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Carlos A. Ball

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COMMUNITARIANISM AND GAY RIGHTS

Carlos A. Ball†

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INTRODUCTION

Liberals and communitarians have been holding a lively debate in political theory circles over the last few years.¹ Communitarians are critical of the priority that liberals give to individual rights; although communitarians do not deny that rights are important,² they do question whether a society should emphasize individual rights over

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² See Philip Selznick, The Idea of a Communitarian Morality, 75 CAL. L. REV. 445, 454 (1987) (“A communitarian morality is not rights-centered, but it is not opposed to rights or indifferent to them or casual about them.”).
Communal norms and responsibilities when confronting difficult questions of political morality and justice. Communitarians believe that the liberal focus on rights leads to the separation and displacement of individuals from the communities to which they belong. According to communitarians, rights are not preexisting, universal principles that are logically prior to community; instead, rights are internal to the shared traditions and understandings of particular societies.

Communitarians also question the liberal conception of state neutrality that seeks to separate the right from the good. State neutrality regarding different, and often conflicting, conceptions of what constitutes a "good life" is important to liberals because it allows individuals to choose the lives that they think are best for them. A state that is neutral as to ends does not impose its version of the good on its citizens. An impartial state also acts as a neutral arbiter in resolving disputes among citizens. Thus, liberals demand that the state separate issues of morality from political debates and definitions of rights. In other words, we must define rights prior to, and independently of, the good.

Communitarians believe that the separation between the right and the good is largely illusory. The state constantly chooses among

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4 See infra Part III.A (discussing the work of Michael Walzer); see also Mary Ann Glendon, Rights Talk: The Imposition of Political Discourse 137-38 (1991) ("The myriad associations that generate social norms are the invisible supports of, and the sine qua non for, a regime in which individuals have rights."); 2 Charles Taylor, Philosophical Papers: Philosophy and the Human Sciences 206 (1985) (arguing, in rejecting the primacy of individual rights, "that the free individual of the West is only what he is by virtue of the whole society and civilization which brought him to be and which nourishes him"); Christopher J. Berry, Shared Understanding and the Democratic Way of Life, in Democratic Community, supra note 1, at 67, 73 ("[T]o communitarians [a] recourse to rights [as trumps] rests on a false prioritisation. The idea of individuals as ipso facto possessors of rights only makes sense in terms of some supposed extra-communal circumstance, a Lockean State of Nature for example, within which 'rights' enjoy some special status.").

5 See Bruce A. Ackerman, Social Justice in the Liberal State 359-78 (1980); John Rawls, Political Liberalism 192-94 (1993); see also Allen E. Buchanan, Assessing the Communitarian Critique of Liberalism, 99 Ethics 852, 854 (1989) ("[If the state enforces the basic civil and political rights it will leave individuals free, within broad limits, to pursue their own conceptions of the good and will preclude itself from imposing upon them any one particular conception of the good or of virtue."). Ronald Dworkin has retreated from his former position that a strict neutrality among different conceptions of the good must be at the core of liberalism. See Ronald Dworkin, A Matter of Principle 205-13 (1985).

6 See Rawls, supra note 5, at 213-54.

7 See, e.g., Alasdair MacIntyre, The Privatization of Good: An Inaugural Lecture, in The Liberalism-Communitarianism Debate, supra note 1, at 1, 1. MacIntyre cites Thomas Aquinas and Aristotle for the proposition that we can only understand the right in the light afforded by the good. The good for the members of each species is that end to which, qua members of that species, those members move in achieving their specific perfection.
different priorities depending on what is good for its citizens; even the judicial branch often makes difficult constitutional decisions by engaging in arguments and assessments about morality and human values. Communitarians argue that liberalism's purported neutrality is problematic because it obscures the fact that even the liberal state constructs and promotes a particular moral framework, namely, one that places individual freedom and autonomy at the top of society's normative hierarchy.

Communitarians, then, believe that it is entirely proper for the state to promote particular conceptions of the good. Communitarians ask that the state cultivate certain values, such as civic virtue, self-respect, and social responsibility, which encourage individuals to participate actively in their own communities and self-government. A truly just and democratic society is created when individuals are active participants in the many communities to which they belong. This sense of communal participation and belonging promotes individual freedom and a true connection with, and responsibility toward, others.

The rules for right action for rational animals are those rules intentional conformity to which is required if their specific perfection is to be achieved.

Id.

8 See infra Part II.A (discussing the work of Michael Sandel); see also GLENDON, supra note 4, at 154 ("Nearly all constitutional cases that reach the Supreme Court are hard cases: they almost always involve choices between positions that are well supported by weighty moral as well as legal arguments.").

9 See, e.g., Thomas Moody, Some Comparisons Between Liberalism and Eccentric Communitarianism, in The Liberalism-Communitarianism Debate, supra note 1, at 91, 96. Moody argues that

[w]e must recognize that liberal neutrality is a myth—any social order will favor some forms of life over others . . . . [T]he issue cannot be posed as if communitarianism were threatening liberty by favoring a form of life while liberalism had the reassuring virtue of being neutral among them. . . . [T]he question [then] becomes: to what extent should a polity favor a form of life and what form of life should a polity favor?

Id.; see also Michael J. Sandel, Introduction, in Liberalism and Its Critics, supra note 1, at 1, 1 ("Toleration and freedom and fairness are values too.").

10 See, e.g., Markate Daly, Introduction, in COMMUNITARIANISM: A NEW PUBLIC ETHICS, supra note 1, at xvii. Daly argues that “[i]nstead of such values as individual interests, autonomy, and universality, natural rights, and neutrality, communitarian philosophy is framed in terms of the common good, social practices and traditions, character, solidarity, and social responsibility.” Id.

11 See Markate Daly, Preface, in COMMUNITARIANISM: A NEW PUBLIC ETHICS, supra note 1, at ix. According to Daly, the communitarian conception of human life gives rise to a distinctive set of concepts and values, and leads to a different vision of a good society. [Communitarians] believe that in order to do justice to the importance of social relationships, philosophy must be formulated in such terms as the common good, commitment to particular others, social practices, shared meanings, and public spiritedness, rather than in terms of traditional liberalism.

Id.; see also John W. Chapman & Ian Shapiro, Introduction, in DEMOCRATIC COMMUNITY, supra note I, at 1, 2 ("According to the communitarians, unless the virtues and demands of
Commentators have paid little attention to how the ongoing debate between liberals and communitarians impacts gay rights issues. In fact, the liberal prism of individual rights largely defines the political and legal debates involving gay men and lesbians in the United States. Whether debating sodomy statutes, employment discrimination, or same-sex marriage, gay men and lesbians (and their supporters) have framed the discussion around the right of privacy, or the right to be free from discrimination, or the right to marry. Although the gay rights movement (as its very name suggests) has remained tied to a discourse of individual rights, other intellectual and political movements on the left side of the American political spectrum have become quite disenchanted with liberalism in general and “rights talk” in particular. Many feminists, critical legal scholars, and critical race theorists complain about the inherent limitations of liberalism that result from its emphasis on what is perceived to be a list of unstable and indeterminate rights that are largely, it is argued, defined through the exercise of political power. In contrast, gay rights scholars and advocates have not expressed that same disenchantment with liberalism and individual rights.

With the important exception of feminists, most proponents of gay rights are, from a political theory perspective, liberals. Some scholars on the “left” side of the gay rights movement promote a politics of liberation based on individual autonomy and freedom of expression and sexuality, with few if any public or private restraints.

community can gain precedence over individualistic aims and opportunism, at least some if not most of the time, the social and cultural ingredients of a viable political and economic order cannot flourish.


The term gay rights presupposes a liberal paradigm that focuses mostly on the rights of individuals. In order to mitigate as much as possible the effects of a pre-determined, liberal theoretical framework, this Article employs the term gay rights not in the narrow sense of enforceable trumps that thwart majoritarian goals, see Ronald Dworkin, Taking Rights Seriously at xv (1977), but in a broader sense, namely as shorthand for important issues to gay men and lesbians. When I use the term gay rights, I include the interests of both gay men and lesbians.

See, e.g., Policing Public Sex: Queer Politics and the Future of AIDS Activism (Ephen Glenn Colter et al. eds., 1996); Michael Bronski, Behind the Sex Panic! Debate, Harv. Gay & Lesbian Rev., Spring 1998, at 29. The recent debate within the gay community over whether the government should regulate public establishments where some gay men engage in sexual conduct that can lead to the transmission of HIV illustrates this point. The sexual liberationists have rejected the criticisms of some gay commentators regarding the sexual conduct of some gay men as a dangerous effort to repress sexual freedom. See Caleb Crain, Pleasure Principles: Queer Theorists and Gay Journalists Wrestle Over the Politics of Sex, Lingua Franca, Oct. 1997, at 27; Sheryl Gay Stolberg, Gay Culture Weighs Sense and Sexuality,
Others, such as Andrew Sullivan, who are considered to be on the "right" side of the movement, although not sexual liberationists, are still liberals because they believe in the primacy of rights and the neutrality of the state.\textsuperscript{15}

Of course, feminist political theory offers one possible alternative to the moral and political ideas that liberalism promotes. In fact, many scholars have written about the beneficial insights feminist principles contribute to the understanding of how society views and regulates gay men and lesbians.\textsuperscript{16} Communitarianism, like feminism, provides an important alternative to liberalism. Surprisingly, the existing gay rights literature contains little discussion regarding the communitarian critique of liberalism. This Article explores how communitarianism fares as a theoretical foundation for gay rights positions.

It is difficult to discuss justice and equality in the United States without emphasizing individual rights. Any social movement that seeks to protect and advance the interests of minorities must contend with the reality that individualism and respect for human autonomy remain a fundamental part of American ideals regarding justice and equality.\textsuperscript{17} At the same time, however, one must view the freedom


\textsuperscript{17} See Shane Phelan, Identity Politics: Lesbian Feminism and the Limits of Community 149 (1989). Phelan suggests that [e]ven as they challenge liberalism, American social movements draw on the strength of the liberal appeal to rights and autonomy. Those who appeal to other traditions are often moving, their voices a powerful contrast to
guaranteed by liberal rights to autonomy in conjunction with the con-
tribution to freedom and dignity that marginalized individuals, such
as gay men and lesbians, receive from the communities to which they
belong. These communities act as buffers between individual homo-
sexuals and the broader, and often hostile, society. Furthermore,
these communities provide gay men and lesbians with the human ties
and bonds that can help them flourish and lead lives of pride and
dignity. As this Article seeks to show, the priorities of traditional
liberalism—namely, individualism, autonomy, and the separation of
the moral from the political—do not fully capture the complexity of
the issues of justice that homosexuality raises in our society. Thus,
theoreticians of gay rights must incorporate the value of community
and the role of social encumbrances and attachments into the liberal
theories that have been at the core of gay rights positions for many
years. It is for this reason that an exploration of communitarian ideals
and values from a gay rights perspective is both appropriate and
essential.

This Article does not suggest, however, that communitarianism
replace liberalism as the theoretical foundation for gay rights. As this
Article will demonstrate, communitarianism has its own serious limita-
tions when applied to gay rights issues. Thus, the Article instead seeks
to distinguish the valid from the invalid in the communitarian critique
of liberalism in order to explore how to strengthen liberalism while
making it more relevant to the lives of gay men and lesbians. As
Shane Phelan accurately notes, gay rights scholars "must look, not for
theory that abandons liberalism, but for theory that builds on it, using
the parts we cannot dispense with and working to transform them so
as to foster a freer order than liberalism can, in fact, endorse or
deliver." 19

Before addressing communitarianism from a gay rights perspec-
tive, a brief discussion of gay rights from the perspective of the para-
digmatic liberalism of John Rawls serves as a useful background.
Many contemporary communitarians have responded to Rawls's
highly influential ideas. 20 While his ideas are well-known and need
not be repeated here, Rawls has recently discussed—for the first
time—how issues of gay rights fit within his conception of political

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Id.

18 See infra notes 142-55 and accompanying text.
19 PHELAN, supra note 17, at 149. Phelan's discussion refers to lesbians, yet in my
estimation, it also applies to gay men.
20 See MULHALL & SWIFT, supra note 1, at 1 ("[C]ommunitarian critics . . . have formu-
lated their positions in terms that make explicit reference to [Rawls's] theory, so that in
many ways Rawls . . . define[s] the agenda.").
liberalism. Part I of this Article, therefore, evaluates Rawls's assessment of gay rights issues and explains why his ideas offer an incomplete vision of how to conduct a debate over gay rights.

The limitations of Rawls's paradigmatic liberalism lead to an assessment of how communitarianism fares as a theoretical foundation for gay rights positions. Instead of discussing communitarianism in general, however, this Article evaluates, from a gay rights perspective, the writings of two leading American communitarian thinkers: Michael Sandel and Michael Walzer. These two scholars represent different strands in contemporary communitarian thinking: Sandel's communitarianism is republican in nature while Walzer's model is egalitarian.

Sandel's brand of communitarianism strives toward a particular normative goal: the promotion of greater civic virtue and participation by citizens in their own self-government. According to Sandel, this civic republican conception of the good should be at the center of American political philosophy and constitutional jurisprudence. Part II of this Article discusses how the experiences of gay men and lesbians reflect Sandel's emphasis on the role of community in the formation of individual identity, and his corresponding critique of the atomistic individual in liberal political philosophy. Sandel's conception of community highlights liberalism's failure to pay sufficient attention to the role that communities play in helping marginalized individuals attain personal freedom. Sandel, however, calls for the promotion and strengthening of what he labels "constitutive communities": those communities into which people are born, such as nation, family, and church. Sandel largely ignores communities formed

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22 In addition to choosing Sandel and Walzer because they represent different strands of communitarian thinking, I chose Sandel because he discusses homosexuality to a greater extent than any other communitarian theorist. See infra note 136 and accompanying text. I chose Walzer because he has developed the most comprehensive theory of justice of any contemporary American communitarian political thinker. See infra Part III.A.

While Walzer and Sandel are two of the most prominent contemporary communitarian philosophers, their views by no means represent the totality of Anglo-American communitarian thought. See generally Robert Booth Fowler, The Dance with Community (1991) (discussing similarities and differences among different manifestations of communitarianism including "participatory," "republican," and "religious"). Other contemporary thinkers whom commentators often label as communitarians include, inter alia, Amitai Etzioni, Alasdair MacIntyre, and Charles Taylor. With the exception of Etzioni, none of the leading communitarians—including Sandel and Walzer—use that term to describe themselves. See Mulhall & Swift, supra note 1, at xv.
23 See infra Part II.A.2.
24 See infra Part II.A.
25 See infra notes 142-63 and accompanying text.
26 See infra notes 164-67 and accompanying text.
through the voluntary choices of individuals. 27 It is these communities of choice, however, that play the largest role in the formation of the homosexual identity of gay men and lesbians. 28 In addition, these communities protect gay men and lesbians from some of the oppression emanating from the larger society. 29

Furthermore, Sandel’s civic republicanism calls for a theory of constitutional interpretation that is incompatible with this country’s institutional need to protect the autonomy and interests of unpopular and marginalized minorities. 30 Ultimately, Sandel’s political philosophy does not sufficiently respect the normative value of autonomy and free choice; as a result, his theory is ultimately incompatible with the interests of gay men and lesbians. 31

While Sandel has particular normative ends in mind, Michael Walzer is more neutral as to ends. Walzer believes that normative goals regarding that which is just and right are inextricably linked to a society’s shared traditions. For Walzer, the key to justice is what he calls “complex equality”: a form of equality concerned with the distribution of social goods according to criteria that the goods’ social meanings determine. Walzer contends that tyranny and unjust inequality arise when society uses distributive criteria (e.g., money or faith) to distribute social goods across political, economic, and social spheres.

Walzer has not applied his theory of justice to gay rights issues. Part III illustrates how Walzer’s emphasis on the social meanings and roles of institutions and goods can help to explain why the exclusion of gay men and lesbians from some of those institutions and goods (e.g., marriage and parenting) is unjust. 32 One must keep in mind, however, that applying Walzer’s theory of justice to gay rights issues produces results that are not terribly different from the results reached through the application of liberal theory. Despite this similarity, the breadth and scope of Walzer’s ideas are fascinating: his theory facilitates a full engagement of the normative traditions and values that are at stake in our society’s legal and political deliberations regarding homosexuality. Furthermore, Walzer allows for a discourse on gay rights issues that goes beyond a mere determination of the appropriate level of state interference in the lives of individuals. In contrast, liberal theory’s separation of the moral from the political and almost exclusive focus on the dichotomy between the individual

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27 See infra notes 168-73 and accompanying text.
28 See infra notes 174-80 and accompanying text.
29 See infra notes 142-55 and accompanying text.
30 See infra Part II.B.2.
31 See infra notes 208-12 and accompanying text.
32 See infra Part III.B.
and the state often fail to account for the broader societal and communal contexts in which discussions of justice and gay rights occur.

Walzer's theory, however, has its own limitations from a gay rights perspective. Ultimately, resolving contentious issues involving gay men and lesbians and their relationships solely through the application of Walzer's notion of "shared traditions" may not be possible because, as the debate over same-sex marriage illustrates, a society may have conflicting internal traditions. For example, an internal societal analysis of marriage cannot easily reconcile the view that emphasizes free choice and love as the appropriate distributive criteria (to use Walzerian terminology) with the view that a person should only choose a spouse of the opposite gender.33

Furthermore, like most communitarian theories, Walzer's theory has no antecedent commitment to autonomy. In fact, Walzer rejects the idea of philosophical norms that are antecedent to other societal norms.34 In the same way that gay men and lesbians should approach Sandel's ideas cautiously, they should be wary of a theory of political morality that does not contain the necessary protections against shifting majoritarian norms.35

Thus, the communitarian critique of liberalism is a mixed enterprise from a gay rights perspective. While both Sandel and Walzer make important points about the limitations of liberalism, their respective brands of communitarianism have their own limitations. In light of the foregoing limitations, Part IV argues that the best theoretical foundation for gay rights positions is a modified form of liberalism, which acknowledges the valid communitarian critiques proposed by Sandel and Walzer, yet remains committed to traditional liberal values such as the protection of individual autonomy and freedom.

I

RAWLSIAN LIBERALISM AND GAY RIGHTS

The liberalism of John Rawls may appear at first glance to be a well-suited theoretical foundation for gay rights positions, given that it prioritizes the right over the good within a paradigm of public reasoning that separates moral values from political discourse. Gay men and lesbians may instinctively prefer a theory of justice that brackets out moral arguments from political discourse, perhaps believing that they

33 See infra Part III.B.1.
35 See infra notes 362-66 and accompanying text.
cannot win those arguments in the face of majoritarian opposition. Rawls's vision of public reason and the need for moral bracketing, however, is ultimately too thin to support a coherent and convincing argument in favor of gay rights positions.

Rawls defines public reason in a democracy as "the reason of its citizens, of those sharing the status of equal citizenship. The subject of their reason is the good of the public: what the political conception of justice requires of society's basic structure of institutions, and of the purposes and ends they are to serve." Rawls's view of public reason is consistent with his original position heuristic, which posits that citizens who do not know their individual characteristics or their places in society's economic and social hierarchies would serve as the optimal prototypes for establishing fundamental principles of justice. As citizens move from the original position to later stages in the creation of a well-ordered society, they can gradually lift the veil of ignorance. Even when citizens are at the last stage of the process, when they publicly debate particular policy issues within an established constitutional system, Rawls still calls for a separation between political values, which go to the right, and nonpolitical normative and moral values, which go to the good. Rawls explains that this separation protects the political discourse and democratic process, as well as individuals, from majoritarian definitions of the good.

Recently, Rawls elaborated on his conception of public reason as he addressed gay rights issues for the first time. Rawls would limit the public reasoning of government officials, and of citizens in the process of electing the officials, to those political values that underlie reasonable yet incompatible comprehensive doctrines. These

37 Rawls, supra note 5, at 213.
39 See id. at 195-99.
40 See Rawls, supra note 5, at 212-54.
41 See Rawls, supra note 21, at 779-80, 788 n.60.
42 See id. at 768-71. While Rawls first notes that the restrictions that his conception of public reason imposes are applicable to judges, government officials, and candidates for public office, see id. at 767, the same restrictions ultimately apply to citizens when voting for their representatives: "We say that ideally citizens are to think of themselves as if they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact." Id. at 769.
43 See id. at 766-68. There are two caveats to Rawls's limitations on public reasoning. The first is that the limitations apply to political discourse and not to what he calls "background culture"—nonpolitical fora such as "churches and associations of all kinds, and institutions of learning at all levels, especially universities and professional schools, scientific and other societies." Id. at 768 n.18. The second caveat is what he calls "the [public reasoning] proviso," which permits "reasonable comprehensive doctrines, religious or nonreligious, [to] be introduced in public political discussion at any time, provided that in due course proper political reasons—and not reasons given solely by comprehensive doc-
limitations are necessary because citizens with vastly different and comprehensive moral, philosophical, and religious views can only use political values that are part of an overlapping consensus to justify to each other the use of political power. Public reason allows for the "exercise of political power... only when we sincerely believe that the reasons we would offer for our political actions... are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons." Citizens, then, abide by the limitations that public reason imposes, when there is true reciprocity, namely, when other citizens accept the same limitations, even if this abidance results in the abandonment of political goals that their comprehensive doctrines deem necessary.

When Rawls gives examples of how the limitations he imposes on public reason would operate in practice, he mentions same-sex marriages while discussing "the state's interest in the family and human life." When a society debates deeply-disputed topics involving the family, human life, and sexual orientation, Rawls advocates limiting the debate to the relevant political values that support and regulate, in an ordered way, the institutions needed to reproduce political society over time. This ordered support and regulation rests on political principles and values, since political society is regarded as existing in perpetuity and so as maintaining itself and its institutions and culture over generations. Given this interest, the government would appear to have no interest in the particular form of family life, or of relations among the sexes, except insofar as that form or those relations in some way affect the orderly reproduction of society over time. Thus, appeals... against same-sex marriages, as [being] within the government's legitimate interest in the

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44 Rawls cites "[e]xamples of political values [that] include those mentioned in the preamble to the United States Constitution: a more perfect union, justice, domestic tranquility, the common defense, the general welfare, and the blessings of liberty for ourselves and our posterity." Id. at 776.
45 See id. at 771, 776.
46 Id. at 771.
47 See id. at 770. According to Rawls, citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and when they agree to act on those terms, even at the cost of their own interests in particular situations, provided that other citizens also accept those terms.
48 Id. at 779.
family, would reflect religious or comprehensive moral doctrines [and would thus be improper].\textsuperscript{49}

While Rawls's limitations on public reason seem to favor gay rights positions, a troubling disparity exists between his theoretical model and the actual debates over gay rights in our society. The debate regarding same-sex marriage, for example, is at its core about whether the state should recognize committed same-gender relationships as equal to committed opposite-gender relationships. The fundamental disagreement is whether same-gender unions deserve the same amount of recognition and support as heterosexual unions.\textsuperscript{50} This dispute opens up a myriad of normative issues including (1) the instrumental role of marriage in encouraging loyalty and stability in human relationships, (2) the interrelationship between marriage and the raising of children, and (3) the unitive and normative value of marriage for the two individuals involved.\textsuperscript{51} When Rawls asks parties on both sides of the debate to limit their public reasoning to the political values necessary for the reproduction of society,\textsuperscript{52} he requests that they confine themselves to issues that seem at best tangential to the controversy.\textsuperscript{53} This is particularly true given that Rawls wants to exclude from the political debate not only moral and philosophical arguments based on religious views, but also secular arguments that citizens make "in terms of comprehensive nonreligious doctrines,"\textsuperscript{54} even when those arguments are "reflective and critical, publicly intelligible and rational."\textsuperscript{55}

\textsuperscript{49} Id. (emphasis added). Elsewhere in his article, Rawls makes the point that "[t]he family must ensure the nurturing and development of . . . citizens [who have a sense of justice and the political virtues that support political and social institutions] in appropriate numbers to maintain an enduring society." Id. at 788. In an accompanying footnote, Rawls adds that

no particular form of the family (monogamous, heterosexual, or otherwise) is required by a political conception of justice so long as the family is arranged to fulfill these tasks effectively and doesn't run afoul of other political values. Note that this observation sets the way in which justice as fairness deals with the question of gay and lesbian rights and duties, and how they affect the family. If these rights and duties are consistent with orderly family life and the education of children, they are, \textit{ceteris paribus}, fully admissible.

\textit{Id.} at 788 n.60.

\textsuperscript{50} See Ball, supra note 36, at 1875-77; Chai R. Feldblum, The Normative Good of Same-Sex Marriage (Jan. 5, 1998) (unpublished manuscript, on file with author).

\textsuperscript{51} See Ball, supra note 36, at 1877-78.

\textsuperscript{52} See supra note 49 and accompanying text.

\textsuperscript{53} Rawls's \textit{proviso} allows for the incorporation of comprehensive doctrines into the political debate as an initial matter. \textit{See supra} note 43. Eventually, however, these comprehensive doctrines must find a common ground within the narrower political values that political liberalism allows. \textit{See id.}

\textsuperscript{54} Rawls, supra note 21, at 775.

\textsuperscript{55} \textit{Id.} at 780. Rawls posits that
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For example, asking gay men and lesbians to justify a societal recognition of same-sex marriage primarily on the need of the political society to reproduce itself, in order, presumably, to attain the necessary reciprocity from opponents of gay rights, is awkward, given that one of the main arguments against same-sex marriage is that neither two men nor two women can engage in reproduction. By limiting the appropriate boundaries of political discourse involving same-sex marriage to the issue of reproduction, Rawls unintentionally joins hands with natural law thinkers who argue that reproductive acts are a fundamental part of marriage. While it is true that Rawls speaks of the reproduction of society and not of individuals per se, society cannot reproduce unless its members procreate. As Rawls acknowledges, the family plays a crucial role in society because it is "the basis of the orderly production and reproduction of society and its culture from one generation to the next."

Thus, Rawls's limits on public reason would not necessarily create an overlapping consensus on so-called political values that gay men and lesbians could accept. Similarly, the conservative opponents of a central feature of political liberalism is that it views all... arguments [based on comprehensive nonreligious doctrines] the same way it views religious ones, and therefore these secular philosophical doctrines do not provide public reasons. Secular concepts and reasoning of this kind belong to first philosophy and moral doctrine, and fall outside of the domain of the political.

Amy Gutmann and Dennis Thompson provide a helpful contrast to Rawls's vision of public reasoning. In their argument for greater deliberation in American democracy, Gutmann and Thompson acknowledge that moral arguments have a role to play in political discourse, even though some of those arguments will ultimately be irreconcilable: "Citizens are more likely to recognize what is morally at stake in a dispute if they employ moral reasoning in trying to resolve it. Deliberation helps sort out self-interested claims from public-spirited ones. Among the latter, deliberation helps identify those that have greater weight." Id. at 43. While it is true that "[m]oral argument can arouse moral fanatics... it can also combat their claims on their own terms." Id. at 44. In the end, Gutmann and Thompson call for an extension of "the domain of deliberation." Id. Rawls does not approve of Gutmann and Thompson's approach; he states, without elaboration, that it "seems to work from a comprehensive doctrine." Rawls, supra note 21, at 770 n.19.


See supra note 49 and accompanying text.

Rawls, supra note 21, at 788.

For a more optimistic gay rights perspective on the value of Rawls's limitations on public reason as they apply to same-sex marriage, see Linda C. McClain, Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage, 66 Fordham L. Rev. 1241, 1248-52 (1998). While Rawls's limits on public reason are understandably appealing to liberal supporters of gay rights, those limits are ultimately too convenient. The limits permit those of us who are liberal supporters of gay rights to emphasize our values, such as tolerance and autonomy, while characterizing our opponents' values as beyond the permissible boundaries of public reason because those values are based on "comprehensive doctrines."
gay rights are not likely to abide by the limitations on public reason that political liberalism requires. This failure of reciprocity suggests that Rawls incorrectly believes that his political values can create an overlapping consensus among most participants in the same-sex marriage debate. In an attempt to separate political values from moral ones, Rawls excludes most of the real-life participants and their real-life concerns. What remains, as communitarians like to point out, is a rather sterile account of a debate over policy and rights that has no correspondence to people’s real lives or their commitments and attachments to their nonpolitical communities. This account asks individuals to separate what they believe is good and valuable in their lives and communities from what they believe is fair and just as a matter of public policy.

After recognizing that citizens inevitably include notions of the good and valuable in their public reasoning, the next crucial step is to understand how individuals develop these notions and to determine what their role should be in public policy discussions involving issues of justice. Communitarians argue that the myriad of communities to which individuals belong (e.g., families, schools, churches, and neighborhoods) play a crucial role in the formation of that which individuals believe is good, valuable, and just. Unlike Rawls, who purposefully seeks to separate political citizens from the values they hold as members of nonpolitical communities, communitarians advance the view that political citizens are fully embedded in the shared traditions and norms of their nonpolitical communities. Communitarians argue that individuals in the real world do not exist prior to their ends or make moral or political decisions that involve questions of justice disconnected from their ties to other human beings.

60 See Robert P. George, Public Reason and Political Conflict: Abortion and Homosexuality, 106 YALE L.J. 2475, 2495-2501 (1997); see also Feldblum, supra note 50, at 15 (“[I]f a significant number of lawmakers make legislative decisions based on their personal normative and moral assessments, the fact that advocates of liberal neutrality can cleverly sidestep such assessments may mean [simply] that such advocates have retreated from the battlefield on which the real war is being waged.”) (footnote omitted)).


62 See infra notes 63-66, 162-67 and accompanying text.

63 Christopher Lasch argues that the dispute between communitarians and liberals hinges on opposing conceptions of the self. Where liberals conceive of the self as essentially unencumbered and free to choose among a wide range of alternatives, communitarians insist that the self is situated in and constituted by tradition, membership in a historically rooted community. Christopher Lasch, The Communitarian Critique of Liberalism, in COMMUNITY IN AMERICA: THE CHALLENGE OF HABITS OF THE HEART 173, 174-175 (Charles H. Reynolds & Ralph V. Norman eds., 1988); see also Jean Bethke Elshtain, The Communitarian Individual, in NEW COMMUNITARIAN THINKING, supra note 1, at 99, 105 (arguing that unlike “the standpoint of
Instead, individuals have many ties of friendship, obligation, and loyalty, which give them their sense of identity and bind them inextricably to the lives and well-being of others. These ties, which communitarians contend liberals like Rawls largely ignore, provide the best understanding of what holds communities together and creates the necessary conditions for freedom and justice. According to communitarians, a theory of political morality is seriously flawed if it does not consider the role that the links among human beings play in establishing and promoting justice and equality. Communitarians argue, then, that a vision of individuals inextricably linked to their communities is consistent with the descriptive reality of most people’s lives and appropriate as an ideal to which a theory of political morality and democracy should aspire. The remainder of this Article explores whether this communitarian vision, which Michael Sandel and Michael Walzer present in different ways, provides a viable theoretical foundation for gay rights positions.

II

MICHAEL SANDEL AND THE ROLE OF COMMUNITY

In the introduction to the second edition of his book *Liberalism and the Limits of Justice*, Michael Sandel argues that some commentators improperly group two critiques of liberalism under the heading extreme individualism, with its thin view of the self, the [communitarian] self is ‘thick,’ more particularly situated, a historical being who acknowledges that he or she has many debts and obligations and that one’s history and the history of one’s society frame one’s own starting point.

64 See generally Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (1985) (analyzing the results of four research projects that studied how love and marriage, psychotherapy, voluntary associations, and political organizations affect the private and public lives of individuals).

65 See, e.g., *The Communitarian Challenge to Liberalism*, supra note 1, passim.

66 See *Glendon*, supra note 4, at 137. Glendon notes that [g]roups are important, not for their own sake, but for their roles in setting the conditions under which individuals can flourish and order their lives together. Because individuals are partly constituted in and through their relationships with others, a liberal politics dedicated to full and free human development cannot afford to ignore the settings that are most conducive to the fulfillment of that ideal. In so doing, liberal politics neglects the conditions for its own maintenance.

Id. The communitarian critique of liberalism “illustrate[s] the consequences for political discourse of assuming situated selves rather than unencumbered selves. [Communitarians] see[ ] political discourse as proceeding within the common meanings and traditions of a political community, not appealing to a critical standpoint wholly external to those meanings.” Sandel, supra note 9, at 10; see also Moody, supra note 9, at 97 (“[C]ommunitarianism sees public life as a constitutive feature of human identity, and thus a necessary part of a good life . . . not simply as an instrument for purely private ends. Liberalism has few, if any, conceptual tools to describe or justify such a view of the public realm.”).
of communitarianism. Sandel contends that both critiques seek to link the right (or justice) to the good, but they do so in different ways. The first "holds that principles of justice derive their moral force from values commonly espoused or widely shared in a particular community or tradition." It is this vision, which as we will see in Part III is promoted by Michael Walzer, that according to Sandel is properly labeled communitarian, because under it, "arguments always take the form of recalling a community to itself, of appealing to ideals implicit but unrealized in a common project or tradition."

According to Sandel, the second way of linking justice to the good is not so much "strictly speaking, communitarian" as it is "perfectionist":

[This second method] holds that principles of justice depend for their justification on the moral worth or intrinsic good of the ends they serve. On this view, the case for recognizing a right depends on showing that it honors or advances some important human good. Whether this good happens to be widely prized or implicit in the traditions of the community would not be decisive.

Sandel categorizes the first method of linking justice to the good as "insufficient" because "[t]he mere fact that certain practices are sanctioned by the traditions of a particular community is not enough to make them just." The limits of liberalism are similar because it "tr[ies] to avoid passing judgment on the content of the ends that rights promote." As an alternative, Sandel proposes "that rights [should] depend for their justification on the moral importance of the ends they serve."

The main thrust of Sandel's argument in *Liberalism and the Limits of Justice* is a critique of Rawlsian liberalism; he criticizes Rawlsian liberalism for, among other things, its Kantian view of the individual as an unencumbered self that is disconnected from its ends and its communities. Sandel argues that the "Rawlsian self is . . . an antecedently individuated subject, standing always at a certain distance from the interests it has."

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68 See id. at xi.
69 Id.
70 Id. at x.
71 Id.
72 Id.
73 Id.
74 Id.
75 Id. at 62. According to Sandel, this view of the self rules out the possibility of any attachment . . . able to reach beyond our values and sentiments to engage our identity itself. It rules out the possibility of a public life in which, for good or ill, the identity as well as the interests of the participants could be at stake. And it rules out the possibility

A. The Civic Republicanism of Michael Sandel

While Sandel's critique of liberalism in *Liberalism and the Limits of Justice* was mostly conceptual, his more recent work provides a detailed review of American history, culture, and Supreme Court jurisprudence. The American nation, Sandel argues, has come to define itself as a liberal procedural republic, constructed on a voluntarist vision of personhood that does not concern itself with particular ends but with the capacity of individuals to choose their own ends. According to this vision, the procedural republic aims to enforce and promote individual rights of autonomy and does not require its citizens to abide by agreements that they do not choose voluntarily.

In contrast to the procedural republic promoted by liberalism, civic republicanism is very much concerned with a particular end, namely, greater self-government by citizens.

Instead of defining rights according to principles that are neutral among conceptions of the good, republican theory interprets rights in the light of a particular conception of the good society—the self-governing republic. In contrast to the liberal claim that the right is prior to the good, republicanism thus affirms a politics of the common good.

that common purposes and ends could inspire more or less expansive self-understandings and so define a community in the constitutive sense, a community describing the subject and not just the objects of shared aspirations.

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76 Sandel, supra note 61.
77 See id.
78 See id. at 4.
79 See id.
80 Id. at 25. Robert Fowler has summarized the views of civic republicans as follows: [They] share a vision of a polity where the common good rules and public concerns triumph over the goals of the self-interested individual. The ideal is a place where citizens are united in public action and public spiritedness, reinforced by a rough equality, common respect, and basic human virtues, above all where ‘disinterested regard for the welfare of the whole [or] civic[al] virtue,’ holds sway.


Civic republicanism and its role in constitutional adjudication has its proponents and detractors in the legal academy. See, e.g., Richard H. Fallon, Jr., *What is Republicanism, and Is It Worth Reviving?*, 102 Harv. L. Rev. 1695 (1989) (detractor); Steven G. Gey, *The Unfortu-
Sandel's portrayal of the tension between liberalism and republicanism has both descriptive and normative components. The descriptive component is largely an historical account of the legal and political struggle between the liberal and civic republican traditions in the United States dating back to the American Revolution.\(^\text{81}\) For our purposes, the most relevant part of this historical account addresses issues of constitutional adjudication and rights.\(^\text{82}\) Before exploring Sandel's normative vision of civic republicanism, a summary of this historical critique of the Supreme Court's liberal interpretation of the Bill of Rights is therefore necessary.

1. **Constitutional Adjudication**

According to Sandel, the Supreme Court's interpretation of the Constitution has contributed greatly to the entrenchment of the liberal procedural republic.\(^\text{83}\) The Court's constitutional jurisprudence, particularly in the last few decades, has prioritized the right over the good, "the ideal of neutrality, and the conception of persons as freely choosing, unencumbered selves."\(^\text{84}\)

Sandel reminds us, however, that a liberal conception of rights has not always been predominant in American history. He points out that "the Bill of Rights [did not] play an important role in protecting individual liberties against federal infringement"\(^\text{85}\) during its first one hundred years, because "[l]iberty in the early republic had less to do with individual guarantees against government action than with the dispersion of power among branches and levels of government."\(^\text{86}\) During the early part of the twentieth century, the Supreme Court, intent on promoting individual rights over ideals of self-government and the common good, superceded the republican way of protecting freedom (i.e., promoting civic virtue and dispersed government).\(^\text{87}\) For example, in *Lochner v. New York*,\(^\text{88}\) the Court "established the priority of right in the sense of rights as trumps" by ranking the right of

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\(^{82}\) See generally *Sandel, supra* note 61 (reflecting on the entrenchment of the public philosophy of the liberal state in the United States' constitutional, political, and economic institutions).

\(^{83}\) See id. at 25-119.

\(^{84}\) See id. at 28.

\(^{85}\) Id.

\(^{86}\) Id. at 38.

\(^{87}\) Id.

\(^{88}\) See id. at 40-42.

198 U.S. 45 (1905).
individuals to enter into contracts higher than the attainment of what the legislature perceived to be the societal good.\textsuperscript{89}

Sandel explains that once the Court viewed constitutional rights as trumps for individuals to pit against the majoritarian will, the rights were subject to criticism as contrary to democratic principles.\textsuperscript{90} This situation compelled promoters of the liberal procedural republic to develop a theory of rights consistent with democratic processes.\textsuperscript{91} According to Sandel, Justice Stone accomplished this feat in \textit{United States v. Carolene Products}.\textsuperscript{92} Sandel views the need to place a liberal, rights-oriented jurisprudence within the context of protecting democratic processes from prejudice as Justice Stone’s driving motivation in that case, as indicated by the Justice’s call for a “more searching judicial inquiry” when laws target “particular religious, or national, or racial minorities.”\textsuperscript{93}

The Court, then, by viewing rights as trumps and by adhering to strict neutrality regarding ends, has contributed to the creation and promotion of the procedural liberal republic. Despite the liberal predilections of the Court, Sandel notes that judicial opinions in this century have sometimes reflected a republican view of the Constitution; however, subsequent interpretations that were more consistent with the procedural republic quickly overwhelmed the republican view. For example, in \textit{Minersville School District v. Gobitis},\textsuperscript{94} the Court upheld a law requiring the saluting of the flag in public schools because the law was “a legitimate way of cultivating the communal identity of [the] citizens.”\textsuperscript{95} Only three years later, however, the Court reversed direction in \textit{West Virginia State Board of Education v. Barnette},\textsuperscript{96} when it struck down a similar statute by reasoning that the judiciary needed to (1) prioritize individual rights over what the majority of society considered the good,\textsuperscript{97} and (2) guarantee that the Constitu-

\textsuperscript{89} \textit{Sandel}, supra note 61, at 43.
\textsuperscript{90} \textit{See} id. at 43.
\textsuperscript{91} \textit{See} id. at 43-47.
\textsuperscript{92} 304 U.S. 144 (1938).
\textsuperscript{93} \textit{Sandel}, supra note 61, at 49 (quoting \textit{Carolene Prods.}, 304 U.S. at 152 n.4).
\textsuperscript{94} 310 U.S. 586 (1940).
\textsuperscript{95} \textit{Sandel}, supra note 61, at 53. According to Justice Frankfurter, The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create the continuity of a treasured common life which constitutes a civilization. \textit{Gobitis}, 310 U.S. at 596.
\textsuperscript{96} 319 U.S. 624 (1943).
\textsuperscript{97} \textit{See} \textit{Sandel}, supra note 61, at 54. Justice Jackson penned this return to liberal political theory: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” \textit{Barnette}, 319 U.S. at 638.
tion remain "neutral among ends [and] that government . . . not impose a particular conception of the good life."\textsuperscript{98}

The flag laws have a particular resonance for Sandel because he approves of government's attempts to inculcate civic virtue in its citizens.\textsuperscript{99} But the Court ultimately viewed such an effort as illegitimate in \textit{Barnette} because "[p]atriotism [is] a matter of choice, not of inculcation, a voluntary act by free and independent selves. A sense of community would flow from a sense of justice rather than the other way around."\textsuperscript{100}

Furthermore, the Court's privacy jurisprudence presents an example for Sandel of the Court's shift from a theory of constitutional interpretation that incorporates issues of morality and the good to one that avoids dealing with such issues.\textsuperscript{101} The former is illustrated by \textit{Griswold v. Connecticut},\textsuperscript{102} where the Court struck down on normative grounds a statute prohibiting the use of contraceptives.\textsuperscript{103} According to Sandel, the Court justified the right of privacy in \textit{Griswold} by employing substantive moral judgment as opposed to voluntarist theory: "[T]he Court vindicated privacy not for the sake of letting people lead their sexual lives as they choose, but rather for the sake of affirming and protecting the social institution of marriage."\textsuperscript{104}

In later privacy cases, however, the Court limited its moral outlook to a voluntarist view of personhood and the need to protect indi-
vidual autonomy.\textsuperscript{105} In \textit{Eisenstadt v. Baird},\textsuperscript{106} the Court, in order to protect the personal autonomy of individuals to live however they choose, struck down a law prohibiting the distribution of contraceptives.\textsuperscript{107} Sandel identifies the Court's theoretical switch as a redescrip-

tion of privacy rights bearers from "persons \textit{qua} participants in the social institution of marriage to persons \textit{qua} individuals, independent of their roles or attachments."\textsuperscript{108} Sandel notes a similar allegiance to a voluntarist conception of privacy in the abortion cases.\textsuperscript{109} As an example, he cites the joint opinion by Justices O'Connor, Kennedy, and Souter in \textit{Planned Parenthood v. Casey},\textsuperscript{110} which explained that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."\textsuperscript{111}

Sandel argues that the dissenting opinions in \textit{Bowers v. Hardwick}\textsuperscript{112} provide another example of the Court's voluntarist perspec-

\begin{itemize}
  \item \textsuperscript{105} See \textit{Sandel}, supra note 61, at 97-100.
  \item \textsuperscript{106} 405 U.S. 438 (1972).
  \item \textsuperscript{107} See \textit{id.} at 455.
  \item \textsuperscript{108} \textit{Sandel}, supra note 61, at 97. According to the \textit{Eisenstadt} Court, "[i]t is true that in \textit{Griswold} the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." \textit{Eisenstadt}, 405 U.S. at 453.
  \item \textsuperscript{109} See \textit{Sandel}, supra note 61, at 98-100.
  \item \textsuperscript{110} 505 U.S. 833 (1992).
  \item \textsuperscript{111} \textit{id.} at 851.
  \item \textsuperscript{112} 478 U.S. 186 (1986).
\end{itemize}

Furthermore, Sandel believes that the \textit{Eisenstadt} Court shifted from the "old" notion of privacy—as first proposed by Brandeis—that had as a primary rationale the need to protect individuals from governmental intrusion and surveillance, to a "new" notion of privacy that primarily focuses on protecting voluntary choice:

More than freedom from surveillance or disclosure of intimate affairs, the right to privacy would now protect the freedom to engage in certain activities without governmental restriction. Whereas privacy in \textit{Griswold} prevented intrusion into "the sacred precincts of marital bedrooms," privacy in \textit{Eisenstadt} prevented intrusion into \textit{decisions} of certain kinds. \ldots The Court protected privacy in \textit{Eisenstadt}, not for the social practices it promotes but for the individual choice it secures.

According to Sandel, the Bowers dissenters had two options when elucidating how a constitutional right to privacy can include the right to engage in homosexual conduct. One possibility was the substantive moral approach, which claims that much that is valuable in conventional marriage is also present in homosexual unions. It defends homosexual privacy in the way Griswold defended marital privacy, by arguing that like marriage, homosexual union may also be "intimate to the degree of being sacred... a harmony in living... a bilateral loyalty," an association for a "noble purpose."

In contrast, Sandel argues that the approach the dissenters actually chose in Bowers relied solely on notions of voluntarism and autonomy:

Instead of defending homosexual intimacies in terms of the human goods they share with intimacies already protected by the Court, Justice Blackmun cast the Court's earlier cases in individualist terms, and found their connection with the homosexual case in the idea that "much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds."

The liberal theory behind the procedural republic, which according to Sandel pervades the Court's constitutional rulings, insists on a form of state neutrality that asks citizens, who challenge governmental action or who seek protection through governmental policies, to bracket their identities "for the sake of political agreement." This bracketing has a tremendous cost because it attains a superficial tolerance that alienates citizens from their government and community: "Respecting persons as unencumbered selves may afford a kind of so-

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113 See Sandel, supra note 61, at 103-08.
114 See id. at 104.
115 Id. (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).
116 Id. at 104-05 (quoting Bowers, 478 U.S. at 205 (Blackmun, J., dissenting)). Sandel adds that Justice Stevens, in a separate dissent, also avoided reference to the values homosexual intimacy may share with heterosexual love. Instead, he wrote broadly of "the individual's right to make certain unusually important decisions" and "respect for the dignity of individual choice," rejecting the notion that such liberty belongs to heterosexuals alone: "From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions."

117 Id. at 105 (quoting Bowers, 478 U.S. at 218-19 (Stevens, J., dissenting)).
118 As examples of citizens who were successful in petitioning their governments for protection, but who lost that protection when courts prioritized the rights of individuals over the needs of the community, Sandel points to (1) Jews in Skokie, Illinois, who wanted to keep Nazis from marching in their town, and (2) feminists in Indianapolis who wanted to protect women from the ill effects of pornography. See id. at 85-88.
119 Id. at 116.
cial peace, but it is unlikely to realize the higher pluralism of persons and communities who appreciate and affirm the distinctive goods their different lives express.”119

According to Sandel, the norms behind the procedural republic are not limited to constitutional adjudication because they also affect every facet of American life; that is, the same vision of the unencumbered self, free from all duties and responsibilities not freely chosen, cuts across legal, political, and economic spheres.120 Sandel argues that this effect on society creates a sense of disillusionment among Americans as their communal identities become disconnected from their identities as citizens participating in a democracy.121 Ultimately, the procedural republic has produced a displacement of community and left Americans isolated from each other, confused, and anxious about social institutions that are unresponsive to their needs.

2. Normative Position

Sandel proposes a clear normative vision in his portrayal of the tension between liberalism and republicanism: He wants to replace the moral brackets of the procedural republic with a vision of government and of private economic forces that promotes the particular end of greater self-government for citizens.122 Sandel notes that “[t]he re-

119 Id.
120 While for purposes of this Article Sandel’s arguments regarding constitutional adjudication are more relevant than his views on the political economy, a brief summary of the latter would be helpful. Sandel frames the current debates about economic policy within a paradigm that highlights the tension between prosperity (emphasized by free market liberals) and fair distributive principles (emphasized by egalitarian liberals). See id. at 278-97. He argues, however, that this has not always been the framework under which debates about the political economy have occurred in this country. Instead, Sandel contends that our history includes a third view that conceives economic policies as a means for the promotion of civic virtue and a greater degree of self-government. See id. at 124-67.

Thomas Jefferson’s opposition to large-scale manufacturers espoused this view, which had a basis “primarily on moral and civic grounds; the agrarian way of life was most likely to produce the kind of citizens self-government requires.” Id. at 142. The notion of the economy as a tool for inculcating civic virtue remained even after the forces of industrial capitalism changed the vision of an agrarian American forever. For example, republican promoters of free labor in the second half of the nineteenth century “sought to reform the economy along lines hospitable to republican ideals,” id. at 184, by creating an economy “that produced virtuous, independent citizens, capable of self-government.” Id. at 200.

While Brandeis and others in the Progressive era tried to abide by a vision of a republican economy, the growing prominence of a voluntarist conception of economics finally displaced this ideal. See id. at 201-49. Even those who opposed unrestrained free markets wanted reforms that would make the conditions for the free exchange of labor more voluntary and fair. See id. Thus, the two-punch strategy of the procedural republic was finally in place: the same form of governmental neutrality and protection of individual choice that was at the core of the Court’s constitutional jurisprudence reappeared in the economic policies of John Maynard Keynes’s New Deal liberalism, see id. at 262, and in the subsequent, more pure free market ideas of economists such as Milton Friedman, see id. at 285.

121 See id. at 321-24.
122 See id. at 6.
publican conception of freedom, unlike the liberal conception, requires a formative politics, a politics that cultivates in citizens the qualities of character self-government requires. How the nation can achieve this normative vision in practice, however, is less clear. If the procedural republic is as entrenched as Sandel contends, the most important private and public American institutions would require significant structural changes.

Only at the end of Democracy's Discontent does Sandel propose a method for reversing the hegemony of the procedural republic. He argues for both an upward and downward dispersal of sovereignty from the nation-state: "The most promising alternative to the sovereign state is . . . a multiplicity of communities and political bodies—some more, some less extensive than nations—among which sovereignty is diffused."

In the international context, Sandel believes that new forms of political association that do not completely overlap with nation-states may help "rival [the] global market forces." To create these entities, Sandel suggests providing "greater cultural and political autonomy to subnational communities . . . even while strengthening and democratizing transnational structures, such as the European Union."

In the domestic arena, Sandel argues that "federalism is more than a theory of intergovernmental relations." He notes that federalism is about returning power not only to state and local governments, but also to nongovernmental communities. In other words, to the extent that the procedural republic's normative restrictions bind state and local governments so that they also become inadequate arenas for republican citizenship, Sandel urges the focus to move beyond governmental institutions.

Sandel concludes his discussion of civic republicanism by illustrating its practical and conceptual connections with the civil rights movement of the 1950s and 1960s. The energy and voice that the movement found within the communities and public spaces of African-American churches provided the practical connection: "[T]he civic education and social solidarity cultivated in the black Baptist

123 Id.
124 See id. at 345.
125 Id.
126 Id.
127 Id.
128 Id. at 347.
129 See id.
130 See id. at 348 ("[W]e must seek such public spaces as may be found amidst the institutions of civil society—in schools and workplaces, churches and synagogues, trade unions and social movements.").
131 See id. at 314, 348-49.
churches of the South were a crucial prerequisite for the civil rights movement that ultimately unfolded on a national scale." According to Sandel, the fact that the movement concerned itself with more than individual rights illustrates the conceptual connection to civic republicanism:

More than a means to equal rights, the movement itself was a moment of empowerment, an instance of the civic strand of freedom. The laws that desegregated public facilities and secured voting rights for blacks served freedom in the voluntarist sense—the freedom to choose and pursue one's purposes and ends. But the struggle to win these rights displayed a higher, republican freedom—the freedom that consists in acting collectively to shape the public world.133

Sandel argues that this notion of community participation in American democracy as a means of promoting and guaranteeing freedom is one that, despite its historic roots, the liberal procedural republic has largely superceded.134 The result is a public discourse and a democracy that are rich in procedural guarantees and individual rights, but poor in substantive moral content, common purpose, and sense of civic unity.135

B. Sandel from a Gay Rights Perspective

Unlike other communitarian philosophers, such as Michael Walzer, Charles Taylor, and Alasdair MacIntyre, Sandel discusses homosexuality at some length in his writings.136 Sandel therefore deserves credit for attempting to fit homosexuality within his republican conception of the good.

This attempt, however, has produced mixed results. For example, the Sandellian notion of communities as sources of identity and freedom for their members is one that should ring true for many gay men and lesbians.137 Unfortunately, when discussing the role of communities, Sandel ignores those communities that have the greatest value for gay men and lesbians, namely, those created through the autonomous acts of individuals.138 In addition, the Sandellian critique of moral bracketing in matters of public reasoning is a notion

132 Id. at 314.
133 Id. at 348.
134 See id. at 348-51.
135 See id.
137 See infra notes 142-55 and accompanying text.
138 See infra notes 164-79 and accompanying text.
that gay men and lesbians should at least consider, even if welcoming issues of morality into political debates about homosexuality seems counter-intuitive. Sandel, however, does not limit his critique of moral bracketing to public reasoning; he also wants the moral brackets removed as a matter of constitutional interpretation. Gay men and lesbians (and their supporters) should reject this suggestion.  

1. Sandellian Communities

Perhaps to a greater extent than any other contemporary American communitarian, Sandel has formulated a trenchant critique of the atomistic individual—one uncoupled from attachments and communities—in liberal political philosophy. The experiences of gay men and lesbians reflect this criticism and confirm its validity. Because of the hostility that emanates from the broader society, a gay or lesbian individual has extreme difficulty attaining true freedom and dignity by remaining isolated from gay and lesbian communities. This isolation usually means a life in the closet—a life without much satisfaction or fulfillment—in which lies and deception constantly undermine an individual's sense of self-worth. Only when the homosexual comes out of the closet, when she declares that she is a member of a community that comes together, at least initially, on the basis of a different sexual orientation, does an opportunity arise for the individual to attain a level of dignity and self-worth commensurate with leading a truly autonomous existence. As Kath Weston has noted,

\[\text{[i]n coming out, a person acts to create a sense of wholeness by establishing congruence between interior experience and external presentation, moving the inner into the outer, bringing the hidden to light, and transforming a private into a social reality. The closet symbolizes isolation, the individual without society, a stranger even to self. Its imagery is consistent with the atomistic conceptions of a society in which individuated actors must struggle to communicate and gain legitimacy for private truths.}\]

\[139\] See infra notes 191-93 and accompanying text.
\[140\] See infra Part II.B.2.
\[141\] See Sandel, supra note 61.
\[142\] Many types of these communities exist, including inter alia friends, families, patrons of bars and coffeehouses, and members of political, religious, athletic, and social organizations. See generally Simon LeVay & Elisabeth Nonas, City of Friends: A Portrait of the Gay and Lesbian Community in America (1995) (discussing gay and lesbian communities in the United States). For a discussion of the role of these communities in the lives of gay men and lesbians, see infra notes 149-55, 174-90 and accompanying text.
\[143\] Kath Weston, Families We Choose: Lesbians, Gays, Kinship 50 (1991); see also Kristin G. Esterberg, Lesbian and Bisexual Identities: Constructing Communities, Constructing Selves 57 (1997) ("Many women ... experience coming out into a particular community or relationship as a way of finding their 'true selves.'").
For gay men and lesbians, the process of coming out encapsulates the duality of autonomy and community in their lives. The initial decision of whether to come out is mostly the individual’s choice, though the amount of support others provide may affect the timing of the decision. The effect of coming out, however, is almost always a decrease in the individual’s isolation; the process of coming out often embeds the individual into gay communities that contribute to the formation of a gay or lesbian identity and provide protection from the hostility emanating from the broader society.

Many scholars have documented how gay and lesbian communities contribute to a sense of belonging and identity for homosexuals. This documentation is beyond the scope of this Article. A

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144 See Mark Blasius, An Ethos of Lesbian and Gay Existence, 20 Pol. Theory 642, 662 (1992) ("Because coming out is such a personal ethical choice, made freely and deliberately, the existence of a lesbian and gay people as a people, as a community . . . is limited by the freedom of each . . . individual to decide for her- or himself whether to come out and become lesbian or gay.").

The duality of autonomy and community in the lives of gay men and lesbians is reflected in the fact that the two most common uses, in political parlance, of the word gay as an adjective precede the nouns rights and community (as in gay rights and gay community).


146 See, e.g., George Chauncey, Gay New York (1994); Creating a Place for Ourselves: Lesbian, Gay, and Bisexual Community Histories (Brett Beemyn ed., 1997); John D’Emilio, Sexual Politics, Sexual Communities (1983); Esterberg, supra note 143; Elizabeth Lapovsky Kennedy & Madeline D. Davis, Boots of Leather, Slippers of Gold: The History of a Lesbian Community (1993); Peter M. Nardi, Gay Men’s Friendships: Invincible Communities (1999); Rural Gays and Lesbians: Building on the Strengths of Communities (James Donald Smith & Ronald J. Mancoske eds., 1997); Weston, supra note 143.

Instead of speaking of community, Mark Blasius prefers to speak of a gay and lesbian ethos "by which [he] mean[s] a shared way of life through which lesbians and gay men invent themselves, recognize each other, and establish a relationship to the culture in which they live." Blasius, supra note 144, at 645. Blasius explains the emergence of the ethos, which merges the self with the community, as follows:

[1]In the formation of an ethos, the earlier posed "How shall I live?" becomes intrinsically connected to "How shall we live?" The stake that one has in the morale and destiny of the local lesbian and gay community, that makes one's "self" possible, becomes a stake in civic involvement in [a] wider sociohistorical existence . . . that may affect one's ability to come out and live a lesbian and gay ethos . . . .

Id. at 659.

Some scholars, particularly those associated with postmodernism and queer theory, question the very existence of objective categories such as identity and community. See, e.g., Esterberg, supra note 143, at 15-16; Annamarie Jagose, Queer Theory: An Introduction 75-78 (1996); Shane Phelan, The Shape of Queer: Assimilation and Articulation, Women & Pol., vol. 18, No. 2, 1997, at 55, 60-61. This Article does not address this important, though complex, queer theory critique. I do, however, agree with Kristin Esterberg that the refusal to recognize the existence of any identity can be as restrictive as the concept of identity itself:

If one of the "goals" of a post-modern politics is to provide social spaces for greater individual democracy and freedom, then to assume a uniform fluid-
couple of references, however, can usefully illustrate why Sandel's vision of individuals attaining freedom, not only through the exercise of individual autonomy as promoted by liberalism but also through participation in communities, is one that rings true for many gay men and lesbians. For example, in his book on the lives of gay men in New York City at the beginning of the twentieth century, the historian George Chauncey asserts that those men were able to construct spheres of relative cultural autonomy in the interstices of a city governed by hostile powers. They forged an immense gay world of overlapping social networks in the city's streets, private apartments, bathhouses, cafeterias, and saloons, and they celebrated that world's existence at regularly held communal events such as the massive drag (or transvestite) balls that attracted thousands of participants and spectators in the 1920s.\textsuperscript{147}

These communal attachments provided gay men with personal freedom, a sense of self-worth and identity, and protection from the hostility of the broader society long before anyone argued that judicially enforced rights of individual freedom should provide any sense of aid or protection to homosexuals. As Chauncey notes,

\begin{quote}
[a]long with sexual camaraderie, [the gay community] offered [gay men] practical support in negotiating the demands of urban life, for many people used their gay social circles to find jobs, apartments, romance, and their closest friendships. Their regular association and ties of mutual dependence fostered their allegiance to one another, but gay culture was even more important to them for the emotional support it provided as they developed values and identities significantly different from those prescribed by the dominant culture.\textsuperscript{148}
\end{quote}

Thus, Chauncey argues that the notion of gay men living in isolation and invisibility before the Stonewall riots of 1969 and the birth of the modern gay rights movement is a myth.\textsuperscript{149} Part of the reason for this myth may be the liberal view that gay individuals cannot lead satisfying and fulfilling lives in the absence of the recognition and enforcement of individual rights. Imagining gay men and lesbians living freely and with dignity prior to the time when society recognized individual rights to autonomy and privacy as legitimate entitlements is difficult under this limited liberal view. As Chauncey illustrates, however, rights did not create community. Instead, gay men seeking

\begin{footnotes}
\item \textsuperscript{147} Chauncey, supra note 146, at 2.
\item \textsuperscript{148} Id. at 2-3.
\item \textsuperscript{149} See id.
\item \textsuperscript{143} For some, identities provide an anchor and stability that is welcomed—as well as a potential basis for political mobilization.
\item \textsuperscript{144} Esterberg, supra note 143, at 171.
\end{footnotes}
to find and support each other created community; the oppression emanating from the society at large contributed to the formation of gay communities decades before it caused the formation of the gay rights movement.\textsuperscript{150}

A similar description of the role of community applies to lesbians. Elizabeth Lapovsky Kennedy and Madeline Davis, in their analysis of the role of bars in the lives of lesbians in Buffalo in the 1930s and 1940s, note that

\begin{quote}
[b]y coming together in public places, lesbians began to challenge the sexist and homophobic structures of U.S. society. They expanded the possibilities for women to live independent lives away from their families without men. They made it easier for lesbians to find others like themselves and to develop a sense of camaraderie and support. They also increased public awareness of the existence of lesbians, as more people became familiar with gay bars. . . . Although they did not dramatically change sexism and homophobia, they did begin to mitigate the disastrous effects of individual isolation and feelings of worthlessness. In doing this they laid the groundwork for increasing solidarity and consciousness that could lead to a political movement in the future.\textsuperscript{151}
\end{quote}

In more contemporary times, community retains an important role in the lives of gay men and lesbians. Kath Weston, in her study of homosexuals living in San Francisco, notes that

\begin{quote}
[d]uring the 1970s the concept of community came to embody practical wisdom emerging from the bars, friendship networks, and a spate of new gay organizations: the knowledge that lesbians and gay men, joining together on the basis of a sexual identity, could create enduring social ties. In the process, sexuality was reconstituted as a ground of common experience rather than a quintessentially personal domain.\textsuperscript{152}
\end{quote}

In 1999, Peter Nardi published a book in which he explores the influence that gay men’s friendships, as a form of community, have on the development and maintenance of gay men’s identities.\textsuperscript{153} Nardi asserts that “[f]riendship among gay men is a means toward learning about one’s gay identity and a source of freedom from the limitations imposed by the culture on being able to live a gay life.”\textsuperscript{154} Moreover, Nardi states that gay friendships, as well as,

\begin{footnotes}
\item[150] See id. at 5-6.
\item[151] See KENNEDY & DAVIS, supra note 146, at 65-66.
\item[152] See WESTON, supra note 143, at 123 (emphasis added); see also LEVAY & NONAS, supra note 142, at 99-199 (describing the many types of communities gay men and lesbians have created for themselves in different parts of the country).
\item[153] See NARDI, supra note 146.
\item[154] Id. at 166 (emphasis added).
\end{footnotes}
participation in the gay communities' institutions (bars, baths, restaurants, book stores, media, political and social organizations, etc.) contributes to gay identity achievement, and gay identity leads to the creation and maintenance of gay communities which, in an ongoing dialectic, provide a context for reproducing identity in a newer generation of people searching for meaning and friendship.\(^{155}\)

Liberals generally pay insufficient attention to the role of communities in helping marginalized individuals such as gay men and lesbians attain personal freedom. In the specific context of sexual orientation, many liberals believe that privacy is the most important value for protecting gay men and lesbians from the rest of society.\(^{156}\) The protection of privacy has an intuitive appeal for liberals because it grants the individual a zone of personal freedom with which the state may not interfere.\(^{157}\) The liberal can advocate the protection of this zone without addressing the social or moral effects of the acts that take place behind "closed doors." In fact, a primary purpose of privacy doctrine is to separate the value (or lack thereof) of conduct that occurs in private from the right of the individual to engage in such conduct.

While the liberal privacy model has some obvious benefits for gay rights positions, it also has limitations. The privacy model "presumes nothing about the primacy of sexual orientation for the political identity of individual gay men and women and nothing about belonging to an actual 'gay community,' whose distinctive neighborhoods, norms, culture, and social relations are structured around sexual practices and erotic ties."\(^{158}\) The model does not take into account those identities, social relationships, and communities that emanate directly from the private expression of sexuality and whose effects go far beyond what transpires behind closed doors. As Shane Phelan points out,

> [t]he liberal attempt to make sexuality simply a matter of what people do in bed does not have the force of intuition behind it . . . . The fundamental insight of both gay liberation and lesbian femi-

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\(^{155}\) Id. at 195.

\(^{156}\) See Nancy L. Rosenblum, Democratic Sex: Reynolds v. U.S., Sexual Relations, and Community, in Sex, Preference, and Family, supra note 16, at 63, 64-65; see also Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431 (1992) (criticizing the emphasis that gay rights proponents place on privacy theory and discourse).

\(^{157}\) See Richard F. Galvin, Moral Pluralism, Disintegration, and Liberalism, in The Liberalism-Communitarianism Debate, supra note 1, at 39, 47 ("One hallmark of a liberal society is the stipulation that there are spheres of conduct that lie beyond the limits of legitimate government interference . . . .").

\(^{158}\) Rosenblum, supra note 156, at 65.
nism has been the need for counterexplanations of the role of sexuality in personality organization as well as social structure.\textsuperscript{159}

By focusing on the right to engage in acts behind the veil of privacy and by ignoring the consequences, including the community-building consequences, of those acts, liberals blind themselves to the role of "interconnections and interdependencies"\textsuperscript{160} in people's lives. As Robin West notes, in the context of Supreme Court opinions, "[p]rivacy cases, liberal rhetoric to the contrary notwithstanding, do not by any stretch protect the isolated liberty right of individuals 'to be left alone.' They protect the right of individuals to form independent societies of interaction with select others, within which the state will not intrude."\textsuperscript{161}

Many gay men and lesbians, then, can attest to Sandel's view that communities assist individuals in forming identities and play a vital role in the development of individual character and sense of self-worth.\textsuperscript{162} As Sandel explains,

\begin{quote}
[c]ommunity . . . describe[s] not just a feeling but a mode of self-understanding partly constitutive of the agent's identity. . . . [T]o say that [individuals] are bound by a sense of community is not simply to say that a great many of them profess communitarian sentiments and pursue communitarian aims, but rather that they conceive their identity . . . as defined to some extent by the community of which they are a part.\textsuperscript{163}
\end{quote}

It is essential, however, to clarify which communities are at issue. In his writings, Sandel tends to discuss communities given to us, namely, communities, such as family, school, church, neighborhood, and nation, into which we are born.\textsuperscript{164} He argues that a theory of political morality that does not recognize the importance of the at-

\textsuperscript{159} Phelan, supra note 17, at 34; see also Nardi, supra note 146, at 3 (noting, in discussing gay men and lesbians, that "to participate in spaces also occupied by others who have grown up with a stigmatized identity and who may have experienced—despite other significant differences—at least some similar forms of personal and social marginalization is a sociopolitical connection, perhaps one of brotherhood and sisterhood"); Arend Soeteman, Legal Moralism in Liberal Communities, in LAW, LIFE AND THE IMAGES OF MAN: MODES OF THOUGHT IN MODERN LEGAL THEORY 577, 585 (1996) ("The collective goods of . . . communities represent values and ways of life which are shared: the value is in the sharing of the values and ways of life. I enjoy them not as an individual but as [a] co-member.").


\textsuperscript{161} Id. at 721.

\textsuperscript{162} See Sandel, supra note 67, at 150.

\textsuperscript{163} Id.

\textsuperscript{164} See, e.g., id. at 179. Sandel emphasizes those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are—as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic.
tachment between individuals and given communities fails to capture
the character and moral depth of human beings. As Sandel sug-
gests, "to have character is to know that I move in a history I neither
summon nor command, which carries consequences none the less for
my choices and conduct." Moreover, Sandel argues that liberalism
"cannot make sense of our moral experience, because it cannot ac-
count for certain moral and political obligations that we commonly
recognize, even prize. These include obligations of solidarity, reli-
gious duties, and other moral ties that may claim us for reasons unre-
lated to a choice."

While Sandel greatly values given communities, he does not have
much interest in communities of choice, that is, communities formed
through the voluntary acts of their members. In fact, Sandel criti-
cizes what he deems individualistic conceptions of community be-
cause they are instrumental; in other words, they are arranged so as to
advance the particular interests of their members. According to
Sandel, the concepts community and choice are mutually exclusive; the
important constitutive function of community arises precisely from its
nonvoluntary components. As Sandel explains, "[f]or [members of
a society], community describes not just what they have as fellow citi-
zens but also what they are, not a relationship they choose (as in volun-
tary association) but an attachment they discover, not merely an
attribute but a constituent of their identity." Sandel's conception

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Id.; see also Sandel, supra note 61, at 294 (noting that contemporary liberalism is helpless in
the face of modern circumstances which are "eroding those forms of community—families
and neighborhoods, cities and towns, civic and ethnic and religious communities—that situate people in the world and provide a source of identity and belonging").

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165 See Sandel, supra note 67, at 179.
166 Id.
167 Sandel, supra note 61, at 13 (emphasis added).
168 Sandel, however, mentions "trade unions and social movements" as examples of communities that can play an important role in the promotion and attainment of civic virtue. Id. at 348. This admission is a positive step because these are communities of choice, but Sandel does not adequately explain what kinds of social movements he has in mind, or how such movements might be different from the other given communities that he discusses. He praises the social movement that he does discuss, i.e., the civil rights move-
ment, mostly because that movement was able to make a connection to a particular form of
given community, namely, African-American churches. See supra notes 131-33 and accom-
ppanying text. As for trade unions, their fit within Sandel's theory of civic republicanism is
not clear because unions, as Sandel recognizes, have been primarily concerned with help-
ing their members bargain and negotiate freely within an individualist, liberal framework,
rather than with instilling in their members the form of civic virtue that Sandel considers
vital in a democracy. See Sandel, supra note 61, at 198-200.
169 See Sandel, supra note 67, at 150.
170 See id.
171 Id.

Michael Walzer has explained the communitarian position on this issue as follows:
[I]t is a mistake, and a characterically [sic] liberal mistake, to think that the
existing patterns of association are entirely or even largely voluntary and
of communities is not simply about shared goals (the object), but is also about common “mode[s] of self-understanding” (the subject).\textsuperscript{172}

Once one comprehends the types of communities that Sandel does and does not value, one could conclude that he would not be interested in the types of communities that gay men and lesbians have formed through voluntary acts. He would likely characterize those communities as being primarily concerned with the attainment of instrumental ends and the pursuit of certain life goals.\textsuperscript{173} Ultimately, Sandel does not want to emphasize communities of choice because choice suggests voluntariness, voluntariness suggests autonomy, and autonomy takes us right back to liberalism.

For gay men and lesbians, however, communities of choice provide a sense of freedom and dignity. Gay men and lesbians often join communities of choice after rejection by communities, such as biological families and churches, into which they were born.\textsuperscript{174} As Kath Weston eloquently explains, many gay men and lesbians have experienced the process of choosing and creating new family and kinship ties that may include close friends, current and former lovers, adopted children, and children from previous heterosexual relationships, among others.\textsuperscript{175} Gay families are not predetermined and are thus not constitutive of a certain form of decreed identity. Instead, they

\begin{footnotes}
\item[172] Sandel, supra note 67, at 150.
\item[173] Sandel emphasizes the importance that community describe [society's] basic structure and not merely the dispositions of persons within the structure. For a society to be a community in this strong sense, community must be constitutive of the shared self-understandings of the participants and embodied in their institutional arrangements, not simply an attribute of certain of the participants' plans of life.
\item[174] See infra notes 183-85 and accompanying text; see also Nardi, supra note 146, at 192 (“Because gays and lesbians tend to grow up outside of and sometimes fearing the very identity group they later become part of, they must create their own communities of belongingness . . . .”).
\item[175] See Weston, supra note 143, at 3; see also Esterberg, supra note 143, at 53 (“The meanings of lesbian and bisexual identity are shaped by the social and historical contexts in which lesbians and bisexuals construct their lives and their identities.” (emphasis added)).
\end{footnotes}
are "[o]rganized through ideologies of love, choice, and creation." Thus, by their very nature gay families are more fluid and accommodating than biological families: "In families we choose, the agency conveyed by 'we' emphasizes each person's part in constructing gay families, just as the absence of agency in the term 'biological family' reinforces the sense of blood as an immutable fact over which individuals exert little control." This homosexual vision of family, then, recognizes the important value of family as a community, but places the responsibility on individuals to decide their own family's rules, obligations, and dynamics. "By opening the door to the creation of families different in kind and composition, choice assigns kinship to the realm of free will and inclination. In the tradition of Thoreau's Walden, each gay man and lesbian become[s] responsible for the exemplary act of creating an ideal environment."

Thus, the key for gay men and lesbians is not simply to find and maintain communities, but to do so as a matter of choice.

Networks of friendships, often reconceptualized as kinships of choice, become the source for developing communities of identity and equality. Unlike being born into a community of kin, an individual can choose a community of identity that provides norms and relationships that "stimulate and develop her identity and self-understanding more adequately than her unchosen community of origin, her original community of place."

Furthermore, as some feminists have pointed out, reliance on and glorification of given communities that are constitutive of identity, as proposed by Sandel and other communitarians such as Alasdair MacIntyre, is problematic. While Sandel speaks of the virtues of

176 Weston, supra note 143, at 27.
177 Id. at 38.

Viewing the gay and lesbian community as unitary or monolithic is an error. Many different subcommunities exist within the larger gay and lesbian community, and they often contain divisions along gender, class, race, and ideological lines. See Estéberg, supra note 143, at 114-19; Nardi, supra note 146, at 192-93; Weston, supra note 143, at 122-36. For the purposes of this Article, the important point is that the free choices of gay and lesbian individuals create these narrower, and sometimes conflicting, subcommunities.

178 Weston, supra note 143, at 110. Blasius describes the creation of a gay and lesbian ethos as

the consequence of coming out—understood as the process of entering into and creating oneself through the field of relationships that constitutes the lesbian and gay community. From this process of self-creation arise freely chosen responsibilities, conceptions of what is proper and fitting, that get constituted as selfhood, as what it means to be lesbian and gay.

Blasius, supra note 144, at 658.

179 Nardi, supra note 146, at 192 (quoting Marilyn Friedman, What Are Friends For? Feminist Perspectives on Personal Relationships and Moral Theory 252 (1993)).

180 See Marilyn Friedman, Feminism and Modern Friendship: Dislocating the Community, in Feminism and Community 187 (Penny A. Weiss & Marilyn Friedman eds., 1995) (noting the limitations of communitarianism from a feminist perspective); see also Elizabeth Frazer &
school, family, church, and neighborhood for inculcating in individuals a sense of citizenship, he is disappointingly silent about the negative social forces, such as racism, sexism, and homophobia, which sometimes emanate from those very same communities. Sandel's analysis of the positive values that undoubtedly inhere in the communities he emphasizes is incomplete without a corresponding discussion of the negative values, which, at least in American history, have been part of those communities. Any discussion of the family without reference to its traditional patriarchal structure, for example, or of neighborhoods without acknowledging the long history of de jure and de facto housing discrimination on the basis of race, provides a one-sided view of the influences of community in American politics and in the formation of individual character and identity.

In fact, commentators have linked discrimination against gay men and lesbians with the very communities that Sandel believes can (1) help individuals in the constitutive process of identity formation and (2) revitalize American democracy. For example, gay men and lesbians face ostracization by their own biological families to a greater extent than just about any other group in America—including, proba-

Nicola Lacey, The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate 140 (1993) ("The mere switch of focus from individual to collective values and public goods does not guarantee progress towards the ending of women's subordination.").

Friedman's critique of communitarianism identified this shortcoming:

Communitarians invoke a model of community that is focused particularly on families, neighborhoods, and nations. These sorts of communities have harbored numerous social roles and structures that lead to the subordination of women, as much recent research has shown. Communitarians, however, seem oblivious to those difficulties and manifest a troubling complacency about the moral authority claimed or presupposed by those communities in regard to their members. By building on uncritical references to those sorts of communities, communitarian philosophy can lead in directions feminists should not wish to follow.

Friedman, supra note 180, at 277; see also Penny A. Weiss, Feminism and Communitarianism: Comparing Critiques of Liberalism, in Feminism and Community, supra note 180, at 161, 166 ("Such forces as sexism and homophobia ... not only often create distinct communities ... but also establish relations that pervade and structure all communities, including ones that seem to have nothing to do with gender, race, sexuality, or class."). Frazer and Lacey note that

If the basic communitarian claim is that moral and political argument is validated within particular cultural discourses and practices, whose role in constructing human identity must be recognised, it is difficult to see how one is to attain the critical capacity to judge the sexism, patriarchy or any other feature of the culture in question.

Frazer & Lacey, supra note 180, at 141.

See Mary Lyndon Shanley, Liberalism and the Future of Democracy, 49 Stan. L. Rev. 1271, 1290 (1997) (book review). According to Shanley, "[t]he story that Sandel tells is suffused with a nostalgia that distorts the historical record by ignoring instances in which appeals to community values would have deprived members of minority groups of a political voice; it is a story that glides over and obscures oppression." Id.
bly, criminals.\textsuperscript{183} While some other minorities have their families as sources of comfort and protection against the larger and often hostile society, many gay men and lesbians lack familial support; their families often reject them or place them in the excruciatingly difficult position of having to choose between a relationship with their biological families and an honest, open life. Many African-American churches provide a second example: the same communities that Sandel points to as bastions of participatory democracy and civic virtue and that were intimately connected with the civil rights movement\textsuperscript{184} have often turned their backs on their gay parishioners who are HIV positive.\textsuperscript{185}

The problem, as Christopher Berry argues, is that a person has no guarantee that communities that are constitutive of a set identity will be democratic or protective of individual autonomy.\textsuperscript{186} Voluntarily created communities whose membership rules and obligations are subject to negotiation and bargaining will be more likely to recognize "the possibility of disagreement and the contingent character of compromise."\textsuperscript{187} The same cannot be said for Sandel's constitutive communities, where the process of forming the appropriate identity through family, church, and nation is in place long before the individual joins or, more often, is born into the communities. These given communities have often failed to promote tolerance and respect for individuals whom the community members view as having ideas, preferences, and values that undermine the communities' constitutive elements.\textsuperscript{188}

\textsuperscript{183} See Weston, \textit{supra} note 143, at 61. Weston reports that when some of the gay men and lesbians whom she interviewed came out to their parents, they were, for example, "institutionalized, threatened with electroshock therapy, kicked out of the house, reduced to living on the street, denied an inheritance, written out of a will, battered, damned as a sinner, barred from contact with younger relatives, shunned by family members, or insulted in ways that encouraged [them] to leave." \textit{Id.}

\textsuperscript{184} See supra notes 131-33 and accompanying text.


\textsuperscript{186} See Berry, \textit{supra} note 4, at 79.

\textsuperscript{187} \textit{Id.} at 78.

\textsuperscript{188} I do not mean to suggest that communities of choice are inured from intolerant tendencies. In fact, I do not want to idealize gay and lesbian communities in the same way that Sandel idealizes given communities. As Susan Krieger has demonstrated, in the context of discussing lesbian communities (and the same could apply to gay male communities), these communities sometimes "threaten as well as affirm individual identity." Susan Krieger, \textit{Lesbian Identity and Community: Recent Social Science Literature}, \textit{Signs}, Autumn 1982, at 91, \textit{reprinted in The Lesbian Issue: Essays from Signs 223} (Estelle B. Freedman et al. eds., 1985). Gay and lesbian communities, like all communities, sometimes trample on individual choices and priorities in order to maintain a sense of stability and cohesion. As Krieger notes (again, in the context of lesbian communities), "[t]he problems posed by lesbian communities are similar to those found in many other social groups and especially in minority groups, where efforts to achieve group solidarity and cohesiveness often conflict
COMMUNITARIANISM AND GAY RIGHTS

In the face of rejection and disapproval from the communities that Sandel and other communitarians consider to be constitutive of identity, gay men and lesbians have created their own communities. For some gay men and lesbians, these communities have completely replaced the more traditional communities from which they came. But for most the situation is more complex because they often retain links and attachments to their given communities while simultaneously becoming deeply embedded into the communities they create around sexuality, love, and friendship. This complex struggle of multiple commitments and multiple sources of identity exposes the simplicity in Sandel's effort to prioritize traditional, nonvoluntary communities. Ultimately, a discussion about the value of community is incomplete if it does not consider the role of communities of choice in the promotion of human flourishing and freedom. Gay men and lesbians, at least, have shown how their communities of choice can provide a source of comfort, a sense of belonging, a degree of personal freedom, and a measure of dignity. If liberals are in fact too limited in their assessment of the good that communities can sometimes contribute to the freedom and well-being of individuals, then Sandel's vision is similarly limited because he ignores the value of communities of choice.

with efforts to foster individuality and to tolerate internal deviance.” *Id.; see also* ESTERBERG, supra note 143, at 114 (reporting that lesbian and bisexual women in a small, northeastern town found that “[w]omen described the [lesbian] community as close yet closed, cohesive yet claustrophobic”).

Despite the tendency of communities of all kinds to prioritize cohesiveness over individuality, those communities created through the voluntary acts of their members contain greater room for flexibility, disagreement, and dialogue. *See supra* notes 174-79, 187 and accompanying text; *see also* Friedman, supra note 180, at 199-204 (noting that friendships and communities of urban dwellers, which are communities of choice, are less likely to be oppressive than the traditional communities emphasized by communitarians).

189 *See* Friedman, supra note 180, at 194-99.

190 Friedman illustrates this by asserting that “[t]he problem is not simply to appreciate community per se but rather to reconcile the conflicting claims, demands, and identity-defining influences of the variety of communities of which one is a part.” *Id.* at 194. In making a similar argument, Michael Walzer has criticized Sandel for not considering that Americans often choose cultural and religious encumbrances. *See Michael Walzer, Michael Sandel’s America, in Debating Democracy’s Discontent 175, 178* (Anita L. Allen & Milton C. Regan, Jr. eds., 1998). In Walzer’s example, an American Jew often chooses the encumbrances she faces, while the Jewish orthodoxy in Eastern Europe essentially provides encumbrances on its people. *See id.* Thus, in immigrant societies such as the United States, individuals can and often must choose among “many possible identifications.” *Id.*

While Sandel does acknowledge that individuals can be subject to “multiple loyalties” of “sometimes conflicting obligations,” SANDEL, supra note 61, at 350, those loyalties and obligations, in order to be valuable and meaningful from the perspective of civic republicanism, must be given rather than chosen, *see supra* notes 164-73 and accompanying text.
2. Moral Bracketing in Constitutional Interpretation

As I have argued elsewhere, Sandel’s critique of the liberal tenet of moral bracketing, which seeks to separate moral values from political discourse, is compelling.\(^{191}\) When gay men and lesbians participate in the public discourse about gay rights, they generally avoid arguments relating to morality; instead, they mostly emphasize traditional liberal, neutral values such as privacy, toleration, and equality.\(^{192}\) Meaningful political discussions about topics such as same-sex marriages and gay and lesbian families, however, are not possible without fully engaging the normative issues involved.\(^{193}\) Sandel is therefore correct when he argues that political debates about controversial issues such as homosexuality must address normative and moral issues. At the very least, Sandel’s arguments relating to the drawbacks of moral bracketing force gay men and lesbians to question the true benefits of this almost instinctive method of coping with their opponents’ normative concerns.

Sandel, however, wants the moral brackets removed not only as a matter of political discourse, but also as a matter of constitutional interpretation.\(^{194}\) This proposal is problematic from a gay rights perspective because it fails to consider sufficiently the institutional role of courts. In fact, Sandel does not appear to fully appreciate the role that constitutional adjudication plays in protecting the interests and rights of minorities from the will and biases of majorities.\(^{195}\)

As a result of Sandel’s failure to address the negative social forces that have influenced the constitutive components of the communities that he seeks to promote,\(^{196}\) he predictably overlooks the type of institutional framework that is necessary to mitigate the impact that these social forces have on marginalized minority groups. For example, as previously mentioned, Sandel contends that the civil rights movement of the 1950s and 1960s was fundamentally a communitarian movement because it found its energy and voice in southern African-American churches.\(^{197}\) While black churches undoubtedly played a vital role in this activism, the movement could not have attained its goals without a federal judiciary that was generally willing to enforce liberal

\(^{191}\) See Ball, supra note 36, at 1893-94.
\(^{192}\) See id. at 1879-75.
\(^{193}\) See id. at 1901-02; Carlos A. Ball & Janice Farrell Pea, Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents, 1998 U. ILL. L. Rev. 253, 267-70; Feldblum, supra note 50; supra notes 50-60 and accompanying text.
\(^{194}\) See supra notes 99-119 and accompanying text.
\(^{196}\) See supra notes 180-85 and accompanying text.
\(^{197}\) See supra notes 131-33 and accompanying text.
right, such as equality under the law, against the will of the majority white community.\textsuperscript{198} The federal judiciary had a critical institutional role to play in protecting the interests of the African-American minority in the racist-dominated political atmosphere of the American South.

Sandel does not contend that the role of the federal judiciary in the civil rights struggle was appropriate because it acted as a buffer to the will of the majority, a view that would support the liberal conception of constitutional rights acting as trumps against majoritarian goals.\textsuperscript{199} Rather, he asserts that the judicial reaction was appropriate because "the nature of the cause" that the civil rights movement advanced was correct.\textsuperscript{200} Asking judges to assess "the nature of the cause" in order to determine the scope and applicability of constitutional rights, however, reduces the constitutional adjudicative process to an essentially political one. Under Sandel's model, judges would decide the scope and applicability of constitutional provisions by engaging in the same normative assessments that citizens and their legislative representatives perform when participating in the political process. Thus, the judges would sit as "super-legislators"; their evaluations of the "nature of the cause" would carry constitutional imprimaturs of approval.\textsuperscript{201}

From a gay rights perspective, this high degree of deference to judicial discretion on issues of morality, without any real constraints on the need to protect individuals from the practical consequences of

\textsuperscript{199} See DWORKIN, supra note 13, at xv.
\textsuperscript{200} SANDEL, supra note 61, at 90.
\textsuperscript{201} As Professors Fleming and McClain point out, Sandel does not explicitly endorse the traditional republican view [that judicial review debilitates the democratic process]. Indeed, his call for moral argument in constitutional law may be anathema to it. For that view entails minimal judicial intervention into politics, especially where questions of morality, virtue, and the like are concerned, whereas his argument entails greater judicial intervention in the sense that courts would weigh in on rather than bracket controversial moral and political issues.


Sandel's call for expanding the role that morality and notions of the good should play in constitutional adjudication is arguably similar to Ronald Dworkin's call for a moral interpretation of the Constitution. See RONALD DWORIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996). Dworkin's approach, however, is different because he retains the liberal principles of autonomy, equality, and privacy as the normative guideposts in constitutional adjudication. See id. at 7-18, 21-29. According to Sandel, Dworkin's approach does not permit a sufficiently deep discussion (i.e., one that goes beyond liberal values) of the normative disputes at issue. See Fleming & McClain, supra, at 526 (arguing that Sandel claims that "minimalist liberalism" like Dworkin's . . . attempts to stay on the surface, philosophically speaking, [and] is [therefore] too shallow to attain agreement upon the justification for and the scope of constitutional rights such as intimate association and reproductive freedom").
judges' substantive moral evaluations, is troubling. Little evidence exists to suggest that judges as a group are any less likely than elected politicians to perceive gay and lesbian relationships and intimacies as lacking in normative value.

It is telling, in this regard, that while Sandel is extremely critical of the dissenting opinions in *Bowers v. Hardwick*\(^ {202} \) because they relied too heavily on issues of autonomy and choice,\(^ {203} \) he does not assess Justice White's majority opinion or Chief Justice Burger's concurring opinion. Justice White argued in *Bowers* that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" is not an "inadequate rationale to support [the criminalization of such sodomy]."\(^ {204} \) Justice Burger employed "Judeo-Christian moral and ethical standards" to question the morality of homosexuals.\(^ {205} \) Sandel's silence regarding these two opinions is instructive because the Court, and Justice Burger in particular, adopted the model that Sandel advocates: They removed the moral brackets in constitutional decision making.

Presumably Sandel could criticize Burger's *moral* reasoning, but such a discussion would entail a comprehensive critique of how Burger's interpretation of the Judeo-Christian tradition did not actually support Burger's position in *Bowers*. Sandel, however, devotes little time to addressing *substantive* moral discourse. Ironically, after all his criticism of the procedural liberal republic, Sandel's theory of constitutional interpretation is similarly procedural: It advocates the removal of moral brackets in constitutional adjudication involving gay men and lesbians, but does not explain what to do, other than to draw an analogy between homosexual intimacy and heterosexual commitment,\(^ {206} \) once those brackets are re-

\(^ {202} \) 478 U.S. 186 (1986).

\(^ {203} \) See supra notes 112-16 and accompanying text.

\(^ {204} \) *Bowers*, 478 U.S. at 196.

\(^ {205} \) Id. (Burger, C.J., concurring). Justice Burger argued that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197 (Burger, C.J., concurring).

\(^ {206} \) See supra note 115 and accompanying text. The issue in *Bowers* was whether the state could criminalize sexual conduct between two men, regardless of their level of commitment to each other. *See Bowers*, 478 U.S. at 190. In the context of *Bowers*, a logical conclusion from Sandel's argument that seeks to link homosexual intimacy with heterosexual marriage is that the state can criminalize sodomy when two consenting strangers engage in it, but not when it involves two individuals in a committed relationship. Obviously, a determination of the scope and applicability of the right to privacy based solely, or even primarily, on an analogy between homosexual conduct and committed heterosexual relationships is problematic. Many homosexuals (and many heterosexuals) are not interested in having commitment accompany their sexual acts, yet that should not be the dispositive criterion in determining whether the state has the authority to interfere with an individual's autonomy and privacy. For a powerful critique of the repercussions of Sandel's definition of privacy in the context of gay rights, see BONNIE HONG, *Political Theory and the Displacement of Politics* 186-95 (1993); see also Fleming & McClain, *supra* note 201,
As a matter of process, then, Justice Burger and Sandel might agree that incorporating the Judeo-Christian tradition into an assessment of the scope of the constitutional right to privacy is not improper, even if they would ultimately disagree on the result of such an incorporation.

Sandel does not explain how the moral vision that he does promote, which calls for the government to advance the goods of greater civic participation and virtue in American society, would help marginalized minorities attain equality and acceptance. Greater participation in democratic institutions and an increased sense of civic virtue are rather empty normative vessels as they apply to the status of gay men and lesbians in society. Sandel, like other civic republicans, is overly optimistic about the benefits that can accrue from greater civic participation and dialogue. This over-optimism is especially evident with respect to minorities: Even if gay men and lesbians engage in an open and ongoing process of civic dialogue, if history is any guide, society is likely to exclude them from the distribution of many of the social goods when the dialogue ends and government enforces the decisions reached. A theory of political morality, as well as a normative vision of the Constitution, that aims to protect individual autonomy, free choice, and the ability of individuals to guide their own destiny provides much better protection for the interests of gay men and lesbians than Sandel’s vision of a government purposefully promoting civic virtue and of judges parceling through issues of morality.

Identifying the limits of civic participation and dialogue, however, does not mean that autonomy and free choice are the only normative values important in constitutional adjudication involving gay men and lesbians. As Professors Fleming and McClain point out,

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207 See Fleming & McClain, supra note 201, at 521 (“[Sandel’s] appeal to analogy is... inherently conservative because... [p]ersons who cannot show the sameness of the goods of their relationship to those of... a traditionally protected relationship fail to secure protection.”).

208 William Connolly suggests the possibility of making a civic case for the need “to appreciate multiple alternatives to univocal ideals of sexual relations and household organization.” William E. Connolly, Civic Republicanism and Civic Pluralism: The Silent Struggle of Michael Sandel, in Debating Democracy’s Discontent, supra note 190, at 205, 208. Connolly, however, recognizes that such an argument would entail not so much civic republicanism as civic pluralism since there are “a variety of patterns through which intimate relations of dignity might be established.” Id. The existence of pluralism, then, takes society away from a predetermined sense of civic virtue and towards the concept that Sandel wants to de-emphasize, namely, choice.

209 See Gey, supra note 80, at 840 (“[T]he civic republicans do not pursue the implications of an... important fact of all political processes: at some point the dialogue must end, a decision must be made, and the community’s decisions must be enforced.”).
Sandel ignores those parts of the *Bowers* dissents that discuss the goods that arise from autonomy: "A more complete, less selective, reading of the dissents in *Bowers* reveals the argument that the protection of choice is important precisely because of the good of such things as marriage, family, and intimate association in persons' lives." The deeper values that Sandel would like judges to keep in mind when they confront constitutional issues involving gay men and lesbians, such as the goodness of committed homosexual relationships that makes them akin to committed heterosexual relationships, emanate from the autonomy that individuals exercise in deciding for themselves the kinds of relationships that have value for them. Sandel's disregard for the value of free choice and autonomy assures that his "republican model artificially separates moral goods from the process of choosing them." A theory of political morality that does not explicitly recognize the connection between autonomy and choice on the one hand, and the attainment of freedom and dignity on the other, has little to offer to gay men and lesbians.

III

**MICHAEL WALZER'S THEORY OF JUSTICE**

For Michael Walzer, justice inheres in a society's shared traditions. Different societies and cultures have different traditions; thus, even if the promotion of a particular form of justice is appropriate in one society, the same may not be true for others. Walzer emphasizes the need to distribute social goods according to a society's definitions of those goods, and not through objective or universal

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210 Fleming & McClain, *supra* note 201, at 530. They note that "[a]s Justice Blackmun puts it: 'Only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'" Id. (quoting *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting)) (emphasis added). Mary Lyndon Shanley makes a similar point in a review of *Democracy's Discontent*. See Shanley, *supra* note 182, at 1284. Justice Blackmun stated in his dissent in *Bowers* that the right to define one's identity "cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment from close ties with others.'"

Thus, the dissent in *Bowers* actually insists that privacy is necessary to foster interpersonal relationships, and acknowledges the primacy of intimate associations as the proper object of the privacy protection. *Id.* (quoting *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting)) (citation omitted) (emphasis added).

211 See *supra* note 115 and accompanying text.

212 Fleming & McClain, *supra* note 201, at 531.

While Sandel, when discussing homosexuality, speaks exclusively of substantive due process and the right to privacy, equality is another important liberal value that provides some constitutional protection to gay men and lesbians. *See Romer v. Evans*, 517 U.S. 620 (1996).

213 See *infra* notes 225-30 and accompanying text.

214 See *infra* notes 231-34 and accompanying text.
standards of justice that are outside of the shared traditions of the particular society in question.\footnote{See infra notes 225-34 and accompanying text.}

Walzer’s communitarianism is different from Sandel’s in two fundamental ways. First, Walzer emphasizes the value of equality—in particular, what he calls “complex equality”\footnote{See infra notes 241-46 and accompanying text.}—while Sandel emphasizes the values of civic virtue and self-government.\footnote{See supra notes 80, 122-23 and accompanying text.} Second, while Walzer explicitly rejects the relevance of universal principles of justice, Sandel, as Stephen Gardbaum notes, implicitly abides by a form of universalism.\footnote{See Stephen A. Gardbaum, Law, Politics, and the Claims of Community, 90 Mich. L. Rev. 685, 697 (1992).} Sandel “does not state that the good is whatever your community values, but rather that the good must be pursued in and through political community.”\footnote{Id. at 700.} Furthermore, Sandel’s version of communitarianism “assert[s] community as a value directly applicable everywhere. It represents the one true conception of the good life for human beings.”\footnote{Id. at 696.} On the other hand, Walzer argues that all social criticism, including assessments of what is just, must be wholly internal to a society and its norms: “[I]t is only the traditions, cultures, and values of particular political communities that are relevant to political argument and knowledge.”\footnote{Id. at 697, 700.}

Ultimately, Walzer’s theory of justice presents a more optimistic communitarian vision for gay rights than Sandel’s ideas. In particular, Walzer’s insistence on the allocation of social goods according to their own appropriate distributive criteria offers support for gay rights positions in the areas of marriage\footnote{See infra Part III.B.1.} and parenting.\footnote{See infra Part III.B.2.} Walzer’s vision is not without its limitations, however, given that a society’s shared traditions can be multiple and conflicting. Currently, this situation confronts the American society as it debates whether the meaning of marriage can include the union of two individuals of the same gender.\footnote{See infra notes 259-65 and accompanying text.}
A. Spheres of Justice and Complex Equality

The starting place for Michael Walzer's theory of justice is the shared traditions through which particular societies give meaning and value to social goods.225 "Goods in the world," he explains, "have shared meanings because conception and creation are social processes. For the same reason, goods have different meanings in different societies."226

Walzer finds particular interest in how a society’s shared traditions call for the distribution of different social goods.227 The distributive criteria that society employs to allocate its goods, like the goods themselves, are dependent on social meanings and traditions.228 As a result, the justness of those distributions is “relative to the social meanings of the goods at stake.”229 Given that justice arises from “social meanings,” an inherent fluidity and changeability exists in what society considers to be just or unjust: “Social meanings are historical in character; and so distributions, and just and unjust distributions, change over time.”230

Because different societies have different ways of distributing social goods, the assessment of the justness of distributive practices must be internal to a society. Thus, shared meanings and traditions become the standard of measurement for distributive practices. In this context, the analysis that Walzer “propose[s] is imminent and phenomenological in character. It will yield not an ideal map or a master plan but, rather, a map and a plan appropriate to the people for whom it is drawn, whose common life it reflects.”231

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225 See WALZER, supra note 34, at 7. Walzer is only interested in goods that have social value. See id. Those goods that are “idiosyncratically valued” are not relevant to his theory of justice. Id. Walzer raises the possibility that all goods are in fact social, because if they did not have some form of social value, they would not be goods, but he purposefully “leave[s that] question open.” Id.

226 Id.

227 See id. at 6-10.

228 See id. at 8-9.

229 Id. at 9.

230 Id. The liberal instinct is to reject a theory of justice that makes justice dependent on the norms of a particular culture, time, or place. See, e.g., THOMAS NAGEL, THE LAST WORD 101-25 (1997); Ronald Dworkin, Objectivity and Truth: You’d Better Believe It, 25 Phil. & PUB. AFF. 87, 89 (1996). For a discussion of this liberal critique of Walzer, see infra notes 256-58 and accompanying text.

231 WALZER, supra note 34, at 26.

Walzer’s brand of philosophy, which focuses on current distributive patterns and shared traditions, can garner criticism for placing too much emphasis on what “is,” rather than on what “ought to be.” This philosophical approach can arguably create a rather sterile and positivistic theory of morality. Walzer responds to this criticism by noting that “the most interesting parts of the moral world are only in principle factual matters; in practice [moral facts] have to be ‘read,’ rendered, construed, glossed, elucidated, and not merely described.” MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 29 (1987). The interpretation of shared traditions entails more than simply studying empirical behav-
Walzer rejects the notion that universal principles exist which can tell people whether a particular distributive pattern is objectively unjust. He also disapproves of the view of the political philosopher as one isolated from the rest of society in an ivory tower thinking about the a priori conditions that are necessary for the creation of a just society. Instead, Walzer views the political philosopher as historian, anthropologist, and sociologist, immersing herself in the process of understanding and evaluating the shared traditions and meanings of a particular society.

Because different social goods within different societies have different distributive criteria, Walzer believes that the key to justice is to ensure that those criteria (1) remain consistent with the shared traditions of their society and (2) remain within their respective spheres. As Walzer explains,

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232 See WALZER, supra note 34, at 3-5. Walzer notes that

[i]n a world of particular cultures, competing conceptions of the good, scarce resources, elusive and expansive needs, there isn’t going to be a single formula, universally applicable. There isn’t going to be a single, universally approved path that carries us from a notion like, say, “fair shares” to a comprehensive list of the goods to which that notion applies.

Id. at 79.

233 Walzer has recently praised Sandel’s Democracy’s Discontent, calling it “a wonderful example of immanent social criticism” because it is “more historical than philosophical: a reflection upon experience rather than a reflection upon ideas.” Walzer, supra note 190, at 175.

234 See WALZER, supra note 34, at xiv.

Walzer believes that there are three important—though not necessarily exclusive—ways of “doing moral philosophy. . . [:] the path of discovery, the path of invention, and the path of interpretation.” WALZER, supra note 231, at 3. He is critical of the first method because it requires the philosopher to “step[ ] back in his mind from his social position.” Id. at 5. The problem with this approach is that “[m]ost often, the moral principles here delivered to us are already in our possession, incorporated, as it were, long ago, familiar and well-thumbed by now.” Id. at 6. The second path, that of invention, is the path of Descartes, Rawls, and Habermas. See id. at 11. This path emphasizes “methodology” and “a design procedure” to achieve an end that society considers just. Id. at 10. Thus, people can create or invent a morality “against which we can measure any person’s life, any society’s practices.” Id. at 13. Because Walzer is skeptical of the universal application of these invented methodologies, he asks: “Why should newly invented principles govern the lives of people who already share a moral culture and speak a natural language?” Id. at 14. Thus, Walzer’s preferred path of “doing moral philosophy” is the path of interpretation, which “lends itself less to abstract modeling than to thick description. Moral argument . . . is interpretative in character, closely resembling the work of a lawyer or judge who struggles to find meaning in a morass of conflicting laws and precedents.” Id. at 20. For further discussion of Walzer’s theory of inoral interpretation, see infra notes 266-77 and accompanying text.

235 See WALZER, supra note 34, at 10.
very social good or set of goods constitutes, as it were, a distributive sphere within which only certain criteria and arrangements are appropriate. Money is inappropriate in the sphere of ecclesiastical office; it is an intrusion from another sphere. And piety should make for no advantage in the marketplace, as the marketplace has commonly been understood.  

The key to justice, then, is to make sure that the distributive criterion that is appropriate for one sphere does not spill over and dominate other spheres. Walzer argues that most egalitarians concern themselves with ensuring that no distributive criterion monopolizes any particular sphere. However, under Walzer's theory, the focus of justice should not be on whether a particular distributive criterion monopolizes a particular sphere, but on whether a distributive criterion dominates outside of its appropriate sphere. For example, using money as the criterion that monopolizes the distribution of commodities in a capitalist society such as the United States may be perfectly acceptable; this domination is not necessarily unjust if it is consistent with American shared meanings and traditions. Rather, injustice results when the role and influence of money spills over into other spheres such as social welfare, education, and politics.

Walzer calls for the recognition of "complex equality": an acceptance of distributive monopolies—and thus inequalities—within specific spheres, but a rejection of the domination by a distributive criterion outside of its proper sphere. As Walzer explains, complex equality establishes a set of relationships such that domination is impossible. In formal terms, complex equality means that no citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good. Thus, citizen X may be chosen over citizen Y for political office, and then the two of them will be unequal in the sphere of politics. But they will not be unequal generally so long as X's office gives him no

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236 Id.
237 See id. at 12-13.
238 See id. at 17-20.
239 See id. at 103-08.
240 In order to keep wealth and money within the sphere of commodities, society must implement and enforce "blocked exchanges"—societal norms that place important social goods beyond the reach of the market. Id. at 100-03. Examples of the goods that should be beyond the scope of the market include inter alia political power, criminal justice, and the rights to marriage, procreation, free speech, and assembly. See id.

Brian Barry argues that Walzer's admission that money can be the dominant distributive criterion within the sphere of commodities, as long as it is consistent with a nation's shared traditions, makes "Walzer and Hayek . . . strange bedfellows." Brian Barry, Spherical Justice and Global Injustice, in PLURALISM, JUSTICE, AND EQUALITY 67, 71 (David Miller & Michael Walzer eds., 1995).

241 See WALZER, supra note 34, at 17-20.
advantages over Y in any other sphere—superior medical care, access to better schools for his children, entrepreneurial opportunities, and so on.242

Complex equality is different from "simple equality."243 Under the latter paradigm, the same distributive criterion applies across the spectrum of social goods.244 For example, Walzer notes that the maxim "[t]o each according to his needs," may be acceptable—from an American perspective, given our shared traditions—for government services such as welfare, but it is an inappropriate criterion for the allocation of political power, religion, or marriage.245 According to Walzer, neither that distributive maxim nor any other should apply across spheres.246

Some goods exist that the community provides through its government, rather than through, for example, market exchanges. Walzer argues that the list of goods that a community decides to provide directly to individuals will depend on the "collective values and political choices" of that community.247 However, he notes that

[o]nce the community undertakes to provide some needed good, it must provide it to all the members who need it in proportion to their needs. The actual distribution will be limited by the available resources; but all other criteria, beyond need itself, are experienced as distortions and not as limitations of the distributive process.248

242 Id. at 19.
243 Id. at 18.
244 See id.
245 Id. at 25-26.
246 See id. Another example of simple equality is the liberal maxim of "equality of opportunity"; such a maxim may be appropriate for the distribution of jobs, but it does not describe, for example, the way that our government allocates services or our polity chooses its leaders.

David Miller interprets simple equality as follows:

[A]n idea of equality [is] 'simple' when it holds that equality requires the equal possession or enjoyment of some advantage X. A society is egalitarian, on this view, when all its members are equal in respect of X; that is, they equally enjoy the stuff or the condition represented by X. There are as many notions of simple equality as there are plausible contenders for the X in this formula: candidates include property, income, opportunity, rights, resources, capacities, and welfare.

David Miller, Complex Equality, in PLURALISM, JUSTICE, AND EQUALITY, supra note 240, at 197, 197. A condition of simple equality can thus exist when everyone has equal shares of a particular resource. Even in the unlikely event, however, that society can attain such a point of complete equality (in the absence of a coercive state that continuously and aggressively redistributes the resource), it would not last very long because individuals, through different interests and abilities, would trade and attempt to monopolize the particular resource in question. See WALZER, supra note 34, at 13-17.

247 WALZER, supra note 94, at 74. In Spheres of Justice, Walzer explains how different communities, such as ancient Athens, a medieval Jewish community, and contemporary America, allocate community-provided goods. See id. at 69-74, 84-91.
248 Id. at 75.
Walzer's main contemporary example of a community-distributed good is medical care.\textsuperscript{249} In the United States, the state provides health care through subsidies for some individuals and most hospitals. Walzer argues that once the state, at the request of its citizens, participates in the provision of health care, it must allocate that good according to need and not wealth.\textsuperscript{250} However, in the United States,

no political decision has yet been made to challenge directly the system of free enterprise in medical care. And so long as that system exists, wealth will be dominant in (this part of) the sphere of security and welfare; individuals will be cared for in proportion to their ability to pay and not to their need for care.\textsuperscript{251}

According to Walzer, this pattern of distribution for health care is unjust because it does not fully abide by the distributive principle of need that the United States accepts for services that the community provides directly.\textsuperscript{252}

The fact that Walzer's theory does not prioritize any specific sphere, or any specific distributive criterion, over others is important. No spheres are ex ante more valuable than others in the same way that no principle of justice, such as Rawls's difference principle,\textsuperscript{253} Raz's normative good of autonomy,\textsuperscript{254} or Sandel's civic republicanism,\textsuperscript{255} cuts across spheres.

Thus, the differences between Walzer's theory of justice and liberalism are easy to identify. Instead of considering individual autonomy—a universal principle that cuts across spheres and societies—as the cornerstone of justice, Walzer focuses on social goods and how particular societies distribute them. While Walzer believes that the protection of human liberty is vital for the creation of a just society, he also believes that the best way to protect that liberty is not through the enforcement of an a priori list of individual rights, but by abiding by the internal traditions through which communities distribute goods.

Because of this difference, liberals have rejected Walzer's ideas. The principal liberal critique of Walzer's brand of communitarianism is that the internal criticism, which Walzer argues is central to the evaluative process of justice, is dangerously optimistic about the existence of shared traditions and relativistic about assessments of justice within the differing internal traditions. For example, Ronald Dworkin con-

\begin{itemize}
\item \textsuperscript{249} See id. at 86-91.
\item \textsuperscript{250} See id. at 88-89. Wealth would be the appropriate distributive criterion to employ when allocating those commodities that the government chooses \textit{not} to provide. See id. at 89.
\item \textsuperscript{251} Id. at 89.
\item \textsuperscript{252} See id. at 86-91.
\item \textsuperscript{253} See RAWLs, supra note 38, at 75-80.
\item \textsuperscript{254} See JosEPH RAz, THE MORALITY OF FREEDOM 369-99 (1986).
\item \textsuperscript{255} See supra Part II.A.
\end{itemize}
tends that “[o]ur political arguments almost never begin in some shared understanding of the pertinent principles of distribution. Every important issue is a contest between competing models.” Specifically, Dworkin questions whether in the United States a shared understanding exists regarding how to allocate medical care, and, if one does exist, whether that shared understanding is compatible with Walzer’s interpretation of the understanding:

Why is the argument defending the status quo in medical care [in the United States]—that the balance between market and need that politics has achieved itself provides the best interpretation of its moral traditions with respect to medicine—any worse than the argument for reform in either direction? If Walzer says that the compromise is a poorer interpretation because it is unprincipled, because it does not express a coherent and defensible vision of justice, then he is appealing to the idea of abstract justice he rejects; if he says it is illegitimate because it does not consistently enforce either the market or the need model then he is appealing to preordained spheres.

Ronald Dworkin & Michael Walzer, To Each His Own: An Exchange on Spheres of Justice, in COMMUNITARIANISM: A NEW PUBLIC ETHICS, supra note 1, at 110, 112. Brian Barry provides a similar criticism of Walzer: “We are heirs of many traditions, religious and secular, which cannot without gross self-deception be presented as forming a harmonious whole. Any critic must therefore pick and choose among the available materials, simply because there is no way of reconciling them.” Brian Barry, Social Criticism and Political Philosophy, 19 PHIL. & PUB. AFF. 360, 370 (1990).

For an illustration of how Walzer’s interpretation of this understanding excludes market factors from the allocation of health care and relies solely on need as the appropriate distributive criterion, see supra notes 249-52 and accompanying text.

Dworkin & Walzer, supra note 256, at 119. Michael Rustin expresses a similar criticism:

Whereas it does follow from the existence of a sphere of health, and a sphere of market exchange, that there is a boundary to be negotiated between them . . . , there seems no consensual reason for drawing this boundary at the point of providing for a universal rather than residual health-care system. [American] citizens seem to be committed both to a view of health as an intrinsic good, and to a conception of property rights which makes health care a legitimate object of purchase.


Another possible criticism of Walzer’s theory of justice is that, despite his protestations to the contrary, the theory relies on some universal principles. See Neera K. Basdwar, Moral Agency, Commitment, and Impartiality, in THE COMMUNITARIAN CHALLENGE TO LIBERALISM, supra note 1, at 1, 8 (noting that Walzer “explicitly affirm[s] universal rights to life and liberty as based on ‘our common humanity’” (quoting inter alia Walzer, supra note 34, at xv)). Similarly, one can view the rule that spillover effects from one sphere to another always lead to injustice, as a form of metaprinciple from which no departure is possible without violating Walzer’s theory of justice. In fact, part of Dworkin’s critique is that some societies may exist for which a comingling of the spheres constitutes their shared tradition. Walzer does seem to reject ex ante such comingling. See supra notes 235-52 and accompanying text.
According to Dworkin, the problem with Walzer's theory of justice is not only that no shared tradition within a political community is usually deep enough to resolve most of the controversial policy disagreements within that community, but also that Walzer's theory has within it a "deep relativism."259 As discussed above, Walzer believes that the process of social criticism and moral interpretation is wholly internal to a society.260 Thus, Walzer argues, in a heavily criticized example,261 that outsiders may incorrectly make automatic conclusions that the hierarchical caste system of India is unjust because Indians may believe in its distributive caste principles.262 Dworkin argues that Walzer's view, which rejects universal principles of justice, ignores the fact that "justice is our critic not our mirror."263 If one shared understanding within our political tradition exists for Dworkin, it is that individuals can always use principles of justice to question even the most established traditions.264 Thus, he suggests that "Walzer's relativism is

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260 See supra notes 225-40 and accompanying text.
261 See, e.g., Badwhar, supra note 258, at 10; Barry, supra note 240, at 75. Dworkin states:

[Walzer] says, for example, that a caste system is just in a society whose traditions accept it, and that it would be unjust, in such a society, to distribute goods and other resources equally. But his remarks about what justice requires in a society whose members disagree about justice are simply mysterious.

Dworkin & Walzer, supra note 256, at 112-13; see also Rustin, supra note 258, at 31 ("[i]t is surely unreasonable to assign . . . overwhelming weight in deciding questions of justice and injustice to internal states of (real or apparent) consensus when these may depend so largely on force or ignorance.")
262 See WALZER, supra note 34, at 313-14.
263 Dworkin & Walzer, supra note 256, at 114.
264 See id. Dworkin states that "our common political life [holds] that any decision about the distribution of any good—wealth, welfare, honors, education, recognition, office—may be reopened no matter how firm the traditions that are then challenged." Id.

In his discussion of the Indian caste system, Walzer argues that it would be appropriate for a visitor to an Indian village to attempt to convince the residents, "for example, that men and women are created equal not across many incarnations but within the compass of this one." WALZER, supra note 34, at 314. Walzer also acknowledges that attempts to criticize the caste system from inside would be appropriate if there was anger and indignation within the village community about the hierarchical distributive principles of the Indian caste system:

If that were so, then it would be important to seek out the principles that shaped their anger and indignation. These principles, too, must have their part in village justice . . . . Social meanings need not be harmonious; sometimes they provide only the intellectual structure within which distributions are debated. But that is a necessary structure. There are no external or universal principles that can replace it. Every substantive account of distributive justice is a local account.

Id. at 313-14; see also WALZER, supra note 231, at 39 ("The outsider can become a social critic only if he manages to get himself inside, [and] enters imaginatively into local practices and arrangements.").
Walzer has responded to the relativism charge by refining his definition of internal social criticism. For example, in *Thick and Thin: Moral Arguments at Home and Abroad*, he begins with a television image of protesters in communist Czechoslovakia in 1989 carrying signs "some of which say, simply, 'Truth' and others 'Justice.'" From a Walzerian perspective, these signs appeal to universal principles of "truth" and "justice," which act as foundations for a more expansive and relevant moral structure applicable to the particular situation of a people trying to free themselves from communist tyranny: "[D]ualism is . . . an internal feature of every morality. Philosophers most often describe it in terms of a (thin) set of universal principles adapted (thickly) to these or those historical circumstances." This conception of moral discourse is consistent with the theory that "[m]en and women everywhere begin with some . . . set of ideas and principles, which they then work up in many different ways. They start thin, as it were, and thicken with age, as if in accordance with our deepest intuition about what it means to develop and mature."

According to Walzer, however, "our intuition is wrong here. Morality is thick from the very beginning, culturally integrated, fully resonant, and it reveals itself thinly only on special occasions, when moral language is turned to specific purposes." Thus, Americans who saw the Czechoslovakian protesters on television marched with them, in one sense, because they shared a "common understanding of tyranny." But apart from that understanding, which is undoubtedly important and can give aid and comfort to the protestors, American citizens' own distinctive minimal morality also separated them from the marchers.

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265  Dworkin & Walzer, supra note 256, at 114.
266  MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD (1994) [hereinafter WALZER, THICK & THIN]. Walzer also discusses the role that internal social criticism plays in discussions of morality and justice in WALZER, supra note 231, and MICHAEL WALZER, THE COMPANY OF CRITICS (1988).
267  WALZER, THICK & THIN, supra note 266, at 1.
268  Id. at 4.
269  Id.
270  Id.
271  Id. at 3.
272  See id. at 9-11. This thin morality, according to Walzer, is necessarily expressive of our own thick morality. A moral equivalent of Esperanto is probably impossible—or, rather, just as Esperanto is much closer to European languages than to any others, so minimalism when it is expressed as Minimal Morality will be forced into the idiom and orientation of one of the maximal moralities. There is no neutral (unexpressive) moral language.

*Id.* at 9.
Walzer argues that the fundamental problem with the liberal view of political morality is that its thinness is heavily coated with a particular maximalist morality. In other words,

the minimal morality prescribed by [liberal] theories is simply abstracted from, and not very far from, contemporary democratic culture. If no such culture existed, this particular version of minimal morality would not even be plausible to us. Maximalism in fact precedes minimalism. But no particular maximum is the sole source of the moral minimum, let alone of all the other maximums.\textsuperscript{273}

Liberals such as Dworkin may believe that they are applying universal principles of justice when evaluating, for example, the right to free speech in China or the right to an abortion in the United States, but they are actually applying their own particular mix of minimalist and maximalist morality.\textsuperscript{274}

This does not mean, as Dworkin's critique of Walzer's relativism suggests, that criticism of the internal arrangements of a nation will be impossible from the outside. Those on the outside looking into the former Czechoslovakia were able to "pick out from among our values and commitments those that make it possible for us to march vicariously with the people in Prague." \textit{Id.} at 9-10. Walzer notes that the result of our marching vicariously with the protesters

will be a set of standards to which all societies can be held—negative injunctions, most likely, rules against murder, deceit, torture, oppression, and tyranny. Among ourselves, late twentieth-century Americans or Europeans, these standards will probably be expressed in the language of rights, which is the language of our own moral maximalism.

\textit{Id.} at 10.

These standards, while having a universal appeal, have limits, as Walzer explains:

\textit{[U]niversal prohibitions barely begin to determine the shape of a fully developed or livable morality. They provide a framework for any possible (moral) life, but only a framework, with all the substantive details still to be filled in before anyone could actually live in one way rather than another. It is not until the conversations become continuous and the understandings thicken that we get anything like a moral culture, with judgment, value, the goodness of persons and things realized in detail. One cannot simply deduce a moral culture, or for that matter a legal system, from the minimal code.}

\textit{Walzer, supra note 231, at 25.}\textsuperscript{273} \textit{Walzer, Thick \& Thin, supra note 266, at 13.} Walzer continues his description of this problem by urging that

\textit{[u]nless we can identity [sic] a neutral starting point from which many different and possibly legitimate moral cultures might develop, we can't construct a proceduralist minimum. But there is no such starting point. Moralities don't have a common beginning; the men and women who work them out are not like runners in a race—who also have a common set of rules and a common goal, neither of which play a part in the less organized work of cultural elaboration.}

\textit{Id.} at 14.\textsuperscript{274} To illustrate how this process works in practice, Walzer describes how "ordinary men and women" debate difficult issues of justice such as affirmative action. \textit{Walzer, supra note 231, at 22.} Walzer argues that the starting point in such a debate consists of asking "what is the right thing to do?" \textit{Id.} This initial question does not at first glance appear to be "about the interpretation of an existing and particular morality, for it is possible that
According to Walzer, the preemption of tyranny and injustice comes not from a reliance on external, and so-called objective, principles of justice, but from maintaining a separation between the different distributive spheres within a society. While Sandel's call for the removal of moral brackets is an effort to overlap purposefully the spheres of politics and morality, Walzer's strict separation of spheres is a form of bracketing writ large—bracketing that protects spheres from each other across society. Political, social, economic, and religious spheres remain separated so that their respective distributive criteria do not influence the distribution of goods in other spheres.

that morality, however interpreted, does not tell us the right thing to do.” Id. However, as we continue to think about the issue, as we follow the course of the argument, listen to it, study its phenomenology, we will see that its real subject is the meaning of the particular moral life shared by the protagonists. The general question about the right thing to do is quickly turned into some more specific question—about the career open to talents, let's say, and then about equal opportunity, affirmative action, and quotas. . . . [These questions] require us to argue about what a career is, what sorts of talents we ought to recognize, whether equal opportunity is a “right,” and if it is, what social policies it mandates. These questions are pursued within a tradition of moral discourse—indeed, they only arise within that tradition—and they are pursued by interpreting the terms of that discourse.

Id. at 23.

Walzer argues that the interplay between minimalism and maximalism constrains the relativism of his maxim that “distributive justice is relative to social meanings.” Walzer, Thic & Tm, supra note 266, at 26 (citation omitted). Moreover, “justice in distributions is a maximalist morality, and it takes shape along with, constrained by, a reiterated minimalism—the very idea of ‘justice,’ which provides a critical perspective and a negative doctrine.” Id.

When answering Dworkin's argument that a need exists for an external and independent standard of justice that will act as a “critic and not a mirror,” Walzer notes that tyrannies have historically feared internal criticism the most. Pointing to the collapse of communism in Eastern Europe, Walzer notes that the collapse began with the criticism of “dissident communists [who] demand[ed] that the tyrants actually deliver on the values to which they [the tyrants] claimed to be committed (and to which their critics were really committed): freedom, equality, and democratic government.” Id. at 46. While those of us in the West could sympathize with the communist dissidents, there were limits to our solidarity with them because most of us would not have been able to endorse their political program consisting of the “correct” brand of communism. See id. If Dworkin is correct, that it is possible “to appeal to an external standard” of justice, then one probably wouldn’t bother with internal criticism at all. All the local critics could be replaced by a universal Office of Social Criticism, where an internationally recruited and specially trained civil service (of professional philosophers? political theorists? theologians?) applied the same moral principles to every country, culture, and religious community in the world.

Id. at 48.

275 See supra notes 235-52 and accompanying text.
276 See supra Part II.B.2.
277 Most Americans are already quite comfortable in protecting the sphere of religion from the distributive principles of other spheres, and protecting other spheres from religion's distributive principles. The separation between church and state is ingrained in the political consciousness of most Americans. Walzer proposes a similar respect for the sepa-
B. Walzer from a Gay Rights Perspective

A discussion of gay rights issues within a Walzerian framework of justice does not begin with the traditional and familiar liberal concepts of privacy and autonomy. Instead, the starting place is an assessment of the distributive principles used to allocate social goods that are of particular importance to gay men and lesbians. To my knowledge, Walzer has mentioned homosexuality only once in his work. It is therefore necessary to apply Walzer’s theory of justice to gay rights issues by discussing two hotly disputed social issues in contemporary America: (1) same-sex marriage and (2) families headed by gay and lesbian parents.

The application of Walzer’s theory to gay rights issues will not lead to results that are different from those reached through the application of liberal theory. In other words, formulation of pro-gay rights arguments from the perspective of both theories is possible. What is particularly interesting about applying Walzer’s ideas to contemporary disputes over gay rights issues, then, is not the outcomes of the application, but the analytical process that leads to those outcomes. To a greater extent than liberal theory, Walzer’s theory allows for a full engagement of the normative traditions and values behind the distribution of social goods that are at the center of our society’s struggles over homosexuality. Unlike many liberal theorists, Walzer does not limit his focus to the relationship between the individual and the state; instead, Walzer broadens the analysis to include the social and nonpolitical roles and meanings of the particular institutions and goods at issue.

1. Same-Sex Marriage

From a traditional liberal perspective, gay men and lesbians have an equality-based right to marriage. Under this view, the state should be neutral in its application of marriage rules and provide gay men and lesbians with an equal opportunity to attain the legal benefits that flow from marriage. The prohibition of same-sex marriage
is a form of impermissible discrimination on the basis of sexual orientation and gender\textsuperscript{284} that entails a preference of some consensual relationships over others and, thus, violates the liberal tenet of state neutrality.\textsuperscript{285} The state's recognition of same-sex marriage would not constitute an approval of gay and lesbian relationships, but would simply allow for equal access to a state-provided privilege.\textsuperscript{286}

In contrast to this liberal argument, a Walzerian critique would be more particular in analyzing the societal context from which the prohibition against same-sex marriage emerges. Walzer recognizes that marriage, like any other social good, is subject to distributive patterns.\textsuperscript{287} The meaning that society attaches to marriage arises from a people's own particularized traditions; as a result, different cultures regulate marriage differently. As Walzer explains,

\begin{quote}
[t]hroughout most of human history, love and marriage have been far more closely regulated than they are in the United States today. The rules of kinship are an anthropological feast, wonderfully various and highly seasoned. There are a hundred ways in which the basic distributive question—\textit{Who . . . whom?}—is asked and answered. Who can sleep with whom? Who can marry whom? Who lives with whom? Who eats with whom? Who celebrates with whom? Who must show respect to whom? Who is responsible for whom? The answers to these questions constitute an elaborate system of rules, and it is a feature of the earliest understanding of political power that chiefs or princes who violate these rules are tyrants.\textsuperscript{288}
\end{quote}

According to a central tenet of liberalism, issues of personal intimacy should be outside of the control of government and community: "Kinship ties and sexual relations are commonly thought to constitute a domain beyond the reach of distributive justice."\textsuperscript{289} In opposition to this view, Walzer notes that "[i]t would . . . be a mistake to think of kinship and love as a sphere different from all the others, as a sacred

\begin{footnotes}
\item See SULLIVAN, supra note 15, at 171-72.
\item See West, supra note 160, at 726.
\item SeeWalzer, supra note 34, at 234-36.
\item Id. at 228.
\item Id. at 227.
\end{footnotes}
precinct, like the Vatican in republican Italy, safe from philosophical criticism."

Long before the Industrial Revolution, "marriages were complex matters of exchange and alliance, carefully planned and elaborately negotiated." Today, these marriages persist in some societies, "though the negotiations nowadays are rarely explicit."

In western cultures until recently, a connection existed between marriage and the advancement of the economic fortunes and social positions of the families involved. Parents participated in selecting whom their children married partly due to an abiding interest in promoting the family's political, social, and economic status. In more contemporary times, however, these considerations have receded in importance, and the notion that love and free choice are the appropriate distributive criteria for marriage has emerged. To use Walzerian terminology, a clearer separation now exists between the sphere of marriage and the spheres of politics and economics. As Walzer explains,

[n]ow romantic love, more or less inflated, is conceived to be the sole satisfactory basis for marriage and married life. But that means that marriages are taken out of the hands of parents and their agents (matchmakers, for example) and delivered into the hands of children. The distributive principle of romantic love is free choice. . . . [R]omantic love focuses our attention on the couple who choose one another. And it has this crucial implication: the man and the woman are not only free but equally free. The feeling must be mutual, it takes two to tango, and so on.

The contemporary shared social meaning of marriage in western societies, then, holds that the choices of the individuals involved should be the primary value in the distribution of marriage. When two individuals decide that a sufficiently close emotional and physical attraction exists to bind their futures together, our social norms provide that they should be able to marry. A Walzerian may therefore argue that denying gay men and lesbians the opportunity to marry is

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290 Walzer, supra note 34, at 227. Of course, many feminists also reject the public/private distinction. See, e.g., Olin, supra note 289, at 111.

291 Walzer, supra note 34, at 234.

292 Id.

293 See id. at 235. According to Walzer:

If family membership and political influence are entirely distinct, if nepotism is ruled out, inheritance curtailed, aristocratic titles abolished, and so on, then there is much less reason to think of marriage as either an exchange or an alliance. And then sons and daughters can (and will) search for mates whom they find physically or spiritually attractive. So long as the family was integrated into political and economic life, romantic love had its place outside. . . . The independence of the family made for a relocation of love.

294 Id.
unjust because this prohibition is inconsistent with the norms of marital distribution in American society. Gay men and lesbians simply want to use the accepted distributive criteria—love and free choice—that heterosexuals use to avail themselves of the social good of marriage.

One court recently followed this line of reasoning in a decision involving the constitutionality of Alaska's prohibition against same-sex marriage. In discussing the protections that substantive due process affords individuals, the judge stated that

[t]he question presented by this case is whether the personal decision by those who choose a mate of the same gender will be recognized as the same fundamental right [identified by the Supreme Court in Griswold v. Connecticut and Loving v. Virginia]. Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. Though the choice of a partner is not left to the individual in some cultures, in ours it is no one else's to make. Indeed, the marriage license and the marriage ceremony themselves make clear that this must be a choice freely made by the individual.

... The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.

In discussing a Walzerian analysis of the issue of same-sex marriage, noting the objections of opponents of those marriages is important. Opponents of same-sex marriages offer two principal objections: one instrumental and the other intrinsic. The instrumental argument seeks to link marriage to reproduction. In the minds of many, the normative value of marriage is at least partly connected to the fact that the creating and rearing of most new human beings occur within that institution. The intrinsic argument is more difficult to articulate, especially when disconnected from issues of reproduction; it holds,
however, that something \textit{intrinsic} to the institution of marriage requires the two involved individuals to be of different genders.\textsuperscript{300}

Walzer’s theory of justice can provide a response to the first argument against same-sex marriage. In fact, a comparison between the approaches of Walzer and Rawls is instructive. Rawls contends that arguments based on nonpolitical values are best left outside of discussions of justice.\textsuperscript{301} Thus, a Rawlsian response to the use of procreation as an argument against same-sex marriage might proceed as follows:

Procreation-based arguments are largely the product of religious or moral views that consider immoral those examples of sexual intimacy that have no connection with the possibility of reproduction. Moreover, these arguments are the product of particular comprehensive doctrines and not political values. While individuals are free to hold and apply those views in their personal lives, bringing those views into the political discourse is improper.

Alternatively, a Walzerian approach would not deem improper the inclusion of procreation in a discussion about same-sex marriage; instead, it would seek to question whether procreation \textit{is in fact} the shared tradition that defines the meaning of marriage in our society. For example, the fact that society would recognize and value the marriage of a heterosexual couple who cannot procreate—due to age or infertility—severely undermines the argument that procreation is the dispositive criterion in society for the distribution of marriage. Rather than tell opponents of same-sex marriage that they cannot bring their reproduction-based arguments to the table because those arguments violate the strictures of political liberalism, a Walzerian would welcome the arguments and then analyze, critique, and eventually undermine the view that our social norms require that reproduction be a constitutive element of marriage.

An argument from within our society’s shared traditions not only helps to undermine the instrumentalist connection between marriage and reproduction, it also exposes the inconsistencies in other arguments of opponents of same-sex marriage. For example, to the extent opponents argue that the ability to reproduce or to engage in acts of a “reproductive type”\textsuperscript{302} is the dispositive moral criterion for defining marriage, they are not truly arguing within a tradition that seeks to place such values as love and commitment at the top of the normative hierarchy in defining marriage.

\textsuperscript{300} See, e.g., Finnis, \textit{supra} note 56, at 1063-66; George & Bradley, \textit{supra} note 56, at 303-10.

\textsuperscript{301} See \textit{supra} notes 37-49 and accompanying text.

\textsuperscript{302} George & Bradley, \textit{supra} note 56, at 302.
Moreover, while critics often accuse gay men and lesbians of being obsessed with sex, it is the opponents in the same-sex marriage debate who focus on the notion that a couple must engage in the correct type of sexual act—vaginal-penile intercourse—before they can deem an intimate relationship "marital.” Alternatively, supporters of same-sex marriage argue that the love and commitment that exist within a relationship is important regardless of the types of sexual acts involved.

A discussion of same-sex marriage within the framework of shared traditions, then, can help gay men and lesbians (and their supporters) expose the inconsistency of their opponents’ positions. On one hand, the latter use love and commitment as one important measure of the value of heterosexual relationships, but on the other they reject the view that those very same criteria are relevant when determining the goodness and eligibility for inclusion in the institution of marriage of same-sex relationships. Walzer’s internal criticism exposes this inconsistency: It allows the opponents of same-sex marriage to bring their normative arguments to the table, but then refutes those arguments on their own terms. Within this Walzerian paradigm of shared traditions, gay men and lesbians in the United States are able to expose the discrepancy between the values that their opponents purportedly promote and the logical conclusions of their opponents’ arguments.

While the foregoing discussion might refute the instrumentalist argument that seeks to link marriage to reproduction from within the sphere of marriage, addressing the intrinsic objection from the same vantage point is more difficult, if not impossible. As mentioned previously, the intrinsic argument does not rely solely on procreation, but views marriage as inherently heterosexual and by definition consisting of one man and one woman. Under this view, two men or two women might be able to love each other and even raise children together, but that arrangement is not what society means by marriage.

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303 Senator Trent Lott, the Republican leader of the United States Senate, to give just one recent example, has likened homosexuality to a form of “sex addiction.” See Alison Mitchell, Controversy over Lott’s Views of Homosexuals, N.Y. TIMES, June 17, 1998, at A24; see also Alan Wolfe, Shut Up About Sex, ADVOC., Apr. 14, 1998, at 43, 44 (asserting that many middle-class Americans believe that “being gay means being obsessed with sex, and most Americans do not put sex at the center of their consciousness”).

304 See Finnis, supra note 56, at 1064 (“Genital intercourse between spouses enables them to actualize and experience ... their marriage.... Non-marital intercourse, especially but not only homosexual, has no such point and therefore is unacceptable.”); George & Bradley, supra note 56, at 310 (arguing that for many people only “genital intercourse of spouses” and not “sodomitical ... acts” can be marital).

305 See Ball, supra note 36, at 1889-94; Stephen Macedo, Homosexuality and the Conservative Mind, 84 Geo. L.J. 261, 278 (1995).

306 See supra notes 225-46 and accompanying text.

307 See supra note 300 and accompanying text.
A large proportion of Americans seem to subscribe to this view and consider heterosexuality an essential and intrinsic component of marriage.308

A skeptic of Walzer’s reliance on shared understandings might therefore argue as follows:

This country possesses a shared tradition regarding marriage: Individuals should marry people of the opposite gender. A conflict exists between this shared tradition and the tradition that Walzer discusses, which uses love and free choice as the appropriate distributive criteria for marriage.309 Therefore, an internal analysis of the dispute will not provide a satisfactory answer regarding the justness of the marriage ban.310

The person raising this argument could cite Bowers v. Hardwick,311 where the opinions of Justice White312 and Chief Justice Burger313 emphasized the tradition that has historically regulated and punished gay intimacy, rather than the tradition that recognizes the value of autonomy in matters of personal intimacy. How can Walzer’s theory of justice, which limits itself to internal criticisms, help individuals choose between two traditions that seem to be mutually exclusive?

As discussed above, liberals such as Dworkin are skeptical that Walzer’s shared traditions can help resolve hotly disputed issues of justice.314 In evaluating the merits of this liberal critique of Walzer’s theory, it is helpful to understand that it operates on three levels of analyses. These levels are represented as circles in Figure 1 below. In circle A, the outermost circle, are those universal principles of justice that are transsocietal: They are not dependent on the norms of any particular society, but apply to all human beings. Liberals generally believe in the possibility of developing a list of fundamental principles of justice, usually enforced as individual rights, that can act as univer-

308 See, e.g., Most Disapprove of Gay Marriages, Adoption, Poll Says, Chi. Trb., Aug. 19, 1996, at 6 [hereinafter Adoption Poll] (discussing a Harris poll that found that 63% of respondents disapprove of marriage between two women and 64% disapprove of marriage between two men); Poll: Majority Against Gay Marriages, Chi. Trb., Feb. 7, 1994, at 8 [hereinafter Gay Marriages Poll] (noting that 62% of those polled opposed legal recognition of same-sex marriage); Hanna Rosin & Richard Morin, In One Area, Americans Still Draw a Line on Acceptability, Wash. Post, Jan. 11, 1999, at 8 (reporting results of a national poll that found that “only 23 percent [of those surveyed] support gay marriage”).
309 See supra notes 293-94 and accompanying text.
310 This critique is similar to Dworkin’s argument that one cannot evaluate the justness of the distribution of health care in the United States solely from within the nation’s shared traditions because there is an internally unresolvable tension between the “free market” and the “take care of the needy” traditions. See supra notes 256-68 and accompanying text.
312 See id. at 191-94.
313 See id. at 196-197 (Burger, C.J., concurring).
314 See supra notes 256-65 and accompanying text.
sal and objective guideposts of that which is fair and just. Alternatively, Walzer contends that the most valuable discussions of justice occur within circle B—within the shared traditions of a particular society. However, Walzer does not stop there; he also believes that identifiable and nonoverlapping spheres of justice exist within circle B. Walzer argues that determinations of justness and unjustness must occur within each one of the spheres. Walzer makes a compelling point when he argues that most assessments of justice must take place within circle B. To the extent liberals believe that they are applying universal principles of justice, they may underestimate the role that their personal and intellectual attachments to particular western and liberal contemporary societies play in the determination and articulation of those principles. Even if one were to agree with this Walzerian critique of universalist principles, one does not have to accept Walzer's stronger thesis that individuals can discuss and resolve controversial issues of justice, such as the best way of allocating health-care or of defining marriage, solely within the parameters of one distributive sphere. In the context of same-sex marriage, it is indeed difficult to see how the conflict between the tradition that promotes free choice in the selection of a

*See supra* notes 235-47 and accompanying text.

The other smaller circles within circle B represent Walzer's other spheres, such as "commodities," "politics," and "religion."

I will in a future article address the role that universal principles play in issues of justice and gay rights.
spouse and the tradition that limits that selection to a spouse of the opposite gender can be reconciled by looking only at norms internal to the sphere of marriage and family. The difficulty exists because marriage as a social good has more than one meaning. As Walzer suggests, love and free choice play an important role in determining how society allocates marriage.318 A supporter of same-sex marriage can always argue that the important value associated with marriage is love and commitment and not the gender of the parties, but many who believe they are abiding by the true intrinsic meaning of marriage will reject such a view.

Ultimately, two conflicting interpretations of the meaning of marriage exist, and internal resolution of the log jam is impossible. In this context, society must make an undoubtedly normative—though not wholly internal to the social meaning of marriage—choice of which value is more important: love and free choice, or the gender of the parties. Society cannot make this choice by looking at the meaning of marriage in American culture because that meaning is multiple and conflicting. As Amy Gutmann points out,

the social meanings of some goods are multiple and the multiple meanings sometimes conflict, leading us to look for moral considerations that can adjudicate among the conflicting meanings. These moral considerations lead us beyond a search for the real social meaning of the good in question to moral considerations that are not internal to the sphere.319

Walzer would contend that the moral considerations of which Gutmann speaks are wholly internal to a society.320 Even if this is true at a macro level (i.e., even if it is true that we cannot step outside of our places in a culture to evaluate issues of justice within that culture), the moral considerations at issue cannot always be wholly internal to a particular sphere. In order to address the political controversy concerning the meaning of marriage, society must choose, or at the very least prioritize, whether free choice or the gender of the parties should be the normatively dispositive criterion in the social definition of marriage. In advocating prioritization of the former over the latter, gay men and lesbians (and their supporters) can point out how autonomy and free choice pervade across political, economic, and social spheres in the social traditions of the American nation.321 In fact, an

318 See supra notes 287-94 and accompanying text.
320 See supra notes 225-34, 266-74 and accompanying text.
321 According to Gutmann, many relevant moral considerations cut across distributive spheres. Although individual responsibility is not specific to the social meaning of any good, it is relevant to the distribution of many. When we draw upon all
autonomy-based argument in favor of same-sex marriage is attractive from a gay and lesbian perspective precisely because those Americans who might otherwise be skeptical about the normative value of same-sex relationships may find arguments based on autonomy and free choice appealing, because these are concepts that history has deeply woven into the American tradition of justice. Ultimately, however, whether the argument fails or succeeds depends on its effectiveness in using the values of autonomy and free choice, as they cut across spheres, to criticize and undermine the shared tradition that links marriage to only unions between persons of opposite genders.

Even if Walzer's theory cannot easily address the intrinsic argument against same-sex marriage, his theory can help gay men and lesbians, in the context of marriage, by showing society that the social good of marriage is not merely that which the state determines. Liberals, of course, worry primarily about protecting individuals from state-sponsored discrimination. They largely focus on the role of government as the regulator of marriage, because the government grants the privilege to enter into the institution and assigns most of the corresponding benefits. While the state obviously has the final word on how to define marriage, many components of marriage are not dependent on state action. Even the optimal amount of governmental regulation—the balance that liberals always try to strike—over marriage will be insufficient for a complete understanding of the justness or unjustness of the distribution of marriage in society. According to Walzer,

[m]arriage is rarely what John Selden called it: "nothing but a civil contract." It is part of a larger system, which legislators ordinarily deal with only at the margins or after the fact, for the moral and

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the moral resources at our disposal, we find that justice is complex, but not specific to each sphere.

Gutmann, supra note 319, at 99.

322 In other work, I elaborate on the role that the normative value of autonomy can play in imposing an obligation on society to recognize same-sex marriage. See Ball, supra note 36, at 1936-42. I discuss autonomy in the context of society's obligations to individuals with disabilities in Carlos A. Ball, Autonomy, Justice, and Disability, 47 UCLA L. Rev. 599 (2000).

323 My skepticism about the ability to keep distributive spheres separate when confronting difficult issues of justice, such as same-sex marriage, is consistent with my criticism of the moral bracketing of political liberalism that seeks to separate the sphere of morality from that of politics. See supra notes 50-60 and accompanying text. If the maintenance of a strict separation among spheres were possible, then an additional gay rights argument from a Walzerian perspective might be available: Even if one were to conclude that gay men and lesbians are not entitled to marry because their relationships do not fit within the definition of marriage as determined by our shared traditions, Walzer's theory of justice would prohibit that view from spilling over into other spheres such as that of employment. See supra notes 235-52 and accompanying text.
also the spatial arrangement of “private” life: homes, meals, visits, duties, expressions of feeling, and transfers of goods.\textsuperscript{324}

Furthermore, as Walzer notes, if individuals “are free to love and marry as they please, there must be a social space, a set of arrangements and practices, within which they can make their choices.”\textsuperscript{325} Even within the highly autonomous American culture, social practices exist relating to courtship and marriage that aim to promote and support individuals’ “choices” to enter into, and stay within, the institution of marriage. For example, the ritual of entering into an engagement prior to marriage provides an opportunity to notify the community of families and friends of the upcoming marriage and permits that community to begin the process of celebrating and supporting the union.

Thus, society, and not merely government, gives value and exalted recognition to individuals who marry while at the same time demeaning or failing to recognize the intimate relationships of those who do not have that option. An examination of marriage as a social good subject to distribution according to community norms, and not simply as a legal construct involving certain rights, facilitates an evaluation of how society, and, again, not merely government, distributes the social good of marriage.\textsuperscript{326}

2. Gay and Lesbian Parents

While some liberals, when addressing issues of justice, have largely ignored the family by assuming that its processes and dynamics are outside of both permissible regulation by government and the concern of justice,\textsuperscript{327} Walzer specifically acknowledges that the family is a sphere of justice unto itself.\textsuperscript{328} Walzer is particularly interested in how the world beyond the sphere of the family reflects what goes on within it. Thus, he focuses on how “the larger world” reflects “sex roles” largely determined from within the family.\textsuperscript{329} He argues that society imposes those roles “upon a range of activities to which sex is

\textsuperscript{324} WALZER, supra note 34, at 228 (footnote omitted).
\textsuperscript{325} Id. at 236 (emphasis added); see also JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 42 (1994) (noting that “[t]he ability of people to have a particular relationship depends on its being established by social practices known to them, and which they share, at least to some degree” (emphases added)).
\textsuperscript{326} See Walzer, supra note 171, at 17 (“[T]he state is not in fact the only or even, for ordinary people in their everyday lives, the most important social union. All sorts of other groups continue to exist and to give shape and purpose to the lives of their members, despite the triumph of individual rights . . . .”); see also PHelan, supra note 17, at 16 (“[O]ppression] does not always result from state action. It issues, rather, from the entire social matrix of which politics is but a part.”).
\textsuperscript{327} See supra note 289 and accompanying text.
\textsuperscript{328} See WALZER, supra note 34, at 227-42.
\textsuperscript{329} Id. at 240.
entirely irrelevant." This use of sex roles to allocate social goods outside of the family—in the spheres, for example, of employment and politics—creates injustices: "The family itself must be reformed so that its power no longer reaches into [other spheres]."

Because Walzer concentrates on the effects of sex roles outside of the family, some scholars have criticized him for "underestimat[ing] the effects of sex roles on the domination of women within the family." The paucity of discussion in Walzer's Spheres of Justice regarding parenting is consistent with his lack of attention to internal family dynamics. However, the large number of gay men and lesbians who choose to have or adopt children necessitates an exploration of how sexual orientation and family law issues fit within Walzer's theory of justice. I provide below a brief exploration of this issue; a more complete account—that merits an article by itself—would seek to determine the many values and norms that influence society's definition of parent.

Scholars can analyze issues of justice relating to gay and lesbian parents in at least two ways. One is the traditional liberal method that emphasizes voluntariness and equality. Under this paradigm, gay men and lesbians who choose to parent have the same rights and obligations as heterosexual parents. A second, more Walzerian approach, would not begin the analysis by looking at voluntariness or equality per se, but would seek to determine what parenting means in our society. As discussed above, the Walzerian conception of justice requires an examination into the social meaning of the particular good and its distributive criteria that are the subject of discussion.

Similar to the decision to marry, the decision to have children occurs within a social normative framework that (1) expects couples to have children and (2) rewards those that do. Government pro-

330 Id.
331 Id.
332 Susan Moller Okin, Politics and the Complex Inequalities of Gender, in PLURALISM, JUSTICE, AND EQUALITY, supra note 240, at 120, 125. In another work, Okin notes: "On a number of occasions, Walzer criticizes the operation of the gender system outside the family. But in spite of the fact that his separate spheres criterion would seem to demand it, he pays almost no attention to the continued operation of the gender structure within the family." OKIN, supra note 289, at 114.
333 Walzer does mention that "parents today are more likely to take pride in their children's achievements than are children in the status of their parents .... This, too, is a product of the separation of the family from politics and economy, the decline of national and local dynasties, the triumph of complex equality." WALZER, supra note 34, at 242.
334 Cf. Ball, supra note 36, at 1873 (noting that gay rights proponents traditionally emphasize values of "neutrality, equality, and toleration").
335 See supra Part III.A.
336 See generally PRONATALISM: THE MYTH OF MOM & APPLE PIE (Ellen Peck & Judith Senderowitz eds., 1974) (discussing the societal pressure to become a parent and its associated biases); JEAN E. VEEVERS, CHILDLESS BY CHOICE 110-16 (1980) (discussing the different
vides a myriad of services, from subsidized day care to education, that, at least for some, reduce the expenses of having children. In addition, the liberal American society affords constitutional protection for the right to reproduce and the parent’s right to make decisions affecting a child without undue state interference. But as with marriage, community norms that have nothing to do with governmental subsidies or enforcement of individual rights define many aspects of parenting. The decision to become a parent often results from complex assessments of what feels right to the individuals involved and what they perceive society expects of them. In fact, one of the most important values or satisfactions that comes with having children is “adult status and social identity,” a value that “fulfills the need to be accepted as a responsible and mature adult member of the community.” Another value that accompanies having children is the “expansion of the self,” which “fulfills the need to have new growth and learning experiences and to add meaning to life.” Other “moral values” also “satisf[y] the need for moral improvement, including becoming less selfish and learning to sacrifice, [and] mak[e] a contribution to society.”

The notions of wanting to raise children in order to “add meaning to one’s life” and to satisfy societal expectations, while often motivating factors behind the decision of couples to have children, fit rather awkwardly, if at all, within the liberal paradigm. Many people view parenting as an important component of leading a good life, yet liberals such as John Rawls want to exclude considerations of what constitutes a good life from discussions of justice. Rawls would rather focus on whether parenting by gay men and lesbians allows for “the nurturing and development of [politically and socially aware] citizens in appropriate numbers to maintain an enduring society.”


337 See Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (noting that “marriage and procreation are fundamental to the very existence and survival of the race”).

338 See Pierce v. Society of the Sisters, 268 U.S. 510, 534-35 (1925) (holding that the compulsory Education Act of 1922 “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (determining that a state law prohibiting school instruction in any language other than English impermissibly interfered “with the power of parents to control the education of their [children]”).


340 Id.
341 Id.
342 See supra notes 339-41 and accompanying text.
343 Rawls, supra note 21, at 788.
must limit himself in this way to abide by his liberal limits on public reasoning.\textsuperscript{344} However, this shows that limiting the discussion to purely political values excludes from the debate many of the important values and norms that influence the societal definition of the good in question, in this case parenting. Walzer’s model, on the other hand, allows for constructive debate about the societal definition and expectations of parenting to see whether parenting by gay men and lesbians is consistent with that definition.

Ultimately, we cannot expect a gay or lesbian individual who lives in a society that places such high value on the decision to have children to be immune from the community-based norms that define the meaning and value of parenting. Typically, he or she grows up in a traditional family where children are, or should be, the most important part of their parents’ lives. He or she also lives in a culture that expects, respects, and, to some extent, subsidizes child-bearing and rearing. Yet when that same gay or lesbian individual, as an adult, decides to have a child, many heterosexuals, even some who might otherwise denounce discrimination against gay men and lesbians in housing and employment,\textsuperscript{345} balk at the idea of families headed by homosexuals.\textsuperscript{346}

Part of this objection stems from a belief that the (homo)sexual relationships of parents harms their children.\textsuperscript{347} The social science literature in this area has found no evidence of harm.\textsuperscript{348} Perhaps no amount of social science data will convince some that the sexual orientation and relationships of gay men and lesbians will not harm their children. Nonetheless, in the absence of evidence of harm to the children, the question remains whether, given the framework under which our culture values and distributes parenting as a social good (to use Walzerian terminology), excluding from parenting those gay and lesbian individuals who are willing and able to provide love, nurturing, and moral guidance to their children is unjust. Society often attempts to exclude gay men and lesbians from the societal good of parenting despite the fact that the vast majority of the gay men and

\textsuperscript{344} See supra notes 37-49 and accompanying text.

\textsuperscript{345} See Gay Marriages Poll, supra note 308, at 8 (reporting on Newsweek poll finding that 74% of those surveyed favored protecting gay men and lesbians from employment discrimination and 81% favored similar protection from housing discrimination).

\textsuperscript{346} See Adoption Poll, supra note 308, at 6 (reporting on Harris poll finding that “61 percent disapprove of a female couple who live together adopting a child, and 65 percent disapprove of two men who live together adopting a child”).

\textsuperscript{347} See generally Lynn D. Wardle, The Potential Impact of Homosexual Parenting on Children, 1997 U. ILL. L. REV. 833, 852-87 (discussing the potential negative effects on children of having gay or lesbian parents).

\textsuperscript{348} See, e.g., Ball & Pea, supra note 193, at 272-308; Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 CHILD DEV. 1025 (1992).
lesbians who raise children act consistently with the shared meanings and traditions of what it means to be a parent.\textsuperscript{349}

As with same-sex marriage, the application of Walzer's theory of justice to the issue of parenting by gay men and lesbians does not lead to results that differ from those reached through the application of liberal theory; both theories can lead us to conclusions favorable to gay rights positions. Unlike liberal theory, however, Walzer's theory fully engages the normative traditions and values behind the institution of parenting. It allows for a discussion of justice that struggles directly with the meaning and role of parenting in society.

What Walzer's theory of justice lacks is an antecedent commitment to the protection of human autonomy regardless of a society's contemporary distributive patterns. As I argue below, gay men and lesbians are unlikely to embrace fully a theory of justice that does not place autonomy at the top of its normative hierarchy. As I also argue below, however, this indispensable commitment to autonomy, and thus to liberalism in one form or another, on the part of gay men and lesbians (and their supporters) should not preclude a recognition of the validity of some communitarian critiques of liberalism.

IV
THE LESSONS FOR GAY MEN AND LESBIANS IN THE COMMUNITARIAN CRITIQUE OF LIBERALISM

Gay men and lesbians in America have experienced major transformations over the last few decades. Many have difficulty leading fulfilling lives while remaining isolated from each other and from the rest of society. Participation in burgeoning and enriching gay and lesbian communities remedies the isolation from each other; these communities play an integral role in providing individual gay men and lesbians with the human ties and bonds that are essential for leading lives of dignity and pride.\textsuperscript{350} Open participation in many of the traditional institutions and communities of mainstream American life, such as family, marriage, churches, and corporations,\textsuperscript{351} reduces the isolation from the rest of society. As a result of these transformations, the vision of the atomistic gay person—alone and isolated—becomes less descriptively accurate.

Therefore, theoreticians of gay rights must incorporate the value of community and the role of social encumbrances and attachments

\textsuperscript{349} See generally Ball & Pea, supra note 193 (arguing that gay and straight couples desire children largely for the same reasons).
\textsuperscript{350} See supra notes 142-55 and accompanying text.
\textsuperscript{351} See Signorile, supra note 14, at xv-xvi (discussing how gay men and lesbians are openly integrating themselves into the lives of their biological families, the congregations of many churches and synagogues, and places of work).
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into the liberal theory of political morality that has acted as the principal foundation for gay rights positions over the last three decades. Fortunately, some liberal philosophers have sought to weave communitarian ideas into their liberal conceptions of justice. For example, Ronald Dworkin recognizes the role of a liberal community in connecting individuals' sense of what constitutes a good life with their conceptions of liberal political morality.\textsuperscript{352} Joseph Raz, in his brand of perfectionist liberalism, emphasizes the role that common goods play in questions of justice.\textsuperscript{353} Raz also recognizes that the liberal state must promote a particular conception of the good life: true autonomy.\textsuperscript{354} These modified versions of liberalism, and Raz's in particular, constitute appealing theoretical foundations for gay rights positions.\textsuperscript{355}

Recognizing and cherishing the positive values of community from a gay and lesbian perspective, however, must not diminish liberalism's commitment to individual rights and autonomy. The freedom that liberalism provides by respecting individual autonomy allows free and open consideration of whether questions regarding the value of community need to supplement issues of autonomy.\textsuperscript{356}

In the political environment in which the current debate about gay men and lesbians and their relationships occurs, we as a society share few thick values that can act as conveyors of real harmony, much less help reach some sort of truth. In this environment, neither Sandel's constitutive communities\textsuperscript{357} nor Walzer's shared traditions\textsuperscript{358} can provide gay men and lesbians with a comforting sense that society will respect their autonomy and humanity in most circumstances. In this context, the question then becomes how will society treat, or punish, or regulate gay men and lesbians in the absence of an agreement about "the nature of their cause."\textsuperscript{359} An exclusive reliance on common goods and the promotion of community ties and civic virtue will not be enough to protect those whose choices large segments of society will often reject.\textsuperscript{360} As Shane Phelan points out, "[w]e can safely

\textsuperscript{353} See Raz, \textit{supra} note 254, at 202-09.
\textsuperscript{354} See id. at 407-20.
\textsuperscript{355} See Ball, \textit{supra} note 36, at 1926-30, 1936-42.
\textsuperscript{356} As Markate Daly explains, "[c]ommunitarianism is a postliberal philosophy in the sense that it could only have developed within a liberal tradition of established democratic practices, and in a liberal culture that had allowed community values to decline to the extent that a corrective seemed necessary." Daly, \textit{supra} note 10, at xiii; \textit{see also} West, \textit{supra} note 160, at 710 (noting, in addressing communitarians' critique of liberalism, that "it would be wrong to jettison either the universalist or individualist aspirations of liberalism").
\textsuperscript{357} See \textit{supra} notes 162-67 and accompanying text.
\textsuperscript{358} See \textit{supra} notes 225-40, 266-74 and accompanying text.
\textsuperscript{359} See \textit{supra} notes 200-01 and accompanying text.
\textsuperscript{360} As Amy Gutmann starkly warns,
dispense with [the liberal notions of rights, individual freedom, and dignity] only as long as we trust that our community will never arrive at a truth that requires our subjugation. Few of us can be so secure.\textsuperscript{361}

Even Sandel acknowledges the risk of coercion that can accompany civic republicanism: "The coercive face of soulcraft is by no means unknown among American republicans."\textsuperscript{362} He adds that "civic education need not take so harsh a form. In practice, successful republican soulcraft involves a gentler kind of tutelage."\textsuperscript{363} Ultimately, however, civic republicanism does not provide an institutional framework that can guarantee that the "republican soulcraft" will be gentle rather than harsh. To his credit, Sandel acknowledges this point:

To accord the political community a stake in the character of its citizens is to concede the possibility that bad communities may form bad characters. Dispersed power and multiple sites of civic formation may reduce these dangers but cannot remove them. This is the truth in the liberal's complaint about republican politics.\textsuperscript{364}

Amitai Etzioni, another leading communitarian thinker, is sanguine about our ability to distinguish good communities from bad communities. After criticizing the liberal penchant for highlighting the oppressive characteristics of communities, he notes that enlightened communitarians "seek a balance between diversity and unity."\textsuperscript{365} Like Sandel, however, Etzioni provides no fall-back position regarding what to do, other than rely on people's good will and sense of civic virtue, when the balance between diversity and unity shifts toward the latter. Unless and until communitarians convince gay men and lesbians otherwise, the only practical institutional framework that can maintain the balance is the enforcement of individual rights.\textsuperscript{366}

\textsuperscript{361} Amy Gutmann, \textit{Communitarian Critics of Liberalism}, 14 Phil. & Pub. Aff. 308, 319 (1985); see also Phelan, \textit{supra} note 17, at 146 ("In the United States, the civic republican tradition has always been challenged by the fear that republicans will not act to protect the minority. Every 'consensus' has been haunted by the suspicion that it is incomplete, perhaps even coercive. It is this suspicion that has kept liberalism alive.").
\textsuperscript{362} Phelan, \textit{supra} note 17, at 159.
\textsuperscript{363} \textit{Id.} at 319-20.
\textsuperscript{364} \textit{Id.} at 321.
\textsuperscript{366} Etzioni seems to concede this point when he accepts the validity of using the Bill of Rights to "single[ ] out matters that are exempt from majority rule and from typical democratic rule making." \textit{Id.} at 162.
Similarly, Walzer’s prioritization of shared traditions within his theory of justice may leave gay men and lesbians, who as a group are often on the losing side of those traditions, feeling uncomfortable and insecure about their places in the broader society. A progressive agenda of gay rights often entails a necessary shift away from, or at least a questioning of, society’s most deeply held traditions, such as the view that marriage and good parenting require two individuals of opposite genders.

Of course, as society’s traditions change in favor of greater tolerance and equality, gay rights advocates will be able to formulate their arguments consistent with those shifting societal mores. But societal norms change in both directions; the possibility and reality of backlash and intolerance make gay men and lesbians appropriately reliant on the uncompromising protection of individual autonomy that only liberalism can provide.

Liberalism, with its respect for the autonomy and freedom of individuals, then, is well-suited to protect gay men and lesbians from coercion and harassment, especially by public institutions. Liberalism provides for the necessary personal freedom and independence that allow individuals to pursue their own lives and desires. Thus, liberalism validly and appropriately appeals to gay men and lesbians.

Liberalism, however, also has its own limitations for gay men and lesbians. First, it fails to recognize sufficiently the positive role that communities which marginalized individuals construct can have in the lives of those individuals. The liberal paradigm’s focus on individual rights and autonomy cannot easily account for the value of community in the lives of gay men and lesbians. As I have argued in this Article, that value is twofold: First, it contributes to the identity of gay men and lesbians, and second, it acts as a buffer that, along with the enforcement of liberal individual rights to privacy and equality, protects gay men and lesbians from harassment and discrimination emanating from the broader society.367

One of the reasons liberals do not describe communities in a positive light when discussing issues of justice is that they often view communities as sources of oppression, coercion, and anti-individualism.368

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367 See supra notes 142-55, 174-79 and accompanying text.
368 See, e.g., H.N. Hirsch, The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community, 14 POL. THEORY 423, 434-35 (1986) (arguing that the only way to create communities is through homogeneity and moral education, both of which “can be politically dangerous in several ways: by encouraging the exclusion of outsiders; by encouraging indoctrination or irrationalism; by compromising privacy and autonomy”); Jeffrey Reiman, Liberalism and Its Critics, in THE LIBERALISM-COMMUNITARIANISM DEBATE, supra note 1, at 19, 30 (“Those who think that liberalism is community’s enemy, and who would instead start by teaching people to share some set of values, would essentially force a conformity on people that is related to true community in the way that forced religious observance is related to true faith.”). As Daly explains,
These liberals, however, fail to recognize that oppression has implications for community formation as well. In other words, when faced by society's oppression, marginalized individuals such as gay men and lesbians often seek the solace and support that only the human ties and bonds found within their own communities can provide. The enforcement of individual rights of autonomy and privacy will not on their own ameliorate the oppression experienced by gay men and lesbians in society because that oppression has deep roots in the almost visceral reaction by many Americans to gay men and lesbians and their relationships.\

Even if the Court in *Bowers v. Hardwick* had struck down the Georgia sodomy statute as unconstitutional, and even if gay men and lesbians today enjoyed the full panoply of legal protections that constitutional rights to privacy and autonomy can guarantee, the reality is that prejudices against homosexuals would remain largely undisturbed. As the experience of African Americans in our country demonstrates, the enforcement of liberal rights can accomplish only so much. Even if our society fully enforced liberal individual rights, communities would still play a crucial role in protecting gay men and lesbians from the prejudices of others. Instead of either ignoring communities altogether or viewing them with apprehension and distrust, liberal theory should recognize that community often plays an important role in promoting freedom and dignity.\

[369] In his recent study of the attitudes of middle-class Americans, Alan Wolfe found that many of those he surveyed had no trouble finding these words, all of which cropped up in [his] interviews when the subject of homosexuality was raised: "abnormal," "immoral," "sinful," "unacceptable," "sick," "unhealthy," "untrustworthy," "mentally ill," "wrong," "perverted" and "mentally deficient." In all likelihood, Americans are less homophobic than they were before the gay rights revolution, but middle-class Americans have not come to the conclusion that homosexuality represents an alternative that is the moral equal of any other. 

Alan Wolfe, *The Homosexual Exception*, N.Y. Times, Feb. 8, 1998, § 6 (Magazine), at 46, 47; see also Rosin & Morin, *supra* note 308, at 8 (noting that while a majority of Americans "now finds divorce, sex before marriage, interracial relationships and single motherhood acceptable," a recent survey found that 57% considered "homosexuality" unacceptable, and 72% deemed "gay sex" to be "outside the bounds of acceptability"). For a further discussion of Wolfe's findings, see ALAN WOLFE, ONE NATION, AFTER ALL 72-81 (1998). 

See Buchanan, *supra* note 5, at 878 (noting that it is appropriate for "advocate[s] of the liberal thesis [to] embrace an expanded psychology and a richer theory of the good and [to] admit that not only autonomy but also community is of fundamental importance"); see also Jane Mansbridge, *Feminism and Democratic Community, in Democratic Co-

\[liberals\] fear that a philosophy in which community is the fundamental good would legitimate features of existing communities that are unacceptable in a democratic society—for example, authoritarian culture, entrenched social hierarchy, and male dominance. Liberals fear that a community-centered political philosophy could lead to government intrusion in private affairs and suffocating conformity in social life. 

Daly, *supra* note 10, at xviii-xix.
The second limitation of traditional liberalism is that it fails to recognize that the right, as Sandel likes to point out, is often linked to the good. Contemporary gay rights arguments are often supported by the belief that committed same-sex relationships are good relationships and that most gay and lesbian parents are good parents. These arguments rely heavily on the normatively valuable in articulating pro-gay rights positions. The separation of the right from the good that Rawlsian liberalism demands, while well-intentioned with its aim to promote tolerance and equality for all minorities, ultimately inadequately captures the complexity of the issues involved.

The third limitation of liberalism relates to its scope and applicability. Liberals always try to strike a balance between the state and the individual: They ask where society should draw the line to protect the individual from the actions of the state. As Walzer correctly argues, however, societal norms and understandings that go beyond what the state dictates play crucial roles in defining social goods and their methods of distribution. For example, the debate over same-sex marriage not only concerns the practical, and undoubtedly important, benefits that the state provides to married couples, but also addresses notions of acceptance and a "sense of belonging to the community."

The history of the same-sex marriage issue in Hawaii illustrates this point. The Hawaii legislature, in response to a judicial opinion that questioned the constitutionality of the ban on same-sex marriage, enacted a comprehensive domestic partnership statute that grants nontraditional couples many of the same state-provided benefits that married couples enjoy. These types of compromises, however, do not satisfy most gay men and lesbians; they want not only equal access to state-provided benefits, but also inclusion in the societal institution of marriage, in its norms and traditions, with the legitimacy, acceptance, and recognition that follow.
The latest chapter in the Hawaii same-sex marriage saga also shows the limitations of relying exclusively on liberal principles of justice. The voters in Hawaii recently authorized the legislature to amend the state constitution to prohibit same-sex marriages.\textsuperscript{379} The litigation challenging the ban on same-sex marriages, which began several years before the constitutional amendment appeared on the ballot, appropriately focused on liberal principles of equality: To allow a man to marry a woman but not another man constitutes gender discrimination that requires the showing of a compelling state interest.\textsuperscript{380} While the Hawaii Supreme Court ultimately accepted this legalistic, liberal, right-to-equality argument, it translates poorly into political discourse about the (in)justice of the prohibition against same-sex marriage. As Walzer would likely remind us, that debate has at its epicenter the meaning and role of marriage in our society. For gay men and lesbians to convince a majority of the population that they also deserve the opportunity to marry and to parent, there has to be a comprehensive political discussion of the social meanings of those terms (or goods), including their normative meanings.\textsuperscript{381} The discussion cannot be limited to, or by, the traditional liberal values of neutrality, equality, and privacy.

Of course, the supplementing of liberal values with nonliberal concerns, such as the value of community and the normative value of marriage in our society, is no guarantee of political victory for gay men and lesbians. The recent vote in Hawaii, however, provides evidence that political liberalism as heretofore understood will not be able to do it on its own.

Ultimately, the communitarian critique of liberalism proves valuable for gay rights supporters because it forces us to think about the benefits and limitations of liberalism. Even if in the end we remain

\textsuperscript{379} See Hawaii, Alaska Don't Want Same-Sex Marriage, ORLANDO SENTINEL, Nov. 5, 1998, at A17. The Hawaii Constitution now states that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST., art. I, §23. After the voters acted, the Hawaii Supreme Court dismissed as moot the constitutional challenge to the prohibition against same-sex marriage. See Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999).

\textsuperscript{380} See Baehr, 852 P.2d at 63-68. I use the term "appropriate" because of the equal protection implications of such an argument.

\textsuperscript{381} The recent decision by the Vermont Supreme Court requiring the legislature to provide same-sex couples with "the same benefits and protections afforded by Vermont law to married opposite-sex couples" offers us the opportunity to engage in such normative discussions. See Baker v. Vermont, No. 98-03, 1999 Vt. LEXIS 406, at *97 (Vt. Dec. 20, 1999). The court noted in its opinion that "the essential aspect of [the plaintiffs'] claim is simply and fundamentally for inclusion in the family of State-sanctioned human relations." Id. at *66. The court added that "[t]he extension of the [Vermont Constitution's] Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity." Id. at *67.
unconvinced that Sandel or Walzer presents a better theory of justice than liberal theories, their criticisms help to transform and improve liberalism. As this Article has sought to show, reading Sandel and Walzer can teach us how to improve liberalism without having to acquiesce in their ultimate suggestion to replace liberalism. In the end, the best theoretical foundation for gay rights arises out of a deep and rich form of liberalism that recognizes the role that communities and shared traditions play in the creation of a just society, but at the same time remains deeply committed to individual autonomy and freedom.

CONCLUSION

Even though communitarians and liberals have engaged in a lively debate for many years now, little attention has been paid to the debate’s impact on gay rights issues. While most gay rights proponents have relied primary on liberal theories to formulate their arguments, they should not accept those theories as a matter of course. This Article has tested the almost instinctive reliance on liberalism by many proponents of gay rights by addressing the communitarian critique of liberalism from a gay and lesbian perspective. That critique proves valuable in supplementing and transforming the traditional liberalism of thinkers such as John Rawls. Ultimately, a transformed liberalism remains the best theory of political morality in helping gay men and lesbians lead lives of both freedom and dignity.