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# “The Pursuit of Happiness” Comes Home to Roost? Same-Sex Union, the Summum Bonum, and Equality

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*Symposium on Whether  
Legalization of Same-Sex Marriage  
Is Constitutionally Required—2012*

II.

EQUALITY MANDATES FOR  
SAME-SEX MARRIAGE IN  
THEORY AND PRINCIPLE

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# “The Pursuit of Happiness” Comes Home to Roost? Same-Sex Union, the *Summum Bonum*, and Equality

Patrick McKinley Brennan\*

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### I. REMOVING “UNEASINESS”

We can imagine a family—or any other tightly bonded social unit, for that matter—in which it is accepted, celebrated, and, furthermore, expected, and expected at a *deep normative level*, that things will be done the way they have always been done in the family. The faithful life of this particular family will ever amount to constructing and re-constructing its future along the lines, and only along the lines, that it has already entrenched as norms, customs, and rules. The best this family can do, pursuant to its own normative commitments, is to make of itself the best possible instance of the principles it already accepts. Let us call this family an instance of constructivism.<sup>1</sup> Life is always a work in progress, and in the case of this family the construction project is limited to what can be made of the conceptual Tinkertoys already in the family box.

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1. On constructivism as a philosophical concept, see *CONSTRUCTIVISM IN PRACTICAL PHILOSOPHY* (James Lenman & Yonatan Shemmer eds., 2012).

We can also imagine a family—or any other tightly bonded social unit—in which inherited norms, customs, and rules are presumptively decisive, yet also open to revision as insight grows into what has been handed down. No family can live every day as if it were its first, but measured openness to change offers cause for hope. To be sure, there is risk in this open way of living; the future could be better, or it could be worse, than the past or the present. Either way, though, it will be more alive because it will not be just a matter of “wash, rinse, repeat” until the sun no longer shines. It will be more alive due to its openness to the deep springs of reality that do not, *and never could*, enter human understanding all at once, or once and for all. The best this family can do is to make of itself the best possible instance of what nature and grace indicate and docile inquiry brings to light, progressively and cumulatively, over time. Let us call this family an instance of Greco-Catholicism. Its project is to live the truth, *veritatem agere*.

The differences between these two sorts of families are reduplicated, *mutatis mutandis*, in states and in the cultures that drive states. States and cultures can be rigid constructivist edifices, or they can be developing works in progress toward the truth. The constructivist state has a limited number of principles from which to work.<sup>2</sup> The Greco-Catholic state, by contrast, has the whole range of being, both natural and supernatural, at its disposal, at least in potency.

What has all of this to do with the question of whether same-sex unions should be recognized at law? Not what one might at first blush be tempted to suppose.

The contemporary American constructivist is apt to conclude that he has a ready rejoinder to the call for legal recognition of same-sex union. According to the self-confident constructivist, marriage should be defined as exclusively between one man and one woman for the simple reason that this is the way we have always defined it in the United States. The constructivist reasons that opposite-sex union is the only relevant concept we have to work with in the inherited box. To be sure, the constructivist is likely to have some quite flattering things to say on behalf of the principles and concepts to which he is committed, and some or perhaps all of these flatteries may even be

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2. Ronald Dworkin's jurisprudence is an instance of constructivism. Dworkin gives the example of using dinosaur fossils (Tinkertoys) to construct the best dinosaur we (think we) can, not to recreate or approximate the real dinosaur whose fossils we have found. See STEVEN GUEST, RONALD DWORKIN 149 (2d ed. 1997). Modernity is a long and fruitless love affair with the formless.

true. The constructivist's distinguishing mark, however, is that his future will resemble his past, *regardless* of the truth *vel non* of his principles. He's prepared to stand by those principles, come what may. The recent practice of redefining marriage to include couples of the same sex must be repudiated posthaste, according to the constructivist, *exactly because* it violates the *grundnorm* of constructivism—a closed system. For a pure constructivist, the existence of the inherited opposite-sex definition of marriage is *sufficient* justification for denying legal recognition to same-sex unions. The constructivist has imposed what Eric Voegelin refers to as an “interdict on the question.”<sup>3</sup>

What I would say in reply to the constructivist is “not so fast.” The constructivist approach to the same-sex union question suffers the following *national* embarrassment: the principles *to which this nation was dedicated at its Founding* cut in favor of—not against—recognition of same-sex unions. True, Americans have almost always defined marriage as between individuals of the opposite sex, but most contemporary American opponents of legal recognition of same-sex union are committed, on a practical and a principled basis, to the constructivist project that took shape in the period preceding 1776 and extending through 1789. Those I have in mind, many of whom self-describe as “neo-conservatives,” are fundamentalists about the principles on which *this nation* was founded and to which it has ever since been proudly dedicated. When it comes to same-sex unions, this fundamentalism makes them hoist of their own petard, though they hardly see it coming.

But here it comes: who will rise to deny that the United States was founded, above all, to give constitutional effect to the opening salvo of the Declaration of Independence, the following moral idea that was first expressed by John Locke: all men “must be allowed to pursue their happiness, nay, cannot be hindered. . . .”<sup>4</sup> The transcendent point for Locke and his disciples, moreover, is that the “happiness” they champion is not man's *summum bonum* as understood in the Greco-Catholic tradition. For Lockeanism, the pursuit of happiness boils down to neither more nor less than the removal of “uneasiness.”<sup>5</sup> Period. “Lockean

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3. ERIC VOEGELIN, *ORDER AND HISTORY: THE ECUMENIC AGE* 330 (1974) (“This interdict on the Question is the symptom of a self-contradiction which makes the existentially open participation in the process of reality impossible.”).

4. JOHN LOCKE, *THE WORKS OF JOHN LOCKE IN NINE VOLUMES: THE REASONABLENESS OF CHRISTIANITY, AS DELIVERED IN THE SCRIPTURES* 149 (London, C. Baldwin, 12th ed. 1824), available at <http://hdl.handle.net/2027/uc1.b3924434>.

5. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 105 (Kenneth P.

man is as easily troubled as he is easily contented.”<sup>6</sup> To the achievement of this latter, modest end, civil society seeks to “procur[e], preserv[e], and advanc[e] . . . civil interests,” such as “life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, *houses*, furniture, and the like,”<sup>7</sup> and nothing more than that, certainly not the care of souls.<sup>8</sup>

In the innocuous-sounding Lockean language of the pursuit of happiness is contained the concentrated germ of the revolution known as *liberalism*. And it is a revolution that keeps on giving, for it is beyond obvious that recognizing same-sex unions would indeed remove considerable “uneasiness” for persons who wish to be united with a person of the same sex. Dedication to—or even acceptance of—“happiness” as the removal of “uneasiness” militates in favor of legal recognition of same-sex unions. Scandalous though it may sound to some, those committed to the nation’s founding principle of the pursuit of happiness as the (mere) removal of “uneasiness” are required, on pain of inconsistency, to give legal effect to same sex unions.

## II. THE FIRST CREEDAL NATION IN HUMAN HISTORY

What, then, are such constructivists to do? One possible response is to concede the nation’s Lockean pedigree, but point out that Locke himself recognized marriage as a pre-state society between man and woman. The latter point, about Locke’s understanding of marriage, is true as far as it goes, but it does not go nearly far enough. To begin with, one can ask whether Locke’s defense of “conjugal society,” as he prefers to call it, amounts to a deliberate, strategic inconsistency on Locke’s part. One need not be a Straussian to acknowledge that Locke is a slippery soul. Locke’s (partial) defense of marriage certainly masks the implications of his novel account of happiness. The question that merits serious attention is the following: can restricting marriage to opposite-sex unions be defended without contradicting Locke’s basic commitment to happiness as the removal of uneasiness? Does Locke’s account of happiness, when taken for all it is worth, not sublimate his

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Winkler ed., Hackett Publ’g Co. 1996) (1689).

6. PIERRE MANENT, *THE CITY OF MAN* 131 (Marc A. LePain trans., Princeton Univ. Press 1998) (1994); see also MICHAEL P. ZUCKERT, *LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY* 11, 224 (2002).

7. JOHN LOCKE, *A Letter Concerning Toleration*, in *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE* 125, 129 (Paul E. Sigmund ed., Norton Critical ed. 2005).

8. On the specific prohibition against care of souls, see *infra* text accompanying note 78.

definition of marriage? Or does Locke privilege marriage over “happiness,” the very sin alleged by contemporary advocates of same-sex marriage?

The “conjugal society” Locke defends is not remotely what tradition understood marriage to be: an indissoluble life-long union.<sup>9</sup> Marriage, as Locke expounds it, already shows a novel plasticity. It amounts to a union that is freely terminable when the couple’s offspring are old enough “to provide for themselves.”<sup>10</sup> According to Locke,

[T]he father, who is bound to take care for those he hath begot, is under an obligation to continue in conjugal society with the same woman longer than other creatures, whose young being able to subsist of themselves before the time of procreation returns again, the conjugal bond dissolves of itself, and they are at liberty, till Hymen at his usual anniversary season summons them again to choose new mates.<sup>11</sup>

Locke is adamant that “the chief, if not the only reason, why the male and female in mankind are tied to a longer conjunction than other creatures” is the longer dependency of human children.<sup>12</sup> With children out of the way, Locke’s civil society has no interest in conjugal society. Although Locke does show an unexpected interest in progeneritiveness, this does not lead him to defend traditional marriage; instead he contends that “barren women may be divorced.”<sup>13</sup> What limited defense of marriage Locke advances runs out when children are not part of the picture.

Another possible reply available to the constructivist is to deny that the nation was dedicated to Lockeanism to the extent that I have contended, and or work to show that the elements of its constructivist project are, therefore, more varied, and perhaps more traditional, than I

9. See JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 31, 46, 283–85, 289–90 (2d ed. 2012).

10. JOHN LOCKE, *The Second Treatise of Government*, in *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE*, *supra* note 7, at 17, 50; see also *id.* at 50–52 [hereinafter LOCKE, *The Second Treatise of Government*].

11. *Id.* at 51 (footnote omitted).

12. *Id.*

13. JOHN LOCKE, *LOCKE: POLITICAL ESSAYS* xxvi, 255–57 (Mark Goldie ed., 1997) [hereinafter LOCKE, *POLITICAL ESSAYS*]; see also JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE’S POLITICAL THOUGHT* 21–43 (2002); RACHEL WEIL, *POLITICAL PASSIONS: GENDER, THE FAMILY, AND POLITICAL ARGUMENT IN ENGLAND 1680–1714*, at 28–30 (1999). Locke’s objection to “adultery, incest, and sodomy” is that they interfere with the “increase of mankind.” JOHN LOCKE, *The First Treatise of Government*, in *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE*, *supra* note 7, at 11.

have contended. Be that as it may, it suffices for my present purpose to counter that, *to the extent that* the nation is dedicated to Locke's understanding of happiness enshrined in the American scripture—that is the Declaration of Independence—to *that extent* marriage cannot be limited to opposite-sex unions. I view that extent to be great indeed, as do others with understanding more learned than my own.

Consider G.K. Chesterton's typically trenchant insight that "America is the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence."<sup>14</sup> Pauline Maier was not claiming anything shocking when she entitled her book about the Declaration's drafting *American Scripture*.<sup>15</sup> And, as Chesterton goes on to say, America is "a nation with the soul of a church."<sup>16</sup> By taking on "a churchly function in becoming the community of righteousness," the American nation became "the primary agent of God's meaningful activity in history . . . ."<sup>17</sup> As Christopher Ferrara has observed in this vein, "Lincoln was not employing a mere trope in his declaration that 'when the people rise in masses in behalf of the Union and the liberties of their country, truly it may be said, "The gates of hell shall not prevail against them.'"<sup>18</sup> The late Richard John Neuhaus, doyen of American neo-conservatives, can hardly wait to confirm the point: "*America is the first creedal nation in human history*. America did not just happen. It was *professed* into being. In that sense, America is the first *universal nation*, for all who are convinced can join in professing its *creed*. . . ."<sup>19</sup> And the first article of that creed is that all men have a right to "the pursuit of happiness" by the removal of "uneasiness."

It is beyond dispute that this nation was founded to give effect to the then-emergent creed of what we now refer to as liberal political

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14. CHRISTOPHER A. FERRARA, *LIBERTY, THE GOD THAT FAILED: POLICING THE SACRED AND THE MYTH-MAKING OF THE SECULAR STATE, FROM LOCKE TO OBAMA* 604 (2012) (quoting 21 G.K. CHESTERTON, *THE COLLECTED WORKS OF G.K. CHESTERTON* (1990)).

15. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1998).

16. FERRARA, *supra* note 14, at 604 (quoting CHESTERTON, *supra* note 14, at 41–45)).

17. *Id.* at 605.

18. *Id.*

19. *Id.* at 605 (quoting RICHARD JOHN NEUHAUS, *DOING WELL AND DOING GOOD* 4 (1992)). For a compendious survey of the extensive literature about the extent to which the founders and the founding documents were Lockean, see *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE*, *supra* note 7, at 386–98. As I indicate below, in Section IV of this Article, I agree with Christopher Ferrara's account of how the radical Enlightenment, including the thought of Locke, led to the founding of the nation and, over time, to the current dilemma of legalizing same-sex unions.



theory. As Mark Tushnet has explained unexceptionably, “[t]he philosophical basis for liberal political theory came from a reaction against the theology of Catholicism. . . .”<sup>20</sup> “The liberal tradition accommodated religion,” Tushnet continues, “by relegating it to the sphere of private life, a sphere whose connections to public life were of essentially no interest.”<sup>21</sup> While the founders were not all “liberals,” some being civic republicans, they were all but united in rejecting the Catholic understanding of man, the state, and the Church.<sup>22</sup> It is not an exaggeration to say that a principal purpose behind this nation’s founding was to create a polity devoid of the Catholic Church and her traditional teaching about the nature of human happiness.<sup>23</sup> Locke was one among many influential anti-Catholic founders and supporters. And now, as the founders’ Founders’ liberal principles continue to work themselves pure, as the saying has it, the time has finally come for the Greco-Catholic understanding of marriage to go, for it has no place in the anti-Catholic creed.

It should go without saying that the Greco-Catholic tradition is not now—nor has it ever been—opposed to happiness, correctly understood. Rather than as the removal of “uneasiness” in the exercise of negative liberty, however, that tradition teaches that man has a *summum bonum*, in which his happiness consists. It is given by nature, awaits discovery by human intelligence, and is to be *achieved*. And it is, furthermore, the role of the state to assist man, including by prudent use of the compulsion of law, in discovering and achieving that *summum bonum*. This, again, is exactly what the Founders meant to rule out, and today’s constructivists are keen to follow the Founders’ rules. Make no mistake about it: “the question regarding the *summum bonum*, the supreme good of man, which is the primary question raised by the tradition . . . is a perfectly idle question for Locke.”<sup>24</sup>

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20. Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 731 (1986).

21. *Id.* at 731–32.

22. For a mostly admiring account of the steady growth of Lockean liberalism in the country’s life and constitutional law, see Nelson Tebbe, *Religious Institutionalism and Constitutional Argument*, J. CONTEMP. LEGAL ISSUES (forthcoming 2013).

23. The founders’ and their immediate successors’ antipathy for all things Catholic is staggering. For a summary, see Alan Brownstein, *Protecting the Religious Liberty of Institutions*, J. CONTEMP. LEGAL ISSUES (forthcoming 2013).

24. MANENT, *supra* note 6, at 130. The “new Lockean notion of ‘the pursuit of happiness’ [is] explicitly opposed to the classical idea of a ‘*summum bonum*,’ or *attainment* of happiness.” THOMAS PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 20 (1988).

## III. TO LIVE THE TRUTH

But what, then, is to be done about same-sex unions at law if, as is the case, the nation's founding ideas are Lockean and otherwise liberal, rather than Greco-Catholic? Does this nation's constitutional commitment not require that the state implement through law the Lockean rather than the Greco-Catholic conception of happiness? James Madison in Federalist No. 14 gushed that it was the glory of the American people to have "accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe. . . . If their works betray imperfections, we wonder at the fewness of them."<sup>25</sup> Is it not a matter of first importance to be faithful to the fabrics of government they reared? Locke, "the confused man's Hobbes,"<sup>26</sup> anticipated this very issue and, of course, answered proleptically in the affirmative. According to Locke in the *Second Treatise of Government*, "he that has once, by actual agreement, and any *express* declaration, given his *consent* to be of any commonwealth, is *perpetually and indispensably obliged to be, and remain unalterably a subject to it*, and can never be again in the liberty of the state of nature; unless, by any calamity, the government he was under comes to be dissolved, or else by some public act cuts him off from being any longer a member of it."<sup>27</sup> In an unmistakable reference to the Catholic Church and the papacy, Locke adds: "nor can any oaths to any foreign power whatsoever, or any domestic subordinate power, discharge any member of society from his obedience to the legislative . . . ."<sup>28</sup> Does this not mean that American citizens are precluded from engaging in non-revolutionary resistance to what is ordained by the legislative power?

I answer "no." Locke's meaning is clear, but his theses are, in my estimation, mistaken. Again, it is a central tenet of Greco-Catholic philosophy that man is to live the truth, *veritatem agere*, and from this it follows that no particular piece or constellation of pieces of positive law can conclusively block that project, even if Lockean philosophy insists otherwise.<sup>29</sup> The fully human project entails that human living

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25. THE FEDERALIST No. 14, at 80 (James Madison) (E.H. Scott ed., 1898).

26. C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE 25 (1962).

27. LOCKE, *The Second Treatise of Government*, *supra* note 10, at 70–71 (emphasis added).

28. *Id.* at 75–76, cited in FERRARA, *supra* note 14, at 73.

29. For a compendious and classic statement of the Greco-Catholic position, see JOSEF PIEPER, LIVING THE TRUTH 171 (1989) ("Moral action is 'doing the truth,' *veritatem agere*.").

is not to be exhaustively determined by whatever conceptual Tinkertoys happen to have been accumulated in a particular cultural box, even if that box be called a Declaration or a Constitution. Constructivism is *morally* untenable *per se* and not just in its Lockean form. It is always available, indeed morally exigent, for men and societies to have further recourse—in prudent and structured ways—to the ends given by nature, in creation, and by supernature, in redemption. It is a fact about the human condition that “knowledge makes a slow, if not a bloody, entrance,”<sup>30</sup> and sometimes even entire cultures can become distorted by error, even on a matter as basic as the nature of happiness. “So it is,” as Bernard Lonergan observes,

that commonly men have to pay a double price for their personal attainment of authenticity. Not only have they to undo their own lapses from righteousness but more grievously they have to discover what is wrong in the tradition they have inherited and they have to struggle against the massive undertow it sets up.<sup>31</sup>

Neither Locke nor any other mortal is authorized to issue a labor-saving, history-stopping dispensation.

It seems to me inescapable and even obvious that the Lockean heritage of this nation is on the side of legal recognition of same-sex unions. The refusal to grant legal recognition to same-sex union, furthermore, cannot be had on the cheap, at least if it is to be a principled refusal. In order to avoid—on honest grounds—granting such recognition, it is necessary to call into question, indeed to repudiate, central ideas that drove this nation’s founding and have shaped its subsequent history. Much of what today passes as neo-conservatism in this nation boils down to revolutionary crypto-Lockeanism by another (and quite misleading) name. I would suggest that the moment has come for neo-cons to double down, so to speak. The time is ripe, indeed overdue, to loosen the hold of the dead hand of Locke and to take up once again the cause of politics rooted in truth. As the saying goes, statecraft is soul-craft writ large, and souls can be lost. Sadly, it took the issue of marriage itself, the very condition of the possibility of the continuation of humanity, to clarify the deadly drift of a nation dedicated to happiness as no more than the removal of “uneasiness.” Now is the time for the constructivist “conservative” to convert to Greco-Catholicism.

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30. BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 186 (Philosophical Library 3d ed. 1970).

31. BERNARD J.F. LONERGAN, *A THIRD COLLECTION* 121 (Frederick E. Crowe ed., 1985).

## IV. JUDGE REINHARDT'S FOLLIES

Returning to the question of Locke's own influence on the founding of the United States, my contestable claim—which certainly flies in the face of the mythology about this being a “Christian nation,”—deserves extensive justification. That justification has recently been given elsewhere, specifically by Christopher A. Ferrara in his book *Liberty, The God That Failed: Policing the Sacred and Constructing the Myths of the Secular State, from Locke to Obama*.<sup>32</sup> I commend Ferrara's book to the reader's attention. In my judgment, it precludes Peter Augustine Lawler's optative judgment that the nation was “built better than [the founders] knew.”<sup>33</sup>

For present purposes I ask the reader to accept my stipulation that the nation was founded and dedicated to “liberty” understood as (what the philosophers refer to as) “negative liberty,”—that is, the right to be let alone in the “pursuit of happiness” by the removal of “uneasiness.” As John Milbank states on the jacket of *Liberty, the God that Failed*, “Ferrara's book most persuasively demonstrates that negative liberty is an idol and that liberalism is the last of the ideologies. Indeed he shows that it was the basic ideology hidden behind all the others.”<sup>34</sup> I consider it to be uncontroversial to observe that, except in the context of showing how the “pursuit of happiness” leads to the requirement of legal recognition of same-sex marriage, most Americans are keen to declare—and not just on the Fourth of July—that this nation is dedicated to the pursuit of happiness for all. By “happiness” they emphatically do not mean the achievement of man's *summum bonum*.

If the reader is inclined to doubt the truth of my stipulation, however, and even if the reader does not doubt it, it is worthwhile to recollect that a majority of what often passes (erroneously) as a “conservative” Supreme Court no longer find the entailments, at least, of such a founding principle to be the least bit controversial. Needless to say, I am referring to *Lawrence v. Texas*, the case that perhaps more than any other provides the background against which debate about the possible constitutional requirement of legal recognition of same-sex union goes forward. Justice Anthony Kennedy's majority opinion begins with this

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32. FERRARA, *supra* note 14.

33. Peter Augustine Lawler, *Better Than They Knew: A Response to Patrick Deneen*, ON THE SQUARE (Jan. 25, 2013), <http://www.firstthings.com/onthesquare/2013/01/better-than-they-knew-a-response-to-patrick-deneen>.

34. FERRARA, *supra* note 14, at jacket.

now-well-known paean to a particular, and historically eccentric, understanding of liberty:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.<sup>35</sup>

The Court was not so blinded by its enthrallment with negative liberty that it forgot to remind students of its opinion that “injury to a person” is *not* constitutionally protected.<sup>36</sup> But having implicitly concluded that the pursuit of what the Court referred to as “a homosexual lifestyle” causes no such injury, the Court held that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>37</sup>

Justice Antonin Scalia captured the Lockean underpinning of the Court’s pseudo-analysis, as well as its entailments, in just one sentence: “[T]he Court simply describes petitioners’ conduct as ‘an exercise of their liberty’—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.”<sup>38</sup> With respect to those implications, Justice Scalia observed as follows:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See *ante*, at 572 (noting “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*” (emphasis added)). The impossibility of distinguishing homosexuality from other traditional “morals” offenses is precisely why *Bowers* rejected the rational-basis challenge. “The law,”

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35. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

36. *Id.* at 567.

37. *Id.* at 578.

38. *Id.* at 586 (Scalia, J., dissenting).

it said, “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”<sup>39</sup>

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.<sup>40</sup>

And so it has. *Lawrence* was decided in 2003, just a decade ago, and now we can fast forward to 2010 and Judge Vaughan Walker’s opinion in *Perry v. Schwarzenegger* overturning California’s Proposition 8 that defined marriage as between a man and a woman. Among his findings of fact, Judge Walker includes the following assertion about the illegitimacy of moral judgment as a valid ground for state action: “In the absence of a rational basis, what remains of the proponents’ case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples.”<sup>41</sup>

Needless to say, Judge Walker’s citations to *Romer*, *Moreno*, and *Palmore*, for the proposition that moral judgment, as such, is an unacceptable basis for legislation, are wholly unavailing.

But Judge Stephen Reinhardt, in the Ninth Circuit Court’s opinion upholding the district court 2–1,<sup>42</sup> was happy to extend Judge Walker’s novel analysis. Judge Reinhardt conceded that California’s Proposition 8 was not subject to any heightened scrutiny for the simple reason that the U.S. Supreme Court has never held that sexual orientation is a suspect classification. Judge Reinhardt acknowledged that Proposition 8 was subject to the lower hurdle of rational-basis review, but he concluded that it did not clear even that low hurdle. Although Judge Reinhardt admitted that “[a]s a general rule, states may use their

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39. *Id.* at 590 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

40. *Id.*

41. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012). Walker continues:

Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.

*Id.* (citing *Romer v. Evans*, 517 U.S. 620, 635 (1996); *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

42. *Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

police powers to regulate the ‘morals’ of their population,”<sup>43</sup> he immediately eviscerated this concession and echoed Walker by asserting that moral judgment, as such, does not constitute a legitimate state interest, and that “animus, negative attitudes, fear, a bare desire to harm, and moral disapproval” are equally unconstitutional grounds for legislation.<sup>44</sup> A remark by Justice O’Connor in her concurrence in *Lawrence v. Texas* supports Judge Reinhardt’s assertion: “Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”<sup>45</sup> Judge Reinhardt speculates that “[t]he *Lawrence* majority opinion seems to have implicitly agreed” with Justice O’Connor’s remark, from which putative fact Judge Reinhardt would have us conclude that moral judgment, as such, is not a legitimate state interest as a matter of Supreme Court precedent.<sup>46</sup>

Walker’s and Reinhardt’s respective contributions to the law of the U.S. Constitution are novelties, but hardly surprising. They are the last necessary steps in the inexorable logic of a juridically enforceable right to “the pursuit of happiness” as the removal of “uneasiness.” A refusal to grant legal recognition to same-sex union causes “uneasiness” to those who would find some or even much happiness in the expressive value, as well as the other benefits, of legal recognition of their homosexual union. But note that *any* legal enforcement of moral judgment *always* will cause uneasiness for some, except in an imagined world in which all are already virtuous.<sup>47</sup> To the extent the Lockean definition of happiness stands, laws rooted in moral judgment must fall.

Back in reality, however, recognition of the twin *facts* of Creation and The Fall is the kiss of death for such a magical world bereft, simultaneously, of both morality and uneasiness. Ample attention to the consequences of our being created and also fallen, furthermore, focuses the mind on why the point and justification of law and government are not just giving people *what they happen to want* by the removal of “uneasiness.” It is, instead, about giving them the help they need to

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43. *Id.* at 1101.

44. *Id.* at 1102 (citing *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

45. *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring).

46. *Perry*, 671 F.3d at 1102.

47. I should add that even a perfectly virtuous people would require the exercise of political (and other) authority. See YVES R. SIMON, *A GENERAL THEORY OF AUTHORITY* 47–50 (1962).

achieve their *summum bonum*, which is discovered not invented.

### V. WHAT HUMAN BEINGS ARE FOR

Or is it? “It may seem quite obvious,” philosopher Michael J. White observes,

[T]hat political organization—that whole governmental complex of legislative, administrative, and judicial machinery associated with residents of a particular geographical area during some temporal period—has some function, purpose, or point. Political machinery should do something for us individually—and perhaps collectively. Otherwise, why bother with it?<sup>48</sup>

Indeed, but, “[o]n the other hand,” White continues:

[I]t may not seem at all obvious, at least to us inhabitants of Western constitutional states at the beginning of the third millennium, that human beings have any such function or point. We humans just seem to be here—with all our individual desires and aversions, our strengths, weaknesses, virtues, and vices, our abilities and accomplishments.<sup>49</sup>

The ensuing absurdity is apparent, as White helps us to see:

So political philosophy is charged with giving a rich account of the proper role of political organization without appeal to any conception (which would almost certainly be controversial) of what human beings are for—that is, without any rich conception of human nature, function, or purpose . . . .<sup>50</sup>

In other words, political philosophy is charged with giving an account of the point of governing for a class of pointless governed, except to the extent that the point of the governed is constituted by all and only what they happen to come up with as their point(s). The resulting dilemma or, rather, impossibility is that,

[t]hrough its judicial organ, government will always appear either to be in arrears on the scope of liberty (always catching up to the latest revisions and concepts of free selfhood), or to be arbitrary in the way it sets determinate limits (the very purpose of which is to make power predictable) . . . . [A]s to rights, the Court is caught in the perpetual

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48. MICHAEL J. WHITE, *POLITICAL PHILOSOPHY* 3 (2d ed. 2012).

49. *Id.*

50. *Id.* at 5.



cycle of being over- and under-inclusive.<sup>51</sup>

To be adequate to the right to liberty as conceived by Locke, the Court would have to be clairvoyant.

Approaching the issue from another angle, before *Lawrence*, those seeking to challenge government regulation bore the burden of demonstrating that their fundamental rights were being violated or, in other words, that government was violating the natural law. Under *Lawrence*, however, there would now seem to be a “presumption of liberty,” with the result that when faced with a plausible claim to an exercise of liberty, government must justify the regulation.<sup>52</sup> But, by its own proud profession, the Court lacks the resources to do so, because, as it said in *Lawrence*: “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>53</sup>

To be sure, this idea, of defining liberty without making moral judgments, is incoherent and utterly impossible—and this is exactly the point that needs to be made in the face of such solemn but absurd assertions. It is simply not possible “to define the liberty of all” without making judgments that are *moral*, that is, about what *should* or *should not* be done. And this just is the perennial domain of human practical reason, the natural law, and the divine law. In the same breath with which it claimed not to be reaching moral judgments (“not to mandate our moral code”), the *Lawrence* Court enacted its own preferred moral theory. No rational person can fail to see that a vindication of liberty still requires distinguishing it from license. The “liberty” to torture innocent children is not going to be recognized as a matter of legal “right,” no matter how “essential” someone may think it is to his self-definition. For example, in arguing for “boundless respect”—boundless!!!—for individual conscience and consequent liberty, Martha Nussbaum promptly retreats: “this principle does not imply that all religions and views of life must be (equally) respected by government . . . . If people seek to torture children . . . citing their religion as their

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51. Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 494 (1990).

52. RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253–69 (2004); see also Patrick McKinley Brennan, *The Individual Mandate, Sovereignty, and the Ends of Good Government: A Reply to Professor Randy Barnett*, 159 U. PA. L. REV. 1623, 1640–48 (2011).

53. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (quoting *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

reason, their claims must be resisted even though they may be sincere.”<sup>54</sup> *Mirabile dictu*, there turn out to be perfectly firm moral bounds on what was boldly, but wrongly described as “boundless.” And this is as it should be, but not just in the breach.<sup>55</sup>

Some philosophers can see what an increasing number of American jurists cannot see: “the claim that it is not possible to legislate morality is both false and absurd.”<sup>56</sup> Governments legislate morality all the time, and the only important question is *whose* morality will be legislated. Why should Locke’s moral theory or John Stuart Mill’s be the presumptively privileged one? The Greco-Catholic tradition counters that it is the morality given by the natural law and clarified by the divine law that is to be our guide, the basic precepts of which law are: to preserve its own being, to engage in sexual intercourse with a person of the opposite sex, to rear and educate offspring, “and to know the truth about God, and to live in society.”<sup>57</sup> These, in barest outline, are the rudiments of man’s earthly *summum bonum*. To it is added, by the grace of redemption, his supernatural *summum bonum*, enjoyment of the supernatural common good. It is the role of the state to assist man in the achievement of both,<sup>58</sup> and for that the state needs the assistance and cooperation of the Church, because, as Benjamin Rush wrote, “nothing but the gospel of Jesus Christ will effect the mighty work of making nations happy.”<sup>59</sup>

I now turn to this last point, the role of the Church.

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54. MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 19, 24 (2008) (emphasis omitted).

55. The two preceding paragraphs are adapted from Patrick McKinley Brennan, *The Place of ‘Higher Law’ in the Quotidian Practice of Law: Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys*, 7 GEO. J.L. & PUB. POL’Y 437, 469–70 (2009).

56. JOHN M. RIST, REAL ETHICS: RETHINKING THE FOUNDATIONS OF MORALITY 130 (2002).

57. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, question 94, art. 2 (Fathers of the English Dominican Province trans., 1947) (1274).

58. This requires recovering the understanding of the state that Hobbes and Locke, along with Jean Bodin and others, demolished.

In the sixteenth century the word ‘state’ itself came to indicate less the community or society as a whole than its government, itself frequently viewed as in at least potential opposition to the citizen. Thus any state, and later even any ‘community,’ might be perceived no longer as a means to the individual’s growth but as a threat to his autonomy.

RIST, *supra* note 55, at 209.

59. Patrick McKinley Brennan, *The Mighty Work of Making Nations Happy: A Response to James Davison Hunter*, 39 PEPP. L. REV. 1091, 1105 (2013).

## VI. THE CARE OF SOULS

So far I have focused on how Locke's degraded (and degrading) notion of happiness must be rejected in order to make cultural and legal space for man's *summum bonum*. There is yet another Lockean legacy, though, that impedes our ability to do that very thing: the banishment of the Church. Before taking the measure of that banishment's consequences, we need to return briefly to another element of Locke's starting point.

One of the putative reasons Locke defines happiness as he does is that he comes to the question of happiness already convinced that "[w]e do not know what man is."<sup>60</sup> In Locke's view it is not, of course, that we know *nothing* about man. What we do not know, *pace* the Greco-Catholic tradition, is man *as a substance*,—that is, man as a hylomorphic unity of body and soul with a hierarchy of given ends, fulfillment of which constitutes his *summum bonum*. As Pierre Manent has written, "[t]hat man is a *substance* and *one* substance, that is the *Carthago delenda* of the new philosophy"<sup>61</sup> of which Locke is the exemplary developer.

In the universe of Locke's philosophy, man knows that he is an animal, and, in fact, fear of hunger is what drives man from the (imaginary) "state of nature" into the "bonds of civil society."<sup>62</sup> To quote Manent again, "Locke will erect the lofty structure of the liberal . . . state on the puny base of the solitary animal in search of food."<sup>63</sup> What can no longer provide the base of politics, as it had in the Greco-Catholic tradition, is knowledge of man as a substance. Locke makes clear in the *Essay Concerning Human Understanding* that moral notions are arbitrary artifacts of man, not given or guaranteed by nature.<sup>64</sup> Greco-Catholic thought sought to know man and to be guided by what was *proper* to him, not exclusively by his animality. "Modern thought," by contrast,

despairs that men will ever agree on what is proper to man, on human substance or ends, and thus it wants to bracket the question of what is proper to man. It seeks to keep man in his efficacious indetermina-

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60. MANENT, *supra* note 6, at 124.

61. *Id.* at 113.

62. See LOCKE, *The Second Treatise of Government*, *supra* note 10, at 57–58.

63. MANENT, *supra* note 6, at 124.

64. *Id.* at 117.

tion so that, by taking his bearings from what is not human but animal and thus determined and necessary, he might construct a human world whose order is independent of human opinions, where man can affirm himself without knowing himself, where he can be free.<sup>65</sup>

Locke is quite serious about how little we can know about man. For example, he holds that the idea of murder is “arbitrary.”<sup>66</sup> Likewise, the question concerning man’s *summum bonum* is, as Locke sees it, as pointless as the question “whether the best relish were to be found in apples, plumbs, or nuts.”<sup>67</sup> And for those who would relish it, polygamy is, as people today like to say, “an option:” “He that is already married may marry another woman . . . . The ties, duration, and conditions of the left hand marriage shall be no other than what is expressed in the contract of marriage between the parties.”<sup>68</sup>

Men who can know so little of themselves would benefit, one might think, from the supernatural teaching authority of the Church on matters of faith *and morals*. This, though, Locke-the-tolerant will not tolerate.

*On the one hand*, Locke postulates “the Law of Toleration”<sup>69</sup> and “the Duty of Toleration”<sup>70</sup>: “The Establishment of this one thing would take away all ground of Complaints and Tumults upon account of Conscience. And . . . there would remain nothing in these Assemblies that were not more peaceable, and less apt to produce Disturbance of State . . . .”<sup>71</sup> The overarching aim of securing social peace and quiet ensures that the Law of Toleration binds the Church as much as it binds the state; indeed, churches must be “obliged to lay down Toleration as the Foundation of their own Liberty[,] and teach that liberty of conscience is every mans [sic] natural Right, equally belonging to Dissenters as to themselves . . . .”<sup>72</sup>

*On the other hand*, however, the Law of Toleration does not extend

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65. *Id.* at 129.

66. LOCKE, *The Second Treatise of Government*, *supra* note 10, at 76.

67. JOHN LOCKE, *Essay Concerning Human Understanding*, in THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE, *supra* note 7, 184, 191,

68. LOCKE, POLITICAL ESSAYS, *supra* note 13, at 256.

69. JOHN LOCKE, A LETTER CONCERNING TOLERATION 51 (James H. Tully ed., Hackett Publ’g Co. 1983) (1689).

70. *Id.* at 33.

71. *Id.* at 51.

72. *Id.*

to papists and fanatics.<sup>73</sup> Not just papists, but the Church herself, cannot be tolerated: “The Church can have no right to be tolerated by the magistrate [whose members] . . . deliver themselves up to the protection and service of another prince. For by this means the magistrate would give way to the settling of a foreign jurisdiction in his own country . . . .”<sup>74</sup>

I would not for a moment suggest that natural human reason is *in principle* incapable of discovering the nature of marriage.<sup>75</sup> My point is that when the state is deprived of the supernatural assurances of the Church on the nature of marriage, among other matters of life and death, the state and its laws are at the whim of popular opinion, whether erroneous or true. As I noted at the outset, whole cultures can be mistaken about matters of great moral magnitude. St. Thomas, for example, thought that the German people were ignorant of the fact that theft is a crime.<sup>76</sup> It is a Lockean legacy that our state’s widening misunderstanding of marriage cannot be corrected and transformed by the operation of the Church’s powers. The state that does not recognize that it is bound by higher law is absolute in its power, including the power to redefine marriage by legislative *ipse dixit*. As historian Peter Gay has observed, “political absolutism and religious toleration [are] the improbable twins of the modern state system.”<sup>77</sup> In Locke’s dispensation, man is left to take care of himself, for neither Church nor state has care of his soul: “[T]he Care of Souls is not committed to the Civil Magistrate, *any more than to other men*. . . . The care of each man’s soul and of the things of heaven, *which neither does belong to the commonwealth* nor can be subjected to it, *is left entirely to every man’s self*.”<sup>78</sup> In the discarded Greco-Catholic tradition, by contrast, man could count on Church and state to cooperate, sometimes more successfully than others, for the good of his soul. Even the chimera of “natural law liberalism” pushed by some neo-conservatives today is incapable of cognizing and serving *souls*.

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73. LOCKE, *supra* note 69, at 17.

74. LOCKE, *supra* note 7, at 157.

75. Cf. SHERIF GIRGIS, RYAN ANDERSON & ROBERT GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* (2012).

76. THOMAS AQUINAS, *SUMMA THEOLOGICA*, *supra* note 57 at art. 4.

77. PETER GAY, *THE ENLIGHTENMENT: THE RISE OF MODERN PAGANISM* 298–99 (1996), *discussed in* FERRARA, *supra* note 14, at 99.

78. LOCKE, *supra* note 7, at 26, 48, *quoted in* FERRARA, *supra* note 14, at 95–96.

Who got the benefit of what some have called “modernity’s wager?”<sup>79</sup> Contemporary neo-conservatives continue to side with Locke against the older tradition in which statecraft is soul craft. The proof is in the pudding, however—and the present pudding is the previously unthinkable, but perfectly logical dismantling of marriage for the purpose of removing “uneasiness” in the “pursuit of happiness.” The Declaration of Independence leads to moral independence—but not, however, to the *true* liberty of achieving the *summum bonum*. It would be better to reckon with the consequences of what we *are*, which is *dependent* rational animals.<sup>80</sup>

## VII. MAKING SENSE OF EQUALITY

But we are not *just* dependent rational animals. We are rational animals who have been created in the image and likeness of the God who loved us into being, who redeemed *all* of humanity from the effects of Adam’s Fall, and who wishes us to be happy with Him in the Kingdom for all eternity. It is a fundamental tenet of Catholic theology, however, that God does not save us all on His own. Each of us has a role to play. God invites and even commands us to cooperate, but we remain “free” to disobey. Either way we choose, we enjoy a breathtaking *equality* in that God “desires all men to be saved, and to come to the knowledge of the truth.”<sup>81</sup> While it is God’s consequent will that the disobedient be damned, it is His antecedent will that all be saved.<sup>82</sup>

The debate and discourse about legal recognition of same-sex unions make much of “equality,” but except for God’s antecedent will that all men be saved, it is hard to say in what significant respect, if any, humans are in fact equal.<sup>83</sup> Here, too, those committed to the sufficiency of the principles on which the nation was founded are bound to be embarrassed. “All men are created equal,” but in respect of what? The authors of the Declaration never say. Equality is not sameness *simpliciter*. Equality is sameness *in respect of some particular*—but in this

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79. The phrase is from ADAM SELIGMAN, *MODERNITY’S WAGER: AUTHORITY, THE SELF, AND TRANSCENDENCE* (2000).

80. See ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS* (1999).

81. 1 *Timothy* 2:4.

82. See JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* 145–214 (1999); Patrick McKinley Brennan, *Arguing for Human Equality*, 18 *J.L. & RELIGION* 99, 144–45 (2002).

83. See MICHAEL J. WHITE, *PARTISAN OR NEUTRAL: THE FUTILITY OF PUBLIC POLITICAL THEORY* 62–75 (1997).

case unstated—predicate. It is trivially true that all humans are equally possessed of human nature, but from this it does not follow that they have an equal right, or any right at all, to do what they will. John Rawls struggled with the question of natural human equality, and I would venture to say even stumbled over it.<sup>84</sup>

I have just been discussing equality as a descriptive or ontological possibility. On the related, but distinct question of equality as a *normative* matter—yes, of course, it is a principle of the natural law that all men and women are normatively entitled to *equal* treatment “under law.” It is equally a principle of the natural law, however, that an unjust “law” is no law at all, and a human “law” that valorized same-sex union would be unjust in the relevant, viz., a violation of higher law.<sup>85</sup>

True human equality consists in the Good News: the surprising news that salvation is offered to all, but on the Offeror’s, not the offer-ees’, terms. This is the news the Church brings, along with the means to bring it to completion. This is news that Locke and the nation’s fabled founders hid under a bushel basket. It is time to put it on a pedestal and make the nation happy, by which I do not mean removing “uneasiness.”

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84. The best Rawls could come up with was a “range property.” See Patrick McKinley Brennan, *Equality, Conscience, and the Liberty of the Church: Justifying the Controversiale Per Controversialius*, 54 VILLANOVA L. REV. 625, 632–36 (2009). On John Rawls’s own version of constructivism, see Patrick McKinley Brennan, *Political Liberalism’s Tertium Quiddity: Neutral “Public Reason,”* 43 AM. J. JURIS. 239, 239–51 (1998) (arguing that Rawlsianism is an attempt to “stop history—by the rules” of political liberalism (quoting WHITE, *supra* note 83, at 81)).

85. See Patrick McKinley Brennan, *Law in a Catholic Framework*, in TEACHING THE TRADITION: CATHOLIC THEMES IN ACADEMIC DISCIPLINES 437 (J. Piderit & M. Morey eds., 2012).

