial sin" of fundamentalism.[2] This pretension of neutrality worsens in questions that most affect vital issues such as the union between two persons in marriage.[3]

In the following Article, the author will argue against the institutionalization of same-sex marriage while moving within the confines of *modern* or *enlightened* (i.e., anti-metaphysical or post-metaphysical) rationality. As highlighted by then Cardinal Ratzinger (Pope Benedict XVI) in his celebrated debate with Jürgen Habermas, it is possible to enter into a dialogue with the modern world on its own terrain and without exiting the ideological parameters of the constitutional State.[4] Within this framework, it is possible to

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2. Frederick Mark Gedicks, *Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason*, 61 ALA. L. REV. 337, 353–54.

> Asserting religious truth-claims in electoral politics, then, is at least bad political manners. Etiquette functions precisely to avoid disclosures that needlessly hurt oneself or others. (What's the point of telling me that you didn't like that wedding gift?) As we should have learned in kindergarten, name-calling ends in hurt feelings, lost friends, and fights. An etiquette that excludes religious truth-claims from electoral politics, therefore, can be understood as a rule that underwrites civil and productive political discourse.

Id.

3. *See* Susan J. Becker, *Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL'Y & L. 177, 220.

> Christian condemnation of sexual minorities and refusal by fundamentalist Christians to engage in CSRA [critical self-reflection of assumptions] on the subject are largely predicated on a fundamentalist interpretation of the Bible. Conservative Christians frequently cite a handful of Biblical passages as proof that God condemns any sexuality except the heterosexual, binary model of Adam and Eve. Labeled by progressive theologians as the 'terrible texts,' these passages include the story of God's destruction of the city of Sodom for alleged homosexual depravity, characterization of a man lying with another man as an 'abomination' that justifies putting both men to death, condemnation of 'fornication,' several passages attributed to Saint Paul that the gates to the kingdom of heaven are not open to homosexuals, language condemning behavior which is 'against nature' and the creation story of Adam and Eve.

Id. (footnotes omitted).

4. JOSEPH CARDINAL RATZINGER & JÜRGEN HABERMAS, DIALECTICS OF SECULARIZATION: ON REASON AND RELIGION 60 (Florian Schuller ed., Brian McNeil trans., 2006) ("This is the question of whether there is something that can never become law but always remains injustice; or, to reverse this formulation, whether there is something that is of its very nature inalienably law . . . . The modern period has formulated a number of such normative elements . . . .").

demonstrate that the proper ordering of political harmony is more easily attainable by assuming the natural law tradition's practical consequences (in that which concerns us, the legal definition of marriage as an intrinsically heterosexual reality).

Secondly, turning to the natural law tradition, the author will propose a classical approach in offering answers to the problem presented by the modern world when it reduces reason. As Pope Benedict XVI recently reminded the International Theological Commission, the "reason which decrees [the natural law] properly belongs to human nature."[5] He also remarked that the ethical content of the Christian faith "does not constitute an imposition dictated to the human conscience from the outside but a norm inherent in human nature itself."[6] In this way, "on the basis of natural law, in itself accessible to any rational creature, with this doctrine the foundations are laid to enter into dialogue with all people of good will and more generally, with civil and secular society."[7]

I. The Shortcomings of Contemporary Philosophy

In confronting an argument based on modern rationalism, it is incorrect to begin an exposition analyzing marriage between people of the same sex. Rather, it is necessary to first identify the reason for, and justification of, the legal protection of marriage.

A. Same-Sex Marriage through the Lens of Kantian Rationalism

We begin the present analysis with the theories of Immanuel Kant, who is viewed on both sides of the Atlantic as the authoritative articulator, and perhaps even the father of,

5. Pope Benedict XVI, Address of His Holiness Benedict XVI to Members of the International Theological Commission (Oct. 5, 2007) (quoting Catechism of the Catholic Church ¶ 1955), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/october/documents/hf_ben-xvi_spe_20071005_cti_en.html.

6. *Id.*

7. *Id.*

modern rationalism.[8] It may even be said that, without Kant's work, it is impossible to understand both contemporary Kelsenian legal theory as well as that of John Rawls or Jürgen Habermas.[9]

Kant's *Metaphysics of Morals* provides the foundation:

> The concept of right, insofar as it is related to an obligation corresponding to it (i.e., the moral concept of right), has to do, first, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But, second, it does signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other's choice. Third, in this reciprocal relation of choice no account at all is taken of the matter of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the form in the relation of choice on the part of both, insofar as choice is regarded merely as free, and whether the action of one can be united with the freedom of the other in accordance with a universal law.[10]

From this conceptual framework, Kant deduces his famed definition of the Law, the "Categorical Imperative": "The supreme principle of the doctrine of virtue is: act in accordance with a maxim of *ends* that it can be a universal law for everyone to have."[11] An agreement between two free, rational

8. *Immanuel Kant*, STAN. ENCYCLOPEDIA OF PHIL. (May 20, 2010), http://plato.stanford.edu/entries/kant/ ("Immanuel Kant (1724–1804) is the central figure in modern philosophy. He synthesized early modern rationalism and empiricism, set the terms for much of nineteenth and twentieth century philosophy, and continues to exercise a significant influence today in metaphysics, epistemology, ethics, political philosophy, aesthetics, and other fields.").

9. Ratzinger & Habermas, *supra* note 4 ("Political liberalism (which I defend in the specific form of Kantian republicanism) understands itself as a nonreligious and postmetaphysical justification of the normative bases of the democratic constitutional state.")

10. IMMANUEL KANT, THE METAPHYSICS OF MORALS 23–24 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

11. *Id.* at 157.

actors can only be Law if, in its universal extension, it would respect the rights and liberties of all concerned parties.[12]

In virtue of this law of liberty, and understanding liberty as self determination, the legal formalization of the union between a man and a woman is a restriction of this self determination.[13] Consequently, the reason for the public recognition of marriage via legal formalization—a recognition that also conveys the enjoyment of certain rights—warrants justification.

Justification of this formalization is necessary in determining a two-fold rationale. Legitimization of the State's juridical recognition of marriage is of primary concern, but also of concern is the legitimacy of the establishment of rights in favor of the spouses, given that the concession of rights to one subject necessarily implies the imposition of duties to another subject.[14]

With respect to justification, we approach one of the principal exponents of contemporary Kantism, the legal and political philosopher John Rawls.[15] Rawls established a presupposition for his political and judicial philosophy, without which his thesis of rational discourse (the decision of a society in his hypothetical "original position" to establish a political order of liberty) bears no meaning.[16]

> Political society is always regarded as a scheme of social cooperation over time indefinitely; the idea of a future time when its affairs are to be concluded and society disbanded is foreign to the conception of political society.

12. IMMANUEL KANT, LECTURES ON ETHICS 64 (Peter Heath & J.B. Schneewind eds., Peter Heath trans., Cambridge Univ. Press 1997) (1930) ("Law, so far as it signifies authority, is the agreement of the action with the rule of law, so far as the action does not conflict with the rule of choice . . . .").

13. *Id.* at 55 ("The act whereby an obligation arises is called an *actus obligatorius.* Every contract is an *actus* of that sort. An *actus obligatorius* can give rise to an obligation to myself, but it can also engender an obligation to another; for example, the begetting of children is an *actus obligatorius,* whereby the parents have imposed on themselves an obligation to the children.").

14. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 120 (Julian Rivers trans.) (2002).

15. JOHN RAWLS, STAN. ENCYCLOPEDIA OF PHIL. (Mar. 25, 2008), http://plato.stanford.edu/entries/rawls/ ("The move to agreement among citizens is what places Rawls's justice as fairness within the social contract tradition of Locke, Rousseau and Kant.").

16. *See* JOHN RAWLS, A THEORY OF JUSTICE 15–19 (Harvard Univ. Press rev. ed. 1999) (1971).

> Thus, reproductive labor is socially necessary labor. Accepting this, a central role of the family is to arrange in a reasonable and effective way the raising of and caring for children, ensuring their moral development and education into the wider culture. Citizens must have a sense of justice and the political virtues that support political and social institutions. The family must ensure the nurturing and development of such citizens in appropriate numbers to maintain an enduring society.[17]

Societal continuity is necessary, because a well-ordered society is, by necessity, conceived by those who would agree to create a political order from Rawls' original position as a society in progress. Its members would see its common form of political life as extending backward and forward in time, through generations toiling to reproduce themselves and their cultural and social life in perpetuity.

In consequence, the democratic constitutional State as the political form of modernity, even from a proceduralist perspective of politics and justice, requires an expectation of continuity of the same political community.[18] Without this expectation, it is impossible to justify obedience to democratically created law.[19]

With what criteria can society demand from its citizens compliance to fundamental norms of a community, when those citizens do not self-identify as owners of the norms promulgated before they were born into the subject community? Thus, it can be deduced that there is a compelling State interest in the *incorporation* of new citizens into the political community in order to reproduce its cultural and social life.[20] For the continuity of the community to be possible, this incor-

17. John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 788 (1997).

18. In this way, Jürgen Habermas describes the democratic process as a method of generating legitimacy from legality. Ratzinger & Habermas, *supra* note 4, at 28. The procedural conception inspired by Kant insists on an autonomous justification of constitutional principles, with the pretension of being rationally acceptable to all citizens. *Id.*

19. *Id.* ("The proceduralist understanding of the constitutional state, inspired by Kant, insists (against the Hegelian view of the law) that the basic principles of the constitution have an autonomous justification and that all the citizens can rationally accept the claim this justification makes.").

20. Paula Abrams, *The Tradition of Reproduction*, 37 Ariz. L. Rev. 453, 460–461 (1995). "As society developed, population would self-regulate through an inverse association of fertility to socio-economic advancement." *Id.* at 460. "A wife had a

poration requires the births of new subjects.[21] These births, with respect to the conception of the constitutional State as a space for liberty under Kantian modern rationalism, should be the consequence of the sexual union of a man and a woman.[22]

Manifestly, it is impossible to create new human life from the union of two men or of two women.[23] But with contemporary techniques, it is possible to resort to artificial human reproduction.[24] Is it then not possible to dispense of the recognition of marriage, and still ensure the continuity of the community through techniques such as in vitro fertilization (IVF)?

In answering this question, one may begin with the Kantian conception of Law as an order of freedom-autonomy as presupposing the treatment of each individual, at all times, as an end and not as a means.[25] IVF techniques, in themselves, imply an instrumentaliz-ation, or reification,[26] of the individual generated: the child is created in order to fulfill the parents' desire to meet the lure of self-realization or, in

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duty to bear children not only for her husband but also for the community, 'a duty tacitly promised the State.'" *Id.* at 461.

21. It could be argued that the incorporation of new citizens into the political community is guaranteed by immigration. However, apart from the fact that this argument overlooks the difference between continuity and replacement, the incorporation of immigrants to replace the first-generation immigrants cannot be carried into infinity.

22. IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 109 (W. Hastie trans., 1887) ("The domestic Relations are founded on Marriage, and Marriage is founded upon the natural Reciprocity or intercommunity (*commercium*) of the Sexes.").

23. *Id.* at 109 n.1 ("This 'usus' is either natural, by which human beings may reproduce their own kind, or unnatural, which, again, refers either to a person of the same sex or to an animal of another species than man.").

24. Mary Ann Davis, *Addressing In Vitro Fertilization and the Problem of Multiple Gestations*, 18 ST. LOUIS U. PUB. L. REV. 503, 503 (1999) ("Assisted reproduction technology ('ART') is one of the greatest developments of modern-day medicine as it provides individuals who face difficulty in producing offspring potential hope.").

25. H.J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY 129 (1948) (quoting Formula II of Kant's Categorical Imperative) ("So act as to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means.").

26. TIMOTHY BEWES, REIFICATION, OR THE ANXIETY OF LATE CAPITALISM 3 (2002) ("Reification refers to the moment that a process or relation is generalized into an abstraction, and thereby turned into a 'thing.'").

line with the present argument, the need for the conservation of society.[27]

In contrast, the generation of new citizens as the welcomed fruit of the union of man and woman takes place without instrumenta-lization. Thus, each spouse is accepted by the other as an end in himself and not as a means to any other end.[28] As Kant underlined, this union, in order to avoid the instrumentalization of one spouse by the other, requires a monogamous, exclusive, and stable marriage.[29] Kant maintains that each member of this mutual relationship, through sexual delivery, becomes reified to himself.[30] Parting from these premises, he considers that reification within an order of liberty is only possible when the reification is reciprocal and reestablishes the rational personality.[31] Further, reciprocity is not limited to the moment of sexual union. Rather, it requires stability and permanence in time through a legal link such that, if one spouse breaks the pact of mutual delivery, the other would remain reified in a relationship without reciprocity.[32] Such a unilateral rupture of a marriage would

27. ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES 80 (2001) ("More precisely, these acts have their unique meaning, value, and significance because they belong to the *only* class of acts by which children can come into being, not as 'products' which their parents choose to 'make,' but, rather, as perfective participants in the organic community (i.e., the family) that is established by their parents' marriage.").

28. Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 729, 750 (2000) ("In my view, children conceived in marital intercourse participate in the good of their parents' marriage and are themselves noninstrumental aspects of its perfection; thus, spouses rightly hope for and welcome children, not as 'products' they 'make,' but rather, as gifts, which if all goes well, supervene on their acts on marital union.").

29. Kant, *supra* note 22, at 111 ("Consequently Marriage is only truly realized in MONOGAMY; for in the relation of Polygamy the Person who is given away on the one side, gains only a part of the one to whom that Person is given up, and therefore becomes a mere *res*.").

30. *Id.* at 110 ("In this relation the human individual makes himself a *'res,'* which is contrary to the Right of Humanity in his own Person.").

31. *Id.* at 110–11 ("This, however, is only possible under the one condition, that as the one Person is acquired by the other as a *res*, that same Person also equally acquires the other reciprocally, and thus regains and re-establishes the rational Personality.").

32. *Id.* at 110.

> The latter is MARRIAGE (*matrimonium*), which is the Union of two Persons of different sex for life-long reciprocal possession of their sexual faculties.—The End of producing and educating children may be regarded as always the End of Nature in implanting mutual desire and inclination in the sexes; but it is not necessary for the rightfulness of

leave one spouse at the disposition of the other, and would permit the law to establish conditions through which a person is no longer treated as an end in himself.[33]

Therefore, the legal recognition of marriage as a contract, as well as the series of rights associated with this recognition, is justified by marriage being a form of life that indirectly contributes to the subsistence of society.[34] Consequently, Ernst-Wolfgang Böckenförde, following within the context of enlightened rationality, argued that the modern State is sustained by a public morality that it cannot create.[35]

With this said, the constitutional State is unconcerned whether two people unite to establish a community of life and love, or whether they imitate that community in a homosexual union.[36] The State's primary concern is its own perpetuation, regardless of the means by which it reaches this objective.[37]

As Kant emphasized in the previously cited excerpt from *The Metaphysics of Morals*, the moral concept of law has as an object only "the external and indeed practical relation of

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> marriage that those who marry should set this before themselves as the End of their Union, otherwise the Marriage would be dissolved of itself when the production of children ceased.

Id.

33. *Id.* at 112 (explaining that marriage viewed as a mere conjugal act implies becoming a *res* that is subject to the will of the other and thus neither partner would could rightly complain of an arbitrary cessation of the contract).

34. Martin Rhonheimer, *The Political Ethos of Constitutional Democracy and the Place of Natural Law in Public Reason: Rawls's "Political Liberalism" Revisited*, 50 AM. J. JURIS. 1, 45–46 (2005) ("[G]enerally speaking, without heterosexual reproductive acts there is nothing like 'family life' and 'education of children'—because there are no children and, without them, no mutual cooperation of citizens *over time*. Civil law cannot possibly disregard this fact and equate unions which are by nature of a non-reproductive kind to the naturally reproductive kind of union which we call 'marriage.'").

35. ERNST-WOLFGANG BÖCKENFÖRDE, STATE, SOCIETY AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW 45 (J.A. Underwood trans., 1991) ("So the question of bonding forces is posed afresh and reduced to its actual core: *the liberal, secularised state is nourished by presuppositions that it cannot itself guarantee.* That is the great gamble it has made for liberty's sake.").

36. John Locke, THE SECOND TREATISE OF GOVERNMENT (1689), *reprinted in* POLITICAL WRITINGS 261, 328 (David Wootton ed., Hackett Publ'g 2003) (1993) ("[T]he first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it.").

37. *Id.*

one person to another . . . ."[38] The law is unconcerned with the relation of free will with the desire of another person.[39] Instead, the law is only concerned with the "relation to the other's *choice*," with a resulting reciprocal relationship of free will and mutual consent.[40] The "*matter* of choice" is not taken into account—each may pursue his own ends with the object.[41] The State does not ask, for example, whether a merchant who purchases a product for resale will obtain a profit from the transaction.[42] Rather, the focus is on three objective factors: (1) whether the relationship between the buyer and the seller is marked by their reciprocal free wills; (2) whether the action of one can be reconciled with the action of the other in agreement with a general law—the meeting of the minds of two rational, free actors; and, (3) that the subject law meets the requirements of Kant's Categorical Imperative.[43]

Consequently, individual desire cannot, on its own, justify new laws that impose obligations upon third parties, if the object of that law does not advance the public good. The rights that married couples enjoy, by virtue of the laws that recognize them, necessarily imply obligations on third parties (*e.g.*, the duty of taxpayers to pay for the healthcare of those that the law defines as the "spouses" of federal employees). These obligations can only be justified by one objective criterion: whether the public good on the whole is benefited.[44] Thus, to the extent that same-sex marriage attributes rights in function of a union that, in itself, does not contribute to the

38. KANT, *supra* note 10.

39. *Id.* at 24 ("[I]t does not signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other's *choice*.").

40. *Id.* ("[N]o account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants . . . .").

41. *Id.*

42. *Id.*

43. *Id.* ("[I]t is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*, and whether the action of one can be united with the freedom of the other in accordance with a universal law.").

44. *Id.* ("Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.").

public interest, it imposes on third parties duties and obligations without a reason that justifies them. Thus, it is socially damaging, as it implies an arbitrary limitation of the liberty and equality of the affected third parties.

In addition, a law recognizing same-sex marriage renounces the logical marriage-family sequence (heterosexuality implicitly carries the possibility of procreation), and, when combined with the renunciation of the stability of the marital contract via statutes that allow for no-fault divorce, and those that maintain the traditional impediments to marriage (kinship, age, soundness of mind, etc.), transforms the matrimonial relationship from a community of affection, with the end of procreation, into a relationship of mere will and desire that is characterized by an exchange of sexual favors.[45] This relationship not only gives birth to a series of rights that import duties and obligations to third parties, but also grants access to these rights through sexual interchange without any social finality as a condition.

A governmental act that permits such unions does not surpass the threshold requirements implicit in the logic of the Kantian democratic constitutional State. Rather, it presents itself as pure arbitrariness.[46]

B. Romanticism and Nihilism

Eighteenth century Kantian rationalism, because of its coldness as an intellectual system divorced from sentiment, was rejected by nineteenth century philosophers, who instead turned to voluntarism and romanticism. These philosophers thereby created a rift between reason and reality in philosophy and elevated the will and sentiment over rationality.[47]

45. KANT, *supra* note 22, at 111–12.

46. Beyond mere will or desire, a justification often posed in the public debate in favor of recognizing same-sex marriage is the "if they love" argument. Yet using love as the only basis for recognizing marriage is problematic, as even two siblings who love each other are not given access to marriage, and no one argues that they should.

47. Frank Thilly, *Romanticism and Rationalism*, 22 PHIL. REV. 107, 114 (1913) ("There is hardly a type of Romantic philosophy clamoring for recognition today that has not its counterpart in the anti-intellectualistic movements of the period inaugurated by Kant. . . . These romantic teachings are symptoms of dissatisfaction with the methods and results of our rationalistic science and philosophy, expressions of the same spirit of impatient discontent which is manifesting itself everywhere in modern life.").

As stated by then Cardinal Ratzinger, "Because in modern States[,] metaphysics, and with it, Natural Law, seem to be definitely depreciated, there is an ongoing transformation of law, the ulterior steps of which cannot yet be foreseen; the very concept of law is losing its precise definition."[48] When man distrusts the possibility of reason discovering the profound meaning of things, the law loses its requisite surroundings of reason and reality and is thereby reduced to force.[49] Even Nietzsche appraised that voluntarism and romanticism end precisely in a purely nihilistic world governed by arbitrary will and desire.[50] In such a world, same-sex marriage is naturally recognized if so desired by those willing its recognition.

Kantian rationalism, though it is an incomplete system for accounting for reality,[51] can serve as a point of support to undermine the nihilist juridical recognition of homosexual union as marriage. Yet, because modern rationalism does not give a wholly satisfactory answer to resolving how to order common public life, the natural law will next be consulted.

II. Classical Approach to Marriage Based in the Natural Law Tradition

In the second part of this Article, the author will show that appealing to natural law[52] makes it possible to give an an-

48. Joseph Cardinal Ratzinger (Pope Benedict XVI), Address Delivered on the Occasion of Being Conferred the Doctorate Honoris Causa by the LUMSA Faculty of Jurisprudence in Rome: Crises of Law (Nov. 10, 1999), *available at* http://www.ewtn.com/library/theology/lawmeta.htm. Then Cardinal Ratzinger added that "[t]he elaboration and structure of law is not immediately a theological problem, but a problem of 'recta ratio,' of right reason." *Id.*

49. *Id.* ("The majority determines what must be regarded as true and just. In other words, law is exposed to the whim of the majority . . . .").

50. *See* Friedrich Nietzsche, Thus Spoke Zarathustra (R.J. Hollingdale trans., Penguin Books 1969) (1885).

51. *Immanuel Kant*, *supra* note 8 ("Kant's theory . . . implies a radical form of skepticism that traps each of us within the contents of our own mind and cuts us off from reality.").

52. *See* St. Thomas Aquinas, Summa Theologica 1474 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947) (1274).

> Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. . . . [T]he light of natural reason, whereby we discern what is good and

swer to whether positive law should recognize same-sex marriage in a way that is both rational and also corresponds to the desires of the heart of man and to the proper ends of the civil government.

Before beginning this section, it may be helpful to clarify that the natural law is *not* an ideal normative order and also that it superimposes positive law.[53] It is a moral and juridical logic that finds itself interested in the normative direction of human social life.[54] It indicates the first and essential precepts that govern moral life, calling itself natural "not in reference to the nature of irrational beings, but because reason which decrees it properly belongs to human nature."[55]

What is in question, when a nation tries to obtain the judicial consideration of homosexual unions as equal to marriage based on the subjective rights of homosexual persons, are the consequences of a completely individualistic consideration of rights whose content appears to depend not on final ends but exclusively on the subjective value of the holder. It is an individualism that converts politics into a battleground by defining the content of these rights, and, in this way, decides the significance of the Constitution.

This ideology of rights and of pluralist constitutionalism is missing a conceptual apparatus apt to treat the institutions serving these rights.[56] Further, is does not address the relation between a society respectful of the rights of the person and the social conditions that permit the maintenance of this order of rights.[57]

In effect, even when the Kantian perspective is insufficient to give a satisfactory reply, in the heart of the debate lies the question: What is due to man by the mere fact of being man?

> what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law.

Id.

53. *Id.* at 1474–75.

54. Pope Benedict XVI, *supra* note 5.

55. *Id.* (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 1955).

56. MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 75 (1991).

57. *Id.*

In addition to the recognition of his humanity, it is access to those basic human goods that facilitate his living in conformity with his dignity and allow for human flourishing. The discovery of these goods is accessible to reason: security of life, work, minimal conditions of health, and the possibility of accessing education and culture, among others.[58]

In other words, the fundamental legal positions that each fundamental right guarantees (the power to licitly do something or to claim something from the State or a third party) depend on the concrete human good around which that right exists.[59] In this way, the right is not in the service of the arbitrary whims of the individual, but rather, responds to the reason through which it is convenient to man in his communitarian life. Obviously, these human goods vary in their concretion in function of time and place.[60] Their determination corresponds to practical reason, guided by its concomitant virtue—prudence, which is not cowardice or timidity, but rather, the discovery of and commitment to the concrete good.[61]

Such reasoned determination permits one to pose a second question: What kind of liberty guarantees the constitutional State? It is not liberty in a vacuum—that indetermination in which any decision is theoretically permitted (and in which none really matters). Rather, it is the type of liberty that permits the responsible and non-coercive affirmation of one's own humanity by obtaining, guaranteeing, and making accessible to all citizens those basic goods that permit dignity and human flourishing.

III. Marriage under the Spanish Laws and Constitution

This perspective permits us to analyze through reason marriage as a juridical institution guaranteed by the Spanish Constitution of 1978.[62]

58. *See, e.g.*, John Finnis, Natural Law and Natural Rights 85–90 (1980) (discussing the self-evidence of certain basic human goods).

59. *See id.* at 198–226 (discussing the nature of rights generally).

60. *Id.* at 93.

61. *Id.* at 226.

62. C.E. art. 32(1), B.O.E. n. 311, Dec. 29, 1978 (Spain).

Article 32 of the Spanish Constitution, in its first section, affirms that "[m]en and women have the right to marry with full legal equality."[63] Article 32 contains both an ownership right (that of a man and a woman to enter into marriage) as well as the guarantee of an institution that the law must respect when configuring it.[64] Accordingly, the Spanish Constitutional Court has affirmed that marriage is a constitutionally guaranteed social institution.[65]

The Spanish Royal Academy of Jurisprudence and Legislation (RAJL), an institute of influential Spanish jurists presided by the King, shares the Constitutional Court's opinion. In its Report on the Project to Modify the Civil Code in the Area of the Right to Contract Marriage, the RAJL expressly indicated that it is the existence of the institution of marriage that makes the right to contract marriage possible.[66] In this way, the Royal Academy made clear that the right to marriage cannot be discussed as a fundamental right or as a constitutional right if the institution to which adhesion is granted did not previously exist.[67] If it could, then the precept contained in Article 32 would be defining no more than the legal capacity to undertake a defined legal action in a way that is completely divorced from any and all objective content.[68]

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63. *Id.*

64. Relating to the present case, the Council of State made known that opening the matrimonial institution to same-sex couples does not suppose to grant those couples access to a right, but it is an alteration of the marriage institution. Consejo de Estado [Council of State], Dec. 16, 2004 (B.O.E., Dictamen 2628/2004) (Spain).

65. S.T.C., Nov. 19, 1990 (R.T.C. No. 184, ¶ 3) (Spain) ("El matrimonio es una institución social garantizada por la Constitución, y el derecho del hombre y de la mujer a contraerlo es un derecho constitucional." ["Marriage is a social institution guaranteed by the Constitution, and the right of men and women to contract marriage is a constitutional right."]).

66. Real Academia de Jurisprudencia y Legislación [Royal Academy of Jurisprudence and Legislation], *Informe acerca del Proyecto de modificación del Código Civil en materia de derecho a contraer matrimonio* [*Report regarding the Project of Modification of the Civil Code in the area of the Right to Contract Marriage*], at 1 (Feb. 21, 2005) (Spain), *available at* http://www.unav.es/civil/nsd/nosindebate/mhinformeralj.doc.

67. *Id.*

68. *Id.* ("[E]ntendiéndolo como derecho de libertad, el precepto no estaría definiendo otra cosa que la capacidad de obrar referida al fenómeno concreto y que, en ese sentido, el precepto resultaría notoriamente insuficiente." ["Considering it as a right to liberty, the precept would be defining nothing more than the capacity to

As a result of the Spanish Constitution's inclusion of the guarantee of the marriage institution in Article 32, the sphere of the marriage institution must first be limited in order to determine to whom the fundamental right to marriage belongs. This perspective avoids reducing the question of whether two people of the same sex can contract marriage to a problem of *ownership of rights* and *discrimination*; it is *not* about affirming or negating the right of homosexuals to contract marriage, as this is not the question of debate.[69] If the issue were framed in such a way, it could only be resolved by an act of the will based on whether the ability of same-sex partners to contract marriage is desired.[70] Rather, the focus is on the legal institution as guaranteed by Article 32 of the Spanish Constitution, since the ownership of the fundamental right to contract marriage will be determined by the capacity to integrate the marriage institution. This determination depends upon a practically reasoned judgment on the possibility of determined unions fulfilling the defining characteristics of such unions.[71] In other words, the rational component that is proper of all juridical ordinations is saved.[72] This impedes neither the debate nor the freedom of

work, referring to the concrete phenomenon and, in this manner, the precept would result flagrantly insufficient."]).

69. Consejo General del Poder Judicial, Servicio de Estudios e Informes [General Counsel of the Judiciary, Studies and Reports Service], *Estudio Sobre la Reforma del Código Civil en Materia de Matrimonio entre Personas del Mismo Sexo* [*Study Regarding Reform of the Civil Code on the Matter of Same-Sex Marriage*], at 19 (no date) [*hereinafter* Estudio del Matrimonio], *available at* http://www.profesionalesetica.org/documentos/fye/estudioCGPJmatrimonio.pdf ("En efecto, cuando el ordenamiento niega el matrimonio a dos personas del mismo sexo no hay, propiamente, discriminación puesto que un homosexual puede casarse del mismo modo y en las mismas condiciones en las que puede hacerlo un heterosexual . . . ." ["Effectively, when the ordinance negates the marriage of two people of the same sex, it is not truly discrimination, in that a homosexual may marry in the same way and subject to the same conditions as a heterosexual . . . ."]).

70. *Id.* at 20 ("[E]l simple hecho de que alguien quiera casarse con alguien no supone necesariamente que pueda casarse con él: así, ¿podría quejarse de discriminación el varón a quien el Derecho le impide casarse con la mujer a la que quiere, solo por el hecho de que dicha mujer es su hermana o su hija?" ["[T]he mere fact that one wishes to enter into marriage does not necessarily mean that he may do so; for example, can a man justifiably complain about discrimination when a law prohibits him from marrying the woman that he loves, simply because she is his sister or daughter?"]).

71. *Id.*

72. For a similar argument see Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 729, 747 (2000). "One

choice of the legislator, whose mission is to delimit the ultimate borders of the institution, in virtue of a political judgment of opportunity and expedience.[73]

In this respect, the Spanish Constitutional Court has signaled that the constitutional guarantee of marriage, in addition to its necessary existence in the legal order, is justified in the existence of its specific civil regime, that is, of the aggregate of rights, obligations, and juridical expectations that are born as a result of having contracted marriage.[74]

In what does the institutional guarantee of marriage then consist? In the first place, as the Spanish Constitutional Court has affirmed, it consists in the "necessary existence in the legal order,"[75] which implies that the civil laws should include the legal recognition of marriage, additionally assuring the existence of its specific civil regime.[76]

A distinct issue is that it corresponds to the legislator to establish the causes of dissolution of marriage and its effects (art. 32 CE),[77] as well as how to establish age requirements, other impediments, etc., or institutionalize in the civil laws the aggregate of rights, duties, and juridical expectations de-

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should not imagine . . . that the law attaches certain benefits to the status of 'marriage' without first determining *that* there is a specific relationship which *deserves* such beneficial treatment." *Id.*

73. *Id.* at 747 ("Marriage has regularly been said to be subject to legal regulation. But the central thrust of the many political, especially judicial, testimonies to the value of marriage has been the salutary effects this pre-political (and thus natural) institution has upon the fortunes of political society, and upon the happiness of the people. For these reasons marriage has been thought worthy of extensive social and legal support.").

74. S.T.C., Dec. 11, 1992 (R.T.C., No. 222, ¶ 10) (Spain) ("Sin duda que la garantía constitucional del matrimonio entraña, además de su existencia necesaria en el ordenamiento, la justificación de la existencia de su específico régimen civil, esto es, del conjunto de derechos, obligaciones y expectativas jurídicas que nacen a raíz de haberse contraído un matrimonio." [Without a doubt, the constitutional guarantee of marriage involves, in addition to its necessary existence in the legal order, the justification of the existence of its specific civil regime, that is, all the rights, obligations and juridical expectations derived from the marital contract."]).

75. *Id.*; *see also* Encarna Roca, *Same-Sex Partnerships in Spain: Family, Marriage or Contract?*, 3 Eur. J.L. Reform 365, 367 (2001) ("Article 32 of the [Spanish Constitution] . . . has generally been interpreted as a constitutional recognition of the right to marry. . . . [But it] is not an absolute right, since its validity is conditioned by the execution of the requirements that the state determines in relation to the capacity and the conditions of both spouses.").

76. Roca, *supra* note 75.

77. C.E. art. 32, B.O.E. n. 311, Dec. 29, 1978 (Spain).

riving from the marital contract. These include, for example, the rights and duties of the spouses,[78] as well as the distinct economic marital regimes.[79] The second section of Article 32 of the Spanish Constitution refers to this when it establishes that the law "shall regulate the forms of marriage, the age at which it may be entered into and the required capacity therefore, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof."[80]

When specifying the aggregation of rights and obligations in the civil regime, the legislator should respect the outlines of the institution in terms that are socially recognizable. This means that the characteristics defining marriage in society's legal traditions should be respected.[81] When the Constitutional Court signals that there is a specific civil marriage regime, it is because there are some characteristics that define the institution and differentiate it from other juridical agreements between persons or from other forms of coexistence that can be assumed in society.[82]

In its *Study on the Reform of the Civil Code on the Subject of Marriage Between Persons of the Same-Sex*, the General Counsel of the Judiciary reached a similar conclusion: "The law can and should fix the form of marriage, the rights of the spouses, the causes of separation and even the age, but it *cannot alter the concept of marriage*."[83] To call a union of persons of the same-sex "marriage" is a radical change, as would be calling "marriage" the union of more than two people or the union of a one-year term followed by an automatic dissolution, etc.[84] To redefine marriage would be to affect the first

78. Spanish Civil Code arts. 66–71 (C.C. 1889) (Spain).

79. *Id.* arts. 1,315–1,444.

80. C.E. art. 32(2), B.O.E. n. 311, Dec. 29, 1978 (Spain).

81. Bradley, *supra* note 72, at 732 ("The most that anyone proposes is that the civil law ought to reflect some basic or defining features of marriage, and only where that serves political society's common good.").

82. *Id.* at 736 ("It is impossible to imagine an institution, however, with as many legal benefits as marriage, having (or proponents of the institution and its concomitant benefits, having) no self-understanding, no parameters, no extra-legal presuppositions or commitments.").

83. Estudio del Matrimonio, *supra* note 69, at 27 (emphasis added).

84. Jordan Herman, Comment, *The Fusion of Gay Rights and Feminism: Gender Identity and Marriage After* Baehr v. Lewin, 56 Ohio St. L.J. 985, 999 (1995) ("[R]ecognition of companionate same-sex couples would effect a redefinition of

section of Article 32, but the law is only fit to act within the scope expressly defined in section 2 of the Article.

IV. The Characteristics that Define Marriage as a Juridical Institution

The matrimonial institution is defined, in a universal way, by three characteristics that have been native to western legal systems since Roman times: (1) the union of a man and a woman; (2) that is characterized by stability; and (3) is guided towards the good of both spouses as well as towards procreation.[85] These defining characteristics of marriage, which are common to the Western legal tradition, are brought together by the principal international human rights instruments.[86] Marriage only exists in the presence of these three elements, which determine the existence of a social interest and give legal form to the affective union of two people.[87]

The mere union of two people, as much as it leads to the good of both, does not directly benefit society.[88] Thus, beyond the strictly private obligations of mere commutative justice, such unions are not governed by the judicial order.[89] The same is worth mentioning of the sexual union of a man and woman when it leads to procreation. This union will generate obligations for the progenitors (e.g., the nourishment of the child), and of the progenitors among each other. However,

marriage and family and a radical change from our modern social norms toward those of less rigid societies.").

85. *See* Congregation for the Doctrine of the Faith, *Considerations regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (June 3, 2003), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

86. *See, e.g.*, International Covenant on Civil and Political Rights art. 23, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

87. *See* Congregation for the Doctrine of the Faith, *supra* note 85 ("Because married couples ensure the succession of generations and are therefore eminently within the public interest, civil law grants them institutional recognition.").

88. *Id.* ("Homosexual unions, on the other hand, do not need specific attention from the legal standpoint since they do not exercise this function for the common good.").

89. *See* Roberto Rosas, *Matrimonial Consent in Canon Law Juridical Aspects*, 43 Rev. Jur. U.I.P.R. 419, 437 (2009) ("[T]he rights-obligations between husband and wife, in as much as they proceed from the stipulated contract between them at marriage, are rights and obligations of pure commutative justice.").

these obligations will be of a private nature deriving from commutative justice.[90]

It is the stability expressed when giving public consent to an ensemble of rights and obligations that transforms a union into the legal institution culturally known from time immemorial as "marriage." This legal institution is the appropriate framework for the constitution of the family, the basic cell of human community in which new members come into being and are formed and educated.[91] In this way, stability, progress, and the very subsistence of political society depends on the vitality of the marital and familial institution.

The words of Pope Benedict XVI synthesize the challenge facing contemporary society:

> In today's ethics and philosophy of Law, petitions of juridical positivism are widespread. As a result, legislation often becomes only a compromise between different interests: seeking to transform private interests or wishes into law that conflict with the duties deriving from social responsibility.
>
> In this situation it is opportune to recall that every juridical methodology, be it on the local or international level, ultimately draws its legitimacy from its rooting in the natural law, in the ethical message inscribed in the actual human being.
>
> Natural law is, definitively, the only valid bulwark against the arbitrary power or the deception of ideological manipulation.[92]

Testifying to the truth of man and the dignity of reason before this arbitrary power in order to fix political coexistence is the major service to the common good that jurists of the twenty first century can undertake and realize.

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90. *Id.*

91. *See* George Brown, *The Revival of Marriage: A Policy for Church and State. Part 1*, 116/117 Law & Jus. Christian L. Rev. 36, 37 (1993).

92. Pope Benedict XVI, Address at the International Congress on Natural Moral Law (Feb. 12, 2007), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/february/documents/hf_ben-xvi_spe_20070212_pul_en.html.